Public or Private: United States Commercial Fisheries Management and the Public Trust Doctrine, Reciprocal Challenges

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ABSTRACT

This article explores contemporary debates over property rights in United States fisheries in the context of the public trust doctrine. The debate surrounding the privatization of harvesting rights in the halibut and sablefish fisheries off Alaska is used as a case study. The public trust perspective guides a new reading of the Alaska debate offering insight into current conceptualizations of both property rights in fisheries and the public trust doctrine itself. A contextual analysis of the early public trust doctrine reveals a strong symmetry between the debate over the early doctrine and that over the Alaska fisheries. Both are debates over fundamental ideas regarding the interrelationships between natural resources, rights, equity, progress and nationhood. A public trust-driven reading of the Alaska debate reveals how much our ideas about rights, and consequently about the public trust doctrine itself, have changed. In our quest for environmental preservation we have all but abandoned earlier emphasis on distributional equity and the specificity of the early public trust doctrine in exchange for the malleability of current articulations of the doctrine.

INTRODUCTION

The purpose of this article is to explore contemporary debates over property rights in United States fisheries in the context of the public trust doctrine. The debate surrounding the privatization of harvesting rights in the halibut and sablefish fisheries off Alaska is used as a case study. The public trust perspective guides a new reading of the Alaska debate. This new reading presents substantial insight into

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current conceptualizations of both property rights in fisheries and the public trust doctrine itself.

The article is presented in three parts. Part 1 introduces the debate over the halibut and sablefish fisheries off Alaska within the context of a more generalized debate over access to fisheries resources. Part 2 focuses on the public trust doctrine and is presented in three stages. First, a review of two cases, *Arnold v. Mundy* and *Martin v. Waddell*, establishes basic contours of the early public trust doctrine. Second, following the lead of the Supreme Court and recent commentators, the discussion shifts to the context of the early cases. This contextual analysis ties the public trust doctrine to 19th century debate between progressivism and populism. Third, characterization of the early doctrine and its larger context provides an archetypal public trust issue which is easily identified as the core of the Alaska debate. However, the Alaska debate has not been considered from the perspective of the public trust doctrine. Part 3 discusses why the connection between the Alaska debate and the public trust doctrine has not been heretofore recognized and explores the implications of the connection.

The focus is on ideas—and how protagonists in both the fisheries and public trust contexts perceive and articulate them—and their context. This focus, and the basis of the argument which links the Alaska debate and the public trust doctrine, is suggested by history. Early articulation of the public trust doctrine featured a concern for distributitional equity and common rights based upon democratic ideals. Most importantly, the early articulation of the doctrine was the product of deliberate attention to ideology. This attention suggests a reading of the Alaska debate focused on ideological exchanges.  

A public trust-driven reading of the Alaska debate reveals how much our ideas about rights, and consequently about the public trust doctrine itself, have changed. In our contemporary quest for environmental preservation we have all but abandoned emphasis on distributional equity. We have also abandoned the specificity of the early public trust doctrine in exchange for the extreme malleability of current articulations of the doctrine. So malleable as to be amorphous, the public trust doctrine has, not unlike fisheries management, reached a critical crossroads.

Part I: Privatization of Fisheries, An Introduction to the Problem

I have approved the individual fishing quota (IFQ) management program for the fixed gear fisheries for sablefish and halibut developed by the Council . . . . In approving the

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1. Here, I refer to ideology quite literally in the dictionary sense of "the study of ideas, their nature and source." Webster's New World Dictionary 696 (2d ed. 1974).
amendments in their entirety, I commend the Council for its dedicated pursuit of a policy that balances market-based allocation of fishery resources and social objectives. The sablefish and halibut IFQ program is progressive in seeking improvements in efficiency, biological conservation, and socio-economic stability in the affected fisheries while providing growth opportunities for under developed coastal communities in western Alaska. This program should provide NMFS with the tools to protect both fishermen and the resources from the excesses that stem from overcapitalization. I encourage the Council to continue its efforts in this direction.2

On January 29, 1993 the Administrator of the National Oceanic and Atmospheric Administration (NOAA) approved a plan to introduce privatized harvesting rights in the halibut and sablefish fisheries off Alaska, ostensibly ending a decade of intense debate.3 Two features characterized the debate. First, the privatization plan reflects two interrelated intellectual histories of access to fisheries resources: 40 years of fisheries economics, and the not always concordant history of fisheries management. The second feature of the Alaska debate is a sense of dejà vu. Neither the Alaska debate nor the larger access issue have shifted appreciably in 40 years. A survey of the debate begins with the generic contours of the fisheries access question and then moves to the specifics of the Alaska debate.

a) Individual Transferable Quotas: Once Over Lightly

Students of fisheries management will recognize debate over privatized harvesting rights as the latest episode in a protracted debate over "limited entry" as a fisheries management tool.4 Limited entry is a response to the problems arising from unrestricted access (open access) to fisheries resources. Garrett Hardin’s tragedy of the commons metaphor serves as an adequate representation of the perceived fundamental problems.5 Hardin’s focus on the collective irrationality

4. For an introduction to limited entry, see Limited Entry as a Fishery Management Tool: Proceedings of a Conference to Consider Limited Entry as a Tool in Fishery Management (R. Reitig & J. Ginter eds., 1978) [hereinafter Limited Entry].
5. G. Hardin, The Tragedy of the Commons, 162 Science 1243 (1968). The specific development of the critique of open access will not be covered here. For the early development see, e.g., H. Gordon, The Economic Theory of a Common Property Resource:
of individually rational action explains the appeal to limited entry to effect economic rationalization.

Limited entry is designed to target perceived irrationalities in so-called "derby style" open access fisheries. First there is a competitive "race for fish." Second, this race spurs continual reinvestment (of captured economic rent) in technology in pursuit of competitive advantage. The combined results are continued growth in the harvesting power of the fleet and a consequent shortening of the fishing season. These results have both economic and biological consequences that are deemed undesirable. From the economist's viewpoint, the continual reinvestment in harvesting effort (in a fleet already capable of harvesting the permissible total catch) is the essence of "overcapitalization." Overcapitalization represents the tragedy of rent dissipation, an unnecessary diversion of capital and labor that could be released to more productive sectors of the national economy. From the biologist's perspective, the short seasons coupled with excessive harvesting power require an uncomfortable level of precision in controlling that power so as not to exceed prescribed harvests. From either perspective, management experience with open access has increasingly been characterized by frustration and disappointment.

The Fishery, 62 J. Pol. Econ. 124 (1954) and A. Scott, The Fishery: The Objectives of Sole Ownership, 63 J. Pol. Econ. 116 (1955); for a review of theoretical developments, see A. Scott, Development of Economic Theory on Fisheries Regulation, 36 J. Fisheries Res. Bd. Can. 725 (1979). It is particularly appropriate to use Hardin to condense the debate since so much of the relevant literature utilizes Hardin's analysis as a kind of expressive shorthand. The Council has been particularly notable in their appeal to Hardinesque imagery. For example, the premier issue of True North (a Council newsletter designed to "present upcoming changes, clear up misunderstandings, and help the industry prepare for new management programs in North Pacific Fisheries") contained section headings entitled Cowboys of the Benthic Plain and Fencing Off the Commons, True North (North Pacific Fishery Mgmt. Council, Anchorage, AK), Sept. 1992, at 1, 2, and 8, respectively. For a more detailed assessment of the influence of Hardin's model on another ITQ debate, see C. Creed, Cutting Up the Pie: Private Moves and Public Debates in the Social Construction of a Fishery 1 (1991) (unpublished Ph.D. dissertation, Rutgers University).

6. See National Marine Fisheries Service, Strategic Plan of the National Marine Fisheries Service Goals and Objectives 1, 9 (June 10, 1991) [hereinafter Strategic Plan]. For another use of this language, see infra text accompanying note 39. For a general summary of the ills associated with the race, see A. Scott, Catch Quotas and Shares in the Fishstock as Property Rights, in Natural Resource Economics and Policy Applications 61, 68-69 (E. Miles et al. eds., 1986).


8. See, e.g., M. Miller et al., Impressions of Ocean Fisheries Management Under the Magnuson Act, 21 Ocean Dev. & Int'l L. 263 (1990); Strategic Plan, supra note 6, at 11. Industry opinion of open access is not so easy to characterize because of the non-homogenous nature of the U.S. fishing industry. Note that open access does not necessarily imply equal access; see S. 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, 314-24 (J. Cordell ed., 1989).
In response to the problems associated with open access fisheries, fisheries economists identified a suite of possible remedial actions. From this array, two broad categories of entry limitation are now firmly established in the vocabulary of fisheries managers: license limitation and individual transferable quotas (ITQs). License limitation resembles taxicab medallions, where the total pool of participants is fixed but each participant’s share of the total allowable catch (TAC) is not fixed. Each licensed participant competes directly against all other licensees for a portion of the TAC. In contrast, ITQs are analogous to stock market shares or to tradable emissions permits. Under an ITQ system the total pool of participants is not fixed, but each participant’s share of the TAC is fixed by the amount of shares possessed. Typically, a participant’s gross holding of shares is adjusted by buying and selling shares in an open market.

The differences between the two broad categories of limited entry are responsible for a distinct evolution of management experience with limited entry. License limitation schemes were tried first but have generally fallen from grace in favor of ITQs. In practice, the results of license limitation have been disappointing from the economic rationalization perspective. The very conditions thought to require amelioration—the race for fish and overcapitalization—are often exacerbated under license limitation. ITQs are a theoretically informed

10. Note that various specific names have been attached to ITQ plans. The Alaska plan refers to IFQs (individual fishing quotas); see Limited Access Management of Fisheries Off Alaska, 57 Fed. Reg. 57,130, 57,130 (1992) (proposed Dec. 3, 1992) [hereinafter Proposed Rule]. Note: As this article was going to press, the final rule was published; see 58 Fed. Reg. 59,375 (to be codified at 50 C.F.R. §§ 204, 672, 675-76). For expositional purposes, I have chosen to retain the generic term, ITQ, throughout this essay.
11. Because the total pool of participants is not fixed (i.e., entry is not fixed and, in theory, participation levels could even rise), ITQs are often distinguished from limited entry which is then regarded as synonymous with license limitation. This distinction is not trivial particularly when “limited entry” has received a statutory blessing. I will not pursue this point in this essay but my use of limited entry as generic term for expositional purposes is not intended to demean the distinction. Strictly speaking, there is a cap on the maximum and minimum number of participants under ITQ systems. The maximum number is a function of the size of the individual quota shares relative to the overall TAC. The minimum number is a function of any constraints on maximum allowable holding of aggregate shares relative to the TAC. For example, the halibut plan amendment specifies a cap of 0.5 percent of the total TAC for most of the exclusive fishing areas designated in the plan, thus the number of participants could conceivably be reduced to 200; see Proposed Rule, supra note 10, at 57,137.
12. Assuming the shares are “transferable,” see infra text accompanying notes 22-24.
14. See, e.g., K. Schelle & B. Muse, Efficiency and Distributional Aspects of Alaska’s Limited Entry Program, in Fishery Access Control Problems Worldwide 317, 325-26, 328-29 (N. Mollett ed., 1986). Recent discussions have tended to lump license limitation with open access in terms of the inability to address these problems; see, e.g., South Atlantic Fishery
response to the record of license limitation. In theory, ITQs would permit harvesters to temporally spread their harvest activities to take advantage of market demand conditions and to engage in other profit-maximizing measures including reductions in operating costs.\textsuperscript{15}

