The Commons Concept: An Historical Concept With Modern Relevance

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In October 1974 the Nature Conservancy, a nonprofit environmental organization, filed a suit in the United States District Court for the Eastern District of Virginia requesting monetary and injunctive relief for alleged trespass committed by members, guests, and employees of the Machipongo Club, a corporation formed for its members' recreational use.¹ Both the plaintiff and defendant owned land on Hog Island, one of the barrier islands off the eastern coast of Virginia's Eastern Shore. In support of its request for relief, the plaintiff asserted that it owned land extending to the low water mark on the northern end of Hog Island and that the defendant had used, without authorization, parts of the plaintiff's property, including the beach, marshes, meadowlands, and several roads and trails.²

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2. More specifically, Nature Conservancy alleged ownership of the entire northern section of Hog Island, except for a 5.4 acre parcel owned by the defendant. Nature Conservancy claimed that the Club committed the following acts of trespass: (1) driving vehicles over sand dunes and otherwise using the Atlantic beach area; (2) hunting in the marshes and meadowlands and damaging nesting areas; (3) traveling on a right-of-way beginning at the defendant's clubhouse and running to the beach (referred to in the opinion as the beach access road); and (4) traveling on a road running southward from the beach access road and bisecting plaintiff's tract of land (referred to in the opinion as the north-south road). Id. at
The defendant argued that the plaintiff did not own the beach, meadows, or marshlands because several Virginia statutes prohibited the conveyance of lands used in common by Virginia citizens for fishing, fowling, and oystering. More specifically, the defendant relied on sections 1338 and 1339 of the 1887 Virginia Code, which the defendant alleged were effective when the state originally granted the land to a private party. Section 1338 provided that "[a]ll the beds of the bays, rivers, creeks, and the shores of the sea" that had not been "conveyed by special grant or compact according to law, shall continue and remain" the state's property and "may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking and catching oysters." Section 1339 extended the boundary of land adjacent to the above waters to the low water mark, but made the extension subject to section 1338. The defendant also relied on an 1888 statute enacted to protect "all unappropriated marsh or meadow lands lying on the eastern shore of Virginia, which have remain ungranted, and which have been used as a common." 

Although the district court ruled in part for the plaintiff, the defendant also argued that it had acquired the right to travel on the north-south road because: (1) the United States Coast Guard had conveyed the beach access road to the Club, thus giving the Club the right to use the north-south road which intersected the access road; (2) the north-south road had become a public road under the theory of implied dedication because of continuous public use; and (3) prescriptive use of the road for more than 20 years had created either a public or a private easement. The defendant argued that the United States Coast Guard transferred some, if not all, of the beach access road as an appurtenance to the 5.4 acre tract and that the Coast Guard had made prescriptive use of the remaining part of the right-of-way ineffectively conveyed to it for the statutory period.

3. The defendant also argued that it had acquired the right to travel on the north-south road because: (1) the United States Coast Guard had conveyed the beach access road to the Club, thus giving the Club the right to use the north-south road which intersected the access road; (2) the north-south road had become a public road under the theory of implied dedication because of continuous public use; and (3) prescriptive use of the road for more than 20 years had created either a public or a private easement. The defendant argued that the United States Coast Guard transferred some, if not all, of the beach access road as an appurtenance to the 5.4 acre tract and that the Coast Guard had made prescriptive use of the remaining part of the right-of-way ineffectively conveyed to it for the statutory period.


7. The district court held: (1) that the defendant had no right to use the north-south road either as a public road or as a private easement acquired by prescription; (2) that the defendant's predecessor in title had acquired a private easement by prescription in the beach access road, which subsequently had been conveyed to the defendant; (3) that the plaintiff held title to the Atlantic beach to the low water mark; and (4) that the grant of marshes and meadowlands to a private party was void. As relief for the plaintiff's injuries, the court granted it $10 in damages and an injunction against the Club's use of the north-south road and the beach area. The Club, however, retained the right to use the beach access road and
court responded favorably to the defendant's commons argument. After noting that the plaintiff's title extended to the low water mark, the court declared that the grant of marshes and meadowlands to the plaintiff was void. According to the court, under the 1888 act "[s]uch lands belong[ed] to the people of Virginia for the purposes of fishing, fowling or hunting." The Nature Conservancy therefore could not prevent public use of these lands.

The court, however, rejected the defendant's commons argument based on Virginia Code section 1338. According to the court:

Section 1338 of the Code of 1887 established that Virginia seashores would remain as property of the State unless conveyed by special grant or compact according to law. There is no requirement in the statute that seashores qualifying under the historical doctrine of "common lands" forever remain in that status. The statute contains an express prohibition against grants by the State of its interest in "any natural oyster bed, rock, or shoal," but there is no corresponding prohibition dealing with the shores of the sea. Section 1338 was viewed as a declaration of the right in the State to the navigable waters and soil underneath them within the state's territorial limits, sanctioned and supported by common law. It would be inconsistent to read the statute as invalidating provisions within the property law of Virginia concerning the grant of the land owned by the State.

The United States Court of Appeals for the Fourth Circuit

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the marshes and meadowlands. 419 F Supp. at 405.
8. Id. at 401-02 (relying on § 1339).
9. Id. at 403.
10. According to the court, there was "ample support for the conclusion that the marsh and meadow lands were used as a common by the residents of Virginia." Id. The evidence consisted primarily of testimony of a native of the island in 1901. Id.

The plaintiff attempted to minimize the effect of the 1888 Act on its title by relying on a 1966 statute ratifying certain grants issued by the State Librarian. See Va. Code § 41.1-6 (1981). In summarily rejecting the plaintiff's argument that the Act retroactively validated one of the grants in its chain of title, the district court noted that the statute expressly excludes grants that were issued prior to 1932. 419 F Supp. at 403-04.
11. 419 F Supp. at 402 (footnote and citation omitted). The defendant argued that § 1338 voided the conveyance to the plaintiff of any interest in the intertidal strip because the area was ungranted and used in common at the time of the state's conveyance to a private party. The plaintiff, on the other hand, maintained that, although § 1338 vested title to the seashores in the state, it did not prohibit a lawful conveyance of those shores to private parties. Id.
agreed with the district court’s ruling on the commons issue, but reversed the decision in part on other grounds. After both parties and the state of Virginia filed petitions for rehearing, the Fourth Circuit abstained from adjudicating the common rights issue. The Fourth Circuit explained that abstention was proper because resolution of the common rights issue involved interpretation of Virginia statutes “which had not been authoritatively construed by the Virginia courts.” Further, the matter raised “fundamental questions of public policy that should be resolved in the first instance by the state courts.” The Fourth Circuit deferred a decision “until the state courts have spoken” because several Virginia citizens had filed a bill of complaint for declaratory judgment and injunctive relief against the Nature Conservancy.

The bill of complaint referred to in the Fourth Circuit’s opinion was filed in the circuit court of Northampton County on February 27, 1979 that court reached a complicated decision based on its interpretation of sections 1338 and 1339, and on the 1888 act. In summary, the court concluded: (1) the Nature Conservancy’s title to part of the land bordering the Atlantic Ocean extended only to the high water mark, with the intertidal strip belonging to the state and subject to the public’s right to fish, fowl, and hunt; (2) title to the remainder of the tract bordering the ocean extended to the low water mark, but remained subject to the statutory “easement” for fishing, hunting, and fowling; (3) the plaintiff held the property bordering tidal waters other than the Atlantic Ocean to the low water mark and held it free of public rights, except for any marsh and meadowlands granted by the state after 1888; and (4) the public had a right to fish, hunt, and fowl in these protected marshes, which were described by the court as “a public com-

12. Nature Conservancy v. Machipongo Club, Inc., 571 F.2d 1294 (4th Cir.), cert. denied, 439 U.S. 1047 (1978). The appellate court upheld the district court’s decision except that part dealing with the beach access road. The Fourth Circuit concluded that the Club’s predecessor in title neither had been granted a right-of-way nor had acquired one by prescription. At most, the predecessor in title acquired a license. Id. at 1296, 1298.
14. Id. at 875-76.
15. Id.
mon." The state circuit court's decision has been appealed to the state supreme court, but oral arguments have not yet been heard.

The controversy in *Nature Conservancy* presents the Virginia Supreme Court with an opportunity to clarify the law of public rights in Virginia's natural resources. The Virginia Supreme Court has not addressed the concept of public or common rights in a comprehensive manner since 1932, and its resolution of the issues in *Nature Conservancy* could represent a landmark decision in Virginia environmental law. Unfortunately, courts that recently have considered issues relating to the commons concept have tended to proceed in a vacuum, focusing primarily on statutory law and almost totally ignoring common law origins. State supreme court decisions, statutes, and constitutional provisions demonstrate, however, that common law principles continue to be significant in water rights cases generally, and in common rights cases specifically. Although the General Assembly recently has enacted various statutes dealing with water resources, these statutes primarily have only supplemented common law doctrines and do not represent a comprehensive revision of Virginia water law.

17. *Id.* at 32-38; Declaratory Order and Decree of the Chancery Court 1-3. The court's opinion apparently was convoluted because, according to the court, the plaintiff's chain of title resulted from the amalgamation of several different land tracts acquired from the state at different times. A change in the wording of the common lands reservation statute also contributed to the complex holding. *See Bradford v. Nature Conservancy*, Chancery No. 16, slip op. at 22-33 (Va. Cir. Ct. Feb. 27, 1979), *appeal docketed*, No. 79-1288 (Va. Sup. Ct. 1979).

18. The decision could be important to other states' environmental law because the concept of public rights in natural resources was transplanted from England into the two original colonies, Virginia and New England.

19. The district court opinion in *Nature Conservancy v. Machipongo Club, Inc.*, for example, reveals several misconceptions about the statutes reserving common rights. When describing the effect of one of these statutes, the court states that "[i]t would be inconsistent to read the statute as invalidating provisions within the property law of Virginia." 419 F Supp. at 402. What the court fails to realize, however, is that at common law common rights were property rights; as the court earlier conceded, the statute largely codified the common law concept.

20. The schedule to the Virginia Constitution, for example, declares: "The common law and the statute laws in force at the time this Constitution goes into effect, so far as not repugnant thereto or repealed thereby, shall remain in force until they expire by their limitation, or are altered or repealed by the General Assembly." Va. Const. art. VII, § 3. *See also* Va. Code § 62.1-12 (1973)("Nothing in this chapter shall operate to affect any existing valid use of such waters or interfere with such uses hereafter acquired "); *Miller v. Commonwealth*, 159 Va. 924, 929-31, 166 S.E. 557, 558-59 (1932)(After the Revolution "the
This Article presents an extensive study of the common law principles underlying public interests in tidal water resources in an attempt to resolve some of the dispute in Virginia concerning this subject. The Article will begin by examining the origins of public interest law in Roman society. It then will follow the development of the Roman-based ideas in England, from feudal days until the late 1700's, during which time public interests in natural resources achieved legal recognition and acceptance through the concept of common lands and rights. Finally, the Article will focus on how the commons concept was transplanted into colonial America, and on its subsequent legal development in the United States and, more specifically, in Virginia. Part of this discussion of the commons concept in early America will consider the historical evidence of common rights that has been discovered in researching the Article.

**INTRODUCTION TO THE COMMONS CONCEPT**

Throughout history, many different cultures and civilizations have developed and flourished. Most have recognized, in one form or another, public rights and interests in their society's natural resources. In more primitive societies, public rights and uses existed out of necessity, helping to ensure the civilization's survival. As societies became more sophisticated and complex, they continued to recognize public interests, although sophistication produced a shift in the theories used to justify the existence of public rights. Whereas more primitive cultures recognized public rights because of compelling economic needs, more developed cultures explained public rights' existence in philosophical terms.

The English-based societies developed several concepts to govern public rights in natural resources such as land, tidal and non-tidal waters, wild animals, and fish. The key concept, that of the commons, is difficult to define precisely or accurately because it became intertwined with several other concepts. Also, as the com-

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22. See text accompanying notes 60-63, 82-93, 137-140 infra.

23. It often has been classified as an easement. Juergensmeyer & Wadley, The Common
mons doctrine evolved, it began to include two related but distinct concepts, common lands and common rights.

The origin of the commons concept is disputed. Some commentators argue that common lands developed during the English feudal period as a consequence of the tenure land system set up by William the Conqueror. Others maintain that common lands existed before the feudal era in early Germanic and Roman settlements, where a kind of communal land ownership prevailed. Even in early England it appears that common lands denoted lands held by a community for public benefit. Gradually, however, as the royalty and central government gained power, this notion of communal ownership disappeared. Instead, the theory arose that the Crown or some designated governmental body owned the common lands and held them subject to certain public uses.

_Lands Concept: A "Commons" Solution to a Common Environmental Problem, 14 Nat. Resources J. 362, 367-68 (1974); see text accompanying notes 178-180 infra._

24. _E.g.,_ W. Hoskins & L. Stamp, _The Common Lands of England and Wales_ 6 (1963). More specifically, Hoskins and Stamp argue that common rights in the forest had been exercised since “time immemorial,” and that even an all-powerful Norman King was obliged to recognize them while he enlarged his forest if he did not wish to encourage a rebellion. _Id._

25. _F Pollock, The Land Laws_ 18-21 (3d ed. 1896). It is inaccurate, from a theoretical perspective, to describe early societies as communally owning lands because the concept of a corporate entity and of treating a group of people as one was foreign to them. Perhaps the phrase “communal enjoyment” would more accurately depict the situation in these societies. _Id._ at 21. _See generally_ T. Smolen, _supra_ note 21, at 23-30.


27. The lord of the manor, for example, held certain manor lands for the benefit of his tenants. _See_ text accompanying notes 88-92 _infra._ This theory also was visible in colonial America, especially in the New England colony where the Crown frequently used proprietorships to create new settlements. Under the proprietary system the king conveyed absolute ownership and control over large land tracts to a single person or group of grantees. The primary duty of the town proprietors was the division and distribution of the land. Usually, the proprietors set aside a small area for the inhabitants’ common use, which often was located in the center of the town. Some of these town commons exist today (perhaps the most famous of which is the Boston Common). T. Smolen, _supra_ note 21, at 45-55.

Although the proprietorship was not used as frequently in the Virginia colony, some grantees held tremendous land tracts in Virginia under the proprietorship method. Lord Fairfax and Lord Culpeper, for example, acquired land on the Northern Neck of Virginia by monarchical proprietorship. F. Harrison, _Virginia Land Grants_ 61-79 (1925); 2 W. Henning, _The Statutes at Large_ 569-78 (1823) [hereinafter cited as Henning’s Statutes]. 15 Va. Mag. Hist. & Biography 392-99 (1907-09) (printing Charter of 1688 to Lord Culpeper); _see_ Hunter v. Fairfax’s Devisee, 15 Va. (1 Munf.) 218, 219 (1810), rev’d, 11 U.S. (7 Cranch) 603, 604-05 (1812) (discussing history of Northern Neck charters). _See generally_ A. Embrey, Wa-
Over time, this definition of common lands also became obsolete as private parties appropriated a steadily increasing amount of common lands. While some of these privately appropriated lands permanently lost their common lands status, many land tracts retained common lands status even after being conveyed to private parties. The nature of the public interest in common lands, however, had changed from a communal ownership interest to a communal right to make certain uses of another's land. Thus, a system of common rights evolved from the original common lands concept.²⁸

The system became increasingly complex and structured as Parliament and the higher ranking lords responded to a rising demand for common lands by regulating their use. To prevent the total destruction of the common lands, the government imposed regulations restricting not only the class of people who could use common lands, but also the scope and nature of the use. As the regulations became more restrictive and specific, narrow categories of common rights developed.²⁹

²⁸. Some English commentators developed an even narrower definition of common lands to reflect the fact that common rights attach to two types of land: common lands and commonable lands. Common lands are lands subject to common rights at all times and thus are lands to which no rights of severalty attach. Commonable lands are lands that are held in severalty for part of a year, but become commonable after the severalty crop is removed. Thus, they are lands subject to exclusive use for part of the year and common use during the rest of the year. ROYAL REPORT, supra note 26, at 23; Halsbury's Laws of England, §§ 517-518 (4th ed. 1974).

²⁹. See W. Hoskins & L. Stamp, supra note 24, at 34-36; ROYAL REPORT, supra note 26, at 149-52. In his now famous article, The Tragedy of the Commons, Hardin explained the demise of common rights in economic terms. According to Hardin, each individual seeks to maximize his gain in using the common. For each additional unit of use of the common there is a positive and negative component. The positive component is a function of the benefits received from the unit of use. The positive component is nearly one because the individual receives all the benefits of his additional unit of use. The negative component is the additional burden imposed on the commons resources by one additional unit of use. The effects of overuse are shared by all the commoners. Thus, the negative component borne by an individual who has decided to add an additional unit of use is only a fraction of -1. Adding the components together, the rational individual will choose to add another unit of use to the common. Unfortunately, because every commoner will reach this conclusion, the
A right of common currently designates a right of one or more persons to take or use a product naturally produced on another's lands or in another's waters. Although many courts classify the right as an easement, the right technically is a profit à prendre. Unlike a common right, an easement merely creates a right to use another's land in a specified manner and does not confer any right to take the land's natural products. Also, whereas an easement creates an exclusive right of use, a common right, by definition, is shared by all commoners. A common right is not an estate held in common because the latter involves an interest in the land that is shared by more than one party and gives each equal possessory rights in the entire tract. Thus, regulation of land held in a concurrent estate would be impossible without the consent of all parties. Finally, unlike most other property interests, common rights exist regardless of the property owner's intent.

The above introductory discussion of the commons concept demonstrates its tremendous flexibility. The concept originally developed out of economic necessity when England was scarcely populated and collective use of lands and waters was the only way to make productive use of resources. Over time, this collective effort led to defining common rights in certain land and waters. Eventu-
ally, as the population increased to the point at which division of labor became possible, the need for collective rights diminished and private appropriation of common lands became widespread. Additionally, the population increase necessitated regulation of common lands not privately appropriated or otherwise subject to public rights. The regulation extinguished many common rights and severely restricted others.

Ironically, the even greater population increase in the twentieth century has caused modern English-based societies to react differently to the public rights problem. The tremendous population increase intensified the problems of pollution and overcrowding, causing the demand for open spaces and lands reserved for public use to increase, but for different reasons, such as fulfillment of aesthetic and recreational needs. In responding to this increased demand, a few American courts have resurrected the ancient common law commons doctrine and its offspring, the public trust doctrine, under which the Crown holds title to lands in trust for the public. Breathing life into this ancient doctrine is not an easy task for a modern court, for the commons doctrine evolved informally through continued usage and acquiescence. Uncertainty continues to exist about the commons concept because the principles governing common use usually were not clearly delineated or formally adopted as rules of law. Further, even when rules of law finally developed, they generally represented nothing more than “the formal expression of the dispositions and habits of society.”

34. It is even more ironic that in both England and the United States, two countries which have strived to protect the rights of even its poorest citizens, the legal system should find little room for public rights in natural resources. See F Pollock, supra note 25, at 16.

35. Of course, some common rights play a vital economic role. The Chesapeake Bay, for example, supports thriving commercial, agricultural, and recreational industries. The bay's waters provide access to two major Eastern ports, Baltimore Harbor, Maryland and Hampton Roads, Virginia. The bay also supports extensive recreational activities, such as boating, hunting, and fishing. The Army Corps of Engineers estimates this demand will more than double between 1980 and 2020. Additionally, the bay supports commercial shell fishing and seafood processing industries. Estimated revenues for blue crabs and oysters alone amounted to $30 million in 1980. U.S. Environmental Protection Agency, Office of Research and Development, Chesapeake Bay 2 (May 1980).


37. F Pollock, supra note 25, at 18. Uncertainty exists, for example, about the various kinds of common rights, the identity of lands subject to common rights, the nature of the
The flexible nature of the commons concept further complicates the problem. Changing the role or nature of the commons concept was a much easier task in feudal England, where the Crown had tremendous power and could act relatively free from due process constraints. Further, transplanting the commons doctrine from England into America was difficult primarily because the doctrine developed in the context of the English tenure land system. Indeed, when the first English settlers arrived in America, the tenure property system had disintegrated to such an extent that colonial America never fully experienced the feudal tenure system.

Resurrection of the commons doctrine raises important and often conflicting interests and policies. On the one hand, the private landowner who suddenly finds his land subject to public rights has strong ownership interests. Most of the basic tenets of our property system, such as the assumptions of private ownership of property and maximization of resources, argue against subjecting his land to common rights. On the other hand, the private property system must fit into its proper legal perspective. The public also has important interests which may have existed before the private ownership system fully developed. Indeed, evidence exists of common rights in colonial America. Resolving the common rights issue will have legal consequences that transcend a private landowner's immediate ownership interests.

Regardless of how today's courts resolve the common rights issue, the answer must be reached in a legally responsible manner. Normally, the due process and takings clauses of the state and federal constitutions impose sufficient constraint on judicial action. The commons doctrine, however, provides a unique situation

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38. 1 R. Minor, supra note 31, § 15; C. Moynihan, supra note 32, at 22-27.
40. For example, if a court strictly construes the public interest in navigable waters to include a right of navigation and perhaps a right of fishery, then the court may be excluding other important public uses such as diversion of watercourses for establishment of a public water supply. Under the riparian doctrine, as interpreted by the Virginia judiciary, diversion of a watercourse is generally not permissible. Purcellville v. Potts, 179 Va. 514, 19 S.E. 2d 700 (1942); Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508 (1921). Riparian rights in navigable waters, however, are subject to whatever public rights and uses are recognized at law. See Commonwealth v. City of Newport News, 158 Va. 521, 164 S.E. 689 (1932); text accompanying notes 238-252 infra.
where the due process clause may not give adequate protection to the reliance interests of private parties. By definition, a common right is a property right in the privately owned land of another. The private landowner conceivably always held his land subject to the common right, even though the right was neither apparent nor exercised, because inaction usually is not an effective method of extinguishing a property right. Thus, subjecting the private owner's interests to common rights arguably neither deprives him of a property interest nor constitutes a taking entitling him to just compensation. To ensure that the commons issue is treated in a legally responsible manner, the concept's common law evolution must be fully explored.

I. Roman Law

Although most commentators agree that Roman law had an impact on the development of public rights in natural resources, the origin of common or public rights in Roman law is difficult to pinpoint. Early Roman civilization was organized around tribal units. When one tribe conquered another, any lands taken by conquest were for the tribe's benefit. Although one person might be allowed to take the land's natural products, no tribe member could exclusively control the land. Similarly, other spoils of war belonged to the entire tribe and were either divided among the tribe's members or sold, with the proceeds paid into the public chest. Other than these general principles, early Roman law was unstructured.

As Roman civilization became more sophisticated, an organized legal system began to develop. This system was derived from three important sources: natural law, universal law or the law of nations, and civil law. Natural law, or *jus naturale*, was defined as "that which all animals have been taught by nature; this law is not pecu-

41. The common right arguably may be destroyed by adverse possession or prescriptive use. Some jurisdictions, however, hold that a party may not adversely possess against the state. If, therefore, the state is deemed to hold the common rights for its citizens, this method of extinguishment may not be possible. 3 American Law of Property § 15.13 (A. Casner ed. 1952).


liar to the human species, it is common to all animals."

Unlike natural law, the law of nations, or jus gentium, applied only to humans and encompassed special local laws governing the Roman Empire as well as universal law applicable to all peoples. The civil law was contained in codified statutes, decrees of the senate, and enactments of the emperors that applied to Roman citizens.

Roman law eventually developed two main branches: (1) the jus publicum, or the public law regulating the relations between the state and the citizen; and (2) the jus privatum, or the law regulating the relations between individuals. The second branch, the jus privatum, regulated property rights through a complex classification system. First, it classified types of property either as tangible, corporeal things (tangi possunt) or as intangible, incorporeal things (tangi non possunt). Second, the system grouped property according to whether it was within one's estate or sphere of trade (in commercio), or whether it was outside of one's estate or sphere of trade (extra commercium).

