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THE COMMON LANDS CONCEPT: A "COMMONS" SOLUTION TO A COMMON ENVIRONMENTAL PROBLEM*

JULIAN C. JUERGENSMEYER** and JAMES B. WADLEY ***

The concept of "commons," long relegated to property law and antiquity and understood only in terms of quaint New England village greens, has recently been hoisted as a newly "discovered" flag of hope on the environmental protection flagpole.¹ To all but a handful of legal historians who have always known of its existence the discovery is a surprise. By "discovered," of course, we mean precisely the same thing as when we say Columbus "discovered" America or Speke "discovered" the origin of the Nile. We mean that someone has finally made something known to that part of the world or of society to which we happen to belong.

Although most of what has been written recently is actually better evidence of a misunderstanding of the concept than it is of the concept's utility, a serious attempt is nevertheless being made in the direction of dealing with one of today's most perplexing environmental problems within the confines of the communal ownership idea expressed in the "commons." Thus, the "commons" concept provides direction, if not a solution, to the problem of reconciling public interest with private ownership rights when, as happens increasingly often, the two conflict in the environmental arena.

An examination of "common lands" in American law must begin with an investigation of that concept in England for, as every American lawyer has been taught, American property law and any study of it begins in England in 1066. For some of the more esoteric property law doctrines one needs to go beyond 1066 to the pre-Norman era during which Germanic communal property law concepts governed the allocation and use of the land of England. The common lands concept is perhaps the best example of a modern property concept which had its origin in the distant past. As two English historians have recently observed: "the common lands of England and Wales are generally the most Ancient institution we now

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1. See Hull, *The Earth Commons: Limits & Rights of Access*, The Nautilus Papers, No. 3, November 8, 1972; Barnes & Casalino, *Who Owns the Land?* Clear Creek, December 1972, at 17; W. Hickel, *Who Owns America?* (1971).

possess; older by far than Parliament, older even than the manor within whose organization and control they subsequently fell."²

A classic source of learning on the common lands concept in English law, at least for American lawyers, is Sir Frederick Pollock's *The Land Laws*.³ That analysis will be used as the primary basis of the English historical discussion for this article.⁴ An understanding of the origin of the common lands concept in England, as with all other principles of English land law, requires one to think medieval or at least pastoral thoughts. If we were to conjure up, as does Sir Frederick, a "typical" English expanse of land at the time English property law was on the threshold of manhood, we would find:

... open and common lands, over which many persons have rights of putting so many beasts to graze, of cutting turf and underwood for the use of their habitations, and the like, according to the custom of the country and place.⁵

This close association of common lands with the manorial pattern of land allocation has caused some common law scholars to maintain that the concept of common lands was part and parcel of feudal landholding theory whereby the lord of the manor granted to certain tenants the right to share the use of designated parcels of land, and that this use continued with the acquiescence of successive lords until "favor" became "right."⁶ According to Pollock, the common

2. Royal Commission on Common Lands, (1963). The Royal Commission was set up in England in 1955, after two full decades of resistance to its organization. Sir Ivor Jennings, an experienced lawyer, served as chairman, George L. Wilde as secretary, W. G. Hoskins as historian and L. D. Stamp as geographer. Hoskins and Stamp were authors of appendices to the Royal Commission report as well as a book, *The Common Lands of England and Wales*. The contribution of these two is frequently used in this article, but unless the reference is specifically to the Royal Commission report, the citations are from the book (which was based on their work for the Commission).

3. F. Pollock, *The Land Laws* (1896).

4. No discussion is undertaken in this article of the concept in Scotland. It must be noted, however, that the classification scheme for commons differed greatly in Scotland from that used in England. In Scotland there are virtually no lands classified as commons today, and although the concept was well defined in the law, encroachments were quite commonly and successfully made. The destructive result of these enclosures was due largely to the fact that they were unchallenged. For an in-depth treatment of the subject, see Ian H. Adams, *The Legal Geography of Scotland's Common Lands*, to be published in French in the *Revue de l'Institut de Sociologie*.

5. F. Pollock, *supra* note 3, 5-6.

6. Several theories have been advanced to explain the origin of common lands in addition to the one mentioned here. See Hoskins & Stamp, *supra* note 2 at 6. For example, Kemble and Maurer support the mark as the origin. See *Essays in Anglo-Saxon Law* 82 (1876). Others have supported the vill, the hundred, the thorp or dorf, and the vicus. These theories are generally treated and refuted in Lodge, *The Anglo-Saxon Land Law in Essays in Anglo-Saxon Law*, 81-83, 91, 98 (1876). A general refutation of all theories opposed to the one adopted by the author of the present article is found in Hoskins and Stamp, *supra* note 2, at 6.

lands concept originated long before the feudal system. The rights to open and common lands were relics of the rights which belonged to the members of a township or agricultural community in the pre-Norman, i.e. Germanic law era, when the concept of private individual ownership of land hardly existed, and communal ownership, or at least communal right to use land, was the rule. As England changed and feudalism flowered, the Englishman's rights changed, but some rights simply endured. These were the rights he enjoyed as a member of some particular class and community.