Despite this theoretical promise, opposition to ITQs has been substantial,\textsuperscript{16} and has been rooted in two conceptually distinct questions. The first questions whether ITQs will work.\textsuperscript{17} The second ostensibly accepts the theory but questions its implications if it does "work."\textsuperscript{18} The limited empirical record of ITQ management appears to support the expectations of its proponents.\textsuperscript{19} Empirical support, however, has done little to quell opposition to ITQs. Opposition is based on the realization that any form of access control, and any alteration in an existing pattern of access control, represents a specific allocation of benefits that advantages some participants over others.\textsuperscript{20} Thus, the characteristic concern associated with limited entry generally has been focused on the implications for distributional equity.\textsuperscript{21}

Distributional equity concerns typically arise in response to a pattern of four critical choices in the design of limited entry systems.\textsuperscript{22} The first critical choice involves the qualification criteria for identifying recipients of the harvesting privileges (for example, should vessel ownership be a necessary condition, and if so, during what period of time?). The second critical choice involves the method of disbursement of harvest privileges: are the privileges simply granted to initial recipients or is some payment exacted from the recipients? The third critical choice follows from the second: for how long are the privileges granted, that is, is there to be periodic consideration of the exaction question or is the disbursement of privileges a one-time event? The
fourth critical choice concerns transferability: do the privileges revert back to the sanctioning regime when a recipient exits the fishery (non-transferability), or may recipients exchange their privileges for remunerative gain in the open market (transferability)? The prevailing United States experience with limited entry is that transferable privileges are given in perpetuity free of charge to qualifying vessel owners.\footnote{23} Transferability in particular produces a conspicuous result: harvest privileges acquire a market value with a demonstrated capacity for rapid escalation.\footnote{24}

The specter of high market values is directly or indirectly associated with four idealized concerns:\footnote{25} 1) the basic equity involved in the apparent give-away of a public resource to a few individuals who stand to collect a sizable windfall;\footnote{26} 2) intergenerational equity—will high entry costs present a prohibitive barrier to future generations?; 3) the potential transfer and consolidation of the industry into the hands of large capital owners at the expense of small-scale participants; and 4) the combined impact of the above concerns on fisheries-dependent coastal communities.

Finally, the general debate is largely bi-modal and polarized. Proponents of limited entry tend to regard opponents as the embodiment of Machiavellian self-interest acting to preserve a status quo that impedes progressive resource management.\footnote{27} At the other extreme, opponents tend toward Proudhon’s view that property is theft and regard proponents as meddlesome social engineers tackling a non-existent problem (“if it ain’t broke, don’t fix it”).\footnote{28}

\footnote{23. The “in perpetuity” characterization is disputed by those apprehensive of takings questions. See infra note 126 and accompanying text.

24. For example, under Alaska’s license limitation plan for the state’s salmon fisheries, the 1993 market value of a permit (license) for the Chignik (seine) and False Pass (drift gill net) registration areas was approximately $400,000 (see Box Score, Pacific Fishing, Sept. 1993, at 60). Note that market values may decline but the free initial endowment means that while subsequent purchasers may lose money, the initial recipients always gain by the sale of their formerly free harvest privileges.

25. Variations on these generalized concerns can be found in almost any consideration of limited entry; see, e.g., B. Cicin-Sain, Evaluative Criteria for Making Limited Entry Decisions, in Limited Entry, supra note 4, at 230, 244-47.

26. This concern has been expressed as a concern for the state induced creation of a “millionaires club”; see Limited Entry, supra note 4, at 121-23.

27. This dichotomy is not as reckless an act of reductionism as it might first appear. Proponents of limited entry tend to transform concern for distributional equity into resolute opposition to limited entry. Thus, the dichotomy is created by the participants themselves. For an illustrative example of such social construction, see J. Crutchfield, Economic and Social Implications of the Main Policy Alternatives for Controlling Fishing Effort, 36 J. Fisheries Res. Bd. Can. 742, 750-51. On the Machiavellian nature of opponents, see Rights Based Fishing, supra note 16, at 1.

28. Ironically, while opponents decry the social engineering of limited entry and proponents lament the social engineering that maintains open access, neither side appears to recognize that all fisheries management is social engineering; see, e.g., open discussion in Issues & Options, supra note 16, at 350-52, 356.}
The extremes of the debate, like the particulars of the critique of open access, were well established by the 1970s and are periodically rearticulated as new fisheries and new fisheries managers encounter the difficulties posed by open access, but little new dialogue has entered the general debate over limited entry and ITQs.29 The next task is to compare the broad contours of the general debate to the specific debate over the halibut and sablefish fisheries off the coast of Alaska.

b) ITQs: Alaska as a Case in Point

The commercial fisheries off of Alaska for Pacific halibut (Hippoglossus stenolepis) and sablefish (Anoplopoma fimbria) are distinct, but were eventually considered under a single composite ITQ management plan.30 The Alaska halibut fishery began in the 1890s, the sablefish fish-

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29. This stagnation is easily discernible in a chronological reading of the “great books” on limited entry; see supra note 16.

30. A collection of documents and the public comments they inspired provide the core “text” for a reading of the debate over ITQs. The development of the ITQ plan is traced by a series of Council documents produced since 1989. Collectively, these documents form the complete Environmental Impact Statement submitted for review under requirements of the National Environmental Policy Act (NEPA). In chronological order these documents are: (1) North Pacific Fishery Management Council, Draft Supplemental Environmental Impact Statement and Regulatory Impact Review/Initial Regulatory Flexibility Analysis to the Fishery Management Plans for the Gulf of Alaska and the Bering Sea/Aleutian Islands (Nov. 16, 1989) [hereinafter SEIS]; (2) North Pacific Fishery Management Council, Revised Supplement to the Draft Supplemental Environmental Impact Statement and Regulatory Impact Review/Initial Regulatory Flexibility Analysis to the Groundfish Fishery Management Plans for the Gulf of Alaska and the Bering Sea/Aleutian Islands (May, 13, 1991) [hereinafter SSEIS]; (3) North Pacific Fishery Management Council, Draft Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Proposed Individual Fishing Quota Management Alternatives for the Halibut Fisheries in the Gulf of Alaska and the Bering Sea/Aleutian Islands (July 19, 1991) [hereinafter DEIS]; and (4) North Pacific Fishery Management Council, Final Supplemental Environmental Impact Statement/Environmental Impact Statement for the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries Gulf of Alaska and Bering Sea/Aleutian Islands (Sept. 15, 1992) [hereinafter FEIS]. The FEIS also refers to an undated original supplement to the SEIS which was revised and released as the SSEIS mentioned above; see FEIS, supra, at 1-1, 1-3. The DEIS states that this original supplement to the SEIS was released for public review in May, 1990; DEIS, supra, at 1-3. Not mentioned as part of the official NEPA submission is yet another supplemental analysis, North Pacific Fishery Management Council, Draft Supplemental Analysis of the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries Gulf of Alaska and Bering Sea/Aleutian Islands (Mar. 27, 1992) [hereinafter DSEIS]. Note that the Council selected the current plan for ITQ management on Dec. 8, 1991 (see DSEIS, supra, at 1-1), thus, several of the NEPA related analyses were conducted after the Council’s final decision on the structure of the plan had been made. Note too, that initially the sablefish and halibut fisheries were treated separately. It is hard to even contemplate navigating through this maze of supplements and supplements to supplements without recalling the argument that the opportunity cost of NEPA (in terms of the diversion of attention and talent to record building) is a “disaster” for natural resources management; see S. Fairfax, A Disaster in the Environmental Movement, 199 Science 743 (1978).
Both fisheries occur throughout the Gulf of Alaska and the Bering Sea/Aleutian Islands with the majority of the harvests taken from the central Gulf region surrounding Kodiak Island. The halibut fishery is managed by the International Pacific Halibut Commission, but the authority to implement limited entry is vested in the North Pacific Fishery Management Council (Council). The Council formulates management policy on all aspects of the sablefish fishery.

There is a considerable difference in the scale of the two fisheries. In 1990 in the central Gulf area, 2,734 vessels landed 37.8 million pounds of halibut compared to 398 vessels landing 23.7 million pounds of sablefish. Halibut are caught entirely with hook-and-line gear (primarily longline gear), and while pots and trawl gear are used in the sablefish fishery, longlining accounts for a majority of the sablefish harvest. In the halibut fishery in particular, a distinct division of the fleet exists between relatively small vessels from Alaskan ports that target halibut as one of many fisheries throughout the year, and larger vessels from the Seattle area that traditionally relied more exclusively on the halibut fishery.

The halibut and sablefish fisheries epitomize the general debate along the dimensions described above: 1) problem diagnosis; 2) prescriptive response; and 3) subsequent polarized, stalled debate focused on equity/productivity tradeoffs. If there is one feature that distinguishes the specific from the general case it is the tendency to push letters received in response to the publication of the proposed rules in the Federal Register (see Proposed Rule, supra note 10) forms an essential element in the reading of the debate. This compilation was provided to the NOAA Administrator for consideration during his evaluation of the ITQ proposal (copies of comment letters are on file with the author and with the National Marine Fisheries Service, Alaska Region, Juneau, AK) [hereinafter Rule Comments; comment letters are identified by the number assigned by the Alaska Region to each letter as it was received]. Other sources such as newspapers and the Council's own informational publication, True North, supra note 5, contribute to the reading of the debate.

31. DEIS, supra note 30, at 1-1 and SEIS, supra note 30, at 27.
32. See SEIS, supra note 30, at 29 (Fig. 3.1), 34 (Table 3.4) and DEIS, supra note 30, at 3-2 (Fig. 3.1), 3-3 (Table 3.1).
33. The Council's authority was established by the Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773c(c).
34. The halibut numbers represent the sum of management areas 3A and 3B (DEIS, supra note 30, at 3-6 (Table 3.2)). Sablefish data are from the SSEIS, supra note 30, at 2-2 (Table 2.1) with landings converted from metric tons.
35. The longline method consists of setting a main ground line on the sea bed with anchors and surface markers on each end of the groundline. Baited hooks are attached by short leaders (gangions) to the groundline at evenly spaced intervals. Traditionally, the gangions are spliced directly into the ground line but there has been continued growth in the popularity of "snap on" gear in which the gangions are attached to the ground line via metal clothes-pin-like devices.
36. This is a reduction of the tripartite fleet typology offered in the DEIS, supra note 30, at 5-46. Much of the modern Seattle fleet has diversified, relying on other longline fisheries (Pacific cod, sablefish, and rockfish) in addition to the halibut fishery.
these dimensions to extremes in the specific case. The halibut fishery in particular presents a classic example of the dilemma of open access. The fishing season in the central Gulf area was reduced from 47 days in 1977 to 3 days in 1990.\textsuperscript{37} In the same area the fleet expanded from 1,692 vessels in 1984 to 2,347 vessels in 1990.\textsuperscript{38} This had the effect of reducing the Alaska debate to a caricature of the general debate. What theoretical subtleties there were in the standard critique of open access were displaced by hyperbolic invocations of Hardinesque imagery:

The race for fish leaves no time to think about responsible use of the resources, about decreasing bycatch, about creative new uses for byproducts or even about basic safety, as we are tragically reminded each time a boat sinks. As the dance floor’s gotten more crowded, the music’s picked up its pace. Open access gives the fleet flexibility, but it doesn’t promote personal stewardship of the resource. If one fisherman backs off for conservation reasons, there are two more pushing to take his place. Faced with intensifying pressure, fishermen have no incentive to conserve and every reason to fish as hard and fast and frantically as they can before the curtain falls.\textsuperscript{39}

The prescriptive response to the problem was typical both in terms of its long gestation period and its specific form. The Council had become “concerned about a rapidly expanding halibut fleet” as early as 1978.\textsuperscript{40} By 1983, the Council was considering a detailed assessment of the potential benefits of ITQ management in the halibut fishery and attempted to place a moratorium on new entry into the fishery.\textsuperscript{41} In 1985, after a two-year lull in interest, the Council initiated the planning process that culminated with the current plans.\textsuperscript{42} By September 1992, Council staff noted that the subject of ITQs had been on the agenda of every Council meeting since 1988.\textsuperscript{43} The specifics of the

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\textsuperscript{37} DEIS, \textit{supra} note 30, at 1-7 (referring only to area 3A). This temporal compression is all the more pronounced given that the total harvest (for all areas) in 1977 was 21.9 million pounds versus 61.2 million pounds in 1990; \textit{id.} at 2-12.

