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An Agricultural Law Research Article

**Three Cases/Four Tales: Commons, Capture,  
the Public Trust, and Property in Land**

by

Dale D. Goble

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# THREE CASES / FOUR TALES: COMMONS, CAPTURE, THE PUBLIC TRUST, AND PROPERTY IN LAND

BY  
DALE D. GOBLE\*

*The founding of America was the rule of capture writ large—the discovery doctrine is just capture applied to continents rather than foxes. But capture produces potentially different results when applied to foxes rather than to continents: “property” in foxes is qualified and possessory because the property ceases if the fox escapes—and animals ferae naturae (unlike continents) are wont to escape. This article examines the legal universe occupied by animals ferae naturae by examining three cases from the early nineteenth century. The cases examine the rule of capture as applied to animals ferae naturae, the nature of property in such animals, and how that property restricts property in land.*

*The past is a foreign country: they do things differently there.*  
*L.P. Hartley<sup>1</sup>*

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<sup>1</sup> THE GO-BETWEEN 1 (1954).

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## I. INTRODUCTION

Judges—like the rest of us—tell stories to explain their decisions. Thus this article becomes a twice-told tale of the stories three courts told about animals *ferae naturae*.<sup>2</sup> The first story—originally written by the New York Supreme Court—is an allegory about the killing of a fox.<sup>3</sup> The New Jersey Supreme Court of Judicature wrote the second story to justify its decision on the ownership of oysters growing in the tidal reaches of the Raritan River.<sup>4</sup> In the final narrative, the Massachusetts Supreme Judicial Court weighed the balance between public and private rights in determining who must pay for the modifications to permit anadromous fish to pass upstream over a dam to spawn.<sup>5</sup>

The three cases examine four recurrent topics in natural resource law: common property, capture, private property, and the public trust. The first case—the story of Pierson, Post, and the fox—is a story of how things come to be private property by capture from the commons. The tale of the Raritan oysters suggests a limit on the fox story: the government’s responsibility as a trustee for the public to protect common property from private appropriation. Finally, the story of the shad and alewives, and Baker and Vose’s milldam on the Neponset River, also examines questions of public trust/common property, but from the perspective of private property in land: its lesson is that such property is subordinate to the public’s interest in wildlife.<sup>6</sup>

Each of the cases probes a different aspect of the balance between public and private. What scope of unchecked autonomy is to be accorded the individual? What does the individual owe to society? The early

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<sup>2</sup> On the common-law distinctions among animals *ferae naturae*, *mansuetae naturae*, and *domitae naturae*, and the differences that flow from these classifications, see DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW* 104–05 (2002). On the continuing relevance of the classifications, see, for example, *State v. Couch*, 103 P.3d 671 (Or. App. 2004), and *State v. Lessard*, 29 P.2d 509 (Or. 1934).

<sup>3</sup> *Pierson v. Post*, 3 Cai. 175 (N.Y. 1805).

<sup>4</sup> *Arnold v. Mundy*, 6 N.J.L. 1 (1821).

<sup>5</sup> *Inhabitants of Stoughton v. Baker*, 4 Mass. (3 Tyng) 522 (1808).

<sup>6</sup> There is at least one additional story that provides an archetype for natural resources and environmental law: “nuisance.” This story is either about protecting the public interest against private land uses (“public nuisances”) or about adjusting mutually interfering land uses (“private nuisances”). On the former, see *Commonwealth v. Knowlton*, 2 Mass. (2 Tyng) 530 (1807), and *Boatwright v. Bookman*, 24 S.C.L. (Rice) 447, 451 (1839) (noting that “an obstruction to the free passage of fish in a public navigable river, is also a public nuisance”). On the latter, see *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199, 202–03 (1827) (holding that a private right in a fishery on a stream is “subject to a reasonable qualification, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it, if their neighbours below them on a stream or river might with impunity wholly impede the passage of fish” and thus the obstruction complained of may be a nuisance at the common law), and *Seaman v. Lee*, 10 Hun. 607 (N.Y. App. Div. 1877) (holding upstream pollution that killed trout could be enjoined as a nuisance).

nineteenth century has particular relevance to these questions. During this period, federal and state judges worked to reconfigure the common law to account for two ongoing revolutions: the political revolution from monarchy to republic, and the economic-social revolution from agrarian-communitarian to market-individualistic.<sup>7</sup>

Animals *ferae naturae* also have a particular relevance to these issues. As Locke wrote a century earlier, "In the beginning, all the world was *America*"<sup>8</sup>—by which he meant, in the state of nature all the world was unowned and available for the taking.<sup>9</sup> For Locke and the Enlightenment civilians (Grotius,<sup>10</sup> Pufendorf,<sup>11</sup> Barbeyrac,<sup>12</sup> Bynkershoek,<sup>13</sup> and Vattel<sup>14</sup>)

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<sup>7</sup> In this, the three cases share the search for a coherent legal system that occupied the early nineteenth century. See, e.g., ST. GEORGE TUCKER'S BLACKSTONE COMMENTARIES (Paul Finkelman & David Cobin eds., Law Book Exchange 1999) (1803). Different parts of this story can be traced in CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT 3–68 (1981); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 105–333 (2d ed. 1985); GRANT GILMORE, THE AGES OF AMERICAN LAW 19–40 (1977); KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 9–128 (1989); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 71–108 (1956); WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 165–74 (1975); WILLIAM J. NOVAK, PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); I MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY 248–70 (2d ed. 2002); and J.R. Pole, *Property and Law in the American Republic*, in PATHS TO THE AMERICAN PAST 75–108 (Oxford Univ. Press 1979).

<sup>8</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 319 (P. Laslett ed., Cambridge University Press 1967) (1690).

<sup>9</sup> Locke was the secretary to the British Board of Trade (which was responsible for managing the colonies) during the 1670s, and his philosophical writings echo the legal justification for dispossessing the indigenous peoples of North America: Indians, who "do but run over the grass" like "wild beasts," had no more claim to ownership than did the beasts. Robert Cushman, *Reasons and Considerations Touching the Lawfulness of Removing Out of England into the Parts of America*, in CHRONICLES OF THE PILGRIM FATHERS 243 (Da Capo Press 1971)(1841). See generally Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713 (2004) (arguing that the Marshall Court's "discovery doctrine" did not by itself divest tribes of their property rights, but that subsequent courts and congresses construed the Marshall Court's rhetoric to breach treaties and break up Indian lands).

<sup>10</sup> Hugo Grotius (1583–1645) was a Dutch jurist and humanist who wrote what is usually considered to be the first definitive work on international law, *De Jure Belli ac Pacis* [*On the Law of War and Peace*], which was published in 1646.

<sup>11</sup> Samuel, Baron von Pufendorf (1632–1694), a German jurist and historian, was educated on the works of Grotius and Thomas Hobbes. In 1672, he published *De Jure Naturae et Gentium* [*On the Law of Nature and of Nations*].

<sup>12</sup> Jean Barbeyrac (1674–1744) was a French legal theorist and historian. He annotated editions of both Grotius' *On the Law of War and Peace* and Pufendorf's *The Law of Nature and of Nations*. He corresponded with John Locke and advocated the English philosopher's theories in his extensive notes on Pufendorf's treatise.

<sup>13</sup> Cornelius van Bynkershoek (1673–1743) was a Dutch writer on international law and a jurist at The Hague. In 1702, he published *De dominio maris* [*Sovereignty of the Sea*] which proposed the three-mile limit to a state's jurisdiction over the sea. In 1702, the range of a canon was a league, or three marine miles. James Brown Scott, *Introduction* to CORNELIUS VAN BYNKERSHOEK, *DE DOMINIO MARIS* DISERTATIO 11, 17 (Ralph van Deman Magoffin trans., Oxford Univ. Press 1923) (1744).

<sup>14</sup> Emer de Vattel (1714–1767) was a Swiss philosopher and jurist whose fame was based on a single book, *DROIT DES GENS; OU, PRINCIPES DE LA LOI NATURELLE APPLIQUES A LA CONDUITE ET*

animals *ferae naturae* were the paradigm of an unowned thing; they were a then-current analogue for the "state of nature," that imagined and imaginary starting point for society.<sup>15</sup> Wildlife law, in short, has often been about more than wildlife, it has often been a speculation about "property." And in the first decades of the nineteenth century, this speculation occurred in a place that seemed to be defined by riotously exuberant abundance.<sup>16</sup> How did this anomalous situation affect the debate and shape assumptions? Were things truly unowned even in such a place?

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AUX AFFAIRES DES NATIONS ET DES SOUVERAINS [THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS] (Joseph Chitty ed., Philadelphia 1876) (1758). The book was important because it supplied a justification for liberal revolutions. Thus it is not surprising that Vattel's ideas were warmly received in this country. James Kent wrote that Vattel is "[t]he most popular and most elegant writer on the law of nations" and noted that "[h]e has been cited, for the last half century, more freely than any one of the public jurists." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (Claitor's Publ'g 1985) (1826).

<sup>15</sup> The fundamental perspective shared by these writers (other than Vattel) was that in the state-of-nature, man was a solitary individual without social relationships. This reductionist perspective reflects the Newtonian, "scientific" (*i.e.*, mechanical) perspective: complex systems could be understood by reducing the system to its simplest constituents and describing those constituents; nature is a collection of bodies moving through Euclidean space. This perspective achieved perhaps its clearest statement in the writings of Thomas Hobbes:

it is manifest that, during the time men live without a common power to keep them all in awe, they are in that condition which is called war, and such a war as is of every man against every man . . . . Whatsoever, therefore, is consequent to a time of war where every man is enemy to every man, the same is consequent to the time wherein men live without other security that what their own strength and their own invention shall furnish them withal. In such condition . . . the life of man [is] solitary, poor, nasty, brutish, and short.

THOMAS HOBBS, LEVIATHAN pt. I, ch. 13 (1651). See also C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 3 (1962) (describing that the central difficulty with liberal democratic theory beginning with Hobbes is its view that "freedom is a function of possession" and that "[s]ociety consists of relations of exchange between proprietors."). This perspective was not shared by many common-law jurists of the period. See *infra* notes 178-88 and accompanying text.

<sup>16</sup> The first stories from America were tales of limitless bounty: "I think in all the world the like abundance is not to be found," stated Arthur Barlowe, Sir Walter Raleigh's agent, after Raleigh's trip to Virginia in 1584. Quoted in ANTHONY NETBOY, THE ATLANTIC SALMON 315 (1968). Thomas Morton described a Massachusetts with "Fowles in abundance, Fish in multitude, and . . . Millions of Turtledoves on the greene boughes: which sate pecking, of the full ripe pleasant grapes, that were supported by the lusty trees." THOMAS MORTON, NEW ENGLISH CANAAN 60 (photo. reprint 1969) (Amsterdam 1637). Richard Whitbourne, when describing the now-extinct great auk, spoke of its ability to "multiply so infinitely," and of God's gift of "the innocency of so poore a creature, to become such an admirable instrument for the sustentation of man." RICHARD WHITBOURNE, A DISCOURSE AND DISCOVERY OF NEW-FOUND-LAND 9 (photo. reprint 1971) (London 1620). That description captured two of the central precepts of the period: nature was both inexhaustibly fecund and created for the sustenance of our species; it was a vast and continuously replenished storehouse.

II. *PIERSON V. POST*: TAKING THINGS FROM THE COMMONSA. *Capture as Possession*

The law often embodies its foundational propositions in stripped-down, mythic allegories. *Pierson, Post*, and the fox is one such story—a tale that offers a partial answer to what Carol Rose, in a long tradition of legal philosophers, has called “a fundamental puzzle for anyone who thinks about property”: “how do things come to be owned?”<sup>17</sup>

Lodowick Post was out with friends and hounds “upon a certain wild and uninhabited, unpossessed and waste land” when he jumped “one of those noxious beasts called a fox.”<sup>18</sup> Just as Post and his companions were about to seize their quarry, Jesse Pierson stepped in, killed the fox, and carried it off. When Pierson refused Post’s demand for the carcass,<sup>19</sup> Post sued out a writ of trespass on the case. The justice court held that Post was indeed entitled to the fox. Pierson obtained a writ of *certiorari* to bring the case to the New York Supreme Court, arguing that Post had no property in the fox and thus no claim that he had been injured.<sup>20</sup>

Both parties agreed that ownership could only be acquired by “occupancy”—that is, possession—but they differed on what occupancy required. Pierson argued that physical possession was required,<sup>21</sup> Post countered that “[a]ny continued act” demonstrating “the intention of exclusively appropriating that which was before in a state of nature” is “equivalent to occupancy.”<sup>22</sup> The parties thus framed the issue before the court as a choice between actual and constructive possession.

The majority sided with Pierson. Citing a long list of “ancient writers upon general principles of law,”<sup>23</sup> the court concluded that “actual bodily seizure” or, at a minimum, “mortally wound[ing] or greatly maim[ing]” the animal, was required because these give the pursuer the “certain control” required for actual possession.<sup>24</sup> Thus, “mere pursuit gave Post no legal right to the fox, but . . . he became the property of Pierson, who intercepted and killed him.”<sup>25</sup> This conclusion was buttressed for the majority by the role possession played in providing “certainty, and preserving peace and order in society.”<sup>26</sup>

<sup>17</sup> Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73 (1985).

<sup>18</sup> *Pierson v. Post*, 3 Cai. 175, 175 (N.Y. 1805). The waste land was Queens. On the relevance of the pleading that the fox was a “noxious beast,” see *Geush v. Minns*, (1614) 79 Eng. Rep. 274 (K.B.).

<sup>19</sup> The fact that each of the parties spent more than \$1,000 suggests that something more than the carcass was at stake. See GOBLE & FREYFOGLE, *supra* note 2, at 121 (indicating that it was the fathers of Pierson and Post who insisted on the proceedings).

<sup>20</sup> *Pierson*, 3 Cai. at 175.

<sup>21</sup> *Id.* at 176.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 177. The court cites Justinian, Fleta, Breton, Puffendorf, Barbeyrac, Bynkershock, and Grotius. *Id.* at 177–79.

<sup>24</sup> *Id.* at 178.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 179. See also *Swift v. Gifford*, 23 F. Cas. 558, 560 (Mass. 1872) (No. 13,696) (holding that usage allowing less than physical possession of a whale was justified on the grounds that,

The dissent began with the proposition that examining the customs of those actually engaged in the activity is preferable to "poring over" the writings of "Justinian, Fleta, Bracton, Pufendorf, Locke, Barbeyrac, or Blackstone."<sup>27</sup> Since there was no evidence of the customs of sportsmen, Livingston (like a law-and-economics sage) contended that "our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career."<sup>28</sup> He believed that awarding the fox to the pursuer would achieve this objective.

The majority and dissent agree on the fundamental propositions: possession is required for ownership and control is the key; it is the control of nature that is the root of property. They also agree that property allocation rules ought to serve utilitarian objectives. They differ only on the degree of control required. The majority favors the unequivocal notice that comes from the act of physical possession because it will reduce litigation with its attendant social costs; the dissent prefers to reward the socially useful labor of the hunters. Neither, however, addresses the more fundamental question: why does *possession* create title?<sup>29</sup>

The "ancient writers," to whom both the majority and dissent refer, offered two different answers to this question. Grotius and Pufendorf advanced a consent theory: "it is to be supposed that all agreed, that whatever each one had taken possession of should be his property."<sup>30</sup> Locke, who thought the likelihood of consent was vanishingly small,<sup>31</sup> countered with a labor theory: when a person removes something from nature "he hath mixed his *Labour* with it . . . and thereby makes it his *Property*."<sup>32</sup>

"[i]f the pursuit of the Rainbow had been clearly understood in the beginning, no doubt the other vessel would not have taken the trouble to join in it, and the usage would have had its appropriate and beneficial effect"; WILLIAM BLACKSTONE, 2 COMMENTARIES \*2-10 (stating that possession gives notice of intent to appropriate).

<sup>27</sup> *Pierson*, 3 Cai. at 180.

<sup>28</sup> *Id.* "When we reflect also that the interest of our husbandmen, the most useful of men in any community, will be advanced by the destruction of a beast so pernicious and incorrigible, we cannot greatly err in saying that a pursuit like the present, through waste and unoccupied lands, and which must inevitably and speedily have terminated in corporeal possession, or bodily seisin, confers such a right to the object of it, as to make any one a wrong-doer who shall interfere and shoulder the spoil." *Id.* at 182.

<sup>29</sup> Other courts also struggled to define "possession" while ignoring the justification for relying on possession. *See, e.g.*, *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881) (whale); *Swift v. Gifford*, 23 F. Cas. 558 (D. Mass. 1872) (No. 13,696) (whale); *Bartlett v. Budd*, 2 F. Cas. 966 (D. Mass. 1868) (No. 1,075) (whale); *Bourne v. Ashley*, 3 F. Cas. 1002 (D. Mass. 1863) (No. 1,698); *Taber v. Jenny*, 23 F. Cas. 605 (D. Mass. 1856) (No. 13,720) (whale); *Treat v. Parsons*, 24 A. 946 (Me. 1892) (alewives); *Brinckerhoff v. Starkins*, 11 Barb. 248 (N.Y. App. Div. 1851) (oysters); *Fleet v. Hegeman*, 14 Wend. 44 (N.Y. Sup. Ct. 1835) (oysters); *Buster v. Newkirk*, 20 Johns. 75 (N.Y. Sup. Ct. 1822) (deer); *Rexroth v. Coon*, 23 A. 37 (R.I. 1885) (bees).

<sup>30</sup> HUGO GROTIUS, *DE JURE BELLI AC PACIS* bk. II, ch. 2, ¶ 5, 189-90 (Francis W. Kelsey trans., 1925). The complete chain of title was from God to humanity-in-common to individuals through consent. *Id.* ¶¶ 1, 4-5, ch. 3, ¶ 1. For Pufendorf's perspective on the transition from common to private property, see SAMUEL, BARON VON PUFENDORF, *DE JURE NATURAE ET GENTIUM* bk. 4, ch. 6, ¶ 2 (Basil Kennett trans., 4th ed. London 1779) (1672).

<sup>31</sup> "If such consent [of all humanity] was necessary, Man had starved, notwithstanding the Plenty God has given him." LOCKE, *supra* note 8, at 306; *see also id.* at 307. In economic jargon, the transaction costs would preclude the bargain.

<sup>32</sup> *Id.* at 306.

Although echoes of Grotius and Locke might be heard in both the majority and dissent, the law is (as we are often reminded) neither logic nor philosophy, but rather a practical thing.<sup>33</sup> In their unexamined assumption that possession is sufficient to establish title, the majority and dissent in *Pierson v. Post* echo Blackstone, who thought that the dispute between Grotius and Locke “savours too much of nice and scholastic refinement”; it was sufficient, Blackstone concluded, “that both sides agree . . . that occupancy is the thing by which the title was in fact originally gained.”<sup>34</sup>

Beyond this, however, the court had no need to consult the “ancient writers upon the general principles of law”<sup>35</sup> because there was ample precedent at common law. In 1592, for example, the King’s Bench had decided that a person could acquire property in wild animals *per industriam*—that is, “by industry as by taking them [*i.e.*, capture], or by making them *mansueta* [*naturae*, *i.e.*, tamed].”<sup>36</sup> The court also defined the property that could be acquired in animals *ferae naturae* as “qualified”: it is possessory in the sense that it is lost if the animal escapes.<sup>37</sup> Thus, arguably at least, the majority got it right: Post’s industry had yet to achieve control over the animal.