For purposes of this Article, the last category of property, extra commercium, is the most important and included the following classes of property: (1) Res divina, or things dedicated to and vested in the control of the gods; (2) Res publicae, or things open for public use and subject to state regulation, but incapable of exclusive individual ownership; (3) Res omnium communes, or things legally not property because they were incapable of dominion and control; and (4) Res nullius, or things not possessed by an individual but capable of possession.

Under Roman law, two kinds of incorporeal property rights sig-

44. Digest 1.1.1.3.
45. Institutes of Gaius 1.1; see F. Walton, supra note 43, at 361.
46. Institutes of Gaius 1.2; see R. Sohm, Institutes of Roman Law 44-47 (1892).
47. Institutes 1.1.4; W. Morey, Outlines of Roman Law 223-24 (2d ed. 1884). The jus publicum today would include such topics as constitutional law, administrative law, and criminal law. P. Van Warming, An Introduction to the Principles of Roman Civil Law 33 (1976). The bulk of Roman law, however, including that governing a person's property and actions, was part of the jus privatum. See F. Walton, supra note 43, at 349.
48. R. Sohm, supra note 46, at 225.
49. P. Van Warming, supra note 47, at 63.
50. See id. at 63-65; R. Sohm, supra note 46, at 225-27. Roman law did not describe the state as the "owner" of res publicae because the state was not a legal person and therefore could not own property. Id. at 226. Examples of each type of property include: (1) res divina, or temples and altars; (2) res publicae, or public roads and places; and (3) res communes, or air and flowing water. Id.
nificantly contributed to the development of common or public rights: real and personal servitudes. Servitudes were similar to the modern easement and gave an individual a right to use another’s property. If the servitude was associated with and improved the value of nonburdened, dominant property, then it was a real or praedial servitude. If, however, the servitude was granted to an individual independently of property ownership, then the servitude was personal. An important kind of personal servitude was the usufruct, or “the right of using and enjoying, without consuming or destroying, things which are the property of another.” A usufruct usually could be exercised only as long as the thing subject to the use existed, because it generally was restricted to things that could not be consumed by use. This characteristic of the usufruct suggests that any public interests developing from it also could be extinguished once the burdened property ceased to exist or perhaps even when the burdened property underwent a radical change in nature.

Servitudes were created by either contract, testamentary transfer, or judicial decree. They could not be created by custom or informal agreement. Once created, however, a servitude could be acquired by prescription. Roman servitudes therefore differed in

51. P Van Warmelo, supra note 47, at 102.
52. Praedial servitudes were divided into two classes: rural, or those that related to land, and urban, or those that related to buildings. Examples of rural servitudes included: iter, a right to pass over an adjoining field on foot; actus, a right to drive cattle over an adjoining field; vicus, a right to let water flow across the servient tenement by means of an aqueduct. P Van Warmelo, supra note 47, at 103-04. Urban servitudes included: jus oneris fireendi, the right of supporting a building upon another’s wall; jus signi immittendi, the right to project a roof over another’s ground. W Morey, supra note 47, at 291.
53. W. Morey, supra note 47, at 292; R. Sohm, supra note 46, at 259; P Van Warmelo, supra note 47, at 107.
54. Institutes 2.4; Digest 7.1.1.
55. Originally the usufruct was restricted to things which could not be consumed by use, such as homes, slaves, and cattle. Institutes 2.4.2. Subsequently, however, quasi usufructs in consumable objects were permitted if sufficient security was given to ensure that the object would be restored in kind or money. W Morey, supra note 47, at 292.
56. W Morey, supra note 47, at 293.
58. Under Roman law servitudes were recognized as incorporeal rights separate from ownership in the property subject to the use. Under early Roman law servitudes could not be
one important respect from the English common right. Whereas
the Roman servitude could be created only if the land owner in-
tended to do so, the English common right existed despite the pri-
ivate owner's intent because of long established usage and the very
nature of the common right.\textsuperscript{59}

The Roman law of public or common rights focused primarily on
the sea and the seashore because the Roman civilization was al-
most completely dependent on navigation for economic survival.\textsuperscript{60}
It is unclear whether Roman law classified the sea and seashore as
\textit{res publicae} (public property), \textit{res omnium communes} (property
incapable of physical control), or \textit{res nullius} (unoccupied prop-
erty). The primary legal authority on public common rights and
the status of the sea and the seashore was Justimian's work, the
\textit{Institutes}. In a now famous passage, Justimian declared:

\begin{quote}
Things common to mankind by the law of nature, are the air,
running water, the sea, and consequently the shores of the sea;
no man therefore is prohibited from approaching any part of the
seashore, whilst he abstains from damaging farms, monuments,
\end{quote}

acquired by prescription because they were incorporeal and therefore incapable of dominion
and control. In practice, however, individuals continued to exercise the use allowed by a
servitude, even though they actually did not hold the servitude. Eventually, Roman law
recognized this exercise as a form of quasi possession which was protected by the law of
prescription (\textit{praescriptio longi temporis}) after a period of continued use. The user was
considered to be a servitude holder after 10 years if the owner of the property was present
or after 20 years if the owner was absent. M. Kaser, \textit{Roman Private Law} 120 (2d ed. 1968);
P Van Wamele, \textit{supra} note 47, at 110.

59. See T. Smolenc, \textit{supra} note 21, at 21-22.
60. See H. Jolowicz \& B. Nicholas, \textit{supra} note 42, at 75-78. Deveney, \textit{Title, Jus Publicicum, and the Public Trust: An Historical Analysis}, 1 Sea Grant L.J. 21 (1976); Note,

Roman law defined the shore as including "all that tract of land; over which the greatest
winter flood extends itself." \textit{Institutes} 2.1.3; \textit{Digest} 50.16. This definition was broader than
the common law definition and therefore subjected a greater area of land to public use. Lord
Hale defined the shore as the land between the common high water and low water mark. M.
Hale, \textit{De Jure Mars et Brachiorum e jusdem}, reprinted in S. Moore, \textit{A History of the}
\textit{Foreshore and the Law Relating Thereto} 370, 378 (3d ed. 1888) [hereinafter paginated
to S. Moore]. The Virginia courts adopted the common law definition of the shore. In
French v. Bankhead, 52 Va. (11 Gratt.) 136 (1854), the Virginia court held that the shore
was "that space alternatively covered and left dry by the rise and fall of the tides, being the
space between high and low water marks." \textit{Id.} at 160. The United States Supreme Court
also adopted the common law definition of the shore. \textit{See} Borax Consolidated, Ltd. \textit{v. Los
edifices, etc., which are not in common as the sea is.\textsuperscript{61}

Various parts of this passage have perplexed scholars of Roman law. The phrase “things common to mankind,” for example, has fostered conflicting interpretations.\textsuperscript{62} The phrase apparently reflected the influence of philosophy on Roman law and originated in the works of Marcian. According to Marcian, the earth produced its fruit and bounty for the benefit of all, at least until greed and civilization eventually caused the development of a private property system. In Marcian’s opinion, communal ownership imposed a moral duty not to deprive others of essential things, especially “elemental” or common things. The air, flowing water, and the sea were included as things common to all because they were difficult to possess or control. The seashore also was included, probably because it was considered an arm of the sea.\textsuperscript{63}

The phrase “no one is prohibited access to the shore” also is unclear. One commentator suggests that it should be interpreted in light of the various remedies available for injury to property interests.\textsuperscript{64} Under Roman law a trespass action lay only if a person broke a close of another or willfully interfered with another’s property\textsuperscript{65} The action did not cover property damage indirectly inflicted when an individual exercised his rights. It therefore seems that a person could prohibit access to the sea from across his upland without being liable in trespass.\textsuperscript{66}

Various prohibitory and restitutionary injunctions (or interdicta) also were available to protect against injury to public rights in waters and the shore.\textsuperscript{67} Many of these injunctions were available to any citizen, regardless of whether he claimed actual

\textsuperscript{61}INSTITUTES 2.1.1. It must be remembered that both the INSTITUTES of Justinian and the Digest were not legally binding under the Roman system. They represent the works of various scholars interpreting Roman law.

\textsuperscript{62}See Deveney, supra note 60, at 26 & nn.74-76. The original Latin phrase “res omnium communes” also can be translated as meaning “things common to all.”

\textsuperscript{63}Deveney, supra note 60, at 26-27. The notion that property interests in the shore were severable from those in the sea did not develop in English law until the late sixteenth century. \textit{Id.} at 27. See generally S. Moore, A History of the Foreshore and Law Relating Thereto 1-29 (3d ed. 1888).

\textsuperscript{64}Deveney, supra note 60, at 25.

\textsuperscript{65}W. Buckland & A. McNaIR, Roman Law and Common Law 102-03 (2d ed. 1965).

\textsuperscript{66}See Deveney, supra note 60, at 25.

\textsuperscript{67}See INSTITUTES 4.15. 1-6.
Roman law, however, created an exception for interference with fishing, limiting remedial options to damage actions. These remedies, however, did not afford the public broad protection of most of their rights in coastal resources. Even if an injunction were granted, no penalty existed if the person continually committed the wrong; practically speaking, the only effective remedy was a damage action. Thus, even if the phrase "no one is prohibited access to the shore" was intended as a broad statement of public rights, the lack of effective remedies limited its practical effect.

Another important source of Roman law was the Digest, a collection of the legal works of various scholars. According to the Digest writers, the sea and seashore were common to all under principles of natural law. Consistent with this view, the Digest declared that anything found on the shore became the property of the finder and that no one was prohibited from entering on the shore to fish, provided he did not interfere with existing buildings. The Digest also considered rivers and harbors to be public property under the law of nations, although the river banks were classified as private property subject to the public's right to load and unload cargo, dry nets, and fasten ropes to trees.

The status of the public's property interests in the seashore was not as clearly defined as their interests in river banks. Passages in the Digest suggest that the seashore could be appropriated for personal use. One passage, for example, described the seashore as public only "in the same sense as things which come direct from nature and have not yet passed into the ownership of any one," and not "in the sense that things belonging to the state and pub-

68. For example, interdicts were granted to prohibit a person from: (1) obstructing a public footpath along the bank of a public waterway; (2) building structures on the shore or in the sea that interfered with navigation or docking; and (3) diverting the waters of a public river. Deveney, supra note 60, at 24 & nn.56-69.

69. Id. at 24; see W Buckland & A. McNair, supra note 65, at 420-23; R. Sohm, supra note 46, at 214-16.

70. Deveney, supra note 60, at 24-25.

71. Digest 1.8.2.

72. Id. 1.8.3.

73. Id. 1.8.4.

74. Id. 1.8.5.
Analogizing to "fishes and wild beasts," which "on capture become beyond doubt the property" of the possessor, the same passage concluded that "[w]hat a man has built on the sea-shore will be his." If, however, the structure later was "rased," then the sea-shore "revert[ed] to its original condition and [was] as public as though there had never been a building on it." Thus, the seashore appears to have been res nullius, that is, property not possessed by a specific individual but capable of private ownership through acts of dominion and control. Those who built structures on the shore became the owners of the soil so long as the structure remained.

In conclusion, Roman law afforded the public important public or common rights in the sea, the seashore, and other watercourses. These rights included the right to load and unload cargo, to use the natural products of the sea and shore, to build cottages on the shore, to dry and keep nets on the shore, to navigate in public waters, and to bank vessels. Even some private property was subject to public rights, for although the river banks were privately owned, the public continued to have the right to use the banks for navigation and fishing. So, as early as Roman times, the legal system recognized that privately owned land should not always be under the owner's exclusive control and use.

The Roman system also recognized the economic value of private ownership and control, for the public rights in the sea and shore were not indestructible. Indeed, they appeared to last only so long as either the state did not grant exclusive rights or an individual did not appropriate by occupancy the land subject to the common rights. Grants of exclusive rights in coastal lands and resources were prevalent. There was, however, a reluctance to convey actual ownership of public or common things. Accordingly, any grant ad-

75. Id. 41.1.14.
76. Id.
77. Id.
78. At least one other writer, however, expressed concern that private appropriation should not be to the public detriment. See id. 41.1.50. If the seashore were classified as res publicae instead of res nullius, then this would mean that an individual could not appropriate the shore without authorization. Indeed, any structure built on public land would become public property. Id. 41.1.65.4.
79. Id. at 1.8.5.
verse to public rights was construed strictly.80 Grants often were limited to possessory rights, or, if the common thing was less capable of possession, an exclusive right to obtain possession was granted.81

II. THE DEVELOPMENT OF THE COMMONS CONCEPT IN ENGLAND

As mentioned previously, the commons concept developed in early England as a necessary part of the agrarian economy. It continued to play a vital economic role until the end of the 1700's.82 While the English settlements remained sparsely populated, the only way to effectively use the land was by collective farming and grazing. Over time, those participating in the collective efforts acquired legally recognized rights in the commonly-used land. The commons concept went through several key evolutionary stages in England before it was transplanted into the United States. These stages are discussed below.

A. Historical Development

Evidence exists that, as early as 688, English settlements used an open field system of agriculture, involving a rotating use of common fields, meadows, and pastures.83 After the fall of the Roman Empire, the Roman common or public rights concept gradually fell into disuse in England.84 Settlements placed increasing limitations on the use of common fields, meadows, and pastures. Initially, the right to use common lands was restricted to the people of a particular region in a shire or county. By the time of the Norman conquest in 1066, the right to use common land generally was limited to the people of a particular manor, vill, or borough, and sometimes even to a particular class of inhabitant within a manor, vill, or borough.85 Besides limiting the size of the class of users, restric-

80. See Deveney, supra note 60, at 32 n.17.
81. Id. at 31-33. For example, an exclusive right of fishery could be granted.
82. W. Hoskins & L. Stamp, supra note 24, at 44.
83. Royal Report, supra note 26, at 149. Under the open field system, crops were rotated yearly from one open field to another. Usually two fields were used for the same period, while one was left fallow. Also, the fields typically were divided into strips for use by individual villagers. After harvest, the villagers pastured their animals over the fields. Id. at 44.
84. See Note, supra note 60, at 764.
85. Royal Report, supra note 26, at 150-51. When, however, waste or common land was
tions also limited the manner in which a common right could be exercised. For example, quotas were placed on the number of animals that could be grazed on certain land.86

When William the Conqueror assumed control of England in 1066, he reshaped England’s property system by developing a land-holding system that served as the basis of the government, the military, and the economy. The King declared himself to be the fee owner of all lands in England. He held these lands in his capacity as sovereign and had the power to grant exclusive rights in them, as well as in the sea, the foreshore, and other navigable waters. The King then granted, or enfeoffed, land to his favorite nobles in return for their promise to perform tenures or services previously agreed upon. These nobles, called tenants in chief or tenants in capite because they held directly of the King, in turn conveyed parts of their lands to nobles of lesser rank in exchange for the performance of tenures. As this infeudation continued, a pyramid structure developed with the King at the top.87

86. Id. at 151. These quotas were referred to as “stints” and took several forms. The commoners each would agree to a stint determined generally by farm size. The first form of stinting, called the rule of “couchant and levant,” involved limiting the number of animals that might be pastured on the commons to those that the farmer could feed during the winter months. In more populated areas of England, however, the stint became a fixed number of animals per yardland or virtgate (usually 24 to 32 acres). Id.

87. Tenures were classified as free or unfree. Free tenures involved the performance of certain services agreed upon in advance when the tenurial relationship was created. The free tenures included the following: (1) tenure by knight service, the most honorable of tenures, originally required the tenant to provide armed knights to the lord, but later substituted a monetary payment for the duty of actually providing able-bodied men; (2) serjeanty tenure involved an obligation to perform personal services for the crown ranging from participating in ceremonies of state to performing menial services such as supplying goods to the lord; (3) frankalmom tenure was a tenure used when land was given to a church, religious body, or ecclesiastical official in return for religious services, such as saying masses; and (4) free and common socage involved providing either a fixed and definite quantity of agricultural products or a monetary payment to the lord. In contrast to the free tenures, the unfree tenures involved the performance of services not clearly defined and dependent on the will of the lord. Those that held land by unfree tenure were subject to the lord’s arbitrary command. 1 R. MINOR, supra note 31, § 6; C. MOYNIHAN, supra note 32, at 1-27; see F POLLOCK, supra note 25, at 53-79. The only tenure that ever existed in the United States was free and common socage, and even that tenure had lost its most burdensome aspects by the time America was colonized. 1 R. MINOR, supra note 31, § 15.
Often a lord within the upper part of the pyramid would form “an agricultural, governmental and fiscal unit composed of lands held by the lord and by tenants of different classes.” This unit, called a manor, typically contained several different kinds of lands. First, a manor contained the lord’s demesne lands, that is lands held by the lord in fee for his own benefit and not conveyed to a feudal tenant. These lands, which were subject to the lord’s exclusive control, included lands on which the manor house stood, as well as lands within the manor that were used for farming, grazing, or other purposes directly benefiting the lord. Second, some lands were held of the lord by a freehold tenant, that is, a tenant who had been conveyed seisin and therefore had an ownership interest in the land, but who owed specific services to the lord. Third, a manor contained common fields, meadows, and pastures that might have been used either by the freehold tenants or the nonfreehold tenants. If the freehold tenants had the right to use a common field or meadow, then they were vested with the fee or ownership interest, but they continued to hold of their lord. If, however, nonfreehold or customary tenants had the right to use the common lands, then the lord held those lands in fee, subject to the common rights of the tenants. This usually meant that the commoners had the right of first use. Finally, a manor contained waste lands, which were vested in fee in the lord, holding of the Crown, but which were subject to certain common rights. Once again, the lord usually had the right to use the land for grazing and taking timber, minerals, and other products from the waste land, but only after the commoners exercised their common rights.

88. C. Moyhnan, supra note 32, at 15.
89. Seisin was a hybrid creature, blending the concepts of possession and ownership. A party who had seisin possessed the land in a manner that also signified the party's ownership interest in the land. See id. at 87-92.
90. In contrast to freehold tenants, nonfreehold tenants received only a possessory interest, not an ownership interest, in the land. In other words, the lord did not convey seisin to the tenant who held by unfree tenure. See notes 87 & 89 supra. Another important difference between the freehold and nonfreehold tenants was the remedial options available to each. Whereas the freehold tenant could seek redress in the King's courts, the nonfreehold tenant was limited to the manorial courts of his particular lord. C. Moyhnan, supra note 32, at 11.
91. Royal Report, supra note 26, at 66, 169 app.
92. Id. at 169. For a general discussion of the manorial organization, see id. at 168-71. During the feudal era, important differences developed between common lands and waste
As the population of English settlements increased, they expanded onto lands that were previously waste or common. Often the lord of the manor appropriated the lands for his private use. Fields, meadows, and pastures, however, were not the only lands taken for private use, for the lords or the Crown often also appropriated the forests, the seashore, and even the fisheries. Combined with the settlements' encroachment onto waste and common lands, this private appropriation drastically reduced the lands and coastal resources available for general public use and consequently had a serious impact on the peasant economy.

The tremendous public inconvenience caused by the Crown and upper nobility contributed to the adoption of the Magna Carta. Although the Magna Carta did not expressly recognize public rights in coastal resources, it did curb the Crown's infringement of lands. First, severalty rights could attach to common lands, but not to waste lands. That is, an individual could have the exclusive right to use certain common lands until after the harvest, at which point the land could be used by all commoners. If severalty rights attached to common lands, they technically were called "communable." See note 28 supra. Waste lands, however, could not be used exclusively by an individual. Second, the two types of land differed in their physical attributes. Whereas common lands typically were arable fields used for cultivation and grazing, waste lands essentially were uncultivated and worthless. W Hoskins & L. Stamp, supra note 24, at 26, 53; Royal Report, supra note 26, at 152, 168-69.

The English inclosure statutes eventually altered the definition of waste by introducing the term "superfluous waste" to refer to the common lands not needed or used by the commoners for pasture or for the lawful exercise of any other common right. Under English law, the lord who held title to lands subject to common rights could inclose any part of the commons constituting superfluous waste without the commoners' consent. Although the legal effect of inclosure usually extinguished common rights, some rights, like estovers and turbary, could not be destroyed, and the lord, if he inclosed superfluous waste lands, had to allow the commoners access to exercise these rights. Statute of Merton, 1 D. Pickering, The Statute at Large, 27 ch. 4 (Cambridge 1762) [hereinafter cited as Pickering's Statutes]; The Commons Act of 1285, 13 Edw. 1, ch. 46; see Royal Report, supra note 26, at 69, 172-74. Under the inclosure statutes, a commoner holding a strip of common land by freehold tenure also had the right to inclose or "approve" that strip of common land. If he chose to do so, however, his inclosure not only destroyed the common rights of others in his strip, but also terminated his common rights in the remaining common land. Statute of Merton, 1 Pickering's Statutes, supra, at 27b ch. 4; The Commons Act of 1285, 13 Edw. 1 ch. 46; see Royal Report, supra note 26, at 172.


93. Deveney, supra note 60, at 39; W Hoskins & L. Stamp, supra note 24, at 8.
property rights by establishing the principle that the Crown was subject to the people. Further, the document contained provisions that the common law subsequently interpreted as protecting specific public interests in watercourses. Chapter 33, for example, provided that “[a]ll kydells [weirs] for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore.” Apparently adopted to prevent the nobility from severely impeding river navigation by placing weirs, or permanent fishing structures, in the waterways, the provision gave the people a legal foothold in their struggle to protect their rights from encroachment by the lords. Seizing upon the provision’s general intent to facilitate navigation, the common law construed Chapter 33 broadly and applied the prohibition to all obstructions, even those not technically weirs. Perhaps more important, the common law also extended the provision’s protective arm to several fisheries.

Chapter 16 of the Magna Carta also dealt with public rights in watercourses. It provided: “No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were want to be in his time.” According to Lord Hale, this provision referred to the King’s practice of putting salt and fresh rivers “in defenso for [his?] recreation; that is, to bar fishing or fowling in a river till the king had taken his pleasure or

94. The Articles of the Barons, the schedule of demands presented to King John that formed the basis of the Magna Carta, did not include the clause “except upon the seashore” in the provision for the removal of kydells from rivers. W. McKECHNIE, MAGNA CARTA 489 (2d ed. 1914). The clause does appear in chapter 33 of the original Magna Carta, signed in 1215, and in chapter 23 of the revised Magna Carta of 1225. Id. at 343, 503.

95. W McKECHNIE, supra note 94, at 343; Note, supra note 60, at 766.

96. Note, supra note 60, at 766-77; see Lord Fitzhardinge v. Purcell, [1908] 2 Ch. 139, 167; Attorney General v. Emerson, [1891] App. Cas. 649, 654 (H.L.). Many commentators disagree with this broad interpretation. E.g., Deveney, supra note 60, at 39. Lord Hale interpreted the provision as imposing a limitation on rights in the shore, arguing that the exception recognized, at least implicitly, the alienability of land between the high and low water mark. M. Hale, supra note 60, at 389.

97. 1 PICKERING’S STATUTES, supra note 92, at 7 ch. 16. Chapter 16 was adopted from chapter 47 of the original Magna Carta, which provided: “All forests that have been made such in Our time shall forthwith be disafforested; and a similar course shall be followed with regard to riverbanks that have been placed in defence by us in our time.” W. McKECHNIE, supra note 94, at 435.
advantage of the writ .  