\textsuperscript{38} \textit{id.} at 3-3 (again for area 3A). The fleet size data presented in the EIS documents begins with 1984 thus precluding parallel construction with the season length data beginning in 1977.

\textsuperscript{39} True North, \textit{supra} note 5, at 3.

\textsuperscript{40} DEIS, \textit{supra} note 30, at 1-1.


\textsuperscript{42} FEIS, \textit{supra} note 30, at 1-2.

\textsuperscript{43} In total, as of their April 1992 meeting, the Council had considered the general question of limited entry for the halibut and/or sablefish fisheries during twenty-seven meetings; see FEIS, \textit{supra} note 30, at 1-4. The Council generally meets on a bi-monthly schedule.
ITQ plan mimic those outlined for the general case, opting for transferable quotas of unlimited duration that are initially allocated free of charge to vessel owners.\(^\text{44}\)

Notably, the ITQ plan responded, through several measures, to generic distributional equity concerns. Transferability between vessel size classes was constrained to protect the traditional small boat character of much of the Alaskan fleet.\(^\text{45}\) The total quotas any one entity could hold were capped to limit fleet consolidation expected under ITQ management.\(^\text{46}\) Despite these concessions to equity concerns, opposition to the plan was broad and extreme, even by the generous standards of generic limited entry debates. The list of opponents included principal coastal cities,\(^\text{47}\) a coastal municipal league,\(^\text{48}\) the Alaska House of Representatives,\(^\text{49}\) members of Alaska’s congressional delegation,\(^\text{50}\) Alaska Native organizations,\(^\text{51}\) a national environmental group focused

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\(^{44}\) On the design decisions, see Proposed Rule, supra note 10, at 57,133-139; see also FEIS, supra note 30, at 2-22 to -47. Although no limitation on durability is specified, the permanency of the quotas is a matter of some dispute; see text accompanying note 126 infra.

\(^{45}\) See Proposed Rule, supra note 10, at 57,136.

\(^{46}\) Id. at 57,137.

\(^{47}\) See Letter from F. Wallace, Mayor, City of Haines, to R. Berg, National Marine Fisheries Service (Dec. 22, 1992); Resolution No. 92-508, City of Sitka (June 23, 1992); Resolution 92-11, City of Yakutat (Apr. 7, 1992); Resolution 1992-4, City of Pelican (Apr. 6, 1992); and Letter (with comments) from J. Selby, Mayor, Kodiak Island Borough, to R. Berg, National Marine Fisheries Service (Jan. 11, 1993) (all letters and resolutions can be found in Rule Comments, supra note 30, at letter nos. 34, 59, and 78).

\(^{48}\) The Southwest Alaska Municipal Conference "is comprised of 105 communities, businesses, Native organizations and nonprofits located or doing business in the Aleutians, Pribilofs, Kodiak Island and Bristol Bay areas" (Letter from R. Wilson, President, Southwest Alaska Municipal Conference, to R. Lauber, Chairman, North Pacific Fishery Management Council (July 28, 1992) (on file with author). The Conference’s opposition to the ITQ plans is presented in Resolution 92-11 (Jan. 19, 1992); see Rule Comments, supra note 30, at letter no. 60.

\(^{49}\) The Alaska House of Representatives passed H.J.R. No. 61 ("opposing Individual Fishery Quota management systems for the Alaska halibut and sablefish fisheries and other Alaska fisheries") by a unanimous vote on Mar. 13, 1992. A companion version of the resolution never reached a vote in the Alaska Senate. For a copy of the resolution, see Rule Comments, supra note 30, at letter no. 59.

\(^{50}\) Representative D. Young expressed outright opposition; see Letter from Rep. D. Young to B. Franklin, Secretary of Commerce (Dec. 22, 1992); see Rule Comments, supra note 30, at letter no. 92. Senator T. Stevens did not explicitly oppose the plan but did express strong concerns over: a) the lack of thorough economic and social impact analyses prior to final decisions, b) inadequate attention to the nature and the value of the ownership interest created by the ITQs, and c) the lack of a detailed specification of the likely funding required to effect the plan and intended sources for such funding; see Letter from Sen. T. Stevens to B. Franklin, Secretary of Commerce (Dec. 21, 1992); see Rule Comments, supra note 30, at letter no. 99.

\(^{51}\) See Letter from F. Elvsaas, President, Seldovia Village Tribe and Seldovia Native Association, Inc., to North Pacific Fishery Management Council (Dec. 5, 1991), and Open Letter from J. Feller, Jr., Subsistence Advisory Board Chairman, Wrangell Cooperative Association (reporting unanimous Tribal Council vote against the ITQ plan on Jan. 5, 1992); see Rule Comments, supra note 30, at letter nos. 53 and 59 respectively.
on marine conservation,\(^5\) and the Council's own industry advisory panel.\(^5\)

In general, this opposition represented heightened but familiar concern for the equity/productivity exchange at the core of all debate over limited entry.\(^5\) The essence of this exchange was established by the early 1980s:

I wonder what the effect the share quota systems . . . [would have on] Alaska's coastal communities or industries.\(^5\)

Well, I suppose I don’t know. To some extent, I’d like those questions to be on the other side of the ledger. What I’m interested in and what I think we need to focus our attention on is the aggregate effect over the entire United States economy, initially ignoring the question of how particular groups, and particular individuals and particular regions come out.\(^5\)

You know the political system as well as I do. There's no shortage of opportunity for you to raise the issue of how is this and how is that community going to come out.\(^5\)

Within this argument though, there were important aspects of the Alaska debate that were qualitatively different from previous limited entry debates. On the proponents’ side, there were pockets of extreme candor revealing central motivations behind the plan and the intended beneficiaries. The ITQ plan’s singular therapeutic feature, com-

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52. In a turn around from earlier general support for the ITQ concept, the Center for Marine Conservation came out with a late statement of opposition to the specific plan adopted by the Council. See Letter from D. Allison, Fisheries Conservation Program Director, Center for Marine Conservation, to R. Berg, National Marine Fisheries Service (Jan. 11, 1993); see Rule Comments, supra note 30, at letter no. 91. For early endorsement of ITQs, see R. Wieland, Center for Marine Conservation, Why People Catch Too Many Fish 1, 48-49 (1992). Note that given the pamphlet’s subtitle, “a discussion of fishing and economic incentives,” one might have expected the title to read “why too many people catch fish.”

53. Under the Magnuson Act, the regional councils are directed to “establish and maintain a fishing industry advisory committee which shall provide information and recommendations on, and assist in the development of, fishery management plans and amendments to such plans”; 16 U.S.C.A. § 1852(g)(3)(A) (West Supp. 1993). The Council’s advisory panel recommended that the Council abandon the ITQ plan; Telephone Interview with C. Oliver, Deputy Director, North Pacific Fishery Management Council (Apr. 26, 1993).

54. Typically the trade-off is seen as one between economic efficiency and equity but economic productivity is the target in sight. On the significance of the generally overlooked distinction between economic efficiency and productivity, see E. Saraydar, The Conflation of Productivity and Efficiency in Economics and Economic History, 5 Econ. & Phil. 55 (1989). For an application of the distinction to natural resources policy, see D. Bromley, The Ideology of Efficiency, 19 J. Envtl. Econ. & Mgmt. 86 (1990).

55. D. Herrnstein, Commercial Fisherman and ex-Borough Mayor, Kodiak, panel discussant in Issues & Options, supra note 16, at 145.

56. R. Stokes, Economist, University of Washington, panel discussant in Issues & Options, supra note 16, at 145.

57. Id. at 146.
pared to other alternatives, was its ability to ameliorate the tragedy of rent dissipation.\footnote{Early on the Council noted that "traditional open access management tools could solve or at least improve all of these problems with the exception of excess harvesting capacity," see SEIS, supra note 30, at 175. In the same passage, the Council displayed the enormous power to steer policy that accompanies the power to define both problems and prospective remedies: "However, since it is not known how the Council will use these [traditional] measures, only a continuation of [1] the status quo, [2] open access management with annual fishing allotments, and [3] the imposition of limited access are compared." \textit{Id. See also SSEIS, supra note 30, at 1-9.}} This economic focus was in turn incorporated into a rationale that stressed the disciplinary comfort of fisheries biologists as much as any putative biological gains:

The primary role of a fishery manager should be [to] regulate such matters as total allowable catch, minimum size, allowable bycatch, opening and closings of fishing seasons and other matters that directly address the biological issues of fishery management.

I am uncomfortable in making detailed social and economic decisions that allocate fish between different parts of the industry. 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 . . . . We must limit access to the resource in some manner. I wish it were otherwise.\footnote{NOAA Administrator J. Knauss, \textit{The State of the Worlds Marine Resources}, Address at the World Fisheries Congress, Athens, Greece (May 4, 1992) (transcript on file with author).}

The entire debate also revealed a lack of interest in the racial diversity within Alaskan fisheries. After a decade of planning, it was still possible to state that "[t]he participation of Alaska Natives in the commercial fishery for halibut on and around Kodiak Island is not known."\footnote{DEIS, \textit{supra} note 30, at 5-43.}

On the opponents' side, new arguments surfaced in response to the decision to award the quotas to vessel owners exclusively. Opponents railed against the privileging of capital as an equity issue, declaring "[t]he boat owners bought fishing boats not a fishery."\footnote{L. Cooper, Executive Director of the North Pacific Fisheries Protective Association, \textit{Letter to the Editor}, Alaska Fishermen's J., June 1991, at 20, 54.} They objected to the preferencing of capital over labor they perceived in the allocation scheme:

The problem with the initial quota share assignment as it is currently proposed is that it awards 100 percent of the total qualifying poundage (used to determine shares) to vessel owners . . . .[This] completely ignores the legal ownership of portions of the qualifying poundage by for-hire skippers and
crew members . . . [M]ere expedience does not excuse the moral and legal theft of commercial fishermen's share of halibut quotas and the distribution of those stolen goods to vessel owners for all time.62

In addition to immediate distributional effects, the allocation scheme presented long term implications for labor/capital relations within the affected fisheries. First, the labor pool necessary under ITQ management was projected to shrink by more than 85 percent due to fleet consolidation and pooling of owner labor.63 Second, the "millionaires club" effect introduces a significant increase in entry costs.64 The combined effect on the traditional occupational advancement path from back deck to skipper's chair to boat owner was not lost on opponents who identified an implicit sexism in the allocation scheme's impact on labor/capital relations:

It takes time to be able to build up the experience necessary and acquire the finances to be able to participate in a fishery in any more than a deckhand capacity. These problems are faced by anyone wishing to break into a fishery. Women also face a great deal of prejudice both in the fishing industry and the financial community. The current IFQ proposal locks out women and many native fishermen. The early years' credit for participation in receiving initial allocations locks in the white male 'good ole boys club' of vessel owners with effective ownership of the resource. The price of IFQs will be prohibitive for minority deckhands to even acquire the rights being granted to these vessel owners. Do not legitimize the injustices of a system that is already full of barriers to women and minorities.65

Proponents of the plan did not respond to this particular aspect of the labor/capital issue. They did offer a succinct rationale for the basic preferencing of capital:

62. Written testimony submitted by G. Plagenz to the North Pacific Fishery Management Council (Nov. 25, 1991). This testimony is attached to Mr. Plagenz’ comment letter submitted during the proposed rule comment period; see Rule Comments, supra note 30, at letter no. 64.