The rule of capture envisions animals *ferae naturae* as (at least potentially) the stuff of property. But wildlife is an uncommon sort of property.<sup>38</sup> In addition to being “qualified and possessory,” as the King’s Bench noted, an animal *ferae naturae* is both alive and dependent for its continued survival on the forbearance of humans, a forbearance that history demonstrates is uncommon. Wildlife, as vagrant stuff subject to capture, requires the tolerance of everyone who might kill it or destroy its habitat—and much of the story of wildlife in America has been a recurring demonstration of the tragedy embedded in the saga of Pierson, Post, and the fox.

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<sup>33</sup> *E.g.*, OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (“The life of the common law has not been logic: it has been experience.”); see also *Laurel Hill Cemetery v. City and County of San Francisco*, 216 U.S. 358, 366 (1910) (Holmes, J.) (“Tradition and the habits of the community count for more than logic.”).

<sup>34</sup> BLACKSTONE, 2 COMMENTARIES \*8. Both theories do have their shortcomings. Consent seems at best a just-so story and there is no intuitively obvious reason why labor itself should create rights in things. See generally Richard Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221–22 (1979) (analyzing the common law and philosophical origins of the doctrine of possession); Carol Rose, *supra* note 17, at 75 (exploring the confines of the doctrine of possession).

<sup>35</sup> *Pierson v. Post*, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805).

<sup>36</sup> *The Case of Swans*, (1592) 77 Eng. Rep. 435, 438 (K.B.). The court’s category is, of course, descriptive rather than prescriptive as it was for Locke.

<sup>37</sup> “Property qualified and possessory a man may have in those [animals] which are *ferae naturae*.” *Id.*

<sup>38</sup> *E.g.*, PAUL SHEPARD, *THE OTHERS: HOW ANIMALS MADE US HUMAN* 12 (1996) (arguing that humans became human by defining themselves in opposition to other animals and that we will cease to be human to the extent that the world lacks other animals).



### B. Capture as the Law of the Rush

America has been a rush from the beginning.<sup>39</sup> There have been gold rushes and timber rushes,<sup>40</sup> rushes to grow cows<sup>41</sup> and to claim newly opened lands. Nor are rushes solely historical: there now is a rush to capture the insecticide intolerance of pests.<sup>42</sup> By capturing and controlling a bit of nature—grass or trees or animals—and converting it into dollars, natural capital is transformed into personal income. When technology creates a market for a previously unvalued piece of nature<sup>43</sup> (as was the case with

<sup>39</sup> See, e.g., BARRY LOPEZ, *REDISCOVERY OF NORTH AMERICA* 9 (1990) (describing how, since the time of the earliest European explorers, the 'New World' has been the stage for "a ruthless angry search for wealth").

<sup>40</sup> E.g., WILLIAM CRONON, *NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST* 148–206 (1991) (describing how the allure of "free land" drove settlers to clear and cut vast swaths of forest in return for generous economic rewards); MICHAEL WILLIAMS, *AMERICANS AND THEIR FORESTS: A HISTORICAL GEOGRAPHY* 197–237 (1989) (stating that the rush to cut the great forests of the upper midwest had begun by the 1840s after eastern forests had been depleted); STEPHEN A. DOUGLAS PUTER, *LOOTERS OF THE PUBLIC DOMAIN* (1908) 17–21 (detailing the fraudulent means by which the redwood forests of northern California were cut during the late 1800s); RICHARD WHITE, *LAND USE, ENVIRONMENT, AND SOCIAL CHANGE* (1980) (describing the lumber boom in the forests around Puget Sound).

<sup>41</sup> See generally ROBERT G. ATHEARN, *HIGH COUNTRY EMPIRE* 127–75 (1960) (describing the cattle ranching boom that occurred after the Civil War); CRONON, *supra* note 40, at 218–59 (1991) (discussing the rapid expansion of the cattle industry during the late 19th century); EDWARD EVERETT DALE, *THE RANGE CATTLE INDUSTRY* 30–170 (1930) (referring to the end of the Civil War, the removal of bison from the grasslands, and a surplus of Texas cattle as factors leading to the expansion of the cattle industry); PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 466–68 (photo. reprint 1979) (1968) (discussing the conflicts that arose between stockmen and settlers over access to public rangelands for cattle grazing in the 1880s); SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* 48–65 (1959) (describing the problems associated with the cattle industry during the ranching boom of the late 19th century); G. WEIS, *STOCK RAISING IN THE NORTHWEST, 1884* at 20 (Herbert O. Brayer trans., 1951) (discussing the "rapid spread of immigration" and the "unequaled prosperity" of ranching in 1884); JAMES A. YOUNG & B. ABBOTT SPARKS, *CATTLE IN THE COLD DESERT* (1985) (describing the factors that shaped the ranching industry during the 1880s); George C. Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Grazing Act*, 13 ENVTL. L. 1, 22 (1982) ("From mid-century to 1891, it is estimated that the number of cattle in Arizona alone rose from 50,000 to perhaps one and one-half million. Similar expansions occurred in the other public land states.").

<sup>42</sup> Consider the case of *Bacillus thuringiensis* (Bt) crops. Bt is a soil bacteria that has genes that encode proteins that are toxic to certain classes of insects, including some significant agricultural pests. Using recombinant DNA technology, seed companies have introduced these genes into plants so that they produce the Bt toxins and thus are toxic to pests that consume the plants. As a result, these crops are expected to sustain less insect damage and produce higher yields. Although Bt susceptibility is the dominant trait, not all individuals in the pest population are susceptible to Bt. If two resistant individuals mate, their offspring are likely to also be resistant. Thus susceptibility is an open-access resource since planting Bt crops reduces the pool of susceptible organisms and increases the likelihood that resistance will develop. Adding the gene for Bt to crops significantly increases the risk of creating resistant insects since the plants continuously manufacture the proteins, thus enhancing the selection for resistance in the pest population. See Rebecca Bratspies, *The Illusion of Care: Regulation, Uncertainty, and Genetically Modified Food Crops*, 10 N.Y.U. ENVTL. L.J. 297, 302–10 (2002).

<sup>43</sup> The conclusion that some piece of nature is a "resource" is a complex act of social definition. Eugene Hunn provides an example: suckers are not resources for Euro-Americans in the Pacific Northwest and agencies nominally acting under "multiple-use resource

great auk feathers<sup>44</sup>), or allows mass marketing of the piece (as was the case with passenger pigeons<sup>45</sup>), the rush is on. Legal historian James Willard Hurst thought that rushes characterized nineteenth-century Americans, whom, he concluded, “had in common a deep faith in the social benefits to flow from a rapid increase in productivity; all shared an impatience to get on

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management” systematically extirpate suckers from trout streams. Eugene S. Hunn, *Mobility as a Factor Limiting Resource Use in the Columbia Plateau of North America*, in *NORTHWEST LANDS, NORTHWEST PEOPLES* 156, 161 (Dale D. Goble & Paul W. Hirt eds., 1999). Suckers are, however, highly valued resources for Indians of the region. *Id.* Cronon’s study of New England demonstrates how the Indians and the English perceived the same habitat in dramatically different ways. See WILLIAM CRONON, *CHANGES IN THE LAND* viii (1983) (attributing many ecological changes in New England to the colonists’ more exclusive sense of property in land). On the more general question of how societies create “natural resources” by valuing certain elements of their habitat, see WALTER FIREY, *MAN, MIND AND LAND* 27–28 (1960) (describing how culture informs societies’ perceptions of available resources through examples detailing how similar resources have been used and viewed differently by different cultures); Alexander Spoehr, *Cultural Differences in the Interpretation of Natural Resources*, in *MAN’S ROLE IN CHANGING THE FACE OF THE EARTH* 93 (William L. Thomas, Jr. ed., 1956) (interpreting natural resources in relation to technology, social structure, and the interpretation of habitat); Carolyn Merchant, *The Theoretical Structure of Ecological Revolutions*, 11 *ENVTL. REV.* 265 (1987) (discussing how society interacts with the environment); and Donald Worster, *Transformations of the Earth: Toward an Agroecological Perspective in History*, 76 *J. AM. HIST.* 1087 (1990) (describing how societies determine what is a resource).

<sup>44</sup> The great auk—*Pinguinus impennis*—was the original penguin. It was a flightless bird of the North Atlantic that stood two and a half feet tall and weighed eleven pounds. The species bred in large colonies on offshore islands. Fishers routinely stopped at nesting colonies such as that on Funk Island off Newfoundland’s east coast for fresh meat. *E.g.*, HAROLD A. INNIS, *THE COD FISHERIES* 26 n.53 (Univ. of Toronto Press 1954) (1940) (quoting 1 *VOYAGES OF THE ENGLISH NATION TO AMERICA BEFORE THE YEAR 1600* at 303, 334 (Edmund Goldsmid ed., 1889)). After about 1770, however, the birds were also systematically slaughtered for their feathers, which were used to stuff mattresses. In 1785, George Cartwright noted that “it has been customary of late years, for several crews of men to live all summer on [Funk] island, for the sole purpose of killings birds for the sake of their feathers, the destruction which they have made is incredible. If a stop is not soon put to that practice, the whole breed will be diminished to almost nothing . . . .” David N. Nettleship & Peter G.H. Evans, *Distribution and Status of the Atlantic Alcidae*, in *THE ATLANTIC ALCIDAE* 53, 68 (David N. Nettleship & Tim R. Birkhead eds., 1985) (quoting 3 GEORGE CARTWRIGHT, *JOURNAL OF TRANSACTIONS AND EVENTS, DURING A RESIDENCE OF NEARLY SIXTEEN YEARS ON THE COAST OF LABRADOR* 55 (Newark, England, Allin & Ridge 1792)).

<sup>45</sup> Although commercial marketing of pigeons became a major industry after 1840, it was not until after the Civil War that the nineteenth century’s most advanced technology—railroads and telegraphs—was available in the service of the pigeon netters. The use of the railroad—with its rapid transportation—and the refrigerator car—which prevented spoilage—opened markets in eastern cities. See A.W. SCHORGER, *THE PASSENGER PIGEON* 144 (1955) (linking the rise in pigeon trading with the increased availability of rapid rail service to large eastern city centers). *Cf.* CRONON, *supra* note 40, at 55–93 (discussing how the development of rail transportation allowed Chicago to become the stockyard of the east coast); *id.* at 234 (noting that the refrigerated railroad car first introduced by Swift in the late 1870s); Etta S. Wilson, *Personal Recollections of the Passenger Pigeon*, 51 *AUK* 157, 163 (1934) (explaining that before there were railroads, birds were shipped by boat to Chicago). The telegraph allowed netters to track the locations of nestings. SCHORGER, *supra*, at 146. The tonnage of birds shipped to market is as staggering as the reports of their migratory flights: from an 1869 nesting in Michigan more than 7,500,000 pigeons were shipped; in 1874, 40–50 tons of squabs—unfledged nestlings—were shipped from Newaygo County, Michigan and another 1,075,000 pigeons were shipped to market from nearby Shelby. *Id.* at 144–56.

with the job by whatever means seemed functionally adapted to it, including the law.<sup>46</sup>

The slaughter of the buffalo herds exemplifies this impatience. As one contemporary observer commented, the rush to kill buffalo "was only surpassed by the rush to the gold mines of California in earlier years."<sup>47</sup> It did produce near-instant wealth for some,<sup>48</sup> but, as with other rushes, the waste was often staggering. One witness, Colonel Richard Dodge, noted, "[b]uffalo were slaughtered without sense or discretion, and oftentimes left to rot with the hides on."<sup>49</sup> Dodge estimated that each hide sent to market in 1872 represented three to five dead buffalo.<sup>50</sup>

Buffalo are only one example of the nineteenth century wildlife rushes. Beaver were trapped out across the continent,<sup>51</sup> the sea otter was extirpated

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<sup>46</sup> HURST, *supra* note 7, at 7. For a contemporary account of this belief, see 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 36-49 (Phillips Bradley ed., Vintage pb. ed. 1945) (1840).

<sup>47</sup> WILLIAM T. HORNADAY, *THE EXTERMINATION OF THE AMERICAN BISON* 493 (E. Anne Bolen ed., Smithsonian Inst. Press 2002) (1887). For a description of the rush, see FRANCIS HAINES, *THE BUFFALO* 190-91 (1970).

<sup>48</sup> For example, one hunter reportedly made \$10,000 in a single season. E. DOUGLAS BRANCH, *THE HUNTING OF THE BUFFALO* 200 (1929). A single hide was worth a week's wages for a laborer. HAINES, *supra* note 47, at 190-91.

<sup>49</sup> RICHARD I. DODGE, *THE GREAT PLAINS AND THEIR INHABITANTS BEING A DESCRIPTION OF THE PLAINS, GAME, INDIANS, ETC. OF THE GREAT NORTH AMERICAN DESERT* 134 (New York, G.P. Putnam's Sons 1877)

<sup>50</sup> *Id.* at 131-32. As the skill of the workers increased and the buffalo became scarcer, the waste decreased. In 1873, the figure was one robe for two dead buffalo and by 1874, Dodge estimated that 100 robes were shipped for every 125 buffalo killed. *Id.* at 141-42.

<sup>51</sup> 4 ERNEST T. SETON, *LIVES OF GAME ANIMALS* 451 (1937) (noting "nearly complete" extinction of beaver in the US and cataloguing attempts to restock over trapped areas).

throughout most of its range,<sup>52</sup> and sea mink<sup>53</sup> and passenger pigeons<sup>54</sup> were driven to extinction.

<sup>52</sup> The historic range of the sea otter was from the northern Japanese archipelago through the Aleutian Islands and along the North American coast as far south as Morro Hermoso in Baja California. See generally ADELE OGDEN, *THE CALIFORNIA SEA OTTER TRADE, 1784–1848* (1941) (collecting early American and Mexican public and private documents to highlight the impact of early Pacific maritime trade on southern otter populations from Japan to California); 2 PAUL C. PHILLIPS & J.W. SMURR, *THE FUR TRADE* 39–42 (1961) (linking England's near obsession with sea otter pelts to Captain Cook's exploration of the Northwest coast of America and noting that expeditions were more motivated by pelt commerce than exploration). Initially, pelts were purchased from Northwest Coast Indian nations at Nootka Sound on the west coast of Vancouver Island. As otter populations along the northwest coast dropped, some traders shipped Aleuts rented from the Russians in Alaska to harvest pelts along the California coast. Sea otters along the Pacific coast had been largely exterminated by 1824–1825. *Id.* at 57. More than 107,000 sea otter pelts were sold in China between 1804 and 1813, but the number of pelts declined steadily and amounted to only 300 skins by 1824–1825. *Id.* As the ever-less plentiful animals became increasingly difficult to find, the trade was abandoned and relict populations of the animal gradually recolonized much of its former range. This led to a second round of hunting. Between 1881 and 1890 more than 47,000 were taken. Again, however, exploitation led to a precipitous decline: by 1900, only 127 pelts were taken. PETER MATTHIESSEN, *WILDLIFE IN AMERICA* 105 (1964). By 1911, otters had been eliminated except for small remnant populations in Alaska and on the central California coast. James A. Estes et al., *Sea Otter Predation and Community Organization in the Western Aleutian Islands, Alaska*, 59 *ECOLOGY* 822, 822 (1978).

<sup>53</sup> The sea mink was extirpated for its pelt. See generally ALFRED J. GODIN, *WILD MAMMALS OF NEW ENGLAND* 230 (1977) (profiling the sea mink); 2 E. RAYMOND HALL, *THE MAMMALS OF NORTH AMERICA* 1002, 1004 (2d ed. 1981) (providing habitat and scientific information); PETER MATTHIESSEN, *WILDLIFE IN AMERICA* 85 (1964) (noting price of sea mink pelts). Before the European invasion, the species apparently inhabited the Atlantic coast from Nova Scotia to Connecticut. Because of their size—about twice that of the inland species—their skins commanded high prices. As one fur buyer who purchased some 50,000 sea mink pelts wrote, because of their price “they were persistently hunted. . . . As the price of mink rose, they were hunted more and grew scarcer, till the [eighteen] sixties, when mink skins brought eight to ten dollars apiece, parties who made a business of hunting nearly or quite exterminated the race.” Manly Hardy, *The Extinct Mink from the Maine Shell Heaps*, 61 *FOREST & STREAM* 125 (1903).

<sup>54</sup> Pigeons were tasty. 2 PETER KALM'S *TRAVELS IN NORTH AMERICA* 369 (Adolph B. Benson ed., John Reinhold Forster trans., Wilson-Erickson Inc. 1937) (1770). They were also used as live predecessors of today's clay pigeons. SCHORGER, *supra* note 45, 157–66. Their gregarious habits made them easy to kill: reports of killing a dozen or more with one shot-gun blast are common and they were netted by the thousands. *Id.* at 167–98; I.L. Brisbin, *The Passenger Pigeon: A Study in the Ecology of Extinction*, *MODERN GAME BREEDING*, Oct. 1968, at 13, 15–16; Pehr Kalm, *A Description of the Wild Pigeons which Visit the Southern English Colonies in North America, During Certain Years, in Incredible Multitudes*, 28 *AUK* 53, 66 (1911) (translation of original report in 20 *KONGL. VETENSKAPS-AKADEMIENS HANDLIGAR* (1759)) (reporting more than 100 birds killed with a single discharge); Wilson, *supra* note 45, at 160–61 (describing the insatiable appetite for pigeon by relating that in one day in 1855, the Fulton Market in Milwaukee received over 18,000 pigeons). As long as hunting was restricted to subsistence needs, the pigeon population withstood the pressure—it could not, however, withstand market demand. See SCHORGER, *supra* note 45, at 137–38 (describing Native American harvesting methods); David E. Blockstein & Harrison B. Tordoff, *A Contemporary Look at the Extinction of the Passenger Pigeon*, 39 *AM. BIRDS* 845, 849 (1985) (stating that at its heyday the pigeon market employed 1000 pigeoners who supplied birds by rail to the big city markets in the east and midwest and noting that one colony in Michigan produced 200,000 birds in one year); see also JENNIFER PRICE, *Missed Connections: The Passenger Pigeon Extinction*, in *FLIGHT MAPS* 1–56 (1999) (chronicling the decline of pigeons, which numbered in the billions in the 1870s and only the dozens by the 1890s).

The law that reflected and reinforced this perspective—the law of the rush—is the law of *Pierson v. Post*. In the words of Stephen J. Field, the California mining-camp attorney who became a United States Supreme Court Justice:

The wild bird in the air belongs to no one, but when the fowler brings it to the earth and takes it into his possession it is his property. He has reduced it to his control by his own labor, and the law of nature and the law of society recognize his exclusive right to it. . . . So the trapper on the plains and the hunter in the north have a property in the furs they have gathered, though the animals from which they were taken roamed at large and belonged to no one. . . . "So the miners, on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle. . . ."<sup>55</sup>

The moral of the tale was not lost on gold miners or pigeon hunters or salmon fishers: the law rewarded individual initiative; the prize went to he who seized it.<sup>56</sup> When first in time is first in right, speed is all. The result was

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<sup>55</sup> *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 374 (Field, J., dissenting) (1884) (quoting *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507, 512 (1874) (Field, J.)). See generally Dale D. Goble, *Prior Appropriation and the Property Clause: A Dialogue of Accommodation*, 71 OR. L. REV. 381 (1992) (exploring the link between western water laws and national jurisprudence).

