PROPERTY AND FISHERIES FOR THE TWENTY-FIRST CENTURY: SEEKING COHERENCE FROM LEGAL AND ECONOMIC DOCTRINE

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INTRODUCTION

This paper provides an opportunity to offer what the Hollywood crowd might call a prequel—an account of logical antecedents that contributes to fuller understanding. Recently, we have challenged the reigning orthodoxy in fisheries policy by rejecting the twin notions that fisheries management in the United States is afflicted by a property rights problem, and that the solution to current woes is to be found in the creation of private property rights.[1] The purpose in this paper is to extend our previous arguments by examining antecedents we were not able to fully explore in our earlier work. We then extend our overall argument by emphasizing how new possibilities for fisheries policy have been precluded by old understandings. A bit of background will help set the stage for readers who are unfamiliar with debates over fisheries policy.

Emphasis on "rights-based fishing" is ubiquitous in contemporary discussions of fisheries and ocean policy.[2] We argue that the rights-based fishing movement is hegemonic and conceptually flawed.[3] The conceptual flaws are both legal and economic in nature and result in a severe constriction of apparent policy options.[4] Anyone interested in fisheries resources is essentially offered a stark policy prescription for the future: privatize or perish.[5]

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1. SETH MACINKO & DANIEL W. BROMLEY, WHO OWNS AMERICA'S FISHERIES (2002).

2. *See generally* FOOD & AGRIC. ORG., UNITED NATIONS, USE OF PROPERTY RIGHTS IN FISHERIES MANAGEMENT: PROCEEDINGS OF THE FISHRIGHTS99 CONFERENCE (Ross Shotton ed., 2000) (1999) [hereinafter USE OF PROPERTY RIGHTS], *available at* http://www.fao.org/DOCREP/003/X7579E/X7579E00.HTM.

3. MACINKO & BROMLEY, *supra* note 1; s*ee also* Daniel W. Bromley, *Rights-Based Fishing: The Wrong Concept and the Wrong Solution for the Wrong Problem*, *in* MANAGING MARINE FISHERIES IN THE UNITED STATES: PROCEEDINGS OF THE PEW OCEANS COMMISSION WORKSHOP ON MARINE FISHERY MANAGEMENT 35, 35–39 (2001).

4. For a full consideration see MACINKO & BROMLEY, *supra* note 1. We will reprise only portions of that exercise here.

5. Others have noted the policy constricting effects of contemporary embrace, and interpretation, of IFQs. *See* Stephen Cunningham, *Fisherman's Incomes and Fisheries Management*, 9 MARINE RESOURCE ECON. 241, 245–46 (1994); Martin L. Weitzman, *Landing Fees vs Harvest Quotas with Uncertain Fish Stocks*, 43 J. ENVTL. ECON. & MGMT. 325, 326 n.2 (2002).

"Privatization" as such is *not* usually the key term employed. Instead, policy discussions are dominated by phrases such as "rationalization," "IFQs" (individual fishing quotas) and, of course, the aforementioned rights-based fishing.[6] But closer inspection reveals a clear, systematic emphasis on the introduction of private property rights as the necessary condition for salvation from the world's fishery problems.[7] Even those who follow fishery policy only sporadically should be particularly clear on this point; prevailing policy prescriptions for the future rest squarely on calls to introduce private property rights into ocean fisheries.[8] Moreover, the policy prescriptions emanating from the rights-based fishing literature do not stop at suggested privatization of access to fish, or of the fish stocks themselves. Leading proponents of the rights-based fishing movement suggest that these developments are just temporary waypoints on the path to privatization of "what really counts," the marine ecosystem itself.[9]

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6. Note that the term "individual fishing quota" and its associated acronym "IFQ" is a peculiarly American term for what is known elsewhere as an individual transferable quota or ITQ. We consider the terms interchangeable (though technically an IFQ program could feature non-transferable IFQs) and will employ the American vernacular throughout this paper unless directly quoting from a source.

7. *See generally* RIGHTS BASED FISHING: PROCEEDINGS OF THE NATO ADVANCED RESEARCH WORKSHOP ON SCIENTIFIC FOUNDATIONS FOR RIGHTS BASED FISHING (Philip A. Neher et al. eds., 1989) [hereinafter RIGHTS BASED FISHING]. Thus, note an often overlooked point: For all the generic talk of rights-based fishing, we are indeed focused only on individual private property rights, not human rights, civil rights, or any other form of rights a society might sanction. Seth Macinko, Property, Place, and Community: Fisheries Management in the 21st Century (2001) (unpublished paper presented at the MARE Conference, August 30 to September 1, 2001 in Amsterdam) (on file with *Vermont Law Review*). "Rationalization" as deployed in the fisheries literature is a very strange term indeed. *See* MACINKO & BROMLEY, *supra* note 1, at 16. Ultimately, rationalization simply means introducing property rights where none are perceived. *See infra* notes 100–01 and accompanying text.

8. "We're going to create property rights. That's all, that's it." PROCEEDINGS OF THE CONFERENCE ON FISHERIES MANAGEMENT: ISSUES AND OPTIONS 356 (T. Frady ed., 1985). *See infra* note 141 and accompanying text.

9. The full quote is both sobering and instructive:

> While the above assesses the property rights quality of the harvesting rights embodied in the quotas another important issue is the quality of *the property right in what really counts, i.e. the resource itself and its environment*. IQs and ITQs, being extraction rights, form only an indirect property right in these underlying resources. Consequently, they provide the individual quota-holders with little control over the fish stocks and the marine environment and equally small protection from the interference of others (quota holders, marine predators and other users of the marine environment such as mining companies, polluters etc.) in these resources.

Ragnar Arnason, *Property Rights as a Means of Economic Organization*, *in* USE OF PROPERTY RIGHTS, *supra* note 2, at 14, 23 (emphasis added); *cf.* Anthony D. Scott, *Conceptual Origins of Rights Based Fishing*, *in* RIGHTS BASED FISHING, *supra* note 7, at 27 [hereinafter Scott, *Conceptual Origins*].

> Of course, private quotas are only harvesting rights. They apply only after a TAC has been set. Thus a quota system cannot dispense with some outside means of determining each year's TAC. Neither can they take over other aspects of

IFQ programs—in which individual fishing operations are assigned a specific share of an annually determined total industry-wide catch—are the quintessential example of this emphasis on private property rights.[10] Indeed, we know of *no* explanation of IFQs that does not invoke a property rights-based explanation of how IFQs work, except for our own argument.[11] The singular emphasis on property rights discards as factually incorrect, if not heretical, any explanation that does not invoke the magic of property rights. Our own explanation for why IFQs "work" is based upon the simple operational distinction between assigned catch and competitively determined catch.[12] The correct explanation has nothing at all to do with property rights.

The explicit rejection of property rights-based explanations unfortunately impedes comprehension of the distinction (and policy relevance) between assigned catch and competitively determined catch. That is, contemporary beliefs about the role and nature of property rights in fisheries seem to be so strongly entrenched as to dominate nearly *all* discussions of fisheries policy.[13] Reference to property rights have ascended to exceptional heights in contemporary conceptualization of fisheries policy. In a perverse tautological logic, even an explanation or an argument that is essentially not about property rights must be about

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> managing the fishstock and its predators and preys; nor of protecting its environment. This requires sole ownership . . . .

Id.

10. For more details on IFQ programs, see COMM. TO REVIEW INDIVIDUAL FISHING QUOTAS, NAT'L RESEARCH COUNCIL, SHARING THE FISH: TOWARD A NATIONAL POLICY ON INDIVIDUAL FISHING QUOTAS (1999) [hereinafter SHARING THE FISH] and Seth Macinko, *Public or Private?: United States Commercial Fisheries Management and the Public Trust Doctrine, Reciprocal Challenges*, 33 NAT. RESOURCES J. 919 (1993) [hereinafter Macinko, *Public or Private*] (presenting a discussion of legal dimensions of IFQs vis-à-vis the public trust doctrine).

11. However, Weitzman, *supra* note 5, at 326 n.2, does note that the IFQ literature rests on an "extreme" property rights interpretation of what are merely catch assignments. For a sampling of this emphasis on the alleged property rights basis of IFQs, see generally RIGHTS BASED FISHING, *supra* note 7 and USE OF PROPERTY RIGHTS, *supra* note 2. These sources also present the end-goal of private ownership of marine ecosystems in the context of IFQs. *See* SHARING THE FISH, *supra* note 10, at 26–33 (providing an overview of the evolution of attention to property rights in fisheries management, culminating in attention to IFQs).

12. Some care is called for when declaring that IFQs work. What is meant by "work" deserves more attention and careful specification than is normal in the promotional literature. What we mean by work (throughout this paper) is that individually assigned catches can markedly reduce the pernicious racing between participants that afflicts many fisheries when individual catch is competitively determined. We are specifically not referring to the effects of IFQ programs on a host of social dynamics within a fishery including labor relations, social solidarity within fishing communities, and the meritocratic nature of the occupational culture of fishing.

13. *See, e.g.*, COMM. ON EVALUATION, DESIGN AND MONITORING OF MARINE RESERVES AND PROTECTED AREAS IN THE U.S., NAT'L RESEARCH COUNCIL, MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS 60–63 (2001).

property rights precisely because it is not about property rights. In other words, when everything is understood through a property rights lens, things that are not about property rights are quite literally incomprehensible. Given the current emphasis on property rights, it may be useful to examine the origins and evolution of thoughts about property, fisheries, and the oceans in greater detail.

I. MONOCHROME: TRAPPED IN TIME AND IDEOLOGY: THINKING ABOUT PROPERTY, FISHERIES, AND THE OCEANS

Contemporary ideas about property rights in fisheries and IFQs reflect the influence of both courts and economists. On the legal side of the ledger, centuries-old legal theories regarding the oceans and ownership of wild animals (*ferae naturae*) have held sway.[14] The influence of economists is much more modern, beginning in the 1950s with the formation of the sub-discipline of fisheries economics.[15]

A. The Legal Arena

Perhaps the best place to begin looking for influences on modern thought about property and fisheries is the courts as IFQs are so widely held to represent the application of private property rights to fisheries. The U.S. Supreme Court has yet to hear a case involving IFQs, but the Ninth Circuit Court of Appeals has heard two cases involving IFQs, both of which neatly highlight influences on legal thinking about property rights in fisheries. In *Alliance Against IFQs v. Brown*, a three-judge panel opened its opinion with a succinct recitation of the classic problem in fisheries:

> Commercial ocean fishing combines difficult and risky labor with large capital investments to make money from a resource owned by no one, the fish. Unlimited access tends to cause declining fisheries. The reason is that to get title to a fish, a fisherman has

14. The usual supporting citation at this point would be *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). However, as we will show, *Pierson* did *not* influence the legal thread we are about to examine until well late in the game. *See infra* notes 59–70 and associated text.

15. *See* Harry N. Scheiber & Chris Carr, *The Limited Entry Concept and the Pre-History of the ITQ Movement in Fisheries Management*, *in* SOCIAL IMPLICATIONS OF QUOTA SYSTEMS IN FISHERIES 235 (Gisli Palsson & Gudrun Petersdottir eds., 1997); H. Scott Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954); Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116 (1955) [hereinafter Scott, *Sole Ownership*]; Scott, *Conceptual Origins*, *supra* note 9, at 21–27; Anthony Scott, *Development of Economic Theory on Fisheries Regulation*, 36 J. FISH. RES. BD. CAN. 725 (1979) [hereinafter Scott, *Economic Theory on Fisheries*] (all giving useful reviews of the evolution of fisheries economics).

