

VIRGINIA
TIDAL AND COASTAL LAW

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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 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.

§ 5.1. Defining the Scope of the Public Trust Doctrine: Some Theoretical Bases for Recognizing Public Rights.

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.

2. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970) [hereinafter cited as Sax, *Public Trust*].

3. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

4. See *National Audubon Soc'y v. Superior Court of Alpine County*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (recognizing ecological and scenic values as part of the public's trust rights); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (recognizing public uses as changing with public needs).

5. But cf. Sax, *Liberating the Public Trust from its Historical Shackles*, 14 U.C.D. L. REV. 185 (1980) (where the author criticizes such searches).

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 public rights played a significant role in the Roman and English legal systems, others suggest that the public's interests were very limited under those systems.⁶ 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 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.⁷ 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.⁸ 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 approach 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 incorporales*). R. SOHM, *THE INSTITUTES* § 58 (J. Ledlie trans. 3d ed. 1907). Under Roman law certain things could not become "objects of private rights." *Id.* § 59, 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 302, 304; see also P. VAN WARMELO, *AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW* 63-68 (1976).

tion,⁹ the Roman legal principles recognizing public rights focus primarily on the sea and the seashore.¹⁰ The principal source defining public rights under

Three classes of *res extra commercium* existed. They included: (1) *res divini*, or things dedicated to and vested in the control of the gods; (2) *res publicae*, or things devoted to common use, but incapable of exclusive individual ownership; and (3) *res omnium communes*, or resources, like the air, that technically were not viewed as things because they were not susceptible to dominion and control. R. SOHM, *supra*, § 59, at 302-03. Coastal resources tended to fall in the second or third classes or in a fourth class known as *res nullius*. Technically considered to be *res in commercio*, property in the class *res nullius* included things not possessed by an individual but capable of possession. *Id.* at 303-04. Specific examples of the different types of property include temples and altars (*res divini*), public roads and places (*res publicae*), air and flowing water (*res communes*), and wild animals (*res nullius*). *Id.* at 302-04.

It is unclear whether Roman law classified the sea and seashore as *res publicae*, *res omnium communes*, or *res nullius*. To the extent that the shore and seas were open to public use, the category *res publicae* seemed to be appropriate. Initially the phrase *res publicae* denoted everything that belonged to the Roman people and therefore the Roman state. *Id.* at 303. But once the concept of a corporate or community individual evolved, things originally classified as *res publicae* could be treated as *res in commercio* and thus as "objects of private ownership." The other two options, however, seemed appropriate classifications as well. The *res omnium communes*, for instance, fit the unrestrainable and intangible nature of flowing water. *Id.* at 303. But then, to the extent that a private party exercised dominion and control over the seashore or over coastal waters, those resources resembled *res nullius*. Thus, because of the multi-varied nature of coastal resources, placing those resources in any one category was a difficult task. See generally W. HUNTER, *A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW* 309-14 (4th ed. 1903) (discussing the various categories).

9. See H. JOLOWICZ & B. NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 75-78 (3d ed. 1972); Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 21 (1976); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

Roman law defined the seashore as including "[a]ll that tract of land, over which the greatest winter flood extends itself." *THE INSTITUTES OF JUSTINIAN* 2.1.3 (T. Cooper trans. 1812). This definition was broader than the common law definition and therefore subjected a greater area of land to public use. Lord Hale affected the common law's approach for many years. He defined the shore as the land between the ordinary high and low water marks. M. Hale, *A Treatise De Jure Maris et Brachiorum Ejusdem*, reprinted in S. MOORE, *A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO* 370, 378 (3d ed. 1888) [hereinafter paginated to S. MOORE]. Until the 1900's, many state and federal courts followed Hale's approach. Today, however, the courts and legislatures tend to define the shore as the land between the mean high and low water marks. For a discussion of the common law's approach to defining the shore, see *supra* § 1.2.

10. These principles had evolved slowly over time. Early Roman civilization and law were organized around tribal units. When one tribe conquered another, lands taken by conquest were for the tribe's benefit. Although one person might be allowed to take the land's natural products, no tribe member could exclusively control the land. Similarly, other spoils of war belonged to the entire tribe and either were divided among the tribe's members or were sold, with the proceeds paid into the public chest. H. JOLOWICZ & B. NICHOLAS, *supra* note 9, at 10, 138-39, 267. Other than these general principles, early Roman law was unstructured.

As Roman civilization became more sophisticated, an organized legal system began to develop. This system was derived from three important sources: natural law, universal law or the law of nations, and civil law. F. WALTON, *HISTORICAL INTRODUCTION TO THE ROMAN LAW* 355 (2d ed. 1912). Natural law, or *jus naturale* was defined as "that which all animals have been taught by nature; this law is not peculiar to the human species, it is common to all animals which are produced on land or sea, and to fowls of the air as well." 1 *THE DIGESTS OF JUSTINIAN* 1.1.1.3 (C. Monro trans. 1904). Unlike natural law, the law of nations, or *jus gentium*, applied only to humans. *Id.* 1.1.1.4. It had developed in response to Rome's increased commerce and the need for laws recognizing the rights of foreigners. H. JOLOWICZ & B. NICHOLAS, *supra* note 9, at 102-07.

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.¹¹

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 law¹² as the sea itself, with the soil or sand which lies beneath it."¹³ 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.¹⁴ 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, exacting recognition by virtue of its inherent reasonableness." R. SOHM, *supra* note 8, § 14, at 70. Finally, civil law, or the *jus civile*, encompassed all the laws that applied only to Roman citizens. *Id.* See generally *id.* §§ 10-14 (discussing the *jus civile* and the *jus gentium*).

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. Cooper trans. 1812); W. MOREY, OUTLINES OF ROMAN LAW 223-24 (2d ed. 1884). The last 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. SOHM, *supra* note 8, § 7, at 26; P. VAN WARMELO, *supra* note 8, at 33. Most of the *Institutes* focus on private law and deal with public law only "incidentally." F. WALTON, *supra*, at 354.

11. THE INSTITUTES OF JUSTINIAN 2.1.1 (T. Cooper trans. 1812). Neither the *Institutes* nor the *Digest*, discussed *infra* at notes 27-34 and accompanying text, were legally binding. They merely represented the works of various scholars interpreting Roman law.

12. The law referred to is the *jus gentium*, or the "law of nations." See *supra* note 10.

13. THE INSTITUTES OF JUSTINIAN 2.1.5 (J. Moyle trans. 5th ed. 1913).

14. See, e.g., *Blundell v. Caterall*, 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 communes*, 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 patrimonium*, *res communes* 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.

attempted to take full economic advantage of its coastal resources.¹⁵ Individuals frequently acquired grants of exclusive interests in coastal resources. Although these grants typically involved the transfer of interests in perpetual leases,¹⁶ the lessee enjoyed most of the rights of the "legal owner."¹⁷ Apparently the government dispossessed the lessee only rarely for nonpayment of rent, choosing instead to sue for the amount due. Further, leasehold interests generally were inheritable upon the death of the lessee.¹⁸

The importance of coastal resources to the Roman Empire explains why the Empire encouraged economic development of those resources. The Roman law governing rights in the sea, the seashore, and coastal waters developed in a society virtually dependent on navigation and trade for its survival. The Roman populace lived on agricultural products from the Mediterranean and Atlantic coasts and on the catches of fishermen. Additionally, communication among the various provinces of the Roman Empire depended in large part on travel by water rather than by land.¹⁹ Given the importance of the seashore and other coastal resources to the Roman economy, it is not surprising that

15. See H. JOLOWICZ & 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 31-33. 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 fishermen, and a similar tablet from Frisia shows that the practice was widespread. See *id.* at 33; see also Sax, *supra* note 5, at 186 n.6.

17. See generally W. HUNTER, *supra* note 8, at 426-30 (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 defining 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 to the law." THE INSTITUTES OF JUSTINIAN 76 (J. Thomas trans. 1975). Because of the different approaches, attempts to classify coastal resources can 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 shores of the sea were not considered subject to the ownership of the State . . . but simply as under its supervision or jurisdiction." W. HUNTER, *supra* note 8, at 310-11. Such readings have inspired the conclusion that 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.²⁰

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 instance, 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.²¹ 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.²² Because the interference with public rights was only indirect, a trespass action could not be brought.

Some remedial measures admittedly 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.²³ Sometimes these injunctions were available regardless of whether actual damages were claimed.²⁴ But often, unless the aggrieved party could establish injury, the remedy was meaningless.²⁵ Even where injunctions were granted, no penalty apparently existed if the guilty party continued to commit the wrong.²⁶ Thus, even if Justinian'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 Justinian'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

20. A study of Justinian's sources makes this emphasis on navigation and fishing more apparent. For example, one passage in *The Digest of Justinian* defines the public's right of access to the seashore by stating: "Accordingly no one is debarred from entering on the seashore for the purpose of fishing . . ." 1 THE DIGEST OF JUSTINIAN 1.8.4 (C. Monro trans. 1904). Similarly, one passage defining the liberty to build huts on the shore accords that right specifically to "[p]ersons who fish in the sea." *Id.* 1.8.5.1.

21. W. BUCKLAND & A. McNAIR, ROMAN LAW AND COMMON LAW 102-03 (2d ed. 1965).

22. See Deveney, *supra* note 9, at 25.

23. See THE INSTITUTES OF JUSTINIAN 4.15.1 to 4.15.7 (T. Cooper trans. 1812).

24. See W. BUCKLAND & A. McNAIR, *supra* note 21, at 420-23. For example, injunctions, or *interdicta*, were granted to prohibit a person from obstructing a public footpath along the bank of a public waterway, building structures on the shore or in the sea that interfered with navigation or docking, and diverting the waters of a public river. See *id.*; see also W. HUNTER, *supra* note 8, at 310-14; Deveney, *supra* note 9, at 24 & nn.56-69.

25. See Deveney, *supra* note 9, at 24; see also W. BUCKLAND & A. McNAIR, *supra* note 21, at 392-95, 420-23.

26. See W. BUCKLAND & A. McNAIR, *supra* note 21, at 420-23; Deveney, *supra* note 9, at 24-25.

the state are public."²⁷ Analogizing to "fishes and wild beasts," which "on capture become beyond doubt 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."²⁸ If, however, the structure later was "rased," then the seashore "revert[ed] to its original condition and [w]as as public as though there had never been a building on it."²⁹ 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 dominion and control. Those who built structures on the shore became the owners of the soil so long as the structure remained.³⁰

But, for all the evidence demonstrating the fallacies of interpreting Justinian's passage broadly, there also is evidence establishing that the public had some rights in coastal resources. For instance, in addition to having passages that define 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.³¹ Consistent with this view, one author declared that anything found on the shore became the property of the finder³² and that no one was prohibited from entering on the shore to fish, provided he did not interfere with existing buildings.³³ 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,

27. DIGEST 41.1.14 (F. de Zulueta trans. 1922).

28. *Id.*

29. *Id.*

30. At least one writer, however, expressed concern that private appropriation should not be to the public detriment. See *id.* 41.1.50. If the seashore were classified as *res publicae* instead of *res nullius*, then this 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.

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 dominion 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 a 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 JUSTINIAN 185 (3d ed. 1963, repr. with corrections 1975). Similarly, although ownership of the soil under harbors inhered in the state, under Roman law use of the harbor was public. See W. HUNTER, *supra* note 8, at 311.

31. 1 THE DIGEST OF JUSTINIAN 1.8.2 (C. Monro trans. 1904).

32. *Id.* 1.8.3.

33. *Id.* 1.8.4.

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

34. *Id.* 1.8.5. 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, as 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 2.1.4 (T. Cooper trans. 1812).

35. See Deveney, *supra* note 9, at 26 & nn.74-76.

36. See 1 THE DIGEST OF JUSTINIAN 1.8.2 (C. Monro trans. 1904); see also Deveney, *supra* note 9, at 26-27.

37. See Deveney, *supra* note 9, at 26-27. The ideal of communality 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 27.

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 generally S. MOORE, A HISTORY OF THE FORESHORE AND LAW RELATING THERETO 1-29 (3d ed. 1888). 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 Deveney, *supra* note 9, at 27.

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 realization 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 those 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 Romans' 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

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" Deveney, *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 Deveney, *supra* note 9, at 17; Wiel, *Origin and Comparative Development of the Law of Watercourses in the Common Law and the Civil Law*, 6 CALIF. L. REV. 245, 247-53 (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 mediately 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 shores 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

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 transplanted 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 582-99.

44. See 1 *WATERS AND WATER RIGHTS* § 36.1 (R. Clark ed. 1967) [hereinafter cited as R. CLARK]; Note, *supra* note 14, at 581-82.

45. See 1 R. MINOR, *THE LAW OF REAL PROPERTY* § 3, at 5 (2d ed. 1963); Deveney, *supra* note 9, at 39.

46. See 1 H. FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 37, at 175-76 (1904).

47. See *id.* § 39, at 180-81; Deveney, *supra* note 9, at 41-42; Fraser, *Title to Soil Under Public Waters — A Question of Fact*, 2 MINN. L. REV. 313, 316 (1918).

48. See R. CLARK, *supra* note 44, § 36.3(A), at 190.

in most grants failed to identify a seaward boundary.⁴⁹ In those situations where a boundary on the shore was not provided, early English law presumed that the private party owned to the low water mark.⁵⁰ By 1216, then, the Crown had granted most of England's shoreland to private parties, either expressly or through this presumption.⁵¹

In addition to shorelands, the Crown also freely granted exclusive fisheries to private parties. Apparently the Norman kings viewed fisheries in England's waters as part of the "lesser regalia" belonging to the Crown.⁵² Even before the Norman conquest, Saxon kings and earls had asserted several fishery rights in both the tidal and nontidal waters of their estates.⁵³ Recordings in the Domesday Book reveal grants of fisheries in most of the nontidal waters covered by that survey and in many tidal waters as well.⁵⁴ After the survey the Normans continued to grant exclusive fisheries in most of England's seas and tidal waters.⁵⁵

By the early 1200's, conflicts began to develop over control and use of tidal resources, especially tidal waters and their fisheries. Although England still was essentially a feudal and agrarian state, the commercial and strategic value of tidal resources finally was being appreciated. Perhaps the best evidence of this appreciation occurred in 1215 when the original version of the Magna Carta was signed.⁵⁶ Although the Magna Carta did not expressly recognize public rights in coastal resources, it did curb the Crown's infringement of private property rights by establishing the principle that the Crown did not have unlimited powers but rather was subject to the people. Furthermore, the document contained provisions that the common law subsequently interpreted as protecting specific public interests in water-courses.⁵⁷

One of those provisions appeared in chapter 33 of the original Magna Carta, signed in 1215, and in chapter 23 of the revised Magna Carta of 1225. It stated

49. See S. MOORE, *supra* note 39, at 1-2, 16; see also R. CLARK, *supra* note 44, § 36.3(A), at 190. Where estates were bounded by tidal or nontidal rivers, grants sometimes described the boundary as mid-stream. See S. MOORE, *supra* note 39, at 1.

50. See Deveney, *supra* note 9, at 41 n.183. Early Saxon and Norman charters appeared to make this presumption, for they "granted lands, together with the foreshore as parcel thereof, without actually specifying it in the charter, and also granted lands with the foreshore, describing it in terms in the grant." S. MOORE, *supra* note 39, at 16. Further, the grants often confirmed the grantees' liberties "on stronde and on streame, on land and on sea." *Id.* For a detailed sampling of Saxon and Norman grants of coastal lands, see *id.* at 1-20.

51. See S. MOORE, *supra* note 39, at 28.

52. See Deveney, *supra* note 9, at 39; Note, *supra* note 9, at 764 & n.12.

53. See Note, *supra* note 14, at 580. A several fishery, also known as a free fishery, is an exclusive private right to fish. Because of its exclusivity, it should be distinguished from a common fishery (the right of the public to fish in tidal waters) and a common of fishery (the right of a designated number of persons, or "commoners," to fish in common with the owner of the soil). A. WISDOM, *THE LAW OF RIVERS AND WATERCOURSES* 254 (4th ed. 1979). For a discussion of common rights, see *infra* chapter 6.

54. See S. MOORE & H. MOORE, *THE HISTORY AND LAW OF FISHERIES* 1-5 (1903).

55. See Deveney, *supra* note 9, at 39.

56. See generally W. McKECHNIE, *MAGNA CARTA* (2d ed. 1914).

57. See A. HOWARD, *supra* note 43, at 18-19; Deveney, *supra* note 9, at 39-41.

that "[a]ll kydealls⁵⁸ for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore."⁵⁹ Apparently the provision was adopted to prevent the Crown from interfering with navigation by placing kydealls, or fishing structures, in England's waterways.⁶⁰ 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 "kydealls" 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 kydealls.⁶¹

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 [b]lanks 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."⁶² According to Lord Hale, this provision referred to the King's practice of putting salt and fresh rivers "in defenso for his recreation; that is, to bar fishing or fowling in a river till the king had taken his pleasure or advantage of the writ or precept *de defensione ripariae*."⁶³ The writ enabled the King to force riparian owners to bear the costs of repairing roads and bridges so that the King could effectively

58. The drafters of the Magna Carta apparently used the term "kydealls" broadly to refer to "all fixed contrivances ... intended to catch fish, and likely by their bulk to interfere with the free passage of boats." W. McKECHNIE, *supra* note 56, at 343 (footnote omitted).

59. *Id.* The Articles of the Barons, the schedule of demands that was presented to King John and that formed the basis of the Magna Carta, did not include the clause "except upon the sea shore" ("nisi per costeram maris") in the provision for the removal of kydealls from rivers. The clause does appear in chapter 33 of the original Magna Carta, signed in 1215, and in chapter 23 of the revised Magna Carta of 1225. Compare *id.* at 343 (1215 version of ch. 33) and *id.* at 503 (1225 version of ch. 23) with *id.* at 489 (the Articles of the Barons version of ch. 23). See generally *id.* at 3-47 (discussing the events leading to the Magna Carta); *id.* at 139-59 (discussing the subsequent versions of the Magna Carta).

60. *Id.* at 343. Cf. *supra* note 58 (discussing the meaning of the term "kydealls").

61. See W. McKECHNIE, *supra* note 56, at 343-45; Note, *supra* note 9, at 766-77; see also Lord Fitzhardinge v. Purcell, [1908] 2 Ch. 139, 167; Attorney Gen. v. Emerson, [1891] App. Cas. 649, 654 (H.L.). Commentators have disagreed about the impact of the chapter. See W. McKECHNIE, *supra* note 56, at 343-45; Deveney, *supra* note 9, at 39. Lord Hale appears to have interpreted the provision as imposing a limitation on public rights in the shore, noting that the provision did not "disaffirm the propriety" and suggesting that the exception for "weares upon the sea-coasts" recognized, at least implicitly, the alienability of land between the high and low water mark. See M. Hale, *supra* note 9, at 389; see also *id.* at 388-90.

62. Magna Carta of 1225, 1 D. PICKERING, THE STATUTES AT LARGE 7 ch. 16 (Cambridge 1762); see also W. McKECHNIE, *supra* note 56, at 502 (1225 version of ch. 16). Chapter 16 was adopted from chapter 47 of the original Magna Carta, which provided: "All forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river-banks that have been placed 'in defence' by us in our time." *Id.* at 435; see also *id.* at 502.

63. M. Hale, *supra* note 9, at 373.

use the waters when he visited.⁶⁴ 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.⁶⁵

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*,⁶⁶ Bracton relied on Justinian's *Institutes* to declare the sea and seashore to be common to all. But in restating Justinian's famous principle, Bracton omitted the statement appearing later in Justinian's work that no one owned the property of the sea.⁶⁷ 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.⁶⁸ Besides borrowing the Roman's communal property concept,

64. S. MOORE & H. MOORE, *supra* note 54, at 6-18.

65. See 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 39-40 (Oxford 1766). Once again, Lord Hale disagreed with the broad interpretation. Under his construction the chapter placed the right of fishery *prima facie* in the public. The Crown, however, could defeat this presumptive right by granting exclusive fisheries. M. Hale, *supra* note 9, at 386. As late as 1768 English courts appeared to agree with his approach. See Carter v. Murcot, 4 Burr. 2162, 98 Eng. Rep. 127 (1768); see also Lord Fitzwalter's Case, 86 Eng. Rep. 766 (K.B. 1674). But once Blackstone interpreted the chapter as prohibiting the Crown from granting exclusive fisheries, see 2 W. BLACKSTONE, *supra*, at 39-40, the courts changed their position. Since Blackstone's time, the courts in both England and America have interpreted the Magna Carta as taking away the Crown's right to grant exclusive fisheries in tidal waters. See A. WISDOM, *supra* note 53, at 258-59 (citing Malcolmson v. O'Dea, 10 H.L.C. 593, 11 Eng. Rep. 1155 (1863)); Note, *supra* note 9, at 768 & n.27 (citing Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)); see also 2 H. FARNHAM, *supra* note 46, at 1369-72.

66. H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND (S. Thorne trans. 1968).

67. Compare 2 *id.* at 39-40 with THE INSTITUTES OF JUSTINIAN 2.1.5 (J. Moyle trans. 5th ed. 1913).

68. See S. MOORE, *supra* note 39, at 31-36; Deveney, *supra* note 9, at 36-38. In discussing Bracton's work, one commentator observes that "when dealing with high generalities he [Bracton] copies from the Roman law, but when dealing with concrete matters he draws his authorities from the records of the English courts." S. MOORE, *supra* note 39, at 31 (describing, with approval, Maitland's introductory remarks on Bracton). Another commentator, writing during the reign of Edward I, criticizes Bracton repeatedly for misunderstanding Roman law and describing it inaccurately. Although recognizing that Bracton had "a perfect right to omit whatever seems to him unsuited to England," the commentator concludes that Bracton was a "poor, an uninstructed Romanist." F. MAITLAND (ED.), SELECTED PASSAGES FROM THE WORKS OF BRACTON AND AZO, at xviii-xix (Selden Society, 1895); see also *id.* at 91-97 (where Maitland discusses a few of Bracton's mistakes).

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.⁶⁹ According to Bracton, these rights even could be protected by various legal remedies.⁷⁰ The courts, for example, could enjoin interference with public use of waterways for navigation.⁷¹

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.⁷² With only a nominal population left after the plague struck, the Crown began to assert greater control over those waterways. The Crown's regulatory efforts included numerous prosecutions for interference with the navigability and the natural flow of waterways.⁷³

By the 1500's England's shoreland 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 shoreland, most of which still appeared to be privately owned.⁷⁴ 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.⁷⁵ After

69. See 2 H. BRACTON, *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. BRACTON, *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. MAITLAND, *supra* note 68, at 95. See generally 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 138-40 (1895) (discussing Bracton's approach to rights of common).

70. See 3 H. BRACTON, *supra* note 66, at 188-93; see also Murphy, *English Water Law Doctrines Before 1400*, 1 AM. J. LEGAL HIST. 103, 106-07 (1957).

71. See 3 H. BRACTON, *supra* note 66, at 190-93; 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.

75. 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 conceal their titles for protection. See S. MOORE, *supra* note 39, at 169-70. Thus, a suspicion arose, which continued unabated through the reign of Elizabeth, that "usurpations 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.⁷⁶ In response, Digges authored a pamphlet attempting to prove the Queen's "propertye in the Sea Landes, and salt shores thereof."⁷⁷ In that pamphlet Digges advanced, for the first time in English history, the theory that title to the "sea lande" and the "salt shore" was *prima facie* in the Crown.⁷⁸

Relying on Roman law and on the scholarly writings of Bracton,⁷⁹ Digges reasoned that those things which by natural law were common to all were now, by the common law of England, the property of the Crown.⁸⁰ For "yt is a sure Maxime in the Common Lawe that whatsoever lande there is [within] the kinges dominion whereunto no man cann justly make propertye yt is the kinges by his prerogative."⁸¹ 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 *occupanti*, 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.

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

77. T. Digges, Arguments proving the Queenes Majesties propertye in the Sea Landes, and salt shores thereof, and that no subject cann lawfully hould eny parte thereof hut by the Kinges especiall graunte, reprinted in S. MOORE, *supra* note 39, at 185 [hereinafter paginated to S. MOORE].

78. T. Digges, *supra* note 77, at 187, 199-200; see also S. MOORE, *supra* note 39, at 180-84 (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 titlehunting practices begun by Henry VIII. Fraser, *supra* note 47, at 317; 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 titlehunting. 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 titlehunters into repurchasing their lands from the Crown under threat of eviction. Thus, there appears to be little support for attributing a noble motive to the Crown's interest in the shore. See *id.* at 170-79; Deveney, *supra* note 9, at 43 n.195. 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 was 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.*

79. See S. MOORE, *supra* note 39, at 172.

80. T. Digges, *supra* note 77, at 185. Digges based this principle on Bracton's statement that "things common to all" under Roman law were, at 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 bee inferred that the Prince only hath proprietie in them." T. Digges, *supra* note 77, at 187; see also *supra* notes 67-68 and accompanying text.

81. T. Digges, *supra* note 77, at 187.

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 graunte."⁸⁴ Since few grants specifically mentioned the foreshore, title to most shoreland would, under Digges' reasoning, remain *prima facie* in the Crown.⁸⁵

After establishing the power of the Crown to reclaim shorelands where no "especiall graunte" 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

82. More specifically, Digges recalls that at Roman law ownership of islands in the sea and wrecks upon the shore could be acquired by *occupanti*. See *id.* at 186-93. He, however, adds that at common law these properties belong to the King because the King is "sayd to bee the firste seasour and possessor." *Id.* at 193.

83. See *id.* at 202-04.

84. See *id.* at 185-91.

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 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 216 (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. Philpott*, at great length and reproduces documents from the case. See S. MOORE, *supra* note 39, at 261-81, app. 1 at 895.

89. S. MOORE, *supra* note 39, at 310 (quoting from the document presented against Charles I).

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 is his appearance as counsel for the defendants in *Johnson v. Barret*, 10 Aleyn, 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.

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 wast"; 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

The manuscript of *De Jure Maris*, *supra* note 9, 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 318.

92. M. Hale, *supra* note 9, 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 reflows." *Id.*

93. *Id.* at 384-406. For example, Hale stated that while there was no common right to moor ships on adjacent shores such a right could be acquired for towing by custom or usage. Hale 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 Historicall Touchinge the Customes*, reprinted in S. MOORE, *supra* note 39, at 319, 344 [hereinafter cited as M. Hale, *A Narrative* and paginated to S. MOORE].

94. M. Hale, *supra* note 9, at 388-89.

95. *Id.* at 379.

96. *Id.* at 394.

97. Cf. 1 H. FARNHAM, *supra* note 46, at 186 (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 England's colonization of the eastern coastline 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 377.

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

99. *Id.* at 389-90.

100. See M. Hale, A Narrative, *supra* note 93.

101. *Id.* at 327-47.

102. See *id.* at 336, 355.

103. See generally *id.* at 327-47 (discussing the *jus regium*, the *jus publicum*, and the *jus privatum*); M. Hale, *supra* note 9, at 376-83 (discussing the King's interest in the sea, its arms, and the shore and the right of fishing). One commentator has interpreted Hale as limiting the *jus publicum* to the right of navigation. Consistent with this narrow interpretation, the same commentator has argued that under Hale's approach no public right of fishing existed. At best the public had a liberty "revocable" by the King. As support for this interpretation, the commentator notes that Hale spoke of the King as having a "primary right of fishing," yet described the common people as having merely a "liberty of fishing." Deveney, *supra* note 9, at 46-47.

The relevant passage in Hale's work provided:

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

M. Hale, *supra* note 9, at 377. In the quoted passage, Hale referred to the liberty of fishing as a "publick common of piscary." His reference could only be to the common right of piscary, 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 "revocable" 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

right to navigate the rivers and ports free of any nuisances because "[t]he ports of the kingdome are like the comon roades or highwayes of the kingdome, wherin every man hath an interest for his use and convenience"¹⁰⁴ Further, the King, as defender of public rights under the *jus regium*, had the duty to keep waterways and ports free from nuisances.¹⁰⁵ The public's interest in fishing was more limited 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,¹⁰⁶ the concept at least meant that the public had certain rights and interests in England's tidal resources.¹⁰⁷ 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, though, 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*.¹⁰⁸

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.¹⁰⁹

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 93, at 327-47 (discussing the several interests in the ports of the kingdom).

104. M. Hale, *supra* note 9, at 336. 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 93, at 327-29, 336, 355; see also Deveney, *supra* note 9, at 46.

106. See *supra* note 103.

107. See *supra* notes 103-05 and accompanying text.

108. See M. Hale, A Narrative, *supra* note 93, at 327-29, 336; see also Deveney, *supra* note 9, at 48-50.

109. M. Hale, A Narrative, *supra* note 93, at 338-40.

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 benefitted 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 exclusive 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

117. *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47, 52 (1972).

118. 41 U.S. at 407-08.

119. *Id.* at 407-08.

120. *Id.* at 408.

121. *Id.* at 409.

122. *Id.* at 410-11.

123. *Id.* at 409.

124. *Id.* at 411; see also *id.* at 412-13.

110. M. Hale, *supra* note 9, at 389-90.

111. See generally *infra* § 6.2.A (discussing common rights and uses in colonial Virginia).

112. See *infra* chapter 6, notes 130-35 and accompanying text.

113. See generally *infra* § 6.2.B (providing an introduction to the commons legislation).

114. 41 U.S. (16 Pet.) 367 (1842).

115. *Id.* at 409-16.

116. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892); *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47, 52 (1972).

emigrate to America only to find that all of the valuable water resources had been privately appropriated.¹²⁵

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.¹²⁶ 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.¹²⁷

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.¹²⁸

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."¹²⁹ 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*¹³⁰ 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.¹³¹ In exchange for the interests conveyed under the statute, the railroad agreed to pay rent and to avoid creating navigational obstructions.¹³² A map depicting part of the conveyed land characterized some of it as "public ground for ever to remain vacant of buildings."¹³³ In 1873 the state legislature repealed the Act, creating doubts about the validity and effectiveness of both the 1869 and 1873 Acts.¹³⁴

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.¹³⁵ 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."¹³⁶

The Court then considered whether the "tidal" 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,"¹³⁷ 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 as 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:

131. See *id.* at 406 n.1.

132. *Id.* at 406-07 n.1.

133. *Id.* at 392.

134. See *id.* at 410-11. The defendant argued that the repealing act violated the contracts clause of the Constitution. *Id.* at 418.

135. *Id.* at 435.

136. *Id.*

137. *Id.*

138. *Id.* at 436.

125. *Id.* at 414.

126. *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 M. Hale, *supra* note 9, at 386-90. See generally J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND IN THE SOIL AND SHORES THEREOF 20-21 (1826); 2 H. FARNHAM, *supra* note 46, at 1369-72; S. MOORE, *supra* note 39, at 720; S. MOORE & H. MOORE, *supra* note 54, at 99.

127. 41 U.S. at 414.

128. *Id.* at 416-17.

129. *Id.* at 410-11.

130. 146 U.S. 387 (1892).

[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 these 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 455.

142. *Id.* at 453.

143. *Id.* at 444, 453, 455, 460. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court delineated a three-part test for determining whether legislative action violates the contracts clause. First, a valid contractual obligation must exist. This obligation may arise from a statute if the legislature had the "intent to create private rights of a contractual nature enforceable against the State." *Id.* at 17 n.14; *see* *Rivera v. Patino*, 524 F. Supp. 136, 143-44 (N.D. Cal. 1981) (concluding that to create a contractual obligation the statute must represent more than an exercise of the state's police powers and must involve "a voluntary, bargained-for exchange" between the parties). Second, legislative action must impair the contractual obligation. Third, the impairment of the contractual rights must not be reasonable or necessary. The Court in *Illinois Central* appears to have rejected the railroad's impairment argument because no valid contractual obligation existed.

144. *See Illinois Central*, 146 U.S. at 452; *see supra* note 139 and accompanying text.

145. *See Shively v. Bowlby*, 152 U.S. 1, 43 (1894).

146. 146 U.S. at 452; *see supra* note 144 and accompanying text.

147. *See* 146 U.S. at 452, 453, 457 (grants of fisheries allowed, as well as grants of submerged land to construct docks, wharves, and other similar structures); *Deveney, supra* note 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.¹⁴⁸ 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.¹⁴⁹

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."¹⁵⁰ 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 quotes from *Stockton v. Baltimore & New York Railroad*,¹⁵¹ 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."¹⁵² 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.¹⁵³

Almost two years after the *Illinois Central* decision, the Supreme Court reconsidered the public trust concept in *Shively v. Bowlby*.¹⁵⁴ 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."¹⁵⁵ 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

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.

148. See 146 U.S. at 457-58; 1 H. FARNHAM, *supra* note 46, § 46.

149. See generally *infra* §§ 6.1, 6.2.A.

150. 146 U.S. at 452.

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 modified.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 Accordingly, 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 nontidal, navigable waters and the underlying lands. Like tidal waters and lands, nontidal, 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,¹⁶³ *Shively* arguably could have little impact in defining the effect of the grant on public trust property.

In conclusion, *Martin*, *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.

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 impairing 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 limitations¹⁶⁷

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 held by the people collectively ... [and] exercised by the parliament."¹⁶⁸ Virginia thus acquired "full and complete

156. *Id.*

157. *Id.* at 14.

158. *Id.* at 57.

159. *Id.*

160. *Id.* at 58.

161. *See id.* at 11.

162. *See, e.g., id.* at 11, 49, 57.

163. *See Shively*, 152 U.S. at 10. *Cf.* 1 H. FARNHAM, *supra* note 46, § 45a (discussing the construction of grants).

164. Compare *Avery v. Beale*, 195 Va. 690, 80 S.E.2d 584 (1954), with *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 138 Va. 461, 122 S.E. 344 (1924), and *McCready v. Commonwealth*, 68 Va. (27 Gratt.) 985, *aff'd sub nom. McCready v. Virginia*, 94 U.S. 391 (1876). *Cf. In re Stewart Transp. Co.*, 495 F. Supp. 38 (E.D. Va. 1980) (where the district court uses the public trust doctrine as a basis for permitting the state and federal governments to recover for damage to wildfowl caused by an oil spill in the Chesapeake Bay).

165. 158 Va. 521, 164 S.E. 689 (1932).

166. *See id.* at 527-32, 164 S.E. at 690-92.

167. *Id.* at 539-40, 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."¹⁷³

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."¹⁷⁴ 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."¹⁷⁵ The court referred to the first right as the *jus publicum* and to the second as the *jus privatum*.

The court interpreted the *jus publicum* as including all of those property rights which were inherent in and incidences of state sovereignty. 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 542-43, 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*.¹⁷⁶ To this extent, then, the court conceded that a kind of public trust existed. In the words of the court:

The legislature, of course, owes to the people of the State a most solemn duty to administer the *jus privatum* of the State and to exercise its *jus publicum* for the benefit of the people; ... but this is a very different thing from asserting that the legislature holds any part of the public domain in trust for any particular use or for the use by the people in common for any purpose.¹⁷⁷

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.¹⁷⁸ 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."¹⁷⁹ 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,¹⁸⁰ 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.¹⁸¹ Yet, in considering Virginia law, the court focused only on the state constitution, ignoring relevant statutory and common law. The court appar-

176. *Id.* at 546-47, 164 S.E. at 696-97.

177. *Id.* at 549, 164 S.E. at 697-98.

178. *Id.* at 550, 164 S.E. at 698.

179. *Id.* at 551, 164 S.E. at 698.

180. *Id.* at 555-56, 164 S.E. at 699-700.

181. *Id.* at 541-42, 164 S.E. at 695.

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.¹⁸² Like their federal counterpart, state constitutions should be interpreted in light of statutory and common law. As one state constitutional law scholar explained, "[a] state constitution is not a code of laws. It should be confined to the fundamentals of government, leaving statutory detail to the statute books."¹⁸³ At least in more recent years, Virginia's constitutional draftsmen appear to have adopted this tenet.¹⁸⁴

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,¹⁸⁵ 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."¹⁸⁶

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,¹⁸⁷ this conclusion appears to

182. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 2674 (1982); NEV. REV. STAT. ANN. § 41.031 (Michie Co. Supp. 1987) (waiving all state and local immunity from all liability, not just tort liability) (prior version cited in *Nevada v. Hall*, 440 U.S. 410 (1979)).

183. Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 196 (1972) (citations omitted).

184. See COMMISSION ON CONSTITUTIONAL REVISION, REPORT ON THE CONSTITUTION OF VIRGINIA 9-10 (1969); Howard, *supra* note 183, at 196-97.

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

186. *Newport News*, 158 Va. at 545, 164 S.E. at 696. One legal scholar argues that, at least until the Civil War, certain unwritten "higher law" principles had constitutional stature. Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703, 717 (1975). In his view these unwritten, but legally binding, constitutional principles formed a prominent part of the legal system when America became self-governing. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 893 (1978). For a general discussion of various approaches to federal constitutional interpretation, see J. ELY, *DEMOCRACY AND DISTRUST* (1980).

187. See generally J. ELY, *supra* note 186, at 48-54. The Virginia Supreme Court relies on an excerpt from T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (8th ed.) in concluding that natural law principles alone cannot be used to limit a sovereignty's power. *Newport News*, 158 Va. at 542 n.1, 164 S.E. at 695 n.1. Although Cooley provides some support for the court's position, he primarily deals with a court's power to declare specific legislative acts unconstitutional. *Commonwealth v. City of Newport News* did not involve a constitutional challenge to any

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.¹⁸⁸ 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.¹⁸⁹ 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 restriction 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.¹⁹⁰

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 220-31 and accompanying text.

188. *Newport News*, 158 Va. at 539, 164 S.E. at 694.

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

190. VA. CONST. art. XI, § 3; see *Newport News*, 158 Va. at 553, 164 S.E. at 699; 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. XIII, § 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 "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 assuage these fears, the Convention amended the provision by deleting the phrase "as at any time defined by law" and adding the clause "but 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.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.¹⁹²

Because section 3 of article XI admittedly 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 in 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*,¹⁹³ for example, the court quoted approvingly from *Martin, Illinois Central*, and other cases discussing the public trust concept. In *Taylor* a riparian owner sued the Commonwealth, alleging that her riparian rights were being violated by an artesian well constructed for withdrawing and selling water to the city of Richmond. The well was 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."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

191. *Newport News*, 158 Va. at 553, 164 S.E. at 699 (emphasis in original).

192. *Id.* at 554, 164 S.E. at 699. The court's conclusion that the provision did not restrict the legislature's power to use the oyster beds for public purposes may have been correct, but not for the reasons given by the court. Under the public trust doctrine, certain public uses (those within the *jus 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 oystering. Article XI of the Virginia Constitution arguably answers that question in the negative. Although the court suggested that the right to discharge sewage was part of the *jus publicum*, *id.* at 554, 164 S.E. at 699, it did not base its decision on that suggestion.

193. 102 Va. 759, 47 S.E. 875 (1904).

194. *Id.* at 775, 47 S.E. at 881.

the state's right to develop soil resources underneath the York River "for the common benefit of all of its citizens."¹⁹⁵

Before ruling for the state, the court suggested that the result may have differed if two private parties were involved.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.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.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.¹⁹⁹ At the very least, the statutes demonstrate legislative recognition of public interests in tidal resources. Because the commons legislation was in effect at the time of the court's decision in *Newport News*,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 if 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."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."²⁰² The drafters 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

195. *Id.* at 776, 47 S.E. at 881.

196. *Id.* at 776-77, 47 S.E. at 882.

197. See, e.g., *Commonwealth v. Garner*, 44 Va. (3 Gratt.) 655 (1846) (1st ed. 1847).

198. *Accord* *Garrison v. Hall*, 75 Va. 150, 162 (1881).

199. See generally *infra* §§ 6.2.B, 6.3.

200. See VA. CODE § 3573 (1930) (current version at VA. CODE § 62.1-1 (1987)) (in force at the time of the *Newport News* decision). For further discussion of the commons legislation, see *infra* Part IV and § 19.1.

201. VA. CONST. art. XI, § 1.

202. *Id.* § 2.

of article XI indicate that one senator attempted to modify the section's language by including a statement that "[o]pen 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."²⁰³ 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.²⁰⁴ 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.²⁰⁵ Section 10-178 of the Act now provides that the section was passed "[i]n furtherance of Article XI of the Constitution of Virginia and in recognition of the vital need of citizens of the Commonwealth to live in a healthful and pleasant environment."²⁰⁶ 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 trustee of the environment for the present and future generations.²⁰⁷

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.

203. PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 375, 377 (extra session 1969, regular session 1970); see also *id.* at 375-79 (discussing the proposed amendment); Howard, *supra* note 183, 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." COMM'N ON CONSTITUTIONAL REVISION, REPORT TO THE GOVERNOR 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 205-07.

204. See VA. CONST. art. XI, § 3.

205. The Virginia Environmental Quality Act was originally enacted in 1972. Act of Apr. 10, 1972, ch. 774, 1972 Va. Acts 1133 (present version codified at VA. CODE §§ 10-177 to -186 (1985 & Supp. 1987)). Sections 1 and 2 of article XI of the Virginia Constitution became effective July 1, 1971. See Act of Apr. 6, 1970, ch. 763, 1970 Va. Acts 1595, 1622-24.

206. VA. CODE § 10-178 (1985) (originally enacted as Act of Apr. 10, 1972, ch. 774, § 10-177, 1972 Va. Acts 1133, 1134).

207. VA. CODE § 10-178 (1985) (emphasis added).

Another important statutory provision, added in 1972, provides that "[e]xisting water rights are to be protected and preserved," but that this protection is "subject to the principle that all of the state waters belong to the public for use by the people for beneficial purposes without waste."²⁰⁸ 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 powers."²⁰⁹ 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."²¹⁰

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 substantially impairs the public right. Third, the court must determine whether the substantial impairment is nevertheless

208. *Id.* § 62.1-44.36(1) (1987) (enacted by Act of Apr. 10, 1972, ch. 728, § 62.1-44.36, 1972 Va. Acts 1024, 1025). Among other provisions, section 62.1-44.36 states that:

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

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

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.* § 62.1-10(a). Furthermore, § 62.1-10(b) defines "beneficial use" to mean "domestic, agricultural, recreational and commercial and industrial uses." *Id.* § 62.1-10(b).

209. VA. CODE § 62.1-11(a), (b) (1987). *Cf. supra* note 208 (discussing other provisions recognizing the public interest in state waters).

210. VA. CODE § 62.1-11(c) (1987). Also, the discharge of untreated sewage no longer is a valid use of navigable waters under current federal and state law. See Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. III 1985); VA. CODE §§ 62.1-44.2 to -44.34:12 (1987).

permissible because it is the result of a legislative decision to use the resources for another valid public purpose.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 abdicate 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 navigation and commerce and is part of the *jus publicum*, such as it exists in Virginia.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 improve waters without compensating injured waterfront landowners to improvements made to navigable waters for the purposes of navigation, flood control, and power development.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 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. 158 Va. at 551-52, 555-56, 164 S.E. at 698-700.

212. See *supra* text accompanying note 171.

213. See, e.g., *Ewell v. Lambert*, 177 Va. 222, 228, 13 S.E.2d 333, 335 (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, notes 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, § 101 (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. 538, 178 S.E. 48 (1935), cert. denied, 298 U.S. 674 (1936) (where the Virginia Supreme Court allowed the diversion of

The Virginia Supreme Court, in *Boerner v. McCallister*,²¹⁴ indicated that the right of navigation is the only public interest in navigable waters.²¹⁵ In *Boerner* the plaintiff sought an injunction to restrain the defendant from trespassing and fishing in that part of the Jackson River that flowed through the plaintiff's property. The plaintiff claimed to be the exclusive owner of the bed of that portion of the river. The defendant argued that he merely was exercising the public's right to fish in navigable waters. In deciding for the plaintiff, the court held that the plaintiff owned the bed pursuant to a Crown grant conveying not only the lands bordering on the river, but also "the rivers, waters and watercourses ... together with the privilege of hunting, hawking, fishing, fowling."²¹⁶ Then, after noting that the defendant had not established the navigability of the river, the court stated that "there is persuasive authority to the effect that even though a stream may be floatable, and in some instances navigable, the public interest therein is limited to the right of navigation."²¹⁷

The court's statement about the scope of the public interest is troubling in several respects. Besides focusing on an issue not raised by the facts before it, the court also ignored key developments in the law. The court in *Boerner*, for example, failed to conduct even a cursory examination of the public trust doctrine as it originated under Roman and English law and as it developed in the American legal system. Indeed, when the court construed the Crown grant, it stated that "[a]t the time of the grant (between 1749 and 1751) there was no law preventing the conveyance" of watercourses.²¹⁸ Yet, by that time the public trust doctrine had begun to develop and common rights were a carefully regulated part of English law. Also, as explained earlier, statutory and constitutional changes to Virginia law now provide greater recognition of public interests in natural resources.²¹⁹ Finally, other Virginia cases decided before *Boerner* indicate that the public interest in navigable waters is broader than the right of navigation.

On several different occasions, for instance, the Virginia Supreme Court has recognized sewage discharge into navigable waters as a legitimate public use. The court in *Commonwealth v. City of Newport News*, for instance, appeared to adopt another state court's description of this use as "part of the *jus publicum*."²²⁰ The court's opinion in *City of Hampton v. Watson*²²¹ contained a similar reference. In *Hampton* an individual riparian proprietor sued the city of Hampton to recover damages for pollution of navigable waters

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. 169, 89 S.E.2d 23 (1955).

215. *Id.* at 174, 89 S.E.2d at 27.

216. See *id.* 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, 201-10 and accompanying text.

220. See 158 Va. at 554, 164 S.E. at 699 (quoting *Sayre Co. v. Newark* reported as *Mayor of Newark v. Sayre*, 60 N.J. Eq. 361, 45 A. 985, 988 (1900)).

221. 119 Va. 95, 89 S.E. 81 (1916).

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.²²²

The court explained that the "sea is the natural outlet for all the impurities flowing from the land."²²³ 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."²²⁴ 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.²²⁵ 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.²²⁶

The court reached a similar result in *Darling v. City of Newport News*,²²⁷ 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.²²⁸

^{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.

^{227.} 123 Va. 14, 96 S.E. 307 (1918).

^{228.} *Id.* at 19-21, 96 S.E. at 308-09. In a frequently cited dissenting opinion, Justice Sims of the Virginia Supreme Court concluded that the city should pay damages to the plaintiff "to the extent of the just compensation required" under the Virginia Constitution for injury by the state to private property interests. *Id.* at 40, 96 S.E. at 315 (Sims, J., dissenting). Although Justice Sims agreed that the state held navigable waters and their beds for the public benefit, *id.* at 23, 96 S.E. at 309, 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 23-26, 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 sufferance 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.

The United States Court of Appeals for the Fourth Circuit, in *DuPont Rayon Co. v. Richmond Industries*,²²⁹ 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.²³⁰

The court found unpersuasive the plaintiff's argument that the defendant was not a riparian owner and therefore had no right to use the river for sewage. The court responded that "the inhabitants of a city are not to be denied the right to use the public sewers emptying into a tidal stream because they are not riparian owners on such stream."²³¹

The dissent's analysis creates several problems. First, it fails to understand the essence of the public trust doctrine and the *jus publicum*. Although the defendant city in *Darling* did not acquire the power to discharge sewage into navigable waters until after the plaintiff obtained his leasehold interest, the state would have had this power before the plaintiff obtained his interest. The key inquiry under the public trust doctrine should be whether the state held property for its citizens' benefit and subject to certain duties, not whether the state had delegated some of its responsibilities to a local political unit. Second, the dissent ignores the common law origins of the public trust doctrine, focusing only on whether the legislature has authorized a public use. Under the common law origins of the public trust doctrine, certain natural resources not granted by the legislature were preserved for the benefit of the people. See *supra* notes 98-110 and accompanying text. Further, as the dissent concedes, grants in derogation of public rights must be strictly construed. See 123 Va. at 38, 96 S.E. at 314 (Sims, J., dissenting).

^{229.} 85 F.2d 981 (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:

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

Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 467, 130 S.E. 408, 410 (1925) (quoting *Stratton v. Mount Hermon Boys' School*, 216 Mass. 83, 88-89, 103 N.E. 87, 89 (1913)). The basic premise of the riparian doctrine is that the right to use the water of a natural watercourse is a right "inherent" in the ownership of waterfront land. *Mumpower v. City of Bristol*, 90 Va. 151, 153, 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 Luray*, 175 Va. 218, 226, 8 S.E.2d 369, 372 (1940). As the above description indicates, there are two basic components to the riparian doctrine. First, a riparian landowner's use of the adjoining watercourse must be for the benefit of his riparian land. Second,

Numerous Virginia cases also have referred to a public right or liberty of fishing. For example, in *McCready v. Commonwealth*,²³² 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."²³³ *McCready* involved the validity of a legislative act prohibiting oyster planting in state waters by any person not a citizen of Virginia. The statute was challenged on constitutional grounds as being 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.²³⁴ Although the court referred to several public trust cases of the United States Supreme Court, including *Martin v. Waddell*,²³⁵ 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."²³⁶ The key inquiry instead was whether the state's citizens had a "proprietary right in common."²³⁷ 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

the use must be a reasonable use of the watercourse. See generally 2 H. FARNHAM, *supra* note 46, §§ 461-474. For further discussion of the riparian doctrine, see Butler, *Allocating Consumptive Water Rights in a Riparian Jurisdiction: Defining the Relationship Between Public and Private Interests*, 47 U. Prrt. L. Rev. 95 (1985).

Many western states follow a doctrine known as the prior appropriation doctrine in defining water rights. Under the prior appropriation doctrine, use rights in watercourses are allocated on the basis of priority in time. Generally those parties who appropriate flowing water first in time and apply it for a beneficial purpose acquire a legally protected right. This principle is a more sensible standard for the arid west, where there often is insufficient water to satisfy all riparian needs. See generally 3 H. FARNHAM, *supra* note 46, §§ 649-695.

Recent cases also have supported the conclusion reached by earlier courts that a riparian's right to use navigable waters is subject to the superior right of the public to use the waters for sewage disposal. In *Ancarrow v. City of Richmond*, 600 F.2d 443, 446 (4th Cir.), *cert. denied*, 444 U.S. 992 (1979), for example, the Fourth Circuit rejected an argument that intervening changes in Virginia law, specifically the state water quality law, weakened an earlier line of sewage disposal cases. See State Water Control Law, VA. CODE §§ 62.1-44.2 to -44.34:12 (1987). In *Ancarrow* the court held that riparian owners were not entitled to just compensation for impairment of their riparian rights, reasoning that a riparian owner is subject to the public's superior right to discharge sewage. If a municipality uses navigable or public waters for sewage disposal, the city arguably also should be allowed to use these waters for public drinking supplies. This second use is as necessary to the public health and development as sewage disposal.

232. 68 Va. (27 Gratt.) 985, *aff'd sub nom. McCready v. Virginia*, 94 U.S. 391 (1876).

233. 68 Va. at 988.

234. *Id.* at 991.

235. *Id.* at 987-88.

236. *Id.* at 990.

237. *Id.*

belongs to all the citizens or subjects of the state."²³⁸ 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.²³⁹

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."²⁴⁰ 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."²⁴¹ 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.²⁴²

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.²⁴³

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

238. *Id.* at 989.

239. *Id.* at 989, 993.

240. *McCready v. Virginia*, 94 U.S. 391, 395 (1876).

241. *Id.*

242. *Id.* The Court also concluded that the statute did not violate the commerce clause because oyster planting and cultivation did not involve commerce. *Id.* at 396. For further discussion of the United States and Virginia Supreme Court opinions in *McCready*, see *infra* § 20.2.B.

243. For a discussion of the factors affecting whether a use is a permissible trust use, see *infra* § 5.3.

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*.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ 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."²⁴⁷ 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.²⁴⁸

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*,²⁴⁹ 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."²⁵⁰ *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.²⁵¹ 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."²⁵² Further, after the Revolution all the royal rights became vested in the people of New Jersey, as the sovereignty.²⁵³ 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."²⁵⁴

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.²⁵⁵ Furthermore, New Jersey courts often defined the public interest narrowly to permit the state to convey trust lands in abrogation of trust rights.²⁵⁶

Then, in the 1972 decision, *Borough of Neptune City v. Borough of Avon-by-the-Sea*,²⁵⁷ 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.²⁵⁸

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."²⁵⁹

²⁵¹ *Arnold*, 6 N.J.L. at 2-3.

²⁵² *Id.* at 77.

²⁵³ *Id.* at 78.

²⁵⁴ *Id.*

²⁵⁵ See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47, 52-53 (1972).

²⁵⁶ See *Neptune City*, 294 A.2d at 53-54.

²⁵⁷ 61 N.J. 296, 294 A.2d 47 (1972).

²⁵⁸ 294 A.2d at 54.

²⁵⁹ *Id.* See generally Note, *Water Law — Public Trust Doctrine Bars Discriminatory Fees to Non-Residents For Use of Municipal Beaches*, 26 RUTGERS L. REV. 179 (1972).

²⁴⁴ 41 U.S. (16 Pet.) 367 (1842).

²⁴⁵ See *id.* at 407.

²⁴⁶ See *id.*

²⁴⁷ *Id.* at 409.

²⁴⁸ *Id.* at 410.

²⁴⁹ 6 N.J.L. 1 (1821).

²⁵⁰ *Id.* at 76-77; see also *Gough v. Bell*, 21 N.J.L. 156 (1847).

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.²⁶⁰ 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."²⁶¹ 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."²⁶² This perspective has contributed significantly to the expansion of permissible trust uses or, as some might describe it, to the infringement of private rights.²⁶³

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*,²⁶⁴ 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."²⁶⁵ That the beach was man-made was immaterial to determining whether the public trust applied to it.²⁶⁶

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

260. *Neptune City*, 294 A.2d at 54. Consistent with this decision, THE NEW JERSEY RIPARIAN RIGHTS HANDBOOK now provides, in pertinent part:

6. Uses consistent with the trust include recreational uses where appropriate, such as bathing, surfing, launching small boats and walking on the land below the mean high water line when the tide permits. Water-related uses, including docks and piers along a harbor or tidal estuary, may be permitted when the land lends itself to such utilization.

L. GOLDSHORE, THE NEW JERSEY RIPARIAN RIGHTS HANDBOOK 18 (2d ed. 1979).

261. *Neptune City*, 294 A.2d at 52.

262. *Id.* at 54.

263. For a discussion of the takings issue raised by application of the public trust, see *infra* § 20.2.A.

264. 78 N.J. 174, 393 A.2d 571 (1978).

265. 393 A.2d at 574.

266. *Id.* But see *Hyland v. Borough of Allenhurst*, 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).

beach areas of their property primarily for recreational purposes."²⁶⁷ The ordinance had zoned most of the lots on the locality's Atlantic coastline for single family residential use and had prohibited recreational use of dry sand beach areas on these lots except as an incidental 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.²⁶⁸ "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 conflict[ed] with State priorities for the use of the State's oceanfront resources."²⁶⁹ As the court further explained, the "ocean water" along the New Jersey coastline "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."²⁷⁰

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.²⁷¹ 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.²⁷² The court in *Arnold v. Mundy*²⁷³ 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.²⁷⁴ 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 ha[d] 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."²⁷⁵ Similarly, the United States Supreme Court, in *Martin v. Waddell*,²⁷⁶ 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

267. 86 N.J. 217, 430 A.2d 881, 888 (1981).

268. 430 A.2d at 886-87.

269. *Id.* at 887.

270. *Id.* at 888.

271. See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47, 54 (1972).

272. 3 N.J.L. 493, 500 (1812).

273. 6 N.J.L. 1 (1821).

274. *Id.* at 76-77.

275. *Id.* at 71.

276. 41 U.S. (16 Pet.) 367 (1842).

right" at least since 1702 when the proprietors surrendered their governmental powers to the Crown.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.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.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. Alienation 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.²⁸⁰ After the Supreme Court's decision in *Illinois Central Railroad v. Illinois*, a few courts suggested that the legislature's power to alienate trust land was less than absolute.²⁸¹ But most still agreed that the legislature had absolute discretion in regulating, managing, and alienating trust property.²⁸² A 1935 decision, *Ross v. Mayor of Edgewater*,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."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,

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 *jura 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.²⁸⁵

The views expressed in *Ross* influenced the direction of New Jersey trust law for almost forty years.²⁸⁶ Then, in the 1972 decision *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.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."²⁸⁸

Because the court in *Neptune City* only noted the possibility of an overbroad approach, the precise effect of *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.²⁸⁹ However, the judge who authored the majority opinion in *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."²⁹⁰ Further, that judge admitted that though he believed the doctrine should "be reinvigorated and enforced to its full intent and purpose ... we may not be able to undo prior transgressions of it."²⁹¹ Though the New Jersey courts generally do not favor this type of estoppel argument when valuable trust land is at stake,²⁹² the numerous court decisions stating that

284. 115 N.J.L. at 484, 180 A. at 870.

285. *Id.*

286. See, e.g., *Borough of Wildwood Crest v. Masciarella*, 51 N.J. 352, 240 A.2d 665 (1968); *Bailey v. Driscoll*, 19 N.J. 363, 117 A.2d 265 (1955). See generally Note, Jaffee, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 *RUTGERS L. REV.* 571 (1971).

287. 61 N.J. 296, 294 A.2d 47, 54 (1972).

288. *Id.* at 308-09, 294 A.2d at 54.

289. See, e.g., *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571, 575 (1978) (Mountain, J., dissenting); Jaffee, *The Public Trust Doctrine is Alive and Kicking in New Jersey Tidalwaters: Neptune City v. City of Avon-by-the-Sea — A Case of Happy Atavism?*, 14 *NAT. RESOURCES J.* 309, 310, 334-35 (1974).

290. *New Jersey Sports & Exposition Auth. v. McCrane*, 61 N.J. 1, 292 A.2d 545, 579 (1972) (Hall, J., concurring in part and dissenting in part).

291. *McCrane*, 292 A.2d at 579.

292. See, e.g., *City of Newark v. Natural Resource Council*, 82 N.J. 530, 414 A.2d 1304 (1980); *O'Neill v. State Hwy. Dep't*, 50 N.J. 307, 235 A.2d 1 (1967).

277. *Id.* at 417; see also *supra* notes 118-28, 244-48 and accompanying text.

278. 41 U.S. at 414.

279. See, e.g., *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 294 A.2d 47, 54 (1972).

280. See *Hoboken v. Pennsylvania R.R.*, 124 U.S. 656 (1888); *Stevens v. Paterson & Newark R.R.*, 34 N.J.L. 532 (1870).

281. See, e.g., *Jersey City v. Hall*, 79 N.J.L. 559, 76 A. 1058 (1910); *Heiney v. Nolan*, 75 N.J.L. 397, 67 A. 1008 (1907); *Woodcliff Land Improvement Co. v. New Jersey Shore Line R.R.*, 72 N.J.L. 137, 60 A. 44 (1905). For a discussion of *Illinois Central*, see *supra* notes 130-53 and accompanying text.

282. See, e.g., *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).

283. 115 N.J.L. 477, 180 A. 866 (1935), *aff'd*, 116 N.J.L. 447, 184 A. 810, *cert. denied*, 299 U.S. 543 (1936).

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.²⁹³ 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, "[a]s a matter of good housekeeping," the state should begin a process of cataloging its holdings.²⁹⁴ Then, in 1968, the legislature enacted the meadowlands mapping statute.²⁹⁵ 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.²⁹⁶ 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, 1980.²⁹⁷

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 for a 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 defined 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.²⁹⁸

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.²⁹⁹

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.³⁰⁰ On May 27, 1982, the Tidelands Resource Council displayed these maps for public view.³⁰¹ 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 party 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.³⁰²

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 envisioned 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 tidal 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 may 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.³⁰³

At the time of the adoption of the maps, one observer estimated that at least 5,000 lawsuits would result.³⁰⁴ Perhaps in an attempt to minimize the number

298. N.J. CONST. art. 8, § 5, ¶ 1 (adopted general election Nov. 3, 1981).

299. The effect of the amendment may not be the same on all tidally flowed land. See *Dickinson v. Fund for the Support of Free Pub. Schools*, 95 N.J. 65, 469 A.2d 1, 5 (1983) (where the court suggests that the state may not have a claim to upland that became tidally flowed because of artificially created conditions).

300. For a description of New Jersey's Tidelands Mapping Program, see N.J. BUREAU OF TIDELANDS, DIVISION OF COASTAL RESOURCES, DEPARTMENT OF ENVIRONMENTAL PROTECTION, *TIDELANDS MAPS AND THE COASTAL PROPERTY OWNER* (May 1982).

301. See *New York Times*, May 28, 1982, at A1, col. 6.

302. See N.J. STAT. ANN. §§ 13:1B-13.4 to -13.9 (West 1979 & Supp. 1987).

303. See *Tell, A Tidal Wave of Claims*, 4 NAT'L L.J., No. 44, at 1 (July 12, 1982); *Newark, New Jersey Sunday Star-Ledger*, June 6, 1982, § 1, at 1, col. 1. The claim maps include cities like Elizabeth, Newark, and Hackensack. But not all possible claims are pursued. For example, the county court house in Hackensack is, according to the records, surrounded by tidelands. But because sufficient historical evidence could not be gathered to establish the state's claim to the tidelands, the state decided not to pursue the claim to the land. *Id.* at 1, col. 1, & 22, col. 1.

304. *Newark, New Jersey Sunday Star-Ledger*, June 6, 1982, § 1, at 1, col. 1, & 22, col. 1.

293. See N.J. CONST. art. 8, § 5, ¶ 1 (adopted general election Nov. 3, 1981).

294. *O'Neill v. State Hwy. Dep't*, 50 N.J. 307, 320, 235 A.2d 1, 8 (1967).

295. Act of Jan. 13, 1969, ch. 404, §§ 87-103, 1968 N.J. Laws 1313, 1373-79 (current version at N.J. Stat. Ann. §§ 13:1B-13.1 to -13.14 (West 1979 & Supp. 1987)).

296. See N.J. Stat. Ann. § 13:1B-13.2 (West 1979). The Tidelands Resource Council is the successor to the Natural Resource Council, see Act of Feb. 5, 1980, ch. 386, § 1, 1979 N.J. Laws 1525, which succeeded the Resource Development Council, see Act of Apr. 22, 1970, ch. 33, § 4, 1970 N.J. Laws 102, 104. See also N.J. STAT. ANN. § 13:1D-3 (West 1979 & Supp. 1987).

297. See N.J. STAT. ANN. § 13:1B-13.6 (West 1979) (amended in 1975 and 1978). Part of the delay was due to the litigation involving the mapping techniques used by the state. See *Newark v. Natural Resource Council*, 133 N.J. Super. 245 (Super. Ct. Law Div. 1975).

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.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*,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 trustees 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.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

305. For a discussion of the New Jersey situation and for several case studies, see Tell, *A Tidal Wave of Claims*, 4 NAT'L J., No. 44, at 1 (July 12, 1982). The article also discusses the problem in a nationwide context.

306. 95 N.J. 65, 469 A.2d 1 (1983), *rev'g in part, aff'g 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.

307. For a discussion of the claims and of the historical background of the amendment, see *Dickinson*, 469 A.2d at 3-7.

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.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*,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 meadowlands mapping statute mentioned earlier.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 meadowlands mapping statute. Although the amendment did not specify many of the procedural requirements, that failure did not mean that strict compliance with the meadowlands mapping statute was required.³¹¹

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

309. 95 N.J. 100, 469 A.2d 19 (1983).

310. *Id.*; see also N.J. STAT. ANN. §§ 13:1B-13.1 to -13.13 (West 1979 & Supp. 1987).

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 meadowlands mapping act did not set forth the "exclusive manner in which a claim could be made." *Dickinson*, 469 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 for 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.

1983 N.J. Att'y Gen. Op., No. 3, reprinted in 111 N.J.L.J. 489, 489 (May 12, 1983).

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 those contributions 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 *jus 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.³¹² Those expectations required a state to "preserve" certain resources for use by the public.³¹³ Further, the state could not discharge this duty by taking action that "substantially impaired" the public trust.³¹⁴

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.³¹⁵ 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 resource that would be subject to public use. This inquiry requires asking 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 allow private appropriation to promote efficient and productive use 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.³¹⁶

312. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842).

313. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

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).

316. Regulation of fishing existed as early as 1680 with "An Act restraining strikeing and killing fish at unseasonable times." See Act of June, 1680, act 17, 2 W. HENING, *THE STATUTES AT LARGE* 487 (1823), *repealed by* Act of Oct., 1686, act 4, 3 *id.* at 30. By the 1800's regulation of fishing began to include the use of certain kinds of nets. See, e.g., Act of Jan. 4, 1805, ch. 60, 3 S. SHEPHERD, *THE STATUTES AT LARGE OF VIRGINIA* 173 (Richmond 1835) (regulating the hauling of seines at certain places and within certain time periods) (amended 1836-1837 and 1839). Towards the end of the 1800's, the General Assembly began to impose various licensing requirements on those who wanted to fish. See, e.g., Act of Mar. 4, 1880, ch. 166, 1879-1880 Va. Acts 162 (governing fishing in state waters); Act of Mar. 17, 1910, ch. 343, 1910 Va. Acts 543 (governing fishing in tidal waters). As the licensing requirements became more complex, the state legislature established various regulatory bodies. Currently, regulation of fishing in tidal and inland waters is conducted by the Commission of Game and Inland Fisheries, see VA. CODE §§ 29.1-100 to -111, 29.1-300 to -570 (Supp. 1987), and by the Marine Resources Commission, see VA. CODE §§ 28.1-1 to -36 (1985 & Supp. 1987).

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.¹ Even in early England, it appears that common lands denoted lands held by a community for public use.² 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.³ 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,"⁴ much as Roman law described "running water, the sea ... and the shores of the sea" as "common to mankind."⁵

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).

2. See W. HOSKINS & L. STAMP, *THE COMMON LANDS OF ENGLAND AND WALES* 34 (1963); ROYAL COMMISSION ON COMMON LAND 1955-1958, at 152 (1958) [hereinafter cited as ROYAL REPORT]; see also F. POLLOCK, *THE LAND LAWS* 6, 20-21 (3d ed. 1896).

3. See Act of May, 1780, ch. 2, 10 W. HENING, *THE STATUTES AT LARGE* 226 (1822) [hereinafter cited as HENING'S STAT.] (current version at VA. CODE § 62.1-1 (1987)). See generally *infra* § 6.2.B (introducing the commons legislation).

4. See, e.g., VA. CODE ch. 62, § 1 (1849); 10 HENING'S STAT., *supra* note 3, at 226. For a more thorough discussion of Virginia's commons legislation, see *infra* Part IV & chapter 19.

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.⁶ During the colonial period that concept served important economic functions, much as the English version did during feudal times.⁷ After Virginia became a state, the commons concept continued to be important, playing a defined role in Virginia's structured land system.⁸

Chapter 6 examines the development of the commons concept under the common law. Because the overall impact of Roman law on public rights theory already has been discussed,⁹ 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.

§ 6.1. Early Development of the Commons Concept in England.

The commons concept developed in early England as a necessary part of the agrarian economy.¹⁰ It continued to play a vital economic role until the end of the 1700's.¹¹ 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.¹² Thus, by the time the

6. See generally *infra* Part IV & chapter 19 (discussing the development of the commons concept in the Virginia courts and legislature).

7. *CF infra* §§ 6.1.A, 6.2.A (discussing the role of the commons concept in England and Virginia).

8. See *infra* § 6.2.B.

9. See generally *supra* § 5.1.A.

10. The origin of the commons concept is disputed. Some commentators argue that common lands developed during the English feudal period as a consequence of the tenure land system set up by William the Conqueror. For example, in their work *The Common Lands of England and Wales*, Hoskins and Stamp argue that common rights in the forest had been exercised since "time immemorial," and that even an all-powerful Norman king was obliged to recognize them when he enlarged his forest if he did not wish to encourage a rebellion. W. Hoskins & L. Stamp, *supra* note 2, at 6. Others maintain that common lands existed before the feudal era in early Germanic and Roman settlements, where a kind of communal land ownership prevailed. See F. Pollock, *supra* note 2, at 18-21.

