VIRGINIA
TIDAL AND COASTAL LAW

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CHAPTER 5

DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE

Under modern legal thought, the public trust doctrine serves as one of the key theories for recognizing and protecting public rights in natural resources. As mentioned in the Introduction to Part II, the doctrine recognizes that certain natural resources are held by each state in trust for its people.\(^1\) If interpreted broadly, the trust concept could have significant implications for public interests in natural resources. Depending on the interpretation given to the doctrine, property subject to the public trust could include state-owned beaches, marshes, forests, and parks,\(^2\) as well as the more traditional trust property like navigable waters and their submerged beds.\(^3\) Furthermore, public uses protected by the trust relationship could range from navigation and fishing to swimming, hiking, and other recreational pursuits.\(^4\)

Most courts and commentators, in defining the scope of the public trust doctrine, examine the doctrine from two different perspectives: an historical and a judicial perspective. When taking the first approach, the historical perspective, they examine the common law origins of the trust doctrine to determine the early purpose and policies of the doctrine. This examination typically involves a study of Roman and English legal thought. Under the second approach, the judicial perspective, they consider the development of the doctrine in state and federal courts. This examination typically involves a study of several significant United States Supreme Court decisions rendered in the mid- to late 1800’s. Section 5.1 focuses on the first approach, the historical perspective, while section 5.2 considers the doctrine from the second approach, the judicial perspective.


Although a thorough search for the historical origins of the public trust doctrine can be both interesting and productive,\(^5\) it also can raise serious problems of interpretation. Because of the nature of the materials being studied under such a search, it is virtually impossible to develop a definitive

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1. For further discussion of the principles of this doctrine, see infra § 5.2.


and comprehensive picture of the origins of the trust doctrine. Like many of today's scholarly publications and legal doctrine, the historical and legal materials from the Roman and English eras are often conflicting, confusing, and incomplete. While some sources might indicate that courts played a significant role in the Roman and English legal systems, others suggest that the public's interests were very limited under those systems. If conducted with caution and reserve, efforts to resolve these inconsistencies and conflicts can be helpful, for such efforts typically expose the strengths and weaknesses of the relevant legal principles. But if a proper perspective is not maintained, then these efforts can easily overshadow the valuable lessons to be learned from an historical search.

To ensure that a study of the common law origins of the public trust doctrine does not obscure the important policy choices implicated by the trust doctrine, those examining the common law origins must realize that it is the legacy of Roman and English law that is valuable today in defining the scope of the public trust doctrine, not the accuracy of a particular principle or school of thought. Proving or disproving an interpretation of Roman or English law is not as important to a court defining the scope of the doctrine today as identifying the strengths and weaknesses of the relevant legal principles. Once the areas of conflict and inconsistency are defined, then the well-accepted policies and legal principles can be identified. As the discussion of Roman and English law should demonstrate, those policies and principles can provide some important insights about the function of early public rights theory. One of the most important lessons is that the public trust doctrine evolved primarily as a normative concept. That is, under both Roman and English law, it reflected certain philosophical and moral judgments about a sovereign's interests in valuable natural resources and, perhaps more importantly, about a sovereign's responsibilities to its people. If accepted by a modern court, these judgments can serve as invaluable tools for preserving natural resources for present as well as future generations.

A. The Impact of Roman Law.

Although most commentators agree that Roman law has had an impact on the development of public rights, the extent of that impact is difficult to define. Because Roman society was almost totally dependent on naviga-

6. See, e.g., infra notes 14-41 and accompanying text.
7. Accord Sax, supra note 5, at 231.
8. Much of that difficulty stems from the confusing and sometimes conflicting approaches taken in classifying interests in coastal resources. Roman law regulated property rights through a complex classification scheme. It used the term res to refer to "anything that can form part of a person's property" and initially divided res into two categories: one, tangible, corporeal things (res corporales), and, two, intangible, incorporeal property such as a right of inheritance (res incorporate). R. Syme, The Institutes § 56 J. (Liddell trans. 3d ed. 1967). Under Roman law certain things could not become "objects of private rights." Id. § 69, at 302. Such things were known as res extra commercium, while things that could become "objects of private ownership" were res in commercio. Id. at 392, 394; see also P. Van Warneken, An Introduction to the Principles of Roman Civil Law 63-68 (1975).
Roman law is Justinian’s work, the Institutes. In a now famous passage, Justinian declared:

"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, edifices, etc. which are not in common as the sea is."

These resources, as Justinian further wrote, could not “be said to belong to any one as private property, but rather are subject to the same law” as the sea itself, with the soil or sand which lies beneath it.” Since Justinian’s time, the statements quoted above have been cited frequently as authority for the proposition that Roman law regarded the air, flowing water, the sea, and the seashore as property that could not be owned by individuals and that could not be appropriated by private parties to the exclusion of the public.

Although the sweeping language and idealistic tone of the quoted passages suggest that this interpretation is correct, many historical and legal sources indicate that the “public rights” interpretation is at least overbroad, if not incorrect.

Historical records, for example, indicate that private appropriation and exploitation of the sea and seashore were permitted and even encouraged. As several commentators have already explained in some detail, the Empire based on principles of equity and good faith, the jus gentium “came to be regarded as a universal law, as a law common to all mankind... a sort of natural law, creating recognition by virtue of its inherent reasonableness.”

Roman law eventually developed two main branches: (1) the jus publicum, or the public law regulating relations between the state and its citizens; and (2) the jus privatum, or the law regulating relations between individuals. See The Institutes of Justinian 1.1.4 (T. Coop trans. 1812); W. Moyle, OUTLINES OF ROMAN LAW 223-24 (3d ed. 1884). The latter branch, the jus privatum, regulated property rights through the complex classification scheme discussed earlier. See supra note 8. The jus publicum today would include such topics as constitutional law, administrative law, and criminal law. See R. SOMA, supra note 8, § 7, at 25; F. VAN WARMELKO, supra note 8, at 33. Most of the Institutes focus on private law and deal with public law only “incidentally.” F. Walton, supra, at 384.

Neither the Institutes nor the Digest discussed at this time, and accompanying text, were legally binding. They merely represented the works of various scholars interpreting Roman law.

The law referred to is the jus gentium, or the “law of nations.” See supra note 10.

The Institutes of Justinian 3.1.5 (J. Moyle trans. 5th ed. 1913).

14. See, e.g., Blundell v. Oakesell, 106 Eng. Rep. 1190 (K.B. 1821); Deveney, supra note 9, at 16-21; Note, State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey, 25 Rutgers L. Rev. 576, 696 (1971); Note, supra note 9, at 763-64. This interpretation appears to rest on the view that Justinian placed res communis, or things common to all, within the category of property res extra commercium, or things which could not be owned by private parties and thus which could not be regulated by private property law, instead of in a second category of property res in commercio, or things which could be owned and thus could be the subject of private commercial transactions. As res extra mercarium, res communis apparently would not be subject to the law regulating relations between private parties, the jus privatum. Rather it would appear to be governed by the jus publicum, the law regulating relations between the state and its citizens. For a discussion of these various classifications, see supra notes 8 & 10.

15. See H. Jozowicz & B. Nicholas, supra note 9, at 75-78; Deveney, supra note 9, at 21-27.

16. The Roman government seems to have had a strong reluctance to part with ownership of lands. Leases were granted for a variety of purposes, including fishing and sponge and shellfish gathering. Leases even were created for the use of marshlands, which were then drained for agriculture or used as hatcheries. See Deveney, supra note 9, at 21-23. An inscription from the late second century A.D. records the grant of exclusive rights in the whole bed of the Tiber to a corporation of sponge gatherers and fisherman, and a similar tablet from Frisia shows that the practice was widespread. See id. at 33; see also Saxo, supra note 5, at 186 n.6.

17. See generally W. T. Blum, supra note 8, at 456-56 (discussing Roman leasehold interests). Some of the confusion surrounding the status of coastal resources under Roman law arises from different approaches taken at various times to define ownership rights. As one commentator explained, “In Justinian’s time, dominium was the only form of ownership by reason of his own reforms; but, at earlier stages of Roman legal history, there had been other forms of proprietary title known in the law.” The Institutes of Justinian 76 n.4 (T. Coop trans. 1812). Other commentators have attempted to classify coastal resources and lead to inconsistent results.

Some commentators attempting to resolve the inconsistencies created by Roman law conclude that neither the fact that public things of the state were “outside commerce” nor the fact that public things technically were not owned by anyone detracted from the proposition that public things were, as a practical matter, owned by the state. They appear to reject the distinction some have attempted to make between the alienability of the “public things of the state” and the “things destined for public use.” See Deveney, supra note 9, at n.110. As one commentator explains, “[t]here was no question of the public’s rights in the seashore being beyond the control and allocation of the Roman state, and it is very difficult, indeed, to imagine how any government could function, or function efficiently, with such great areas totally beyond its regulation and power to allocate.” Id. at 31.

In an effort to reconcile this recognized need for a maritime state to exert some control over vital resources with an apparent classification of the seashore as incapable, either legally or physically, of ownership, yet another commentator states: “public things were regarded as belonging to the State, or, as in the case of river banks, to private individuals. The shore of the sea were not considered subject to the ownership of the State . . . simply as under its supervision or jurisdiction.” W. Hunter, supra note 8, at 310-11. Such renditions of the Roman government held such resources in “public trust” for the people, an interpretation which ignores the fact that the Romans lacked both the concept of a “trust” and of a “public” necessary for such a doctrine. Deveney, supra note 9, at 17.

18. See Deveney, supra note 9, at 32.

19. See id. at 21.
the Roman Empire encouraged some private appropriation and use of those resources. The public rights interpretation also would be inconsistent with other developments in Roman law. The legal principles defining the remedies available for injury to property interests, for example, demonstrate that at best nominal protection was given to any public rights that may have been recognized in coastal resources. Under Roman law a trespass action apparently could be brought only if a person entered on enclosure, such as a house, without permission or willfully interfered with another’s property. In such an action, a party could not recover for damage indirectly inflicted on the party when he exercised his rights. Thus, for example, a person apparently could prohibit the public from crossing his upland to reach the seashore without being liable in trespass. Because the interference with public rights was only indirect, a trespass action could not be brought.

Some remedial measures admitted were available for injury to public rights. Various forms of injunctions, for instance, could be sought by Roman citizens to protect their interests in the seashore and coastal waters. Sometimes these injunctions were available regardless of whether actual damages were claimed. But often, unless the aggrieved party could establish injury, the remedy was meaningless. Even where injunctions were granted, no penalty apparently existed if the guilty party continued to commit the wrong. Thus, even if Justiniian’s passage was intended as a broad statement of public rights, those rights were, as a practical matter, very weak, receiving only limited protection under Roman law.

Further support for a narrow interpretation of Justiniian’s passage can be found in another important source of Roman law, the Digest. A collection of the works of various legal scholars, the Digest contains several passages indicating that the seashore could be appropriated for private use. Perhaps the most troublesome passage describes 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 are public.” Analogizing to “fishes and wild beasts,” which “on capture become beyond the property” of the possessor, the author of the passage concludes that “[w]hat a man has built on the sea-shore will be his.”

If, however, the structure later was “raised,” then the seashore “reverted” to its original condition and “was in public as though there had never been a building on it.” Thus, the seashore appears to have been classified as res nullius, that is, property not possessed by a specific individual but capable of private ownership through acts of deminishing and control. Those who built structures on the shore became the owners of the soil so long as the structure remained.

But, for all the evidence demonstrating the fallacies of interpreting Justiniian’s passage broadly, there is also evidence establishing that the public had some rights in coastal resources. For instance, in addition to having passages that describe how private rights in coastal resources could be acquired, the Digest also contains passages describing the various types of public rights existing in coastal resources. According to one of those passages, the sea and the seashore were common to all under principles of natural law. Consistent with this view, one author 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. Furthermore, some privately owned property even was subject to public rights. As one Digest writer noted, although Roman law considered river banks to be private property, the public continued to have the right to use the banks for purposes related to navigation and fishing. Members of the public.

28. Id.
29. Id.
30. At least one writer, however, expressed concern that private appropriation should not be for the public detriment. See id. 41.1.50. If the seashore were classified as res publicae instead of res nullius, then this position could mean that an individual would not have been able to appropriate the shore without authorization. Indeed, any structure built on public land arguably would become public property. See id. 41.1.65.4.
31. In an attempt to reconcile the passages recognizing private appropriation and use with some scholars’ classification of coastal resources as res communes, some commentators have argued that although such resources are not susceptible to deminishment or control in their totality, a circumscribed part could be individually appropriated. Thus, just as a wild animal is owned upon capture, a part of the sea or shore could be owned by enclosing it. If an individual acquired dominion and control over part of the sea or the shore, then it became in patrimonio and within the jus privatum, or realm of private transactions. See Deveney, supra note 9, at 30 & n.102. Another scholar has suggested that perhaps only the use of the shore was public, as, for example, was the case with river banks. See W. Buckland, A Text-Book of Roman Law from Augustus to Justiniain (3d ed. 1863, repub. with corrections 1975). Similarly, although ownership of the soil under harbors induced in the state, under Roman law use of the harbor was public. See W. Hunter, supra note 8, at 311.
for instance, could use the banks to load and unload cargo, dry nets, and
fasten ropes to trees.34

Finally, in addition to the evidence provided by the Digest, some of the
sources relied upon by Justinian suggest that he intended to recognize and
provide for public rights. One source, the writings of a third century jurist
named Marcian, apparently affected the wording of the phrase identifying
"things common to all."35 Perhaps more so than any legal scholar, Marcian
incorporated the thoughts of classical poets and philosophers into his
restatement of Roman law.36 The classics maintained that before greed and
civilization spawned the development of the private property system all
things were held in common and the earth yielded its bounty for the benefit of
all.37 To this theory Marcian added the stoic's concept of morality. Under the
stoical view of morality, each man owed a moral duty to others not to deprive
them of essential things, especially the "elemental" or common things of
nature like air, flowing water, and the sea.38 Marcian apparently added the
seashore to this list, probably because it was considered an arm of the sea.39
Thus, to the extent that Justinian relied on Marcian's writings in drafting the
 provision identifying "things common to all," Justinian would appear to be
adopting Marcian's position that common or public rights should exist in
"elemental" resources.

The preceding discussion should demonstrate that Roman law often is given
too much credit by commentators assessing its impact on the evolution of
public rights theory. While public rights in coastal resources were recognized
under Roman law, they received very little protection. If a private party
appropriated an area of the shore for his exclusive use, the public apparently
lost the right to use that portion of the shore, unless the public use could be
conducted without injuring private property. But although public rights in
coastal resources were weaker under Roman law than many attribute, the
preceding also demonstrates that public rights clearly existed. Besides fishing
and navigating in coastal waters, the public's rights also appear to have
included using shores and banks for docking, loading and unloading cargo,
and drying nets.

Coastal resources thus played a special role in the Roman legal structure.
Through those resources the law attempted to recognize and provide for both
private and public interests. Private rights were recognized through the
concepts of appropriation and occupancy. These rights reflected the realiza-
tion that treating coastal resources as res nullius, or as property available for
private use and control, would produce significant economic benefits. Public
rights, in contrast, existed because of the idealistic notion that at least some
coastal resources should be classified as res omnium communes, or as property
generally available to all. At the very least, these rights reflected a
philosophical commitment to the open availability of coastal resources to the
Roman people. While not always a reality, that commitment remained
present in Roman law, if only as an undercurrent. Though less clear, public
rights also may have reflected the recognition that the sovereign's need for
and responsibilities towards valuable coastal resources required the sovereign
to retain "title" to some of these resources. Under this philosophy coastal
resources would be viewed as res publicae, or as property owned by the
sovereign but dedicated to public use.40

During Roman times the private interests appeared to be stronger and more
compelling than the public interests. Today, however, it is the Roman's
philosophical commitment to the public interest that has had the most
significant impact on coastal law.41 While scholars may continue to debate
whether Rome's commitment only involved the idealism of communal
ownership or whether it included the notion of sovereign responsibility as
well, the commitment to the public interest now has acquired both normative
aspects.

B. English Law Origins.

Like the Roman legal principles defining public interests in coastal
resources, the English legal principles governing public interests developed in
an ambiguous and often circuitous manner. As early as 688, English
communities recognized public interests in natural resources, but these
interests generally involved agricultural lands and were not the type of
interest now protected under the public trust doctrine. Referred to as a
common right, this early form of public interest tended to be more restricted

34. Id. 1:9.5. Justinian described the public's rights in rivers and their banks by stating:

By the law of nations the use of the banks is as public as the rivers; therefore all persons
are at equal liberty to land their vessels, unload them, and to fasten ropes to trees upon
the banks, so to navigate upon the river itself; still, the banks of a river are the property of those
who possess the land adjoining; and therefore the trees which grow upon them, are also the
property of the same persons.

The Institutes of Justinian 2:14 (T. Cooper trans. 1812).

35. See Devaney, supra note 9, at 28 & nn.74-76.

36. See 1 The Digest of Justinian 1:8.2 (C. Montis trans. 1904); see also Devaney, supra note 9,
at 28-29.

37. See Devaney, supra note 9, at 26-27. The ideal of community has persisted in western
history since the time of the classics. Perhaps man's present attitude towards "nature" and
the environment reflects this idea. As one commentator wrote, "[t]here is something 'unnatural'
in the thought of one man 'owning' a mountain or a part of the sea and excluding others." Id. at 28.

38. See id. at 28-29.

39. See id. at 26-27. The notion that property interests in the shore were severable from those
in the sea did not appear in English law until the late sixteenth century. See id. at 27. See
1958). The special treatment accorded the foreshore under Roman law is attributable as much to
the economic value that it brought a maritime Empire, as to its role as the boundary between dry
land and the sea. See Devaney, supra note 9, at 27.

40. Cf. supra note 8 (discussing the different classifications for coastal and other resources).

41. As one commentator observed, "It has been just this misunderstanding and idealization of
the Roman law which has been most productive in the growth of our modern law ...." Devaney,
supra note 9, at 17. Some of the more significant scholars who "idealized" Roman law include
Bracton, who incorporated the Institutes almost verbatim into his writings, and Justice Story,
who relied on it and on the French civil code to justify the doctrine of riparian rights. See
Devaney, supra note 5, at 17; Wiel, Origins and Comparative Development of the Law of
Watercourses in the Common Law and the Civil Law, 6 CALIF. L. REV. 245, 247-55 (1918).
and defined than the type of public interest eventually recognized under English law. In addition, the early form of public right was tied more closely to the tenure system and to private property rights than the public interest later recognized in England's coastal resources.\(^{42}\) English law apparently did not begin to define this second type of public interest until the 1200's, when England started to develop its navigational and fishing skills. From the thirteenth to the seventeenth centuries, England gradually evolved from a feudal economy into a maritime and commercial power.\(^{43}\) Along with the expansion in the shipping and fisheries industries and along with England's population growth came an increased demand on England's tidal resources.\(^{44}\) The increased demand, in turn, intensified tensions among the competing users, which included private landowners, the general public, and the Crown. The law that developed during this period reflects a commitment to accommodating these competing interests. Two key factors played significant roles in the evolution of that law.

One factor concerned the artificial nature of the property system that existed during feudal times. At the core of that system was the notion that the Crown held title in fee to all the lands in England.\(^{45}\) Though a legal fiction, this concept enabled the law to recognize that title to lands could be held by the Crown as sovereign at the same time that an individual actually possessed and enjoyed the immediate benefits of the land. Thus, when a private party acquired lands, that individual held the lands either mediatarily or immediately of the Crown.\(^{46}\)

The second factor involved a more practical consideration relating to conveyancing patterns of the feudal era. Apparently the Crown, in rewarding loyal followers, transferred land to private parties often without regard for whether coastal lands were included. Like their Saxon predecessors, the Norman kings made no special distinctions between dry upland and lands inundated by the tides.\(^{47}\) The Saxons had begun to trade by sea with neighboring kingdoms, but navigation and fishing methods still were quite primitive, even under the early Norman kings. Having no significant economic interest in barren shore and marshland wastes, the Crown apparently did not perceive a need to reserve tidal lands from grant.\(^{48}\) Although a few grants specifically mentioned the shore, the land descriptions

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42. Common rights also could exist in tidal resources like fisheries. Perhaps because of this type of common right, the two public rights theories became closely intertwined, especially once translated to America. For a discussion of the public interest known as the common right, see infra chapter 6.