> to catch it before someone else does. Pierson v. Post, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805). This gives each fisherman an incentive to invest in a fast, large boat and to fish as fast as possible. As boats and crews get more efficient, fewer fish escape the fishermen and live to reproduce. "The result is lower profits for the too many fishermen investing in too much capital to catch too few fish." Terry L. Anderson and Donald R. Leal, Free Market Environmentalism, 123 (1991).[16]

We see here that there are actually several dimensions to the court's understanding of what has been called "the fisherman's problem."[17] First, note the central contention that no one owns the fishery resource. Second, in this ownership vacuum, the fisheries decline and so "ownership" is immediately tied, ineluctably, to the well being of the natural resource. Suddenly, the presumptions of ownership and agreeable stewardship are locked together.[18] Third, the ownership vacuum means that the law of capture prevails. Fourth, the open fishery promotes competitive racing between boats for catches (the so-called race for fish). Fifth, investment in the race results in economic losses. And finally, note the authorities relied upon to inform the court: a nineteenth century case, *Pierson v. Post*, and a modern ideologically-driven offshoot of resource economics associated with the so-called Wise Use movement.[19]

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16. Alliance Against IFQs v. Brown, 84 F.3d 343, 344 (9th Cir. 1996).

17. *See generally* ARTHUR F. MCEVOY, THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES 1850–1980 (1986).

18. On the issue of the health of the resource, the court seemed completely unaware that the fisheries involved in the case (fisheries for halibut and sablefish off Alaska) were not in decline at all prior to implementation of the IFQ program. Perhaps the government did not make this fact clear to the court, but the highest official in the land with responsibility for fisheries had previously stated that the fisheries were biologically sound under the pre-IFQ regime. Speaking at the World Fisheries Congress in Athens, John Knauss (then NOAA Administrator) commented on the long history of the pre-IFQ management program for the halibut fishery: "In some respects, this has been a very successful management program. When the program was first established, the halibut fishery was very depleted. Catch limits were established, the resource recovered, and there has been a healthy fishery ever since." John A Knauss, *The State of the World's Marine Resources*, *in* THE STATE OF THE WORLD'S FISHING RESOURCES: PROCEEDINGS OF THE WORLD FISHERIES CONGRESS, PLENARY SESSION 19, 22 (Clyde W. Voigtlander ed., 1994). Later in the same address, Knauss suggested that the shift to IFQs (and away from the intense race for fish that had developed in the open derby fishery) was pursued primarily for economic not conservation reasons: "On the other hand, I question the desirability of managing a fishery like our west coast halibut fishery in a way that may make good biological sense, but appears to make such little economic sense." *Id.* at 23–24.

19. Accounts of the Wise Use movement vary. *See, e.g.*, DAVID HELVARG, THE WAR AGAINST THE GREENS: THE "WISE USE" MOVEMENT, THE NEW RIGHT AND ANTI-ENVIRONMENTAL VIOLENCE (1994); Richard Miniter, *You Just Can't Take it Anymore: America's Property Rights Revolt*, 70 POL'Y REV. 40 (1994).

Soon after *Alliance*, the Ninth Circuit addressed IFQs again in *Foss v. National Marine Fisheries Service*.[20] In *Foss*, a different three-judge panel expanded upon the court's understanding of property rights in fisheries and the property content of IFQs:

> The threshold question is whether Foss has a constitutionally protectible property interest in acquiring an IFQ permit . . . . There can be no doubt that the IFQ permit is property. It is subject to sale, transfer, lease, inheritance, and division as marital property in a dissolution. *See* 50 C.F.R. § 679.41; *Johns v. Johns*, 945 P.2d 1222, 1225–26 (Alaska 1997); *Ferguson v. Ferguson*, 928 P.2d 597, 599–600 (Alaska 1996). The property right in obtaining this specific permit is, of course, distinguishable from a claim of owning the fish themselves, which the Supreme Court has termed "pure fantasy." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977).[21]

Notice the court's shifting focus from property interests in *acquiring* or *obtaining* an IFQ permit, to the IFQ permit as property itself, and finally to property rights to the fish themselves. Ultimately, the court relies upon the status of an IFQ permit as a commodity in exchange and as an item contested in divorces. In *Foss*, the court relied upon two divorce cases that reached the Supreme Court of Alaska (*Johns v. Johns* and *Ferguson v. Ferguson*), and a U.S. Supreme Court case well known in ocean and coastal law (*Douglas v. Seacoast Products*).[22] Though not decided on these grounds, *Douglas v. Seacoast Products* is most notable in the present context for commentary on the so-called state ownership doctrine.[23] Exploration of the state ownership doctrine, most importantly the demise of the doctrine, will serve as a guide to unpacking the courts' understanding of property rights and fisheries.

1. Twisting Mr. Justice Holmes' Blade: The (Demise of the) State Ownership Doctrine

The rise and fall in U.S. law of the state ownership doctrine, the notion that individual states in the union "own" the fish and wildlife within their

20. Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584 (9th Cir. 1998).
21. *Id.* at 588.
22. *Id.*
23. Douglas v. Seacoast Products, 431 U.S. 265 (1977).

jurisdiction, is well documented and not in dispute.[24] Philosophical impetus for the claim of state ownership is traced to Roman legal traditions that in turn were manifested in provisions of the Magna Carta.[25] The resulting philosophical amalgam passed to the fledgling colonies and then carried over to the states in the post-revolutionary period.

The U.S. Supreme Court ruling in *Martin v. Waddell* in 1842 is considered to be the progenitor of the state ownership doctrine.[26] The beginnings of state ownership are thus found in the Court's embrace of the public trust doctrine in *Martin*. Following *Martin*, however, the evolution of the two doctrines diverged.[27] This divergence was evident in *McCready v. Virginia* in 1876 where the Court cited *Martin*, but considered state ownership of fisheries to be a distinct issue from other claims associated with the public trust doctrine.[28] The Court clarified the position of free swimming fish: "[T]he States own the tide-waters themselves, and the fish in them, *so far as they are capable of ownership while running*."[29]

The hallmark case in the development of the state ownership doctrine, *Geer v. Connecticut*, came in 1896.[30] In *Geer*, the Court extended the concept of state ownership to all forms of wildlife, not just the fishery resources featured in the earlier cases mentioned above, and held that a ban on exporting wild game from the state was not subject to the Commerce Clause because of the state ownership doctrine.[31] *Geer* begins with an expansive consideration of Roman, medieval European, and English authorities.[32] Most notable for present purposes is the Court's reading of all these sources as emphasizing the notion that the law of capture relating to wild animals is qualified by, and subject to, governmental authority: "From

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24. *See* MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 7–38 (3d ed. 1997) (providing a standard account of the state ownership doctrine).

25. *Id.* at 9–10.

26. Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); *see* BEAN & ROWLAND, *supra* note 24, at 10–12. In *Martin*, a landowner asserted a right to exclude others from taking oysters from mudflats, claiming that his title from the King was for riparian and submerged lands. The Court drew from the public trust doctrine that the resources were owned by the King initially, and then indicated that such ownership passed to the states following the Revolution. *Id.* at 11.

27. *See generally* BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY 68–79 (1998) (explaining the early evolution of the public trust doctrine); Macinko, *Public or Private*, *supra* note 10 (considering the public trust doctrine dimension of IFQs).

28. McCready v. Virginia, 94 U.S. 391 (1876).

29. *Id.* at 394 (emphasis added). We explain our emphasis of the Court's qualifying language below.

30. Geer v. Connecticut, 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

31. *Geer*, 161 U.S. at 528–29.

32. *Id.* at 522–28.

the earliest traditions, the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power."[33] Moreover, the *Geer* Court stressed that this control or ownership (by the "law-giving power") was in the form of a trusteeship of a sovereign nature:

> Whilst the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this court in *Martin v. Waddell*, represents its people, and the ownership is that of the people in their united sovereignty.[34]

Geer represents the apogee of the state ownership doctrine, and the reasons for the subsequent demise of the doctrine are directly rooted in the central issue at hand in *Geer*. The question in *Geer* was whether a state law prohibiting the sale and transportation of game birds killed in Connecticut to locations outside the state violated the Commerce Clause of the U.S. Constitution.[35] The ruling would subsequently be attacked on many constitutional grounds including the Commerce Clause, the Supremacy Clause, and the Privileges and Immunities Clause. In *Hughes v. Oklahoma*, the Supreme Court explicitly overruled *Geer*.[36] The Court noted that its assault on *Geer* was not novel; to the contrary, over the intervening century *Geer* had "been eroded to the point of virtual extinction."[37] The Court tracked this demise by quoting some of the sound-bite quality dicta that had been used in the cases subsequent to *Geer*.

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33. *Id.* at 522.

34. *Id.* at 529 (citation omitted).

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> [T]he sole issue which the case presents is, was it lawful under the Constitution of the United States (section 8, Article I) for the State of Connecticut to allow the killing of birds within the State during a designated open season, to allow such birds, when so killed, to be used, to be sold . . . [and to] regulate the killing of game within her borders so as to confine its use to the limits of the State and forbid its transmission outside of the State?

Id. at 522.

36. Hughes v. Oklahoma, 441 U.S. 322 (1979). In *Hughes*, the Court found a case presenting "facts essentially on all fours with *Geer*" to be "repugnant to the Commerce Clause." *Id.* at 335, 338.

37. *Id.* at 331.

First, in *Missouri v. Holland*, the Court rejected the state of Missouri's claim to *exclusive* authority over wildlife (i.e., to the exclusion of federal authority) on the grounds of the Supremacy Clause.[38] But, writing for the majority, Oliver Wendell Holmes went further to pen the memorable quotation that, "[t]o 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."[39] Next, in *Toomer v. Witsell*, the Court rejected another assertion of exclusive state authority over wildlife (shrimp), this time on the grounds that a discriminatory state statute violated the Privileges and Immunities Clause of the Constitution.[40] Taking another shot at the state ownership doctrine, the *Toomer* Court first quoted Holmes' slender reed line and then stated, "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[41] Last, in *Douglas v. Seacoast Products Inc.*, the Court again invoked Holmes' slender reed and then embellished the "fiction" line from *Toomer* declaring:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction . . . .[42]

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38. Missouri v. Holland, 252 U.S. 416, 432 (1920). This case involved a challenge to an international treaty (the Migratory Bird Treaty Act of 1918); as such it fell within the treaty powers mentioned within the Supremacy Clause. U.S. CONST. art. VI.

39. *Missouri*, 252 U.S. at 434. In *Hughes*, the Court noted that Holmes' famous remark was made "in passing." *Hughes*, 441 U.S. at 332.

40. Toomer v. Witsell, 334 U.S. 385 (1948).

41. *Id.* at 402. The Court cited Roscoe Pound's *An Introduction to the Philosophy of Law* as the source of their "fiction" label and, following Pound, noted that "[t]he fiction apparently gained currency partly as a result of confusion between the Roman term *imperium*, or governmental power to regulate, and *dominium*, or ownership. Power over fish and game was, in origin, *imperium*." *Id.* at 402 n.37. We will return to the *imperium*/*dominium* distinction below, but note here that in attempting to deliver a blow to the state ownership doctrine, the Court seems to have unintentionally administered a self-inflicted wound to the public trust doctrine (in as much as the latter is also derived from reliance on Roman notions of *dominium*).

42. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977) (citing *Geer*, 161 U.S. at 539–40; *Toomer*, 334 U.S. at 402). Despite the rhetorical flourishes it is worth noting that like the other cases involved in dismantling the state ownership doctrine, *Seacoast Products* was decided on other grounds; the Court noted that its decision was reached on statutory grounds, not the constitutional issues raised by the parties. *Id.* at 271. However, the *Seacoast Products* Court later stated that the Virginia

In *Hughes*, the Court quoted all of these memorable passages in support of its opinion that *Geer* was archaic, but a dissenting opinion by Justice Brennan from the year before *Hughes* provided a more graphic post-mortem:

> The lingering death of the [ownership] doctrine as applied to a State's wildlife, begun with the thrust of Mr. Justice Holmes' blade in *Missouri v. Holland* . . . and aided by increasingly deep twists of the knife in [later cases, for example *Toomer,* etc.], finally became a reality in *Douglas v. Seacoast Products, Inc.*[43]

In actuality, the death of *Geer* and the state ownership doctrine owed as much to the dissenters in *Geer* as to Justice Holmes' blade. The *Hughes* Court pointedly emphasized that "[t]he view of the *Geer* dissenters increasingly prevailed in subsequent cases."[44] Later, the *Hughes* Court stated that, "*Seacoast Products* explicitly embraced the analysis of the *Geer* dissenters."[45] The use of the plural form "dissenters" obscures a critically important detail: while there were in fact two dissents filed in *Geer*, one by Justice Field, and one by Justice Harlan, the dissents are different.[46] The differences between these dissents underscore that there are two distinct threads running throughout the dismantling of the state ownership doctrine. One thread is dispositive and focuses on federalism; the other thread is dicta and focuses on capture. Ever since *Geer*, the courts have emphasized the latter. Understanding these two threads and the distinction between the two dissents is critical to understanding the relevance, and irrelevance, of the debate over the state ownership doctrine to present discussions of fisheries policy. We will begin with the dispositive thread.

For Justice Harlan, *Geer* presented an open and shut case of a violation of the Commerce Clause, and he therefore concluded that the statute must fall in deference to the supremacy of the Constitution.[47] Thus, Justice

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laws in question "must fall under the Supremacy Clause." *Id.* at 283. Further, the Court held that "the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution." *Id.* at 284–85. The *Hughes* Court cited the passages quoted here to support the idea that *Seacoast Products* involved a Commerce Clause challenge. *Hughes*, 441 U.S. at 334–335.

43. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 405 (1978) (Brennan, J., dissenting).

44. *Hughes*, 441 U.S. at 329; *see also Seacoast Products*, 431 U.S. at 284 (noting its reliance on Justice Field's dissent).

45. *Hughes*, 441 U.S. at 334.

46. *Compare* Geer v. Connecticut, 161 U.S. 519, 535 (1896) (Field, J., dissenting), *with id.* at 542 (Harlan, J., dissenting).

47. Harlan concluded his brief dissent by noting that "the statute of Connecticut . . . is not consistent with the liberty of the citizen or with the freedom of interstate commerce." *Geer*, 161 U.S. at

Harlan concentrated on disposition of the case based on a clear legal principle. Justice Field's dissent may be regarded as having two facets. In one paragraph, Field echoed Harlan's analysis:

> I do not doubt the right of the State, by its legislation, to provide for the protection of wild game, so far as such protection is necessary for their preservation or for the comfort, health or security of its citizens, and does not contravene the power of Congress in the regulation of interstate commerce. But I do deny the authority of the State, in its legislation for the protection and preservation of game, to interfere in any respect with the paramount control of Congress in prescribing the terms by which its transportation to another State, when killed, shall be restricted to such conditions as the state may impose. The absolute control of Congress in the regulation of interstate commerce, unimpeded by any state authority, is of much greater consequence that any regulation the State may prescribe with reference to the place where its wild game, when killed, may be consumed.[48]

Field's comments, to this point, combine with Harlan's dissent to highlight the critical point of federal supremacy. Throughout the entire saga of the state ownership doctrine, from *Geer* to *Hughes*, the decisions (and dissents) that suggested overturning *Geer* were always fundamentally about the paramount interest (and needs) of the federal government, rather than "ownership" *per se*.[49] In every case, the proponents of the state ownership doctrine were trying to frustrate, and so, to preemptively void and avoid, federal authority over wildlife. Ownership of wildlife, by the states, is problematic not so much because it is ownership of an elusive object (*ferae naturae*), but because it can be used as an advantage in the age-old struggle between state and federal authority that *is* federalism. From this perspective, Justice Harlan's suggestion in *Geer* easily applies across the board. Thus, the cases should have all been moot—nothing more than doomed garden-variety challenges to federal supremacy. The Court's final words in *Hughes* aptly summarize this point: "The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders. Today's decision makes clear, however, that States

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544 (Harlan, J., dissenting). Harlan expressed surprise that the Commerce Clause basis needed much elaboration. *Id.*

48. *Id.* at 541 (Field, J., dissenting).

49. In fact, there are *many* grounds that could be used to overrule the state ownership doctrine as presented in *Geer*, including the Property Clause, the Commerce Clause, and the Privileges and Immunities Clause. BEAN & ROWLAND, *supra* note 24, at 17–38.

may promote this legitimate purpose only in ways consistent with the basic principle that 'our economic unit is the Nation' . . . ."[50]

Thus, the demise of the state ownership doctrine was about federalism, not fish, or even ownership of fish. However, the popular legacy of the demise of the state ownership doctrine stresses exactly the opposite conclusion found in the second thread of Field's dissent in *Geer*. The attention accorded Holmes' "passing" slender reed comment is one example, but there is no better illustration of this ironic twist than the particular emphasis that Field's dissent received in subsequent decisions.[51] Field's brief focus on interstate commerce and the paramount federal interest in this arena did not constitute the bulk of his dissent and is *not* what the *Hughes* and *Seacoast Products* courts chose to highlight.[52] What primarily occupied Field and what later courts repeatedly chose to emphasize was the law of capture. We quote here from the relevant portion of Field's dissent:

> Although there are declarations of some courts that the State possesses a property in its wild game, . . . I am unable to assent to its soundness, where the State has never had the game in its possession or under its control or use. I do not admit that in such case there is any specific property held by the State . . . . But on the contrary, I hold that where animals within a State, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the State in any respect, they are not the property of the State or of any one in a proper sense. I hold that until they are brought into subjection or use by the labor or skill of man, they are not the property of any one, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit. When man by his labor or skill brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them, and the ownership of others in the animals is limited by the extent and right thus acquired. This is a generally recognized

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50. *Hughes*, 441 U.S. at 338–39 (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537 (1949)).

51. It should be noted that in the sentence immediately preceding Holmes' quote-collecting slender reed comment, Holmes struck at the dispositive issue in accordance with our emphasis on federalism: "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*." Missouri v. Holland, 252 U.S. 416, 434 (1920) (emphasis added).

52. *See infra* note 53 and accompanying text; *cf. Hughes*, 441 U.S. at 334–35; *Seacoast Products*, 431 U.S. at 284.

> doctrine, acknowledged by all States of Christendom. It is the doctrine of law, both natural and positive. . . .
>
> . . . The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it.[53]

It is Field's emphasis on the law of capture that is reflected in contemporary discussions of property rights and fisheries policy. Thus, to understand his influence on these contemporary discussions, we must understand the influences on, and precursors to, Field's dissent. As Justice Field acknowledged, he was not the first to emphasize that ownership sprang from possession, but he did omit mention of some powerful authorities.

2. Mr. Justice Field, Meet John Locke

When Justice Field spoke of "the law of nature" in which *ferae naturae* are un-owned until they "become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit" he almost quoted directly from John Locke.[54] The Lockean myth has it that the earth—God's Commons—was given to humans with the obligation that we appropriate it for the fulfillment of our desires and needs.[55] Locke insisted that since we are the owners of our labor power, if we would but mix our labor with the land we could thereby become the owners of the land.[56] Field simply sent John Locke to sea:

> The pearl at the bottom of the sea belongs to no one, but the diver who enters the water and brings it to light has property in the gem. He has by his own labor reduced it to possession, and in all communities and by all law, his right to it is recognized.[57]

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53. *Geer*, 161 U.S. at 538–40 (Field, J., dissenting) (emphasis omitted).

54. *Id.* at 539.

55. *See* PETER COATES, NATURE: WESTERN ATTITUDES SINCE ANCIENT TIMES 123–24 (1998) (describing Locke's theory that individual labor on land produces property rights); Donald A. Krueckeberg, *Private Property in Africa: Creation Stories of Economy, State, and Culture*, 19 J. PLAN. EDUC. & RES. 176, 177 (1999) (citing John Locke to explore questions about common and private property in Africa).

56. COATES, *supra* note 55, at 123.

57. *Geer*, 161 U.S. at 540 (Field, J., dissenting).

Field's emphasis on property as the just fruit of labor is purely Lockean, while his emphasis on reducing things to possession foretells Holmes' note that "possession is the beginning of ownership."[58]

3. Lessons from Noxious Beasts and Loose Fish

Ironically, neither Field nor Holmes cited the case that has become the law-school staple for demonstrating the idea that property is rooted in possession—*Pierson v. Post*.[59] The case involved Lodowick Post, who had found, started, and chased "one of those noxious beasts called a fox," and Pierson, who stepped in at the last minute and, in view of Post, killed the fox and carried it off.[60] On appeal to the New York Supreme Court, Pierson argued that the lower court had erred in deciding that Post's effort in the protracted chase afforded him a claim to the fox.[61] The appellate court framed the case as follows: "It is admitted that a fox is an animal *ferae naturae*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals."[62] The court found a simple answer to a simple question and reversed the lower court's decision.[63] Citing authorities from the Institutes, to Bracton, and Puffendorf, the court found that "occupancy" of *ferae naturae* rested on "the actual corporeal possession of them."[64] Accordingly, "mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him."[65]

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58. Missouri v. Holland, 252 U.S. 416, 434 (1920). All the attention to possession as the beginning of ownership obscures the important point that it is certainly not the end of ownership. A dog with a bone is in possession of that bone but the community of dogs certainly has no concept of ownership. If a woman picks up a watch lying on the sidewalk she is in possession of it, but she is not immediately its owner.

59. Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). On the law school staple count, readers are invited to enter "Pierson v. Post" in a Google internet search and peruse the number of resulting "hits" involving law school syllabi. *Pierson* did eventually make it into the state ownership canon, in Justice Rehnquist's opinion in *Seacoast Products* in 1977. Rehnquist concurred with the judgment but dissented in part with the majority's reasoning. Douglas v. Seacoast Products, Inc., 431 U.S. 265, 287 (1977) (Rehnquist, J., concurring in part). We will have more to say about Rehnquist's iconoclastic and prescient departures in both *Seacoast Products* and *Hughes*. *See infra* notes 152–53 and accompanying text.

60. *Pierson*, 3 Cai. R. at 174.

61. *Id.* at 176.

62. *Id.*

63. *Id.* at 179.

64. *Id.* at 177.

65. *Id.* at 178.

By now, a pattern can be detected. From John Locke, to *Pierson*, to Justices Field and Holmes, and indeed in all of the varied assaults on the state ownership doctrine, what emerges is a picture of the natural world—most particularly *ferae naturae*—as belonging to one of two, and only two, dichotomous states: raw, wild, and un-owned *or* reduced to possession and thus private property by the divinely inspired exercise of human labor. Of all the authorities reviewed, none captures this binary state of the world as succinctly as does an authority not nearly so prevalent on law-school syllabi—Herman Melville.

In commenting on the various contingencies that could arise in the arduous and uncertain business of whaling, Melville noted that "the most vexatious and violent disputes would often arise between the fishermen, were there not some written or unwritten, universal, undisputed law applicable to all cases."[66] Remarkably, American whalers had produced such a universal code of property law that could be expressed in just two fundamental legal principles: "I. A Fast-Fish belongs to the party fast to it. II. A Loose-Fish is fair game for anybody who can soonest catch it."[67] A Fast-Fish was simply any fish that was made "fast" to a boat.[68] A Loose-Fish was every fish that was not a Fast-Fish, in other words, literally at loose in the sea.

Of course, as Melville noted, these two principles were simply representations of "the fundamentals of all human jurisprudence" and ought to be familiar to everyone since they were based upon the importance of possession in the law.[69] Moreover, Melville stressed the dichotomous division of everything into Fast-Fish or Loose-Fish applied to the world of human relations at large, not just to whaling. Indeed, the Fast-Fish/Loose-Fish code was in perfect harmony with a Lockean view of the world: "What was America in 1492 but a Loose-Fish, in which Columbus struck the

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66. HERMAN MELVILLE, MOBY DICK 506 (Charles Feidelson, Jr. ed., Bobbs-Merrill Co., Inc. 1964) (1851).