He lived under customs and enjoyed franchises which might be peculiar to his native town or even his native parish. In the Middle Ages there were few holders of land, by however humble a tenure, who had not some kind of rights of common annexed to their holdings. And every village and township would no doubt be as anxious to exclude strangers from its woods and pastures as to preserve its ordinary members' rights in them against encroachment from within or from above.⁷

Along with the common lands concept that certain land was left to communal use rather than private individual ownership, the common law assimilated and later merged with it the concept of the privilege of common rights. In its early sense, all members of the community with common lands were equally entitled to the use and enjoyment of the common lands. The concept of rights of common altered this situation considerably. Common rights, in general, consist of privileges of use, i.e., the liberty of taking sand and gravel, of pasture, of cutting underbrush, etc., according to the customs of the particular neighborhood, and naturally depend upon the resources of the neighborhood. On the whole, rights of common are derived

either from the ancient use and enjoyment of undivided common land under the customs of the particular neighborhood, or from use and enjoyment really granted by lords to their inferior tenants in imitation of the ancient customs. The old common land, then, is represented on the one hand by such remnants of the common system of cultivation as now exist in England, or lately existed, on the other hand by rights of common and the like.⁸

Thus, after the incorporation of this idea into the common lands scheme, it was entirely possible that not all the members of a given village with common lands shared equally, or even at all, in the use and enjoyment of the lands. Those to whom the common lands originally belonged (and their heirs) retained their rights over the

7. Pollock, *supra* note 3, at 18.

8. *Id.* at 43.

common. In addition, others, perhaps of another village or even members of the same village who had moved in after the common originated but who lacked rights by descent, might have only one or another of the rights of common, *e.g.*, the right of pasturage, or of turbary. It was possible to have only a right of common without any other claim over the common lands. The close resemblance between this idea and that of an easement or a license has caused considerable confusion for the courts, lawyers and scholars. Much of the confusion undoubtedly results from the practice of overlapping uses of land.

A typical pattern of such usage was as follows: from seedtime to harvest the land was divided among several occupiers each of whom tilled his own portion; after the harvest, the land was opened to pasturage, sometimes to the same persons who occupied in severalty, sometimes to a larger class, and commonable hay and fields were also opened at the end of the harvest.

Before examining changes that were made in the common lands scheme by way of enclosure, implications of the institution of common lands itself must be briefly considered. It is important to note that where this institution prevailed one finds agricultural villages; whereas in those areas where only private individual ownership was the rule, one finds only scattered and independent homesteads. In addition, the existence of common lands was of tremendous importance to the peasant economy of England and Wales as a source of grazing and farming land as late as the eighteenth century (and is of some importance in the highland farming zone even today).⁹

Pollock traces the common lands concept backward from the time he wrote his treatise in the middle of the 19th century. In his time, common lands were viewed by many as a diminishing entity, eroded by the systematic enclosures and partitions of the immediately preceding generations. Even so, a generation earlier more than half the land of some English counties was under one or another variety of common land usages. Significantly, these usages were most prevalent in the parts of the country where the soil was most fertile, since the land could be cultivated at an early time and was therefore subjected to pre-Norman ownership concepts. "The history of commons until the second half of the nineteenth century," as one authority has observed, "was in the main a history of increasing pressure of population of a fixed supply of land,"¹⁰ and, as we noted above, Pollock's generation foresaw the extinction of the common lands, just prior to his writing.

9. Hoskins & Stamp, *supra* note 2, at 44.

10. Royal Commission, *supra* note 2, at 15.

There were three primary ways that this near extinction was brought about. The Statute of Merton¹¹ in the 13th century authorized the lords of manors to enclose for their own profit portions of the waste lands as long as they left enough unenclosed for the use of the commoners. The second method¹² was far less practical and required the consent of all the persons entitled to rights of common before enclosure could be allowed. The third method was the most thorough and was accomplished through the 1801 Enclosure Act.¹³ This act took over where the local acts of Parliament and old enclosures statutes left off. The 1801 measure set up a standing commission to conduct and regulate the enclosure of common lands. The purpose of this act was twofold: to bring fresh land into cultivation and to eliminate the old customs of cultivation by scattered parcels.

One other method of extinction merits notice. Some reduction of commons was achieved by way of encroachment by the rural poor who built cottages on the edge of the commons and enclosed small parts thereof for gardens. This type of settlement resembled our own "squatter" practice and had its own rules. It was widely believed, both in the highland zone and in the lowland, that if a house could be built in one night in the common, with smoke coming from its chimney before the sun rose, the owner had established his right. This right was extended in Wales to include all the land enclosed in one night which was within the throw of an axe from the dwelling!¹⁴

A reversal of the enclosing policy, as expressed in the earlier English statutes, began in the mid-1800's. Dr. Hoskins, writing for the Royal Commission on Common Land, has described the course and impetus of this reversal in policy:

Increased population and increased urbanization combined to make the common lands very valuable, on the one hand for fresh air, exercise, and recreation and on the other as tempting sites for speculative building near the expanding industrial towns. Legislative measures sought to regulate the competition for this valuable land. One example was the General Enclosure Act of 1845 which laid down first, that common land in the neighborhood of a populous place could be enclosed only by a provisional order; secondly, that health, comfort and convenience of the local inhabitants should be taken into consideration before such an order was made; thirdly, that no town or village green could be inclosed under the act; and fourthly, that the commissioners could specify, as a condition for

11. The Common Act (1236).

12. *Id.*

13. 41 *Geo.* 3, c. 109.

14. Hoskins & Stamp, *supra* note 2, at 52.

inclosure, the appropriation of an area for the purposes of exercise and recreation for the inhabitants of the neighborhood. Such measures made inclosure difficult and costly. In addition, they encouraged regulation.¹⁵

Not only were these Parliamentary limitations imposed on enclosures, but practical difficulties made inroads as well. Some areas simply refused to allow enclosure. A good case in point is the village of Otmoor in the early 1600's. As fast as the enclosing fences were built, they were torn down by the commoners. This state of rebellion persisted several years and effectively blocked enclosure efforts.¹⁶

Thus, in English common law the common lands concept is a purposely preserved vestige of communal ownership and rights to land use. These were originally preserved on behalf of a relatively small number of individuals, the residents of a village, for example, and ultimately preserved because they were deemed worthy of public use by virtue of their inherent public quality and hence set aside to be used for general purposes.