11. W. Hoskins & L. Stamp, *supra* note 2, at 44.

12. See *infra* notes 41-47 and accompanying text.

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.¹³ Evidence exists that, as early as 688, English settlements used an open field system to cultivate arable land.¹⁴ Under this system the fields surrounding a settlement were alternately sown or left fallow.¹⁵ During the harvest season, the fields typically were divided into strips for use by individual villagers. After the harvest, the fields became available for pasturage, sometimes only to those who held arable strips and sometimes to a larger group.¹⁶

Natural meadows or hayfields, rare and very valuable according to the Domesday Book, also were apportioned in strips to each villager, either permanently or according to an annual distribution scheme.¹⁷ In addition, the villagers enjoyed and used in common the surrounding waste lands, which included woods, marshes, and fens.¹⁸ From the waste lands medieval villagers removed wood and brush, as estovers, dug peat or turf for fuel, as turbary, fished in rivers and lakes under their right of piscary, grazed pigs and goats according to their right of pannage, pastured other animals, and took sand,

13. It would be inaccurate to describe these public or communal rights as including ownership. Early societies did not recognize the concept of treating a group of people as one through the corporate form. The phrases "communal enjoyment" or "communal use" rights would more accurately depict the situation existing in these societies. See F. Pollock, *supra* note 2, at 21. See generally T. Smolen, *Historical Overview of Lands Known as Common 23-30* (1974) (C. Jones & N. Theberge eds.) (manuscript available at Virginia Institute of Marine Science, School of Marine Science, College of William and Mary, Gloucester Point, Virginia).

14. ROYAL REPORT, *supra* note 2, at 149. This system predominated in parts of England where the soil was most fertile and the land had been cultivated from an early date. In the wetter, more pastoral regions, large tracts of land, including pasture and woods, were enclosed and possessed in isolated farmsteads and hamlets. *Id.*; F. Pollock, *supra* note 2, at 39.

15. F. Pollock, *supra* note 2, at 37-39; 1 F. Pollock & F. Maitland, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 562-63 (2d ed. 1959).

16. F. Pollock, *supra* note 2, at 38. The Germans seem to have brought this practice of allotting cultivable land in several strips to England. In an apparent effort to assure that each villager had an equivalent area of arable land, both in amount and quality, the Germans divided land into numerous strips. Although a villager may have had 30 acres of arable land, it consisted of 40 to 50 strips scattered throughout the cultivable fields. This practice of intermixed strip-holding endured throughout the middle ages, and open fields worked under it were not consolidated into single tracts until the sixteenth and seventeenth centuries. See F. Maitland, *DOMESDAY BOOK AND BEYOND* 394-95, 404 (1897, printed 1960) [hereinafter cited as *DOMESDAY BOOK*]; F. Pollock, *supra* note 2, at 38-39; 1 F. Pollock & F. Maitland, *supra* note 15, at 562-63.

17. *DOMESDAY BOOK*, *supra* note 16, at 406; see also F. Pollock, *supra* note 2, at 38-39.

18. Waste lands were distinguishable from meadows, hayfields, and other arable lands. Unlike those lands, waste lands were not naturally cultivable. See ROYAL REPORT, *supra* note 2, at 169; see also *infra* note 30.

stone, and clay as needed.¹⁹ At least until the eighth century, these wastelands were open to use by all who could reach them.²⁰ 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.²¹ By the time of the Norman conquest in 1066, the right to use common land generally was limited to the people of a particular manor, vill, or borough,²² and sometimes even to a particular group of inhabitants within a manor, vill, or borough.²³ 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.²⁴

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 fee owner of all lands in England. He held these lands in his capacity as sovereign and had the power to grant exclusive rights in them, as well as in the shore, the sea, and other navigable waters. The King then granted, or enfeoffed, land to his favorite nobles in return for their promise to perform tenures or services previously agreed upon. These nobles, called tenants in chief or tenants in capite because they held directly of the King, in turn conveyed parts of their lands to nobles of lesser rank in exchange for the performance of tenures. As this infeudation process continued, a pyramid structure developed with the King at the top.²⁵

19. See *infra* note 62.

20. W. HOSKINS & L. STAMP, *supra* note 2, at 6.

21. *Id.* at 7.

22. For jurisdictional and administrative purposes, medieval England was divided into shires or counties, then hundreds, and then vills. 1 F. POLLOCK & F. MAITLAND, *supra* note 15, at 529. Although vills varied in size, they typically included a farm village and surrounding open fields. See *id.* at 562. Sometimes a vill coincided with one manor, but often a vill encompassed several manors. *Id.* at 617-18. A borough, though resembling a vill 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 634-38. See generally *id.* at 527-688 (discussing the English communities of county, hundred, vill, 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 "intercommoning" 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 "couchant and levant," involved limiting the number of animals that might be pastured on the commons to those that the farmer could feed during the winter months. In more populated areas of England, however, the stint became a fixed number of animals 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 tenurial 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

Often a lord within the upper part of the pyramid would form "an agricultural, governmental and fiscal unit ... composed of lands held by the lord and by tenants of different classes."²⁶ This unit, called a manor, typically included several different categories of land. One category consisted of the lord's demesne lands, that is lands held by the lord in fee for his own benefit. These lands, which were subject to the lord's exclusive control, included lands on which the manor house stood, as well as lands within the manor that were used for farming, grazing, or other purposes directly benefiting the lord. Frequently serfs or nonfreehold tenants²⁷ worked the lord's demesne lands for his benefit. In addition to the lord's privately used lands, a manor also included some lands that the lord had granted to freehold tenants. Through the grant the tenant acquired seisin, or an ownership interest in the land.²⁸ But the tenant still held of the lord, owing him specific services or tenures. A third category of land consisted of common fields, meadows, and pastures that might have been used either by the freehold tenants or by the nonfreehold tenants. If the freehold tenants had the right to use a common field or meadow, then they had a vested fee or ownership interest, but they continued to hold of their lord. If, however, nonfreehold or customary tenants had the right to use the common lands, then the lord held those lands in fee, subject to the common rights of the tenants. This usually meant that the commoners had the right of first use.²⁹ A final category consisted of waste lands, which were vested in fee in the lord who in turn held of the Crown, but which were

ceremonies of state to performing menial services such as supplying goods to the lord; (3) the frankalmoin 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 socage, 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 which were not clearly defined and which were dependent on the will of the lord. Those who held land by unfree tenure were subject to the lord's arbitrary command. See 1 R. MINOR, *THE LAW OF REAL PROPERTY* § 6 (1908); C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 1-27 (1962); see F. POLLOCK, *supra* note 2, at 53-79. The only tenure that ever existed in the United States was free and common socage, and even that tenure had lost its most burdensome aspects by the time America was colonized. 1 R. MINOR, *supra*, § 15. See generally 1 F. POLLOCK & F. MAITLAND, *supra* note 15, at 229-406 (discussing the feudal land system).

26. C. MOYNIHAN, *supra* note 25, at 15. See generally 1 F. POLLOCK & F. MAITLAND, *supra* note 15, at 594-605 (discussing the manor).

27. In contrast to freehold tenants, nonfreehold 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 nonfreehold tenant concerned the remedial options available to each. Whereas the freehold tenant could seek redress in the King's courts, the nonfreehold tenant was limited to the manorial courts of his particular lord. C. MOYNIHAN, *supra* note 25, at 11. See generally 1 F. POLLOCK & F. MAITLAND, *supra* note 15, at 356-83 (discussing the unfree tenant).

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. MOYNIHAN, *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, 168-69.

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.³⁰

As the description 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.³¹ By the early thirteenth century, manor lords or the Crown itself

30. *Id.* at 169-70. For a general discussion of the manorial organization, see *id.* at 168-71. Over time some subtle differences developed between common lands and waste lands. First, severalty rights could attach to a special class of common lands, but not to waste lands. That is, an individual could have the exclusive right to use certain common lands until after the harvest, at which point the land could be used by all commoners. If severalty rights attached to common lands, they technically were called "commonable." See *infra* note 73. Waste lands, however, could not be used exclusively by an individual. Second, as more severalty rights were recognized, the class of commonable lands increasingly included arable lands used for such productive purposes as cultivation and grazing, while waste lands generally included lands that were uncultivated and appeared to be worthless. See ROYAL REPORT, *supra* note 2, at 152, 168-71, 175. See generally 6 HALSBURY'S LAWS OF ENGLAND ¶¶ 506, 510-522 (4th ed. 1974) (discussing the different types of wastes and commons).

The English inclosure statutes eventually altered the definition of waste by introducing the concept of "superfluous waste" to refer to the common lands not needed or used by the commoners for the lawful exercise of their right of pasture. ROYAL REPORT, *supra* note 2, at 69. 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 other rights of the commoners. *Id.* This right to inclose superfluous waste arose from the Statute of Merton, 1235, 20 Hen. 3, ch. 4, 1 D. PICKERING, THE STATUTES AT LARGE 27 (Cambridge 1762) [hereinafter cited as PICKERING'S STAT.], and the Commons Act, 1285, 13 Edw. 1, ch. 46, 3 HALSBURY'S STATUTES OF ENGLAND 686 (3d ed. 1968) [hereinafter cited as HALSBURY'S STAT.]. See ROYAL REPORT, *supra* note 2, at 69. Under the inclosure statutes, a commoner holding a strip of common land by freehold tenure also had the right to inclose or "approve" that strip of common land. If he chose to do so, however, his inclosure not only destroyed the common rights of others in his strip, but also terminated his common rights in the remaining common land. See *id.* at 172. See generally 6 HALSBURY'S LAWS OF ENGLAND ¶¶ 705-750 (4th ed. 1974) (discussing the inclosure of commons).

Several Virginia Supreme Court decisions appear to adopt at least the spirit of the English distinction between waste lands and common or public lands. See, e.g., *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 138 Va. 461, 471-73, 122 S.E. 344, 347-48 (1924); *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 165-69 (1854).

31. The lord of the manor, for example, held certain manor lauds 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 conveyed 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 town commons exist today (perhaps the most famous of which is the Boston Common). See T. Smolen, *supra* note 13, at 45-55.

Although the proprietorship was not used as frequently in the Virginia colony, some grantees held tremendous land tracts in Virginia under the proprietorship method. Lord Fairfax and Lord Culpeper, for example, acquired land on the Northern Neck of Virginia by monarchical proprietorship. F. HARRISON, VIRGINIA LAND GRANTS 61-79 (1925); 2 HENNING'S STAT., *supra* note

had apportioned most of the common lands and wastes.³² 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.³³

Rapid population growth and residential expansion further reduced the lands available for common use. During the twelfth and thirteenth centuries, scores of new towns sprung 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"³⁴ common lands for cultivation and commoners seeking to protect their ancient rights from being extinguished through inclosure.³⁵ The stage thus had been set for the struggle that was to

3, at 569-78 (1823); 15 VA. MAG. HIST. & BIOGRAPHY 392-99 (1907-1908) (printing the Charter of 1688 to Lord Culpeper); see *Hunter v. Fairfax's Devisee*, 15 Va. (1 Munf.) 218, 219 (1810), rev'd, 11 U.S. (7 Cranch) 603, 604-05 (1812) (discussing the history of the Northern Neck charters). See generally A. EMBREY, WATERS OF THE STATE 94-127 (1931); T. Smolen, *supra* note 13, at 45-48. Also, the London Company initially held all land in the Jamestown settlement for the colonists' benefit. This first system of landholding in Virginia was remarkably similar to a socialist approach to property ownership. See A. BROWN, THE FIRST REPUBLIC IN AMERICA 76-79 (1898); text accompanying notes 87-114 *infra*.

32. ROYAL REPORT, *supra* note 2, at 152. In addition to common lands within royal manors and royal boroughs, there were common lands which were parts of "royal forests." A royal forest was "a tract of land, not necessarily all densely wooded, set aside for royal hunting and subject to the special severities of forest law." W. HOSKINS & L. STAMP, *supra* note 2, at 8. Establishing a royal forest did not involve the "expropriation of private property" or the destruction of previously existing manors, villas, and parishes. *Id.* But the creation of a royal forest did subject the land to a "special code of laws . . . onerous and sometimes infuriating," which were designed to preserve and enhance the amount and quality of the hunting game. *Id.* New Forest, a vast expanse of common waste in Hampshire, had been declared a royal forest by the Saxon kings some time before 1016. William later enlarged it. Both the Saxon and Norman kings carefully acknowledged and preserved the rights of commoners over the surface of the forest. *Id.* at 8, 47-48. Apparently the Crown realized that, without certain common rights like the right of pasturage, peasant farming would have suffered serious economic harm, which in turn would have produced a large scale rebellion. *Id.* at 8-9. Eventually statutes were passed to preserve the rights of common of pasture in certain lands forming part of the royal forests. See, e.g., Ordinance of the Forest, 1306, 34 Edw. 1, ch. 6, 1 PICKERING'S STAT., *supra* note 30, at 325 ch. 6. See generally 6 HALSBURY'S LAWS OF ENGLAND ¶¶ 513-516 (4th ed. 1974) (discussing common rights in forests).

33. See W. HOSKINS & L. STAMP, *supra* note 2, at 8-12, 34-37; ROYAL REPORT, *supra* note 2, at 151-53.

34. Originally to "inclose" or "approve" common or waste lands meant to enclose them by erecting fences. The open fields and the waste lands of a manor usually remained unfenced, at least until improved agriculture made it profitable to fence. Once enclosed or fenced, the commoners lost their right to pasture animals over the land. Later the word "inclosure" came to designate the extinguishment of common rights over common lands, even though no fences were actually erected. ROYAL REPORT, *supra* note 2, at 172-73. In contrast, the term "enclosure" eventually signified only that land had been fenced without regard to whether common rights attached to the land. See *id.* at 23-24.

35. *Id.* at 153-54. Hoskins and Stamp offered this perspective on the importance of the

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.³⁶ But, despite this first regulatory attempt by Parliament, disputes regarding inclosures persisted.³⁷ A subsequent act, passed in 1285, 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.³⁸

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 sheepfarming 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.³⁹

Besides appropriating prior wastelands, the inclosure movement also consolidated arable strips into compact tracts and converted them into

commoners' rights: "It is therefore almost 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. HOSKINS & L. STAMP, *supra* note 2, at 44-45.

36. Statute of Merton, 1235, 20 Hen. 3, ch. 4, 1 PICKERING'S STAT., *supra* note 30, at 27. 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 *Commons in Legal History*, 166 THE LAW TIMES 363, 364 (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 manor lords, 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 owners 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 36 and accompanying text. Fifty years later, Parliament passed a subsequent act that expanded the lord's authority to inclose commons. In contrast to the 1235 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 2, at 172.

39. See THE LAW TIMES, *supra* note 37, at 364-65.

pasture, causing further loss of agricultural land.⁴⁰ Although Parliament passed statutes in 1487 and 1533, and again in 1555 and 1562, to check the "evil" of inclosure, they were laxly enforced, even in the face of peasant uprisings.⁴¹ In some places, lords responded by creating new commons for their villagers to use as pastureland or by entering into agreements with their tenants to set aside new commons. Where a lord attempted to inclose a common within the manor without at least reaching an amicable agreement with his tenants, he often found his fences pulled down and burned by commoners, who then tried to defend their rights in the courts.⁴²

During the first half of the seventeenth century, inclosure by private landowners continued, at an even greater rate than in the two previous centuries. Besides inclosing common lands, private landowners also drained and appropriated the great fens, or marshlands, of the eastern counties. These inclosures often occurred by private agreement executed between the lord and his tenants and frequently received the approval of the chancery courts. To make matters worse for the peasants, the Crown also decided to reassert its ancient forest rights.⁴³

As early as 1775, some observers recognized that the inclosure process would, if left unchecked, result in the extinction of common rights and thus in the end of the peasant economy and way of life.⁴⁴ But until the 1800's, efforts by Parliament to control the inclosure movement were infrequent and ineffective. By the mid-1800's, though, the disadvantages of permitting the inclosures to continue had become obvious, prompting Parliament to make a serious commitment to the preservation of commons.⁴⁵ Increases in urban populations caused by the Industrial Revolution apparently had convinced most members of Parliament of the need for regulatory control. As a result of those increases, the demand for commons rose in urban areas, and common and waste land became valuable for many conflicting purposes, including use as open, recreational space and as "tempting sites for speculative building."⁴⁶ Beginning in 1845, Parliament passed a series of acts regulating inclosure and improvement of commons.⁴⁷ Since the early 1900's, inclosures have virtually ceased.

40. *Id.*

41. *Id.* at 365.

42. ROYAL REPORT, *supra* note 2, at 156-57; T. Smolen, *supra* note 13, at 41-42.

43. See ROYAL REPORT, *supra* note 2, at 161-65; THE LAW TIMES, *supra* note 37, at 365.

44. See ROYAL REPORT, *supra* note 2, at 163. As early as 1782, Parliament recognized the "dangers" of the inclosure process and "made timid attempts to mitigate the effect of the parliamentary inclosure movement on the smaller peasantry and the poor." *Id.* at 164. But serious reforms were not enacted until 1845. See *infra* notes 45-47 and accompanying text.

45. See, e.g., Inclosure Act, 1845, 8 & 9 Vict., ch. 118, 86 PICKERING'S STAT., *supra* note 30, at 973; see also ROYAL REPORT, *supra* note 2, at 165; *infra* note 47.

46. ROYAL REPORT, *supra* note 2, at 165.

47. See *id.* at 165-66, 172-78. Parliament enacted several major statutes to regulate commons. The Inclosure Act of 1845 empowered Inclosure Commissioners to authorize the inclosure of lands covered by the Act by provisional order upon the application and consent of such persons "interested" in the commons, as defined by the Act. See Inclosure Act of 1845, 8 & 9 Vict., ch. 118, §§ 16, 25, 27, 86 PICKERING'S STAT., *supra* note 30, at 973, 978-79, 982-84. Lands exempted from the general inclosure procedures of the Act included waste lands of manors subject to indefinite

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 *prima*

common rights, certain tidal lands, town or village greens, two royal forests, and lands within a specified distance of certain large towns. *Id.* §§ 12-15, 86 PICKERING'S STAT., *supra* note 30, at 977-78. The commissioners were required to report the provisional order to Parliament, certifying that the inclosure would be "expedient," "having regard as well to the Health, Comfort, and Convenience of the Inhabitants of . . . [localities] near any Parish in which the Land proposed to be inclosed or any Part thereof shall be situate, as to the Advantage of the Proprietors of the Land to which such Application shall relate." *Id.* §§ 3, 26, 27, 86 PICKERING'S STAT., *supra* note 30, at 973, 974, 982-84. The inclosure was not final until Parliament confirmed the provisional order by the passage of a "Public General Act." *Id.* § 32, 86 PICKERING'S STAT., *supra* note 30, at 973, 986.

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

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

The Law of Property Act of 1925 provided that the public had "rights of access for air and exercise to any land" that was a metropolitan common, manorial waste, borough or urban district common, or any land which at the commencement of the Act was subject to rights of common. Law of Property Act, 1925, 15 Geo. 5, ch. 20, § 193(1). The construction of any building, fence, or other work which would "prevent" or "impede" the public access to these lands was prohibited without the consent of the appropriate minister. *Id.* § 194(1). See generally 3 HALSBURY'S STAT., *supra* note 30, at 678-85 (discussing the inclosure acts).

48. For further discussion of a government's regulatory interests in natural resources, see *infra* chapter 20.

49. See *supra* chapter 5, notes 47-51 and accompanying text; see also Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 41 (1976).

50. By the mid-to late 1600's, the courts expressly recognized that title to the land between the high and low water mark was *prima facie* in the Crown. See *Earl of Salisbury v. Joyn*, 84 Eng. Rep. 992 (K.B. 1677); *Lord Fitzwalter's Case*, 86 Eng. Rep. 766, 767 (K.B. 1673); *Whittaker v. Wife*, 84 Eng. Rep. 479, 480 (K.B. 1671); *Kirby v. Gibs*, 84 Eng. Rep. 183 (K.B. 1667).

facie 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 severalty, 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.A, 6.3.

52. DOMESDAY BOOK, *supra* note 16, at 406, 409.

53. *Id.* at 404-05.

54. F. POLLOCK, *supra* note 2, at 18; see also DOMESDAY 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 clerkly and exotic institution" most probably introduced by the church, which was familiar with the Roman system. 1 F. POLLOCK & F. MATTLAND, *supra* note 15, at 60; see also F. POLLOCK *supra* note 2, at 20, 23-27.

55. F. POLLOCK, *supra* note 2, at 18; DOMESDAY BOOK, *supra* note 16, at 407.

56. See DOMESDAY 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 parish 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, 15 Geo. 5, ch. 20, § 193(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 minister. *Id.* § 194(1).

the Crown, the lord of a manor, or perhaps a lesser freehold tenant.⁵⁸ Through long usage and custom, the tenants of a manor acquired rights in the common and waste lands belonging to their lord.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶² Traditionally these waters only

58. See *supra* note 25 and accompanying text.

59. See 6 HALSBURY'S LAWS OF ENGLAND ¶ 501 (4th ed. 1974). Hoskins and Stamp describe the recognition of common rights as "an economic necessity." They explain:

There can be little doubt that common land was originally common property. Today all common land is private property, subject to certain rights over its surface. At some point in time, therefore, what had been common land must have been appropriated as private property, though the new owners were obliged to accept the existence of the surface rights that had always been exercised in common over it. It was indeed an economic necessity to recognize and accept these anterior rights, for without them the whole agrarian economy, whether in the highland or the lowland zone, would have collapsed and with it the lord's revenue from his estates. This profound change in the status of common land is evident as far back as the ninth century, where the records exist, and was probably the result of the imposition of manorial organization upon the earlier Old English community. However it came about precisely, this appropriation of the soil of the commons by lords of manors was momentous in its consequences in later centuries.

W. Hoskins & L. Stamp, *supra* note 2, at 34, reprinted by permission.

60. F. POLLOCK, *supra* note 2, at 40-49; THE LAW TIMES, *supra* note 37, at 363.

61. See, e.g., 6 HALSBURY'S LAWS OF ENGLAND ¶¶ 509, 557, 576, 579, 581 (4th ed. 1974); see also 1 R. MINOR, *supra* note 25, §§ 72, 73. The most important common right apparently was the right of pasture, followed by the rights of turbary and estovers. ROYAL REPORT, *supra* note 2, at 160.

62. Fisheries generally may be classified as exclusive or nonexclusive, with the common right of fishing falling into the latter category. Exclusive fisheries, in turn, may be either corporeal or incorporeal. A grant of a corporeal fishery conveyed the title to the appropriate water and soil, as well as the right to fish in the granted waters. Exclusive corporeal fisheries most frequently were conveyed in grants from the King to manor lords and monasteries. Grants of incorporeal fisheries conveyed only the right to fish in the described waters and did not transfer title to the waters. The two main forms of incorporeal fisheries were a franchise or license from the Crown to fish exclusively in some portion of waters held by the Crown and grants by the manor lord to his tenants to fish in the manorial waters. See generally J. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 70-85, 324 (6th ed. 1869).

Other important common rights included the common of pasture, the common of turbary, and the common of estovers. The common of pasture involved the right to feed cattle, horses, and other animals on the land of another. This common right often existed as an incident of a grant involving the military tenure. The common law apparently implied the common of pasture from a grant of arable land made by a lord to a tenant, reasoning that the tenant would need to pasture his animals on the waste lands of the lord because the tenant's own lands would be arable and therefore used for cultivation. If the common right of pasture arose as an incident of a feudal grant, it was described as appendant or annexed to the land. The right of pasture also could arise

included nonnavigable waters.⁶³ Where waters were navigable and tidal, a public right of fishing also existed, but it apparently arose from the *prima 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.⁶⁴

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.⁶⁵ Other times a court may explain the common right of fishery in the context of the *prima facie* theory.⁶⁶ As will be explained in more detail later, the development of the commons concept in Virginia demonstrates this confusion well.⁶⁷

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.⁶⁸ 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.⁶⁹ 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.⁷⁰

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 turbary 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 of estovers generally could cut timber for use as fuel (fire-bote), for making or repairing agricultural tools (plough-bote or cart-bote), for repairing the house (house-bote), and for building or repairing fences and hedges (hedge-bote). The common of estovers should not be confused with the life tenant's right of estovers, which was an exclusive right to make similar uses. *Id.* § 73. For further discussion of the different types of common rights, see 6 HALSBURY'S LAWS OF ENGLAND ¶¶ 547-586 (4th ed. 1974).

63. 6 HALSBURY'S LAWS OF ENGLAND ¶ 582 (4th ed. 1974).

64. See *id.* Cf. *supra* § 5.1.B (discussing the development of the *prima facie* theory).

65. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842).

66. See *McCready v. Virginia*, 94 U.S. 391, 394-96, *aff'g* *McCready v. Commonwealth*, 68 Va. (27 Gratt.) 985 (1876).

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

68. See 1 R. MINOR, *supra* note 25, § 72; see also *supra* note 62.

69. Similar restrictions also appeared in Virginia's land system, but applied to waste and unappropriated lands being settled by private parties, and not common lands. See generally *infra* chapter 8 (discussing private land distribution in Virginia).

70. ROYAL REPORT, *supra* note 2, at 151, 169. No detail of management appeared to be too insignificant for the attention of the commoners. See *id.* at 160. Even customs concerning the lord's rights and interests in common lands were regulated. For instance, records of the parish of Bampton in the Bush, Oxfordshire, dated 1593, note that "[t]he 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.⁷¹ 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.⁷² 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.⁷³ 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 commoners.⁷⁴ 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 draw his net 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 records).

71. See W. HOSKINS & L. STAMP, *supra* note 2, at 34-36; ROYAL REPORT, *supra* note 2, at 149-52.

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

73. 6 HALSBURY'S LAWS OF ENGLAND ¶ 504 (4th ed. 1974); see also W. HOSKINS & L. STAMP, *supra* note 2, at 4; F. POLLOCK, *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 commonable lands. Common lands would be lands subject to common rights at all times of the year. These lands would never be subject to severalty rights or exclusive use, not even for part of the year. Commonable lands would include lands that are held in severalty for part of a year, but that become commonable after the severalty crop is removed. These lands thus 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, 517-519 (4th ed. 1974); ROYAL REPORT, *supra* note 2, at 23.

74. See 1 R. MINOR, *supra* note 25, §§ 70, 92, 96. The distinction between common rights and easements can have important legal consequences. The right of use 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. 2 AMERICAN LAW OF PROPERTY §§ 8.66-69 (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).

land as an estate held in common.⁷⁵ Finally, in contrast to most other property interests, common rights could exist regardless of the private landowner's intent.⁷⁶

Further, under English law common rights could arise in a variety of ways. Sometimes, for example, the lord of a manor voluntarily gave his tenants common rights, or the tenants and the lord agreed on common rights. In other instances parts of waste lands that never were inclosed eventually were used in common.⁷⁷ Management of common lands also varied, usually being placed in the lord of the manor who governed conflicts through his courts. As the manor system disintegrated and the manor courts disappeared, management sometimes occurred in village meetings.⁷⁸ Eventually Parliament assumed full control over the management of common lands and rights, adopting numerous statutes regulating the exercise of common rights.⁷⁹

Along with the power to manage the commons came the power to alter the nature and scope of common rights. As history demonstrates, common rights were not immutable, for the party managing the commons often changed the right of use to accommodate the fluctuating needs of a particular manor or village. Sometimes the change was only partial, involving a more restrictive definition of the type of use or class of user.⁸⁰ Other times, however, the change totally extinguished the common rights. This process of extinguish-

75. See generally 1 R. MINOR, *supra* note 25, §§ 70-74 (discussing common rights); C. MOYNHAN, *supra* note 25, at 216-35 (discussing concurrent estates). Roman law appears to have affected the nature of common rights. Under Roman law 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 WARMELO, *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 praedial servitude. See *id.* §§ 270-272. If, however, the servitude was granted to an individual independently of a dominant or servient tenement, then the servitude was personal. *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. 1812). A usufruct originally 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.* 2.4.2; W. MOREY, *OUTLINES OF ROMAN LAW* 292 (2d ed. 1914). This characteristic of the usufruct suggests that any public interests developing from it also could be extinguished once the burdened property ceased to exist or perhaps even when the burdened property underwent a radical change in nature.

Servitudes could be created by contract, by testamentary transfer, or by judicial decree. *Id.* at 291-93. Under early Roman law, servitudes could not be created by informal agreement or prescription. See P. VAN WARMELO, *supra*, §§ 286-293. Eventually, however, these methods were recognized. See *id.* §§ 291-292. Roman servitudes therefore differed in one important respect from the English common right. 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.

76. See W. HOSKINS & L. STAMP, *supra* note 2, at 5-6.

77. ROYAL REPORT, *supra* note 2, at 6, 44-45.

78. *Id.* at 63-66, 159-66, 178. For a discussion of the factors contributing to the decay of the manor system, see *id.* at 63-65. Although a few manorial courts still are held in England, most ceased to exist after 1922. *Id.* at 65.

79. See *id.* at 159-66; see also *supra* note 47.

80. See *supra* notes 21-24, 57 and accompanying text.

ment, better known under English law as "inclosure," literally involved building fences around common lands to destroy common rights. The result was a redistribution of property rights in the land.⁸¹ Throughout the seventeenth century, inclosure usually occurred by private agreement executed among the lord of the manor and his tenants and frequently was confirmed by the chancery courts. Later, as Parliament assumed greater control over commons, inclosure began to be effected by private acts or general legislation. By the mid-1800's only Parliament had the power to abolish common rights.⁸² Parliament's exclusive control of common rights evidences the importance of the commons concept in the English legal system. The concept also was destined to play a significant role in America.

§ 6.2. Common Rights and Uses in Colonial Virginia.

By the time the commons concept was transplanted from England to colonial America, it had become an accepted and important part of the English economic and legal structure. Besides providing the general populace with a type of interest in agricultural lands, the concept also played a key role in maintaining the economic well-being of England. But despite its significance in England, the concept never achieved as much prominence or importance in America. Several factors contributed to the more subdued role played by the concept in Virginia and other colonies.

One factor concerns the development of property law in England. By the time of the first settlements in colonial America, the English tenure system had disintegrated.⁸³ The only form of tenure still existing at that point was free and common socage, which usually required a monetary payment instead of the performance of some act or duty.⁸⁴ Because the tenure system had helped to shape the commons concept, it is not surprising that the concept would lose some of its appeal when the tenure system disappeared.

A second factor contributing to the more restrained use of the commons concept concerns the plentiful supply of resources available to early settlers.

81. ROYAL REPORT, *supra* note 2, at 173.

82. *See id.* at 161-66. Although Parliament authorized some parties to make decisions concerning the inclosure of commons, it generally retained control over the inclosure 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 colonial governors were reluctant to grant manorial privileges which would reduce their political and judicial power. Further, the New England environment was better suited to mercantile rather than agricultural industries. 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 3-43, 129-61 (1932). For cases involving the two principal New York manors, Van Rensselaer and Livingston, see Van Rensselaer v. Radcliff, 10 Wend. 639 (Sup. Ct. N.Y. 1833); Livingston v. Broeck, 16 Johns. 14 (Sup. Ct. N.Y. 1819); Livingston v. Potts, 16 Johns. 28 (Sup. Ct. N.Y. 1819); Watts v. Coffin, 11 Johns. 495 (Sup. Ct. N.Y. 1814).

84. *See generally* C. MOYNIHAN, *supra* note 25, at 22-27 (discussing the disintegration of the tenure system); 1 F. POLLOCK & F. MATLAND, *supra* note 15, at 291-96 (discussing the tenure of socage).

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 behould; and at the head of the Ryvar ... ar ... mountaynes, that prommyseth Infynyt Treasure."⁸⁵

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.⁸⁶ 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.⁸⁷ These Letters Patent, which comprised the colony's first charter, granted the patentees "all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marshes, waters, fishings, commodities, and hereditaments"⁸⁸ to be held in "free and common socage."⁸⁹ The charter, which only

85. Letter from William Brewster to the Earl of Salisbury, reprinted in A. BROWN, *supra* note 31, at 33.

86. *See generally infra* chapter 8 (discussing the private land system in Virginia's colonial and early statehood eras). 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." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION 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).

87. Letters Patent, Apr. 10, 1606, reprinted in 1 HENING'S STAT., *supra* note 3, at 57-75 (1823).

88. *Id.* at 59.

89. *Id.* at 66.

briefly referred to land grants, provided that the King would grant "lands, tenements and hereditaments" to other individuals nominated by the patentees.⁹⁰ Apparently, though, these land grant powers were not exercised, for no evidence of grants to private parties has been discovered.⁹¹ 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 neer to the common laws of England, and the equity thereof as may be," and that "all the lands, tenements, and hereditaments to be had and enjoyed by any of our subjects ... [within the colony] shall be had and inherited and enjoyed, according as in the like estates they be had and enjoyed by the lawes within this realme of England."⁹²

On May 23, 1609, the Crown issued a second charter which explained and 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 preeminences.⁹³ 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.⁹⁴ 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."⁹⁵ Perhaps most significantly, the charter committed the colony's government to the Company.⁹⁶

After the second charter was issued, the Company published a pamphlet entitled "Nova Britannia" which explained various aspects of its operation in the New World. More specifically, the Company defined an "adventurer" as a person who adventured his money in the colony and a "planter" as a person who personally came to the colony to live. Additionally, the pamphlet provided that the adventurers were to hold their joint stock for seven years from the second charter's issuance and that the planters were to apply the fruits of their labors for the joint stock's benefit for the same seven-year period. At the end of seven years, the lands were to be divided by a commission "according to each mans seuerall adventure."⁹⁷

During the first few years of the Jamestown settlement, the settlers faced formidable obstacles. Disease and fights with the Indians seriously depleted

90. *Id.* at 65-66.

91. See A. EMBREY, *supra* note 31, at 220.

92. Articles, Instructions, and Orders, Nov. 20, 1606, reprinted in 1 HENING'S STAT., *supra* note 3, at 67, 68-69 (1823).

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 P. FORCE, TRACTS AND OTHER PAPERS, No. 6, at 1, 24 (1947); see also *id.* at 23-24. *Cf. infra* note 114 (discussing the amount of land to be granted under the 1618 Great Charter).

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.⁹⁸ 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 "set[ting] up the Comon Garden" and providing the settlement with a "standing revenue."⁹⁹

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.¹⁰⁰ 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.¹⁰¹ 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."¹⁰²

From 1616 through the early 1620's, 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.¹⁰³ 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.'"¹⁰⁴

On November 18, 1618, the London Company issued a document entitled "Instructions to Governor Yeardley."¹⁰⁵ 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

98. A. BROWN, *supra* note 31, at 150.

99. VIRGINIA COMPANY OF LONDON, 1 RECORDS OF THE VIRGINIA COMPANY OF LONDON 267 (reprinted from the manuscript in the Library of Congress, 1910).

100. A. EMBREY, *supra* note 31, at 221 (describing the report).

101. See *id.* See generally A. BROWN, *supra* note 31, at 225-27.

102. C. CAMPBELL, HISTORY OF THE COLONY AND ANCIENT DOMINION OF VIRGINIA 116 (1860).

103. A. BROWN, *supra* note 31, at 225-27, 253-54, 323-24.

104. *Id.* at 253 (quoting from a report made before a Virginia Company court in 1620).

105. Instructions to Governor Yeardley, 1618, reprinted in 2 VA. MAG. HIST. & BIOGRAPHY 154-65 (1968).

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 Kiccotan.¹⁰⁶ Within each of these boroughs, public lands were to be set aside for, among other purposes, "a further ease to the inhabitants of all taxes and contributions to support and for the Entertainment of the particular magistrates and officers."¹⁰⁷

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 "freed grounds [worked] by the common Labour of the people sent thither at the Company's Charges and of the Lands formerly conquered or purchased."¹⁰⁸ 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."¹⁰⁹ 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.¹¹⁰

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 maintainance 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."¹¹¹ Additionally, the borough of Henrico was to set aside ten thousand acres for the establishment of a college.¹¹² 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.¹¹³ 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

106. *Id.* at 156.

107. *Id.* at 158.

108. *Id.* at 155.

109. *Id.* at 155-56.

110. *Id.* at 156.

111. *Id.* at 158.

112. *Id.* at 158-59.

113. *Id.* at 157, 161-62.

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.¹¹⁴

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.¹¹⁵ 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.¹¹⁶ According to historian Alexander Brown, after the demise of the London Company, "the public lands passed to the crown and were afterwards parceled out and granted by patents as other lands."¹¹⁷ 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 1625.¹¹⁸ 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 be it further enacted, by the authority aforesaid, That the freeholders and inhabitants of the said town, so soon as they have built upon and saved their lots, according to the conditions of their deeds of conveyance, shall then be entitled to, and have and enjoy, all the rights, privileges and immunities, granted to or enjoyed by the freeholders and inhabitants of other towns erected by act of assembly in this colony.*¹¹⁹

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 residing and investing in the Virginia colony before it was settled. Subsequent planters and adventurers, who arrived after 1616 and benefited from the earlier settlers' efforts, received only a 50-acre dividend. *Id.* at 156-57, 163-64.

115. Embrey defines common lands as including governor's lands and glebe lands. See A. EMBREY, *supra* note 31, at 16.

116. A. Brown, *supra* note 31, at 601-03. 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 616-32.

117. *Id.* at 627.

118. See *infra* chapter 6 appendix.

119. E.g., Act of Nov., 1762, ch. 20, 7 HENING'S STAT., *supra* note 3, at 597, 597-98 (1820) ("An act for establishing the town of Charlottesville, in the County of Albemarle"); see also Act of Nov., 1762, ch. 22, *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., 1769, 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 claimers to unpatented lands"¹²⁰ 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*....¹²¹

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 allowance for the charge and risk they have incurred, and that the property so acquired should be secured to them."¹²²

Thus, a comparison of the language in 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

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, those 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.¹²⁴ Eventually, however, as private 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 restrained 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. Juergensmeyer & Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 NAT. RESOURCES J. 361, 368 (1974); see also *supra* notes 87-102 and accompanying text.

towns at Rocky Ridge, Gloucester court-house and Layton's warehouse"); Act of Oct., 1778, ch. 22, 9 *id.* at 555 (1821) ("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 Boonsborough, 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)).

120. Act of May, 1779, ch. 12, 10 *id.* at 35 (1822).

121. *Id.* at 39 (emphasis added).

122. *Id.* at 38-39.

immigrants from the Old World to replace 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,¹²⁵ 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 as common to all the good people thereof, shall be, and the same are hereby excepted out of [the 1779 land act].¹²⁶

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."¹²⁷ 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.¹²⁸ Because this omission would permit "a few individuals" to "monopolize" benefits "formerly derived to the publick," the General Assembly enacted the 1780 statute.¹²⁹

As the Act's preamble indicates, the General Assembly enacted the statute to clarify the effect of a prior land grant act on common lands and rights.¹³⁰ Enacted in 1779, this earlier legislation established a land grant office and

provided a procedure for private appropriation of waste and unappropriated lands.¹³¹ 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 fishery 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 "accustomed privilege of fishing."¹³²

The problem of private appropriation of the shore created by the 1779 Act may have been exacerbated by a reference in the records of the 1679 session of the Colonial Assembly to the rights of private waterfront landowners. The reference appeared in response to a complaint by a colonist, Robert Liny, who asserted that third parties 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 vertue of his pattent extends into the rivers or creekes soe farre as low water marke, and it is a priviledge granted to him in and by his pattent, and that therefore noe person ought to come and fish there above low water marke or hale their sceanes on shoare (without leave first obtained) under the hazard of committing a trespassse, for which he is sueable by law.*¹³³

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.¹³⁴ The Virginia Supreme Court has long

131. Act of May, 1779, ch. 13, 10 HENING'S STAT., *supra* note 3, at 50. The Land Office Act allowed private parties to purchase waste and unappropriated land at 40 pounds per 100 acres. Upon payment of the consideration fee, the Auditor's Office issued to the purchaser a warrant stating the acreage purchased. The warrant authorized the county surveyor to locate and survey a tract of waste and unappropriated land. Once completed, the survey and warrant were returned to the Land Office where, if after six months no caveat had been entered against the warrant, the purchaser received a grant. See generally *infra* §§ 8.3-8.5 (discussing the 1779 land act). Legislation eliminated the land warrant system in 1952, prohibiting the issuance of warrants after July 1, 1952. See Act of Mar. 5, 1952, ch. 185, 1952 Va. Acts 208 (repealed, revised, and recodified in 1970). Since 1952, waste and unappropriated land can be sold only in proceedings in the circuit or corporation courts of the county where the land is located. See *id.*; see also VA. CODE § 41.1-16 (1986). For a judicial description of the land grant procedure, see *Miller v. Commonwealth*, 159 Va. 924, 166 S.E. 557 (1932), and *Powell v. Field*, 155 Va. 612, 155 S.E. 819 (1930).

132. 10 HENING'S STAT., *supra* note 3, at 227. The original version of the 1780 Act referred only to the privilege of fishing, thus suggesting that fishing was the only valid common use. Later versions, however, expressly mentioned hunting and fowling as well. See, e.g., VA. CODE ch. 62, § 1 (1849); see also *Garrison v. Hall*, 75 Va. 150, 163-64 (1881). For a more thorough discussion of the 1780 Act, see *infra* chapter 9.

133. 2 HENING'S STAT., *supra* note 3, at 456 (1823).

134. This approach would have been contrary to the majority position, which presumed that grants of land abutting tidal waters extended only to the high water mark. See *Miller v. Commonwealth*, 159 Va. 924, 929, 931, 166 S.E. 557, 561, 562 (1932). See generally 1 H.

125. See generally *infra* Part IV.

126. Act of May, 1780, ch. 2, 10 HENING'S STAT., *supra* note 3, at 226, 227.

127. *Id.* at 227.

128. *Id.* at 226 (quoting the title of the earlier legislation).

129. *Id.* at 227.

130. *Accord Garrison v. Hall*, 75 Va. 150 (1881).

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 Passed in 1888 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 §§ 36-61 (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, 1779, ch. 13, 10 HENNING'S STAT., *supra* note 3, at 50, 52. Thus, if *Liny* had general applicability, it increased the 1779 Act's infringement on public interests.

135. Compare *Garrison v. Hall*, 75 Va. 150 (1881), *French v. Bankhead*, 52 Va. (11 Gratt.) 136 (1854), and *Commonwealth v. Garner*, 44 Va. (3 Gratt.) 655 (1846) (1st ed. 1847) (high water mark), with *Steelman v. Field*, 142 Va. 383, 128 S.E. 558 (1925), *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875 (1904), and *Waverly Water-Front & Improvement Co. v. White*, 97 Va. 176, 33 S.E. 534 (1899) (low water mark). For further discussion of the *Liny* order, see *infra* § 7.2.

136. See VA. CODE § 62.1-2 (1987). For further discussion of the extent of private ownership rights in waterfront property see *infra* chapters 11 & 19.

137. Act of Feb. 16, 1819, ch. 28, 1818-1819 Va. Acts 40 (codified at VA. CODE ch. 87, § 1 (1819)).

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.

139. Act of Feb. 24, 1888, ch. 219, 1887-1888 Va. Acts 273.

and shall be subject to the right of the people to "fish, fowl, or hunt."¹⁴⁰ The legislature apparently passed the Act to clarify the status of the public interest in marshes and meadowlands on the Eastern Shore of Virginia. An 1873 statute had modified the scope of the 1780 commons act to protect "[a]ll the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special grant or compact according to law."¹⁴¹

Although there is disagreement over whether the phrase "which have been used as a common" found in the 1780, 1819, and 1888 Acts represents a legislative recognition that all such lands have in fact been so used, or whether it represents a qualification of the kinds of lands reserved by the legislation,¹⁴² the Acts provide further evidence that common rights exist. Furthermore, this evidence appears to become stronger over time. The 1888 Act, for instance, seems to provide greater protection to the common areas falling within its scope than the 1780 legislation.¹⁴³ Whereas the 1780 Act arguably reserves only a public right to use certain lands owned by private parties, the 1888 Act clearly reserves all relevant lands from being granted. Further, unlike the 1873 version of the 1780 legislation, the 1888 Act does not contain a phrase limiting the protected land to that "not conveyed by special grant or compact according to law," thus suggesting that, at a minimum, the legislature expressly would have to repeal or amend the 1888 Act to convey the Eastern Shore's common marshlands.¹⁴⁴

Since 1780, the General Assembly has, on numerous occasions, altered the protection accorded common rights under the 1780 Act, usually expanding that protection. In 1802, for example, the legislature extended the common lands exemption to the "banks, shores, and beds of the rivers and creeks in the western parts" of the state.¹⁴⁵ The only exceptions to this trend occurred in 1866 and 1867, when the General Assembly enacted statutes repealing the common lands protection first codified in 1780 and authorizing the sale of those previously protected lands.¹⁴⁶ It was not until 1873 that the common lands protection was fully reinstated, with some substantial modifications. In that year the General Assembly passed an act providing:

All the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of this commonwealth, and not conveyed by special

140. *Id.* (present version codified at VA. CODE § 41.1-4 (1986)).

141. Act of Apr. 1, 1873, ch. 333, 1872-1873 Va. Acts 310. The 1873 Act repealed 1866 legislation authorizing the sale of common lands and thus reinstated, in modified form, the common lands reservation of the 1780 Act. *CF. infra* note 146 and accompanying text (discussing the Reconstruction legislation). For further discussion of the 1873 and 1888 Acts, see *infra* §§ 14.1.B, 14.4.

142. See generally *infra* §§ 9.2.C, 19.1.A.3.

143. See generally *infra* chapter 9 & § 14.4.

144. Compare Act of Apr. 1, 1873, ch. 333, 1872-1873 Va. Acts 310, with Act of Feb. 24, 1888, ch. 219, 1887-1888 Va. Acts 273.

145. Act of Jan. 15, 1802, ch. 7, preamble, 2 S. SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA 317 (Richmond 1835). For further discussion of the 1802 Act, see *infra* § 10.2.

146. See Act of Feb. 28, 1866, ch. 44, 1865-1866 Va. Acts 160; Act of Mar. 20, 1867, ch. 34, 1866-1867 Va. Acts 804. For further discussion of the Reconstruction legislation, see *infra* chapter 13.

grant or compact according to law, shall continue and remain the property of the commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking and catching oysters and other shell fish, subject to the reservations and restrictions hereinafter imposed.¹⁴⁷

As the above language indicates, instead of only reserving lands "which have been used as a common," the 1873 Act reserved identified lands regardless of such use, stating that those lands "shall continue and remain the property" of Virginia.¹⁴⁸ The change in language removed the uncertainty concerning the meaning of the "use as a common" clause, entitling the public to exercise common rights on identified lands even where the lands were not previously used as a common.¹⁴⁹

As the brief introduction to the commons legislation should suggest, the legislature's dedication to the concept of commons has been steadfast and persistent for almost two hundred years. Except for the Reconstruction period, the General Assembly has affirmatively protected the common rights of Virginia's people in valuable coastal lands and waters. But, despite the strong legislative commitment, numerous problems of interpretation have been raised by the commons legislation. In addition to the problems created by modifications in wording, the legislation also fails to define clearly the relationship between public and private interests in coastal resources. After a few conclusory remarks on the two key common law doctrines protecting public rights, the remaining portions of this book will address that relationship.

§ 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-

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 1780 Acts reveals some significant revisions, including: (1) the deletion of the phrase "unappropriated lands" and the use of the phrase "[a]ll the beds of the bays, rivers and creeks"; (2) the reservation of the "shores of the sea," instead of the "sea 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 (1918) (Sims, 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 oysters 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, 1780, ch. 2, 10 HENING'S STAT., *supra* note 3, at 226. For further discussion of the 1873 Act, see *infra* § 14.1.B.

148. *Accord* *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E.2d 866 (1982).

149. See *supra* note 142 and accompanying text. For further discussion of the meaning of the "use as a common" clause, see *infra* §§ 9.2.C, 14.1.B.5.

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 shoreland 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 those common lands included woods, meadows, and fields used for pasturage, 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.¹⁵⁰ The Virginia judiciary also provided protection for the public interest, primarily by interpreting the policy of the commons legislation broadly.¹⁵¹ 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,¹⁵² 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

150. See *Garrison v. Hall*, 75 Va. 150 (1881).

151. See *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E.2d 866 (1982).

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.¹⁵³

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.¹⁵⁴ 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,¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷

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.¹⁵⁸

153. Such change is demonstrated by the variety of common rights that evolved as people's needs became more diversified and defined.

154. 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 appears to define the public's common uses narrowly. For further discussion of the commons legislation, see *infra* Part IV.

155. Other states appear to have made a similar change in focus. See, e.g., S.C. CODE ANN. § 49-1-10 (Law. Co-op. 1987) (navigable streams as common highways); *id.* § 50-17-40 (1977) (certain coastal waters and beds as common to all the people of the state).

156. See, e.g., *Miller v. Commonwealth*, 159 Va. 924, 166 S.E. 557 (1932). For a discussion of Virginia decisions interpreting the commons legislation, see *infra* chapters 9 & 19.

157. See generally *infra* § 19.3 (discussing key judicial interpretations).

158. See generally *infra* §§ 19.1.B, 19.2.B (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. Indeed, 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.¹⁵⁹

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.¹⁶⁰ 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

159. The law of custom developed in feudal England long before a formal legal system provided legal recognition to certain usages exercised by the people. The basic premise of the doctrine of customary rights was that 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* §§ 20, 21, 25, 27, 30-31 (1881); 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. 98 (1905); *Department of Natural Resources v. Mayor & Council of Ocean City*, 274 Md. 1, 332 A.2d 630 (1975); *Ackerman v. Shelp*, 8 N.J.L. 125 (1825); *Gillies v. Orienta Beach Club*, 159 Misc. 875, 289 N.Y.S. 733 (Sup. Ct. 1935); *Harris v. Carson*, 34 Va. (7 Leigh) 632, 639 (1836). 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. SEA GRANT L. & POLICY J. 161 (1978); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970).

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.

160. For a discussion of the timing implications of Virginia's commons and boundary legislation, see *infra* § 19.2.B.

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.¹⁶¹ 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 theory resulted in few, if any, benefits for the English populace.¹⁶² In an attempt to justify the Crown's reassertion of control over shorelands, Digges, Hale, and others borrowed from ancient Roman law concepts. Eventually, as the American courts became involved with the theory, the reliance on 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 4 AMERICAN LAW OF PROPERTY §§ 17.4-.36 (A. Casner ed. 1952). 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 355, 358 (1939); *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848). See generally 2 AMERICAN LAW OF PROPERTY §§ 9.24-.40 (A. Casner ed. 1952). Whether the party took his interest for value also may be an important consideration. See RESTATEMENT OF PROPERTY § 539 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.B.

private and a public figure, the Roman law origins convinced the American judiciary to interpret the doctrine as a normative concept.

As an expression of sovereign responsibility, the public trust doctrine could be applied to a wide range of resources and interests. It, for example, could be used to protect public interests, like navigation, so intrinsically important to every citizen that private control would undermine the democratic nature of our government. Or the doctrine could be applied to resources, like water-courses, that are incapable of being corporeally possessed, except perhaps in a transient sense, and resources, like wild animals, that are not normally possessed by an individual but that are capable of being controlled. Finally, resources that should be public in nature, either because of their unique characteristics (for example, natural wonders) or because they are incapable of ordinary use and occupation (for example, the shore) could be protected through the doctrine.¹⁶³

In contrast, under both English and Virginia law, the various kinds of common rights have been defined in specific terms. Those terms appear to prevent the commons concept from responding quickly, if at all, to changes in societal needs. If, for example, the demand for aesthetically pleasing open spaces or for recreational areas drastically increases while the available supply of such lands substantially decreases, the public would not have the right to demand that new common lands be created for those purposes. Nor could existing common lands be subject to such purposes, at least not under Virginia's present laws. But under the public trust doctrine, setting aside suitable lands arguably could be justified under several of the categories listed above.¹⁶⁴

Since the commons concept was part of the principles used by Digges and Hale to develop the *prima facie* theory, or the public trust doctrine as it is now known, it seems reasonable to conclude that a link exists between the two. But, despite the existence of that link, the difference in perspective is unmistakable today. Whereas the trust doctrine has become a theory of sovereign responsibility, the commons concept has become part of the internal structure of property law. Both perspectives serve valuable functions. The commons concept, for instance, tends to minimize the state's role and to interfere less with private rights.¹⁶⁵ Also, to the extent that the concept is interpreted as superimposing common rights on privately owned lands,¹⁶⁶ the concept reduces the state's costs of maintaining and regulating burdened land.¹⁶⁷ The public trust doctrine, however, has greater flexibility and thus

163. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 484-85 (1970).

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 *infra* § 19.1.B.2.

167. Accord ROYAL REPORT, *supra* note 2, at 106-08 (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,¹⁶⁸ 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.*].

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.

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

In this declaration the Governor and the Grand Assembly sought to bar the Virginia Company from returning to power in the colony. The declaration denounces the Company's condemnation of the King's grantees as "occupiers of our land that is to say of the common land of us the said Treasurer and Company." *Id.* at 232. The declaration later states: "We [the Governor and Grand Assembly] cannot ... give up and resign the lands which we had granted and hold from the king." *Id.* at 233.

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

"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 pattent extends into the rivers or creekes soe farre as low water marke"

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

"An act for Confirmation of Lands."

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

Act of Oct., 1705, ch. 21, 3 *Hening's Stat.*, *supra*, at 304, 306-07.

"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.

Act of Oct., 1705, ch. 43, 3 *Hening's Stat.*, *supra*, at 419, 427.

"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 Feofees of the Town of York; and for settling the same, for a Common, for the use of the Inhabitants of the said Town."

This Act 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 shoar." *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 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.

Act of Mar., 1761, ch. 21, 7 *Hening's Stat.*, *supra*, at 424, 427-28 (1820).

"An Act for further enlarging the town of Dumfries"

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

Act of Feb., 1772, ch. 52, 8 *Hening's Stat.*, *supra*, at 613, 615 (1821).

"An act to encourage the further settlement of the town of Alexandria"

This Act forever vests the wharf at Point West in the trustees of Alexandria, who are directed to operate it "in such manner, as they ... shall think proper." The Act also discharges the public from any future expense associated with the wharf.

Act of May, 1779, ch. 12, 10 *Hening's Stat.*, *supra*, at 35, 39 (1822).

"An Act for adjusting and settling the titles of claimers to unpatented lands under the present and former government"

This Act grants to each settlement in the western part of the colony 640 acres of common land adjacent to the settlement until each settlement can make a representation of their particular case to the General Assembly.

Act of Oct., 1779, ch. 4, 10 *Hening's Stat.*, *supra*, at 134, 134-35 (1822).

"An act for establishing the town of Boonsborough, in the County of Kentucky."

This Act establishes the town of Boonsborough and ratifies the representation that "six hundred and forty acres of land allowed by law to every such township for a common" have been laid off in an area adjoining the town.

Act of May, 1780, ch. 2, 10 *Hening's Stat.*, *supra*, at 226, 227 (1822).

"An act to secure to the publick certain lands heretofore held as common."

This Act excludes from any future grant unappropriated lands on the Chesapeake Bay, on the sea shore, or on the shores of rivers and creeks in the eastern part of the state which previously had been held "as common."

Act of May, 1780, ch. 19, 10 *Hening's Stat.*, *supra*, at 279, 285 (1822).

"An act for emitting and funding a sum of money for supplying the present urgent necessities of this commonwealth."

This Act specifies that, in the event efforts to collect taxes to finance the war prove unproductive, the capitol and palace in Williamsburg and the "publick lands" in James City County and on the Eastern Shore are to be sold.

Act of May, 1782, ch. 12, 11 *Hening's Stat.*, *supra*, at 29, 29-30.

"An act to establish a town at the courthouse in the county of Buckingham."

Buckingham Courthouse is established with the provision that four of

the lots in the center of town "shall be, and they are hereby reserved for the public use of the said county." It further provides that 100 acres adjoining the town are vested in the trustees "to 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."

Act of May, 1784, ch. 30, 11 *Hening's Stat., supra*, at 399.

"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.

Act of Oct., 1785, ch. 39, 12 *Hening's Stat., supra*, at 97.

"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.

Act of Oct., 1785, ch. 92, 12 *Hening's Stat., supra*, at 207.

"An act to repeal the act of assembly for establishing the town of Walkerton."

Land previously directed to be held by the town's trustees as a common is revested in the legal representatives of the person originally granting the land to the town.

Act of Oct., 1785, ch. 94, 12 *Hening's Stat., supra*, at 208.

"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.

Act of Oct., 1785, ch. 102, 12 *Hening's Stat., supra*, at 218.

"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."

Act of Oct., 1785, ch. 110, 12 *Hening's Stat., supra*, at 227.

"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.

Act of Jan. 2, 1788, ch. 15, 12 *Hening's Stat., supra*, at 495.

"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.

Act of Dec. 20, 1790, ch. 46, 13 *Hening's Stat., supra*, at 173.

"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 Commonwealth.'"

The Act directs that public lands are not to be sold by the sheriffs except when the proceeds of the sales equal the debts incurred by the public.

Act, circa 1748-1749, *The Laws of Virginia: Supplement to Hening's Statutes at Large* 443, 444 (1971) [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.

Act, circa 1748-1749, *Hening's Supp., supra*, at 447.

"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.

CHAPTER 8

THE LAND GRANT ACT OF 1779 AND OTHER LEGISLATION AFFECTING DISTRIBUTION OF PRIVATE INTERESTS IN LAND

§ 8.1. The Private Land System During the Colonial Period: Some Introductory Remarks.

A system for distributing land developed early in colonial Virginia. When King James I issued the charters of 1606 and 1609, granting the power to establish the Virginia colony to a group of investors eventually known as the London Company,¹ he authorized the distribution of land to private parties upon nomination of the patentees and approval of the King.² It was not until 1616, though, that the patentees actually exercised their power to distribute land to private parties.³ Up until that point in time, they preferred instead to use a communal-type arrangement, holding land in the colony for the general benefit and common use of the colonists.⁴ The patentees apparently feared that another system of landholding would not provide the London Company with sufficient funds to cover the costs of establishing the colony. As explained in one of the pamphlets published by the Company to clarify its land distribution policies, any party desiring to purchase land in the Virginia colony could do so by first purchasing stock in the Company and holding it for a seven-year period, during which time the stockholder would share in the Company's expenses and profits.⁵ At the end of the period, the Company would distribute land to the appropriate parties.⁶

Although the Company waited until 1616 (the end of the first seven-year period) to carry out such a distribution,⁷ it apparently realized that its communal system of landholding was stymieing development of the colony.⁸

1. See Charter of 1606, 1 W. HENING, *THE STATUTES AT LARGE* 57-75 (1823) [hereinafter cited as HENING'S STAT.]; Charter of 1609, *id.* at 80-98.

2. See Charter of 1606, 1 HENING'S STAT. *supra* note 1, at 66; Charter of 1609, *id.* at 89.

3. See A. EMBREY, *WATERS OF THE STATE* 220 (1931).

4. See *Nova Britannia* (1609), *reprinted in* 1 P. FORCE, *TRACTS AND OTHER PAPERS*, No. 6, at 1, 23-24 (1947) [hereinafter paginated to P. FORCE].

5. *Id.* at 23.

6. *Id.* at 23-24. According to the pamphlet, at the end of the seven-year period, shareholders would receive land dividends at a rate of 500 acres per share. *Id.* at 24.

7. See A Brief Declaration (1616), *reprinted in part in* 2 A. BROWN, *GENESIS OF THE UNITED STATES* 774, 777 (1890) (statement of intent to distribute). The first recorded company land grant occurred in March of 1616 and was to Simon Codrington. See A. BROWN, *THE FIRST REPUBLIC IN AMERICA* 233 (1969) [hereinafter cited as FIRST REPUBLIC].

8. See W. CRAVEN, *THE VIRGINIA COMPANY OF LONDON, 1606-1624*, at 31-33 (1957). The communal approach was severely criticized by Captain John Smith in his account of the colonization of Virginia. He, for example, wrote that "when our people were fed out of the common store, and laboured jointly together, glad was he [who] could slip from his labour, or slumber over his task, he cared not how." II J. SMITH, *TRAVELS AND WORKS* 516 (Arber ed. 1910). Others, however, have praised the "communistic" experiment. One legal scholar, for instance, described Virginia in its first years as a "plantation system ... with great rigor, the colonists working in gangs under officials as overseers, eating at common tables, and living in common barracks." 1 H.

Shortly after its first distribution to private parties, the Company abandoned its original land distribution system and, with the help of the Crown, established a system favoring greater distribution to private parties. Originally set forth in the Great Charter of 1618,⁹ the new system provided for two methods of distributing land to private parties: the head right and the treasury right methods.¹⁰ Because these methods affected the nature of private interests in land for several hundred years, a brief discussion of their key characteristics and policies follows. The discussion should provide some important insights into the evolution of land law in Virginia.

A. Colonial Land Distribution.

The first method of land distribution to develop during the colonial era was the head right. After the Great Charter authorized its use, the head right quickly became the primary land distribution scheme for private parties. Under the original version of the head right system, any party who emigrated to the colony at his own expense or who paid the transportation of another to the colony acquired the right to claim fifty acres of waste and unappropriated land for each person transported.¹¹ To obtain the actual patent to a particular tract of land, the party entitled to the head right first had to present proof to the appropriate local court establishing that a specified number of persons had been imported into the colony at the party's expense. If satisfied with the proof, which usually only consisted of a statement, the court then issued a certificate of importation rights. Once that certificate was taken to the Secretary's office in the Capitol, the Secretary would issue a "head right," which authorized a county surveyor to survey and locate a tract for the holder of the right. After the survey and any other necessary papers were completed and returned to the Secretary, he then would issue a patent.¹²

OSGOOD, *THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY* 63-64 (1904); accord VA. STATE ARCHIVES, *VIRGINIA LAND OFFICE INVENTORY* vii-ix (1981) [hereinafter cited as *LAND INVENTORY*]. For a discussion of the forces leading to policy changes in the London Company, see Stephenson, *Some Inner History of the Virginia Company*, 22 WM. & MARY Q. 89 (1913-1914).

9. Instructions to Governor Yeardley, 1618, reprinted in 2 VA. MAG. HIST. & BIOGRAPHY 154-65 (1894) [hereinafter cited as *Yeardley's Instructions* and paginated to VA. MAG. HIST. & BIOGRAPHY]. Most of the Great Charter, though, dealt with establishing boroughs and setting aside public lands. *Id.* at 156-63. For a more extensive discussion of the Great Charter, see *supra* chapter 6, notes 105-15 and accompanying text.

10. Yeardley's Instructions, *supra* note 9, at 163-64. Under the Charter both the Governor and the Council of State shared the power of issuing land patents. *Id.* at 155, 163.

11. *Id.* at 164-65. See also *Miller v. Commonwealth*, 159 Va. 924, 933-34, 166 S.E. 557, 560 (1932); A. EMBREY, *supra* note 3, at 176.

12. See Act of Mar., 1661-1662, act 68, 2 HENING'S STAT., *supra* note 1, at 95; Act of Mar., 1658-1659, act 5, 1 *id.* at 518; Act of Mar., 1657-1658, act 25, 1 *id.* at 444; Act of Mar., 1642-1643, act 58, 1 *id.* at 274; Act of Mar., 1623-1624, act 13, 1 *id.* at 125; see also 1696-1697 CALENDAR OF STATE PAPERS, AMERICAN & WEST INDIES 89, 172 (London 1860-1908) [hereinafter cited as *CAL. STATE PAPERS A. & W.I.*]. For an example of a patent based on the head right, see the conveyance from Sir Francis Wyatt to Thomas Hothersall dated January 26, 1621 and recorded in 1623-1644 VIRGINIA PATENT BOOKS 1 (Va. State Archives, Microfilm Collection) [hereinafter cited as *PATENTS*]. See also F. HARRISON, *VIRGINIA LAND GRANTS* 17-18 (1925).

Patents obtained under the head right system usually contained two important conditions. First, because England still adhered to the feudal system at the time of Virginia's colonization, patentees had to pay a quit rent to satisfy their tenurial obligations.¹³ Second, patentees usually had to meet certain seating and planting requirements or risk forfeiture of their interests.¹⁴ Although the nature of these requirements varied according to the condition of the land and the needs of a particular area, "seating" basically required the patentee to build a house and keep livestock for a certain period of time, while "planting" required the patentee to cultivate a specified number of acres of land.¹⁵

Despite facing a serious challenge to its validity in the 1620's, the head right system established by the Great Charter served as the primary method of conveying land throughout the seventeenth century. After the English courts revoked the London Company's charter in 1624 and the Crown placed the colony under its direct control, the continued effectiveness of the charter's land system became unclear.¹⁶ When the King appointed Sir Francis Wyatt to

13. See, e.g., Act of Mar., 1661-1662, act 74, 2 HENING'S STAT., *supra* note 1, at 99; Act of Jan., 1639-1640, act 24, 1 *id.* at 228. The tenure of free and common socage required the tenant to pay a periodic rent or quit rent, originally one shilling for every 50 acres, instead of the military service often required in earlier days. This change to a monetary payment played a significant role in the transition from the feudal land system to a modern property system. See 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 291-95 (2d ed. 1959).

14. However, the land dividends of the ancient planters were exempt from forfeiture for failure to seat and plant. See F. HARRISON, *supra* note 12, at 44. The "ancient adventurers and planters" were those settlers who "were transported ... [to the Virginia colony] with Intent to Inhabit at their own costs and charges before the coming away of Sir Thomas Dale" (April, 1616) and who remained for three years. Yeardley's Instructions, *supra* note 9, at 156; see also M. Voorhis, *The Land Grant Policy of Virginia 1607-1774*, at 20-21 (1940) (a dissertation presented to the graduate faculty at the University of Virginia for the degree of Doctor of Philosophy) [hereinafter cited as Voorhis]. Each ancient planter and adventurer was entitled to receive a 100-acre tract of land. Yeardley's Instructions, *supra* note 9, at 156. For an example, see the patent to Henry Dawkes recorded in 1623-1644 PATENTS, *supra* note 12, at 114.

15. The colonial legislature first defined the seating and planting requirements in 1666, passing an act providing that "building an house and keeping a stock one whole yeare upon the land shall be accounted seating; and that cleering, tending and planting an acre of ground shall be accounted planting, and that either of those shalbe accounted a suffittient performance of the condition required by the pattent." Act of Oct., 1666, act 18, 2 HENING'S STAT., *supra* note 1, at 244.

The requirements seldom were enforced, causing Spotswood to characterize them as "sham" conditions. 2 *The Official Letters of Governor Spotswood* 15, reprinted in 1-2 *COLLECTIONS OF THE VIRGINIA HISTORICAL SOCIETY* (1882) [hereinafter cited as *Letters of Governor Spotswood*]. An amendment was proposed in 1705 which would have required the house to be of specified dimensions in order to qualify. This failed to pass, however, and the requirements remained the same for 47 years until 1713. Then, in that year, the colonial legislature passed an act requiring the surveyor of the patented land to certify the land as plantable, pasturable, and stoney or rocky. Under the law, standards were established to define what conduct would qualify as seating and planting. Within three years of the patent date for arable land, three of each 50 acres had to be cleared and tended or three acres of marshland had to be drained. If the acreage was barren, the patentee was required to keep three cows or six goats for every 50 acres of land. Finally, patentees of stoney land had to dig a stone quarry or mine, employing one hand for every 100 acres for a period of three years. Act of Nov., 1713, ch. 3, 4 HENING'S STAT., *supra* note 1, at 37, 39-40 (1820).