43. See A. Howard, MAGNA CARTA: TEXT AND COMMENTARY 18-19 (1964); Note, supra note 14, at 582-89.

44. See 1 WATERS AND WATER RIGHTS 26.1 (R. Clark ed. 1967) (hereinafter cited as R. CLARK); Note, supra note 14, at 581-82.

45. See R. MINOR, THE LAW OF REAL PROPERTY § 3, at 5 (2d ed. 1963); Deveney, supra note 9, at 39.


47. See id. § 99, at 190-91; Deveney, supra note 9, at 41; 42; Fraser, Title to Soil Under Public Waters — A Question of Fact, 2 MINN. L. REV. 315, 316 (1918).

48. See R. CLARK, supra note 44, § 30.3(b), at 190.
that "[a]ll kydells" for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore."58

Appropriately the provision was adopted to prevent the Crown from interfering with navigation by placing kydells, or fishing structures, in England's waterways.59 As an added benefit, the provision also facilitated fishing by freeing the waterways of structures blocking the passage of fish to upstream areas. Apparently because the term "kydells" was used, some commentators and courts have interpreted this added benefit as being the primary motive for the chapter and have construed the chapter's directive broadly. They, for example, have interpreted the chapter as prohibiting the creation of exclusive fisheries in tidal waters and have applied the provision to all obstructions, even those not technically kydells.60

Another part of the Magna Carta, chapter 16, imposed additional limitations on the Crown's interests in tidal waters and their resources. It declared that "[n]o [blanks shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather, by the same places, and the same bounds, as they were wont to be in his time."61 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 fouling in a river till the King had taken his pleasure or advantage of the [writ or precept de] defensione riparia."62 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.63 Once again, at least some courts interpreted the chapter's provisions as providing a basis for recognizing and protecting public rights in tidal resources. These rights apparently arose from what some courts and commentators construed to be chapter 16's prohibition against alienation of exclusive fisheries.64

Though the impact of the Magna Carta on public rights may not be as broad as some would suggest, the document nevertheless represented a significant point in the development of the law governing public rights. At the very least, the Magna Carta demonstrated that the sovereign's interests in fisheries and tidal waters were not absolute. Instead of having an unlimited power to use coastal resources, the Crown owed some responsibilities to private landowners after the adoption of the Magna Carta. Eventually these responsibilities would inure to the benefit of the general public as well.

The work of the thirteenth century legal scholar Bracton provided further direction to the evolution of public rights law. In his work De Legibus et Consuetudinibus Angliae,65 Bracton relied on Justinian's Institutes to declare that the sea and seashore is to be common to all. But investigating Justinian's famous principle, Bracton omitted the statement appearing later in Justinian's work that no one owned the property of the sea.66 Because the English seacoast either was privately owned or held by the Crown, including that statement would have highlighted the tensions between Roman ideals and the English feudal system.67 Besides borrowing the Roman's communal property concept,
Bracton also used Roman law as support for recognizing various public rights, including the Roman 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. According to Bracton, these rights even could be protected by various legal remedies. The courts, for example, could enjoin interference with public use of waterways for navigation. In the fourteenth century, the conflicts over tidal resources eased considerably as the plague decimated the populations of villages and towns throughout England. Prior to the plague's devastating effects, the Crown had appointed special parties to supervise use of England's waterways. With only a nominal population left after the plague struck, the Crown began to assert greater control over these waterways. The Crown's regulatory efforts included numerous prosecutions for interference with the navigability and the natural flow of waterways.

By the 1500's England's seashore had become an extremely valuable resource, not only to merchants, fishermen, naval personnel and colonial development companies, but also to the Crown. This renewed appreciation for the shore once again prompted interest in the legal status of rights in seashore, most of which still appeared to be privately owned. In an attempt to regain power over the seashore, Queen Elizabeth, in 1571, established a commission to determine the Crown's interests in various tidal areas. After

69. See 2 H. BRACHTON, supra note 66, at 40. Several commentators have questioned whether England's river banks really were subject to public use. See 1 R. CLARK, supra note 44, § 35.2(b), at 182; Deveney, supra note 9, at 36 n.149. Bracton also describes the right to fish as "common to all persons." 2 H. BRACHTON, supra note 66, at 40. In a later passage, however, Bracton acknowledges that all property that "belonged to the finder by natural law," like fish, "are now made the property of the prince by the jus gentium." Id. at 41.

Bracton also appears to restate Roman law inaccurately at times. He, 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 alone," whereas common things belonged "to all living things." Id. at 40. That distinction misstates Roman law. See F. MALTZ, supra note 66, at 95. See generally 2 P. FOLLOCK & P. MALTZ, THE HISTORY OF ENGLISH LAW 156-49 (1989) discussing Bracton's approach to rights of common.

70. See 3 H. BRACHTON, supra note 66, at 186-93; see also Murphy, ENGLISH WATER LAW DOCTRINES BEFORE 1899, 1 AM. J. LEGAL HIST. 163, 166-77 (1871).

71. See 3 H. BRACHTON, supra note 66, at 190-98; see also Murphy, supra note 70, at 107.

72. See Murphy, supra note 70, at 110.

73. See 1 R. CLARK, supra note 44, § 35.2, at 181. For a detailed discussion of some of these ancient cases, see Murphy, supra note 70, at 111-18.

74. See Note, supra note 14, at 592.

Elizabeth's predecessors, beginning with Henry VIII, had confronted a similar situation in their search for new sources of revenues. Although much of the "terra firma" of England also had already been granted away to private owners, Henry simply confiscated it back. He claimed that the titles were forfeited to the Crown, either because the lands belonged to the Church or because their owners were charged with treason. The threat of such forfeitures, which continued under Henry's successor, led many to cancel their titles for protection. See S. MOORE, supra note 39, at 189-70. Thus, a suspicion arose, which continued unabated through the reign of Elizabeth, that "disturbances of land against the Crown" were widespread. Id. at 170. Because of this suspicion, almost every man's title was challenged by commissions of inquiry, creating a class of royal officials known as "title-hunters." Id. The Crown was so desperate in its search for lands or rights to reclaim and then resell for revenues that it searched the kingdom "from end to end to discover 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 within seven years. In response, Digges authored a pamphlet attempting to prove the Queen's "proprietie in the Sea Landses, and salt shores thereof." In that pamphlet Digges advanced, for the first time in English history, the theory that title to the "sea landes" and the "salt shore" was prima facie in the Crown.

Relying on Roman law and on the scholarly writings of Bracton, Digges reasoned that these things which by natural law were common to all were now, by the common law of England, the property of the Crown. For "yt is a sure Maxime in the Common Lawe that whatsoever landes ther [within] the kinges dominion whereunto no man can justly make propertie yt is the kinges by his prerogative." Reclaiming lands recognized as common to all under natural law would not increase the powers and rights of the Crown, according to Digges, because the Crown already had jurisdiction as sovereign over such lands. Under the Roman legal principle of occupatio, anyone could become the owner of things which natural law declared to be common to all by the minutest fragment of land that was concealed, or alleged to be concealed, of the smallest right of the prerogative that was encroached upon." Id. During the first years of Elizabeth's reign, she continued to actively pursue claims of encroachment and defective title. See id. at 170, 177.

75. See id. at 215. See generally id. at 212-24 (discussing the proceedings by Digges).

76. T. Diggis, Argumenta proving the Queenes Majesty proprie in the Sea Landes, and salt shores thereof, and that such subject can lawfully build any parts thereof but by the Kings especiall grant, reprinted in S. MOORE, supra note 39, at 185 [hereinafter paginated to S. MOORE].

77. T. Digges, supra note 77, at 187, 199-200; see also S. MOORE, supra note 39, at 189-94 (where Moore describes Digges' theory). Moore describes Digges as a mathematician and engineer, but provides no information on his official status or his possible motives for advancing this theory. See id. at 180 n.1. Another commentator, however, presents Digges' theory as a further development in the tithe-hunting practices begun by Henry VIII. Prais, supra note 47, at 517; see also supra note 75. He may have drawn such a conclusion from Moore, who discusses Digges and reproduces his treatise immediately following a detailed history of tithe-hunting. See S. MOORE, supra note 39, at 169-211. Most of the lands eventually seized by the Crown were sold to third parties or to the original owners, who were blackmailed by title-hunters into repurchasing their lands from the Crown under threat of eviction. Thus, there appears to be little support for attributing a sole motive to the Crown's interest in the sea lands. See S. MOORE, supra note 9, at 43 n.199. Digges' motives, however, may have been more noble. Digges had been employed by the Crown in various official capacities relating to harbors and maritime affairs. He also was a friend of John Dee, noted astronomer, mathematician, and publisher of a pamphlet about English sovereignty of the seas in which he first advanced the idea of the Mare Clausum, or the "closed sea." Digges thus could have been inspired by concerns for his country's defense and for its sovereign interests. See id.

78. See S. MOORE, supra note 39, at 172.

79. T. Digges, supra note 77, at 185. Digges based this principle on Bracton's statement that "things common to all" under Roman law were, by common law, the property of the King. See Deveney, supra note 9, at 42 n. 186. Digges, however, adds the passage that Bracton omitted from Justinian stating that the property of the shores was in no one. From this, Digges writes, "maye necessarily be inferred that the Prince only hathe proprietye in them." T. Digges, supra note 77, at 187; see also supra notes 67-68 and accompanying text.

80. T. Digges, supra note 77, at 197.
taking possession of them.82 This legal rule, however, applied only where the land was uninhabited and within a king's territorial limits. But under the common law tenure system, the Crown held all land either mediately or immediately.83 No private party thus could become owner of England's shoreland simply by possession or occupation. Private ownership rights in shoreland along tidal waters only could be acquired by "especiall grauntes."84 Since few grants specifically mentioned the foreshore, title to most shoreland would, under Digges' reasoning, remain primae facie in the Crown.85

After establishing the power of the Crown to reclaim shorelands where no "especiall grauntes" existed, Digges and fellow commissioners brought suit against those who claimed title to shoreland as part of their estates.86 For a while the courts rejected the suits and, along with them, the prima facie theory.87 Eventually, however, the courts yielded to royal pressure and accepted the theory when Charles I decided to dictate the opinion of a decision.88 The unpopularity of the decision returned to haunt Charles I: he was beheaded shortly after writing the opinion 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."89

The prima facie theory did not receive serious attention again until the middle of the seventeenth century, when Lord Hale wrote his famous work A Treatise De Jure Maris et Brachiorum Ejusdem (Concerning the Law of the Sea and Its Arms).90 One of the most eminent legal scholars of his day, Lord Hale accepted the basic premise of Digges' theory, but amended some of its details.91 Like Digges, Hale maintained that title to the foreshore and lands under water was prima facie in the Crown.92 Unlike Digges, Hale concluded that individuals could acquire proprietary interests in tidal lands and waters by prescription and custom, as well as by royal grant.93 As support Hale cited chapter 23 of the Magna Carta, which excepted the seashore from the prohibition against obstructing navigation.94 In his view the "shore may be and commonly is parcel of the manor adjoining, and so may belong to a subject."95 Proving ownership to the shore could occur in several ways. Among other methods identified by Hale, ownership could be proved by taking or licensing others to take gravel, sand, and seaweed from the shore, enclosing or embanking parts of the sea, and taking royal fish by prescription.96 Under Hale's view then, the prima facie theory only established a rebuttable presumption that the Crown still retained title to the foreshore. A party claiming ownership of shoreland still had to prove the strength of his title, but an express grant was not necessary; acts of ownership could provide sufficient proof.97

Besides expanding private interests in shoreland, Hale also strengthened private and public interests in fisheries. Hale considered the King to have the "primary right of fishing in the sea and the creeks and arms thereof," as owner of England's "great waes," but Hale also recognized that "the common people of England ha(d) regularly a liberty of fishing" and could not "be restrained of it...[except] where either the king or some particular subject hath gained a propriety exclusive of that common liberty."98 A private

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82. More specifically, Digges recalls that at Roman law ownership of islands in the sea and wrecks upon the shore could be acquired by occupancy. See id. at 188-90. He, however, adds that at common law these properties belong to the King because the King is "suius to the first seassour and possessor." Id. at 193.
83. See id. at 202-04.
84. See id. at 185-89.
85. Id. at 187; see also S. Moore, supra note 39, at 182; see also Deveney, supra note 9, at 42; Fraser, supra note 47, at 317-18.
86. See S. Moore, supra note 39, at 169-79, 212-24; Deveney, supra note 9, at 42.
87. For example, in an action brought by Digges in 1571 to recover 50 acres of land covered over 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. S. Moore, supra note 39, at 215 (quoting from the case). The courts reached similar results in cases involving beach and marsh lands. See id. at 217, 219-24.
88. Deveney, supra note 9, at 42; Fraser, supra note 47, at 318. Moore discusses the case, Attorney-Gen. v. Phillips, at great length and reproduces documents from the case. See S. Moore, supra note 39, at 201-81, app. 1 at 885.
89. S. Moore, supra note 39, at 310 (quoting from the document presented against Charles D.
90. M. Hale, supra note 9.
91. As a lawyer and then as a judge, Hale had participated in a number of suits by the Crown concerning title to the foreshore. See S. Moore, supra note 39, at 278, 310, 314. Most often noted in his appearance as counsel for the defendants in Johnson v. Barret, 10 Alyn, 82 Eng. Rep. 887 (1646). In that case he argued that title to the shore was prima facie in the Crown. The court ruled against him, affirming title in the adjoining landowner. See 1 H. Farnham, supra note 46, at 183; S. Moore, supra note 39, at 310-12.
92. Id. at 379. See generally id. at 370-413. Hale defined the shore as "that ground that is between the ordinary high-water and low-water mark." Id. at 378. He defined an arm of the sea as an area "where the sea flows and reflexes." Id.
93. Id. at 384-405. For example, Hale stated that while there was no common right to moor ships on adjacent shores such a right could be acquired for toying by custom or usage. Hale appeared to characterize the right as an easement when it was acquired "for the benefit of the common wealth" and as a servitude when acquired for the benefit of certain individuals. See M. Hale, A Narrative Legall and Historick Teachings the Customs, reprinted in S. Moore, supra note 39, at 319, 344 (hereafter cited as M. Hale, A Narrative and paginated to S. Moore).
94. M. Hale, supra note 9, at 339-89.
95. Id. at 379.
96. Id. at 384.
97. Cf. H. Farnham, supra note 46, at 188 (noting that under Hale's theory "ordinary acts of ownership were sufficient" to prove private ownership of shoreland). Clark, in his treatise on water rights, offers the following perspective on the effect of the presumption on American law:

That was the state of development of English law at the time of Royall's colonization of the eastern coast of North America. The presumption of ownership in the Crown or in a state or the people as successor to the Crown, and against private ownership, is part of the heritage which the United States received from England.

1 R. Clark, supra note 44, § 36.3(A), at 191 (footnote omitted).
98. M. Hale, supra note 9, at 577.

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The manuscript of De Jure Maris, supra note 3, was discovered among Hale's papers after his death and was not actually published by Hargrave until 1786. See 1 H. Farnham, supra note 46, at 184. Hale's first treatise, discussed infra notes 100-02 and accompanying text, evidently represents the "original draft" of De Jure Maris and other works. It apparently was discovered after Hale's death and perhaps after the printing of De Jure Maris. See S. Moore, supra note 39, at 314.
proprietary interest, however, could not be exercised in a manner creating a nuisance to the remaining public rights, such as navigation. As Hale explained, "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."99

In an earlier work,100 Hale had explained in more detail his views on the different types of interests in coastal resources. He divided interests in coastal resources into three categories: one, the jus regium, 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; two, the jus privatum, which included private proprietary interests in property; and, three, the jus publicum, which encompassed the interests of the general public.101 To the extent that conflicts developed between interests in different categories, Hale believed that a clear set of priorities existed. Any private proprietary interests held by the King under his jus privatum would be subject to appropriate public interests in the jus publicum. If the jus privatum was in an individual, then the King would serve as defender of any public rights existing in the privately held land under his jus regium.102

As the definition of the three categories should suggest, the strength of the public interest depended on whether a use was included in the jus publicum. Hale's writings suggest that he would limit the jus publicum to navigation and possibly fishing.103 According to Hale, the people should have a public right to navigate the rivers and ports free of any nuisances because "[t]he ports of the kingdom are like the common roads or highways of the kingdom, wherein every man hath an interest for his use and convenience ..." Further, the King, as defender of public rights under the jus regium, had the duty to keep waterways and ports free from nuisances.104 The public's interest in fishing was more recognized since the King had the right to grant exclusive fisheries under the jus privatum. But until such a grant was made, the public could exercise its "liberty of fishing."

The preceding discussion should suggest that, of all the works and events affecting the development of public rights under English law, Hale's works contributed the most to the evolution of the public trust doctrine. Perhaps most significantly, his works introduced the concept of the jus publicum into English law. Although the exact nature of the jus publicum was not clearly defined by his works,105 the concept at least meant that the public had certain rights and interests in England's tidal resources.106 As more distinctions were made between the Crown's private and public status, the concept of the jus publicum eventually developed into a type of trust relationship. Hale, however, did not actually recognize the concept of the public trust. In his works he did not maintain that the Crown held title to certain lands in trust for the public and that the Crown therefore could not alienate those lands. Rather his position was that title was subject to the jus publicum, regardless of who held title. Even under Hale's theory, the King arguably had a "trust" duty to preserve the jus publicum, as the defender of public rights under his jus regium. But even if this duty existed under Hale's theory, it arose out of the jus regium — out of the duties that a sovereign owed to its people — and not out of the jus publicum.107

In addition to declaring that the public had certain rights in tidal resources, Hale's works also established that at least some interests encompassed by the jus publicum were virtually indestructible. Not even the Crown could interfere with the public's right of navigation. Under the jus publicum that right was protected against nuisances by the King or any private party.108

The relevant passage in Hale's work provided:

"But though the king is the owner of this great waste, 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, and in the public 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 9, at 377. In the quoted passage, Hale referred to the liberty of fishing as a "public common of piscary." His reference could only be to the common right of fishing, which was a type of property right developing during feudal days. See infra chapter 6, note 62 and accompanying text. Although the public common of fishing could be destroyed by an exclusive grant from the King, that fact did not mean that the use could not be classified as a right. Historically, common rights were "repealable" in the sense that they usually could be appropriated by a private party, whether through grant or usage. Nor does the fact that Hale described the King's interest as a "primary right of fishing" and the public's interest as a "liberty of fishing" mean that the public did not have a right of fishing. The difference in terminology might have reflected an intent to emphasize that the King had title to the sea and the fish in it, while the public only had a common right of fishing. Interpreted in this manner, the terminology would be consistent with the definition of a common right as a right to use the land or waters of another. See infra chapter 6, note 73 and accompanying text. But even if the commentator overemphasized or misconstrued Hale's terminology, some support for the commentator's interpretation still can be found in Hale's works. Perhaps the most significant support exists in Hale's discussion of the relationship of the King's interests to the public interest. In that discussion Hale suggests that only one public right is superior to the King's interests and that right is the public right of navigation. See generally M. Hale, A Narrative, supra note 95, at 327-47 (discussing the several interests in the ports of the kingdom).

M. Hale, supra note 9, at 335. Hale's definition of the jus publicum applied only to tidal waters. See Fraser, supra note 47, at 322.

"[T]he ports of the kingdom are like the common roads or highways of the kingdom, wherein every man hath an interest for his use and convenience ..."

104. M. Hale, supra note 9, at 335. Hale's definition of the jus publicum applied only to tidal waters. See Fraser, supra note 47, at 322.

105. See M. Hale, A Narrative, supra note 95, at 327-29, 336, 355; see also Deveney, supra note 9, at 40.

106. See supra note 103.

107. See supra notes 103-95 and accompanying text.

108. See supra notes 103-95 and accompanying text.

109. See supra note 95, at 327-29, 336; see also Deveney, supra note 9, at 48-50.

110. M. Hale, A Narrative, supra note 93, at 388-40.
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* existing in the tidal waters.\(^{110}\)

Finally, by adopting and revitalizing Digges’ prima facie theory, Hale increased the area under the King’s control. Under Hale’s modified version, the Crown presumptively held title to all shores and submerged lands. Furthermore, the Crown had significant powers over fisheries which indirectly benefited the public, at least until granted to private parties. Ultimately, after the development of the trust concept, both types of royal interests proved to be very beneficial to the public.