63. This estimate is for the halibut fishery and was derived from a model of the fishery fully adjusted to ITQ management and a 50 day season; see FEIS, supra note 30, at 2-10. Of course this is just a theoretical estimate but the debate was largely over just what the theory behind ITQs meant. The pace and extent of actual consolidation occurring under ITQ management of the mid-Atlantic surf clam fishery has surprised many observers; see K. Moore, Individual Quota Plan Shrinks Mid-Atlantic Surf Clam Fleet, Nat'l Fisherman, Mar. 1993, at 26-27.

64. On the millionaires club effect, see supra note 26 and accompanying text.

65. Letter from T. Seaton, Homer, AK, to R. Berg, National Marine Fisheries Service (undated); see Rule Comments, supra note 30, at letter no. 77. For other comments regarding the recent entry of women into the fisheries and the plan's inherent sexism, see Rule Comments, supra note 30, at letter nos. 64 and 68.
The Council made the decision that the appropriate recipients of the limited entry fishing privileges created by this program were the vessel owners or leaseholders of vessels who undertook the financial investment and risk in these fisheries. Skippers and crewmen were paid for their work.66

Like the opponents, proponents of the ITQ plan were concerned with potential alterations to existing labor/capital relations, but the proponents sought to avoid advantaging—not disadvantaging—labor. Including crew members among the initial recipients of quota shares would “have the potential to increase the bargaining position of crew relative to owners.”67 “The Council did not want to disrupt the complex business relationships among these groups.”68

New aspects of the Alaska debate did not dislodge it from the characteristic pattern of limited entry debates. In particular, the debate became extremely polarized as the decade-long saga neared a climax. Opponents increasingly viewed the apparently intransigent commitment of the proponents as something of a conspiracy. Proponents, meanwhile, appeared to increasingly view opponents as desperate obstructionists.69

Extreme positions were voiced with extreme rhetoric. At one extreme lay the conspiracy theorists: “This is not conservation... These proceedings are an absolute crime. A crime against humanity.”70 “The Council continues to reject other more equitable proposals as they try to steal the fishery from the American people and give it to a greedy few.”71

The other extreme vilified opponents of the plan:

It is difficult to understand the logic of their opposition, unless it is just selfishness... In my opinion as vice chairman of the Council, if you don’t have a substitute plan in writing, and haven’t participated through the public process, you

66. FEIS, supra note 30, at 12 App. E (responses to comments received during the NEPA review, response to comment no. 12).
67. FEIS, supra note 30, at 2-22.
68. FEIS, supra note 30, at 7-3. Note that the concern reflected in this quotation was specifically directed at four groups: vessel owners, permit holders, crew, and processors.
69. These views are displayed in the comments and responses accompanying the final environmental impact statement; see id. at Apps. E & F. A palpable sense of frustration, exasperation, and loss of patience—in short the sense that the Council and Council staff were simply fed up with the opponents’ litany of complaints and concerns—pervades the responses.
70. Letter from S. Rutter, Sitka, AK, to B. Franklin, Secretary of Commerce (undated); see Rule Comments, supra note 30, at letter no. 96.
71. Letter from P. Soileau, longline fisherman, to B. Franklin, Secretary of Commerce (Dec. 6, 1992); see Rule Comments, supra note 30, at letter no. 84. Note that Soileau was running the vessel Nettie H when it vanished en route to a crab fishery in the fall of 1993. All hands on board, including two of Soileau’s brothers, are presumed to have perished in the incident. See B. King, Nettie H Lost in Bering Sea, Alaska Fishermen’s J., Nov. 1993, at 1.
are at cross purposes with the fisheries managers and out of touch with the professional longline fishermen in Alaska.\textsuperscript{72}

Is it possible to give the Alaska debate another reading? In particular, is it possible to locate within opposition to the proposed ITQ scheme something more substantive than short-term self-interest? It is suggested that an alternative reading is possible, one which debates fundamental ideas regarding the interrelationships between natural resources, rights, equity, progress and nationhood. We can arrive at this reading, and improve the stagnant limited entry dialogue, by recasting the issues on a framework which has been, surprisingly, ignored: the public trust doctrine. The effort to exhume the public trust framework has three components. First, the relevance of the public trust doctrine to fisheries access questions is noted. Second, the dimensions of early public trust cases are charted. Third, the context of the early public trust doctrine is considered. The public trust doctrine provides an archetype against which the Alaska debate may be measured.

Part 2: Of Rights and Resources: The Public Trust Point of View

a) Why look to the public trust?

A simple observation launches an alternative consideration of limited entry debates and the Alaska debate in particular. Limited entry debates focus on access rights, specifically on proposed alterations to the prevailing concept of open access to fisheries resources. A logical point of departure is to inquire why open access has prevailed up until the relatively recent advent of limited entry programs. The answer to that question for domestic coastal fisheries is found in the public trust

\textsuperscript{72} R. Alverson, Manager, Fishing Vessel Owners Ass’n, Seattle, WA, Letter to Senator T. Stevens, Alaska Fishermen’s J., Dec. 1992, at 22, 50. Alverson was vice chairman of the Council during the final development of the ITQ plan. The Fishing Vessel Owners Association represents much of the Seattle longline fleet participating in the halibut and sablefish fisheries. In the first part of the quotation, Alverson is directly referring to the opposition of Kodiak and Sand Point vessel owners. In the second part of the quotation, Alverson is responding to Senator Stevens’ having put “forward so many issues of concern” without sitting “through a hearing on the issues.” Alverson also raises the issue of Stevens’ accountability for fatalities occurring under the present open access system: “Politicians who choose to slow down or impede the IFQ program need to begin justifying the death certificates and emotional pain resulting from the status quo regulations.” Id. at 50.

\textsuperscript{73} Open access to fisheries resources has two distinct roots. One root—the public trust doctrine—is little noted yet manifests the core of the limited entry debates. The other root is often noted in the context of limited entry debates and is associated with the writings of Hugo Grotius, fishing on the high seas, international law of the sea, and industrial development. See H. Grotius, Mare Liberum (R. Magoffin trans., 1916) (1609). This root, because of its high seas focus and reliance on notions of inexhaustibility of ocean resources, is irrelevant to the core of the limited entry debates. For recognition of Grotius’ influence and the connection between his notion of freedom of the seas and the so-called common property nature of marine fisheries, see F. Christy, Jr. & A. Scott, The
doctrine. The public trust doctrine is associated with nearshore fisheries and domestic political theory.\textsuperscript{73}

The origins and evolution of the public trust doctrine have been extensively explored elsewhere.\textsuperscript{74} Here, it is necessary only to reiterate the most obvious contours of the doctrine: The doctrine represents a constraint on alienation by a sovereign power of resources associated with navigable waters. Traditionally, the doctrine has been tied to public use interests in commerce, navigation and fisheries. The general notion of a constraint on alienation and the connection to navigable waters is traceable to Roman legal notions of common property (\textit{res communes}) and resources not susceptible to conventional ownership (\textit{res nullius}) and to provisions of Magna Charta.\textsuperscript{75}

American legal articulation of the public trust doctrine began in cases involving fisheries access questions.\textsuperscript{76} Four features of the original doctrine are relevant to the Alaska debate: 1) a distributional equity/common use rights nexus as an issue and the specific rhetoric associated with this issue; 2) a perception of the profundity of the common use rights issue; 3) a conceptual distinction between use rights and regulation; and 4) the role of contextual analysis in shaping these features.

b) The Public Trust Doctrine: A Fishy Beginning.

Formal judicial articulation of the public trust doctrine is traced to two key cases, the 1821 New Jersey Supreme Court case of \textit{Arnold v. Mundy}, and the closely related 1842 United States Supreme Court case

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\textsuperscript{75} See J. Sax, \textit{Liberating the Public Trust Doctrine from its Historical Shackles}, 14 U.C. Davis L. Rev. 185, 185 (1980); see also Stevens, supra note 74, at 195-200. Note that such gross generalization about the doctrine is perilous. Perhaps the key danger point regards conflation of constraints on alienation with outright prohibition on alienation; see Sax, supra note 74, at 486-89.

\textsuperscript{76} For the moment, the changing contours of the doctrine are not of primary interest. I shall return to these changing contours in Part 3; see \textit{infra} text accompanying notes 150-161. The definitive work on the fisheries root of the public trust doctrine is B. McCoy, \textit{Public Trust and Private Alienation} (forthcoming U. Ariz. Press).
\end{flushright}
of Martin v Waddell. Arnold v Mundy addresses issues that are characteristic of early public trust cases: common use rights and title to lands submerged beneath navigable waters. The defendant was the leader of a band of commoners who deliberately invaded the plaintiff’s staked-off oyster bed “to try the right” of the plaintiff to claim an exclusive fishing right, a right the defendant regarded as merely a “pretended right.” While the court ostensibly viewed the case as a contest over the right to convey title to the submerged lands in Perth Amboy, New Jersey, it ultimately answered the question by focusing on the public and private use rights issues at the heart of the public trust doctrine:

It is a fact as singular as it is unexpected in the jurisprudence of our state, that the taking of a few bushels of oysters, alleged to be the property of the plaintiff in this suit, should involve in it questions momentous in their nature as well as in their magnitude . . . and embracing in their investigation, the laws of nations and of England, the relative rights of sovereign and subjects, as well as the municipal regulations of our country.

The plaintiff claimed an exclusive fishing right tied to the right of the proprietors of East Jersey to convey title to the relevant submerged lands. The defendant argued that the proprietors had no right to convey title and thus the plaintiff had no basis to claim an exclusive fishing right. The defendant’s argument was based on distributional equity and the common right of all citizens of the state to take oysters from the submerged lands.

i) Distributional Equity

The case was decided in favor of the defendant’s assertion of common rights of fishing and against the right of the proprietors to convey submerged lands. Mundy’s victory on the title question is less important to the Alaska debate than its basis in common use rights as an instrument of distributional equity.