16. The London Company was dissolved in *quo warranto* proceedings in 1624. See 1 E. HAZARD, *HISTORICAL COLLECTIONS OF STATE PAPERS* 189-92 (1792-1794).

be the first Crown governor in 1624, the King failed to include specific provisions for land distribution in Wyatt's commission. The commission, however, authorized Wyatt and succeeding governors to govern "as fullye and amplye as any Governor ... resident there, at any time within the space of five years now last past, had or might perform or execute."¹⁷ Lacking any explicit guidance from the Crown, the royal governors interpreted the broad language of their commissions, as well as other statements by the Crown,¹⁸ as an implied authorization to continue to convey under the head right system.¹⁹ In 1634 the Privy Council officially ratified this practice, stating that colonists "may enjoy their estates and trades with the same freedome and privileges as they did before the recalling" of the London Company's charter.²⁰

17. *Id.* at 192; see also *infra* note 19 (discussing instructions to succeeding governors).

18. In 1625 Charles I issued a proclamation setting forth the Crown's policies toward Virginia. Under the proclamation the interests of planters and adventurers were to be preserved as they had existed under the Virginia Company's rules. The revocation of the charter "was not intended ... to take awaie or ympeach the particuler interest of anie private Planter or Adventurer, nor to alter the same otherwise than should be of Necessity for the Good of the Publique." Proclamation of 1625, reprinted in 1 E. HAZARD, *supra* note 16, at 203, 204.

19. Governor Wyatt petitioned the colonial council seeking assurances for those seated in Virginia and for future titles, but evidently did not want to assume the risk of interpreting his instructions too broadly. Prior to his departure in May, 1626, he had not issued any new land patents. See F. HARRISON, *supra* note 12, at 18-19. Governor Yeardley, who succeeded Wyatt, received equally indefinite instructions about the patenting of land. See Instructions to Yeardley, 1626, reprinted in 2 VA. MAG. HIST. & BIOGRAPHY 393, 394 (1894). Commentators appear to disagree about whether Yeardley interpreted these instructions broadly. Compare, e.g., F. HARRISON, *supra* note 12, at 20, with Voorhis, *supra* note 14, at 41-42. One commentator maintains that the fact that Yeardley signed patents demonstrates he "gave a broad interpretation to the terms of his commission." See *id.* at 41-42. Another points out that the only patents that Yeardley and the interim governors, Pott and West, signed were to planters who had been present in the colony prior to the dissolution of the Virginia Company. F. HARRISON, *supra* note 12, at 21-22. Both, however, agree that after Governor Harvey arrived he was signing patents for any patentee who could qualify under the previous customs. Compare Voorhis, *supra* note 14, at 42-43, with F. HARRISON, *supra* note 12, at 23. What is clear, then, is that land patents were being issued under instructions which neither specifically authorized nor prohibited their issuance and that they were being issued according to the policies of the Virginia Company existing prior to the revocation of its charter. See generally Robertson, *An Account of the Manner of Taking Up and Patenting of Land in Her Majesty's Colony and Dominion of Virginia with Reasons Humbly Offered for the Continuance Thereof*, 3 WM. & MARY Q. 2d 137 (1923) [hereinafter cited as Robertson].

20. 1 ACTS OF PRIVY COUNCIL, COLONIAL SERIES, 1613-1680, at 203-04 (Liechtenstein 1966) [hereinafter cited as ACTS OF PRIVY COUNCIL]. The Privy Council's statement was made in response to two petitions sent by the colonial government. See JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 55 (1619-1659); 1675-1676 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 78. The statement actually referred to the recalling of patents held by settlers when the Company existed. In its response, the Privy Council stated: "We haue thought fit hereby to certifie you that his Majesty of his royal favor, and for the better encouragement of the planters there, doth let you knowe that it is not intended that the interestes which men had settled when you were a Corporation should be impeached; that for the present they may enjoy their estates and trades with the same freedome and privileges as they did before the recalling of their Patentees." 1 ACTS OF PRIVY COUNCIL, *supra*, at 203-04. As late as 1676, the Crown reaffirmed the validity of the head right system by issuing a new charter providing that, "for the incouragement of such our subjects as shall from time to time go to dwell in the said plantation, there shall be assigned out of lands not already appropriated to every person so comeing to dwell, fifty acres of land, according

By the late 1600's, the head right system had evolved into a complicated and often abused method of financing the colonization of Virginia. Because fifty acres of land usually did not allow adventurers to recoup their costs, they began to develop various devices for circumventing the fifty-acre limitation. One early method, which resulted in the development of the plantation system, involved the pooling of land dividends by a group of adventurers. By pooling their dividends, the adventurers could obtain a patent for a large tract of land. The group would hold the land in common, but then would subdivide the tract into smaller plantations among the various members.²¹ A second method involved the purchasing of land dividends. Under this method adventurers took advantage of the fact that head rights were transferable. They would buy up the head rights of less enterprising settlers and then use those rights to acquire one large, continuous tract of land.²²

As both methods of circumvention became increasingly common, settlers began to ignore the planting and seating requirements. Because of the size of the tracts being acquired, the requirements eventually became too inconvenient to meet.²³ By the end of the seventeenth century, most of the patented

as hath been ... allowed since the first plantation" Charter of 1676, 2 HENING'S STAT., *supra* note 1, at 532. This reaffirmance apparently was necessitated by the change in government that occurred during England's Commonwealth period. See 1 *id.* at 358-59. Following the Restoration, a dispute arose over whether the governor or the Assembly had the power to issue land grants. See JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 37 (1659-1693) (entry for Oct. 29, 1666). In 1675 Virginia petitioned for a charter of incorporation to allow it to buy out the Arlington and Northern Neck charters. See 2 J. BURK, HISTORY OF VIRGINIA xlv-xlvi (1804-1816); 1 ACTS OF PRIVY COUNCIL, *supra*, at 629, 636, 661. In response, the Crown issued the Charter of 1676, which included the language affirming the head right. Pursuant to this new charter, the governor drafted a new form of patent, which subsequently was authorized by the legislature. See Act of Oct., 1677, act 9, 2 HENING'S STAT., *supra* note 1, at 418.

21. The Charter of 1618 divided the Company land into four principal boroughs or plantations: James Town, Charles City, Henrico, and the Borough of Kiccotan. Yeardley's Instructions, *supra* note 9, at 154, 156. But private adventurers were permitted to develop and manage smaller, secondary plantations, which apparently were self-governing, independent political bodies. See *id.* at 160-61. Like the four primary plantations, the secondary plantations were required to follow the terms of the 1618 Charter, including the setting aside of commons and other public lands. See *id.* at 163. For some unexplained reason, though, the secondary plantations did not acquire the same political power and status. Some, like Martin's Hundred and Berkeley's Hundred, were designated as hundreds, which meant that they were entitled to send representatives to the Assembly to vote equally with representatives from the primary boroughs. Other secondary plantations, however, were not given a voice in the colonial Assembly. See F. HARRISON, *supra* note 12, at 46-48. See generally Voorhis, *supra* note 14, at 12-17 (discussing Virginia's plantations and hundreds). For a list of Virginia plantations which had been patented as of June, 1623, see List of Patents for Lands in Virginia, reprinted in 6 VA. MAG. HIST. & BIOGRAPHY 372 (1898).

22. Patents indicated on their face whether or not they were transferable. See, e.g., March 5, 1628, patent to Zachariah Cripps, 1623-1644 PATENTS, *supra* note 12, at 74. The extent of the practice of transferring head rights is described in Nicholson's *Report to the Board of Trade*, reprinted in 1697-1698 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 389. See also Proclamation, 1712, 4 HENING'S STAT., *supra* note 1, at 557 (1820) (addressing the abuses in obtaining head rights); R. BEVERLEY, HISTORY AND PRESENT STATE OF VIRGINIA 249-51 (Wright ed. 1947).

23. Beginning in the late 1690's, the Board of Trade began to inquire into the rumored abuses of the head right system. See 1696-1697 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 172. In

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land in the colony apparently did not satisfy the requirements. According to one estimate, made by Governor Randolph in a 1696-1697 report to the Board of Trade, only 40,000 out of about 500,000 acres of patented land in the colony were cultivated.²⁴ Randolph also noted that the population of the colony was developing slowly, in spite of the "vast quantities of servants and others" transported to the colony.²⁵ In his opinion, the abusive practices under the head right system were the principal reasons why the colony's growth was so slow.²⁶

In a paper presented soon after Randolph's report, James Blair and several other Virginians voiced similar criticisms of the head right system. The document, entitled "An Account of the Present State of the Government in the Colony of Virginia,"²⁷ gave several reasons for the failure of the system to achieve its goal of encouraging settlement. Besides pointing out the problem of inaccurate and fraudulent surveys, the document also noted that "all Courts were very lavish in allowing certificates for rights," failing to require sufficient proof of importation.²⁸ Additionally, the paper noted that while

responding to the Board's questions, Edward Randolph stated that he knew of no lands seized for failure to pay the quit rents. Also, he concluded that the practice of giving out false head right certificates was common "but little regarded, being of no prejudice to private persons." *Id.* at 188. Lands, for example, were being granted for the importation of Negroes. Randolph himself thought it would be a good idea to limit to 500 acres the amount of land conveyed in one grant. *Id.*

Henry Hartwell, James Blair, and E. Chilton wrote, in "An Account of the Present State of the Government in the Colony of Virginia," of further abuses in the system. Hartwell, Blair, & Chilton, *An Account of the Present State of the Government in the Colony of Virginia*, reprinted in 1696-1697 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 641-66 [hereinafter cited as Hartwell, Blair & Chilton and paginated to 1696-1697 CAL. STATE PAPERS A. & W.I.]. Ship captains, upon entering the colony, would obtain head rights for themselves, their sailors, and their passengers. The sailors also would obtain head rights for themselves, and masters who purchased servants would claim head rights for the servants. As a result, the entrance of one person into the colony could be the basis for the issuance of two or three head rights. *Id.* at 646. According to the authors, the head right system had fallen to such a poor state of affairs that clerks in the office of the Secretary of the Colony would sell head rights for one to five shillings per head right. The government in the colony knew of these abuses, but made no attempt to stop them. *Id.* These abuses would not have been as serious, the authors maintained, if the lands being purchased were actually "seated." But instead of building one house and cultivating one acre of land per head right grant (50 acres), most purchasers ignored the seating requirements. Often the requirements were never met, or they were met in such a way as to make a mockery of them. *Id.* at 647.

24. Letter from Edward Randolph to the Board of Trade, reprinted in 1696-1697 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 88, 89-90.

25. *Id.* at 89.

26. In his report Randolph wrote:

[S]ervants are not so willing to go there [Virginia] as formerly, because the members of Council and others who make an interest in the government have from time to time procured grants of very large tracts of land, so that for many years there has been no waste land to be taken up by those who bring with them servants, or by servants who have served their time. But the land has been taken up and engrossed beforehand, whereby such people are forced to hire and pay rent for lands or go to the utmost bounds of the Colony for land exposed to danger, and often the occasion of war with the Indians.

Id. at 88-89.

27. Hartwell, Blair & Chilton, *supra* note 23, at 641-66.

28. *Id.* at 646.

speculators were allowed to take up large tracts of land, the colony failed to enforce the seating and planting requirements, causing "all the good land in the country ... [to be] taken up ... [with] very little improvement on it."²⁹

Dissatisfaction with the head right system eventually led to the emergence of the second method of land distribution recognized by the Great Charter, the treasury right system.³⁰ Ignored in most parts of the colony until a 1699 order

29. *Id.* at 647; see also 1 P. BRUCE, *ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY* 518-26 (1907).

30. See Yeardley's Instructions, *supra* note 9, at 154. The reform movement to correct abuses in the land grant system began in the late 1690's and continued into the late 1710's. Much of the impetus for the reforms came from the Board of Trade and from Alexander Spotswood during his term as Royal Governor. The problems described by Hartwell, Blair, and Chilton in their report to the Board of Trade, see *supra* note 23 and *supra* notes 27-29 and accompanying text, and the complaints made by Governor Nicholson about the system's abuses, see 1696-1697 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 89, led the Board to issue instructions to Nicholson to reform the head right system and base it upon actual settlement of the land rather than importation. *Id.* at 423. These instructions continued to be given to the succeeding Royal Governors until 1709. See 2 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 588-89 (L. Labaree ed. 1935) [hereinafter cited as L. LABAREE].

In 1705 the House of Burgesses passed "An Act concerning the Granting, Seating, and Planting, and for Settling the Titles and bounds of Lands; and for preventing unlawful Shooting and ranging thereupon." Act of Oct., 1705, ch. 21, 3 HENING'S STAT., *supra* note 1, at 304. Besides recognizing the treasury right, the Act also sought to correct many of the abuses under the head right system. It, for instance, prevented mariners and Virginians returning from overseas trips from claiming head rights. *Id.* at 304. Apparently in deference to the old seating and planting requirements, though, the Act did contain a mild seating and planting provision requiring that one acre in 50 be cleared and planted within three years of patenting and that one wooden house measuring 12' x 12' be built. *Id.* at 313. Also, the Act imposed a limit of 500 acres on the amount of land that could be conveyed in one patent, but if a patentee had five or more servants or slaves he could take an additional 200 acres for every servant or slave, provided that the patent did not exceed 4,000 acres. *Id.* at 306. In 1707 the Board of Trade disallowed the Act, concluding that it still permitted speculative landholding. In its view, at least three out of 50 acres had to be planted within three years of patenting in order for the problem of speculation to be minimized. 1706-1708 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 404, 406-07. This repeal understandably upset the colonial government. The Colonial Council, for example, voiced strong displeasure with the three-acre seating requirement, noting that this requirement, along with other proposed restrictions, would cause settlers to immigrate to North Carolina where land was cheaper and restrictions were fewer. 3 EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA 193 (1928) (entry for Oct. 19, 1708) [hereinafter cited as EXEC. J.]. As part of their protest, the Council also tried to evade the repeal of the 1705 Act by stating it had not received proper notice of it. See 1706-1708 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 404.

The conflict between the Board and Council continued until the arrival of Governor Spotswood in 1710. Upon his arrival, he created a new form of head right that contained the more constructive features of the old form, along with some of the reforms suggested by the Board, including the three-acre seating requirement. See 2 Letters of Governor Spotswood, *supra* note 15, at 14-15; see also 1710-1711 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 409. For an example of the new patent, see F. HARRISON, *supra* note 12, at 39-40. Apparently weary of the conflict, the House of Burgesses passed an act in 1713 basically adopting Spotswood's format. See Act of Nov., 1713, ch. 3, 4 HENING'S STAT., *supra* note 1, at 37 (1820). Then in 1720 it passed an amendment further clarifying the types of improvements that would satisfy the seating requirements. Act of Nov., 1720, ch. 3, *id.* at 81.

At the time that the movement to reform the head right system was ending, Governor Spotswood began to correct defects in the issuance of the treasury rights. He decided in November, 1716, to recall all the treasury rights that had been issued. See 3 EXEC. J., *supra*, at

of the colonial council expressly approved its use as an alternative to the head right,³¹ the treasury right differed in one significant respect from its precursor. Unlike the head right, the treasury right permitted the direct purchase of rights to a specified number of acres of land.³² Any party who paid five shillings to the state auditor would receive a certificate, called a treasury warrant, entitling the party to take up and patent fifty acres of waste and unappropriated land.³³ To obtain a patent, the holder of the warrant then would go to the surveyor of the particular county in which he wanted to take up land, present the warrant, and have the surveyor survey the appropriate land. Once the survey was completed and returned, the governor and his council issued a patent.³⁴

434 (entry for Nov. 3, 1716). Up until that time, the treasury rights had been issued without adherence to any sort of numbering system. *See id.* Because Spotswood and the Council believed that this heightened the danger of counterfeited treasury right certificates, they ordered the treasury certificates to be numbered sequentially. *Id.* Spotswood issued a proclamation in January, 1717, announcing the recall and notified the Board of Trade of his action in August. Proclamation, Jan. 23, 1716, reprinted in *id.* at 605-06; 1717-1718 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 20.

This action brought an end to the concerted efforts of the Board and the royal governors to reform the land grant system in Virginia, for it regularized the system for issuing patents considerably. The action, however, failed to eliminate the problems caused by land speculation, as demonstrated by subsequent efforts to control lax seating and other practices of speculators. For instance, almost 20 years later, the Council still was trying to prevent speculation by ordering surveyors not to lay out 400-acre patents in a contiguous manner for the same individual. *See Journal of the Council of Virginia in Executive Sessions 1737-1763*, reprinted in 14 VA. MAG. HIST. & BIOGRAPHY 229 (1907). For other examples, see F. HARRISON, *supra* note 12, at 41-42.

31. *See* 1 EXEC. J., *supra* note 30, at 457 (1925) (entry for June 21, 1699); *see also supra* note 10 and accompanying text. In 1705 the Council passed an act officially recognizing treasury rights. *See supra* note 30. Although the Crown subsequently repealed the 1705 Act, *see id.*, the colonial government used the treasury right anyway without objection from the Crown. *See* F. HARRISON, *supra* note 12, at 49-50.

32. 1 EXEC. J., *supra* note 30, at 457 (1925) (entry for June 21, 1699).

33. *Id.* The decision to officially sanction the treasury right in 1699 was in part a response to the land rush that occurred in the Pamunkey Neck and the Blackwater Swamp regions. The official sanctioning prevented a number of settlers from obtaining head rights to keep their lands. *See* Robertson, *supra* note 19, at 38. Another motivating factor was the shortage of funds in the colony's treasury. *Id.* Why the amount of five shillings was chosen is not entirely clear. In the Hartwell, Blair, and Chilton report to the Board of Trade, they comment that the head rights "[m]ay be purchased at from one schilling to five schillings per right." Hartwell, Blair & Chilton, *supra* note 23, at 646. Perhaps the Governor and the Council decided to set the price of the new treasury right at five shillings because they believed that figure to be the highest rate that patentees would be willing to pay for a 50-acre head right.

34. In reality, though, many holders of treasury warrants delayed getting a patent after obtaining a survey, apparently to avoid the quit rent obligation. This problem plagued the government throughout the colonial era. The colonial government took numerous actions in an attempt to solve the problem. Governor Spotswood, for example, issued a proclamation ordering those holding surveyed lands to patent the lands. Proclamation, Aug. 12, 1713, 4 HENING'S STAT., *supra* note 1, at 562 (1820). In 1717 the Executive Council issued a similar order, directing those holding surveyed but unpatented lands to register them under the threat of losing their lands. 3 EXEC. J., *supra* note 30, at 454-55 (entry for Aug. 13, 1717). Between 1756 and 1774 the Royal Governors were under specific instructions to bring to an end the practice of surveying without patenting lands. 2 L. LABAREE, *supra* note 30, at 590. Governor Dinwiddie apparently responded by inducing landowners to register 294,755 acres before popular pressure caused him to stop. *See*

The treasury right already had become the primary method of distributing land in that part of the colony known as the Northern Neck. Situated between the Rappahannock and Potomac Rivers,³⁵ the Northern Neck had begun to develop a different private land distribution scheme in the mid-1600's. Shortly after Charles I was beheaded in 1649, the exiled Charles II granted the unsettled portion of the Northern Neck to several loyalists in return for their military service to be held as a proprietary.³⁶ Because the King did not regain

³⁴ ACTS OF PRIVY COUNCIL, 1745-1766, *supra* note 20, at 232; B. BOND, *THE QUIT-RENT SYSTEM IN THE AMERICAN COLONIES* 243-45 (1919).

³⁵ As described in the May 8, 1669, grant of land to Henry Earl of St. Albans, John Lord Berkeley, Baron of Stratton, Sir William Moreton, and John Tretheway, the Northern Neck generally included that area "bounded by and within the head of the rivers Tappahannock, alias Rapahannock, and Quiriough or Pattawomacke Rivers, the courses of the said rivers, as they are commonly called or known by the inhabitants, and descriptions of those parts and Chesapoyocke Bay...." 1669-1674 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 23. The total acreage of the Northern Neck, though, was in dispute for many years. Central to the controversy was the meaning of the phrase "head of the rivers." English usage defined the phrase as referring to the fountainhead or source, while the American approach used the phrase to signify the head of navigation. See F. HARRISON, *supra* note 12, at 76. Depending on which definition of "head" was used in construing the land's description, the size of the Northern Neck tract could range from 1,476,000 to 5,282,000 acres. See LAND INVENTORY, *supra* note 8, at xvii; Letter from W. Byrd to Lt. Gov. William Gooch, reprinted in J. DICKINSON, *THE FAIRFAX PROPRIETARY XLIV* (1959). See also Brown, *Manors on the Frontier*, 16 VIRGINIA CAVALCADE 42-47 (1967) (for a description and a map of the Northern Neck grant).

³⁶ In July, 1639, the proprietors of Somers Islands (Bermuda) petitioned Charles I "for a grant of land between the rivers Rappahannock or Potomac not yet inhabited by or granted to any." *Virginia in 1639*, 12 VA. MAG. HIST. & BIOGRAPHY 385, 395 (1905). The petitioners cited an agreement with the Virginia Company promising land in Virginia to offset the small quantity of land in their Somers Island purchase. *Id.* Although this petition was denied, it served as the basis of the later Northern Neck grant. See *id.* at 395-96.

In 1649 Charles II conveyed to Ralph Lord Hopton and six other noblemen all the land between the head of the Rappahannock River and the head of the Potomac River. See Act of Aug., 1736, ch. 13, 4 HENING'S STAT., *supra* note 1, at 514-15 (1820). The patent contained a recital of proprietary rights similar to those of the Bishop of Durham. Under the grant, the patentees acquired the power to divide the land into counties, to erect cities, churches, colleges and prisons, to divide portions into manors, and to convene court to hear pleas for actions such as debt, trespass and contract. It also authorized the patentees to sell tracts of land and to create tenures. *Id.* at 517-18.

The 1649 patent created a proprietary similar to those existing in Maryland, Maine, Pennsylvania, and the Carolinas. See 2 H. OSGOOD, *supra* note 8, at 5. A proprietary represents a unique form of landholding dating back to William the Conqueror's eleventh century grant to the Bishop of Durham. Durham's grant created a county palatine, also called a *palatio*. Under the grant the Bishop of Durham acquired "*jura regalia*, as fully as the king hath in his palace." 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 113 (1765). That is, William made the Bishop of Durham a feudal sovereign by the proprietary grant, giving the Bishop the regal powers of a country palatine. See S. LIVERMORE, *EARLY AMERICAN LAND COMPANIES* 31 (1939). These powers included the power to pardon, the power to issue writs and indictments in the Bishop's name, and all other seignorial rights. 1 W. BLACKSTONE, *supra*, at 113-14. For a discussion of other proprietary rights, see 2 H. OSGOOD, *supra* note 8, at 6-7. Because all seignorial rights were transferred when a proprietary was created, the owners of the proprietary, and not the King, had the right to grant land. Further, when Parliament passed a statute, like the 1290 Statute Quia Emptores, that affected the Crown's feudal lands, the statute did not apply to the proprietary if the land was held by the proprietor. See 2 H. OSGOOD, *supra* note 8, at 9. Despite all the proprietor's powers, though, the King still retained a vestige of power — the acknowledgement that he was the ultimate sovereign.

the throne until May, 1660, a longstanding dispute developed between the proprietors and the colonial government over the validity of the proprietary grant³⁷ and the boundaries of the area granted.³⁸ The colonial government maintained that it had the power to regulate and distribute land in the Northern Neck under its land grant system, while the proprietors claimed the exclusive right to govern the area conveyed to them.³⁹

A 1669 charter issued by Charles II at least partially resolved the dispute.⁴⁰ Under the terms of the 1669 charter, the proprietors recognized the colonial government's title to all plantations in the Northern Neck seated prior to 1661 under the government's head right system. Equally as important, the proprietors acknowledged that the Virginia government would have political jurisdiction over the proprietary.⁴¹ In exchange, the colonial government

37. For 11 years, the Virginia colony remained under the Commonwealth's rule. See Articles at the Surrender of the Countrie, Mar. 12, 1651, *reprinted in* 1 HENING'S STAT., *supra* note 1, at 363. The Governor and Council continued to treat land in the Northern Neck as any other ungranted land, dividing the land into counties and marking the boundaries. *Id.* at 381. Settlers also continued to move into this area, sending representatives to the colonial legislature. *Id.* at 506-07; see also JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA 32 (1659-1693) (entry for Oct. 23, 1666). The proprietors apparently had little claim or control over their granted land.

After the Restoration, the grantees of the proprietary renewed their claim. A letter from Charles II to the Governor and Council of Virginia, dated December 5, 1662, indicates that the grantees had leased their land to Sir Humphrey Hooke and others for a term of years. The King admonished the Virginia officials to assist Hooke in settling the plantation and collecting quit rents. See 1661-1668 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 116. Apparently this letter was lost or ignored, for Charles II wrote another letter, dated August 3, 1663, reiterating that the patent should be assisted and not obstructed. *Id.* at 151-52.

Negotiating with Col. Francis Moryson, Virginia's agent in England, the proprietors agreed to surrender their 1649 charter and receive a new one. 1 ACTS OF PRIVY COUNCIL, *supra* note 20, at 373. This new charter, issued in 1669, recognized the colonial government's powers by confirming land grants issued by the colonial government prior to September 29, 1661 and by reserving political and military power in the colonial government. In exchange for their concessions, the proprietors received 21 years within which to establish title to lands in the Northern Neck through purchase, settlement, or cultivation. 1669-1674 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 22-24.

Thomas Kirton, the proprietors' Virginia agent, presented the 1669 patent to the Governor and the Council in April, 1671. Robinson, *Notes from the Council and General Court Records 1641-1678*, 9 VA. MAG. HIST. & BIOGRAPHY 45 (1901). The Northern Neck settlers continued to resist the proprietors' influence, fearing the imposition of new fines and rents and the loss of rights and property acquired from the colonial government. Preferring to remain directly under the King's rule and protection, the colonial government petitioned the King to revoke the patent and offered to raise capital to buy out the proprietary. See Act of Sept., 1674, act 1, 2 HENING'S STAT., *supra* note 1, at 311; JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA 61 (1659-1693) (entry of Oct. 20, 1673). The colonial government applied for a charter to purchase the proprietary but these negotiations collapsed due to Bacon's Rebellion. 2 J. BURK, *supra* note 20, at liv.

38. See *supra* note 35.

39. See *supra* notes 36-37.

40. See Charter of 1669, *reprinted in* 1669-1674 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 22. For a discussion of the preparations made for the surrender of the 1649 patent and the issuance of the new one, see 1661-1668 *id.* at 476 and 1 ACTS OF PRIVY COUNCIL, *supra* note 20, at 373.

41. The charter stated in pertinent part:

agreed that the proprietors would have twenty-one years in which to inhabit, plant, or otherwise develop the area.⁴²

Despite the resolution of this and other disputes,⁴³ the land grant system of

Provided always that these presents shall not extend to infringe or prejudice any contracts or grants made by the Governor and Council of Virginia of the premisses or any part thereof to any inhabitants now in actual possession thereof by virtue of any grant made before the 29th September 1661, which grants shall remain good and effectual ... that the said grantees shall not intermeddle in the military affairs of or within the premisses, or with the command of the castles, forts, & c. thereof without the authority of the Governor and Council of Virginia; and that said Governor and Council shall have full power to impose any taxes and impositions upon the said territories and the inhabitants thereof for the public defence of Virginia and the territories hereby granted, as upon other parts of Virginia proportionably; and that said grantees and the inhabitants of the premisses shall be in all things subject and obedient to such laws and constitutions as are or shall be made by said Governor and Council and Assembly for said Colony.

Charter of 1669, reprinted in 1669-1674 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 22, 23-24.

42. In recognizing the proprietors' interest, the charter stated: "Provided that, as to so much of the premisses as within 21 years shall not be possessed, inhabited, or planted by the means of said grantees, these premisses shall cease and be void." *Id.* at 24.

43. Tension arose again in the early 1670's, when Charles II conveyed all the ungranted land in Virginia to Lords Arlington and Culpeper. *See id.* at 334; *see also* Grant to Lords Arlington and Culpeper, reprinted in 2 HENING'S STAT., *supra* note 1, at 569. This conveyance affected the interests of both the Northern Neck proprietors and the colonial government. Because Lords Arlington and Culpeper received all rights and interests in the conveyed land for 31 years, *see id.* at 570-72, the colonial government could not issue further patents. *See id.* at 576-77. In addition, the title of the proprietors became questionable. *See* F. HARRISON, *supra* note 12, at 64.

In 1681, Lord Culpeper, desiring to own as much of the Northern Neck proprietary as possible, purchased deeds from the Northern Neck proprietors. *See id.* at 69. He also bought out Lord Arlington's interest in the Northern Neck. *See* Deed from Lord Arlington to Lord Culpeper, May 26, 1683, reprinted in 2 HENING'S STAT., *supra* note 1, at 578. When combined with his inheritance rights, these purchases enabled Lord Culpeper to virtually complete his title to the Northern Neck. His father, John Lord Culpeper, had been one of the original patentees of the Northern Neck proprietary. The only other party with an apparent interest was his cousin, Alexander Culpeper, who claimed a one-sixth interest in the proprietary. *See* 2 J. BURK, *supra* note 20, app. at liv; *see also* F. HARRISON, *supra* note 12, at 66-69.

In 1677 Charles II had appointed Culpeper as the colonial governor. Letter from King Charles II, Dec. 27, 1677, reprinted in 2 HENING'S STAT., *supra* note 1, at 564-65. Culpeper tried to solidify his control over the Northern Neck proprietary. In May, 1683, he ordered that "no Patents be thereafter granted for Lands in the Northern Neck the same being Granted by his Majesty to several patentees." 1 EXEC. J., *supra* note 30, at 494 (1925) (entry for May 22, 1683). Despite Culpeper's firm hand as Governor and proprietor, residents of the Northern Neck continued to resent his presence and, on occasion, pleaded with the Crown to purchase the proprietary or confirm their land titles. *See* JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA 203 (1659-1693) (entry for Apr. 29, 1684); 1 EXEC. J., *supra* note 30, at 119 (1925) (entry for June 5, 1690); *see also* Address, Apr., 1684, 3 HENING'S STAT., *supra* note 1, at 26. Residents also refrained from taking land patents from Lord Culpeper. Because the Lord could not sell the land in the proprietary, and because the 21-year period set in the 1669 charter was almost over, he returned to England to try to protect his interests. In England, Lord Culpeper succeeded in convincing James II that all attempts to settle the Northern Neck had been thwarted by "local obstructions." F. HARRISON, *supra* note 12, at 75; *see also id.* at 68-77. Persuaded of the need to renew the charter, James II issued the third and final Northern Neck Charter in Culpeper's name. *See The Randolph Manuscript*, reprinted in 15 VA. MAG. HIST. & BIOGRAPHY 392 (1908). The new charter eliminated the time requirement for patenting land and expanded the description of the grant. *See* F. HARRISON, *supra* note 12, at 75. This expansion resulted in the development of several boundary disputes that remained unresolved until 1786. *See Hite v. Fairfax*, 8 Va. (4 Call) 42 (1786).

the Northern Neck continued to develop characteristics distinct from the

The amended description substituted the clause "land situate, lying and being in Virginia in American and bounded by and within the *first heads or Springs* of the Rivers of Tappahanocke alias Rappahanocke and Quiriough alias Patowmacke Rivers" for the earlier description "bounded by and within the *head* of the rivers of Tappahannock, alias Rapahannock, and Quiriough or Pattawomacke Rivers...." *Compare* Charter of 1688, reprinted in 15 VA. MAG. HIST. & BIOGRAPHY 329 (1908) (emphasis added), with Charter of 1669, reprinted in 1669-1674 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 22 (emphasis added). The amended description, though, did not alter the English understanding of the grant because "head" still connoted the source of the river. See 5 THE OXFORD ENGLISH DICTIONARY 146 (1961) (definition of "head"); see *supra* note 35. But the change did clarify that under the Virginia approach the proprietary would be limited to an area extending from the falls in the Rappahannock to the falls in the Potomac. See Letter from Lt. Governor Gooch to the Council of Trade and Plantations, reprinted in 1733 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 37-40.

Upon Culpeper's death, his proprietary interest passed to his daughter Katherine and her husband, Thomas Lord Fairfax, under the law of *couverture*. See F. HARRISON, *supra* note 12, at 78. Because they continued to face colonial resistance, the new proprietors sought and received confirmation of their grant. See 2 ACTS OF PRIVY COUNCIL, 1680-1720, *supra* note 20, at 188-89.

The proprietary changed ownership several more times through death and inheritance. Alexander Culpeper left his 1/6 interest to Lady Culpeper, Thomas' widow, who in turn left the interest to her grandson, Thomas, the sixth Lord Fairfax. See F. HARRISON, *supra* note 12, at 92, 96. Further, upon the fifth Lord Fairfax's death, Katherine Lady Fairfax held a 5/6ths interest which she devised in trust for her son in fee tail. See *id.* at 101. During this period, the resident land agents managed the proprietary, collecting quit rents and granting patents. See generally *id.* at 79-121 (discussing the land agents).

The boundary dispute continued until the Virginia Supreme Court finally resolved the matter in the 1786 decision *Hite v. Fairfax*. This dispute initially arose many years earlier, in 1730, when the colonial government issued an Order of Council granting John Vanmeter 10,000 acres of land lying in the fork of the Shenandoah River and another 20,000 acres patentable as soon as twenty families settled in the region. At the same time, Isaac Vanmeter received an Order of Council for 10,000 acres patentable when 10 families settled there. Joist Hite purchased the Vanmeters' claims in August, 1731, and received a similar Order of Council for an additional 100,000 acres. 8 Va. (4 Call) 42, 44 (1786).

Lord Fairfax petitioned the Privy Council to stay further land grants by the Governor and Council until the boundaries were settled. See 3 ACTS OF PRIVY COUNCIL, 1720-1745, *supra* note 20, at 385; 1733 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 152. For a discussion of Lt. Governor Gooch's arguments in support of the colonial position, see *id.* at 37-40. The Privy Council directed that surveyors be appointed to determine the exact boundaries and stayed the Virginia government from granting further patents. 3 ACTS OF PRIVY COUNCIL, 1720-1745, *supra* note 20, at 385; 1733 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 152, 216-17, 242. Apparently these orders were not received in Virginia until 1736, for a 1734 Order of Council confirmed Hite's original 40,000-acre grant. See *Hite*, 8 Va. at 45. In that same year, Lord Fairfax issued a caveat against any further grants of Northern Neck land. See *id.*

The surveyors commissioned by Governor Gooch and by Lord Fairfax had issued their findings in 1737. See 2 VA. CODE app. II, at 345 (1819); *Hite*, 8 Va. at 48. For an accounting of the survey trip, see Harrison, *The Northern Neck Maps of 1737-1747*, 4 WM. & MARY Q. 2d 7 (1924). The survey showed that the boundaries of the proprietary began "at the first Spring of the South Branch of the River Rappahannock now called Rappidan ... thence drawn in a Streight Line North West to the Place in the Alagany Mountains where that part of the River Patowomeck alias Potowmack which is now called Cohongoroota alias Cohongoronton first Arises...." 3 ACTS OF PRIVY COUNCIL, 1720-1745, *supra* note 20, at 389. The King accepted the Privy Council's approval of this boundary and confirmed the grant. *Id.* Northern Neck landowners who had not received their patents from the proprietors or their land agents understandably were upset. To eliminate their doubts, the colonial legislature passed an act in 1748 confirming all Northern

system governing the rest of the Virginia colony. One of the most important differences was that the Northern Neck system never recognized head rights. To acquire land in the proprietary, a party first purchased a warrant specifying the exact location of the desired land and then took the warrant to a surveyor for surveying. After the plat and other necessary papers were returned to the office of the proprietor or his agent, the office issued a grant, in the absence of any conflicting claims.⁴⁴ Usually copies of both the survey and the grant were recorded and kept for an indefinite time after the grant, thus enabling the preservation of important historical documents and the creation of an orderly recording system.⁴⁵ In contrast, the land office for Virginia proper often destroyed its records yearly.⁴⁶

Neck land grants. The Act, however, reserved all rents and services to be paid and performed to Thomas Lord Fairfax. Act of Oct., 1748, ch. 55, 6 HENING'S STAT., *supra* note 1, at 198 (1819).

The Hite controversy arose when Lord Fairfax's land office refused to issue patents to Joist Hite for the lands claimed by him. See Hite, 8 Va. at 47. Lord Fairfax asserted that the 1748 Act protected only "grants" of land. Because Hite's "Orders of Council" had not been reduced to formal patents by the time of the 1748 Act, his claims to lands in the proprietary were not protected by that Act. In response, Hite argued that he had complied as well as he was able. Also, he maintained that Orders of Council were covered under the 1748 Act. In 1749 Hite filed a bill in chancery against Lord Fairfax, seeking to compel the proprietor to issue him patents. *Id.* In 1771, the General Court awarded Hite the 40,000-acre claim, as well as 54,000 of the 100,000-acre tract covered under the Order of Council. For an excellent discussion of the lower court case, including Fairfax's testimony, see *Transcript of the Record*, reprinted in J. DICKINSON, *supra* note 35, at I-LVII.

44. See generally A. EMBREY, *supra* note 3, at 94-127 (discussing the Northern Neck land system); F. HARRISON, *supra* note 12, at 79-137 (discussing the Northern Neck land system and its differences with the system applying in the rest of the colony). For a copy of a warrant to survey proprietary lands, see Hite v. Fairfax, *Transcript of Record*, reprinted in J. DICKINSON, *supra* note 35, at xiv-xv.

45. As Lord Culpeper's agent, Thomas Kirton appeared at Jamestown in 1670 to begin managing the proprietary, commissioning surveyors, and opening a land office. Kirton was the first in a succession of agents who administered the granting of proprietary lands. For a detailed listing of the proprietary land agents in the land office administration, see F. HARRISON, *supra* note 12, at 79-121. See also A. EMBREY, *supra* note 3, at 105-06.

Although the recording system of the Northern Neck land office may have been better than the system used in the rest of Virginia, the form of the land grants in the Northern Neck was not very precise. For instance, during Philip Ludwell's term as land grant officer, the grants he wrote were always recited as being from "the Honorable Mrs. Katherine Culpeper ... And Alexander Culpeper." F. HARRISON, *supra* note 12, at 85 (quoting Ludwell's form). Ludwell apparently never recited the name of Katherine's husband. Under English common law her husband should have been recognized as a proprietor. See F. HARRISON, *supra* note 12, at 87. Ludwell's successors did not improve the accuracy of the grants, failing even to acknowledge the death of Alexander Culpeper who had passed his share of the proprietary to Margaret Lady Culpeper. See *id.* at 92.

46. See LAND INVENTORY, *supra* note 8, at xvii. But cf. A. BROWN, *supra* note 9, at 603-04 (discussing the efforts of the London Company to record all of its writings). Other differences also existed between the two land systems. Proprietary grants, for example, tended to reserve greater mineral rights than patents from the Virginia colonial government and to include a right of reentry clause in case of default of rent. See F. HARRISON, *supra* note 12, at 131-33. Furthermore, in contrast to grants issued by the colonial government, proprietary land grants did not limit the amount of acres that could be granted to one person. Nor did the proprietary grants impose seating and planting requirements on the grantees. See *id.* at 132; see also A. EMBREY, *supra* note 3, at 95-103. See generally F. HARRISON, *supra* note 12, at 123-37 (discussing the differences between the two land systems).

§ 8.1 LAWS AFFECTING PRIVATE INTERESTS IN TIDAL RESOURCES

Over time, the abuses of the colonial government's head right system became more notorious and the advantages of the Northern Neck's treasury right system became more apparent. Besides facilitating the transfer of land to speculators and settlers alike, the treasury right system also yielded greater revenues for the government.⁴⁷ Because of its advantages, the treasury right system became the preferred system by 1715.⁴⁸ Eventually, after the Virginia government had completely abandoned the head right in favor of the treasury right, the land systems of the Northern Neck and the rest of the Virginia colony merged.⁴⁹

47. Whereas the head right system of the Virginia government generally limited patents to those who could afford to acquire an importation or head right by transporting a settler to the colony, the treasury right system of the Northern Neck opened up waste lands to any settler who could pay the "nominal" fee. See F. HARRISON, *supra* note 12, at 126-27; see also LAND INVENTORY, *supra* note 8, at xii. However, as one commentator noted, the failure to settle lands in the colony, as a whole, was not actually due to problems in the issuance of head rights or treasury rights, but rather to the "failure of the land office to carry out the conditions of settlement [which] encouraged a widespread land speculation." B. BOND, *supra* note 34, at 253.

In an effort to correct some of the abuses of its system, the colonial government reformed the head right, incorporating some of the traits of its Northern Neck counterpart. For example, to encourage parties to cultivate the land, the colonial government began including a clause reserving a right of reentry for default of rent after three years. See F. HARRISON, *supra* note 12, at 134-35. Also, in 1705 Governor Spotswood began to include in all patents thereafter granted the name of the sovereign as the grantor, rather than the name of the governor. His patents also provided for a stricter seating requirement and restored the Crown's royalties in all granted mines, which had been forfeited earlier. See *id.* at 39.

48. See F. HARRISON, *supra* note 12, at 42 & 147 n.58.

49. By an act of 1785, the General Assembly extended the jurisdiction of the government's land office to waste lands in the Northern Neck not already covered by proprietary warrants or surveys. Act of Oct., 1785, ch. 47, 12 HENING'S STAT., *supra* note 1, at 111. By the turn of the eighteenth century, the state of Virginia had completely succeeded to all the interests of the proprietary, having obtained them through lengthy negotiations. See *supra* note 43. After the death of George Fairfax, the sixth Lord Fairfax and proprietor of the Northern Neck, in 1781, a dispute over the possession of the land office had arisen among the different heirs of the Fairfax title. Before any settlement was reached, however, the Virginia Assembly, in October, 1782, enacted a law sequestering quit rents within the hands of all Northern Neck landowners. As the Act explained, there was "reason to suppose that the said proprietorship hath descended upon alien enemies." Act of Oct., 1782, ch. 8, 11 HENING'S STAT., *supra* note 1, at 112, 128. Those reasons stemmed from the Fairfax's support for the British during the Revolutionary war.

Bryan Fairfax, one of the heirs of the Culpeper proprietary, attempted to have this statute revoked on the grounds that the Treaty of Peace of 1783 and the Jay Treaty of 1794 had restored to British sympathizers their rightful lands. During the War those lands had been sequestered. See *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 609, 612 (1812), *rev'g* *Hunter v. Fairfax's Devisee*, 15 Va. (1 Munf.) 218 (1810). Besides refusing to restore the quit rents, the Assembly also decided not to grant any compensation. A few years later, Denny Martin, the final heir of the Northern Neck proprietary, decided to execute an agreement with John Marshall (the future Chief Justice of the Supreme Court) to sell him the proprietary. Marshall, in turn, had entered into an agreement with the Commonwealth to waive the proprietary jurisdiction when he received the title. In 1806, after Marshall had made all the payments for the proprietary, he finally received title. See F. HARRISON, *supra* note 12, at 119-20.

While quit rents remained in effect in the proprietary until the 1782 Act, quit rents were abolished in Virginia proper under the land grant act of 1779. See *infra* note 162 and accompanying text.

Besides the head right and treasury right systems, land in colonial Virginia also could be acquired by military right. Less prevalent than the other two land distribution schemes, the military right system involved the acquisition of land patents in return for past or future military service.⁵⁰ The colonial council authorized use of the military right periodically when it perceived a need to secure the frontier from enemy encroachment.⁵¹ In spite of the strong

50. The military warrants can be divided into three groups. The first group, generally granted in the 1600's, includes special grants that were made either as a reward for settling on the frontier or as payment for garrisoning a fort. The second group encompasses warrants issued to those who agreed to defend frontier lands. See, e.g., Act of Aug., 1701, act 1, 3 HENING'S STAT., *supra* note 1, at 204. The final group includes the warrants issued under the 1763 Royal Proclamation as a bounty to all soldiers who had served in the French and Indian War. See Proclamation of 1763, *reprinted in* 7 *id.* at 663 (1820). These warrants differed from earlier military rights because they were authorized by the Crown rather than the colony. Additionally, the warrants could be satisfied out of any ungranted lands in the colony, not just the frontier lands. See LAND INVENTORY, *supra* note 8, at xiv.

51. In 1636, for example, the House of Burgesses granted 500 acres to one John Chew for settling others and himself next to hostile Indians. See Stanard, *Abstracts of Virginia Land Patents*, 5 VA. MAG. HIST. & BIOGRAPHY 341 (1898). Also, in 1644 and 1645, the colony authorized the building of four forts to protect its frontiers, and in 1646 it granted a military right to each of the commanders of the forts. See Act of Oct., 1646, act 2, 1 HENING'S STAT., *supra* note 1, at 326; Act of Mar., 1645-1646, act 13, *id.* at 315; Act of Feb., 1644-1645, act 9, *id.* at 293. An example of one of these grants, issued to a Capt. Abraham Wood, provided:

Be it therefore enacted, That Capt. Abraham Wood whose service hath been employed att fforte Henery, be the undertaker for the said fforte, unto whome is granted sixe hundred acres of land for him and his heires for ever; with all houses and edifices belonging to the said fforte, with all boats and ammunition att present belonging to the said fforte, Provided that he the said Capt. Wood do maintayne and keepe ten men constantly upon the said place for the terme of three yeares, duringe which time he the said Capt. Wood is exempted from all publike taxes for himselfe and the said tenn persons.

Act of Oct., 1646, act 2, *id.* at 326, 326.

Some justify these grants as "a special waiver of the constitutional methods of land acquisition" permitted in promoting the "general welfare" of the colony. F. HARRISON, *supra* note 12, at 52; see also LAND INVENTORY, *supra* note 8, at xi-xii. Others believe that the practice merely was an extension of the London Company's practice of awarding land to servants who served the Company meritoriously. Meritorious service included the defense of the colony. See 1 P. BRUCE, *supra* note 29, at 508-11.

In 1701 the House of Burgesses passed an act in an effort to organize a better defense of the frontier. Act of Aug., 1701, act 1, 3 HENING'S STAT., *supra* note 1, at 204. The Act authorized the granting of land to any society which could provide a minimum of 20 armed men. *Id.* at 205. The society would be granted land at a rate of 500 acres for every armed, healthy white male, up to a maximum of 30,000 acres of land. *Id.* Although the societies were given some regulatory authority over the ordering and managing of the land, they also were required to meet certain requirements, like building a fort and providing a public storehouse. *Id.* at 205, 207-08. Evidently no society acquired land under this method. See F. HARRISON, *supra* note 12, at 53.

During the French and Indian War, the military right became a major land distribution method. In 1754 Governor Dinwiddie issued a proclamation granting 200,000 acres of land to the members of an expedition sent to build a fort on the Ohio River at the fork of the Monongahela, where Pittsburgh presently is located. See Proclamation of 1754, *reprinted in* 7 HENING'S STAT., *supra* note 1, at 661 (1820). The allotments of land were to be based upon merit as reported to the Governor by the officers of the expedition. *Id.* It took until the early 1770's for the grants to be issued. Apparently the efforts of George Washington were needed to protect "the soldier[s] about to be wronged." See A List of Early Land Patents and Grants, 5 VA. MAG. HIST. & BIOGRAPHY 173

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inducements under the military right system, most attempts to fortify and settle the frontier through it proved to be unsuccessful.⁵²

Under all three methods, the colonial legislature frequently found itself searching for ways to encourage settlement yet prevent abusive practices and evasive tactics. In the early colonial period, for example, the colonial legislature focused on the inability of many struggling settlers to meet their quit rent obligation, even at the nominal rate of two shillings per 100 acres.⁵³ Aware of this problem and of the scarcity of currency, the Colonial Assembly passed measures to alleviate the burdens of the obligation, including one that proclaimed tobacco to be an acceptable medium of payment.⁵⁴ Later, when it became apparent that even financially able landowners were avoiding payment of quit rents, the colonial legislature then enacted stricter measures to ensure payment and prevent evasion. One such measure, passed in 1647, allowed the lands of delinquent patentees to be held as a pledge for unpaid rents.⁵⁵

(1897). As commander of the expedition, Washington was entitled to a considerable portion of the 200,000 acres. See 41 PATENTS, *supra* note 12, at 66.

Similarly, in 1763, the King issued a proclamation authorizing the issuance of land to all disbanded soldiers, British as well as colonial, to certain officers who had served in North America, and to certain naval officers who had served in the naval forces at Louisburg and Quebec. Proclamation of 1763, reprinted in 7 HENING'S STAT., *supra* note 1, at 663 (1820). The proclamation established the grants at the following rates:

Field Officer	5,000 acres
Captain	3,000 acres
Subaltern or Staff Officer	2,000 acres
Noncommissioned Officer	200 acres
Privates	50 acres

Id. at 666. Any lands granted under the proclamation were to be held free from quit rents and the seating requirements for a period of ten years. *Id.*

52. For example, in 1646 and 1653, the colonial government authorized land grants to prospective settlers to establish military outposts. Order of July, 1653, 1 HENING'S STAT., *supra* note 1, at 380; Act of Oct., 1646, act 2, *id.* at 326. Despite these grants, Deputy-Governor Sir Henry Chicheley found it necessary to build additional forts and provide men and ammunition to protect the frontier. See R. BEVERLEY, *supra* note 22, at 87; see also F. HARRISON, *supra* note 12, at 51.

53. See, e.g., Act of Jan., 1639-1640, act 24, 1 HENING'S STAT., *supra* note 1, at 228 (where legislature permitted payment of quit rents "seven years after the date of patents"). The quit rent obligation apparently commenced again in the early 1640's. See Act of Mar., 1642-1643, act 72, *id.* at 280.

54. See Act of Mar., 1661-1662, act 74, 2 *id.* at 99; Act of Mar., 1645-1646, act 14, 1 *id.* at 316. In 1686, James II repealed the 1662 Act allowing payment in tobacco, primarily because of the large amount of unmerchantable tobacco leaf tendered as currency.

55. See Act of Nov., 1647, act 20, 1 *id.* at 351. But in 1660 the colonial assembly permitted landowners to clear their unpaid quit rent obligations by doubling the payments that they owed for the next two succeeding years. Act of Mar., 1660-1661, act 36, 2 *id.* at 31. Procedures for enforcing quit rent payments gradually became more demanding. Initially, Governor Spotswood did not allow land forfeitures for nonpayment of quit rents, even where no pledgeable property existed on the land. 1 *Letters of Governor Spotswood*, *supra* note 15, at 51. The land act of 1710 marked a change in this policy, authorizing land forfeitures from patent owners who were three years in default of quit rent payments. Act of Oct., 1710, ch. 13, 3 HENING'S STAT., *supra* note 1, at 517, 526. Most colonial officials, though, ignored this forfeiture provision, thus minimizing its

Surveying practices caused frequent land disputes under all three methods. Even before the dissolution of the London Company, the Colonial Assembly passed legislation prescribing proper survey practices and procedures.⁵⁶ Despite these legislative responses, errors in the resulting survey plats still abounded. These errors were due in large part to the failure of surveyors to account for imprecise instruments by including a margin of error.⁵⁷ Also surveyors typically relied on natural boundaries like streams,⁵⁸ and, if the natural boundary deviated significantly from the actual line that the surveyor should have been running, an inaccurate survey plat would result.⁵⁹ Other abusive surveying practices included the drawing of surveys by surveyors who never visited the site⁶⁰ and the selling of survey maps to persons other than the party requesting the survey.⁶¹ Because of the many abuses and problems, and because of the need for an orderly method of transferring land, the Colonial Assembly soon felt compelled to pass legislation for resolving the disputes.⁶² Eventually, after Virginia became a state and after each method of

impact. See L. DODSON, *ALEXANDER SPOTSWOOD* 149-50 (1932); 2 R. MORTON, *COLONIAL VIRGINIA* 422 (1960). See also 1 *Letters of Governor Spotswood*, *supra* note 15, at 62.

56. One act, for instance, provided:

That every privatt planters devident shall be surveyed and laid out in several and the bounds recorded by the survey; yf there be any pettie differences betwixt neighbours about their devidents to be divided by the surveyor if of much importance to be referred to the governor and counsell: the surveyor to have 10 lbs of tobacco upon every hundred acres.

Act of Mar^y, 1623-1624, act 13, 1 HENING'S STAT., *supra* note 1, at 125. The survey procedures were reaffirmed after the dissolution of the London Company, thus underscoring the perceived need for orderly and reliable surveys. See Act of Feb., 1631-1632, act 44, *id.* at 173.

57. See *infra* note 59. For a discussion of survey practices in general, see 1 P. BRUCE, *supra* note 29, at 532-51.

58. See *Virginia's Cure*, reprinted in 3 P. FORCE, *supra* note 4, at 4. To obviate the need for continued resurveying, an act of the colonial legislature confirmed all existing surveys by "allowed surveyors" as authentic. Act of Mar., 1642-1643, act 38, 1 HENING'S STAT., *supra* note 1, at 262. *Cf. also* Act of Oct., 1705, ch. 22, 3 *id.* at 329 ("An act directing the duty of Surveyors of Land, and ascertaining their Fees").

59. 1 P. BRUCE, *supra* note 29, at 538-40. One colonist described one surveyor's efforts in the following manner: "Upon finishing the first line at your corner tree on Potomack, your brother Sam, myself and some others, drank your health. In running the second line, either the unskilfulness of the Surveyor or the badness of the instruments, made us come away with the business *re in facta*." Letters of William Fitzhugh (July 18, 1687), *quoted in id.* at 539 n.1. Inaccurate surveys sometimes permitted landowners to reduce the quit rent obligation. Many grants actually contained almost double the acreage recited in the land patent. See Letter from Edward Randolph to the Board of Trade, reprinted in 1696-1697 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 90.

60. See Hartwell, Chilton & Blair, *supra* note 23, at 646.

61. In an effort to halt this practice, the Colonial Assembly passed an act prohibiting a surveyor from transferring a plat map for six months after the plat is drawn to anyone other than the party originally requesting the survey. Act of Mar., 1661-1662, act 76, 2 HENING'S STAT., *supra* note 1, at 100.

62. A 1646 Act, for instance, allowed any claimant contesting title to bring suit within five years. At the end of this period, any person holding the land in peaceful possession would be deemed the rightful owner. A disability clause exempted orphans from the five-year period, extending their time to bring suit five more years after reaching the age of majority. Act of Oct., 1646, act 13, 1 *id.* at 331.

land acquisition had fully developed, the legislature's response would include comprehensive revisions to Virginia's land laws.⁶³

B. Land Policy During the Colonial Period.

When the private land system that developed during the colonial period is considered together with the public system discussed in Part II, several recurring themes become apparent. First, the development of the land system, particularly the public land scheme, demonstrates an unwaivering dedication to the public interest in land. Although serious questions recently have developed about the extent of the public interest, especially in common lands, the uncertainty does not concern whether public or common lands ever existed, but rather such questions as the identity of the lands, the scope of the public rights, and the possible extinguishment of the public rights.⁶⁴ As shown earlier, historical documents provide ample evidence to support the conclusion that common and other public lands existed during the 1600's and 1700's.⁶⁵ This dedication to public use of certain land resources continues to have an impact on Virginia's land laws today, more than 370 years after the first settlement at Jamestown.⁶⁶

Second, throughout Virginia's colonial and early statehood periods, its land system often has been used to achieve various social, political, and economic goals. Perhaps one of the most obvious examples of this function was the abandonment of the communistic experiment for a property system more oriented to private enterprise. Apparently the colonial leaders hoped the change would encourage industriousness and provide greater incentive for developing the land.⁶⁷ Economic considerations also contributed to the adoption of the treasury right system. Although the head right system tended to encourage importation of settlers, the treasury right system generated more revenues.⁶⁸

Additionally, the land system was used at various times during the colonial period to encourage colonization and expansion of the frontier.⁶⁹ Governor

⁶³. See generally *infra* §§ 8.3-8.5 (discussing the most significant revision, the 1779 land grant act).

⁶⁴. See *Bradford v. Nature Conservancy*, 224 Va. 181, 176 S.E.2d 866 (1982); see also *infra* § 19.3.B (discussing *Bradford*). The uncertainty is caused by many factors including the passage of time, the destruction of many records, and the subsequent enactment and interpretation of statutes by legislators and judges who failed to fully understand the concepts involved. See *supra* note 46 and accompanying text; see also *infra* Part IV and *supra* Part II (both discussing the complexity of the public rights concepts).

⁶⁵. See, e.g., *supra* chapter 6 appendix. See generally § 6.2 (discussing public lands in colonial Virginia).

⁶⁶. See generally *infra* Part VII (discussing the laws affecting public and private interests in Virginia's shorelands).

⁶⁷. See *supra* notes 7-8 and accompanying text.

⁶⁸. See F. HARRISON, *supra* note 12, at 140 n.3; *supra* notes 11-12, 25, 32-34, 47-48 and accompanying text.

⁶⁹. See 3 ACTS OF PRIVY COUNCIL, 1720-1745, *supra* note 20, at 23; 1718-1722 JOURNAL OF THE COMMISSIONERS FOR TRADE AND PLANTATION 298 (1925); 1 *Letters of Governor Spotswood*, *supra* note 15, at 40.

Spotswood especially was interested in settlement of the western frontier. During his administration the colonial assembly attempted to enact, though not always successfully, several bills designed to facilitate settlement in the piedmont and valley regions of Virginia. These pro-expansion legislative actions included a 1712 law expanding the list of improvements that could be made to fulfill the seating and planting condition,⁷⁰ a 1720 quit rent bill which was subsequently disapproved by England and which provided that the failure to pay quit rent would not result in forfeiture,⁷¹ and a 1720 act allowing those who settled in two newly created piedmont counties to take land without paying "publick levies for ten years."⁷² The colonial assembly also periodically passed acts authorizing procurement of land located in the frontier regions through the military right system. These acts represented attempts not only to colonize the frontier, but also to secure it against enemy attack.⁷³ Hostilities with the French and Indians eventually caused a retreat from the expansionist policies, with the British government prohibiting settlement beyond the Alleghenies, apparently for political reasons.⁷⁴ Diligent

70. Act of Nov., 1713, ch. 3, 4 HENING'S STAT., *supra* note 1, at 37, 39 (1820) (providing that the seating and pasturing requirements for a 50-acre grant could be met by clearing, fencing, and pasturing a few animals in a three-acre area of the tract and that the patentee had three years to complete this work.)

71. See Act of Nov., 1720, ch. 2, *id.* at 79; 1718-1722 JOURNAL OF THE COMMISSIONERS FOR TRADE AND PLANTATION 299 (1925); 1722-1723 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 165-66.

72. Act of Nov., 1720, ch. 1, 4 HENING'S STAT., *supra* note 1, at 77, 78 (1820). The Act further encouraged settlement by giving settlers a 10-year exemption from the duty to pay quit rents. *Id.*; see also JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 293 (1712-1726) (entry for Dec. 8, 1720).

73. See *supra* notes 50-52 and accompanying text. Governor Spotswood's efforts to settle the frontier in the early 1700's are especially notable. His term as governor of Virginia is remembered for its expeditions westward, for its humane attitude towards the Indians, and for its persistence in making the frontier a safe place to settle. Evidence of these attitudes and policies include Governor Spotswood's attempts to establish trading with the Indians and to protect and pacify them. Also, on more than one occasion, he urged the Crown to improve their efforts in checking French progress in the Mississippi Valley and promised prospective settlers forts, exemptions from taxes, and an easier land patenting process. See generally L. DODSON, *supra* note 55, at 225-50; Voorhis, *supra* note 14, at 129-42.

Later, in the 1750's, the Virginia government again felt compelled to expand Virginia's stake in the West. To induce settlements, especially on the Mississippi River, the House of Burgesses decided in 1752 to grant all settlers who "situate to the westward of the ridge of mountains, that divides the rivers Roanoke, James, and Potomack, from the Mississippi," a 10-year exemption from all state levies. Act of Feb., 1752, ch. 21, 6 HENING'S STAT., *supra* note 1, at 258 (1819). The House of Burgesses also attempted to induce poorer people to move West by encouraging the taking of smaller land grants. When Governor Dinwiddie attempted to put a tax on the land grants, the House of Burgesses quickly rebuked him. See JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 143-44 (1752-1758). In 1754, the Privy Council ordered Dinwiddie to limit grants to 1,000 acres and to give treasury right and quit rent exemptions for 10 years to the settlers who took land west of the Alleghenies. 4 ACTS OF PRIVY COUNCIL, 1745-1766, *supra* note 20, at 235-38; 2 L. LABAREE, *supra* note 30, at 647-48.

74. The hostilities between the French and the Indians provoked the Indians to make raids on Virginia's western settlements. These raids forced the Virginia settlers eastward. After the hostilities ended and the French withdrew, fear of the Indians still ensued. Because of this fear and because of the perception of English officials that further western settlement was not needed, frontier settlement slowed down significantly. See 6 EXEC. J., *supra* note 30, at 175-77 (1966).

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collection of quit rents, strict enforcement of the seating and planting requirements, and limitations on the amount of acres that could be patented were more indirect methods used to restrict settlement.⁷⁵

Perhaps the best example of how the Virginia land system was used to achieve various social, political, and economic goals concerns its role in shaping the political identity of the United States.⁷⁶ The democratic character of the public land system was readily apparent, for the public land laws openly sought to preserve certain resources for the public benefit. The democratic underpinnings of the private land system were not as apparent, especially when the system was considered in light of the large tracts of land owned by a few wealthy, powerful people and often acquired improperly or through fraud. It was these abusive practices, though, that brought out the commitment to a private land distribution scheme based at least in part on democratic ideals. In pushing for reform of the head right system, for example, the British Lords of Trade spoke disapprovingly of that system, noting that it permitted "all the lands remaining ungranted in the colony ... [to] fall into a few rich men's hands, which will be a discouragement to such persons as might go to settle there."⁷⁷ Although the colonial assembly failed at that time to pass the reform measures proposed by the Lords of Trade, the colonial legislature gradually moved away from the head right to the treasury right system by passing various acts discouraging the old system and favoring the new.⁷⁸ To an extent, this movement away from the much abused head right system to the treasury right system reflected a decision to ensure that all free men had access to waste lands. By adopting a system based on settlement rather than importation, more settlers theoretically could afford to purchase land.⁷⁹

(entry for Dec. 11, 1760); Proclamation of 1763, reprinted in 7 HENING'S STAT., *supra* note 1, at 663, 665-68 (1820).

75. See, e.g., 4 ACTS OF PRIVY COUNCIL, 1745-1766, *supra* note 20, at 235-38. Changes in federal land legislation also can be explained in terms of shifts in social, political, and economic goals. For example, although Congress used the cash sale system for many years to help raise needed revenues, it eventually adopted a homestead act to encourage the settlement of land and the promotion of agricultural values. The Homestead Act entitled any male over 21 to claim up to 80 acres of unappropriated lands in the United States. After residing upon or cultivating the land for five years and paying only a small amount for each acre claimed, the homesteader would be entitled to a patent for the land. See Homestead Act, ch. 75, 12 Stat. 392 (1862). See generally P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (Public Land Law Review Comm'n, 1968); S. PROUDFIT, PUBLIC LAND SYSTEM OF THE UNITED STATES (1923).

76. As historian Brown observed: "The General Assembly, the first popular representative legislative assembly ever held within the limits of the present United States, convened at Jamestown on Friday, August 9, 1619." FIRST REPUBLIC, *supra* note 7, at 315.

77. 1697-1698 CAL. STATE PAPERS A. & W.I., *supra* note 12, at 423; see also Robinson, *supra* note 19, at 141-42.

78. See *supra* notes 30-34, 47-49 and accompanying text.

79. The 1705 land reform bill represents one of the colonial legislature's strongest reform measures. See Act of Oct., 1705, ch. 21, 3 HENING'S STAT., *supra* note 1, at 304. The legislature passed it to correct many of the abuses that had been occurring within the head right system. The bill provided that only those persons who were imported or who came into the country on their own were entitled to the 50 acres. If the individual was brought in as a Christian servant, he or she would receive the 50 acres when the servitude was ended. *Id.* The crucial change in this land

This notion that Virginia's land system contained certain democratic elements or tendencies is stated in slightly different terms and with a slightly different emphasis by historian Alexander Brown. Brown's thesis, as explained in his work *The First Republic of America*, is that by implementing the Great Charter the London Company established "the first republic in America."⁸⁰ From its beginning, the Virginia colony was a commonwealth of land, with the colonial government and free men having the authority, and ultimately the right, to share in and dispose of her vast resources for the benefit of her people.⁸¹ Brown and others who have developed similar theses⁸² attribute the development of Virginia as a commonwealth to several interrelated factors.

One factor is the independent and rebellious nature of the early settlers which acted as a catalyst to the development of a democratically oriented land system. This rebellious streak caused the settlers to resist certain measures designed by the British government to increase control over the colony and to adopt alternatives allowing them more freedom of choice.⁸³ As early as 1616, for example, the settlers' independent nature influenced the London Com-

grant policy was that the reform no longer permitted the master who had his servants imported or the shipmaster who actually transported them to claim the lands of those imported. See F. HARRISON, *supra* note 12, at 38. Through this bill, the Assembly had hoped to end the abusive practices flourishing under the head right system and thus eliminate the situation where only a few people held most of the colony's claimed land. See *supra* note 30. The Board of Trade and the Privy Council disallowed it, though, apparently because it did not make enough changes. See *id.*

After this repeal, Governor Spotswood arrived in Virginia. Finding that the abusive practices still continued despite the legislature's latest reform efforts, Spotswood initiated a new head right patent intended to appeal to the conscience of all loyal Englishmen. See *id.* Because Spotswood's reforms did not substantially interfere with speculators' efforts to accumulate land, the reforms generally were accepted by the landowners. The continued speculation left Governor Spotswood especially irate. In his view, the speculation resulted in large tracts of land being held by a few and remaining "for the greatest part uncultivated, to the great prejudice of the colony and the discouragement of future adventurers where they can find little or no convenient land to plant upon." 2 *Letters of Governor Spotswood*, *supra* note 15, at 15; see also F. HARRISON, *supra* note 12, at 41.

80. FIRST REPUBLIC, *supra* note 7, at 329.

81. *Id.* at 650.

82. See, e.g., F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* 250 (1920) (where Turner maintains that "those who win the vacant lands are entitled to shape their own government in their own way").

83. Throughout the colonial period, settlers in Virginia retained the belief that every individual was entitled to a land grant. Because the Virginia Company originally had promised a head right to each immigrant, it became their belief that this was a guarantee. After the Crown took over the government of Virginia, the settlers would not relinquish this belief. Because of it, for example, they refused to pay more taxes on the land than were originally required. The notion that every settler could obtain a land grant even affected the land system in Northern Virginia. Although the Northern Neck had developed a different land system, see *supra* notes 35-46 and accompanying text, the land agents administering that system often found enforcement of requirements existing in other proprietaries, such as those in Maryland and Pennsylvania, to be impossible. Apparently adherence to some of the requirements typically found in proprietaries would have resulted in significant losses in land sales. Settlers in the market for land simply would have bought from the competing land vendor — the colonial government of Virginia proper. See 2 *Letters of Governor Spotswood*, *supra* note 15, at 14; F. HARRISON, *supra* note 12, at 9-11.

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pany's decision to retreat from the communistic system established in the colony and allow private enterprise.⁸⁴ Although the settlers' resistance did not always succeed, their efforts ultimately led to the development of freely accessible and transferable property rights in land.

