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Monopolizers of the Soil: The Commons as a Source of Public Trust Responsibilities

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MONOPOLIZERS OF THE SOIL: THE COMMONS AS A SOURCE OF PUBLIC TRUST RESPONSIBILITIES

ABSTRACT

In the seventeenth century, public resources were essential to the survival of the English poor. The common law, stretching back to Magna Carta and the Forest Charter, provided them with usufructuary rights to the commons. Those rights were violated by the enclosure movement, which received royal assent beginning with Charles I's absolutist reign in 1625. As a result, the common people joined with Parliament to overthrow Charles I. After the Interregnum, Matthew Hale wrote De Jure Maris, a treatise foundational to the public trust doctrine in America and the doctrine's expansion abroad. Hale lived through the Civil War which resulted from the king's abuse of his prerogatives, and Hale's treatise was written during an effluvium of ideas about the obligations that a sovereign incurs incidental to their rule. Two of the most radical groups to espouse reciprocal rule were the Levellers and the Diggers. Their ideas were also among the most popular expressions of the anti-monopoly sentiment that common law contained a guarantee that public resources would be guarded for the benefit of all. American jurists, beginning with Arnold v. Mundy in the early 19th century, reached back to Hale's treatise to define the public trust doctrine. Given the cases before them, they could have just as easily relied on the populist theories of the law percolating around Hale's tenure on the bench. Indeed, the public trust doctrine should include populist groups and their ideas about stewardship of common resources and the duty of governments to prevent their alienation for private gain in its pedigree. Broadening the intellectual background of the public trust doctrine beyond what self-interested elites like Hale thought it to be also broadens the state's duties beyond the tidelands.

I. INTRODUCTION

On the Raritan River in 1818, Benajah Mundy led a band of oyster skiffs to an area of the riverbed that Robert Arnold had staked out with willow poles.[1] Once there, Mundy proceeded to harvest the oysters using his trade's iconic scissor-like tongs.[2] By his harvest, Mundy joined a long tradition of "trying the right" by direct action.[3] Arnold was furious, as he had purchased his 175-acre river-side estate in 1814 hoping to enclose an additional thirty-five to forty-five acres of submerged oyster bed for an attached fishery.[4] Arnold and similar landowners' enclosures of common fisheries for their sole benefit incensed Mundy and likeminded oyster harvesters.[5] Mundy and other New Jersey oyster-folk acted boldly to capture the attention of the courts and sought legal confirmation of what they believed was their common right.[6] Although humble, this dispute about oysters had roots that were nearly 200 years old.

The case went all the way to New Jersey's Supreme Court because, rather than accept a trial court verdict for damages in his favor, Mundy moved for a nonsuit declaring that Arnold had no case for trespass because the state could not convey title to common oyster beds.[7] Mundy prevailed at trial, and Arnold appealed. While arguing the case, Mundy frankly admitted that he had taken the oysters "merely with a view of trying the plaintiff's pretended right."[8] This simple assertion of a public right reverberated into an articulation of the public trust doctrine that became the doctrine's definition.[9]

The public trust doctrine is firmly rooted in the common law of England and the common law's translation across the Atlantic to the American context.[10] In deciding Mundy's test case, Chief Justice Andrew Kirkpatrick rooted his decision in English common law and determined that title to the Raritan River's bed was "vested in all the people" at independence.[11] He observed that in return for its sovereign power, New Jersey must use that power to hold, protect, and regulate the *res* "for the common use and benefit."[12] The public trust, as described in Kirkpatrick's decision,

1. BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY 45 (1998).

2. *Id.*

3. *Id.* at 45.

4. *Cf. id.* at 46–47.

5. *Id.* at 51; *cf.* Shlomit Yanisky-Ravid, *The Hidden Though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National Versus International Approaches*, 21 LEWIS & CLARK L. REV. 1, 10 (2017) (characterizing even John Locke's theory of property as limited by the requirement "that the acquisition must leave sufficient materials ('building blocks') to others.").

6. MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL & NATURAL RESOURCES LAW 61 (2015).

7. MCCAY, *supra* note 1, at 48; Arnold v. Mundy, 6 N.J.L. 1, 9 (1821).

8. MCCAY, *supra* note 1, at 48.

9. *See generally* BLUMM & WOOD, *supra* note 6.

10. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970).

11. *Arnold*, 6 N.J.L. at 76-78.

12. *Cf. id.* at 71.

imposed on the state a duty to not impair the *res*.[13] This reciprocal obligation mirrored the rights that English commoners believed they held to the commons through immemorial custom. Mundy's direct action likewise mirrored the methods English laborers employed in the struggle against privatization of public lands via enclosure.[14]

Locating the reciprocity, which is inherent to the public trust doctrine in the English common law makes sense because the doctrine originated in that tradition.[15] Kirkpatrick traced the doctrine's origins back to the Institutes of Justinian through the English jurists, including Matthew Hale, Chief Justice of the King's Bench.[16]

On the other hand, some commentators have treated *Arnold v. Mundy* as an aberrational departure from normal American judicial decisions.[17] For example, James Huffman has characterized the public trust doctrine as an undemocratic judicial fiat.[18] Huffman's version of the public trust's history attempted to undermine the doctrine's pedigree—both as to its Roman form and by displacing the authorities relied on by both Kirkpatrick and those who followed New Jersey's lead.[19] Professor

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13. *Res*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining Res as "1. An object, interest, or status . . . .2. The subject matter of a trust").

14. CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION 43 (1972) (describing the semi-legal insecurity of those who relied on the commons for subsistence, and their own view that they had a fundamental liberty interest in the commons remaining common); *see* C.S. ORWIN & C.S. ORWIN, THE OPEN FIELDS 64–68 (1967) (describing the extent of the open fields system in various counties based on four main features of open field farming evidenced by public records spanning from 1517 through 1907); *see* J.L. HAMMOND & BARBARA HAMMOND, THE VILLAGE LABORER: 1760–1832: A STUDY IN THE GOVERNMENT OF ENGLAND BEFORE THE REFORM BILL 63 (1912) (arguing that direct action was the only reasonable response to perceived encroachment for commoners who had no notion of their legal title to the commons aside from immemorial custom); *cf.* C.S. Orwin, *Observations on the Open Fields*, 8 ECON HIST. REV. 125, 134 (1938) ("[C]ommon rights confer[] a degree of security and a chance of economic advancement which no other system can give."); *see generally* H.N. BRAILSFORD, THE LEVELLERS & THE ENGLISH REVOLUTION 123 (Christopher Hill ed., 1961) (detailing the self-help remedies used by the Levellers in the run-up to the English Civil War).