77. Arnold v. Mundy, 6 N.J.L. 1 (1821); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). The formative role of Arnold v. Mundy is acknowledged in such landmark public trust cases as Illinois Central Railroad v. Illinois, 146 U.S. 387, 456 (1892) and Shively v. Bowlby, 152 U.S. 1, 16 (1894).
78. The decision in Arnold v. Mundy specifically distinguishes between the legal title and the usufruct (6 N.J.L. at 13). This distinction is echoed, for example, in Shively v. Bowlby (on title, 152 U.S. at 9; on usufructuary rights, 152 U.S. at 11).
79. Arnold v. Mundy, 6 N.J.L. 1, 2, 66 (1821) (respectively).
80. "As to the right of the proprietors [of East Jersey] to convey. This is the great question in the cause." Id. at 69-70.
81. Id. at 79.
82. Id. at 65-66.
83. Id. at 2.
84. Id. at 76-78.
Chief Justice Kirkpatrick explored the connection between common use rights and title rights in English and Roman legal traditions. Kirkpatrick reasoned that if a tradition existed declaring some things to be the common property of all, then the relevant sovereign (or representative) should be considered as "trustee to support the title for the common use." He found clear evidence of such a tradition, especially in post-Magna Charta England where he noted that Lord Hale had written of "a public common [of] piscary." Kirkpatrick held that lands under navigable water and the water over them were common to all citizens for purposes of navigation, fishing, fowling, and sustenance: "the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him, not for his own use, but for the use of the citizen." He then found that, upon the American Revolution, the people of New Jersey became the relevant sovereign impressed with "both the legal title and the usufruct" of the submerged lands in question.

Kirkpatrick's consideration of class relations and distributional equity is clear in his discussion of the gradual encroachment of English barons on common rights of access to submerged lands and associated fisheries. Arnold v Mundy was a pronouncement on the duty of the state, as the representative of the people, to maintain common use rights as an instrument of distributional equity. For the state, in its regulatory capacity, to divest the citizens of their common rights "would be a grievance which never could be long borne by a free people."

The emphasis on equity and common use rights in turn provided the core of a particular view of nationhood that is currently echoed in the Alaska debate.

ii) An Ideal of Nationhood

It is hard to overemphasize the Justices' perception that the Arnold case involved issues central to the very conceptualization of nationhood. Kirkpatrick's pronouncement on the potential grievance involved in the alienation of common use rights is echoed in Justice Rossell's concurring opinion:

[S]hall we, after the lapse of almost three centuries, insult the memory of men [the founders of New Jersey] who were an ornament to the human race, whose virtues have highly

85. Id. at 70.
86. Id. at 74.
87. Id. at 77.
88. Id. at 78.
89. Id. at 73-77. This attention to distributional equity and to the class elements of the case is reinforced by the concurring opinion issued by Justice Rossell; Id. at 79-94, see especially 91-93. Concerns for distributional equity and class relations have been called the sources of the public trust doctrine; see Sax, supra note 75, at 189-92.
90. Arnold v. Mundy, 6 N.J.L. at 78.
exalted their names, and whose labors have been a blessing to the world, by saying they knew nothing of their privileges, and that their birthrights were lost forever in the forests of New Jersey; that their boasted Magna Carta was a farce from which they could derive no benefit; and that liberty, which they so highly valued, was confined to the grants and concessions, or that our legislatures, from time to time taking upon them to regulate fisheries of oysters, as well as floating fish, for the public benefit, were totally ignorant of their powers, overstepped the bounds prescribed by the constitution, to the destruction of the rights of individuals? I think not.91

iii) Rights v. Regulation

The justices' comments on the national significance of the issues involved also address the third highlighted aspect of the case, the distinction between the regulation of fisheries for the public benefit and the use rights of individuals. Kirkpatrick's opinion was explicit on this point, declaring the power of the state to regulate, the jus regium, to be "wholly foreign" from the issues at stake in the case.92 Thus, Arnold v. Mundy was grounded in a concern for the distributive aspect of common use rights, these rights were perceived as being fundamental to the very character of the nation, and they were regarded as an issue distinct from regulation. The fourth point of inquiry examines how the justices were led to these perceptions.

iv) Context and the Construction of the Public Trust Doctrine

The justices' historical search through English and Roman law for ideas about common property and its use reflects an embrace of broad judicial construction. They looked to the context in which the critical ideas about use rights were formed.93 The state court's emphasis on contextual analysis was subsequently echoed by the United States Supreme Court.

The first United States Supreme Court case to examine the public trust doctrine also focused on access to oysters in New Jersey. Martin v. Waddell was a continuation of the dispute over common and private rights raised 21 years earlier in Arnold v. Mundy.94 The Court's

91. Id. at 92-93. See also the opening of Rossell's opinion (supra text accompanying note 81).

92. Id. at 75. The state could regulate use, "but still this power . . . is nothing more than what is called the jus regium, the right of regulating, improving, and securing for the common benefit of every individual citizen." Id. at 78.

93. Id. at 70-77. Popular criticisms of this foundation are addressed infra note 100.

94. Merritt Martin's attorney declared that the object of the suit originally brought by Waddell was to review and overturn the decision issued in Arnold v. Mundy. See Martin v. Waddell, 41 U.S. (16 Pet.) 367, 389 (1842).
opinion relied heavily upon, and confirmed, Kirkpatrick's ruling. As Martin v Waddell replicates the four essential elements of Arnold v Mundy, only the Court's position on the issue of construction warrants additional emphasis here.

The Court explicitly set a question that required a judgment on construction, saw great issues tied to this judgment, and argued for an expansive contextual approach:

And in deciding a question like this, we must not look merely to the strict technical meaning of the words of the letters patent. The laws and institutions of England, the history of the times, the object of the charter, the contemporaneous construction given to it, and the usages under it, for the century and more which has since elapsed, are all entitled to consideration and weight.

Notably, the Court did not apply this contextual approach to the times of the oyster dispute at hand. Following the state court, the interpretive effort focused on the times of the colonial charters and on the times of Magna Charta. A wider application of this approach is critical to understanding both the public trust doctrine and the centrality of the doctrine to the Alaska debate over ITQs.

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95. The extent of the Court's reliance on Kirkpatrick's ruling was acknowledged in Shively v. Bowlby, 152 U.S. 1, 16 (1894).

96. The symmetry between the two cases is strong regarding: (1) emphasis on common use rights and distributional equity (see Martin v. Waddell, 41 U.S. at 406-18; see also the specific arguments presented by the plaintiff's attorney (id. at 380-92)); and (2) the importance of the issues involved (particularly the tie between common use rights and the conception of nationhood); see id. at 411-13. The distinction between use rights and regulation is less clearly drawn than in Arnold v. Mundy but the Court noted that regulation for preservation occurred as early as 1719; see id. at 417.

97. The question was whether the submerged lands and associated uses "were intended to be a trust for the common use of the new community about to be established; or private property to be parcelled out and sold to individuals." See Martin v. Waddell, 41 U.S. at 411.

98. The possibility that a chain of conveyances were all impressed with public trust responsibilities removed the case from the category of conventional private title conveyances; id. In particular, the grant from the King to the Duke of York was "an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed"; id. at 412.

99. Id. at 411.

100. This emphasis on contextualization contains a refutation of the charges that the public trust doctrine was the unsupportable creation of the Arnold and Martin courts; see Deveney, supra note 74, at 55-58, and MacGrady, supra note 74, at 589-591. To assert that the public trust doctrine was pulled from ether simply because the Romans had no concept of "trusts" is to be precisely the kind of narrow pedant—relying only on the "strict technical meaning of the words"—that the Martin court cautioned against. It was the thread of the idea of preserving common rights, not the specific invocation of the word trust, that the Arnold and Martin courts found so important.
c) Contextualizing the Public Trust: From the King's Deer to Wage Labor.

Professor Joseph Sax has argued that only the superficial aspects of the public trust doctrine are revealed independent of a contextual appreciation of the doctrine's formative ideas. This is entirely consistent with the courts' construction of the doctrine. But both courts and commentators have studied a specific place and period—England from Magna Charta to the colonial grants. It is suggested here that application of this contextual approach to the public trust doctrine also include the historical period of the New Jersey oyster cases—whose laws, institutions, and history are all entitled to consideration and weight. The core meaning of the public trust doctrine is found in the class relations of old world game laws. It is also found in a 19th century struggle between populist and progressive visions for the American political economy. This struggle featured populist concern for the rights of labor versus the rights of capital, and an associated populist opposition to the use of private property to disadvantage labor vis-à-vis capital, rather than opposition to private property per se. Adding this populist-progressive struggle to the contextual analysis of the public trust doctrine is a critical step in the construction of an archetype public trust issue.

A contextual analysis emphasizes that the focus on ideology is not primarily directed towards the role of the courts and individual justices per se, but to broader currents in public thought (i.e., the doctrine cannot be explained by the ideological commitment of select individuals, be they the King of England or American justices). The early public trust cases are part of a larger chain of 19th century fisheries access disputes, between those embracing a vision of national progress rooted in local small scale producerism, and those linking national progress with large scale interregional industrialism. Fisheries use rights conflicts pitted a "culture of the commoners" against those who viewed them as obstacles to progress. Notably, the common-

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101. See Sax, supra note 75.
102. See Sax, supra note 75, at 188-91; see also B. McCay, Sea Tenure and the Culture of the Commoners, in Small Boats, supra note 73, at 203, 206-10. This distributional equity core is augmented by two interrelated emphases on promoting evolutionary not revolutionary change (see Sax, supra note 75, at 188) and on safeguarding democratic processes (see Sax, supra note 74, at 560-61).
104. McCay, supra note 102, at 205.
ers' argument was not based on absolute opposition to private property qua use rights. Instead, it emphasized the determining role property rights played in a class struggle between capital and producerist labor:106

Are the fishermen to be driven from their fishing grounds, are the people to be deprived of food, that a few men may be made rich out of the public treasury of the sea? And has he or they only the right to catch fish who can afford the extensive and costly apparatus of the trappers?107

These descriptions of 19th century fisheries disputes suggest a general struggle between populism and progressivism: producerism, use rights in support of labor, and a vision of national progress built on local stability versus industrial capitalism, use rights in support of capital, and a vision of national progress defined simply as national economic growth.108 Consideration of populism in particular assists in construction of the archetype public trust issue.

While American populism was generally concerned with labor/capital relations as a determining factor of class relations, specific concern over the transition to wage labor was the sine qua non of populism.109 Sentiments in favor of structuring property rights to benefit labor, not capital, were not based on a denunciation of private property. Rather, they were based on a "radical Lockeanism" that sought to use private property to effect distributional equity.110 Finally, concern for labor/capital relations was not confined to a narrow populist fringe but was prevalent throughout the American political landscape: "Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration."111

106. McCay, supra note 102, at 224, notes that the commoners embraced a notion that use rights should go first to those who needed them most. This notion is consistent with existing contextualizations of the public trust doctrine; see Sax, supra note 75, at 191.