A second factor involved certain frontier conditions, such as the abundance of land, that created expectations in the emigrants which even the Crown could not remove.⁸⁵ Almost from the beginning, settlers who came to Virginia perceived that they had a "reserved legal right sooner or later to carve an individual holding out of the inexhaustible abundance of land" in the colony.⁸⁶ Although the Crown and royal governors attempted to assert the royal prerogatives held by the Crown in colonial lands, they never were successful in convincing the Virginia colonists that land grants were a matter of royal grace and generosity.⁸⁷ Governor Spotswood attested to this lack of success when he complained about two of the unusual procedures of the Virginia land system: first, the practice of allowing the colonial government to participate in the issuance of land grants, along with the royal governor, and second, the sentiment of the colonists that they had a "Right to have a Patent" upon petition.⁸⁸

In addition to the first two themes, the early development of Virginia's land system demonstrates a third theme closely related to the factors mentioned above: the private land system that developed early in Virginia's history differed (at times significantly) from the land system in England and even in some of the other colonies. The Great Charter, for example, established a head right system that recognized that "the governor for the time being and the said Council of State" shall have the power to allot lands, thus enabling the Council to outvote the governor in granting lands.⁸⁹ That the colonial government could participate in the granting of estates demonstrates how different the land systems of England and Virginia already had become. In England, local governing bodies rarely participated in the land grant process.

84. See *supra* notes 8-10 and accompanying text; see also *FIRST REPUBLIC*, *supra* note 7, at 234-35, 249-50.

85. Turner maintains that the influence of frontier conditions, and not the character of the original European settlers, was the primary reason why American democracy developed. F. TURNER, *supra* note 82, at 267.

86. F. HARRISON, *supra* note 12, at 9.

87. Historian Brown, for example, describes James I as "the great friend to the colonization enterprise," who, prior to 1617, seemed to have been "more willing to concede favors (even yielding his own ideas of government, colonization, etc., and his royal prerogatives) to the managers than to oppose their interests in any way." *FIRST REPUBLIC*, *supra* note 7, at 249.

88. In his correspondence, Spotswood wrote: "Every one who had a mind to a tract of land vested in the Crown, either originally, or by lapse or Escheat, claim'd a Right to have a Patent for it upon his petition, without acknowledging any right in the Gov'r to dispense the favours of the Crown, according to the merits and qualifications of the person." 2 *Letters of Governor Spotswood*, *supra* note 15, at 14; see also F. HARRISON, *supra* note 12, at 139 n.1.

89. Yeardley's Instructions, *supra* note 9, at 163. Governor Berkeley challenged this practice, but the Assembly confirmed it. See 2 *HENING'S STAT.*, *supra* note 1, at 253; *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA* 37 (1660-1693); see also F. HARRISON, *supra* note 12, at 31-32.

Giving a local government the power to veto land grant decisions made by the Crown's emissary thus would have been unthinkable.⁹⁰

Nor did the English feudal land system have much impact on other aspects of Virginia's land system. Although the language of the land patents referred to the origins and bases of the conveyance, typically reciting that the land was "[t]o be held of or Sovereyn Lord the King, his heirs & Successors for Ever, as of his mannour of East Greenwich, in free & comon soccage & not in Capite nor by Knts [knights] service,"⁹¹ this language was little more than a token gesture to the Crown.⁹² The only other significant reminder of the feudal origins of the franchise was the fee rent or quit rent, as it was more commonly known. Yet even this tenurial obligation only remotely resembled the original concept as it existed in feudal England.⁹³ Furthermore, after experiencing considerable resistance to the quit rent obligation, the King eventually yielded and acknowledged the unique nature of the quit rent in Virginia. As early as 1681, he declared "that he would henceforth make no grant of any Quit Rents to any person ... that they might be reserved for the support of the Government in the places aforesaid, as they were originally intended."⁹⁴ Such successful resistance to the Crown only served to further encourage the colonists to control the destiny of their land system and instill it with a sense of independence and democracy not present in England.

The themes and policies affecting the development of land law in the colonial period continued to play an important role in shaping the land system after the Revolutionary War. Indeed, the early state legislation may have intensified some of these policies, by formally recognizing their validity and importance. The remaining portions of this chapter study the development of Virginia's land system after Virginia achieved statehood. They place special

90. Participation by the colonial government in the land grant process eroded the feudal land grant system because that government had the power to overrule any land grant authorized by the Governor, who was the Crown's representative in Virginia. In such circumstances, the council would, in effect, be overruling the Crown. See F. HARRISON, *supra* note 12, at 10, 139 n.1.

91. See Patent issued to George Barker, Oct. 27, 1663, 5 PATENTS, *supra* note 12, at 293; see also F. HARRISON, *supra* note 12, at 31.

92. As one commentator observed, Virginia land patents used words "which served historically to declare the unaltered fact that the Virginia planter was a member of a community which had once been a corporation and as such had inherited a 'right' to a 'dividend' of land." F. HARRISON, *supra* note 12, at 10 (omitting footnote citing correspondence from Governor Spotswood).

93. Although Maryland, under the leadership of Lord Baltimore, had initiated a quit rent system like that of Virginia, the Maryland government found it necessary to raise the minimum price of the quit rent from four to ten shillings. The effect of the higher price was a decrease in the number of land grants given. See C. GOULD, *THE LAND SYSTEM IN MARYLAND* 9-10 (1913). Unlike Maryland, the only time that the Virginia Assembly reluctantly raised the quit rent occurred in 1755 during the French and Indian War. See Act of May, 1755, ch. 2, 6 HENING'S STAT., *supra* note 1, at 461 (1819). The Assembly had exhausted its other source of income, the poll tax, and quickly repealed the Act raising the quit rent once the danger from the war was over. See Act of Mar., 1768, ch. 1, 8 *id.* at 295 (1821).

94. 2 ACTS OF PRIVY COUNCIL, 1680-1720, *supra* note 20, at 22. According to one commentator, by relinquishing the quit rent obligation to the colonial government of Virginia, England was acknowledging Virginia as a "commonwealth," whose citizens rightly deserved to keep the "fruits" of their labor. F. HARRISON, *supra* note 12, at 137.

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emphasis on the degree to which the colonial themes and policies continued to have vitality.

§ 8.2. Early Statehood Legislation.

Although English rule over Virginia ended in 1775 with the flight of Lord Dunmore, Virginia waited until 1779 to adopt comprehensive changes to its land laws. Until 1779, most of the land laws passed by the legislature dealt with settlement on Virginia's western frontier⁹⁵ and represented attempts by the Virginia General Assembly to clarify the status of interests in land in that region. This section focuses on some of the legislative actions taken in the early statehood period to clarify private interests in land.

A. The 1776 Resolution.

As explained earlier, the French and Indian War caused King George III to issue a proclamation prohibiting settlement on the western frontier. But while that proclamation prevented the governor and colonial council from issuing land patents for the affected area, it did not, as a practical matter, stop colonists from settling in the western areas.⁹⁶ As the number of parties settling without legal authorization increased, conflicts arose over title to various tracts of land.⁹⁷

In 1776 Virginia's Revolutionary Convention passed a resolution addressing one of those conflicts — a dispute between "inhabitants on the western frontiers" and patentees "pretending to derive titles from Indian deeds and purchases."⁹⁸ Under the Resolution, the Convention declared that "all persons actually settled on any of the said lands, ought to hold the same" without payment until the merits of the claims could be considered by the legislature.⁹⁹ Furthermore, it gave preemptive or preferential rights to "all persons, who are now actually settled on any unlocated or unappropriated lands in Virginia, to which there is no other just claim ... in the grants of such lands."¹⁰⁰

95. At least one of the acts even dealt with western lands acquired by a specific group of individuals. See Act of Oct. 3, 1778, ch. 33, 9 HENING'S STAT., *supra* note 1, at 571 (1821).

96. The Greenbrier and Loyal companies began selling parts of the western frontier even though the companies could not convey good title. Pioneers moved west, selected their farm sites and left the question of title for future determination. See Voorhis, *supra* note 14, at 175.

97. See *id.* A conflict, for instance, developed between several land companies and warrantees who took by military right. Although the Proclamation of 1763 prohibited grants or settlements beyond the Atlantic watershed, it excepted those who acquired military rights for serving during the French and Indian War. Many of these people acquired patents during 1773 and 1774. Apparently upset about this situation, the Greenbrier and Loyal land companies sought, in 1773, to have their prior rights in the region recognized. In 1773 the Colonial Council decided to protect the rights of the companies over the military warrantees, instructing those parties still having military warrants to locate their bounty lands in a manner that did not interfere with settlements or surveys already made. See 2 VA. CODE app. II, at 348 (1819).

98. Resolution of Convention, June 24, 1776, reprinted in 2 VA. CODE app. II, at 350 (1819).

99. *Id.*

100. *Id.* (emphasis in original).

Approximately a year later, the Virginia legislature supplemented the 1776 resolution with an act subjecting the western lands covered by the resolution to taxation. More specifically, the 1777 Act provided, in pertinent part, that:

all persons who, on or before the said twenty fourth day of June one thousand seven hundred and seventy six, had bona fide settled themselves, or at his or her charge had settled others, upon any waste and ungranted lands on the said Western Waters, and had not by regular entry, survey, or contract, ascertained the quantity of their claim, shall be allowed for every family so settled four hundred acres of land, to include such settlement, or such lesser quantity as the person entitled thereto ... shall ... declare to the accessors ... and the assessment [of a land tax] shall continue to be made from year to year ... during the term of six years, or until regular surveys shall be made, and grants obtained for the same.¹⁰¹

The Act also established a procedure for collecting the taxes¹⁰² and abolished quit rents for all lands within the Commonwealth, except for the Northern Neck region. As the legislation explained, it discharged most Commonwealth lands from the payment of quit rent "to prevent the danger to a free state from perpetual revenue."¹⁰³

B. The 1779 "Cleaning Up" Act.

The General Assembly reconsidered the problem of settlements on western waters in May, 1779, passing an act to clean up and settle "the various and vague claims to unpatented lands."¹⁰⁴ Apparently enacted in conjunction with the land grant act of 1779,¹⁰⁵ the "cleaning up" statute listed several reasons for its enactment in its preamble. They included the desire to avoid possible "tedious and infinite litigation and disputes" and the fear that potential "purchasers would be discouraged from taking up lands," thus reducing much needed public revenues. In addition, the preamble expressed a need for clearly

101. Act of Oct., 1777, ch. 2, § 5, 9 HENING'S STAT., *supra* note 1, at 349, 356 (1821).

102. *Id.*, § 8, at 358. The Act provided that assessors should value all lands which were subject to the tax. If any person believed that an assessor had valued his land incorrectly, he could appeal the assessor's judgment in a hearing before the tax commissioner in the county of corporation. The Act also directed the sheriff to collect the taxes after posting a bond with sufficient security, payable to the Commonwealth's treasurer. If the sheriff failed to give the required security, the court was to appoint another person, also required to post security, to collect the assessed taxes. *Id.* §§ 6, 8, at 357-58.

By August of each year, the tax commissioner was to deliver a list of all people in the county required to pay taxes pursuant to the Act. After receipt of the list, the sheriff or collector was to receive and collect taxes based on the list. Failure to pay taxes by September 1 resulted in a forced sale of the estate. *Id.* § 8, at 358. If taxes were due on lands belonging to a proprietor living outside of a county, the commissioner was to determine the proprietor's whereabouts and transmit the assessment to the county where the proprietor resided so that the sheriff in the county where the proprietor resided could collect, levy and account in "like manner as the other assessments of such county." *Id.* § 8, at 359.

103. *Id.* § 9, at 359.

104. Act of May, 1779, ch. 12, preamble, 10 *id.* at 35 (1822).

105. Although the "cleaning up" act appears before the land grant act in HENING'S STAT., *supra* note 1, Embrey reasonably concluded that the land grant act was passed first because it was so fundamental to the entire system. A. EMBREY, *supra* note 3, at 184.

defined rules and procedures for purchasing, settling and determining rights in land so that "subsequent purchasers and adventurers may be enabled to proceed with greater certainty and safety."¹⁰⁶

After explaining the reasons for its enactment, the statute then provided for validation of certain claims to waste and unappropriated lands. As set forth in section 1 of the Act, such validation occurred where surveys of waste and unappropriated lands were made upon any of the western waters before January 1, 1778 and "upon any of the eastern waters at any time before the end of th[e] present session of assembly," and where the claims were based on charter, importation, treasury or military rights, or on legislative acts or council orders.¹⁰⁷ All other surveys of "waste and unpatented lands" were to be "null and void."¹⁰⁸ Those parties having valid claims under the Act could procure a grant by presenting the survey plat and certificate, along with the "rights, entry, order, warrant, or authentick copy thereof upon which" the survey was based, to the land office, which would issue a grant if "no caveat shall have been legally entered."¹⁰⁹

Section 2 of the curative act imposed a one-year time limit on the right of a section 1 claimant to obtain a grant under that section's procedures. Section 2 also provided that persons who claimed rights under importation, treasury or military rights, but who had not located and surveyed a tract, had one year within which to perfect their claims and obtain title under the provisions of the new land grant act.¹¹⁰ Finally, persons who had made an entry in accordance with a legislative act "for any tract of land not exceeding four hundred acres, upon any of the eastern waters," but who had not yet surveyed the tract, had until the end of the present legislative session to obtain a lawful survey and then procure a grant under the land grant act.¹¹¹

Section 3 of the curative act voided all claims based on orders of the council that had not already been surveyed, with the exception of an order affecting the Dismal Swamp. Additionally, the section voided all claims to land based on royal proclamation or any other military right, except where the claimant completed the land grant process within a year.¹¹²

The fourth section of the Act addressed the problem created by "great numbers of people [who] ... settled in the country upon the western waters, upon waste and unappropriated lands," and who had been unable to obtain legal title for a number of reasons, including the Proclamation of 1763 and the delays caused by the Revolutionary War.¹¹³ Reasoning that "it is just that those settling under such circumstances should have some reasonable allowance for the charge and risk they have incurred," the legislature provided that all parties who, before January 1, 1778, had "bona fide settled

106. 10 HENING'S STAT., *supra* note 1, at 35.

107. *Id.* at 35-36.

108. *Id.* at 36.

109. *Id.*

110. *Id.* at 37.

111. *Id.* at 37-38.

112. *Id.* at 38.

113. *Id.*

themselves or their families, or at ... their charge, have settled others upon any waste or unappropriated lands on the said western waters, to which no other person hath any legal right or claim, shall be allowed for every family so settled, four hundred acres of land, or such smaller quantity as the party chooses, to include such settlement."¹¹⁴ This provision thus continued the validation process begun by the 1777 tax act.

The fifth section of the Act focused exclusively on concerns facing settlers on western waters, providing protection not only for their private, but also for their public interests in land. As discussed earlier, it was this section of the Act that specifically set aside 640 acres of unclaimed land in certain western villages and townships to be "reserved for the use and benefit" of the inhabitants until the General Assembly could more fully consider the needs and rights of the inhabitants of the individual towns.¹¹⁵ The villages and towns affected by the reservation were those where "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."¹¹⁶ This provision thus ratified, at least temporarily, the custom of using certain lands in common.

After protecting the settlers' common or public interests, section 5 recognized their private interests, reaffirming the settlers' right to claim and procure title to waste and unappropriated land "in consideration of their settlement" pursuant to the previous section.¹¹⁷ As defined under section 5, a "settler" was a party who had "made a crop of corn in that country, or resided there at least one year since the time of their settlement."¹¹⁸ Additionally, section 5 granted preemptive rights in grants of land to those who failed to qualify for section 4 settlement rights. More specifically, to be entitled to the preemptive rights, a person, after January 1, 1778, must have "actually settled on any waste or unappropriated lands" on western waters not otherwise claimed or, prior to January 1, 1778, must have "marked out or chosen for ... [himself], any waste or unappropriated lands, and built any house or hut, or made other improvements thereon."¹¹⁹ To prevent conflicts between those claiming under settlement rights and those claiming under preemptive rights, the section stated that the register of the land office should give priority to certificates of settlement by refusing to admit warrants for preemptive rights for a certain time period.¹²⁰

In an apparent attempt to minimize uncertainty and to prevent the growth of abusive practices like those that developed under the head right system, the legislature imposed several restrictions on the settlement and preemptive rights of settlers on western waters. A party, for example, only could assert

114. *Id.* at 38-39.

115. *Id.* at 39.

116. *Id.*

117. *Id.*

118. *Id.* at 40.

119. *Id.*

120. *Id.* at 41.

one claim for preemptive rights on the basis of improvements to the land.¹²¹ Additionally, the section limited the number of acres that could be claimed under settlement or preemptive rights to 1,000 acres and imposed certain time deadlines on the perfection of such claims through the procurement of title.¹²²

Section 6 of the Act required all those "suing out grants" to pay various fees before issuance of the grant,¹²³ while section 7 dealt with a problem created by several land companies, which had been authorized by orders of the council to survey lands for public sale and which apparently had induced many people to rely on the prospect of a future sale and settle without a specific agreement. The section ordered such companies to confirm the titles of the appropriate settlers.¹²⁴

The remaining sections of the Act dealt with various evidentiary, procedural, and administrative issues. The most comprehensive of these sections was section 8. It established a procedure for resolving disputes which involved the formation of four districts comprised of counties on the western waters with appointment by the governor of four commissioners for each district.¹²⁵ As explained in the Act, the primary duty of the commissioners was to determine and adjust claims to lands on western waters based on settlement rights, preemptive rights, or council orders. To enable them to carry out this charge, the section delegated various powers to the commissioners, including the power to determine title claims through hearings, to require interested parties to attend, and "to punish contempts, enforce good behaviour in their presence, and award costs, in the same manner with the county courts."¹²⁶ In resolving disputes involving conflicting claims of settlement, section 8 directed the commissioners to give a preference to the party "who made the first actual settlement."¹²⁷ Similarly, disputes involving conflicting claims of preemption were to be resolved in favor of the party "who made the first improvement."¹²⁸

To guide the commissioners in hearing and determining claims, section 8 set forth numerous procedural requirements. Remarkably similar to various procedures followed by courts and administrative bodies today, these requirements covered such issues as notice, the maintenance of a record, the place and nature of hearings, investigatory powers, hearing powers, subpoenas, summons, the bias of the decisionmaker, the opportunity to participate and present conflicting claims, the rules of evidence, the nature and form of the

121. *Id.* at 40.

122. *Id.* at 40-41.

123. *Id.* at 41. Before issuing a grant, the land office required a party to pay "ten shillings sterling for every hundred acres, to be discharged in current money, at the rate of thirty three and one third per centum exchange" in addition to "common office fees." If a person already had lodged a certificate of survey in the secretary's office, only office fees were required. *Id.* at 42.

124. *Id.* at 42.

125. *Id.* at 43.

126. *Id.* at 44.

127. *Id.* at 44-45.

128. *Id.* at 45.

commissioners' judgment, and finality and availability of review.¹²⁹ Once the commissioners ruled for a particular claimant, they issued a certificate entitling the holder either "to an entry and survey, or a warrant," depending on the basis of the decision.¹³⁰

Without going into greater detail on the nature of the procedural requirements, these requirements appear designed to further two goals: the speedy resolution of claims and the instilling of certainty in the dispute resolution process. For example, other than an exception made in section 9 for those disabled by distance, the judgment of the commissioners was final.¹³¹ Additionally, the first-in-time rule of law provided an unambiguous, workable standard for evaluating conflicting claims, while the broad powers delegated to the commissioners allowed them to perform their tasks effectively and expeditiously.

Although section 8 applied to most land claims, it did not cover those based on orders of the council, which were reserved by section 10 for evaluation by the court of appeals.¹³² Finally, section 11 imposed a duty on the register of the land office to "regularly record all land warrants issued by virtue of this act"

129. Before taking office, each commissioner had to take an oath pledging to serve the Commonwealth by "'collecting, adjusting, and settling the claims'" of those persons claiming lands or preemptions in a particular district, of settlers claiming lands surveyed by order of council, and of various companies. *Id.* at 43 (quoting oath). A commissioner had to swear not to compromise his office by taking, directly or indirectly, fees, gifts, or awards other than those allowed by law. *Id.*

Section 8 empowered the commission to "administer oaths to witnesses or others ... to punish contempts, enforce good behaviour in their presence, and award costs." *Id.* at 44. The commission had free access to the county surveyor's books and could pay surveyors and sheriffs for their attendance at commission meetings out of fees received for certificates. Section 8 also required the commission to post notices in forts, churches, meeting houses, and other public places announcing the time and location of meetings for hearing and determining claims. A clerk, appointed and sworn by the commissioners, kept minutes of all proceedings. The Act specified that the minutes should include a record of all persons, the description of the lands in dispute, and the names of parties judged to have the right to preemption or title to certain lands.

If a contest over land arose under the Act, the clerk issued a summons alerting the defendant to the nature of a plaintiff's claim and requiring the defendant to appear at a designated time and place to refute the plaintiff's request for title to land or for a grant of land. The summons was served by the sheriff of the county in which the defendant resided. If the sheriff returned the service, the commissioners could decide either to proceed to trial or, for good cause, to postpone the trial. The clerk also could request either party to issue subpoenas requiring witnesses to appear at the trial. *Id.* § 8.

The commission could hear evidence and apply rules and principles of law or equity. Any person injured by the commissioners' determination could appeal the decision to general district court which could modify or reverse the former determination. If necessary, sheriffs could be used to enforce a judgment. *Id.* at 42-47.

130. *Id.* at 46. The certificates attested by the commission's clerk specified the number of acres, the time of settlement, and the quantity of adjacent land subject to preemption that a certain claimant was to receive. Commissioners, after completing their business in a particular district, were required to submit to the land office register an alphabetical list or schedule, attested to by the clerk, of all certificates granted. The commissioners also were required to submit a duplicate list or schedule to the county surveyor. *Id.* at 46-47.

131. Section 9 of the Act created an exception for "persons at a great distance [who] may not have timely notice, and may be unable to appear in support of their claims." *Id.* at 48.

132. *Id.* at 48-49.

and to make out grants,¹³³ while section 12 dealt with caveats pending at the time of the Revolution, empowering the general courts to resolve them.¹³⁴

C. Some Comments on the Early Legislation.

Although the land laws discussed above did not play a significant role in Virginia's land system, they provide some important insights into the policies and thinking of the state legislature. Perhaps most importantly, the laws shed some light on the meaning of the words "waste and unappropriated," a phrase which becomes a pivotal concept in later land legislation.¹³⁵ In several of the laws, the terms "unpatented," "unappropriated," and "ungranted" appear to be used interchangeably. The 1779 curative act, for instance, continually uses the phrases "waste and unappropriated," "waste and unpatented," and "waste or unappropriated" all for the same purpose — to define the general category of land subject to the Act's special claim settlement process.¹³⁶ Although the 1777 tax act does not contain any of those phrases, it does refer to "waste and ungranted lands" on several different occasions.¹³⁷ Since the 1777 Act was a precursor to the 1779 Act, it would seem logical to conclude that the terms "ungranted," "unappropriated," and "unpatented" had similar meanings.

Judge Embrey, author of *Waters of the State*, apparently would disagree with this conclusion. In his book, Embrey wrote that "[w]aste and unappropriated lands were by the act converted into unpatented lands, by authorized surveys"¹³⁸ This statement suggests that he perceived a legal distinction existing between waste and unappropriated lands, on the one hand, and unpatented lands, on the other. Apparently only lands in the latter category would have been subjected to at least part of the patenting process.

Both the title to the 1779 Act and the opening sentence of the preamble contradict this perception. The title describes the Act as "adjusting and settling the titles of claimers to unpatented lands under the present and former government, previous to the establishment of the commonwealth's land office," while the preamble begins with the language "Whereas the various and vague claims to unpatented lands under the former and present government"¹³⁹ Although neither the title nor the preamble can control the plain meaning of the statute, both can be used to explain or clarify the statutory language.¹⁴⁰ In the 1779 Act, the preamble and the title appear to

133. *Id.* at 49.

134. *Id.* at 49-50.

135. The 1779 curative act also provides some insights into the meaning of the phrases "western" and "eastern" waters, phrases used without much clarity in later land statutes. See *infra* § 10.2.B.

136. See 10 HENING'S STAT., *supra* note 1, § 1, at 35 (1822) ("waste and unappropriated"); *id.* § 1, at 36 ("waste and unpatented"); *id.* § 4, at 38 ("waste and unappropriated"); *id.* § 4, at 39 ("waste or unappropriated"); *id.* § 5, at 40 ("waste or unappropriated").

137. Act of Oct., 1777, ch. 2, 9 HENING'S STAT., *supra* note 1, at 349, 355-56 (1821).

138. A. EMBREY, *supra* note 3, at 197.

139. Act of May, 1779, ch. 12, 10 HENING'S STAT., *supra* note 1, at 35 (1822).

140. Under early English parliamentary practice, the title of an act was supplied by a clerk to one of the houses of Parliament rather than by the legislative body. Because of this practice, English courts have held that the title to an act was not part of the act and thus could not be used

use the phrase “unpatented lands” generally to refer to all those waste and unappropriated lands governed by the Act. Whether the lands were surveyed seems to be irrelevant to defining the various terms. A later provision in the Act admittedly appears to use the term “unpatented” in a narrower sense to refer just to unappropriated lands. But even in that case, unpatented lands do not appear to be a category of lands legally distinct from either waste or unappropriated lands.

Some support for Embrey’s position exists, however. The 1779 Act enhances the legal position of claims to waste and unappropriated lands on western waters, in part by using surveying as one benchmark for determining whether a claim merits the Act’s added protection. Further, under rules of statutory construction a court generally must give effect to each word and provision of a statute so as to avoid rendering any part “inoperative or superfluous.”¹⁴¹ These rules of construction, however, also allow courts to transpose the words and phrases of a statute to effectuate legislative intent and “to make the act consistent and harmonious throughout.”¹⁴² Additionally, the meaning of ambiguous words may be determined by examining their association with other words.¹⁴³ Given that the terms “unpatented,” “unappropriated,” and

to interpret the meaning of the act. See *Salkeld v. Johnson*, 154 Eng. Rep. 487, 499 (1848); *Mills v. Wilkins*, 87 Eng. Rep. 822, 822-23 (1703).

In the United States, legislatures generally are required to provide a title which gives accurate notice of the contents of an act. The courts thus are willing to use the title to interpret the accompanying act. But the title still has limited interpretive value. As one commentator explained, the “title cannot control the plain words of the statute . . . [but] [i]n case of ambiguity, the court may consider the title to resolve uncertainty in the purview of the act or for the correction of obvious errors.” 2A C. SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 47.03 (4th ed. 1984) (footnotes omitted); see also *Brotherhood of R.R. Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 529 (1947) (in construing the Interstate Commerce Act, the Court held that title and subheadings of an act could be used to shed light on the ambiguous portions but could not limit the plain meaning of the statute).

Because the preamble to an act explains the reasons leading to its enactment, early English courts gave great weight to the preamble. 2A C. SANDS, *supra*, § 47.04, at 126-27. Today, however, courts tend to give equal weight to all parts of an act when interpreting it. *Id.* at 127. In the United States, the preamble to an act cannot control the statute when the enacting part of the statute is expressed in clear and unambiguous terms. As Sutherland explains, “[t]he preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty.” *Id.* at 128 (footnote omitted).

The Virginia courts follow the general rules described above in interpreting titles and preambles. For example, in *Brown v. Commonwealth*, 215 Va. 143, 207 S.E.2d 833 (1974), the court stated that the “summary title is not part of the body of the statute” and is not controlling. *Id.* at 146, 207 S.E.2d at 836. Similarly, in *Commonwealth v. Smith*, 76 Va. 477 (1882), the court quoted, with approval, a statement providing that “[t]he preamble is properly referred to when doubts or ambiguities arise upon the words of the enacting part. The preamble can never enlarge; it cannot confer any power *per se*.” *Id.* at 485; see also *Commonwealth v. Ferries Co.*, 120 Va. 827, 92 S.E. 804 (1917).

141. 2A C. SANDS, *supra* note 140, § 46.06.

142. *Id.* § 47.35 (footnotes omitted); see also *id.* § 47.16.

143. The principle of determining the meaning of ambiguously used words by reference to their association with other words and phrases is called *noscitur a sociis*. Under this rule the courts are willing to construe a “general” word such as “waste” in light of a “special” word like “unpatented” when the two words ordinarily have similar meanings but are not “equally comprehensive.” See

"ungranted" generally are used in the same relation to the term "waste," it seems logical to apply the transposition and association principles to the statutory provision and to conclude that all those terms are synonymous.

The laws fail to shed as much light on the meaning of the word "waste." In all but one of the legislative actions, that term appears in conjunction with the word "unappropriated." In the 1776 resolution, however, the phrase "unlocated or unappropriated" is used instead of "waste or unappropriated."¹⁴⁴ Because the resolution's phrasing does not appear in the other laws, it could indicate that a difference exists between the terms "unlocated" and "waste." But since the subsequent laws basically deal with the same issues raised by the 1776 resolution, it seems more logical to interpret "waste" and "unlocated" as having similar meanings.

Regardless of the significance of the reference to "unlocated" lands, the acts adopted after the 1776 resolution suggest, through their repeated use of the phrase "waste and unappropriated," that waste is not synonymous with unappropriated. Furthermore, the 1779 curative act suggests that lands do not lose their waste and unappropriated status just because a party has begun the land grant process. The Act repeatedly refers to waste and unappropriated lands in the context of lands that have been surveyed, located by warrant, or subjected to a caveat or counterclaim. Implicit in these references is the assumption that the entire process must be completed before the lands lose this status.¹⁴⁵

In addition to providing insights into the meaning of the phrase "waste and unappropriated," the legislative acts and resolution also reveal that different legal consequences flow from the various stages of the land grant process. As the earlier discussion of the 1779 curative act shows, clear legal distinctions existed among the concepts of entry, warrant, surveying, settlement, and improvement. Settlement of land, for example, did not occur simply because a structure was built on the land.¹⁴⁶ Further, not all of the various stages necessarily led to the acquisition of legally protected rights in land.

Finally, beginning with the 1776 resolution and culminating in sections 4 and 5 of the 1779 curative act, the early laws demonstrate that the legislature gradually enhanced the legal stature associated with the act of "settling," until eventually that act became a basis for procuring title to land. By rewarding the actions of those who, without legal authorization, settled on or improved western lands, the legislature recognized a new method for

id. § 47.16. The resulting interpretation under the principle of *noscitur a sociis* must be consistent with legislative intent. *Id.*

Use of the conjunction "and" in a statute suggests that the legislature intended that all enumerated conditions must be fulfilled. Use of the disjunctive "or" suggests that the failure to comply with any identified requirement imposes liability. But because there is "great laxity in the use of these terms," many courts find that "and" and "or" are interchangeable and that one may be substituted for the other if to do so is consistent with legislative intent. 1A *id.* § 21.14 (1985).

¹⁴⁴ 2 VA. CODE app. II, at 350 (1819).

¹⁴⁵ See Act of May, 1779, ch. 12, 10 HENING'S STAT., *supra* note 1, at 35-36, 37, 38-39, 40-41 (1822).

¹⁴⁶ *Id.* at 40.

acquiring rights in land. Perhaps more importantly, the legislature recognized and promoted a land policy destined to become one of the cornerstones of property law — the policy of maximizing use of resources. This policy would gain greater prominence in later years as the principles of squatters' rights and adverse possession developed under Virginia land law.¹⁴⁷

The 1793 case of *Jones v. Williams & Tomlinson*¹⁴⁸ demonstrates both the importance and the limitations of settlement rights. In that case, Williams and Tomlinson filed a bill in chancery court requesting conveyance of certain land to them on the basis of their settlement rights established before 1775 and validated by land commissioners in 1780. The defendant Jones had acquired the land from Jacobs and his wife, who, in turn, had obtained the land in 1784 by a patent based on a military warrant. The military warrantee had located the warrant in 1775 and returned the survey in 1776, after plaintiffs' settlement. Although Williams had filed a caveat against the issuance of a grant to the military warrantee, the caveat had been dismissed accidentally.

In reversing the lower court and ruling for the defendant, the court concluded that, even assuming the plaintiffs had settled first on the land, they still did not acquire any rights to the land by virtue of their settlement since the settlement occurred before passage of the 1779 land legislation. According to the court, no right of settlement "could be acquired ... in lands formerly belonging to the crown, until the act passed in May 1779 — before that time, those lands might have been entered, and patented by any person, notwithstanding prior settlements by others."¹⁴⁹ Even after the passage of the 1779 legislation, though, settlers only acquired "a preference to such settlements in lands, as at that time were *waste & unappropriated*."¹⁵⁰ By the time the legislation was passed, the land in question had lost its status as waste and unappropriated land because the military warrantee "was then entitled to a patent for it."¹⁵¹ As the court explained, the 1779 legislation only "applies to controversies between mere settlers" and does not defeat rights "legally acquired under warrants."¹⁵²

The value of all three lessons provided by the early land laws becomes more apparent after consideration of the 1779 land grant act. The remaining sections of this chapter focus on that statute.

§ 8.3. The 1779 Land Grant Act.

In May, 1779, the Virginia General Assembly decided to substantially revise its land system. As explained by the preamble to the land grant office

147. See generally A. EMBREY, *supra* note 3, at 224-25 (discussing the first squatters statute passed in 1789).

148. 1 Va. (1 Wash.) 230 (1793).

149. *Id.* at 231. The court did not clearly identify the 1779 Act to which it was referring. Its discussion of settlement rights suggests that it meant the curative act, while its discussion of the patenting process suggests that the 1779 land grant act was intended.

150. *Id.* (emphasis in original).

151. *Id.* at 232.

152. *Id.* at 231.

act adopted by the 1779 legislature, the revisions were necessary because there were "large quantities of waste and unappropriated lands within ... [Virginia], the granting of which will encourage the migration of foreigners hither, promote population, increase the annual revenue, and create a fund for discharging the publick debt."¹⁵³ To achieve these goals, the land grant office act set forth, in great detail, the terms for acquiring waste and unappropriated lands and implemented significant changes in prior law.¹⁵⁴

One significant change concerned the basic form of the land patent, which had remained relatively settled since 1677.¹⁵⁵ Calling it a "grant by way of deed poll," the Act provided for the issuance of a grant "to the party having [the] right" for the relevant "'tract or parcel of land,'" along "'with its appurtenances.'"¹⁵⁶ Conspicuously absent from the 1779 form was any language automatically conveying interests in waters, watercourses, or bottoms contained within the boundaries of the granted land, or any language granting the privileges of fishing, fowling, hunting, or hawking. Apparently the legislature only intended to create a general form to be used for the conveyance of land and nothing else.¹⁵⁷

This intent became more apparent in subsequent provisions of the Act that distinguish between high and low lands and set forth special rules for the latter. Under the special provisions, "[a]ny person possessing high lands, to which any swamp, marshes, or sunken grounds are contiguous" received a preemptive right to such low lands for one year.¹⁵⁸ If the owner of the high land failed to exercise his preemptive right within the one-year period, then any other person could "enter on and obtain a grant for the same in the like manner as is directed in the case of other unappropriated lands."¹⁵⁹ By adopting different rules for swamps, marshes, and sunken lands,¹⁶⁰ the legislature suggested that the rest of the Act's provisions dealt with high lands that were not adjacent to these types of tidal resources. Additionally, the legislature demonstrated that it was continuing a policy begun in the colonial period to encourage development of lands adjoining tidal waters. Special rules were needed because of the "many inconveniences [that] may

153. Act of May, 1779, ch. 13, 10 HENING'S STAT., *supra* note 1, at 50. The Act was entitled "An act for establishing a Land office, and ascertaining the terms and manner of granting waste and unappropriated lands." *Id.*

154. Judge Embrey describes the Act as "fundamental, and, from its passage until now, ... [as] substantially prescrib[ing] the terms and conditions upon which public lands could be acquired." A. EMBREY, *supra* note 3, at 184.

155. Prior to the 1779 Act, the form of patents basically had to conform to specifications established in the 1677 "Act settling the forme of pattents." See 2 HENING'S STAT., *supra* note 1, at 418; see also A. EMBREY, *supra* note 3, at 184.

156. 10 HENING'S STAT., *supra* note 1, at 60 (1822) (quoting from the form of the grant).

157. The main requirements imposed by the 1779 Act were that a monetary payment or military service had to be made, that the deed had to be signed by the governor of the Commonwealth, that the seal of the Commonwealth had to be affixed to the deed, and finally that the deed had to be registered and recorded by the land office. *Id.* at 60-61.

158. *Id.* at 61.

159. *Id.* at 61-62.

160. For a discussion of the ecological and physical characteristics of tidal lands and resources, see *supra* chapters 1-3.

arise to severall inhabitants of this country who have land adjoining to swamps, marshes, and suncken land unpattented if any others who are disjoyned from the same may ... take up and pattent them.”¹⁶¹

Besides restricting the general conveyance to interests in land, the land grant act of 1779 also abolished all tenures, reservations of mines and other interests, and all feudal conditions contained in royal patents, declaring that all lands henceforth “be held in absolute and unconditional property.”¹⁶² Additionally, the Act recognized only two methods for acquiring title to “waste or unappropriated lands”: the military right and the treasury right.¹⁶³ The Act thus formally recognized the demise of the head right system.

The final major change implemented by the 1779 land grant act involved the manner in which land grants could be procured. In a departure from past procedure, the General Assembly created a state land office charged with the responsibility of issuing grants for waste and unappropriated lands and keeping all relevant land documents. The head of the land office, the register, was “appointed, from time to time, by joint ballot of both houses of assembly” and held his office “during good behaviour.”¹⁶⁴ Under the provisions of the land grant act, anyone could purchase rights to waste and unappropriated lands by paying forty pounds for every 100 acres to the treasurer, who then would give a receipt to the purchaser. Upon presenting the receipt at the auditor’s office, the purchaser would obtain a certificate specifying the quantity of land to which the holder was entitled.¹⁶⁵ After taking the certificate to the land office, the holder would receive a warrant authorizing a qualified surveyor to lay off and survey the specified amount of land pursuant to the method set out in the Act. Once the land was located in a particular county, the surveyor made an entry in his books indicating the location of the

161. Act of Sept., 1672, act 9, 2 HENING’S STAT., *supra* note 1, at 300, 300. Subsequent statutes promulgated to settle titles continued to include similar provisions for the preemptive rights of landowners to adjacent lowlands. See, e.g., Act of Oct., 1748, ch. 1, 5 *id.* at 408, 421-22 (1819); Act of Oct., 1705, ch. 21, 3 *id.* at 304, 306-07. Eventually, in 1784, the legislature decided that the one-year time limitation of the 1779 Act also was an inconvenience to owners of adjacent lowlands, and it repealed the provision of the 1779 Act which had required landowners to lay claim to adjacent lowlands within one year or forfeit those rights forever. See Act of May, 1784, ch. 10, 11 *id.* at 371-72. In its place the legislature substituted a preemptive rights provision that permitted landowners to exercise their preemptive rights until May, 1786. Further, the 1784 Act declared “all and every entry or entries that may have been made ... for such swamps, marshes, or sunken grounds ... null and void.” *Id.* at 372.

Even under the 1779 Act’s one-year limitation, persons under a disability were exempted. The 1779 Act included a provision protecting “any feme covert, infant under the age of twenty one years, persons not being compos mentis, or person out of the commonwealth” who owned highlands located next to any swamps, marshes, or sunken ground. 10 *id.* at 62 (1822). No one could obtain a grant for those lowlands and all persons under a legal disability had “one year after the removal of their several disabilities” to preempt the lowlands adjacent to their lands. *Id.*

162. 10 *id.* at 64-65.

163. *Id.* at 51-52.

164. *Id.* at 50. If a vacancy arose because of death, resignation, or removal from office between sessions of the General Assembly, the governor or first magistrate of the Commonwealth could, with the advice of the council, appoint a person to act as register until the end of the next session of the General Assembly. *Id.* at 51.

165. *Id.* at 52.

§ 8.3 LAWS AFFECTING PRIVATE INTERESTS IN TIDAL RESOURCES

party's warrant and the date of the location.¹⁶⁶ The entries served to give notice to and thus protect the warrantee against subsequent purchasers who could not locate a warrant on land for which there already had been an entry.¹⁶⁷ Within one year after completion of the survey, the warrantee had to return the plat, certificate of survey and warrant to the land office, or risk forfeiting all interests in the land to other parties.¹⁶⁸ The documents remained in the land office for a period of not less than six but not more than nine months and, if within that time no caveat had been entered against the

166. *Id.* at 54. A surveyor was liable to any person for all damages sustained by his failure to survey land in accordance with the provisions of the Act, including failure to give adequate notice of the planned survey and failure to return a true list of all surveys made by him with the names of the persons for whom they were made and the quantities of land included in each. *Id.* at 58. Additionally, a surveyor who delivered a plat to anyone other than to the party for whom it was surveyed was subject to a fine of 50 pounds sterling per 100 acres or actual damages, at the injured party's election. *Id.* at 61.

167. Under Virginia law an entry technically represented the first legal step towards the acquisition of title to a specific tract of land. *Johnson v. Brown*, 7 Va. (3 Call) 259, 266 (1802). No one could enter a tract of the land when there had been a prior entry for the tract. The prior entry gave the warrantee a preference in obtaining a grant. *Nichols v. Covey*, 25 Va. (4 Rand.) 365, 366 (1826); *Johnson v. Brown*, 7 Va. (3 Call) 259, 266 (1802). That preference, however, did not last forever. In *Johnson v. Brown*, for example, the court declared invalid an entry which had not been acted upon for 34 years and instead affirmed the validity of a subsequent patent. 7 Va. (3 Call) 259 (1802). Similarly, in *Nichol v. Covey*, the court vacated a prior entry for neglect to survey and return a plat, in favor of a patent issued six years after the original entry. *See generally infra* notes 186-213 and accompanying text (discussing interests created during the land grant process).

In other jurisdictions, the term "entry" has been applied to a variety of proceedings under land law. In *Stearns v. United States*, for example, the court recognized that, under the homestead act, the term has been used to describe a preliminary entry, a final entry, or the acquisition process as a whole. *See* 152 F. 900, 907 (8th Cir. 1907). But despite this variation, the court then concluded that, at least in the dispute before it, "entry" referred to the proceedings "whereby the possession and the title are acquired." *Id.* Because the defendants' entries on public land either were obtained to protect persons who previously had taken illegal possession of those lands or contained false information concerning the natural resources of those lands, the court found the entries to be fraudulent.

The term "entry" also has been used by courts in its ordinary sense to mean the physical act of entering and settling upon the land. *See St. Paul, M. & M. R. Co. v. Greenhalgh*, 26 F. 563 (C.C.D. Minn.), *aff'd*, 139 U.S. 19 (1886). In *Greenhalgh*, the court rejected a railway company's claim that an occupant of land near the company's railway line had not formally "entered" the public land because of failure to register with the land office prior to withdrawal of the parcel from sale. The court suggested that physical settlement on the land constituted "entry" for the purposes of giving the occupant a preemptive right to the land. The occupant thus was able to defeat the company's claim to the land. *See* 26 F. at 567-68.

168. Under the provisions of section 3, "a fair and true plat" was to be accompanied by a certificate of survey which showed the

quantity contained, the hundred (where hundreds are established in the county wherein it lies) the courses and description of the several boundaries, natural and artificial, ancient and new, expressing the proper names of such natural boundaries, where they have any, and the name of every person whose former line is made a boundary; and also the nature of the warrant and rights on which such survey was made.

issuing of the grant to the warrantee, then the register made out a grant to the warrantee.¹⁶⁹

Persons objecting to the issuance of a grant for a particular tract of land had the right under the 1779 land act to file a caveat with the land office explaining the reasons for the objection. The complaining party then had three days within which to deliver a certified copy of the caveat to the clerk of the general court or lose his right to assert the claim. After receiving the certified copy, the clerk issued a summons ordering the defendant to appear in court at a designated time to defend his interests. Under the Act, the court could use summary procedures in determining the rights of the parties and only had to impanel a jury "for the finding of such facts as are material to the cause, and are not agreed by the parties."¹⁷⁰ Although the court's judgment could not be appealed, a new caveat could be entered against the grant if the judgment were for the defendant and he failed to deliver a copy of it to the land office within three months.

Besides the procedures described above, the 1779 Act also contained other miscellaneous provisions. Some of the more significant ones included: (1) a provision giving "[a]ll persons ... the right to assign or transfer of warrants or certificates of survey;"¹⁷¹ (2) several provisions outlining the recording obligations of surveyors and the register, including one requiring the register to note in his books any subsequent action taken with respect to a warrant;¹⁷² (3) several oversight provisions, including one directing the county courts to examine the books of their chief surveyors¹⁷³ and one requiring the general court to cause the land office to be examined on a yearly basis;¹⁷⁴ and (4) several provisions dealing with mistakes in land grants.¹⁷⁵

§ 8.4. Subsequent Amendments to the 1779 Land Grant Act.

The procedures established by the 1779 land grant act remained substantially intact until the 1920's when the state legislature began to dismantle and abolish the land office. Up until that time, most of the amendments to the Act extended the time limit for taking certain actions or addressed the

169. *Id.* at 60. Military rights were established in a similar manner. Section 2 of the 1779 Act provided that officers and soldiers entitled to land bounties under the laws of the Commonwealth could receive the quantity of waste or unappropriated lands designated to them in those laws in the following manner. Officers and soldiers were to present proof of service before a court of record either on the person's own oath or by authenticity of certificate of service from the person's commanding officer executed before a court of record. Upon satisfactory proof of service, the clerk of the court would endorse and certify the certificate of service and record. The patentee then would take the certificate to the land office to receive a warrant. *Id.* at 51-52.

170. *Id.* at 59.

171. *Id.* at 60.

172. *Id.* at 59-60.

173. *Id.* at 57.

174. *Id.* at 64.

175. *Id.* at 63-64. One section, for example, set forth a procedure for quieting title to surplus land, defined as arising when a party held greater quantities of land than specified in his patent. *Id.* § 4, at 62; see also *infra* note 179.

problem of competing claims to land.¹⁷⁶ In a 1784 statute, for example, the General Assembly extended the time during which owners of land contiguous to "swamps, marshes, or sunken grounds" could exercise their preemptive rights to such land because, as explained by the amendment, the 1779 land act was not duly promulgated.¹⁷⁷ Then, to avoid "a multiplicity of law suits," the legislature declared that all entries made by any person on these lands prior to the amendment were void.¹⁷⁸ Additionally, the 1784 Act attempted to minimize potential conflicts by clarifying the procedures to be used in obtaining patents to vacant sunken grounds, adopting the same procedures as those used for surplus lands and prescribed in the 1779 land grant act.¹⁷⁹ Finally, the 1784 amendment authorized the register to receive land surveys without the corresponding warrant, justifying the elimination of the warrant requirement by noting that the register already had a sufficient record of warrants.¹⁸⁰

Another amendment addressing the problem of conflicting claims was passed on December 28, 1795. It prohibited the register of the land office from receiving plats "which evidently comprehend the rights of others."¹⁸¹ Almost sixty years later the legislature still was struggling with the problem. In adopting the 1849 Code, it decided to require, for the first time, that a person applying for a grant issue an affidavit stating that the land had not been previously appropriated or that the land was liable to entry.¹⁸² The 1860 Code altered the affidavit requirement somewhat, adding that the applicant could,

176. See, e.g., Act of Nov., 1781, ch. 29, 10 HENING'S STAT., *supra* note 1, at 484 (1822); Act of Mar., 1781, ch. 10, *id.* at 403; Act of May, 1780, ch. 9, *id.* at 237.

177. Act of May, 1784, ch. 10, 11 *id.* at 371, 371-72; see *supra* note 161.

178. 11 HENING'S STAT., *supra* note 1, at 371, 372.

179. *Id.* Under § 4 of the 1779 land grant act, a party could not enter and survey any land held as surplus within any grant or patent except during the lifetime of the patentee or grantee and then only prior to any conveyance or alienation of the land. Surplus land existed when a party held greater quantities of land than specified in his patent. The party wishing to enter the land had to give one year's notice of his intent to the original holder of the grant or patent. If the landowner holding the surplus land did not obtain a patent within that year, then, upon proof of notice to the court in the county where the land was located, the party could obtain a warrant from the register of the land office to resurvey the tract. Upon returning a plat and a certificate of resurvey, along with the warrant upon which the survey was based, and then purchasing new rights for the surplus land found within the bounds of the original patent, the party could obtain a new grant. The original patentee however, could assign surplus land in his tract, provided the width of the land assigned was at least one third of the length. 10 *id.* at 62-63 (1822).

180. 11 *id.* at 372-73 (1823). It is unclear whether the provision eliminating the warrant requirement only applied to marshes, swamps, and sunken grounds. Because the need for eliminating the requirement was explained in the context of patents for "all vacant sunken grounds aforesaid," the provision eliminating the warrant requirement arguably only applied to marshes, swamps, and sunken lands. See *id.* at 372.

181. Act of Dec. 28, 1795, ch. 9, 1 S. SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA 361, 361 (Richmond 1835) [hereinafter cited as SHEPHERD'S STAT.].

182. The requirement provided: "The said register shall not issue any grant for land upon any survey ... unless there be endorsed on such survey an affidavit of the person applying for the grant that he verily believes that the land embraced in the survey has not been previously appropriated, or that it was at the time of the entry thereof liable to entry." VA. CODE ch. 112, § 38 (1849).

as an alternative, attest "that he has bona fide title or claim to such land, and desires by a new grant to perfect or quit his title or claim thereto."¹⁸³ A few years later, the legislature expanded the scope of the affidavit provision, requiring the surveyor, as well as the grant applicant, to endorse the completed survey with his affidavit before the survey could be returned to the land office.¹⁸⁴ The two-affidavit requirement remained in each subsequent code until the 1952 revision, which effectively abolished the land grant system as established in the 1779 land grant act.¹⁸⁵

§ 8.5. Judicial Interpretations of the 1779 Land Grant Act.

In spite of the clear, certain, and detailed nature of the provisions of the 1779 land grant act, it raised numerous issues for the courts to resolve. These issues range from questions involving key policy concerns to those purely procedural in tone. The issues generally can be separated into three categories: (1) those relating to the legal status of interests created during the land grant process; (2) those relating to procedural provisions in the Act; and (3) those relating to the scope of the Act, especially as defined by the phrase "waste and unappropriated." The most significant issues in each category are addressed below.

A. *Legal Status of Interests Created During the Land Grant Process.*

One question frequently litigated concerns the legal status of interests created by the land grant process. Because that process generally required the potential grantee to go through several different stages, from making an entry and locating land to obtaining the actual patent, uncertainty surrounded the status of the interests acquired by the applicant during the various stages. As late as 1930, the Virginia Supreme Court attempted to remove some of this uncertainty. One of its decisions, *Powell v. Field*,¹⁸⁶ focused on the question of when during the various land grant stages "does the right of a purchaser become a vested interest in the particular tract."¹⁸⁷ In that case, the plaintiffs filed a bill in equity requesting injunctive relief for interference to their leasehold interest in marshland located in Accomack County. The plaintiffs had obtained their lease from a state oyster inspector in 1923 pursuant to a statutory procedure. In reliance on the lease, they had taken possession of the land, planted oysters, paid taxes, and remained in peaceful possession until defendants attempted to use the same land. In response to plaintiffs' bill, defendants asserted a superior interest by claiming

183. *Id.* ch. 112, § 43 (1860).

184. Act of Feb. 26, 1866, ch. 50, 1865-1866 Va. Acts 167.

185. In 1952 the legislature made three important changes to the land office: one, the State Librarian was prohibited from issuing warrants after July 1, 1952; two, any warrants that had been issued had to be "carried into grant" by Jan. 1, 1954; and three, the duties of maintaining and preserving the land office records were transferred to the State Librarian. These amendments effectively abolished the land grant system. Act of Mar. 5, 1952, ch. 185, 1952 Va. Acts 208, 208.

186. 155 Va. 612, 155 S.E. 819 (1930).

187. *Id.* at 617, 155 S.E. at 820.

that a grant for the same land had been issued to a predecessor of one of the defendants by the register of the land office in 1897.¹⁸⁸

The plaintiffs, in turn, questioned the validity of the grant by noting that although defendant's predecessor-in-title made an entry and a survey of the land on November 28, 1887 and January 6, 1888, respectively, the predecessor had not filed his final application and obtained his patent until after the General Assembly passed an act affecting certain unappropriated lands like his. Effective February 24, 1888, that statute provided, in pertinent part, that "all unappropriated marsh or meadow lands lying on the eastern shore of Virginia, 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, and no land warrant located upon the same."¹⁸⁹ A subsequent statute authorized use of the land in question for oystering.¹⁹⁰ While the defendants admitted that the land in the grant was the type of land covered by the 1888 marshlands act, they maintained that the marshlands statute did not apply to the land because the defendant's predecessor-in-title had begun the land grant process at the time the Act was passed and thus had acquired a vested right.

In responding to the argument that the process of entry and survey created a vested interest in a warrantee, the court reviewed state and federal law on the question and concluded that the defendant's title was void because it was finally acquired after passage of the 1888 Act. According to the court,

before the interest of an applicant to purchase public lands becomes vested, as against the State, he must have fully performed all the requirements of law, thereby entitling him to a patent, but if the State withdraws the land from sale before he does all that he is required to do he has no vested interest.¹⁹¹

Stated in more concrete terms, to obtain a vested interest against the state, the applicant must file an application, accompanied by all necessary documents, including the plat, survey, and proof.¹⁹² In explaining its position, the court quoted from an earlier case that had stressed that legal title did not pass from the state until the process was completed and that had noted, consistent with this reasoning, that the state could not charge a party with land taxes until after the state had issued a grant.¹⁹³ Also, as the earlier case had observed, the state was not the only party that could back out; the warrantee also could change his mind by withdrawing the warrant at any

188. Only one defendant, Field, actually claimed title to the land under the grant. The other defendant, Pruitt, claimed to have an interest superior to plaintiffs', as Field's lessee. *Id.* at 614-15, 155 S.E. at 819-20.

189. Act of Feb. 24, 1888, ch. 219, 1887-1888 Va. Acts 273 (present version codified at VA. CODE § 41.1-4 (1986)).

190. VA. CODE ch. 128, §§ 3219-3298 (1919); see also *Powell*, 155 Va. at 624, 155 S.E. at 823.

191. *Powell*, 155 Va. at 623, 155 S.E. at 822. The court unfortunately misuses the phrase "public lands." Because the court uses that same phrase in describing the land grant act, it apparently intended "public lands" to refer to waste and unappropriated lands, and not to lands set aside for public use. See *id.* at 616, 155 S.E. at 820.

192. *Id.* at 619, 155 S.E. at 821.

193. *Id.* at 618-19, 155 S.E. at 821, quoting *Nichols v. Covey*, 25 Va. (4 Rand.) 365, 367 (1826).

time and applying it later to the purchase of that or any other available tract.¹⁹⁴

The court, however, made a point of observing that a party did acquire a legally protected interest of sorts by making an entry and survey. Borrowing the words of an earlier decision, the court explained: "An entry is the first legal step towards acquiring waste land and gives the person making it, if properly pursued, a preference to a grant, the true definition of an equitable interest. The survey is a progressive legal step; but it is the grant, only, which passes the legal title."¹⁹⁵ Although this equitable interest was not vested as against the state, thus enabling Virginia to withdraw lands from grant as it did in the 1888 Act, the interest did give the holder a preferential right or priority in buying lands as against other individuals.¹⁹⁶ Furthermore, even if the state withdrew the located land from sale, the applicant for purchase still was entitled to use his warrant to locate on other waste and unappropriated lands available for sale.¹⁹⁷

Other decisions of the Virginia Supreme Court also have considered the nature of the interest created by an entry and have described the interest in similar terms. Courts, for example, have described the interest as an "equitable right,"¹⁹⁸ as an "inchoate right" to the land,¹⁹⁹ and as giving "the person making it, (not an absolute legal right, but) *if properly pursued*, a preference to a grant."²⁰⁰ The court in one case even went so far as to classify the interest created by an entry and survey as an interest in real estate and not personalty, at least for purposes of intestate succession and estate

194. *Powell*, 155 Va. at 618-19, 155 S.E. at 821.

195. *Id.* at 618, 155 S.E. at 820-21, quoting *Johnson v. Brown*, 7 Va. (3 Call) 239, 267 (1802) (emphasis omitted).

196. *Powell*, 155 Va. at 618, 155 S.E. at 821. In reaching this conclusion, the court distinguished an earlier case, *Morrison v. Campbell*, 23 Va. (2 Rand.) 206 (1824). In *Morrison*, the defendant, a creditor of the deceased holder of an entry, had obtained the entry by an assignment. Subsequently, the executors of the decedent's estate sold the surveys and the warrant for the same land to the plaintiff. The subsequent purchaser prevailed, but only because the court held that entries could not be assigned. Despite this rationale, the court in *Powell* chose to distinguish *Morrison* on another basis: by noting that *Morrison* did not involve the right of the Commonwealth, but rather the rights of private parties. See *Powell*, 155 Va. at 617-18, 155 S.E. at 820. The distinction between preferential rights involving individuals and those involving the state also appears to be important under federal law. See *id.* at 619-23, 155 S.E. at 821-22.

197. *Powell*, 155 Va. at 623, 155 S.E. at 822. Although the court did not explain the distinction between an applicant's rights against the state and against private parties, its position is consistent with general principles of equity. As a general matter, the superior legal interest must prevail unless the equities of the situation compel a different result. Thus, in a conflict between the state and a warrantee, the state generally must prevail because it still has legal title. But where neither party has legal title and both claim equitable interests, the party with the prior equity generally should prevail as long as he actually acquired a valid equitable interest and as long as the party with the subsequent equity had notice of the prior equity. Thus, the first party to enter and survey generally should be able to prevail against others who enter even though the first party lacks legal title. See *M'Clung v. Hughes*, 26 Va. (5 Rand.) 453, 475-76 (1827); *Morrison v. Campbell*, 23 Va. (2 Rand.) 206, 220 (1824).

198. *Morrison v. Campbell*, 23 Va. (2 Rand.) 206, 224 (1824).

199. *Id.* at 217.

200. *M'Clung v. Hughes*, 26 Va. (5 Rand.) 453, 485 (1827).

distribution.²⁰¹ As a consequence of this classification, the interest created by an entry and survey would pass to the heirs at law as realty if the person who made it died intestate and could only be devised by a will satisfying the formalities imposed for passing realty.²⁰² That same court also found a difference in the characteristics of warrants and surveys, on the one hand, and entries, on the other. As one member of the court observed, whereas warrants and surveys clearly were assignable, there was no law "authorising an assignment of an entry," though in practice such transfers probably occurred.²⁰³ This distinction actually would have made sense under the law existing at that time. Although any person could obtain a copy of an entry, only the person authorizing the survey could obtain a copy of the survey.²⁰⁴ Thus, if assignments of entries were allowed, it would have been easy for someone to pass a forged document.

Besides focusing on the status of entries and surveys, Virginia case law also has examined the legal effect of grants. One case in particular, *M'Clung v. Hughes*,²⁰⁵ studied at some length the finality of a grant, especially in relation to the caveat process. According to Judge Green of the court, after a party obtains a land grant, anyone else claiming a prior equity against the grantee could not obtain relief in equity unless the grantee was "guilty of an actual fraud in the acquisition of the legal title," or unless the claimant could establish he was prevented from asserting his prior equity in a caveat proceeding because of "fraud, accident or mistake."²⁰⁶ By actual fraud, Judge Green meant "the proceeding to procure a patent, after actual notice of a prior entry."²⁰⁷

Although other judges in the case did not agree with Judge Green's statement of the law or his judgment, they all appeared to agree on the need

201. *Morrison v. Campbell*, 23 Va. (2 Rand.) 206, 217 (1824) (statement by J. Green).

202. *But see* *Whittington v. Christian*, 23 Va. (2 Rand.) 353, 366-69 (1824) (particularly *id.* at 369, where J. Green states that the right obtained by petitioner for lapsed land "was not *jus in re*, nor *jus ad rem*, so as to give a right to enter and possess the land," thus suggesting that he would disagree with the classification of the interest created by an entry as an interest in realty).

203. *Morrison*, 23 Va. at 225.

204. *See* Act of May, 1779, ch. 13, 10 HENING'S STAT., *supra* note 1, at 50, 54, 59 (1822); *see also Morrison*, 23 Va. at 225.

205. 26 Va. (5 Rand.) 453 (1827).

206. *Id.* at 488. The "caveat" proceeding referred to by J. Green in *M'Clung* is described in *Noland v. Cromwell*, 18 Va. (4 Munf.) 155 (1814), and is codified in the 1779 land grant act, 10 HENING'S STAT., *supra* note 1, at 50. According to the decision in *Noland*, a caveat proceeding was a "kind of preventive justice," which allowed a person claiming superior title to a tract of land to file with a court in equity to prevent the granting of a patent to that land to another person. 18 Va. at 160-61. In *Noland* a subsequent patentee claimed that he should prevail over a prior patentee because the prior patentee had failed to file a caveat preventing issuance of the subsequent patent and had not been prevented from doing so by any actual fraud on the part of the subsequent patentee. Although the prior patentee had a faulty patent, he had the superior equitable interest. Desiring to protect this interest, the court held that failure to file a caveat would not bar a person with superior equitable title to land from retaining possession of the land as long as the particular circumstances of the case indicated that the prior claimant had made adequate attempts to ensure that his patent was proper and that no one else had asserted a claim to the land. *Id.* at 170-71.

207. *M'Clung*, 26 Va. at 489.

for finality in grants. Judge Carr was particularly persuasive in articulating the reasons favoring finality, returning to the policies of the basic land act. As he interpreted prior law, one of the important concerns of the legislature in providing for the sale of tremendous quantities of "vacant" land was to have title disputes settled as quickly as possible.²⁰⁸ To achieve this goal, the legislature created a special dispute resolution system, called the caveat proceeding, which was designed to be a summary procedure. One of the key ingredients of this process was the notice requirement, which was first met by "entry in the surveyor's book, open to all" and "which, when followed up by a survey, ... afford[ed] complete notice of the claim."²⁰⁹ By putting all parties on notice of what was duly recorded, the land grant act eliminated the numerous disputes focusing on the meaning of notice and favored certainty over ensuring justice in each individual case.²¹⁰ Thus, as a general matter, a party who failed to prosecute a caveat could not later attack the validity of the grant in equity unless he established special grounds like actual fraud.

Judge Green reiterated many of the points already made by Judge Carr, but also focused on the needs of individual adventurers. In his view, adventurers "had even a greater interest in a speedy decision of their claims."²¹¹ If they failed in their claim to a particular tract of land, their injury would not be that substantial as long as they could acquire similar land at minimal additional expense. The lengthier the dispute resolution process, the more likely others would have taken up all the valuable land.²¹² Permitting persons who failed to use the caveat proceeding to seek relief in equity thus would undermine important objectives of the 1779 land act.²¹³

B. Some Procedural Issues.

Judicial opinions also have examined various procedural issues raised by the land grant statute. *Challice v. Clark*,²¹⁴ for example, considered the evidentiary effect of a grant, as well as the notice provisions of the land warrant section. In that case the plaintiff brought a suit to remove a cloud on

²⁰⁸. *Id.* at 463.

²⁰⁹. *Id.*

²¹⁰. *Id.*

²¹¹. *Id.* at 490.

²¹². *Id.* at 490-91.

²¹³. *Id.* at 491. In order to increase the population of the state and, more importantly, to increase the state treasury through sale of unpatented lands between the Allegheny Mountains and the Mississippi River, the state legislature decided to provide for a speedy resolution of disputes. By establishing the caveat proceeding, the legislature displayed its "strong anxiety ... to coerce the parties claiming, to assert their rights in the mode prescribed by law, with promptitude and vigilance, to take out the patent immediately, and to provide for the indemnity of the losing party as far as was possible." *Id.* If the courts of equity were allowed to become involved in the determination of these patents, these legislative objectives would, in the court's view, be thwarted. Courts of equity would delay proceedings and could not indemnify an unsuccessful defendant. That party also would lose the fees that he paid to the public to obtain the patent. Moreover, because there was "an adequate and simple remedy in another forum," the courts of equity probably could not even assume jurisdiction in such cases. *Id.* at 492.

²¹⁴. 163 Va. 98, 175 S.E. 770 (1934).

part of her land created by the state's issuance of a grant to the defendant subsequent to the plaintiff's grant from a private party. Ruling for the defendant, the court first observed that upon the issuance of a grant by the state a presumption arose that, in the absence of evidence to the contrary, the grantee had complied with all statutory requirements. "The burden rests upon the person attacking the validity of the grant to prove that it was not validly procured," a burden which the plaintiff failed to meet.²¹⁵

Furthermore, the court concluded that plaintiff misconstrued the notice provisions of the Virginia Code. They provided that, if a party locating a warrant upon lands subject to entry which are in the possession of another gives notice of his intention to the possessor, then the latter must file a caveat within three months to prevent issuance of the grant. But if notice is not given to the possessor, then the latter may, at any time prior to the issuance of a grant, locate a warrant and file a caveat to prevent the issuance of a grant to the first party.²¹⁶ As interpreted by the court, these provisions did not require the person locating a warrant to give notice to a possessor as a prerequisite to obtaining a grant.²¹⁷

C. "Waste and Unappropriated" Lands.

The most important issues raised by the 1779 land grant act concern the meaning of the phrase "waste and unappropriated." Although those words were used throughout the 1779 Act to define the types of lands subject to entry, the Act did not define the terms. Nor has any legislation passed since that time explained their meaning.²¹⁸ Given the integral role that the terms played years ago in identifying lands that could be distributed to private persons, and given the continued viability of those terms today, that omission is shocking. The only plausible explanation for the deletion is that the words had an unequivocal and accepted meaning during the eighteenth and nineteenth centuries. Efforts to define the terms therefore must concentrate on historical records, judicial decisions, and other relevant events, circumstances, customs, or usages of that time period.

^{215.} *Id.* at 110, 175 S.E. at 774.

^{216.} The statute cited by the court in *Challice* specifically stated: "[w]here any land subject to entry is in the actual possession of any person claiming the same, under written color of title ... any other person intending to locate any land office warrant on such land may file ... a statement, and give to the person so in possession a notice of such intention" VA. CODE § 428 (1919). The statute further provided that if notice was given in this manner, "the person having such possession and claim may, at any time within three months after such notice, ... file ... a caveat, to prevent the issuing of a grant to the person so giving notice; or ... [if notice has not been given], then the person having possession and claim may, at any time before a grant issues to the person thus failing to give notice, locate a warrant on such lands" *Id.* § 429.

^{217.} *Challice*, 163 Va. at 111, 175 S.E. at 774; accord *Minnick v. Woods*, 111 Va. 114, 68 S.E. 282 (1910) (also concluding that *jus tertii* claims were not permitted in caveat proceedings and that the caveator must win on his own title).

^{218.} See, e.g., VA. CODE §§ 41.1-5, -16, -19 (1986).

1. *English Law Connotations.*

The terms "waste and unappropriated" were perhaps easier to understand before the Revolution when the feudal system still existed. According to *A Dictionary of American and English Law*, English law defined wasteland as "land which has never been cultivated, as opposed to pasture and arable land"²¹⁹ Under this definition, most of the marshland in tidewater Virginia would have been classified as waste since it was not arable and could not be cultivated without being drained. This conclusion is consistent with various accounts of the pattern of settlement during the colonial period. Historian Philip Bruce, for instance, describes how the colonists tended to settle first on arable lands in tidewater near major watercourses. Ultimately though, as these lands lost their fertility, many of the settlers abandoned them and moved to lands farther to the west without even attempting to drain adjacent marshlands.²²⁰ The local government tried on several occasions to halt this trend, without much success, by creating incentives for draining and using marshland. One such inducement was the 1672 marshlands act, which, as explained earlier, gave owners of upland located adjacent to marshes, swamps and "sunken" lands a preemptive right to take up the marshland.²²¹ Despite its existence, few landowners exercised their preemptive rights,²²² apparently because they perceived such lands to be poor soil for cultivation of crops, especially tobacco.²²³

There is some evidence that the term "waste" was extended under Virginia law to include any land to which common rights attached.²²⁴ At least under English law, such an extension arguably would have been improper. During

219. 2 S. RAPALJE & R. LAWRENCE, *A DICTIONARY OF AMERICAN AND ENGLISH LAW* 1349 (1883).