\textit{de defensione ripariae.}^{98} \textsuperscript{98} The writ enabled the King to force riparian owners to bear the costs of repairing roads and bridges so that the King could effectively use the waters when he visited.\textsuperscript{99} Once again the common law went beyond the immediate circumstances surrounding the adoption of the provision and interpreted the chapter as a ban against granting exclusive fisheries in tidal waters.\textsuperscript{100}

The Magna Carta represented a turning point in the development of common rights because the common law seized upon the spirit of the movement leading to the adoption of the Magna Carta to interpret its provisions broadly. The legal scholar Bracton added even more impetus to the directional change of the evolutionary process. In his thirteenth century work \textit{De Legibus et Consueto Diniibus Angliae}\textsuperscript{101} Bracton relied on the Roman concept of common property as explained in Justianian's \textit{Institutes} to declare the sea and seashore to be common to all. He also used Roman law as support for recognizing various public rights, including the common right of fishing in the rivers and ports, the right to use the seashore for building cottages and for drying nets, and the right to use river banks for banking and towing.\textsuperscript{102} Although Bracton sometimes restated the Roman law inaccurately, his explanation of common rights eventually became authoritative.\textsuperscript{103}

The increased recognition of common or public rights was reflected not only in the Magna Carta and the works of Bracton, but also in acts of Parliament. The Statute of Merton, passed in 1236, was the first state regulation of common lands. It provided that a

\begin{itemize}
  \item [98.] M. Hale, supra note 60, at 373.
  \item [99.] S. Moore & H. Moore, The History and Law of Fisheries 6-18 (1903).
  \item [102.] Id. at 40.
  \item [103.] Bracton, for example, differentiated between public and common things by stating that under Roman law public things belonged "to all people for the use of mankind," whereas common things belonged "to all living things." Id. Yet this distinction did not accurately reflect Roman law. See text accompanying notes 50-63 supra. See generally 2 F Pollock & F Maitland, The History of English Law 138-40 (1895).
\end{itemize}
lord could enclose common lands and therefore extinguish common rights only if sufficient common lands remained for the freehold tenants. Another commons act passed in 1285 placed the burden of proof on the landowner to establish that sufficient land remained for common pasture.

In the fourteenth century the plague alleviated the pressure on common lands, causing a retreat from many common and waste lands already privately appropriated. This pressure was not revived until the late 1500's when the population reached preplague levels and caused a renewed interest in common rights, especially in the foreshore. In an attempt to regain power over the seashore, Queen Elizabeth established a commission in 1571 to determine the Crown's interests in various tidal areas. After the commissioners concluded that the land belonged to the Queen, she granted to Digges, one of the commissioners, by patent dated July 25, 1571, all of her fee interests in such lands as he could recover, including mesne profits, within seven years. In response, Digges developed the prima facie theory, which he published in a pamphlet entitled "Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof." Under that theory Digges maintained that

104. Statute of Merton, 1 PICKERING'S STATUTES, supra note 92, at 27 ch. 4. Inclosure literally meant putting fences around land, but in the eighteenth century it also signified a means of fencing a commons to extinguish common rights. See ROYAL REPORT, supra note 26, at 173; note 135 & accompanying text supra.

105. The Commons Act of 1285, 13 Edw. 1, ch. 46. At common law, the owner of land incumbered with common rights could not inclose the land because common rights attached to the whole parcel and could not be severed from any part. E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 85 (1797). A conflict therefore arose between manor lords who desired to inclose the common to put the land to more productive use and commoners who needed the land for pastures. The Statute of Merton circumvented the common law rule and balanced the competing interests of the owners and tenants. Statute of Merton, 1 PICKERING'S STATUTES, supra note 92, at 27 ch. 4. The statute permitted owners to inclose wasteland provided sufficient pasture was left for the tenants. Id. at 27. A subsequent act, the Statute of Westminster, expanded the owner's authority to inclose commons. Statute of Westminster, 1 PICKERING'S STATUTES, supra note 89, at 225 ch. 46. Whereas under the 1235 Act the owner could inclose only land incumbered with common of pasture appendant, the 1285 Act permitted the inclosure of neighboring commons as well. Id. at 226. See also ROYAL REPORT, supra note 26, at 172.


107. T. Digges, Arguments Prooving the Queenes Majesties Propertye in the Sea Landes, and Salt Shores Thereof, and That No Subject Cann Lawfully Hould Eny Parte Thereof But By The Kinges Especiall Graunte, reprinted in S. MOORE, supra note 93, at 185-211.
those things which by natural law are common to all were now by common law the Crown's property.\textsuperscript{108} For "it is a sure maxim in the common law that whatsoever land there is within the king's dominion whereunto no man can justly make property it is the king's by his prerogative."\textsuperscript{109} Title to the shore, therefore, remained in the Crown despite previous grants of tidal lands, unless those grants contained language specifically granting the foreshore to the grantee. An individual could not acquire title to the shore in any other manner, such as by usage or prescription.\textsuperscript{110}

As support for his theory, Digges relied primarily on Roman law and Bracton's work. He reasoned that reclaiming lands subject to common use under natural law did not increase the powers and rights of the Crown because the Crown already had jurisdiction as sovereign over such lands. Under the Roman legal principle of \textit{occupanti}, anyone could become the owner of things which natural law declared to be common to all by taking possession of them. This legal rule, however, applied only where the land was uninhabited or within a King's territorial limits. Yet, under the common law tenure system, the Crown held all land either mediately or immediately, and therefore, no land could be acquired by occupation.\textsuperscript{111} Although the courts initially rejected the prima facie theory,\textsuperscript{112} they eventually yielded to royal pressure and accepted the theory, at least until Charles I was beheaded for, among other reasons, "the taking away of men's right under colour of the King's title to land between the high and low water marks."\textsuperscript{113}

The prima facie theory did not receive serious attention again until the middle of the seventeenth century, when Lord Hale wrote his famous treatise \textit{De Jure Maris et Brachiorum Ejusdem} (Con-

\textsuperscript{108} \textit{Id.} at 185.

\textsuperscript{109} \textit{Id.} at 187.

\textsuperscript{110} \textit{Id.} at 188-90 (author's translation).

\textsuperscript{111} \textit{Id.} at 202-04.

\textsuperscript{112} For example, in an action brought by Digges in 1571 to recover 50 acres of land covered by the sea, "which are and of right ought to be in the hands of the lady the Queen by reason of her prerogative," judgment was given for the defendants. \textit{Id.} at 216. The courts reached similar results in the following: (1) the Attorney General entered a \textit{nolle prosequi} in an action against Hebblethwait and others to recover a beach; and (2) the court decided that the land between the flowing and reflowing of the sea belonged to the manor's lord in an action against Hamond for 120 acres of marshland. \textit{Id.} at 217, 219-24.

\textsuperscript{113} S. Moore, \textit{supra} note 63, at 310.
cerning the Law of the Sea and its Arms). Although Hale adhered to the basic premises of Digges' theory, he partly disagreed and added new concepts to the theory Hale maintained, like Digges, that title to the foreshore and lands under water was prima facie in the Crown. 

Unlike Digges, however, Hale argued that individuals could acquire proprietary interests in tidal lands and waters by grant, prescription, or custom. As support Hale cited chapter 33 of the Magna Carta, which excepted the seashore from the prohibition against obstructing navigation. Thus, although title to tidal lands and waters was prima facie in the Crown, an individual could, for example, acquire by usage a right to a several fishery, "exclusive of that common liberty which otherwise of common right belongs to all the king's subjects." A private proprietary interest, however, could not be exercised in a manner creating a nuisance to the remaining public rights, such as navigation, "for the jus privatum, that is acquired to the subject either by patent or prescription, must not prejudice the jus publicum wherewith public rivers or arms of the sea are affected for public use." 

In another work, Hale further refined his theory, increasingly disagreeing with Digges. Whereas Digges based his theory primarily on the Crown's private proprietary rights, Hale divided interests in coastal resources into three possible categories: (1) the jus regum, which encompassed the police powers of the sovereign, or the Crown's power as sovereign to manage the kingdom's resources for the public safety and welfare; (2) the jus privatum, which included private proprietary interests in property; and (3) the jus publicum, which encompassed the interests of the general pub-

114. See generally M. Hale, supra note 60, at 370-413. Hale defined the shore as "that ground that is between the ordinary high-water and low-water mark." Id. at 378.

115. Id. at 384-406. For example, Hale stated that while there was no common right to moor ships on adjacent shores such a right could be acquired for towing by custom or usage. Hale characterized the right as an easement when it was acquired for the commonwealth's benefit, and as a servitude when acquired for the benefit of individuals. M. Hale, A Narrative Legall and Historicall Touchinge the Customes, reprinted in S. Moore, A History of the Foreshore and the Law Relating Thereto 319, 344 (3d ed. 1888) [hereinafter cited as M. Hale, A Narrative] [hereinafter paginated to S. Moore].

116. M. Hale, supra note 60, at 388-89; see text accompanying notes 94-96 supra.

117. Id. at 386.

118. Id. at 389-90. Hale defined an arm of the sea as a watercourse affected by the ebb and flow of the tides. Id. at 378.

119. M. Hale, A Narrative, supra note 115.
Hale explained the interaction of all three categories by noting that any private proprietary interests held by the King under his _jus privatum_ were subject to appropriate public interests in the _jus publicum_. If the _jus privatum_ was in an individual, then the King was defender of any public rights existing in the privately held land under his _jus regium_.

Hale's work was important for several reasons. First, his work introduced the concept of the _jus publicum_ into English law. Although the exact nature of the _jus publicum_ remained unclear, the concept meant at least that no one, not even the Crown, could destroy or alienate certain public rights. As more distinctions were made between the Crown's private and public status, the concept of _jus publicum_ eventually developed into the public trust doctrine. Hale, however, did not recognize the concept of the pub-

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120. Id. at 327-47.
121. See id. at 355.
122. One commentator interpreted Hale as limiting the _jus publicum_ to the right of navigation. Consistent with this narrow interpretation, the same commentator argued that, under Hale's approach, there was no public right of fishing. At best, the public had a liberty "revocable" by the King. As support for this interpretation, the commentator noted that Hale spoke of the King as having a "primary right of fishing," yet described the common people as having merely a "liberty of fishing." Deveney, _supra_ note 60, at 46-47. The relevant passage provided:

> But though the king is the owner of this great wast [the sea], and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.

M. Hale, _supra_ note 60, at 377. In the quoted passage, however, Hale referred to the liberty of fishing as a "publick common of piscary," which can be referring only to the common right of piscary that developed during feudal days. This common right was a property right or interest. See text accompanying notes 129-130 _infra_. Further, that the public common of fishing could be destroyed by an exclusive grant from the King does not mean that it cannot be classified as a right. Historically, common rights have been "revocable" in the sense that they usually could be appropriated by a private party, whether through grant or usage. Finally, Hale's description of the King's interest as a "primary right of fishing" and the public's interest as a "liberty of fishing" does not necessarily mean that the public had no right of fishing. The different terminology might have been used by Hale to emphasize that the King had title to the seas and the fish in it, while the public had only a common right of fishing. Interpreted in this manner, the terminology is entirely consistent with the definition of a _common right_ as a right to use the land or waters of another.

123. See Deveney, _supra_ note 60, at 38-39.
lic trust, for he did not maintain that the Crown held title to certain lands in trust for the public and therefore could not alienate those lands. Rather, his position was that title was subject to the *jus publicum* regardless of who held title. It can be argued that the King had a "trust" duty to preserve the *jus publicum* because he was the defender of public rights under his *jus regium*. Under Hale's theory, however, this duty arose out of the *jus regium*, out of the duties that a sovereign owed to its people, and not out of the *jus publicum*.124

Second, and perhaps most important, the interests encompassed by the *jus publicum* were in a sense indestructible. Not even the Crown could authorize a direct nuisance to the *jus publicum*.125 Further, if the Crown granted an exclusive fishery or conveyed title to tidal lands to an individual, that party took subject to the *jus publicum*.126

Finally, by adopting the prima facie theory, Hale increased the area under the King's control. Under Hale's modified version of Digges's theory, the Crown presumptively held title to all shores and submerged lands. Ultimately, after the development of the public trust theory, this proved to benefit the public.

B. *Summary of the Legal Theory Underlying English Commons*

By the American Revolution, the common rights concept was firmly established in the English common law. The legal theory underlying the commons concept, however, was not clearly defined. What was clear was that before the Elizabethan era the common law presumed that the riparian owner held the foreshore as owner to the extent that he occupied and used it.127 Digges's attempt to change that presumption with his prima facie theory did not begin to gain widespread acceptance until the middle to late 1600's.128 As

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126. M. Hale, *supra* note 60, at 389-90. According to Hale, fresh water rivers also were subject to common or public use for transportation. These rivers were prima facie *publici juris*, common highways for man and goods, and therefore all navigational nuisances were punishable by indictment. *Id.* at 374.
128. The courts expressly recognized that title to the land between the high and low water mark was prima facie in the Crown. *See* Earl of Salisbury v. Joyn, 84 Eng. Rep. 992
restated by Hale, that theory declared the Crown to be the prima facie owner of tidal lands and waters. Even the Crown's proprietary interest, however, was subject to the *jus publicum*, or public rights, including at a minimum the right of navigation. Hale, however, did not state that the Crown could not alienate those lands and waters held for the public. The concept of malienable public trust property developed later, as the private and public status of the King was more clearly delineated.

Regardless of whether the English common law considered various common rights as malienable parts of the *jus publicum*, they did exist in agrarian land as well as in tidal lands. Under the English system common rights were considered property interests and were classified according to the subject matter of the use.129 The *common of piscary*, for example, gave a party the right to fish in another's waters. This common right has been applied to two important situations. First, the right has referred to the public's "common fishery," or to the public's right to fish in unappropriated public waters. Second, the right has been interpreted as including the common of fishery, which usually arose when two owners of exclusive fisheries permitted each other to fish in their respective waters, or when an owner of an exclusive fishery permitted third parties to fish in his waters.130


129. E.g., 6 Halsbury's Laws of England §§ 509, 547, 576, 579, 581 (4th ed. 1974); see 1 R. Minor, supra note 31, §§ 72, 73. The most important common right apparently was the right of pasture, followed by the right of turbary, and then estovers. Royal Report, supra note 26, at 160.

130. Some commentators define the common of piscary more narrowly, limiting it to the right to fish in the private waters of another. 1 R. Minor, supra note 31, § 73, at 105. Fisheries generally may be classified as exclusive or nonexclusive, with the common right of fishing falling into the latter category. Exclusive fisheries, in turn, may be either corporeal or incorporeal. A corporeal fishery grant conveyed the title to the water and soil as well as the *profit a prendre* to fish in the granted waters. Exclusive corporeal fisheries most frequently were conveyed in grants from the King to manor lords and monasteries. Grants of incorporeal fisheries conveyed only the right to fish in the described waters and did not transfer title to the waters. The two major forms of incorporeal fisheries were a franchise or license from the Crown to fish exclusively in some portion of waters held by the Crown and grants by the manor lord to his tenants to fish in the manorial waters. See generally J. Angell, Law of Watercourses 70-85, 324 (6th ed. 1869).

Other important common rights included the common of pasture, the common of turbary,
Common rights were created in a variety of ways. Sometimes, for example, the lord of a manor voluntarily gave his tenants common rights, or the tenants and the lord agreed on common rights. In other instances parts of waste lands that never were enclosed eventually were used in common.\textsuperscript{133} Management of common lands also varied, usually being placed in the lord of the manor who governed conflicts through his courts. As the manor system disintegrated and the manor courts disappeared, management sometimes occurred in village meetings.\textsuperscript{132} Eventually Parliament assumed full control over the management of common lands and rights, adopting numerous statutes regulating the exercise of common rights.\textsuperscript{133}

and the common of estovers. The common of pasture, perhaps the most important of the common rights under the feudal system, was the right to feed cattle, horses, and other animals on the land of another. This common right often existed as an incident of a grant involving the military tenure. The common law apparently implied this right from land grants made by a lord to tenants to be held in military tenure, reasoning that the tenant would need to pasture his animals on the waste lands of the lord because the tenant's own lands would be arable and therefore used for cultivation. If the common right of pasture arose as an incidence of the feudal grant, it was described as appendant or annexed to the land. The right of pasture also could arise independently of the creation of a tenure by grant or prescription, in which case it would be either appurtenant to the land or a right in gross. 1 R. Minor, \textit{supra} note 31, §§ 71, 72.

The common of turbary was the right to dig peat or turf out of another's soil for use as fuel in the commoner's house, whereas the common of estovers allowed a commoner to cut and take wood from another's land. A person having the common of estovers generally could cut timber for use as fuel (fire-bote), for making or repairing agricultural tools (plough-bote or cart-bote), for repairing the house (house-bote), and for building or repairing fences and hedges (hedge-bote). The common right of estovers must not be confused with the life tenant's right of estovers, which was an exclusive right to make similar uses. 1 R. Minor, \textit{supra} note 31, § 73.

131. ROYAL REPORT, \textit{supra} note 26, at 6, 44-45; \textit{see} notes 88-92 & accompanying text \textit{supra}.

132. ROYAL REPORT, \textit{supra} note 26, at 63-66, 159-66, 178. For a discussion of the factors contributing to the decay of the manor system, \textit{see} id. at 63-65. Although a few manorial courts still exist in England, tenure was abolished in 1922. \textit{Id.} at 65.

133. ROYAL REPORT, \textit{supra} note 26, at 159-66; \textit{see} T. Smolen, \textit{supra} note 21, at 41-43. Parliament enacted several major statutes to regulate the commons. The Inclosure Act of 1845 empowered the Inclosure Commissioners to authorize the inclosure of commons by provisional order upon the application and consent of such persons "interested" in the commons as defined by the Act. Inclosure Act of 1845, 8 & 9 Vict., ch. 118, § 16, 25. The commissioners were required to report the provisional order to Parliament, certifying that the inclosure would be "expedient," "having regard as well to the health, comfort and convenience of the inhabitants where the land proposed to be inclosed is situate," as to "the advantage of the proprietors of the land to which the application relates." \textit{Id.} §§ 3, 27. The inclosure was not final until Parliament confirmed the provisional order by the passage of a
Along with the power to manage the commons came the power to alter the nature and scope of common rights. As history demonstrates, common rights were not immutable, for the party managing the commons often changed the right of use to accommodate the fluctuating needs of a particular manor or village. Sometimes the change was only partial, involving a more restrictive definition of the type of use or class of user. Sometimes, however, the change totally extinguished the common rights. This process of extinguishment, better known under English law as "inclosure," literally involved erecting fences around common lands to destroy common rights and thus redistribute property rights in the land.

Throughout the seventeenth century inclosure usually occurred by private agreement executed among the lord of the manor and his tenants, and frequently was confirmed by the chancery courts. As Parliament assumed greater control over commons, however, inclosure began to be effected by private acts or general legislation. By the mid-1800's only Parliament had the power to abolish common

"Public General Act." Id. § 32.

The Inclosure Act of 1845 was amended by 10 subsequent acts before it was substantially revised in 1876. Schedule to Commons Act of 1876, 39 & 40 Vict., ch. 56. The Commons Act of 1876 changed the criteria for reviewing applications for the inclosure of commons. Inclosure would be permitted only upon proof satisfactory to the commissioners and Parliament "that such inclosure will be of benefit to the neighborhood as well as private interests, and to those who are legally interested in any such commons." Commons Act of 1876, 39 & 40 Vict., ch. 56, § 1.

The Commons Act of 1899 extended authority to regulate commons beyond Parliament and the Inclosure Commissioners to urban and rural district councils. The Act authorized the councils to regulate and manage any common within their district, "with a view to the expenditure of money on the drainage, leveling, and improvement of the common, and to the making of bylaws, and regulations for the prevention of nuisances and preservation of order on the common." Commons Act of 1899, 62 & 63 Vict., ch. 30, § 1(1). The council's regulations were, however, subject to approval and modification by the Board of Agriculture. Id. § 2(4).

The Law of Property Act of 1925 provided that the public had rights of access for air and exercise to any land that was a metropolitan common, manorial waste, borough or urban district common, or any land which at the commencement of the Act was subject to rights of common. Law of Property Act, 15 Geo. 5, ch. 20, § 193(1) (1925). The construction of any building, fence, or other work which would impair the public access to these lands was prohibited without the consent of the appropriate minister. Id. § 194(1).

134. See notes 29, 85-86 & accompanying text supra.

135. ROYAL REPORT, supra note 26, at 173. In contrast to the term "inclosure," the word "enclosure" will be used to signify only that land has been fenced without regard to whether common rights attach to the land. See id. at 23-24.
Parliament's exclusive control of common rights evidences the importance of the commons concept in the English legal system. The concept also was destined to play a significant role in America.

III. THE COMMONS CONCEPT AND PUBLIC RIGHTS IN EARLY AMERICA

Although the commons concept was transplanted from England to colonial America, the concept never was as clearly defined nor as strongly rooted as in England. This difference may be attributable to several factors. First, by the time of the first American settlements in the early 1600's, the English tenure system had disintegrated. The only form of tenure still existing at that point was free and common socage, which required a monetary payment instead of the performance of some act or duty. Second, after their initial battle for survival, the American colonists did not need common lands and rights as did the English. During the early colonial years, of course, the settlers needed to share products obtained from the land and sea to survive, but when the New England and Virginia colonies became self-sustaining this need diminished. Further, resources abounded and there was plenty of land, fish, and game for everybody. In the words of one colonist, "such a bay, river, and a land, did never the eye of man behold, and at the level of the river... are mountains, that promise infinite treasure." Finally, the independent and often rebellious nature of the first settlers served as a catalyst for the development

136. Id. at 161-66.
137. See, e.g., Van Rensselaer v. Radcliff, 10 Wend. 639 (Sup. Ct. N.Y. 1833). The manor system did not develop in America as it had in England because of different political and economic considerations. The colonial governors were reluctant to grant manorial privileges which would reduce their political and judicial power, and the New England environment was better suited for mercantile rather than agricultural industries. In the southern regions that produced agricultural goods, inadequate transportation and marketing systems hindered manor development. See generally S. Kim, LANDLORD AND TENANT IN COLONIAL NEW YORK 3-44, 129-62 (1932). For cases involving the two principal New York manors, Van Rensselaer and Livingston, see Van Rensselaer v. Radcliff, 10 Wend. 639 (Sup. Ct. N.Y. 1833); Livingston v. Broeck, 16 Johns. 14 (Sup. Ct. N.Y. 1819); Livingston v. Potts, 16 Johns. 28 (Sup. Ct. N.Y. 1819); Watts v. Coffin, 11 Johns. 495 (Sup. Ct. N.Y. 1814).
138. 2 F. POLLOCK & F. MAITLAND, supra note 103, at 271.
of a property system based primarily on private ownership.\textsuperscript{140}

Given the basic differences between the English and early American property systems, it is not surprising that the evolution of the commons concept eventually took a slightly different course in the United States. The development of the concept in colonial America will be considered by examining first the factual evidence of common rights and second the underlying legal theory.

A. Early Historical Development

Common lands and rights existed in both the Virginia and the New England colonies. On April 10, 1606, King James I granted "Letters Patent" to Sir Thomas Gates and several others to establish the Virginia colony\textsuperscript{141} These Letters Patent, which comprised the colony's first charter, granted the patentees "all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marshes, waters, fishings, commodities, and hereditaments"\textsuperscript{142} to be held in "free and common soccage."\textsuperscript{143} The charter, which only briefly referred to land grants provided that the King would grant "lands, tenements, and hereditaments" to other individuals nominated by the patentees.\textsuperscript{144} Thus far, no historian or legal scholar has uncovered evidence of grants to private parties.\textsuperscript{145} In addition to the Letters Patent, the King also issued Articles, Instructions and Orders on November 20, 1606. They ordered that Virginia be governed "as near to the common laws of England, and the equity thereof as may be," and that "all the lands, tenements, and hereditaments to be had and enjoyed by any of our subjects [within the colony] shall be had and inherited and enjoyed, according as in the like estates they be had and enjoyed by the laws.

\textsuperscript{140} Unlike settlers in England, settlers in colonial America did not constitute a dependent peasantry. They tended to be absolute owners of the land they worked. As one scholar noted, "[O]ne of the most remarkable circumstances in our colonial history is the almost total absence of leasehold estates." J. Story, Commentaries on the Constitution of the United States 159-61 (1833). The existence of common rights was "uncongenial with the genius of our government, and with the spirit of independence which animates our cultivators of the soil." Van Rensselaer v. Radcliff, 10 Wend. 639, 648 (Sup. Ct. N.Y. 1833).

\textsuperscript{141} 1 Hening's Statutes, supra note 27, at 57-75.

\textsuperscript{142} Id. at 59.

\textsuperscript{143} Id. at 66.