108. See C. Lasch, The True and Only Heaven: Progress and Its Critics 40-225 (1991). Note that I use the terms populism and progressivism broadly. I refer to broad ideological undercurrents, consistent with those chronicled by Lasch, supra, that were growing in the 19th century, not to specific movements and moments resulting from these undercurrents (e.g., the late 19th century formation of "Progressive" and "Populist" political parties). Thus by progressivism I am not making an explicit reference to the conservation movement associated with Theodore Roosevelt and Gifford Pinchot but that "Progressive" movement's commitment to scientific expertise, rational central planning, and efficiency is representative of the progressive ideology I refer to; see S. Hays, Conservation and the Gospel of Efficiency (Atheneum 1969). This ideology grew, like the science and industrialism it embraced, as the 19th century progressed but its roots lie in the epistemological revolution of the Enlightenment; see S. Toulmin, Cosmopolis (1990).


The application of the contextual method articulated in Martin v. Waddell thus provides the following archetype of a public trust issue. At the broadest level, a public trust issue involves a concern for class relations, mediated by property rights relative to trust resources. More specifically, the issue revolves around distributional equity concerns spawned by proposed alienation of trust resources. The archetypal issue is also characterized by 1) a populist/progressive split over notions of progress and nationhood; 2) a populist focus on distributional equity concerns related to use rights; 3) within these general concerns, the populist position focuses on labor/capital relations with perhaps even a refined focus on the development of wage labor; and 4) the populist position does not evince blanket opposition to alienation of trust resources, but to specific forms of alienation relative to the distributional equity and labor/capital concerns.

Measuring the Alaska Debate

The Alaska debate is an incarnation of this idealized public trust issue. First the debate centers on the proposed alienation of the halibut and sablefish fisheries. Second, the Alaska-based opposition to the plan is part of a long-standing concern over the rural community impacts of limited entry and of the view that national benefits flow from communities to the state and then to the nation. Third, the opposition is squarely centered on distributional equity issues, principally associated with the windfall give-away to vessel owners. Fourth, this initial allocation to vessel owners was seen as a deliberate disenfranchisement of labor. Finally, segments of the opposition endorsed the concept of privatized harvesting rights but consistently argued for a more equitable approach especially in regard to the windfall profit.

112. Note too, that the magnitude of the proposed alienation satisfies the scale effect criterion articulated in Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892), that is, we are talking about the alienation of common use rights to the entire halibut fishery not some limited expanse. Dispute over the exact nature of the alienation involved in ITQ systems is discussed infra part 3.

113. On the emphasis on community well being, see, e.g., Issues & Options, supra note 16, at 145-46, comments and questions of former Kodiak Mayor and long time commercial fisher D. Herrnsteent. On the issue of nationhood and national benefits, proponents of limited entry have long recognized that the Alaskans were arguing "for working from the welfare of Alaska toward the national welfare." J. Crutchfield & G. Pontecorvo, The Pacific Salmon Fisheries: A Study of Irrational Conservation 50 (1969). It is no exaggeration to say that property rights in fisheries are essential to the very concept of Alaska as a state. I refer to the role of the debate over fish traps in shaping the battle for statehood; see, e.g., R. Cooley, Politics and Conservation: The Decline of the Alaska Salmon 31-97 (1963), and Morehouse & Hession, supra note 21, at 296-97.

114. See supra text accompanying notes 54-62.

115. See supra text accompanying notes 62-66. Extension of this general concern to a specific focus on wage labor is discussed infra, see text accompanying notes 142-47.
and labor/capital issues.\textsuperscript{116} The Alaska debate over ITQs measures up at any level as a public trust issue.

Part 3: Implications of Seeing ITQs as a Public Trust Issue

From the core elements of the original articulation of the public trust doctrine to the broader characterization offered above, the symmetry between the debate and the doctrine is clear. This clarity, however, poses a paradox. Why, if the connection between the debate over ITQs and the public trust doctrine is both so strong and so evident, has the debate not been considered from the public trust perspective?

There are four readily identifiable explanations for the failure to associate the Alaska debate (and limited entry debates generally) with the public trust doctrine: 1) the obscurity of the doctrine; 2) a rejection of the claim that ITQs involve private property concepts repugnant to the doctrine (where the focus is on property); 3) a similar rejection of the private property claim (this time focused on the "privateness" of ITQs); and 4) a revised obscurity explanation based on the modern contours of the public trust doctrine. These possible explanations provide a survey of the insights offered by the public trust perspective. These explanations and insights are the focus of this section.

a) The Publicly Obscure Doctrine

One possible explanation of the lack of recognition of the public trust context of the debate over ITQs is that the doctrine is simply too obscure. The doctrine is generally not well known, a fate compounded by the dominance of the international face of fisheries management since Grotius. Were it empirically sound, this explanation would present an unflattering intellectual implication regarding our collective scholarship and curiosity. But this potential explanation defies the empirical record. Knowledge of the doctrine is perhaps less widespread within fisheries management circles compared to other environmental arenas, but the doctrine is known. Significantly, it is known by those familiar with limited entry.\textsuperscript{117} More significant still, the exis-

\begin{itemize}
\item \textsuperscript{116} See, e.g., L. Cooper, \textit{supra} note 61.
\item \textsuperscript{117} See, e.g., G. Cook, \textit{The Public Trust Doctrine in Alaska, in Recent Developments in Wildlife and Fisheries Law in Alaska} 29 (Alaska Bar Ass'n, Anchorage, AK, 1992) (the author specializes in wildlife and fisheries law in Alaska where limited entry is certainly well known); J. Archer & C. Jarman, \textit{Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources}, 17 Ocean & Coastal Mgmt. 253 (1992) (the authors are members of the Ocean Governance Study Group, a group that knows of the public trust doctrine and has an ad hoc working group focused on the "privatization of fishery resources"); \textit{see} Center for the Study of Marine Policy, Graduate College of Marine Studies, U. Del., \textit{DEL-SG-17-92, Ocean Governance: A New Vision} (B. Cicin-Sain ed., 1992); H. Knight & J. Lambert, L.S.U. Sea Grant Rpt. No. LSU-T-75-004, \textit{Legal Aspects of Limited Entry for Commercial Marine Fisheries} 1, 114 (1975); and
\end{itemize}
tence of such a doctrine was known (however sketchily) by the Council. The problem is not a lack of familiarity with the doctrine but a failure to grasp the conceptual connection between two known entities. This conceptual disconnect could be explained by an “it’s not really privatization” response; a contention that the ITQ plan is not repugnant to the public trust doctrine’s constraint on alienation of trust resources. There are two components to this response which arise from the two concepts embedded in “private property.” The two components are treated as separate explanations below.

b) It’s Not Really Privatization, Part 1: The Fish are still Fugitive

Regarding property, the public trust/ITQ nexus could be refuted by an assertion that ITQs represent no creation of property rights. Fish are, with or without ITQ management, wild (ferae naturae), remaining


118. The introductory section of the DEIS, supra note 30, at 1-11, notes that the legality of ITQs has been challenged on the basis of the public trust doctrine. The DEIS, at 1-11, 1-12, then dismisses this notion with a curious characterization and subordination of the public trust doctrine:

Simply stated, [the] public trust doctrine says that while the sovereign may dispose of its proprietary rights in trust lands, it cannot alienate its obligation to manage trust lands in the public interest. Whether or not the public trust doctrine applies to marine resources, the Magnuson Fishery Conservation and Management Act authorizes the Secretary of Commerce to establish limited access systems (citation omitted).

This quotation represents the entire recorded discussion afforded the public trust doctrine. Current Council staff are uncertain as to the original impetus behind this scant mention of the doctrine. Personal Communication with C. Oliver, Deputy Executive Director, North Pacific Fisheries Management Council (June 21, 1993). Perhaps the Council’s uncertainty over the maritime scope of the public trust doctrine is partially understandable. Under the Magnuson Act, the Council develops management policies for fisheries in the federal zone which extends from the seaward boundary of Alaska to 200 nautical miles offshore; 16 U.S.C. § 1802(6) (1988), 16 U.S.C. § 1811(a) (1988), Proclamation No. 5030, 3 C.F.R. 22 (1984). In contrast, the seaward boundary of Alaska (3 nautical miles from the coastal baseline, 43 U.S.C. §§ 1301(b), 1312 (1988)) represents the conventional limit of the public trust doctrine; see generally Putting the Public Trust Doctrine to Work 1, 27 n.72 (D. Slade ed., 1990). Council actions might thus not normally involve public trust issues. However, the Council’s privatization plans were anything but normal in this respect since, for the halibut fishery, the plans were explicitly intended to apply within both state and federal waters. See Proposed Rule, supra note 10, at 57,131, 57,144. Since the public trust doctrine clearly applies to fisheries issues in Alaska state waters (see, e.g., CWC Fisheries v. Bunker, 755 P.2d 1115, 1117-19 (1988)), there can be no question as to the general relevance of the doctrine to the present discussion. Note that it would be odd if the public trust doctrine principles that apply to the halibut fishery 2.9 miles from the coastal baseline do not apply to the same fishery 3.1 miles from the coastal baseline, but such important federalism issues (manifest in the case study under consideration) are beyond the scope of this article.

119. Ironically, the one commentator that does link the limited entry debates to the public trust doctrine views the doctrine, and relevant aspects of Magna Charta, as an unfortunate historical anomaly responsible for interrupting the allegedly normal evolution of common law towards private property; see Scott, supra note 6, at 73-80, 89. See also Scott, supra note 73, at 17-18.
unowned until reduced to possession in accordance with the law of capture.\textsuperscript{120} This potential explanation is irrelevant to the public trust doctrine because it rests on a fundamental confusion of the corporeal with the incorporeal aspects of property and of \textit{res nullius} (what is not owned) with \textit{res communes} (what is owned in common). Since at least the time of Justinian, property has been regarded as a right, not a thing, thus permitting the corporeal/incorporeal distinction to be drawn:

1. Corporeal things are those which are by their nature tangible, as land . . . .\textsuperscript{121}

2. Incorporeal things are those which are not tangible. They are such as consist in a right, as an inheritance, a usufruct, a use . . . .\textsuperscript{122}

The fisheries basis of the public trust doctrine was not concerned with any common right to fish themselves, they remained \textit{res nullius}. The focal point was instead an activity judged \textit{res communes}, the common "right of fishing."\textsuperscript{123} Thus, this rejection of a public trust connection is based on a misspecification error. This leads to the second component of the "it's not privatization" response.

c) It's Not Privatization, Part 2: It's not a right, it's a privilege . . . well whatever it is, it's not private

This response correctly shifts the focus on rights from the fish to the activity of fishing. The question becomes, do ITQs privatize the right to fish thus raising an obvious challenge to public trust principles? A negative answer exists in three varieties, all driven by the specter of the constitutional "takings" issue.\textsuperscript{124} The first comes from existing analyses of the legal contours of limited entry and can be accurately applied to the specific case of ITQs: "A claim that there is a property right in the right to fish is groundless as an abstract proposition."\textsuperscript{125} Such pronouncements are the product of analyses conspicu-
ously lacking consideration of the public trust doctrine, representing a return to the obscurity explanation.

The second form of answer that negates the takings implication, and implicitly rejects a public trust/ITQ nexus, asserts that ITQs represent mere harvesting privileges, not rights. This tack is employed by those responsible for defending the ITQ plan and features an emphasis on the revocability of the ITQ system.126 The third variation on a theme denying takings and public trust implications abandons the privileges versus rights distinction and simply states that there is no privatization involved; ITQs are just another form of management of a public resource.127 The merit and the implications of these privatization denials can be evaluated by consideration of first principles.