§ 5.2. Perspectives of the American Judiciary on the Public Trust Doctrine

A. Emergence of the Public Trust Doctrine in the United States Supreme Court.

Although the public trust doctrine evolved from Roman and English law, its most significant development occurred in the American judicial system. During the colonial period, the English and colonial governments made some provisions for public rights in tidal lands and resources.\(^{111}\) But those provisions usually were temporary measures, allowing public rights to be extinguished by private appropriation.\(^{112}\) Also, those public rights appeared to be based on the commons concept, rather than the public trust doctrine. In Virginia, for example, the people appeared to have certain common rights of use, like fishing and hunting, in tidal resources.\(^{113}\)

It was not until the 1840’s that the public trust doctrine began to gain legal prominence in America. Then, beginning with the 1842 decision *Martin v. Waddell*,\(^{114}\) the Supreme Court started to interpret some pre-Revolutionary English law principles as supporting the concept of the public trust. As explained by the Court in *Martin*, the concept of the public trust evolved primarily from the English theory that presumed that the Crown held title to tidal lands and waters for the public benefit. English law apparently developed this theory to protect the people’s interests in tidal waters from encroachment by the nobility.\(^{115}\) Any serious deprivation of those interests by the Crown would have crippled the peasant economy because tidal waters provided the people with their principal means of transportation and with an important food source.\(^{116}\) Further, inasmuch as tidal resources generally were incapable of being possessed, except perhaps in a transient sense, title to tidal lands and waters could only logically be vested in the sovereign for the benefit of its people.\(^{117}\)

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 could trace his title 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 disputed lands and waters, as well as all powers of government.\(^{118}\) 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 were to be set aside for the cultivation of oysters. The area affected by the statute included the disputed land.\(^{119}\)

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."\(^{120}\) It was, however, "proper to inquire into the character" of the rights claimed by the Crown and conveyed to the Duke.\(^{121}\) 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 exclusory right of fishery in the grantee and defeat any public interests in the waters.\(^{122}\)

The Court first concluded that, prior to the conveyance to the Duke of York, the King 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."\(^{123}\) 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 community about to be established."\(^{124}\) 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. Because of these expectations, the settlers would not have expected to

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110. M. Hale, supra note 9, at 389-90.
111. See generally infra § 6.5.A (discussing common rights and uses in colonial Virginia).
112. See infra chapter 6, notes 130-35 and accompanying text.
113. See generally infra § 6.5.B (providing an introduction to the commons legislation).
115. Id. at 406-16.

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118. 41 U.S. at 497-98.
119. Id. at 498.
120. Id. at 498.
121. Id. at 499.
122. Id. at 410-11.
123. Id. at 406.
124. Id. at 411; see also id. at 413-14.
emigrate to America only to find that all of the valuable water resources had been privately appropriated. 126

Under English law, one of the rights traditionally reserved for 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. 127 In the words of the Court,

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. 128

Using this rule of strict construction, 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 their rights by, for example, leasing exclusive rights to oyster beds to Martin and the other defendants. 129

The Supreme Court's treatment of the public trust doctrine in Martin raised several important questions. First, because 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. 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." 130 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.

Illinois Central Railroad v. Illinois 131 partially answered these questions. In 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 language of the 1869 statute 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. 132 In exchange for the interests conveyed under the statute, the railroad agreed to pay rent and to avoid creating navigational obstructions. 133 A map depicting part of the conveyed land characterized some of it as "public ground for ever to remain vacant of buildings." 134 In 1873 the state legislature repealed the Act, creating doubts about the validity and effectiveness of both the 1869 and 1873 Acts. 135

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. 136 Under this principle of state sovereignty, each 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. 137

The Court then considered whether the "tide" nature of the waters was central to the state sovereignty doctrine. Although the Court recognized that in England the "ebb and flow of the tide constitute[d] the legal test of the navigability of waters," it concluded that this definition would not be rationally related to geographical conditions in the United States, which has a large number of navigable, nontidal waterbodies. As the Court explained, the key to the sovereignty doctrine was not the tidal nature of the waters, but rather the navigability of the waters. The doctrine thus should be equally applicable to lands under navigable, nontidal waterbodies, like the Great Lakes, as to tidal waters. According to the Court, 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." 138

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:

126. Id. at 414. (1843)
127. Id. at 410-11. Whether the Crown had the right to alienate interests in tidal waters and the soils beneath them was controverted. Most authorities appear to have concluded 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. But see H. Hale, supra note 9, at 358-360. See generally J. Anderson, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND IN THE SOIL AND SUBMARINE TERROV 20-21 (1826); 2 H. Farnham, supra note 46, at 1358-72; S. Moore, supra note 39, at 730; S. Moore & H. Moore, supra note 54, at 99.
128. 41 U.S. at 414.
129. Id. at 416-17.
130. Id. at 410-11.
131. 146 U.S. 387 (1892).
132. 41 U.S. at 406 n.1.
133. Id. at 405-07 n.1.
134. Id. at 395.
135. See id. at 410-11. The defendant argued that the repealing act violated the contracts clause of the Constitution. Id. at 418.
136. Id. at 435.
137. Id.
138. Id. at 436.
§ 5.2 PUBLIC TRUST DOCTRINE AND COMMONS CONCEPT

[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 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.\(^{139}\)

Further, although the state could grant parcels of submerged lands to private parties to build wharves, docks, or other structures designed to aid navigation, the state could not "substantially impair the public interest in the lands and waters remaining."\(^{140}\)

Abdication of state-controlled 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."\(^{141}\) The Court explained:

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.\(^{142}\)

The Court declared the attempted cessation of the state's ownership interests in the disputed lands to be inoperative because the 1869 statute substantially impaired the public interest. The only rights acquired by the railroad under the statute were those limited interests needed to accomplish the Act's stated purposes. Further, the legislature's subsequent action in repealing the 1869 statute did not impair a valid contract. As the Court explained, any grant of lands under navigable waters made in violation of the public trust would necessarily be revocable, if not void, and thus there could be no "irrepealable contract."\(^{143}\)

Several different readings of Illinois Central are plausible. One possibility is that the Court in Illinois Central was defining the scope of the public trust doctrine only to include navigable waters and the lands underneath those waters. This interpretation follows from the Court's statement that title to soils under navigable waters is different than title to public lands available for sale.\(^{144}\) A second, much narrower reading is that Illinois Central represents little more than a restatement of Illinois law governing allocation of rights and interests in state waters.\(^{145}\) Under the second interpretation, the only federal question would concern whether the Illinois legislature's actions impaired a contract obligation in violation of the United States Constitution.

But, even under the narrower reading, the opinion's discussion of the state's obligations, as sovereign, over navigable waters and lands still is necessary to the decision. In Illinois Central, the Court used the public trust doctrine to explain why the legislative grant was void, or at least revocable, and therefore why subsequent legislative action did not impermissibly impair a contract obligation. This explanation relates to the very 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 sovereign state 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 those 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 third reading of Illinois Central also arises from the Court's distinction between title to navigable waters and lands and title to lands generally held by the state and intended for sale.\(^{146}\) In making this distinction, the Court could be interpreted as suggesting that the special public interest in navigable waters and lands makes that property inalienable. The result in Illinois Central certainly would support this approach. Shortly after declaring that the public trust could not "be relinquished by a transfer of the property," the Court concluded that a grant made in violation of the public trust would be revocable, if not void.

Other observations and conclusions made by the Court in Illinois Central, however, weaken the persuasiveness of the third interpretation. The Court, for example, adopted a substantial impairment standard, suggesting that trust property could be alienated as long as the public interest was not substantially impaired. In addition, the Court made repeated references to situations where the state could convey interests in public trust property.\(^{147}\) Although the Court's decision to invalidate the transfer before it seems inconsistent with those references, Illinois Central was a relatively easy case for the Court to decide. Given the value of the Chicago harbor and given the state's total abdication of its rights and responsibilities over a significant portion of that harbor, it seems unnecessarily broad to interpret Illinois Central as holding all trust property to be inalienable.

Even if Illinois Central does not stand for the proposition that a state's citizens have an inalienable interest in certain water resources, the decision

139. Id. at 452.
140. 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.
141. Id. at 456.
142. Id. at 444.
143. Id. at 444, 445, 445, 446. 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.13; see Rivera v. Faito, 524 F. Supp. 136, 145-44 (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 "voluntary, bargain-for-exchange relationship between the parties."
144. See Illinois Central, 146 U.S. at 452; see supra note 139 and accompanying text.
146. 146 U.S. at 452; see supra note 144 and accompanying text.
147. See 146 U.S. at 452, 453, 455 (grants of fisheries allowed, as well as grants of submerged land to construct docks, wharves, and other similar structures); Devereux, supra note 9, at 61.
nevertheless reiterates an important principle established in *Martin* and other cases. That principle is that 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. Thus, although public trust property may be alienable, it may not be transferred as easily or freely as property generally held as part of the public domain.

The *Illinois Central* decision unfortunately leaves several important questions unanswered. This failure may be due in part to the decision's clear factual situation, which enabled the Court to avoid addressing several key aspects of the public trust doctrine. The decision, for example, never clearly defines the types of property held in trust for the public. As mentioned earlier, one possible interpretation of *Illinois Central* is that the public trust doctrine is limited to navigable waters and their underlying lands. The Court's statement that federally owned public lands are different than navigable waters and lands held by a state in trust for its people certainly supports this interpretation, as does the Court's expansion of the scope of the English public trust concept to reach its result. This interpretation, however, ignores the impact of a related English doctrine, the commons concept. Because that concept traditionally permitted common or public rights in lands other than those under tidal waters, the Court could have relied on it in developing the scope of the public trust.

Another unanswered question concerns the substantial impairment standard. Because a "gross perversion" of the public trust had occurred in *Illinois Central*, the Court did not have to develop a definition of the substantial impairment standard. Without such a definition, it is difficult to predict the impact of *Illinois Central* on other situations involving closer violations of the public trust. Furthermore, 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 had 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. Yet, the aggregate effect of each situation would have been the same.

Finally, the decision does not define what public uses warrant protection under the public trust doctrine. Granted, even the narrowest reading of *Illinois Central* classifies the use of waters for navigation and commerce as a protected public right. But the status of other uses, such as fishing, is less clear. 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." The Court thus appears to include the right of fishery within the scope of the public trust doctrine. Later in the opinion, however, the Court quoted from *Stockton v. Baltimore & New York Railroad*, a decision that identifies the "liberty of fishing" as an example of a public use that could be granted exclusively to private parties without substantial impairment to the public interest. According to the passage from *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." Thus, although the Supreme Court's opinion in *Illinois Central* indicates that the "liberty of fishing" is a public interest protected by the trust doctrine, it also suggests that the right of fishery can be conveyed to private parties without violating the substantial impairment standard.

This position, that certain public interests may receive greater protection under the trust concept than others, seems rational. In comparing the right of fishery and the right of navigation, it is apparent that differences exist between the two rights. These differences relate to the goals, as well as the nature, of the uses. Whereas the goal of exercising the right of fishery is to obtain possession of tangible property, fish, the object of navigating a watercourse generally is to use the watercourse in its natural state, and not to capture the watercourse or any part of it. Also, although fish are not possessed by anyone in their natural state, they are capable of being possessed. A watercourse, however, cannot be possessed, at least not in the corporeal sense.

Almost two years after the *Illinois Central* decision, the Supreme Court reconsidered the public trust concept in *Shively v. Bowley*. In *Shively* 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 tidal 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." This proprietary interest was better known as the *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 *jus publicum*. As the Court explained, the dual nature of the Crown's interests in the tidal waters and lands arose because "[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

148. See 149 U.S. at 457-58; 1 H. FARNHAM, supra note 46, ¶ 46.
149. See generally infra §§ 6.1, 6.2A.
150. 146 U.S. at 452.
151. 32 F. 9 (C.C.D.N.J. 1887).
152. Id. at 20, quoted in *Illinois Central*, 146 U.S. at 456-57.
153. Cf. infra notes 315-16 and accompanying text (discussing factors affecting whether a use is protected).
154. 152 U.S. 1 (1894).
155. Id. at 11.
commerce, domestic and foreign, and for the purpose of fishing by all the
King's subjects. 156

After the Revolution this common law principle became the rule of law in
the United States, as well as in the original states, unless otherwise modi-
fied. 157 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." 158 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." 159 Accord-
ingly, congressional grants of land bordering navigable waters would not
convey "of their own force" any rights below the high water mark. 160

The Shively decision is important for several reasons. First, like the Court's
earlier decisions, Shively appears to be willing to define the public trust
doctrine in the context of navigable waters and the lands beneath them.
Although the Court only focuses on tidal waters and lands, its reasoning
suggests that it would reach a similar result for non-tidal, navigable waters
and the underlying lands. Like tidal waters and lands, non-tidal, navigable
waters and the lands beneath them would be "incapable of ordinary and
private occupation." 161 Second, the Shively opinion, more so than prior
decisions, recognizes the immense public value of tidal resources, especially
the shore. Throughout its opinion the Court emphasizes the public importance
of these resources for commerce, navigation, and fishing. 162 Finally, the
decision supplies the theoretical background missing in earlier decisions. For
the first time, the Court examines 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. In Shively the disputed grant was
between the United States, a sovereign, and a private party. Thus, when a
disputed grant involves only private parties, Shively arguably could have
little impact in defining the effect of the grant on public trust property.

In conclusion, Marten, Illinois Central, and Shively represent important
steps in the development of a legal theory recognizing public rights in
navigable waters and lands. Many state courts also have contributed to the
development of that theory. The remaining portions of this chapter focus on
some of those contributions. More specifically, consideration is given first to
Virginia, where the courts have demonstrated some reluctance in accepting
the doctrine, and then to another original colony, New Jersey, where the
courts have rendered some of the most progressive opinions on the doctrine.

156. Id.
157. Id. at 14.
158. Id. at 57.
159. Id.
160. Id. at 88.
161. See id. at 11.
162. See, e.g., id. at 11, 49, 57.
163. See Shively, 132 U.S. at 10. Cf. 1 H. 1 Carnahan, supra note 46, § 45a (discussing the
construction of grants).

B. Evolution of the Public Trust Doctrine in Virginia.

Virginia's approach to the public trust doctrine is far from clear. Some
opinions of the Virginia Supreme Court indicate almost total acceptance of
the concept, while others demonstrate a reluctant acceptance, if not outright
rejection. 164 These opinions are discussed below.

1. Perspectives of the Virginia Judiciary.

The leading Virginia case on the public trust doctrine is Commonwealth v.
City of Newport News. 165 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 its citizens. By emptying untreated
sewage into a navigable watercourse, Newport News was substantially
imparing various public rights, including the right of fishery. 166

In denying the state relief, the Supreme Court of Virginia severely limited
the public trust theory as applied to Virginia's water resources. 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 court construed the public trust concept
narrowly. 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 and
comprehend 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....

Furthermore, even if the Crown held certain lands and waters in trust for
navigation and fishing, the court believed that important differences existed
between the Crown and the state of Virginia that justified the court's narrow
interpretation. 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 he'd by the people collectively ... [and]
exercised by the parliament." 167 Virginia thus acquired "full and complete

Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 138 Va. 461, 122 S.E. 344 (1924), and
McCreary v. Commonwealth, 138 Va. (1924), and
McCreary v. Commonwealth, 68 Va. (1776), and In re Stewart-Trane Corp., 495 F. Supp. 38 (E.D. Va. 1980) (where the district
court uses the public trust doctrine as a basis for allowing the state and federal governments to
recover for damage to wilderness caused by an oil spill in the Chesapeake Bay).
165. 186 Va. 521, 164 S.E. 699 (1933).
166. See id. at 627-30, 164 S.E. at 690-92.
167. Id. at 529-40, 164 S.E. at 694.
168. Id. at 541, 164 S.E. at 694-95.
proprietary right" in all lands and waters, except as limited by the federal Constitution.169

If a public trust were to exist then, it must arise from the federal Constitution or from a limitation imposed on the sovereign state by the Virginia Constitution or its laws.170 The United States Constitution provided, implicitly at least, the basis for imposing a trust on navigable waters and their beds for the purpose of furthering navigation. According to the court, this trust relationship arose from the constitutional power granted to the United States to regulate and control navigation and commerce among the states.171

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 or permitting the legislature or any other governmental agency to relinquish, alienate, ... or substantially impair the sovereignty," its inherent rights, or its power to govern.172 Such protected "incidents of sovereignty" included the state's "police power, the power or right of eminent domain, and the power to make, alter and repeal laws."

Having defined some of the general principles governing the relationship between a sovereign and its constitution, the court then focused on a state's powers over the 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."173 Second, as a proprietor, the state had "the 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."174 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 incipience of state sovereignty. Because these inherent rights of the jus publicum were the rights of the people, who

169. Id. at 541, 164 S.E. at 695.
170. The court rejected classifying rights such as the rights of navigation and fishery as "natural rights," stating:
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.

Id. at 442-43, 164 S.E. at 695.
171. Id. at 543-44, 164 S.E. at 695-96.
172. Id. at 545, 164 S.E. at 696.
173. Id. at 545-46, 164 S.E. at 696 (footnotes omitted).
174. Id. at 546, 164 S.E. at 696.
175. Id.

collectively comprised the sovereignty, they could not be substantially impaired or destroyed. As a consequence, any legislative grants of rights or interests in property belonging in the public domain, including tidal waters and their bottoms, would be subject to whatever rights were included in the jus publicum.175 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 any use by the people in common for any purpose.176

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

After defining the state's interests in the public domain, the court then focused on the types of 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. In the court's view, 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 was "an inherent and inseparable incident" of the sovereignty.177 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."178 The right of fishery admittedly was a type of public use, primarily because the public shared the right of enjoyment. But once a party successfully exercised the right, 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 it could permit the tidal waters and bottoms to be used to impair or destroy their use as fisheries. Because the General Assembly had exercised the second option in the instant case, authorizing Newport News' sewage discharge into Hampton Roads,179 the court concluded that the defendant was not violating any public rights.

Although the court's analysis in Newport News shows that the court spent considerable time dealing with the difficult issues before it, the decision is troubling in several respects. One problem concerns the court's statement that the public trust theory can arise only from one of two sources, either "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 state law.180 Yet, in considering Virginia law, the court focused only on the state constitution, ignoring relevant statutory and common law. The court appar-
ently believed that any limitation on the power of the sovereign state should come from constitutional law.

Many different legal principles, however, can limit a sovereign’s power. Statutes, for example, sometimes waive the sovereign immunity that a government traditionally enjoys. Like their federal counterpart, state constitutions should be interpreted in light of statutes and common law. As one state constitutional law scholar explained, “[i]n state constitution is not a code of laws. It should be confined to the fundamentals of government, leaving statutory detail to the statute books.” At least in more recent years, Virginia's constitutional draftsmen appear to have adopted this tenet.

Further, even assuming that the state constitution is the only appropriate source of state law for limiting the state's powers, that document need not expressly create the limitation. It may be implied or may emanate from the document and from the form of government that the document seeks to establish. Judicial interpretation of the federal Constitution certainly has proceeded by relying on this principle, and even the court in Newport News appeared to recognize the principle. 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 involves the notion of public 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 law, this conclusion appears to beg the question. Even assuming that both concepts originated in natural law, those origins should not prevent the concepts from later achieving legal recognition. Indeed, the opinions of the United States Supreme Court in Illinois Central, Martin, and Shively demonstrate this point. But, despite these opinions, the Virginia Supreme Court remained unconvinced of the existence of a public trust, discounting the discussion of the United States Supreme Court on the matter. In the state court's view, the Supreme Court had been "confused" and had "inadvertently" declared 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 by applying it to the bed of a nontidal waterbody. To further undermine the position of the Virginia Supreme Court, its state constitution specifically refers to the public trust concept. The concept appears 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.

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, legislative act. Indeed, if accepted, the public trust doctrine traditionally would sustain the validity of a legislative act authorizing the city of Newport News to discharge its sewage into the Hampton Roads River. See infra notes 220-3; and accompanying text.

See e.g., supra text accompanying notes 141-42.