Despite Justice Field's grandiloquent mythology, both the gold in California and the "wild bird in the air" belonged to someone. The failure of Congress to decide upon a policy for the gold fields did not transform the trespassers into owners, as Justice Field had recognized in his earlier role as a justice on the California Supreme Court:

It is sometimes said, in speaking of the public lands, that there is a general license from the United States to work the mines which these lands contain. But this language, though it has found its way into some judicial decisions, is inaccurate, as applied to the action, or, rather, want of action, of the government. There is no license in the legal meaning of that term. A license . . . implies a permission . . . . It carries an interest in the land, and arises only from grant. The mineral . . . is under the exclusive control of Congress, equally with any other interest the government possesses in land. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. And it is from its want of specific action, from its passiveness, that the inference is drawn of a general license. The most which can be said is, that the government has forbore to exercise its rights, but this forbearance confers no positive right . . . .

It may be, and undoubtedly is, a very convenient rule, in determining controversies between parties on the public lands, where neither can have absolute rights, to presume a grant, from the government, of mines, water-privileges, and the like, to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor.

*Boggs v. Merced Mining Co.*, 14 Cal. 279, 374-75 (1859) (Fields, J., dissenting), *appeal dismissed sub nom. Mining Co. v. Boggs*, 70 U.S. (3 Wall.) 304, 309 (1865) (noting that the only possible basis for jurisdiction is the allegation of prior possession, "[b]ut this allegation does not set up any authority exercised under the United States in taking such possession"); see also *Mallett v. Uncle Sam Gold & Silver Mining Co.*, 1 Nev. 188, 202 (1865); *Gold Hill Quartz Mining Co. v. Ish*, 5 Or. 104, 106 (1873). It was—and still is—illegal to occupy federal lands until "duly authorized by law." Act of Mar. 3, 1807, ch. 46, § 1, 2 Stat. 445, 445.

<sup>56</sup> It is in this sense that capture—like Locke's labor theory—rests upon "desert," which in turn accounts for much of its appeal. *E.g.*, LAWRENCE BECKER, *PROPERTY RIGHTS: PHILOSOPHICAL*

often profligate waste: buffalo rotted on the high plains and pigeons were left where they fell when picking them up became too onerous.<sup>57</sup>

This is, of course, what has come to be known as the “Tragedy of the Commons,” the idea that individuals acting with rational self-interest produce tragedy for the group.<sup>58</sup> But the title is misleading, like the magician’s waving hand that directs attention away from the doing of the deed. In fact, common property is often an ecologically coherent response to seasonal resource variation such as an anadromous fishery.<sup>59</sup> Indeed, the history of common property in the absence of a market economy is one of long-term management.<sup>60</sup> A more apt phrase might be “Tragedy of the Market,” since the problem arises from the conjunction of the market-driven goal of capturing a saleable surplus, and an open-access or common-pool regime in which anyone can capture.<sup>61</sup> It is at the latter point that *Pierson v. Post* becomes relevant: when animals *ferae naturae* are a thing-owned-by-no-one (*res nullius*), and property is based on capture and possession, the drive for marketable surplus produces tragedy—and the rule of capture necessarily presumes a thing-owned-by-no-one, otherwise it would be theft.<sup>62</sup>

FOUNDATIONS 49 (1977).

<sup>57</sup> “Of the countless thousands of birds bruised, broken and fallen, a comparatively few could be salvaged yet wagon loads were being driven out in an almost unbroken procession, leaving the ground covered with the living, dying, dead and rotting birds. An inferno where the Pigeons had builded their Eden.” Wilson, *supra* note 45 at 166. Similarly, James Fenimore Cooper has Leatherstocking issue a Biblical denunciation on the wasteful slaughter of pigeons. JAMES FENIMORE COOPER, *The Pioneers, or the Sources of the Susquehanna*, 1 THE LEATHERSTOCKING TALES 246–50 (Library of America ed. 1985) (1823).

<sup>58</sup> Garret Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

<sup>59</sup> For example, in his examination of the interaction between New England’s indigenous peoples and the European invaders, William Cronon has demonstrated that common property arrangements allowed cyclical use of seasonal resources. Cronon concludes that it was the English conception of property as alienable things to be traded in a marketplace that led to their overuse. See generally CRONON, *supra* note 43; see also MARSHALL SAHLINS, *STONE AGE ECONOMICS* 1–39 (1972) (analyzing the approach of hunter gatherer societies toward possessions and provisions in a state of plenty).

<sup>60</sup> See, e.g., S.V. Ciriacy-Wantrup & Richard C. Bishop, “Common Property” as a Concept in Natural Resources Policy, 15 NAT. RESOURCES J. 713, 718–19 (1975) (discussing the strategies used by various societies to manage common property); Robert Netting, *Of Men and Meadows: Strategies for Alpine Land Use*, 45 ANTHROPOLOGICAL Q. 132 (1972) (detailing the success of Swiss mountain communities in managing scarce, common-property resources).

<sup>61</sup> See, e.g., Ciriacy-Wantrup & Bishop, *supra* note 60, at 718–19 (noting that the exposure of communal management to outside market forces results in the depletion of the resource because the market forces are outside communal management, and because of communal management’s “inherent weakness” in adapting to contact with the market); Arthur F. McEvoy, *Toward an Interactive Theory of Nature and Culture: Ecology, Production, and Cognition in the California Fishing Industry*, in THE ENDS OF THE EARTH 211 (Donald Worster ed., 1988) (suggesting that “the tragic tale” of the commons which portrays people as “profit-maximizing automatons” may “serve less well as a heuristic device for understanding environmental problems than as a recipe for exacerbating them”); Michael Taylor, *The Economics and Politics of Property Rights and Common Pool Resources*, 32 NAT. RESOURCES J. 633 (1992) (examining various criticisms of traditional notions of the tragedy of the commons).

<sup>62</sup> But recall the words of the English nursery rhyme:

They hang the man and flog the woman

III. *ARNOLD V. MUNDY*: LIMITING CAPTURE

The “ancient writers” that the court cited in *Pierson v. Post* began with the proposition that animals *ferae naturae* were *res nullius*. Justinian’s discussion of how “things become property of individuals,” for example, begins with the example of “wild animals, birds and fish, *i.e.*, all animals born on land or in the sea or air, [which] as soon as they are caught by anyone, forthwith fall into his ownership by the law of nations: for what previously belonged to no one is, by natural reason, accorded to its captor.”<sup>63</sup> The Enlightenment civilians followed Justinian, and treated animals *ferae naturae* as the paradigm of an unowned thing. Indeed, it was as property that wildlife excited the imagination of the “ancient writers” that was the focus of the discussion in *Pierson v. Post*. For jurists such as Hugo Grotius<sup>64</sup> and Samuel, Baron von Pufendorf,<sup>65</sup> wild animals were one of the few remaining examples of unowned stuff.

At the common law, however, the record is more complicated.

A. *Before Mundy: The King’s Prerogative and Wildlife*

The colonies’ rebellion against England necessitated a fundamental transformation in American political thought. “For most Americans,” as Gordon Wood has written, “the deeply felt meaning of the Revolution [was]: they had created a new world, a republican world.”<sup>66</sup> But this new world did not spring ready-made, it required re-understanding the roots of political power. At the time of the Revolution, political actions were legitimate to the extent that they were taken under the sanction of the king and illegal to the extent that they were not because sovereignty was located in the king. With the revolution, sovereignty had to be relocated.<sup>67</sup>

This relocation is relevant to this twice-told tale because it is central to the historical evolution of the concept of “prerogative.” To understand this evolution and its current residue, it is helpful to locate it in the transition that occurred around the turn of the eighteenth century into the nineteenth century—a transition from property to sovereignty, on one hand, and from

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That steal the goose from off the common,  
But let the greater villain loose  
That steals the common from the goose.

Quoted in David Bollier, *Reclaiming the Commons*, BOSTON REV. (Summer 2002) available at <http://www.bostonreview.net/BR27.3/bollier.html>.

<sup>63</sup> THE INSTITUTES OF JUSTINIAN bk. II, tit. 1, §§ 11–12 (J.A.C. Thomas trans., 1975) (533); see also GAIUS, THE INSTITUTES OF GAIUS, FIRST COMMENTARY: CONCERNING FIDUCIARY GUARDIANSHIP, in 1 THE CIVIL LAW § 66 (S.P. Scott ed., 1932) (“we become owners of [property] because it previously belonged to no one else; and in this class are included all animals which are taken in land or in water or in air”).

<sup>64</sup> GROTIUS, *supra* note 30, at bk. II, ch. 8, § 2.

<sup>65</sup> PUFENDORF, *supra* note 30, at bk. 4, ch. 6, § 4.

<sup>66</sup> GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 47 (1969).

<sup>67</sup> See JERRILYN GREENE MARSTON, KING AND CONGRESS 14–34 (1987) (discussing the source of the king’s authority, his loss of legitimacy leading up to the revolution, and ultimately Congress’s adoption of the king’s lost legitimacy).

property to contract, on another. To understand these shifts, it is helpful to take one step back, to the transition from personal to proprietary—to a period when the current terms are nonexistent or, at least, inapt.

### *1. From Personal to Proprietary*

The English common law evolved out of the customs of largely autonomous agricultural communities bound to the seasonal rounds of planting and harvesting at a time when change was nearly nonexistent.<sup>68</sup> In such a universe, custom is a guide to how things should be done and, as such, the first step to law.

Providing for the material needs of this society produced sophisticated arrangements for distributing and managing natural resources. The actions and claims of different community members intertwined to create complex patterns of resource use on the land: After some community members harvested crops from individual plots, others grazed cattle in fields so that their dung fertilized the soil; the grass and acorns in a copse of trees provided forage for cattle and pigs during another part of the seasonal cycle; community members used wood from those trees for fuel or building; they netted fish and hunted wildlife. The patterns were complex, but spatially limited and centered on subsistence.

The Norman Conquest in 1066 overlaid these resource allocation patterns with a feudal economic and social system—a hierarchical series of relationships in which subservient persons held land under a personal relationship to a lord in return for an obligation of service to that lord. This mix of Anglo-Saxon and feudal ideas became the tenurial system that evolved into the common law of property.

The feudal structure also strengthened centralizing forces already at work. For this twice-told tale, it is the king's courts, and the common law that those courts created, that produced the most important changes. Although these courts began primarily as a source of revenue and as a means of clarifying the rights and duties in feudal land tenures, in time the judiciary became a powerful mechanism for asserting royal/national authority.

This transition in perspective—from local to national—created pressure to regularize the nomenclature and content of land-use rights. The resource allocation and management patterns abstracted from local manors and villages slowly were transformed into property. “The man of the thirteenth century does not say, ‘I agree that you may have so many trees out of my copse in every year,’ he says, ‘I give and grant you so much wood.’”<sup>69</sup> That is, he created what we would now define as a proprietary relationship. Thus,

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<sup>68</sup> See generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 11–20 (2d ed. 1979) (chronicling the emergence of the common law from “institutions which existed in an undeveloped state before 1066”); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 11–12 (2d ed. 1981) (describing how the common law developed from laws and institutions that were local and faced “needs of society [that] were diverse but unchanging”).

<sup>69</sup> 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 146 (2d ed. 1968).



the customary rotational grazing system became a “right of common in pasture”; the right to feed pigs on acorns became a “right of pannage”; the custom of taking wood became “estovers”; the customary fishing hole became a “common piscary.”<sup>70</sup> Custom was transformed into a series of “incorporeal hereditaments”—inheritable, intangible property such as profits *a’ prendre*. As Bracton wrote near the end of the thirteenth century, “[a] servitude may be constituted in many ways, as that one have the right to pasture in another’s property, or the right to cultivate it, to go over it, to draw water from it, to fish in it, to conduct water over it, to hunt on it, and there may be an infinite number of other rights.”<sup>71</sup>

This evolutionary process was both untidy and convoluted. In part, this reflected the conjunction of proprietary rights and governmental powers. What we now conceive as “sovereignty”—governmental and regulatory power—generally began as property-like tenures. The lord of the manor, for example, was the chief landholder, the head of the local government, and the representative of the distant king. The king himself was, after all, only a manorial lord writ large; and the “kingly power . . . a mode of dominium; the ownership of a chattel.”<sup>72</sup> One of the great themes of medieval English legal history, the English legal historian Frederic Maitland has noted, is the “struggle of ownership and rulership to free themselves from each other.”<sup>73</sup> In such a system, the power to hold court or to hang a criminal was based on personal relations between ruler and ruled, relationships that were slowly being transformed into property.

In wildlife law, for example, the power to regulate taking of wildlife or habitat modification has one of its founts in the prerogative of the English kings to declare land to be a “forest,” an area where the king had a right to hunt the “beasts of the forest” such as the king’s deer.<sup>74</sup> In such a universe,

<sup>70</sup> See generally 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 355-57 (3d ed. 1923) (discussing the law of incorporeal things at the time of the reign of Edward I); 3 *id.* at 137-51 (3d ed. 1923) (continuing the discussion of the law of incorporeal things during the late medieval period); 7 *id.* at 312-42 (1926) (tracing the subject through the end of the nineteenth century); MILSOM, *supra* note 68, 21, 101-02 (discussing changes in the law of incorporeal rights).

<sup>71</sup> 3 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 166 (Samuel Thorne trans., 1997). Henry of Bratton (Henricus de Brattona) (c. 1210–1268) was a judge on the *coram rege* (later the King’s Bench) from 1247–1250 and 1253–1257. He is remembered for *De Legibus et Consuetudinibus Angliae—On the Laws and Customs of England*—a broad, philosophical treatise often called the most important work on English law before Blackstone. The book—commonly known as “Bracton”—attempts to rationalize English common law in terms of the combination of Roman and canon law that was taught in the universities of the period. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND is available online at <http://hls.law.harvard.edu/bracton/Common/index.htm>.

<sup>72</sup> 1 POLLOCK & MAITLAND, *supra* note 69, at 513.

<sup>73</sup> FREDERIC W. MAITLAND, TOWNSHIP AND BOROUGH 30 (Cambridge 1897). Over time, as sovereignty and property came to be perceived as different things, the king’s powers slowly declined. The story is summarized in Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, 22 NOMOS 28, 34–47 (J. Pennock & J. Chapman eds., 1980). More detail on the early period, in which vassals in Norman England began to acquire identifiable property rights, is provided in Robert C. Palmer, *The Origins of Property in England*, 3 LAW & HIST. REV. 1 (1985), and Robert C. Palmer, *The Economic and Cultural Impacts of the Origins of Property: 1180–1220*, 3 LAW & HIST. REV. 375 (1985).

<sup>74</sup> Following the Norman Conquest, William the Conqueror arrogated to himself the

the right to hunt was property-like. In trying to rationalize this untidy, ongoing evolution of the common law, Bracton concluded that the king was the “owner” of animals *ferae naturae*: “wild beasts, birds and fish . . . are . . .

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prerogative power to designate tracts of land as “forests.” Edward Coke gave a concise definition of the term: “A Forest doth consist of eight things, *videlicet* of soil, covert, laws, courts, judges, officers, game, and certain bounds.” EDWARD COKE, *FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 288 (Hargrave & Butler eds., 1st Am. ed. 1853) (1628); see also JOHN MANWOOD, *A TREATISE AND DISCOURSE OF THE LAWS OF THE FOREST* ch. i, § 1 (Garland Publ’g 1978) (1598). The forest law was, in the traditional phrase, intended to protect “the vert and Venison.” The vert—the green plants—was protected by restricting the uses of lands within the forest; it was protected to preserve the “venison”—specified species of wildlife (“game”): the “five wild beasts of venerie, that are called beasts of Forest . . . the *Hart*, the *Hynde*, the *Hare*, the *Boare*, and the *Wolfe*.” *Id.* at ch. iv, § 1. To protect the vert and venison, there was an administrative and law enforcement system staffed with unique officers—justices, wardens, verderers, gamekeepers, woodwards, agisters, and regarders—who acted under a distinct body of law in a series of prerogative courts—the courts of Swanimote, Attachment, Regard, the General and Special Inquisitions, and the Eyre. Although the king had the power—the prerogative—to create the forest and, indeed, was seized of the *forest*, he was not necessarily seized of all of the lands within the forest because individuals could hold land within forests. *Id.* at ch. iii, § 4. The ability of such inholders to fully exploit their land was, however, restricted by its location within the forest. The crucial point is that a “forest” was a legal classification of land rather than a physical description of that land: a forest might include villages and cultivated fields as well as tracts of trees and brush. In more modern terminology, a forest was a land-use classification. As Manwood put it, “by the lawes of the Forest, no man may cut downe his woods, nor destroy any coverts, within the Forest, without the view of the Forester, and license of the Lord Chief Justice in Eyre of the Forest, although that the soile, wherein those woods do grow, be a mans owne freehold.” *Id.* at ch. viii, § 2. The punishment for impermissibly intruding upon the forest was amercement (fine) at the next Eyre in addition to an annual fine based on the crops sown: For every acre illegally planted, the fine was a shilling for winter corn (either wheat or rye) and sixpence for spring corn (generally oats). The tenant was allowed to remain—subject to the continuing payment of the fine at subsequent regards. See *id.* at ch. viii, § 5. Thus the administrative system effectively converted fines into a source of permanent, annual rent. While the hunt was the origin of the forest, the institution quickly acquired a financial component that often overshadowed the desire to prevent the destruction of habitat. See generally E.P. THOMPSON, *WHIGS AND HUNTERS* 28–32 (1975) (discussing the management of Windsor Forest for deer). See also RICHARD, FITZ NIGEL, *DIALOGUS DE SCACCARIO* [THE COURSE OF THE EXCHEQUER] bk. I, ch. xi–xii (Charles Johnson ed. & trans., 1983) (1176) (discussing the “King’s Forest”); G.J. Turner, *Introduction to SELECT PLEAS OF THE FOREST* ix–xiv (G.J. Turner ed. & trans., 1901) (discussing beasts of the forest).

the property of the prince by the *jus gentium* [i.e., civil law].<sup>75</sup> Bracton was not alone.

## 2. Royal Animals and Royal Rivers

In 1592, Queen Elizabeth claimed ownership of some 500 unmarked swans<sup>76</sup> in Dorset County and directed her sheriff to seize them.<sup>77</sup> Lady Joan Young and Thomas Saunger, knight, disputed the Queen's claim, asserting title to the swans through prescription.<sup>78</sup> When the case reached the King's

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<sup>75</sup> 2 BRACTON, *supra* note 71, at 41. Although Bracton generally followed Roman law, in his assertion that the king owned animals *ferae naturae* he departed from that law. See, e.g., THE INSTITUTES OF JUSTINIAN bk. II, tit. 1, §§ 12–13, 15 (J.A.C. Thomas trans., 1975) (533) (noting that animals *ferae naturae* were *res nullius*). His position has been described as

an extreme statement of the view that beasts of the chase ought to belong to the king unless the privilege of hunting them had been conceded to subjects by a Royal grant. The law of the Forest was derived from such a view and although it ran counter to old usage it found strong support among partizans of Royal power.

Sir Paul Vinogradoff, *The Roman Elements in Bracton's Treatise*, 32 YALE L.J. 751, 754–55 (1923). Cf. 7 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 491 (1925).