When English common law property concepts migrated to America, the common lands concept barely managed to survive the voyage, arriving in a drastically weakened condition.¹⁷ It should be noted at the outset that the difficulty of tracing the fate of the concept in America is compounded by the previously mentioned difficulty of defining the common lands concept in England.¹⁸ As is the case with most legal concepts and institutions, jurists developed the concept to explain, describe and govern a pre-existing lay practice or pattern of behavior, in this particular case, one which did not fit easily with other property law concepts. Thus, the concept of common lands in the common law was from its outset an exception or, perhaps, even a concession to vestiges of another legal system. Since that other legal system had never existed in the New World, and since the American colonists made no concessions to pre-existing local law as far as property law was concerned, any role which the

15. Royal Commission, *supra* note 2, 79-80.

16. An interesting and more detailed discussion of the troubles at Otmoor is found in Hoskins and Stamp, *supra* note 2, 55-60. Similar difficulties under the Enclosure Acts prompted such anonymous wit as the following—in addition to their rebellion:

The law locks up the man or the woman
Who steals the goose off the common
But the greater villain the law lets loose
Who steals the common from the goose.

Quoted in Barnes & Casalino, *supra* note 1, 18-19.

17. By way of comparison, in England and Wales, the concept has survived the rigors of time in admirable fashion. In 1963, there were in England and Wales 1.5 million acres of land officially classified and enjoyed as common lands. Hoskins & Stamp, *supra* note 2, at 3.

18. *Id.* at 6.

common lands concept was to play in the New World depended entirely upon any value its conceptual framework had to the colonists in effectuating their needs and goals concerning land ownership and allocation. In short, the concept developed in England to recognize and protect claims of common rights. In America, if it was to be used at all, it would have to be used to create common rights.

The search for the common lands concept in America leads one through a maze of confusion in early and contemporary America, centering around the relationship between public land, government-owned land, land owned as tenants in common by large numbers of people, "implied" or "automatic" easements and profits, water rights and even Indian lands.

The pursuer of the common lands concept in America has it from authority no less basic than *Corpus Juris Secundum* and its predecessors that the concept not only exists in the U.S. but exists rather prominently, as it merits rather lengthy discussion!¹⁹ The authors of the most recent entry on the subject in C.J.S. provide extremely confusing introduction to the subject,²⁰ which should strongly forewarn the researcher that American courts have used the "commons" or "common land" concept for a variety of purposes, many of which

19. 15A C.J.S. *Common Lands* (1967).

20. "Common," "commons" or "common lands," in a strictly legal sense may be defined to be those lands in which rights of common exist. Standing alone the terms are ambiguous, since the kind of enjoyment, and for what persons, cannot be understood without something more; but the surrounding circumstances may be sufficient to remove the ambiguity. In its popular sense the word "common" is used to denote pieces of ground left open for common or public use for the convenience and accommodation of the inhabitants of the town or municipality; and a similar meaning has been given the word "commons" as used in statutes. The fact that lands were uninclosed was held insufficient to bring them within the meaning of the word "common," as used in a statute; but the terms "common lands" and "undivided lands" were said to be used interchangeably in a statute. "Common" is distinguishable from "park" and possesses a much more comprehensive meaning than the words "park" or "pleasure ground." The term "common lands of the town" has been used in statutory provisions to designate lands held in common by the proprietors, and has been construed not to mean the lands of individuals lying common and uninclosed.

A "right of common" is a right or privilege which several persons have to the produce of the lands or waters of another. It is distinguishable from an estate in common in that it is an incorporeal hereditament and is a profit which a man has in the land of another, while an estate in common is a corporeal hereditament and is the land itself. *History*. Rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil. Such rights have been said to be uncongenial with the genius of our government, but they have been recognized in some states; so, various specific lands have been declared to be common.

Id. §1.

have little or no connection with the concept as it developed in the early English common law. It is submitted that the use made of the ideas in the United States up to very recent times can be classified as follows: (1) easements, profits and licenses specifically granted or more frequently implied by the courts on behalf of grantees of interests in land; (2) land subject to public use owned by local governmental units or individuals as co-tenants per grant from a governmental unit; (3) Indian land; (4) resources not susceptible of ownership; and (5) state and federal "public land."

EASEMENTS, LICENSES AND PROFITS IMPLIED ON BEHALF OF GRANTEES OF INTERESTS IN LAND

In America, unlike in England, land ownership concepts were developed from the very beginning around private individual ownership as the protected and recognized norm. Exceptions were few. In the colony of Virginia, for example, no grants of land were made to private individuals until 1615, all land being held up until that time as "common property." Except for this brief experiment other exceptions existed only where communal ownership was found as the norm in some of the Utopian communities which have appeared on the American scene from the beginning of our country. But as exceptions, these were of limited importance.

Nonetheless, the need for several people to have some rights in land which "belonged" to another or others, in the sense of more rights appertaining thereto, soon became apparent. Thus, American courts were quick to recognize and even imply a multiplicity of common rights. Examples would include common of pasture (*i.e.*, that one or more people had the right to pasture their animals on land which otherwise belonged to another), common of piscary, common of turbary, etc. Thus, it is clear the "right of commons" (discussed above in its historical context in England) survived the voyage across the Atlantic. The survival was, of course, not intact, since the seemingly unlimited amount of land in the colonies made such arrangements in the nature of easements or licenses much less necessary and even suspect as far as American courts were concerned. The same can be said for the "profit" or "easement" concept usually referred to as the law of estovers.²¹ Also, the seemingly unlimited

21. The law of estovers has been defined in various ways. The word derives from the Norman-French "estouffer"—to furnish. Hence, the common right, appurtenant or in gross, of cutting and taking tree droppings or gorse, furze, bushes, or underwood, heather or fern, of a common for fuel to burn in the commoner's house or for the repair of the house and farm buildings, hedges, fences and farm instruments. The Early English equivalent was 'bote', hence fire-bote, house-bote, prough-bote, cart-bote, and hey- or hedge-bote. Royal Commission, *supra* note 2, at 273.

supply of wood or other fuel in America made these items less important than they were in England.