190. Va. Const. art. XI, § 3; see Newport News, 153 Va. at 539, 544 S.E. at 694; see also infra notes 201-04 and accompanying text (discussing § 1 and 2 of art. XI). The oyster trust provision first appeared in the Virginia Constitution of 1902. Va. Const. art. XII, § 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. X, § 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 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 "as 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. Id. at 2881. Apparently attempting to avoid these fears, the Convention amended the provision by deleting the phrase "as at any time defined by law" and adding the clause "that the General Assembly may from time to time provide by law for surveys to define such natural beds, rocks and shoals.” Id.
permitting or suffering a private use to be made" of the natural oyster beds, rocks, and shoals.\textsuperscript{191} 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 the discharge of sewage into tidal waters.\textsuperscript{192}

Because section 3 of article XI admitted is limited to "natural oyster beds, rocks, and shoals," it could be interpreted as rejecting application of the public trust doctrine to additional resources. But, as mentioned earlier, a state constitution is not intended to be "a code of laws" and normally is construed as "leaving statutory detail to the statute books." Given this function, it seems preferable to interpret section 3 as a less prohibitive and more positive manner. Instead of being construed as rejecting the public trust doctrine for resources other than "natural oyster beds, rocks, and shoals," section 3 could be interpreted as an indication that the trust concept existed at common law. Under this interpretation, the reference to specific resources simply would signify that the doctrine is being explicitly elevated to constitutional stature in one particular situation to further enhance the legal protection given to natural oyster beds, rocks, and shoals.

Besides discounting common law principles enunciated by the United States Supreme Court and reflected in its own constitution, the Virginia Supreme Court also ignored its own precedent. Several earlier opinions of the Virginia Supreme Court had referred to the public trust doctrine in more favorable terms. In Taylor v. Commonwealth,\textsuperscript{193} for example, the court quoted approvingly from Martin v. 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 artisan well constructed for withdrawing and selling water to the city of Richmond. The well was located 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 "Commonwealth 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."\textsuperscript{194} Although recognizing that the riparian owner had certain rights beyond the low water mark, the court concluded that the riparian proprietor could not exercise those 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."\textsuperscript{195}

Before ruling for the state, the court suggested that the result may have differed if two private parties were involved.\textsuperscript{196} 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 a judicially protected interest. Like Taylor, other decisions of the Virginia Supreme Court also have adopted the spirit, if not the legal principles, of the public trust concept.\textsuperscript{197} Because the decisions accepting the concept of a public trust occurred earlier in time than the Newport News decision, and because that concept underwent significant development in the mid-to late 1800’s, perhaps those opinions closer in time to the development period should be entitled to more weight.\textsuperscript{198}

Finally, the court in Newport News ignores statutes specifically enacted to protect common rights. As will be demonstrated, the concept of common rights is closely related to the public trust concept and furthers some of the same policies and objectives as the public trust doctrine.\textsuperscript{199} At the very least, the statutes demonstrate legislative recognition of public interests in tidal resources. Because the commonwealth legislation was in effect at the time of the court’s decision in Newport News,\textsuperscript{200} the court should have considered the impact of the legislation on the existence of a public trust and on the appropriateness of the sewage discharge by Newport News.

But, even in the court in Newport News accurately described Virginia law in 1932, the court’s position has been weakened by subsequent changes in the law. The Virginia Constitution, for instance, now declares, in section 1 of article XI, 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."\textsuperscript{201} Section 2 of the same 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."\textsuperscript{202} The drafter of section 1 apparently believed that the provision would create a public trust in certain state-owned lands and waters. The records of the 1969 senate debates that accompanied consideration of section 1

\textsuperscript{191} Newport News, 158 Va. at 553, 164 S.E. at 699 (emphasis in original).
\textsuperscript{192} Id. at 554, 164 S.E. at 699. The courts 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 jure publicum) are superior to other public uses, as well as to private interests. The proper inquiry therefore should have been whether the discharge of sewage was a public use superior to the public use in controversy. Article XI of the Virginia Constitution arguably answers this question in the negative. Although the court suggested that the right to discharge sewage was part of the jure publicum, id. at 554, 164 S.E. at 699, it did not base its decision on that suggestion.
\textsuperscript{193} 192 Va. 765, 47 S.E. 876 (1904).
\textsuperscript{194} Id. at 775, 47 S.E. at 881.
\textsuperscript{195} Id. at 776, 47 S.E. at 881.
\textsuperscript{196} Id. at 776-77, 47 S.E. at 882.
\textsuperscript{197} See, e.g., Commonwealth v. Garner, 44 Va. (3 Grant) 665 (1846) (1st ed. 1847).
\textsuperscript{198} Accord Garrison v. Hall, 75 Va. 190, 122 (1881).
\textsuperscript{199} See generally infra §§ 6.2.3, 6.3.
\textsuperscript{200} See VA. CODE § 3573 (1930) (current version at VA. CODE § 62.1-1 (1977)) (in force at the time of the Newport News decision). For further discussion of the commonwealth legislation, see infra Part IV and § 19.1.
\textsuperscript{201} VA. CONST. art. XI, § 1.
\textsuperscript{202} Id. § 2.
of article XI indicate that one senator attempted to modify the section's language by including a statement that "[l]open lands and waters owned by the Commonwealth shall be held in trust for the benefit of the people of the Commonwealth." 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 around the same time period, the conclusion becomes inescapable.

One key statute is the Virginia Environmental Quality Act, originally enacted in 1972 only a few months after the amendments to article XI became effective. Section 10-178 of the Act now provides that the section was passed "in furtherance of Article XI of the Constitution of Virginia and in recognition of the vital need of citizens of the Commonwealth to live in a healthful and pleasant environment." Then, after explaining its purpose, the section states:

it 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 Commonwealth and fulfill the state's responsibility as trustees of the environment for the present and future generations.

Besides supporting the floor sponsor's conclusion that a trust existed for public lands and waters, section 10-178 also suggests that the scope of the trust included the environment in general.

Another important statutory provision, added in 1972, provides that "[r]eexisting 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." 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 that "should be regulated by the Commonwealth in the exercise of its police power." Such regulation is "to be exercised with a view to the welfare of the people of the Commonwealth" and to the public's "changing wants and needs."

In summary, the 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 natural resources. The court in Newport News, however, is correct in its description of the interaction 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 subordinate to public rights. Rather, the private interest will be affected only to the extent that there is a valid public right or interest being jeopardized.

Under Illinois Central and Newport News, then, determining the extent to which a private interest should be restricted requires a court to make three inquiries. First, it must determine whether a particular public use should be protected as part of the jus publicum, and thus superior to conflicting private interests, or as part of the jus privatum, and thus subject to private interests. Second, assuming that a valid public use exists, a court must determine whether the private interest unambiguously impairs the public right. Third, the court must determine whether the substantial impairment is nevertheless

203. Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution 376, 377 (extra session 1969, regular session 1970); see also id. at 375-79 (discussing the proposed amendment); Howard, supra note 155, at 219. A report on the proposed revision of article XI of the state constitution observed that the "proposed Conservation article was "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, and other problems of the environment." Commonwealth of Virginia, The General Assembly of Virginia and the People of Virginia, H. Doc. No. 1, at 322 (1969); see also infra text accompanying notes 265-71.

204. See Va. Const. rt. XI, § 3


(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 Commonwealth as a whole.

209. Va. Code § 62.1-44.36(2), (3) (1987). Under the Code, the term "water" includes "all waters, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction and which affect the public welfare." Id. § 62.1-11(a). Furthermore, § 62.1-10(b) defines "beneficial use" to mean "domestic, agricultural, recreational and commercial and industrial uses." Id. § 62.1-10(b).


permissible because it is the result of a legislative decision to use the resources for another valid public purpose.\(^\text{211}\)

Regardless of how the conflict concerning the public trust doctrine is resolved, Virginia clearly must accept the doctrine, at least to an extent. After the American Revolution, each state acquired jurisdiction and dominion over all lands and waters within its boundaries. But, as Illinois Central established, this jurisdiction and dominion does not entitle a state to abrogate its responsibilities for navigable waters and lands. To the extent that a transfer of state interests in navigable waters and lands would substantially impair the public interest, the transfer would not be permitted and the state's responsibilities over the resources would become nondelegable. Only those transfers by the state that did not violate the substantial impairment standard would be permitted. Thus, depending on how the substantial impairment standard is defined, the public trust doctrine could become an effective tool for balancing and accommodating the competing interests of public and private parties.

2. Permissible Public Trust Uses in Virginia.

To the extent that the public trust doctrine is recognized in Virginia, the public would appear to be entitled to only a few permissible trust uses. The most obvious public use protected by the Virginia Supreme Court is the right of navigation. As suggested by Newport News, the public right of navigation arises, at least in part, from the federal constitutional right to regulate water and commerce and is part of the jus publicum, such as it exists in Virginia.\(^\text{212}\) Whether this right includes uses tangentially related to navigation is far from clear. Although the federal courts generally have interpreted the navigation right broadly, some state courts have demonstrated a willingness to limit the scope of the navigation right, at least for purposes of deciding what related uses are protected by the right. Some courts, for example, have limited the government's power to improves waters without compensating injured waterfront landowners to improvements made to navigable waters for the purposes of navigation, flood control, and power development.\(^\text{213}\)

\(^{211}\) 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 the relief because the impairment of the public's right of fishery resulted from a legislative decision to use the resources for another valid public use, sewage discharge. 15 Va. at 551-52, 555-56, 164 S.E. at 698-700.

\(^{212}\) See supra text accompanying note 121.

\(^{213}\) See, e.g., Ewell v. Lambett, 177 Va. 225, 228, 13 S.E.2d 383, 385 (1941) (where the court concluded that the navigational servitude only applied to a watercourse that was being used or was "susceptible of being used, in its natural and ordinary condition, as a highway for commerce"); see also supra chapter 3, note 110-11 and accompanying text discussing the disagreement over the impact of artificial improvements on the navigability of watercourses. See generally 2 R. Clark, supra note 44, § 181 (discussing the scope of the public's right of navigation). But even state courts interpret the right of navigation broadly when a use clearly involves navigation. See, e.g., Oliver v. City of Richmond, 165 Va. 528, 178 S.E. 48 (1935), cert. denied, 298 U.S. 674 (1936) (where the Virginia Supreme Court allowed the diversion of navigable waters to improve navigation and refused the compensation claims of several riparian owners although the diversion would diminish the stream's flow).

\(^{214}\) 197 Va. 225, 228, 13 S.E.2d 383, 385 (1941).

\(^{215}\) Id. at 174, 89 S.E.2d at 27.

\(^{216}\) S., at 170, 89 S.E.2d at 24 (quoting from the conveyance); id. at 173-75, 89 S.E.2d at 26-27 (discussing the impact of the conveyance).

\(^{217}\) Id. at 174, 89 S.E.2d at 27.

\(^{218}\) Id. at 174, 89 S.E.2d at 26.

\(^{219}\) See supra notes 190-92, 210-10 and accompanying text.

\(^{220}\) See supra notes 190-92, 210-10 and accompanying text.
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.223

The court explained that the "sea is the natural outlet for all the impurities flowing from the land."224 In its view, 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."225 Furthermore, at least in well-settled areas, the use of navigable waters for sewage disposal had 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.226 The court, however, noted that only navigable, tidal waters would be subject to this public use, for traditionally Virginia law had distinguished between navigable, tidal waters and nonnavigable streams.227

The court reached a similar result in Darling v. City of Newport News,228 once again denying relief to the 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 sewage discharge.229

222. Id. at 101, 89 S.E. at 82.
223. Id.
224. Id.
225. Id. at 101-02, 89 S.E. at 82.
226. Id. at 98, 89 S.E. at 81.
228. Id. at 18-21, 96 S.E. at 368-69. 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 to the state by private property interests. Id. at 40, 96 S.E. at 315 (Sims, J., dissenting). Although Justice Sims agreed that the state held navigable waters as their beds for the public benefit, id. at 23, 96 S.E. at 309, 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 and the states acquired that power. Id. at 23-25, 96 S.E. at 310. 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 sovereign or legislative grant." Id. at 26, 96 S.E. at 310. 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. 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.

229. 25 F.2d 281 (4th Cir. 1928).
230. Id. at 984.
231. Id. Like most Eastern states, Virginia has adopted the common law riparian doctrine to govern allocation of rights in natural watercourses. As explained by the Virginia Supreme Court, this doctrine provides:

A proprietor may make any reasonable use of the water of the stream in connection with his 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 by the common property of other riparian owners.

Virginia Hot Springs Co. v. Hoover, 143 Va. 400, 413, 136 S.E. 408, 410 (1926) (quoting Stratton v. Mount Hermon Boys' School, 216 Mass. 83, 86-87, 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 ownership of waterfront land. Manpower v. City of Bristol, 90 Va. 161, 163, 17 S.E. 853, 854 (1893). The Virginia courts consider water rights to be vested property rights that are created as an incidence of ownership of land through or by which natural watercourses flow. See, e.g., Hite v. Town of Lunacy, 175 Va. 218, 219, 8 S.E.2d 369, 372 (1940). As the above description indicates, there are two basic components to the riparian doctrine. First, a riparian landowner's use of the adjoining watercourse must be for the benefit of his riparian land. Second,

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The United States Court of Appeals for the Fourth Circuit, in DuPont Bayon Co. v. Richmond Industries,290 extended the reasoning of the above cases, suggesting that the public right to use a sewer system could be exercised for city inhabitants even though they did not reside along the navigable waters. In DuPont a riparian manufacturing corporation sued to enjoin a dyeing plant from discharging waste into the James River through the Richmond sewerage system. In explaining its decision to deny 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.290

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 waters emptying into a tidal stream because they are not riparian owners on such stream."291

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 owns in Darling did not acquire the power to discharge sewage into navigable waters until after the plaintiff obtained his

229. 65 F.2d 281 (4th Cir. 1936).
230. Id. at 984.
231. Id. Like most Eastern states, Virginia has adopted the common law riparian doctrine to govern allocation of rights in natural watercourses. As explained by the Virginia Supreme Court, this doctrine provides:

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Numerous Virginia cases also have referred to a public right or liberty of fishing. For example, in McCreary v. Commonwealth, 236 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." 237 McCreary 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 in violation of the privileges and immunities clause and the commerce clause. In rejecting the constitutional challenges, the Virginia Supreme Court held that the state had plenary power to regulate use of the soils under navigable waters for purposes such as oyster planting, so long as the exercise of that power did not interfere with navigation and commerce. 238 Although the court referred to several public trust cases of the United States Supreme Court, including Martin v. Waddell, 239 the state court acknowledged that the validity of the public trust doctrine was disputed. But that dispute did not, in its view, affect the public interest in fishing. As the court explained: "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." 240 The key inquiry instead was whether the state's citizens had a "proprietary right in common." 241 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." 242 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. 243

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." 244 According to the Court, each state acquired exclusive dominion and control over the navigable water 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." 245 Further, when such appropriation occurred, the state 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 law. 246

In summary, Virginia case law indicates that only a few public uses are part of the jus publicum—that is, the category of state property interests that arise from the state's sovereignty, limiting private interests, and that impose management duties on the state for the benefit of its people. Public uses included within the jus publicum appear to be limited to the right of navigation and the right to discharge sewage into 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 jus privatum. Although the Virginia courts never fully explain their decisions about the status of various public interests, their conclusions demonstrate a narrow interpretation of the public trust doctrine. 247

C. Evolution of the Public Trust Doctrine in New Jersey: A Comparative Study.

New Jersey, or New Caesarea as it was first known, is one of the most active and progressive states in developing public rights theory. For years its judiciary and legislature have recognized and protected public rights in tidal resources through the public trust doctrine. Although this progressive approach has brought significant benefits to the public, it also has had its disadvantages. As the scope of public rights has expanded, the infringement on private rights has increased, sometimes substantially. A brief study of the development of the public trust doctrine under New Jersey law highlights the

237. Id. at 210.
238. Id. at 211.
239. Id. at 212.
240. Id. at 213.
241. Id. at 214.
242. Id. at 215.
243. Id. at 216.
244. Id. at 217.
245. Id. at 218.
246. Id. at 219.
247. Id. at 220.
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extent of that infringement and demonstrates some of the problems of interpreting the trust doctrine broadly.

Most studies of the public trust doctrine in New Jersey probably would begin with the 1842 decision Martin v. Waddell. In that decision the United States Supreme Court examined the impact of the charters granted by Charles II to his brother the Duke of York for the purpose of establishing a colony. The Duke of York subsequently granted that part of the territory known as East New Jersey to twenty-four persons who were called the Proprietors of East New Jersey. These individuals were vested with all the proprietary rights and governmental powers that originally had been conferred on the Duke of York in the letters-patent issued by the King. Eventually, however, in 1702, the Proprietors surrendered to the Crown all the powers of government, but still retained their proprietary interests. Because the King claimed the territory of New Jersey by right of discovery, the Supreme Court of the United States declared, in Martin, that the King held the land designated in the letters-patent "in his public and regal character, as the representative of the nation, and in trust for them." After the Revolution the people of New Jersey became the sovereignty and therefore assumed the right to all the navigable waters and the soils under them for their own common use, subject only to the rights surrendered under the Constitution to the general government.

But even before the Supreme Court had begun to develop the public trust doctrine, the New Jersey courts had focused on the concept. Relying on English common law, the New Jersey courts have developed a public trust doctrine that is expansive and broad, often protecting the public interest to the detriment of private rights. In recent years even the voters of New Jersey have become involved in the development of the doctrine and in the conflict between public and private rights. As the following discussion should demonstrate, the conflict is far from resolved.

1. Perspectives of the New Jersey Courts.

In what appears to be one of the earliest American cases on the public trust doctrine, Arnold v. Mundy, the New Jersey Supreme Court declared that "the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens." Arnold involved an action of trespass brought by a waterfront landowner against a party who had entered upon an oyster bed staked off by the plaintiff. The defendant had responded to the plaintiff's claim of an exclusive fishery by arguing that the oyster bed was located in a navigable, tidal river, that such waters were held by the prior and present governments in trust for the people, and that all citizens had the right in common to take oysters from public waters. In rejecting the plaintiff's claim of an exclusive fishery, the court concluded that the grant of charters by Charles II to the Duke of York passed all the common property in the colony, including "the rivers, bays, ports, and coasts of the sea," to the Duke of York as part of his "royal authority" to be exercised "for the public benefit, and not as the proprietor of the soil . . . for his own private use." Further, after the Revolution the all the royal rights became vested in the people of New Jersey, as the sovereignty. Because the legislature was the rightful representative of the people, the legislature could take appropriate action to regulate the common property. But this power did not permit the sovereign to "make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right."

Since Arnold numerous New Jersey decisions have discussed the concept of the public trust. Up until 1972, those decisions tended to adopt a traditional perspective in defining the doctrine. New Jersey decisions, for example, limited the doctrine to tidal waters and submerged lands extending landward to the high water mark. Furthermore, New Jersey courts often defined the public interest narrowly to permit the state to convey trust lands in abrogation of trust rights.

Then, in the 1972 decision, Borough of Neptune City v. Borough of Avon-by-the-Sea, the state supreme court decided to expand the public's rights under the trust doctrine. In Neptune City the Borough of Avon-by-the-Sea charged beach access fees which discriminated between residents and nonresidents. In striking down the higher fees for nonresidents, the court concluded that at least where the upland sand area is owned by a municipality ... and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.

Furthermore, the court suggested that even "the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters."
Nor were permissible public uses to be limited to those uses traditionally recognized as trust uses. Although such traditional trust uses as navigation and fishing still would be allowed, the court decided to recognize other uses, like bathing and swimming, typically exercised by the public today in coastal areas. The court admitted that the original purpose of the trust doctrine was "to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food." In the court's view, though, "the public trust doctrine ... should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public; it was created to benefit." This perspective has contributed significantly to the expansion of permissible trust uses or, as some might describe it, to the infringement of private rights.

2. Permissible Public Trust Uses.

As a result of the broader perspective taken by the court in Neptune City, the class of permissible trust uses has expanded under New Jersey law. A 1978 decision, for example, extended the public trust to a beach that was man-made. In that case, Van Ness v. Borough of Deal, the Borough of Deal had attempted to limit use of a man-made beach to residents of the borough. In striking down the limitation, the Supreme Court of New Jersey observed that "Deal cannot frustrate the public right by limiting its dedication of use to residents of Deal. Nor may it allocate to the public on a limited basis, rights which, under the doctrine, the public inherently has in full." That the beach was man-made was immaterial to determining whether the public trust applied to it.