220. 1 P. BRUCE, *supra* note 29, at 425-27, 430-34.

221. Act of Sept., 1672, act 9, 2 HENING'S STAT., *supra* note 1, at 300; see also Act of Nov., 1713, ch. 3, 4 *id.* at 37, 38 (1820) (which required that a patentee improve three acres of a fifty-acre patent within three years of receiving the grant because, among other reasons, "many ... tracts are full of marshes, swamps, and sunken grounds, unfit, either for cultivation or pasturage, without being first cleared and drained"); 1 P. BRUCE, *supra* note 29, at 431; *supra* notes 158-61 and accompanying text.

222. At one time Governor Berkeley questioned whether even 100 acres had been reclaimed from the tide or standing pools. See 1 P. BRUCE, *supra* note 29, at 431.

223. Tobacco grown in reclaimed soil apparently produced a heavier leaf, which was not as combustible or sweet scented as tobacco grown on high land. See *id.* at 434-35. Additionally, production costs were higher because of the costs of draining the land. *Id.* at 432. However, when settlers used reclaimed land for growing tobacco, they appeared to be pleased. See *id.* at 432-34.

Water law also discourages the draining of marshlands because it prohibits a landowner from draining the water from his land onto another's land. See 3 H. FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* § 894 (1904). This prohibition could explain why some landowners decided not to bother with reclamation of marshland. But, although a private landowner might not be able to drain his land, the courts tend to hold that the state can drain marshes and other lowlands under its police powers where the lowlands pose a threat to public health and create a public nuisance. See, e.g., *Black Marsh Drainage Dist. v. Rowe*, 350 Mich. 470, 87 N.W.2d 65 (1957). This condition certainly existed in Jamestown, for the swampy surroundings contributed substantially to the high death rate and widespread illness at the settlement. See 1 P. BRUCE, *supra* note 29, at 189-90.

224. See *infra* notes 265-73 and accompanying text.

the feudal era several differences appeared to have developed between common lands and waste lands. Whereas an individual could acquire the exclusive right to use certain common lands, he could not acquire such a right in lands generally classified as waste.²²⁵ The two categories of land also tended to have different physical attributes. Although lands subject to defined common rights typically were arable fields used for cultivation and grazing, waste lands often were uncultivated and practically worthless.²²⁶ Thus, if a court accepts English law in interpreting the phrase "waste," it arguably should not apply the term generally to all common lands.

The litigation involving Lord Fairfax's landholdings in the Northern Neck sheds further light on the meaning of the terms "waste" and "unappropriated" under English law. A reading of the Virginia and United States Supreme Court decisions in that litigation shows that waste and unappropriated lands were those lands not specifically occupied or used by the lord having seisin and not subject to any tenurial obligation created by that lord.²²⁷ Thus, although the lord had seisin, or legal title, to waste and unappropriated land acquired from the Crown, and therefore had the right to possession and use of the lands, the lord had not yet cultivated them or conveyed them in tenure to another party.²²⁸

225. See ROYAL COMMISSION ON COMMON LAND 1955-1958, at 23-24 (1958) [hereinafter cited as ROYAL REPORT]. When a party could acquire an exclusive interest in common lands, the lands technically were known as commonable lands. See *id.* at 175; *supra* chapter 6, notes 30, 73.

226. See W. HOSKINS & L. STAMP, *THE COMMON LANDS OF ENGLAND AND WALES* 53 (1963). Many waste lands were subject to common rights. But these rights appeared to arise informally because of usage and were not as stringently regulated as other lands subject to common rights. See ROYAL REPORT, *supra* note 225, at 23-24. Cf. *supra* chapter 6, notes 58-60 and accompanying text (discussing customary rights in common and waste lands). During feudal days waste lands typically included lands in a manor not conveyed by the lord to a tenant. Although these lands often were subject to common rights, the rights differed, in some respects, from common rights in common lands. See *id.* notes 26-30 and accompanying text. Thus, depending on whether a narrow or broad approach is taken in defining common lands, waste lands could be classified as commons. See ROYAL REPORT, *supra* note 225, at 23-26.

227. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 619 (1812), *rev'g* *Hunter v. Fairfax's Devisee*, 15 Va. (1 Munf.) 218, 236-37 (1810).

228. Under the facts of *Hunter v. Fairfax's Devisee*, the plaintiff/appellant had obtained a grant in 1789 from the Commonwealth of Virginia for a parcel of land which Lord Fairfax had described as waste and ungranted land. The land had been part of the Northern Neck territory which Lord Fairfax had devised to the defendant/appellee, a British citizen, in 1781. In suing for ejectment, the plaintiff argued that the various Acts of Assembly, which had been passed to provide for the granting of waste and unappropriated land, justified the grant by the Commonwealth. The defendant, on the other hand, argued that he had properly acquired title when the land was devised to him and that, absent an act by the Commonwealth specifically divesting him of that title, he was the rightful legal possessor.

Writing for the majority, Judge Roane expressed the view that the Commonwealth, by statutorily authorizing entries on vacant land in the Northern Neck subsequent to the defendant's devise but prior to a 1785 treaty acknowledging such title to be good, had implicitly declared the entire vacant territory to be in the possession and control of the Commonwealth. Furthermore, this possession was sufficient to avoid the confirmation of title of the defendant under the 1785 treaty. 15 Va. at 228-30. Judge Fleming, on the other hand, rejected the proposition that legislation had authorized the granting of the particular parcel of land in dispute to the plaintiff. In Fleming's view, the defendant clearly had taken legal title to the land and the

Besides being consistent with English legal principles governing land use and ownership under the feudal system, this interpretation also explains why both terms, waste and unappropriated, were used to describe the lands. Admittedly, because the lord had acquired seisin to the lands from the Crown, it could be argued that the lands were appropriated for that lord's use in a very general sense. But since the lord had not actually set aside the lands for his own use and benefit or conveyed them to a tenant, they remained unappropriated in a more narrow sense, at least with respect to the lord's rights in the land. Furthermore, from the lord's perspective, these lands were waste, bringing little immediate benefit to him since they were unproductive and therefore did not help him to meet his tenurial obligations.²²⁹

After the Revolution, when Virginia abolished all remaining tenures,²³⁰ the concept of seisin disappeared from property law, and the phrase "waste and unappropriated" lost some of its theoretical framework. The term "unappropriated" no longer could be defined in relation to the actions of the lord having seisin. Nor could the character of the land be measured against the lord's ability to meet his tenurial obligations. Perhaps this explains why many judicial opinions and legislative acts use the terms interchangeably with each other and with such other terms as "ungranted" and "unpatented." An 1827 decision illustrates this approach well. In that case the court noted that "[t]he words *unpatented*, *waste and unappropriated*, and *waste and unpatented*, are used as synonymous throughout the statutes; particularly ... in the 1st section of the act of 1779.... To the same purpose were used the terms *unpossessed land* in the act of 1705 ... and '*not before granted by patent*,' in the act of 1748"²³¹

2. General Judicial Interpretations by the Virginia Courts.

Regardless of the proper meaning of the words "waste and unappropriated" under English law, it is clear that they have come to mean "not before patented" under Virginia law. A reading of an 1824 Virginia Supreme Court

legislation was not sufficiently explicit to represent a confiscation of the defendant's land. See *id.* at 233-37.

When the case was appealed to the United States Supreme Court, the Court addressed two issues: first, whether Lord Fairfax was indeed proprietor of all of the waste and unappropriated land in the Northern Neck, and, second, whether the defendant could have inherited full legal title or whether he was merely a "trustee of the estate at the will of the commonwealth," which obtained title by operation of the law immediately upon the death of Lord Fairfax. See 11 U.S. at 621. The Court held that the defendant did indeed have full legal title over the land referred to as "waste and unappropriated" and that no subsequent act of the Commonwealth had divested him of that title.

229. Although Judge Embrey also believed that the two terms had slightly different connotations, he distinguished them in a different manner. He stated that "unpatented, or ungranted, lands were waste, irrespective of the question or claim of settlement or appropriation." A. EMBREY, *supra* note 3, at 175 (emphasis in original).

230. Act of May, 1779, ch. 13, 10 HENING'S STAT., *supra* note 1, at 50, 61 (1822).

231. *McClung v. Hughes*, 26 Va. (5 Rand.) 453, 478-79 (1827); accord *Whittington v. Christian*, 23 Va. (2 Rand.) 353, 367 (1824). Cf. *Taylor v. Brown*, 9 U.S. (5 Cranch) 234, 253 (1809) (which suggests that vacant means unappropriated).

case, *Whittington v. Christian*,²³² demonstrates this point. The issue before the court in that case concerned whether lands which had been forfeited to the Commonwealth for nonpayment of quit rents subsequently could be taken up as waste and unappropriated lands. In holding that they could not, the court examined the various land laws affecting waste and unappropriated lands and concluded that the entry and survey procedure established in the 1779 land grant act only applied to lands "which have not before been patented."²³³ According to the court, waste and unappropriated lands "were not, according to law, appropriated in the sense of the statute, by entry and survey.... But, as to lands once appropriated by patent and lapsed, no title could be acquired by entry and survey."²³⁴

As pointed out in the opinion of Judge Green, a special procedure was developed during colonial times to govern acquisition of lapsed land, or lands which had been forfeited back to the government. Although lapsed lands originally could be taken up like other vacant lands,²³⁵ as early as 1657 the colonial legislature passed a law requiring any party desiring to obtain title to land that was not planted as required to file a petition for such land with the Governor and Council, who then would decide if the land had been deserted and forfeited.²³⁶ Eventually the colonial government placed the responsibility for determining whether land had lapsed back to the Crown in the General Court, but still required the filing of a petition.²³⁷ This procedure remained basically in force until the passage of the 1779 land act. That statute contained a -clause providing that "no petition for lapsed land shall be admitted or received for or on account of any failure or forfeiture whatsoever, alleged to have been made or incurred after the twenty ninth day of September," 1775 and that any procedures for taking up such lands were repealed.²³⁸ Since the Act was silent as to forfeitures occurring before September 29, 1775, Judge Green concluded that the special colonial procedures still applied to those lands and that therefore they were not waste and unappropriated within the scope of the 1779 Act.²³⁹

An examination of some of the forfeiture procedures in the curative and the land grant acts of 1779 supports the court's conclusion that "waste and

232. 23 Va. (2 Rand.) 353 (1824).

233. *Id.* at 371.

234. *Id.*

235. *Id.* at 364.

236. *Id.* at 359-60.

237. *Id.* at 363, 365. Under the 1748 Act, the party desiring the lapsed land would petition the governor and file a copy of the petition in the Secretary's office. That office then would issue a writ to the sheriff to summon the original grantee to court to explain why a seating had not been made or quit rents had not been paid. If the original grantee did not appear to defend himself or was unable to prove that he had acted in accord with the land laws, the General Court would judge the land "forfeited, and revested in the crown." Act of Oct., 1748, ch. 1, 5 HENING'S STAT., *supra* note 1, at 408, 419 (1819). The party who brought the petition then was entitled to make a subsequent entry and survey onto the land. He thus could acquire the land on the same conditions as if the land always had been unpatented. *Id.*; see also *Whittington*, 23 Va. at 364-65.

238. Act of May, 1779, ch. 13, 10 HENING'S STAT., *supra* note 1, at 50, 65 (1822).

239. *Whittington*, 23 Va. at 368-69, 371; accord *id.* at 382 (opinion of Cabell, J.).

unappropriated" signified lands never before patented. Section 5 of the 1779 curative act, for instance, provided that, upon forfeiture of preemptive rights in certain lands, the lands could be "entered for by any other person holding another land warrant."²⁴⁰ That the provision permitted the lands to be entered by a party with a land warrant suggests that the lands still were waste and unappropriated. Similarly, under the 1779 land act, when a person failed to comply with certain conditions of the Act, like not appearing for the survey,²⁴¹ he forfeited his rights and the land was subject to subsequent entry and survey. In each of these situations, the lands subject to forfeiture were never patented and therefore the entry and survey procedures still could be used.

A subsequent case, *M'Clung v. Hughes*,²⁴² also supports the earlier court's decision that waste and unappropriated lands were never before patented. Although the court in *M'Clung* focused primarily on when, if ever, a grant could be set aside,²⁴³ Judge Green also considered the question of whether waste and unappropriated land lost its status after a party had begun the process of acquiring a patent to the land. In concluding that land retained its status as waste and unappropriated as long as legal title had not been acquired, Judge Green examined and then rejected the position of a United States Supreme Court case, *Taylor v. Brown*,²⁴⁴ on the matter. The Court in *Taylor* had observed that a military warrant only authorized a surveyor to "lay off ... vacant land which had not been surveyed by order of council, and patented subsequent to the proclamation."²⁴⁵ In disagreeing with this position, Judge Green stated:

The direction to locate treasury warrants on waste and unappropriated land, does not except that *to which another has a legal claim*, if it be not a *legal title by patent*. The party locates at his peril, so far as that if he innocently interferes with the prior right of another, it is at the peril of being intercepted, in procuring his patent, by a *caveat*, or, if fraudulently,

240. Act of May, 1779, ch. 12, 10 HENING'S STAT., *supra* note 1, at 35, 41 (1822).

241. See *id.* at 56.

242. 26 Va. (5 Rand.) 453 (1827).

243. Generally, when the issuance of a grant was the subject of a dispute, the person challenging the patent would file a caveat. A special court would then determine the genuineness of the caveat. See *supra* notes 169-70 and accompanying text. But when the challenger did not submit a caveat on time and a patent was issued, a few limited circumstances still could justify setting aside the grant. If an owner had acted under "the fraudulent suppression of the truth or suggestion of falsehood," he would be entitled to relief. He also would be excused for failing to file a caveat where he had relied upon mistaken declarations made by the other party. However, any mistake or negligence on the owner's part would be sufficient grounds for retaining the patent. See *M'Clung*, 26 Va. at 472-73.

244. 9 U.S. (5 Cranch) 234 (1809).

245. *Id.* at 242; see also *id.* at 249. The Supreme Court in *Taylor v. Brown* explained that military warrants only authorized the acquisition of vacant lands. The doctrine of caveat emptor applied to any claimant and imposed a duty on him to ensure that no claims had been made on the land. Further, the claimant had a duty to do more than just inquire into whether the land had been patented. Because a patent relates back to the inception of the title — that is, to the time that the first survey is made — a person who first appropriates the land has the superior title. The holder of the military warrant thus had the responsibility to discover if there had been a prior survey. *Id.* at 242-43, 249; see also *M'Clung*, 26 Va. at 476-79 (discussing *Taylor*).

of being corrected by a Court of Equity, even after he has obtained his patent.²⁴⁶

In reaching his conclusion, Judge Green reasoned that when the legislature wanted to exclude those waste and unappropriated lands subject to legal claims it did so. Settlement rights, for example, could not exist in waste and unappropriated lands subject to legal claims.²⁴⁷

Judge Green's conclusion, that waste and unappropriated land subject to a legal claim was still subject to entry and location by another as long as the claimant did not have legal title, seems reasonable. The land grant act of 1779 expressly created a procedure for dealing with conflicts arising because more than one party had entered into the same land — the caveat proceeding. This proceeding would serve little purpose if waste and unappropriated land already surveyed could not be entered and possibly acquired by another.

3. *The Virginia Judiciary's Perspectives on Public Lands, the Submerged Bed, and the Intertidal Strip as Waste and Unappropriated Lands.*

A few judicial decisions also have studied the meaning of the phrase "waste and unappropriated" in the context of specific types of land. Several cases, for example, have addressed the question of whether the phrase includes public lands. One of the most illuminating of these cases is *French v. Bankhead*.²⁴⁸ That case involved a dispute over land located at Old Point Comfort, part of which Virginia had ceded to the United States "for the purpose of fortification, and other objects of national defence."²⁴⁹ Plaintiff French had brought an action of ejectment against the United States, claiming a superior interest by virtue of a patent issued by Virginia after the cession. Additionally, the plaintiff had argued that since the deed to the United States described its boundaries in courses and distances it was limited to that boundary and could not benefit from a statute extending the boundaries of certain riparian lands to the low water mark.²⁵⁰

Besides considering whether the boundary of the United States was extended, by operation of law, to the low water mark,²⁵¹ the Supreme Court of Virginia also addressed the question of whether the land conveyed in French's patent was waste and unappropriated and therefore liable to entry. The answer, according to the court, was that the land at Point Comfort was not

^{246.} *M'Clung*, 26 Va. at 479; see also *id.* at 478. Because *Taylor* involved a dispute between parties claiming title under military warrants issued pursuant to the Proclamation of 1763 and *M'Clung* involved parties acquiring title after passage of the 1778 land laws, the Virginia Supreme Court in *M'Clung* arguably was not bound by the position expressed by the United States Supreme Court in *Taylor*.

^{247.} *Id.* Apparently the rule was different for the Northern Neck because surveyed lands were not considered unappropriated and therefore could not be granted by the state. *Id.* at 482.

^{248.} 52 Va. (11 Gratt.) 136 (1854).

^{249.} Act of Mar. 1, 1821, ch. 73, 1820-1821 Va. Acts 102, 103 (quoted and construed in *French*, 52 Va. at 144).

^{250.} *French*, 52 Va. at 137, 140-41, 150.

^{251.} For further discussion of the rights of waterfront landowners in the intertidal zone, see *infra* chapter 19.

subject to entry as waste and unappropriated land, but rather was “public land, the title to which had vested in the commonwealth for special purposes.”²⁵² Judge Allen, in writing for the court, explained:

[I]n addition to the waste and unappropriated lands thus made the subject of entry, survey and grant, in the mode prescribed, there were certain lands in the eastern part of the state which, by the acts of the agents of the crown or commonwealth, the proprietor of all the waste lands in the commonwealth, had been set apart and appropriated to public purposes. It does not appear that any specific grant or special act passed for such appropriation. They seem to have been dedicated to the public use by being so used and enjoyed.²⁵³

In support of the court’s conclusion, Judge Allen noted that whenever the legislature wanted to dispose of public lands they passed special laws which designated the public lands to be sold and established a special procedure authorizing commissioners to execute deeds for them.²⁵⁴ Since many of these special acts were passed after the 1779 land act, Judge Allen found the conclusion that the legislature did not intend to embrace public lands in the category waste and unappropriated lands to be inescapable.²⁵⁵ Then, turning to the land in dispute, Judge Allen concluded that the legislature had made “a complete appropriation to the public use of the lands at Old Point Comfort ... and withdrew them from the mass of waste and unappropriated lands.”²⁵⁶

French v. Bankhead makes two important points about the scope of the 1779 land act. First, in a unanimous opinion the court declared waste and unappropriated land to be “all lands which had never before been pat-

²⁵². *French*, 52 Va. at 167-68.

²⁵³. *Id.* at 166.

²⁵⁴. *Id.* at 167. Examples of these special laws included those passed in May, 1784, which provided for the sale of certain public lands in and near the city of Richmond, Act of May, 1784, ch. 30, 11 HENING’S STAT., *supra* note 1, at 399, and adjacent to the city of Portsmouth, Act of Oct., 1784, ch. 32, *id.* at 496. See *infra* note 256.

²⁵⁵. *French*, 52 Va. at 167.

²⁵⁶. *Id.* at 168-69. The Assembly had withdrawn certain lands in the eastern part of the state from the category of waste and unappropriated lands and maintained them as public lands. As Judge Allen stated, “[t]hey seem to have been dedicated to the public use by being so used and enjoyed.” *Id.* at 166. When the legislature was compelled to sell these lands, it did so through special legislation and specially designated commissioners. The titles to these lands were conveyed by special deed from the commissioners and not by the usual patent process. *Id.* at 167. One of the first pieces of special legislation enacted by the state was the Act of May, 1784, which directed the selling of almost all public lands in Richmond. The purpose of the sale was to help build public buildings on Shockoe Hill. See Act of May, 1784, ch. 30, 11 HENING’S STAT., *supra* note 1, at 399. A subsequent legislative act authorized the selling of more Commonwealth public lands “for the use of the public.” Act of May, 1784, ch. 34, *id.* at 405. In October of 1784, the legislature annexed the public lands known as Gosport to the city of Portsmouth and authorized commissioners to divide this land into lots and sell them to the general public. Act of Oct., 1784, ch. 32, *id.* at 496. A 1785 statute again authorized a similar procedure for selling public lands in York and Elizabeth City Counties, except for an area known as Point Comfort. Act of Oct., 1785, ch. 39, 12 *id.* at 97. Because this land also was protected as commons, it apparently could not be sold except through more specific legislation. In 1798 the legislature finally gave that special authorization, directing the governor to convey the land to the United States to build a lighthouse there. See VA. CODE ch. 13 (1819) (Act of Jan. 2, 1798).

ented.”²⁵⁷ Although previous decisions had contained similar declarations,²⁵⁸ these pronouncements were made by individual judges.²⁵⁹ Second, the case demonstrates that waste and unappropriated lands liable to entry under the 1779 land grant act do not include lands still unpatented but set aside for public use.²⁶⁰ In other words, *French* establishes three main categories of land: one, waste and unappropriated lands subject to entry and location under the land grant act; two, public lands set aside for various public purposes, including support of public officials (e.g., governor’s lands), use by churches (glebe lands), establishment of educational institutions (college lands), and use as a common for certain activities, like fishing, that provided subsistence (common lands); and, three, lands owned by private parties.²⁶¹

Miller v. Commonwealth,²⁶² a major Virginia Supreme Court opinion on common lands, reaffirms the conclusion of *French* that public lands do not fall within the scope of the 1779 land act. *Miller* also supports a suggestion made by the court in *French* that public lands did not have to be created expressly, but rather could be set aside informally through continued public use.²⁶³ According to the court in *Miller*, waste and unappropriated lands “did not include lands which had been expressly appropriated for the use of the government or which were being so used though not expressly appropriated for such use.”²⁶⁴

257. *French*, 52 Va. at 168.

258. See generally *supra* § 8.5.C.2 and notes 135-45 and accompanying text (discussing the meaning of the phrase “waste and unappropriated”).

259. The old practice of each individual judge writing his own opinion, delivering it, and having it published separately is known as *seriatim*. See 2 S. RAPALJE & R. LAWRENCE, *supra* note 219, at 1174.

260. *French*, 52 Va. at 168-69.

261. Embrey apparently would disagree with this observation. He adds a fourth category called the Great Waste, which he defines as “the bottoms under navigable water in England mostly, if not entirely, land under water where the tide ebbed and flowed.” A. EMBREY, *supra* note 3, at 176. Also, his description of the category of lands set aside for public use suggests that there are two subclasses, public lands and common lands, instead of the four or five listed in *French v. Bankhead*. He states that “[p]ublic or [c]ommon lands ... [are lands] title to which had not been granted, or patented, but which lands had, in effect, been set aside for some public purpose or common use,” *id.*, thus suggesting that he does not view common lands as a subclass of public lands. Furthermore, Embrey defines waste lands as “the great body of land taken from the Indians and neither set aside for Public or Common use, nor granted or patented.” *Id.* The only known exception to this definition apparently was made in 1643 for an area near the Rappahannock River, which was to remain unseated until the boundaries of that area were determined. See Act of Mar., 1642-1643, act 59, 1 HENING’S STAT., *supra* note 1, at 274; act 58, *id.*; see Act of Oct., 1648, act 1, *id.* at 352 (where the legislature finally permitted patenting in the Rappahannock River area in October, 1648). Embrey’s last category consists of “[g]ranted, or patented lands, title to which had passed from the Crown, or King, to the subject by special grant or by patent.” A. EMBREY, *supra* note 3, at 176.

262. 159 Va. 924, 166 S.E. 557 (1932).

263. See *French*, 52 Va. at 166.

264. *Miller*, 159 Va. at 946, 166 S.E. at 565 (footnote omitted). The court did not actually refer to the lands described by the quoted language as “public lands.” But in the footnote supporting its definition, the court lists numerous statutes dealing with public lands. See *id.* at 946 n.10, 166 S.E. at 565 n.10.

Miller, however, then creates some confusion about the status of common lands. Shortly after making the above observations, the court in *Miller* observes that "it would appear" that waste and unappropriated lands "included the 'common lands' ... or certainly such of them as had not been expressly appropriated by an order of the governor and council or some other agency of the Crown as 'common lands,' or were used for governmental purposes."²⁶⁵ This statement is troubling because it inaccurately uses the phrase "common lands," apparently interpreting that phrase to mean any type of land set aside for some sort of public purpose. Defined as such, it would include governor's and college lands, but, as demonstrated earlier, those categories of land represented distinct types of land, each having different legal significance.²⁶⁶ Also troubling is the fact that the court cites *Embrey* as support, yet fails to notice that his definition of waste specifically excludes public or common lands.²⁶⁷ These problems indicate that the court appears to be confusing three separate questions: one, whether waste and unappropriated lands subject to entry and survey include common lands, regardless of how the common lands were created; two, whether land has validly been set aside for common use, either expressly or informally; and, three, whether common lands can lose their status and be sold to private parties.

Other weaknesses of the *Miller* interpretation are highlighted by a comparison of *Miller* and *French*. Although the court in *French* uses broad, general language to describe public lands,²⁶⁸ the court in *Miller* ignores that language. In addition, the court in *Miller* ignores an assumption made by the court in *French* that public lands include common lands. This assumption is illustrated in *French*'s discussion of an act ceding Point Comfort to the United States. That Act specifically appropriates certain land for public or governmental use and then reserves for the public a traditional common right, "the right and privilege of fishery hitherto enjoyed and used by the citizens of this Commonwealth."²⁶⁹ Furthermore, when the court in *French* gives examples of land appropriated for public use, it refers not only to the public square in Richmond, but also to "the navigable waters and the soil under them held by the commonwealth for the common use, and expressly exempted from grant by the Code."²⁷⁰

Despite these weaknesses, the position taken by the *Miller* court has some merit. Until 1873 every major statute dealing with common lands referred to

^{265.} *Id.* at 947, 166 S.E. at 565.

^{266.} See generally *supra* chapter 6, notes 105-15 and accompanying text (discussing the different types of public lands).

^{267.} See 159 Va. at 947, 166 S.E. at 565 (citing A. EMBREY, *supra* note 3, at 213-29); *supra* note 261. But cf. A. EMBREY, *supra* note 3, at 176 (discussing common lands and waste lands as separate categories).

^{268.} See *French*, 52 Va. at 166.

^{269.} Act of Mar. 1, 1821, ch. 73, 1820-1821 Va. Acts 102, 103 (quoted in *French*, 152 Va. at 144). An earlier act dealing with the cession had similarly provided "[t]hat nothing in this act contained, or in the deed of cession to be made in pursuance thereof, shall be construed to deprive the citizens of this Commonwealth of the privilege they now enjoy of hauling their seines on the shores of the land to be ceded in pursuance of this act." VA. CODE ch. 13 (1819) (Act of Jan. 2, 1798).

^{270.} 52 Va. at 169.

them as unappropriated. The statutes typically identified protected lands as "all unappropriated lands on the bay of the Chesapeake, on the sea shore, or on the shores of any river or creek ... which have remained ungranted ... and which have been used as common."²⁷¹ In 1873 the legislature changed the language to delete the word "unappropriated."²⁷² It is possible to interpret this deletion as signifying that the legislature finally was elevating common lands from a special category of unappropriated lands receiving some legal protection to a more protected class, public lands. Further, if the *Miller* court's perception were totally unfounded, it would not have been necessary for the General Assembly to enact legislation in 1780 specifically protecting certain common lands from grant.²⁷³

A second category of land analyzed in the context of the phrase "waste and unappropriated" is submerged land. In *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*,²⁷⁴ the Supreme Court of Virginia considered the status of some submerged land forming part of the bed of the James River to determine if it was alienable generally by the state and specifically by the land office as waste and unappropriated land. The issue arose because plaintiff brought an action under a special remedial provision of the Virginia Code to establish the boundary line between defendant and itself.²⁷⁵ The plaintiff had claimed title to the land lying in the bed of the James River, arguing that because that part of the James was nontidal, the common law rule allowing a riparian landowner to take title to the middle of the watercourse should apply.²⁷⁶

271. See Act of May, 1780, ch. 2, 10 HENING'S STAT., *supra* note 1, at 226, 227 (1822). See generally *infra* § 19.1 (discussing the commons legislation).

272. VA. CODE ch. 62, § 1 (1873).

273. See Act of May, 1780, ch. 2, 10 HENING'S STAT., *supra* note 1, at 226 (1822).

274. 138 Va. 461, 122 S.E. 344 (1924).

275. VA. CODE § 5490 (1919) set forth the procedure that a party had to follow to establish boundary lines for realty. First, the party must demonstrate a "subsisting interest" in the particular real estate and a right to its possession or some portion of it. *Id.* Generally a party may meet this requirement by showing the type of estate interest that he holds in the land. *Id.* §§ 5459, 5490. Also, the party must establish the boundary line or lines that he is seeking to establish. The party may be able to meet this requirement by submitting an appropriate plat. *Id.* § 5490.

A party seeking to use the statutory remedy must file his action in the same court that would determine an ejectment proceeding for the particular property. The defendants in the proceeding generally are all those persons who have any type of present interest in the disputed area. All defendants are to be notified of the petition and must submit their defenses in writing. When a dispute arises, the parties are entitled to a jury trial at law. The determination of the court is final unless appealed. *Id.*

This statutory remedy to determine boundary lines closely resembles the action of ejectment. Both actions are brought in the same type of court of law and must be brought by one who holds a present estate in the property. Only a few differences exist between the two actions. One difference is that the petitioner in a procedure to establish a boundary line does not have to serve a copy of the petition to the defendants. Also, in an action to ascertain or establish boundary lines, no claims for rents, profits, or damages are considered. The present boundary determination statute is codified at VA. CODE §§ 8.01-179 to -183 (1984).

276. *James River*, 138 Va. at 465-67, 122 S.E. at 345.

After concluding that the state held title to the bed of river at the time of the grant to the plaintiff's predecessors-in-title,²⁷⁷ and that the state had the right to alienate the disputed part of the bed,²⁷⁸ the court addressed the question of whether the land office could dispose of the disputed land under the powers conferred upon it in the 1779 land grant act. To answer that question the court focused on the primary purposes of the 1779 Act and noted that at the time the Act was passed "[t]here were vast areas of land that were in fact 'waste and unappropriated.'"²⁷⁹ This land was valuable not only because of its timber, minerals and other natural resources, but also because of its potential for agricultural development and for supporting a growing population.²⁸⁰ "In order to induce immigration ... [the state] offered these lands for sale to anyone who would buy them at the very low price of forty pounds per hundred acres."²⁸¹

When considered in light of these purposes and needs, the terms "waste and unappropriated" had a meaning totally inappropriate for land under water. As explained by the court, the phrase "waste and unappropriated" was "peculiarly appropriate to lands which were not occupied by anyone, and hence was 'waste' so far as benefit to the State was concerned...."²⁸² Thus "there were manifest reasons why the State should wish to sell them to those who would occupy and cultivate them," for the sales would help the state "to increase its population and also its productive wealth."²⁸³ This accepted meaning of "waste and unappropriated land" had, in the words of the court, "no natural application to land under water."²⁸⁴ As the court further explained, including submerged land within that category of land would be inconsistent with the reasonable expectations of people: "[n]o one who bought a hundred acres of 'waste and unappropriated lands' would expect to find the whole area in the bed of a navigable stream."²⁸⁵ Also, usually when the legislature conferred or dealt with rights in beds of waters, it did so in an act specifically mentioning the right or interest. The marshland preemptive rights statute, for example, demonstrated "that when land partly under water or under water from time to time was intended to be embraced, it was

²⁷⁷. *Id.* at 468, 122 S.E. at 346.

²⁷⁸. *Id.* at 471, 122 S.E. at 347. For years legal authorities have debated the ownership of beds of navigable, nontidal waters. One view holds that, if nontidal waters are navigable, landowners having waterfront property only own down to the line where the river begins. Under this view the bed is considered to be the property of the state and is held for public use. A second view construes common law more strictly and concludes that title to waterfront property extends to the middle of the river. Under this view the public would have an easement for navigation over the river. See *id.* at 466-70, 122 S.E. at 345-46. In Virginia, the courts have tended to conclude that the state owns the beds of navigable rivers and has the right to sell these beds, subject to the public right of navigation and other recognized public uses. See, e.g., *id.* at 470, 122 S.E. at 347; *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875 (1904).

²⁷⁹. *James River*, 138 Va. at 471-72, 122 S.E. at 347.

²⁸⁰. *Id.* at 472, 122 S.E. at 347.

²⁸¹. *Id.*

²⁸². *Id.*

²⁸³. *Id.*

²⁸⁴. *Id.*

²⁸⁵. *Id.*

expressly mentioned.”²⁸⁶ Furthermore, offering valuable beds of navigable waters for sale at such a nominal price as that asked for waste and unappropriated lands would, in the court’s view, be imprudent and wasteful.²⁸⁷ In any event, the 1780 common lands act, as amended by the 1819 Code, reserved certain beds of rivers and creeks from grant.²⁸⁸

Thus, for the above reasons, the court concluded that the land office lacked the power to grant title to the disputed portion of the bed to plaintiff’s predecessors-in-title. But, even if it did have the power to alienate the beds of nontidal or tidal waters, the land office still could not have granted this particular portion of the bed of the James. As the court explained, an earlier Virginia decision already had declared it to be a “public bed, belonging to the State of Virginia, and was incapable of private ownership, and incapable of private use.”²⁸⁹

Although the Virginia Supreme Court clearly concludes that title to the disputed bed could not pass to a private party and firmly declares that beds of navigable waters are not waste and unappropriated land, its opinion raises two problems. First, the court’s use of the marshlands statute as support for its conclusion that land under water is not waste and unappropriated is troubling because marshland technically is not part of the bed of a watercourse. The court appears to realize this technicality, for in its explanation of why the statute lends support the court refers to “land partly under water or under water from time to time.”²⁹⁰ The court, though, still fails to clarify why the two types of land should be treated together. Nor does the court appear to realize the implications of its reference. Because the court’s reference suggests that the court intended the phrase “land under water” to embrace land in the intertidal strip, the court’s conclusion that land under water is not waste and unappropriated land subject to entry would appear to apply to valuable shorelands as well.

Second, the court’s statement that the disputed bed is part of the public domain is confusing, not only in its wording, but also in its intent. The court appears to be providing an alternative basis for its decision by noting that, even if the beds of watercourses generally are waste and unappropriated land subject to alienation, the disputed portion cannot be granted since it is a public bed and outside the purview of the land act. If this interpretation of the court’s intent is accurate, then the court would appear to be using the public trust doctrine to limit the scope of the 1779 land grant act and remove certain

286. *Id.* at 472-73, 122 S.E. at 347 (discussing Act of May, 1780, ch. 2, 10 HENING’S STAT., *supra* note 1, at 226 (1822)). The oyster planting statutes also demonstrated this point. *See James River*, 138 Va. at 473, 122 S.E. at 348.

287. *James River*, 138 Va. at 473, 122 S.E. at 348.

288. Those areas retained for the public under these acts included “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 as common to all the good people thereof.” Act of May, 1780, ch. 2, 10 HENING’S STAT., *supra* note 1, at 226, 227 (1822); *see also James River*, 138 Va. at 473-74, 122 S.E. at 348.

289. *James River*, 138 Va. at 475, 122 S.E. at 348, *quoting* *Old Dominion Iron & Nail Co. v. Chesapeake & Ohio Ry.*, 116 Va. 166, 81 S.E. 108 (1914).

290. *James River*, 138 Va. at 473, 122 S.E. at 347.

lands from the category "waste and unappropriated lands."²⁹¹ Although such an application of the trust doctrine might be inconsistent with the leading Virginia decision on the doctrine,²⁹² it would follow from the Supreme Court cases developing the doctrine.²⁹³ Such an application also would be consistent with the conclusion in *French* that the legislature did not intend to include public lands within the category waste and unappropriated lands.²⁹⁴ Yet if the court in *James River* intended to rely on the trust doctrine, it would have been preferable for the court to be explicit in doing so. Although the trust doctrine is closely related to the concept of common lands, some important differences exist between the two theories of public rights.²⁹⁵

A later Virginia Supreme Court decision, *Boerner v. McCallister*,²⁹⁶ is inconsistent, implicitly at least, with the conclusion reached by the court in *James River* that the bed of a navigable watercourse is not waste and unappropriated land subject to entry. In *Boerner*, the court addressed the question of whether the defendant trespassed on plaintiff's land by fishing in that part of the Jackson River flowing through plaintiff's property. The plaintiff claimed to be owner of the bed of the river flowing through his property by virtue of a royal patent recorded between 1749 and 1751 and conveying the land and "the rivers, waters and water courses therein contained, together with the privilege of hunting, hawking, fishing, fowling."²⁹⁷ In response, the defendant argued that the patent did not expressly convey the bed or bottom of the river and that in any event the public had a right to fish in the river because it was navigable.²⁹⁸ To resolve the dispute, the court focused on whether the Crown could have conveyed ownership of the beds of streams to private parties. According to the court, at the time of the grant, "there was no law preventing the conveyance" of rivers and their beds.²⁹⁹ Furthermore, as the court noted, it was not until 1780, for the eastern part of the state, and 1802, for the western part, that the rule was changed to ban the conveyance of beds submerged under certain waters.³⁰⁰

At first glance the *Boerner* court's reasoning appears to be consistent with some of the language in *James River*. The court in *James River*, for example, observes that although there are certain public uses of navigable waters which the state cannot take away, "there is no reason why the beds of navigable streams may not be granted unless restrained by the Constitution."³⁰¹ Closer scrutiny, however, reveals that the *James River* court only was talking about the state's right to alienate beds, not the land office's

291. See *id.* at 469, 122 S.E. at 346.

292. See *Commonwealth v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932), discussed *supra* § 5.2.B.

293. See generally *supra* § 5.2.A.

294. See *supra* notes 252-56 and accompanying text.

295. See generally *supra* § 6.3 (comparing the public trust doctrine and the commons concept).

296. 197 Va. 169, 89 S.E.2d 23 (1955).

297. *Id.* at 170, 174, 89 S.E.2d at 24, 26 (quoting the Crown grant).

298. *Id.* at 171-72, 89 S.E.2d at 25.

299. *Id.* at 174, 89 S.E.2d at 26.

300. *Id.*

301. *James River*, 138 Va. at 469, 122 S.E. at 346.

right.³⁰² The *Boerner* court unfortunately fails to be as discriminating, describing the law in a careless manner. It, for instance, makes certain assumptions about the law that are contrary to its own precedent. Its statement about the 1780 and 1802 Acts reveals such a contradiction. In making that statement, the *Boerner* court appears to contradict *James River* by suggesting that before the 1780 and 1802 statutes the beds of rivers could be granted as waste and unappropriated land under the 1779 Act. *James River*, however, concluded that waste and unappropriated lands subject to entry did not include "land under water."

This conflict can be resolved in part by strictly construing the two cases and limiting them to their facts. In *Boerner*, for example, the defendant never established the navigability of the river,³⁰³ while in *James River* the river not only was navigable, but also was declared to be part of the public domain. Furthermore, the earlier decision relied on by the court in *James River* to support the conclusion that the bed was public had carefully limited its discussion to the relevant portion of the *James River*.³⁰⁴ Yet, even these observations fail to completely explain the assumption apparently made by the court in *Boerner* that the beds of watercourses were waste and unappropriated. Given that the *Boerner* court inaccurately used key words³⁰⁵ and engaged in analysis that at best can be described as cursory, and given that the court in *James River* directly addressed the question of the status of submerged land and considered the policies and purposes of the land grant act in answering that question, it is clear that the *James River* decision is the more persuasive precedent.³⁰⁶

The third type of land considered by the courts in the context of the phrase "waste and unappropriated" is the intertidal strip. In *Garrison v. Hall*,³⁰⁷ for instance, the Supreme Court of Virginia considered the status of upland and shoreland bordering the Chesapeake Bay and Atlantic Ocean. To determine whether the land had been validly conveyed to the plaintiff, the court faced the task of analyzing the scope of the 1779 Act. According to the court, that

302. See *id.* at 469-71, 122 S.E. at 346-47.

303. *Boerner*, 197 Va. at 174, 89 S.E.2d at 26.

304. In the earlier decision, the court limited its consideration of the state's rights to only that portion of the *James River* that is "above tide and between the termini of the *James River* and *Kanawha canal*." *Old Dominion Iron & Nail Co. v. Chesapeake & Ohio Ry.*, 116 Va. 166, 170, 81 S.E. 108, 109 (1914).

305. See, e.g., *Boerner*, 197 Va. at 174, 89 S.E.2d at 26 (where the court assumes that "eastern" means "tidewater" without recognizing the longstanding debate over the division between eastern and western Virginia, discussed *infra* § 10.2.B).

306. Regardless, though, of how one resolves the question of whether the beds of navigable waters are waste and unappropriated and therefore subject to entry, a riparian landowner still acquires certain rights in the submerged land just by virtue of his ownership of riparian land. So, even if the beds of navigable waters could not be conveyed to private parties under the land grant legislation, the owner of the riparian estate still would have certain property rights in the submerged land out to the line of navigation. He, for example, would have the right to build wharves, piers, or bulkheads. See *Peek v. City of Hampton*, 115 Va. 855, 80 S.E. 593 (1914); *Grinels v. Daniel*, 110 Va. 874, 67 S.E. 534 (1910). See generally *infra* chapter 15 (discussing the concept of riparian ownership).

307. 75 Va. 150 (1881).

Act authorized any person to locate a warrant "on any waste and unappropriated lands, and the shores of the Chesapeake bay, of the sea, or of the rivers and creeks, if located there, would be included in his grant down to ordinary low water mark, as they were not excepted by said act"³⁰⁸

Once again, an inconsistency can be seen between two Virginia decisions. Whereas *Garrison* declared the shore to be waste and unappropriated under the 1779 Act, *James River* appeared to reach an opposite conclusion. Although the latter court's decision technically could be limited to the beds of navigable rivers, its reasoning still would appear to apply equally as well to the intertidal strip. As observed earlier, this uncertainty over the status of submerged lands and the strip apparently existed even in 1779 and was sufficiently troublesome to prompt the Virginia legislature to pass an act in 1780 reserving various beds and shores for the public and exempting them from the 1779 Act. The 1780 Act is perhaps the most important piece of legislation protecting the public interest in tidal resources. The next chapter discusses the impact of that legislation.

308. *Id.* at 159.

Part IV

Development of Legislation Protecting the Public Interest in Tidal Resources

CHAPTER 9

THE COMMONS ACT OF 1780

Besides setting forth methods of distributing land to private parties, the land system that developed in colonial Virginia also provided for the creation of certain public lands.¹ As explained in Part II, historical documents indicate that there were several different types of public lands — that is, lands set aside for public use. The category of public lands included lands dedicated to the use of certain public officials, like the governor and secretary;² lands worked for the benefit of the London Company until 1624 when it lost its charter;³ and lands dedicated to certain common uses, like gardening,⁴ pasturing,⁵ and fishing.⁶ In addition, the colonial land system recognized glebe lands or lands dedicated to religious purposes,⁷ college lands or lands set aside for educational purposes,⁸ and finally, miscellaneous lands used for specific public purposes like the construction of government buildings and the maintenance of public warehouses,⁹ wharves,¹⁰ and landings.¹¹

1. According to Embrey, "[a]ll Virginia lands were first Crown lands." A. EMBREY, *WATERS OF THE STATE* 175 (1931). The Crown lands then were divided into four key groups: (1) public or common lands, which had no formal grant or patent but were, in effect, set aside for public or common use; (2) granted or patented lands, title to which passed in the form of a special grant or patent from the Crown; (3) waste lands, which were taken from the Indians and neither set aside for public use nor granted or patented; and (4) the "Great Waste," or lands submerged by the tides. *Id.* at 176; see also R. BEVERLEY, *THE HISTORY AND PRESENT STATE OF VIRGINIA* 48 (1947); A. BROWN, *THE FIRST REPUBLIC IN AMERICA* 617-23, 627 (1898); 1 N. NUGENT, *CAVALIERS AND PIONEERS* xvi (1934); T. Smolen, *Historical Overview of Lands Known as Common* 55 (1974) (C. Jones & N. Theberge eds.) (unpublished manuscript available at Virginia Institute of Marine Science, School of Marine Science, College of William and Mary, Gloucester Point, Virginia).

2. 3 W. HENING, *THE STATUTES AT LARGE* 285 (1823) [hereinafter cited as HENING'S STAT.]; see also Instructions to Governor Yeardley (1618), reprinted in 2 VA. MAG. HIST. & BIOGRAPHY 155 (1894-1895) [hereinafter cited as Yeardley's Instructions and paginated to VA. MAG. HIST. & BIOGRAPHY]; Foreman, *The Bygone "Subberbs of James Cittie"*, 20 WM. & MARY Q. 2d 477 (1940).

3. Yeardley's Instructions, *supra* note 2, at 157.

4. Some common gardens were used to produce necessities such as flax and hemp, which frequently were unavailable from England. T. Smolen, *supra* note 1, at 55. Other gardens, such as those at the Governor's Palace, were purely decorative. See 3 HENING'S STAT., *supra* note 2, at 483-84; JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 285 (1702-1712) (entry for Nov. 29, 1710); R. GOODWIN, *WILLIAMSBURG IN VIRGINIA* 29 (3d ed. 1941).

5. T. Smolen, *supra* note 1, at 48, 49.

6. 5 HENING'S STAT., *supra* note 2, at 68 (1819).

7. Yeardley's Instructions, *supra* note 2, at 158.

8. *Id.* at 159.

9. See, e.g., 3 HENING'S STAT., *supra* note 2, at 55 (warehouses); 5 *id.* at 15 (1819) (warehouses); 6 *id.* at 174 (1819) (warehouses); 10 *id.* at 317 (1822) (government buildings, public square).

10. 3 *id.* at 55 (1823); 8 *id.* at 656 (1821); Hath, *An Old Wharf at Yorktown, Virginia*, 22 WM. & MARY Q. 2d 224 (1942).

11. 8 HENING'S STAT., *supra* note 2, at 656 (1821).

At least until 1624, the process of creating public lands appeared to be fairly formal, occurring primarily through the Great Charter of 1618. As explained earlier, in that document the Crown directed that various types of public lands be surveyed and set aside. Because most of the original records of the London Company were destroyed in 1624, there is little documentary evidence of the lands actually being set aside.¹² But even if the London Company followed the directive of the Crown to set aside public lands, the status of those lands was soon confused by the revocation of the London Company's charter in 1624. According to one historian, "[w]ith the exception of the glebe lands, which continued to belong to the church, and the governor's lands, which ... continued to belong to that office, the public lands passed to the crown and were afterwards parceled out and granted by patents as other lands."¹³ Another scholar interprets this statement as "express[ing] no opinion concerning the Common lands."¹⁴ Apparently, he viewed common lands as being in a different category than public lands.¹⁵

Regardless of whether all "public" lands, including commons, passed back to the Crown in 1624, it is clear that after that point in time public lands still existed. But, in contrast to the formal public land scheme set forth in the Great Charter, after 1624 lands often became subject to public use through more informal means. Although acts passed by the colonial legislature occasionally dealt with public lands, recognition of public rights in lands appeared to occur more informally after long continuous use by the public and acquiescence by private landowners.¹⁶ Indeed, it was not until after the Revolution that more comprehensive legislative protection of public rights occurred. The General Assembly implemented that protection in 1780 when it passed its most significant piece of public land legislation — the commons act of 1780. The remaining portions of this chapter deal with that Act's provisions and ramifications.

§ 9.1. General Provisions and Policies.

Although colonial rule ended in 1775, Virginia did not enact major land legislation until 1779 when it passed the land grant act. Because this Act only

12. According to the historian Alexander Brown, "the original records of the acts, plans and purposes of the company were all destroyed in 1624, or soon after." A. BROWN, *supra* note 1, at 617. Despite the lack of records, he concludes that the specific acreage of public lands prescribed by the Company in the Great Charter was set aside. Brown describes these lands in his "State of the Colony of Virginia when it was returned by the company to the Crown in 1625." *Id.* at 616-17. He, for example, concludes that the Corporation of Henrico had "3,000 acres of company and 1,500 acres of common land; 10,000 for the university and 1,000 acres for the college." *Id.* at 617; see also A. EMBREY, *supra* note 1, at 223; T. Smolen, *supra* note 1, at 58.

13. A. BROWN, *supra* note 1, at 627.

14. A. EMBREY, *supra* note 1, at 224.

15. Embrey notes that he has "no available record concerning any Common lands after the Crown resumed its authority over the Colony," but admits that "Commons may have been set apart by Orders of Council, or Royal Commands, from time to time." *Id.* In contrast, numerous references to public lands exist. However, as Embrey explains, the references are not very informative because "few ... give the origins of these Public lands." *Id.*

16. See generally *supra* § 6.2.

contained provisions for private appropriation of waste and unappropriated lands, uncertainty arose as to the status of public lands. The common law origins of public lands suggested that at least some types of public lands were not waste and unappropriated lands subject to entry under the 1779 Act.¹⁷ The land grant act, however, did not expressly exempt public lands from conveyance and some private appropriation thus occurred.¹⁸ The type of public land threatened the most by the private appropriation process apparently was common land bordering tidal waters and subject to a common right of fishery. To the extent that a private party acquired interests in these lands, the public's common rights were restricted.¹⁹

In an attempt to clarify the effect of the 1779 land grant act on common lands and rights, the General Assembly passed its first major piece of commons legislation in 1780. Entitled "An act to secure to the publick certain lands heretofore held as common," it provided:

WHEREAS certain unappropriated lands on the bay, sea, and river shores, in the eastern parts of this commonwealth, have been heretofore reserved as common to all the citizens thereof, and whereas by the act of general assembly entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," no reservation thereof is made, but the same is now subject to be entered for and appropriated by any person or persons; whereby the benefits formerly derived to the publick therefrom, will be monopolized by a few individuals, and the poor laid under contribution for exercising the accustomed privilege of fishing: *Be it therefore enacted by the General Assembly*, That all unappropriated lands on the bay of 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 as common to all the good people thereof, shall be, and the same are hereby excepted out of the said recited act, and no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law, to pass an estate or interest therein.²⁰

As the preamble explained, the General Assembly passed the 1780 Act to protect "the accustomed privilege of fishing" and to prevent the "monopoliz[ation] by a few individuals" of "benefits formerly derived to the publick."²¹

17. See generally *supra* § 8.5.C.

18. See *Miller v. Commonwealth*, 159 Va. 924, 946, 166 S.E. 557, 565 (1932); *Garrison v. Hall*, 75 Va. 150, 159 (1881).

19. See *Garrison v. Hall*, 75 Va. 150, 159 (1881). The policy being furthered by this approach was the settlement of the country. *Id.* at 160. See also Act of May 1779, ch. 13, 10 HENING'S STAT., *supra* note 2, at 50 (1822). The problem of private appropriation of public lands may have been exacerbated by a reference in the records of the 1679 session of the Colonial Assembly. In that reference the Colonial Assembly declared that private ownership extended to the low water mark and that those who fished on private land without permission were liable as trespassers. Case of Robert Liny, 1679, 2 *id.* at 456 (1823). For further discussion of this 1679 declaration, see *supra* § 7.2.

20. Act of May, 1780, ch. 2, 10 HENING'S STAT., *supra* note 2, at 226 (1822).

21. Accord *Garrison v. Hall*, 75 Va. 150, 161 (1881) (where the court held that the purpose of

The 1780 commons act provides important evidence of common rights. As the Supreme Court of Virginia later stated in examining a subsequent version of the Act, the rights protected by the reservation "are not an arbitrary assumption of power on the part of the State, but are declaratory of the common law."²² But perhaps more importantly, for the first time since the settlement of Virginia, a legislative body broadly declared 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 the state were subject to certain common or public rights, such as the "accustomed privilege of fishing." The 1780 Act thus demonstrates a renewed dedication to the public interest in tidal resources first evident in the colonial period.

Other important land policies that developed during the colonial period also were furthered by passage of the 1780 Act. The statute, for instance, demonstrated that the state land system would retain some of the democratic predilections of the colonial system. By preventing certain "benefits" like fisheries from being "monopolized by a few individuals," the Act ensured that poor and rich alike could benefit from at least some of Virginia's tidal resources.²³ Also, through adoption of the commons legislation, the General

the 1780 Act was to preserve the privilege of fishing for the people and to prevent the benefit from being monopolized by a few). More recently, a chancery court described the purpose of the 1780 Act in the following manner: "The Act of 1780 was the first legislative recital of the public policy of Virginia to reserve for public use the intertidal strip on the shores of the Atlantic Ocean, the Chesapeake Bay, and the rivers and creeks in the Commonwealth for the use of the public so as to prevent ... 'the benefits formerly derived to the public therefrom,' being 'monopolized by a few individuals....'" *Bradford v. Nature Conservancy*, Ch. No. 16, slip op. at 25 (Northampton County Cir. Ct. Feb. 27, 1979), *aff'd in part, rev'd in part*, 224 Va. 181, 294 S.E.2d 866 (1982).

"The enacting clause is that portion of a statute which gives it jurisdictional identity and constitutional authenticity." 1A C. SANDS, *SUTHERLAND STATUTORY CONSTRUCTION* § 19.01 (4th ed. 1985) (footnote omitted). What language constitutes the enacting clause is usually specified in the constitution of the governing state, and the appropriate language is mandatory for the legislation to be valid. In Virginia the state Constitution does not contain a specific reference to an enactment clause, stating only that "[n]o law shall be enacted except by bill" presented before the General Assembly and that "[n]o law shall embrace more than one object." *See* VA. CONST. art. IV, §§ 11, 12; *see also Webster v. Commonwealth*, 141 Va. 589, 597, 127 S.E. 377, 379 (1925). It seems, therefore, that a law in Virginia is enacted if approved by the Virginia legislature in the form of a bill and that strict conformance to specific words or wording is not necessary. *See* C. SANDS, *supra*, § 19.01. More generally, few courts in other jurisdictions appear willing to hold a legislative enactment that clearly expresses the legislature's intent void because the enactment fails to conform with the technical language requirements of an enacting clause. *See id.* § 19.03.

In many states an enacting clause may be placed in any section of a statute, but a court construing the statute will not treat any material preceding the enacting clause as law. *Id.* at § 19.05. Because of this practice, the enacting clause is usually found after the preamble. *Id.* §§ 19.05, 20.02. In Virginia, however, the whole body of a valid bill arguably could be considered law since the Virginia Constitution does not require an enacting clause.

22. *Meredith v. Triple Island Gunning Club*, 113 Va. 80, 84, 73 S.E. 721, 723 (1912) (referring to a 1904 version of the 1780 Act).

23. In *Bradford v. Nature Conservancy*, Ch. No. 16 (Northampton County Cir. Ct. Feb. 27, 1979), *aff'd in part, rev'd in part*, 224 Va. 181, 294 S.E.2d 866 (1982), the chancery court, in discussing the issue of commons, stated: "In 1780 the General Assembly made it clear that certain lands 'which have been used as common to all the good people' in the eastern part of the Commonwealth were reserved from grant under the 1779 act." Ch. No. 16, slip op. at 24. The

Assembly ensured that Virginia's land system would continue to ratify the reasonable expectations of its people. As the Supreme Court of the United States later explained in a slightly different context, the English settlers were accustomed to having protected rights in navigable waters and would not expect to emigrate to America only to find that all of the valuable water resources had been privately appropriated.²⁴

Despite its clear statement of purpose and policies, the 1780 commons act has created serious problems of interpretation for modern courts. The principal issues raised by the Act include questions relating to the scope of the Act, to the nature of the public interest protected by the Act, and to the effect of the Act on private interests. Although the answers may have been readily apparent back in 1780, they are far from clear today. Section 9.2 focuses on the first category of issues, while sections 9.3 and 9.4 focus on the second and third types, respectively.

§ 9.2. The Scope of the 1780 Act: Tidal Resources Affected by the Act.

By its express terms the 1780 commons act applies to lands meeting four key criteria: one, the lands are unappropriated; two, they are located on the Chesapeake Bay, on the sea shore, or on the shores of any river or creek in the eastern parts of the state; three, the lands have remained ungranted; and, four, they have been used as a common for the people of the state.²⁵ The meaning of the second prerequisite is fairly clear. Both Virginia and English common law define the term "shore" as "that space alternately covered and left dry by the rise and fall of the tide, being the space between high and low water marks."²⁶ Although technically this definition limits the phrase to

court continued, noting that the purpose of the Act was to "prevent the benefits formerly derived to the public ... [by the use of common land from] being monopolized by a few individuals, and the poor laid under contribution for exercising the accustomed privilege of fishing." *Id.* at 25. *Accord* *Garrison v. Hall*, 75 Va. 150, 159, 160 (1881).

24. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 366, 414 (1842). Under English law one of the rights traditionally reserved for the common use was the right of fishery and any grant made in derogation of that public right was strictly construed. Since the adoption of the Magna Carta, most authorities seem to agree that even the Crown could not grant exclusive interests, including fisheries, in tidal waters. See generally *supra* chapter 5, notes 56-65 and accompanying text.

25. In *Garrison v. Hall*, the court described the Act as including "unappropriated lands on the bay of Chesapeake, or on the sea shore, or on the shore of any river or creek, which have remained ungranted by the former government, and which has been used by the good people of this Commonwealth." 75 Va. 150, 157 (1881). Embrey construes the phrase "all unappropriated lands on the bay of Chesapeake, the sea shore, or on the shores of any river or creek in the eastern part of this Commonwealth" in accordance with the holding in *Garrison*. He defines the phrase to include "'the space between the high water and low water marks,' and ... the reservation would necessarily include lands bordering on the shores which were necessary for the enjoyment of the privilege." A. EMBREY, *supra* note 1, at 211.

26. *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 160 (1854); *accord* *Bradford v. Nature Conservancy*, Ch. No. 16, slip op. at 31 (Northampton County Cir. Ct. Feb. 27, 1979), *aff'd in part, rev'd in part*, 224 Va. 181, 294 S.E.2d 866 (1982). Although the term "shore" commonly is used to refer to lands along the seas, rivers also can have shores. In *Commonwealth v. Garner*, for example, a dispute arose over the natural boundary line between Virginia and Ohio. In considering whether the high water mark or the low water mark of the Ohio River was the proper

those waterbodies affected by the tides, some courts have applied the term to nontidal waters as well to signify that portion of the bank of the watercourse touching the waters.²⁷ Similarly, the general identity of waterbodies affected by the Act is clear. Although some confusion admittedly exists about the precise geographic location of protected waters, most of that confusion concerns the phrase "eastern parts." As will be explained later, commentators have disagreed for years about the correct boundary between eastern and western parts.²⁸ But, other than that key issue, there is little dispute about the identity of the waters affected by the Act.²⁹

The first, third, and fourth criteria, however, raise serious problems of interpretation. While phrases like "unappropriated" and "used as common" apparently had accepted meanings in the 1700's, they do not have clear meanings today. Perhaps this confusion and uncertainty is due to the fact that society no longer depends on common rights for survival and thus misunderstands the commons concept. Or perhaps it is simply due to the passage of time. But, whatever the reason, it is clear that understanding these phrases

boundary line, one justice observed that "rivers subject to the flux and reflux of the tide" have low and high water marks. 44 Va. (3 Gratt.) 655, 668 (1846) (1st ed. 1847) (opinion of J. Taliaferro). He further noted that shores can be adjacent to "rivers subject to the tide," as well as to the sea. *Id.* at 675.

27. In defining the "shore", Embrey cites to M. Hale, *A Treatise De Jure Maris et Brachiorum Ejusdem*, reprinted in S. MOORE, *A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO* 370 (3d ed. 1888) [hereinafter paginated to S. MOORE], and *Scott v. Doughty*, 124 Va. 358, 366, 97 S.E. 802, 804 (1919). Embrey concludes that "[a] good workable definition, adopted both in England and in Virginia, is that strip of land on navigable water, between ordinary high water and ordinary low water — not spring tide, or neap tide, uninfluenced by special seasons, winds or other circumstances." A. EMBREY, *supra* note 1, at 256. For further discussion of the meaning of shore, see *supra* § 1.2.

In *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 155 (1854), the Virginia Supreme Court recognized that a deed calling for the boundary to run along the shore of a river conveyed a fee simple to the bank of the river. The court noted that it would be unlikely for the parties to have intended to leave a strip of land between the river and the boundary merely because a few or all the artificial objects named stood at a slight distance from the river. As the court explained, "[t]he expression of an intent to run the line along the stream reaches a distinct natural monument which overcomes the others." *Id.*; see also *Commonwealth v. Garner*, 44 Va. (3 Gratt.) 655 (1846) (1st ed. 1847).

28. Embrey interprets the phrase "eastern waters or parts" by focusing on the watershed of the state. He concludes that "eastern waters or parts" refer to waters and lands east of the crest of the Alleghenies. A. EMBREY, *supra* note 1, at 279-80. Having arrived at this definition, Embrey finds that the 1780 Act's reference to "'certain unappropriated lands on the bay, sea and river shores, in the eastern parts of the Commonwealth,' ... refer[s] to the same *water sheds*, the *river shores in the eastern parts of the Commonwealth*' being the same as the rivers and creeks of the Atlantic ocean and Chesapeake bay, that is the waters of which enter the ocean or bay, and this description comprehends all the rivers east of the Alleghenies." *Id.* at 286. For further discussion of the boundary between eastern and western waters, see *infra* § 10.2.B.

29. Embrey lists "in the eastern part" as a separate requirement of the Act. A. EMBREY, *supra* note 1, at 200. But under rules of statutory construction, a qualifying phrase generally only applies to the preceding phrase unless separated by commas. See 2A C. SANDS, *supra* note 21, § 47.33 (1984) ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma."). In the context of the 1780 Act, that qualifying phrase would be "on the shores of any river or creek."

requires examining the legislative enactments and judicial decisions of earlier time periods. A discussion of each of these three criteria follows.

A. Unappropriated Lands.

Although the term “unappropriated” has appeared in numerous land statutes, including several still in force today,³⁰ it never has been defined by the legislature. As explained in the chapter 8 discussion of the meaning of the phrase “waste and unappropriated,” both the judiciary and the legislature seem to use the term “unappropriated” interchangeably with such words as “unpatented,” “ungranted,” “unpossessed,” and “vacant.”³¹ Though these words may clarify the meaning of the term for most situations, the phrases do not adequately resolve the status of all unpatented lands. They, for example, do not address the status of lands that are unpatented and that are not susceptible to occupation or settlement. Nor do they answer the question of whether unappropriated lands include lands that are not patented and that are used, either formally or informally, for public purposes.

Only a few judicial decisions have examined the meaning of the phrase “waste and unappropriated” in the context of Virginia’s land legislation. Typically those decisions have focused on the private land legislation, in particular the 1779 land grant act. For instance, in an 1824 decision, the Virginia Supreme Court stated that the phrase signified lands “which have not before been patented” and which were liable to entry and survey under the 1779 land grant act.³² The court explained that waste and unappropriated lands “were not ... appropriated in the sense of the [1779] statute, by entry and survey....”³³ Until that process was completed, the lands retained their status as waste and unappropriated.³⁴

Since the 1780 commons act represents an attempt to clarify the effect of the 1779 Act on the public interest in common lands, it seems reasonable to assume that the term “unappropriated” at least has the same connotations under the commons act as it has under the 1779 Act and that therefore it

30. See, e.g., VA. CODE § 41.1-5 (1986) (empowering circuit and corporation courts to dispose of waste and unappropriated lands); *id.* § 41.1-16 (giving a citizen of the state “the right to file a proceeding in the name of the county or the city seeking the sale and disposition” of waste and unappropriated land); *id.* § 41.1-19 (giving the governing body in which waste or unappropriated land lies the right to initiate proceedings to have the land sold).

31. See *supra* § 8.5.C.

32. *Whittington v. Christian*, 23 Va. (2 Rand.) 353, 371 (1824). In *Whittington* the court held that once land had been patented, a mere lapse in the patent would not make the land available for appropriation as waste or unappropriated land. *Id.* at 371; see also *supra* chapter 8, notes 232-41 and accompanying text.

33. *Whittington*, 23 Va. at 371.

34. *M’Clung v. Hughes*, 26 Va. (5 Rand.) 453, 479 (1927). But in *M’Clung* the court also stated “in respect to actual settlers, it is provided, that all persons who, before the 1st of January, 1778, have really and *bona fide* settled themselves, ... upon any waste and unappropriated lands, to which no other person hath any legal title or claim, shall be entitled to 400 acres.” *Id.* (emphasis in original). This statement thus covers the situation where there is an occupier or a legal claimant but no patent. See also *supra* chapter 8, notes 242-47 and accompanying text.

generally signifies lands subject to entry and survey.³⁵ One problem with this assumption, though, is that the 1779 Act applies to waste and unappropriated lands, whereas the 1780 Act only applies to unappropriated lands. Also, it fails to resolve adequately the question of whether “unappropriated” should be defined only in the context of the 1779 Act or whether a broader approach should be taken. Under the narrower perspective, “unappropriated” would be defined only in light of the 1779 Act to mean lands not yet granted and therefore not yet subjected to the complete patenting process. This definition therefore would include as unappropriated all lands to which the state still retains title unless excepted by other legislative action, regardless of whether the land is being used for a public purpose. Under the broader approach, “unappropriated” would be defined in the context of the public, as well as the private, land system to mean unpatented lands that have not been subjected to the complete land process or that otherwise have not been set aside by the government for a public purpose. This standard thus would exclude as unappropriated lands to which the state still retained title as long as some form of public or private appropriation had occurred. Deciding between the two approaches is crucial to defining the type of lands affected by the 1780 Act, in particular to the two categories of unpatented lands identified earlier as having an uncertain status under the Act.

The first category, lands that are not patented and that are not susceptible to settlement or occupation, would include submerged lands and arguably the intertidal zone. In determining whether this category should be classified as waste and unappropriated under the 1779 Act, the Virginia Supreme Court appears to focus not only on whether the land is unpatented, but also on whether the land can be constructively settled and developed. So, for example, in *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*,³⁶ the court concluded that submerged lands were not waste and unappropriated because they could not be occupied and cultivated and therefore could not promote the purposes of the 1779 Act to encourage settlement and development of the state's lands.³⁷

Although the court's reasoning in *James River* is at times troubling and inconsistent,³⁸ its conclusion that submerged lands are not waste and

35. “Other statutes dealing with the same subject as the one being construed — commonly referred to as statutes in *pari materia* — comprise another form of extrinsic aid useful in deciding questions of interpretation.” 2A C. SANDS, *supra* note 21, § 51.01 (1984). “Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense.” *Id.* § 51.02 (footnotes omitted).

36. 138 Va. 461, 122 S.E. 344 (1924).

37. The court explained:

The terms “waste and unappropriated lands” in the usual acceptance of the term, was peculiarly appropriate to lands which were not occupied by anyone, and hence was “waste” so far as benefit to the State was concerned, and there were manifest reasons why the State should wish to sell them to those who would occupy and cultivate them. The object to be accomplished by the State was to increase its population and also its productive wealth. The phrase [therefore] has no natural application to land under water.

Id. at 472, 122 S.E. at 347. See also *supra* chapter 8, notes 274-95 and accompanying text.