\textsuperscript{144} Id. at 65-66.

\textsuperscript{145} A. Embrey, supra note 27, at 220.
within this realm of England."\textsuperscript{146}

On May 23, 1609 the Crown issued a second charter which further enlarged and explained the first, and which incorporated the patentees into one body called the London Company. Like the first, this charter granted the patentees, among other rights and interests, all lands, soils, havens, ports, rivers, waters, fishings, commodities, jurisdictions, royalties, privileges, franchises, and preheminences.\textsuperscript{147} Yet the charter authorized the London Company to grant "portion[s] of lands, tenements, and hereditaments" only to individuals nominated and approved.\textsuperscript{148} The second charter also clarified the status of persons born in Virginia by declaring them to have all the liberties and immunities as "natural subjects."\textsuperscript{149} Perhaps most significant, the charter committed the colony's government to the Company.\textsuperscript{150}

After the second charter was issued, the Company published a pamphlet entitled "Nova Britannia" which explained various aspects of its operation in the New World. More specifically, the Company defined an "adventurer" as a person who adventured his money in the colony and a "planter" as a person who personally came to the colony to live. Additionally, the pamphlet provided that the adventurers were to hold their joint stock for seven years from the second charter's issuance and that the planters were to apply the fruits of their labors for the joint stock's benefit for the same seven-year period. At the end of seven years, the lands were to be divided among the adventurers and planters, with each receiving fifty acres per adventure.\textsuperscript{151}

During the first few years of the Jamestown settlement, the settlers faced formidable obstacles. Disease and fights with the Indians seriously depleted the number of settlers, and the settlement almost was abandoned in 1610. Although the settlement became more stable by 1612, conditions were serious enough to cause Deputy-Governor Dale and his council to build public works and to set

\textsuperscript{146} ~ 1 Hening's Statutes, supra note 27, at 67-69.
\textsuperscript{147} ~ Id. at 80-89.
\textsuperscript{148} ~ Id. at 89.
\textsuperscript{149} ~ Id. at 95.
\textsuperscript{150} ~ Id. at 91-92. The charter also was important because it was the first form of "popular" or representative government in America. A. Brown, supra note 27, at 74.
\textsuperscript{151} ~ 1 P Force, Force's Tracts No. 6, at 1-28 (1835).
aside "common" or public gardens for hemp and flax. This apparently is the first reference to common lands in the colonial documents. Dale's plan seemingly worked well, for in 1619 the Michaelmas quarter court praised him for "set[ting] up the common garden" and providing the settlement with a "standing revenue."

In 1616 His Majesty's Counsel for Virginia published a report on the colony, describing it as a "flourishing state," which now included settlements at several different sites. The report attributed the colony's success partially to Dale's good management. In addition to setting up common gardens, Dale in part abandoned the idea of joint stock, or common property, and authorized some private enterprise. For example, he permitted settlers to own whatever they could raise on three acres of Company land. The report also stated that the Company was to make its first division of land among the planters and adventurers. One historian described this event as "the first establishment of a fixed property in soil, fifty acres of land being granted by the Company to every freeman in absolute right."

Thus, by 1616-1617, it appears that the Virginia colony adopted to a significant degree the concept of common or public lands. Although settlers usually cultivated their own private gardens, they also were required to work the common gardens. Crops produced from the common gardens were used for the settlement's benefit. In addition, settlers arriving at the Company's expense had to provide seven years of service to the Company. This service usually involved working Company lands, with half of the profits going to the Company. Colony officers even received designated public lands as compensation, which apparently were relinquished at the end of their term and passed on to successors. Servants or tenants of the colony worked these lands. For example, in 1620 when Sa-

152. A. Brown, supra note 27, at 150.
154. A. Embrey, supra note 27, at 221.
155. Id. at 221; see generally A. Brown, supra note 27, at 225-27.
156. C. Campbell, History of the Colony and Ancient Dominion of Virginia 116 (Philadelphia 1860).
muel Argall arrived to assume his post as principal governor, Governor Yeardley "delivered to him a portion of public land called the Company's garden."\[158\]

On November 18, 1618, the London Company issued a document entitled "Instructions to Sir George Yeardley"\[159\] Better known as the Great Charter of 1619, the document set forth a plan for the colony's management and development that became the basis of Virginia's land system until the Revolution. The Great Charter set up a central colonial government, giving each town or plantation the right to elect two burgesses to the colonial legislature, the General Assembly. The Charter instructed the Virginia colonial government to establish four principal cities or boroughs: James Town, Charles City, Henrico, and Kiccotan.\[160\] Within each of these boroughs public land was to be set aside "for a further ease to the Inhabitants of all taxes and contributions to support and for the Entertainment of the particular magistrates and officers."\[161\] For example, the Great Charter ordered that three thousand acres of governor's land be set aside in James Town for the use and support of the present and each succeeding governor. The lands were to consist of "freed grounds [worked] by the common Labour of the people set thither at the Company's Charges."\[162\] Additionally, the Great Charter directed that three thousand acres of Company lands be set aside in each borough for the support of other officers. Like the governor's lands, the Company lands were to be worked by tenants transported to the colony "at the common charge of the company."\[163\] Fifty percent of the profits derived from the governor's and Company lands was allocated to the tenants occupying the lands, twenty-five percent to the Company, and the remaining twenty-five percent to the appropriate official. Not all of the Company lands, however, could be occupied and worked by Company tenants, for under the instructions, the colony always had to reserve "a sufficient part" of the Company lands "for the securing

158. Id. at 253.
160. Id. at 156.
161. Id. at 158.
162. Id. at 155.
163. Id. at 155-57.
and wintering of all sorts of Cattle which are or shall be the pub-
lick stock and store” of the Company.\footnote{164}

Besides setting aside governor’s and Company lands, the Great
Charter also provided that each borough must allot one hundred
acres of glebe land “toward the maintenance of ministers” and
fifteen hundred acres of land “to be the common Land of the
Borough to be known and called by the name of the city’s or
Borough’s Land.”\footnote{165} Additionally, the borough of Henrico was to
set aside ten thousand acres for the establishment of a college.\footnote{166}

Unlike the Company and governor’s lands, the common lands were
to be worked by settlers or planters, persons who paid their pas-
sage from England but who had not bought London Company
shares. The planters worked for three years, with a fourth of the
profits paid to the Company.\footnote{167} During this period the planter was
deemed to be an “occupier” of the common lands. After the three-
year period had expired, the settler had two years within which to
procure a grant from the appropriate court for the common land
occupied by him. If he failed to do so, he forfeited his right to an
ownership interest and remained an occupier.\footnote{168}

These instructions demonstrate several important points con-
cerning public interests in early America. First, they show that sev-
eral kinds of public lands existed in colonial Virginia: governor’s
lands, Company lands, glebe lands, college lands, and finally com-
mon lands.\footnote{169} Second, they reveal that although each category
served different public purposes, they all shared one characteristic:
each kind of public land had been intentionally set aside by the
London Company for the general public’s use and benefit. Finally,
the instructions show that the common lands were the least perma-
nent of all the public lands. Whereas other kinds of public lands
were to be used over an indefinite time period, the instructions an-

\footnote{164. \textit{Id.} at 156.}
\footnote{165. \textit{Id.} at 158.}
\footnote{166. \textit{Id.} at 158-59. The ancient planters and adventurers received a 100 acre land divi-
dend for the economic and personal risks they bore in residing and investing in the Virginia
colony before it was settled. Subsequent planters and adventurers, who arrived after 1616
and benefited from the earlier settlers’ efforts, received only a 50 acre dividend. \textit{Id.} at 162.}
\footnote{167. \textit{Id.} at 161.}
\footnote{168. \textit{Id.} at 161-62.}
\footnote{169. Embrey appears to define common lands as including governor’s and glebe lands. A.
\textit{Embrey, supra} note 27, at 16.}
ticipated that the common lands would be conveyed after a relatively short time period to the settlers occupying them. Thus, the colony not only had the right to alienate the common lands, but also was to base its decision whether to convey the lands on a standard that closely resembled the Roman principle of *occupanti*.

In 1624 the patent to the London Company was overthrown and the Crown resumed control of the colony. According to historian Alexander Brown, after the demise of the London Company "the public lands passed to the crown and were afterwards parcelled out and granted by patents as other lands." This statement is inaccurate because it implies that the colonists lost all rights and interests in public and common lands. There is ample evidence that common rights existed even after 1625. Although many acts expressly provided for commons, the majority of acts establishing towns and settlements did not contain specific language referring to inhabitants' common rights. Most of the acts, however, contained the following language, or its equivalent:

*And be it further enacted, by the authority aforesaid, That the freeholders and inhabitants of the said town, so soon as they have built upon and saved their lots, according to the conditions of their deeds of conveyance, shall then be entitled to, and have and enjoy, all the rights, privileges and immunities, granted to or enjoyed by the freeholders and inhabitants of other towns erected by act of assembly in this colony.*

170. A. Brown, supra note 27, at 601-03. Technically, the London Company charter never was vacated from the records of the Office of the Rolls because of the ultimely death of James I. Id. at 603. For a description of the state of the colony in 1624 when it was returned to the King, see id. at 616-32.

171. Id. at 627.

172. Appendix, Tables 1 & 2.

173. E.g., 7 Hening's Statutes, supra note 27, at 597 ch. 20, "An act for establishing the town of Charlottesville, in the County of Albemarle." See also id. at 600 ch. 22, "An act for establishing the town of Mecklenburg, in the county of Frederick."; id. at 601 ch. 22, "An act for establishing the town of Hanover, in the county of Hanover."; 8 id. at 424, "An act for establishing towns of Rocky Ridge, Gloucester court house and Layton's warehouse "; 9 id. at 555, "An act for establishing a Town at the Courthouse in the county of Washington." (Whereas heretofore the language of the privileges and immunities clauses had ended with "privileges and immunities, granted to or enjoyed by the freeholders and inhabitants of other towns erected by act of assembly in this colony," the clause in id. and 12 id. at 402 ended with the language "privileges and immunities, which the freeholders and inhabitants of other towns in this state, not incorporated by charter, hold and enjoy."); 10 id. at 134, "An act for establishing the town of Boonsborough, in the county of Kentucky.";
When this clause is read in the light of a 1779 legislative enactment entitled "An Act for adjusting and settling titles of claimers," and containing language giving each settlement in the western region of the colony 640 acres of land to be held as common, it appears that the clause grants each established town the right to set aside ground as a common in the future, perhaps even without further legislative action. If this conclusion is correct, the existence of common rights may be more pervasive than the historical evidence indicates.

A closer examination of the 1779 Act, however, weakens this interpretation. First, the Act contains language indicating its provisions applied only to settlements in the western region of Virginia that were not officially established by the General Assembly. Clause V of the Act provides:

V And whereas several families have settled themselves in villages or townships, under some agreement between the inhabitants of laying off the same into town lots That six hundred and forty acres of land shall be reserved for the use and benefit of the said inhabitants until a true representation of their case can be made to the general assembly

Further, an earlier clause of the Act indicates that the Act's primary purpose was to protect the reliance interests of people who settled in the western region without the benefit of patents or government charters. It provides:

IV And whereas great numbers of people have settled in the country upon the western waters for which they have been hitherto prevented from suing out patents or obtaining legal titles by the king and it is just that those settling under such circumstances should have some reasonable allowance for the charge and risk they have incurred and that the property so acquired should be secured to them

Finally, a comparison of the language in the 1779 Act and in the privileges and immunities clause suggests that the two are disjunc-

11 id. at 29, "An act to establish a town at the courthouse in the county of Buckingham.";
12 id. at 402, "An act to establish a town at the courthouse of the county of Accomack."
174. 10 id. at 35-50 ch. 11.
175. Id. at 39 (emphasis added).
176. Id. at 38-39.
tive. Under the terms of the privileges and immunities clause, inhabitants of the appropriate town are entitled only to those “rights, privileges and immunities, granted to inhabitants of other towns erected by act of assembly in this colony.” The 1779 Act, however, only recognized the right to set aside common rights until the General Assembly established the town. Thus, under a narrower interpretation, the broad language of the privileges and immunities clause would not incorporate any common rights established by the 1779 Act because those rights existed only in western settlements not officially created by an act of assembly. This interpretation is strengthened since the 1779 Act was passed after many of the eastern settlements were officially established and thus after the privileges and immunities clause was inserted in many of the town charters. 177

Even if the privileges and immunities clause cannot be construed as incorporating the 1779 Act to augment settlers’ common rights, the Act’s language suggests several important points about the existence of common rights in Virginia during the 1700’s. First, it shows that, at least in western Virginia, settlers created common rights by agreement, as did the lords and tenants in feudal England. It is reasonable to assume that this practice reflected what had already occurred in many eastern settlements because western settlers frequently migrated from eastern Virginia. Second, the 1779 Act indicates that the right to lay off 640 acres of common land may have been only a temporary right because it existed only until the General Assembly considered the merits of the settlers’ agreements to distribute lands and establish common areas. Given the broad language of clause IV, however, it is reasonable to conclude that the General Assembly usually ratified the settlement agreements.

177. Interpreting the 1779 Act as a general grant of the right to create commons appurtenant to every settlement also is incongruous with the language of a later act. 11 id. at 29. That later act contained not only the standard privileges and immunities clause, but also a clause mandating that four lots in the middle of town be reserved for public use and a clause vesting 100 acres “to and for the common use and benefit of the inhabitants of the said town.” Id. at 30 ch. 12. There would be no need for specific grants of public and common land if it was within the town’s power to claim land under the general grant.
B. Early Legal Development

Although the previous discussion clearly establishes that the common lands concept, as a practical matter, was transplanted into the United States, the concept's development in American jurisprudence is not as clearly defined. The judicial system often interprets the concept in conflicting ways and applies it to a wide range of situations. One interpretation, for example, classifies the commons concept as an easement,\(^{178}\) while another equates com-

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178. E.g., Gion v. City of Santa Cruz, 2 Cal. 3d 29, 39, 465 P.2d 50, 55-56, 84 Cal. Rptr. 182, 187-68 (1970)(blending the concepts of implied dedication and easements by prescription in concluding that the public could acquire a public easement in a shoreline); Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (trial court holding that the public acquired an easement in a beach area for recreational pursuits, and the state supreme court affirming by disregarding the concepts of implied dedication and prescriptive easements, relying instead on the law of custom); Seaway Co. v. Attorney General, 375 S.W.2d 923, 935-37 (Tex. Civ. App. 1964)(relying on the theory of implied dedication to uphold the validity of the public's recreational use of a beach, but noting that the prescriptive easement theory also could have been used). The above cases show that the courts use various theories to support their finding of a public easement. The legal significance of the easement approach is that private parties, rather than the state, own the land subject to the public right of use. The marketplace, therefore, should govern and reflect the value of the public use. 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 46 (1904). For a discussion of the easement approach to public rights, see Note, supra note 60, at 768-72.

One federal statute, the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1976 & Supp. III 1979), has adopted the easement approach in protecting "selected rivers of the Nation with their immediate environments for the benefit and enjoyment of present and future generations." Id. § 1271. Under the Act, the Secretaries of the Interior and Agriculture may acquire "lands and interests in land" within a designated wild, scenic, or recreational river area, including "scenic easements or such other easements as are reasonably necessary to give the public access to the river" and to permit passage in the area. Id. § 1277. The Act defines "scenic easement" as "the right to control the use of land for the purpose of protecting the natural qualities of a designated wild, scenic or recreational river area." Id. § 1286(c). See also United States v. 637.84 Acres of Land, 524 F Supp. 688 (W.D. Mo. 1981)(interpreting the definition of scenic easement).

Pursuant to § 1284 of the Wild and Scenic Rivers Act, which imposes certain duties on states, the Virginia legislature adopted its own Scenic Rivers Act, Va. Code §§ 10-167 to -175 (1978). In the Virginia Act, the General Assembly declared that "preservation of certain rivers or sections of rivers for their scenic values is a beneficial purpose of water resource policy." Id. § 10-167(b). The Virginia Act establishes a specific procedure for identifying scenic rivers. See id. §§ 10-169 to -172. Once the General Assembly designates a stream as a scenic river, "all planning for the use and development of water and related land resources including the construction of impoundments, diversions, or other uses" that will affect the scenic value of the river must give "full consideration" to the river as a scenic resource. Id. § 10-167(d). Legislative approval for designation as a scenic river has been given to parts of five streams: the Rivanna River, Goose Creek, Catocin Creek, the Appomattox River, and the Staunton River. See Va. Water Resources Center, Virginia Water
mon lands with public lands and resources owned by state and federal governments. A third approach uses the law of custom to explain common rights and public interests in certain resources.

Law: A Functional Analysis with respect to Quantity Management, Special Report No. 7, at 9 (Feb. 1979). Strong opposition to the scenic rivers program has precluded other rivers from receiving this special status. Id.


180. The law of custom developed in feudal England long before a formal legal system provided legal recognition to certain usages exercised by the people. The basic premise of the doctrine of customary rights was that, because the usage must at one time have been conferred upon the people by a legal authority, it now merited formal recognition. To warrant legal recognition, the usage had to be reasonable, certain, continuous, acquiesced in, peaceably enjoyed, consistent with other customs and laws, and of immemorial duration. J. Brown, THE LAW OF USAGES AND CUSTOMS §§ 20, 25, 27, 30-31 (1881); 1 W. Blackstone, Commentaries on the Laws of England 77-78 (Oxford 1765). The doctrine has been virtually uniformly rejected in the United States because it was developed to protect the expectancy interest of those whose rights were created before the establishment of a recording system, and because the requirement that the custom be immemorial was interpreted as meaning that the custom commenced with the reign of Richard I (1189). Graham v. Walker, 78 Conn. 130, 61 A. 98, 99 (1905); Department of Natural Resources v. Mayor & Council of Ocean City, 274 Md. 1, 332 A.2d 630, 638 (1975); Ackerman v. Shelp, 8 N.J.L. 125 (1825); Gillies v. Orienta Beach Club, 159 Misc. 675, 289 N.Y.S. 733 (Sup. Ct. 1935); Harris v. Carson, 34 Va. (7 Leigh) 632, 639 (1838). Recently, however, one court invoked the doctrine to uphold public use of shoreline areas. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). See generally Niven, Beach Access: An Historical Overview, 2 N.Y. SEA GRANT L. & POLICY J. 161 (1978); Note, Public Access to Beaches, 22 STAN. L. REV. 564 (1970). Thornton demonstrates how the various theories interact and often become confused. See note 178 supra.

The law of custom presents probably the best explanation of how common rights developed in the legal system. It essentially was used to ratify the reasonable expectations of ordinary people by giving legal recognition to usages that were traditionally and widely accepted in a particular community. However, once the law found a common right had been created by custom, it then recognized the right as a property interest. Eventually, this meant that the law of custom was not needed to justify the common rights. By the time of the American Revolution, some common rights existed independently of the law of custom. In a sense, then, the law of custom served merely as a means to an end.

Indeed, a distinction must be made between the theoretical development of common rights under the law of custom and the acquisition of rights of common by customary right. Under English law a right of common, once recognized, was considered to be a profit a prendre, which could not be acquired by custom. 12 HALSBURY'S LAWS OF ENGLAND, Custom and Usage ¶ 431 (1975); J. Gray, The Rule Against Perpetuities § 579, at 560 (4th ed.
The various approaches adopted by the courts quite obviously have created confusion and uncertainty about the nature and scope of the commons concept.

In recent years several commentators have attempted to clarify the law of public interests in natural resources and to unite the various judicial approaches by advancing one legal theory. Known by courts and commentators alike as the public trust doctrine, this theory first appeared in *Martin v. Waddell*, a major Supreme Court opinion decided in 1842. As explained by the Court, the concept of public trust evolved primarily from early English common law, under which the Crown held title to tidal lands and waters for the public benefit. English law apparently developed this concept primarily to protect people’s interests in tidal waters from encroachment by the nobility. Any serious deprivation of these interests by the Crown crippled the peasant economy because tidal waters provided the people with their principal means of transportation and with an important food source. Further, inasmuch as “common property” included things incapable of being possessed, except perhaps in a transient sense, title to common property logically could only be vested in the sovereign power for the benefit of those people who ultimately exercised dominion and control over it.

In *Martin v. Waddell* the plaintiff, a lessee of Waddell, brought an ejectment action against Martin and others, claiming as owner...
the exclusive right to take oysters from lands below the high water mark of a navigable tidal river located in New Jersey. Waddell's title traced back to two charters granted from Charles II to his brother, the Duke of York, to establish a colony in the New World. Under the terms of the original charters, the King conveyed to his brother all interests in the territorial lands and waters, as well as all powers of government.\textsuperscript{186} Eventually, through a later conveyance, the Crown reacquired the powers of government to the territory originally conveyed to the Duke of York but did not reacquire the private proprietary interests. The defendants also claimed the exclusive right to take oysters from the disputed land under a lease executed with the state of New Jersey pursuant to an 1824 act. In that statute, the state legislature declared that certain shores and submerged lands be set aside for the cultivation of oysters. The designated area included the disputed land.\textsuperscript{187}

The Supreme Court admitted that the "right of the king to make this grant [to the Duke of York], with all of its prerogatives and powers of government, cannot, at this day, be questioned."\textsuperscript{188} It was, however, "proper to inquire into the character" of the rights claimed by the Crown and conveyed to the Duke.\textsuperscript{189} This inquiry, in turn, required considering whether the King had the power and intent to convey dominion and control to navigable waters, and the soils under them, so as to create an exclusive right of fishery in the grantee and defeat any public interests in the waters.\textsuperscript{190}

The Court first concluded that, prior to the conveyance to the Duke of York, the Crown held title to the territory covered by the charters "in his public and regal character as the representative of the nation, and in trust for them."\textsuperscript{191} Accordingly, when the King passed all proprietary interests in the territory, together with his powers of government, to the Duke of York to create a colony, the King must have intended that all interests in the territory also be held in trust by the Duke of York for the "common use of the new

\textsuperscript{186} 41 U.S. at 407-08.  
\textsuperscript{187} Id.  
\textsuperscript{188} Id. at 408-09.  
\textsuperscript{189} Id.  
\textsuperscript{190} Id. at 410-11.  
\textsuperscript{191} Id. at 409.
community about to be established."\textsuperscript{192} To hold otherwise, according to the Court, would be contrary to the reasonable expectations of settlers, who were accustomed to having protected rights in navigable waters in England and who would not expect to emigrate to America only to find that all of the valuable water resources had been privately appropriated.\textsuperscript{193}

Under English law, one of the rights traditionally reserved for the common use was the right of fishery. Further, even assuming the King had the power to defeat the people's common rights by granting an exclusive fishery, any grant made in derogation of public rights was to be strictly construed.\textsuperscript{194} In the words of the Court,

\begin{quote}
it would require very plain language in these letters patent to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away.\textsuperscript{195}
\end{quote}

Using this rule of construction disfavoring the destruction of the common right of fishery, the Court concluded that when the powers of government were restored to the Crown the right of common fishery passed back as an incidence of the sovereign powers. This conclusion necessarily followed from the absence of language clearly indicating that the right of fishery was severed and retained. Thus, when the people of New Jersey assumed the powers of the sovereignty after the Revolution, they acquired, in their sovereign capacity, all the royal rights and incidences not effectively conveyed away, including the common right of fishery. The state, as trustee of the people's common rights, had the power to regulate this right by, among other things, providing for the leasing of the

\begin{footnotes}
\item[192] Id. at 411.
\item[193] Id. at 414.
\item[194] Id. at 410-11. The right of the Crown to alienate interests in tidal waters and the soils beneath them was controversial. Most authorities appeared to conclude that, at least since the adoption of the Magna Carta, the Crown could not grant exclusive interests, including fisheries, in tidal waters. See id. at 410. See generally J. Angell, A Treatise on the Right of Property in Tides Waters, and in the Soil and Shores Thereof 20-21 (Boston 1826); M. Hale, supra note 60, at 376, 386-87; W McKechnie, supra note 94, at 343-48; S. Moore, supra note 63, at 720; S. Moore & H. Moore, supra note 99.
\item[195] 41 U.S. at 414.
\end{footnotes}
exclusive rights to oyster beds to Martin and the other defendants.\textsuperscript{196}

The Supreme Court's treatment of the public trust doctrine in \textit{Martin} raised several important questions. First, because \textit{Martin} involved the Court's interpretation of several English patents, its decision raised the question of whether the public trust doctrine also applied to state grants. The doctrine arguably could have had a limited effect on state conveyances because, as the Court conceded, state grants must "be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation."\textsuperscript{197} Second, assuming states did hold property in public trust, the decision left undefined the nature and extent of the state's duties and powers over public trust property.