15. *Cf.* OLIVER WENDEL HOLMES, JR., THE COMMON LAW 219 (1881) ("Legal duties are logically antecedent to legal rights.").

16. Arnold, N.J.L. at 72–75 (citing Hale's treatise *De Jure Maris* as the source for the public trust in navigable waterways frequently occurs in legal opinions); *see*, *e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 486 (1988) (O'Connor, J., dissenting); Shively v. Bowlby, 152 U.S. 1, 11 (1894); Martin v. Waddell's Lessee, 41 U.S. 367, 397 (1842); Glass v. Goeckel, 703 N.W.2d 58, 65–66 (Mich. 2005) (citing *Shively*, 152 U.S. at 2); Serin v. Grefe, 25 N.W. 227, 229 (Iowa 1885); Bell v. Gough, 23 N.J.L. 624, 677 (1852) (treating Hale as an elementary writer on the subject of when custom establishes a right to use a riparian owner's banks for navigation).

17. *See* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL L. & POL'Y F. 1, 38 (2007) [hereinafter Huffman, *Speaking of Inconvenient Truths*]; *see* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, & Some Doctrines that Don't Hold Water,* 3 FLA. ST. U. L. REV. 511, 610 (1975). *Contra* HARRISON C. DUNNING, *The Antiquity of the Public Right*, *in* 2 WATERS & WATER LAW THIRD EDITION § 29.02(b), at 29-1, fn. 4 (Amy K. Kelley, ed., 2013) (describing *Gough*, 23 N.J.L. 624, reaffirmation of *Arnold*, 6 N.J.L.1).

18. James Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional* Democracy, 19 ENVTL. L. 527 (1989).

19. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 7–8. *Contra* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was it, & Does it Support an Atmospheric Trust?,*

Huffman accused English legal theorists of formulating aspirational, rather than actual rules.[20] He attacked Hale, in particular, as an obscure writer who was unable to espouse meaningful limits on the alienation.[21]

According to Professor Huffman, these defects in pedigree are fatal to the modern public trust.[22] However, Chief Justice Hale was not an obscure writer. In fact, it is hard to name an individual who had more influence on Anglo-American law, aside from perhaps Coke or Blackstone.[23] In terms of obscurity, the real flaw with Hale's jurisprudence is that much of it was prevented from entering circulation until the eighteenth century because Hale refused to print his legal works.[24]

Although many of his works, including *De Jure Maris*, were not published until the eighteenth century, Hale wrote his treatise while his nation was reeling from civil war. This context must inform any faithful interpretation of his writings. The English Civil War lasted from 1642 through 1651 and grew out of a deep disagreement over what rights the common law afforded its people, and what obligations bound the sovereign to respect those rights.[25] Although Hale recognized that "the subjects in general . . . have *prima facie* a common of fishing," he was careful to state that this common was alienable.[26] To the extent that Hale misstated the English common law, as Huffman suggested, Hale was likely hedging in favor of both Royal prerogative and Parliamentarian authority to give grants to landholders because England in the 1670s was a dangerous place to espouse the rights of

47 ECOLOGY L. Q 117, 126-127 (2020) (refuting Huffman's assertions regarding the Roman lineage of the public trust doctrine); *see also* Martin v. Waddell, 41 U.S. 367, 410 (1842) ("[W]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject *only* to the rights since surrendered by the constitution to the general government.") (emphasis added).

20. Huffman, supra note 18, at 27.

21. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 27 (describing that in Huffman's estimation, this would undermine the public trust's relevance to modern advocacy). *Contra* CHRISTOPHER HILL, THE CENTURY OF REVOLUTION 1603–1714, at 224-226 (1962) (discussing the influence of jurists like Hale on the supremacy of the common law, and the distinction between Charles I's judges and the standardization of legal continuity).

22. *See generally* Huffman, *supra* note 18, at 101–102 ("The king continued to grant lands and fisheries to private individuals, often with the approval of Parliament, notwithstanding the prohibitions of Magna Carta.").

23. *See* JOHN H. LANGBEIN, ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEAL INSTITUTIONS (2009) (describing Hale as "the most important common law judge of the second half of the seventeenth century"); *see* JOHN H. BAKER, AN INTRODUCTION TO LEGAL HISTORY 190 (4th ed., 2007) (describing Hale as having been regarded "as an oracle in his own time"); *cf.* Marc Mohan, *Originalist Sin: The Failure of Originalism to Justify the Unitary Executive Theory*, 24 LEWIS & CLARK L. REV. 1063, 1069–71 (2020) (discussing the influence of Coke & Blackstone).

24. BAKER, *supra* note 23, at 190 (describing this as Hale's "singular attitude to publication").

25. *See generally* J.P. SOMMERVILLE, ROYALISTS & PATRIOTS: POLITICS & IDEOLOGY IN ENGLAND, 1603–1640 (1999); *see generally* HILL, *supra* note 14, at 59.

26. MATTHEW HALE, DE JURE MARIS ET BRACHIORUM EJUSDEM (1670), re*printed in* STUART A. MOORE, A HISTORY OF THE FORESHORE & THE LAW RELATING THERETO 370, 387 (1993) ("[T]he sea-shore and maritime increases . . . may belong to the subject in point of propriety, not only by charter or grant . . . but also by prescription or usage.").

commoners.[27] The king and Parliament needed to zealously guard their prerogatives, and both lords and men of money eyed the commons as an area to expand their wealth and power.[28]

Precisely because of such hedging by self-serving elites', the commoners were notoriously suspicious of lawyers as advocates for their rights.[29] In Hale's time, landlord expropriation of the soil by enclosing the commons was the order of the day. However, commoners repeatedly and consistently utilized resources from the commons by direct action, thus charting the course Mundy followed nearly 200 years later.[30]

Thus, Huffman inadvertently exposed an avenue to expand the public trust doctrine when he attacked Hale's characterization because he correctly posited that legal scholars should examine the context of Hale's work more closely. This context suggests that the public trust doctrine, in its original setting, involved more than just navigable or tidal waters—it encompassed a broad range of waste and common lands as well.[31] Benajah Mundy's brazen effort to try his right to the Raritan oyster beds mirrored countless cases of English farmers occupying land for their common benefit.[32] Given the historical context, the common law history that underpinned the public trust doctrine at the time it received its most influential formulation in Hale's writings must be examined.[33]

In Section I, this paper traces the theoretical connections between Mundy's daring oyster harvest and the English Civil War by illuminating the common law usufructuary rights to the commons,[34] presumed by English commoners, and linking those rights with the obligations of the English sovereign. Section II highlights aspects of Huffman's characterization of the common law tradition borrowed by American courts to establish the public trust doctrine. Section III examines the English common law and the public's view of traditional rights through a study of two populist movements contemporary with Hale's writing: The Levellers and the Diggers. Section IV briefly recounts anti-monopoly American court decisions in order to illustrate the transfer of English commoners' anti-monopoly traditions. The

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27. *See* HILL, *supra* note 14; *see generally* JAMES HENDERSON BURNS, *Biographies*, *in* THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450–1700 (James Henderson Burns & Mark Goldie, eds., 2008) ("Living through the Civil War and the Interregnum, [Hale] made the necessary accommodations.").