More recently, in Lusardi v. Curtis Point Property Owners Association, the New Jersey Supreme Court declared a locality's zoning ordinance to be "invalid to the extent that it prevents the owners of undeveloped oceanfront lots along all of ... (the locality's) Atlantic coastline from using the dry sand beach areas of their property primarily for recreational purposes." The ordinance had zoned most of the lots on the locality's Atlantic coast for single family residential use and had prohibited recreational use of dry sand beach areas on these lots except as an incident use to a recognized primary use. In invalidating this prohibition, the court relied on the public trust doctrine, as interpreted by Neptune City, Van Ness, and other decisions, to conclude that the doctrine attempts to encourage coastal localities to provide for greater public access to and use of ocean beaches for recreational purposes. By dedicating most of its land along the Atlantic Ocean to single family residential use, and by prohibiting "primary recreational use of undeveloped land," the locality had "unreasonably restricted the ability of private organizations to encourage" public recreational use and had "clearly conflicted with State priorities for the use of the State's oceanfront resources." As the court further explained, the "ocean water" along the New Jersey coast belongs to all the citizens of the state, and "a municipality may not unreasonably prevent private organizations from expanding the number of citizens able to enjoy its pleasures."

In addition to the new types of public uses, New Jersey law also recognizes most of the traditional uses, like navigation, fishing, and sewage disposal. But whereas the new uses are explained in the context of the public trust doctrine, the traditional uses are justified as much in terms of the commons concept, as in the context of the trust doctrine. The cases involving the right of fishing provide the best example of this mingling of the public rights theories. For example, in the 1812 case, Yard v. Carman, the court described the right to fish in the Delaware River as a "common right," which remains in the public until some person has gained an exclusive right. The court in Arnold v. Mundy made a similar statement, observing that fishing in a navigable, tidal river is prima facie a "common right" which each citizen had a right to enjoy. But while this "right" constituted "common property," it did not vest in the public as a normal property right. As the court explained, the common property involved "things in which a sort of transient usufructuary possession, only, can be had ... and therefore, the wisdom of ... [the common] law had placed ... [title to the common property] in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit." Similarly, the United States Supreme Court, in Martin v. Waddell, acknowledged that the people of New Jersey had exercised and enjoyed "the rights of fishery for shell-fish and floating fish, as a common and undoubted public possession," and subsequently in opinion. 297. 86 N.J. 217, 430 A.2d 881, 888 (1981).

298. 430 A.2d at 886-87.

299. Id. at 887.

300. Id. at 888.

301. See Borough of Neptune City v. Borough of Aven-hurst, 78 N.J. 190, 393 A.2d 579 (1978) (where the court refused to extend the public trust doctrine to man-made improvements built to complement a municipal beach).

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right" at least since 1702 when the proprietors surrendered their governmental powers to the Crown.\textsuperscript{277} This "public and common right of fishery" existed in navigable waters and was "so carefully guarded in England" that it "would require very plain language" to take away the right.\textsuperscript{278} These references to the commons concept suggest that the distinction between the commons concept and the public trust doctrine is not clear. Most of the references to the commons concept appear in cases decided before the public trust doctrine had fully developed. In contrast, more recent New Jersey opinions tend to use the trust concept to protect the public interest, even where the case involves a use traditionally described as a common right.\textsuperscript{279} Because the language used to protect the public interest has changed over time, as the trust doctrine has developed, it is difficult to tell whether the change represents a conscious decision to replace one theory with another or whether the courts even recognize any differences between the two concepts. That recent decisions support the existence of a public trust by relying on earlier cases using commons language suggests that the New Jersey courts view the two concepts as interchangeable. But, regardless of whether the difference in word usage is conscious or intended, it is clear that the concepts are related but distinct theories. Once the evolution of the commons concept is traced, some of the differences between the two theories should become apparent.

3. Aliensation of Public Trust Property.

Until the turn of the century, the New Jersey courts almost uniformly agreed that the legislature had absolute authority to alienate trust lands free of public rights.\textsuperscript{280} After the Supreme Court's decision in \textit{Illinois Central Railroad v. Illinois}, a few courts suggested that the legislature's power to alienate trust land was less than absolute.\textsuperscript{281} But most still agreed that the legislature had absolute discretion in regulating, managing, and alienating trust property.\textsuperscript{282} A 1935 decision, \textit{Ross v. Mayor of Edgewater}\textsuperscript{283} best explains the view of those New Jersey courts. In upholding the absolute power of the legislature to deal with trust lands, the Supreme Court of New Jersey observed that the "public has no rights in ... [tidal] waters so fundamental as to be beyond legislative impairment."\textsuperscript{284} According to the court, the proper comparison to be made in defining the legislature's power over trust lands was between the state legislature and Parliament, and not between the legislature and the Crown. As the court explained,

\begin{quote}
while the king at common law ... was not possessed of the right to divest the people of their common right of navigation and of fishery ... the dominion of parliament over the \textit{jure publica} was absolute and unlimited, and the legislature is possessed of like omnipotent authority to regulate, abridge or vacate public rights in navigable rivers, except in the field reserved to congress by the federal constitution.\textsuperscript{285}
\end{quote}

The views expressed in \textit{Ross} influenced the direction of New Jersey trust law for almost forty years.\textsuperscript{286} Then, in the 1972 decision \textit{Borough of Neptune City v. Borough of Avon-by-the-Sea}, the New Jersey Supreme Court suggested that the approach of the earlier decisions to the question of the legislature's power over trust lands was overbroad.\textsuperscript{287} The court made that suggestion just before holding that "the public trust doctrine dictates that ... [trust property] must be open to all on equal terms ... and that any contrary state or municipal action is impermissible."\textsuperscript{288}

Because the court in \textit{Neptune City} only noted the possibility of an overbroad approach, the precise effect of \textit{Neptune City} on the alienation issue is not certain. A few justices and legal scholars have expressed the view that the decision removes the authority of the legislature to alienate trust property.\textsuperscript{289} However, the judge who authored the majority opinion in \textit{Neptune City} subsequently commented that New Jersey's public trust doctrine "does not prohibit all use and alienation by the state of such lands, but conveyances must be subject to use conditions depending on the nature of the particular land involved."\textsuperscript{289} Further, that judge admitted that though he believed the doctrine should "be reinvigorated and enforc[ed] to its full intent and purpose ... we may not be able to undo prior transgressions of it."\textsuperscript{290} Though the New Jersey courts generally do not favor this type of estopped argument when valuable trust land is at stake,\textsuperscript{291} the numerous court decisions stating that

\begin{itemize}
\item \textsuperscript{277} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{278} \textit{Id.} at 414.
\item \textsuperscript{279} \textit{See, e.g., Borough of Neptune City v. Borough of Avon-by-the-Sea,} 81 N.J. 298, 294 A.2d 47, 64 (1972).
\item \textsuperscript{281} \textit{Borough of Neptune City v. Borough of Avon-by-the-Sea,} 81 N.J. 298, 294 A.2d 47, 64 (1972).
\item \textsuperscript{282} \textit{Id.} at 414; \textit{Ross v. Mayor of Edgewater,} 115 N.J.L. 477, 484, 180 A. 866, 870 (1935), aff'd, 116 N.J.L. 447, 184 A. 810, cert. denied, 299 U.S. 543 (1936).
\item \textsuperscript{283} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{284} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{285} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{286} \textit{Id.} at 414.
\item \textsuperscript{287} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{288} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{289} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{290} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{291} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{292} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\item \textsuperscript{293} \textit{Id.} at 417; see also supra notes 113-23, 244-48 and accompanying text.
\end{itemize}
the legislature had absolute power to convey trust lands may justify such an exception. As the above discussion demonstrates, New Jersey law is confused and uncertain on the matter of regulation and alienation of trust property. In 1981 the New Jersey voters attempted to clarify the law by approving an amendment to their constitution. The amendment, in effect, imposed a statute of limitations on state claims to New Jersey tidelands. A discussion of that amendment follows.

4. The Tidelands Amendment to the New Jersey Constitution.

As explained earlier, a tremendous amount of uncertainty surrounds the nature and extent of the public interest in New Jersey tidelands. Both the state legislature and courts have attempted to rectify the problem. In 1967, for example, the state supreme court suggested that "[t]he matter of good housekeeping, the state should begin a process of cataloging its holdings." Then, in 1968, the legislature enacted the meadowlands mapping statute. That Act required the Resource Development Council, now the Tidelands Resource Council, to perform title studies and surveys of the state's meadowlands in order to identify and certify those lands that are state-owned. The mapping statute set forth the procedures to be used in identifying state-owned lands and fixed a completion date of December 31, 1974. The completion date was twice extended, ultimately to December 31, 1980.

Although the cataloging process should have clarified the status of many lands, it seemed instead to create more confusion. On November 3, 1981, the voters of New Jersey decided to provide further clarification by adopting a constitutional amendment. Under the amendment the state could claim title to lands that had not been "tidal flowed" during the past forty years, provided the state acted quickly to pursue its claims. The amendment provided:

No lands that were formerly tidal flowed, but which have not been tidal flowed at any time during the period of 40 years, shall be deemed riparian lands, or lands subject to a riparian claim, and the passage of that period shall be a good and sufficient bar to any such claim, unless during that period the State has specifically dedicated and asserted such a claim pursuant to law. This section shall apply to lands which have not been tidal flowed at any time during the 40 years immediately preceding adoption of this amendment with respect to any claim not specifically defined and asserted by the State within 1 year of the adoption of this amendment.

In effect, then, the constitutional amendment gave the state one year, until November 3, 1982, to claim lands that had not been tidal flowed since November, 1941. If New Jersey failed to assert a claim within that time period, the claim would be barred.

To comply with the 1981 tidelands amendment to the New Jersey Constitution, the Tidelands Resource Council promulgated 713 maps and studies setting forth state claims to tidelands. On May 27, 1982, the Tidelands Resource Council displayed these maps for public view. The maps were filed in the Secretary of State's office and with county and municipal clerks. Parties holding land subject to a claim could contest the claims with the Council or the courts. If the challenge was rejected, the party then could apply to the Council for a riparian grant to clear title. Before receiving the grant, though, the property would have to pay an appropriate value for the property, as determined by the Council after taking into account the equities of the particular situation.

Needless to say, the response of the Council has caused a strong public outcry. The impact of the Council's claims on private concerns appears to be significant. The largest of the affected properties consists of a portion of a 56-acre tract for which Resorts International had announced a $1 billion construction project. The plan included construction of a casino hotel and a housing development to help ease a severe housing shortage in Atlantic City. Thousands of property owners holding small amounts of formerly tidel flowed land also could be detrimentally affected by the Council's action. Because of the existence of the state's claims, they are faced with the prospect of having to pay for their land for a second time. Some even have to pay back rent totaling as much as 10% of the "fair market value" for each of the years the land has been occupied without a riparian grant.

At the time of the adoption of the maps, one observer estimated that at least 5,000 lawsuits would result. Perhaps in an attempt to minimize the number

§ 5.2 DEVELOPMENT OF PUBLIC TRUST DOCTRINE

of lawsuits, the state decided not to proceed with its claims until those who thought that they owned affected property decided whether to sell their land or to approach the state to acquire a riparian grant. In either situation, the cloud on the title would be discovered at that future date in time and the state then could proceed with its claim.\textsuperscript{305}

5. Recent Developments.

The catastrophic effects which many New Jersey residents expected as a result of the 1981 constitutional amendment have not yet come to pass. The state has not, as many feared, been evicting people or knocking on doors seeking to collect rent from people living on state-claimed land. The courts, however, have decided several noteworthy cases, which merit discussion.

In a case argued before the Supreme Court of New Jersey on September 12, 1983, and decided by that court on December 21, 1983, the court upheld the constitutionality of the tidelands amendment. Plaintiffs in that case, Dickinson v. Fund for the Support of Free Public Schools,\textsuperscript{306} challenged the validity of the amendment by advancing five principal arguments: one, that the amendment was invalid because it purported to convey title to state-owned lands without the payment of consideration to the state; two, that the amendment unlawfully deprived the state and beneficiaries of the Fund for the Support of Free Public Schools of their property without due process and just compensation; three, that the effect of the amendment would be discriminatory because the November 1982 cutoff date meant that some owners whose properties had been mapped and claimed by the state would be treated less favorably than others whose properties were not mapped and against whom state claims would be barred; four, that the Tidelands Resource Council acted unreasonably in deciding what claims to assert; and, five, that the amendment violated the contract clauses of the New Jersey and United States Constitutions by impairing the security that the Fund for the Support of Free Public Schools provided to purchasers of school bonds.\textsuperscript{307}

In rejecting the challenges, the Supreme Court of New Jersey stressed the validity of the constitutional amendment in all respects. More specifically, the court held that the amendment did not, by itself, divest the state of any property; nor did the amendment impermissibly impair any contractual obligations or violate the equal protection clause of the federal Constitution. As the court explained, no infirmities could exist under the state constitution because the amendment authorizing the Council’s actions was part of that constitution and the people could amend their constitution. Similarly, the amendment did not impermissibly take the Fund’s property without compensation in violation of the federal Constitution since the Fund was expressly created by the New Jersey Constitution and thus could be modified or even eliminated by subsequent constitutional amendment. Further, the amendment’s financial impact on other contractual obligations of the state was too speculative to justify upholding the impairment of contract challenge. Finally, under the equal protection clause, a legitimate objective existed for the classification scheme adopted by the amendment and the scheme was rationally related to that objective. In the court’s view, the amendment promoted the legitimate goals of clarifying title to coastal lands and identifying lands subject to state claims. In addition, the amendment had been implemented by the state in a sensible, rational manner that had properly alerted the public of the state’s claims.\textsuperscript{308}

In another recent case, also argued before the New Jersey Supreme Court on September 12, 1983, and decided on December 21, 1983, the court held that the mapping procedures used by the state in preparing its 713 maps were adequate. In City of Jersey City v. Tidelands Resource Council,\textsuperscript{309} the plaintiffs challenged various aspects of the maps, including a disclaimer statement used on the documents, as well as the failure to file the maps with various record-keeping authorities, the failure to provide metes and bounds descriptions of the claims, and the failure to publish in local newspapers a listing of parcels claimed by the state. The plaintiffs also argued that the mapping procedures did not meet the requirements of the meadowslands mapping statute mentioned earlier.\textsuperscript{310} Consistent with its decision in Dickinson, the court concluded that the tidelands amendment did not require the state to follow the techniques set forth in the meadowslands mapping statute. Although the amendment did not specify many of the procedural requirements, that failure did not mean that strict compliance with the meadowslands mapping statute was required.\textsuperscript{311}

\textsuperscript{305} For a discussion of the New Jersey situation and for several case studies, see Tell, A Tidal Wave of Claims, 4 N.J.L. J., No. 44, at 1 (July 2, 1983). The article also discusses the problem in a nationwide context.

\textsuperscript{306} 89 N.J. 65, 499 A.2d 1 (1983), rev'd in part, aff'd in part, 187 N.J. Super. 224, 454 A.2d 491 (1982). The ten plaintiffs, all New Jersey residents, included landowners, taxpayers, a public school teacher, two public school students, an owner of a bond issued by a New Jersey School District, and a purchaser of a riparian grant from the state.

\textsuperscript{307} For a discussion of the claims and of the historical background of the amendment, see Dickinson, 499 A.2d at 3-7.

\textsuperscript{308} Id. at 12-14. For a discussion of the statutory issues raised by the plaintiffs, see id. at 8-11.

\textsuperscript{309} 95 N.J. 100, 469 A.2d 19 (1983).


\textsuperscript{311} The court specifically relied on its decision in Dickinson to reject the claims of procedural irregularities. Tidelands Resource Council, 469 A.2d at 22. In Dickinson the court had concluded that the meadowslands mapping act did not set forth the "exclusive manner in which a claim could be made." Dickinson, 499 A.2d at 8. Although the court recognized that the amendment nevertheless required the state to "specifically define and assert" its claims, the court in Dickinson concluded that the state had adequately defined its claims and had given sufficient notice. Id. at 8-11.

In a third pronouncement made by New Jersey in 1983, the Attorney General handed down a formal opinion regarding the fixing of prices or grants. In the opinion the Attorney General stated:

- It is our opinion that the Council [The Tidelands Resource Council] does have the discretion to fix a price for a grant of the state's interest in tidelands based on its underlying value without any improvements. It is also our opinion that in an instance where the state's claim to tidelands is in dispute, the Council's determination of an appropriate price should reflect the strength of the state's claim to those lands as determined by the Attorney General.

As Dickinson and Tidelands Resource Council demonstrate, New Jersey's attempt to define a balance between private rights and public trust interests has raised more problems than it has resolved. Though these problems might suggest otherwise, New Jersey and other states attempting to effectively use the trust doctrine to protect the public interest in natural resources must continue to search for such a balance. For as the demand for valuable coastal resources increases and the supply dwindles, the conflict between public and private interests will only intensify.

§ 5.3. The Public Trust Doctrine and Natural Resources: Some Concluding Remarks.

As sections 5.1 and 5.2 should demonstrate, the public trust doctrine has evolved into a powerful tool for protecting the public's interests in natural resources. Some of that progress can be attributed to Roman law. Although the impact of Roman law on public rights theories has been overemphasized in recent times, Roman law clearly left one important legacy: the ideal that certain natural resources, primarily coastal resources in Roman times, should be dedicated in part to the general populace. While Roman law also clearly recognized the importance of private use to its economy, the Roman legal structure made at least a philosophical commitment of its tidal resources to its people.

English law made even more significant contributions to the development of the trust doctrine. During the feudal era, these were primarily limited to the development of the principle that the sovereign could retain an ownership interest in lands while private parties enjoyed the benefit and use of the land. Later, when England had developed into a maritime power and had become more dependent on its tidal waters and lands, English law made perhaps its most significant contribution. It developed the prima facie theory, which presumed that the sovereign still owned valuable tidal lands and waters. Part of that theory included the idea that the crown could have different types of interests in England's natural resources. One such interest, the jusa publicum, involved the notion that at least some natural resources held by the sovereign were subject to public use. These contributions of English law admittedly did not originate from grand philosophies or idealistic views. But they provided a basis for eventually taking a more normative approach to public rights theory.

Without a doubt, though, the American judiciary contributed the most to the development of the public trust doctrine. It was the American judiciary, and not Roman or English jurists, that developed the concept of a trust relationship existing between a sovereign, its people, and certain natural resources. Moreover, American courts, and not their Roman or English counterparts, were primarily responsible for formulating the key policies and principles of the doctrine and for applying the doctrine to protect the public interest in natural resources. As the Supreme Court of the United States once explained, the trust doctrine protected the people's reasonable expectations that they would be able to use the country's valuable natural resources. These expectations required a state to "preserve" certain resources for use by the public. Further, the state could not discharge this duty by taking action that "substantially impaired" the public trust.

Except for these basic principles, there is no clear consensus as to what the public trust doctrine means or entails. Some courts define the scope of the doctrine liberally, while others adopt a restrictive view. Thus, whether a use or interest is protected by the doctrine depends to a large extent on the decisionmaker. But while the results may not be consistent or uniform, two key factors appear to affect whether and to what extent a court will consider a use or interest protected by the public trust.

First, the courts appear to focus on the nature of the resources that would be subject to public use. This inquiry requires assessing whether the public use would involve property, like wildfowl or fish, that can be captured and controlled by an individual or whether it would involve property, like flowing water, that cannot be possessed corporally by an individual, except perhaps in a transient sense. If the property is capable of possession, then the courts generally will consider the private appropriation to promote efficient and productive uses of the resource. But because of the public interest in the state's natural resources, some limitations usually are imposed on the private allocation system. The system, for instance, generally must be structured in a manner that gives all citizens an equal opportunity to obtain an interest in the resource. Historically, Virginia has attempted to accomplish 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. In the past, for example, fishery rights often were available to the general public, but over time have been increasingly regulated as it became more apparent that an open allocation system led to depletion of ecologically and economically valuable fisheries.

314. Id. at 452.
315. See, e.g., supra § 5.2.B (discussing Virginia's restrictive view); § 5.2.C (discussing New Jersey's liberal approach).
§ 5.3 PUBLIC TRUST DOCTRINE AND COMMONS CONCEPT

Second, at least some courts appear to consider whether an obligation should be imposed on a sovereign to govern use of certain natural resources to ensure its citizens' survival and promote their health and welfare. Some courts, for instance, have recognized the right to discharge sewage into state waters as a right that the state, as sovereign, should protect to promote the public health.317 The right of navigation also appears to involve this second factor. For hundreds of years, the law has recognized the importance of navigation to the survival of a people. In both Roman and English societies, for example, the legal system decided to impose duties on the sovereign to protect the people's interests in navigable waters. Apparently the legal authorities were motivated by the importance of commerce and navigation to their societies. The United States Constitution continues this approach. In its commerce clause, the United States Constitution recognizes, implicitly at least, the importance of navigation.318 Without this clause each state would have had plenary powers over the navigable watercourses within their boundaries. By giving the supreme power to regulate navigable waters to one sovereign body — the federal government, the drafters of the Constitution helped to ensure that those resources would be open to commerce and navigation by the people of all states.