67. *Id.* at 507.

68. "What is a Fast-Fish? Alive or dead a fish is technically fast, when it is connected with an occupied ship or boat, by any medium at all controllable by the occupant or occupants,— a mast, an oar, a nine-inch cable, a telegraph wire, or a strand of cobweb, it is all the same." *Id.* The sole deviation from this rule of technically fastening the captured fish to the boat was in the case of a marked or "waifed" fish: "Likewise a fish is technically fast when it bears a waif, or any other recognised symbol of possession; so long as the party waifing it plainly evince their ability at any time to take it alongside, as well as their intention so to do." *Id.* That a whale is technically not a fish was apparently not important to this homespun code.

69. *Id.* at 509. "Is it not a saying in everyone's mouth, Possession is half of the law: that is, regardless of how the thing came into possession? But often possession is the whole of the law." *Id.*

Spanish standard by way of waifing it for his royal master and mistress?"[70] With this continuity between Locke and the Loose-Fish/Fast-Fish dichotomy in mind, let us return now to contemporary times and the cases presented earlier involving IFQs.

4. Back to the Future: From All-the-World-as-Loose-Fish to IFQs as (at least Marital) Property

Consider again the quote from the Ninth Circuit in *Foss v. National Marine Fisheries Service* presented earlier:

> The threshold question is whether Foss has a constitutionally protectible property interest in acquiring an IFQ permit . . . . There can be no doubt that the IFQ permit is property. It is subject to sale, transfer, lease, inheritance, and division as marital property in a dissolution. See 50 C.F.R. § 679.41; Johns v. Johns, 945 P.2d 1222, 1225–26 (Alaska 1997); Ferguson v. Ferguson, 928 P.2d 597, 599–600 (Alaska 1996). The property right in obtaining this specific permit is, of course, distinguishable from a claim of owning the fish themselves, which the Supreme Court has termed "pure fantasy." Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 . . . (1977).[71]

The court invoked *Seacoast Products* to dispel the idea of ownership of the fish themselves. We can now understand this invocation of *Seacoast Products* as a shorthand reference to a century of debate over ownership claims to *ferae naturae*. This shorthand embodies the famously derisive sound bites—Justice Holmes' "slender reed" and the *Toomer* court's "fiction"—and Justice Field's much relied upon dissent in *Geer*. Most specifically, the court's expressive shorthand represents the invocation of a

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70. *Id.* at 510. For an explanation of "waifing" and its relationship to Fast-Fish, see *supra* note 68. *Cf.* John Locke, *Of Property, in* PROPERTY: MAINSTREAM AND CRITICAL THINKING 17, 26 (C.B. Macpherson ed., 1978) (quoting Locke's famous observation that "in the beginning all the World was *America*"). Ironically, despite all of the assertions that possession is the beginning of property, those committed to this view manage to ignore the prior *possession* of much "property" when they find that property possessed by indigenous populations upon initial contact with European immigrants. *See, e.g.*, DANIEL W. BROMLEY, ECONOMIC INTERESTS AND INSTITUTIONS: THE CONCEPTUAL FOUNDATIONS OF PUBLIC POLICY (1989) (describing how the property approach to institutional change obscures the difference between institutional arrangements that give rise to a situation of open access and those that define common property); Steve Langdon, *From Communal Property to Common Property to Limited Entry: Historical Ironies in the Management of Southeast Alaska Salmon*, *in* A SEA OF SMALL BOATS 304 (John Cordell ed., 1989) (providing a vivid portrayal of how shifting concepts of property are opportunistically used to disadvantage indigenous populations).

71. Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998).

Lockean theory of property based on possessive individualism. In *Alliance Against IFQs v. Brown*, the court performed exactly the same kind of shorthand when it invoked *Pierson v. Post*.[72] When the *Alliance* court set the stage for its decision by tutoring that commercial ocean fishing involves a "resource owned by no one," we see that the court specifically embraced the long-standing dichotomy that all the fish in the world are loose until they are made fast.[73]

Into this black and white vision of property rights in fisheries, the *Foss* court introduced a new dimension with the confident declaration that "[t]here can be no doubt that the IFQ permit is property."[74] However, as we intimated in our opening presentation of *Foss*, the court displayed a curious imprecision in the language it used. The *Foss* court implies that a property interest in acquiring an IFQ permit, a property right in obtaining a specific IFQ permit, and the IFQ permit as a property right itself, are all the same.[75] The court's focus on the process of acquiring an IFQ permit is understandable given the nature of the case. The case involved a complaint by a commercial fisherman (Foss) who felt he had been incorrectly denied the IFQ permit he applied for from the National Marine Fisheries Service (NMFS) during the initial application period in 1994, prior to the first season of fishing under the IFQ program in 1995.[76] Foss applied forty-five days after the six-month application window had closed.[77] Foss filed suit claiming, among other things, a violation of his due process rights.[78] Finding that NMFS had followed published regulations, the appellate court upheld the lower court's denial of Foss's claim.[79] However, the appellate court disagreed with the lower court's rationale that Foss had no due process claim in the first place.[80]

In the process of explaining its view that Foss at least had grounds to bring a claim, the *Foss* court enters curious waters and begins to blur important distinctions. For example, the bold declaration that the IFQ is itself property seems somewhat different than the court's actual holding that "*for procedural due process purposes*, Foss has a protectible property

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72. *See* Alliance Against IFQs v. Brown, 84 F.3d 343, 344 (9th Cir. 1996).

73. *Id.*; *see supra* note 16 and accompanying text.

74. *Foss*, 161 F.3d at 588.

75. *Id.*

76. *Id.* at 586–87.

77. *Id.* at 587.

78. *Id.* at 588.

79. "NMFS's procedures were 'constitutionally sufficient' and NMFS properly denied Foss's application." *Id.* at 586 (citing Mathews v. Eldridge, 424 U.S. 319, 334 (1976)).

80. "The district court held that Foss had no property or liberty interest in the permit and hence did not have a due process claim. . . . We disagree with the district court's analysis of the due process issue." *Id.*

interest in receiving the IFQ permit."[81] In the sentence preceding this rather important qualification, the court evinced further confusion. The court sought to distinguish an IFQ from other forms of management under the general authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), since "[u]nlike the specific, mandatory regulations implementing the IFQ program, the language of the Magnuson Act does not confer any claim of entitlement or property rights."[82] The problem here is that the *Foss* court shows no cognizance of the specific construction of IFQs in the Magnuson Act, a construction that leaves no doubt that the denial of entitlement or property rights *includes* IFQs:

> An individual fishing quota or other limited access system authorization—
> (A) shall be considered a permit for the purposes of sections 1857, 1858, and 1859 of this title;
> (B) may be revoked or limited at any time in accordance with this chapter;
> (C) shall not confer any right of compensation to the holder of such individual fishing quota or other such limited access system authorization if it is revoked or limited; and
> (D) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested.[83]

This statutory language alone presents a considerable challenge to the appellate court's boast that there can be "no doubt" about the property status of an IFQ permit.[84] And yet the *Foss* court displayed additional

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81. *Id.* at 588 (emphasis added).

82. *Id.*

83. 16 U.S.C. § 1853(d)(3) (2000).

84. *Foss*, 161 F.3d at 588. Indeed, one wonders what the Ninth Circuit knows that the Supreme Court does not. As noted, the Supreme Court has yet to adjudicate a case involving IFQs; but the Supreme Court has decades of experience with permits established under the Taylor Grazing Act, and Congress defined these permits in terms exactly analogous to the statutory construction of IFQs. Title 43 of the U.S. Code states:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts . . . . So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

Taylor Grazing Act of 1934, 43 U.S.C. § 315b (2000). It would be difficult to imagine stronger language conveying that a grazing permit is not a right. Nonetheless, this clarity has not dissuaded ranchers from filing claims alleging that their permits entail property rights rather than privileges. The courts have consistently refused to sanction these claims (the definitive case is *U.S. v. Fuller*, 409 U.S. 488 (1973)). Not only does the holder of a grazing permit *not* have or acquire a property right "in or to

confusion over IFQs and the content of the Magnuson Act in a restatement of its central holding: "[W]e hold that for purposes of procedural due process, Foss had a protectible property interest in receiving a guaranteed fishing quota permit."[85] Contrary to the court's characterization, there is nothing guaranteed about an IFQ in either the statutory definition or in operational practice.[86] Fish must still be caught in the uncertain business called fishing. What a holder of an IFQ permit has is an *opportunity* to capture a federally assigned share of a federally ascertained total allowable catch.

The *Foss* court buttressed its assertion about the property status of IFQs by noting that IFQs are "subject to sale, transfer, lease, inheritance, and division as marital property in a dissolution."[87] The court shifted from one qualified form (sub-species?) of property—property for the purposes of procedural due process—to another, marital property. To investigate the influences on the *Foss* court's thinking about this latter form, we turn now to the cases the court cited.

Johns v. Johns and *Ferguson v. Ferguson* both reached the Supreme Court of Alaska, and of the two, *Ferguson* is the most instructive for present purposes.[88] *Ferguson* was a proceeding to divide marital assets, including IFQ holdings for halibut and sablefish, following a divorce.[89] In deciding how to split the IFQ holdings between the Fergusons, the court first had to decide whether the IFQs were "marital property."[90] Donald Ferguson argued that the IFQs were not property relying on

> language from the Federal Register stating that the IFQ "regulations do not convey property rights in the fishery resources," . . . [and that] "the IFQ program does not establish an

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the [public] lands," the holder of a grazing permit does not have or acquire a property right to the forage that grows *on* the public lands. This means that should a drought drive the surplus of range vegetation available for grazing to zero, the grazing permit fails to entitle the holder either to: (1) range forage; or (2) compensation for being denied access to range forage. Most recently, the Supreme Court has not only unanimously confirmed the non-property right status of grazing permits, but it also declared that permanent "improvements" (such as fences and wells) made by permit-holding ranchers on the public range become the property of the United States by virtue of being on public lands. Public Lands Council v. Babbitt, 529 U.S. 728, 748–50 (2000).

85. *Foss*, 161 F.3d at 586.

86. Congress has defined an IFQ as "a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person." 16 U.S.C. § 1802(21) (2000).

87. *Foss*, 161 F.3d at 588; *see supra* text accompanying notes 20–22.

88. Johns v. Johns, 945 P.2d 1222 (Alaska 1997); Ferguson v. Ferguson, 928 P.2d 597 (Alaska 1996).

89. *Ferguson*, 928 P.2d at 598.

90. *Id.* at 599.

> entitlement to [quota shares] and IFQ, which, if 'taken' by the government, requires just compensation under the Fifth Amendment of the U.S. Constitution."[91]

The court rejected this attempt to shield the Fergusons' IFQs from the marital division with the following response:

> The superior court never attempted to divide any property interest in the fishery resources themselves. It could not have, since fish do not become the property of individuals until reduced to capture. Instead, the court merely divided the interest in the IFQ that has value independent of any fish that may or may not be caught. Furthermore, *the fact that an interest in an IFQ does not constitute "property" for Fifth Amendment purposes is not determinative of whether such an interest is "property" for the purpose of a marital property division.*
>
> [We have previously observed] that business good will should be considered in a property division "if the evidence suggests that it has value and is marketable." The same considerations are relevant here. An interest in an IFQ, while it may not be property under the Fifth Amendment, has value and is marketable.[92]

Beyond the familiar invocation of the law of capture, and Locke et al., we see here a far more nuanced statement than what is transmitted by the *Foss* court's citing of the case. The Alaska court has obviously read the regulations and understands that IFQs are not a guarantee and are not property under U.S. law. Moreover, unlike the *Foss* court's broad appeal, the Alaska court's reliance on market value and trading of IFQs is specifically focused on the qualified entity it calls marital property.[93]

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91. *Id.* (quoting 58 Fed. Reg. 59,400 (1993)). This language in the Federal Register announcing the inception of the IFQ program corresponds to the spirit of the statutory language later incorporated into the Magnuson Act. *See supra* text accompanying note 83.