The 1833 New York case of *Van Rensselaer v. Radcliff*²² is a good illustration of the reluctant recognition of the right of commons concept by an American court. The litigation involved the Van Rensselaer estate.²³ Stephen Van Rensselaer, Jr. brought an action of trespass for the cutting of logs on his land against Radcliff, the successor in interest to a ground rent conveyance from the plaintiff's father. The conveyance under which defendant claimed provided in part "for out-drift of cattle, and the cutting and carrying away of timber for building, fencing and fuel in the unappropriated land of the said (Rensselaer) manor . . ." Over objections from the plaintiff that there was no express grant of the right of common, that the right of common granted was for the farm conveyed as an entity and not to subsequent grantees of portions thereof such as the defendant, and that only the original grantor and not his heirs and successors in title held subject to the right of common, the trial judge directed a verdict for the defendant thereby recognizing his "right of common." On appeal the Supreme Court of Judicature reversed on the ground that according to the authority, Lord Coke, rights of common appurtenant are not apportionable, and consequently the division of the land granted to defendant's predecessor in title extinguished the rights of common.²⁴

The significant thing about the opinion for purposes of this article is the judge's attitude toward the right of common concept. The judge begins his opinion by stating that:

Common or a right of common, is a right or privilege which several person have to the produce of the lands or waters of another. Thus, *common of pasture* is a right of feeding the beasts of one person on the lands of another; common of estovers is the right a tenant has of taking necessary wood and timber from the woods of the lord for fuel, fencing, etc.; common of turbary and piscary are in like manner rights which tenants have to cut turf or take fish in the grounds or waters of the lord. All these rights of common were originally intended for the benefit of agriculture, and for the support of the families and cattle of the cultivators of the soil. They are in general either appendant or appurtenant to houses and lands. There is much learning in the books relative to the creation, apportionment, suspension, and extinguishment of these rights, which fortunately in this country we have but little occasion to explain; but

22. 10 Wend. 639 (N.Y. Sup. Ct. 1833).

23. For a discussion of the historical significance of this estate, one of the few feudal estates in America, see A. Casner & W. Leach, *Cases and Text on Property* 240-241 (1969).

24. 10 Wend. 639, 650-652 (N.Y. Sup. Ct. 1833).

few manors exist among us as remnants of aristocracy not yet entirely eradicated. These common rights which were at one time thought to be essential to the prosperity of agriculture, subsequent experience, even in England, has shown to be prejudicial. In this country such rights are uncongenial with the genius of our government, and with the spirit of independence which animates our cultivators of the soil. In our state, however, we have the manors of Livingston and of Rensselaerwyck, in which these rights have existed, and to some extent do still exist, and we are obliged therefore to look into the doctrine of commons to ascertain the rights of parties and do justice between them.²⁵

Thus by some curious fate, a concept preserved in England to protect small landowners from the power of the large landholders is looked upon suspiciously by the American judge, who implies that the entire concept will disappear when there are no longer such landholdings. The prediction has not come true, since estovers are still recognized as a legitimate concept for the protection of tenants from actions of waste brought by landlords.²⁶ Nonetheless, contemporary American jurists seldom, if ever, refer to estovers in the right of commons context, and easement, profit and license concepts have controlled the field.

LAND SUBJECT TO PUBLIC USE OWNED BY LOCAL
GOVERNMENTAL UNITS OR INDIVIDUALS AS
CO-TENANTS PER GRANT FROM A GOVERNMENTAL UNIT

In England the designation of most common lands predated the governmental system which then recognized them. In the United States the governments designated certain lands as common.²⁷ In the original colonies, particularly in Massachusetts, it was customary for early settlers to be authorized to acquire legal title to a limited tract of land.

25. *Id.*, 648-649.

26. See *Hood v. Foster*, 194 Miss. 812, 13 So.2d 652 (1943) for a recent case involving the application of the concept of estovers.

27. A more complete statement would be that the governments designated as common lands certain lands, recognized as commons other lands, and confirmed title in still other lands. See Act of June 13, 1812, 2 Stat. 748 which confirmed titles to "town or village lots, out lots, common field lots and commons, in, adjoining and belonging to the several towns or villages in the territory of Missouri which lots have been inhabited, cultivated or possessed, prior to the twentieth day of December, one thousand eight hundred and three." This act had the effect of conferring on the individual whatever title the United States had at that date to the village lot of which he had been or was then in possession and to the common field lot that he was or had been cultivating, and reserved to the United States all village lots, out lots and common field lots not rightfully owned or claimed by private individuals or held as commons belonging to the village. *City of St. Louis v. St. Louis Blast Furnace Co.* 138 S.W. 641 (Mo. 1911). Act of May 26, 1924, 4 Stat. 65, required the persons upon whom the title had been conferred to appear before the recorder to make proof of inhabitation of the claimed lands. See also, Act of Jan. 27, 1831, 4 Stat. 435.

Until the Colony's recognition of a settlement as constituting a quasi-corporate municipal body, entitled to a measure of self-government and to representation in the General Court of the Colony, it is clear that all land not expressly granted by the Colony or acquired in severalty, as above stated, remained the property of the Colony itself. With the recognition of a settlement by the Colony as a quasi-corporate town, however, it is equally clear that all land within the limits of that town, as then or thereafter bounded, if such land had not been previously granted by the Colony to individuals or had not otherwise become the property in severalty of settlers under the general laws, became by virtue of the town's establishment the common land of the town in its quasi-corporate capacity as a municipal organization. This land was to be managed and disposed of by the town through vote of its duly qualified voters, the freemen of the town.²⁸

The confusing practice arose of making the grants of common lands not to the settlement but to named members of the settlement as tenants in common.²⁹ The extent to which such grants conveyed beneficial rather than trustee interests to the named individuals and the rights of the descendants of the "citizens" of the settlements to common lands granted at the "recognition" of the settlement have been at issue even quite recently. But as more and more disputes are settled, the limited number left for potential dispute places this use of the common lands concept in America more and more into the category of historic American legal curiosities.³⁰

INDIAN LAND

It is clear that the land use and allocation concepts of the

28. Wight, *The Common Lands in Massachusetts—The Case of Bates v. Town of Cohasset—A Warning to Massachusetts Cities and Towns*, 20 Mass. L.Q., No. 3, 20, 24-25 (May, 1935).