Through the first factor, the American judiciary can, where appropriate, promote private use of natural resources. Through the second factor, the judiciary can ensure that that private use does not destroy the public interest in the resource being used. Because this second factor incorporates the philosophical or normative perspective of Roman law, it enables the public trust doctrine to provide protection for the public interest in a variety of natural resources. Although the doctrine initially focused on navigable waters and submerged lands, the expectation analysis that led to imposition of a trust can, through this factor, be applied to other valuable natural resources as well. If, for example, an ecologically significant wetlands area became threatened by private use and appropriation, it would seem appropriate to use the public trust doctrine to protect the public interest in those lands.319 Permitting the private use to occur without restraint would result not only in the destruction of the wetlands area, but also in the impairment of surrounding resources dependent on the continued well-being of that area.320 Whether many courts would be willing to extend the trust doctrine in this manner remains to be seen. But if they focus on the policies and functions of the doctrine and do not interpret the historical origins too restrictively, then they should be willing to apply the doctrine to a wide variety of situations.

317. See supra notes 220-31 and accompanying text.
318. See U.S. Const. art. I, § 8, cl. 3; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). For further discussion of the federal government's power over navigation, see infra chapter 20.
319. For a discussion of statutes and regulations affecting wetlands, see infra chapter 20.
320. For a discussion of the importance of wetlands and other coastal resources, see supra chapters 2-4.
VIRGINIA
TIDAL AND COASTAL LAW

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CHAPTER 6

DEVELOPMENT OF THE COMMONS CONCEPT*

Long before the concept of a public trust began to develop, first in England as a theory of sovereign ownership and then in the United States as a theory of sovereign responsibility, the law had provided for certain public rights in natural resources through the commons concept. In the days of Rome, public rights in natural resources appeared primarily in the context of tidal resources. Although Roman jurists used the term "commune" or "common" to describe those rights, the Roman approach to public rights reflected a philosophical commitment to the public not generally associated with the commons concept today. Even in early England, it appears that common lands denoted lands held by a community for public use. After the fall of Rome, though, the notion of broad public rights disappeared and a more practical concept of commons appeared in its place. Instead of reflecting the Roman idealism of committing valuable natural resources to the public, the new version of commons assumed a functional and defined role in England's structured property system.

Despite the difference in perspective existing between the Roman concept of commons and the English version, it is clear that both have had an impact on the evolution of common rights in Virginia. At least on the surface, the Roman perspective would appear to have had the greater impact. Like the Roman version, Virginia's concept of common rights focuses on tidal resources, especially on the shores along the sea and the beds of tidal waters. Furthermore, the Virginia laws defining the commons concept refer in broad and sweeping terms to the rights of the people to use "all unappropriated lands on various state waters as a "common," much as Roman law described "running water, the sea ... and the shores of the sea" as "common to mankind."

But, as the following discussion should demonstrate, these similarities are largely superficial. Both the history of the commons concept in Virginia and the state judiciary's interpretation of the concept suggest that the English perspective was much more influential. Both also indicate that Virginia law

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1. See generally supra § 5.1.A (discussing the impact of Roman law on public rights).
5. See The Institutes of Justinian 2.1.1 (T. Cooper trans. 1812); see also supra chapter 5, notes 11-14 and accompanying text.
regards the commons concept as an important, but very traditional, property concept. During the colonial period that concept served important economic functions, much as the English version did during feudal times. After Virginia became a state, the commons concept continued to be important, playing a defined role in Virginia's structured land system.

Chapter 6 examines the development of the commons concept under the common law. Because the overall impact of Roman law on public rights theory has already been discussed, the chapter begins, in section 6.1, with a discussion of the evolution of the commons concept in England. Following that discussion, section 6.2 then studies the development of common rights in Virginia. Although the section focuses primarily on the colonial period, it also provides some preliminary insights into legislation now governing common rights in Virginia. Then, in section 6.3, the chapter concludes with a comparison of the commons concept and the other important public rights theory, the public trust doctrine. As those concluding remarks will explain, the two theories take significantly different perspectives to the issue of public rights in natural resources.


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. 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. Later, as the population increased to the point where division of labor became possible, the need for collective rights diminished and private appropriation of common lands became widespread. Further, where common lands remained, regulation became necessary because of the combined effects of population increases and private appropriation. Although a few of these regulations appeared in the 1500's, most were adopted in the 1700's and 1800's. Thus, by the time the commons concept was brought over to America, it had evolved through several key stages. Because of the importance of these stages to an understanding of the American version of commons, they are presented below.

A. Historical Development.

As mentioned previously, the Roman concept of common or communal rights in tidal resources appeared to affect the type of land rights recognized in early England. Apparently because of the Roman concept, the Anglo-Saxons recognized certain lands as held for the benefit of a community. Evidence exists that, as early as 688, English settlements used an open field system to cultivate arable land. Under this system the fields surrounding a settlement were alternately sown or left fallow. During the harvest season, the fields typically were divided into strips for use by individual villagers. After the harvest, the fields became available for pasture, sometimes only to those who held arable strips and sometimes to a larger group.

Natural meadows or hayfields, rare and very valuable according to the Domesday Book, were also apportioned in strips to each villager, either permanently or according to an annual distribution scheme. In addition, the villagers enjoyed and used in common the surrounding waste lands, which included woods, marshes, and fens. From the waste lands medieval villagers removed wood and brush, as stoves, dog meat, and turf for fuel, asurbary, fished in rivers and lakes under their right of piscary, grazed pigs and goats according to their right of pannage, pastured other animals, and used sand.
stone, and clay as needed. At least until the eighth century, these wastelands were open to use by all who could reach them. But with the growth of villages and with the division of England into counties by the Anglo-Saxon kings in the 700’s, settlements began placing limitations on the use of waste and common lands. 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, villein, or borough, and sometimes even to a particular group of inhabitants within a manor, villein, or borough. Besides limiting the size of the class of users, restrictions also controlled the manner in which common rights could be exercised. Quotas, for example, were placed on the number of animals that could be grazed on certain land.

When William the Conqueror assumed control of England in 1066, he reshaped England’s property system by developing a system of landholding that served as the basis of the government, the military, and the economy. The King declared himself to be the “sine 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 shore, 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 infusion process continued, a pyramid structure developed with the King at the top.

19. See infra note 62.
21. Id. at 7.
22. For jurisdictional purposes, medieval England was divided into shires or counties, then hundreds, and then towns. 1 F. Pollock & F. Maitland, supra note 15, at 629. Although town varied in size, they typically included a farm village and surrounding open fields. See id. at 522. Sometimes a villein coincided with one manor, but often a villein encompassed several manors. Id. at 617-18. A borough, though resembling a town in its use of open fields, meadows and pastures, often was larger, acting as a center of commerce or military strength for the shire within which it was located. Over time boroughs acquired special powers of self-government, becoming answerable only to the King. Id. at 354-56. See generally id. at 537-698 (discussing the English communities of counties, hundred, villein, manor, and borough).
23. Royal Report, supra note 2, at 150-51. When, however, waste or common land was contiguous to two manors, the animals from both were pastured over the entire area. This practice of “intercomming” developed because of the difficulty of keeping the animals from one manor on that manor’s part of the common. Id. at 169.
24. Id. at 151. These quotas were referred to as “stints” and took several forms. One of the earliest forms of stinting, called the rule of “ouchest and levant,” involved limiting the number of a particular group 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 that could be grazed per yardland or virgate (usually 24 to 32 acres). Id.
25. Tenures were classified as free or unfree. Free tenures involved the performance of certain services agreed upon in advance when the tenural relationship was created. The free tenures included: (1) the tenure by knight service, which was the most honorable of tenures and which originally required the tenant to provide armed knights to the lord, but later required a monetary payment instead of actually providing able-bodied men; (2) the serjeanty tenure, which 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) the franklin’s tenure, which was used when land was given to a church, religious body or ecclesiastical official and which involved performance of religious services, such as saying masses; and (4) free and common scage, which involved providing 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 whose performance was not clearly defined and which were only vaguely defined by the will of the lord. See generally J. Thirwall, The Law of Real Property § 46 (1808); C. Mynheer, Introduction to the Law of Real Property 1-27 (1826); see F. Pollock, supra note 2, at 53-79. The only tenure that ever existed in the United States was free and common scage, and even that tenure had lost its burdensome aspects by the time America was colonized. 1 R. Minor, supra, § 15. See generally 1 F. Pollock & F. Maitland, supra note 15, at 220-406 (discussing the feudal land system).
27. In contrast to freehold tenancy, unfreehold or unfree 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 infra note 28; supra note 25. Another important difference between the freehold and unfreehold tenants concerned the remedial options available to each. Whereas the freehold tenant could seek redress in the King’s courts, the unfreehold tenant was limited to the manorial courts of his particular lord. C. Mynheer, supra note 25, at 11. See generally 1 F. Pollock & F. Maitland, supra note 15, at 350-85 (discussing the unfree tenure).
28. 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 generally C. Mynheer, supra note 25, at 87-92; 2 F. Pollock & F. Maitland, supra note 15, at 29-80.
29. Royal Report, supra note 2, at 166, 186-69.
subject to certain common rights. The lord usually had the right to use the land for grazing and taking timber, minerals, and other products from the waste land, but often only after the commoners exercised their right of pasture and any other common rights recognized in the waste land.

As the expression of the manor lands indicates, the Roman concept of common rights had disappeared during the feudal era. Instead of recognizing certain lands as held in common by the public, the feudal system treated all lands in England as being privately owned, either directly by the King or by some lord. By the early thirteenth century, manor lords or the Crown itself had apportioned most of the common lands and wastes. Nor were fields, meadows, and pastures the only resources taken for private use. Besides them, the King and his lords appropriated many valuable forests, shorelands, and fisheries.

Rapid population growth and residential expansion further reduced the lands available for common use. During the twelfth and thirteenth centuries, scores of new towns sprang up and existing villages expanded onto common lands and wastes. Use of these lands for cultivation created a serious shortage of pasture lands. The effectiveness of the open field system depended on the availability of lands for both cultivation and pasturage. Because of the settlement expansion process, and because of the private appropriation discussed earlier, the quantity of lands available for common use was drastically reduced. Violent disputes often arose between the lords who had granted licenses to "approve" or "inclose" common lands for cultivation and commoners seeking to protect their ancient rights from being extinguished through inclosure. The stage thus had been set for the struggle that was to arise.

The English inclosure statutes eventually altered the definition of waste by introducing the concept of "superfuous waste" to refer to the common lands not used by commoners for the lawful exercise of their right of pasture. Royal Report, supra note 2, at 92. Under English law, the lord who held title to lands subject to common rights could inclose common lands without the commoners' consent if the lands were superfluous waste and if the inclosure did not interfere with the right of the commoners. Id. This right to inclose superfuous waste arose from the Statute of Merton, 1236, 20 Hen. 3, c. 4, 1 De Barron, 22 Rep. 1 (1752) [hereinafter cited as FERGUSON'S STATUTE]; and the Commons Act, 1825, 13 Edw. 1, c. 46, 3 Halsbury's Statutes of England § 686 (2d ed. 1968) [hereinafter cited as Halsbury's Statute]. See Royal Report, supra note 2, at 92. 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 right of others in his strip, but also terminated his common rights in the remaining common land. See id. at 172. See generally 3 Halsbury's Laws of England § 705-706 (4th ed. 1974) (discussing the inclosure of commons).


31. The lord of the manor, for example, held certain common lands for the benefit of his tenants. See supra notes 26-30 and accompanying text. This theory of landholding 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 granted absolute ownership and control over large land tracts to a single person or group of persons. The primary duty of the proprietors was to divide and distribute 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 towns common exist today (perhaps the most famous of which is the Boston Common). See supra note 13, at 45-65.

Although the proprietors were not used as frequently in the Virginia colony, some grants held tremendous land tracts in Virginia under the proprietary 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); Hening's Statutes, supra note 166, at 167.
occur throughout the thirteenth century between the lords, who sought to preserve their private interests, and the peasants, who sought to preserve their customary or common rights.

The Statute of Merton, enacted in 1235, attempted to control the demands of manorial lords and enterprising farmers and the threat that they posed to the balance between arable and pasture lands. It provided that a lord could inclose common lands and therefore extinguish common rights only if sufficient common lands remained to permit freehold tenants to exercise their common of pasture. But, despite this first regulatory attempt by Parliament, disputes regarding inclosures persisted. A subsequent act, passed in 1255, represented a mixed victory for commoners. That Act generally reaffirmed the right of freehold tenants to protect their right to common of pasture, but then expanded the landowner's authority to inclose commons.

The conflict between private landowners and commoners was eased considerably by an unfortunate event, the Black Plague. During the last half of the fourteenth century, the plague decimated the English population, reducing it by nearly one-half. As the population declined, a significant retreat from commons and wastes also occurred. The pressure on those lands was not renewed again until the late 1500's, when the population finally reached pre-plague levels. This time, however, the demand for wool and leather and the growth of the sheep farming industry heightened the need for pasture land, at the expense of lands available for cultivation. Since sheep farming could not be conducted effectively on open commons, inclosure became widespread during this period.

Besides appropriating prior wastelands, the inclosure movement also consolidated arable strips into compact tracts and converted them into commoners' rights: "It is therefore absurd: impossible to convey to modern minds the full significance of common lands for the old peasant or thrift economy, which made use of all the resources of the neighbourhood and was very largely self-sufficient. In this old economy, a true economy of natural resources, common rights of all kinds played a fundamental part." W. Horsfall & L. Staveley, supra at 2, at 44-45. Inclosure originally meant putting fences around land, but eventually it signified a means of fencing a commons to extinguish common rights. See supra note 34.

37. See Common in Legal History, 166 This LAW TIMES 963, 964 (Nov. 17, 1928) (hereinafter cited as THE LAW TIMES).

38. See The Commons Act, 1285, 13 Edw. 1, ch. 46, 3 Halsbury's Stat., supra note 30, at 686. As the population of England increased, conflicts arose between landowners, who desired to inclose the common and put the land to more productive use, and commoners, who needed the land for pasturage. See Royal Report, supra note 2, at 154. The Statute of Merton attempted to balance the competing interests of the owner's and tenants. See Statute of Merton, 1235, 20 Hen. 3, ch. 4, 1 Pickering's Stat., supra note 30, at 27. Passed in 1235, that Act permitted lords to inclose "wastes, woods, and pastures" provided sufficient pasture was left for their freehold tenants. Id.; see also supra note 30 and accompanying text. Fifty years later, Parliament passed a subsequent act that expanded the lord's authority to inclose commons. In contrast to the 1225 Act, which only permitted the lords to inclose land incumbered with their freehold tenants' common of pasture, the 1285 Act permitted the inclosure of neighboring wastes, woods, and pastures as well. See Commons Act, 1285, 13 Edw. 1, ch. 46, 3 Halsbury's Stat., supra note 30, at 686; see also Royal Report, supra note 3, at 172.

39. See THE LAW TIMES, supra note 37, at 364-65.
§ 6.1 PUBLIC TRUST DOCTRINE AND COMMONS CONCEPT

B. Theoretical Development.

By the time of the American Revolution, the commons concept was firmly established in the English common law, both as a source of "public" or community rights and as a basis for government regulation.48 But though common rights existed throughout England and though their regulation eventually became pervasive, the theory underlying the commons concept was far from clear at the time of the Revolution. Part of the confusion can be attributed to the fact that the commons concept changed informally over time, in response to the fluctuating demands on England's agrarian lands. Part of the confusion also can be attributed to the development of the prima facie theory, described in chapter 5. Prior to the Elizabethan era, the common law presumed that a private party owning land on tidal waters owned down to the low water mark.49 Once the prima facie theory gained acceptance in the mid-to late 1600's, the presumption was reversed.50 Because advocates of the primacy theory used the same Roman law principles to support their theory that led to the development of the commons concept, the two public rights theories became closely intertwined, especially in America.51 But, despite the absence of clear theoretical underpinnings, a few key principles have emerged over time to help define the concept of commons.

A study of the development of the concept in early days, for instance, reveals that "individualism" rather than communalism lay at the "core" of the Anglo-Saxon agricultural villages.52 Even though the open field system depended for its success on the common use of arable, pasture, and waste lands by the inhabitants of a village, those who worked the strips in the open fields used them in severity, subject only to the agreed rotation system. Although villagers cooperated with one another in using the fields, they did not share the fruits of their labor.53 A villager's right to use nearby waste and common lands "annexed" to his arable strips. Like most of the rights of this time, it represented a personal or local right belonging to the villager "as a member of some particular class and community."54 The villagers could protect their allotted interest against encroachment by strangers, fellow commoners, and later even a manor lord.55 Historical records, for example, indicate that a commoner could use self-help and that he could even sue for damages if his right of pasture was infringed.56 The common rights recognized in agricultural lands during early England thus were not "public" rights in the truest sense of the word. Each village might have had its own common lands. But use was restricted to members of a defined class, generally the local community.57

Most of the commons concept's traditional property characteristics developed during the feudal period. As explained earlier, under the tenure system, all land in England was considered to be owned and vested in someone, either

51. See generally infra §§ 6.2, 6.3.
52. DORMEY BOOK, supra note 16, at 406, 409.
53. Id. at 404-05.
54. F. POLLOCK, supra note 2, at 18; see also DORMEY BOOK, supra note 16, at 411. The Anglo-Saxons appeared to view property in terms of possessory rights, and not ownership interests. Recorded grants of land were "a clerical or ecclesiastic institution" most probably introduced by the church, which was familiar with the Roman system. 1 F. POLLOCK & F. MAITLAND, supra note 15, at 69; see also F. POLLOCK supra note 2, at 20, 23-27.
55. F. POLLOCK, supra note 2, at 18; DORMEY BOOK supra note 16, at 407.
56. See DORMEY BOOK supra note 16, at 411. For further discussion of the right of pasture, see infra notes 68-70 and accompanying text.
57. The idea of rights common to the public actually is a fairly modern one. See F. POLLOCK, supra note 2, at 16-17. Except where a town or village green was open to local inhabitants for recreation by customary usage, or where a commons had been set aside by an inclosure award for the recreation of the inhabitants, the public generally did not have a right of access to common lands prior to 1925. ROYAL REPORT, supra note 2, at 181. In that year Parliament passed the Law of Property Act. It recognized a public right 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, 1925, 1 Geo. 5, ch. 20, §130(1). To protect this right, the Act prohibited the construction of any building, fence, or other work that would "impede" or "prevent" the public access to these lands without the consent of the appropriate authority. Id. §19(1).
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the Crown, the lord of a manor, or perhaps a lesser freehold tenant. Through long usage and custom, the tenants of a manor acquired rights in the common and waste lands belonging to their lord. Over time these customary rights eventually were confirmed by grants of land to freehold tenants, by agreements with nonfreehold tenants, and later by recording of customary rights in the manor court rolls. During the feudal system then, the common rights of the tenants of a manor existed in lands owned by their lord — that is, in lands owned by a private party.

Besides clarifying that common rights existed in privately owned lands, the tenure system also provided a detailed classification system for defining and regulating common rights. Under that system common rights were classified according to the subject matter of the use. One example of a common right involving tidal resources was the common of piscary. The holders of this right could fish in waters belonging to another. Traditionally these waters only included nonnavigable waters. Where waters were navigable and tidal, a public right of fishing also existed, but it apparently arose from the primae facie theory and not from the commons concept. Under that theory the Crown was presumed to own tidal waters and lands, and to the extent that the presumption held for various tidal waters the public had the right to fish in those waters.

But, despite the theoretical distinction between the two types of public rights of fishing, courts and lawmakers have confused the two. Sometimes, for example, a court uses the phrase "common right of fishery" to describe a public trust right. Other times a court may explain the common right of fishery in the context of the primae facie theory. As will be explained in more detail later, the development of the commons concept in Virginia demonstrates this confusion well.