38. See *supra* chapter 8, notes 290-95 and accompanying text.

unappropriated lands subject to entry is reasonable in light of the expansionist policies of the 1779 land act. The court's conclusion, however, is not entirely consistent with the public interest policies of the 1780 commons act. Although submerged lands cannot actually be settled and occupied, they can be used productively for such activities as fishing and oystering. Because the 1780 Act seeks to protect the public's right to engage in these activities, it seems logical to classify submerged lands as unappropriated lands for purposes of that Act.³⁹ This conclusion is not necessarily inconsistent with the conclusion reached by the court under the 1779 Act since the commons act only applies to "unappropriated" lands, while the land act applies to "waste and unappropriated" lands. Indeed, perhaps the *James River* court engaged in the inquiry concerning the productivity of submerged lands solely to determine whether the lands qualified as waste, and not as unappropriated. Regardless of whether this is a correct interpretation, the legislature eventually resolved the matter by amending the commons statute to include "the bed of any river or creek."⁴⁰

Unlike submerged land, the intertidal strip can be physically occupied and possessed and often is closely tied to effective use of the upland. Apparently because of this fact, the Virginia Supreme Court has declared that such land is waste and unappropriated land subject to entry under the 1779 Act.⁴¹ This conclusion also is consistent with the express language of the 1780 Act which refers to "all unappropriated lands ... on the shore."

The second category of land, public lands, poses a more difficult problem to a court deciding whether to classify the land as waste and unappropriated land. As explained in more detail in chapter 8, the Virginia Supreme Court concluded in *French v. Bankhead*⁴² that public lands, or certain lands that were set aside by agents of the Crown or state for public purposes, were not waste and unappropriated lands within the meaning of the 1779 Act.⁴³ The

39. When courts interpret a statute, they must do so in light of the purposes, policies, and intent of the legislators involved. One commentator has identified two standards for interpreting a statute: genuine interpretation and spurious interpretation. Pound, *Spurious Interpretation*, in 4 C. SANDS, *supra* note 21, at 31, 32-33 (1975). As he explains, the "object of genuine interpretation is to discover the rule which the law-maker intended to establish" by looking at the language used and the context of its use in the statute. *Id.* at 33. In contrast, the "object of spurious interpretation is to make, unmake, or remake, and not merely to discover," the legal rule. *Id.* at 34. This type of interpretation is used "to meet deficiencies or excesses in rules imperfectly conceived or enacted." *Id.* at 32. Because spurious interpretation assumes that the legislators considered morals, policy, and fair dealing in enacting the statute, it prefers the interpretation that "appeals most to our sense of right and justice," treating that interpretation as the one that is "most likely ... the meaning of those who framed the rule." *Id.* at 33.

40. See Act of Dec. 17, 1792, ch. 24, § 6, 1 S. SHEPHERD, *THE STATUTES AT LARGE OF VIRGINIA* 64, 65 (Richmond 1835) [hereinafter cited as SHEPHERD'S STAT.].

41. As the court in *Garrison v. Hall* announced, "when riparian rights had not been acquired by individuals, the public right of fishing existed, and was common to all the people of the State." 75 Va. 150, 159 (1881). Because the court made this declaration without offering any explanation, it apparently did not question the matter.

42. 52 Va. (11 Gratt.) 136 (1854).

43. *Id.* at 166. The court stated:

court reasoned that the lands already had been appropriated for public use and that whenever the legislature wanted to sell public lands it established special procedures for that purpose different from those generally governing the patenting of land.⁴⁴ In *Miller v. Commonwealth*,⁴⁵ the Virginia Supreme Court supported the conclusion of the court in *French*, stating that “[i]t would seem clear that these terms [waste and unappropriated] did not include lands which had been expressly appropriated for the use of the government or which were being so used, though not expressly appropriated for such use.”⁴⁶ The United States Supreme Court further substantiated this view in *McCready v. Virginia*,⁴⁷ where it stated that a state has the right “to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish”⁴⁸ The opinion in *McCready v. Virginia* is one of the few opinions that actually recognizes that land can be appropriated for public use.

[b]ut in addition to the waste and unappropriated lands thus made subject to entry, survey and grant, in the mode prescribed [under the 1779 act], there were certain lands in the eastern part of the state which, by the acts of the agents of the crown or commonwealth, the proprietor of all the waste lands in the commonwealth, had been set apart and appropriated to public purposes.... They [the exempt lands] seem to have been dedicated to the public use by being so used and enjoyed. When referred to in the laws, they are designated as public lands, and a specific mode of disposition was prescribed.

Id.

44. *Id.* at 166-67. The court noted four subsequent enactments authorizing the conveyance of public lands after the passage of the 1779 land grant act. As these statutes suggested, “the legislature did not suppose that lands set apart for public purposes, or the public lands, were embraced under the designation of waste and unappropriated lands. Special acts were passed for the sale of these public lands by commissioners, and the title of the state passed, not by patent, but by a conveyance of the commissioners specially authorized to execute deeds.” *Id.* at 167.

45. 159 Va. 924, 166 S.E. 557 (1932).

46. *Id.* at 946, 166 S.E. at 565. In *Miller* the court reasoned that since the 1779 statute “made no provision for a grant of any lands except ‘waste and unappropriated lands’ ... [it] therefore, by necessary implication excluded from grant under it any lands not falling within the meaning of the words ‘waste and unappropriated lands.’” *Id.* Thus, public lands could not be conveyed under the authority of the 1779 land grant act. *Id.*

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

48. *Id.* at 395. In *McCready v. Commonwealth*, the Virginia Supreme Court, in holding a non-resident of Virginia was not entitled to seed and harvest an oyster bed on the Ware River, found “that the people of each state had title to their navigable waters and to the soil under them, which was exclusive of the people of the other states and all others.” 68 Va. (27 Gratt.) 985, 990, *aff’d sub nom. McCready v. Virginia*, 94 U.S. 391 (1876). The court went on to state that exclusivity does not conflict with the federal Constitution’s guarantees of “protection of the government; the enjoyment of life and liberty; the right to acquire and possess property of every kind, and to pursue happiness and safety.” 68 Va. at 994. While the Constitution “guarantees to the citizen of one state the right to acquire and possess property of any kind in any other state, it does not give him the right to seize and hold the property belonging to the citizens of that other state, or to share with them in the enjoyment of property which belonged exclusively to them.” *Id.*

The United States Supreme Court affirmed the Virginia Supreme Court’s findings in *McCready v. Virginia*, stating “that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away.... For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty.” 94 U.S. at 394. The state, therefore, has the right to regulate the use of the common property. *Id.* at 395. Both courts’ holdings have been limited, if not overruled. See *infra* § 20.2.B.

The conclusion that public lands are not waste and unappropriated seems reasonable for those public lands formally set aside for public use. Because those lands officially have been appropriated or "set apart for ... a particular purpose or use,"⁴⁹ a clear standard exists for distinguishing between appropriated public lands and unappropriated public lands. The conclusion, however, is troubling in those situations where the public use has arisen informally through long usage or custom, for in that type of situation the government has not taken any affirmative action to appropriate the land. Without such action it is never really clear whether the public use is valid and legally enforceable until the question is tested in court or clarified by the legislature. The court in *Miller* apparently recognized this dilemma. Immediately after supporting the *French* court's conclusion that public lands are not waste and unappropriated, the court in *Miller* expressed doubt as to whether this conclusion applied to common lands. The court thus would appear to be questioning how this type of land could not be unappropriated land when the 1780 Act referred to it as such. The court then attempted to resolve the dilemma by concluding that at least those common lands that "had not been expressly appropriated by an order of the governor and council or some other agency of the Crown" qualified as waste and unappropriated lands.⁵⁰

Although this position is somewhat confusing since it creates two types of commons, appropriated and unappropriated, it can be defended. First, only those common lands that have been expressly set aside for public use have been appropriated in a technical sense. Also, until 1873 every major statute dealing with common lands referred to them as unappropriated. Finally, applying the *French* position that public lands are not waste and unappropriated to common lands would mean that the 1780 statute technically was not necessary.⁵¹ Of course, the legislature nevertheless may have wanted to pass the Act to remove all doubts about the status of the land.

As the preceding discussion demonstrates, the meaning of the word "unappropriated" is far from certain. The confusion surrounding the term can be attributed at least in part to the fact that the 1779 Act applies to "waste and unappropriated" land, while the 1780 Act only applies to "unappropriated" land. Although such an omission would appear to have legal significance, neither of the Acts clearly distinguishes between the two terms. That many land acts use the term unappropriated interchangeably with unpatented and ungranted suggests that the term "unappropriated" at least refers to lands never before patented. Yet if that was all the word meant, then it arguably would be superfluous because of the presence of another phrase in the 1780 Act, "which have remained ungranted." Also, if the term "unapro-

49. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 106 (1961) (definition of "appropriate").

50. *Miller v. Commonwealth*, 159 Va. at 946-47, 166 S.E. at 565. In *Miller* the court noted "[t]he act contains no definition of the terms 'waste and unappropriated lands.' It would seem clear that these terms did not include lands which had been expressly appropriated for the use of the government or which were being so used though not expressly appropriated for such use." *Id.* at 946 (footnote omitted). See generally A. EMBREY, *supra* note 1, at 213-29.

51. For further discussion of the *French* position, see *supra* chapter 8, notes 248-61 and accompanying text.

propriated" only signified unpatented lands, it would not clarify the status of certain unpatented lands that were not susceptible to settlement, and thus patenting, or that were used for public purposes. Apparently recognizing this deficiency, some courts have defined the phrase waste and unappropriated in light of the policies of the 1779 land act to mean unpatented land not yet appropriated by entry and survey procedures.

Whether such a definition also applies to the word "unappropriated" as used in the 1780 Act is unclear. As explained above, two plausible interpretations exist. *French* indicates that the broader approach is the proper perspective, for it defines "appropriated" in terms of governmental action, and not just the patent process. The broader perspective also seems preferable in light of the strong protectionist policy reflected in the 1780 Act. Furthermore, if the narrower approach were adopted, then the term "unappropriated" would encompass unpatented public lands officially set aside or appropriated for public use. But such lands apparently could not be sold without special legislative authorization and therefore would not need to be protected from the 1779 land grant procedures.⁵² Also, the narrow approach is inherently inconsistent with the meaning of the phrase "appropriated," for the approach suggests that land never could be reserved from private appropriation by governmental action. Finally, the broader approach better explains the need for clarification of the effect of the 1779 Act on public rights. Under the broader approach, the status of public lands that had not been officially appropriated for a public purpose but that had come to be recognized as subject to a public use would be unclear. Legitimate arguments could be advanced both to support and attack the position that such lands should be unappropriated. It apparently was because of this uncertainty that the General Assembly passed the 1780 commons act.⁵³

52. Special acts by the Virginia General Assembly appear to be necessary to authorize the sale of public lands. In *French v. Bankhead*, the court cites numerous examples of the General Assembly authorizing the sale of public lands by special act. See 52 Va. at 166-68.

53. Embrey concludes that the 1779 Act did not define "unappropriated lands" because the meaning of the term "was apparent to the minds of those who sat in the General Assembly — so apparent, likely, that they deemed it useless to define it." A. EMBREY, *supra* note 1, at 199. In his view the 1779 Act "dealt with 'waste and unappropriated' lands, with 'surplus land,' and with 'unpatented' land, with certain material differences between lands on the Eastern Waters and lands on the Western Waters." *Id.* To clear up the uncertainty about the meaning of the phrase "unappropriated lands," the General Assembly passed the 1780 Act. According to Embrey's interpretation of that Act, the phrase included lands "(1) [o]n the Bay, (2) [o]n the sea shore, (3) [o]n the shores of any river or creek, (4) [i]n the Eastern parts of the Commonwealth, (5) [u]ngranted by the former government, [and] (6) [u]sed as a Common to all the good people." *Id.* at 200; see also *supra* note 29.

Property can be "appropriated" either by law or through use. To "appropriate" land by law, a government body must set aside the land for a particular use or otherwise authorize a party to acquire and hold the land. See *Town of Somerset v. Dighton Water Dist.*, 347 Mass. 738, 741-42, 200 N.E.2d 237, 239 (1964); *McSorley v. Hill*, 2 Wash. 638, 27 P. 552, 556 (1891). Under this theory occupancy of the land is irrelevant as long as the requisite intent and "setting aside" exist. As one court noted, "[o]ccupancy may always include an appropriation, but an appropriation does not necessarily include occupancy." *Id.*

The second method for "appropriating" property focuses on the use of the land by one party to the exclusion of any beneficial use by other parties. Such a use may arise, for example, where a

B. *Lands Which Have Remained Ungranted.*

In reserving certain unappropriated lands for public use, the 1780 Act describes the affected lands as those "which have remained ungranted by the former government." Grammatically the use of the word "which" suggests that the phrase merely is descriptive and is not further defining the lands being reserved.⁵⁴ This interpretation would be consistent with the Act's earlier use of the word unappropriated, which, as explained, means ungranted or unpatented.

Several factors might have prompted the legislature to include the phrase "which have remained ungranted" in the Act, even though as a grammatical matter it was superfluous. The legislature, for instance, might have inserted the phrase to clarify that the 1780 Act did not affect prior conveyances of common lands. Additionally, the General Assembly might have been trying to distinguish between common lands and common rights. As explained in Part II, the commons concept developed under Roman and English law into two distinct concepts: common lands, or lands held and used in common, and rights of common, or the "right of one or more persons to take or use a product naturally produced on another's land or in another's waters."⁵⁵ Thus, by inserting the phrase "which have remained ungranted," the legislature could have intended to clarify that the Act excluded the second type of commons and did not reserve lands privately owned but subject to common use. Although it now would be difficult to discern which, if any, of these motivated the legislature, statutory rules of construction support interpreting the phrase

city's sewage disposal plant pollutes the waters adjacent to the landowner's property, depriving him of a beneficial use of his property. *Lewis v. City of Potosi*, 317 S.W.2d 623, 629 (Mo. Ct. App. 1958); see also *El Paso County Water Improvement District No. 1 v. City of El Paso*, 133 F. Supp. 894, 908 (W.D. Tex. 1955) (discussing appropriation of water through use).

In deciding a dispute over the use of the waters of the Segreganset River, the court, in *Town of Somerset v. Dighton Water District*, recognized both methods of appropriation as independent tests. 347 Mass. 738, 741-42, 200 N.E.2d 237, 239 (1964). The court concluded that appropriation of the waters does not require that there be in specie appropriation and actual physical use. Rather, appropriation can occur when a party has been given legislative authority to acquire and hold property or when a government body has used, but not formally taken, a property. *Id.*

54. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2603 (1961). The distinction between "that" and "which" does not appear to have been as strong in 1780. Samuel Johnson, in his 1786 dictionary, does not appear to recognize distinctive uses for "that" or "which." Johnson defines "which" as a "pronoun relative; relating to things." An ordinary relative pronoun introduces an additional statement about the antecedent, and the sense of the principal clause is complete without the relative clause. S. JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (London 1786) (definition of "which"). "That" is defined by Johnson as "which; relating to an antecedent thing." See *id.* (definition of "that" as relative pronoun). Because Johnson defines "that" as "which," the term "that" seems to have been used in 1780 as a relative pronoun and apparently was interchangeable with "which." Although the distinction between a restrictive clause begun by "that" and an unrestricted clause begun by "which" does not appear to have been made in 1780, the clause "which have remained ungranted" would have the same effect on the statute as it would under modern grammatical interpretation. Because Johnson defined "which" to be a relative pronoun, it would introduce a nonessential, additional statement about a completed antecedent. See also 11 THE OXFORD ENGLISH DICTIONARY at 252-53 (1961) (definition of "that"); 12 *id.* at 39 (definition of "which").

55. See generally *supra* § 6.1.

"which have remained ungranted" in a meaningful manner and not merely as a redundancy.⁵⁶

C. Lands Which Have Been Used as a Common.

1. The Declaratory v. Restrictive Debate.

Besides identifying the unappropriated lands being reserved as those "which have remained ungranted," the 1780 Act also refers to them as lands "which have been used as common to all the good people" of Virginia. One important issue raised by this phrase concerns whether the phrase merely describes the status of identified lands under the common law or whether it further qualifies the types of resources being reserved. Under the descriptive approach, the clause would be construed as recognizing and affirming the law in effect at the time of passage and thus would represent a broad statement of public policy. Under the narrower, qualifying approach, the clause would become an additional requirement that must be met before the 1780 reservation would apply and thus would restrict the types of resources protected by the Act.

Both approaches would have significant ramifications on public and private rights. The choice made affects not only the quantity of land protected by the Act, but also the nature of the public rights permitted under the Act and the allocation of evidentiary burdens. Adoption of the descriptive approach, for example, would mean that all unappropriated lands on the Chesapeake Bay, the sea shore, and the shores of rivers and creeks in the eastern part of Virginia were being used as a common in 1780 and that therefore the Act automatically reserved a strip of land on those waters. Interpreting the statute in this manner thus would reduce significantly the evidentiary burdens of those claiming the right to use certain lands as common. Because the Act would be interpreted as automatically recognizing as commons lands otherwise identified in the Act, the claimants would not have to establish prior common use, a task not easily accomplished after the passage of 200 years. Additionally, interpreting the clause broadly would mean that the courts probably would be more receptive to claims that common or public rights were being infringed by private parties. Because courts adopting the descriptive approach would interpret the legislation as a broad statement of public policy and an important declaration on the legal status of the public interest in tidal resources,⁵⁷ those courts probably would be more generous in identifying the types of public uses permitted under the Act.

⁵⁶. As one commentator also noted: "It is always an unsafe way of construing a statute or contract to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographers and then reconstruct the instrument upon the basis of these definitions." 2A C. SANDS, *supra* note 21, § 46.05 (1984). According to that commentator, "[a]n instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of the ... body which enacted ... the statute." *Id.* (footnote omitted).

⁵⁷. For a discussion of the question of whether the public has a right of access over private property to lands subject to common rights, see *infra* § 16.1.

Adoption of the restrictive approach, on the other hand, would mean that prior use as a common would have to be established before the 1780 Act's protective arm would apply. Unappropriated lands bordering the Chesapeake Bay, the sea shore, and the shores of rivers and creeks in eastern Virginia would not necessarily fall within the scope of the Act. Geographic location would not, by itself, be sufficient grounds for protection. Additionally, a more restrictive interpretation would mean that courts would be more reluctant to uphold claims of public rights, requiring sufficient proof not only of prior common use, but also of the validity of the particular use in question before upholding the rights against actions by private parties. Those claiming the protection of the Act thus would bear a higher burden of proof under the narrower interpretation.

In *Miller v. Commonwealth*,⁵⁸ a leading case on the effect of the 1780 Act the Supreme Court of Virginia indicated that the narrower, restrictive approach was the proper interpretation. Although the court did not appear to address the matter directly, the court, in describing the general effects of the commons act, stated that

the act of 1780 had no *general* reference or application to the strip of land lying between low and high-water marks along the tidal waters of the Commonwealth, but applied only to tracts of land which had been theretofore designated as a common for the use of the people, or which .. had been used by the people as a common and came to be recognized as such.⁵⁹

Thus, in the view of the *Miller* court, the 1780 statute did not create a blanket exemption from the land grant act for all unappropriated lands along Virginia's tidal waters.

The *Miller* court's interpretation is consistent with basic rules of statutory construction. As explained by another Virginia decision, one of these rules is that "[e]very part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary."⁶⁰ Interpreting the clause

58. 159 Va. 924, 166 S.E. 557 (1932).

59. *Id.* at 948, 166 S.E. at 565 (emphasis in original).

60. *Raven Red Ash Coal Corp. v. Absher*, 153 Va. 332, 335, 149 S.E. 541, 542 (1929). In *Raven* the court applied the aforementioned rule of statutory construction to interpret the phrase "in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury." The court found that the period of compensation started running at the date of the injury and was not tolled by any intermittent periods of work by the injured employee. As the court explained, "[i]f this [phrase] be construed to give to the employee unconditional compensation for three hundred weeks, then the phrase 'from the date of injury' is meaningless." *Id.*; see also *City of Richmond v. Grand Lodge of Va.*, 162 Va. 471, 476-77, 174 S.E. 846, 848 (1935) ("Under the usual and elementary rules of construction the language of a statute must be construed so as to give that language some meaning where it is possible to do so, without doing violence to the clear intent and purpose of the enactment."); *Postal Telegraph-Cable Co. v. Farmville & Powhatan R.R.*, 96 Va. 661, 664-65, 32 S.E. 468, 470 (1899) ("we must find and give effect to the legislative intent by considering, not a part, but all of the language used, and are justified in rejecting any part of the statute as unnecessary and irrelevant only in the last resort....").

as declaratory of the common law would render the clause meaningless, at least in the sense that it would not be contributing substantively to the Act.

The court's interpretation also is consistent with basic policies of property law, which strongly favor private ownership and use of property. Infringement of private property rights normally is disfavored, and courts tend to construe strictly any exception to this rule.⁶¹ A private landowner who purchases and improves land later found to be subject to common rights has important reliance interests tied up in his development of the land. Subjecting his proprietary interests to common rights discourages future economic development of land similarly situated. Additionally, if the private party purchased without notice of the common rights, applying the 1780 Act to his land would seriously undermine the integrity of the recording statute. Adopting a narrow construction of the commons statute, thus, would help to reduce tensions between some of the basic policies of property law and those special policies underlying the 1780 Act.

Unfortunately, most other judicial opinions considering the 1780 Act do not address, either directly or indirectly, the question of whether the language "which have been used as common" imposes a requirement or is merely declaratory of the common law. Only one earlier case, *Mead v. Haynes*,⁶² provides strong support for the *Miller* court's interpretation. *Mead v. Haynes* briefly considers the effect of a later version of the 1780 Act, noting that the commons legislation has "prohibit[ed] the granting, since 1779, of the bed of any stream in the Eastern parts of the Commonwealth, which had been used as a common by all the people of the Commonwealth; but not otherwise."⁶³ Although this statement suggests that private appropriation is the general practice, it does not, by itself, resolve the question of whether common use is a requirement. It is only when the court applies the principle to a particular bed that the court's position becomes clear. In that discussion the court notes that the bed of the creek in question was alienable before 1779 because the watercourse was nonnavigable and that the bed also was alienable after 1779 "if not granted before, unless it appeared that it had been used as a common to all the people of the Commonwealth."⁶⁴ Thus, according to the *Mead* court, the

61. "A proprietary right is a right customarily associated with ownership, title, and possession. It is an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls." *Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 186 (1980). The courts have historically protected an individual's proprietary right in private property. "The right to take private property for a public use is a very high prerogative right, but there is no doubt about the power of the State to exercise it.... The taking of private property, however, is a matter of serious import and is not to be permitted except where the right is plainly conferred and the manner of its exercise has been strictly followed." *School Bd. of Harrisonburg v. Alexander*, 126 Va. 407, 412, 101 S.E. 349, 351 (1919). Furthermore, "[t]he right to take or damage private property ... is in derogation of the common law, seriously affects the rights of private citizens, and can only be exercised for the purpose, to the extent, and in the manner provided by law." *City of Richmond v. Childrey*, 127 Va. 261, 267, 103 S.E. 630, 631 (1920).

62. 24 Va. (3 Rand.) 33 (1824).

63. *Id.* at 36 (emphasis added).

64. *Id.* As the court explained: "By common law, every river, so far as it ebbs and flows, belonged to the Crown; but rivers, not navigable, were the property of the proprietors of the land on both sides of the river; that is, if both sides of a river not navigable belonged to one owner, the

commons legislation only prevented alienation of the bed of a nonnavigable creek located in the eastern part of Virginia where the bed was ungranted and actually was used as a common. Because the *Mead* decision was rendered close to the time when the 1780 statute was enacted, it seems reasonable to give its interpretation of the Act substantial weight.⁶⁵

Another decision, *French v. Bankhead*,⁶⁶ also offers some support for the *Miller* court's interpretation. In *French v. Bankhead* the court notes that "in addition to the waste and unappropriated lands ... there were certain lands in the eastern part of the state which ... had been set apart and appropriated to public purposes."⁶⁷ Although the court observes that no special act or grant was needed to create the public lands, it discusses numerous legislative acts referring to specifically identified lands as public lands.⁶⁸ These acts suggest that only distinct pieces of land became public lands.

Several other judicial decisions, however, indicate that the commons legislation was "declaratory of the common law."⁶⁹ These decisions admittedly analyze a later version of the 1780 Act which contained some significant

whole river was his; if different persons own the lands on each side of the river, the bed belonged to them in moieties." *Id.* at 35; see also *Hayes v. Bowman*, 22 Va. (1 Rand.) 417, 420 (1823). The Act of 1792, however, prohibited the granting of the bed of any stream in the eastern parts of the Commonwealth which had been used as a common by all people of the Commonwealth. *Mead*, 24 Va. at 36. Thus, the "beds of navigable streams were not grantable," but "a grant bounded by a stream not navigable extended to the middle of the stream." *Id.*

65. In *Garrison v. Hall*, the Supreme Court of Virginia agreed with this rule, stating: "in construing the acts of 1780 and 1796 and 1802, the chancellor in 1808 being cotemporary with the men of that generation, who ... were informed as to whether said lands had been used as a common to all the good people of this Commonwealth anterior to said act of 9th of May, 1780 ... had better means of rightly interpreting said act than this court could have after a lapse of a hundred years." 75 Va. 150, 156-57 (1881).

Evidentiary rules employ a similar approach in analyzing the reliability and trustworthiness of evidence. For instance, when most evidence of an act or event becomes unavailable shortly after the occurrence of the act or event, then a court may rely on "a trustworthy official statement of the fact ... made close to the time of the fact and with the most satisfactory data before the officer." As Wigmore explains, "it might well be thought that on the whole a closer approach to the truth could be reached by accepting the official statement as conclusive, instead of making the attempt to weigh the scanty or untrustworthy evidence that might be available for the purposes of the subsequent judicial investigation." 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1348, at 811 (J. Chadbourn rev. 1972). Other examples of this approach in evidentiary rules are the hearsay exceptions. See, e.g., *id.* § 1048 (admissions by a party opponent); 5 *id.* § 1431 (dying declarations); *id.* § 1455 (statements against self-interest); 6 *id.* §§ 1745-1747 (excited utterances/spontaneous statements).

66. 52 Va. (11 Gratt.) 136 (1854).

67. *Id.* at 166.

68. *Id.* at 166-70. The court discussed the Act of May 1784 (concerning public lands and property in or near the City of Richmond), the Act of May 1784 (concerning the sale of specific public tracts in Williamsburg and James City), and the Act of October 1785 (concerning the sale of land in York and Elizabeth City Counties).

69. *Meredith v. Triple Island Club*, 113 Va. 80, 83-84, 73 S.E. 721, 722-23 (1912). In *Meredith* the court held that the rights declared in the appropriate version of the commons legislation were not an arbitrary assumption of power by the state, but were "declaratory of the common law." *Id.*; see also *Taylor v. Commonwealth*, 102 Va. 759, 770, 47 S.E. 875, 879 (1904) (the state's statutory right to control the navigable waters and the lands beneath them was "sanctioned and supported by the common law").

changes in wording. Furthermore, the decisions speak only in general terms about the impact of the commons legislation. But despite these limitations, the decisions do, at least, provide support for the general proposition that the commons legislation was not an arbitrary exercise of power by the state and that the legislation reflected common law principles governing navigable waters and the lands under them.⁷⁰

Finally, quite a few judicial opinions indicate, in their discussions of the nature of the public interest in navigable waters and lands, that the public interest was pervasive and broad and that the people of the state generally had the right to fish in the state's tidewaters and beds. For instance, in describing the public interest in navigable waters and the lands underneath them, the court in *French v. Bankhead* observes that they are "held by the commonwealth for the common use, and expressly exempted from grant by the Code...."⁷¹ When this observation is compared to the court's description of the public interest in other public lands, the court's perception of the commons legislation becomes clearer. While the court in *French v. Bankhead* described the public interest in other lands as arising only where specific pieces of property are set aside for a public purpose, it referred to the public interest in navigable waters and common lands broadly, as if the public interest existed in all such resources.⁷²

Similarly, the court in *Garrison v. Hall*⁷³ uses language suggesting that the common right of fishing was pervasive and that the people generally had been accustomed to exercising the right on unappropriated lands on the Chesapeake Bay, the sea shore, and the shores of rivers and creeks.⁷⁴ At one point in its discussion of the public right of fishery, the court seems to suggest that the 1780 Act reserved a strip of land along public waters.⁷⁵ A prior reference by the court to a surveying practice used with respect to the disputed land strengthens this observation. As the court explains, the surveyor conducted his survey so as to leave sufficient space "between the boundaries of his

70. See *Taylor*, 102 Va. at 765-70, 47 S.E. at 877-79; see also *Martin v. Beverley*, 9 Va. (5 Call) 444, 446 (1805) (where the court describes the 1794 version of the commons act as "reserv[ing] the bed of any river or creek, in the eastern part of the commonwealth, which may have remained ungranted by the former government" and thus suggests that a common use designation is not a requirement).

71. 52 Va. (11 Gratt.) 136, 169 (1854). The court was referring to a later version of the 1780 Act: VA. CODE ch. 62, § 1 (1849).

72. 52 Va. at 169. The court in *French* noted that protecting land that would otherwise be waste and unappropriated land available for entry requires legislative action to remove the land from the category, waste and unappropriated land. Legislative action also would be needed to declare that the land shall be used only for a public purpose. *Id.* at 166-68. The *French* court seemed to skirt the issue of whether there was such action for lands under the navigable waters, simply declaring that the Commonwealth holds these lands for common use. *Id.* at 169.

73. 75 Va. 150 (1881).

74. The court found that "when riparian rights had not been acquired by individuals, the public right of fishing existed, and was common to all the people of the State." *Id.* at 159.

75. The court stated that "the object of the act was to reserve the right of fishing, and by a liberal construction, of fowling and hunting, being only coextensive therewith, as a common right to the people of the State ... which embrace the shores and the lands adjacent to them, so far as necessary for the enjoyment of those rights." *Id.* at 163.

survey and the shores of the Chesapeake bay, of the sea and the rivers and creeks for fishing, fowling and hunting.”⁷⁶ This practice, according to the court, suggested that the party seeking the survey knew of the existence of the 1780 Act and of a later version in effect at the time of the survey.⁷⁷ Because this discussion of the surveying technique occurs immediately before the court’s statement on the right of fishing and the effect of the 1780 Act, it seems logical to conclude that the court interpreted the Act broadly as reserving a strip of land along the appropriate waters.

Yet, as with the *French* opinion,⁷⁸ other language in *Garrison* indicates that common use was a requirement. In focusing on the disputed land, for example, the court in *Garrison* expressly poses the question “whether the lands embraced in Whitehead’s survey had been used as a public common.”⁷⁹ If the court interpreted the commons legislation as reserving a strip of land along the relevant waters for common use, then the court arguably would not need to pose this question. But, as a practical matter, this issue probably would arise in most controversies involving the commons legislation because of its exemption for certain unappropriated lands. The party claiming a private ownership interest in the disputed land naturally would assert that the land was waste and unappropriated land subject to entry and that the land had not been used as a common.⁸⁰

Various legislative acts, patents, grants, and other historical documents also contain language supporting the position that the 1780 Act was declaratory of the common law. For instance, a resolution adopted around the time that the 1780 Act was passed uses broad language to describe the problem of private appropriation of commons, stating that:

the unappropriated land on the Bay sea shores and Point Comfort, hath hitherto been considered as common, and numbers of poor people availing themselves thereof, have drawn considerable support for their families; and it would be greatly injurious both to the poor and to the community in general, if such lands were monopolized and possessed by a few.⁸¹

To help alleviate the problem, the House then resolved “[t]hat the said unappropriated lands shall remain as common, and not be appropriated to any

76. *Id.* at 162.

77. The court noted that Mr. Whitehead, the original appropriator of the land, appeared “to have been a man of high character and an intelligent lawyer” and “must have known of the existence of the acts of May, 1780 and the act of 1796” and of the surveying practice of leaving a strip along the shore for the public to use for fishing and fowling. *Id.*

78. See *supra* notes 66-72 and accompanying text.

79. 75 Va. at 157.

80. The opinions of the United States Supreme Court and the Virginia Supreme Court in an 1876 case lend additional support to the argument that the people of Virginia generally had the right to fish in the state’s tidal waters and beds. See *McCready v. Virginia*, 94 U.S. 391, 394-95, *aff’d* *McCready v. Commonwealth*, 68 Va. (27 Gratt.) 985, 987-89 (1876). Although the opinions did not consider the commons legislation, they did focus on the rights of the public in the state’s tidal waters. See *infra* notes 181-82 and accompanying text.

81. JOURNALS OF THE HOUSE OF DELEGATES OF VIRGINIA 14 (1777-1780) (entry for May 19, 1780).

person or number of persons whatever" and directed the Register of the Land Office to act accordingly.⁸²

Additionally, the 1821 cession act under consideration in *French v. Bankhead* describes the public right of fishery in broad terms, stating that the cession shall not "prevent, abolish or restrain the right and privilege of fishery hitherto enjoyed and used by the citizens of this commonwealth"⁸³ Many other legislative acts contain similar references to public lands, describing them in general terms and thus suggesting that they were extensive and well accepted. An Act passed in 1780, for example, authorizes the sale of "publick lands in the county of James City, as well as those on the eastern shore,"⁸⁴ while a 1785 Act authorizes certain commissioners to sell most of "the public lands lying in the counties of York and Elizabeth City...."⁸⁵ Additionally, acts affecting public landings have tended to be sweeping in tone. A 1705 Act, for instance, provides "[t]hat all such landing places, as have store-houses, ... built at or near them, or have heretofore been commonly used for bringing tobaccos unto, and to which there are plain roads already made, shall be held and accounted public landings"⁸⁶ Besides being broadly worded,⁸⁷ this Act also suggests that it merely is ratifying and affirming what already was the practice of the day.

Numerous patents and other documents also contain general references to common and other public lands. A 1638 patent, for example, describes the patented land as "butting north upon the Commons."⁸⁸ Like other historical documents, this patent suggests that public rights were recognized throughout eastern Virginia and thus lends support to the proposition that the 1780 Act represented an affirmation of prior practices and common law. But even if this interpretation is rejected as too tenuous, the historical documents described above at least establish that numerous public lands existed and that their identity and location was well-known and accepted.

82. *Id.*

83. 52 Va. at 163. The court ruled that the granting of a parcel of land by the Commonwealth to the United States would not void the public's right to fish from shorelands encompassed in the grant. *Id.* But see Act of Jan. 2, 1798, ch. 19, 2 S. SHEPHERD'S STAT., *supra* note 40, at 88, 89 (which describes the "right of fishery" in the more specific terms of "the privilege they [citizens] now enjoy of hauling their seines on the shores of the land to be ceded"); *French*, 52 Va. at 168.

84. 10 HENING'S STAT., *supra* note 2, at 285 (1822).

85. 12 *id.* at 97 (1823); see also *Miller v. Commonwealth*, 159 Va. 924, 946-47 n.10, 166 S.E. 557, 565 n.10 (1932). Later versions of the 1780 Act also suggest that the commons statute was intended to be a broad declaration of common law. For discussion of the acts of 1792, 1802, 1849, 1873, and 1888, see *infra* chapters 10, 12, 14.

86. 3 HENING'S STAT., *supra* note 2, at 392, 394.

87. A. EMBREY, *supra* note 1, at 237 ("a very sweeping and drastic act....").

88. 1 VIRGINIA PATENT BOOKS 547 (Va. State Archives) (May 6, 1638 patent to William Clark). The 1638 patent was cited by the court in *Miller v. Commonwealth*, 159 Va. 924, 944 n.9, 166 S.E. 557, 564 n.9 (1932), as an example of a grant whose north boundary was delineated by common lands. The cite appeared in the court's general discussion of the inability of the state or an individual to transfer or acquire lands traditionally recognized as commons. For other specific examples of land grants that contain references to public land, see *Miller*, 159 Va. at 946 n.10, 166 S.E. at 565 n.10.

Furthermore, the broader, declaratory construction is consistent with basic rules of grammar. As explained earlier, when the word "which" is used and set off by commas, the clause normally is viewed as nonrestrictive and nonessential to the sentence.⁸⁹ Although rules of grammar and composition admittedly do not provide "specific or direct evidence" of legislative intent, the rules do provide general guidance to the meaning of a statute, especially on "the understanding which a statute is believed to convey to others."⁹⁰ Here the basic rules of grammar favor interpreting the "used as common" clause broadly.

Interpreting the phrase consistent with grammatical rules would render the phrase somewhat meaningless, for the clause then would not help to define lands subject to the 1780 Act. But the phrase still would serve a purpose indicative of a declaratory statute — it would clarify that the common law concept of commons remains a viable one, even after the passage of the 1779 land act, and that the 1780 Act is not altering that common law concept.⁹¹ As Sutherland explains in his treatise on statutory construction, the traditional purpose of a declaratory statute is "to affirm old customs which had either fallen into disuse or had become disputable and were enacted merely to clarify the state of the common law and affirm it as it was."⁹² The preamble of the 1780 Act itself indicates that this was the express purpose of the Act — to protect rights recognized prior to the passage of the 1779 land act and threatened by that statute.⁹³ Furthermore, the need for such clarification is not at all surprising, given the confusing development of the commons concept at common law.⁹⁴

Treating the 1780 Act as a declaratory statute also would be consistent with the development of such statutes under English law. As Sutherland briefly explains, declaratory statutes were "used frequently in England during the period when the law emerged independent of the royal prerogative."⁹⁵ Although the exact period referred to is unclear, it appears to coincide with the period during which public rights in tidal resources achieved greater protection.⁹⁶ Because common rights tended to conflict with the Crown's interests, they would seem to be the type of right that would have to develop independent of the "royal prerogative."

No special language is needed to create a declaratory act, and the language can be affirmative or negative in tone. As long as the purpose of the act is to affirm the common law and not to introduce a new rule of law, a court may characterize an act as declaratory.⁹⁷ Traditionally the courts favored the

89. See *supra* note 54 and accompanying text.

90. 2A C. SANDS, *supra* note 21, § 47.01 (1984). As Sutherland further notes, "the worth of these rules depends on how true they are as generalizations about customary habits in the use of language." *Id.*

91. See 1A *id.* § 26.02 (1985) (discussing purpose of declaratory statutes).

92. *Id.*

93. See *supra* notes 20-21 and accompanying text.

94. See generally *supra* chapter 6.

95. 1A C. SANDS, *supra* note 21, § 26.01 (1985).

96. See generally *supra* § 5.1.B.

97. See 1A C. SANDS, *supra* note 21, §§ 26.02-.04 (1985).

declaratory construction, because of their hostility to legislative acts, and tended to construe strictly any act contradicting the common law.⁹⁸ Today courts do not adhere to this preference as much, in part because of the complexity and comprehensiveness of modern legislation.⁹⁹ But, to the extent that a court still has such a preference, it would be displayed in an area like the law governing tidal resources, where traditionally few statutes are enacted and where even today legislatures tend to grandfather common law rights or expectations in enacting legislation.¹⁰⁰ By interpreting a statute as declaratory, a court then has greater freedom to interpret the statute as "coextensively with the common law."¹⁰¹

As the preceding discussion demonstrates, arguments can be advanced to support both the declaratory and restrictive approaches. Although the arguments favoring the declaratory interpretation appear to be somewhat stronger, the arguments for the restrictive approach also are persuasive. Because of this fact and because of the absence of a clear legislative mandate, it admittedly is impossible to reach an unequivocal resolution of the issue. When faced with such a situation, a court should realize that its choice really involves a policy decision, more than an interpretation of legislative intent. Before making its policy choice, the court needs to consider the implications of the remaining provisions of the statute. Those implications are discussed now.

2. *Defining Common Use.*

A second key issue raised by the clause "which have been used as common" concerns the substantive meaning of the words "used as common." Many definitional questions are raised by that phrase, including questions concerning the type and degree of public use required or contemplated by the General Assembly, the meaning of the word common, and the manner in which common rights arise.

98. *Id.* Sutherland explained this hostility by stating: "As a manifestation of the historic judicial hostility toward legislation and a corollary of the notion that statutes in derogation of the common law should be strictly construed, there has been a tendency to favor the construction of a statute as being declaratory of the common law instead of establishing new law whenever there was substantial doubt about the question." *Id.* (footnote omitted).

99. As Sutherland observed, "[t]he initiative for legal change and modernization now rests with the legislatures," which today are thoroughly organized and experienced in lawmaking. *Id.* Indeed, the "purpose of most new statutes is to make some change in the legal order" from what it was before. *Id.*

100. VA. CODE § 41.1-5 (1986) directs the circuit and corporate courts to sell waste and unappropriated lands, but then recognizes limitations on that power imposed by §§ 41.1-3, 41.1-4, and 62.1-1. Section 41.1-3 prohibits the granting of any interest in specifically designated lands, as well as in other lands more generally referred to as a common or as natural oyster beds, rocks, and shoals. *Id.* § 41.1-3. Section 41.1-4 prohibits the granting of any unappropriated marsh or meadow lands lying on the Eastern Shore, which have remained ungranted and have been used as a common by the people of the state. *Id.* § 41.1-4. Finally, section 62.1-1 protects certain lands on the bays, rivers, creeks, and shores of the sea within the Commonwealth not heretofore granted by law, reserving them for use as a common for the purpose of fishing and fowling. *Id.* § 62.1-1 (1987). These statutes represent attempts to codify the common law concept of commons.

101. 1A C. SANDS, *supra* note 21, § 26.05 (1985).

Courts and commentators have advanced two different approaches as proper measures of public use. Under one approach, general use of unappropriated lands by the public would be sufficient to establish use as a common. Under a second, narrower approach, land would have to be specifically set aside or specifically used for a defined public purpose to meet the "used as a common" requirement. Thus, mere use by the public for a variety of unidentified uses would not suffice.¹⁰²

*Miller v. Commonwealth*¹⁰³ suggests that the narrower approach is the proper construction. In *Miller* the court draws a distinction between unappropriated lands generally used by the public for the exercise of certain rights in common and those lands specifically recognized and used as a common. In the words of the court: "'Common' is here used in a more restricted and specific sense than that in which it is used when it is said that the people had the right in common to fish and hunt upon all ungranted lands."¹⁰⁴ So, according to the *Miller* court, "used as common" does not connote indiscriminate use by the public, but rather a more specific, defined use of certain lands.

Although the court's distinction provides, at best, a vague definition of lands used as a common within the meaning of the 1780 Act, the discussion immediately preceding it helps to clarify the court's thinking. In that discussion the court sets forth its interpretation of the 1780 Act, stating that the statute "applied only to tracts of land which had been theretofore designated as a common for the use of the people, or which, though they had not been expressly designated as a common, had been used by the people as a common and come to be recognized as such."¹⁰⁵ Thus, the *Miller* court apparently believed that the phrase "used as common" only referred to lands that either had been specifically designated as common lands or had become a common informally through long usage and acquiescence.

The *Miller* court's brief definition of lands "used as common" probably raises more problems than it solves. Besides leaving many questions

102. Both approaches were advanced in the controversy in *Bradford v. Nature Conservancy*. The lower court appeared to adopt the broader approach. It interpreted an earlier case as stating that the term "common" "as used in the statutes of 1780 and 1819 should be construed more broadly than when used to describe tracts of land which had been 'theretofore designated as a common for the use of the people.'" Ch. No. 16, slip op. at 36-37 (Northampton County Cir. Ct. Feb. 27, 1979). The lower court interpreted the earlier case as applying the term "common" to "lands 'which, though they had not been expressly designated as a common, *had been used by the people as a common and come to be recognized as such.*'" *Id.* at 37. On appeal, the Virginia Supreme Court failed to choose clearly between the two approaches. On the one hand, it agreed with the chancery court's finding of common use. Also, like the lower court, the Virginia Supreme Court noted that commons could arise formally, through specific designation, or informally, from long use as a common. 224 Va. 181, 192, 294 S.E.2d 866, 871 (1982). But, on the other hand, the court relied on an earlier case, *Miller v. Commonwealth*, 159 Va. 924, 166 S.E. 557 (1932), in which the court clearly rejected the broader approach in favor of a more "restricted and specific" approach. *See Bradford*, 224 Va. at 192, 294 S.E.2d at 871; *Miller*, 159 Va. at 948, 166 S.E. at 565. For a more thorough discussion of both cases, see *infra* § 19.3.

103. 159 Va. 924, 166 S.E. 557 (1932).

104. *Id.* at 948, 166 S.E. at 565. The court also found that "the act of 1780 had no *general* reference or application to the strip of land lying between low and high-water marks along the tidal waters of the Commonwealth" *Id.* (emphasis in original).

105. *Id.*

unanswered,¹⁰⁶ the definition also seems to contradict other judicial opinions, which, at least on a superficial level, suggest that *Miller's* restrictive definition is untenable. Justice Johnston in *Commonwealth v. Garner*,¹⁰⁷ for example, only uses the term "common" in a more general sense to refer to navigable waters and lands, which "were common to every person till granted."¹⁰⁸ Similarly, in *Taylor v. Commonwealth*,¹⁰⁹ the Supreme Court of Virginia uses the term "common" to describe the state's interests in the broad class of lands "covered by the flow of the tide."¹¹⁰ As the court explained,

The Commonwealth holds as trustee a vast body of land covered by the flow of the tide ... for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive.... [I]t alone has the right to develop ... hidden sources of wealth ... for the common benefit of all of its citizens.¹¹¹

Thus, in contrast to *Miller*, other opinions of the Virginia Supreme Court suggest that the term "common" applies generally to natural resources, like tidal lands and waters, that have not been privately appropriated and that are being managed by the state.

This connotation of "common" also appears in several opinions of the United States Supreme Court. In *McCreedy v. Virginia*,¹¹² for example, the United States Supreme Court uses the term in describing the interests of each state and its people in tidal waters and beds located within the state's boundaries. The Court explains that a state has the right "to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish.... Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property."¹¹³ Because lands under tidal

106. For example, one question raised in a subsequent case is whether the phrase "used as a common" requires lands to be "used in the past by the people as a common to such an extent and degree of regularity that they had come to be recognized as common lands." *Bradford v. Nature Conservancy*, Ch. No. 16, slip op. at 38 (Northampton County Cir. Ct. Feb. 27, 1979), *aff'd in part, rev'd in part*, 224 Va. 181, 294 S.E.2d 866 (1982).

107. 44 Va. (3 Gratt.) 655 (1846).

108. *Id.* at 726 (where Justice Johnston used the general definition of the commons concept in deciding whether the boundary line, as formed by the Ohio River, lay at the high water mark or, as Johnston determined, the low water mark of the bank on the Ohio side of the river).

109. 102 Va. 759, 47 S.E. 875 (1904).

110. *Id.* at 775, 47 S.E. at 881.

111. *Id.* at 775-76, 47 S.E. at 881. The court found that each state, as sovereign over the navigable waters and soil under those waters, is a trustee for the public and, as trustee, can exercise its discretion in developing submerged beds and in preventing private infringement of the public interest.

112. 94 U.S. 391 (1876).

113. *Id.* at 395 (finding that Virginia can prevent a party not a citizen of the Commonwealth from planting oysters in the bed of the Ware River); see also *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894) (finding a grant of land below the high water mark was void because it violated the public trust concept); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453-55 (1892) (finding that the state cannot give away the lands beneath Lake Michigan without violating the state's duty to prevent impairment of the public's interest in navigable waters); *Martin v. Waddell*, 41 U.S. (16 Pet.) 366, 410-14 (1842) (narrowly construing a grant of land and water in the present state of Delaware by the King to the Duke of York so as to preserve the traditional rights of the public to fish from the waters instead of granting the Duke of York an exclusive right of fishery in the navigable

waters are one of the types of resources covered by the 1780 Act, the general connotation given the word "common" by other judicial opinions in describing tidal resources logically would seem to apply to the use of the term in the 1780 Act.

A closer reading of the decisions described above, however, indicates that they are not necessarily inconsistent with *Miller*. Whereas *Miller* was defining "commons" in the context of a specific statute, the other courts arguably were using the word more loosely to refer to the broad category of tidal resources generally subject to the public trust. As explained more fully in chapter 5, the public trust doctrine declares that title to soils under navigable waters is "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."¹¹⁴ Under the doctrine the state may not totally abdicate its trust obligations by, for example, selling a valuable harbor,¹¹⁵ or otherwise "substantially impair the public interest."¹¹⁶ But, absent such conduct, the state can regulate and sometimes even alienate certain interests in public trust property.¹¹⁷ Further, until such regulation or alienation occurs, the land is subject to general public use. Although lands subject to common use also cannot generally be conveyed, the restriction on alienation of common lands arises solely from the 1780 Act and is easily circumvented by a legislative directive to sell common lands.¹¹⁸ Thus, when the *Miller* court distinguished between "1780 commons" and other commons, it might have been trying to differentiate between those tidal resources generally held by the state in trust for common use by the people and those specifically recognized as subject to common use.

A study of the development of the commons concept also supports *Miller's* restrictive interpretation of "1780 commons." Historically, the commons concept evolved from a concept of "communal ownership" into a system of specifically defined rights of use.¹¹⁹ By the 1500's, the English concept of commons had become very complex, with numerous regulations being passed by Parliament.¹²⁰ Besides defining the permissible types of uses, the regula-

waters); *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 166-67 (1854) (finding that public lands are not to be considered waste and unappropriated lands and that public lands are not subject to entry, survey, and patent as waste and unappropriated lands).

114. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892).

115. *Id.* at 455.

116. *Id.* at 452.

117. See, e.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 416-17 (1842) (recognizing that states routinely infringe on public trust property by regulating construction of bridges, abutments, and wharves and by restricting oystering on soils beneath navigable waters).

118. For further discussion of the public trust doctrine and its relation to the commons concept, see *supra* Part II.

119. The commons concept began as a type of "communal" ownership interest in early Germanic and Roman settlements. As governmental power was centralized in the Crown, a government body was designated "owner" of the common lands and held them subject to certain public uses. Over time, the public interest in the common lands evolved from a communal ownership interest to a communal right to make certain uses of another's land. See *supra* § 6.1.

120. To prevent the total destruction of the common lands that eventually would result from

tions also restricted the manner in which the common rights could be exercised¹²¹ and limited the size of the user class to people living within a defined geographic area.¹²² The regulatory process continued for hundreds of years, with some major regulatory measures being adopted in the 1800's.¹²³

The creation of common rights occurred in a variety of ways in feudal England. Sometimes the lord of the manor specifically agreed to set aside certain lands for common use by his tenants. In other instances common rights arose informally as people began to use certain unenclosed waste lands as commons.¹²⁴ But even when the rights evolved informally, they developed into highly regulated interests.

When the English colonized America, they brought over the concept of commons, though it never became as firmly rooted in American property law as in the English system.¹²⁵ As explained in chapter 6, common and other types of public lands played a key role in the early settlement of Jamestown.¹²⁶ Initially common lands appeared to be created by order of the colonial governor and his council, by instructions from the London Company,¹²⁷ or perhaps even by informal usage. The Great Charter of 1618, in particular, provided for the setting aside of common and other public lands in the four principal boroughs of colonial Virginia.¹²⁸ The other types of public lands provided for in this land management plan included company lands to be worked for the mutual benefit of the tenant, the company, and certain officials, governor's lands to be worked for the benefit of the governor, glebe lands to be used as support for the ministers, and college lands to be used to establish a college.¹²⁹

unregulated use of the commons, the government imposed regulations restricting not only the class of people who could use common lands, but also the scope and nature of the use. *See generally supra* § 6.1.A (discussing development and regulation of commons).

121. One typical limitation involved the imposition of "stints" or quotas on the number of animals that could be grazed by any one commoner on a certain tract of common land. *See supra* chapter 6, notes 24, 69-70 and accompanying text.

122. The right to use common land generally was limited to the people of a particular manor, vill, or borough and sometimes even to a particular class of inhabitant within the manor, vill, or borough. *See supra* chapter 6, notes 22-23 and accompanying text.

123. Eventually Parliament assumed full control over the management of the common lands and rights, adopting numerous statutes regulating the exercise of common rights throughout the nineteenth and twentieth centuries. *See supra* chapter 6, notes 36-47 and accompanying text.

124. *See generally supra* § 6.1.B.

125. The difference may be attributed to several factors. First, by the time America was settled, the English tenure system had disintegrated. Second, the American settlers, with their abundance of land, did not need common lands and rights. Finally, the independent and rebellious settlers preferred a property system of private ownership. *See supra* chapter 6, notes 83-86 and accompanying text.

126. Due to the hardships encountered in the early years of the settlement, the Deputy-Governor of Jamestown established public works and set aside common or public gardens. This system proved beneficial to the fledgling colony. For a discussion of the role of common lands and rights in colonial Virginia, *see supra* § 6.2.A.

127. A. BROWN, *supra* note 1, at 323-24.

128. Yeardley's Instructions, *supra* note 2, at 154-65.

129. *Id.* at 155-62.

The Great Charter reveals several important characteristics of common and public lands. First, it demonstrates that at least certain types of public lands, including commons, were intentionally created by the colonial government. Because some of these lands were subject to public use prior to their formal recognition, the Great Charter ratifies public usages and practices. Subsequent historical records demonstrate more clearly that, like their English counterpart, commons in Virginia could arise informally through private agreement or usage, as well as formally.¹³⁰ Facts and circumstances indicative of informal usage include evidence of navigation and fishing¹³¹ and in some areas apparently even grazing, gardening, and the absence of fences.¹³²

130. See *Miller v. Commonwealth*, 159 Va. 924, 944-45, 166 S.E. 557, 564 (1932) (discussing some of the evidence). Another possible method of creating common lands was established in a 1779 act which allowed settlements in the western part of the Commonwealth to lay aside 640 acres of land as common lands in order to protect the settlers' reliance in settling the land without being able to obtain a patent or government charter. See *supra* chapter 6, notes 120-23 and accompanying text.

131. *Mead v. Haynes*, 24 Va. (3 Rand.) 33, 36 (1824) (concluding that a nonnavigable creek was not used as common land by examining the record "in relation to fish of passage and ordinary navigation").

132. See *infra* notes 133-44 and accompanying text. That property rights and interests can be developed through long, continuous use and acquiescence is well settled in our property system. The most common example is prescription which requires "an uninterrupted enjoyment or use immemorially, or for twenty years..." to the land claimed. *City of Richmond v. Gallego Mills Co.*, 102 Va. 165, 170, 45 S.E. 877, 879 (1903). The Virginia Supreme Court has recognized that public rights in water resources sometimes can be developed through long, continuous, uninterrupted control and use. In *Old Dominion Iron & Nail Co. v. Chesapeake & Ohio Ry.*, the court found that the James River was a public waterway above tidewater. It explained that "long prior to the revolution the river above tidewater was used by the inhabitants for transportation of their products to market, and numerous acts were passed for the purpose of improving and facilitating its use as a public highway." 116 Va. 166, 169, 81 S.E. 108, 109 (1914). This finding, coupled with the court's observation "that throughout her history the State of Virginia has by numerous acts asserted her right to control and dispose of the waters of the James River above tide" led the court to conclude that "it is now too late for the appellant, as a riparian owner, to claim rights in the river superior to those so long exercised by the State." *Id.* at 170, 81 S.E. at 109. The theory of *Old Dominion* thus appears to be based on the state's superior interest in the river bed gained by the state's and the public's history of control and use of the river bed. Cf. *supra* note 64 (discussing ownership of river and stream beds).

If *Old Dominion* had been decided in England, the English courts might have used the law of custom to find an interest in the river bed that could be protected as a common by the state for the benefit of the public. "A custom is a particular rule which has ... obtained the force of law in a particular locality although contrary to or not consistent with, the general common law of the realm," 12 HALSBURY'S LAWS OF ENGLAND ¶ 401 (4th ed. 1975) (footnotes omitted). The theory behind the law of custom springs from the fiction that a custom or usage lasting continuously from time immemorial must have been legally authorized prior to the establishment of a recording system. To have the force of law, a custom must possess four essential attributes: (1) it must be immemorial; (2) it must be certain; (3) it must have continued uninterrupted since its inception; and (4) it must be reasonable. *Id.* ¶ 406. See generally J. BROWNE, THE LAW OF USAGES AND CUSTOMS (1881).

The court in *Old Dominion* probably did not rely on the law of custom because of an earlier Virginia Supreme Court decision. Like most other American courts, the Virginia courts have rejected the theory of customary rights. As the Virginia Supreme Court once explained, customary rights could not arise in the new world because no custom could have existed from time immemorial. *Harris v. Carson*, 34 Va. (7 Leigh), 632, 638-39 (1836); see also *Delaplane v.*

Second, the Charter demonstrates that public lands included several different types of lands, many of which had a specific, well-defined purpose. When this fact is considered in light of early statehood legislation permitting distribution of public lands to private parties, it becomes apparent that the phrase public lands applied to a wide range of lands which could be placed along a continuum of increasing public interest. At the bottom of this continuum were those waste and unappropriated lands in the public domain eventually subject to entry and survey under the land grant act. This category of public land qualified as such primarily because the lands had not yet been granted and thus the government still had title to them. Farther along on the continuum were those public lands set aside for a specific public purpose, while perhaps even higher up were those public lands like 1780 commons protected by statute from alienation. Given that public lands seemed to encompass those lands subject to a specific public purpose, as well as those subject to general public use, it seems logical to conclude that the same was true of common lands.

At least some historical documents suggest, though, that the general connotation of commons was the prevalent, if not exclusive, meaning of that term. During the 1600's the colonial government adopted several significant enclosure statutes generally preserving open lands as pastures. For example, as early as 1626, the General Court prohibited planters in those parts of the colony where cattle were grazed, such as James City Island, from enclosing fields used for cultivation in a manner that would cut off access to pasture lands. Under the law the planters had to limit their fences to cultivated areas and, if one of them violated the Act, the fence was to be destroyed.¹³³ Then, in 1673, the court declared all unowned marshland located in the boundaries of James City Island to be the property of all the inhabitants for use as a common pasturage.¹³⁴ Through these orders the General Court thus upheld

Crenshaw & Fisher, 56 Va. (15 Gratt.) 457, 475 (1860); *National Fire Ins. Co. v. Catlin* (Danville Corp. Ct. 1902), in 8 VA. L. REG. 127, 129 (1903) (where the judge stated that he did "not know of any case in which a custom has been permitted to transfer the title to property from one person to another"). *But cf.* *Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969) (where the court invokes the doctrine to uphold public use of shoreland).

133. The court order provided:

It is at this Court ordered yt in such places where cattle are kept, as hogg Island, James City Island, the necke of land & other places, yt there the inhabitants for ye lefsening or shortening of their workes in securing of their corne, shall not soe raile or fence by advantage of creeks and neckes, as ye cattle be thereby cut of from a great part of ye feed yt they might have, but doe in such sort raile pale or fence their ground as the pasture & feed of the cattle be not taken from them in which case if any shall offend his fence shal be pulled downe, & the lofse ensuing thereby fall upon himself.

General Court Orders, Oct. 12, 1626, ROBINSON TRANSCRIPTS 55 (Virginia Historical Society, 1885); see also 1 P. BRUCE, *ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY* 313 (1907).

134. The court declared: "Upon the Petition of the severall Inhabitants of James City County, It is ordered that all the Marsh Land unpattented in James City Island for ever here after be and remaine in common for a pasture to be held of those that now or shall here after live in the said Island or Towne." RECORDS OF THE GENERAL COURT 127 (Virginia Historical Society, Mar. 12, 1673); see also 1 P. BRUCE, *supra* note 133, at 432.

the general practice of common grazing that developed during the early colonial days.¹³⁵

Similarly, during the 1631-1632 term, the colonial legislature passed an act declaring that "[e]very man shall enclose his ground with sufficient fences uppon theire owne perill."¹³⁶ Although that Act did not explain the consequences of failing to enclose, a 1642 Act did so, setting forth what apparently was implicit in the 1632 Act. According to the subsequent Act, a planter who failed to enclose his "cleared ground" with a sufficient fence could not sue for trespass or damage to his crops. Furthermore, if such planter killed any cattle, hogs, or goats in attempting to protect his crops, he would be liable for twice the value of the animals killed.¹³⁷ If, however, the planter built a sufficient fence, then, as a 1657 Act shows, he could recover for any damage or trespass committed.¹³⁸

These enclosure acts apparently served several important functions. Because they placed the burden on the landowner, they opened up vast tracts of land for grazing.¹³⁹ At least in the early days of the colony, this method was more convenient to the ordinary settler who owned small tracts of land.¹⁴⁰ Also, many settlers preferred to graze stock together in designated areas secured from the Indians or rendered unproductive for cultivation.¹⁴¹ Lands

135. 1 P. BRUCE, *supra* note 133, at 204 (custom permitting livestock to run at large in the fields and woods..."); *id.* at 216 (noting the free and unrestricted grazing of various livestock in Virginia); *id.* at 224 (noting that in the year 1618 the public cattle were no longer for public taking and were killed for the benefit of the Governor Argall); *id.* at 226 (noting the destruction of the public cattle by Argall); *id.* at 312 (noting a proposal by Governor Harvey to establish a refuge for livestock in which the cattle could wander at liberty).

In England a similar concept had existed since the feudal times. A manor usually contained fields, meadows, and pastures that were subject to common use. See *supra* chapter 6, notes 26-30 and accompanying text. The Statute of Merton, passed in 1236, attempted to prevent a lord from enclosing common lands and extinguishing common rights unless sufficient common lands remained for the freehold tenants. See *supra* chapter 6, notes 36-37 and accompanying text.

136. 1 HENING'S STAT., *supra* note 2, at 176; see also *id.* at 199.

137. *Id.* at 244-45; see also *id.* at 458 (describing a sufficient fence as "at the least fower foot and a halfe high, which if he [the landowner] shall be deficient in what trespass or damage soever he shall receive or sustain by hoggs, goates or catell, shall be his own loss and detriment, And also if it shall happen that any person shall hunt, anie of the said horses, mares, hoggs, goates or cattell [sic] that shall so offend and doe them harm he shall make satisfaction for any of them, that shall be so hurt to the owners of them").

138. *Id.* at 458 ("where the fence shall be adjudged sufficient, vizt. ffoure foot and a halfe, high and close downe to the bottom, that in case any damage or trespass be then done or committed to any person having such fences, ... the owner of such horses, mares, & c. shall be liable to make satisfaction for their trespass and damage").

139. Large landowners generally could not afford to enclose tracts of lands including several thousand acres and miles of exposed borders. Under the enclosure acts, the land that was not enclosed "became a common, upon which it was not a trespass for any person in the neighborhood to permit his cattle to run." 1 P. BRUCE, *supra* note 133, at 315.

140. As one commentator observed, the fencing statute "was in its essence a regulation that worked for the benefit of the small planter, and has continued to operate to his special advantage by throwing open a boundless range for his cattle." The "land unenclosed became a common" for his use. *Id.* at 314-15.

141. During the first part of Governor Harvey's term, a secured refuge for livestock was created

not properly enclosed apparently became common pasturage; settlers could graze their stock on this land without fear of a trespass action being brought.¹⁴² On occasion certain lands were even declared to be for common pasturage.¹⁴³ Finally, the fence laws also helped the large landowners, who were spared the expense of enclosing all of their land, regardless of whether it was being used.¹⁴⁴

Although the enclosure laws adopted in the early 1600's basically remain in force today,¹⁴⁵ they have undergone several major modifications. One such revision focuses on the meaning of the phrase "lawful fence." Initially defined by the 1646 colonial legislature as being 4½ feet high and "close downe to the bottome,"¹⁴⁶ subsequent legislatures expanded the definition as private development increased. In 1705, for example, the colonial assembly redefined the phrase to include certain hedges and rail fences.¹⁴⁷ But it was not until 1835 that the state legislature significantly broadened the definition to include the banks of certain rivers and the boundary lines of low grounds

at the lower end of the York peninsula in which "the cattle wandered at liberty" and into which "the Indians hardly dared to venture." *Id.* at 312-15.

142. *Id.* at 315. "If the owner desired to prevent such incursions, it was in his power to erect a line of fence." *Id.* As one Virginia court explained, a proper enclosure entailed surrounding land by a fence; "and a fence is a visable or tangible obstruction, which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property." *Kimball & Fink v. Carter*, 95 Va. 77, 85, 27 S.E. 823, 825 (1897).

In his work *Commentaries on the Modern Law of Real Property*, Thompson refers to the "local custom of allowing cattle to stray from one common to another without creating liability for trespass" as "[c]ommon 'because of vicinage.'" 1 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 135, at 473 (Repl. 1980). But the author also notes that a common because of vicinage never existed in the United States. As he explains, "where the owner of cattle was not bound to keep them from trespassing on unfenced land owned by others ... [the owner's right did not lay in a common of vicinage], but such right belonged to everybody, and constituted in no sense a right of common of pasture." *Id.* at 474 (footnotes omitted). Thompson then summarily concludes that "the subject possesses very little importance to us" and refers the reader to ten cases as support. *Id.* at 474 & n.15.

143. See, e.g., 1 P. BRUCE, *supra* note 133, at 432 (where author observes that, "[i]n March, 1673, the marsh land situated in the boundaries of James City Island, remaining without an owner, was determined to be the property of all the inhabitants of the corporation, the object of this provision being to furnish a common for the live stock of the whole population").

144. The fencing law, which required enclosing only lands under cultivation, "was in the eyes of the large planter to be preferred to a measure requiring the enclosure of all land in each tract, which would have imposed upon him a very heavy burden, as many tracts included several thousand acres, and miles of expensive fencing would have been necessary to raise a sufficient protection on every side." *Id.* at 314-15.

145. VA. CODE § 55-306 (1986) states that if any domesticated livestock "shall enter into any grounds enclosed by a lawful fence, as defined in §§ 55-299 through 55-303, the owner or manager of any such animal shall be liable for the actual damages sustained."

146. See 1 HENING'S STAT., *supra* note 2, at 332.

147. The 1705 Act defined a strong and sound fence to be "four foot and half high, and so close that the beasts or kine breaking into the same, could not creep through; or with an hedge two foot high, upon a ditch of three foot deep, and three foot broad, or instead of such hedge, a rail fence of two foot and half high, the hedge or fence being so close that none of the creatures aforesaid can creep through." 3 *id.* at 279-80.

bordering such rivers as lawful fences.¹⁴⁸ Significantly, while expanding the definition of lawful fence to include the shores of the James River, the legislature included a provision protecting “the rights of any person or persons to the privileges of hunting or fishing as heretofore enjoyed by law on said river.”¹⁴⁹

A second major modification occurred in 1856 when the General Assembly enacted the first no-fence law.¹⁵⁰ Still in force today in modified form,¹⁵¹ this statute allows individual counties to replace the state enclosure law with the common law no-fence rule. Not generally applicable in Virginia, the common law rule requires “the owner of animals to keep them on his own land or within enclosures.”¹⁵² But unless a county specifically adopts the no-fence rule, the owner of stock bears no obligation to fence. Thus, in order to sue for trespass, a landowner generally has to construct a lawful fence.¹⁵³

The early enclosure laws thus played an important role in defining the relationship between private property and commons. As the Supreme Court of Virginia once explained, “enclosed lands” were “lands surrounded by a fence” and thus separated from common grounds and set off as private property.¹⁵⁴

148. The Act of February 20, 1835 declared the banks of the James River and the boundary lines of the low grounds bordering the river to be a lawful fence in certain counties because it was “difficult to keep fences on the banks of the river, or across the low grounds, by reason of the scarcity of timber and the destruction of rails by boatmen.” Act of Feb. 20, 1835, ch. 73, 1834-1835 Va. Acts 54. The Act of March 12, 1835 similarly declared the margins of the tidewaters of the James River and certain of its tributary streams to be a lawful fence. As the General Assembly explained, “such boundaries generally require no fencing to prevent the crossing of stock . . . , the fences are kept up at great expense . . . , as the adjacent lands are . . . destitute of timber suitable for fencing . . . , they [fences] are continually liable to be destroyed by storms, high tides, etc. . . .” Act of Mar. 12, 1835, ch. 74, 1834-1835 Va. Acts 54; *see also* Act of Feb. 28, 1837, ch. 85, 1836-1837 Va. Acts 79 (declaring the North Anna and Pamunkey Rivers lawful fences); Act of Mar. 30, 1837, ch. 86, 1836-1837 Va. Acts 80 (declaring a portion of Licking Hole Creek, in the county of Goochland, a lawful fence); Act of Mar. 21, 1838, ch. 111, 1838 Va. Acts 85 (declaring a portion of the Rivanna River a lawful fence); Act of Mar. 28, 1839, ch. 157, 1839 Va. Acts 115 (declaring a portion of the Rivanna River a lawful fence); Act of Jan. 25, 1839, ch. 158, 1839 Va. Acts 115 (declaring a portion of the Dan River a lawful fence); Act of Mar. 28, 1839, ch. 159, 1839 Va. Acts 116 (declaring portions of the Roanoke and Staunton Rivers lawful fences); Act of Mar. 26, 1839, ch. 160, 1839 Va. Acts 116 (declaring a portion of Kanawha River a lawful fence).