28. *See generally* HILL, *supra* note 14, at 69.

29. *Id*.

30. MCCAY, *supra* note 1, at 50–51.

31. *See*, *e.g.*, Daniel R. Coquilette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 807–09 (1979) (arguing, in part, that the commons were a *res communes* which the state violated by opening up to private grants).

32. J.M. NEESON, COMMONERS: COMMON RIGHT, ENCLOSURE & SOCIAL CHANGE IN ENGLAND, 1700-1820, at 18–22 (1993) (recounting contemporary arguments that enclosure had threatened the internal peace of England by creating a population of disaffected laborers).

33. Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust Doctrine as an Antimonopoly Doctrine*, 44 B.C. ENVTL. AFF. L. REV. 1, 9–18 (2017) (detailing restraints on privatization in tidal waters, inland waters, water resources, and wildlife); *see* Michael C. Blumm, *Two Wrongs? Correcting Professor Lazarus's Misunderstanding of the Public trust Doctrine*, 46 Envtl. Law 481, 483–84 (2016).

34. *See Usufruct*, Black's Law Dictionary (11th ed. 2019) (A usufruct is the right to use and enjoy property to which one does not have title).

paper concludes that—when analyzed in the context of the struggle over the English commons—the public trust doctrine is broader, not narrower, than previously thought.

II. AN INCONVENIENT HISTORY

Professor Huffman began his version of the public trust doctrine's history by suggesting that its rise represented the flight of environmentalists from hostile legislatures to a judiciary all too ready to supplant democratically enacted decisions.[35] Huffman argued that because "judicial intervention will often be in contravention of the actions of elected legislatures and executives," it is "counter-intuitive [sic] that the public trust doctrine is rooted in the requirements of democracy."[36] However, Huffman's version of the separation of powers debate is far too one-sided. As the prominent public trust scholar Michael Blumm noted, "the public trust doctrine ought to be seen as a vehicle for enhancing effective public involvement in the allocation of trust resources."[37] By both forcing legislatures to increase transparency and enabling citizens to sue to enforce trust obligations, the public trust doctrine can help create a government that is more responsive to the citizens' need for shared resources management.[38]

Professor Huffman criticized modern public trust doctrine advocates for "making it up as they go," albeit "in the tradition of some of the common law's greatest lawyers."[39] For example, he accused the thirteenth century jurist Henry de Bracton of "stating an aspiration for the common law rather than reporting the actual laws of his time," insofar as the English common law adopted the Institutes of Justinian.[40] Even more damaging, according to Huffman, was Hale's endorsement of the rule of presumptive ownership by the crown of submerged tidal lands which he characterized as "fabricated from whole cloth."[41] However, Huffman's

35. *See* William D. Araiza, *Democracy, Distrust, & the Public Trust: Process Based Constitutional Theory, the Public Trust Doctrine, & the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 389 (1997) (cabining the public trust doctrine in order to refute the counter-majoritarian difficulty); *see generally* Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 3. *Contra* Michael C. Blumm, *Public Property & the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 580, 595 (1989) (arguing that, in enforcing public access, the public trust doctrine to act as a democratizing force).

36. Huffman, *supra* note 18, at 5.

37. Blumm, *supra* note 33, at 597.

38. *See* Sax, *supra* note 10, at 494; *see* Gould v. Greylock Reservation Cmm'n, 215 N.E.2d 114, 122–23 (Mass. 1966) (construing a statute strictly in order to prevent diversion of rural parkland to ski resort use inconsistent with powers previously conferred on a public body).

39. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 8.

40. *Id.; see generally* W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW 15–17 (2d ed., 1952) (discussing the interplay between local custom and Roman law during the time of the empire). *Contra* 1 BRACTON ON THE LAWS & CUSTOMS OF ENGLAND, 101 (George E. Woodbine ed., Samuel E. Thorne Trans., Belknap Press 1968) (c. 1235) (describing some issues with Bracton's interpretation of Roman law as deriving in part from later scribes' errors and omissions in the course of copying and translating Bracton's work).

41. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 8; *see also* Patrick Deveney, *Title, Jus Publicum, & the Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 45 (1976) (describing Hale's acceptance of the rule of *prima facie* ownership of the foreshore in the King as being "on very questionable grounds").

assessment of these contributions to the public trust doctrine is reciprocally flawed because what Hale actually omitted was even more radical common perceptions of public resources rights, rather than fabricated rules of title.[42]

Huffman's assessment of the public trust doctrine's Roman history has been convincingly challenged, but as this Article demonstrates, his recounting of the English history is also lacking.[43] Professor Huffman relied almost exclusively on Magna Carta, Sir Matthew Hale, and two law review articles to show that the English common law regarding trust resources included no right to fish, allowed for alienation, and in any event depended on sovereign prerogative for its existence.[44] Huffman cited one article for the proposition that the kings' property differed from that held by the barons only because the king owned more land.[45] In a sense this was true.[46] However, that fundamental similarity between the lords and the king does not mean that neither had any reciprocal duties or obligations to the public. In fact, in popular governmental theory, it was precisely because of their power that both the lords and the king owed duties to the people. Their power was legitimate only so long as they observed those duties.

At a minimum, the titles of both the lords and the king were subject to the *jus publicum*,[47] insofar as sovereignty carries with it a responsibility to manage the commons for the benefit of the public.[48] While the king had authority to convey title to the lands owned by the crown, the inequitable buying and selling of such lands, along with aggrandizement of the forests and monopolization of trade, led to the English Civil War.[49] The proprietary title held by a sovereign, whether lord or king,

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42. *Contra* MacGrady, *supra* note 17, at 551 (arguing, using only a single citation, that virtually no one relied on the rule of presumptive title).

43. Ruhl & McGinn, *supra* note 19, at 8 (observing that Huffman relies almost entirely on "two previously obscure law journal articles"); *see* Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 389–390 (2003) (lamenting the foibles of "law office history").

44. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 19–27. At least one court in Washington state has cited Huffman's history as the most skeptical boundary of the public trust doctrine. *See* Chelan Basin Conservancy v. GBI Holding Co., 413 P.3d 549, 554 (Wash. 2018) ("[E]ven . . . the most skeptical of critics [accept] that the public trust doctrine has a long history and was firmly ingrained in English and American common law by the 19th century.").

45. Huffman, *Speaking of Inconvenient Truths*, *supra* note 18, at 21 (citing Deveney, *supra* note 41, at 38).

46. *See* Deveney, *supra* note 41, at 38.

47. *Jus Publicum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The Right, title, or dominion of public ownership. . . .").

48. ORWIN & ORWIN, *supra* note 14, at 140–41 (describing the offenses committed against the commons and the jury's indictments for those offenses including "encroachments [interfering] with getting to and from the strips" of farmland); *see also infra* text accompanying notes 60–62.

49. *See* ACT FOR THE LIMITATION OF FORESTS (1640) & THE GRAND REMONSTRANCE (1641), *reprinted in* SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 379 (George Burton Adams & H. Morse Stephens, eds., 1916) [hereinafter Adams & Stephens] (requesting that the king forgo alienation of certain crown lands, requesting more discretion of juries, and condemning any leniency for "papists"); *see also* NEESON, *supra* note 32, at 19 (describing the withdrawal of official resistance to enclosure in the 1620s).

was entrusted with the common weal and the common English folk were willing to fight and die to see that trust carried out.[50]

Strangely, neither of the articles Huffman relied on mentioned the backdrop of Civil War against which Hale wrote *De Jure Maris*.[51] This oversight led him to claim that, in Article 26 of *The Grand Remonstrance*,[52] no objection was made to the abrogation of public rights.[53] Huffman cited no other article of the *Remonstrance*, nor interrogated any related writings or circumstances surrounding its publication in any depth.[54] If he had, his analysis may have been different. At a minimum, Huffman would have avoided quoting Deveney's supposition that, "[n]one of the parties involved [in the sixteenth and seventeenth centuries] was interested in expanding the interests of the general public in the coastal area."[55] A cursory glance at the primary sources shows a multitude of parties intensely interested in expanding the *jus publicum* beyond even the coastal areas.[56]

Professor Huffman concluded that the crown was welcome to fritter away the foreshore because it could be alienated although there was a *jus publicum* in England.[57] Huffman quoted the key language Hale used to divide the bundle of rights in the foreshore into three categories, yet still overlooked the fact that the *"jus privatum* of the owner or proprietor" remains subservient to "that *jus publicum* which belongs to the king's subjects."[58] The reason for the primacy of the *jus publicum* was not, as MacGrady asserted, bare "lawmaking by personal reputation."[59] Indeed, the

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50. JOHN LILBURNE, A DECLARATION OF SOME PROCEEDINGS OF LT. COL. JOHN LILBURN (1648), *reprinted in* THE LEVELLER TRACTS 1647–1653, 88, at 106 (William Haller & Godfrey Davies eds., 1964) [hereinafter LEVELLER TRACTS] ("[W]hen the King . . . peremptorily declared that the people, who trusted him for their good, could not . . . require any account of the discharge of his trust . . . the Judg [sic] of the Earth . . . hath brought him low. . . ."); *see* E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 79 (1971).

51. Deveney, *supra* note 41, at 41 (considering Hale's time of writing to be that of Charles II); MacGrady, *supra* note 17, at 549 (observing only that "*De Jure Maris* . . . was written . . . around 1667").

52. THE GRAND REMONSTRANCE (1641), *reprinted in* Adams & Stephens, *supra* note 49, at 379 ("[A]ll Councillors of State may be sworn to observe those laws which concern the subject in his liberty."); *see* Oliver Knight, *The Grand Remonstrance*, 24 PUB. OPINION Q. 77, 80 (1960) (describing the Remonstrance as a device of economic propaganda).

53. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 24 (citing Article 26 of the Grand Remonstrance).

54. *See id*.

55. Deveney, *supra* note 41, at 42–43 (arguing that the only relevant interests were those represented by royal title-hunters and proprietary owners), *quoted in* Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 24.

56. *See*, *e.g.*, HILL, *supra* note 14, at 14 (detailing no fewer than eight different groups bent on expanding common rights to voting, fishing, hunting, tillage, and religious freedom during the seventeenth century).

57. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 25; *see* THE GRAND REMONSTRANCE, art. 32 (1641), *reprinted in* Adams & Stephens, *supra* note 49, at 379 ("Large quantities of common and several grounds hath been taken from the subject . . . without their consent. . . .").

58. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 26 (quoting Hale); *see* HALE, *supra* note 26, at 404–05; *Jus Privatum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The right, title, or dominion of private ownership.").

59. MacGrady, *supra* note 17, at 567. *Contra*, ALAN CROMARTIE, SIR MATTHEW HALE 1609-1676: LAW, RELIGION, & NATURAL PHILOSOPHY 96–97 (1995) ("A so-called 'public' right, imposing

jus publicum maintained the superior claim on common lands because the interests of the public were the foundation of a legitimate government based in the English common law tradition stretching all the way back to Saxon days.[60]

The Saxon era, lasting from roughly 600 until 1066, may seem at first an insufficient foundation on which to ground a major modern property doctrine.[61] However, subjects of the common law maintained a consistent view of their rights and believed that legitimate methods of dealing with public resources always included the benefit of all. Property law is undeniably rooted in those customs.[62] In writing about later agrarian and populist disturbances in England, E.P. Thompson developed a descriptive framework for reconstructing the sense of legal right and wrong of the lower classes that he termed their "moral economy."[63] The moral economy derives from "a popular consensus as to what were legitimate and what were illegitimate practices . . . grounded upon a consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the

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contractual limits on private interests, could not be tampered with by royal power. . . . 'Ius publicum' . . . was 'a common interest' in some collective end. 'Ius regium' was a trust, again for some national purpose, and not a transferrable right.").