The common of pasture, perhaps the most important of the common rights under the feudal system, illustrates the rigorous nature of the classification system that developed. That common right gave a party the right to graze cattle, horses, or other animals on the land of another. As pasture land became scarcer, the common of pasture was subjected to increasingly restrictive regulations. Quota or "stints" specifying the number of animals each tenant might pasture were among the earliest forms of regulations. At first, the restrictions permitted a tenant to pasture only as many animals as could feed on his strips during the winter months. Called the rule of "levant and couchant," this restriction eventually was replaced by stints in more densely populated areas. A stint defined the precise number of animals that a tenant could pasture on every yardland, usually 24 to 32 acres, that he held.

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, supra note 25, §§ 71, 72.

The common of turbery permitted digging peat or turf out of another's soil for use as fuel in the commoner's house, while the common of estovers allowed a commoner to cut and take wood from another's land. A person having the common o'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), or for building or repairing fences and hedges (hedge-bote). The common of estovers should not be confused with the life tenant's right of estovers, which was an exclusive right to make similar uses. See supra § 73. For further discussion of the different types of common rights, see 6 HALESHURST'S LAWS OF ENGLAND § 547-556 (4th ed. 1974).


67. See generally infra § 6.2. Cf. infra Part IV & chapter 19 (discussing the statutory development of the commons concept in Virginia).

68. See infra Part IV & chapter 19 (discussing the statutory development of the commons concept in Virginia).

69. ROYAL REPORT, supra note 2, at 151, 160, 189. No detail of management appeared to be too insignificant for the attention of the commons. See supra at 150. Even customs concerning the land's rights and interests in common lands were regulated. For instance, records of the parish of Hamptoon in the Bush, Oxonshire, dated 1853, note that "the custom is that the chief lord of..."
The preceding discussion should demonstrate that the feudal system extensively regulated common rights. As the regulations became more restrictive and precise, narrow categories of common rights developed. When the manorial system gradually was abandoned, many of the regulated commons and wastes became appropriated by private landowners or settled by new or expanding villages. Eventually, when the loss of commons and waste became acute, Parliament began to assume management and regulatory responsibilities. Like the manor lords, Parliament also found that protection of common lands required detailed regulation. By assuming regulatory responsibility and asserting control over commons, Parliament solidified the concept’s position in England’s property system. When the concept was brought over to America, that position became very influential.

Under English law, then, a right of common designates the 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 have classified the right as an easement, the right technically would be 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 a 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 commons. Nor is a common right an estate held in common. Besides the absence of a fee or possessory interest, a common right also is not shared in the same manner as an estate in common. As a consequence, management and use of common lands does not require the same degree of cooperation among parties having a common interest in the

Bampton Hundred shall have every year a draught with a lawful net in the common water of Aston and Coate and no more; and if he draweth not up he is not by the custom to put in his net again that year. The Law Times, supra note 37, at 364 (quoting from the record).

74. See W. Hooke & L. Stamp, supra note 2, at 34-36; Royal Report, supra note 2, at 149-52.

75. For an explanation of why government regulation is needed to preserve commons, see Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

76. 6 HALSBURY’S LAWS OF ENGLAND § 504 (4th ed. 1974); see also W. Hooke & L. Stamp, supra note 2, at 41-43. Some English law commentators have defined commons more precisely to reflect the fact that common rights attach to two types of land: common lands and commenable lands. Common lands would be lands subject to common rights at all times of the year. These lands would never be subject to severable rights or exclusive use, nor even for part of the year. Commencible lands would include lands that are held in severalty for part of the year, but that become commenable after the several crop is removed. These lands therefore would be subject to exclusive use for a portion of the year and to common use during the rest of the year. 6 HALSBURY’S LAWS OF ENGLAND § 506, 517-518 (4th ed. 1974); Royal Report, supra note 2, at 28.

77. See 1 R. MINOR, supra note 25, §§ 70, 82, 86. The distinction between common rights and easements can have important legal consequences. The right of way acquired by the holder of an easement, for example, generally will be extinguished by a change in the condition of the dominant estate not reasonably contemplated by the parties. 3 AMERICAN LAW OF PROPERTY § 6.06-08 (A. Casner ed. 1952); 1 R. MINOR, supra note 25, §§ 110, 114. A common right, however, will not be extinguished by a radical change unless the right no longer can be exercised effectively. A common of pasture, for instance, will be extinguished by a change only if cattle no longer can be kept on the land or be maintained by its produce. 6 HALSBURY’S LAWS OF ENGLAND § 630 (4th ed. 1974).

78. See generally 1 R. MINOR, supra note 25, §§ 70-74 (discussing common rights); C. McVean, supra note 25, at 216-35 (discussing concurrent easement). Roman law appears to have affected the nature of common rights. Under Roman law there were two types of intangible property rights existed: real and personal servitudes. Resembling a modern easement, a servitude basically entitled a party to use another’s property. P. Van Wamelo, An Introduction to the Principles of Roman Civil Law § 269 (1976). If the servitude was associated with and tied to the use of a piece of property, then it was a real or personal servitude. See id. § 272. If, however, the servitude could be created by contract, or by testamentary transfer, or by judicial decree, id. § 279. An important type of personal servitude was the usufruct, or "the right of using and enjoying, without consuming or destroying, things which are the property of another." The Institutes of Justinian 2.4 (T. Cooper trans. 1912). A usufruct traditionally could be exercised only as long as the thing subject to the use existed. Usufructs generally were restricted to things that could not be consumed by use. See id. § 242; W. Mozley, Outlines of Roman Law 292 (3rd ed. 1914). The characteristic of the usufract is 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 radical change in nature. Servitudes could be created by contract, by testamentary transfer, or by judicial decree. See id. §§ 291-35. Under early Roman law, servitudes could not be created by informal agreement or prescription. See P. Van Wamelo, supra, §§ 286-289. Eventually, however, these methods were recognized. See id. §§ 291-292. Roman servitudes therefore differed in important respects from the English common rights. Whereas the Roman servitude generally was created when a landowner intended to do so, the English common right often existed despite the private owner’s intent because of long established usage and because of the very nature of the common right. See T. Smolen, supra note 13, at 21-22.

79. See W. Hooke & L. Stamp, supra note 2, at 5-6.

80. Id. at 83-86, 159-66, 178. For a discussion of the factors contributing to the decay of the manorial system, see id. at 63-65. Although a few manorial courts still are held in England, most ceased to exist after 1923. Id. at 65.

81. See id. at 159-65; see also supra note 47.

82. See supra notes 21-24, 67 and accompanying text.
During the early colonial years, the settlers needed to work together to survive. This sharing included cultivating lands together and pooling products obtained from the land and the sea. But once the New England and Virginia colonies became self-sustaining, the need to share diminished. Then, when private appropriation began to occur, the plentiful supply of land and water resources in America ensured that a private party could appropriate lands and waters without depriving the general populace of a livelihood. As one colonist once noted, "suche a Baye, a Ryvar, and a land, did never the eye of man behold; and at the head of the Ryvar ... ar ... montaynes, that promysseth Infinytre Treasure."46

A final factor involves the independent and often rebellious nature of the early settlers. While the Crown attempted to control land ownership and use in the Virginia colony just as it did in England, the colonists refused to submit to many of the controls. Undoubtedly helped by the tremendous distance separating the colony from England, the settlers often succeeded in getting the controls removed. Because of their resistance, the settlers prompted the development of a property system based primarily on private ownership.48 Under this system limitations on private ownership rights like the commons concept would have been disfavored, at least as long as a bountiful supply of resources existed and remained available to all.

Given the basic differences between the English and colonial 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 Virginia demonstrates that divergence. The discussion focuses, first, on the historical development of common rights in Virginia and, second, on the legal response to the concept.

A. Historical Development.

Common lands and rights existed in the Virginia colony almost from the beginning of its settlement. On April 10, 1606, King James I granted "Letters Patent" to Sir Thomas Gates and several others to establish the Virginia colony.47 These Letters Patent, which comprised the colony's first charter, granted the patentees "all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marashes, waters, fisheries, commodities, and hereditaments"48 to be held in "free and common socage."49 The charter, which only

81. Royal Report, supra note 2, at 173.
82. See id. at 161-65. Although Parliament authorized some parties to make decisions concerning the enclosure of commons, it generally retained control over the enclosure process. See supra note 47.
83. See 1 R. Minor, supra note 25, § 15. The manor system did not develop in America as it had in England because of different political and economic considerations. The colonists were more difficult to grant manorial privileges which would reduce their political and judicial power. Further, the New England environment was better suited to mercantile than agricultural practices in the southern regions where agricultural goods were produced, inadequate transportation and marketing systems hindered manor development. See generally S. Kim, LANDLORD AND TENANT IN COLONIAL NEW YORK (1938); Van Rensselaer v. Radcliff, 10 Wend. 639 (Sup. Ct. N.Y. 1819); Livingstone v. Broek, 16 Johns. 14 (Sup. Ct. N.Y. 1819); Livingstone v. Potts, 16 Johns. 28 (Sup. Ct. N.Y. 1819); Watts v. Coffin, 11 Johns. 495 (Sup. Ct. N.Y. 1814).
84. See generally G. Mowihan, supra note 15, at 22-27 (discussing the disintegration of the tenure system); F. Pollock & F. Maitland, supra note 10, at 291-96 (discussing the tenure of socage).
86. See generally infra chapter 8 (discussing the private land system in Virginia's colonial and early statehood era). 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. J. Short, COMMENTARIES ON THE CONSTITUENCY OF THE UNITED STATES 159-60 (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).
88. Id. at 59.
89. Id. at 65.
brieﬂy referred to land grants, provided that the King would grant “lands, tenements and hereditaments” to other individuals nominated by the patentees. Apparently, though, these land grant powers were not exercised, for no evidence of grants to private parties has been discovered. In addition to the Letters Patent, the King also issued Articles, Instructions and Orders on November 20, 1606. These documents 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] he shall be had and inherited and enjoyed, according as in like estates they be had and enjoyed by the laws within this realm of England.”

On May 23, 1609, the Crown issued a second charter which expanded the terms of the ﬁrst and which incorporated the patentees into one body called the London Company. Like the ﬁrst document, the 1609 charter granted the patentees all lands, soils, havens, ports, rivers, waters, ﬁshings, commodities, jurisdictions, royalties, privileges, franchises, and prebeneﬁces. But unlike the ﬁrst document, the 1609 charter authorized the London Company to grant “portions of lands, tenements, and hereditaments” to individuals nominated and approved. In addition, the second charter clariﬁed the status of persons born in Virginia, declaring them to have all the liberties and immunities of “free denizens and natural subjects.” Perhaps most signiﬁcantly, the charter committed the colony’s government to the Company.

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冒险ed 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 by a commission “according to each man’s several adventure.”

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 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 apparently worked well, for in 1619 the Michaelmas quarter court praised him for “setting up the Comon Garden” and providing the settlement with a “standing revenue.”

In 1616 His Majesty’s Counsel for Virginia published a report on the colony, basically describing it as a “flourishing state,” which now included settlements at several different sites. The report attributed the colony’s success in part to Dale’s good management. In addition to setting up common gardens, Dale partially abandoned the idea of joint stock, or common property, and authorized some private enterprise. Among other innovations, he permitted settlers to own whatever they could raise on three acres of company land. The report also stated that the Company soon should 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.”

From 1616 through the early 1620s, it appears that the Virginia colony adopted the concept of common and other “public” lands to a signiﬁcant extent. 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 who traveled to the colony 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. When, for example, Samuel Argall arrived in 1620 to assume his post as principal governor, Governor Yeardley “delivered” to him a portion of public land called the Company’s garden.”

On November 18, 1618, the London Company issued a document entitled “Instructions to Governor Yeardley.” Better known as the Great Charter, 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. Under

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90. Id. at 85-86.
91. See A. EMMERT, supra note 31, at 230.
92. Articles, Instructions, and Orders, Nov. 20, 1606, reprinted in 1 HENRY’S STAT., supra note 3, at 67, 68-69 (1852).
93. Second Charter, May 23, 1609, reprinted in 1 id. at 80, 88.
94. Id. at 89.
95. Id. at 95.
96. 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 31, at 74.
97. Nova Britannia (1609), reprinted in 1 Phibition, Tracts and Other Papers, No. 8, at 1, 24 (1847); see also id. at 23-24, at infra note 114 (discussing the amount of land to be granted under the 1618 Great Charter).
the plan a central colonial government was to be established, with each town or plantation receiving the right to elect two burgesses to a colonial legislature. The Charter further instructed that the Virginia colonial government was to create four principal cities or boroughs: James Town, Charles City, Henrico, and Kecoxtan. Within each of these boroughs, public lands were to be set aside for, among other purposes, "a further case to the inhabitants of all taxes and contributions to support and for the Entertainment of the particular magistrates and officers." More specifically, 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 "fured grounds [worked] by the common Labour of the people sent thither at the Company's Charges and of the Lands formerly conquered or purchased." 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." Fifty percent of the profits derived from the governor's and Company lands was allocated to the tenants occupying the lands, with the remaining fifty percent to be divided between the Company and 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 and wintering of all sorts of Cattle which are or shall be the publick stock and store" of the Company.

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 ... city or Borough ... to be known and called by the name of the city's or Borough's Land." Additionally, the borough of Henrico was to set aside ten thousand acres for the establishment of a college. Unlike the Company and governor's lands, the common lands were to be worked by settlers or planters, that is persons who paid their passage from England but who had not bought London Company shares. Under the charter the planters worked the lands for three years, with a fourth of the profits paid to the Company. 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 that he had occupied. If he failed to do so, he forfeited his right to an ownership interest and remained an occupier.

These instructions demonstrate several important points about "public" land rights in early America. First, they establish that several kinds of public lands existed in colonial Virginia: governor's lands, Company lands, glebe lands, college lands, and, finally, common lands. 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 permanent of all the public lands. Whereas other kinds of public lands were to be used over an indefinite time period, the instructions anticipated that the common lands would be conveyed after a relatively short time period to the settlers occupying them. Thus, the Company not only had the right to alienate the common lands; it also was to prefer the occupier in conveying the lands.

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." To the extent that this statement suggests that the colonists lost all rights and interests in public and common lands, it would appear to be inaccurate. 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 approximate:

And if be 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.

114. Id. at 161-62. The ancient planters and adventurers received a 100-acre land dividend for the economic and personal risks they bore in founding and investing in the Virginia colony before it was settled. Subsequent planters and adventurers, who arrived after 1618 and benefited from the earlier settlers' efforts, received only a 50-acre dividend. Id. at 156-57, 163-64.


116. A. Embrey, supra note 31, at 60-63. Technically, the London Company charter never was vacated from the records of the Office of the Rolls because of the untimely 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 619-32.

117. Id. at 627.

118. See infra chapter 6 appendix.

119. E.g., Act of Nov., 1762, ch. 30, 7 HENRICE'S STAT., supra note 3, at 597, 597-98 (1820) ("An act for establishing the town of Chalfontville, in the County of Albemarle"); see also Act of Nov., 1762, ch. 32, id. at 600 ("An act for establishing the town of Mecklenburg, in the county of Frederick"); Act of Nov., 1762, ch. 23, id. at 601 ("An act for establishing the town of Hanover, in the county of Hanover"); Act of Nov., 1768, ch. 60, 8 id. at 421 (1821) ("An act for establishing..."
When this "privileges and immunities" clause is read in the light of a 1779 legislative enactment entitled, in part, "An Act for adjusting and settling the titles of claimants to unpatented lands" and containing language giving each settlement in the western region of the colony 640 acres of land to be held as common, it would appear 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.

For instance, the 1779 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:

And whereas several families for their greater safety have settled themselves in villages or townships, under some agreement between the inhabitants of laying off the same into town lots, to be divided among them, and have, from present necessity, cultivated a piece of ground adjoining thereto in common: Be it enacted, 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..."111

Further, an earlier clause of the statute 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 notes that "great numbers of people have settled in the country upon the western waters" without being able to obtain patents. It is only "just," the clause continues, "that those settling under such circumstances should have some reasonable assurance for the charge and risk they have incurred, and that the property so acquired should be secured to them."112

Thus, a comparison of the language of the 1779 Act and in the privileges and immunities clause suggests that the two are not addressing the same issue or matter. Under the terms of the privileges 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 recognizes the right to set aside common

terms at Rocky Ridge, Gloucester courthouse and Layton's warehouse, Act of Oct., 1778, ch. 22, 9 id. at 555 (1822) ("An Act for establishing a Town at the Courthouse in the county of Washington") (Whereas the earlier 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. at 556 ended with the language "privileges and immunities, which the freeholders and inhabitants of other towns in this state, not incorporated by charter, have, hold, and enjoy"); Act of Oct., 1779, ch. 4, 10 id. at 134 (1822) ("An act for establishing the town of Bensboro, in the county of Kentucky"); Act of May, 1782, ch. 12, 11 id. at 29 (1823) ("An act to establish a town at the courthouse in the county of Buckingham"); Act of Oct., 1786, ch. 107, 12 id. at 402 (1823) ("An act to establish a town at the courthouse of the county of Accomack," ending with the same language as 9 id. at 555 (1821)).

110. Act of May, 1779, ch. 12, 10 id. at 36 (1823).
111. Id. at 39 (emphasis added).
112. Id. at 38-39.

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lands until the General Assembly establishes the town. Thus, under a narrower interpretation, the language of the privileges and immunities clause would not incorporate any common rights established by the 1779 Act. Rather, these rights would exist only in western settlements not officially created by an act of assembly. Since the 1779 Act was passed after many of the eastern settlements were officially established and thus after the privileges clause was inserted in many of the town charters, this interpretation also reflects actual settlement patterns.123

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

As the preceding discussion should demonstrate, the commons concept was brought to colonial America at the beginning of the colonization period and, at least for a while, played an important part in the settlers' lives. Eventually, however, Virginia's ownership rights became more prevalent, common rights diminished in importance. Among other factors, the absence of a strong tenure system contributed to the colonists' more restricted use of common lands. In England the commons concept had developed in the context of the feudal tenure system — a system where 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 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. Furthermore, land and water resources abounded in the New World and there was a steady source of

123. 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. 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." Act of May, 1782, ch. 12, 11 id. at 29, 29-30 (1823). There would be no need for specific grants of public and common land if the town already had the power to set aside common land under the general grant.

124. In the Virginia colony, for example, there was no evidence of private land grants before 1615. Juergensen & Walley, The Commons Land Concept: A "Commons" Solution to a Common Environmental Problem, 14 NAT. RESOURCES J. 361, 369 (1974); see also supra notes 87-102 and accompanying text.
immigrants from the Old World to rep.ace those who did not survive the many perils of life in America. Because of the almost unlimited resources of the New World, the economic need for common rights was not nearly as strong in America as it was in feudal England. Finally, perhaps because of the independence of many settlers, private enterprise and ownership became the foundation of America's property system. Thus, although common rights clearly existed in colonial Virginia, they played a more limited role than in England.

B. An Introduction to the Commons Legislation.

Despite the more limited role played by the commons concept in America, the notion of common lands and rights has remained a part of Virginia's land system since colonial days. Once Virginia became a state, its legislature passed a series of statutes to protect the common rights of its citizens, primarily in tidal resources. Although the particular nuances of each statute are to be addressed later, a brief introduction to the commons legislation would help to underscore the continuing viability of the commons concept.

In May, 1780, the General Assembly enacted the first major piece of legislation protecting common rights. Entitled "An act to secure to the publick certain lands heretofore held as common," it provided that

all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth, which have remained ungranted by the former government, and which have been used so common to all the good people thereof, shall be, and the same are hereby excepted out of [the 1779 land act].

Further, to ensure protection of these "common" lands, the 1780 Act declared that "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." The preamble to the Act provided some insights into the Act's purpose and policies. It noted that "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 that legislation "establishing a land office" had not reserved those lands from grant. Because this omission would permit a "few individuals" to "monopolize" benefits "formerly derived to the publick," the General Assembly enacted the 1780 statute.

The preamble indicates that 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 1779 Act did not exempt lands on the Chesapeake Bay, the sea shore, and rivers and creeks, private parties could acquire interests in these lands. To the extent that they did, the public right of fishing was restricted. By reserving certain shorelands for common use in its 1780 legislation, the General Assembly ensured that all citizens, including the poor, could continue to exercise their "acustomed 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 1769 session of the Colonial Assembly to the rights of private waterfront landowners. The reference appeared in response to a complaint by a colonist, Robert Liny, who assailed third party parties who were interfering with his exclusive right to fish from the shore of his land. The third parties apparently claimed 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:

it is ordered and declared by this grand assembly that every mans right by virtue of his patent extends into the rivers or creeks so farre as low water marke, and it is a privilidge granted to him in and by his patent, and that therefore noe person ought to come and fish there above low water marke or hale their scenes or shoare (without leave first obtained) under the hazard of committing a trespass, for which he is suable by law.