92. *Id*. (emphasis added) (citation omitted).

93. In fact, the Alaska court's qualified discussion (i.e., restricted to consideration of "marital property") is unusual. In general there seems to be much confusion. The fact that in the United States IFQs (and, we might note, limited licenses) are customarily traded among fishermen, that trading results in market values, and those market values result in credit markets (and contested divorce proceeding claims) are not *ipso facto* proof that IFQs (or licenses) are property rights. Again, the analogy between IFQs and grazing permits is instructive. *See supra* note 84. Writing for the majority in 1973, then-Justice Rehnquist acknowledged that government-created grazing permits can obviously acquire coveted market values, but market value in a permit (or augmented market value in a private asset resulting from association with that permit) is *not* grounds for a legally supportable claim to a property right by virtue of that state-created value. United States v. Fuller, 409 U.S. 488, 491–93 (1973).

In the final analysis we suspect that the court's qualifying language of "for the purpose of a marital property division" is as critical as the *Foss* court's language of "for the purposes of procedural due process."[94] We will examine what practical significance these qualified forms of "property" have for contemporary discussions of IFQs later. For now, we conclude our review of formative contributions from the legal arena to contemporary thought about property rights and fisheries with the following summation. Centuries of jurisprudence have left us firmly entrenched in a worldview familiar to both Locke and Melville (and fox hunting aficionados). There are no property rights to free swimming fishery resources; all fish are un-owned until reduced to possession.[95] However, the government can step into this dichotomous world of Loose-Fish and Fast-Fish and distribute what the government does not have: property rights (in the form of IFQs).[96]

As we have seen in *Alliance*, the courts have arrived at this worldview informed not only by legal traditions *per se*, but by the symbiotic contributions from economists. We turn now to the worldview of fisheries economics.

B. Fisheries Economics and Property Rights: If All You Have is a Hammer . . .

Since it has influenced the courts' views on property rights and fisheries, it is perhaps not surprising that the fisheries economics literature resembles the simple dichotomous view of property rights in fisheries described above; still the degree of conformity between the legal and economic realms cannot be overstated. In brief, such literature is firmly rooted in the belief that (until the advent of "rationalization" programs like IFQs) there were no property rights in fisheries or that fisheries were characterized by "common property," which amounted to the same thing in

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94. *See* Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3, 9 (Gail Daneker & Charles Geisler eds., 2000) (noting that the contextually specific setting of a divorce proceeding is such that analogies from or to divorce proceedings in terms of property law are questionable). In many cases "title is substantially irrelevant in dividing those interests on divorce." *Id.* In a divorce, the whole world is reduced to just two competing parties and the question is simply: What is it best to do in this particular circumstance? "Marital property" is entirely, and exclusively the focus of this question. We have no doubt that the Alaska court was correct to include IFQs in the estates being divided by the Fergusons and the Johns, but we are doubtful that such divisions provide a sound or relevant basis for the court's generic property pronouncement in *Foss*.

95. *See supra* notes 66–73 and accompanying text.

96. That it is logically incoherent for the government to create and distribute that which it is obligatorily pointed out not to possess itself has apparently never been seen as problematic. We will return to this point in Part II.

the minds of (too) many fisheries economists.[97] Significantly, the fisheries economics literature departs from the legal arena's emphasis on the law of capture and attributes the property rights vacuum to a much earlier influence: Hugo Grotius.[98]

Despite this difference in ultimate authorities, the legal and economic literatures converge on explanation or diagnosis. The problem for fisheries is the lack of property rights that results in the pernicious race for fish. But whereas the legal literature essentially stops at explanation, the fisheries economics literature extends to explicit, even evangelical, prescription. Calls for the introduction of private property rights are incessant in the fisheries economics literature.[99] A simple logic informs this diagnosis/prescription chain:

> *Premise*: Private property creates the incentive for wise resource management.
> *Empirical Claim*: There are no private property rights in fisheries and fisheries management is a mess.
> *Conclusion*: This situation requires private property.

We see clear expressions of this catechism throughout the rights-based fishing literature. For instance, consider a representative diagnosis:

> Fisheries, as so many other natural resource extraction activities, are among the economic activities where property rights are poorly defined or even nonexistent. This generally results in huge inefficiencies, frequently referred to as *the fisheries problem*. Since the fisheries problem fundamentally stems from lack of property rights, the obvious solution is to introduce these rights.[100]

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97. We will provide specific examples from the fisheries economics literature in the following sections.

98. The reference is to Grotius' tract of 1609, *Mare liberum*, in which Grotius reasoned that "[t]he seas are inappropriable and inexhaustible, therefore they are not property." FRANCIS T. CHRISTY, JR. & ANTHONY SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES: SOME PROBLEMS OF GROWTH AND ECONOMIC ALLOCATION 155 (1965). A more contemporary example of fishery economists relying on Grotius to explain the non-property nature of fisheries can be found in the National Research Council's recent review of marine protected areas as a fishery management tool. COMM. ON EVALUATION, DESIGN, AND MONITORING OF MARINE RESERVES AND PROTECTED AREAS IN THE U.S., NAT'L RESEARCH COUNCIL, MARINE PROTECTED AREAS: TOOLS FOR SUSTAINING OCEAN ECOSYSTEMS 2 (2001).

99. *See, e.g.*, RIGHTS BASED FISHING, *supra* note 7; USE OF PROPERTY RIGHTS, *supra* note 2. Those perusing this literature for the first time may find the emphasis on property rights extreme and shocking. Weitzman, *supra* note 5, at 326 n.2.

100. Arnason, *supra* note 9, at 14.

And prescription:

> It follows immediately that the fisheries problem would disappear if only the appropriate property rights could be defined, imposed and enforced.[101]

Notice the mono-causal nature of this standard argument—the "fishery problem" is a "property rights problem." Note too, the axiomatic nature of the prescriptive phase—property rights problems beget property rights solutions. Of course, nothing is wrong or incorrect, *so long* as the original diagnosis is correct. However, the axiom becomes tautology when the diagnosis itself becomes automatic and the result of base reflex assumption, rather than analysis. This situation is precisely the one fisheries economics seems to have arrived at: all problems are property rights problems, therefore all solutions involve property rights, and, *by definition*, solutions work because they are property rights. In this manner, fisheries economics has simply extended the monochromatic Loose-Fish/Fast-Fish perception of the world. Let us take a closer look at this melding of economic and legal thought.[102]

1. Exegesis: The Standard Diagnosis

The Lockean view of land, so prominent in American thought and action, finds its marine equivalent in received thought and action concerning America's ocean fishery. Just as the Homestead Act enabled immigrants to reduce to private ownership that which Native Americans had used for several millennia, a new homestead movement sees the oceans as the last American frontier freely available for expropriation for certain commercial purposes.[103] Recall that in the Lockean view nature was given to humans with the obligation that we appropriate it for the fulfillment of our desires and needs.[104] That is, the purpose of nature is to satisfy our production and consumption needs. That is what *nature is for*. While this

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101. *Id.* at 19.

102. We may be too reckless in saying economic *and* legal thought, for the economic view of property rights is decidedly autodidactic. For a stunning critique of the gap between legal and economic understandings of "property rights," see Daniel H. Cole & Peter Z. Grossman, *The Meaning of Property Rights: Law versus Economics?*, 78 (3) LAND ECON. 317 (2002).

103. For an assertion equating IFQs (and rights-based fishing) with marine homesteading, see Donald R. Leal, *Homesteading the Oceans: The Case for Property Rights in U.S. Fisheries*, PS-19 PERC POLICY SERIES 1 (2000), *available at* http://www.perc.org/pdf/ps19.pdf.

104. *See supra* notes 55–56 and accompanying text.

idea is often expressed in terms of nature as a storehouse, it is more correct to see the Lockean allegory in terms of a fair exchange. If humans would but exercise wise stewardship of nature, then nature would provide us with a reliable flow of material goods and services.

Nature, in this view, becomes a collaborator in our material provisioning. An essential part of our side of the bargain is that we must take possession of nature and make it our private property—from which wise stewardship is thought unavoidably to flow.[105] For Locke, we become owners of the land by applying our labor to the land. Locke believed that only with the creation of private property in land are we able to secure the bargain by protecting against the inevitable destruction of the mythical commons.[106]

This Lockean idea is at the core of the literature concerning the management of ocean fisheries. Starting in 1954 with H. Scott Gordon, reinforced one year later by Anthony Scott, popularized by the biologist Garrett Hardin thirteen years later,[107] and now part of accepted fisheries doctrine, we find that the Lockean bargain with nature's marine resources has been violated by individuals quite unable to help themselves as they rush to harvest that which God has freely provided. In this conventional wisdom, those who fish are the innocent victims of the inevitable tragedy that accompanies free choice in the face of the inevitable limitations of nature. They simply cannot help themselves in the rush to overexploit the fishery.

Locke insisted that private property in land would solve the exploitation problems of God's Commons, and so it should not surprise us that the Lockean vision seems compelling to those who write about the fishery.[108] Exploitation problems associated with the marine portion of God's Commons were found to be in need of the same prescription that had been applied to land. Unfortunately, conceptual confusion between true common property and the free-for-all of the oceans has produced

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105. The connection between private property and wise stewardship is one that transcends the fishery. Indeed, all of the literature associated with the so-called "tragedy of the commons" is predicated on this idea. *See, e.g.*, DANIEL W. BROMLEY, ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY 104 (1991) [hereinafter BROMLEY, ENVIRONMENT AND ECONOMY].

106. Locke, *supra* note 70, at 18.

107. Gordon, *supra* note 15; Scott, *Sole Ownership*, *supra* note 15; Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

108. Locke, *supra* note 70, at 17–18. While we will concentrate on Locke's influence on contemporary fisheries economics, the ideas of Jeremy Bentham also reverberate through this literature. *See infra* note 168.

incoherence in many of the stories about the fishery.[109] In fact, it is rather rare to find an economic analysis of the fishery problem that does not shift seamlessly between talk of "open access" and confident pronouncements about "[t]he evils of common property."[110]

Such accounts exhibit a conflation of *open access resources* and *common property regimes*.[111] Indeed, the evil of common property seems to be that it is in fact not property at all (i.e., open access).[112] Contemporary calls for rights-based fishing are founded upon this perception of a property vacuum.

In Part II, we shall argue that this idea is, of course, a false portrayal of the property status of fisheries precisely because of the United States' claim to an exclusive economic zone (EEZ) (and sovereign rights over all resources in that zone including fisheries).[113] Here, however, we simply wish to discuss the apparent confusion between property (here alleged to be common property), the condition of no property (open access or *res nullius*), and resource degradation. This confusion persists for two reasons: (1) Garrett Hardin's confusion over what, precisely, is meant by the commons; and (2) many Americans' recollection of hearing something about the commons in a course on European history.[114] Surely the European commons was destroyed because it was "common property." Is that not why the commoners had to be evicted from their self-inflicted squalor in order that these lands could be brought under the wise and beneficent management of the landlords? Indeed, the convenient association of a commons with degradation has proved useful in fisheries allegories about why it is now thought necessary to eliminate the commons and replace it with something that seems to represent private property.

In point of fact, the widespread assault on the commons—particularly in England and Scotland—by the landed gentry had nothing at all to do with resource degradation and everything to do with the full play of possessive individualism by those with the economic and political clout to pull it off.

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109. *See* Daniel W. Bromley & Richard C. Bishop, *From Economic Theory to Fisheries Policy: Conceptual Problems and Management Prescriptions*, *in* ECONOMIC IMPACTS OF EXTENDED FISHERIES JURISDICTION 282–87 (Lee G. Anderson ed., 1977).

110. Scott, *Economic Theory on Fisheries*, *supra* note 15, at 726 (surveying fisheries economics and replete with alternating references to the open access/common property nature of the fishery).