[T]here is no reason to think that [the idea that all wild animals were the property of the crown] was ever the law of England. The king may, it is true, have claimed to be the owner of all wild animals, just as he may have claimed to be the owner of all mines; but just as his claims over mines came to be limited to mines of a special kind, so his claims to wild animals came to be limited to a few varieties, such as swans and whales; and, even in these cases, his rights were subject to all sorts of qualifications and limitations.

*Id.*

<sup>76</sup> Swans are "marked" by notching their bills and the webbing of their feet. Marking serves the same purpose as branding livestock. There is a royal officer—the Master of the King's (or Queen's) Game of Swans (the *magister deductus cignorum*)—who is responsible for the care of the royal swans as well as the general supervision of swan-keeping in England. This involves several tasks including supervising the annual "upping," the round-up of the year's new broods of cygnets and their marking with the parents' swan-marks. This was a process not unlike the annual fall round-up and branding of range cattle. See NORMAN F. TICEHURST, THE MUTE SWAN IN ENGLAND 54–72 (1957) (stating that cygnets are captured with their parents, the parents' swan-marks checked, and the cygnets marked).

<sup>77</sup> The Case of Swans, (1592) 77 Eng. Rep. 435, 436 (K.B.).

<sup>78</sup> "Prescription" is the assertion of a right to the enjoyment of something based on immemorial use and enjoyment. It was a means for people to prove their ownership of a thing when they lacked a piece of writing to evidence that ownership. In medieval England, most people could neither read nor write; documents were not commonly created and were easily lost or destroyed. For centuries, even transfers of land could take place by means of a ceremony that included no written instrument of transfer. Thus, many owners whose rights began by express grant, oral or written, had to rely on prescription to prove their rights. The essential element of proof was the unbroken possession and use of a thing so long as anyone could remember (that is, for such period as "the memory of man runneth not to the contrary"). In Bracton's words, incorporeal rights may be acquired "if one uses for some time, peacefully and without interruption, neither by force nor stealth nor at will . . ." 3 BRACTON, *supra* note 71, at 163 [bk. 4, ch. 37, f. 222a]. A more recent discussion of the concept notes

The true foundation of these incorporeal interests is long continued occupation and enjoyment, under circumstances implying acquiescence on the part of those, who have other interests, which conflict either directly or by consequence with the newly assumed right. . . . [T]he foundation of prescription is the necessity of upholding an interest, which

Bench, the judges offered a detailed classification system of the ways in which animals *ferae naturae* could be “property.”<sup>79</sup> For this tale, the crucial decision was that “all white swans not marked, which having gained their natural liberty, and are swimming in an open and common river, might be seized to the King’s use *by his prerogative*, because . . . a swan is a Royal fowl; and all those, the property whereof is not known, do belong to the King *by his prerogative*. and so . . . whales and sturgeons are Royal fish, and belong to the King *by his prerogative*.”<sup>80</sup>

Five years later, Justice Walmsley extended the *Case of Swans* to apply to all animals *ferae naturae*. That case, *Bowlston v. Hardy*,<sup>81</sup> involved a coney warren.<sup>82</sup> The defendant had brought the conies onto his land under a

has been exercised as if enjoyed under an actual grant, from the policy of sustaining rather than destroying rights.

*Acquisition of Title by Prescription*, 19 AM. JURIST 96, 100–101 (1838).

<sup>79</sup> The court began by distinguishing between domesticated (*domitae naturae*) and wild animals (*ferae naturae*): a person may have “absolute” property in domesticated animals, but only a “qualified” property in wild animals, *i.e.*, a right that is possessory in the sense that the right ends if the animal escapes from possession. 77 Eng. Rep. at 438. This qualified, possessory property right in wild animals may arise in two ways:

(a) *per industriam*, that is, “by industry as by taking them [*i.e.*, by capture], or by making them *mansueta* [*naturae, i.e.*, tamed].” *Id.* If the animal is killed, the property in its carcass becomes absolute since it can no longer escape.

(b) *ratione impotentiae et loci*, that is, when the animal is powerless to leave “by reason of inability and place,” *i.e.*, “as if a man has young shovelers [a species of duck] or goshawks, or the like, which are *ferae naturae*, and they build in my land, I have possessory property in them, for if one takes them when they cannot fly, the owner of the soil shall have an action of trespass . . .” *Id.* The Latin tag for this category was eventually shortened to “*ratione loci*,” *i.e.*, by reason of location, and sometimes restated as *ratione soli*, *i.e.*, by reason of [ownership] of the soil. This category thus was a recognition that the owner of land had a right to exclude others that implied a possessory interest resulting simply from the animal’s presence on her land.

<sup>80</sup> *Id.* at 436 (emphasis added).

<sup>81</sup> (1597) 78 Eng. Rep. 794 (K.B.).

<sup>82</sup> “Coney” (which rhymes with “honey”) is the now-obsolete term for adult rabbits. The *Oxford English Dictionary* defines “coney” as “[a] rabbit: formerly the proper and ordinary name but now superseded in general use by *rabbit*, which was originally the name for the young only.” 1 OXFORD ENGLISH DICTIONARY 955 (1971).

A “warren” was one of the hunting franchises that the king could grant. In *Case of Swans*, the court also discussed a third category of property in animals: *ratione privilegii*. The owner of a park or warren had a franchise or “privilege” to take game within the confines of the park or warren, *i.e.*, “he hath not any property in the deer, or conies, or pheasants, or partridges . . . but they do belong to him *ratione privi[legii]* for his game and pleasure, so long as they remain in the privileged place.” 77 Eng. Rep. at 438. This type of possessory interest was a result of a grant by the king and differed from the possessory property right that the average landowner held. See *Sutton v. Moody*, (1698) 91 Eng. Rep. 1063 (K.B.) (discussing ownership rights in wild animals acquired through ownership of a franchise). Blackstone provided the following discussion of the hunting franchises:

As to a *forest*; this, in the hands of a subject, is properly the same thing as a chase: being subject to the common law, and not to the forest laws. But a *chase* differs from a park, in that it is not enclosed, and also in that a man may have a chase in another man’s ground as well as in his own, being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land with a power of hunting them thereon. A *park* is an enclosed chase, extending only over a man’s own grounds. The

grant from the Queen.<sup>83</sup> The conies had increased in number to the point that they were damaging the plaintiff's adjacent land. The court held that the action would not lie, "for although one hath conies in his land, he hath not any property in them, because they are *ferae naturae*."<sup>84</sup> As Walmsley noted, because the conies were *ferae naturae*, no one could own them except "by grant from the King, or by prescription . . . for the Queen hath *the royalty* in such things whereof none can have any property."<sup>85</sup>

When James I succeeded Elizabeth on the throne in 1603, he granted Sir Randall Mac Donnell a tract of land on the River Banne in Ireland.<sup>86</sup> Mac Donnell subsequently petitioned to be put into possession of the salmon fishery in the river. When his petition was denied, he brought the action to the King's Bench. The court also rejected his claim:

[t]here are two kinds of rivers; navigable and not navigable. Every navigable river, so high as the sea flows and ebbs in it, is a *royal* river, and the fishery of it is a *royal* fishery, and belongs to the king *by his prerogative*. . . . The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, . . . and the sea is not only under the dominion of the king . . . but it is also his proper inheritance; . . . Also the king shall have the grand fishes of the sea, whales and sturgeons, which are *royal* fishes, . . . and the king shall have wild swans, as *royal* fowls, on the sea and branches of it.<sup>87</sup>

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word *park* indeed properly signifies an enclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so. . . . [I]t is unlawful at common law for any person to kill any beasts of park or chase, except such as possess these franchises of forest, chase or park.

*Free-warren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren; which, being *ferae naturae*, every one had a natural right to kill as he could; but upon the introduction of the forest laws, at the Norman conquest . . . these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of free-warren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons . . . [N]o man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of free-warren . . . .

BLACKSTONE, 2 COMMENTARIES \*38–39. See also RICHARD BURN, 1 THE JUSTICE OF THE PEACE 437 (Henry Lintot ed., London 1755) (defining warren as "a place privileged by prescription or grant of the King, for the preservation of the beasts and fowl of the warren; viz. hares, conees, partridges, and pheasants").

<sup>83</sup> On the necessity of a grant from the king, see *Sutton v. Moody*, (1698) 91 Eng. Rep. 1063 (K.B.) and GOBLE & FREYFOGLE, *supra* note 2, at 201–203 (discussing *Sutton v. Moody*).

<sup>84</sup> 78 Eng. Rep. at 794. It is, the court held, "unreasonable" to hold a person liable when he has no interest in the "savage and wild" rabbits. *Id.*

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *Le Case Del Royall Piscarie de la Banne* [The Case of the Royal Fishery of Banne], (1611) 80 Eng. Rep. 540 (K.B.). For a translation of the original French, see GOBLE & FREYFOGLE, *supra* note 2, at 272.

<sup>87</sup> 80 Eng. Rep. at 541–42 (emphasis added). The decision that the king was the owner of the

In each of these cases, the Queen is said to “own” the disputed wildlife as an incident of her prerogative or royalty. How can prerogative—that is, a power, the exercise of which, is beyond review—create property? What is it that navigable rivers, swans, whales, and animals *ferae naturae*, such as conies and deer, share? These now seem strange questions and to understand them requires a reorientation of perspective.

Blackstone defined prerogative as “that special pre-eminence, which the king has over and above all other persons . . . in right of his regal dignity.”<sup>88</sup> This preeminence flows from “the king’s political person”<sup>89</sup> and includes the attributes of “sovereignty,”<sup>90</sup> “perfection,”<sup>91</sup> and “perpetuity.”<sup>92</sup> The fact that perfection and perpetuity are not actual human attributes is the key: the king is both a human being and the physical embodiment of the government.<sup>93</sup> Obviously, the king-as-human is neither perfect nor immortal; the king-as-government, however, is assumed to be both.<sup>94</sup>

In his list of prerogative powers, Blackstone discussed the king’s interest in wildlife:

[b]y the feudal law all navigable rivers and havens were computed among the *regalia* [royalties], and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore,

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soil—and, therefore, of the fishery—in a navigable stream was effectively a presumption. As the court also noted, “by the common law of *England*, a man may have a proper and several [*i.e.*, private] interest, as well in a water or river, as in a fishery; and therefore a water may be granted. . . . If one grants to another *aquam suam*, the fishery in it shall pass, because it is included in the word *aqua*.” *Id.* at 541 (emphasis in translation). As the court noted in a subsequent case, either the soil or the fishery itself might be held by another person:

In case of a private river, the lord’s having the soil is good evidence to prove, that he hath the right of fishing; and it puts the proof upon them that claim *liberam piscariam*. But in the case of a river that flows and reflows, and is an arm of the sea, there, *prima facie*, it is common to all: and if any will appropriate a privilege to himself, the proof lieth on his side.

*Lord Fitzwalter’s Case*, (1674) 86 Eng. Rep. 766 (K.B.). Thus, the presumption is rebuttable and can be overcome by showing a grant or a prescriptive right that altered the default position.

<sup>88</sup> BLACKSTONE, 1 COMMENTARIES \*239. *Cf.* 2 BRACON, *supra* note 71, at 58 (distinguishing between the “ruling king” and the “crown”: “A thing belonging to the fisc is also *quasi*-sacred and cannot be given or sold or transferred to another by the prince or reigning king; such things constitute the crown itself and concern the common welfare”); EDUARDO COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON f. 90b (1st Am. ed., Philadelphia 1853) (1628) (“legally [prerogative] extends to all powers, preeminences, and privileges which the law giveth to the crowne”); SIR MATTHEW HALE’S THE PREROGATIVES OF THE KING (D.E.C. Yale ed. 1976) (1640) (setting out a catalogue of powers rather than formal definition). See generally ERNST H. KANTOROWICZ, THE KING’S TWO BODIES 172–73 (1957) (discussing the “distinction . . . to be drawn between matters affecting the king alone in relation to individual subjects, and matters affecting all subjects”).

<sup>89</sup> BLACKSTONE, 1 COMMENTARIES \*240.

<sup>90</sup> *Id.* at \*241.

<sup>91</sup> *Id.* at \*246.

<sup>92</sup> *Id.* at \*249.

<sup>93</sup> This reflects the Tudor “mystic fiction” of the “King’s Two Bodies”—his human and governmental selves. KANTOROWICZ, *supra* note 88, at 3.

<sup>94</sup> The familiar phrase “The king can do no wrong.” DAVID M. WALKER, THE OXFORD COMPANION TO LAW 702 (1980).

and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm.<sup>95</sup>

The king's power over navigable rivers thus flows from his responsibility as guardian of the country. As Commander in Chief, in modern parlance, the king had the prerogative powers necessary to defend the kingdom.<sup>96</sup> Furthermore, "the right to *royal fish*" (such as whales and sturgeons), Blackstone noted, was "said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers."<sup>97</sup> The king's prerogative ownership of royal fishes, in other words, was part of his ownership of navigable waters because the greater includes the lesser. Similarly, the king's sovereign power over animals *ferae naturae* (or, at least, game animals) flowed from his power to create forests and grant the hunting franchises of chase and warren—otherwise he would be conveying something he did not own.<sup>98</sup>

A kindred logic is reflected in the sovereign ownership of swans. In the *Case of Swans*, the court held that "a swan . . . being of its nature a fowl Royal, doth belong to the King."<sup>99</sup> The swan was of its nature "royal," the court noted, because "the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls."<sup>100</sup> Swans were royal, in other words, because they were—like the king—the peak of perfection. This point was explicitly stated in a contemporaneous case involving a possible gold mine:

[The first reason] why the King shall have mines and ores of gold or silver within the realm, in whatsoever land they are found . . . was, in respect of the excellency of the thing, for of all things which the soil within this realm produces or yields gold and silver is the most excellent; and of all persons in the realm the King is in the eye of the law most excellent.<sup>101</sup>

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<sup>95</sup> BLACKSTONE, 1 COMMENTARIES \*264.

<sup>96</sup> *Id.* at \*262–66.

<sup>97</sup> *Id.* at \*290.

<sup>98</sup> *Id.* at \*289. For our purpose, one crucial point to note is what the king's prerogative power to create hunting franchises says about land ownership. The granting of a franchise was effectively an assertion of royal power as both a positive and a negative. Granting a hunting franchise was a positive assertion of power because it asserted power over wildlife. But it was also a negative assertion—the grant of a franchise also implicitly creates a limitation: that which is not granted is retained. A landowner who does not have a warren cannot "of right" hunt on his own property; the fee, in other words, does not include a power to hunt. This negative power could form the basis for other, more traditional regulatory acts since the King necessarily had the power to protect his property from acts of third parties including landowners on which the wildlife might be found. Property and regulation, thus, are not always in opposition: property can also be a form of regulation.

<sup>99</sup> *The Case of Swans*, (1592) 77 Eng. Rep. 435, 436 (K.B.).

<sup>100</sup> *Id.* at 437.

<sup>101</sup> *The Case of Mines*, (1568) 75 Eng. Rep. 472, 479 (K.B.). In the case, the Queen's attorneys argued that "all mines and ores of gold or silver, which are in the lands of subjects, with power to dig the land, and carry away the ore, and other incidents thereto, belong of right to the King of this realm by prerogative." The court continued:

And the common law, which is founded upon reason, appropriates every thing to the

Thus “prerogative” is a historical hodge-podge: recognizable bits of sovereignty blended with a now-enigmatic logic. The statement in the *Case of Swans* that swans, whales, and sturgeons “belong to the King by his prerogative”<sup>102</sup> is one example: the king’s responsibility as guardian of the country is transmogrified into the ownership of “fish” such as whales. The powers of the king-as-government (in a time when government was itself property-like) were almost-necessarily conceived to be property-like. Since the king’s subjects could own swans or hunt deer only if they had a grant from the king, the king must *a priori* own all swans and deer not granted—and this gave the king the power to regulate activities affecting swans and deer because they were his “property.” The power to govern gives rise to ownership because the power to govern is itself a question of ownership. Thus, for Blackstone—like Bracton<sup>103</sup> and Walmsley<sup>104</sup> before him—the king owned animals *ferae naturae*.

### 3. Sovereignty and Property

Relying on this handful of precedents and the fundamental proposition of feudalism that “the king is the ultimate proprietor of all the lands in the kingdom,”<sup>105</sup> Blackstone concluded that “the property of such animals *ferae naturae*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them . . . is vested in the king alone” by his prerogative.<sup>106</sup> Blackstone’s view was sharply contested by Edward Christian, the editor of an annotated edition of Blackstone and the author of an 1821 treatise on game laws.<sup>107</sup> Christian argued that “game does not belong to the King” because

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persons whom it best suits, as common and trivial things to common people, things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all others; and because gold and silver are the most excellent things which the soil contains, the law has appointed them (as in reason it ought) to the person who is most excellent, and that is the King.

*Id.*

<sup>102</sup> 77 Eng. Rep. at 436.

<sup>103</sup> 3 BRACTON, *supra* note 71, at 166.

<sup>104</sup> *Bowlston v. Hardy*, (1597) 78 Eng. Rep. 794, 794 (K.B.).

<sup>105</sup> BLACKSTONE, 2 COMMENTARIES \*415. Since “he has the right of the universal soil, [he also has the right] to enter thereon, and to chase and take such creatures as his pleasure.” *Id.* This principle was buttressed by another: “[T]hese animals are *bona vacantia* [unclaimed goods], and, having no other owner, belong to the king by his prerogative.” *Id.*

<sup>106</sup> *Id.* at \*410.

<sup>107</sup> The chapter in the treatise titled “Game does not belong to the King” is a reprint of Christian’s note in his edition of Blackstone. EDWARD CHRISTIAN, A TREATISE ON THE GAME LAWS 22–38 (J. & W.T. Clarke eds., London 1821). The *Biographical Dictionary of the Common Law* reports that Edward Christian was the brother of Fletcher Christian of *H.M.S. Bounty* fame (or infamy). He is also described as a “[f]ailure at the bar” who became a professor at Cambridge—an example of the belief of generations of law students that professors teach because they cannot practice. Lord Ellenborough observed that he was “fit only to rule a copybook.” He is reported to have died “[i]n the full vigour of his incapacity.” BIOGRAPHICAL DICTIONARY OF THE COMMON LAW 114 (A.W.B. Simpson ed. 1984).



[i]f all wild animals belonged to the crown, it would have been superfluous to have specified whales, sturgeons, and swans. Lord Coke tells us, that "a swan is a royal fowl; and all those the property whereof is not known, do belong to the king by his prerogative: and so whales and sturgeons are royal fish, and belong to the king by his prerogative:" *Case of Swans*, . . . But these are the only animals which our law has conferred this honour upon.<sup>108</sup>

Although the English courts eventually sided with Christian,<sup>109</sup> Blackstone was more compatible with the new republican governments in America, which shared his abhorrence of the hierarchical social structure embedded in the English game laws.<sup>110</sup>

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<sup>108</sup> BLACKSTONE, 2 COMMENTARIES \*419 n.9 (New York, W.E. Dean 1832) (this edition, among others, includes Christian's notes). To bolster his argument, Christian cited an early case holding that the king had no property in deer that escaped from a forest, as well as *dicta* from *The Case of Monopolies*.

[I]t is true, that none can make a park, chase, or warren, without the King's license, for that is [in a certain way] to appropriate those creatures which are *ferae naturae*, [and among the property of no person] to himself, and to restrain them in their natural liberty, which he cannot do without the King's license; but for hawking, hunting, &c. which are matters of pastime, pleasure, and recreation, there needs no license, but every one may, in his own land, use them at his pleasure, without any restraint to be made, unless by Parliament.