The broadly phrased order arguably applied to all lands adjoining rivers and creeks. If the order had such a broad scope, then any grant obtained for lands on rivers and creeks pursuant to the 1779 land grant statute 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

125. See generally infra Part IV.
127. Id. at 227.
128. Id. at 226 (quoting the title of the earlier legislation).
129. Id. at 227.
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.135

Regardless of how the Virginia judiciary resolves the debate over *Liny*, it is clear that the boundaries of many lands bordering the Atlantic Ocean, the Chesapeake Bay, and the rivers and creeks of Virginia now extend to the ordinary low water mark.136 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. Despite this lofty purpose, the statute created as many "doubts" as it resolved. Perhaps the most problematic language in the 1819 Act is a clause providing that "nothing in this section contained shall be construed to prohibit any person or persons from the right of fishing, fowling and hunting on those 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."137 Thus, while extending the boundaries of many lands 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.138

A third statute protects the public’s common rights in "all unappropriated marsh or meadow lands lying on the eastern shore of Virginia."139 Pased in 1838 and still applicable today, the Act provides that all such lands, "which have remained ungranted, and which have been used as a common by the people of this state, shall continue as such common, shall remain ungranted,"

FARNHAM, THE LAW OF WATERS AND WATER RIGHTS §§ 36-36 (1904). As a practical matter, it would seem that a settler would not have wanted his grant to include the intertidal strip or marshland because these areas essentially were worthless for agrarian uses. 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 intertidal or marsh lands. See Act of May, 1770, ch. 19, § 10 HENNING’S STAT., supra note 3, at 50, 52. Thus, if *Liny* had general applicability, it increased the 1779 Acts’ infringement on public interests.


138. Cf. infra chapter 11 (discussing the impact of the 1819 Act); chapter 19 (discussing the relationship of the 1819 Act to the commons legislation). 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 type of communal interest. However, as each land became more populated, the concept lost its "communal" characteristics and acquired traits more similar to an easement. See generally supra §§ 6.1, 6.2. A. Through its adoption of the 1819 Act, the General Assembly appears to have completed the evolutionary process, suggesting that, at least with respect to tidal shores, common lands signify lands privately owned yet subject to certain public uses. For a more thorough discussion of the 1819 Act and its relationship to the 1780 Act, see infra chapters 11 & 19.


140. Id. (present version codified at Va. Code § 41.1-4 (1966)).


143. See generally infra chapter 9 & § 14.4.


§ 6.3. The Commons Concept and the Public Trust Doctrine: A Difference in Perspective

As sections 6.1 and 6.2 should demonstrate, the development of public rights theory in England and in Virginia has gone through similar stages. In both places the theory began with interests in agricultural lands. In feudal England common lands became a very important part of the agrarian economy, providing the peasantry with a way of life. In colonial Virginia lands set aside for common use and for other public purposes provided much-needed sustenance during the early years and helped the colonists to raise revenues and support government officials during later years. Eventually, though, as the need for collective efforts diminished, private rights in land became more desirable in England and in Virginia. Development companies, private individuals, and the nobility began appropriating a wide variety of lands, ranging from valuable agricultural lands to shoreline and submerged beds. Although the private appropriation process produced many benefits, especially to the economy of Virginia, it eventually posed enough of a threat to the survival of the general populace that the governments of both England and Virginia intervened.

In England legislative intervention resulted in the adoption of a series of commons acts designed to preserve the interests of the people in common lands in their surrounding area. Typically these common lands included woods, meadows, and fields used for pasture, for building homes, for providing a supply of fuel, and for other purposes related to life in an agricultural village. Perhaps more significantly, judicial intervention in England resulted in the development of a second theory for protecting public interests in natural resources. By the time Parliament was actively involved in regulating common lands in the mid-to late 1800's, that theory had become known as the prima facie theory in England and the public trust doctrine in America.

Legislative intervention also occurred in Virginia. But in contrast to Parliament's intervention, the efforts of the Virginia General Assembly focused on coastal resources. Under the first of a series of common acts, for example, the state legislature reserved ungranted lands on the sea shore, on the Bay, and on other tidal waters for the people's common use. Fishing, fowling, and hunting apparently were the primary activities protected by the legislation. The Virginia judiciary also provided protection for the public interest, primarily by interpreting the policy of the commons legislation broadly. Unlike its English counterpart, the Virginia judiciary generally did not endorse use of the prima facie theory as an independent basis for recognizing public interests in coastal resources.

Thus, by the late 1800's, one important difference existed between public rights in England and public interests in Virginia. In England the legal system generally used the commons concept to protect "public" interests in agricultural and related lands, while it depended on the prima facie theory to protect public interests in tidal resources. Whereas England's commons concept had become a highly structured part of its land system, regulated through numerous statutes, the prima facie theory provided a more flexible doctrine for protecting the public interest in tidal resources. But even under England's highly regulated commons concept, the interests of the public could change as the needs of public and private parties fluctuated. Common lands

147. Act of Apr. 1, 1873, ch. 333, § 1, 1872-1873 Va. Acts 310 (codified, with some modification, at Va. Code ch. 62, § 1 (1873)). A comparison of the 1873 and 1789 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 "seas shore" or the "shores of any river and creek"; (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, 96 S.E. 307, 311 (1919) (Simms, J., dissenting); French v. Bankhead, 52 Va. (11 Gratt.) 136, 152-53 (1854); (4) the addition of language identifying protected activities as "fishing and fowling, and ... taking and catching oystera and other shell fish"; and (5) the deletion of the language "which have been used as common." Compare Va. Code ch. 62, § 1 (1873) with Act of May, 1789, ch. 2, 10 HENING'S STAT., supra note 3, at 226. For further discussion of the 1873 Act, see infra § 14.1.B.


149. See supra note 142 and accompanying text. For further discussion of the "use as a common" clause, see infra §§ 9.2.C, 14.1.B.

150. See Garrison v. Hall, 75 Va. 150 (1883).


152. See generally supra § 6.1. As explained earlier, these interests were not "public" in the truest sense of the word. See supra note 13.
could be inclosed and common rights extinguished, or new commons could be created, depending on the circumstances.\(^{163}\)

In contrast, Virginia law only recognized one theory for protecting the public interest in natural resources — the commons concept — and that concept had developed into a fairly rigid public rights theory.\(^{164}\) As in England, Virginia's commons concept had become a matter of statutory law. But unlike the English version, Virginia's commons legislation dealt primarily with identified coastal lands and waters, protecting only water-related uses. This more limited scope could have significant implications for public rights in Virginia. Whether these implications are realized depends on the perspective taken in interpreting Virginia's commons concept.

A. The "Commons" Perspective.

That the Virginia version of commons now focuses on the public interest in tidal resources, much as the Roman's commons concept did, instead of on agricultural lands as in colonial days,\(^{165}\) suggests that Virginia might have undergone a change in perspective. As noted earlier, the Roman concept reflected a philosophical commitment to protecting the public interest in natural resources, more so than a property concept. But the judicial interpretations given the statutory concept by the Virginia courts, as well as their reliance on the historical development of the concept, suggest otherwise.\(^{166}\) Those interpretations indicate that the commons concept continues to serve traditional property functions under Virginia law. As under English law, the concept still defines public interests in affected lands through the property system, acting as a limitation on private ownership rights in affected lands.\(^{167}\)

But, despite the adherence to a traditional property perspective, Virginia's commons concept lacks the clear theoretical development that many property doctrines have. Perhaps this absence is due to the fact that the commons concept is part of a property system that heavily favors private rights. In our predominately private property system, the courts tend to construe narrowly interests that compete with private rights. Because of the strength of private interests, identification of lands subject to common rights can be difficult.\(^{168}\)

\(^{163}\) Such change is demonstrated by the variety of common rights that evolved as people's needs became more diversified and defined.

\(^{164}\) Though not nearly as regulated as the English commons concept, Virginia's version is nevertheless rigidly defined. Besides identifying a limited category of lands that could be protected as commons, Virginia's commons legislation also defines the public's common uses narrowly. For further discussion of the commons legislation, see infra Part IV.

\(^{165}\) Other states appear to have made a similar change in focus. See, e.g., S.C. Code Ann. § 49-1-10 (Law: 1957) (prohibiting use of streams as highways); id. § 50-17-40 (1977) (certain coastal waters and beds as common to all the people of the state).

\(^{166}\) See, e.g., Miller v. Commonwealth, 120 Va. 924, 160 S.E. 597 (1932). For discussion of Virginia decisions interpreting the commons legislation, see infra chapters 9 & 19.

\(^{167}\) See generally infra § 19.3 (discussing see judicial interpretations).

\(^{168}\) See generally infra §§ 19.5, 19.2.5 (discussing evidentiary matters involved in establishing common rights).

But a more likely explanation for the absence of a solid theoretical foundation concerns the manner in which the commons concept developed. Unlike many traditional property interests, common rights did not develop through the formal legal structure. Instead, the courts and the legislature did not become actively involved with the commons concept until after common rights had become an accepted part of the tenure system. Rather the concept developed informally over time, through long usage and acquiescence, until eventually the legal system decided to formally recognize the usages as property rights. In a sense, this recognition resulted in the protection of property rights based on customary uses. But because of the courts' reluctance to admit creation of property rights through the law of custom, courts often have relied on other doctrines to justify and explain the protection of common rights.\(^{169}\)

Although this practice may ease the conscience of those courts hesitant to recognize the creation of public rights through informal means, it can lead to artificial interpretations of the commons concept. The search for a formal theory, for example, can cause a court to ignore the flexible origins of the concept and to define common rights as fixed in time. Instead of changing according to the needs of the public today, common rights would exist only if recognized at some defined time in the past.\(^{170}\) If the commons concept is going to fulfill its key function, to provide for the public interest in valuable natural resources, then it must be interpreted with greater flexibility.

Interpreting the commons concept more liberally admittedly would result in problems for private landowners. An individual who improves his land

\(^{169}\) 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 promise of the doctrine of customary rights was that usages that had continued for a long period of time must have been conferred upon the people by a legal authority at one time and thus should be formally recognized. 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 §§ 30, 31, 25, 30-31 (1884); see also 1 W. Blackstone, Commentaries on the Laws of England 74-79 (Oxford 1765). Most courts in the United States have rejected the doctrine, reasoning that it was developed to protect the expectancy interests of those whose rights were created before the establishment of a recording system. Additionally, they have interpreted the requirement that the custom be immemorial as meaning that the custom must have begun with the reign of Richard I (1189). See Graham v. Walker, 78 Conn. 130, 61 A. 99 (1905); Department of Natural Resources v. Mayor & Council of Ocean City, 274 Md. 1, 352 A.2d 630 (1976); Ackerman v. Shelp, 8 N.Y.L.J. 125 (1826); Gillies v. Orlando Beach Club, 159 Misc. 675, 269 N.Y.S. 733 (Sup. Ct. 1935); Harris v. Carson, 34 Va. (7 Leigh) 632, 638 (1856). Recently, however, one court invoked the doctrine to uphold public use of shoreline areas. See Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969). See generally Niven, Beach Access: An Historical Overview, 2 N.Y. St. Grantz L. & Policy J. 161 (1978); Natt, Public Access to Beaches, 28 Stan. L. Rev. 564 (1976).

\(^{170}\) 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, upholding usages that were widely accepted in a particular community. But 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 right. For a discussion of the timing implications of Virginia's commons and boundary legislation, see infra § 19.2.8.
without notice of common rights has tremendous reliance interests at stake. Subjecting his proprietary interests to common or public interests discourages future development. But because the commons concept is part of the traditional property system, courts should be able to apply at least some property policies and principles to resolve conflicts between public and private parties. Notice, for example, could play a significant role in determining whether the public interest should prevail over private interests. If a private landowner had notice of the common rights, either through deeds and other recorded documents, through actual public use of the land, or through any other legally accepted method of putting a party on notice, then subjecting that proprietor to the public’s property rights does not seem unfair or unreasonable. By focusing on the status of the party who purchased the disputed land after the creation of the common rights, the legal system might be able to strike an equitable balance between the competing interests.  

B. The “Public Trust” Perspective.

If the Virginia courts interpret the state’s commons legislation more from the perspective of the Roman concept, or if they decide to adopt the public trust theory as well, then public rights in Virginia’s natural resources could broaden significantly. In contrast to the commons concept, the public trust doctrine evolved outside the property system. Instead of arising out of policies of property law, the trust doctrine developed from idealistic notions of sovereign responsibility. Primarily a product of the American judiciary, the public trust doctrine represents an attempt by the courts to hold the sovereign states accountable to their people for the management of their valuable natural resources.

At least initially, the trust doctrine appeared to be anything but a return to Roman idealism. Motivated by the Crown’s selfish desire to regain control over England’s shorelands, the public trust doctrine resulted from, in any, if any, benefit for the English populace. In an attempt to justify the Crown’s reassertion of control over shorelands, Diggles, Hale, and others borrowed from ancient Roman law concepts. Eventually, as the American courts became involved with the theory, the meaning of Roman law proved to be significant. Together with the gradual development of the Crown’s status as both a

161 Notice, for example, is important in determining whether a subsequent purchaser of real estate can prevail against a prior purchaser. See generally A AMERICAN LAW OF PROPERTY §§ 17.4-36 (A. Casner ed. 1928). Similarly, it is important in determining whether a remote purchaser of a lot in a planned subdivision is subject to the various use restrictions on his land, known in equity as equitable servitudes. See Springer v. Gaddy, 172 Va. 533, 540, 2 S.E.2d 305, 308 (1939); Tulk v. Mozley, 41 Eng. Rep. 1143 (1848). See generally 2 AMERICAN LAW OF PROPERTY §§ 9.24-40 (A. Casner ed. 1962). Whether the parties’ interest for value also may be an important consideration. See Estabrook v. Property § 639 comment 1 (1944). For further discussion of the role of notice in resolving disputes involving commons, see infra chapter 19, notes 73-78 and accompanying text.  

162 As mentioned earlier, the theory that developed in the 1600’s in England actually was known as the prima facie theory and did not involve the concept of a trust relationship. See generally supra § 5.1.D.  


164 See id. The New Jersey approach to the public trust doctrine supports this conclusion. See generally supra § 5.2.C.  

165 Government involvement has been much greater in England than in Virginia. See supra notes 45-47 and accompanying text.  

166 For a discussion of this and the alternative interpretation, see supra § 19.1.B.2.  

167 Accord Royal Surrey, supra note 2, at 104-09 (recommending that parties having private proprietary interests in lands subject to common rights be given the power to manage the common lands).
would be more effective in providing for the needs of future generations. Further, it inherently imposes management responsibilities on the state and, because the trust doctrine arose outside traditional property law, the doctrine recognizes public rights even though competing private rights also may exist or be asserted. Although it is not clear to what extent the public can exercise trust uses without having to compensate affected landowners, trust rights are not easily obscured or destroyed by private concerns.

Regardless of which approach is taken, some legal theory should provide for the public interest in natural resources. Whether that theory is expressed in a judicial doctrine or a legislative enactment, it is probably more important than ever that the law continue to recognize and regulate the public interest in coastal resources. As natural resources in coastal areas dwindle in response to a rising population and increased demand, the legal structure must provide a means for safeguarding the public interest.

168. For a discussion of this issue, see infra § 20.2.A.

APPENDIX TO CHAPTER 6

LEGISLATIVE MATERIALS AFFECTING COMMON OR PUBLIC LANDS DURING THE COLONIAL AND EARLY STATEHOOD ERAS

Act of Sept., 1632, act 49, 1 W. Hening, The Statutes at Large 199 (1823) [hereinafter cited as Hening’s Stat.1].

   "The Declaration against the Company to be entered as the twenty first act."

   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.

   Declaration, 1642, 1 Hening’s Stat., supra, at 230.

   "An Act to empower the Secretary of this colony, to sell certain lands therein mentioned."

   This Act authorizes the Secretary of the colony to sell certain public lands set aside for the benefit of the Secretary. One tract located in the county of Northampton had been designated as Secretary’s lands in 1621. A second tract located in the county of James City had been set aside in 1637.

   Cary v. Brewer, 1659-1660, 1 Hening’s Stat., supra, at 548.

   This order declares that the inhabitants of Stanley Hundred have a right of common to 50 acres on the plantation.

   Case of Robert Liny, 1679, 2 Hening’s Stat., supra, at 456.

   The Grand Assembly ordered and declared that "every mans right by vertue of his patente extends into the rivers or creekes so farre as low water marke ...."

   Act of Apr., 1692, act 2, 3 Hening’s Stat., supra, at 101.

   "An act for Confirmation of Lards."

   This Act exempts uninhabitable marshes and sunken grounds from a "seating" or settlement requirement applicable to lands acquired in a patent.

"An Act concerning the Granting, Seating, and Planting, and for Settling the Titles and bounds of Lands ...."

This Act gives the owners of land lying adjacent to "swamps, marshes or low grounds" the right to acquire the swamps, marshes, or low grounds before anyone else.


"An Act Continuing the Act directing the building the Capitol and the city of Williamsburg; with additions."

This act directs that a "sufficient quantity of land at each port or landing place shall be left in common."

Act of Nov., 1738, ch. 18, 5 Hening's Stat., supra, at 68 (1819).

"An Act, for better securing the title of certain Lands to the Feoees 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 formally recognizes the common rights existing in the Yorktown waterfront. It notes the original survey of Yorktown designating several uninhabitable waterfront parcels as parcels "to be laid off for a common shore." Id. at 69. 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 or points of land ... as and for a common." Id. at 70. Finally, the Act declares that those particular waterfront parcels "shall be ... and remain, as and for a common, for the use of the inhabitants of the said town ... 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).

Act of May, 1742, ch. 20, 5 Hening's Stat., supra, at 191, 192 (1819).

"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.

Act of May, 1755, ch. 21, 6 Hening's Stat., supra, at 510 (1819).

"An Act to impower the Secretary of this colony, to sell certain lands therein mentioned."

This Act authorizes the Secretary of the colony to sell certain public lands set aside for the benefit of the Secretary. One tract in the county of Northampton had been designated as Secretary's lands in 1621. A second tract located in the county of James City had been set aside in 1637.
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 and for the common use
and benefit of the inhabitants."

Act of May, 1782, ch. 31, 11 Hening's Stat., supra, at 58.

"An act to amend the act for erecting a Light House on Cape Henry."
This Act provides new instructions on the construction of a lighthouse
at Cape Henry, appointing several parties to be trustees of land at Cape
Henry to be "held as common."


"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.


"An act for the sale of certain public lands."
In this Act certain public lands in York and Elizabeth City Counties
are directed to be sold.


"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 vested in the legal representatives of the person originally granting the
land to the town.


"An act for establishing the town of Clarksburg in the county of
Harrison."
One-half an acre is directed to be appropriated by the trustees for the
establishment of a courthouse and other public buildings.


"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."


"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."
This Act authorizes construction on and the conveyancing of common
lands.

DEVELOPMENT OF COMMONS CONCEPT


"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.

Act of Dec. 29, 1787, ch. 64, 12 Hening's Stat., supra, at 603.

"An act to explain and amend the act for establishing the town of Boone's
Borough in the county of Kentucky."
This Act explains that seventy 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.


"An act authorizing several lotteries, and the sale of certain lots in the
town of Portsmouth."
The Act permits certain lands held by the trustees of various localities
to be sold by lottery, the proceeds to be used to build schools, churches,
and roads.

Act of Nov. 24, 1792, ch. 20, 13 Hening's Stat., supra, at 524.

"An act to amend an act intituled, 'An act authorising the executive to
direct the sheriffs to sell certain lands the property of this Common-
wealth.'"
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.

Act, circa 1748-1749, The Laws of Virginia: Supplement to Hening's Statutes
at Large 443, 444 (1771) [hereinafter cited as Hening's Supp.].

"An act for erecting a Town at Hunting Creek Warehouse in the County
of Fairfax."
This Act establishes Alexandria and directs the trustees to set apart
portions of land for a market place and a public landing.


"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 thereof."
This Act authorizes the sale and purchase of glebe lands.