111. DANIEL W. BROMLEY, ECONOMIC INTERESTS AND INSTITUTIONS: THE CONCEPTUAL FOUNDATIONS OF PUBLIC POLICY 14–15 (1989); BROMLEY, ENVIRONMENT & ECONOMY, *supra* note 106, at 25–34; Daniel W. Bromley, *The Commons, Property, & Common Property Regimes*, *in* MAKING THE COMMONS WORK: THEORY, PRACTICE, AND POLICY 3, 11 (Daniel W. Bromley et al. eds., 1992).

112. The phrase "the evils of common property" clearly echoes, and shares the same conceptual flaws as, Hardin's "tragedy of the commons." *See* Hardin, *supra* note 107.

113. *See infra* note 125.

114. *See* Hardin, *supra* note 107.

The first evictions from the commons were carried out by the great landlords acting on their own initiative; they simply moved people off.[115] The much larger second wave of dispossession, in the middle of the eighteenth century, required special private (meaning individually initiated) Acts of Parliament ("acts of enclosure") so that the full coercive power of the state could be mobilized, the better to rid the countryside of the pesky commoners.[116]

The landlords (and later the government), quite unable to call it what it was, decided that the term "enclosure" sounded safe enough—as if the massive evictions were just a large fencing and hedging project. The Scottish had the honesty to refer to the same process as the "clearances"—though here, too, it might be imagined that it was undesirable brush (rather than inconvenient poor families) that was being "cleared."[117] The reality of these evictions was captured in a poem of the day:

> The law locks up the man or woman
> Who steals the goose from off the common;
> But leaves the greater villain loose
> Who steals the common from the goose.[118]

The evictions were carried out under the prevailing logic that agriculture would become more "efficient" if the landlords could but replace people with sheep.[119] What happened to those millions who were evicted in this move to "efficiency" was, of course, of little interest to the landlords. The compelling logic was to bring all land under the authority of a single decisionmaker who, by evicting commoners, was displaying the irresistible logic of "good management." Similarly, the wise "improving landlord" of Locke became the "sole owner" of the fisheries economics literature, who—in the fullness of time—would become the hardy yeoman

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115. From the fourteenth to sixteenth centuries, the landlord-tenant system in rural England changed as the raising of wool for cloth became more profitable than traditional grain farming. Tenants were evicted, hedges began to appear, and the entire process was called the "enclosure movement." EDWARD POTTS CHEYNEY, AN INTRODUCTION TO THE INDUSTRIAL AND SOCIAL HISTORY OF ENGLAND 120–24 (1920).

116. Beginning in the early eighteenth century there were a series of private acts of enclosure, usually made at the instigation, and profit, of the lord of the manor. After enclosure, lands which were previously arable were typically turned into pasture, leaving many small tenant farmers without land and forcing them to become laborers instead. CHEYNEY, *supra* note 115, at 185–88.

117. *See generally* MAGNUS MAGNUSSON, SCOTLAND: THE STORY OF A NATION 654 (2000).

118. CHEYNEY, *supra* note 115, at 188.

119. *Id.* at 185–88.

with an IFQ.[120] Very soon, rationalization of the fishery—and wise stewardship—would appear.[121] With private ownership, or so the story goes, natural resources will be wisely managed.[122]

The dominant Lockean ethic finds the unregulated fishery—often incorrectly said to be an example of the "commons dilemma"—to be in need of private property.[123] Indeed, the contemporary policy trajectory was prefigured in the mid-1950s by flawed diagnoses of the fishery as an example of a common property in need of—to recapitulate English and Scottish history—a sole owner.[124] When the Fishery Conservation and Management Act of 1976 extended exclusive U.S. jurisdiction over fishery resources out to 200 miles,[125] it seemed that the sole owner of the literature had at last arrived in the form of a Hobbesian Leviathan.[126] Following enactment of this law, vessels from foreign nations could no longer fish with impunity in a zone that was now under exclusive U.S. jurisdiction. Unfortunately, the exclusion of foreign fishers did nothing to solve the

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120. *See* Anthony Scott, *Introducing Property in Fishery Management*, *in* USE OF PROPERTY RIGHTS, *supra* note 2, at 1 (arguing for an IFQ-based property regime to manage fisheries resources). This rejoicing would be done with silence, however, concerning the fact that the sole owner would thereby be a monopolist.

121. *See id.*

122. There is the obvious exception that public ownership of many stunning natural areas is required to prevent them from being plowed, grazed, and logged into submission under the Lockean "imperative." The idea, widespread in economics as well as in most public discourse, that private owners manage their assets in the best interest of society, is a useful myth. The "proof" of such enlightened management on the part of individuals is only true by construction. That is, if one starts with the assumption that individual maximizing behavior leads to outcomes that are also—and coincidentally—best for society as a whole, then one cannot but reach the conclusion that private ownership and management of natural resources is in the best interest of all of us. If this myth were true, then farmers, not in doubt about the ownership of their land, would not undertake agricultural practices that lead to the loss of precious topsoil at the rate of, in many places, twelve to twenty tons per hectare per year. *See* Ecology Action, Worldwide Loss of Soil and a Possible Solution *at* http://www.growbiointensive.org/biointensive/soil.html#soil (last visited March 7, 2004).

123. *See* Arnason, *supra* note 9, at 14–15 (asserting that the answer to the "fisheries problem" is to introduce property rights).

124. *See* Scott, *Sole Ownership*, *supra* note 15.

125. The 200-mile "fishery conservation zone" or FCZ was first created in 1976. Magnuson Fishery Conservation Act of 1976, Pub. L. No. 94-265 § 101, 90 Stat. 331, 336 (1976) (enacted as amended at 16 U.S.C. § 1811). The Act was originally entitled the Fishery Conservation and Management Act of 1976, but was renamed in 1980. American Fisheries Promotion Act, Pub. L. No. 96-561 Title II § 238(a), 94 Stat. 3275, 3287, 3300 (1980). In 1983, President Reagan proclaimed a new 200-mile "exclusive economic zone" or EEZ that replaced the FCZ. Presidential Proclamation 5030, 3 C.F.R. 22 (1983), 48 Fed. Reg. 10,605 (March 10, 1983) (incorporated in 16 U.S.C. § 1801(b)(1)(A)).

126. Ironically, for all their obsessive focus on property rights, fisheries economists seemed to pay little notice to the possibility that a sole owner had arrived. The explanation for this glaucoma would seem to lie with the widespread confusion of property with *private* property. *See* C.B. Macpherson, *The Meaning of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 9–11 (C.B. Macpherson ed., 1978).

problem of overfishing as the U.S. fleet, suddenly liberated from foreign competition, expanded to take advantage of this wondrous legislative windfall.

The new 200-mile zone was divided into eight regions and fishery management councils for each region were established.[127] The need for such councils, consisting of industry and government representatives, was a necessary part of nature's bargain. That is, freely produced benefits from nature required some form of externally imposed limits (emanating from Leviathan) on what could be harvested. The fishery management councils acquired the task of managing the fish stocks in their particular region, and in setting the total allowable catch (TAC) by species.[128] Once management programs were in place to prevent overfishing—with great intentions but so far without great success—a new problem emerged. Suddenly, fisheries were plagued with "too many boats chasing too few fish."[129] Evicting the foreigners simply liberated the U.S. ocean fishery so that more U.S. boats and gear could enter. Fisheries economists call this *overcapitalization* and assert that this is the cause of dissipation of resource "rents."[130] In other words, while the biological dimension of TAC might, or might not, have been rectified by the fisheries management councils, a new economic problem persisted in the form of allegedly "redundant" capital and labor in most fisheries.[131]

Once it was realized that fishing effort was continuing to expand in many fisheries, the various councils, or regulators in the several states, enacted a variety of measures to limit effort and fishing power. In essence, many fishing vessels were being purposely impaired in their ability to catch

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127. 16 U.S.C. § 1852.

128. Not all Councils opted to set TACs, and others abandoned early TAC efforts.

129. Suzanne Iudicello et al., *Putting Conservation into the Fisheries Conservation and Management Act: The Public Interest in Magnuson Reauthorization*, 9 TUL. ENVTL. L.J. 339, 346 (1996).

130. *See* Arnason, *supra* note 9, at 14–15.

131. Concern for the large number of small ("inefficient"?) vessels in a fishery is not confined to the academic literature. One sees official government concern as well.

> The fishing industry is highly fragmented. Fishermen consist, for the most part, of small independent fishing vessel operators, more than 90 percent of which employ less than five people. The fish processing and distribution components likewise consist principally of small establishments. The fragmented nature of the industry leaves little opportunity for capital accumulation and makes achieving coordination among various operators to develop fisheries extremely difficult.

GEN. ACCOUNTING OFFICE, THE US FISHING INDUSTRY: PRESENT CONDITION AND FUTURE OF MARINE FISHERIES 119 (1976). Given all the lamentation over the disappearance of the small "family farm" it is odd to see such disparaging talk of small fishing firms. Is rationalization of the fishery an excuse to enable large-scale industrial fisheries under the pretense of so-called economic efficiency?

fish, to better accommodate all who wished to fish.[132] In addition, the length of the season continued to shrink in many fisheries. It seemed that no matter what was done in the way of regulation, nothing could deter the expansion of fishing effort. The next logical step was to limit entry. A variety of licensing schemes arose on the presumption that this would limit entry, but when this initiative failed to produce the desired reduction in effort, the next logical step was to embrace full possessive individualism.[133] Thus, the Hobbesian phase in American fisheries policy (in which the federal government—Leviathan—collaborated with industry to establish regulations in the interest of preserving fish stocks) now seems to be on the verge of being supplanted by the Lockean imperative to privatize the fishery—on the apparent belief that, at last, the magic answer has been found.

2. The Standard Prescription

"From the start" fisheries economists were focused on introducing private property rights into the apparent property vacuum of the oceans.[134] Indeed, it is fair to say that the reigning imperative in fisheries policy was, and is, seen to be the necessary evolution to property rights regimes:

> A general principle for future economic work would be to focus on those studies that will facilitate the evolution to property rights regimes. This would include the identification of the hazards along the evolutionary path and the development of measures to overcome those hazards. The great danger is that the very real hardships that are associated with the evolution may lead to the imposition of constraints that will impede eventual rationalization.[135]

The essential challenge, and the unavoidable imperative in American fisheries policy, seems to be one of getting on with the inevitable conversion of the oceans and their wealth to the logic of thoroughgoing

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132. The classic critique of "legislated inefficiency" is JAMES A. CRUTCHFIELD & GIULIO PONTECORVO, THE PACIFIC SALMON FISHERIES: A STUDY OF IRRATIONAL CONSERVATION 7 (1969).

133. *See* LIMITED ENTRY AS A FISHERY MANAGEMENT TOOL (R.B. Rettig & J.J.C. Ginter eds., 1978) (presenting an authoritative overview of the concept, and early enthusiasm for, "limited entry"). The turn to a more perfected possessive individualism is chronicled in Scott, *Economic Theory on Fisheries*, *supra* note 15, and Scheiber & Carr, *supra* note 15.

134. Parzival Copes, *A Critical Review of the Individual Quota as a Device in Fisheries Management*, 62 LAND ECON. 278, 278 (1986).

135. Francis T. Christy, *The Death Rattle of Open Access and the Advent of Property Rights Regimes in Fisheries*, 11 MARINE RESOURCE ECON. 287, 302 (1996).

possessive individualism—Lockean private property. Some fisheries economists admit that it once seemed quite impossible to accomplish full privatization, but things are now looking up for the wealth of ocean fisheries: "The so-called public goods, of which roads, public parks and national defense are often-quoted examples, are by definition non-amenable to private property rights. But, on closer inspection it often turns out that there are ways to turn public goods into private goods."[136]

However, we learn that full privatization will first require the intermediate step of establishing an IFQ fishery. According to one leading economist in the rights-based fishing movement, IFQs are not the *end* point of some logical imperative but merely a necessary *starting* point of a desirable and inevitable evolution toward complete control of ocean fisheries and their habitats by the fishing industry.[137]

Embedded in this vision of rationalizing the fishery is a presumption about the *purpose* of America's coastal and ocean habitats. That purpose is to create a particular structure of fisheries exploitation in which other uses of the marine habitat would appear to be of lesser importance.[138] We refer to this reigning ethic as that of *nature for*. That is, *nature* (in this case the oceans) is *for* the extraction of fish under a management regime that resembles in all of its essential traits those institutional structures that exist on land.