60. MATTHEW HALE, THE HISTORY & ANALYSIS OF THE COMMON LAW OF ENGLAND 46 (2003) ("[T]he Law is . . . that which declares and asserts the Rights and Liberties, and the Properties of the Subject. . . ."); HOLMES, *supra* note 15, at 3, 17, 167–69 (tracing the roots of the common law back to Saxon, Germanic and Roman laws); WILLIAM STUBBS, SELECT CHARTERS & OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 156–57, 347–48 (1890) (describing the Assize of the Forest of 1184 and subsequent Forest Charter of 1217 as returning Saxon usufructuary rights to the people at the expense of the King's jurisdiction); *see* WILLIAM BLACKSTONE, THE GREAT CHARTER & THE CHARTER OF THE FOREST vii (1759) (asserting that Magna Carta was "compiled from the ancient customs of the realm . . . the old common law, which was established under our Saxon princes, before the rigors of feudal [sic] tenure . . . were imported from the continent by the kinds of the norman [sic] line."); *see also* Corinne C. Weston, *England: Ancient Constitution & Common Law*, *in* CAMBRIDGE HISTORY OF POLITICAL THOUGHT, *supra* note 25, 374, 384 ("The ancient constitution was . . . a Saxon constitution."); THE HUMBLE PETITION (1648), *reprinted in* LEVELLER TRACTS, *supra* note 50, at 151–52 (describing the ways in which government is subservient to the people including by passing laws limiting Parliament's power, abolishing the draft, and abrogating lords' ability to enclose the commons); GERRARD WINSTANLEY, A LETTER TO THE LORD FAIRFAX (1649), *reprinted in* THE WORKS OF GERRARD WINSTANLEY 280, 282 (George H. Sabine ed., 1965) [hereinafter Sabine] ("[W]e are Englishmen equall [sic] with them, and rather our freedome [sic] than theirs, because they are elder brothers and Freeholders, and call the Inclosures [sic] their own land, and we are younger brothers, and the poore [sic] oppressed, and the Common Lands are called ours, by their owne [sic] confession. . . .").

61. HAROLD POTTER, AN HISTORICAL INTRODUCTION TO ENGLISH LAW & ITS INSTITUTIONS 7 (1932) (reciting the history of Saxon law-making).

62. *See* HILL, *supra* note 14, at 53 ("[T]he royal policy of disafforestation and enclosure . . . as applied before 1640, involved disrupting a way of life, a brutal disregard for the rights of commoners. . . ."); *see* ORWIN & ORWIN, *supra* note 14, at 3–11 (reviewing the scholarly debate about the open fields system, and determining that, by modern standards, historians cannot conclude whether the commonage tradition derives from the Celts or the Romans, but that it probably does not descend from Teutonic Germany); *see* Sean Watts & Theodore Richard, *Baseline Territorial Sovereignty & Cyberspace*, 22 LEWIS & CLARK L. REV. 771, 794–804 (2018) (describing the history, stretching back at least to the 1555 Peace of Augsburg, of the property-like concept of territorial sovereignty between nations); *cf.* HOLMES, *supra* note 15, at 5 ("The customs, beliefs, or needs of a primitive time establish a rule or formula.").

63. Thompson, *supra* note 50, at 76.

community."[64] This populist and antimonopoly consensus viewed the stewardship of the commons as a right inherent to membership in the English polity.

The moral economy of the English commons, therefore, is a lodestar for social responsibility that informed England's ancient constitution and included reciprocal obligations owed by landholders to the public.[65] Deviations from obligations of reciprocity led to widespread revolt in England in 1642, and not just from the lordly actors Professor Huffman highlighted.[66] Indeed, the view that ancient rights, such as equal access to public land, had been transgressed "caused the movement for restoration, for recovery of the old rights and liberties, to develop on either side of the Atlantic."[67] Overlooking the rights of those who stood to lose the most by the enclosure movement muddies the headwaters of the public trust doctrine.[68]

The Grand Remonstrance of 1641 is worthy of more than the proverbial footnote it received in Huffman's history because of the men and women who rose with the Parliamentarians to claim what they viewed as their legal rights.[69] They joined the English Civil War expecting to see all lords abolished, their commons perpetually safeguarded, and their ancient rights to freely access and farm public commons respected.[70] Even after Charles I lost his head in 1649, their demands for guarantees against enclosure and religious establishment were ignored. Thus, it did not take long for many of the commoners to lose faith in Parliament.[71] The Leveller's schism with the New Model Army,[72] the Digger's movement,[73] the Ranters' heresy,[74] and other radicals all gained their strength from the common-folk's dissatisfaction with Parliament's continuation of the enclosure movement.[75]

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64. *Id*. at 79.

65. *See generally* Weston, *supra* note 60, at 379.

66. BRAILSFORD, *supra* note 14, at 427; Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 24.

67. HANNAH ARENDT, ON REVOLUTION 133 (2006).

68. *See* Thompson, *supra* note 50 at 78 ("[M]en and women in the crowd were informed by the belief that they were defending traditional rights or customs; and, in general, that they were supported by the wider consensus of the community."); HILL, *supra* note 14, at 21 ("The government was held to blame for its mismanagement of the economy and for monopolies . . . of the 1630s which visibly added to the cost of living.").

69. BRAILSFORD, *supra* note 14, at 205–206 (describing the appeal that Leveller leaders enjoyed among the rank-and-file, and officers, of the New Model Army).

70. *Id.* at 143–44 ("[I]t was an army of volunteers who fought for their own convictions, religious and political, and this held for the privates in the ranks as well as the officers."); *cf.* Adams & Stephens, *supra* note 49, art. 27, 36, 37, 115, 119 (castigating monopolies).

71. *Id*. at 137; *see infra* Section III.

72. HILL, *supra* note 14, at 14 (describing the Levellers as seeking a new democratic form of government).

73. *Id*. (ascribing to the Diggers a belief in the need for economic solutions).

74. *Id*. (calling the Ranters a group in search of a new order in all facets of society).

75. PETER LINEBAUGH & MARCUS REDIKER, THE MANY HEADED HYDRA: SAILORS, SLAVES, COMMONERS, & THE HIDDEN HISTORY OF THE REVOLUTIONARY ATLANTIC 116–17 (2000) (detailing the various revolts and their indignation with an unresponsive Parliament that they viewed as hiding behind the violence of the law to appropriate the fruits of the Civil War to its sole benefit); *see infra* Section III (informing on the Levellers and Diggers).