First, the public trust doctrine responded to an attempted assertion of an exclusive right of fishing. Whether property or privilege, ITQs are decidedly private in the sense of excludability and are thus precisely the subject matter of the doctrine. Second, we can look to the first principles of ITQs to address the rights-versus-privileges issue head on. For first principles, look to theory. The theory behind ITQ management is clear. The critique of open access is based on an appeal to property not “privileges.” “From the start, it was recognized that fishery problems were related to the absence of individual property rights in the fish stocks” and all forms of limited entry sought a property right in the fishery as a partial proxy for the elusive goal of property rights to the fish themselves.128

It is also clear that theoreticians speaking of property rights and “rights based fishing” mean private property rights:

[A]n ITQ . . . [is] a private property right, an instrument for extending the institution of property from land to the sea.129

. . . . ITQs are part of one of the great institutional changes of our times: the enclosure and privatization of the common resources of the ocean.130

This emphasis on private property is understandable, deliberate, and in fact necessary. ITQs are but a specific case of a more generic free market approach to environmental regulation. This approach ap-

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126. “Quota shares are a harvest privilege that may be modified or revoked at any time without compensation.” Transmittal memo from D. Cottingham, Director, Office of Ecology and Conservation, NOAA, accompanying the FEIS, supra note 30 (Dec. 1, 1992). Note that the courts have accepted this tactic in a case involving the first federal ITQ plan which addressed mid-Atlantic surf clam and ocean quahog fisheries; see Sea Watch Int’l v. Mosbacher, 762 F. Supp. 370, 375-76 (D.D.C. 1991).

127. I am indebted to Allison Rieser of the University of Maine’s Marine Law Institute for bringing a concise version of this potential explanation to my attention.

128. See Copes, supra note 13, at 278.

129. See Rights Based Fishing, supra note 16, at 1. The entire volume is replete with references to the private property nature of ITQs.

130. Id. at 3.
peals to the marketplace to induce good resource husbandry, thus remedying the tragedy of the commons.\textsuperscript{131} In the realm of fisheries management, the free market approach has acquired the moniker "rights based fishing."\textsuperscript{132} The perspective provided by the public trust doctrine reveals a suite of implications for the growing appeal to rights-based fishing.

The public trust doctrine was born of careful consideration of the distinctions between private and common property. Similar attentiveness lays bare the hypocrisy inherent in attempts to transform the nature of ITQs from private property to privileges.\textsuperscript{133} Ironically, this attempt to dodge the takings issue jeopardizes the effectiveness of ITQs by undermining the certainty of expectations provided by private property. The whole theory of ITQ management rests on certainty of expectations. In other contexts proponents have decried the destabilizing effects of the rights-into-privileges transformation.\textsuperscript{134}

The ideals of the public trust reveal a contrasting irony in the takings dodge, the potential futility of the whole maneuver. Expectations associated with property are as much a state of mind and practice as they are a product of law.\textsuperscript{135} Try as they might to avoid it, the proponents of ITQs are about to confront the bedevilment of entitlements that has long plagued managers of western rangelands.\textsuperscript{136}

\begin{itemize}
\item \textsuperscript{132} See Rights Based Fishing, supra note 16.
\item \textsuperscript{133} See supra note 126 and accompanying text.
\item \textsuperscript{134} This danger has been noted by one of the foremost proponents of the theoretical basis of ITQs; see Scott, supra note 6, at 86-87. Scott argues that revocable privileges/rights will not provide adequate security of expectations that in turn unleash a long term husbandry effect. According to Scott, full actuation of this effect will require private property in the fish themselves. Of course, it is possible to make one more about face and argue that no one will really take the revocability clause seriously, thus effecting the privatization remedy to the tragedy of the commons. As the Council noted, "[t]here are no known instances of an IFQ system being permanently abandoned in favor of open access or license] [limitation]." SEIS, supra note 30, at 153.
\item \textsuperscript{135} Cf. Sax, supra note 75, at 191-93.
\item \textsuperscript{136} The early embrace of ITQs by national environmental groups is particularly puzzling when viewed from this perspective (note a later reversal in position occurred; see supra note 52). Regarding rangelands, see, e.g., R. Cowart & S. Fairfax, Public Lands Federalism: Judicial Theory and Administrative Reality, 15 Ecology L. Q. 375, 390 & n.65 (1988). Decades of court debate on the rights versus privileges issue in rangelands has settled on privileges (see United States v. Fuller, 409 U.S. 488 (1973)), but an earlier court foresaw the practical reality behind this shellgame with a clarity that fisheries afficianados are advised to ponder:
\end{itemize}
The public trust perspective also reveals gross conceptual reductionism regarding property rights. First, there is the reduction of the property rights aspect of ITQs to a takings question. Only when the takings issue rears its head is any attention paid to the nature of the interest created by ITQs. But distributional equity, not takings and compensation, was the essence of the early public trust and is the core of the opposition in the Alaska debate. This fundamental difference in the perception of property rights is heightened in the second exhibit of reductionism. In both the general and specific debates over ITQ management, proponents reduce rights to private property rights. There is no better evidence of collapse in conceptual capacity, nor of the spread of this loss, than the ubiquitous phrase “rights-based fishing.” The phrase suggests that non-rights based fishing exists. Surely, the public trust doctrine exudes a response self-evident to Benajah Mundy and Merritt Martin: all fishing is rights-based.

This reduction of rights additionally provides for a particular telling of environmental history. To proponents of limited entry and ITQs, common use rights exist due to an historical anomaly: Magna Charta unfortunately truncated the natural evolution towards private property rights and “by default” common use rights were “allowed to reappear.” This tepid view is in direct contrast to the sanguinary view embodied in the public trust doctrine. Rights are not simply “allowed” to appear, they are actively made and defended. Benejah Mundy and his belligerent band of commoners vigorously asserted common use rights in a case that viewed complementary provisions of Magna Charta as triumphant assertions, not tragic historical accidents.

137. Other forms of rights are acknowledged (see, e.g., K. Ruddle, The Organization of Traditional Inshore Fishery Management Systems in the Pacific, in Rights Based Fishing, supra note 16, at 73) but the overwhelming emphasis is on private property rights. The degree to which the implicit conceptual hegemony of the phrase has been uncritically accepted is evidenced by its casual use by commentators who otherwise devote critical analytical attention to ITQ systems; see, e.g., Creed, supra note 5, at 1-25.

138. Scott, supra note 73, at 18.

139. This is a central thesis presented by McCay, supra note 76. In contrast, the conceptual glaucoma of the rights based fishing school is so advanced that it permits incredulous denials of history: “[T]he common law offers us no base case for a modern maritime fishing right. We have no history of conflict and incremental change to look back to.” Scott, supra note 73, at 18.

140. The triumphal view is expressed in Note, supra note 74, at 789. How is it that the same set of historical facts, regarding the genesis of the doctrine, can produce such divergent accounts? The situation seems ripe for an investigation of William Cronon’s assertion that our perception of environmental history is as much a product of the imperatives of narrative form as it is of the empirical observations behind the narrative accounts, W. Cronon, A Place for Stories: Nature, History, and Narrative, 78 J. Am. Hist. 1347 (1992). The tragic view of Magna Charta should present a sobering reality check for those that attempt to deny the privatization inherent in ITQs. Writing of necessary steps towards ITQs and ultimately full ownership, Scott, supra note 6, at 89, states: “The biggest step of course is to reverse the direction once taken in Magna Carta. That fisheries in tidal and navigable waters should not be subject to private ownership and planning
The public trust doctrine provides a useful perspective on the privatization question not only in terms of the creation of private rights, but in terms of the distribution of these rights. The initial allocation of ITQs only to vessel owners stands in direct contrast to the historical emphasis on using property rights to effect distributional equity, particularly via the structuring of labor/capital relations. The justification for this allocation is even more repugnant to the doctrine and evinces more conceptual confusion. In rewarding investors for their risk while denying crew labor, the Council reversed the emphasis on the rights of labor embodied in the public trust doctrine. This produced a specific definition of "fishermen" as vessel owners and independent crew as "investments": "An IFQ system . . . [would] allow fishermen to remove vessels, gear, crewmen and other investments from the fishery in order to increase the profit from each IFQ."\(^{141}\)

The Council went beyond redefining fishermen as vessel owners and relegated crew to the status of wage labor. Opponents of the ITQ plan noted that by law and by practice, crew are independent producers that sell their share of the catch not their labor.\(^{142}\)

The distinction between wage laborer and independent producer is not trivial and provides a basis for treatment of one of the key aspects of the Alaska debate.\(^{143}\) The transformation of labor from holder of property rights in the productive process to a mere commodity in that process represents the primal fear of 19th century populism.\(^{144}\) The Council's rationale implies that this transformation has already occurred; experience with ITQ management elsewhere suggests that it might occur.\(^{145}\) In either case, the relative position of labor is weakened is an idea so completely antithetical to the very concept of quotas as to lie beyond discussion in this paper."

141. SEIS, supra note 30, at 149. This exclusionary definition of fishermen seems problematic from the perspective of National Standard No. 4 of the Magnuson Act which requires that allocations of fishing privileges among U.S. fishermen shall be "fair and equitable to all such fishermen" 16 U.S.C. § 1851(a)(4) (1988). The focus on the rights of capital in the harvesting sector also ignores the co-dependent processing sector. These issues have been clearly articulated to the Council as it proceeds to develop an ITQ plan for the billion dollar groundfish fisheries off Alaska; see Letter from J. Plesha, General Counsel, Trident Seafoods, to R. Alverson, Chairman, Comprehensive Rationalization Committee, North Pacific Fishery Management Council (June 14, 1993) (on file with author). "Comprehensive rationalization" is the Council's euphemism for privatization.

142. See supra text accompanying note 62.

143. Note too that proponents of ITQs are well aware of the distinction as evidenced by the attention paid to the distinction in the so called inshore/offshore allocation dispute over groundfish; see, e.g., North Pacific Fishery Management Council, Potential Elements of Individual Fishing Quotas or License Limitation Programs in North Pacific Groundfish and Crab Fisheries 9 (June 15, 1993).

144. See Lasch, supra note 108, at 203-08, 212-16, 223.

145. Wage labor arrangements for crew are beginning to appear in the British Columbia halibut fishery as a result of implementation of an ITQ management system for that fishery. Telephone Interview with B. Turris, Dep't Fisheries & Oceans, Vancouver, Can. (Apr. 20, 1993).
and the symmetry between the ITQ opponents’ and 19th century populists’ concern for what Lincoln called “the door of advancement” is striking. The subject of concern is more formally known as an “occupational ladder” in which wage labor occupies the lowest rung. If the introduction of ITQs results in either a transition to wage labor or a reduction in traditional share benefits, then the effect of ITQs will be to lower labor’s position on the ladder and/or to space the rungs farther apart. Passage up a modified ladder will be most difficult for the more marginal participants in the fisheries, especially Native Alaskans and recent women entrants.