The easy dismissal of alternative institutional arrangements and governance structures simply serves to affirm the inevitability of the Lockean ethic applied to marine habitats. The fishery economics literature provides a glimpse of this institutional inevitability. "[A]n ITQ [is] a private *property right*, an instrument for extending the institution of property from land to the sea."[139] Or, "ITQs are part of one of the great institutional changes of our times: the enclosure and privatization of the common resources of the ocean."[140] And, finally: "My exact point is that we are not trying anything new on the fishery. What we are trying to say is

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136. Arnason, *supra* note 9, at 24.

137. "This has alerted fishermen to the argument that, if they are to pay for the services government provides, they might as well choose them, and if their fishing is to be controlled by rules, they might as well make them." Anthony Scott, *Moving Through the Narrows: From Open Access to ITQs and Self-Government*, *in* USE OF PROPERTY RIGHTS, *supra* note 2, at 105–17 [hereinafter Scott, *Moving Through the Narrows*]. It is this ultimate endpoint that leads Scott to proclaim: "[A] fishery-management regime based on ITQs is good but not yet great. There is room for improvement." *Id.* at 115.

138. The conflict between commercial and recreational fishing is but one manifestation of this contested purpose of marine ecosystems.

139. *Introduction*, RIGHTS BASED FISHING, *supra* note 7, at 1.

140. *Id.* at 3. Note the implied celebration of the original enclosure movement.

'let's let the fishery be like every other industry in our capitalist economy.' We're going to create property rights. That's all, that's it."[141]

Notice the claim that "we are not trying anything new on the fishery."[142] If logging on public lands were spoken of in the same terms, it is likely that a significant number of Americans would be surprised to be told that those who harvest federal timber were intent on acquiring private rights in the nation's public timber resources. The same might be said about those who graze livestock on the public lands. Likewise, we would imagine some considerable public surprise in the notion that IFQs are simply the first step towards full private control and ownership of the ocean fishery.

Talk of the need to privatize the fishery can, at times, become rather overdone. For example, one advocate of full privatization of the fishery asks us to imagine a world without any property rights at all—as if this situation had any bearing on the nation's fishery resource.[143] He then invokes an odd story of some mythical state of nature to add weight to his alarm that unless fishery resources are soon privatized they will disappear.[144] Indeed, it appears that civilization itself would revert to animalistic conflict in the absence of property rights.

> So, the fundamental conclusion that property rights are necessary for a high supply of goods is established and, indeed, what is generally regarded as economic progress in general.
>
> The importance of this conclusion can hardly be overemphasized. Without property rights, there can be neither trade nor accumulation of capital. Without trade there can be little specialization. Without specialization and accumulation of capital, there can be little production. So, without property rights, human society seems doomed to abject poverty. In fact, with little or no property rights, human society would be primitive indeed, not much different from the more advanced versions of animal societies.
>
> Given that property rights are necessary for economic progress, an interesting question is whether they are also sufficient. More to the point, does the existence of well defined and enforced *private* property rights inevitably lead to economic

141. The speaker is fishery economist Lee Anderson in a panel discussion in PROCEEDINGS OF THE CONFERENCE ON FISHERIES MANAGEMENT, *supra* note 8, at 356.

142. *Id.*

143. Arnason, *supra* note 9, at 17.

144. *Id.*

> progress, *i.e.*, increased supply of desirable goods? The answer to this question appears to be a qualified 'yes.'[145]

Despite this grim rendering of the manifold perils of a world without property rights, it seems useful to point out that the issue for fishery policy is certainly *not* a choice between some blissful state *with* property rights, and a state of nature in which anarchy is the order of the day. The issue is, rather, which property regime is best suited for particular settings and circumstances.[146] Notice, as well, slippage between celebration of property rights in general—a plausible position to hold—and the curious *non sequitur* that the ocean fishery must become the private property of those who harvest fish from it.[147] This hyperbole, however, serves as a fitting closing point for our review of legal and economic thinking about property rights and fisheries.

Centuries of legal thought and a half-century of fisheries economics have combined to offer a remarkably simple view of the property rights content of, and indeed property rights possibilities for, fisheries. This received view is also a stagnant view with but a single option for change. In essence, anyone concerned about fisheries policy is immediately thrust into a binary worldview supplied by Grotius and Locke, a worldview explained to us in the law and literature by fables about foxes and fish made fast and an ideology that cannot distinguish property from private property.

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145. *Id.* (emphasis added).

146. We will return to this discussion in Part II.

147. Interestingly, the author seems to recognize something about property rights that is reminiscent of the English enclosures and the Scottish clearances. He writes:

> First, the institution or improvement of property rights almost by definition dispossesses someone. Private property rights means the exclusion of a subset of the population. Hence, an immediate impact of expanded property rights is the expropriation of prior rights, even if unused. This may be more or less dramatic depending on the details of the situation. Second, although the opportunity exists, there is no guarantee that there will be full compensation to those dispossessed and that everyone will be better off. This depends to a large extent on who has the political and economic power in society . . . .
>
> For these reasons and others, there is likely to be social opposition to extension of the system of private property rights . . . In fisheries, one of the most crucial reasons for the relatively slow adoption of ITQ fisheries management system[s] around the world is precisely this social opposition.

Arnason, *supra* note 9, at 24–25.

Notice that the anticipated roadblock to full privatization is mere "social opposition." There is, however, a more significant impediment to privatization of the ocean fishery than mere social opposition. Specifically, a more compelling obstacle is that the economic theory of the fishery, correctly understood, fails to provide a logical basis for privatization. In the absence of that logical support, we see that calls for privatizing the fishery are baseless ideological judgments. We will demonstrate this ideological core in Part II.

Besides bolstering the binary worldview, the ideology produces a single policy prescription for all problems: private property rights.

II. (TOWARDS) POLYCHROME

Fashioning a future with policy *options* will require escape from the straight-jacketing effects of past conceptual confusions. One means of escape is to pursue conceptual clarity. Sound policy cannot possibly be formed without challenging the notions that fishery resources are forever un-owned until captured and that IFQs work because they are property rights.

A. "Under Modern Analysis," The EEZ Must Mean Something [148]

Simply put, the entire saga of the state ownership doctrine is irrelevant to the contemporary context of fisheries debates. We now live in an era in which the United States has claimed sovereign rights over fishery resources in an exclusive economic zone (EEZ) extending 200 nautical miles from shore.[149] All of the cases involved in the evolution of the state ownership doctrine were tried before the declaration of the EEZ.[150] No matter how often various incantations of the idea that "fish are not the property of anyone until reduced to possession" are repeated, the EEZ exists and it must have meaning. Only an obsession with corporeal possession can explain the stunted conception of property in fisheries resources displayed in the legal history reviewed in Part I. Several steps are involved in seeing our way clear of this crabbed view.

First, the obsession with possession has led to an obscuring effect that continues to define the direction of all fishery discourse. In the beginning, i.e., in *McCready v. Virginia*, the ownership idea was carefully qualified; fish were owned by the state "*so far as they are capable of ownership while running*."[151] Similarly, Justice Rehnquist in the dissenting portion of his opinion in *Douglas v. Seacoast Products, Inc.*, struggled with the baby-out-

148. We deliberately borrow from *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977).

149. Presidential Proclamation 5030, 3 C.F.R. 22 (1983), 48 Fed. Reg. 10,605 (March 10, 1983).

150. Only *Hughes* and, arguably (the dates are too close to each other to be sure), *Seacoast Products* were tried after the creation of the initial fishery conservation zone (FCZ; superseded by the EEZ, see *supra* note 125) and neither of these cases seemed to have reflected on the meaning of the FCZ. The *Foss* court's reliance on *Seacoast Products* as proof that fish are un-owned is thus more evidence of the rather casual mode of inquiry displayed in *Foss*. Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998).

151. McCready v. Virginia, 94 U.S. 391, 394 (1876) (emphasis added); *see supra* note 29 and accompanying text.

with-the-bathwater effects of the Court's obsession with possession.[152] Rehnquist did not question possession as the key to ownership of individual fish but nonetheless struggled to find room to recognize the states' "substantial proprietary interest—sometimes described as 'common ownership'" in fishery resources and recognized that the distinction was "of substantial legal moment" that the majority obscured.[153] It would seem that what both the *McCready* Court and Justice Rehnquist over a century later were struggling to define was the distinction between ownership of a fishery *resource* and ownership of *individual* fish themselves.

Second, the modern comprehension of property, not as corporeal things but as control over an income stream, must be grafted onto the distinction between individual fish and a fishery resource.[154] Ownership of a fishery resource then means, in modern times, control over the income streams associated with that resource. This seems like the definition of the sovereign rights declared in the EEZ proclamation.[155]

Third, we must remember and move beyond the fixation with the contest between state and federal authority that was the basis of the disputes over the state ownership doctrine. In modern times, when we speak of property rights and ownership of fisheries resources (remember, resources, not fish) in fisheries policy debates, we are talking about *federal* ownership in the federal zone, not some fanciful claims of state immunity out of the reach of federal authority. Indeed, the history of the demise of the state ownership doctrine is completely consistent, if not outright supportive, of the idea of federal ownership of fishery resources.[156]

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152. *Seacoast Products*, 431 U.S. 265 at 287–88 (Rehnquist, J., dissenting in part).

153. *Id.* (quoting from Geer v. Connecticut, 161 U.S. 519, 529 (1896)). Note that Justice Rehnquist reiterated and elaborated upon his concerns regarding the particular reasoning (focused on a narrow conception of ownership) employed in the Court's assault on the state ownership doctrine in his dissenting opinion in Hughes v. Oklahoma, 441 U.S. 322, 339–42 (1979) (Rehnquist, J., dissenting).

154. *See* Macpherson, *supra* note 126, at 8; *see generally* DANIEL W. BROMLEY, ENVIRONMENT AND ECONOMY; *supra* note 105, at 25–29 (1991) (explaining several modern theories of property).

155. Curiously, we don't seem to have to overcome these kinds of conceptual distinctions when it comes to other elusive resources. Take, for example, the air or the radio frequency spectrum. We do not see cases upon cases littered with pronouncements that "no one can own the air for no one can reduce the individual molecules of hydrogen to possession." In fact, in these regulatory arenas, we do not talk about ownership at all, we simply get on with the business of regulating (and collecting rent). Indeed, the lack of obsession with possession and the implicit if not explicit consensus that the United States has all the regulatory authority it needs to control income streams derived from use of these other elusive resources suggests that in modern times, under a modern conception of property rights as control over an income stream, the distinction between *dominium* and *imperium* is perhaps less clear than in the past and that *imperium* is relatively more relevant. *Cf. supra* note 41.