\textit{Illinois Central Railroad v. Illinois}\textsuperscript{198} partially answered these questions. In \textit{Illinois Central}, the state attorney general instituted an action in equity against the Illinois Central Railroad and the city of Chicago to determine the rights of the parties in lands reclaimed from Lake Michigan and used by the railroad, as well as in lands submerged under Lake Michigan and comprising most of the Chicago harbor. The defendant railroad claimed to have absolute title to the lands in dispute because of an act passed by the Illinois legislature in 1869 for the purpose of constructing bridges and other structures. The Act's language was very broad, providing that "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan" were granted "in fee" to the railroad.\textsuperscript{199} In exchange for the interests conveyed under the Act, the railroad agreed to pay rent and to avoid creating navigational obstructions.\textsuperscript{200} A map depicting part of the land conveyed characterized some of it as "Public ground for ever to remain vacant of buildings."\textsuperscript{201} In 1873, the state legislature repealed the Act, thereby questioning the validity of both

\textsuperscript{196.} \textit{Id.} at 416-17.  
\textsuperscript{197.} \textit{Id.} at 410-11.  
\textsuperscript{198.} 146 U.S. 387 (1892).  
\textsuperscript{199.} See \textit{id.} at 406 n.1.  
\textsuperscript{200.} \textit{Id.} at 406-07 n.1.  
\textsuperscript{201.} \textit{Id.} at 392.
the 1869 and 1873 acts. 202

In holding that the state legislature could not convey such a broad, absolute interest to the railroad, the Supreme Court referred to the well-settled principle "that the ownership of and dominion and sovereignty over lands covered by tide waters" passed to the various states after the Revolution. 203 Consequently, the state had the right to regulate or dispose of any of the tidal lands, but only so long as it could be done "without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation." 204

The Court then considered whether the "tidal" nature of the waters was central to the above principle by focusing on the definition of navigability under English law. Noting that in England the "ebb and flow of the tide constitute[d] the legal test of the navigability of waters," 205 the Court concluded that this definition would not be rationally related to geographical conditions in the United States, where there are a large number of navigable nontidal water bodies. The Court reasoned that the key to the above principle was not the tidal nature of the waters but rather the navigability of the waters. Therefore, the principle should be equally applicable to lands under navigable, nontidal water bodies such as the Great Lakes. As the Court explained, the doctrine was developed to preserve "to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." 206

After the Court extended the state sovereignty doctrine to all navigable waters and the lands underneath them, it began to examine the nature of the state's title. In an oft-quoted passage, the Court stated:

[Title to soils under navigable waters] is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title

202. See id. at 410-11. The defendant argued that the repealing act violated the contracts clause of the Constitution. Id. at 418.
203. Id. at 435.
204. Id.
205. Id.
206. Id. at 436.
THE COMMONS CONCEPT

held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.\textsuperscript{207}

Further, although the state may grant parcels of submerged lands to private parties to build wharves, docks, or other structures designed to aid navigation, the state may not "substantially impair the public interest in the lands and waters remaining."\textsuperscript{208}

Abdication of state control of navigable waters and submerged lands in a harbor as valuable as Chicago was, in the Court's view, "a gross perversion of the trust over the property under which it is held."\textsuperscript{209} The Court explained:

\begin{quote}
Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.\textsuperscript{210}
\end{quote}

The Court declared the attempted cession of the state's ownership interests in the disputed lands to be inoperative because the 1869 Act substantially impaired the public interest. The only rights acquired by the railroad under the Act were those limited interests needed to accomplish the enactment's stated purposes. In addition, the legislature's actions did not impair a valid contract because any grant of lands under navigable waters made in violation of the public trust would be revocable, if not void.\textsuperscript{211}

\textsuperscript{207} Id. at 452.

\textsuperscript{208} Id. The Court apparently adopted the "substantial impairment" standard to reconcile conflicts over state power to control lands under navigable waters. See id. at 453-54.

\textsuperscript{209} Id. at 455.

\textsuperscript{210} Id. at 453.

\textsuperscript{211} Id. at 444, 453, 455. In United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), the Supreme Court delineated a three-part test for determining whether legislative action violates the contracts clause. First, a valid contractual obligation must exist. This obligation may arise from a statute if the legislature had the "intent to create private rights of a contractual nature enforceable against the State." Id. at 17 n.14; see Rivera v. Patino, 524 F. Supp. 136, 143-44 (N.D. Cal. 1981)(concluding that to create a contractual obligation the statute must represent more than an exercise of the state's police powers and must involve "a voluntary, bargained-for exchange" between the parties). Second, the legislative action must impair the contractual obligation. Third, the impairment of the contractual rights
There are several conflicting ways to interpret the Court's decision in *Illinois Central*. For example, certain language in the opinion suggests that the Court is distinguishing between navigable water resources, on the one hand, and lands generally owned by a state or federal government, on the other, in defining the scope of the public trust doctrine.\textsuperscript{212} If interpreted in its narrowest light, however, *Illinois Central* is nothing more than a restatement of Illinois law which, as the Supreme Court indicates, would govern allocation of water rights and uses in Illinois.\textsuperscript{213} Under this interpretation, the only federal question concerns whether the Illinois legislature’s actions impaired a contract obligation in violation of the United States Constitution.

Even under the latter interpretation, however, the opinion's language concerning the state's obligations as sovereign with respect to navigable waters and lands is necessary to the decision. In *Illinois Central*, the Court used the public trust doctrine to explain why the legislative grant was facially void, or at least revocable by subsequent legislative action. This explanation relates to the essence of the state’s obligations as a sovereign and to the validity of its legislative process, and thus represents more than an impairment of contracts case.

Although each state as sovereign has jurisdiction and dominion over all navigable waters and lands within its boundaries, *Illinois Central* demonstrates that there are outer limits beyond which a state cannot pass in regulating these resources. At a minimum the public trust doctrine requires a state to assume some responsibility for resource management on behalf of the public. Total abdication of these managerial duties is impermissible.

A broader interpretation of the Court's decision in *Illinois Central* is difficult to support. The Court recognizes that title to navigable waters and lands is somehow different than title to lands generally held by the state and intended for sale,\textsuperscript{214} thus suggesting that the former may be inalienable. Yet the Court's adoption of the substantial impairment standard, as well as its repeated refer-


\textsuperscript{213} See *Shively v. Bowlby*, 152 U.S. 1, 43 (1894).

\textsuperscript{214} 146 U.S. at 452.
ences to situations where the state could convey interests in public trust property, supports the conclusion that the decision does not hold certain trust property to be inalienable. The clear factual situation presented in Illinois Central also weakens the broader interpretation. Illinois Central was a relatively easy case for the Court to decide, given the state's total abdication of its rights and responsibilities. In addition, a broad interpretation would be inconsistent with the nature of the commons concept, which was the progenitor of the public trust doctrine. As mentioned earlier, the commons concept developed as a flexible device for defining the public's rights in certain resources to maximize resource use and meet the economic needs of lords and peasants alike. As the needs of the public and the economy changed, the nature and scope of the commons concept also fluctuated. If the public trust device could be used to declare resources inalienable, then the commons concept no longer would serve the important economic policies that led to its development.

Even if Illinois Central does not stand for the proposition that state citizens have an inalienable interest in certain water resources, it reiterates a point established in Martin and other cases: any grant that destroys public interests in navigable waters and lands is to be construed strictly and read as containing an implied reservation of public rights not expressly conveyed away. Further, those parties taking an exclusive right in public trust property take subject to the remaining public rights.

The Illinois Central decision unfortunately leaves several important questions unanswered. This failure may be due in part to the clear factual situation, which did not force the Court to address several key aspects of the public trust doctrine. The decision, for example, never clearly defines public trust property. As mentioned earlier, some have construed Illinois Central as limiting the public trust doctrine to lands under navigable waters. The Court's statement that federally owned public lands are different from lands held by a state in trust for its people certainly supports this inter-

215. See id. at 452, 453, 457 (grants of fisheries allowed, as well as grants of submerged land to construct docks, wharves, and other similar structures); Deveney, supra note 60, at 61.

216. See 146 U.S. at 457-58; 1 H. FARNHAM, supra note 178, at 223-25.
interpretation, as does the Court's expansion of the scope of the English public trust doctrine to all navigable waters.

The Court's discussion of the public trust concept, however, contains serious problems. For example, the Court generally ignores the English commons concept, especially the fact that common or public rights also existed under English law in lands other than those under tidal waters. The Court also inadequately examines the public trust doctrine's theoretical underpinnings. Further, the Court's explanation of the substantial impairment standard suggests anomalous results. Under its explanation, it appears that the Court would have reached a different result if the legislature periodically made a series of conveyances to the railroad for small parcels of submerged land, instead of granting a large quantity of land in one conveyance. The aggregate effect, however, remains the same.

Finally, the decision does not define what public uses warrant protection under the public trust doctrine. Even the narrowest reading of Illinois Central classifies the use of waters for navigation and commerce as protected public rights. Less clear is the status of the right of fishery. In its discussion of the public trust concept, the Court describes the state as holding title to navigable waters and the soils under them in trust for the people "that they may enjoy the navigation of the waters, carry commerce over them, and have liberty of fishing."217 Thus, the right of fishery appears to be included expressly within the scope of the public trust doctrine. Later in the opinion, however, the Court quotes from Stockton v. Baltimore & New York Railroad,218 a case that uses "liberty of fishing" as an example of a public use that could be granted exclusively to private parties without substantial impairment of the public interest. According to Stockton, after the fisheries were granted the "land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries."219 Thus, although the Supreme Court's opinion in Illinois Central suggests that the "liberty of fishery" is a public interest protected by the public

217. 146 U.S. at 452.
trust doctrine, it also implies that the right of fishery can be conveyed to private parties without violating the substantial impairment standard. This conclusion makes sense in light of the basic difference between the right of fishery and the right of navigation, a difference that is inherent in the nature of the things being used. Although in their natural state fish are not possessed by anyone, they are capable of being possessed. A watercourse, however, never can be possessed, at least not in the corporeal sense.\textsuperscript{220}

Almost two years after the \textit{Illinois Central} decision, the Supreme Court reconsidered the public trust concept in \textit{Shwely v. Bowlby}\textsuperscript{221} In \textit{Shwely}, the Court considered whether a grant from the United States passed title to land below the high water mark so as to prevent a subsequent state grant from passing the same land. Before concluding that the United States grant did not pass any interest in property below the high water mark, the Court discussed in detail the evolution of the public trust concept both in England and in the United States. According to the Court, the English common law provided, since the time of Lord Hale, that the King as sovereign held title to all tidal waters and lands below the high water mark, just "as of waste and unoccupied lands."\textsuperscript{222} This proprietary interest was better known as \textit{jus privatum}. However, as representative of the people, the King also held the right of dominion over these tidal resources for the public benefit. This royal interest was called the \textit{jus publicum}. As the Court explained, the dual nature of the Crown's interests in the tidal waters and lands arose because

\begin{quote}
[s]uch waters, and the lands which they cover are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects.\textsuperscript{223}
\end{quote}

After the Revolution this common law principle became the rule

\textsuperscript{220} Once again, the common law appears to borrow, perhaps unknowingly, from Roman legal concepts. \textit{Cf.} text accompanying note 50 \textit{supra.}
\textsuperscript{221} 152 U.S. 1 (1894).
\textsuperscript{222} \textit{Id.} at 11.
\textsuperscript{223} \textit{Id.}
of law in the federal system as well as in the original states, unless otherwise modified.\textsuperscript{224} Therefore, the Court reasoned, the federal government held title to all lands outside the boundaries of the original states "for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory."\textsuperscript{225} The lands under tidal waters were subject to special trust duties because they were "incapable of cultivation or improvement in the manner of lands above the high water mark," and because they were "of great value to the public for the purposes of commerce, navigation and fishery."\textsuperscript{226} Accordingly, congressional grants of land bordering navigable waters would not convey "of their own force" any rights below the high water mark.\textsuperscript{227}

The Shively decision is important for several reasons. First, consistent with the Court's earlier decision, it appears to limit the public trust doctrine to navigable waters and to lands below the high water mark. Both the Court's language and reasoning support this interpretation. The Court's explanation that tidal waters and lands are "incapable of ordinary and private occupation," and therefore are public by nature, applies to few resources other than nontidal navigable waters, the lands beneath them, and perhaps marshlands.\textsuperscript{228} Second, the Shively opinion, more than prior decisions, recognizes the immense public value of tidal resources, especially the shore. Throughout its opinion the Court emphasized the public importance of these resources for commerce, navigation, and fishing.\textsuperscript{229} Finally, the decision supplies the theoretical background missing in the earlier decisions. For the first time the Court examined in detail not only the English common law approach, but also the positions of the original states. One factor, however, may limit Shively's precedential impact. The grant questioned in Shively was between the United States, a sovereign, and a private party. Many disputes involving common rights, however, will arise between two private parties.\textsuperscript{230}

\begin{footnotes}
\item 224. Id. at 14.
\item 225. Id. at 57.
\item 226. Id.
\item 227. Id. at 58.
\item 228. See id. at 11, 57.
\item 229. See, e.g., id. at 11, 49, 57.
\item 230. 1 H. Farnham, supra note 178, at 223-25; see 152 U.S. at 10.
\end{footnotes}
Before discussing how Virginia law has dealt with the public trust doctrine and the commons concept, several comments about the federal approach must be made. In Martin, Illinois Central, and Shwely, the United States Supreme Court stated that it developed a theory of public rights derived from English common law. The public trust doctrine, however, did not exist under early English common law, at least not as the Court explains it. Rather, the English legal system used the concept of commons to protect public rights and interests in various resources. This concept differs in several significant respects from the public trust doctrine.

For example, under the public trust doctrine the state holds legal title to certain resources, while its citizens have an equitable interest. By contrast, the commons concept gives a class of people the legal right to make use of another's land. Although the lands subject to common rights originally were owned by the community or state, by the mid-1600's private parties had appropriated most of these lands. Title to lands subject to common use therefore usually was vested in private parties, not the state.

Second, whereas the Supreme Court appeared to limit the public trust doctrine to navigable waters and the soils beneath them, the commons concept applied to other types of resources as well. Indeed, the concept first developed in England as a tool for sustaining the agrarian economy. As this function gradually lost its importance, the English courts and scholars devoted more attention to common rights in tidal waters and lands.

Finally, because the two doctrines place legal title to appropriate resources in different parties, they sometimes serve different purposes. The public trust doctrine splits legal and equitable ownership between a state and its citizens, and can be applied to a wide range of resources and interests, including: (1) interests so intrinsically important to every citizen that private control runs contrary to the nature of our democratic form of government (for example, the right of navigation); (2) resources that are incapable of being corporeally possessed, except perhaps in a transient sense (for example, watercourses); (3) resources that are not possessed by an individual but that are capable of dominion and control (for example, wild animals, wildfowl, and fish); and (4) resources that are public in nature, either because of their unique characteristics (for example, natural wonders) or because they are incapable of ordi-
nary use and occupation (for example, the shore).\textsuperscript{231} Although use of common lands for farming and grazing during feudal days arguably is consistent with the interests included in the first category because collective use of land was necessary for survival, such would not be the case today. This calls attention to an important characteristic of the public trust doctrine—its tremendous flexibility. The public trust doctrine may be more capable of responding to changed needs than the commons concept because the public trust doctrine less clearly defines the nature of the public's equitable interests. The various kinds of common rights, however, were well defined and regulated by the English legal system.\textsuperscript{232} The nebulous nature of the public's interest under the trust doctrine enables the public uses protected by the concept to fluctuate more easily, thus allowing the doctrine to respond better to changes in societal needs. If, for example, the demand for environmental areas that are aesthetically pleasing and suited to recreational uses drastically increases while the supply of such lands substantially decreases, these areas arguably would fit within the first category of the public trust property described above.

Although history demonstrates that the commons concept is a flexible device, the strong ownership interests of private parties in lands subject to common use limit the amount of change that can occur. Indeed, in our predominantly private property system, private ownership interests tend to obscure common rights, making their identification difficult. Advantages nonetheless flow from the commons concept. The concept, for example, interferes less with our system of private enterprise and ownership because the state's role is minimized. Also, by superimposing various public rights on privately owned land, the concept reduces the state's costs of maintaining and regulating the burdened land.\textsuperscript{233}

Regardless of whether the public trust doctrine or the commons concept is used to define the public's interests in various natural resources, both theories similarly affect private rights. The two concepts recognize that certain public rights exist intrinsically;

\begin{itemize}
\item \textsuperscript{231} See Sax, The Public Trust, supra note 181, at 484-85.
\item \textsuperscript{232} See notes 129-133 & accompanying text supra.
\item \textsuperscript{233} Accord, ROYAL REPORT, supra note 26, 106-08 (recommending that parties having a private proprietary interest in lands subject to common rights be given the power to manage the common lands).
\end{itemize}
these public rights actually limit, rather than regulate, the extent to which private rights are recognized. Stated differently, under the two theories private rights are subordinate to certain public rights and generally may be impaired without compensation by the exercise of these public rights.234

IV. THE COMMONS CONCEPT AND PUBLIC RIGHTS IN VIRGINIA

As explained earlier, the English transplanted the public rights concept into the American colonies. After the American Revolution each state assumed jurisdiction and control over all lands and waters within its territorial limits, except to the extent that the state surrendered rights to the federal government pursuant to the United States Constitution. Regulation of the lands and waters generally was, and still is, a matter of state law.235

The historical evidence presented in part II. A. of this Article establishes that common rights existed in Virginia both before and after it became a state. Additionally, the evidence demonstrates that those common rights often combined traits of both the traditional English commons concept and the public trust doctrine. For example, grants establishing common lands usually referred to the right of a class of people to use certain common lands, and not to their right to own those lands, thus suggesting that the public's interest was more similar to an easement than to a beneficial ownership. Some of these grants, however, also placed management duties in a "trustee," and if the trustee failed to manage the commons properly for the use and benefit of the local inhabitants, he was subject to removal.236

Perhaps this hybrid nature confused the Virginia courts, but for whatever reason, Virginia's position on common rights and the public trust doctrine is far from clear. Some opinions of the Virginia Supreme Court indicate almost total acceptance of the concepts, while others demonstrate a reluctant acceptance, if not outright rejection.237

234. See, e.g., Oliver v. City of Richmond, 165 Va. 538, 542, 178 S.E. 48, 53 (1935); cases discussed in text accompanying notes 300-336 infra.
235. See text accompanying notes 196, 203-204 supra.
236. 12 HENING'S STATUTES, supra note 27, at 603; 10 id. at 135-36.
The leading Virginia case on the public trust doctrine is *Commonwealth v. City of Newport News.* In *Newport News,* the state sought to restrain Newport News from dumping untreated sewage into the Hampton Roads River. The state's primary argument was that the state held title to the lands under navigable waters in trust for state citizens. By emptying untreated sewage into a navigable watercourse, Newport News was substantially impairing various public rights, including the right of fishery.

In denying the state relief, the Supreme Court of Virginia severely limited the public trust theory as applied to Virginia water rights. Although the Virginia Supreme Court recognized that the United States Supreme Court adopted the public trust doctrine in *Martin v. Waddell* and *Illinois Central Railroad v. Illinois,* the state judiciary construed the public trust concept narrowly, limiting its scope to the right of navigation, and perhaps fishing. The court explained its reluctance to adopt the public trust doctrine by initially observing:

> It is questionable whether the interposition of the conception of a trust in these cases serves any useful purpose or tends to clarity of thinking or correctness of decision. It may be of some assistance in helping the mind to grasp limitations upon the powers of the state over its tidal waters and their bottoms; but it wholly fails to prove or account for the existence of such limitations.

The court further pointed out that even if the Crown held certain lands and waters in trust for navigation and fishing, important differences existed between the Crown and the State of Virginia. Unlike the King, the state was a sovereign entity, having "acquired not only the powers, prerogatives and rights of the British crown, but also the powers and rights held by the people collectively [and] exercised by the Parliament." The State of Virginia thus acquired "full and complete proprietary right" in all lands and wa-

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238. 158 Va. 521, 164 S.E. 689 (1932).
239. Id. at 527-29, 531-32, 164 S.E. at 690-92.
240. Id. at 539-40, 164 S.E. at 694.
241. Id. at 540-41, 164 S.E. at 694-95.
ters, except as limited by the Federal Constitution.\textsuperscript{242}

According to the court, if a public trust existed, it must have arisen from the Federal Constitution or from a limitation imposed on the sovereign state by the Virginia Constitution or its laws.\textsuperscript{243} The United States Constitution provided, implicitly at least, the basis for imposing a trust on navigable waters and their beds for navigation. This trust relationship arose from the constitutional power granted to the United States to regulate and control navigation and commerce among the states, as interpreted by the Supreme Court in \textit{Illinois Central}.\textsuperscript{244}

Whether the state constitution imposed a public trust on state lands and waters was a more complicated question. In answering this question, the court first made some general observations about the nature of the state sovereignty. Noting that the purpose of a constitution was to provide for the orderly exercise of government and not for its abdication, the court concluded that it would be "a perversion of the Constitution to construe it as authorizing the Legislature or any other governmental agency to relinquish, alienate, or substantially impair the sovereignty," its inherent rights, or its power to govern. Such protected "incidences" of the sovereignty included the state's "police power, the power or right of eminent domain, and the power to make, alter and repeal laws."\textsuperscript{245} Having defined some of the general principles governing the relationship between a sovereignty and its constitution, the court then focused on state powers over public domain. According to the court, the state held two rights in the public domain. First, as a sovereign, the state had "the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits."\textsuperscript{246} Second, as a proprietor, the state had "the

\textsuperscript{242} \textit{Id.} at 541, 164 S.E. at 695.

\textsuperscript{243} The court rejected classifying rights such as the rights of navigation and fishery as "natural rights," stating:

\textit{If the basis for the trust or a limitation of the power of a state or its Legislature can be found only in the so-called natural law, it is beyond the power of courts to enforce it. If it has any existence, it is enforceable only by force of arms, or by the forces of nature, or by divine power.}

\textit{Id.} at 542-43, 164 S.E. at 695.

\textsuperscript{244} \textit{Id.} at 543-44, 164 S.E. at 695-96.

\textsuperscript{245} \textit{Id.} at 545-46, 164 S.E. at 699.

\textsuperscript{246} \textit{Id.} at 546, 164 S.E. at 696.
right of private property in all the lands and waters within its territorial limits of which neither it nor the sovereign state to whose rights it has succeeded has divested itself." The court referred to the first right as the *jus publicum* and to the second as the *jus privatum*.

The court interpreted the *jus publicum* as including all of those property rights which were inherent in and incidences of state sovereignty. These inherent rights of the *jus publicum* were the rights of the people and could not be substantially impaired or destroyed since the people collectively comprised the sovereign. Thus, any legislative grants of rights or interests in property belonging in the public domain, including tidal waters and their bottoms, were subject to whatever rights were included in the *jus publicum*. To this extent then, the court conceded that a kind of public trust existed. In the words of the court:

> The Legislature, of course, owes to the people of the State a most solemn duty to administer the *jus privatum* of the State and to exercise its *jus publicum* for the benefit of the people; but this is a very different thing from asserting that the Legislature holds any part of the public domain in trust for any particular use or for the use by the people in common for any purpose.

The practical effect of this public trust, however, was limited since the state had broad discretion in determining what rights were in the public benefit.