*Id.* (quoting *The Case of Monopolies*, (1602) 77 Eng. Rep. 1260, 1264 (K.B.)).

<sup>109</sup> See *Blades v. Higgs*, (1865) 11 Eng. Rep. 1474 (H.L.) (noting that the issue remained unsettled in England until 1865, when a decision by the House of Lords determined that the landowner, as an incident of ownership of the soil, had a right to the wild animals on her property).

<sup>110</sup> See THOMAS A. LUND, AMERICAN WILDLIFE LAW 21–24 (1980) (noting that Blackstone's view was more compatible with America's frontier condition); JAMES A. TOBER, WHO OWNS THE WILDLIFE? 146–47 (1981) (noting Blackstone's support for a more non-discriminatory system of access to game). During the colonial period, the right to hunt in England was restricted to the upper classes; substantial penalties—including involuntary transportation to America and death—were imposed for violation of game laws. *Id.* at 146. During the same period, the abundance of game in America and the equality of opportunity to kill it "were important symbols of liberty in the pictures painted for the purposes of generating settlement and financial backing for colonial ventures." *Id.* at 4. This hostility to the game laws can be seen in cases such as *State v. Campbell*, T.U.P.C. 166 (Ga. Sup. Ct. 1808), in which the defendant was indicted under the Waltham Black Act, 9 Geo. 1, ch. 22 (1723), for unlawful hunting. The defendant argued that the statute had never been in force in Georgia because it was

founded upon a tender solicitude for the amusement and property of the aristocracy of England. It was made to protect from the violation or profanation of the people, the forest of his majesty or the park of a peer. How then could it apply to a country which was but one extended forest, in which the liberty of killing a deer, or cutting down a tree, was as unrestrained as the natural rights of the deer to rove, or the tree to grow?

*Id.* at 167–68. The court concurred, concluding that the statute "is not only penal to a feudal degree, but it is productive of tyranny." *Id.* at 168. See also *Johnson v. Patterson*, 14 Conn. 1, 5 (1840) (noting oppressiveness of English game laws); *Sterling v. Jackson*, 37 N.W. 845, 865–66 (Mich. 1888) (Morse, J., dissenting) (noting that game laws in England were inconsistent with American institutions); *Broughton v. Singleton*, 11 S.C.L. (26 Nott & McC.) 338, 341 (1820) (holding that hunting on unenclosed lands is not a trespass); *M'Conico v. Singleton*, 9 S.C.L. (2 Mill) 244, 246 (1818) (holding that a landowner cannot deny the right to hunt on unenclosed lands); *New England Trout & Salmon Club v. Mather*, 35 A. 323, 328 (Vt. 1896) (Thompson, J., dissenting) (noting the unjust nature of English game laws).

*B. Arnold v. Mundy: Republicanizing Royal Prerogative*

Robert Arnold purchased several boatloads of oysters and planted them in the Raritan River in front of his farm. He marked off the area “and drove off, so far as he was able, every one who attempted to take oysters without his leave.”<sup>111</sup> When Benajah Mundy “came, at the head of a small *fleet* of *skiffs*, and took away the oysters,”<sup>112</sup> Arnold brought suit.

The issue was presented to the court in terms of property. The plaintiff claimed that the right to fish (including the right to take shellfish) was an incident of the ownership of the soil<sup>113</sup> and that he owned the submerged lands in front of his farm under a grant from the Proprietors.<sup>114</sup> The defendant, on the other hand, contended that “all the citizens of the state had a common right to take oysters therein” because the Raritan was navigable.<sup>115</sup> He argued that the Proprietors could not usurp the public right by creating inconsistent private rights.<sup>116</sup>

Chief Justice Kirkpatrick began his analysis by tracing title to the land in question.<sup>117</sup> In March 1664, Charles II granted his brother James, the Duke of York, a patent to a substantial part of North America.<sup>118</sup> In June, James sold the land that became the colony of New Jersey to Lord Berkeley and Sir George Carteret.<sup>119</sup> Through a variety of conveyances, the grants passed to the Proprietors. The grant from Charles to James (and from James to his successors in interest) included the power to govern.<sup>120</sup> James, in other words, was granted the sovereign powers of the king. In 1702, however, the Proprietors reconveyed the power to govern to Queen Anne.<sup>121</sup> The issue thus becomes, what was conveyed by the retrocession? Specifically, is title to the submerged lands an incident of property or sovereignty?

Had this been England, the answer would have been the same as that in *The Case of the Royal Fishery of Banne*: the submerged lands belonged to the king “by his prerogative.”<sup>122</sup> New Jersey, however, did not have a king;

<sup>111</sup> *Arnold v. Mundy*, 6 N.J.L. 1, 2 (1821). Professor Rasband offers a different perspective on *Arnold v. Mundy*. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1 (1997).

<sup>112</sup> *Arnold*, 6 N.J.L. at 2.

<sup>113</sup> Plaintiff claimed a “several fishery”—an interest technically classified as a *profit a prendre*. *Seymour v. Courtenay*, (1771) 98 Eng. Rep. 478, 478 (K.B.).

<sup>114</sup> The “Proprietors” were the successors in interest to the first grantee, the Duke of York, of Charles II, King of England. The Proprietors continued to sell land in the colony and then in the state after the Revolution. *Arnold*, 6 N.J.L. at 7.

<sup>115</sup> *Id.* at 3. Mundy claimed that the fishery was a “common fishery” (*communis piscaria*), a right like other commons such as a common of pasture: it is a nonexclusive and limited right. *Smith v. Kemp*, (1693) 91 Eng. Rep. 537, 537–38 (K.B.). The most widespread common fishery was the right of the public to fish in navigable waters.

<sup>116</sup> *Arnold*, 6 N.J.L. at 3–4.

<sup>117</sup> See generally *id.* at 1 (beginning with an extensive explanation of the history of the land); see also *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 369–80 (1842) (explaining how the title of land was passed down).

<sup>118</sup> *Martin*, 41 U.S. at 369.

<sup>119</sup> *Id.* at 374.

<sup>120</sup> *Arnold*, 6 N.J.L. at 70.

<sup>121</sup> *Martin*, 41 U.S. at 380.

<sup>122</sup> *The Case of the Royal Fishery of Banne*, (1611) 80 Eng. Rep. 540, 541–42 (K.B.).

thus, there was a need to parse the concept of "prerogative" into the at-the-time-more-distinct categories of property and sovereignty. Beginning with Emer de Vattel and William Blackstone, the court offered a typology of property, noting that, although "everything susceptible of property is considered as belonging to the nation that possesses the country, . . . the nation does not possess all those things in the same manner."<sup>123</sup> Most things are divided up among individuals as private property, while other things that have not been so divided are public property.<sup>124</sup> Some public property (public domain) is used to benefit the public by meeting the needs of the government and some public property (common property) "remain[s] common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use."<sup>125</sup> The latter include air, water, the sea, and animals *ferae naturae*.<sup>126</sup> Although these things are common property, title to them cannot be vested in all the people "according to the common law notion of title . . . therefore, the wisdom of that law placed common property in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit."<sup>127</sup> Thus, the right to fish in navigable waters was "a royal fishery, and belongs to the king by his prerogative,"<sup>128</sup> so that the king's interest was in some sense proprietary. But the fact that the public had rights to fish in such fisheries without any grant from the king suggested that the king did

<sup>123</sup> *Arnold*, 6 N.J.L. at 71.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* The court followed Vattel:

Let us now see what is the nature of the different things contained in the country possessed by a nation, and endeavour to establish the general principles of the law by which they are regulated. This subject is treated by civilians under the title *de rerum divisione*. There are things which in their own nature cannot be possessed: there are others, of which nobody claims the property, and which remain common, as in their primitive state, when a nation takes possession of a country: the Roman lawyers called those things *res communes*, things common: such were, with them, the air, the running water, the sea, fish, and wild beasts.

Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the aggregate mass of its wealth. But the nation does not possess all those things in the same manner. Those not divided between particular communities, or among the individuals of the nation, are called *public property*. Some are reserved for the necessities of the state, and form the demesne of the crown, or of the republic: others remain common to all the citizens, who take advantage of them, each according to his necessities, or according to the laws which regulate their use; and these are called *common property*. . . . Finally, the property belonging to individuals is termed *private property*, *res singulorum*.

VATTEL, *supra* note 14, at bk. 1, §§ 234–235; see also BLACKSTONE, 2 COMMENTARIES \*14 (noting that animals *ferae naturae* are an example of "some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common").

<sup>126</sup> *Arnold*, 6 N.J.L. at 71.

<sup>127</sup> *Id.* The court bolstered this conclusion by citing *The Case of the Royal Fishery of Banne*, (1611) 80 Eng. Rep. 540 (K.B.); *Lord Fitzwalter's Case*, (1674) 86 Eng. Rep. 766 (K.B.); *Warren v. Matthews*, (1704) 87 Eng. Rep. 831 (K.B.); *Carter v. Murcot*, (1768) 98 Eng. Rep. 127 (K.B.).

<sup>128</sup> *Arnold*, 6 N.J.L. at 74 (quoting the Kings Bench in *The Case of the Royal Fishery of Banne*, (1611) 80 Eng. Rep. 540 (K.B. 1611)).

not “own” the submerged lands as a private person; his interest therefore was that of a “sovereign.” This led the court to conclude that the king’s title was as trustee for the public:

[B]y the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; . . . by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a Few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that 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, that is, for his direct and immediate enjoyment.<sup>129</sup>

Given the nature of the title held by the king, he could convey no greater power to the Proprietors.

Furthermore, the Proprietors had retroceded sovereignty—and hence their interest as trustee—to the Queen. Therefore, after the Revolution, “these royal rights became vested in *the people* of New Jersey, as sovereign of the country.”<sup>130</sup> The people, in turn, delegated this power to the state—subject to any inconsistent powers subsequently granted to the federal government.<sup>131</sup> Thus, republican ideology transformed the royal prerogative into a trust to be exercised for the public’s benefit.

### *C. After Mundy: State Ownership as a Limit on Capture*

During the nineteenth century, state and federal judges, following the lead of the New Jersey Supreme Court of Judicature, transformed the jumble of English precedent into a relatively coherent body of wildlife law. Broadly, the courts concluded that fishing rights were an incident of the title to lands beneath the waterway, which was determined by the navigability of the waterway. “Navigability,” in other words, became a marker for the line between public and private.<sup>132</sup> These conclusions reflected both a reading of

<sup>129</sup> *Id.* at 76–77.

<sup>130</sup> *Id.* at 78. Arnold thus had no claim to the submerged lands fronting his farm; planting the oysters was a loss of possession that left them available for the next capturer, Benejah Mundy and his colleagues. *See id.* at 93 (Rossell, J., concurring); *see also* *Shepard v. Levenson*, 2 N.J.L. 369, 373 (1808) (holding that planting oysters in a common fishery is a complete abandonment); *Brinckerhoff v. Starkins*, 11 Barb. 248, 248 (N.Y. App. Div. 1851) (holding that planting oysters does not give the planter a possessory right in the oysters).

<sup>131</sup> The most significant of the powers subsequently granted to the federal government in the context of navigable water ways was the Commerce Power. U.S. CONST. art. I, § 8, cl. 3.

<sup>132</sup> The question of what was “navigable” proved at least initially problematic. Some courts followed what they took to be the English law that navigability depended upon whether the waterway was subject to the ebb and flow of the tides. *E.g.*, *Adams v. Pease*, 2 Conn. 481, 483

the English case law and a theory of popular sovereignty: the king had owned the lands beneath navigable waterways as a sovereign and, upon the Revolution, this sovereignty passed to the people. *Arnold v. Mundy* was a crucial step in this evolution.<sup>133</sup>

Through a parallel process, state and federal judges concluded that the state also had an ownership interest in wildlife. The development of the "state ownership" doctrine (as it came to be known) is a classic example of the process by which the common law is transformed by its analogical categories. Beginning with the proposition from *Arnold v. Mundy* that the state-as-trustee owned the land beneath navigable waters, the courts initially concluded that this also gave the state an interest in the oysters growing on that soil. In a case testing the power of a state to prohibit non-citizens from harvesting oysters,<sup>134</sup> Supreme Court Justice Bushrod Washington (sitting as Circuit Justice) relied upon the state's ownership of the shellfish to justify his decision that the state statute was not unconstitutional under either the Commerce Clause<sup>135</sup> or the Privileges and Immunities Clause.<sup>136</sup> Noting, for example, that the Commerce Clause did not "interfere with [the power] of the state to regulate its internal trade,"<sup>137</sup> Washington concluded, "much less can that power [over interstate commerce] impair the right of the state governments to legislate, in such manner as in their wisdom may seem best, over the public property of the state."<sup>138</sup> Like the court in *Arnold*, Washington turned to Vattel in deciding that the state's proprietary interests extended to "fisheries of all descriptions," including "oyster beds within the territorial limits of [the] state."<sup>139</sup>

Sovereign ownership was extended from shellfish to fin fish. In *Dunham v. Lamphere*, Chief Justice Lemuel Shaw<sup>140</sup> upheld a state statute

(1818); *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867); *Hooker v. Cummings*, 20 Johns. 90, 100 (N.Y. 1822). Other courts were more receptive to the geographic realities and focused on the actual navigability of the waterbody. *E.g.*, *Carson v. Blazer*, 2 Binn. 475, 484 (Pa. 1810); *McManus v. Carmichael*, 3 Iowa 1, 53 (1856); *Ingram v. Threadgill*, 14 N.C. 59, 61 (1831).

<sup>133</sup> Other cases in this evolution include *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 416 (1842); *Adams v. Pease*, 2 Conn. 481, 484 (1818); *Pitkin v. Olmstead*, 1 Root 217, 219 (Conn. 1790); and *Carson v. Blazer*, 2 Binn. 475, 485 (Pa. 1810). See generally GOBLE & FREYFOGLE, *supra* note 2, at 282-99 (tracing the evolution of public rights in waterways).

<sup>134</sup> *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

<sup>135</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>136</sup> U.S. CONST. art. IV, § 2.

<sup>137</sup> *Corfield*, 6 F. Cas. at 550 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

<sup>138</sup> *Id.* at 551.

<sup>139</sup> *Id.* In a subsequent Supreme Court decision, the Court analogized oysters to corn: "The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way." *McCready v. Virginia*, 94 U.S. 391, 396 (1876).

<sup>140</sup> 69 Mass. 268, 274 (1855). Lemuel Shaw (1781-1861) was one of the leading jurists of his day. After serving in the Massachusetts legislature, he served as Chief Justice of the Massachusetts Supreme Judicial Court from 1830-1860. Among his influential opinions was *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296-97 (1850), establishing negligence as the primary standard for liability in tort, and *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 62 (1851), discussing the "police power." *Alger* is considered *infra* at notes 195-202. See generally LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957).

prohibiting the use of seines within a mile of the Nantucket shore. Shaw also drew upon Vattel: “like other valuable commodities, fish, *as well swimming as shell fish*, are susceptible of being property; and every such thing, says Vattel, . . . is considered as belonging to the nation that possesses the country, as forming part of the aggregate mass of its wealth; those not divided are called public property.”<sup>141</sup> The final step was to extend state sovereign ownership to all wildlife—a step that seemed natural since fish and wildlife were treated identically by both common-law<sup>142</sup> and civilian writers.<sup>143</sup>

But there was a core ambiguity in the doctrine, an ambiguity that reflects its origin in the concept of prerogative: was the state’s claim one founded on sovereignty (that it had the power to regulate capture), property (that it owned the wildlife), or some combination of the two? Throughout the *Corfield* decision, for example, Washington commingled the language of property and the language of sovereignty. At some points he treated the state’s power as an incident of the ownership of the soil; in others, his language suggested that it was sovereignty over the soil that was crucial.<sup>144</sup>

Nor was Washington alone in his seeming uncertainty as to the source of the state’s power. In a related case decided in state court, the Pennsylvania Supreme Court concluded, “[a]s to the ownership of property in oysters, while lying in the Bay of Delaware . . . the judge [in the decision below said,] ‘Although, perhaps, they [the citizens of the state] may not have a right of absolute property in these articles, they . . . may, nevertheless, pass regulations for their preservation.’”<sup>145</sup> The court upheld this instruction. Similarly, as Chief Justice Shaw noted in *Dill v. Inhabitants of Wareham*,<sup>146</sup>

the *property* of the coasts, bays, and arms of the sea, and of the fishery therein, was in the king; but in trust, as to fisheries, for all the king’s subjects . . . By the colony charters, this right of the crown was transferred, with the territory

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<sup>141</sup> *Dunham v. Lamphere*, 69 Mass. (3 Gray) 268, 270 (1855) (emphasis added). See also *Manchester v. Massachusetts*, 139 U.S. 240, 263 (1890) (holding that state fishing regulations did not conflict with federal authority to regulate the same waters); *McCready v. Virginia*, 94 U.S. 391, 396 (1876) (upholding the constitutionality of a state law granting its citizens exclusive use of its fisheries); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1855) (holding that state police power extends to the seabed beneath navigable waters and does not conflict with federal power to regulate commerce).

<sup>142</sup> *E.g.*, BLACKSTONE, 2 COMMENTARIES \*391–92.

<sup>143</sup> *E.g.*, VATTEL, *supra* note 14, at bk.1, § 234.

<sup>144</sup> Washington argued:

Although wild beasts, birds, and fishes, which have not been caught, have never in fact been appropriated, so as to separate them from the common stock to which all men are equally entitled, yet where the exclusive right in the water and soil which a person has occasion to use in taking them is vested in others, no other persons can claim the liberty of hunting, fishing, or fowling, on lands, or waters, which are so appropriated. “The sovereign,” says Grotius . . . , “who has dominion over the land, or waters, in which the fish are, may prohibit foreigners (by which expression we understand him to mean others than the subjects or citizens of the state) from taking them.”

*Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

<sup>145</sup> *Kean v. Rice*, 12 Serg. & Rawle 203, 209 (Pa. 1824).

<sup>146</sup> 48 Mass. (7 Met.) 438 (1844).

and jurisdiction, to the colonies, for the use and benefit of the inhabitants. This vested the *power* in the colonial governments to make laws, *to regulate* and protect this, as one of the common rights of the inhabitants.<sup>147</sup>

The New York Court of Appeals was even more explicit:

The people in their sovereign corporate capacity own the beds of all navigable waters within the state. They are held for the common benefit, and to promote the convenience and enjoyment of all the citizens, and not in the manner the capitol and public buildings are owned . . . . One of the purposes for which the people own the beds of such waters is to protect and regulate the rights of fishing in them.<sup>148</sup>

Some decisions emphasized property,<sup>149</sup> others sovereignty,<sup>150</sup> and others freely mingled the concepts.<sup>151</sup> Indeed, many of the decisions reflect a web comprised of common law property concepts (such as the common fishery), the public interest, and state ownership.<sup>152</sup>

<sup>147</sup> *Id.* at 445–46 (emphasis added).

<sup>148</sup> *Smith v. Levinus*, 8 N.Y. 472, 473–74 (1853).

<sup>149</sup> *E.g.*, *Coolidge v. Williams*, 4 Mass. 140, 144–45 (1808) (noting that “the property in the fish, and also in all tide waters, is in the public”); *see also* *Boatwright v. Bookman*, 24 S.C.L. (Rice) 447, 451 (1839) (holding that “an obstruction to the free passage of fish in a public navigable river, is . . . a public nuisance”).