149. That provision declared “that nothing in this act contained shall alter or abridge any right of way now or along the shores of James River or in any manner impair the rights of any person or persons to the privileges of hunting or fishing as heretofore enjoyed by law on said river.” Act of Mar. 12, 1835, ch. 74, § 3, 1834-1835 Va. Acts 54. Until 1922 the right to hunt and fish extended to all unfenced private lands. *See* Act of Mar. 4, 1922, ch. 123, 1922 Va. Acts 208; VA. CODE § 3338 (1919); *id.* §§ 2071, 2072, 2125 (1887).

150. Act of Mar. 15, 1856, ch. 224, 1855-1856 Va. Acts 158.

151. VA. CODE § 55-310 (1986) (stating that the board of supervisors or other governing body of a county can declare the boundary line of any tract of land, lot, stream, or governmental subdivision to be a lawful fence as to any or all animals mentioned in § 55-306).

152. In *Poindexter v. May*, the Supreme Court of Virginia explained the no-fence rule as a common law principle requiring “the owner of animals to keep them on his own land or within enclosures.” 98 Va. 143, 148, 34 S.E. 971, 973 (1900).

153. *Id.* at 148, 34 S.E. at 973; *accord* *McDonnold v. Weinacht*, 465 S.W.2d 136 (Tex. 1971) (finding “in the absence of special stock laws, an owner who does not properly fence his property has no cause of action for damage done by cattle of ordinary disposition that enter the land”).

154. *Kimball & Fink v. Carter*, 95 Va. 77, 85, 27 S.E. 823, 825 (1897).

Until the 1830's, the legislature clearly drafted the enclosure statutes to favor the common grounds. The private landowner bore the burden of taking affirmative action to protect his property by building a fence around it. If he failed to act, the law declared that no trespass action could be brought for encroachment and the unenclosed lands, in essence, became common pastures. The private landowner, however, could defeat the common use by building a lawful fence, just as the English could extinguish common rights by a similar process.¹⁵⁵ The preference for common use began to weaken in the 1800's when the cost of fencing certain lands became prohibitive. To increase the protection of private landowners, the legislature gradually expanded its definitions of lawful fences and permitted adoption of no-fence laws.¹⁵⁶

The evolution of the enclosure statutes demonstrates that the commons concept was tied to the definition of trespass and enclosed lands. The statutory definition of lawful fence determined not only the amount of protection given private landowners, but also whether a trespass existed and therefore whether the land was subject to common use. Thus, at least until the 1800's, the enclosure laws favored open lands and common grazing.

Furthermore, at least in the context of the enclosure laws, the term commons appears to be used in a general sense to refer to a broad category of lands not lawfully fenced and thus not set off as private property. This, however, does not necessarily mean that *Miller* was wrong in its interpretation of commons. While the enclosure laws appear to be dealing with only one type of use; grazing, the 1780 Act focuses on several types of common uses of tidal resources.¹⁵⁷ Furthermore, as the historical development of common lands indicates, the concept of commons has included a wide range of public uses and interests.¹⁵⁸

Finally, even if the enclosure statutes suggest that "commons" had a general connotation, the other historical evidence suggests that that connotation is not the only meaning of the term and that a difference does exist between 1780 commons and lands generally subject to public use. Whereas the general category would include any unappropriated lands that could be used by the public until granted, 1780 commons only would include specific

155. See *supra* chapter 6, notes 34-47 and accompanying text.

156. During the 1800's the Virginia General Assembly addressed the issue of fences and no-fence laws in specific counties at least 27 times, if not more.

157. For a discussion of the types of common uses permitted under the 1780 Act, see *infra* § 9.3.B. Unlawful hunting statutes enacted about the same time as some of the enclosure statutes support this argument. They generally were designed to prevent unlawful hunting and fishing, giving a remedy to landowners against persons who shall fish or fowl in any creeks or waters within the bounds of their property. See *Martin v. Beverley*, 9 Va. (5 Call) 444, 446 (1805). But until 1922 even these acts permitted hunting and fishing on unenclosed private land. See Act of Mar. 4, 1922, ch. 123, 1922 Va. Acts 208; VA. CODE § 3338 (1919); *id.* §§ 2071, 2072, 2125 (1887). According to Embrey, "the modern proto-type of this ancient 'unlawful hunting' law" is VA. CODE § 3338 (1924), which prohibits hunting and fishing "on or in the lands, waters, millponds, or private ponds of another other than uninclosed mountain lands west of the Blue Ridge mountains not used for cultivation." A. EMBREY, *supra* note 1, at 142.

158. Under English common law important common rights include the common of fishery, the common of pasture, and the common of estovers. See generally *supra* § 6.1.B.

lands, like the Desert tract¹⁵⁹ or Old Point Comfort,¹⁶⁰ clearly appropriated or recognized as commons. Furthermore, as *Miller* stated, the historical evidence demonstrates that common rights either could be created expressly, by specific designation as a commons, or informally, through long public use and recognition. The informal method of creation admittedly would mean that courts would face difficulties distinguishing between commons that arose informally and unappropriated lands generally subject to public use until granted. This, in turn, would mean that controversies concerning 1780 commons often would turn on who bore the burden of proof, a question not clearly answered by the 1780 Act. Given the uncertainty surrounding the meaning of the phrase "used as a common," and given the bias of our property system in favor of private rights, a bias which began to surface in colonial days, perhaps the courts should resolve the ambiguity in favor of private landowners.¹⁶¹

§ 9.3. Nature of the Public Interest.

A. Determining What Is Reserved.

After identifying the types of lands to be protected in the commons act, the General Assembly then provides that such lands "are hereby excepted out of the ... [1779 land grant act], and no grant issued by the register of the land office for the same ... shall be valid or effectual in law, to pass any estate or interest therein."¹⁶² Because the purpose of the 1780 Act was to protect lands previously "reserved as common to all the citizens" of Virginia,¹⁶³ the language excepting commons from the 1779 land act and prohibiting grants of commons can be interpreted as creating an ownership interest in the people of Virginia.¹⁶⁴ Other statutory language, however, indicates that the General

159. *Garrison v. Hall*, 75 Va. 150 (1881).

160. *French v. Bankhead*, 52 Va. (11 Gratt.) 136 (1854).

161. The court, in *Miller v. Commonwealth*, concluded that the term "common" was used in the 1780 Act "in a more restricted and specific sense than that in which it is used when it is said that the people had the right in common to fish and hunt upon all ungranted lands." 159 Va. 924, 948, 168 S.E. 557, 565 (1932). If the *Miller* court is correct in its interpretation of "used as a common," then this would support adopting the restrictive approach in construing the clause "which have been used as a common" in the 1780 Act. See generally *supra* § 9.2.C.1.

As explained earlier, some of the legislative acts defining the phrase "lawful fence" recognize the public's right to hunting and fishing. An 1835 Act, for example, provides "that nothing in this act contained shall ... in any manner impair the rights of any person or persons to the privileges of hunting or fishing as heretofore enjoyed by law on said river." Act of Mar. 12, 1835, ch. 74, § 3, 1834-1835 Va. Acts 54, 55. It is unclear whether the preserved right to hunt and fish originates out of the public's right to hunt and fish along the shores of the James River because that area is a recognized common, or whether the reserved right to hunt or fish originates from the notion that land still could be considered unenclosed for purposes of hunting and fishing even though certain geographic boundaries were recognized as fences. But see A. EMBREY, *supra* note 1, at 183 (stating that legislation in the eighteenth century made it "unlawful to 'shoot, hunt, or range, upon the lands or tenements; or fish, or fowl, in any creek or waters included within the bounds of any person or persons, without license or permit from the owner'") (emphasis in cited source).

162. 10 HENING'S STAT., *supra* note 2, at 227 (1822).

163. *Id.* at 226 (preamble).

164. Under traditional rules of statutory construction, language in a statute that is negative or

Assembly only intended to give the public a type of use right in the protected lands, perhaps a privilege or license, if not an easement or profit. The preamble, for example, refers to the "accustomed privilege of fishing," while the Act itself identifies protected lands as those which have been "used" as a common.¹⁶⁵ Determining which is the proper interpretation is crucial to interpreting later statutes that attempt to define the relationship between public and private interests.¹⁶⁶ It also is important in defining the extent to which the state can regulate and alienate property subject to common rights.

A study of the historical development of the commons concept tends to support interpreting the public interest as a type of use right. To review briefly those principles developed in chapter 6, a common right under English common law was the right of one or more persons to take or use a product from lands or waters owned by another.¹⁶⁷ In technical terms, a common right was a profit à prendre, not an easement; in contrast to an easement, a common right authorized the taking of something of value from the burdened land.¹⁶⁸ Originally used in England to promote the development of agriculture,¹⁶⁹ the commons concept gradually was extended to some tidal resources and adopted as a legal tool for protecting the people's interest in those resources.¹⁷⁰

When the concept was applied to life in colonial America, it began to acquire slightly different connotations than those in England. Whereas in England the concept referred to rights that a certain group of people had in lands privately owned, in many of the colonies the term commons described

prohibitory in nature indicates an obligatory or mandatory provision, while affirmative language implies that the provision is only directory or permissive. 1A C. SANDS, *supra* note 21, § 25.03. Further, use of the word "shall" in a statute is generally considered mandatory, see *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965), while the word "may" is considered to be directory, *Price v. Commonwealth*, 209 Va. 383, 387, 164 S.E.2d 676, 679 (1968). The importance of the distinction is that a violation of a permissive provision does not result in liability. In contrast, noncompliance with a mandatory provision "either invalidates the transaction or subjects the noncomplier to the consequences stated in the statute." 1A C. SANDS, *supra* note 21, § 25.03. Thus, when strict compliance with a statutory provision is required, as where important public or private rights are concerned, prohibitory language is used. *Id.*

165. 10 HENING'S STAT., *supra* note 2, at 227 (1822).

166. See, e.g., VA. CODE ch. 87, § 1 (1819). The 1819 Act extended boundaries of land on tidal waters to the ordinary low water mark, provided that the public would continue to have the right of fishing, fowling, and hunting on such intertidal strips then being used as a common. *Id.* See generally *infra* chapter 11.

167. W. HOSKINS & L. STAMP, *THE COMMON LANDS OF ENGLAND AND WALES* 4 (1963); F. POLLOCK, *THE LAND LAWS* 41-43 (3d ed. 1896). See generally Juergensmeyer & Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 NAT. RESOURCES J. 367-69 (1974); *supra* chapter 6.

168. 1 R. MINOR, *THE LAW OF REAL PROPERTY* § 70 (Ribble 2d ed. 1928); 1 A. REEVES, *A TREATISE ON THE LAW OF REAL PROPERTY* §§ 126, 226 (1909).

169. J. TAYLOR, *A TREATISE ON THE AMERICAN LAW OF LANDLORD AND TENANT* § 218 (5th ed. 1869). See generally *supra* § 6.1 (discussing early development of the commons concept in England).

170. The commons concept, however, was not the primary method for protecting the public interest in tidal resources. In fourteenth century England, a closely related theory, the *prima facie* theory, began evolving into a doctrine to protect the sovereign's and the public's interest in tidal resources. For a discussion of the evolution of that doctrine, see *supra* chapter 5.

lands usually conveyed to a local government to be used by its inhabitants, subject to the control of that local government.¹⁷¹ In colonial Virginia, for example, common lands apparently belonged to the London Company, which had governmental powers.¹⁷² Otherwise, though, the concepts were fairly similar. For instance, like in England, the commons concept in early colonial Virginia originally served as a means for promoting agriculture, although fishing eventually became one of the most important common uses.¹⁷³ Also, although the American version of commons tended to involve public rights in government owned property, the public interest still included the right to use certain lands or waters for a particular purpose, usually to remove a product.¹⁷⁴

171. See *City of Cincinnati v. White's Lessee*, 31 U.S. (6 Pet.) 429 (1832); *Trustees of the Town of Southampton v. Mecox Bay Oyster Co.*, 12 N.Y. St. Rep. 514 (Sup. Ct. Gen. Div. 1887). But see 3 H. TIFFANY, *THE LAW OF REAL PROPERTY* § 934 (3d ed. 1939) ("In the New England colonies the term 'common' was applied to a particular class of lands [known as proprietorship commons], which belonged, not to the municipality or to individuals, but rather to associations of individuals"). According to some commentators, the most important of the common rights, the common of pasture *appendant*, could not exist in America. Apparently it only could arise as an incident of feudal military tenures, which never existed here in this country. See 1 R. MINOR, *supra* note 168, § 72.

172. The Virginia colony's second charter, issued May 23, 1609, incorporated the patentees of the first charter into one corporate and political body called the London Company and then gave the corporate body general powers of government over the colony. 1 HENING'S STAT., *supra* note 2, at 91, 92. The charter granted the London Company all lands, soils, minerals, woods, rivers, waters, and fisheries, as well as other rights and interests. *Id.* at 88. This charter is regarded as the first form of "popular" or representative government in America. See A. BROWN, *supra* note 1, at 74-75.

173. Many early references to commons in historical documents indicate that common lands generally were public gardens, fields, or pastures. See, e.g., A. BROWN, *supra* note 1, at 150 ("common" or public gardens for hemp and flax). Later references indicate that fisheries also were subject to common use. See, e.g., Pearson, *The Fish and Fisheries of Colonial Virginia*, 23 WM. & MARY Q. 2d 279, 282-83 (1943) [hereinafter citing this and other articles by Pearson on same topic appearing in 23 WM. & MARY Q. 2d as *Colonial Fisheries*] (citing a 1770 petition that asserted public rights to the fisheries along Cape Henry and that called for the preservation of the fisheries as a common). For a description of colonial fisheries, see Pearson, *The Fish and Fisheries of Colonial Virginia*, 22 WM. & MARY Q. 2d 213-20, 353-60 (1942); *Colonial Fisheries*, *supra*, at 1-7, 130-35, 278-84, 435-39. The English companies who financed the first colonies in America regarded their respective grants as including a monopoly of all fisheries within their territorial limits. These perceptions eventually led to numerous disputes over whether fisheries were exclusive or common. One dispute, for example, arose over the Virginia Company's right to fish within the limits of the Northern Colony. An individual named Ferdinando Georges claimed exclusive rights to the New England fisheries under a pending patent. Yet, the Virginia Company's letters-patent had clearly granted the Southern Colony the right to fish along the coast of Cape Cod, within the Northern Colony's limits. See W. SMITH, *THE HISTORY OF THE FIRST DISCOVERY AND SETTLEMENT OF VIRGINIA* 185 (1747).

174. The emergence of the public trust doctrine in the late 1800's solidified this tendency to place ownership of property subject to public rights in local or state governments. Although the link between the doctrine and the commons concept is not entirely clear, both attempt to define public rights in natural resources, like tidal lands and waters, as well as nontidal navigable waters, the lands beneath them, and perhaps marshlands. See *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Martin v. Waddell*, 41 U.S. (16 Pet.) 366 (1842). For a discussion of the relationship between the commons concept and the public trust doctrine, see *supra* § 6.3.

Language in later versions of the 1780 Act and in other statutory provisions also supports defining the public interest in common lands as a type of use right. The 1849 version, for example, states that the people of Virginia “may fish, fowl or hunt” on the reserved shores or beds,¹⁷⁵ while the 1887 version provides that the reserved lands “may be used as a common by all the people of the state for the purpose of fishing and fowling, and of taking ... oysters....”¹⁷⁶ Similarly, an 1835 Act extending the definition of lawful fence to include certain shores of the James River specifically provides that its provisions do not “abridge any right of way” along the shores of the river or “in any manner impair the rights of any person ... to the privileges of hunting or fishing as heretofore enjoyed by law” on the river.¹⁷⁷

Only a few judicial decisions actually have focused on the characteristics of the public interest in commons. In *Garrison v. Hall*,¹⁷⁸ the Supreme Court of Virginia described the 1780 Act as “relating only to riparian rights, involving the common right of fishing” and other similar activities like fowling and hunting.¹⁷⁹ As support for its interpretation of the Act, the court pointed out that the revisors of the Code in 1849 clearly “regarded the rights of common so reserved as aquatic, rather than land rights ... plac[ing] them under the caption of ‘water courses.’”¹⁸⁰ Additionally, in *McCready v. Virginia*¹⁸¹ the United States Supreme Court described the interest of Virginia citizens in the state’s tidal resources as “a property right” involving “use” of common property for such pursuits as “taking and cultivating fish.”¹⁸² These comments, when considered with the other historical documents and legislation, indicate that the public interest protected by the 1780 Act resembled the English commons concept in one fundamental respect — the public interest primarily involved the right to use certain lands or waters for the purpose of taking a defined product or products from the common property.

Besides raising questions about the type of public interest reserved, the 1780 Act also creates doubt about the extent to which that interest can be destroyed and about the amount of land subject to common use. The destructibility issue arises because the Act only prohibits grants by the register of the land office and not transfers authorized by subsequent

175. VA. CODE ch. 62, § 1 (1849).

176. *Id.* § 62.1-1 (1987); *id.* § 3573 (1919); *id.* ch. 60, § 1338 (1887).

177. Act of Mar. 12, 1835, ch. 74, 1834-1835 Va. Acts 54.

178. 75 Va. 150 (1881).

179. *Id.* at 159, 160.

180. *Id.* at 161; see also *id.* at 163 (reference to “aquatic right on the public waters”).

181. 94 U.S. 391 (1876).

182. *Id.* at 395; see also *id.* at 396 (reference to “use” of common property). *McCready v. Virginia* does not directly consider the commons act, but rather addresses the validity of an oystering statute forbidding the planting of oysters in state waters by noncitizens. The United States Supreme Court concluded that since each state owns the beds of tidewaters within its jurisdiction, a state may appropriate its beds to be used by its citizens as a common for taking and cultivating fish. *Id.* at 395; see also *McCready v. Commonwealth*, 68 Va. (27 Gratt.) 985, 988, *aff’d sub nom. McCready v. Virginia*, 94 U.S. 391 (1876) (references in opinion of state supreme court in same litigation to “public uses” of land owned by the state). For further discussion of *McCready* and of subsequent cases limiting it, see *infra* § 20.2.B.

legislation, thus suggesting that the public interest could be destroyed by the General Assembly. Such powers of destruction would be consistent with the commons concept as it existed in England and Virginia. English law permits destruction of common rights, generally through a defined process known as inclosure.¹⁸³ Apparently in Virginia extinguishment could occur through more diverse methods.

For example, in early colonial Virginia the Great Charter of 1618 authorized the destruction of common lands by a special conveyancing process. A settler occupying common land could procure a grant for the common land that he occupied after he had worked it for three years.¹⁸⁴ Also, when Virginia became a state, common rights appeared to be destroyed by disuse¹⁸⁵ and private appropriation prior to passage of the 1780 Act and by legislative enactments after its passage.¹⁸⁶ Thus, although the method of extinguishment varied in Virginia, its legal system clearly allowed destruction of common rights. Indeed, until 1780 common lands appeared to be the least permanent of public lands. Whether and to what extent subsequent developments like the evolution of the public trust doctrine¹⁸⁷ limit the power of termination is a question more appropriately discussed in the context of those developments.¹⁸⁸

The issue concerning the amount of land subject to common rights is not as easily resolved under Virginia law. Unfortunately, the 1780 Act only vaguely identifies the geographic area protected by the Act, referring in general terms to "lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek."¹⁸⁹ Although this language suggests that an area greater than

183. By the 1800's this process had become very formal and regulated. The Inclosure Act of 1845 provided for inclosure of commons by Inclosure Commissioners upon the application and consent of certain "interested" persons as defined by the Act. Inclosure Act, 1845, 8 & 9 Vict., ch. 118, §§ 16, 25, 86 D. PICKERING, *THE STATUTES AT LARGE* 973, 978-80, 982 (Cambridge 1845). The inclosure was authorized by a provisional order which had to be reported to Parliament and confirmed by the passage of a "Public General Act" before the inclosure became final. *Id.* §§ 3, 27, 32, at 974, 983-84, 986.

184. Yeardley's Instructions, *supra* note 2, at 161-62.

185. See *Miller v. Commonwealth*, 159 Va. 924, 945, 166 S.E. 557, 564 (1932) (common lands which had fallen into disuse may have been granted to patentees as waste and unappropriated land).

186. See, e.g., Act of Feb. 28, 1866, ch. 44, 1865-1866 Va. Acts 160. See generally A. EMBREY, *supra* note 1, at 225-26.

187. See generally *supra* chapter 5 (discussing evolution of the public trust doctrine).

188. The public trust doctrine enunciated by the United States Supreme Court in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892), and other cases suggests that at least certain types of common lands are not destructible. Although the Court explains the public trust doctrine in terms slightly different than the commons concept, the two are related concepts that attempt to define the public interest in certain natural resources. Because federal law would govern navigable waters, *id.* at 435, *Illinois Central* would restrict the power of the state legislature to alienate common lands, at least in those situations where the lands were navigable waters and their beds. See generally *supra* § 5.2.A. For a more complete discussion of the regulatory power of the state and federal governments over tidal resources, especially the intertidal zone, see *infra* chapter 20.

189. 10 HENING'S STAT., *supra* note 2, at 227 (1822).

the intertidal strip is reserved, it does not define the limits of the amount of land reserved for public use.

Two Virginia Supreme Court opinions, *Garrison v. Hall*¹⁹⁰ and *Miller v. Commonwealth*,¹⁹¹ shed some light on the problem. The first decision quickly discounted the argument that the Act reserved extensive tracts of land which bordered the identified waters. As the court in *Garrison* explained, "[s]uch could not have been the intention of the legislature in 1780" because it would be inconsistent with "what is known to have been the public policy, to have the country settled and the waste lands appropriated."¹⁹² Instead, the Act reserved only those shores along the bay, the sea, and certain rivers and creeks, which had been used as a common and "the lands adjacent to them, so far as necessary for the enjoyment" of the common rights of fishing, fowling, and hunting.¹⁹³ Similarly, in *Miller v. Commonwealth*, the court stressed that the 1780 Act "reserves from grant the tracts of land on the tidal waters which had been used as a common, not merely the land lying between low and high-water marks which had been used as common."¹⁹⁴ In both cases, however, the court failed to provide more specific guidance on how to identify lands reserved for common use.

Providing more concrete guidelines is a difficult, if not impossible, task. Not only would the amount of land necessary for enjoyment of common rights depend on the type of water resource involved. It also would vary according to the type of activity being pursued and the methods being employed. In colonial days, for example, fishermen generally used haul seines or drift or set nets where a natural fishery existed, pulling the catch onto a suitable shore.¹⁹⁵ Because the length of the haul seine net ranged from several hundred to several thousand feet, not all shores were appropriate for such use and sometimes the land above the high water mark had to be used.¹⁹⁶ Thus,

190. 75 Va. 150 (1881).

191. 159 Va. 924, 166 S.E. 557 (1932).

192. 75 Va. at 160.

193. *Id.* at 163; accord *French v. Bankhead*, 52 Va (11 Gratt.) 136, 168, 169 (1854). This apparently was contrary to the general common law rule, which provided that members of the public could not go above the high water mark in exercising their fishing rights. See 3 H. TIFFANY, *supra* note 171, § 936.

194. 159 Va. at 948, 166 S.E. at 565.

195. M. BREWINGTON, *CHESAPEAKE BAY: A PICTORIAL MARITIME HISTORY* 175 (1953). For a description of the operation of seine fishing and colonial fisheries by early Virginia planters, see *Colonial Fisheries*, *supra* note 173, at 1-7, 130-135, 278-84, 435-39.

196. M. BREWINGTON, *supra* note 195, at 175. Where a shore was inappropriate, a battery or large raft was used in place of the beach for landing the netted fish. *Id.* Another fishing method that was invented by the Indians, improved by the colonists, and still used today is the weir or pound net. A weir consists of a net attached to a long row of piles extending out from the shore for up to a mile or more. The fish are diverted by the net into a pound located at the other end. *Id.* In addition to seines and weirs, the colonists used trolls, casting nets, setting nets, hand-fishing, and angling. R. BEVERLEY, *supra* note 1, at 310; Pearson, *supra* note 173, at 358. For the size and a description of an early seine, see *id.*

At a very early date, Virginia adopted measures to protect and conserve its fish resources. For example, in 1662 a Middlesex County court enjoined the spearing of fish because it chased fish away from its waters and wounded four times more fish than were taken. See *Colonial Fisheries*, *supra* note 173, at 280. Other measures, though, were careful to preserve certain fishing methods.

determining the amount of land reserved by the 1780 Act would involve questions of fact better resolved by a trial court on a case-by-case basis.

B. *Permissible Public Uses.*

Although the 1780 Act clearly reserves certain lands for the public, it fails to define adequately the types of permissible public uses. Only the preamble contains a reference to a public use, speaking of the "accustomed privilege of fishing."¹⁹⁷ Under traditional rules of statutory construction, a preamble's function is to explain why an act was passed, but not to confer powers or create rights. It thus cannot be relied on to enlarge or restrict the scope of the act.¹⁹⁸ Courts, however, tend to use the preamble as an interpretative tool when the statutory provisions are vague and the facts recited in the preamble are precise and objective, as opposed to judgmental.¹⁹⁹ Here, although the 1780 Act's use of the word "accustomed" appears to reflect both judgments of law and fact,²⁰⁰ the reference to "fishing" seems to be the type of objective fact that courts are willing to use in interpreting ambiguous statutory provisions. Apparently agreeing, implicitly at least, with these rules of construction,

For example, an Act of January 2, 1798, authorizing the conveyance of a parcel of land at Old Point Comfort, provided for the continuation of the public privilege of hauling seines on the shores of that land. See Act of Jan. 2, 1798, ch. 19, 2 SHEPHERD'S STAT., *supra* note 40, at 88; see also *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 168 (1854). VA. CODE §§ 28.1-47, 28.1-51 to -53 (1985) presently regulate the size and use of various fishing nets.

197. 10 HENING'S STAT., *supra* note 2, at 227 (1822).

198. 1A C. SANDS, *supra* note 21, § 20.03; 2A *id.* § 47.04 (1984); *Commonwealth v. Smith*, 76 Va. 477, 485-86 (1882).

199. Preambles generally recite facts that serve to explain the reason for a law. Although legislatures determine the existence of these facts, the courts do not necessarily feel bound to accept the facts as true, primarily because the courts are responsible for gathering facts in settling disputes. In many situations, however, the courts will defer to the legislative body and accept the facts as true. This deference typically occurs "where the fact is precise and objective and it appears that the legislature is as well qualified to determine its existence as a court." 1A C. SANDS, *supra* note 21, § 20.03. However, when the fact only can be determined by objective judgment, the courts will determine the meaning of the fact independently of any facts stated in the preamble. A typical example of when a court would find it necessary to exercise its own judgment is when an act supposedly has been created during an emergency. *Id.* See, e.g., *Board of Supervisors of Elizabeth City County v. State Milk Comm'n*, 191 Va. 1, 10, 60 S.E.2d 35, 40 (1950) (where the court used post-legislative history to conclude that a reference to an emergency contained in the preamble of an act should not be construed to mean that the act was passed because of the existence of the emergency where the preamble contained other statements explaining the passage of the act).

200. "Accustom" has been defined as "[t]o make (a thing) customary, habitual, usual, or familiar." 1 THE OXFORD ENGLISH DICTIONARY 71 (1961). Under this definition "accustomed" would refer to a fact that is widely known and identifiable by the legislature. But where the accustomed act becomes sporadic or unusual and first occurred many years ago, deciding whether a customary use exists would involve a judgment of law. As stated by the court in *Garrison v. Hall*, 75 Va. 150 (1881), someone who was aware of the circumstances surrounding passage of the 1780 Act would have "had better means of rightly interpreting said act than this court could have after a lapse of a hundred years, except so far as it may derive assistance from the light which may have been shed upon the subject by subsequent judicial interpretation and legislative construction." *Id.* at 156-57.

several Virginia Supreme Court opinions have concluded that the 1780 Act protects the public right of fishing.²⁰¹

Both English common law and historical evidence from the colonial period tend to support this conclusion. Under English common law the public had a right to fish in all tidal waters not appropriated for private use.²⁰² At common law fisheries were profits à prendre in the land over which the water flowed,²⁰³ and, consequently, the owner of a fishery derived his interest from the owner of the underlying soil.²⁰⁴ When title to a fishery was severed from the land to which it attached, the fishery became an incorporeal hereditament, or an intangible right passing as real property but not held as part of the ownership interests in the affected land.²⁰⁵ Conversely, where severance did not occur and title to the fishery and the soil was held together, the fishery was classified as a corporeal hereditament, or an interest in land. A fishery either

201. *Garrison v. Hall*, 75 Va. 150, 159-61 (1881); *McCready v. Commonwealth*, 68 Va. (27 Gratt.) 985, 989, *aff'd sub nom. McCready v. Virginia*, 94 U.S. 391 (1876); *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 168 (1854). *But see* *Boerner v. McCallister*, 197 Va. 169, 174, 89 S.E.2d 23, 27 (1955) (where the court states that "even though a stream may be floatable, and in some instances navigable, the public interest therein is limited to the right of navigation; the only restraint placed upon the owner being that he cannot obstruct or impede the public right").

The Supreme Court has recognized the importance of the public right of fishery. In *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), the Court adopted Sir Matthew Hale's explanation of the common right of fishing. The Court quoted from his work *De Jure Maris*, writing: "'although the king is the owner of this great coast, and as a consequence of his proprietary, hath the primary right of fishing in the sea, and creeks and arms thereof, yet the common people of England have, regularly, a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks or navigable rivers, where either the king or some particular subject hath gained a proprietary exclusive of that common liberty.'" 41 U.S. at 412 (quoting M. Hale, *supra* note 27, at 377). The Court further observed that this common right only could be excluded through "very plain language." *Martin*, 41 U.S. at 414.

Because the Supreme Court found that the states hold the enjoyment of certain public rights, such as the right of fishery, in trust for the people of the state, *see* *Smith v. Maryland*, 59 U.S. (18 How.) 71, 74-75 (1855), it declared that a private right to use public trust waters could be granted only if there would not be a "substantial impairment of the interest of the public in the waters." *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892). Moreover, the Court in *Illinois Central* extended the common right of fisheries to nontidal, navigable waters. *Id.* at 436.

However, the Court has suggested that the common right of fishery is not always absolute. Besides indicating that grants of waters could be made if there was not a substantial impairment of the public interest, the Court also has stressed that the public uses "'of navigation and commerce ... are always paramount to those of public fisheries.'" *Stockton v. Baltimore & N.Y. R.R.*, 32 F. 9, 19-20 (1887), *quoted in Illinois Central*, 146 U.S. at 457.

According to one commentator, Virginia law recognizes the doctrine of common fishery which gives the public the right to fish in public waters and perhaps even private waters. *See* 1 R. MINOR, *supra* note 168, § 73. Another commentator, however, acknowledges that the state can grant exclusive rights to a fishery. But if holders of such grants "obstruct the free use of the river, as a highway for boats or rafts," they would be committing a nuisance. J. TAYLOR, *supra* note 169, § 221.

202. *Carter v. Murcot*, 4 Burr. 2162, 2164, 98 Eng. Rep. 127, 128 (1768).

203. *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139, 160-63.

204. *Id.*

205. *Attorney-Gen. v. Emerson*, 1891 A.C. 649, 654-55.

could be exclusive, that is vested solely in a private party, or nonexclusive, that is vested in the general public or in one or more private individuals.²⁰⁶

At early common law, fisheries and watercourses passed along with the upland even though the deed conveying the upland contained no express reference to them.²⁰⁷ After the adoption of the Magna Carta, a royal grant of tidal lands no longer could convey exclusive fisheries.²⁰⁸ The grantee thus took subject to the public's right to fish and navigate over the foreshore.²⁰⁹ Private fisheries conveyed either a right of several fishery or a common fishery. A several fishery represented an exclusive right to fish in a given area, regardless of ownership of the underlying soil.²¹⁰ A common of fishery gave the grantee a liberty to fish in another individual's waters in common with the owner or others.²¹¹ This right, however, did not extend to nontidal waters, not even those that were navigable.²¹² Also, except where permitted by local custom, the public right of fishery did not include the right to use the land above the high water mark to dry nets,²¹³ to hunt wildfowl,²¹⁴ or as a means of access to tidal waters.²¹⁵ Nor did the right of fishery include the right to tow vessels from the banks of navigable waters²¹⁶ or the right to drive stakes into the foreshore.²¹⁷ The public right, however, did encompass the right to use the shore to draw nets and land boats.²¹⁸

206. *Seymour v. Courtenay*, 5 Burr. 2814, 2817, 98 Eng. Rep. 478, 479 (1771); *Malcomson v. O'Dea*, 10 H.L.C. 593, 618-619, 11 Eng. Rep. 1155, 1165-66 (1863). For a more detailed discussion of fisheries, see 18 HALSBURY'S LAWS OF ENGLAND ¶¶ 601, 617, 618 (4th ed. 1977); 2 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS §§ 368-411 (1904); S. MOORE & H. MOORE, THE HISTORY AND LAW OF FISHERIES 32-36 (1903); A. WISDOM, THE LAW OF RIVERS AND WATERCOURSES 254-76 (4th ed. 1979).

207. S. MOORE & H. MOORE, *supra* note 206, at 19-22.

208. *Attorney-Gen. v. Emerson*, 1891 A.C. 649, 655; *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139, 167; *Malcomson v. O'Dea*, 10 H.L.C. 593, 618, 11 Eng. Rep. 1155, 1166 (1863).

209. *Gann v. Free Fishers of Whitstable*, 11 H.L.C. 192, 208, 11 Eng. Rep. 1305, 1312 (1865); *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139, 165.

210. *Hanbury v. Jenkins*, [1901] 2 Ch. 401, 411; *Malcomson v. O'Dea*, 10 H.L.C. 593, 618, 11 Eng. Rep. 1155, 1166 (1863); *Holford v. Bailey*, 13 Q.B. 426, 446, 116 Eng. Rep. 1325, 1333 (1850).

211. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 34 (1765); *Lord Chesterfield v. Harris*, [1908] 2 Ch. 397, 410-12.

212. *Reece v. Miller*, [1882] 8 Q.B. 626, 630-31.

213. *Mercer v. Denne*, [1904] 2 Ch. 534, 556-58.

214. *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139, 165-66.

215. *Behrens v. Richards*, [1905] 2 Ch. 614, 619-21.

216. *Ball v. Herbert*, 3 T.R. 253, 260-61, 100 Eng. Rep. 560, 564 (1789).

217. At common law the public only could acquire an unrecorded right in the land when such a right had continually occurred over time. *Id.* at 261, 100 Eng. Rep. at 564. Furthermore, if a party was arguing that a customary right existed, the party would have to establish that it extended "to every bank of every navigable river throughout the Kingdom." *Id.* at 262, 100 Eng. Rep. at 565.

218. The public had the right to use private shores to draw nets for fishing because "such fishery [was] for the common wealth, and for the sustenance of all the kingdom." *Blundell v. Catterall*, 5 B & Ald. 268, 295-96, 106 Eng. Rep. 1190, 1200 (1821). The right to land boats on private soil was permitted because England's prosperity and independence depended on navigation. Furthermore, the roads that led to the seas also had to be secured for the public to ensure these goals. *Id.* at 280, 106 Eng. Rep. at 1195.

During the first few years of the Virginia settlement, the colonial government apparently did not recognize a public right to free and common fishery within Virginia waters. As early as 1606, the developers of the colony had successfully protected their interests in colonial fisheries by securing a conveyance from the Crown of exclusive fisheries.²¹⁹ The Virginia Company's claim of exclusive fisheries, which extended to waters as far north as Newfoundland, eventually resulted in a dispute with the colony of New England over the fisheries at Cape Cod.²²⁰ By 1630 the Virginia Company's claim of exclusive fisheries lost support, perhaps because of the Company's inability to police the extensive area involved,²²¹ and other parties began to assert claims of exclusive fisheries in colonial Virginia. As late as 1679, the colonial legislature declared that every riparian landowner along rivers and creeks had the exclusive right to fish down to the low water mark.²²² Although

The English court in *Blundell v. Catterall* stated that pitching stakes for hanging nets to dry could not be considered a custom because it would be against reason. "[F]or if he may dig in one place, he may dig in another place; and so if a man hath a meadow adjoining the sea, they may, by such custom, destroy all the meadow, which would not be reasonable." 5 B & Ald. 268, 297, 106 Eng. Rep. 1190, 1200 (1821). As the court further explained, people are allowed to fish on the shores that are at times covered by the flow of water because, when the water is at its high mark, they have the right to fish in that water which covers the land. However, when the water covers the land, they cannot dig stakes into it. Logically then, they should not be able to dig stakes into the land when it is not covered by the water. *Id.* at 307, 106 Eng. Rep. at 1204.

219. The conveyance provided:

[T]hey shall have all the ... fishings ... from the said first seat of their plantation and habitation by ... the said coast of Virginia and America, towards the west and southwest, as the coast lyeth, with all the islands within one hundred miles directly over against the same sea coast; and also all the ... fishings ... from the said place of their first plantation ... for the space of fifty ... miles, all alongst the said coast of Virginia and America, towards the east and north-east, or towards the north, as the coast lyeth ... and also the ... fishings ... from the same fifty miles every way on the sea coast, directly into the main land by the space of one hundred ... miles.

1 HENING'S STAT., *supra* note 2, at 59; see also *Colonial Fisheries*, *supra* note 173, at 278.

220. The dispute arose between the land companies of Virginia and New England because Virginia's fish supply was irregular. Inadequate fishing gear and personnel caused a need for the salted codfish of the north. *Colonial Fisheries*, *supra* note 173, at 278-79. The disputes arose over the extent of the exclusive fisheries of both colonies. For a discussion of the various disputes, see A. BROWN, *supra* note 1, at 349-51, 388, 403-05, 425.

Disputes over fisheries also arose between the colonists and the Indians. While attempting to drive the Indians to the interior, Virginians destroyed most of the Indians' fisheries, "leav[ing] not a fishing Weere standing." 1 A. HART, *AMERICA HISTORY TOLD BY CONTEMPORARIES* 217 (1897). The Indians, in return, attempted to massacre their adversaries. *Colonial Fisheries*, *supra* note 173, at 435. Not until 1662 did the English finally agree that the Indians could oyster and fish on their lands. See Act of Mar., 1661-1662, act 138, 2 HENING'S STAT., *supra* note 2, at 138, 140. The English again encouraged better relations with the Indians by granting fishing rights in 1676. Act of June, 1676, act 2, *id.* at 350.

221. *Colonial Fisheries*, *supra* note 173, at 279.

222. The legislative order provided:

that every mans right by vertue of his pattent extends into the rivers or creeks soe farre as low water marke, and it is a privilege granted to him in and by his pattent, and that therefore noe person ought to come and fish there above low water marke or hale their sceanes on shoare (without leave first obtained) under the hazard of committing a trespassse, for which he is sueable by law.

the precise legal effect of this declaration is in doubt, other colonial documents demonstrate that many estates had private fisheries and that numerous individuals continued to hold exclusive fisheries throughout the 1700's as well.²²³

By the second half of the eighteenth century, the colonial government of Virginia apparently had recognized a public right of fishery. In 1764, for example, the Council of Colonial Virginia rejected a petition for an exclusive fishery,²²⁴ apparently because granting such a petition would jeopardize the public's rights.²²⁵ When a private party acquired exclusive fishing rights, the public lost its right of fishery.²²⁶ A petition presented in 1770 also referred to the public right of fishing at Cape Henry, requesting protection for the "Common Fishery," which "hath been carried on by many of the Inhabitants" of Princess Anne County, and "for such other publick Uses as ... shall be found convenient."²²⁷ In describing the right of fishery, the petition noted that the area was "unfit for Tillage or Cultivation and contains several thousand Acres" and that "during the Fishing Season the Fishermen usually encamp amongst the ... Sand Hills and get Wood for Fuel and Stages from the Desert."²²⁸ Although the legislature apparently did not respond directly to this petition, the subsequent passage of the 1780 commons act and the 1790 Act ceding some of the Cape Henry area to the United States suggests that a public right of fishery was recognized, at least at Cape Henry,²²⁹ and that it included other uses necessary for enjoyment of that right.²³⁰ But not all tidal

Case of Robert Liny, 1679, 2 HENING'S STAT., *supra* note 2, at 456. For further discussion of this order, see *supra* § 7.2.

223. A. EMBREY, *supra* note 1, at 259-61. Among those holding exclusive fisheries were George Washington, whose fisheries were near his Mount Vernon estate, and Col. William Byrd, near Richmond. See *Colonial Fisheries*, *supra* note 173, at 130. Private parties sometimes bought and sold exclusive fisheries. For an example of a "Seine for Sale," see *Historical and Genealogical Notes and Queries*, 11 VA. MAG. HIST. & BIOGRAPHY 224 (1903-1904).

224. 6 EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA 680 (1754-1775) (entry for Jan. 14, 1764) [hereinafter cited as EXEC. J.].

225. The Committee of Correspondence's response to George Walker's petition for the grant of an exclusive fishery declared that "all such exclusive Grants are extremely prejudicial to others; and further that ... the proprietors of the adjoin'g Lands are bounded by the Sea." *Proceeding of the Virginia Committee of Correspondence, 1759-1767*, 12 VA. MAG. HIST. & BIOGRAPHY 5 (1904-1905).

226. 1 J. LOMAX, DIGEST OF THE LAWS OF REAL PROPERTY 514 (2d ed. Richmond 1855).

227. *Miscellaneous Colonial Documents*, 18 VA. MAG. HIST. & BIOGRAPHY 57-59 (1910).

228. *Id.* at 58.

229. See *Garrison v. Hall*, 75 Va. 150 (1881) (apparently agreeing with this conclusion at least for the Desert tract).

230. The other use mentioned in the statute was the taking of wood for fuel, which qualifies as a common right under English law. This common use is known as the common of estovers and has been defined as the "right to go upon the land of another and cut timber thereon, in common with the owner of the land, for the purpose of fuel." 1 R. MINOR, *supra* note 168, § 73. Another right similar to the common of estovers is the common of turbary, or the "right of getting turf for fuel from another's land in common with him." *Id.*

Legal scholars and authorities have debated whether the commons are, in fact, appurtenant to the dwelling or to the parcel of land on which the dwelling stands. At least one commentator has concluded that because "there must be a fit relation between the enjoyment of the right and the needs of the dominant estate," the common right can "only be appurtenant to a dwelling." *Id.*

lands subject to the public right of fishery were subject to other uses. The compact of 1785 executed between Maryland and Virginia, for instance, limited the common right of fishing enjoyed by the citizens of both states to fishing in the Potomac River. Neither state's citizens had "the right to fish with nets or seines on the shores" of the other state.²³¹

Determining what other uses are protected by the 1780 Act is a question not easily resolved under Virginia law. Judicial opinions of the United States Supreme Court expressly recognize navigation as one of the rights that the public enjoys in navigable waters.²³² However, because the Court expressed its justification for the navigational servitude in terms of the public trust doctrine, a doctrine which the Virginia Supreme Court has been reluctant to accept,²³³ doubts exist over the degree to which the state recognizes this and other uses.

The state court resolved some of these doubts in *Commonwealth v. City of Newport News*, adroitly managing to recognize the public right of navigation without also espousing the public trust doctrine.²³⁴ The state court explained its position initially by describing the navigational servitude as a right created by the federal Constitution and inherent in the sovereignty of the United States.²³⁵ Later, however, it added that it recognized the right as an "inseparable incident ... of the governmental power of the State."²³⁶ In explaining this second rationale, the court stated:

The right of navigation is the right to move and transport goods from place to place over the great natural highways provided by the navigable waters of the State without let or hindrance from or charge by any private person or corporation. It bears a relationship to the right of liberty, which comprehends the right to move freely from place to place over the public highways; and the right of liberty is declared by the bill of rights of the Constitution of Virginia to be an inalienable right. The duty to provide and maintain highways for the use of its people is a governmental power and duty of which the legislature may not divest the State and cannot exercise without holding the requisite proprietary right in the highway.²³⁷

231. 12 HENING'S STAT., *supra* note 2, at 51.

232. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

233. The Virginia Supreme Court questions this doctrine because although

[i]t may be of some assistance in helping the mind to grasp and comprehend limitations which may be shown to exist upon the powers of a State legislature or the State over its tidal waters and their bottoms ... it wholly fails to prove or account for the existence of such limitations, which is what must be proved to sustain the decisions to support [that] which the trust theory is invoked.

Commonwealth v. City of Newport News, 158 Va. 521, 540, 164 S.E. 689, 694 (1932). For further discussion of this case, see *supra* § 5.2.B.

234. 158 Va. 521, 539-41, 543-44, 550, 164 S.E. 689, 694, 695-96, 698 (1932); *accord* *Boerner v. McCallister*, 197 Va. 169, 174, 89 S.E.2d 23, 27 (1955); *McCready v. Commonwealth*, 68 Va. (27 Gratt.) 985, 990, *aff'd sub nom. McCready v. Virginia*, 94 U.S. 391 (1876).

235. 158 Va. at 543-44, 164 S.E. at 695-96; *accord* *McCready*, 68 Va. at 991.

236. 158 Va. at 550, 164 S.E. at 698.

237. *Id.* at 550-51, 164 S.E. at 698.

Thus, the Virginia Supreme Court derived the right of navigation from a source that was independent of the public trust doctrine.

Because the court based the public right of navigation on principles of sovereignty and constitutional law, it then was able to distinguish fishing from the navigational servitude. As the court observed, unlike the right of navigation, the right to use tidal waters for fishing was "a public use only in the same sense that the exercise of a common right of pasturage upon unappropriated uplands, or of a common right of fowling upon tidal waters, puts them to a public use The particular incident which makes it a public use is the enjoyment thereof in common."²³⁸ Because of this difference in the nature of the two rights, the court then concluded that, in the absence of a constitutional provision to the contrary, the state legislature could deprive the public of their right of fishery by, for example, granting exclusive fisheries.²³⁹

As the above demonstrates, the theory used to support the existence of a public right can be very important in determining the strength of that right. Because the court did not use the public trust doctrine to justify the public right of fishery, but rather treated it as any other common right, it did not hesitate to conclude that the legislature could "impair or even destroy" the public right.²⁴⁰ The navigational servitude, however, was a superior right because of its relationship to the right of liberty and to the duties of a sovereign.

This conclusion, that a public right of navigation existed and that it was somehow superior to other public interests like fishing, is consistent with English common law. As explained earlier, early English law did not distinguish between private and public interests in tidal waters, recognizing only the rights of the Crown and its grantees.²⁴¹ Eventually, however, through the efforts of Lord Hale and others, English law began to recognize public rights in tidal waters.²⁴² Although those efforts began with a theory designed to protect the Crown's title to tidal resources,²⁴³ the theory eventually was expanded to recognize the Crown's responsibilities in protecting the public

²³⁸. *Id.* at 551, 164 S.E. at 698.

²³⁹. *Id.* at 552-53, 164 S.E. at 698-99.

²⁴⁰. *Id.* at 552, 164 S.E. at 698-99.

²⁴¹. See generally *supra* §§ 5.1.B, 6.1 (discussing development of public rights under English law).

²⁴². See M. Hale, *supra* note 27; see also *supra* § 5.1.B (discussing impact of Hale and others on the development of public rights in tidal resources).

²⁴³. According to Digges' version of the *prima facie* theory, the King owned, by his prerogative, all things which were left in common under the law of nature. By the law of reason, the worthiest things, like gold and silver mines, must reasonably be attributed to the worthiest person, the King. As support, Digges observed that the laws of England required payment to the King for anchoring upon otherwise unowned ground and specifically allowed merchants to traffic upon the waters. Furthermore, although the King could grant away these lands, they never could be acquired by prescription against the King. See T. Digges, *Arguments proving the Queenes Majesties propertye in the Sea Landes, and salt shores thereof, and that no subject cann lawfully hould eny parte thereof but by the Kinges especiall graunte*, reprinted in S. MOORE, *A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO* 185 (3d ed. 1888) [hereinafter paginated to S. MOORE].

interest, particularly in navigation and fishing.²⁴⁴ Where the right of navigation conflicted with fishing, the right of navigation prevailed, although a party exercising his navigational right had to exercise reasonable care to avoid damaging fisheries.²⁴⁵

Only one Virginia decision actually considers what other types of public uses might be protected by the 1780 Act. In *Garrison v. Hall*, the Supreme Court of Virginia admits that the primary purpose of the 1780 Act was to preserve the common right of fishery for the people of Virginia,²⁴⁶ and that the Act “does not even include fowling and hunting, as some of the subsequent acts do.”²⁴⁷ But despite this admission, the court concludes that “the object of the act was to reserve the right of fishing, and by a liberal construction, of fowling and hunting, being only coextensive therewith.”²⁴⁸ Although the court does not offer any explanation for its conclusion, it apparently was convinced by subsequent versions of the Act, which repeatedly referred to the public’s right to fish, fowl, and hunt on the reserved shores and beds.²⁴⁹

The court’s conclusion in *Garrison* can be supported by documentary evidence from the colonial and early statehood periods, which indicates that the public often used marshes, shores, and beds for various activities other than fishing. For example, besides the reference to gathering wood contained in the Cape Henry petition described earlier, numerous references to use of shores and marshes for hunting and fowling appear in legislative acts.²⁵⁰ Indeed, until 1922, the right to fish and hunt apparently extended to all unenclosed lands.²⁵¹ Also, colonial records indicate that, where appropriate, marshes sometimes were used as common pastures.²⁵² Thus, the practices and

244. See generally *supra* chapter 5.

245. *Mayor of Colchester v. Brooke*, 7 Q.B. 339, 373, 115 Eng. Rep. 518, 531 (1845) (where the court found that the vessel owner was not liable for grounding his vessel on plaintiff’s property but that he was liable for his negligent failure to moor the vessel properly so that it would not swing and damage oyster beds).

246. 75 Va. 150, 159 (1881).

247. *Id.* at 160.

248. *Id.* at 163.

249. *Id.* at 160-61. Cf. VA. CODE ch. 62, §§ 1, 2 (1849) (which refer to the right of the people of Virginia to “fish, fowl, or hunt on the said shores or beds”).

250. See VA. CODE ch. 101, §§ 1, 2, 19 (1849) (“for the Preservation of Certain Useful Animals”); Act of Feb. 18, 1842, ch. 109, 1841-1842 Va. Acts 65 (“An Act for the further protection of wild fowl”); Act of Apr. 9, 1839, ch. 80, 1839 Va. Acts 50 (“An Act to prevent the destruction of wild fowl in the counties of Accomack and Fairfax”); Act of Mar. 12, 1835, ch. 74, 1834-1835 Va. Acts 54 (“An Act constituting the margins of the tide water of the James River and certain of its tributary streams a lawful fense”); VA. CODE ch. 251 (1819) (“An Act to prevent unlawful Hunting and Ranging”); Act of Dec. 4, 1792, ch. 26, 1 SHEPHERD’S STAT., *supra* note 40, at 78 (“An Act to prevent unlawful hunting and ranging”); Act of Oct., 1748, ch. 1, § 63, 5 HENING’S STAT., *supra* note 2, at 408, 430 (1819) (“An Act for settling the Titles and Bounds of Lands, and for preventing unlawful Hunting and Ranging”). Although many of the acts cited above do not provide for public rights, they do indicate that the uses of fishing, fowling, hunting, and ranging were treated together.

251. See Act of Mar. 4, 1922, ch. 123, 1922 Va. Acts 208; VA. CODE § 3338 (1919); *id.* §§ 2071, 2072, 2125 (1887).

252. See *supra* note 134 and accompanying text.

usages of the people of Virginia indicate that they did not restrict common use of tidal waters and lands to fishing.

In conclusion, permissible public uses protected by the 1780 Act clearly include fishing by lawful methods in tidal waters, on appropriate shores adjacent to those waters, and on lands above the high water mark so far as is necessary to ensure enjoyment of the right.²⁵³ Although navigation also clearly is a permissible public use, it would qualify as a public right regardless of whether the 1780 Act remained in effect.²⁵⁴ Finally, according to the court in *Garrison*, protected public rights also include other water-related activities such as fowling and hunting.²⁵⁵ Protection of these public rights under the 1780 Act, however, does not mean that they are indestructible or inalienable, as subsequent discussions will demonstrate.²⁵⁶

C. Factors Affecting the Public Interest: Some Introductory Remarks.

Although the 1780 commons act is one of the primary sources of public rights in Virginia's tidal resources, some judicial decisions have suggested other legal theories that could be used to create or protect public rights. The public trust doctrine, developed in the late 1800's by the United States Supreme Court, is perhaps the most important of these other theories. Although a link arguably exists between that doctrine and the commons concept, the Virginia Supreme Court apparently believes that the doctrines are sufficiently different and, in a 1932 decision, rejected the public trust doctrine as a potential source of public rights under state law.²⁵⁷ Preferring instead to rely on constitutional, statutory, and perhaps common law as determinants of public rights, the court explained that the state, as sovereign, "acquired not only the powers, prerogatives and rights of the British crown, but also the powers and rights held by the people collectively ... [and] exercised by the parliament."²⁵⁸ Virginia thus acquired a "full and complete proprietary right" in all tidal lands and waters and could exercise its discretion in managing those resources, except as limited by the state or

²⁵³. Any resident of the state could fish by any method that he desired so long as state law did not prohibit the method and the resident, in the exercise of his right, did not draw in a seine or take fish onto the land of a property owner without the owner's permission. 1 J. LOMAX, *supra* note 226, at 660-61. This right included the special privilege of fishing with fixed devises. See VA. CODE § 2086 (1904). *But see id.* § 2108 (which prohibits "any person [to] plant oysters or place stakes in Chesapeake bay, Lynnhaven bay, or Willoughby's bay, from Cape Henry to Seawell's point, within the limits of any fishery where a seine is laid out, set, or hauled during the fishing season").

²⁵⁴. *Commonwealth v. City of Newport News*, 158 Va. 521, 540-41, 164 S.E. 689, 694-95 (1932).

²⁵⁵. 75 Va. 150, 161 (1881).

²⁵⁶. See, e.g., *infra* chapter 13 (discussing Reconstruction legislation authorizing sale of commons). See generally *infra* chapter 19 (discussing extent to which private rights limit common rights) and chapter 20 (discussing government's regulatory powers over the intertidal zone).

²⁵⁷. *Commonwealth v. City of Newport News*, 158 Va. 521, 540-41, 164 S.E. 689, 694-95 (1932). For a discussion of the relationship between the two doctrines, see *supra* § 6.3.

²⁵⁸. *Newport News*, 158 Va. at 541, 164 S.E. at 695.

federal Constitution or by state law.²⁵⁹ While the court admitted that the federal Constitution provided the basis, implicitly at least, for imposing a trust on navigable waters and beds,²⁶⁰ the court made its position clear that, as a matter of state law, it was not willing to accept, much less expand, the notion of a public trust.

The other sources of public rights suggested by the cases are not as well defined as the public trust doctrine and the commons concept. Focusing more on specific factors than on a coherent theory, these cases have identified three key factors that can affect the existence of public rights in watercourses: one, the navigability of the watercourse, two, ownership of the bed of the watercourse, and three, prior public use or state control of the watercourse. Although a full discussion of each of these factors is not appropriate now, one preliminary comment should be made. Like the commons legislation and the public trust doctrine, these factors focus on coastal lands and waters. Unlike the commons concept and the trust doctrine, the factors represent, at best, undeveloped and unclear expressions of legal thought. To become effective tools for protecting the public interest in coastal resources, the courts or legislature would have to define and develop the policies and legal principles underlying each factor. Because the commons concept and the public trust doctrine already provide well developed statements of policy and legal theory, developing the factors into a coherent public rights theory seems both unwise and unnecessary.

§ 9.4. Defining the Act's Effect on Private Interests.

A. *The Void v. Voidable Debate.*

After identifying the types of lands falling within the scope of the 1780 Act, the General Assembly then protects those lands by declaring that "no grant issued by the register of the land office ... 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."²⁶¹ This prohibition on the issuance of grants raises an important question concerning the Act's effect on grants executed for lands later found to include common lands. Because the Act does not expressly define the legal effect of such grants, a court conceivably could treat them either as void or voidable.

Determining which approach should be taken involves making a difficult policy choice. A court that decides to treat as void a grant issued in derogation of the 1780 Act provides greater protection for common lands and thus promotes the public interest over private concerns. The court also arguably is adopting the approach that is more consistent with a literal interpretation of the Act since the clause's prohibitive language appears to deprive the land

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 543-44, 164 S.E. at 695-96. One possible basis for imposing this trust is the commerce clause of the United States Constitution, which grants the United States regulatory control over all waters that affect commerce with foreign nations and among states. See U.S. CONST. art. I, § 8, cl. 3. For further discussion of the "navigational servitude," see *infra* chapter 20.

²⁶¹ 10 HENING'S STAT., *supra* note 2, at 226, 227 (1822).

office of the power to issue grants of common lands, regardless of whether the lands have been formally determined to be commons. A court adopting the voidable approach, however, gives greater protection to private property rights and thus enhances the integrity of marketplace transactions. Because a voidable title arguably could be passed to a good faith purchaser who takes without notice of the public interest,²⁶² grantees of common land having the requisite status could be protected despite the existence of public rights.²⁶³ Also, this approach would provide greater protection for reliance interests and thus would offer greater incentive for private development. As recent litigation in Virginia indicates, grants of common land may not be challenged until hundreds of years after the original conveyance from the land office.²⁶⁴ Furthermore, determining whether a particular tract of land falls within the scope of the 1780 Act often is a difficult and uncertain process involving consideration of complicated factual and legal issues not easily resolved without judicial assistance. Numerous evidentiary problems arise because of the incomplete nature of the old land records and other historical documents, while legal issues raised by the Act often lack a predictable or clear answer.²⁶⁵ In these types of situations, striking down grants to private parties involving 1780 commons seems unfair and counterproductive.

Although the Supreme Court of Virginia never has directly confronted the policy choice underlying the void-versus-voidable issue, it has responded to the legal question on several occasions, adopting the void approach with little, if any, explanation. In *Garrison v. Hall*, for example, the court declared that if a grant included lands protected by the 1780 Act, the grant would be “void as to such part” as is necessary for the enjoyment of the common rights of fishing, fowling, and hunting and “valid as to the residue.”²⁶⁶ The court then continued: “But if no such exempted lands at the date of the grant were so embraced, but have been subsequently by the encroachment of the ocean, or bay, and rivers and creeks, the grant for such part was valid when it emanated from the Commonwealth, and must continue to be valid.”²⁶⁷

This statement by the court demonstrates that the key time in evaluating the validity of a grant under the 1780 Act is not years later when the grant is challenged, but rather at the date of issuance of the grant from the Commonwealth. Equally as important, by explaining the conclusion concerning the relevant time framework in terms of a grant’s validity, the court reveals its reason for adopting the void approach: grants from the land office embracing common lands at the time of conveyance would be void because that office would lack the power to execute the grant. The court, however, does not offer any other explanation, policy or otherwise, for its conclusion that such grants would be void.

²⁶². See *Deacons v. Doyle*, 75 Va. 258, 262 (1881).

²⁶³. See *id.*

²⁶⁴. See *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E.2d 866 (1982).

²⁶⁵. For a discussion of the practical and legal problems raised by application of the 1780 Act, see *infra* chapter 19.

²⁶⁶. 75 Va. 150, 164 (1881).

²⁶⁷. *Id.*

The adoption of the void approach in *Garrison* affirms a similar position taken in an earlier case, *Norfolk v. City of Cooke*.²⁶⁸ Like in *Garrison*, the court in *Cooke* declared grants of certain lands such as the beds of navigable rivers to be void, explaining that the patent could confer on the patentee only "such title as was in the commonwealth."²⁶⁹ Because the bed of a navigable river was "incapable of being granted to any individual,"²⁷⁰ any grant encompassing the bed would be void. Although the court did not expressly state that such lands could not be granted because of the common lands exemption, it cited to a later version of the 1780 Act to support its conclusion that the state could not alienate the bed.²⁷¹ Like in *Garrison*, though, the court in *Cooke* failed to engage in any policy analysis in explaining its position.²⁷²

Perhaps strong public policy considerations motivated the court in *Garrison* and *Cooke* to interpret strictly the prohibition against grants of common lands. But, whatever the reason, the court also has made its position clear, on several other occasions, that not all grants of interests in common lands are void. In *Power & Kellog v. Tazewells*, for example, the court concluded that a one-year assignment of oyster beds, executed pursuant to an 1873 Act, transferred "an exclusive right to the use and occupancy of beds or shores of creeks ... for the purpose of planting or sowing oysters," even though the assigned beds "might theretofore have been used or exercised in common by the citizens of the commonwealth."²⁷³ The statutory provision in dispute authorized the assignment of this exclusive right "by the inspector of the district" to owners or occupiers of waterfront property where the beds or shores were suitable for planting or sowing oysters.²⁷⁴ In analyzing the

²⁶⁸. 68 Va. (27 Gratt.) 430 (1876).

²⁶⁹. *Id.* at 433.

²⁷⁰. *Id.*

²⁷¹. *Id.*

²⁷². See also *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 138 Va. 461, 122 S.E. 344 (1924). In *James River* the court questions whether the land office ever could grant the beds of navigable waters under the 1780 Act. The court first focused on the purpose of the 1779 land office act, which was to promote the expansion of population throughout the vast, untouched lands of the state, and in so doing, to tap the natural resources of the state and increase the state's productive wealth. See Act of May, 1779, ch. 13, 10 HENING'S STAT., *supra* note 2, at 50 (1822). This objective, the court believed, would preclude lands under water from being considered "waste and unappropriated lands." A second reason for questioning the land office's power over beds was that, later in the 1779 Act, the legislature expressly mentioned land partly or occasionally under water. See *id.* at 61. This reference led the court to conclude that whenever such lands were intended to be included they would be specifically mentioned. As the court further explained, "[t]he rights and interests of the State in the beds of its navigable waters are of a peculiar nature and would seem too valuable to be open to purchase by anyone who may offer the nominal price therefore asked by the State for its 'waste and unappropriated lands.'" *James River*, 138 Va. at 473, 122 S.E. at 348.

The actions of the legislature also support the adoption of the void approach because it tended to pass special acts to sell public lands, which generally were not liable to normal entry and survey procedures. See, e.g., 2 VA. CODE app. II, chs. 36, 37, 42, 46 (1819); see also *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 166-167 (1854).

²⁷³. 66 Va. (25 Gratt.) 786, 789 (1875).

²⁷⁴. Act of Apr. 1, 1873, ch. 333, §§ 6-8, 1872-1873 Va. Acts 311; see also *Tazewells*, 66 Va. at 787-88.

interest created by the statutory transfer, the court described the interest as “more in the nature of a lease” than a license.²⁷⁵ As the court explained, a license is “nothing more than an excuse ... [to do an] act which would otherwise be a trespass;”²⁷⁶ yet permission to take oysters was not needed under the facts before it since the “privilege was enjoyed independently of the statute.”²⁷⁷ To avoid interpreting the Act as serving a superfluous purpose, the court decided that the purpose of the Act was to give “an exclusive right to use, occupy or take the profits of lands by planting or sowing oysters upon it” for one year in exchange “for a consideration payable to the state, the proprietor.”²⁷⁸ But, despite this decision, the court was unwilling to identify further the type of interest created under the statute, other than to conclude that the interest was an exclusive one that defeated any public rights.²⁷⁹

Power & Kellog v. Tazewells establishes that the 1780 ban against grants applies only to transfers by the land office. Transfers of interests in common lands by other state agencies are not affected, even if they involve conveyances of estates such as leasehold interests. Additionally, the decision demonstrates that although the state land office may not grant any interest in 1780 commons, the state legislature may, through subsequent legislation, modify the ban against grants of 1780 commons by authorizing transfers of interests in lands previously used in common.

A second decision, *Commonwealth v. City of Newport News*, further supports the observation that the 1780 Act does not provide absolute protection for common lands. In that case the court stated that although the Commonwealth’s power over tidal waters and beds may be subject to certain limitations like the federal right of navigation,²⁸⁰ the state legislature generally is free to transfer interests in tidal waters and lands to private parties.²⁸¹ More specifically, in the context of the common right of fishery, the court observed that

the State legislature, in the absence of any constitutional provision on the subject, has the right to take away ... [the right of fishery in tidal waters] or authorize, permit or suffer its tidal waters on their bottoms to be used

275. 66 Va. at 791.

276. *Id.* at 790 (citing *Cook v. Stearnes* reported as *Cook v. Stearns*, 11 Mass. 533 (1814)).

277. *Tazewells*, 66 Va. at 791.

278. *Id.*

279. *Id.* Besides suggesting that the interest resembled a lease, the court also stated that the interest could, in the alternative, be classified as a license coupled with an irrevocable interest. But, in either case, the court noted that the interest involved an exclusive right of use. *Id.* at 792.

280. 158 Va. 521, 543-44, 164 S.E. 689, 695-96 (1932). Other limitations on the state’s power over tidal waters and beds include the rights and obligations of the state as sovereign existing under its constitution and under the concept of the *jus publicum*. Although the constitutional limitations are obvious, the impact of *jus publicum* is not. That concept basically was derived from “pre-existing laws, rights, habits, and modes of thought of the people who ordained it,” which the court conceded could limit a state. *Id.* at 545, 164 S.E. at 696. See generally *supra* chapter 5 (discussing the development of the *jus publicum* and the public trust).

281. The state legislature can transfer these lands to private parties because they hold a proprietary right, or *jus privatum*, “in all the lands and waters, including tidal waters and their bottoms, within its territorial limits,” *Newport News*, 158 Va. at 541, 164 S.E. at 695, that are not subject to the *jus publicum*. *Id.* at 547-49, 164 S.E. at 697-98.

for purposes which impair or even destroy their use for purposes of fishery, and may lease, or sell to private persons portions of its tidal bottoms with the right to use them for private purposes to the exclusion of the use of the waters thereover for purposes of fishery.²⁸²

Although the *Newport News* controversy did not involve the 1780 Act, a subsequent version of the Act was in effect at the time of the decision.²⁸³ Apparently the court believed that only the state or federal Constitution could impose limitations on the ability of the state legislature to alienate lands subject to common use.²⁸⁴ The court's failure to consider the 1780 prohibition thus suggests, implicitly at least, that the prohibition is to be strictly construed and that it may be circumvented by subsequent legislative action.²⁸⁵

^{282.} *Id.* at 552, 164 S.E. at 699. A 1924 decision, *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, contains language very similar to that used in *Newport News*. At one point, for instance, the *James River* court observes that there are certain public uses of navigable waters, like navigation, which the state cannot take away from the people; but subject to these few uses, "there is no reason why the beds of navigable streams may not be granted unless restrained by the Constitution." 138 Va. 461, 469, 122 S.E. 344, 346 (1924). Apparently the court meant grants by the legislature, because in the next sentence the court explains its position by referring to the legislature. See *id.* Unlike *Newport News*, though, *James River* later includes fishing as one of the public rights limiting the power of the state to dispose of tidal beds. *Id.* at 470, 122 S.E. at 347. Because the court in *James River* was discussing the effect of section 175 of the Virginia Constitution on the state's power of alienation immediately before this reference to fishery, see *id.* at 470, 122 S.E. at 346-47, the court conceivably could have been referring only to those public fishing rights protected by the constitutional provision.