After defining the state interests in the public domain, the court then specified the rights included in the *jus publicum*. According to the court, only a few public rights of use were part of the *jus publicum*, and those that were not could be regulated or transferred by the state to private parties so as to destroy the public rights. The court reasoned that the right of navigation probably was part of the *jus publicum* because it bore "a relationship to the right of liberty, which comprehends the right to move freely" and therefore is "an inherent and inseparable incident" of the sover-

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247. Id.
248. Id. at 546-47, 164 S.E. at 696-97.
249. Id. at 549, 164 S.E. at 697-98.
The right of fishery, on the other hand, was not "any more an incident of the jus publicum than the right to take game in the forest or use the unappropriated uplands for pasturage." The court classified this right as a public use primarily because the public shared the right of enjoyment. Once a party successfully exercised the right, however, he converted the property into private property. As part of the jus privatum, the General Assembly could grant the right of fishery exclusively to a private party, or could permit the tidal waters and bottoms to be used to impair or destroy their use as fisheries. The court then concluded that the defendant was not violating any public rights since the General Assembly had authorized Newport News's sewage discharge into Hampton Roads.

Although the court's analysis in Newport News clearly shows that the court spent considerable time dealing with the difficult issues before it, the decision is troubling in several respects. First, the court states that the public trust theory can arise only from one of two sources: (1) "the operation of a law ordained by a power which has a dominion over the public domain of the state superior to the sovereign authority of the state"; or (2) state law. Yet, in considering Virginia law, the court focused only on the state constitution, ignoring relevant statutory and common law. The court apparently believed that any limitation on the power of the sovereign state should come from the constitution. Many different legal principles, however, at least indirectly limit a sovereign's power. Statutes, for example, sometimes waive the sovereign immunity that a government traditionally enjoys. In addition, state constitutions, more than their federal counterpart, need to be interpreted in light of statutory and common law. As one state constitutional law scholar explained, "A state constitution is not a code of laws. It should be confined to the fundamentals of government,  

250. Id. at 550, 164 S.E. at 698.
251. Id. at 551, 164 S.E. at 698.
252. Id. at 551-52, 555-56, 164 S.E. at 699-700.
253. Id. at 541-42, 164 S.E. at 695.
leaving statutory detail to the statute books." In recent years, Virginia's constitutional draftsmen appear to have adopted this tenet. Even assuming that the state constitution is the only appropriate source for the creation of a limitation like the public trust concept, that document need not expressly create the limitation. It may be implied or emanate from the document and from the form of government that the document seeks to establish. Judicial interpretation of the Federal Constitution has proceeded by relying on this principle.

Finally, as the court conceded, a State Constitution "is based upon the pre-existing laws, rights, habits and modes of thought of the people who ordained it, and the fundamental theory of sovereignty and of government which has been developed under the common law; and must be construed in light of this fact." One of the "rights" or "habits" found in pre-existing law pertained to the public's interests in certain natural resources, as expressed in the commons and public trust concepts. The Virginia Supreme Court's treatment of these public interest concepts is cursory at best. Although some scholars would support the court's conclusion that the law cannot recognize limitations on a sovereignty arising from a body of natural laws, this conclusion assumes away the

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257. Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965), are classic examples of this practice.

258. Commonwealth v. City of Newport News, 158 Va. at 545, 164 S.E. at 696. One legal scholar argues in several articles that, at least until the Civil War, there was an understanding that certain unwritten "higher law" principles had constitutional stature. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703, 717 (1975). Grey also maintained that a prominent part of the framework within which the legal system operated when America became self-governing was the idea of legally binding, but unwritten, constitutional principles. Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843, 893 (1978). For a general discussion of various approaches to federal constitutional interpretation, see J. ELY, DEMOCRACY AND DISTRUST (1980).

259. See generally J. ELY, supra note 258, at 48-54. The Virginia Supreme Court relies on an excerpt from T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (1972) in concluding that natural law principles alone cannot be used to limit a sovereignty's power. 158 Va. at 542 n.1, 164 S.E. at 696 n.1. Although Cooley provides some support for the court's
question. The commons concept indeed may have originated in natural law. The Romans justified their protection of various public interests on natural law principles. By the American Revolution, however, some of the public rights had achieved legal recognition as valid property interests.

The United States Supreme Court’s decision in *Illinois Central* supports this statement, as do the opinions in *Waddell* and *Shwely*. The Virginia Supreme Court, however, discounts the federal Court’s discussion of the public trust doctrine in *Illinois Central*, stating that the Supreme Court must have been “confused” in “inadvertently” declaring that a state held navigable waters and lands in public trust. If the state court is accurate in its characterization of the Supreme Court’s discussion of the public trust concept, the Supreme Court’s confusion was pervasive, for the *Illinois Central* opinion contains several strongly worded passages articulating the state’s trust obligations. Indeed, the Court in *Illinois Central* extended the trust doctrine’s traditional scope in applying it to the bed of Lake Michigan.

Additionally, the Virginia Constitution specifically refers to the public trust concept in section 3 of article XI, which provides:

> The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise.

position, he primarily deals with a court’s power to declare specific legislative acts unconstitutional. *Commonwealth v. City of Newport News* did not involve a constitutional challenge to any legislative act. Indeed, if accepted, the public trust doctrine would sustain the validity of a legislative act authorizing the city of Newport News to discharge its sewage into the Hampton Roads River.

260. 158 Va. at 539, 164 S.E. at 694.

261. See text accompanying notes 207-211 supra.

262. VA. CONsT. art. XI, § 3; see 158 Va. at 553, 164 S.E. at 699. The oyster trust provision first appeared in the Virginia Constitution of 1902. VA. CONsT. art. 13, § 175 (1902). The Constitution of 1870 contained a related provision prohibiting the state from taxing its citizens for “the privilege of taking or catching oysters from their natural beds.” VA. CONsT. art. 10, § 2 (1870). The language of the 1902 oyster trust provision resulted from a short debate over the language of a version proposed to the Constitutional Convention. The proposal provided protection for “natural oyster beds, rocks and shoals in the waters of this
Despite this constitutional provision, the Virginia Supreme Court concluded that the state constitution did not adopt the public trust concept to limit the state's power to dispose of or use water resources. According to the court, the constitutional provision only prohibited "the legislature from authorizing, permitting or suffering a private use to be made" of the natural oyster beds, rocks, and shoals.\textsuperscript{263} It did not restrict the legislature's power to use those resources for public purposes where the public use was authorized by law. One legitimate use was discharge of sewage into tidal waters.\textsuperscript{264} Although section 3 of article XI is limited to "natural oyster beds, rocks, and shoals," its use of the public trust language suggests that the concept existed at common law. The provision's narrow application does not necessarily mean that Virginia law rejects application of the public trust doctrine to additional resources. Rather, it could signify simply that the doctrine is being elevated to constitutional stature in one particular situation to further enhance the legal protection given to natural oyster beds, rocks, and shoals:

Besides failing to consider common law principles enunciated by the United States Supreme Court, such as the commons concept, the Virginia Supreme Court also ignored its own precedent. Earlier opinions of the Virginia Supreme Court referred to the public trust State, as at any time defined by law." II Report of the Proceedings and Debates of the Constitutional Convention of Virginia, 1901-1902, at 2880 (1906). At least some parties to the Convention feared that the phrase "at any time defined by law" would fix permanently the status of oyster beds once they were determined to be natural beds. One Convention delegate noted that a survey authorized by the General Assembly had mistakenly determined some beds to be natural and others to be planting grounds. The delegate maintained that under the proposed version such mistakes could not be rectified. \textit{Id.} at 2881. The Convention, apparently attempting to assuage these fears, amended the provision by deleting the phrase and adding: "but the General Assembly may from time to time provide by law for surveys to define such natural beds, rocks and shoals." \textit{Id.} at 2880-81.

\begin{itemize}
  \item \textsuperscript{263} 158 Va. at 553, 164 S.E. at 699 (emphasis added).
  \item \textsuperscript{264} \textit{Id.} at 554, 164 S.E. at 699. The court's conclusion that the provision did not restrict the legislature's power to use the oyster beds for public purposes may have been correct, but not for the reasons given by the court. Under the public trust doctrine, certain public uses (those within the \textit{jus publicum}) are superior to other public uses, as well as to private interests. \textit{See} notes 207-210, 222-227, 248-252, & accompanying text supra. The proper inquiry therefore should have been whether the discharge of sewage was a public use superior to the public use of oystering. Article XI of the state constitution arguably answers that question in the negative. Although the court suggested that the right to discharge sewage was part of the \textit{jus publicum}, \textit{id.} at 554, 164 S.E. at 699, it did not base its decision on that suggestion.
\end{itemize}
doctrine in more favorable terms. In *Taylor v. Commonwealth*, the court approvingly quoted from *Martin, Illinois Central*, and other cases discussing the public trust concept. In *Taylor*, a riparian owner sued the Commonwealth, alleging that her riparian rights were being violated by an artesian well constructed for withdrawing and selling water to the city of Richmond. The well was in front of the plaintiff's riparian land between the low water mark and the line of navigability of the York River. In rejecting the plaintiff's claim, the court stated that the "[C]ommonwealth holds as trustee a vast body of land covered by the flow of the tide, precisely as in the case before us, for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive." Although recognizing that the riparian owner had certain rights beyond the low water mark, the court concluded that the riparian proprietor could not exercise these rights "capriciously and arbitrarily," without regard for the rights of others. One of these rights was the state's right to develop soil resources underneath the York River "for the common benefit of all of its citizens."

Before ruling for the state, the court suggested that the result may have differed if two private parties were involved. This suggestion further highlights the court's reliance on the public trust doctrine. Without that doctrine, the court could not have resolved the conflict between the respective rights of the riparian proprietor and the state in the state's favor because the state would not have had an interest.

Other decisions of the Virginia Supreme Court rendered before *Newport News* also adopted the spirit, if not the legal principles, of the public trust concept. Given that these earlier supreme court decisions accepted the concept of common or public rights more readily than the later opinions, and that common rights is an ancient concept, perhaps the opinions closer in time to the colonial

265. 102 Va. 759, 47 S.E. 875 (1904).
266. Id. at 775, 47 S.E. at 881.
267. Id. at 776, 47 S.E. at 881.
268. Id. at 776-77, 47 S.E. at 882.
and early statehood periods should be entitled to more weight.  

Finally, the court ignored statutes specifically enacted to protect common rights. The first major legislation protecting common rights was an 1780 General Assembly act. Entitled “An act to secure to the publick certain lands heretofore held as common,” it provided:

WHEREAS certain unappropriated lands on the bay, sea, and river shores, in the eastern parts of this commonwealth, have been heretofore reserved as common to all the citizens thereof, and whereas by the act of general assembly entitled “An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands,” no reservation thereof is made, but the same is now subject to be entered for and appropriated by any person or persons; whereby the benefits formerly derived to the publick therefrom, will be monopolized by a few individuals, and the poor laid under contribution for exercising the accustomed privilege of fishing: Be it therefore enacted by the General Assembly, That all unappropriated lands on the bay of Cheasapeake, on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth, which have remained ungranted, and which have been used as common to all the good people thereof, shall be, and the same are hereby excepted out of the said recited act, and no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law, to pass any estate or interest therein.

As the Act’s preamble indicates, the General Assembly enacted the statute to clarify the effect of a prior land grant act on common lands and rights. Enacted in 1779, this earlier legislation established a land grant office and provided a procedure for private appropriation of waste and unappropriated lands. Because the

270. The Virginia Supreme Court has recognized the validity of this point. See Garrison v. Hall, 75 Va. 150, 162 (1881).
273. Act of May 3, 1779, ch. 13, 1779 Va. Acts 50. The Land Office Act allowed anyone to purchase waste and unappropriated land at 40 pounds per 100 acres. Upon payment of the consideration fee, the Auditor's Office issued the purchaser a warrant stating the acreage purchased. The warrant authorized the county surveyor to locate and survey a tract of waste
The Commons Concept

1779 Act did not exempt the shores of the Chesapeake Bay, the sea, and rivers and creeks, private parties could acquire interests in these lands. To the extent that they did, the public right of fishery was restricted. By reserving certain shorelines for common use in its 1780 legislation, the General Assembly ensured that all citizens, including the poor, could continue to exercise their "accustomed privilege of fishing."  

The problem of private appropriation of the shore created by the 1779 Act may have been exacerbated by a reference in the records of the 1679 session of the Colonial Assembly to the rights of private riparian owners. The reference was made in response to a complaint by a colonist, Robert Liny, who alleged that third parties were interfering with his exclusive right to fish from the shore of his land. The third parties asserted that they were entitled to use the watercourse and the adjoining shore for fishing because the King held title to the waterway. In granting Liny relief, the Colonial Assembly stated:

\[ \text{[I]t is ordered and declared by this grand assembly that every mans right by vertue of his pattent extends into the rivers or creekes soe farre as low water marke, and it is a priviledge granted to him m and by his pattent, and that therefore noe person ought to come and fish there above low water marke or hale their scenes on shoare (without leave first obtained) under the hazard of committing a trespasse, for which he is sueable by law.}\]

The broadly-phrased order arguably applied to all lands adjoining rivers and creeks. If this was the case, then any grant obtained for and unappropriated land. The completed survey and warrant were returned to the Land Office where, if after six months no caveat had been entered against the warrant, the purchaser received a grant. Legislation eliminated the land warrant system in 1952, thereby prohibiting the issuance of warrants after July 1, 1952. Va. Code § 41-1 (1953). Since 1952, waste and unappropriated land can be sold only in proceedings in the circuit or corporation courts of the county where the land is located. Va. Code § 41.1-16 (1981). For a judicial description of the land grant procedure see Miller v. Commonwealth, 159 Va. 924, 166 S.E. 557 (1932), and Powell v. Field, 155 Va. 612, 155 S.E. 819 (1930).

274. The original version of the 1780 Act referred only to the privilege of fishing, thus suggesting that fishing was the only valid common use. Later versions, however, extended the scope of the commons reservation to include fowling and hunting. See Code of Virginia ch. 62, § 1 (1849); Garrison v. Hall, 75 Va. 150, 163-64 (1881).

275. 2 HENING'S STATUTES, supra note 27, at 456.
riparian lands pursuant to the 1779 Act automatically would extend to the low water mark regardless of whether the grantee located his land warrant to include the shore. The Virginia Supreme Court has long puzzled over the meaning of the Robert Liny order, not knowing whether to interpret it as a legislative enactment, a legal judgment, or an advisory opinion. The court's decisions have been inconsistent.

Regardless of how Virginia jurisprudence resolves the debate on Liny, it is clear that the boundaries of lands bordering the Atlantic Ocean, the Chesapeake Bay, and Virginia rivers and creeks now extend to the ordinary low water mark. In 1819 the General Assembly passed a statute that accomplished this result, apparently for the purpose of erasing any "doubts" as to the "rights of owners" of land bordering the above waters. The language of the statute, however, explicitly provided:

That nothing in this section shall be construed to prohibit any person or persons from the right of fishing, fowling and hunting on these shores of the Atlantic ocean, Chesapeake bay and the rivers and creeks thereof, within this Commonwealth, which are now used as a common to all the good people thereof.

276. This approach would have been contrary to the majority position, which presumed that grants of land abutting tidal waters extended only to the high water mark. Miller v. Commonwealth, 159 Va. 924, 929, 931, 166 S.E. 557, 561, 562 (1932). See generally 1 H. Farnham, supra note 178, §§ 36-61. As a practical matter, it seems that a private party would not want his grant to include the intertidal strip or marshland because these areas essentially were worthless from an agrarian standpoint. Once a party paid the fee for a warrant, he was limited to the number of acres specified in the warrant and probably would not want to waste this acreage on nonagrarian land. See Act of May 3, 1779, ch. 13, 1779 Va. Acts 50, 52. Thus, if Liny had general applicability, it increased the 1779 Act's infringement on public interests.


279. 1 VA. CODE ch. 87, § 1 (Rev. 1819).
Thus, while extending the boundaries of land on tidal waters to the ordinary low water mark, the 1819 Act continued to preserve the public's right to use the shore for fishing, fowling, and hunting if the shores previously had been used in common.\(^{280}\)

A third statute protects the public's common rights in "[a]ll unappropriated marsh or meadow lands lying on the Eastern Shore of Virginia." Passed in 1888 and still applicable today, the Act provides that all lands, "which have remained ungranted, and which have been used as a common . . . shall continue as such common, shall remain ungranted," and shall be subject to the right of the people to "fish, fowl, or hunt."\(^{281}\) The legislature apparently passed the act to clarify the status of the public interest in certain marshes and meadowlands. A previous act had modified the protection of the 1780 Act by limiting its scope to "[a]ll the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law."\(^{282}\)

Although there is disagreement over whether the phrase "which have been used as a common by the people of the state" represents a legislative recognition that all such lands have in fact been so used, or whether it represents a qualification of the kinds of lands reserved by the Act, the statute provides further evidence that common rights exist. Indeed, the 1888 Act appears to give greater protection to the common areas falling within its scope than does the 1780 legislation, as modified by the 1819 Act and subsequent statutes.\(^{283}\) Whereas the 1780 Act reserves only a public right to use certain lands owned by private parties, the 1888 Act reserves

\(^{280}\) A comparison of the development of the commons concept in Virginia and in England reveals striking similarities. Initially, the concept in both places connoted a communal ownership interest. However, as each land became more populated, the concept lost its public ownership characteristics and acquired traits similar to an easement. Through its adoption of the 1819 Act, the General Assembly completed the evolutionary process, making it clear that, at least with respect to tidal shores, common lands signified lands privately owned yet subject to certain public uses.


\(^{282}\) Act of April 1, 1873, ch. 333, 1873 Va. Acts 310. The 1873 act repealed 1866 legislation authorizing the sale of common lands and thus reinstated, in modified form, the common lands reservation of the 1780 Act. See note 286 infra.

all relevant lands from being granted. Further, unlike the present version of the 1780 legislation, the 1888 Act does not contain a phrase limiting the protected land to that “not conveyed by special grant or compact according to law,” thus suggesting that, at a minimum, the legislature expressly would have to repeal or amend the 1888 Act to convey the marshlands covered by the Act. 284

Since 1780, the General Assembly has significantly altered the protection accorded common rights under the 1780 Act. In 1802, for example, the legislature extended the common lands exemption to the “banks, shores, and beds of the rivers and creeks in the western parts” of the state. 285 Then, as mentioned earlier, in 1866 and 1867 the General Assembly enacted reconstruction statutes that repealed the common lands reservation first codified in 1780 and authorized the sale of these previously protected lands. 286 Not until 1873 was the common lands legislation reenacted, with some substantial modifications. In its revised form the statute provided:

1. All the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state, for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish, subject to the reservations and restrictions [hereinafter] imposed. 287

287. Va. Code ch. 62, § 1 (1873). A comparison of the 1873 and 1780 acts reveals some significant revisions, including: (1) the deletion of the phrase “unappropriated lands” and the use of the phrase “All the beds of the bays, rivers and creeks”; (2) the reservation of the “shores of the sea,” instead of the shores of rivers and creeks; (3) the inclusion of the language “not conveyed by special grant or compact according to law;” apparently in recognition of possible oyster, hunting, or fishing right grants, see Darling v. City of Newport News, 123 Va. 14, 28, 16 S.E. 307, 311 (1918)(Sims, J., dissenting); French v. Bankhead, 52 Va. (11 Gratt.) 136, 152-53 (1854); (4) the omission of hunting from the protected activities and the addition of “taking and catching oysters”; and (5) the deletion of the language “which have been used as a common.” Arguably, the legislators made the last change because they considered it nonrestrictive and therefore unessential. Alternatively, it can be argued that previously only those lands used as a common could be reserved and that after 1873 this requirement no longer was necessary. Also, the title of § 1 of the 1873 act contradicts the body
The common lands statute in effect at the time of the *Newport News* decision was substantially similar to the 1873 version. Thus, even statutory law recognized the validity of public interests in tidal resources.

Yet, even if the court in *Commonwealth v. City of Newport News* accurately described Virginia law in 1932, the court's position has since lost merit. Important changes have been implemented in constitutional and statutory provisions dealing with water policy. For example, the Virginia Constitution now declares that "it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings" and "to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth." Section 2 of the article authorizes the General Assembly to implement the broad policy of section 1, stating that "the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth." The drafters of section 1 apparently thought that it of the act. Whereas the act is entitled "Ungranted shores of Chesapeake bay, and of the sea and rivers or creeks, to be sold or rented by the board of public works as fisheries," the text of the act itself refers to "[a]ll of the beds of the bays, rivers and creeks, and the shores of the sea." According to the canons of statutory construction, the body of the act controls because the code revisor, not the legislature, supplies the titles. See 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 47.03, 47.14 (4th ed. 1943 & Supp. 1981). See also VA. CODE § 1-13.9 (1979)(headlines of sections are mere catchwords to indicate contents of statute and are not considered titles of statutes unless expressly provided); Chesapeake & Ohio Ry. v. Pew, 109 Va. 288, 293, 64 S.E. 35, 37 (1909)(the court, in referring to the 1904 code, states that titles to acts are inserted by a compiler for convenience).

288. See VA. CODE § 3573 (1930)(current version at VA. CODE § 62.1-1 (1973)). The few changes included the deletion of the word "and" that preceded "creek" in the earlier statutes and the addition of the language "Subject to the provisions" of proceeding sections and future acts of the General Assembly. Although the second change clearly was intentional, the first change probably should not be construed as indicating a change in the statute's meaning. Under the canons of statutory construction, there is a presumption that a change in statutory language is to clarify the statute especially when the change is in a code, which serves primarily to simplify the law. Also, if the modified language can be construed consistently with the old wording, it should be interpreted as such. See 1A C. SANDS, supra note 287, § 28.11. It is interesting to note that the earlier versions of the common lands statutes were more clearly drawn, perhaps because they more accurately reflected common law principles.

289. VA. CONST. art. XI, § 1.

290. Id. § 2.
would create a public trust in certain lands and waters. Indeed, the records of the 1969 Senate debates that accompanied consideration of section 1 of article XI indicate that one senator attempted to modify the section's language by including a statement that "open lands and waters" owned by the state were to be held in trust for the people of the state. The article's floor sponsor opposed the amendment because he believed the article already established a "trust" for "public lands and waters." When these two constitutional provisions are interpreted in light of the third section, which establishes the trust for natural oyster beds, rocks, and shoals, the floor sponsor's conclusion appears logical. When interpreted in light of certain statutes enacted contemporaneously, the conclusion becomes inescapable.

One key statutory provision is Virginia Code section 10-178 which is part of the Virginia Environmental Quality Act. After providing that the section was passed "[i]n furtherance of Article XI of the Constitution of Virginia and in recognition of the vital need of citizens . to live in a healthful and pleasant environment," the provision then states:

[I]t is hereby declared to be the policy of the Commonwealth to promote the wise use of its air, water, land and other natural resources and to protect them from pollution, impairment or destruction so as to improve the quality of its environment. It shall be the continuing policy of the government of the Commonwealth to initiate, implement, improve, and coordinate environmental plans, programs, and functions of the State in order to promote the general welfare of the people of the Com-

291. Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution 374-77 (extra session 1969, regular session 1970); see Howard, supra note 255, at 219. A report on the proposed revision of article XI of the state constitution described the "proposed Conservation article" as "making a statement of policy" and "removing possible legal barriers to effective governmental programs." It also stated that the proposal "should operate as part of the climate of state and private initiative to deal with such increasingly important problems as air and water pollution, access to the countryside for recreation and other purposes." Report of the Commission on Constitutional Revision to His Excellency, Mills E. Godwin, Jr., Governor of Virginia, The General Assembly of Virginia and the People of Virginia, H. Doc. No. 1, H. & S. Doc. 322 (1969); see notes 293-295 & accompanying text infra.


294. Id. § 10-178 (1978).
monwealth and fulfill the State’s responsibility as trustee of the environment for the present and future generations.\textsuperscript{295}

Enacted shortly after article XI was amended, the above section not only supports the floor sponsor’s conclusion that a trust existed for public lands and waters specifically, but suggests that the scope of the trust also included environmental resources generally.