<sup>150</sup> *E.g.*, *Duncan v. Sylvester*, 24 Me. 482, 486 (1844) (“The State may regulate its navigable waters, and the fisheries within them; yet all the citizens are entitled as of common right to fish in those waters”); *Parker v. Cutler Milldam Co.*, 20 Me. 353, 357 (1841) (“navigation may be impeded, if in the judgment of [sovereign] power the public good requires it”).

<sup>151</sup> *E.g.*, *Manchester v. Massachusetts*, 139 U.S. 240, 264–65 (1890); *McCready v. Virginia*, 94 U.S. 391, 394–95 (1876); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 74–75 (1855); *Gentile v. State*, 29 Ind. 409, 417 (1868); *Dunham v. Lamphere*, 69 Mass. (3 Gray) 268, 270–73 (1855); *Hallock v. Dominy*, 7 Hun. 52, 54 (N.Y. App. Div. 1876).

<sup>152</sup> *Compare* *Fuller v. Spear*, 14 Me. 417, 418 (1837) (holding that the legislature has the power to regulate fisheries in navigable waters that would otherwise be public), and *Burnham v. Webster*, 5 Mass. (4 Tyng) 266, 269 (1809) (stating that the legislature may regulate the taking of fish and that this regulation is for the public benefit), *with* *Hayden v. Noyes*, 5 Conn. 391, 397 (1824) (stating that every person has a common law right to fish unless that right is extinguished by regulation), and *People v. Platt*, 17 Johns. 195, 211–15 (N.Y. Sup. Ct. 1819) (reaffirming that fishing in navigable waters is a public right and stating that the legislature has the authority to regulate this right but that the legislature may not regulate fishing rights in private waters without compensating the owner whose rights are taken), *State v. Glen*, 52 N.C. (7 Jones) 321, 325 (1859) (recognizing the common right to fish in navigable waters), *Cottrill v. Myrick*, 12 Me. 222, 229–30 (1835) (stating that the public has the right to regulate the interior fisheries), *Vinton v. Welsh*, 26 Mass. (9 Pick.) 87, 91, 92 (1829) (holding that the legislature may regulate fisheries to further the public interest), *Inhabitants of Stoughton v. Baker*, 4 Mass. (3 Tyng) 522, 528 (1808) (holding that the public right to a fishery prevents a landowner from constructing a dam that interrupts that fishery by completely blocking spawning ground), and *Arnold v. Mundy*, 6 N.J.L. 1, 9 (1821) (stating that the right to fish navigable waters is vested in the people and the government may make regulations in the interest of protecting this resource for its citizens). It was only as the courts abandoned the feudal perspective, which treated most relationships as forms of property, that they began to separate out what now seem distinct strands: that states have the power to regulate land uses and conduct up to the point that the regulation infringes some constitutional prohibition even if there are no identifiable common or governmental property interests involved. This change had largely occurred by the Civil War. A similar conjunction of seemingly disparate doctrines lies at the core of the state ownership

These cases are often like the picture of an ancestor: there is both a family resemblance and something undeniably alien. On one hand, they feel ancient with the Blackstonian classification of rights and the oddness of inquiring whether the obstruction of a stream is a public nuisance or only an injury to the property of upstream riparian landowners.<sup>153</sup> On the other hand, the cases are concerned with the very current question of the proper balance between public and private interests.

This evolution was recapitulated by the Supreme Court at the end of the nineteenth century. The defendant in *Geer v. Connecticut*<sup>154</sup> appealed his conviction for possession of woodcock, ruffed grouse, and quail “with the wrongful and unlawful intent to procure transportation beyond the limits of the State.”<sup>155</sup> Following a meander through Athenian, Roman, and French feudal law, the Court turned to Blackstone and several state cases before concluding:

Whilst the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State . . . represents its people, and the ownership is that of the people in their united sovereignty.<sup>156</sup>

In addition to property language, however, the Court also speaks of sovereignty, concluding the decision by noting:

Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end.<sup>157</sup>

Thus, property and sovereignty were metaphorically and legally joined in wildlife. In England, the court would have spoken of the Crown’s “prerogative” which was a conjunction of property and sovereignty. Royal prerogative, however, was unacceptable in America. Hence the need for different terminology.

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doctrine.

<sup>153</sup> See, e.g., *People v. Platt*, 17 Johns. 195, 216 (N.Y. 1819) (holding that the state lacked power to regulate dam that obstructed fish run because the defendant owned its entire length); *Woolever v. Stewart*, 36 Ohio St. 146, 150–151 (1880) (holding that only upstream riparian landowners can object to obstruction of fish runs in a nonnavigable stream and state statute requiring dam owner to add fishways was void).

<sup>154</sup> 161 U.S. 519 (1896).

<sup>155</sup> *Id.* at 520.

<sup>156</sup> *Id.* at 529.

<sup>157</sup> *Id.* at 534.



Beginning with the proposition that the king-as-sovereign was the owner of navigable rivers and wildlife, the New Jersey Supreme Court of Judicature offered a translation into the new jurisprudence of popular sovereignty: the state held legal title to wildlife in trust for the people.<sup>158</sup> The result was a blending of the two ways to talk about power over things. First, there was *proprietary* power, embodied in concepts of property and title. Second, there was *sovereign* power, represented by the government's authority—granted by the sovereign people—to regulate conduct.

In the case of wildlife, however, neither of these powers, whether alone or conjoined, seemed quite right. Searching for a better description, the courts mingled the categories: the expansive nature of government's role was recognized by vesting it with both title to game and absolute governmental control. But this blended power also seemed inaccurate because the combined powers gave the government too much discretion. Unlike a private owner who might use wildlife solely for personal gain, when the government was the owner its powers were constrained by the public interest.

Thus, the government's proprietary rights could be exercised only for the use and benefit of the people of the states and not for the benefit of an individual or special group. The government's absolute regulatory power was similarly limited by the "common right of the people."<sup>159</sup> The metaphor employed to describe this mixture of sovereign and proprietary powers was the trust: the state was a trustee for the people and state sovereign ownership was a public trust.<sup>160</sup>

This perspective solved at least two jurisprudential problems. Not only did it convert monarchy to republic, it also offered a vantage point that helped to resolve questions surrounding the new and novel relationship between national and state governments: as state property, wildlife was neither commerce nor a privilege and immunity to be shared with the citizens of other states.<sup>161</sup>

<sup>158</sup> *Arnold v. Mundy*, 6 N.J.L. 1, 31 (1821).

<sup>159</sup> *Id.* at 35.

<sup>160</sup> Courts have relied on English law to find that the sovereign must act with regard to the best interests of the people. *See, e.g.*, *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *Peck v. Lockwood*, 5 Day 22 (Conn. 1811); *Parker v. Cutler Milldam Co.*, 20 Me. 353 (1841); *Dill v. Inhabitants of Wareham*, 48 Mass. (7 Met.) 438 (1844); *Percy Summer Club v. Welch*, 28 A. 22 (N.H. 1890); *State v. Welch*, 28 A. 21 (N.H. 1890); *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Rogers v. Jones*, 1 Wend. 237 (N.Y. Sup. Ct. 1828); *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & Rawle 71 (Pa. 1826); *State v. Cozzens*, 2 R.I. 561 (1850).

<sup>161</sup> *E.g.*, *Geer v. Connecticut*, 161 U.S. 519, 533–35 (1896) (finding that animals in the food supply may never become "the object of commerce except with the consent of the state" and subject to the interests of the public good); *Manchester v. Massachusetts*, 139 U.S. 240, 264–66 (1890) (concluding that the absence of congressional action placed control over fish with the state); *McCready v. Virginia*, 94 U.S. 391, 395–96 (1876) (finding that the Privileges and Immunities Clause does not vest rights in the common property of one state with citizens of another state); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 74–76 (1855) (holding that a state may exercise the authority to stop and detain ships that violate state oyster protection laws without conflicting with the Commerce Clause); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 388 (1842) (recognizing the idea of the common right to protect wildlife from "encroachment by citizens of other states"); *Corfield v. Coryell*, 6 Fed. Cas. 546, 549 (C.C.E.D. Pa. 1823) (No. 3,230) (finding that the Privileges and Immunities Clause applies only to citizenship and not to the common

This conjunction of sovereignty and property—state sovereign ownership—provided a storyline for judicial decisions over the course of the nineteenth century.<sup>162</sup> The blending of property and sovereignty in the ownership-because-sovereign formula of the state ownership doctrine defines the special relationship that the state has to animals *ferae naturae*—a relationship that reflects the unique quality of wildlife as common property.

Although *Arnold v. Mundy* and its progeny solved one set of problems by defining wildlife as a public trust, they raised others. What, for example, is the relationship between this public trust property interest and private property in land? That is, what is the relationship between private property and common property—when the public property is something that can wander willy-nilly across human boundaries?

#### IV. INHABITANTS OF STOUGHTON V. BAKER. ANIMALS FERAЕ NATURAE AS A LIMIT ON PROPERTY IN LAND (THE WILDLIFE EASEMENT)

In 1633, the town of Dorchester, Massachusetts granted Israel Stoughton a mill site on the Neponset River and “an exclusive right to take shad and alewives . . . with a condition that he was to sell the alewives [to the residents of the town] at five shillings the thousand, and other fish at reasonable rates.”<sup>163</sup> More than 170 years later, the Massachusetts legislature appointed a committee to investigate the various dams on the Neponset and to determine what changes should be made to ensure that anadromous fish were able to proceed upstream to spawn. The legislature specified that

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property of a state). Neither proposition remains good law. *Geer* was overruled by *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (overruling *Geer* as an impermissible state regulation interfering with Congress’s power to regulate commerce). On the Privileges and Immunities Clause, see *Baldwin v. Fish & Game Commission*, 436 U.S. 371 (1978) (explaining that a “state’s interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident’s right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause”).

<sup>162</sup> By the close of the nineteenth century state sovereign ownership of animals *ferae naturae* was the black-letter law. See, e.g., *Organ v. State*, 19 S.W. 840, 840 (Ark. 1892) (fish); *Ex parte Maier*, 37 P. 402, 402 (Cal. 1894) (deer); *Ieck v. Anderson*, 57 Cal. 251, 251 (1881) (fish); *Hayden v. Noyes*, 5 Conn. 391, 392 (1824) (oysters); *Magner v. People*, 97 Ill. 320, 326 (1881) (quail); *Gentile v. State*, 29 Ind. 409, 409 (1868) (fish); *Eubank v. Pence*, 15 Ky. (5 Litt.) 338, 338 (1824) (fish); *Cottrill v. Myrick*, 12 Me. 222, 223 (1835) (fish); *Commonwealth v. Knowlton*, 2 Mass. (2 Tyng) 530, 530 (1807) (salmon, shad, and alewives); *People v. Collison*, 48 N.W. 292, 292 (Mich. 1891) (fish); *State v. N. Pac. Express Co.*, 59 N.W. 1100, 1100 (Minn. 1894) (fish); *State v. Rodman*, 59 N.W. 1098, 1098 (Minn. 1894) (deer); *State v. Blount*, 85 Mo. 543, 544 (1885) (fish); *W. Point Water Power & Land Improvement Co. v. State ex rel. Moodie*, 66 N.W. 6, 6 (Neb. 1896) (fish); *State v. Franklin Falls Co.*, 49 N.H. 240, 241 (1870) (fish); *Shoemaker v. State*, 20 N.J.L. 153, 154 (1843) (fish); *Phelps v. Racey*, 60 N.Y. 10, 12–13 (1875) (gamebirds); *Palmer v. Hicks*, 6 Johns. 133, 134 (N.Y. Sup. Ct. 1810) (clams); *Fagan v. Armistead*, 33 N.C. 433, 433 (1850) (fish); *Roth v. State*, 37 N.E. 259, 259 (Ohio 1894) (quail); *Woolever v. Stewart*, 36 Ohio St. 146, 148 (1880) (fish); *Kean v. Rice*, 12 Serg. & Rawle 203, 203 (Pa. 1824) (oysters); *State v. Cozzens*, 2 R.I. 561, 561 (1850) (oysters); *Boatwright v. Bookman*, 24 S.C.L. (Rice) 447, 448 (1839) (fish); *McCready v. Commonwealth*, 68 Va. (27 Gratt.) 982 (1876), *aff’d sub nom. McCready v. Virginia*, 94 U.S. 391, 391 (1876) (oysters); *State ex rel. Curry v. Crawford*, 44 P. 876, 876 (Wash. 1896) (fish); *Willow River Club v. Wade*, 76 N.W. 273, 273 (Wis. 1898) (fish).

<sup>163</sup> *Inhabitants of Stoughton v. Baker*, 4 Mass. (3 Tyng) 522, 524 (1808).

three-fourths of the cost of any changes were to be borne by the owners of the dams. Following an evaluation of their milldam and modifications to it, Edmund Baker and Daniel Vose, proprietors of Stoughton's grant, refused to pay their share of the costs, contending that the legislature lacked the constitutional power "to interfere and take from them their estate."<sup>164</sup> The towns of Staughton, Sharon, and Canton sued to recover the statutory amount due.

The Massachusetts Supreme Judicial Court began with the proposition that the defendants' right was a fee interest that included the right to erect a dam to raise the water to power the mill.<sup>165</sup> But property interests, the court noted, are not absolute. Rather, they are subject to "implied limitations," including those necessary

to protect the rights of the public in the fishery; so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water-mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it.<sup>166</sup>

The state's action thus was constitutional—defendants' title was inherently limited by the public's interest in ensuring the passage of fish through the defendants' land.<sup>167</sup>

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<sup>164</sup> *Id.* at 525.

<sup>165</sup> *Id.* at 528.

<sup>166</sup> *Id.*

<sup>167</sup> Other courts reached the same conclusion. For the proposition that states have an interest in and are within their constitutional powers regulating actions affecting fish populations, see *Parker v. People*, 111 Ill. 581, 599 (1884); *Gentile v. State*, 29 Ind. 409, 418 (1868); *Lunt v. Hunter*, 16 Me. 9, 11 (1839); *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 450 (1870), *aff'd sub nom., Holyoke Co. v. Lyman*, 82 U.S. (15 Wall.) 500 (1872); *People v. Collison*, 48 N.W. 292, 292 (Mich. 1891); *West Point Water Power & Land Improvement Co. v. State ex rel. Moodie*, 66 N.W. 6, 8 (Neb. 1896); *State v. Franklin Falls Co.*, 49 N.H. 240, 250–51 (1870); *Shaw v. Crawford*, 10 Johns. 236, 237–38 (M.Y. 1813) (per curiam); *State ex rel. Weller v. Snover*, 42 N.J.L. 341, 346 (1880); *Commonwealth v. Bailey*, 95 Mass (13 Allen) 541, 544 (1866). In the current terminology, the public interest in protecting wildlife and its habitat is a background principle inhering in Baker and Vose's title. *Lucas v. South Carolina Coastal Comm.*, 505 U.S. 1003, 1029 (1992) ("Regulations that prohibit all economically beneficial use of land . . . cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon landownership."). See generally Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005). For a discussion of the impact of *Lucas* on protecting endangered species, see Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does that Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings?"*, 80 IOWA L. REV. 297 (1995), and Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849 (2000).

A. *The Common-Law World of the Early Republic*

In thinking of Baker and Vose's milldam, it is important to banish nostalgic visions of moss-covered mills with their water wheels gently turning in willow-draped streams. Although many of the dams were small,<sup>168</sup> water was the major source of mechanical power in the United States until at least the middle of the nineteenth century.<sup>169</sup> In addition, the grist and sawmills that were powered by this water were central to the economies of an agrarian society. As one author commented, "the deficiency of a mill [is] inconsistent with the existence of civilized life."<sup>170</sup> As a result, state and local governments often provided subsidies to encourage their construction—as was the case with Dorchester's grant of the mill site to Israel Stoughton.<sup>171</sup> Baker and Vose, in short, were members of an economically powerful industry.

In addition to adjusting one's technological perspective, a societal re-envisioning is also necessary. Baker and Vose's society—like that of Israel Stoughton—was a *public* society in ways hard to imagine after the invention of twentieth-century privacy. Its governance was predicated on the elemental assumption that public interest was superior to private interest.<sup>172</sup> Eighteenth and nineteenth century common-law judges viewed humans not as autonomous individuals but as members of a community—and, as such, dependent for their well-being on a healthy, functioning community. Individuals held rights, but those rights arose out of, and were constrained by, the duty of all citizens to conduct their affairs to sustain the well-being of the whole.

The power to use one's property was one of the rights that was constrained by the community's needs.<sup>173</sup> Millers opened their dams so that fish could pass upstream to spawn; as part of the community, they were unlikely to interfere with the fish runs given the importance of the resource.<sup>174</sup> Had the millers refused to do so, the neighbors were likely to

<sup>168</sup> Not all dams were small; the dam on the Merrimack River at Lawrence, Massachusetts was the largest dam in the world when it was completed in 1848; the amount of water power it generated exceeded the water power produced in all of France. THEODORE STEINBERG, *NATURE INCORPORATED* 79, 95 (1991).

<sup>169</sup> 1 LOUIS C. HUNTER, *A HISTORY OF INDUSTRIAL POWER IN THE UNITED STATES, 1780–1930*, at 1 (1979); see also 1 J. LEANDER BISHOP, *A HISTORY OF AMERICAN MANUFACTURES* 122–32 (Augustus M. Kelley Publishers 3d ed., 1966) (1868) (discussing the first mills in New England and their impact on economic development).

<sup>170</sup> 1 HUNTER, *supra* note 169, at 30.

<sup>171</sup> *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 524 (1808).

<sup>172</sup> NOVAK, *supra* note 7, at 9.

<sup>173</sup> See John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. REV. 1099, 1107–31 (2000) (chronicling a variety of ways early government restricted the power to use one's property); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996) (arguing that government regulated beyond merely preventing harm).

<sup>174</sup> As one early historian wrote, "[I]t was a time of rejoicing . . . when spring came and the salmon began to run." SAMUEL T. DOLE, *WINDHAM IN THE PAST* 275 (Frederick H. Dole ed., 1916). See generally Gary Kulik, *Dams, Fish, and Farmers: Defense of Public Rights in Eighteenth-Century Rhode Island*, in *THE COUNTRYSIDE IN THE AGE OF CAPITALIST TRANSFORMATION: ESSAYS IN THE SOCIAL HISTORY OF AMERICA* 25, 29–34 (Steven Hahn & Jonathan Prude eds., 1985)

destroy the dams or summarily abate them as nuisances,<sup>175</sup> or to appeal to the legislature for relief: “[b]y 1800, thirteen states had laws prohibiting mills dams on some or all of their rivers from obstructing the passage of fish.”<sup>176</sup> One measure of the importance of the public interest can be seen in the fact that some of these statutes required the removal of existing dams.<sup>177</sup>

These communitarian restraints reflect the traditional common-law perspective on the nature of the relationship between public and private interests. This common-law vision of a “well ordered civil society”<sup>178</sup> inspired lawyers, judges, and writers such as James Wilson,<sup>179</sup> James Kent,<sup>180</sup> Nathaniel Chipman,<sup>181</sup> and Zephaniah Swift.<sup>182</sup> Two common-law maxims

(discussing the challenges faced by New Englanders and their needs for water mills combined with the struggle to keep salmon runs unhindered).