^{283.} VA. CODE § 1338 (1887).

^{284.} *Newport News*, 158 Va. at 548-49, 164 S.E. at 697. Although the court also identified the *jus publicum* as a third limitation on the state legislature, the court's own definition of that phrase suggests that it is a constitutional limitation. After describing the *jus publicum* as "the right of jurisdiction and dominion for governmental purposes over all the lands and waters within its territorial limits, including tidal waters and their bottoms," *id.* at 546, 164 S.E. at 696, the court then notes that "the Constitution impliedly denies to the legislature the power to relinquish, surrender or destroy, or substantially impair the *jus publicum*," *id.*, 164 S.E. at 697. The only state constitutional limitation considered by the court was section 175, concerning "natural oyster beds, rocks, and shoals." This section required the legislature to hold certain oyster lands in trust for the people of the state and prohibited it from renting, leasing, or selling such lands. *Id.* at 553, 164 S.E. at 699; cf. *James River*, 138 Va. at 470, 122 S.E. at 346-47. For further discussion of the oyster provision, see *infra* § 18.3.B.1.

^{285.} The court's discussion in *Newport News* of the state's power over its tidal resources may, however, be limited to the public right of fishery, for nowhere in its discussion does the court actually state that the General Assembly may transfer a fee interest in other tidal resources. Cf. *Darling v. City of Newport News*, 123 Va. 14, 18-19, 96 S.E. 307, 308 (1918) (where the court strictly construes a grant in derogation of public rights). But see *James River*, 138 Va. at 469, 122 S.E. at 346 (where the court suggests that the state may grant beds of navigable streams unless the Constitution prohibits such a grant).

Allowing the state to grant the beds of navigable streams except when the grant would impair the public right of navigation or violate a constitutional restraint is consistent with the English approach to alienation. See *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139, 167 (where the court acknowledged "that no grant by the Crown of part of the bed of the sea or bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation"); *Gann v. Free Fisheries of Whitstable*, 11 H.L.C. 192, 208, 11 Eng. Rep. 1305, 1312 (1865) ("[i]f the Crown ... grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even

A third case decided before *Newport News* and after *Tazewells* is somewhat inconsistent with those two decisions, suggesting that the 1780 prohibition is not as restrictive in scope as they would indicate. In that case, *Darling v. City of Newport News*, the court concluded that a party taking an interest under a Virginia oyster law only acquired a limited right to cultivate oysters on designated beds. All other rights held by the public or by private riparians were preserved. The court explained by observing that “[g]rants in derogation of the common or public rights” must be strictly construed.²⁸⁶ According to the court, “[n]othing passes except what is granted specifically or by necessary implication.”²⁸⁷ The majority opinion in *Darling*, however, failed actually to apply this rule of construction to common rights like fishing protected under the 1780 Act. It instead gave a more limited decision, concluding that the assignee of the oyster beds took subject to the public’s right to use the waters above the beds for sewage.²⁸⁸

Unlike the majority’s approach, the dissent in *Darling* closely adheres to the legal principles announced in *Tazewells* and *Newport News*. Indeed, the dissent even refers to the *Tazewells* decision in analyzing the interest acquired under the oyster assignment, concluding, as *Tazewells* did, that the interest was an exclusive right of use that could be protected by remedies available under property law.²⁸⁹ In an opinion more analytical than the majority’s, the dissent advances several persuasive arguments to support the position that in certain situations public rights can be restricted by exclusive grants to private parties. For example, in response to the majority’s statement that grants in derogation of public rights must be strictly construed, the dissent notes that this rule applies only where the grant is ambiguous and that in the case before the court the statute “unquestionably” granted exclusive fishing rights.²⁹⁰ Also, the dissent points out that the version of the 1780 Act in force at the relevant time specifically provided that the common rights of the public could be withdrawn “by special grant.”²⁹¹ The statutory provision authorizing the assignment of oyster beds to private parties qualified as a special grant, according to the dissent.²⁹² Finally, the dissent suggests that any exemption from grant contained in the commons statute is merely “a self-imposed limitation of the sovereign right of the Commonwealth” to grant interests in protected areas, which could be waived later by the legislature.²⁹³ Thus, although the dissent recognizes that the common

if it be expressly granted to him, which in any way interferes with the enjoyment of the public right”).

286. 123 Va. 14, 18, 96 S.E. 307, 308 (1918).

287. *Id.*

288. *Id.* at 20-21, 96 S.E. at 308-09.

289. *Id.* at 29, 38-39, 96 S.E. at 311, 314-15 (Sims, J., dissenting); see *Power & Kellogg v. Tazewells*, 66 Va. (25 Gratt.) 786, 790-92 (1875).

290. *Darling*, 123 Va. at 38, 96 S.E. at 314 (Sims, J., dissenting).

291. *Id.* at 28, 96 S.E. at 311; see VA. CODE § 1338 (1904).

292. *Darling*, 123 Va. at 28, 39, 96 S.E. at 311, 314 (Sims, J., dissenting).

293. *Id.* at 28, 96 S.E. at 311. More specifically, the court was describing a specific exemption for “any natural oyster bed, rock or shoal” contained in later versions of the 1780 Act. *Id.*; see VA. CODE § 1338 (1904); *id.* § 1338 (1887); *id.* ch. 62, § 1 (1873).

egislation preserves public rights in certain resources, it also concludes that his legislation does not prevent the General Assembly from subsequently authorizing transfers of interests in these resources to private parties.

The *Newport News* decision suggests that the dissenting opinion in *Darling* has acquired more acceptance than the majority, at least with respect to the question of the legislature's power to restrict public rights. At several different places in its opinion in *Newport News*, the court discusses or cites the dissenting opinion in *Darling*.²⁹⁴ Although the *Newport News* court also refers to the majority opinion in *Darling*, it does so primarily to support its conclusion that the discharge of sewage in tidal waters is a valid public use which the General Assembly has the power to authorize even though the use may restrict other uses of the waters.²⁹⁵ That the court in *Newport News* relied on the dissent's approach suggests that the clause in the 1780 Act prohibiting grants of common land is being interpreted fairly narrowly in Virginia. As the dissent in *Darling* pointed out, although the legislature decided to protect certain public rights in the 1780 Act, it also has the power to decide otherwise by, for example, authorizing assignments of exclusive rights in protected resources. But even this power to restrict protected common rights through subsequent legislation is limited by federal and state constitutional law.²⁹⁶

B. Burden of Proof and Other Miscellaneous Issues.

Although the 1780 Act clearly expresses the legislature's intent to preserve certain lands for public use, the Act fails to provide a clear allocation of the burden of proof between public and private concerns. Several Virginia Supreme Court decisions indicate that the party claiming the commons exemption from grant bears the burden of proving that a particular tract of land qualifies for the Act's protection. In *French v. Bankhead*, for example, the court stated that "[a]s a general rule, all lands which had never before been patented are to be considered as waste and unappropriated, and are liable to location" under the land grant act.²⁹⁷ Almost thirty years later, the court in *Garrison v. Hall* relied on this statement to support its conclusion that the burden of proof falls on the party claiming the 1780 Act's exemption. More specifically, the court stated: "To show that said tract ... or any part of it falls within the reservation or exception of the act of 1780, the *onus* is on them."²⁹⁸

Finally, *Miller v. Commonwealth* indicates that the burden of proof is on the party asserting rights of common, and not on the private party. Although the court in *Miller* never expressly states who bears the burden of proof, the

294. See, e.g., *Newport News*, 158 Va. at 547-48, 552, 164 S.E. at 697, 698-99.

295. *Id.* at 554-56, 164 S.E. at 699-700.

296. See, e.g., *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892) (where the Supreme Court discusses a limitation arising from the Constitution); VA. CONST. art. XI, § 3 (formerly § 175) (where the Virginia Constitution imposes a limitation).

297. 52 Va. (11 Gratt.) 136, 168 (1854).

298. 75 Va. 150, 154 (1881) (emphasis in original).

court does state that "there is no evidence tending to show that the land lying between high and low-water marks which is here involved was ever 'used as common to all the good people'" of Virginia within the meaning of legislation affecting common rights.²⁹⁹ This statement, when considered in light of the facts of *Miller*, suggests that the court placed the burden on the party claiming common rights. The dispute in *Miller* involved a criminal prosecution for unlawful hunting on marshland between the high and low water marks. Whether the accused violated the law depended on whether a private riparian could prohibit the public from hunting on the intertidal strip without his consent. After a lengthy discussion of the meaning of commons and of legislation affecting commons, the court upheld the conviction. Although the discussion of the court's analysis is not appropriate now, one factor that played a key role in the court's holding was its statement that there was no evidence of common use.³⁰⁰ The court thus appeared to place the burden of establishing a commons exemption on the accused, the party claiming the privilege of hunting on common land.

The Virginia Supreme Court's allocation of the burden of proof in the above cases does not appear to be entirely consistent with early English and colonial law. As the *Miller* court itself explained, a presumption existed under English law that title to the shores remained in the Crown. Although the King generally had the right to convey parts of the shore to private persons, the law presumed that he did not do so, and "[s]o long as this strip of land remained ungranted, or unappropriated by the king ... the people had the use thereof for purposes of navigation and fishing"³⁰¹ Eventually this notion that title

299. 159 Va. 924, 928, 166 S.E. 557, 558 (1932). The legislation referred to by the court was the boundary extension statute of 1819, which defines the relationship between private and public interests in the shores of tidal waters. VA. CODE ch. 87, § 1 (1819). For a discussion of this statute see *infra* chapter 11.

300. See 159 Va. 924, 928, 951, 166 S.E. 557, 558, 566 (1932). For further discussion of *Miller* see *infra* § 19.3.A.

301. *Miller*, 159 Va. at 929, 166 S.E. at 558. Thomas Digges was the first advocate of the theory that "an[e] wastes of or in the seas shores of Englande" belonged to the Crown unless they had been expressly granted away. See T. Digges, *supra* note 243, at 204. Because the land grants from the Crown rarely included specific reference to the shores, many riparian owners would have lost their rights to the foreshore under this theory. To avoid this situation, the English courts initially refused to recognize this presumption. See, e.g., *supra* chapter 5, notes 87-89 and accompanying text.

Lord Hale refined the theory somewhat, making it more acceptable to the courts. He argued that, as a derivative of the feudal system, the shorelands must belong to the Crown unless title had been given away. But he also recognized the possibility of private ownership and advocated the use of a rebuttable presumption. According to Hale, title should be presumed to be in the Crown unless the evidence indicated otherwise. Facts helpful in overcoming the presumption included "constant and usual fetching gravel and sea-weed and sea-sand between the high-water and low-water mark, and licensing others so to do; inclosing and imbanking against the sea, and enjoyment of what is so inclosed; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of a manor; and such like." M. Hale, *supra* note 27, at 394.

Under Hale's rebuttable presumption theory, the Crown seldomly prevailed in a dispute with a riparian owner. According to one English court, any act of ownership could be used as evidence to rebut the prima facie presumption of the Crown's ownership so long as the "act was such and so

was *prima facie* in the Crown developed into a means for protecting the public's interest in tidelands.³⁰²

Granted, there were several different ways to rebut the presumption of title in the Crown. Proof of ownership of an exclusive fishery along the foreshore, for example, raised a presumption of ownership of the shore as well.³⁰³ The overall effect of the *prima facie* theory, though, was to require the party

done that those who were interested in disputing the ownership would be aware of it." Lord Advocate v. Blantyre, 4 App. Cas. 770, 791 (1879). For a thorough discussion of the arguments of the Crown and of the problems facing it in these riparian ownership disputes, see Attorney-Gen. v. Corporation of London, 8 Beav. 270, 50 Eng. Rep. 106 (1845). Because the Crown rarely prevailed in these cases, one commentator concludes that Hale's *prima facie* doctrine "was invented for the purpose of giving the Crown a standing in court upon which he might succeed in getting possession of some portions of the seashore through the inability of the nominal owners to establish their title." 1 H. FARNHAM, *supra* note 206, § 39c.

302. While Digges' *prima facie* theory proposed that the King owned all ungranted waste lands solely because he was the King, Hale's doctrine was based on the belief that the Crown represented and personified the public interest. Hale's premise thus permitted him to argue that the Crown could grant the shore to private owners and still retain the rights of navigation and fishery for the public. Under this doctrine then, the courts could protect the public interest while allowing land titles to remain in private ownership. See 1 H. FARNHAM, *supra* note 206, § 39b.

303. Attorney-Gen. v. Emerson, 1891 A.C. 649, 654; see also Holford v. Bailey, 13 Q.B. 426, 444, 116 Eng. Rep. 1325, 1332 (1850). However, "[a] grant of the foreshore between high and low-water mark admittedly would not of itself convey the right to a several fishery over it." Emerson, 1891 A.C. at 654. Lord Hale presumed ownership of the shore from ownership of an exclusive fishery. He reasoned that "a several fishery was not a bare right of liberty or *profit à prendre*; but the right of the very water and soil itself, for he made wearers in it." M. Hale, *supra* note 27, at 387; see also *id.* at 384-406. As Moore and Moore further explain, because fisheries were profits of the soil, the owner of a fishery either must be or must derive his title to the fishery from the owner of the soil. Moreover, ownership of the soil could be inferred from the use of fishing structures permanently attached to the soil. S. MOORE & H. MOORE, *supra* note 206, at 23; see also Emerson, 1891 A.C. at 656. Farnham disagreed with this presumption, asserting that title to a fishery is derived from the soil and not the reverse. See 2 H. FARNHAM, *supra* note 206, §§ 371, 374.

For evidentiary reasons, the common law has followed the presumption that the owner of a fishery owns the underlying soil. Originally, ownership of fisheries evolved from prescription rather than from title and express grants. In order for an owner to establish his prescriptive right, he would establish his use of the fishery rather than the soil. However, because the use of a fishery generally implied the use of the soil underneath, a fishery rarely would be granted without the soil. S. MOORE & H. MOORE, *supra* note 206, at 23.

Another way to prove ownership of the shore involved establishing a usage, which presupposes a grant of general terms. Chad v. Tilsed, 2 Brod. & B. 403, 129 Eng. Rep. 1022 (1821). Also, a party could prove ownership if he had been granted a manor abutting the shore, together with the rights of wreck and fishery, and if the party and his tenants had for many years exercised the rights of taking sand, stones, and seaweed, and allowing others to enter only by permission. Calmady v. Rowe, 6 C.B. 861, 136 Eng. Rep. 1487 (1848). One court, for example, determined that ownership could be shown through a grant of seashore property, as well as the rights to wrecks, flotsam, jetsam, and all other appurtenances belonging to it, but enjoyment of the shore had to continue for at least seventy years. Healy v. Thorne, 4 Ir. R.-C.L. 495 (1869). Another court found that every act shown to have been done by the claimants that would not be lawful unless they were owners of the foreshore was evidence of a grant if done for 40 years. Lord Advocate v. Blantyre, 4 App. Cas. 770 (1879). Generally the courts required occupation of the land in question. Attorney Gen. v. Jones, 2 H. & C. 347, 353, 159 Eng. Rep. 144, 146-47 (1863).

claiming a private interest to establish his title.³⁰⁴ Given that the English legal system eventually used the *prima facie* theory to protect public rights in tidal resources and that that theory affected the development of the law governing tidal resources in America,³⁰⁵ it would seem that the Virginia Supreme Court's allocation of the burden of proof contradicts the common law origins of Virginia's commons concept.³⁰⁶

The enclosure statutes enacted during the colonial period also support allocating the burden to the private party. As explained earlier, colonial enclosure laws presumed that unenclosed lands could be used as common grazing grounds. Although a private landowner could stop such use by building a lawful fence, the burden was on the private party to take affirmative action. Perhaps the court in *Miller* recognized this placement of the burden when it tried to distinguish 1780 commons from unappropriated lands generally subject to common use. If this is so, then the Virginia court's approach would not necessarily be inconsistent with the English rule since the two would be speaking to different types of commons.

Furthermore, the burden under the enclosure laws arguably has been shifted away from the private landowner, at least in those counties adopting the no-fence rule. As previously mentioned, the no-fence statute authorizes counties to replace the state enclosure laws with the common law no-fence rule, which requires owners of animals to keep their stock on their own land or within enclosures. Thus, unlike the early enclosure statutes, the no-fence law places the burden on the party claiming the right to common use.

In any event, the law governing the burden of proof issue is sufficiently confusing and uncertain to justify resolving the issue on the basis of policy considerations and rules of statutory construction. At least during the late 1600's and the 1700's, colonial land policy favored private appropriation and development of land. The colonial land system offered many incentives to encourage settlement by private parties.³⁰⁷ When Virginia became a state, the

304. *Attorney-Gen. v. Chamberlaine*, 4 K. & J. 292, 300, 70 Eng. Rep. 122, 125 (1858); *Attorney Gen. v. Richards*, 2 Anstr. 603, 614, 145 Eng. Rep. 980, 983 (1794).

305. See generally *supra* chapter 5.

306. Consistent with the presumption that title to the foreshore remained in the King, English law also placed the burden on private landowners seeking to extinguish common rights by inclosure. Under early inclosure acts, a landowner seeking to inclose land subject to common rights had to prove that there was sufficient pasturage left for his tenants and that the tenants would have free egress and regress to the pasture. See, e.g., Statute of Merton, 1235, 20 Hen. 3, ch. 4, 1 D. PICKERING, *THE STATUTES AT LARGE* 27 (Cambridge 1762); see also *supra* chapter 6, notes 36-38 and accompanying text. More modern inclosure statutes generally require the party applying for inclosure to provide satisfactory proof "that such inclosure would be expedient, having regard as well to the health, comfort, and convenience of the inhabitants," and "that such inclosure will be of benefit to the neighbourhood as well as to private interests, and to those who are legally interested in any such commons." Commons Act, 1876, 39 & 40 Vict., ch. 56, preamble. For further discussion of the inclosure movement, see *supra* § 6.1.

307. For example, to encourage settlers to move to the newly formed counties of Spotsylvania and Brunswick, the 1720 legislature freed the inhabitants of the counties from public levies for 10 years. Act of Nov., 1720, ch. 1, 4 HENING'S STAT., *supra* note 2, at 77, 78 (1820).

General Assembly continued this policy, favoring private development by passage of the 1779 land grant act. As the preamble of the 1779 statute indicates, the General Assembly wanted to "encourage the migration of foreigners," "promote population, increase the annual revenue" and discharge the public debt by authorizing the granting of Virginia's "large quantities of waste and unappropriated lands."³⁰⁸

But in drafting the 1779 legislation, the General Assembly failed to provide for public use of certain tidal resources, which had long been recognized in Virginia. In an attempt to rectify this oversight, the General Assembly passed the 1780 commons act and clarified that Virginia's land policy also included protection of the public interest. As the language of that later Act indicates, it creates an exception to the 1779 statute's land grant procedures, referring to the protected lands as being "excepted out of the said recited" land act.³⁰⁹ When one section of a state's code creates an exception to another, the burden of proof generally rests with the party claiming the benefit of the exception.³¹⁰ Also, traditional canons of statutory construction dictate that where the scope of an exception is ambiguous, a court is to construe it strictly and to treat the main act as expressing the legislature's policies.³¹¹ Given these rules of construction and given Virginia's strong bias towards private property rights, a bias which has existed since colonial days, it seems reasonable to resolve the burden of proof issue by placing the burden on those claiming protection of the commons act. Any other result would seriously undermine third party reliance on the recording statute and would detrimentally affect the expectation interests of private owners of waterfront property, many of whom have invested heavily in the development of their property.

C. *The Retroactivity Issue.*

Besides being unclear about the legal effect of grants of land later found to be common, the language in the 1780 Act prohibiting the issuance of grants also raises a timing issue. As Embrey explains, this issue concerns whether the prohibition applies just to grants already issued, to grants to be issued, or to both.³¹² Although the Act clearly states that surveys "already made, or which may hereafter be made" fall within its scope, the Act does not contain a similar provision for grants. Embrey argues that the Act should not have retroactive effect and should apply only to "grants 'to be issued' after the passage of the act whether the surveys were made before, or after, the act."³¹³ He explains the special provision for surveys by pointing out that the land grant procedure is a lengthy process, with surveys sometimes "lay[ing] over six months or longer before being carried into grant."³¹⁴

308. Act of May, 1779, ch. 13, 10 *id.* at 50 (1822).

309. Act of May, 1780, ch. 2, 10 *id.* at 226, 227.

310. See 2A C. SANDS, *supra* note 21, § 47.11 (1984).

311. *Id.* For suggestions for resolving the burden of proof issue, see *infra* § 21.5.

312. A. EMBREY, *supra* note 1, at 202.

313. *Id.*

314. *Id.*

Embrey's conclusion seems logical in light of the nature of the survey and entry procedures. As Embrey explained, a significant time lapse can exist between the completion of the entry and survey procedures and the issuance of a grant. Also, some important differences exist between a land survey and a grant. The Virginia Supreme Court pointed out one significant difference in *Powell v. Field*.³¹⁵ In that case the court stressed that the state does not lose its right to withdraw lands from patent until a party has filed an application, along with a "plat, survey and proof, for a grant, thereby showing that a certain tract of land has been segregated from other public lands"³¹⁶ Until all those actions are taken, the party does not acquire any vested rights against the state.³¹⁷ Furthermore, even after the party files a survey, his claim still may be challenged through caveat proceedings.³¹⁸ Thus, unlike the entry or survey, the grant represents a final divestment of the state's title.

Embrey's conclusion also seems logical in light of the problems caused by retroactive statutes. Applying statutes retroactively raises some fundamental fairness concerns. As one commentator explained, these questions have caused courts to declare retroactive statutes to be unconstitutional, except where the purpose of the statute is curative or remedial.³¹⁹ In his view, the most fundamental concern raised by retroactive statutes is that they prevent a party from "plan[ning] his conduct with reasonable certainty of the legal consequences."³²⁰ Further, the enactment of retroactive statutes upsets the stability of past transactions and causes people to suspect that such legislation was passed to aid specific persons.³²¹ Apparently recognizing the problems inherent in retroactive legislation, the Virginia General Assembly has tended to include savings or grandfather clauses in its legislation. Although the 1780 Act does not have such a clause, a prospective application

315. 155 Va. 612, 155 S.E. 819 (1930).

316. *Id.* at 619, 155 S.E. at 821.

317. *Id.*

318. See, e.g., Act of May, 1779, ch. 13, § 3, 10 HENING'S STAT., *supra* note 2, at 50, 58-59 (1822). For a detailed explanation of the caveat procedure, see *Noland v. Cromwell*, 18 Va. (4 Munf.) 155, 160-61 (1814). See generally *supra* §§ 8.3-8.5 (discussing 1779 land grant act and procedures).

319. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 703-06 (1960). All laws that are retroactive on their face are not necessarily unconstitutional unless "their retroactive effects would offend the Constitution." *Chase Securities v. Donaldson*, 325 U.S. 304, 315-16 (1945). To determine the validity of retroactive legislation, courts tend to balance considerations on both sides of the issue. Hochman, *supra* at 694-95. According to Hochman, the factors that should be examined during the balancing analysis include: "the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters." See *Id.* at 697.

320. Hochman, *supra* note 319, at 692.

321. *Id.* at 692-93.

would avoid the potentially serious fairness concerns identified above.³²²

322. When potentially retroactive statutes are being examined to determine their constitutionality, close inspection is given to the exact words of the statute. Because courts prefer a prospective rather than retroactive interpretation of a statute, "a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application." 2 C. SANDS, *supra* note 21, § 41.04 (1986). The Virginia courts have accepted this policy against retroactive interpretation. See, e.g., *City of Richmond v. Supervisors of Henrico County*, 83 Va. 204, 212, 2 S.E. 26, 30 (1887).

Because of the judiciary's reluctance to uphold retroactive statutes, Embrey's conclusion that the 1780 statute is not retroactive seems reasonable. The statute is not retroactive on its face and thus would not prevent a Virginia court from finding that the statute was prospective for all grants made after the statute was passed. Furthermore, if the statute was interpreted as retroactive, such an interpretation might offend the due process clause of the fifth and fourteenth amendments. See U.S. CONST. amends. V, XIV. To the extent that a retroactive interpretation would recognize public interests in lands privately owned and not previously subject to those rights, it would infringe on private property rights. For further discussion of the takings issues raised by public rights theories, see *infra* § 20.2.A.

CHAPTER 10

PUBLIC INTEREST LEGISLATION ENACTED DURING THE PERIOD 1781-1818

§ 10.1. The 1792 Act.

In 1792, the General Assembly passed an act "reducing into one, the several acts concerning the land-office."¹ Besides adopting most of the provisions of the 1779 land grant act governing acquisition of waste and unappropriated lands,² the 1792 Act also continued to protect certain lands for common use. More specifically, section 6 of the 1792 Act provided:

That all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek, *and the bed 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 as a common to all the good people thereof, shall be, and the same are hereby excepted out of *this* act; and no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law to pass any estate or interest therein.³

With the exception of the italicized part, the common lands provisions of the 1792 Act are identical to those contained in the actual body of the 1780 Act.⁴ That exception, though, clearly enlarges the scope of the 1780 statute. As the Virginia Supreme Court once observed in discussing the impact of the change, the 1792 Act not only protects from grant "the tracts of land which are reserved from grant by the act of 1780," but also "the beds of any river or

1. Act of Dec. 17, 1792, ch. 24, 1 S. SHEPHERD, THE STATUTES AT LARGE OF VIRGINIA 64 (Richmond 1835) [hereinafter cited as SHEPHERD'S STAT.].

2. The only significant differences in the land grant provisions of the 1779 and 1792 Acts concern the amount of consideration to be paid and the manner in which it could be paid. Under the 1779 Act, one hundred acres of land could be acquired for £40. Act of May, 1779, ch. 13, 10 W. HENING, THE STATUTES AT LARGE 50, 52 (1822) [hereinafter cited as HENING'S STAT.]. Under the 1792 Act, consideration for the same amount of land was only two dollars. Further, the 1792 Act allowed payment in one of three ways: in specie, in auditor's warrants, or in audited certificates. 1 SHEPHERD'S STAT., *supra* note 1, § 5, at 65.

3. 1 SHEPHERD'S STAT., *supra* note 1, § 6, at 65 (emphasis added).

4. Instead of using the phrase "this act" as in the 1792 Act, *see id.*, the 1780 commons act uses the language "out of the said recited act" to refer back to the 1779 land grant act mentioned in the 1780 Act's preamble. Act of May, 1780, ch. 2, 10 HENING'S STAT., *supra* note 2, at 226-27. Also, the 1792 Act does not contain the preamble found in the 1780 Act. That preamble provided:

Whereas certain unappropriated lands on the bay, sea, and river shores, in the eastern parts of this commonwealth, have been heretofore reserved as common to all the citizens thereof, and whereas by the act of general assembly entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," no reservation thereof is made, but the same is now subject to be entered for and appropriated by any person or persons; whereby the benefits formerly derived to the publick therefrom, will be monopolized by a few individuals, and the poor laid under contribution for exercising the accustomed privilege of fishing:

creek in the eastern parts of the Commonwealth which have been used as a common to all the good people thereof.”⁵

Besides making one significant addition to the 1792 Act, the General Assembly also omitted one important part of the 1780 legislation from the 1792 version — the preamble of the 1780 statute. The deletion of the preamble from the 1792 commons legislation could be interpreted as an attempt by the legislature to expand, or at least clarify, the intended scope of the 1780 Act. In the 1780 statute, the preamble refers to “certain unappropriated lands ... heretofore reserved as common” in describing the lands to be protected. The language following the enacting clause, however, refers to those lands as “all unappropriated lands ...,” thus creating a conflict, or at least some doubt, as to the scope of the 1780 Act.⁶ Whereas the phrase in the preamble suggests that the Act should be interpreted restrictively, the language in the Act itself supports interpreting the Act as a declaration that all identified areas are common lands.⁷ By deciding to delete the preamble from the 1792 Act, the General Assembly arguably resolved that conflict in favor of the broader declaratory approach.⁸ A commons statute passed in 1802 lends even further support to this conclusion.

§ 10.2. The 1802 Act.

A. General Provisions.

Twenty-two years after the General Assembly passed the 1780 statute to protect lands in the eastern part of the state, it enacted a statute giving similar protection to certain lands on western waters. Explaining in the preamble that many settlers apparently had located on “the banks, shores, and beds of the rivers and creeks in the western parts of this commonwealth, which were intended and ought to remain as a common to all the good people thereof,”⁹ the legislature then protected those lands from grant. That prohibition simply provided “[t]hat 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 herein.”¹⁰ Except for the vague reference to “grant ... for the same,” the actual provisions of the 1802 statute do not otherwise identify the lands to be protected by the legislation.

5. *Miller v. Commonwealth*, 159 Va. 924, 949, 166 S.E. 557, 566 (1932). For further discussion of the significance of this change, see *infra* § 12.1.

6. See 10 HENING’S STAT., *supra* note 2, at 226, 227.

7. For further discussion of the declaratory-versus-restrictive debate, see *supra* § 9.2.C.1.

8. As one party argued in the dispute *Bradford v. Nature Conservancy*, because the 1792 General Assembly dropped the word “certain” when it deleted the 1780 Act’s preamble, the legislature must have intended the 1792 Act to mean that “all the area was a commons and not permitted to be granted.” Supplemental Brief for Appellant-Appellee at 4-5, *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E.2d 866 (1982) (emphasis in original).

9. Act of Jan. 15, 1802, ch. 7, 2 SHEPHERD’S STAT., *supra* note 1, § 1, at 317.

10. *Id.* § 2, at 317.

Under traditional rules of statutory construction, the explanatory language appearing in the preamble of the 1802 Act normally would not be binding.¹¹ But where the statutory provisions are vague and the facts recited in the preamble are "precise and objective," courts are willing to use the preamble as an interpretative tool.¹² The facts recited in the preamble to the 1802 Act admittedly seem judgmental, reflecting both conclusions of law and conclusions of fact about the status of the identified lands as commons. But the actual provisions of the 1802 Act also refer to the lands identified in the preamble. Because of this reference, and because of the preamble's specificity in identifying the types of lands to be protected in the western parts of the state, it seems reasonable to interpret the preamble's identification of protected lands as conclusive.¹³

Regardless of whether this interpretation is accepted, a comparison of the language used in the 1780, 1792, and 1802 Acts to identify protected areas indicates that the legislature was gradually broadening those areas and thus expanding public rights. Whereas in 1780 the protected areas just included "unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the eastern parts,"¹⁴ by 1792 they also included "the bed of any river or creek"¹⁵ in eastern Virginia. Finally, in 1802 the General Assembly added certain lands "in the western parts"¹⁶ of the state to the protected category. Assuming those lands included "the banks, shores, and beds of the rivers and creeks" in western Virginia, then by 1802 it was clear that the General Assembly believed that certain lands on watercourses throughout the state should be reserved for common use by the public and that those lands should include the shores or banks of watercourses.

Such a comparison also suggests that the General Assembly intended the commons legislation to be a statutory declaration that all the identified areas were commons and therefore exempted from grant. Although, as mentioned earlier, the legislature seemed somewhat tentative in the 1780 Act, using restrictive language on at least one occasion to refer to the protected areas, the General Assembly used less restrictive language in both of the later Acts. This observation is especially true of the 1802 Act, where the legislature refers to the identified areas as lands "which were intended and ought to remain as a common."¹⁷ If the legislature viewed the banks, shores, and beds

11. As Sutherland explains in his treatise on statutory construction, "[b]ecause of its position preceding the enacting clause, it has often been said that matter in the preamble, not having been 'enacted,' cannot be given any binding legal effect." 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.04 (4th ed. 1984); see also *Yazoo & Miss. Valley R.R. v. Thomas*, 132 U.S. 174, 188 (1889) (where the Court states that because "the preamble is no part of the act, ... [it] cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous"). Cf. *supra* chapter 9, notes 21 & 199 (discussing the role of preambles and enacting clauses).

12. 1A C. SANDS, *supra* note 11, § 20.03 (1985); see also *supra* chapter 9, note 199.

13. See also *Miller v. Commonwealth*, 159 Va. 924, 949, 166 S.E. 557, 566 (1932).

14. 10 HENING'S STAT., *supra* note 2, at 227.

15. 1 SHEPHERD'S STAT., *supra* note 1, § 6, at 65.

16. 2 *id.* at 317.

17. *Id.*

of western waters as lands which were intended to remain as commons, then it must have held a similar view of lands on eastern waters. Settlers immigrating to western Virginia usually brought with them ideas and principles developed in the east. Because the western part of Virginia lacked the tradition of public lands present in the eastern part since the 1600's, the conclusion that the 1802 Act incorporated the concept of common lands that developed in the east seems inescapable.¹⁸

B. *The Boundary Between Eastern and Western Waters.*

Although the 1780, 1792, and 1802 Acts all distinguish between the eastern and western parts of the Commonwealth in defining areas reserved for common use, none of these Acts defines the dividing line between east and west.¹⁹ Rather, like many other statutes that also use the eastern-western distinction as a legal benchmark,²⁰ the commons statutes appear to assume that the line of demarcation is known. Although this failure to define a line of demarcation that appears so frequently in colonial and early statehood legislation seems puzzling, it is not as perplexing once the customs of the time are understood. As Embrey explains in his work *Waters of the State*, "[i]t was a custom of the Colonial Assembly" to use geographic features, like watersheds and ridges, as dividing lines.²¹ Furthermore, although the legislature could have clarified the issue by at least naming the particular watershed or ridge serving as a boundary, a more precise definition probably would have been impossible. Often the only way to identify the exact location of a ridge or watershed was by actually surveying the area in question.

But even though there may be a logical explanation for the legislature's failure to define the dividing line between eastern and western Virginia, there is no satisfactory way to resolve the ambiguities posed by that failure. Those commentators who have attempted to determine the boundary between eastern and western Virginia disagree about what conclusions should be

18. Accord Supplemental Brief for Appellant-Appellee at 5, *Bradford v. Nature Conservancy*, 224 Va. 181, 294 S.E.2d 866 (1982) (where Bradford suggested that if all the western shores of Virginia, which do not have the tradition of public lands, are considered common, then it is only logical that all the eastern shores, which have such a tradition, must be considered common).

19. According to Embrey, the words "waters" and "parts" were used interchangeably. A. EMBREY, *WATERS OF THE STATE* 279 (1931).

20. See, e.g., Act of Jan. 17, 1804, ch. 94, 3 SHEPHERD'S STAT., *supra* note 1, at 72 ("An ACT to amend the act, intituled, 'An act providing for the opening a road from the upper navigation of James river, to the upper navigation of Kanawha river'"); Act of Dec. 13, 1796, ch. 47, 2 *id.* at 47 ("An ACT giving further time to the owners of certain surveys to return the plats and certificates thereof into the land office, and a further time to the owners of entries on the western waters to survey the same"); Act of Oct., 1785, ch. 27, 12 HENING'S STAT., *supra* note 2, at 72 (1823) ("An act appropriating certain arrears of public taxes to the opening a waggon road from the eastern to the western waters"); Act of Oct., 1783, ch. 19 [sic], 11 *id.* at 347 ("An act to ascertain the mode of obtaining grants to certain lands on the western waters"); Act of Oct., 1783, ch. 28, *id.* at 345 ("An act for establishing inspections of tobacco on the western waters, at Portsmouth, in the county of Norfolk, and at Gibson's, in the county of King George"); see also A. EMBREY, *supra* note 19, at 285-87.

21. A. EMBREY, *supra* note 19, at 279.

reached. In his work the *Institutes of Common and Statute Law*, Minor uses the Blue Ridge to describe the effect of the 1780 and 1802 Acts. He states, in rather cursory terms, that "by statute the beds of the bays, rivers and creeks, and the shores of the sea within the jurisdiction of the commonwealth, are reserved, which were granted by the State east of the Blue Ridge after 1780, and west of it after 1802."²² Although Minor then cites several sources as support, he fails to explain or analyze them.²³

In contrast, Embrey discusses the boundary question in depth, devoting an entire chapter to the matter in his work *Waters of the State*. Concluding that "the 'dividing line' is not the Blue Ridge," but rather "the water shed in the Alleghenies,"²⁴ Embrey explains that the Alleghenies divide "the waters flowing westward to the Ohio and Mississippi from the waters flowing eastward to the Chesapeake Bay and the Atlantic Ocean."²⁵ He then observes that "[a] study of the map of the territory of Virginia" reveals that, with a few minor exceptions, all major rivers in Virginia flowing to the Atlantic or Chesapeake Bay "rise in the eastern sides and foot hills of the Alleghenies,"²⁶ while all major waters in Virginia flowing to the Mississippi begin on the western side of the Alleghenies.²⁷

Besides relying on hydrography to support his conclusion, Embrey also cites to numerous legislative acts that appear to recognize, in contexts other than common rights situations, the Alleghenies as the boundary between eastern and western Virginia. Because Embrey thoroughly discusses these acts in his work, they will be summarily reviewed now.

Most of the acts cited by Embrey as support for his conclusion can be classified according to their basic purpose or function and placed into one of five categories. The first category, which includes acts affecting the land grant process, tends to contain provisions specifically naming counties lying on western waters. For example, a 1779 Act dealing with the settling of titles to unpatented lands on eastern and western lands identifies "the counties on the western waters" as Monongalia, Yohogania, Ohio, Augusta, Botetourt, Greenbrier, Washington, Montgomery, and Kentucky.²⁸ Although some of these counties appear to straddle the Allegheny Mountains, containing land lying east and west of the Alleghenies, the majority of the counties lie west of

22. 2 J. MINOR, *INSTITUTES OF COMMON AND STATUTE LAW* 23 (4th ed. 1892).

23. The sources cited by Minor tend to support his general statement of the law that grants of land along nonnavigable rivers extend to the middle of the river. The sources, however, fail to explain why he chose the Blue Ridge as the dividing line between eastern and western Virginia. See *id.*; see also 3 J. KENT, *COMMENTARIES ON AMERICAN LAW* 427 (12th ed. 1873); 1 J. LOMAX, *DIGEST OF THE LAWS OF REAL PROPERTY* 661-63 (2d ed. 1855); *Mead v. Haynes*, 24 Va. (3 Rand.) 33, 35-36 (1824); *Hayes v. Bowman*, 22 Va. (1 Rand.) 417, 420 (1823).

24. A. EMBREY, *supra* note 19, at 279.

25. *Id.*

26. *Id.* at 281.

27. *Id.* at 282.

28. Act of May, 1779, ch. 12, 10 HENING'S STAT., *supra* note 2, at 35, 43 ("An Act for adjusting and settling the titles of claimers to unpatented lands under the present and former government, previous to the establishment of the commonwealth's land office"); see A. EMBREY, *supra* note 19, at 283-84.

the Allegheny. Other acts in this category contain similar provisions identifying counties located west of the Allegheny as counties on "western waters" or in the "western frontier," thus supporting Embrey's conclusion that those mountains divide the eastern and western parts of Virginia.²⁹

A second group of acts dealing with the problem of delinquent land taxes tends to contain only general references to the Allegheny Mountains and thus fails to provide direct support for Embrey's position. An 1831 Act, for instance, provides for the forfeiture of lands "lying west of the Alleghany Mountains," but does not describe those lands as part of western Virginia.³⁰ Yet, although most of these acts do not specifically link the Alleghenies to western waters, they do show that counties west of the Allegheny often were treated as a unit by the legislature.

The third category, which includes legislation passed to improve transportation between eastern and western portions of Virginia, provides better support for Embrey's conclusion than the second group. As a 1780 Act demonstrates, these acts tend to link western or eastern waters with specific counties or geographic areas. In that 1780 Act, the legislature authorized the Court of Greenbrier County to open a wagon road from the courthouse to eastern waters, or, in the words of the legislature, "from Greenbrier courthouse to the Warm Springs, or to the waggon road at the mouth of the Cow Pasture river."³¹ As Embrey notes, this road would have crossed the Alleghenies, not the Blue Ridge.³²

The fourth category of acts includes legislation enacted to establish new counties on western waters. Probably providing the greatest support for Embrey's conclusion, this group tends to define lands on western waters by naming specific counties located westward of the Alleghenies as lands on western waters. One act in particular refers specifically to the "ridge which divides the Eastern from the Western waters" in setting forth the boundaries for several new counties.³³ Although the Act does not specifically name that ridge, the Act does identify the ridge as the place where "the line between Augusta and Botetourt crosses the same, and running thence the same course continued ... west to the Ohio."³⁴ As Embrey explains, a letter addressed to

29. Act of May, 1781, ch. 18, 10 HENING'S STAT., *supra* note 2, at 431 ("western frontier" included Lincoln, Fayette, and Jefferson counties); Act of May, 1780, ch. 36, *id.* at 315 (counties named as being upon the "western waters" included Jefferson, Fayette, and Lincoln, which are west of the Alleghenies); see A. EMBREY, *supra* note 19, at 284-85.

30. Act of Apr. 1, 1831, ch. 28, § 5, 1831 Va. Acts 87, 90. *But see* Indexes to Va. Acts of 1833, 1839, 1842-1844, 1845 (where acts concerning lands west of the Alleghenies are indexed under the headings "Western Titles," "Western Land Titles," and "Western Lands"); A. EMBREY, *supra* note 19, at 289.

31. Act of Oct., 1780, ch. 20, 10 HENING'S STAT., *supra* note 2, at 367, 367 *see also* Act of Oct., 1779, ch. 12, *id.* at 143, 143 (which authorized the "marking and opening" of a road over the Cumberland mountains to link people settling "upon the waters of the Ohio river ... in the county of Kentucky" with "eastern ... parts thereof").

32. A. EMBREY, *supra* note 19, at 285.

33. Act of Oct., 1777, ch. 18, 9 HENING'S STAT., *supra* note 2, at 420, 421 (1821) ("An act for forming several new counties, and reforming the boundaries of two others"); see A. EMBREY, *supra* note 19, at 294.

34. Act of Oct., 1777, ch. 18, 9 HENING'S STAT., *supra* note 2, at 420, 421 (1821).

him from the state geologist subsequently identified the ridge “‘which divides the Eastern from the Western Waters’” as “‘the crest of the divide between the streams, flowing eventually into the Atlantic Ocean, and the streams, flowing eventually into the Mississippi River.’”³⁵

The final group of statutes analyzed by Embrey includes acts passed to establish courts for counties on western waters and to define their jurisdiction. Unlike the other four categories, which appear to define western waters as lying west of the Alleghenies, this group of statutory provisions uses the Blue Ridge as the dividing line between eastern and western for purposes of regulating the state’s courts. An 1803 Act, for instance, suspends the power of the courts to process grants for lands located on the west side of the Blue Ridge.³⁶ Similarly, an 1836 Act “explain[ing] the laws concerning western land titles” contains provisions defining “the duty of the circuit superior court for each county situate west of the Blue Ridge mountains.”³⁷

Despite these references, Embrey still believed that the Acts supported his view. As he explained, the Acts used the Blue Ridge Mountains as the dividing line because “some of the counties which saddled the Alleghenies, had Courts East of the Alleghenies and West of the Blue Ridge.”³⁸ The Blue Ridge thus provided a more effective dividing line for defining the duties of courts having jurisdiction over counties with western lands. But where “geographical divisions” were intended, the Allegheny Mountains “became the dividing line.”³⁹ For example, as the 1836 Act mentioned above also demonstrates, the Alleghenies were used when the legislature dealt with matters affecting substantive rights in realty.⁴⁰

One type of statute that was not considered by Embrey and that weakens his conclusion is the legislation regulating unlawful hunting, fishing, and fowling. An 1872 Act, for example, bans the hauling of seines and the taking of fish with nets “in the Roanoke river, or the waters thereof, west of the Blue Ridge.”⁴¹ Similarly, a 1924 law prohibits hunting, ranging, shooting,

35. A. EMBREY, *supra* note 19, at 300, quoting a personal letter from Arthur Bevan, State Geologist, December 24, 1930. For other acts defining lands on western waters, see Act of May, 1780, ch. 36, 10 HENING’S STAT., *supra* note 2, at 315 (“An act for establishing three new counties upon the western waters”); Act of May, 1780, ch. 9, *id.* at 237 (“An act for giving farther time to obtain warrants upon certificates for pre-emption rights, and returning surveys to the Land Office, and for other purposes”); see also A. EMBREY, *supra* note 19, at 284-85.

36. The Act provides that the laws of the Commonwealth relative to “settling the titles and bounds, and directing the mode of processioning lands on the west side of the Blue Ridge, shall be suspended for the term of eight years.” Act of Jan. 30, 1804, ch. 98, 3 SHEPHERD’S STAT., *supra* note 1, at 76, 76; see A. EMBREY, *supra* note 19, at 286.

37. Act of Mar. 30, 1837, ch. 8, § 3, 1836-1837 Va. Acts 10; see A. EMBREY, *supra* note 19, at 287-88.

38. A. EMBREY, *supra* note 19, at 288.

39. *Id.*

40. Act of Mar. 30, 1837, ch. 8, § 11, 1836-1837 Va. Acts 12. The matters referred to concern a party’s right to recover possession or seisin of land. According to Embrey, the 1803 Act, discussed *supra* at note 36 and accompanying text, also could be explained in this manner. A. EMBREY, *supra* note 19, at 287.

41. Act of Mar. 20, 1872, ch. 244, § 1, 1871-1872 Va. Acts 325 (repealed by Act of Apr. 30, 1874, ch. 325, 1874 Va. Acts 449).

trapping, fishing, or fowling "on or in the lands, waters, millponds, or private ponds of another other than uninclosed mountain lands west of the Blue Ridge mountains not used for cultivation."⁴² Because these Acts deal with hunting on unenclosed lands and with fishing in state waters, both of which relate to the exercise of common rights, the Acts arguably should receive substantial weight in defining the boundary between eastern and western.⁴³ It is equally as plausible, though, that the legislature used the Blue Ridge as the dividing line because it better approximated the line where watercourses became nonnavigable, a characteristic which is important in determining whether the public has any hunting, fishing, or fowling rights.⁴⁴ But, whatever the reason, this type of legislation, standing alone, probably should not outweigh the numerous acts identified by Embrey.

Although Embrey's discussion of the legislative acts is thorough, other perspectives should be considered in defining the boundary between east and west. Political evidence, for example, tends to support treating the Blue Ridge as the dividing line. From 1776 until 1830, membership in the Virginia Senate was heavily balanced in favor of those counties east of the Blue Ridge, with twenty out of twenty-four members elected from that area.⁴⁵ When reapportionment occurred in 1830, the balance of power in the Senate equalized somewhat, but even then counties east of the Blue Ridge held six more slots.⁴⁶ But even if the Blue Ridge Mountains served as the key political boundary between eastern and western Virginia in the late 1700's and early 1800's, that fact admittedly does not mean that the Blue Ridge should be identified as the dividing line for all other purposes. As Embrey observed in discussing the significance of the western courts legislation, the General Assembly may have preferred to use the Blue Ridge as a political boundary because of the fact that several western counties straddled the Alleghenies.⁴⁷

42. VA. CODE § 3338 (1924). The original version of the 1924 Act appeared in 1916 without the qualifying language "lands west of the Blue Ridge." See Act of Mar. 11, 1916, ch. 152, § 33, 1916 Va. Acts 257, 263. The phrase "lands west of the Blue Ridge" was not added until 1922 when the law was amended and reenacted. See Act of Mar. 4, 1922, ch. 123, 1922 Va. Acts 208. Other examples include VA. CODE § 3206 (1919) (fixing time and manner of catching trout and black bass in waters "west of Blue Ridge mountains"); *id.* § 2071 (1898) (dealing with "unlawful hunting, trespassing, & c., on another's land" east of the Blue Ridge); Act of Mar. 18, 1884, ch. 514, 1883-1884 Va. Acts 695 (regulating gaming "west of the Blue Ridge"); Act of Mar. 9, 1880, ch. 274, 1879-1880 Va. Acts 268 (protecting fisheries "east of the Blue Ridge").

43. See generally *supra* § 9.2.C.2 (defining common use), and § 9.3.B (discussing permissible public uses on common lands).

44. If watercourses are nonnavigable, then they generally cannot be used by the public. See generally 1 H. FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* §§ 27, 57, 133-145 (1904).

45. See VA. CONST. of 1776, para. VI; Ordinance of May, 1776, ch. 6, 9 HENING'S STAT., *supra* note 2, at 128 (1821); JOURNAL OF THE SENATE OF VIRGINIA app. B at 80 (1796).

46. VA. CONST. of 1830, art. III, § 3, states that the Virginia senate shall consist of thirteen representatives from counties west of the Blue Ridge and nineteen representatives from counties east of that Ridge. See also JOURNAL OF THE SENATE OF VIRGINIA app. B at 80 (1796).

47. A. EMBREY, *supra* note 19, at 288. Since 1790, the crest of the Blue Ridge has formed the western boundary line for Loudoun, Fauquier, Culpeper, Madison, Orange, Albemarle, Amherst, and Franklin. No county straddles the Blue Ridge. *Map of Maryland & Virginia: Counties & Regions*, ca. 1970, in N. RISJORD, *CHESAPEAKE POLITICS, 1781-1800*, at 75 (1978).

As with the western courts legislation, use of the Alleghenies for political purposes would have created jurisdictional problems.

Although judicial opinion on the matter has varied, it also tends to undermine Embrey's conclusion. For example, as Embrey himself pointed out, the Supreme Court of Virginia, in *Mead v. Haynes*,⁴⁸ indicated that the 1792 commons act protecting certain lands in the eastern parts of Virginia controlled whether the bed of a creek located in Bedford County, just east of the Blue Ridge, was "grantable."⁴⁹ Then, more than 100 years later, the court, in *Boerner v. McCallister*,⁵⁰ described the 1780 commons act as applying to land lying "in the eastern or tidewater section."⁵¹ At least during the 1600's and 1700's, when the eastern-versus-western distinction was developing, the common law differentiated between tidal and nontidal waters in defining public and private rights. This differentiation thus supports the court's use of the fall line as the dividing line.⁵²

Only two decisions appear to support Embrey's position about the boundary between eastern and western waters. In the earlier of the two decisions, *McClung v. Hughes*,⁵³ the court refers to the Alleghenies in describing the 1779 land act, stating that "the Commonwealth opened the land office for the disposition of all the unpatented land from the Alleghany mountains to the Mississippi."⁵⁴ Then, in a later decision, *Commonwealth v. Garner*,⁵⁵ one member of the court refers to counties west of the Alleghenies in describing the development of the western frontier.⁵⁶ Even these statements, though, do not provide significant support for Embrey's position.

But when the boundary question is examined from an historical perspective, strong support can be found for Embrey's conclusion. Very early in the

48. *Mead v. Haynes*, 24 Va. (3 Rand.) 33 (1824).

49. See *id.* at 36; A. EMBREY, *supra* note 19, at 290 (where he acknowledges that *Haynes* dealt with a creek east of the Blue Ridge and that no case can be found that refers to "a stream further West, or between the Blue Ridge and the Alleghenies").

50. *Boerner v. McCallister*, 197 Va. 169, 89 S.E.2d 23 (1955).

51. *Id.* at 174, 89 S.E.2d at 26.

52. American courts have long since rejected the tidal-versus-nontidal distinction. As the Supreme Court explained in an 1892 decision, "there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters" *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 435 (1892). In Virginia the tidal waters distinction has remained important for certain limited purposes like the regulation of fishing. See, e.g., Act of Apr. 14, 1877, ch. 325, 1876-1877 Va. Acts 330 (which declared that no person shall "put out any pound net, purse net, trap, or fixed apparatus, or device of any kind whatsoever, in any of the tidal waters of this commonwealth"). For further discussion of the regulation of fishing in tidal waters, see *infra* chapter 18. But this distinction would appear to be more a function of geography than anything else. Perhaps the court in *Boerner* was confused by later commons legislation which specifically protects the Eastern Shore. See, e.g., Act of Feb. 24, 1888, ch. 219, 1887-1888 Va. Acts 273 ("An Act to prevent the granting of unappropriated marsh or meadow lands on the eastern shore of Virginia") (current version at VA. CODE § 41.1-4 (1986)).

53. 26 Va. (5 Rand.) 453 (1827).

54. *Id.* at 490.

55. 44 Va. (3 Gratt.) 655 (1846) (1st ed. 1847).

56. See *id.* at 774-79. But some of the counties referred to lie to the east of the Alleghenies. See *id.*

1600's, the colonial government began to encourage frontier development, providing numerous incentives for settlement.⁵⁷ Although this expansionist land policy encouraged westward migration, it eventually led to a conflict with the French and Indians over rights to frontier land. Recognizing this problem, the colonial government adopted a variety of protective measures in the 1700's to strengthen Virginia's claims to frontier lands and to minimize the chance of fighting.

Concern over the security of the frontier, for instance, prompted the governor and his council to order suspension of surveying on the frontier. Issued in 1749, the order directed that "no Surveyor do survey any Lands beyond the great Mountains, commonly call'd the blue Ridge ... nor receive Entries for such Lands till further orders"⁵⁸ Several months later, though, the Board of Trade issued instructions granting leave to survey lands "on the South Side of the River Alligane, otherwise the Ohio, and betwixt the two Creeks and the yellow Creek on the North Side of the River, or in such other Parts of the West of the Great Mountains," on the condition that the surveyors erect a fort on the surveyed lands and establish a settlement sufficient to house a garrison "for the Security and Protection of the Settlers."⁵⁹ Unlike the Governor, the Board of Trade apparently believed that the development of forts on the frontier would serve as a more effective defense against the French and Indians than a policy of restraint.⁶⁰

Only a few years later, the governor's philosophy prevailed when the Board of Trade decided to prohibit all settlement west of the Appalachian Mountains.⁶¹ The Board apparently was following the example set by Pennsylvania.

57. In 1642, for example, the colonial legislature passed an Act to encourage settlers "to undertake the discovery of a new river" southwest of the Appomattox River. The Act allowed explorers to retain all profits from their journey. Act of Mar., 1642-1643, act 36, 1 HENING'S STAT., *supra* note 2, at 262, 262 (1823). A similar order passed in 1652 gave certain individuals named in the order a fourteen year license to all profits they might discover in their western explorations. Order of Nov., 1652, *id.* at 376-77. Also, in a 1653 order, the legislature authorized any party so desiring "to discover the Mountains," so long as they had sufficient supplies. Order of July, 1653, *id.* at 381.

58. 5 EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA 288 (1739-1754) [hereinafter cited as EXEC. J.].

59. *Id.* at 295. The instructions issued by the Board of Trade were dated July 12, 1749. Earlier instructions by the Council, dated May 5, 1749, defined the Great Mountains as being "commonly call'd the blue Ridge" *Id.* at 288. Because of the closeness in time, it seems logical to assume that the Council also considered the Blue Ridge Mountains to be the Great Mountains when it issued the July instructions.

60. In order to continue encouraging frontier development, the Board of Trade recommended, in a 1754 report, that management of Indian affairs be placed under royal control. 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 903-06 (E.B. O'Callaghan ed. 1855) [hereinafter cited as COLONIAL DOCUMENTS — NEW YORK]; see 1 C. ALVORD, THE MISSISSIPPI VALLEY IN BRITISH POLITICS 117 (1917). Taking this advice, the Crown appointed two Indian superintendents in 1756. The first superintendent for the northern region, William Johnson, and his secretary, Peter Wraxall, reported in January, 1756, on the fraudulent purchases of land from the Indians by land companies and on the encroachment upon Indian hunting grounds by settlers. 7 COLONIAL DOCUMENTS — NEW YORK, *supra*, at 15-29 (1856); 1 C. ALVORD, *supra*, at 119-20.

61. The Allegheny Mountains are part of the Appalachian system. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 55 (1961) (definition of "allegheny").

In 1758 Pennsylvania had released to the Indians “all the Lands within their province to the Westward of the *Allgeheny* hills,” promising “[t]hat no white people should make Plantations or Settlements on the Lands to the Westward of those Hills.”⁶² Eventually the Crown also adopted this policy of restraint. More specifically, in 1763 the Crown issued a Royal Proclamation providing in pertinent part:

And we do further declare it to be our royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson’s bay company, *as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest*, as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.⁶³

Although the Proclamation did not expressly identify the dividing line, the reference to the source of the rivers flowing into the sea suggests that it is the Alleghenies. Instructions subsequently issued by the Crown also support this

Although the Board of Trade recognized the many abuses noted by the 1756 Johnson report, *see supra* note 60, the Board’s policy toward the Indian problems did not change until 1761. In October of that year, the Earl of Egremont was appointed the Secretary of the Southern Department for the Board. Probably due to his influence, the November 1761 Board report concluded that “[t]he granting Lands hitherto unsettled and establishing Colonies upon the Frontiers before the claims of the Indians are ascertained appears to be a measure of the most dangerous tendency.” The report stated that settlements should be stopped “‘until the Event of the War is determined and such Measures taken thereupon, with respect to our Indian Allies as shall be thought expedient.” 7 COLONIAL DOCUMENTS — NEW YORK, *supra* note 60, at 473-74 (1856); *see* 1 C. ALVORD, *supra* note 60, at 125.

The Privy Council adopted the Board’s report, directing the Board to send instructions on the subject to the colonial governors. *See* 7 COLONIAL DOCUMENTS — NEW YORK, *supra* note 60, at 477-78 (1856); *see also* 1 C. ALVORD, *supra* note 60, at 126. The instructions, dated December 2, 1761, provided that the governors and other appropriate officers were not to “pass any Grant or Grants to any person whatever of any lands within or adjacent to the Territories possessed or occupied by the said Indians or the Property Possession of which has at any time been reserved to or claimed by them.” 7 COLONIAL DOCUMENTS — NEW YORK, *supra* note 60, at 478 (1856); *see* 1 C. ALVORD, *supra* note 60, at 126.

The Board modified its policy of royal control over the sale of Indian lands in 1763 when Lord Shelburne replaced the Earl of Bute as President of the Board of Trade. Shelburne urged that a boundary line be established beyond which land could be purchased only from the Crown through its colonial agents. In a final report to the King dated June 8, 1763, the Appalachian Mountains were designated as the principal boundary line between the Indian lands and the colonies. *See* 1 C. ALVORD, *supra* note 60, at 162-78. The King reacted favorably to this report and again directed that instructions be drawn up to send to the colonial governors. *Id.* at 178.

62. JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA xi (1761-1765) (describing the terms of the Treaty of Easton).

63. Proclamation of 1763, 7 HENING’S STAT., *supra* note 1, at 663, 667 (1820) (emphasis added). A proclamation was issued, instead of the proposed instructions, because while the instructions were being drafted news reached England that war with the Indians had broken out again on the frontier.

interpretation, referring to illegal settlements made "westward of the Allegheny Mountains."⁶⁴

The Proclamation of 1763 had two immediate effects on Virginia. First, it removed the power of the governor and the council to issue grants for lands beyond the mountains. Second, because the Proclamation did not resolve the status of prior claims to affected lands, it clouded the title of settlers who already were located in the area and who were claiming under grants from the land companies or under military warrants. To protect their interests, many Virginians ignored the prohibitions of the Proclamation. This disobedience angered the King, prompting him to issue further instructions. Directed to William Penn, the Lt. Governor of Pennsylvania, the instructions provided:

Whereas, it hath been represented unto us that several persons from Pennsylvania and the back settlement of Virginia have emigrated to the westward of the Allegheny Mountains, and there have seated themselves on lands contiguous to the river Ohio, in express disobedience of our royal proclamation of October 7, 1763, it is, therefore, our will and pleasure, and you are enjoined and required, to put a stop to all these and all the other like encroachments for the future.⁶⁵

Although Virginians feared that the Proclamation of 1763 would act as a permanent bar to settlement on western lands, subsequent negotiations conducted between the Crown and the Indians alleviated this fear. These negotiations resulted in the Treaty of Fort Stanwix signed by the Six Nations Indians on November 5, 1768. According to the pertinent terms of the treaty, the Indians deeded to the Crown:

that Tract of land situate in *North America* at the Back of the *British Settlements*, bounded by a line which we have now agreed upon, and do hereby establish as the boundary between us and the British Colonies in *America* Beginning at the mouth of the *Cherokee* or *Hogohee* River where it emptys into the River *Ohio* and running from thence upward along the South side of the said River to *Kittanning* which is above Fort *Pitt*, from thence by a direct line to the nearest fork of the West Branch of *Susquehannah*, thence thro' the *Alleghany Mountains* along the South side of the said West Branch.⁶⁶

The resolution of the Indian boundary dispute renewed the settlement interests of those individuals who had prior claims to lands in the disputed area, either under land company grants or military warrants. Anticipating these claims, the House of Burgesses petitioned the governor in December of 1769 for instructions. In the petition, the Burgesses specifically asked whether the government intended "to confirm any Orders of Council for granting of Lands, lying between the *Alleghany Mountains*, and a Line that may be run from the Western Termination of the *North Carolina Line* to the Confluence of the *Ohio* with the *Mississippi*."⁶⁷ Apparently no satisfactory

64. J. PEYTON, HISTORY OF AUGUSTA COUNTY, VIRGINIA 121 (1882).

65. *Id.*

66. JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA xxviii, xxix (1766-1769) (emphasis in original).

67. *Id.* at 318, 319 (emphasis in original).

answer was received by the House of Burgesses because five years later, in 1774, the residents of Augusta County filed a petition complaining of the difficulty of obtaining title to lands west of the Allegheny Mountains. The entry in the *Journals of the House of Burgesses of Virginia* noting receipt of that petition identifies the petitioners as "several Persons, whose Names are thereunto subscribed, in behalf of themselves and other Adventurers and settlers upon the Western Waters, and lands to the Westward of the Allegany Mountains."⁶⁸

The only significant historical documents and events supporting adoption of the Blue Ridge as the dividing line appear to be several maps depicting the western frontier of Virginia and events relating to the defense of that frontier. A map entitled "Western Virginia, 1780," for instance, indicates that the region consists of all counties west of the Blue Ridge.⁶⁹ Other maps depicting the western frontier of Virginia contain similar suggestions, identifying as the frontier area lands west of the Blue Ridge.⁷⁰

Events and documents relating to defense tactics for the frontier also seem to define all lands west of the Blue Ridge as western Virginia. For instance, the records of the 1780 proceedings of the Virginia council reflect the receipt of a "Letter from the Lieutenants of the Northwestern Counties beyond the blue ridge on the plan of defence for the Western frontier."⁷¹ According to those records, the Council responded to that letter by advising the governor as to the placement and garrisoning of militia posts in the western frontier. Among those counties referred to were the counties of Shenandoah, Frederick,

68. The *Journals* entry provides in full:

A Petition of several Persons, whose Names are thereunto subscribed, in behalf of themselves and other Adventurers and settlers upon the Western Waters, and lands to the Westward of the *Alleghany* Mountains, in this Colony, was presented to the House and Read; setting forth, that the excessive and almost unsupportable expence of seating and planting those remote Lands, according to the Conditions of the Grants, and the Modes prescribed by the Laws now in force, will very much retard the settlement and cultivation of that part of the Country; that many of his Majesty's Subjects who have Titles and Claims to Lands upon the Western Waters, under the Charters, Laws and Customs of this Colony, under the Proclamation of this Government, in the Year 1754, and under the Royal Proclamation of 1763, are in danger of losing their Estates by forfeitures, for nonperformance of the said Conditions, which, it hath been impracticable for them to comply with; and that such of the Petitioners, who, as Officers or Soldiers in the first *Virginia* Regiment, have already obtained Patents, are subject to peculiar hardships, the Grants being to them in joint tenancy, and Partitions not being made, for that none of them can know what parts are their own; and therefore praying the House to take the Premises into Consideration, and grant the Petitioners such Relief as shall be thought just and reasonable.

Ordered, that the said Petition be referred to the Consideration of the Committee of Propositions and Grievances; and that they do examine the matter thereof, and report the same, with their Opinion thereupon, to the House.

JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA 127 (1773-1776) (entry for May 25, 1774) (emphasis in original).

69. *Map of Western Virginia, 1780*, in T. ABERNETHY, *WESTERN LANDS AND THE AMERICAN REVOLUTION* 65 (1959).

70. A 1790 map identifies all the counties of Virginia lying west of the Blue Ridge as being in the West Region. *Map of Maryland and Virginia: Counties and Regions, ca. 1790*, in N. RISJORD, *supra* note 47, at 75.

71. 2 JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA vi (1777-1781).

Rockingham, and Rockbridge, all of which extend to the Blue Ridge.⁷² The 1749 order described earlier⁷³ also used the Blue Ridge to define the frontier area subject to unrest and potential conflict with the French and Indians. As previously mentioned, that order suspended surveying of lands "beyond the great Mountains, commonly call'd the blue Ridge" because of concern over the security of those lands.⁷⁴ Significantly, this order not only used the Blue Ridge as the dividing line; it also identified the Blue Ridge as "the great Mountains," a phrase that appears frequently in other legislation.⁷⁵

Both types of evidence undermine Embrey's position that the Blue Ridge only was used as a dividing line in matters involving jurisdiction. In contrast to the evidence involving the western courts legislation and the political structure, these last two types represent a geographic division of Virginia. Jurisdictional problems would not result if the Alleghenies were used. That the Blue Ridge would be used as the dividing line for defense purposes is not surprising, though, since areas to the west of that ridge posed the same type of defense problems as lands to the west of the Allegheny. The land not only became more mountainous after crossing the Blue Ridge; it also was more sparsely populated and thus more susceptible to occupation by the enemy. Furthermore, the Blue Ridge provided a cleaner line of demarcation for defining defense plans since counties did not straddle it as extensively as with the Alleghenies.⁷⁶

In spite of this evidence suggesting that the Blue Ridge served as a boundary between western and eastern lands, a substantial amount of evidence still indicates that the Alleghenies provided the main basis for dividing eastern and western lands and waters. This evidence includes numerous legislative acts using the Alleghenies as a legal benchmark for defining their scope, as well as strong historical evidence. The dispute with the French and Indians, in particular, indicates that the Alleghenies were considered to be the primary dividing line between eastern and western waters and lands. This perception was reflected in documents issued by the King, entries in the *Journals of the House of Burgesses of Virginia*, treaties signed with the Indians, and even in petitions filed by ordinary settlers.

72. *Id.*; see *Map of Western Virginia, 1780*, in T. ABERNETHY, *supra* note 69, at 65; *Map of Maryland and Virginia: Counties and Regions, ca. 1790*, in N. RISJORD, *supra* note 47, at 75. A 1783 Virginia council proceeding also seems to indicate that in matters having to do with defense and the militia the Blue Ridge Mountains were considered the dividing line between the eastern and western parts of the state. In the proceeding the Governor was advised to "write to the recruiting Officers appointed for the Districts beyond the blue ridge ... to stop ... enlistments of Soldiers for the Continental Service ... and to call into the Treasury the recruiting money collected in the Western which have already been taken with respect to that collected on the eastern side of the blue ridge of mountains. 3 JOURNALS OF THE COUNCIL OF THE STATE OF VIRGINIA 238 (1781-1786).

73. See *supra* note 58 and accompanying text.

74. 5 EXEC. J., *supra* note 58, at 288.

75. See, e.g., *id.* at 295.

76. See N. RISJORD, *supra* note 47, at 75; *Map of Virginia Counties — 1735, Map of Virginia Counties — 1750, Map of Virginia Counties — 1763*, in 2 R. MORTON, *COLONIAL VIRGINIA* 563, 581, 742 (1960).