156. Of course, the exception to this conclusion is the statement by the Court in *Seacoast Products* that the federal government had no more claim to ownership than the states. *See supra* note 42 and accompanying text. As noted, the *Seacoast Products* Court gave no indication it was yet familiar with the FCZ and it could not have anticipated the declaration of the EEZ; like all the other courts, it

Of course, there is a simpler argument in support of the idea that the fishery resources of the United States are owned by the United States. Ironically, most of the proponents of IFQs as rights-based fishing—a theory that, as we have seen, is built around the notion that fishery resources are un-owned and thus suffering from the lack of property rights—in fact recognize the existing public ownership of fishery resources. Two representative quotes from the literature demonstrate this situation. The first has an international focus: "ITQs are a part of one of the great institutional changes of our times: the enclosure and privatization of the common resources of the ocean. These are now mostly the exclusive property of the coastal states of the world."[157] The second is domestic in focus: "This action [a proposed ITQ plan] conveys a share of a common property resource belonging jointly to the people of the United States to private ownership forever . . . ."[158]

Clearly, there is no dispute about the property/ownership status of fishery resources. And yet fisheries are said to be suffering from a property rights deficit. The answer to this apparent paradox lies, as we saw in Part I, in the conflation of property with private property. Fisheries, it turns out, are not suffering from a lack of property rights (and this is the beginning of seeing options where none have been seen before). But rereading the above quotes slowly makes us confront another question: Why would anyone talk this way if they didn't have to? In other words, if we already have property rights (and property rights are what are necessary for healthy fisheries), why would we embark on a pathway to privatization? The putative answer is that we in fact have to, or we have been led to believe that we have to by the fisheries economics literature. "Property rights" are not enough; they must be private property rights and the corollary is that IFQs "work" because they are private property rights. Breaking free of *Pierson v. Post*—and thus seeing the meaning of the EEZ—is not enough to reach a new menu of policy options. We must return to the ideology of IFQs.

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was obsessed with a corporeal conception of property. For all of these reasons, we believe our conclusion holds across all the state ownership cases. Finally, we note the irony of how the case law is being invoked in modern times. In *Missouri v. Holland*, Justice Holmes was concerned about state ownership claims impeding sound conservation at the federal level:

> 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 [migratory birds] 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. . . . It is not sufficient to rely upon the States.

Missouri v. Holland, 252 U.S. 416, 435 (1920). To deny federal ownership within the EEZ would run precisely against the national interest in natural resource conservation identified by Holmes.

157. RIGHTS BASED FISHING, *supra* note 7, at 3.

158. GULF OF MEX. FISHERY MGMT. COUNCIL, REEF FISH AMENDMENT 8 app. A, at 1 (1999).

B. Thinking About What Works and Why: Or, Lessons from Leasing

In Part I, we discussed how IFQs are defined in the law (as established in statute by Congress) as mere privileges not involving property rights. Yet the fisheries economics literature (and the Ninth Circuit) insists that IFQs are property and work because private property rights are involved.[159] As we have noted elsewhere, it is a useful exercise to trace out exactly how rights do or do not contribute to the working of IFQs.[160] First, consider the argument from the proponents of rights-based fishing. IFQs are said to work, in direct contrast to other more traditional forms of fishery management, because they provide exclusive harvesting rights, and exclusive rights are the key to combating the *bete noire* of fisheries—the non-exclusive nature of fisheries resources that in turn leads to a host of conflicts and competition between fishers in space and time.[161]

Second, we need an operational concept of what "rights" are. Rights are enforceable claims.[162] That is, rights are a subset of claims. We can all run around making claims (and do), but only those claims that society elects to sanction (enforce) are rights. Thus, we all have interests, but a considerably smaller subset of those interests may be sanctioned as rights (said subset may even be the empty set).[163] With the concept of rights as enforceable claims in mind, let us examine how IFQs work. That is, let us ask what enforceable claims are associated with IFQs.

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159. *See, e.g.*, *supra* notes 74–86 and 139–41 and accompanying text.

160. MACINKO & BROMLEY, *supra* note 1, at 12–13. We will expand upon that discussion here.

161. "Since no fisherman has the right to exclude another from access to the resource, two or more fishermen can interact at the same time and place in a fishery." *Individual Fishing Quota Act of 2001: Hearing on S. 637 Before the Subcommittee on Oceans and Fisheries of the Senate Committee on Commerce*, 106th Cong. 6 (2001) (testimony of Jon G. Sutinen, Department of Environmental and Natural Resource Economics, University of Rhode Island). *See generally* Jon G. Sutinen, *What Works Well and Why: Evidence From Fishery Management Experiences in OECD Countries*, 56 ICES J. MARINE SCI. 1051 (1999). "[T]he right to exclude others was 'fundamental to the achievement of economic efficiency.'" SHARING THE FISH, *supra* note 10, at 30 (citation omitted).

162. BROMLEY, ENVIRONMENT AND ECONOMY, *supra* note 105, at 155; MACINKO & BROMLEY, *supra* note 1, at 12; *see also* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE LAW J. 710; Macpherson, *supra* note 126, at 3 (classifying property as an enforceable claim, rather than a thing).

163. Notice that we deliberately start our exercise just focused on the generic concept of a right, not with the more specific concept of a property right. We note in passing here that part of the conceptual problem for the fisheries economics literature has to do with the autodidactic version of "rights" employed: "In the fishing context, the term *rights* refers to an *interest* that a person or a collective can claim to have in terms of access to a fish stock or to the harvest from it." RIGHTS BASED FISHING, *supra* note 7, at 5 (emphasis in original); *cf.* Cole and Grossman, *supra* note 102. If mere interests equal rights, then *all* fishing is rights-based and the term rights-based fishing is redundant. *C.f.* Macinko, *Public or Private*, *supra* note 10, at 947-48.

Imagine two IFQ holders: Smith and Jones. What enforceable claims can Smith bring against Jones? Smith cannot successfully claim that Jones is catching Smith's fish because no specific fish have been assigned to Smith. Smith cannot claim that Jones is fishing in Smith's spot, or that Jones is fishing in a time assigned exclusively to Smith. Nor can Smith claim that Jones is catching Smith's particular share of the overall TAC. In short, Smith cannot successfully bring any claims of the kind posited in the rights-based fishing literature as explanations for why IFQs work.

Now let us consider some of the more specific forms of right said to reside in IFQs. Our position is that to call IFQs a property right means that they are protected under the Fifth Amendment's Takings Clause.[164] But we *know* that this is not the case. Smith can bring no claim for compensation because that is expressly prohibited in the Magnuson Act.[165] Perhaps some of the other forms of property in IFQs posited by the courts will explain the workings of IFQs? What about what we will call a *Foss* claim? Suppose Smith encounters Jones fishing in his favorite spot. Does Smith hail Jones on the VHF radio and announce "Hey, move! For the purposes of procedural due process, I had a right to apply for my IFQ permit"? Perhaps, but we are unconvinced that Jones (or the authorities) will care. Or perhaps there is the possibility that IFQs work because of what could be called the *Ferguson* claim: Perhaps Smith, knowing that Jones is unhappily married, shouts across the water, "Move! Or I'll tell your spouse to divorce you. IFQs are marital property you know." Again, we doubt the authorities will take note or that this scenario is what the rights-based literature really has in mind.

The reality is all the talk about rights-based fishing and IFQs is a red herring that throws all of us off the track of what is important. IFQs do not work *because* they are rights, or because they are property rights, or because they are for-the-purposes-of-procedural-due-process-property-rights, or because they are property-for-the-purpose-of-a-marital-property-division. IFQs work because they involve an assigned catch, as opposed to having catch be determined competitively. Grasping this fact is what we have called a moment of policy liberation.[166]

An additional increment of policy liberation comes from an appreciation of what it means that most, if not all, IFQ programs feature leasing.[167] The presence of leasing is important precisely because the

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164. U.S. CONST. amend. V.

165. *See supra* note 83 and accompanying text.

166. MACINKO & BROMLEY, *supra* note 1, at 17.

167. "Further, in, perhaps most, ITQ systems, the quotas are highly transferable in the very short run- rights to catch and land fish can be rented by the trip, by the week, and by the season." Scott,

literature has been adamant that IFQ assignments must be permanent in order to ensure the desired functioning of the program.[168] Why this insistence on permanent allocations? *Because* it is held that IFQs work because they are property rights, and it is allegedly well known that property rights must be "secure" (read: permanent) to work well. Therefore, if we want an IFQ program to work well, the allocations must be permanent. The fact that, as we have just reviewed, the property rights content of IFQs is irrelevant to their functioning is problematic for this emphasis on permanent allocations. A bigger challenge, however, is presented by the empirical evidence of programs featuring widespread leasing. They work just fine. In fact, these are the very same programs celebrated in the voluminous rights-based literature.[169]

Perhaps the best example of the challenge posed by leasing resides in a putatively rights-based program that is not technically an IFQ program: the community development quota (CDQ) program in Alaska.[170] The CDQ program is built around royalty leasing, and it is widely celebrated as a success precisely because of the royalty leasing arrangements, not in spite of them.[171] The fact that a program based around royalty leasing (where some of the leases are of very short duration) does not collapse, exposes the fallacy in the long-standing notion that catch assignments must be permanent.[172] Finally, note one inescapable conclusion that follows from this discussion: if a program built on royalty leasing between private parties works, there is no reason that a program built on royalty leasing between

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Moving Through the Narrows, *supra* note 137, at 113; *see also* SHARING THE FISH, *supra* note 10, at 96. For the U.S. specifically, see *id.* at 78–79 and at 171–73 for a broader discussion on concerns associated with leasing.

168. For emphasis on permanency, see Arnason, *supra* note 9, at 19–24 and SHARING THE FISH, *supra* note 10, at 199–201. It is with regard to the emphasis on permanency and security that the influence of Jeremy Bentham on contemporary fisheries policy is most noticeable. *See* Jeremy Bentham, *Security and Equality of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL THINKING, *supra* note 70, at 41–58.

169. *Cf. supra* note 167.

170. NAT'L RESOURCE COUNCIL, THE COMMUNITY DEVELOPMENT QUOTA PROGRAM IN ALASKA AND LESSONS FOR THE WESTERN PACIFIC 1 (1999). Actually, there is no doubt that the CDQ program is distinct from an IFQ program, the first letter in each acronym testifies to the difference. However, the CDQ program has been celebrated in the rights-based literature as a form of, or analogous to, an IFQ program.

171. *Id. See also* K. Lind & J. Terry, Community Development Quota (CDQ) and Open Access Pollock Fisheries in the Eastern Bering Sea: A Comparison of Discard Rates, Product Values, and Fishing Effort, *in* AFSC Processed Rep. 95-07, Alaska Fisheries Center, National Marine Fisheries Service, NOAA, 7600 Sand Point Way NE, Seattle, WA 98115-0070 (1995).

172. Leases may mimic the period of the award of TAC-portions to the CDQ groups (these vary from one to three years in duration) and within these overall lease periods, there may be much shorter leases as fishing firms are contracted to help the CDQ groups assure that they will take all of their allowable annual catch.

public (for example, say a municipality in a depressed area) and private parties will not work.[173] The choice is ours.

CONCLUSION: BEYOND FOXES AND IDEOLOGUES

The upshot of the discussion presented above is that the American public and its fisheries decisionmakers have been profoundly misled about the possible menu of policy choices. Recall the question: "Why would you talk about permanently conveying public fishery resources into private ownership if you did not have to?" We suggested that such conversions are being contemplated precisely because the fisheries policy community has been persuaded—misled—that there is no choice if the current failures in fisheries management are to be fixed. But, there are indeed choices. All it takes to see these choices is to open our eyes and to move beyond a monochromatic vision of property rights and fisheries. Better yet, let's wean ourselves off the obsessive focus on property rights altogether, and start thinking about *management* and *governance*. The literature has forced all of us to focus on a diversion, and we will never sort out the foxes from the fishery resources if we keep distracting ourselves with irrelevant conversations.

173. Note too that this discussion forces the following question: What is the purpose of the initial allocation in an IFQ program? If the purpose is to make the initial recipients wealthy as a result of the initial allocation itself, then there is a reason to opt for permanent allocations (they are worth more on the open market). Short of this purpose, however, we can see no reason, in view of the lessons from leasing, to justify the standard practice of treating the initial recipients to permanent allocations distributed for free. Ironically, under standard practice, we subject *all* other participants in the program to the market forces believed to be so salubrious yet exempt the select few chosen (by the government, not the market) to receive the initial allocation from these same healthful market forces.