Finally, consider the weak version of the “it’s not privatization” response which states that ITQs are just another form of management. Here too, a public trust perspective provides analytical purchase and yet more evidence of loss of conceptual capacity. The distinction between use rights and regulation was a central principle upon which the doctrine was founded. ITQs, as privatized harvesting rights, do not represent just another form of management; they are qualitatively different from other forms of management. Of course, the relevant subject of management may not be fisheries resources per se, but industrial relations in contemporary society. As proponents of ITQs have noted, the privatization of common use rights is “one of the great institutional changes of our times.” This transformation is the basis of the larger struggle between populist and progressive visions of progress:

My exact point is that we are not trying anything new on the fishery. What we are trying to say is ‘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.

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146. By one estimate, crew in the mid-Atlantic surf clam fishery earn $20,000 less on an annual basis since the introduction of ITQ management. See K. Beal, National Marine Fisheries Serv., Surf Clam/Ocean Quahog ITQ Evaluation Based on Interviews with Captains, Owners and Crews (undated) (report contained in materials released to J. O’Malley, Executive Director, East Coast Fisheries Foundation, Inc., in response to a Freedom of Information Act request) (copy on file with author).

147. The wage labor issue was recognized, though effectively dismissed, by the Council in the early stages of the planning process; see SEIS, supra note 30, at 157-59, 176. As the debate moved towards the extremes characterized in Part 1, this issue (like the public trust doctrine) disappeared. Significantly, opponents who questioned the impact of the ITQ system on the traditional path of occupational advancement did not draw a connection between their concerns and earlier mention of a possible transition to wage labor; see supra text accompanying notes 62-64. On the ladder concept generally, see J. Atack, The Agricultural Ladder Revisited: A New Look at an Old Question with Some Data for 1860, 63 Agricultural History 1 (1989).

148. Rights Based Fishing, supra note 16, at 3; cf. supra note 130.

All of the possible denials of an ITQ/public trust doctrine nexus considered thus far are flawed. Rather than attempting to fashion another denial focused on interpretations of ITQs, perhaps a focus on interpretation of the public trust doctrine instead would be more successful.

d) It’s not the (modern) Public Trust: Or, In Which Trust Shall We Trust?

The most plausible explanation for the lack of a recognized linkage between the public trust doctrine and the ITQ debate is that the linkage depicted herein is illusory, based on an outdated characterization of the public trust doctrine. Current characterizations of the doctrine are dominated by emphasis on environmental preservation. Two ironies are associated with this emphasis. First, it is not clear that the ITQ plan is consistent with the preservation emphasis. Second, it is clear that the popular pursuit of preservation threatens to undermine the public trust doctrine’s effectiveness as a legal doctrine.

Contemporary commentators on the public trust doctrine distinguish between a “classic” and a “modern” form of the public trust doctrine. The signal feature of the modern public trust doctrine is the emphasis on the “fiduciary” duty of government to preserve trust resources (the “corpus” of the trust):

[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands, and tidelands . . .

While the courts emphasized preservation as early as Illinois Central, the objective of this duty has shifted from preservation for use to preservation itself: “There is a growing public recognition that one of the most important public uses . . . [of trust resources is] preservation . . . .”

The contemporary emphasis on preservation has all but eclipsed the original emphasis on equity. The eclipse is near total as evidenced by the conceptual chasm separating the doctrine articulated in Arnold v Mundy from the doctrine depicted in current characterizations:

The notion that governments hold certain resources in trust for the public and have an affirmative obligation to protect them is called the public trust doctrine.

150. On classic, see C. Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. Davis L. Rev. 269, 273-74 (1980); on modern, see Archer & Jarman, supra note 117, at 256, 261.


At its simplest level, the public trust doctrine revolves around the concept that government owes its citizens special duties of care, or stewardship, regarding certain natural resources which the state holds in trust for the public. At this most basic level, the public trust doctrine holds that government must act as a fiduciary in its management of the resources which constitute the corpus of the trust.  

Thus, the lack of attention to the public trust dimensions of the ITQ debate can be explained by a shift in the characteristic emphasis of the doctrine itself. But acknowledging this shift does not dismiss the inquiry; the shift itself warrants consideration from several perspectives.

Consider the magnitude of the shift. The central concerns of the "classic" doctrine—distributional equity, evolutionary rather than revolutionary change, and safeguarding democratic processes—all point to potential incompatibilities in the Alaska debate, but implicit in the lack of attention to the public trust perspective is the opposite conclusion: that the ITQ plan is unquestioningly compatible with the doctrine. This conclusion reflects the modern emphasis on preservation. There is an obvious explanation for this emphasis, based on the presumed innocence of the past: the concessions of the "classic" public trust doctrine to common use rights and distributional equity are an artifact of an age that did not account for the possibility of resource depletion. This nostalgic presumption is supported by the long play accorded Grotius' notions of inexhaustibility, but it is confounded by the factual record concerning common rights in coastal waters. The Arnold v Mundy court explicitly recognized the issue of depletion and pointed to a long regulatory history focused on preservation. Still, the court chose to draw a distinction between use rights and regulation, a distinction complementary to an emphasis on distributional equity and class relations as mediated by common use rights.

The shift in the doctrine's emphasis is more a reflection of our own cognitive processes than those of our ancestors. Consideration of the emphasis on preservation illuminates an unexpected alignment of interests on both ends of the ITQ/public trust doctrine connection. Consider first the compatibility between the ITQ plan and the preservation theories.

154. Cook, supra note 117, at 1. That the eclipse is not yet total is evident from statements such as "reasonable regulation [of trust resources] is in order; use prohibition is not." People v. El Dorado County, 157 Cal. Rptr. 815, 817 (1980).

155. See supra note 102.

156. See Lasch, supra note 108, at 82-119, on the connection between progressivism and the embrace of nostalgia.

157. Chief Justice Kirkpatrick noted that no matter what the ruling, the resource might be destroyed, Arnold v. Mundy, 6 N.J.L. 1, 9 (1821), while Justice Rossell noted regulation for preservation as early as 1718; see id. at 92.
tion emphasis of the modern public trust doctrine. The departure from a strict focus on preservation is obvious in a plan motivated by the desire to curb the tragedy of rent dissipation, to secure the conventional world-view of biologists, and to make commercial fishing like any other industry in capitalist America.158

This last motivation is particularly significant. The apparent outcome of the Alaska debate suggests a tacit alignment of environmental preservationists and free market economics. The unasked question is what are the implications, in terms of preservation goals, of a “successful” transformation of commercial fishing? Is the spirit of the “modern” public trust being met in other areas with privatized harvesting rights to public natural resources? Furthermore, if we think about preservation and privatization, is the exclusion of distributional equity desirable? The implicit judgment that preservation and common use rights are mutually exclusive goes against the grain of much current thought on the links between human and environmental sustainability.159

Shifting to the public trust doctrine, the more the public trust doctrine drifts away from its original attention to distributional equity and class relations, the more it approaches one of two unexpected outcomes. First, many contemporary applications of the public trust doctrine exhibit a conflation of the doctrine with the nonspecific appeal to the “public interest” found in the multiple use mandates of federal statutes guiding most utilization of public natural resources.160 Conflation with broad public interest statutes condemns the public trust doctrine to an amorphous future.161 The second possible trajectory of the public trust doctrine is one of effective absorption by other forms of trusts. Em-

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158. See supra text accompanying notes 58, 59 and 149, respectively. While it is certainly foolish to attempt to draw too strong a line between the non-biological goals of the plan and beneficial biological outcomes, naive appeal to structural change is equally foolish. An a priori case for the biological benefits of ITQ management can be made, but the same case can be made for any structural form of disciplined resource management. In and of themselves, structural changes do not effect a political will to manage. On the issue of blind appeals to structuralism versus a commitment to management, see M. Marchak, What Happens When Common Property Becomes Uncommon?, 80 BC Studies 3 (Winter 1988-89).

159. Emphasis on the symbiotic nature of human and environmental sustainability is especially prevalent in the international development literature on natural resources; see, e.g., N. Peluso, Rich Forests, Poor People: Resource Control and Resistance in Java (1992).

160. See, e.g., Archer & Jarman, supra note 117, at 260, stating that the Magnuson Act “clearly promoted public trust values.” Sax, supra note 74, at 478, offers a more general caution along these lines.

161. Cf. C. Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711, 722 (1986) (“the modern public trust doctrine is notoriously vague” thus the need to turn to the traditional doctrine for “enlightenment”). The lack of meaningful distinction between some contemporary characterizations of the public trust doctrine and multiple use/public interest statutes has been noted by those offering the characterizations; see Mantell, supra note 153, at 244-245.
phasis on fiduciary duties coupled with maximization of public benefits is more characteristic of the so-called beneficial trust than of the public trust doctrine.\textsuperscript{162} Either fate is ironic for a doctrine thought to be vulnerable to historical shackling\textsuperscript{163} and death by constriction.\textsuperscript{164} Rather than a strangulating appeal to original intent, the chief contemporary threat to the public trust doctrine appears to be death by overstretching. The point is not to argue for rigid original intent in applying public trust principles to the ITQ debate. To question the abandonment of attention to distributional equity is not to argue for unbridled common use rights; this would be as superficial a reading of the doctrine as an assertion that alienation is absolutely prohibited.

CONCLUSIONS: THE NATURE OF A NATION

We are at once witnesses to a profound change in the perception of rights, and to little change in the progressive approach to natural resource management. Since \textit{Arnold v. Mundy} we have moved from finding great national principles at stake in the disposition of rights to a few bushels of oysters to a barely concealed yawn at these same principles in terms of the disposition of rights to the entire halibut resource off Alaska. At the same time, rather than confronting the fundamental tensions between the tenets of scientific resource management and the populist nature of American political institutions, we "choose merely to identify the[] opposition as 'selfish interests.'"\textsuperscript{165}

Fusing the debate over ITQs to the changing contours of the public trust doctrine offers a commentary on the changing character of a nation. A striking feature of the idea behind the classic trust doctrine, the role of common use rights in mediating class relations through distributional equity, is that it underlies responses to great class challenges of different epochs. Game laws were one of the defining elements of class relations in medieval England. In nineteenth century America, the same could be said for the transition to wage labor. In each age, the base ideas of the doctrine responded. To what defining aspect of class

\textsuperscript{162} On the beneficial trust concept in natural resource management, see, S. Fairfax et al., \textit{The School Trust Lands: A Fresh Look at Conventional Wisdom}, 22 Envtl. L. 797 (1992); J. Souder et al., \textit{State School Lands and Sustainable Resources Management: The Quest for Guiding Principles}, Nat. Res. J. Vol. 33, No. 4 (1993). As with the inherent privatization associated with ITQs, this transformation of the public trust doctrine (towards a focus on maximization of benefits) hints of an alignment between free market economists and environmentalists.

\textsuperscript{163} Sax, supra note 75.

\textsuperscript{164} Sax, supra note 74, at 553. But see Sax, \textit{id}. at 478, on the danger of conflation with broad public interest.

\textsuperscript{165} See Hays, supra note 108, at 275; \textit{cf. supra} text accompanying note 72.
relations does the modern doctrine (and which doctrine at that) respond today?

Finally, the road ahead for fisheries management from the public trust doctrine perspective lies not with a desiccating appeal to its original intent. Nor does it lie with a continued blind embrace of structural panaceas at the expense of intellectual effort. Instead, we need to face the large issues—those that define the character of the nation—head on. How can the central features of the old and the new public trust doctrines be reconciled in order to promote both distributional equity and environmental preservation? Have we changed so much as a nation that we no longer have the capacity or will to ask?