29. See, for example, the case of *Bates v. Town of Cohasset*, 280 Mass. 142, 182 N.E. 284 (1932), which "although decided in the town's favor, shows too clearly that, without the fortunate discovery of evidence that the so-called 'proprietors' in Hingham (Cohasset's parent town) surrendered to the town any rights which they had in common lands, the town of Cohasset would probably have failed, under the Court's present theories, to establish its title. Such failure would have been in spite of the evident fact that this land had been held for public purposes (and the court so finds) ever since a Colony grant of 1640." Wight, *supra* note 28, at 20.

30. For an example of an area, and the reason for it, that may involve a potential dispute, see, A. Embry, *Waters of the State* (1931). "Many phases of what might be called Virginia land and water law are apparently in not a very satisfactory, or settled condition. This condition has, we believe, been brought about by attempts to apply fully evolved modern law of real property to rights and interests which had become fully established long before the legal rules were perceived." *Id.* at 175. "It is believed that some of these 'commoners' still exist—unclaimed, unsettled, untaxed to this day, not carried on the body of the Commission of the Revenue, or the county treasures of the respective counties of their location . . ." *Id.* at 227.

American Indian varied considerably from tribe to tribe.³¹ It is equally clear that nearly all contained a strong element of communal ownership, the progenitor of the common lands concept.³² Thus, had the earlier colonists cared, they would have found considerable land areas already vested with ownership concepts understandable to them as "common lands," and other lands clothed with "rights of common," particularly fishing and hunting rights. It was relatively late in our history as a nation that jurists did care, but by then legal regimes had become established by statute, treaty and case law. Since then, both the white man's conception of Indian land ownership and the extent to which he decided to allow continued communal Indian land ownership through the reservation system has been expressed, sometimes specifically, sometimes not, in common lands concepts and terminology.

An example is found in the case of *Shulthis v. McDougal*³³ in which a federal court was presented with the necessity of describing the nature of the interest held by an occupant of Creek lands:

From the time they took up their residence west of the Mississippi, the Constitutions of the Five Nations provided that their land should remain "common property, but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them."³⁴

Another example can be seen from the concept which has developed in non-Indian American law of "tribal ownership." Courts have sometimes approached the problem from the point of view that the lands held by the tribes are held as tenancies in common. This is not always a correct picture of the situation. As Felix Cohen observed:³⁵

31. For example, "Ownership of personal property is purely individual among the Navajo . . . The land is 'owned' only in the sense that it is 'used'." G. Reichard, *Social Life of the Navajo Indians* 88-89 (1928). "The conception of individual property seems hardly to have extended beyond personal effects and domestic equipment, which last, with the lodge, belonged to the wife." H. Kidder, *The Central Ojibway* 47 (1929). "Slave shall not raise property of any kind. If the master does not take it from them, the law makers shall and they may do as they please with the property." *Laws of the Creek Nation* 21 (A. Waring ed. 1960). "Women shall be considered the progenitors of the nation. They shall own the land and the soil." (From the Code Tree of the Long Leaves, section 61 of Law 21, 184 New York State Museum Bulletin: *The Constitution of the Five Nations*, 42 (1916).)

32. There is some suggestion that several Indian tribes were entirely unconcerned with ownership of real property. For example, the system of affinal avoidances of the Apache made it necessary to separate the houses sufficiently that disputes over land use and ownership were eliminated. Of course, these tribes were generally nomadic. See M. Opler, *An Apache Life Way* (1941). For a good example of the communal ownership idea, see Kidder, *supra* note 31, at 47. "Land was held in common by the band or by the family."

33. 225 U.S. 561 (1912), *aff'g* 170 F. 529 (8th Cir. 1909).

34. 170 F. 529, 533-544 (8th Cir. 1909).

35. F. Cohen, *Handbook of Federal Indian Law* 288 (1970 ed.).

The distinction between tribal property and property owned in common by a group of Indians appears most clearly in connection with the claims repeatedly put forward by descendants of tribal members who are not themselves tribal members and who, under a theory of tenancy in common, would be entitled to share in the common property but, if the property is indeed tribal, have no valid claim thereon. The Supreme Court has made it clear in such cases as *Fleming v. McCurtain* [215 U.S. 56 (1909)] and *Chippewa Indians of Minnesota v. United States* [307 U.S. 1 (1939)], that where the Federal Government has dealt with Indians as a tribe no tenancy in common is created, and no descendible or alienable right accrues to the individual members of the tribe in being at the time the property vests. The fact that the plural form is used in describing the grantee does not show an intent to create a tenancy in common nor does a limitation to a tribe "and their descendants" establish any basis for declaring a trust for descendants of individual members.

A second distinction between tribal ownership and tenancy in common relates to the method of transfer. As the Attorney General declared, in the early case of the Christian Indians,

The gravest of your questions remains to be answered. Can these Christian Indians sell the lands thus acquired? The right of alienation is incident to an absolute title. If the patent is not to a nation, tribe, or band, called by the name of the Christian Indians, but to the individual persons included within that designation, then all those persons are patentees, and all hold as tenants in common. No conveyance can be made but by the lawful deed of all. If any one refuses or is unable to consent, he cannot be deprived of his interest by an act of the others. Some of these persons being children, and some, perhaps being under other legal disabilities, it will be impossible for any purchaser to get a good title if they are tenants in common.