The commons were essential to the English peasantry's survival because more than half of seventeenth century England's daily necessities came from resources held in common.[76] Although title to the metes and bounds of the commons often reposed in the local lord, collectives of local commoners worked the land and took the essentials of their subsistence from this essential trust resource.[77] Many of these commoners viewed the government's stewardship of the commons as a duty imposed on their rulers because it was inherent to the legitimacy of English sovereignty.[78]

III. ANTIENT PUBLIQUE USE

This Section focuses on two of the popular movements that espoused consent of the governed. These people most frequently interacted with public lands during the seventeenth century, and their thoughts—insofar as they can be gleaned from extant writings—reveal the common law origins of the public trust doctrine. The first movement began as multiple groups of agitators in the army banded together. They were called "Levellers" by their detractors for their belief in universal male suffrage, resistance to privatization, and contempt for nobility.[79] The name stuck and later became a rallying point for populists and rabble-rousers, both in and out of uniform. The second movement called themselves "True Levellers" because they did not think the Levellers were radical enough. They believed in universal suffrage, revealed law, and that all property should be held in common. They are remembered as "Diggers" because of their modus operandi: when a stretch of land was privatized, they would simply go to it and plant it for communal harvest.[80] The Levellers and Diggers had no special friends in Parliament and no money except

76. BRAILSFORD, *supra* note 14, at 428 (describing one instance where a former colonel turned Parliamentarian enclosed "one third of each [peasant's] share in the open fields, all their cow pastures and their water-supply"); ORWIN & ORWIN, *supra* note 14, at 57 (explaining that the commons were essential for winter survival because without this usufructuary right, villagers could not fuel their fires or feed their livestock that kept them through the colder months); HILL, *supra* note 14, at 43 (discussing the necessity of the commons and the reflection of that ideal in the "sylvan liberty" of Robin Hood); LINEBAUGH & REDIKER, *supra* note 75, at 108–109 ("Those in Putney, for example, enjoyed common pasture, furze, turf, gravel, underwood, and stones, as well as river resources of smelt, salmon, flounder, shad, roach, dace, barbel, eel, and gudgeon."); *see also* A DECLARATION OF SOME PROCEEDINGS, *reprinted in* LEVELLER TRACTS, *supra* note 50, at 114 ("Now O ye worthy Trustees! . . . Let us not pine away with famine . . . . [C]ompell us not to take the natural remedy to preserve our selves . . . .").

77. HILL, *supra* note 14, at 43; *cf.* HOLMES, *supra* note 15, at 210 ("English law has always had the good sense to allow title to be set up in defense to a possessory action.") (footnotes omitted).

78. HILL, *supra* note 14, at 43 (describing these people as "cliff-hanging in legal insecurity"); BRAILSFORD, *supra* note 14, at 309–10 (detailing the organization of the Levellers into a coherent political party with a democratically elected leadership and treasury dedicated to cast down the enclosures, hedges, and fences of the nobility); LEVELLER TRACTS, *supra* note 50, at 2–3 ("[A]gitation for personal rights and economic redress . . . issued in a broad and definite program for constitutional reform. . . ."); WINSTANLEY, A WATCH-WORD TO THE CITY OF LONDON & THE ARMIE, FREEDOME & PEACE DESIRED (1649), *reprinted in* Sabine, *supra* note 60, at 315 (describing as a divine revelation the idea that "the earth shall be a common Treasury of livelihood to whole mankind, without respect of persons") (emphasis omitted).

79. *See generally* HILL, *supra* note 14.

80. *Id.*

what they drew as pay for their armed service.[81] Yet, their cause attracted some of the best thinkers of their age and their ideas about legal rights to public resources framed England's Agricultural Revolution for centuries.[82]

Against this rich background of social upheaval, Hale led an illustrious career. He defended Royalists at their state trials after the English Civil War, Oliver Cromwell appointed him as Justice of the Common Pleas, and Charles II appointed him first Chief Baron of the Exchequer, and later, as Chief Justice of the King's Bench.[83] Hale was well respected by both royalists and regicides. Given this pedigree, Huffman's suggestion that Hale's *De Jure Maris* meekly accepted a self-interested title-hunter's rule of law concerning crown ownership is unlikely.[84] Huffman's idea that Hale recognized no limit on the crown's power to alienate lands on the other hand, is a more complicated problem for advocates of the public trust doctrine. Hale did not deny the crown's ability to alienate lands held in trust. Instead, he recognized that the power of alienation was subject to the requirements of the *jus publicum*.[85]

Contemporary events strongly influenced Hale's views on the rights and duties of the crown. The subjection of the *jus privatum* to the benefit of the *jus publicum* can be explained by recognizing that Hale's experiences with the tumultuous conflict between royal absolutism, Parliamentarian prerogative, and commoner's rights that grew into the English Civil War influenced *De Jure Maris*.[86] Although statutes and case law may be sparse, modern scholars must analyze this backstory to fully account for how and why a public trust doctrine is inherent in lands held by the sovereign.[87]

The English Constitution is rooted in the supposed restoration of Saxon liberty by Magna Carta and the Forest Charter. A key element of this restoration was the right of commonage: access to and use of areas for the benefit of the agricultural activities of the poor.[88] The idea that the right of commonage was inalienable—and

81. BRAILSFORD, *supra* note 14, at 147 ("The sword had won back for them what they obstinately believed to be their birth-right of equality as free-born Englishmen.").

82. *Id.* at 430–33 (detailing the proposals of the various Leveller leaders to introduce legislation against enclosure and undo already accomplished enclosures).

83. B.B. Edwards & W. Cogswell, *Biography of Sir Matthew Hale*, 10 AM. Q. REG. 113, 115–17, 120 (1837) (discussing also the speculation that Hale served as counsel to Charles I).

84. *Id*. at 115, 117 (describing Hale as a zealous advocate for Royalists and as a barrister who also garnered the respect of Parliamentarians he served); CROMARTIE, *supra* note 59, at 110 ("The treatise . . . has the air of a quite genuine enquiry. . . ."); *see* Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 8 (accusing Hale of endorsing an evidentiary rule fabricated by Royal title hunters).

85. HALE, *supra* note 26, at 390 ("[The several fishery], that a subject hath in this or any other private or public river, or creek fresh or salt, is subject to the laws for the conservation of fish and fry, which are many.").

86. *But see* EDWARD P. THOMPSON, *Custom, Law and Common Right*, *in* CUSTOMS IN COMMON: STUDIES IN TRADITIONAL POPULAR CULTURE 97, 176 (1993) ("If it is pretended that the law was impartial, deriving its rules from its own self-extrapolating logic, then we must reply that this pretence [sic] was class fraud.").

87. *C.f.* HILL, *supra* note 14, at 17 ("Historians are in interested in ideas . . . because they reveal the societies which give rise to them.").