<sup>175</sup> See, e.g., 2 CHARLES FRANCIS ADAMS, *THREE EPISODES IN MASSACHUSETTS HISTORY* 831–33 (Cambridge Riverside Press rev. ed. 1894) (describing attempts by numerous citizens to abate a dam at an ironworks as a public nuisance because it prevented alewives from reaching upriver ponds to spawn); E.N. HARTLEY, *IRONWORKS ON THE SAUGUS* 262–65 (1957) (describing successive attempts by local citizens to destroy a dam at an ironworks); cf. THEODORE STEINBERG, *NATURE INCORPORATED* 100–02 (1991) (detailing attempts to destroy dams that flooded land, impeded navigation, and prevented transportation of logs to mills).

<sup>176</sup> John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 292 (2004). See generally GOBLE & FREYFOGLE, *supra* note 2, at 404–07 (discussing the different problems faced and methods used to ensure the passage of fish).

<sup>177</sup> Hart, *supra* note 176, at 288–89 (stating that “occasionally dams were ordered to be torn down altogether because they were found to be incompatible with fish passage”).

<sup>178</sup> NOVAK, *supra* note 7, at 19.

<sup>179</sup> Wilson (1742–1798) was born near St. Andrews, Scotland. He immigrated to the United States in 1765. He was elected to the Continental Congress in 1775 and signed the Declaration of Independence the following year. Wilson participated in the drafting of the United States Constitution and was a leader in the struggle for its adoption in Pennsylvania; his influence on the final document was second only to that of James Madison. An ardent federalist, he was appointed by President Washington to the Supreme Court in 1789. While serving on the Court, Wilson also helped draft the Pennsylvania Constitution of 1790 and lectured in law at the College of Philadelphia in 1789–1790. Perhaps the most important decision he authored on the Court was *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)—a decision that was reversed with the adoption of the Eleventh Amendment. His lectures in the law were posthumously published in 1804. CHARLES P. SMITH, *JAMES WILSON, FOUNDING FATHER 1742–1798* (1956).

<sup>180</sup> Kent (1763–1847) was active in the Federalist party and served several terms in the New York Legislature before he moved to New York City in 1793 where he became the first professor law at Columbia College. He was appointed to the state supreme court in 1798, was made chief judge in 1804, and became Chancellor (chief judge of the court of chancery) in 1814. As Chancellor, Kent was instrumental in reviving equity which had lapsed following the American Revolution. After his mandatory retirement in 1823, Kent again became a professor of law at Columbia University for two years. Beginning in 1826, he published his lectures in a four-volume, substantially expanded form as *COMMENTARIES ON AMERICAN LAW* (1826–1830). James Kent, *Autobiographical Sketch of Chancellor Kent*, 1 S. L. Rev. 381 (1872).

<sup>181</sup> Chipman (1752–1843) was Chief Justice of the Vermont Supreme Court. He first published his major work, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT*, in 1793; he substantially expanded and elaborated the book in 1833. Roy J. Honeywell, *Nathaniel Chipman: Political Philosopher and Jurist*, 5 New Eng. Q. 555, 555–56 (1932).

<sup>182</sup> Swift (1759–1823) was a Connecticut jurist and sponsor of the Hartford Convention at which representatives of the New England states considered but rejected seceding from the Union. Swift published *A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT* in 1795–1796. Elizabeth Forgens, *An Unpublished Letter of Zephaniah Swift*, 11 New Eng. Q. 180, 180 (1938).

were particularly important: *salus populi suprema lex est* (the welfare of the people is the supreme law) and *sic utere tuo ut alienum non laedat* (use your own property so as not to injure that of another).

In his 1845 book, *A Selection of Legal Maxims*, Herbert Broom placed the *salus populi* maxim first because it is “of such universal application, and result[s] so directly and manifestly from motives of public policy or simple principles on which our social relations depend.”<sup>183</sup> He went on to explain the maxim: “There is an implied assent on the part of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good.”<sup>184</sup> Although the principle applies most dramatically when buildings are destroyed “for the preservation and defence of the kingdom” or to “arrest the progress of a fire,” the maxim “likewise applies to cases of more ordinary occurrence, in which the Legislature *ob publicam utilitatem*, disturbs the possession or restricts the enjoyment of property by individuals.”<sup>185</sup>

Broom placed the *sic utere tuo* maxim first in his discussion of the principles applicable to the rights and liabilities of property.<sup>186</sup> Nathaniel Chipman went further, considering it to be a fundamental principle not only of civil law, but also of natural law:

The first rule for the attainment of [the general utility, the general interest and the happiness of man], is that rule of the civil law,—“so use your own right, that you injure not the rights of others.” This is not only a rule of civil law, but is a general rule of the law of nature, subordinate to the more general rule, which requires that all actions of individuals be so directed as to promote the good of the whole. Each individual is supposed best to understand what will contribute to his own interest and happiness, and the individuals of any society, what will most contribute to the interest and prosperity of their society, and they will pursue their own interest with more alacrity as well as knowledge. All have an equal right to the pursuit, and to make use of all proper means; but if no limits are set to the manner of the pursuit, some may usurp or monopolize the means to the deprivation of others. They may, temporarily, increase their own enjoyments, but are constantly exposed to the same deprivation by a more powerful usurper.<sup>187</sup>

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<sup>183</sup> HERBERT BROOM, *A SELECTION OF LEGAL MAXIMS* 1 (The Lawbook Exchange, 1992) (1845).

<sup>184</sup> *Id.* at 2.

<sup>185</sup> *Id.* at 3. The principle finds early expression in *Mouse's Case*, (1609) 77 Eng. Rep. 1341 (K.B.), and *The Case of the King's Prerogative in Saltpetre*, (1607) 77 Eng. Rep. 1294 (K.B.).

<sup>186</sup> BROOM, *supra* note 183, at 357.

<sup>187</sup> NATHANIEL CHIPMAN, *SKETCHES OF THE PRINCIPLES OF GOVERNMENT* 164–65 (Burlington, Vt., 1833). James Wilson sounded a similar theme:

Nature has implanted in man the desire of his own happiness; she has inspired him with many tender affections towards others, especially in the near relations of life; she has endowed him with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those, for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of

In addition to drawing upon the common law, this strand of American jurisprudence reflected a philosophical foundation that rejected the mechanistic, reductionist views of man-as-individual in a state of nature popularized by Hobbes and others:<sup>188</sup> it was society—rather than solitariness—that was natural. These writers found a sympathetic spirit in Emer de Vattel, a natural law jurist who began with the proposition that

[m]an is so formed by nature, that he cannot supply all his own wants, but necessarily stands in need of the intercourse and assistance of his fellow-creatures, whether for his immediate preservation, or for the sake of perfecting his nature, and enjoying such a life as is suitable to a rational being. This is sufficiently proved by experience.<sup>189</sup>

Since it was society that was the natural state of humans, society had claim upon the individual and her property. One measure of society's claim was the trust inherent in notions of state sovereign ownership.

### B. *The Rise of the Police Power*

The early nineteenth century was a time of social and legal transformation. In addition to the constitutional and jurisprudential changes required by the political revolution and its shift from the sovereign as king-in-Parliament to the sovereign as "We, the People," the stirrings of industrialization and the increasing reach of the market also prompted substantial changes in the law. Just as *Arnold v. Mundy* was part of the legal transformation caused by the political revolution, *Inhabitants of Stoughton v. Baker* was part of the social and economic revolution that transformed the country from an agrarian-communitarian to a market-individualistic society. As Morton Horowitz, James Willard Hurst, and other historians have noted, the nineteenth century was a time of increasing judicial willingness to use property as a tool to facilitate economic change. Growth was more

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those purposes, in such manner, and upon such objects, as his inclination and judgment shall direct; *provided he does no injury to others; and provided more publick interests do not demand his labours.*

JAMES WILSON, *Man as a Member of Society*, in 1 THE WORKS OF JAMES WILSON (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896) (emphasis added).

<sup>188</sup> See *supra* note 15.

<sup>189</sup> VATTEL, *supra* note 14, at lix. Echoing Vattel, James Wilson wrote, "we are fitted and intended for society, and . . . society is fitted and intended for us." WILSON, *supra* note 187, at 262; see also 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT § 3 [*Of Civil Society*] (Arno Press 1972) (Windham, Conn., John Byme 1795) (positing that mankind resigns a part of its natural liberty in order to acquire civil liberty).

important than protecting settled expectations.<sup>190</sup> As Hurst wrote, property law itself became an “instrument of growth rather than merely security.”<sup>191</sup>

Gary Kulik’s study of the century-long struggle between farmers and dam owners in northern Rhode Island provides a window into this transformative period. The farmers sought to maintain traditional, public rights to fish not only because fish were an important subsistence food item but also because “they were defending a deeply held definition of the public good and a sense of the proper balance between public and private rights”—between “economic individualism and public virtue.”<sup>192</sup> This conflict surfaced with the erection of ironworks in the mid-eighteenth century. These forges and furnaces, unlike grist and sawmills, required a continuous supply of waterpower. Owners of the furnaces thus opposed statutory requirements that dams include fishways since fishways required spilling water and thus reduced efficiency and potential output. In addition, the furnaces (and the cotton mills that succeeded them) were market concerns, owned by capitalists living outside the community, employing wage workers, and producing commodities for regional, national, or international markets.

The struggle between farmers and dam owners was largely played out in the legislature as each sought statutes protecting their differing visions of the public good. As market relations increasingly supplanted the communitarian economic order based on subsistence, barter, and limited markets, the growing economic individualism was reflected in an increasing number of petitions signed not only by furnace and mill owners, but also by freemen of the community. The corporations gradually succeeded in

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<sup>190</sup> Hence the importance of the Supreme Court’s evolving jurisprudence on vested rights and the Contract Clause. U.S. CONST. art. 1, § 10. For cases tracing the rise and decline of the Contract Clause, see *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Sturgis v. Crownshield*, 17 U.S. (4 Wheat.) 122 (1819); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); *Providence Bank v. Billings*, 29 U.S. (2 Pet.) 514 (1830); *Beaty v. Knowles*, 29 U.S. (4 Pet.) 152 (1830); and *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837). See generally DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 127–59, 203–36 (1985) (noting that the Contract Clause was the basis for the largest group of cases decided by the Marshall Court); STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION* 18–20 (1971) (examining the *Charles River Bridge* Case in which the Court held that granting a charter to a new free bridge did not invade any vested rights of the owners of the existing toll bridge); C. PETER MAGRATH, *YAZOO* vii (1966) (describing how the case of *Fletcher v. Peck* became a major precedent “for regulating the relationship between government and business”); FRANCIS N. STITES, *PRIVATE INTEREST PUBLIC GAIN* (1972) 99–113 (describing how the Court used *Dartmouth College v. Woodward* to “infus[e] the doctrine of vested rights into the contract clause of the national Constitution”); I UROFSKY & FINKELMAN, *supra* note 7, at 229–47, 290–94 (explaining Chief Justice Marshall’s belief that the contract clause of the Constitution authorized the federal government to support national economic development, and describing Chief Justice Taney’s subsequent concurrence in that belief); BENJAMIN F. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 1–88 (1938) (describing the economic forces and attitudes that led to the rise of the contract clause). For examples of the impact of this jurisprudence on wildlife, see *People v. Platt*, 17 Johns. 195 (N.Y. 1819), and *State v. Glen*, 52 N.C. 321 (1859).

<sup>191</sup> HURST, *supra* note 7, at 28. Property became an “instrumental value in the service of the paramount goal of promoting economic growth.” HOROWITZ, *supra* note 7, at 53.

<sup>192</sup> Kulik, *supra* note 174, at 29–34; see also John T. Cumbler, *The Early Making of Environmental Consciousness: Fish, Fisheries Commissions, and the Connecticut River*, ENVTL. HIST. REV., Winter 1991, at 73 (examining the relationship between farmers and dam owners).



obtaining exemptions from statutes requiring dams to be constructed with suitable fish passage facilities. But it was not until the nineteenth century that the matter was finally settled in favor of the mill owners. They were able to change both the patterns of river use and the laws protecting fishing rights. With the exemption of dams from the requirement of fishways, the legislature chose economic development and private gain; both farmers and fish lost.<sup>193</sup>

As nineteenth century American society changed under the pressures of industrialization and urbanization, legislation increasingly became the primary method of making law.<sup>194</sup> This reallocation of power between courts and legislatures required the courts, supplanted as the chief lawmakers, to explain the nature of the state's power to keep the society "well-regulated." A key decision, carrying forward old common-law ideals while giving shape to the new understanding of state power, was an opinion written by Chief Justice Shaw of the Massachusetts Supreme Judicial Court, *Commonwealth v. Alger*.<sup>195</sup>

*Alger* was an appeal by Cyrus Alger of his conviction under a statute that prohibited the construction of wharves into the Boston harbor beyond a specified line. After exhaustively reviewing the nature of Alger's title to the land in question and concluding that he owned the land upon which he had built the wharf,<sup>196</sup> Shaw turned to the question of the state's power to prohibit the use of privately owned land. He began with the king's prerogative: the land in question, he noted, is subject to the dominion of the state as heir to "the king's prerogative [which] extended to the dominion and control of the shores of the sea, as a power held in trust for the security and protection of the public rights of navigation and fisheries."<sup>197</sup> This royal

<sup>193</sup> See HOROWITZ, *supra* note 7, at 31–62 (exploring fish and dam conflicts in Massachusetts); NELSON, *supra* note 7, 145–64 (discussing the trend of industrial interests prevailing in courts); see also ADAMS, *supra* note 175, at 831 (describing conflict over alewives migrating to the Braintree ponds); STEINBERG, *supra* note 175, at 100–10 (discussing hydropower in the Lake Winnepesaukee area). On the environmental impacts of the early ironworks, see ROBERT G. GORDON, *A LANDSCAPE TRANSFORMED* (2001); Kulik, *supra* note 174.

<sup>194</sup> In part this reflects the transformation in the understanding of sovereignty. When "We, the people" are the sovereign, the legitimacy of law-making becomes increasingly suspect the further that it is removed from the people. The codification movement of the antebellum period reflects a similar perspective. COOK, *supra* note 7.

<sup>195</sup> 61 Mass. (7 Cush.) 53 (1851). The decision has been called "one of the most influential and frequently cited [opinions] in constitutional law." LEVY, *supra* note 140, at 248. Ernst Freund, in contrast, harrumphed that, although the decision "is generally treated as one of the leading cases," its definition of the police power is "very vague, and its application to the case in hand . . . is based upon no intelligible principle." ERNST FREUND, *THE POLICE POWER* § 405, at 425 (1904). Freund himself spent more than 800 pages on his definition. On the context of the decision, see generally NOVAK, *supra* note 7.

<sup>196</sup> The court held that Alger was the owner of the land where he had built the wharf because, under a colonial ordinance enacted in 1647, all grants made by the government that were bounded by the sea "or places where the tide ebbed and flowed" conveyed "a fee to the low water mark, or one hundred rods." 61 Mass. (7 Cush.) at 81.

<sup>197</sup> *Id.* at 83. "[T]hese were among the regalia or incidents of sovereignty." *Id.* Shaw subsequently restated this conclusion by noting that the right of property (the *jus privatum*) is subject to the government's regulatory powers (the *jus publicum*)—and the *jus publicum* is nothing other than "the royal prerogative" or the "royal right" that is vested in the government.

prerogative in navigable waters was “*jus publicum*, . . . held by the crown in trust” so that even when such land was granted to a private individual it remained impressed with the trust.<sup>198</sup>

Furthermore, this prerogative power extends beyond navigable waters: “it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use may be so regulated, that it shall not be . . . injurious to the rights of the community.”<sup>199</sup> This public-interest limitation applies to “[a]ll property in this commonwealth, as well that in the interior as that bordering on tide waters.”<sup>200</sup> Among the analogous situations that Shaw offered as examples was the “right of the public to have [non-navigable] rivers kept open and free for the migratory fish, such as salmon, shad, and alewives, to pass from the sea, through such rivers to the ponds and head waters, to cast their spawn.”<sup>201</sup>

Shaw’s “settled principle, growing out of the nature of well ordered civil society,” reflected the traditional common-law perspective on the nature of the relationship between public and private interests. As Shaw noted in *Alger*, one measure of this public interest was the public trust.<sup>202</sup>

## V. CONCLUSIONS

These cases mark out fuzzy lines between four categories that remain central to natural resource law: commons, capture, public trust, and private property in land. How can they inform our understanding of current debates about the conservation of wildlife? What do they have to say about the restrictions on the use of private property in land to protect endangered species or ecosystem services?

The starting point is the unusual legal status of animals *ferae naturae*. In part, this status reflects our fraught and ambiguous relationship to animals,

*Id.* at 90.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 84–85. On the concept of a “well ordered civil society,” see NOVAK, *supra* note 7.

<sup>200</sup> *Alger*, 61 Mass. (7 Cush.) at 85. The decision is not entirely consistent on the scope of the police power: in some places Shaw seems to tie it to tidal lands, *id.* at 81–83, 90–91, 93 (recognizing the “royal prerogative” in places where the tide ebbed and flowed); and in others he speaks far more broadly, *id.* at 84–86, 88 (recognizing the “settled principle” that property is subject to government regulation for the public good). In part, of course, the inconsistency may be more apparent than real since the case before the court concerned tidelands and it is to be expected that the court would focus on such lands. In addition, Shaw argued that restrictions fall more heavily on the seashore because there is a public right to use the sea, “so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from place which the public have common right.” *Id.* at 95.

<sup>201</sup> *Id.* at 98. The “most important” of the cases cited for this principle was *Inhabitants of Stoughton v. Baker*. *Id.* at 99–101.

<sup>202</sup> *Alger*, 1 Mass. (7 Cush.) at 88–89. Other courts also agreed with this principle. See, e.g., *People v. Truckee Lumber Co.*, 48 P. 374 (Cal. 1897); *Parker v. People*, 111 Ill. 581, 588 (1884); *Cottrill v. Myrick*, 12 Me. 222 (1835); *Burnham v. Webster*, 5 Mass. 266 (1809); *West Point Water Power & Land Improvement Co. v. State ex rel. Moodie*, 66 N.W. 6 (Neb. 1896); *Hooker v. Cummings*, 20 Johns. 90 (N.Y. 1822).

the "others" that have always occupied a unique niche in human consciousness. We have largely defined our "human-ness" in contrast to them—they are the symbols that people our thoughts and dreams: the Grimm Brother's wolf at the door; Reynard the crafty fox of medieval market dramas (and the dissent in *Pierson v. Post*<sup>203</sup>); and the magical, ambiguous coyote of so many Indian stories. Paul Shepard argued that "the human species emerged enacting, dreaming, and thinking animals and cannot be fully itself without them."<sup>204</sup> This relationship is only partially and, even then imperfectly, captured by crude concepts of property.

Animals *ferae naturae* are also unusual even as a legal category given the special relationship between wildlife and the state.<sup>205</sup> Despite continued repetition of the once-upon-a-time story of *Pierson v. Post* in first-year property classes, wild animals are not now a common-access resource, nor were they in 1805.<sup>206</sup> Commons, as free-access, are and always have been uncommon at common law. Wild animals have been the object of intense legal concern for nearly a millennium. For at least that long, governments have treated them as a public resource, extensively regulating their capture and the destruction of their habitat.<sup>207</sup>

<sup>203</sup> 3 Cai. 175, 180 (N.Y. 1805).

<sup>204</sup> SHEPARD, *supra* note 38, at 4.