But I think the patent will vest the title in the tribe. You have mentioned no fact to make me believe that their national or tribal character was ever lost or merged into that of the Delawares. They are treated as a separate people, wholly distinct and different from the Delawares. The land, therefore, belongs to the nation or band, and can be disposed of only by treaty. [9 Op. Att'y Gen. 26 (1857)].

A third distinction lies in the fact that debts of individuals may be set off against claims of tenants in common but not against claims of tribes. Thus in the case of *Shoshone Tribe of Indians v. United States* [299 U.S. 476 (1937)], the Government sought to offset, against allowed tribal claims, debts due from individual allottees to

the United States for irrigation construction costs. This contention was rejected on the ground that debts of individual allottees were not debts of the Indian tribe.

The essential differences between tribal ownership and tenancy in common are thus analyzed by the Court of Claims in the case of *Journeycake v. Cherokee Nation and the United States* [155 U.S. 196 (1894)], in an opinion quoted and affirmed by the Supreme Court:

The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.

In other cases, courts have approached the problem from a point of view dependent entirely on the time the particular treaty was made with the Indians. If the treaty was made when the Indians were considered an independent nation, it has been held that all of the lands not given to the government were reserved by the tribe as tribal lands.³⁶ If the treaty was made after the Indians were treated as just other Americans, courts talk as if the lands were reserved by the government for the Indians.³⁷ In the former case, analogy to common lands is more easily made, and often the terminology used by the courts is suggestive of the common lands concept.³⁸

It seems clear that in many cases the courts have failed entirely to grasp the applicability of the concept to the Indian lands problem and have developed or borrowed other concepts.³⁹

36. 2 Waters and Water Rights 379, 381 (R. Clark ed. 1967). "The grant was not a grant to the Indians, but was a grant from the Indians to the United States, and such being the case all rights not specifically granted were reserved to the Indians." *Skeem v. United States*, 273 F.93, 95 (9th Cir. 1921).

37. For example, "[T]he United States did reserve the water rights for the Indians [quaere: analogy to rights of common?] effective as of the time the Indian reservations were created." *Arizona v. California*, 373 U.S. 546, 600 (1963).

38. "[T]he treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted . . . There was an exclusive right of fishing reserved within certain boundaries [Again, quaere: right of piscary?]. There was a right outside of those boundaries reserved 'in common with citizens of the territory.'" *United States v. Winans*, 198 U.S. 371, 381 (1905).

39. See, e.g., *United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 328 (9th Cir. 1956): "We deal with the conduct of the Government as trustee for the Indians."

RESOURCES (PROPERTY) NOT SUSCEPTIBLE OF OWNERSHIP

The civil law, always more preoccupied with logical schemes of classification than the common law, has long had a concept of "common things," based generally on the Roman concept of *res omnium communes*. This concept together with private and public ownership constitutes the three civilian types of property.⁴⁰ The United States' quasi-civil law jurisdiction, Louisiana, adopts this classification scheme in its Civil Code. Conceptually this classification concerns things legally insusceptible of ownership or "out-of-commerce."⁴¹ As Article 450 of the Louisiana Civil Code provides: "[Common things] are those the ownership of which belongs to nobody in particular, and which all may freely use, conformably with the use for which nature has intended them; such as air, running water, the sea and its shores."⁴²

In spite of this clear classification of important resources as "common" by the Code, Louisiana statutes have asserted state ownership over all resources classified by the Code as common except for air.⁴³

40. See Yiannopoulos, *Property*, in 2 Louisiana Civil Law Treatise § 1-3 (1967).

41. "Apparently, the intention of the redactors of the Civil Code was to distinguish, as did Roman jurists, between things susceptible of private ownership (*res quae in nostro patrimonio sunt*) and things which cannot be the object of patrimonial rights (*res extra nostrum patrimonium*). This distinction, originally made by Gaius, was taken over in the Institutes of Justinian. Other Roman jurists, however, seemed to distinguish between things "in commerce" (*res in commercio*) and things "out of commerce" (*res extra commercium*). This distinction rests on the possibility of alienation of things and then susceptibility of private ownership." Further, "in articles 449-459 and 481-483 the Civil Code of Louisiana follows the terminology of Gaius and Justinian. Yet, other articles in the Code, subsequent legislation and jurisprudence speak of things 'in commerce' or 'out of commerce' and seem to indicate that things in Louisiana might be classified according to whether or not they may become the object of private relations rather than the object of private ownership." *Id.* § 12.

42. Common things, in the Roman law, were regarded as insusceptible of private ownership by their nature. Thus, Article 450 reproduces a passage in the Institutes of Justinian. This approach has been abandoned in modern civil codes as it has been made clear that insusceptibility of ownership is a matter of legal prohibition and is not an inherent condition. See *Id.* § 24. Modern codes rejecting the Justinian code include the German civil code, which contains no mention of common things and the French civil code, which contains merely an allusion. *Id.* An interesting approach attempting to adopt for the common law the civil law characterization structure—including the concept of common property—was undertaken in 1839 by George Blaxland with a parallel citation to Article 542 of the French Civil Code. Blaxland postulates in Book II, tit. 1, on *Common, Public, and Private Property*, that "By the word 'common' is understood a right which one person has of taking some part of the produce of land while the whole property is vested in another. In almost all manors there are certain lands called commons, over which tenants have a right to depasture cattle, subservient to tillage and manurance. This somewhat differs from corporate property, which is that to the ownership of which one or more corporations, sole or aggregate, or townships or parishes, have acquired right. G. Blaxland, *Principles of English Law* 335 (1839).

43. E.g., La. Rev. Stat. Ann. § 9:1101 (1965) as amended by La. Acts 1954, No. 443 (waters, bayous, lagoons, lakes and bays are owned by the state); La. Rev. Stat. Ann. § 49:3 (1965) (waters and bed of the Gulf of Mexico within Louisiana boundaries are owned by the state).