88. MAGNA CARTA (1215) & THE CHARTER OF THE FOREST (1217), *reprinted in* 3 ENGLISH HISTORICAL DOCUMENTS 318, 333 (David C. Douglas ed., 1975) (guaranteeing freedom of navigation in

thus could not be privatized—became central to two important groups: the Levellers and the Diggers. The Levellers located the source of the right in the public nature of the commons, while the Diggers believed that the natural law element of the common law impressed public land with stewardship obligations to protect it for use by the poor.[89]

The English Civil War was an attempt to drastically reorder society.[90] Competing visions variously aimed at achieving an equitable democracy, restructuring England into a theocracy, enlarging Parliament's prerogative, establishing a dictatorship, abolishing property, and overturning established Protestant morality.[91] All these radical views boiled to the surface at a time when English society was intensely hierarchical.[92] Hierarchical puritanism found itself besieged by a democracy that drew its strength from the commons. This struggle gave birth to a multitude of schemes for a reordered society that would better provide for the needs of the people. As varied as these groups were, all but the Royalists agreed that the king—if monarchy had any legitimate role at all—served as a trustee for the commonweal.[93]

The power of the monarch to unilaterally dispose of property had been curtailed by the decapitation of a king who pushed the limits of his prerogative too far. Yet, the king's loss was not originally intended to only benefit the landed lords and gentry.[94] Cromwell and his supporters won the Civil War and got their dictatorship during the Interregnum.[95] However, the revolt against sovereign caprice had been fueled by radicals steeped in a common law tradition of enforcing their rights—including public access rights to the commons—against reticent lords intent on their own profit.[96] Even the greediest new masters recognized that their power

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the Thames and the right to use forests and waste lands for the growing of grain, gathering of lumber, and grazing of herd animals free from taxation); *see also* HALE, *supra* note 26, at 389 ("[The] interest or right in the subject must be so used as it may not occasion a common annoyance to passage of ships or boats; for that is prohibited by the common law. . . .").

89. *See generally* LINEBAUGH & REDIKER, *supra* note 75, at 116, 119–20 (describing The Leveller influence at the Putney Debates as "a high point of revolutionary possibility" that dissipated when the Leveller and Digger leaders were crushed or arrested").

90. HILL, *supra* note 14, at 24 (describing how the gentry, in recruiting the poor to help fight the King, "disrupted the long accepted hierarchy of subordination" and were then forced to contend with a lower-class steeped in plebian heresy).

91. Sabine, *supra* note 60, at 3 ("It is hopelessly unhistorical to take the seventeenth century radical out of the religious and theological context."); BRAILSFORD, *supra*, note 14, at 2–3, 8–12; HILL, *supra* note 14 (discussing in depth the range of these views about the proper role of government in a commonwealth).

92. For example, fathers could arrange marriages for sons who were already barred attorneys. *See* BRAILSFORD, *supra* note 14, at 43 (describing Sir Simonds d'Ewes father's meddling in his love life).

93. *See generally id.*

94. *See generally* DUNNING, *supra* note 18, at 29-3–5 (describing Hale's presumption of private property in riparian owners as "subject to a public right to use the bed and banks").

95. *See* HILL, *supra* note 14, at 346–48 (describing the period between Charles I and the Restoration of Charles II when Parliaments and Cromwell's Protectorate ruled).

96. LINEBAUGH & REDIKER, *supra* note 75, at 109 ("[T]he decision of Charles I in 1637 to enclose 236 acres . . . [grew] into a revolutionary clamor and [brought] down a succession of tyrants. . . .").

would not continue long without the support of at least some of the former soldiers.[97] Indeed, Cromwell's army was staffed and led by individuals convinced that lords and their lawyers violated the common law when they unjustly denied them access to one of the first areas of public property: the commons.[98]

The history of communal farming in England stretches at least back to the eighth and ninth centuries when perennial Viking raids mandated economic and cultural changes that resulted in a system of commons that would have been familiar to a seventeenth century farmer.[99] The rights to the commons involved grazing and tilling rotations in half-acre strips, hunting, fishing, wood-gathering, and more.[100] Violations of these rights by private enclosure could have apocalyptic repercussions for the affected community.[101] Despite the importance of these rights, landlords often responded to economic vicissitudes during the sixteenth and seventeenth centuries by enclosing ever more common land to private grazing and tilling. The common people responded in turn with increasingly violent protests.[102]

Nevertheless, the violation of a lord's duty to maintain the commons for public use—a violation Huffman himself, among others, pointed out—did nothing to dissuade the commoners from believing they had an enforceable right against the

97. WINSTANLEY, AN HUMBLE REQUEST (1650), *reprinted in* Sabine, *supra* note 60, at 416, 429 (reminding Parliament that "K. Charles . . . is cast out of England, by the victory of the Armie over him . . . [if Parliament] doe not againe lose this their honour and peace too, by their selfe-love and covetousnesse . . . and thereby being in Kingly power again" they will ultimately lose the Civil War because "the people wants nothing now but possession of the Common-wealths freedome").

98. HILL, *supra* note 14, at 70–71 (detailing the radical leaders of Ranters, Quakers, Diggers, and Levellers who served in the New Model Army against the King); *see also* GEOFFREY ROBERTSON, THE TYRANNICIDE BRIEF: THE STORY OF THE MAN WHO SENT CHARLES I TO THE SCAFFOLD 86 (2006) (describing how Levellers in the army were able to influence MPs to hold a trial against Charles I).

99. CHRISTOPHER JESSEL, A LEGAL HISTORY OF THE ENGLISH LANDSCAPE 47 (2011) ("[T]he best layout was a great open field . . . in which each farmer had his own strips distributed throughout the field."); *cf.* HARRIETT BRADLEY, THE ENCLOSURES IN ENGLAND: AN ECONOMIC RECONSTRUCTION 27 (1918) (noting an early complaint against enclosure in the thirteenth century).

100. THOMPSON, *supra* note 86, at 103 ("Forests, chases, great parks and some fisheries were notable areas . . . of conflicting claims (and appropriations) of common rights."); FREDERIC SEEBOHM, THE ENGLISH VILLAGE COMMUNITY 8, 18–19 (1971) (describing the fourteenth century evidence in Piers Plowman of open fields system).

101. *See* ROBERT C. ALLEN, ENCLOSURE AND THE YEOMAN 40 (1992) (tabling the desertion of villages that followed enclosures during the period before the eighteenth century).

102. BRADLEY, *supra* note 99, at 34–35.

transgressors.[103] Where the courts and lawyers failed to protect that right,[104] the commoners simply resorted to direct action by knocking down fences, filling in ditches, and even hamstringing the domestic animals that had displaced them on the common lands.[105] In 1649, King Charles I lost his head, in part because he failed to guard these rights to the common lands against both his own transgressions and the transgressions of his lords.[106]

The conception of the public trust doctrine that is most often linked to the English common law derives from the Magna Carta's language regarding the navigability of the River Thames.[107] However, as Huffman noted, this connection is tenuous and at best links English common law with Justinian's assertion that the sea and air belong to all men.[108] Linking English and Roman law may be warranted, especially considering Roman Canon Law's presence in medieval England. However, Magna Carta itself secured to English lords' prerogatives, which they felt were threatened by the King.[109] The lords' concerns were largely self-serving, and Magna Carta failed to fully safeguard the liberties of the commons.[110] Its failings were immediately apparent, resulting in a second attempt to create a bulwark against the caprice of lordly power, which led to the 1217 Forest Charter.[111]