Another important Virginia statutory provision provides that “[e]xisting water rights are to be protected and preserved,” but that this protection is “subject to the principle that all of the State waters belong to the public for use by the people for beneficial purposes without waste.”\textsuperscript{296} This statement recognizes that the public has important interests in Virginia’s water resources and that existing private rights “are to be preserved subject to” the public’s ownership interests. Similarly, another statutory provision declares that state waters are natural resources subject to regulation pursuant to state police powers.\textsuperscript{297} Such regulation is “to be exercised with a view to the welfare of the people of the State” and to the public’s “changing wants and needs.”\textsuperscript{298}

In summary, the \textit{Newport News} decision is questionable both because of its analysis and because of the subsequent adoption of important statutory and constitutional provisions granting greater recognition to the public interest in water resources. The court in \textit{Newport News}, however, is correct in its description of the interac-

\textsuperscript{295} Id. (emphasis added).

\textsuperscript{296} Id. § 62.1-44.36 (1973). Section 62.1-44.36 also provides that:

(2) Adequate and safe supplies should be preserved and protected for human consumption, while conserving maximum supplies for other beneficial uses

(3) It is in the public interest that integration and coordination of uses of water and augmentation of existing supplies for all beneficial purposes be achieved for the maximum economic development thereof for the benefit of the State as a whole.

Under the Code, the term “water” includes “all waters, on the surface and under the ground, wholly or partially within or bordering the State or within its jurisdiction and which affect the public welfare.” \textit{Id.} § 62.1-10(a) (1973). Furthermore, § 62.1-10(b) defines “beneficial use” to mean “domestic, agricultural, recreational and commercial and industrial uses.” \textit{Id.} § 62.1-11(a), (b) (1973); see note 296 supra.

tion between the *jus publicum* and the *jus privatum*. As the court explained, when the state grants interests in tidal waters and lands to private parties, those parties take subject to the *jus publicum*. This, however, does not necessarily mean that the interest conveyed to the private party actually will be restricted or subordinated to public rights. Rather, the private interests will be affected only to the extent that there is a valid public right or interest being jeopardized.

Under *Illinois Central* and *Newport News*, determining the extent to which a private interest should be restricted requires the court to make three inquiries: first, whether a particular public use should be protected as part of the *jus publicum*, and therefore superior to conflicting private interests, or as part of the *jus privatum*, and therefore subject to alienation to private parties; second, assuming a valid public use exists, whether the private interests substantially impair the public right; and third, whether the substantial impairment is the result of a legislative decision to use the resources for another valid public purpose. 299

Regardless of how the conflict concerning the public trust doctrine is resolved, Virginia clearly must accept the doctrine to a degree. Although after the American Revolution each state acquired jurisdiction and dominion over all lands and waters within its boundaries, *Illinois Central* establishes that each state bears non-delegable responsibilities for navigable waters and lands. Yet, under the doctrine, the state can both meet these responsibilities and transfer interests in natural resources to private parties, as long as the state does not violate the substantial impairment standard by, for example, totally disposing of its ownership interests or abdicating its duties. Thus, if properly used, the doctrine provides a flexible method for accommodating the interests of both public and private parties.

Determining the extent to which the doctrine can be used in Virginia requires considering the kinds of public uses that the Virginia

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299. For example, in *Newport News*, the court decided that the right of fishery was part of the *jus privatum*, which meant that the public could exercise the right to the extent that it had not been conveyed to private parties. Nonetheless, the court denied the state relief because the substantial impairment of the public’s right of fishery resulted from a legislative decision to use the resources for another valid public use, sewage discharge. 158 Va. at 551-52, 555-56, 164 S.E. at 698-700; see text accompanying notes 250-252 supra.
courts protect. The most obvious public use protected by the Virginia Supreme Court is the right of navigation. As previously mentioned, the public right of navigation arises from the federal constitutional right to regulate navigation and commerce, and is part of the *jus publicum*, such as it exists in Virginia. Whether this right includes uses indirectly related to navigation is unclear. The state courts have tended to construe strictly the scope of the navigation right in the public trust doctrine, limiting, for example, the power to improve navigable waters without compensating injured riparian proprietors to improvements made for the purposes of navigation, flood control, and power development.

The Virginia Supreme Court, in *Boerner v. McCallister*, indicated that the right of navigation is the only public interest in navigable waters. In *Boerner*, the plaintiff sought an injunction to restrain the defendant from trespassing and fishing in the part of the Jackson River that flowed through the plaintiff's property. The plaintiff claimed to be the exclusive owner of the bed of that portion of the river. The defendant argued that he merely was exercising the public's right to fish in navigable waters. In deciding for the plaintiff, the court held that the plaintiff owned the bed pursuant to a Crown grant conveying not only the lands bordering on the river, but also "the rivers, waters and watercourses . . . together with the privilege of hunting, hawking, fishing, fowling." Then, after noting that the defendant had not established the navigability of the river, the court stated that "there is persuasive authority to the effect that even though a stream may be floatable, and in some instances navigable, the public interest is therein limited to the right of navigation."
This statement lacks merit for several reasons. First, the court's language concerning the scope of the navigability right is dictum because the stream was unnavigable. Second, as mentioned earlier, current statutory and constitutional provisions now provide greater recognition of public interests in natural resources. Third, the court in Boerner failed to conduct even a cursory examination of the public trust doctrine as it originated through the commons concept and as it developed in the American legal system. Moreover, when the court construed the Crown grant, it stated that "[a]t the time of the grant [between 1749 and 1751] there was no law preventing the conveyance" of watercourses. Yet by that time the public trust doctrine had begun to develop and common rights were regulated carefully in England. Finally, other Virginia decisions indicate that the public interest in navigable waters is broader than the right of navigation.

For example, Virginia courts have recognized sewage discharge into navigable waters as a legitimate public use. Indeed, the Virginia Supreme Court, in Commonwealth v. City of Newport News, quoted approvingly another court's description of this use as "part of the jus publicum." The Virginia Supreme Court in City of Hampton v. Watson made a similar reference. In Hampton, an individual riparian proprietor sued the city of Hampton to recover damages for pollution of navigable waters caused by the city's sewers. The plaintiff claimed that the pollution was damaging the oyster planting grounds that he had leased from the state. In ruling for the city, the court held that under the public trust doctrine Hampton had

the right to use the waters of Hampton creek for the purpose of carrying off its refuse and sewage to the sea, so long as such use does not constitute a public nuisance, and as such be discontinued by the legislature, which has control over the extent to which these waters may be so used.

306. See text accompanying notes 262, 289-298 supra.
308. 158 Va. at 554, 164 S.E. at 699 (quoting Sayre Co. v. Newark, 60 N.J. Eq. 361, 45 A. 985 (1900)).
309. 119 Va. 95, 89 S.E. 81 (1916).
310. Id. at 101, 89 S.E. at 82.
The court explained that the "sea is the natural outlet for all the impurities flowing from the land" and the public health demands of the rapidly growing coastal cities "should not be obstructed in their use of this outlet, except in the public interest." Moreover, it declared that sewerage systems of well-settled areas have become "an imperative necessity, a public right, which is superior to the leasing by the state of a few acres of oyster land" to the plaintiff.

The court, however, noted the well-established distinction between pollution of navigable tidal waters and unnavigable streams, for only the former are held by the state for the public use and benefit.

A similar result was reached in *Darling v. City of Newport News,* where the Virginia Supreme Court once again denied relief to a lessee of oyster planting grounds suing for damages to those grounds caused by the city's sewer system. The court explained that the lessee acquired only a limited right to plant and take oysters from the grounds. All other public rights were preserved, including the right of drainage.

311. Id.
312. Id. at 101-02, 89 S.E. at 82.
313. Id. at 90, 89 S.E. at 81.
315. Id. at 19-20, 96 S.E. at 309. In a frequently cited dissenting opinion, Justice Sims of the Virginia Supreme Court concluded that the city should pay damages to the plaintiff "to the extent of the just compensation required" under the Virginia Constitution for injury by the state to private property interests. Id. at 40, 96 S.E. at 315 (Sims, J., dissenting). Although Justice Sims agreed that the state held navigable waters and their beds for the public benefit, id. at 23, 96 S.E. at 309 (Sims, J., dissenting), he also believed that the state had the statutory right to transfer exclusive fishery rights to private parties. As Justice Sims explained, upon obtaining independence from England the states acquired both the Crown's and Parliament's powers, except as limited by the United States Constitution. Although the Magna Carta prohibited the Crown from granting exclusive fisheries, it did not restrict Parliament's power to grant fisheries; the states therefore assumed Parliament's right. Id. at 23-26, 96 S.E. at 310 (Sims, J., dissenting). Further, according to Justice Sims, "aside from the public right of navigation," which derives from the United States Constitution, "there is no jus publicum, or public right, or public interest in tidal navigable salt waters or the beds thereof, except as the public is permitted to enjoy by legislative sufferance or legislative grant." Id. at 26, 96 S.E. at 310 (Sims, J., dissenting). Under the facts of *Darling*, the plaintiff acquired a property right, the exclusive right to use oyster beds for planting, before the city obtained its power to discharge sewage. Id. at 29, 38-39, 96 S.E. at 312-13 (Sims, J., dissenting). This fact enabled Justice Sims to discount *City of Hampton v. Watson*, where the plaintiff acquired his oyster lease after the city began discharging sewage. Id. at 33, 96 S.E. at 313 (Sims, J., dissenting).
The United States Court of Appeals for the Fourth Circuit, in *DuPont Rayon Co. v. Richmond Industries*, carried the reasoning of the above cases further by suggesting that the public right to use a sewer system would be protected even though the city inhabitants were not riparians. In *DuPont*, a riparian manufacturing corporation sued to enjoin a dyeing plant's waste discharge into the James River through the Richmond sewerage system. Denying the injunction, the Fourth Circuit stated:

> If the waters of the stream become polluted from [public sewage disposal], no right of the riparian owner is invaded, because his right to use such waters is subject to the superior right of the public for it is clear under the law of Virginia that neither the public health nor the industrial development of its tidewater cities, both of which are dependent upon sewage disposal, can be subordinated to the rights of a riparian owner to make use of public waters for private purposes.

The court found unpersuasive the plaintiff's argument that the defendant was not a riparian owner and therefore had no right to use the river for sewage. The court responded that "the inhabitants of a city are not to be denied the right to use the public sewers emptying into a tidal stream because they are not riparian owners on such stream."

The dissent's analysis creates several problems. First, it fails to understand the essence of the public trust doctrine and the *jus publicum*. Although the defendant city in *Darling* did not acquire the power to discharge sewage into navigable waters until after the plaintiff obtained his leasing interest, the state would have had this power before the plaintiff obtained his interest. The key inquiry under the public trust doctrine should be whether the state held powers and rights for the citizens' benefit, not whether it had delegated some of this power to a local political unit. Second, the dissent ignores the common law origins of the public trust doctrine, focusing only on whether the legislature has authorized a public use. Under the common law public trust doctrine, any public rights not granted by the legislature were preserved for the benefit of the people. See text accompanying notes 194-195, 207-211, 218 *supra*. Further, as the dissent concedes, grants in derogation of public rights must be strictly construed. See 123 Va. at 38, 96 S.E. at 314 (Sims, J., dissenting). Third, the dissent's emphasis on the temporal priority of the plaintiff's interest closely resembles principles of the prior appropriation doctrine. Virginia, however, is a riparian doctrine state. See note 318 *infra*.

316. 85 F.2d 981 (4th Cir. 1936).
317. *Id*. at 984.
318. *Id*. Like most Eastern states, Virginia adopted the common law riparian doctrine to govern allocation of rights in natural watercourses. As explained by the Virginia Supreme Court, this doctrine provides:
Numerous cases also have referred to a public right or liberty of fishing. For example, in *McCready v. Commonwealth*, the Supreme Court of Virginia stated that a legitimate public use of the soil below the low water mark was "the right of the people of the state to take and plant oysters subject to the regulations of law." *McCready* involved the validity of a legislative act prohibiting oyster planting in state waters by any person not a citizen of Virginia. The statute was challenged on constitutional grounds as being violative of both the privileges and immunities clause and the commerce clause. In rejecting the constitutional challenges, the Vir-

A proprietor may make any reasonable use of the water of the stream in connection with this riparian estate and for lawful purposes within the watershed, provided he leaves the current diminished by no more than is reasonable, having regard for the like right to enjoy the common property of other riparian owners.

Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 467, 130 S.E. 408, 410 (1925)(quoting Stratton v. Mt. Herman Boys' School, 216 Mass. 83, 88-89, 103 N.E. 87, 89 (1913)). The basic premise of the riparian doctrine is that the right to use the water of a natural watercourse is "a right inherent in the [riparian] land." Mumpower v. City of Bristol, 90 Va. 151, 153, 17 S.E. 853, 854 (1893). In other words, water rights are vested property rights that are created as an incidence of ownership of land through or by which natural watercourses flow. Hite v. Town of Luray, 175 Va. 218, 226, 8 S.E.2d 369, 372 (1940). As the above description indicates, there are two basic components to the riparian doctrine. First, a riparian owner's water use must be for the riparian land. Second, the riparian proprietor has the right to make a reasonable use of the watercourse. See generally 2 H. Farnham, supra note 178, §§ 461-474.

Most of the Pacific coast states have modified the common law by replacing the riparian doctrine with the prior appropriation doctrine. Under the latter doctrine, watercourse rights depend on the priority of the use. Generally those parties who first appropriate flowing water and apply it for a beneficial purpose acquire a legally protected right. This principle was more sensible in the arid west, where there often was insufficient water to satisfy all riparian needs. See generally 3 id. §§ 649-695.

Recent cases also have supported the conclusion reached by earlier courts that a "riparian right to use public waters is always subject to the superior right of the public to pollute those waters for sewage disposal." In Ancarrow v. City of Richmond, 600 F.2d 443, 446 (4th Cir.), cert. denied, 444 U.S. 992 (1979), the Fourth Circuit rejected an argument that intervening changes in Virginia law, specifically the state water quality law, weakened an earlier line of sewage disposal cases. In *Ancarrow*, the court held that riparian owners were not entitled to just compensation for impairment of their riparian rights because a riparian owner is subject to the public's superior right to dispose of sewage. (The State Water Control Law is found in Va. Code §§ 62.1-44.2 to .34:7 (Supp. 1981).) If a municipality uses navigable or public waters for sewage disposal, the city arguably also should be allowed to use these waters for public drinking supplies. The latter use is as necessary to the public health and development as sewage disposal.

319. 68 Va. (27 Gratt.) 985, aff'd, 94 U.S. 391 (1876). 320. Id. at 988.
Virginia Supreme Court held that the state had plenary power to regulate soil use under navigable waters for purposes such as oyster planting, as long as the exercise of that power did not interfere with navigation and commerce.\textsuperscript{321} Although the court referred to several public trust cases of the United States Supreme Court, including \textit{Martin v. Waddell},\textsuperscript{322} it acknowledged that the public trust doctrine’s validity was disputed, stating: “It is a question of no importance, as far as this case is concerned, whether the people of Virginia were clothed with the legal title to the lands and waters in question, or only had a beneficial interest in them or right to their enjoyment.”\textsuperscript{323} The key inquiry instead was whether the state’s citizens had a “proprietary right in common.”\textsuperscript{324} The answer, according to the court, was that “[w]here private rights do not exist to the exclusion of the common right, that of fishing belongs to all the citizens or subjects of the state.”\textsuperscript{325} This common right was a property right, which was held by the state’s citizens as “tenants in common” and which did not have to be shared with the people of other states.\textsuperscript{326}

On appeal, the Supreme Court of the United States affirmed the decision of the Virginia Supreme Court, stating that the privileges and immunities clause did not vest the people of one state with “any interest in the common property of the citizens of another State.”\textsuperscript{327} According to the Court, each state acquired exclusive dominion and control over the navigable waters and beds within their boundaries after the American Revolution, except as limited by the federal right of navigation. Virginia, therefore, had the right “to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish.”\textsuperscript{328} Further, when such appropriation occurred, the state’s citizens acquired “a property right, and not a mere privilege or immunity of citizenship,” which arose not only from their citizenship but also from property

\begin{itemize}
\item \textsuperscript{321} Id. at 991.
\item \textsuperscript{322} Id. at 987-88.
\item \textsuperscript{323} Id. at 990.
\item \textsuperscript{324} Id.
\item \textsuperscript{325} Id. at 989.
\item \textsuperscript{326} Id. at 989, 993.
\item \textsuperscript{327} McCready v. Commonwealth, 94 U.S. 391, 395 (1876).
\item \textsuperscript{328} Id.
\end{itemize}
In *Garrison v. Hall*, the Virginia Supreme Court again considered the nature and extent of the public's interest in fisheries. According to the court, at common law "the public right of fishing existed, and was common to all the people of the State," as long as private parties had not acquired riparian rights in the area. The land grant legislation of 1779 and 1780 altered this situation. As mentioned earlier, the 1779 Act established a land grant office and set up a procedure for granting waste and unappropriated lands. This Act apparently included the shores of navigable waters within the land grant process, so that the public right of fishery was restricted to the extent that land was privately appropriated pursuant to statutory procedure. Thus the 1780 Act was passed to preserve the common right of fishery "which the people had been accustomed heretofore to enjoy." According to the court, the effect of the Act was

to reserve the right of fishing, and by a liberal construction, of fowling and hunting, being only coextensive therewith, as a common right to the people of the State, as an aquatic right on the public waters, which embrace the shores and the lands adjacent to them, so far as necessary for the enjoyment of those rights, and to that extent excepted them from location and grant by land office treasury warrant.

The court's opinion in *Garrison* suggests that the right of fishery was a pervasive right, well established by custom and usage. The court refers to evidence indicating that the surveyor, in laying the boundaries of the plaintiff's land, left a space between the boundary and navigable waters apparently to accommodate the public interests in fishing, fowling, and hunting. Although the court ap-

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329. *Id.* The Court also concluded that the statute did not violate the commerce clause because oyster planting and cultivation did not involve commerce. *Id.* at 396.

330. 75 Va. 150 (1881).

331. *Id.* at 159.

332. *Id.*, see text accompanying notes 271-274 supra.

333. 75 Va. at 163.

334. *Id.* at 162. See Power & Kellogg v. Tazewells, 66 Va. (25 Gratt.) 786 (1875), which considered the nature of the interest given to private parties by the various oyster statutes. The court suggested that the interest was more than a revocable license because, inter alia, the right to fish existed before the statutory enactments.
peared hesitant to construe the public interest as including the rights of fowling and hunting, other decisions have described the right of fowling in all waters affected by the 1780 Act as "common" to all state citizens.\textsuperscript{335} The court in Garrison, however, indirectly reached the same result by interpreting the right of fishing as including the rights of fowling and hunting. The court then interpreted the 1780 Act as reserving common rights in all lands "necessary for the enjoyment of those rights," which may include land above the high water mark.\textsuperscript{336}

In summary, Virginia case law indicates that only a few public uses are part of the \textit{jus publicum}\textemdash the category of state property interests arising from the state's sovereignty and therefore imposing a duty on the state to its people and limiting private interests. Public uses included within the \textit{jus publicum} appear to be limited to the right of navigation and the right to dispose sewage in navigable waters. Most other public uses that can be made of natural resources, including the rights of hunting, fishing, and fowling, apparently are part of the \textit{jus privatum}. Although the Virginia courts never explained fully how they reached their decisions on the status of various public interests, their classifications appear consistent with previous law. Though not clearly enunciated, the following factors apparently play an important role in deciding whether a public use should be part of the \textit{jus publicum} or of the \textit{jus privatum}.\textsuperscript{337} First, a court considers the nature of the public use. This inquiry requires asking whether the public use involves prop-

\begin{itemize}
\item \textsuperscript{335} See, e.g., Meredith v. Triple Island Gunning Club, Inc., 113 Va. 80, 84, 73 S.E. 721, 723 (1912)(first describing the 1780 statute, then referring to the "right of fowling in these waters," apparently meaning the waters affected by the 1780 Act). \textit{See also In re Steuart Transp. Co.}, 495 F Supp. 38, 40 (E.D. Va. 1980)("Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people."). \textit{But see} Coupland v. Morton, 5 EnvTL. L. Rep. 20504, 20506 (E.D. Va. 1975)(No. 145-73-N), \textit{aff'd per curiam} 5 EnvTL. L. Rep. 20507 (4th Cir. 1975)(claiming that common rights of hunting, fishing, and fowling in all property within several miles of the Atlantic Ocean is foolish given the tremendous commercial development in the area).
\item \textsuperscript{336} 75 Va. at 163.
\item \textsuperscript{337} This analysis assumes that the court has determined the validity of the public use. That is, it assumes that the public use of certain natural resources already has received legal recognition and that the inquiry concerning the \textit{jus publicum} and \textit{jus privatum} attempts to discern the degree to which the use should be protected.
\end{itemize}
erty that can be possessed by an individual (e.g., wildfowl or fish), or whether the natural resource used cannot be possessed corporeally by an individual, except perhaps in a transient sense (e.g., watercourses). If the property is capable of possession, the law must allow private appropriation to maximize resource use. This is one of the basic assumptions of our property system. If, however, the law determines that the resource should be subject to a public interest and not absolutely owned by a private party, it must structure its system of private appropriation in a manner that gives all state citizens a reasonably equal opportunity to privately possess the property.

Virginia previously has accomplished this goal in one of two ways: either by allowing all citizens to exercise the particular public use or by setting up a regulatory system allocating exclusive use of the public right to a limited number of citizens through leasing or licensing arrangements. The right of fishery, for example, initially was available to the general public, but over time has been increasingly regulated as an open allocation system led to inefficient results.

Second, a court should consider whether an obligation should be imposed on a sovereign to govern use of certain natural resources to ensure its citizens' survival and health. Previously, for example, both early English and Roman societies imposed duties on the sovereign to protect the people's interests in navigable waters. The right of commerce and the freedom to travel by watercourse was vital to the survival of both societies. Today, the United States

338. This surely is one of the points of Illinois Central. See text accompanying notes 198-211 supra.

Constitution implicitly recognizes the importance of this right in the commerce clause, which limits the otherwise plenary powers of the states over navigable watercourses within their boundaries. The Virginia courts appear to recognize the right to discharge sewage into state waters as a right that the state as sovereign should protect to insure the health of its people. As a corollary, this second variable considers whether the resource is one that a free people would want one party to control. Indeed, the preamble to the 1780 Act clearly established that this consideration was of paramount importance in the Act’s passage.

**CONCLUSION**

The *Nature Conservancy* controversy is an excellent example of the relevance of a largely forgotten, ancient concept. The commons concept attained legal stature in English common law before America was colonized. A somewhat nebulous legal doctrine, the commons concept served as a means of ratifying people’s reasonable expectations by giving legal validity to property interests created either by private agreement or by long usage and acquiescence. The English legal system used the commons concept to elevate what appeared to be at least a well-accepted practice, and at best a private contractual right, to the status of a public property right. Although common rights apparently developed in England initially in the context of feudal manor lands, the rights also existed in tidal waters and the lands underlying them. Further, just as the rights first developed by private agreement, they also later were extinguished by both private contractual arrangements and private appropriation. The appropriation process eventually created a conflict between the lords, who wanted to obtain exclusive use of the common lands, and the peasants, who needed the common lands to survive. The Magna Carta partially alleviated the tensions of the competing interests by giving the peasants certain limited protection; it was Parliament, however, that eventually resolved the conflict by assuming full responsibility for common land.

340. The following conclusory remarks are made primarily in light of the common law development of the commons concept in England and Virginia, and generally without consideration of statutory and constitutional changes in the concept, especially under Virginia law, which will be the subject of a later manuscript.
management and regulation.