Thus, what was once a meaningful distinction and a fruitful area of common ownership, as opposed to public ownership, has for all practical purposes disappeared.

STATE AND FEDERALLY OWNED PUBLIC LANDS AND RESOURCES

Technically speaking, common lands are not public lands. Contrary to widespread belief, common lands are private and not public property. They belong to someone, either an individual or a corporation, though they may once have been unappropriated lands. However, confusion has been widespread.⁴⁴ Over one-third of the land in the United States is federally owned, and a large amount is state owned. The status of these lands and the policy which should underlie their administration have been subjects of bitter controversy since the early years of the nation. The countless and frequently meaningless distinctions and classifications coupled with shocking inconsistencies in regard to their presentation or disposition culminated in the appointment and years of work of the Public Land Law Review Commission, which has only recently issued its report. Even to summarize the main points of the report and the discussion of it would require pages and lead us far afield from our topic.⁴⁵ For our purposes the salient feature of the Commission's recommendations and the controversy they have engendered is that the question is not the existence of public interests and rights of the private citizens but the extent and most effective manifestation of that interest. The battle has just begun and will no doubt be won and lost in regard to specific types and even specific plots of public land, rather than by a general loss or victory for those who propose the recognition of a public interest in terms of environmental protection to the exclusion of development by and for private interest and profit.

Nonetheless, there is clearly a growing tendency to consider the public lands as owned in common by individual citizens, an approach that resembles the technical connotation of common lands and clearly marks a resurgence of the common lands concept or at least an application of it to public land. The ramification of such a concept is interestingly discussed in the "memoirs" of ex-Secretary of the Interior Hickel, significantly entitled *Who Owns America?*⁴⁶ Mr.

44. Hoskins & Stamp, *supra* note 2, at 4, 34. For an example of the confusion, see Embry, *supra* note 30, at 212, where common lands are variously referred to as "waste land," "unappropriated lands," "public lands," and "common lands."

45. A symposium presenting an analysis of the Public Land Law Review Commission Report is found in 6 Land and Water Law Review 1-457 (1970). It is significant that the report itself makes no mention of the common lands concept.

46. Hickel, *supra* note 1.

Hickel very plainly but adequately expresses the spirit of the communal ownership concept when he states:

The American people, so proud of their private ownership, are largely unaware of their public obligation for the care and use of those things they will always own in common—millions of acres of public land, including national parks, wilderness and recreation areas as well as the Continental Shelf, not to mention the water and the air.⁴⁷

The legal and political ramifications of thinking in terms of citizen ownership, rather than government ownership, of public land and resources can best be understood by considering certain recent developments in the area of environmental law. One of the most recent legal doctrines in this rapidly developing area of American jurisprudence is the public trust doctrine. The advocate of this doctrine, Professor Sax, asserts the right of private individuals to require and obtain judicial protection of the environment and natural resources on the theory that they are owners of a beneficial interest in resources owned by the government. Professor Sax considers the resources owned by the government to be the corpus of a so-called public trust, the existence of which he explains in the following terms:

Other than the rather dubious notion that the general public should be viewed as a property holder, there is no well-conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection. Rather, there is a mixture of ideas which have floated rather freely in and out of American public trust law. The ideas are of several kinds, and they have received inconsistent treatment in the law.

The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs. It is thought that, to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them. The historic public rights of fishery and navigation reflect this feeling; and while the particular English experience which gave rise to the controversy over those interests was not duplicated in America, the underlying concept was readily adopted. Thus, American law courts held it "inconceivable" that any person should claim a private property interest in the navigable waters of the United States

An allied principle holds that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the

47. *Id.* at 115.

whole of the populace. From this concept came the laws of early New England reserving "great ponds" of any consequence for general use and assuring everyone free and equal access. Later this same principle led to the creation of national parks built around unique natural wonders and set aside as natural national museums.

Finally, there is often a recognition, albeit one that has been irregularly perceived in legal doctrine, that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only a usufruct—an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies.

Of all existing legal doctrines, none comes as close as does the public trust concept to providing a point of intersection for the three important interests noted above.⁴⁸

The future of this conception of the public trust idea and its effect in such areas as the environment or public lands, remains in doubt. With one notable exception the use of the concept up to the present time has been largely academic. The exception is the Tennessee Water Quality Control Act of 1971,⁴⁹ one of the most modern and commendable statutes ever drafted and enacted in the resources area. The concept upon which the Act is founded is expressed thus:

Recognizing that the waters of the State of Tennessee are the property of the State and are held in public trust for the use of the people of the State, it is declared to be the public policy of the State of Tennessee that the people of the State of Tennessee as beneficiaries of this trust have a right to unpolluted waters. In the exercise of its public trust over the waters of the State, the government of the State of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.⁵⁰

Rather than leave the courts with the monstrous problem of figuring out exactly what rights and obligations the various beneficiaries and trustees have, not to mention the very basic problem of ascertaining the corpus of the trust, as is the case with the Sax theory, the drafter of the statute, Professor Frank Maloney, provides explicit state administrative machinery for the reconciliation of the conflicting

48. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 484 (1969).

49. Tenn. Code Ann. § 70-324 to 70-342 (Supp. 1973).

50. Tenn. Code Ann. § 70-325 (Supp. 1973).

interests asserted in the water resources subject to the public trust.⁵¹

A study of the common lands concept leads one to question Professor Sax's espousal of the public trust concept. As quoted above, he notes the historic public rights of fishing and navigation, asserts the principle that certain gifts of nature's bounty ought to be reserved for the whole of the populace and concludes that certain resources, such as water, have a peculiarly public nature that makes their adaptation to private use inappropriate, arguing that "Of all existing legal doctrines none comes as close as does the public trust concept to providing a point of intersection for the[se] three important interests. . . ."⁵² As we have seen, it is really the common lands concept which has and continues to express communal interest and right to land resources. Statutory and administrative expression of this right, as has taken place in England, would seem to be a use of traditional common law concepts in the land and natural resources area preferable to the Sax approach of judicial activism or trust concepts.