<sup>205</sup> This relationship is also echoed in the context of another resource that is subject to capture: in western water law where, water also is owned by the public. *E.g.*, IDAHO CONST. art. XV, § 1 (declaring the use of all waters in the state to be public); MONT. CONST. art. IX, § 3(3) (recognizing existing water rights and declaring that the "use of water . . . shall be held to be a public use"); OR. REV. STAT. § 537.110 (1997) ("All water within the state from all sources of water supply belongs to the public."); Wash. Rev. Code § 90.03.005 (1992 & Supp. 1998) ("It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state's public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect instream and natural values and rights."); *see also* Wyoming Hereford Ranch v. Hammon Packing Co., 236 P. 764 (Wyo. 1925) (recognizing the right of the state to deny an appropriation if it contravenes the public welfare).

<sup>206</sup> The Case of Swans, (1592) 77 Eng. Rep. 435, 438 (K.B.).

<sup>207</sup> The English government imposed a wide variety of hunting and habitat-altering restrictions to conserve wildlife. In addition to declaring lands "forest" and thus protected, prohibitions on burning of "Grig, Ling, Heath, Furze, Gosse, or fern," from February through June to protect grouse were adopted in 1692. An Act for the More Easy Discovery and Conviction of Such as Shall Destroy the Game of this Kingdom, 4 W. & M., c. 23, § 9 (1692). When the statute prohibiting the burning of heath proved insufficient to deter illegal habitat destruction, Parliament prohibited unlicensed persons from selling fern ashes. An Act for the Better Preservation of the Game, 6 Ann. c. 16, § 5 (1706). *See also* An Act for the Preventing the Burning or Destroying of Goss, Furze or Ferne, in Forests or Chaces, 28 Geo. 2, c. 19, § 3 (1755) (prohibiting burning to protect habitat). In 1285, for example, Parliament enacted closed seasons on the taking of salmon. Statute of Westminster II, 13 Edw., c. 47 (1285); *see also* An Act Agaynst Tracing of Hares, 14 & 15 Hen. 8, c. 10 (1523) (specifying penalty for tracing hares); An Act Aeynst Destruccon of WildFowle, 25 Hen. 8, c. 11, § 1 (1533) (prohibiting capture of wildfowl from May through August); An Act for the Preservation of the Game of Pheasants and Partridges, and againste the destroyinge of Hares with Harepipes and tracinge Hares in the Snowe, 1 Jac. 1, c. 27, § 6 (1604) (placing limits on birds that can be shot). A statute enacted in 1393 strengthened these restrictions and also restricted habitat alteration by mandating that all dams include weirs "of reasonable Wideness" to permit the fish to reach upstream spawning areas. Justices of the Peace Shall be Conservators of the Statutes Made Touching Salmones, 17 Rich. 2, c. 9 (1393). Lawmakers also relied upon bag limits, *e.g.*, An Acte for Preservation of

In England, courts conceived of this special relationship in terms of the Crown's prerogative, a blending of property and sovereignty. But royal prerogative was extinguished by the American Revolution—hence the struggle in *Arnold v. Mundy*<sup>208</sup> and its progeny to reconceive the legal status of animals *ferae naturae* and to find a new language to express that relationship. Since the relationship between society and animals did not change, the courts followed the formula inherited from England but transformed it to reflect the difference between monarchy and republic: the state's relationship to animals *ferae naturae* was reconceived as a blending of proprietary power and sovereign power—an ownership based on the government's status as sovereign.

But this formulation created its own problems. To speak of ownership requires ignoring several traditional indicia of property. As Oliver Wendell Holmes noted in an echo of *Pierson v. Post*:

To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away.<sup>209</sup>

Similarly, the state-as-owner has none of the liabilities that traditionally accompany ownership.<sup>210</sup> The state's interest is, at best, a metaphorical form of property.

At the same time, to speak of the relationship as simply "regulatory" is also problematic. The lesson of *Inhabitants of Stoughton v. Baker*<sup>211</sup> is that the public's interest in wildlife is more than simply regulatory. Treating the power as regulatory, for example, raises questions of takings that are alien to wildlife law: landowners hold their property subject to the limitation that they must not use the land to destroy the wildlife that frequents it.<sup>212</sup> The

Spawne and Frye of Fishe, 1 Eliz., ch. 17, § 2 (1558) (limiting the length of fish that could be taken); gear restrictions, e.g., No Man Shall Fasten Nets to Any Thing over Rivers, 2 Hen. 6, c. 15 (1423) (prohibiting the use of nets) and An Act for the Preservation of Fishing in the River of Severne, 30 Car. 2, c. 9 (1678) (limiting the months in which nets were permitted); and prohibitions on commerce to conserve and to allocate wildlife, e.g., Partridges and Faysante 32 Hen. 8, ch. 8 (1540) (prohibiting the sale of partridge and pheasant to anyone not an officer of the royal household) and An Act for the Better Preservation of the Game, 6 Ann., c. 16, § 2 (1706) (prohibiting the possession of certain wild animals for some citizens).

<sup>208</sup> 6 N.J.L. 1 (1821).

<sup>209</sup> *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

<sup>210</sup> E.g., *Moerman v. State*, 21 Cal. Rptr. 2d 329 (Cal. App. 1993) (discussing a landowner who sought compensation from the state for property damage due to elk herd relocated on property); *Barrett v. State*, 116 N.E. 99 (N.Y. 1917) (holding that the state was not liable for protected beavers that felled trees); *Cook v. State*, 74 P.2d 199 (Wash. 1937) (holding state not liable for damage to skating rink from protected beavers that dammed the water source).

<sup>211</sup> 4 Mass. (3 Tyng) 522 (1808).

<sup>212</sup> E.g., *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1511–12 (10th Cir. 1988) (holding that landowner had no power to construct fence that excluded wildlife from reaching checkerboarded public lands); *Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930, 934 (Fla. 1995) (holding that a prohibition on the construction of a fence that restricted deer from freely crossing private land did not violate due process or result in taking of property); *State v. Sour*

public's interest in wildlife, in other words, is a limitation on the title to private property. Landowners generally do not have a right to capture wildlife on their land to protect the land from damage<sup>213</sup> or to fence their property to keep wildlife out.<sup>214</sup> Landowners also have no claim against the government for damage to land by animals<sup>215</sup> even when the animals have been reintroduced by the state.<sup>216</sup> Similarly, the denial of a permit to develop land to protect wildlife is not a compensable taking because there is no right to change the uses of land.<sup>217</sup> Wildlife protection, in other words, is more

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Mountain Realty, Inc., 714 N.Y.S.2d 78, 80 (N.Y. App. Div. 2000) (holding that the erection of 3500 foot-long, "snake proof" fence that was intended to exclude migrating rattlesnakes is an unlawful taking of the snakes under state endangered species act).

<sup>213</sup> There is, for example, no right to take game on one's land. *Cawsey v. Brickey*, 144 P. 938, 939 (Wash. 1914) ("There is no private right in the citizen to take fish or game, except as either expressly given or inferentially suffered by the state."); *State v. Herwig*, 117 N.W.2d 335, 339-40 (Wis. 1962) (holding that the state can regulate hunting rights on one's private land because the wildlife is owned by the state for the benefit of the people). There is also no right to hunt out of season. *E.g.*, *Maitland v. People*, 23 P.2d 116, 117 (Colo. 1933) (holding that the creation of a game refuge which included plaintiff's private property was constitutional because the state can regulate hunting even on private property). Furthermore, capturing an animal that is damaging one's property is also generally impermissible. *Compare* *Christy v. Hodel*, 857 F.2d 1324, 1337 (9th Cir. 1988), *cert. denied sub nom.* *Christy v. Lujan*, 490 U.S. 1114, 1114 (1989) (holding that regulations preventing the killing of federally protected species do not violate the Fifth Amendment); *and* *State v. Thompson*, 33 P.3d 213, 216 (Idaho Ct. App. 2001) (holding that a statute that prohibited killing deer out of season was a reasonable limit on private property rights); *and* *State v. Cleve*, 980 P.2d 23, 29, 37 (N.M. 1999) (finding that defendant illegally killed deer that came on his property); *and* *State v. Vander Houwen*, 115 P.3d 399, 404 (Wash. Ct. App. 2005) (finding that the state presented enough evidence to support the defendant's conviction for hunting wild game on his land), *with* *Aldrich v. Wright*, 53 N.H. 398, 423 (1873) (holding that a property owner may defend his geese against mink even under a statute prohibiting the killing of mink at certain times of year); *and* *Cook v. State*, 714 P.2d 199, 203 (Wash. 1937) (holding that "one has the constitutional right to defend and protect his property, against imminent and threatened injury by a protected animal . . ."); *and* *State v. Cross*, 370 P.2d 371, 378 (Wyo. 1962) (holding that one may use force in protecting his property against wild animals as a last resort). For an overview of cases and statutes discussing whether there is a right for a landowner to defend one's property from wildlife, see generally GOBLE & FREYFOGLE, *supra* note 2, at 240-43.

<sup>214</sup> *E.g.*, *United States ex rel. Bergen v. Lawrence*, 848 F.2d 1052 (10th Cir. 1988), *cert. denied*, 488 U.S. 980 (1988) (fencing off public land kept pronghorn sheep from winter grazing range); *Dep't of Cmty. Affairs v. Moorman*, 664 So. 2d 930 (Fla. 1995) (fencing held harmful to deer habitat); *State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (N.Y. App. Div. 2000) (fencing interfered with migration pattern of endangered timber rattlesnake).

<sup>215</sup> *E.g.*, *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (denying claim for damage caused by grazing of federally protected horses and burros); *Leger v. Louisiana*, 306 So. 2d 391 (La. Ct. App. 1975) (holding state not responsible for damage caused to private property by wild deer); *Cook v. State*, 74 P.2d 199 (Wash. 1937) (relieving state of liability for damage caused to a waterway by state-protected beavers).

<sup>216</sup> *E.g.*, *Moerman v. State*, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993), *cert. denied sub nom.* *Moerman v. California*, 511 U.S. 1031 (1994) (denying claim for damage caused by reintroduced elk on the basis that they are not instrumentalities of the state); *Barrett v. State*, 116 N.E. 99 (N.Y. 1917) (barring claim against the state for damage to timber caused by reintroduced beavers).

<sup>217</sup> *E.g.*, *Southview Assoc. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) (affirming dismissal of a takings claim where state denied development permit to preserve deer habitat). *Cf.* *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) ("An owner of land has no absolute and unlimited right to change the essential natural character of his land.").

than regulation;<sup>218</sup> in the modern terminology, it is a “background principle” incident to owning property in land.<sup>219</sup>

Finally, the blending of property and sovereignty is also problematic because the government’s powers are constrained by the public interest. Thus the trust metaphor: state sovereign ownership is a public trust that must be exercised to protect the public’s interest in wildlife.<sup>220</sup> But the trust metaphor is also imperfect. The state often seems to have the powers of a trustee but not the accompanying responsibilities. States as trustees can, for example, obtain compensation for damage to wildlife,<sup>221</sup> but courts have been far less willing to impose trust obligations on the state, generally

<sup>218</sup> Again, water is analogous. See, e.g., *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 456 (1892) (noting the public character of state ownership of navigable waters); *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 723–24 (Cal.), cert. denied, 464 U.S. 977 (1983) (illustrating the public trust doctrine as it relates to navigable waters).

<sup>219</sup> *Sierra Club v. Dep’t of Forestry & Fire Prot.*, 26 Cal. Rptr. 2d 338, 347 (Cal. Ct. App. 1993) (depublished). The state’s interest also impacts other federal constitutional claims. For example, the Fourth Amendment’s prohibition on unreasonable searches does not preclude a warrantless search of a wholesale fish dealer to determine the source of fish on the company’s premises given the “state’s obligation as trustee . . . ‘to exercise continued supervision over the trust’ to prevent parties from using the trust in a harmful manner.” *People v. Harbor Hut Rest.*, 196 Cal. Rptr. 7, 8 (Cal. Ct. App. 1983) (quoting *Nat’l Audubon Soc’y v. Superior Court*, 658 P.2d 709, 721 (Cal. 1983)). For other examples of judicial approval of warrantless searches based on states’ duties as trustees of wildlife resources, see *Tallman v. Department of Natural Resources*, 333 N.W.2d 193 (Mich. Ct. App. 1983), remanded, 365 N.W.2d 724 (Mich. 1985); *State v. Marconi*, 309 A.2d 505 (N.H. 1973); *State v. Nobles*, 422 S.E.2d 78 (N.C. Ct. App. 1992), aff’d, 429 S.E.2d 716 (N.C. 1993) (per curiam); *State v. Westside Fish Co.*, 570 P.2d 401 (Or. App. 1977); and *Washington v. Mach*, 594 P.2d 1361 (Wash. Ct. App. 1979).

<sup>220</sup> See, e.g., *Martin v. Waddell*, 41 U.S. 367, 411 (1842) (holding that in granting partially submerged land to the Duke of York, the King was powerless to abrogate the common law right to continue fishing in the waters and that this right survived beyond New Jersey statehood); *People v. Brady*, 286 Cal. Rptr. 19, 22 (Cal. Ct. App. 1991) (holding that state ownership of abalone gives rise to a duty to protect the shellfish for the public trust); *Peck v. Lockwood*, 5 Day 22, 128 (Conn. 1811) (holding that the right to take shellfish on the land of an individual between the high and low water-mark is a common right); *Attorney Gen. v. Hermes*, 339 N.W.2d 545, 550 (Mich. Ct. App. 1983) (finding that a state could seek civil damages based on its sovereign ownership of wildlife); *Oregon v. Couch*, 103 P.3d 671, 678 (Or. Ct. App. 2004) (holding that state sovereign ownership of wildlife is limited to animals “in a state of nature and at large,” and not previously subject to lawful capture (quoting *State v. Pulos*, 129 P. 128, 130 (Or. 1913))); *State v. Herwig*, 117 N.W.2d 335, 337 (Wisc. 1962) (stating that hunting regulations “in the interest of conservation” are an appropriate exercise of the state’s police power).

<sup>221</sup> *E.g.*, *State v. City of Bowling Green*, 313 N.E.2d 409, 411 (Ohio 1974) (holding that the state can sue a city for fish killed by negligent operation of a municipal sewage treatment plant); *State Dep’t of Fisheries v. Gillette*, 621 P.2d 764, 767 (Wash. Ct. App. 1980) (holding that the state is entitled to damages for destruction of salmon spawning habitat); *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (holding both state and United States can obtain damages for pollution-killed waterfowl under both public trust and *parens patriae*); see also *Maryland Dep’t of Natural Res. v. Amerada Hess Co.*, 350 F. Supp. 1060, 1066–67 (D. Md. 1972) (holding that Maryland could maintain a common law action for relief in a pollution discharge case despite lack of state legislation on the issue); *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1100 (D. Me. 1973) (finding that Maine had sufficient interest in its coastal waters and marine life to support a suit for damages under its *parens patriae* capacity). Other fact patterns have also produced litigation. *E.g.*, *United States v. Burlington N. R.R.*, 710 F. Supp. 1286, 1286 (D. Neb. 1989) (involving wildlife losses due to fire caused by locomotive); *Attorney Gen. v. Hermes*, 339 N.W.2d 545, 548 (Mich. Ct. App. 1983) (awarding damages based on wholesale value of fish taken by commercial fisher in violation of state law).

holding that it is for the legislature (or its delegatee) to determine the applicable duties.<sup>222</sup>

This is, at least in part, a semantic problem: "property" and "sovereignty" are seldom more than conclusory ciphers loaded with ideological baggage.<sup>223</sup> As the Supreme Court has noted, state ownership is a "legal fiction"—but one that expresses "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."<sup>224</sup> As then-Justice Rehnquist noted, although a state does not "own" animals *ferae naturae* "in any conventional sense of the word," this does not mean that "the concept expressed by the 'ownership' doctrine is obsolete"; rather, the concept reflects the Court's long recognition that "the ownership language . . . is simply a shorthand way of describing a State's substantial interest in preserving and regulating . . . the fish and game . . . ."<sup>225</sup>

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<sup>222</sup> Despite early cases employing broad public trust language, for example *Dill v. Wareham*, 48 Mass. (7 Met.) 438, 445 (1844), the argument that the state was prohibited from destroying public rights for private gain was almost uniformly rejected when made in the context of access to or conservation of wildlife. See, e.g., *Munson v. Baldwin*, 7 Conn. 168, 171 (1828) (construing a statute granting limited title to a person who clears and uses a fishing place, "so long as they continue to use the same, for the purpose of fishing"); *Parker v. Cutler Milldam Co.*, 20 Me. 353 (1841) (holding construction of a private dam across a navigable river, when authorized by state law, does not give a cause of action when the dam reduces access to the fishery); *Brinckerhoff v. Starkins*, 11 Barb. 248, 250–51 (N.Y. App. Div. 1851) (stating the "general rule . . . that no person can acquire an exclusive right, in navigable waters, except by grant from the sovereign power, or by prescription . . ."); *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & Rawle 71 (Pa. 1826) (holding state charter authorizing construction of a dam relieved the dam owner of liability for harm to fisheries); *State v. Cozzens*, 2 R.I. 561, 565 (1850) (upholding a statute permitting the lease of oyster beds covered by public waters, "to secure to the public a more abundant supply."). The recurrent rationale was that offered by Chief Justice Shaw in *Commonwealth v. Essex Co.*, 79 Mass. (13 Gray) 239, 247 (1859): "It is . . . for the legislature to determine which [public right] shall yield, and to what extent, and whether wholly, or in part only, to the other; and such question will ordinarily be determined by the legislature, according to their conviction of the greater preponderance of public necessity and convenience." Courts have been more willing recently to reinvigorate public trust requirements. See *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 719 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) ("[ecological [values such as] the use of the lake for nesting and feeding by birds . . . [are] among the purposes of the public trust."); *Texas East Transmission Corp. v. Wildlife Pres., Inc.*, 225 A.2d 130, 137 (N.J. 1966) ("[D]efendant's devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection against taking of its preserve or a portion of it by arbitrary action of a condemnor."); see also Deborah G. Musiker, Tom France & Lisa A. Hallenbeck, *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 88 (1995) (asserting that "[a] trustee, the state must protect the corpus of its wildlife trust by preventing its unreasonable exploitation and by seeking compensation for unavoidable losses").

<sup>223</sup> See Alf Ross, *Tu-Tu*, 70 HARV. L. REV. 812, 818 (1957) ("our terminology and our ideas bear a considerable structural resemblance to primitive magic thought concerning the invocation of supernatural powers which in turn are converted into factual effects").

<sup>224</sup> *Toomer v. Witsel*, 334 U.S. 385, 402 (1948); see also *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 284 (1976) ("The 'ownership' language . . . must be understood as no more than a nineteenth-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'").

<sup>225</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 341–42 (1979) (Rehnquist, J., dissenting); see also *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 382, 392 (1978) (Burger, C.J., concurring) (the state ownership doctrine "manifests the State's special interest in regulating and preserving

That is to say: the public's interest in wildlife—whether characterized as a trust, state ownership, state custodianship, or a “substantial interest in preserving” such animals—gives the state a special authority and responsibility to ensure the preservation of wildlife.

There is, in short, ample power to conserve the nation's biodiversity and the ecosystem services on which we depend. Having power and exercising it are, of course, different things, particularly in these uncertain times. Given the failure of political will or the purchase of political power, *de facto* commons are common, and the public interest is often swamped by private gain.