The common rights concept was brought to colonial America and, at least at the beginning of the colonization period, common lands played an important part in the settlers' lives. Eventually, however, the common right approach substantially yielded to private ownership. Several factors contributed to the deterioration in the importance of common rights. First, the commons concept developed in the context of the English feudal tenure system—a system in which land played an integral role in maintaining the military and governmental framework, in providing an important source of revenues and in establishing the social hierarchy. Common rights gave peasants interests in the land and allowed them to use property without requiring the Crown to transfer seisin, and thus governmental power and social prestige. The feudal system, however, never existed in the United States to the same extent as in England. Second, there were bountiful resources in the New World and a steady source of immigrants from the Old World to replace those who did not survive the many perils of life in America. The economic need for common rights was not nearly as strong in the New World as it was in feudal England. Finally, perhaps because of the independence of many American settlers, private enterprise and ownership became the foundation of America's property system. So, although common rights clearly existed in colonial Virginia and America, they played a more limited role than in England.

Once Virginia became a state sovereignty, its legislature passed a series of statutes to protect the common rights of Virginia citizens, primarily in tidal resources. Although the particular nuances of each statute are beyond the scope of this Article, the statutes demonstrate that the commons concept remains viable. Similarly designed state constitutional provisions support this statement. Despite these statutes, constitutional provisions, and the common law heritage of the commons concept, the Virginia Supreme Court has only reluctantly applied legal protection to common rights and has avoided interpreting that protection broadly. Nor has the court

341. In the Virginia colony, for example, there was no evidence of private land grants before 1615. Juergensmeyer & Wadley, supra note 23, at 368; see notes 141-151 & accompanying text supra.
fully accepted the statements of the United States Supreme Court on public rights in natural resources.

The state court's reluctance is understandable in light of the flexible, vague use of the commons concept, the absence of a clear, theoretical underpinning, and the private ownership bias of our property system. Yet, the concept's flexibility has assured its survival thus far by permitting it to respond to society's changing needs. In Roman society, for example, the economy centered around navigable watercourses, and common rights consequently existed in watercourses and their underlying soils. In feudal England, however, the agrarian economy caused the commons concept to apply primarily to farming or grazing land. Since the concept has been transplanted into America, the doctrine's focus has shifted back to navigable waters and the soils underneath them.  

Although the doctrine's vagueness may cause the state judiciary to balk at the prospect of adopting it, the concept can be applied in a legally responsible manner. For example, because the doctrine developed in England and the Roman Empire in a property context, it seems logical to apply the concept consistently with property law policies. A traditional policy of property law, exemplified by the law of custom, is to ratify people's reasonable expectations. Determining reasonable expectations in the common rights context requires focusing on evidence of common use, or the lack thereof, depending on the burden of proof. If there is no evidence of either prior legal recognition or actual common use of common rights in disputed resources, then subjecting the property to common rights would not ratify the public's or the private landowner's reasonable expectations.

Another important property law policy, more clearly enunciated

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342. See Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892). This shift is logical in light of the strong private ownership bias of our real property system.  

343. Determining who bears the burden of proof partially depends on the theory used to support the common rights. For example, under the prima facie theory, title to tidal waters and lands was prima facie in the Crown. See text accompanying notes 107-110 supra. The Virginia Supreme Court has interpreted the 1780 common lands statute as placing the burden of proof on the party claiming that certain land falls within the common lands exemption. Garrison v. Hall, 75 Va. 150, 154 (1881). According to the court, "all lands which ha[ve] never before been patented are to be considered as waste and unappropriated" French v. Bankhead, 52 Va. (11 Gratt.) 136, 168 (1854).
in recent years, concerns efficient use of resources.\textsuperscript{344} If the commons or public trust doctrines were accepted and interpreted in the broadest possible manner, then the allocation of resources subject to those doctrines arguably would be inefficient. The historical development of the commons concept in England, for example, demonstrates some of these inefficient results,\textsuperscript{345} including the problem of the freerider, who willingly allows other commoners or the private landowner to bear maintenance and management costs to reduce his own costs and thus maximize his short-run benefits. Another inefficient result is the individual user’s failure to perceive accurately the costs of increased use because the costs are spread among the entire class while the benefits are measured only in terms of individual gain.\textsuperscript{346} Finally, history demonstrates that the costs of management are increased because all members of the class of users have an interest in the common lands, and management therefore must occur by consent. These inefficiencies could be minimized by placing management duties in one entity, whether it be the state as holder of legal title and trustee for the people, or the private landowner.

In addition to the problems suggested by the English experience, application of the commons concept in modern America raises other unique economic considerations. A private landowner who improves his land without notice of common rights has a tremendous reliance interest at stake. Subjecting his proprietary interests to common or public interests discourages future economic land development. If, however, the private landowner had notice of the common rights, either through deeds, other recorded documents, actual use of the land by the public, or through any other legally accepted method of putting a party on notice, then the proprietor should be subject to the public’s property rights just as with other property interests.\textsuperscript{347} By focusing on the status of the party who


\textsuperscript{345} See Royal Report, supra note 26, at 9-10, 14, 42-43, 45-47, 52-53, 67-68.

\textsuperscript{346} See note 29 supra.

\textsuperscript{347} Notice, for example, is important in determining whether a subsequent purchaser of real estate can prevail against a prior purchaser. See generally 4 American Law of Property §§ 17.4-.36 (A. Casner ed. 1952). Similarly, it is important in determining whether a
purchased the disputed land after the creation of the common rights, the legal system perhaps can strike an equitable balance between the competing interests.

Further, in addition to conducting a policy analysis of the viability of the commons concept in our modern world, a court could consider certain established principles discussed in this Article to resolve Virginia common rights disputes. The common law background and the state's constitutional and statutory provisions firmly established the existence in Virginia of common or public interests in certain resources. So, the key inquiries in common rights controversies should concern (1) whether a particular piece of property is subject to common use and (2) if so, the nature and scope of the use. The legal existence of common rights, however, does not guarantee their continued existence, for the rights are not indestructible. Regardless of the theory used to explain the commons concept, the Virginia General Assembly, as representative of the state's citizens and as partial successor to the English Parliament and Crown, generally has the power to regulate property subject to common rights. Although *Illinois Central* demonstrates that this power is not absolute, the state legislature appears to have the power to alienate, within limits, common rights to exclusive, private use. The legislative provisions regulating common or public rights in natural resources, however, must be interpreted in light of their common law origins. For, while resolution of the status of public interests in water resources ultimately may depend on the philosophical predilections of the decisionmaker, the commons concept deserves a thorough consideration of its common law historical development.

Evidence of Common or Public Lands in W. Hening, The Statutes at Large

1 Hening's Statutes 199 (1632)
In this Act, which prohibited the killing of wild hogs without a license from the governor, the killing of deer and other wild beasts or fowl was permitted "in the common woods, forests, or rivers," to encourage training in the use of arms.

1 Hening's Statutes 230 (1642)
"The Declaration against the company to be entered as the twenty-first act."
In this declaration the Governor and the Grand Assembly sought to bar the Virginia Company from returning to power in the colony. The declaration denounces the Company's condemnation of the King's grantees as "occupiers of our land that is to say of the common land of us the said Treasurer and Company." Id. at 232. The declaration later states: "We [the Governor and Grand Assembly] cannot . . . give up and resign the lands which we had granted and hold from the king." Id. at 233.

Cary v. Brewer, 1 Hening's Statutes 548 (1660)
This order adjudges to the inhabitants of Stanley Hundred a right of common to 50 acres on the plantation.

Case of Rob't Liny, 2 Hening's Statutes 456 (1679)
"[I]t is ordered and declared by this grand assembly that every mans right by vertue of his pattent extends into the rivers or creekes soe farre as low water marke . . . ."

3 Hening's Statutes 101 (1692)
"An act for Confirmation of Lands"
This Act recognizes a right of private proprietorship in uninhabitable marshes and sunken grounds. See also id. at 307, 527.

3 Hening's Statutes 419, 427 (1705)
"An Act continuing the Act directing the building of the Capital and the city of Williamsburg; with additions."
This Act directs that a sufficient quantity of land at each port and landing place be left in common.

5 Henig's Statutes 68 (1738)
"An Act, for better securing the title of certain Lands to the Feofees of the Town of York; and for settling the same, for a Common, for the use of the Inhabitants of the said Town."

This Act, which creates a common at the Yorktown waterfront, traces the history of the common:

(1) The original survey of Yorktown denoted several uninhabitable waterfront parcels as parcels "to be laid off for a common shoar." Id. at 69.

(2) The Act also recognizes that from the time of the settling of Yorktown to the time of the Act "the inhabitants of the said town, have always used and enjoyed the aforesaid small parcels of land . . . as and for a common." Id. at 70.

(3) The Act finally declares that those particular waterfront parcels "shall be . . . and remain, as and for a common for ever." Id. at 71. See also E. Riley, The Founding and Development of Yorktown 1691-1781, at 200 (1942)(Ph.D. dissertation University of Southern California).

5 Henig's Statutes 191, 192 (1742)
"An Act, for establishing the Town of Richmond . . ."

This Act establishes an area adjacent to the river to be held forever as a common for the use and benefit of the inhabitants of Richmond.

7 Henig's Statutes 424, 427-28 (1761)
"An Act for further enlarging the town of Dumfries"

This Act empowers the trustees to lay off and assign any unimproved and unsold lots for a market place and a common.

8 Henig's Statutes 613 (1772)
"An Act to encourage the further settlement of the town of Alexandria"

This Act forever vests the wharf at Point West in the trustees of Alexandria who are directed to run it and free the public from any future expense associated with the wharf.
“An Act for adjusting and settling the titles of claimers to unpatented lands under the present and former government”

This Act grants, en masse, to each settlement in the western part of the colony 640 acres of common land adjacent to the settlement until each settlement can make a representation of their particular case to the general assembly

“This Act establishes the town of Boonsborough and states that “six hundred and forty acres of land allowed by law to every such township for a common may also be laid off adjoining thereto.”

“This Act excludes from any future grant lands on the Chesapeake Bay, the seashore, or shores of rivers and creeks which previously had been held as common.

“This Act concerns raising money for the war effort. The Act specifies that, in the event taxes prove unproductive, the capitol and palace in Williamsburg, and the public lands in James City County and on the Eastern Shore, are to be sold.

“Buckingham Courthouse is established with the provision that four of the lots in the center of town “shall be, and they are hereby reserved for the public use of the said county.” It further provides that 100 acres adjoining the town are vested in the trustees to the common use and benefit of the inhabitants.
11 Henning's Statutes 58 (1784)
  "An Act to amend the act for erecting a Light House on Cape Henry."
  
  This Act directs that a lighthouse be erected at Cape Henry and that the adjoining land be vested in the trustees to be held as common.

11 Henning's Statutes 399 (1784); 2 Code of Virginia ch. 36, at 414 (rev. 1819)
  "An Act directing the sale of the public lands and other property in or near the city of Richmond."
  
  This Act directs the sale of public lands, with the proceeds to be used for the erection of public buildings.

12 Henning's Statutes 97 (1785); 2 Code of Virginia ch. 47, at 423 (rev. 1819)
  "An Act for the sale of certain public lands."
  
  In this Act, public lands in York and Elizabeth City Counties are directed to be sold.

12 Henning's Statutes 207 (1785)
  "An act to repeal the act of assembly for establishing the town of Walkerton."
  
  Land previously directed to be held by the town's trustees as a common is revested in the legal representatives of John Walker.

12 Henning's Statutes 208-09 (1785)
  "An act for establishing the town of Clarksburg in the county of Harrison."
  
  One-half acre is directed to be appropriated by the trustees for the establishment of a courthouse.

12 Henning's Statutes 218 (1785)
  "An act for giving further powers to the trustees of the town of York."
  
  The trustees of the town of York are empowered to dispose of lands previously held by the town as common.

12 Henning's Statutes 227 (1785)
  "An act to empower Robert Mackey and John Peyton to build upon and convey certain lots in the common annexed
to the town of Winchester”

The title of this Act describes its content.

12 Henning’s Statutes 495-96 (1787)
“An act directing the sale of certain public lands.”
Public lands in James City and Northampton Counties are directed to be vested in commissioners charged with the sale of those lands.

12 Henning’s Statutes 603 (1787)
“An act to explain and amend the act for establishing the town of Boone’s Borough in the County of Kentuckey.”
This Act explains that 70 of the 640 acres vested in the trustees are to be laid out and sold as lots; the remainder are to be held in common.

13 Henning’s Statutes 173, 175 (1790)
“An act authorizing several lotteries, and the sale of certain lots in the town of Portsmouth.”
The Act permits certain lots belonging to the Commonwealth to be sold by lottery, the proceeds to be used to build schools, churches, and roads.

13 Henning’s Statutes 524 (1792)
“An act to amend an act entitled, An act authorizing the executive to direct the sheriffs to sell certain Lands the property of this ‘Commonwealth.’”
The Act directs that public lands are not to be sold by the sheriffs except when the proceeds of the sales equal the debts incurred by the public.

Henning’s Supplement 443 (circa. 1748-49)
“An act establishing a town at Hunting Creek in Fairfax County.”
This Act establishes Alexandria and directs the trustees to set apart portions of land for a market place and a public landing.

Henning’s Supplement 447 (circa. 1748-49)
“An act to empower the Vestry of the Parish of Newport in the County of Isle of Wight to sell the Glebe Lands in the said Parish and to purchase a more convenient glebe in lieu
The title of this Act describes its content.

Later Acts

Code of Virginia ch. 37, at 415-23 (rev 1819)
"An act directing the sale of certain public lands, and for other purposes."

This Act, along with its amendments, directs that the public land be sold and appoints commissioners to carry out the Act.

Code of Virginia ch. 41, at 31 (1850-51)
"An act amending the Code of Virginia."

This Act voids any conveyance of common land at the Westham Magazine.
Evidence of Common or Public Lands in Various Historical Journals and Books

A. The Virginia Magazine of History and Biography

Abstracts of Virginia Land Patents, 1 VA. MAG. HIST. & BIOGRAPHY 82 (1893-94)

This discussion of the early land patent and grant system mentions the grant of public lands in colonial Virginia.

Instructions to Governor Yeardley, 1618, 2 VA. MAG. HIST. & BIOGRAPHY 154 (1894-95); A. EMBREY, WATERS OF THE STATE 9 (1931) [hereinafter cited as A. EMBREY]

These instructions from the Virginia Company to the new Governor, Sir George Yeardley, make several references to common and other public land:

(1) Yeardley was to lay out 3,000 acres of the Governor's land and 3,000 acres of the Company's Land. 2 VA. MAG. HIST. & BIOGRAPHY at 155-56; A. EMBREY at 9-10.

(2) In each borough an additional 3,000 acres of the company's land were to be laid out to be worked by Company tenants. 2 VA. MAG. HIST. & BIOGRAPHY at 157; A. EMBREY at 11.

(3) Each borough was to have 100 acres of glebe land. 2 VA. MAG. HIST. & BIOGRAPHY at 158; A. EMBREY at 12.

(4) Each borough was to have 1,500 acres of common land to be known as the Borough's Land. 2 VA. MAG. HIST. & BIOGRAPHY at 158; A. EMBREY at 12.

(5) The instructions pronounce that occupiers of land without a grant from the Virginia Company are deemed occupiers of the common lands of the Company. 2 VA. MAG. HIST. BIOGRAPHY at 162; A. EMBREY at 15; see 1 HENING'S STATUTES 230.

(6) The Company reserved the right to later enlarge the acreage of Glebe and Borough Lands. 2 VA. MAG. HIST. & BIOGRAPHY at 163; A. EMBREY at 15.

Instructions to Berkeley, 1642, 2 VA. MAG. HIST. & BIOGRAPHY 281 (1894-95)

These instructions to the colonial Governor direct that each Virginia congregation have a parsonage house and 200 acres of "Gleable lands." The instructions also direct the reassignment
of lands formerly granted to public society. *Id.* at 285.


This book review mentions the communal manner in which land was held and worked in the early years of the colony. *See also* V. Dabney, *Virginia the New Dominion* (1971); 22 Wm. & Mary. Q. 89 (1913-14).


Glebe land of the Bristol and Hampton parishes is mentioned. *Id.* at 165. Action regarding the glebe land of the Henrico parish also is mentioned. *Id.* at 166.


These records of the General Council direct that the glebe lands be laid out for the parishes of Marston in York County and Middleton in James City County. The Council ordered that marshland in James City remain in common for a pasture. *Id.* at 45.


This journal reports the vesting of a small parcel of land on the waterfront in the feoffees of Yorktown to be used as a common. *See also* 5 Henning’s Statutes 68.


This is the petition of inhabitants of Princess Anne County, signed between 1770 and 1772, asking the Council to preserve Cape Henry and its vicinity as common land. *See also* 11 Henning’s Statutes 58.


Governor Berkeley granted the inhabitants of Bruton Parish escheated land, near Queens Creek.

Southall, *Captain John Martin of Brandon on the James*, 54
The author discusses the transition from communal land ownership to private ownership during Thomas Dale’s tenure as Colonial Governor. See also V. DABNEY, VIRGINIA THE NEW DOMINION (1971); 3 VA. MAG. HIST. & BIOGRAPHY 434 (1895-96).

B. The William and Mary Quarterly

Stephenson, Some Inner History of the Virginia Company, 22 WM. & MARY Q. 89, 90-91 (1913-14)
This article discusses the communal or corporate manner in which land was held and worked under the Virginia Company.

This article mentions the setting out of 3,000 acres of Governor’s land in 1619 upon the governorship of Yeardley. The article discusses the leasing of the land and its working by tenants.

Hatch, An Old Wharf at Yorktown, Virginia, 22 WM. & MARY Q. (2d ser.) 222 (1942)
This article mentions the construction of a public wharf in 1749, maintained at York County’s expense.

C. The Calender of Virginia State Papers

Letter from Col. Davies to the Governor (Mar. 12, 1782), 3 CALENDAR VA. ST. PAPERS 97 (1883)
This letter from Col. Davies concerns the mismanagement of public property. The property apparently is appropriated for or held by the military.

Letter from J. Prestis to the Governor (Dec. 1782), 3 CALENDAR VA. ST. PAPERS 410 (1883)
Prestis reports the pillaging of timber on “[t]he lands belonging to the Palace” in Williamsburg.

Letters from Commissioners to the Governor (Nov 10, 1785), 4 CALENDAR VA. ST. PAPERS 63 (1884)
This letter reports to the Governor regarding the progress of funds collected by the sale of public lands to raise money to
erect public buildings. See also 11 Hening's Statutes 399.

5 Calendar Va. St. Papers 342 (1885)
This report of July 1791 from Samuel Shepard to the Governor concerns the proceeds of sales of “Public Boats and Gosport Lands.” See Code of Virginia ch. 42, at 419 (Rev. 1819).

10 Calendar Va. St. Papers 41 (1892)
This is a required report dated Jan. 12, 1809 of all repairs necessary on the “public square.”

D. Proceedings of the Virginia Historical Society

This letter from Governor Spotswood discusses the exchange of Governor’s land at Jamestown for land at the new capitol in Williamsburg.

This letter from Governor Spotswood discusses a disputed boundary on the Governor’s Land.

E. Tyler’s Quarterly Historical and Genealogical Magazine

Petition of the Lessees of the Governour’s Land, 2 Tyler’s Q. Hist. & Genealogical Mag. 181 (1920-21)
This petition by lessees of the Governor’s land protests “an Act directing the sale of certain public lands,” the proceeds of which would go the “University [sic] of William and Mary.”

F. The Virginia Historical Register and Literary Advertiser

This article does not mention public or common land but explains the technical mode of acquiring land in colonial Virginia.

G. Books and Dissertations

V Dabney, Virginia the New Dominion 22-23 (1971)
Dabney discusses the transition from communal ownership and working of the land to private landholding. See also 3 Va.
MAG. HIST. & BIOGRAPHY 434 (1895-96); 22 WM. & MARY Q. (2d ser.) 89 (1913-14).

R. MORTON, 1 COLONIAL VIRGINIA 51-61 (1960)
Morton discusses the significance of the "Instructions to Governor Yeardley," which mentions Governor's Glebe, Company, Common and Borough Lands. See A. Embrey, supra, at 9; 2 VA. MAG. HIST. & BIOGRAPHY 154 (1894-95).

J. WISE, YE KINGDOME OF ACCAWMACKE OR THE EASTERN SHORE OF VIRGINIA IN THE SEVENTEENTH CENTURY 227-29 (1911)
Wise discusses the difficulty in persuading the inhabitants of the Eastern Shore to settle into towns. The General Assembly attempted to induce the settlements of towns by passing the "Act of Cohabitation," 2 HENING'S STATUTES 471. Wise reports that the statute provided that 50 acres should be purchased by each county to be held in trust for the town's benefit. The trust appears to provide a location for a settlement of private lots rather than a permanent common or public use.

Hecht discusses public and common lands in her chapters on Virginia Company Land policy: "A Study In Mismanagement, 1617-1624" and "The Emergence of the Private Section":

(1) Hecht cites and discusses the "Instructions to Yeardley" Id. at 127-28.
(2) She mentions the settling of colonists on common and public lands. Id. at 130.
(3) She notes that 600 people were to be settled on public lands. Id. at 131.
(4) She cites the laying out of common and Company land in each borough. Id. at 139.
(5) She discusses the beginning of private land holding. Id. at 142.
(6) She notes that, upon the founding of Berkeley Hundred, 1,500 acres were set aside for public uses. Id. at 152.

Riley's history of Yorktown contains several references to the waterfront common.

(1) The first survey of Yorktown denoted a series of waterfront lots as a "common shore" and the inhabitants subsequently used them as such. *Id.* at 200. *See also* 5 HENING'S STATUTES 68, 69-70.

(2) Certain individuals subsequently disputed the ownership and use of the waterfront as a common and claimed ownership in themselves. E. Riley at 201.

(3) These claims were bolstered when the Virginia government granted individuals property below the high water mark. *Id.*

(4) Riley discusses the citizens' petition of the General Assembly, asking to have the waterfront vested in trustees and held as common. *Id.* at 203.

(5) He discusses the inhabitants of the common and the uses made of that area. *Id.* at 204.

(6) He notes the division of the common and the sale of its parcels to private individuals. *Id.* at 205. *See also* 12 HENING'S STATUTES 218.

1 R. WHITELAW, VIRGINIA'S EASTERN SHORE (1968)

Whitelaw's history makes several references to the Company's and Secretary's lands:

(1) In 1620, the first settlements on the Eastern Shore were made on the Company and Secretary's lands. *Id.* at 22.

(2) In 1623, the Eastern Shore was represented in the General Assembly by John Wilcockes, "the representative of the Governor on the Company land." *Id.* at 23.

(3) When the Company land was ceasing to exist as such, William Eppes was possibly in charge of the Secretary's land. *Id.* at 26.

(4) Whitelaw mentions that the private settlement at Dale Plantations existed when the first settlers arrived on the Company's and Secretary's land. *Id.* at 96.

(5) Five hundred acres of land were laid out at the Secretary's land to be seeded and planted. *Id.* at 168.
(6) The tract known as the Secretary’s land later became known as Town Fields. *Id.* at 169.

(7) The Secretary’s land became the official seat of local government in approximately 1632. *Id.* at 169.

(8) In 1680, the Secretary’s land was chosen as the town site in Northampton County as directed by “An Act of Cohabitation.” *Id.* at 173.

(9) In 1784, Littleton Eyre willed his interest in the Secretary’s land. *Id.* at 174.

(10) The same London court that authorized the Secretary’s land provided that Company lands should also be seated throughout the colony. *Id.* at 175.

(11) Ten Company tenants were sent to plant the Secretary’s land on the Eastern Shore. *Id.* at 176.

(12) During 1655 three courts were held at the Company land. *Id.* at 178.

(13) In 1620 Captain Wilcockes established Company land on the Eastern Shore. *Id.* at 216.

(14) John Savage, the first permanent white settler on the Eastern Shore, conveniently located his home near the Company land. *Id.* at 217.

(15) Wilcockes was the Governor’s official representative at the Company land. Later representatives of the Governor probably administered business at the Secretary’s land. *Id.* at 246.

(16) By 1626 “the Company Land project had ceased to be,” and the first church on the Eastern Shore was erected on the Secretary’s land. *Id.* at 1394.