Others have apparently recognized this weakness in the public trust doctrine and have advanced the idea of commons as an alternative to accomplish the same ultimate end. Approaches have varied from the very radical Earth Commons idea of E. W. Seabrook Hull,⁵³ to the more reasonable proposal of a land trust of Barnes and Casalino.⁵⁴ Although it is clear, as suggested initially, that these proposals have failed to grasp the nature of commons as it has developed in American jurisprudence, they are interesting since they do suggest

51. Tenn. Code Ann. §§ 70-327 to 70-333 (Supp. 1973).

52. Sax, *supra* note 48, at 484.

53. Hull, *supra* note 1. The idea of treating certain elements of the earth as if they were a shared "commons" is somewhat confusing as it is presented here. The idea seems to have originated in an attempt to formulate an interdisciplinary approach to the development of an international legal regime for ocean pollution control and bases itself on the theory that neither international air nor international water can be legally contained, held or possessed and therefore are common to all. Just as with the village green or commons, "freedom in the common brings ruin to all" in the sense that unlimited access results in unlimited and unregulated destruction, rules need to be set up to control access to the Earth Commons (by which is meant, of course, international air and water). These rules are expressed as pollution emission standards which are to be a fundamental part of an international agreement to protect and equitably manage the Earth Commons.

54. Although Barnes and Casalino are generally concerned with the problem of corporate and absentee ownership in America, several of their proposed remedies raise the idea of commons. One alternative in particular merits discussion here. It is suggested that "land trusts" be set up (a suggestion which appears on superficial examination to be virtually indistinguishable from Sax's public trust concept). Land is taken off the market permanently on the theory that the land can be used and cared for but not owned, those who live on the land are its stewards and trustees, and as the stewards and trustees die or move off the land it is passed on to other stewards. While the land trusts, in terms of legal nature, are non-profit corporations, in philosophical terms, they are very "similar to the Mexican *ejido* and the traditional African and American Indian concepts of common land ownership." Barnes & Casalino, *supra* note 1, at 30.

a revival of the communal interest expressed in the commons. The attempt to revive the very language of commons with its inherent connotation of communality suggests a growing awareness of, or at least a growing desire that, the social function of property be given greater recognition as a tool in policy making particularly in the area of environmental problem solving.

CONCLUSION

The reader has been subjected to a rapid pilgrimage beginning in pre-Norman England, proceeding through English legal history to the American colonies, where he was exposed to such varying considerations as estovers and Indian law, and then left in modern American jurisprudence as it deals with the myriad problems of environment and ecology. The purpose of the voyage was to follow the common lands concept. In retrospect, perhaps there is a more fundamental purpose that gives greater coherence and significance to the trip. Indeed, it would seem that the search has led to an examination of land policy or, to be even more basic, to a search for an ownership concept appropriate to the time and place of each stopover. As has been frequently asserted in this article,⁵⁵ the common lands concept is but a manifestation of the communal ownership principle. If so, the search has become one for the ownership concept in American jurisprudence as it has been reflected in the use of the common lands concept.

When we ask the question, "Does the common lands concept exist in contemporary American jurisprudence?" we are asking whether a role is given in the contemporary American ownership scheme for the concept of communal ownership. Such a concept of communal ownership is indeed present in the contemporary scheme, if ownership in America can be explained in the terms of the social function theory of Leon Duguit.⁵⁶ One of the few recent discussions of the social function theory of ownership dates the acceptance of the theory of ownership in the United States from the enactment of the major items of New Deal legislation.⁵⁷ Others have argued that early court decisions upholding the constitutionality of zoning without compensation, such as *Village of Euclid v. Ambler Realty Co.*,

55. See text accompanying notes 7 and 8, *supra*.

56. Briefly stated, the theory is that ownership is not an absolute right but a right that is permitted and protected to the extent it is consistent with the needs of society at a given time.

57. Mimeographed but unpublished lectures of Professor M. E. Kadam of the University of Geneva prepared for the *Faculté Internationale pour l'Enseignement du Droit Comparé* entitled *La notion et les Limites de la Propriété Privée en Droit Comparé*.

deserve at least equal credit.⁵⁸ At any rate, it is quite safe to say that the idea of community is a very real part of American property ownership. Nevertheless, although from a functional point of view we are gradually recognizing the social nature of property, from a policy point of view we remain very compartmentalized. As professor Caldwell pointed out in his article, "The Ecosystem as a Criterion for Public Land Policy:"⁵⁹

Our concepts of public law and private property split our thought and action so that we tend to think of public land policy *only* as policy for publicly-owned lands The immediate and practical problems of land policy under the prevailing laws and assumptions require attention, and most students of public land policy will examine them in this context. Yet the larger view is also needed. Our preoccupation with immediate and practical problems should not prevent our questioning whether we are indeed addressing ourselves to the right questions, at the right time, and in the right way . . . unless the context of public land policy is consistent with ecological realities, specific land policies will ultimately prove to be ineffectual or harmful.⁶⁰

The relevance of the common lands concept to contemporary American jurisprudence has thus become the relevance of society's need and ability, as pointed out by the environmental crisis, to recognize more communal ownership and less private ownership. The common lands concept provides us with a beginning framework and analytical methodology. Though the concept has changed from the early English origin, its role in society has changed as well. We may have now achieved the full circle. The concept was developed to protect individuals in their enjoyment of private land use rights. It is now needed to protect individuals in their enjoyment of public land use rights.

58. Juergensmeyer, *The American Legal System and Environmental Pollution*, 23 U. Fla. L. Rev. 439, 448 (1971).

59. Caldwell, *The Ecosystem as a Criterion for Public Land Policy*, 10 Natural Resources J. 203 (1970).

60. *Id.*, 219-220.