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103. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 24 ("[T]he Crown's objective in pressing the prima facie rule was not to protect the lands for the public, but rather 'to expropriate lands long in private hands in order to resell them to replenish their coffers.") (quoting Deveney, *supra* note 41, at 42); Carol Rose, *The Comedy of the Commons: Custom, Commerce, & Inherently Public Property*, 53 U. CHI. L. REV. 711, 740 ("[C]ustom had traditionally supported a communities claims to use a variety of lands in common. . . ."); Molly Selvin, *The Public Trust Doctrine in American Law & Economic Policy, 1789-1920*, 1980 WIS. L. REV. 1403, 1437 (detailing how modern environmentalists have similarly attempted to imposed affirmative duties on sovereign governments to not spoil the *res*); *see also* BRAILSFORD, *supra* note 14, at 426 ("Down below, in the villages, among the peasants, . . . the countryman [did not] lose his attachment to his common fields for two centuries to come [up through the nineteenth century]. . . . peasants were still ready to take a risk to tear down fences.").

104. *Cf.* CROMARTIE, *supra* note 59, at 94–95 (describing Hale's rejection of Hugo Grotius' "necessity defense" to theft); *cf.* BRADLEY, *supra* note 99, at 46 (recognizing the theoretical possibility of a benefit to the community where enclosure is mutually agreed on).

105. *See* BRAILSFORD, *supra* note 14, at 426-427.

106. *See Sentence of the High Court of Justice Upon Charles I, in* Adams & Stephens, *supra* note 49, at 391 ("Charles Stuart, being admitted King of England, and therein trusted with a limited power to govern . . . being obliged to use the power committed to him for the good and benefit of the people. . . .").

107. GREAT CHARTER OF LIBERTIES (1215), *in* Adams & Stephens, *supra* note 49, at 46 ("All the fish-weirs in the Thames and Midway, and throughout all England shall be done away with, except those on the coast.").

108. THE INSTITUTES OF JUSTINIAN 2.1.1 (J.B. Moyle, trans., 1896) (533) ("The following things are by natural law common to all—the air, running water, the sea, and consequently the seashore.").

109. *See* Sax, *supra* note 10, at 475 (linking the Institutes of Justinian with the Magna Carta); *see also* Peter C. Davis, *California's Tideland Trust: Shoring it Up*, 22 HASTINGS L.J. 759, 761–62 (1971) ("Under Roman law the public's right to use the seashore was almost unrestricted. . . . [T]he rights of private grantees (*jus privatum*) were always viewed as subservient to the rights of the public (*jus publicum*).").

110. *See* Michael C. Blumm & Courtney Engel, *Proprietary & Sovereign Public Trust Obligations: from Justinian & Hale to Lamprey and Oswego Lake*, 43 VT. L. REV. 1, 7 (2018); *see also* Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 10.

111. Daniel Magraw & Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 Env't. L. Rep. 10934, 10936 (2017); *see* JESSEL, *supra* note 99, at 88 (discussing the resentment of the common people towards the old forest laws).

After King John died, and just two years after Magna Carta, Henry III's regent, William Marshal, created the Forest Charter. When the new monarch came of age, the Forest Charter was officially signed into law.[112] The two documents formed the core constraints on the English monarchy for over four hundred years, protecting both commoner and lord alike from invasions of property rights.[113] Although enclosure ramped up throughout the fifteenth century, commoners consistently and successfully used direct action to oppose the seizure of their lands.[114] Yet, statutory law was not on their side. Charlies I's violations of both the lords' proprietary rights and the peasantry's commonage rights led to a general revolt against both his rule and ultimately against the institution of hierarchy in general.[115]

A. Levellers: The Sword & The People

The most important group asserting rights to the commons was the Levellers. The Levellers wished to end enclosure, and they bridled under the tithes paid to support a church to which they did not belong.[116] They appealed to the ancient constitution of England to show that their grievances, among them the enclosure of commons, were based in the rights of Englishmen in need of legislative protection.[117] Many of the Levellers had their appetites for democracy whetted while serving in the New Model Army, which formed on 15 February 1645.[118] The New Model Army was England's first professional fighting force to be staffed by merit. The officers were drawn from the ranks, often by election, in direct contravention of the Royalist method of using peerage to determine eligibility for leadership.[119]

William Walwyn, who would go on to become one of the most prolific Leveller theorists, offered an early constitutionalist reform proposal in 1645.[120] He advocated that Magna Carta should be abandoned and a fresh charter should be written by the people to replace it. In Walwyn's view, Magna Carta only represented a portion of English liberties. The common law, derived from a continuously reinvigorated social compact, provided much broader protection than Magna Carta

112. Magraw & Thomure, *supra* note 111, at 10934.

113. *See* WILLIAM BLACKSTONE, THE GREAT CHARTER & THE CHARTER OF THE FOREST, WITH OTHER AUTHENTIC INSTRUMENTS, i (1759) (calling the two charters "the charters of liberties").

114. *See* LINEBAUGH & REDIKER, *supra* note 75, at 17–19 (listing fifteen different risings of the poor during the fifteenth through seventeenth centuries).

115. *Id*. at 18; *see* BRAILSFORD, *supra* note 14, at 426 ("Up to the reign of the first Charles the crown sought by legislation and penalties to arrest [enclosure]. . . . [But] beyond a doubt enclosure was profitable . . . [and] the royal family did a good deal of enclosing on its own lands . . . .").

116. *See* HILL, *supra* note 14, at 82–83 (describing the army's frustration with preachers who proselytized against removing enclosures).

117. *Id.* at 76 ("The appeal to the past, to documents (whether the Bible or Magna Carta) becomes a criticism of existing institutions, of certain types of rule.").

118. *See* HILAIRE BELLOC, CHARLES I 236–37 (2003) (illustrating that rebellious Levellers deviated from traditional military organization towards something resembling a democratic military).

119. *See id*. at 236 ("The wages were high; even the foot solider could count himself better off than the average of the laboring classes from which he was drawn. . . ."); Sabine, *supra* note 60, at 2; BRAILSFORD, *supra* note 14, at 511.

120. David R. Como, *Print, Censorship, and Ideological Escalation in the English Civil War*, 51 J. BRITISH STUDIES 820, 840 (2012); Martin Dzelzainis, *History and Ideology: Milton, the Levellers, and the Council of State in 1649*, 68 HUNTINGTON LIBRARY Q. 269, 280–81 (2005).

purported to afford. Walwyn called Magna Carta a "messe of pottage" wrestled from Norman conquerors, and rejected ancient constitutionalism in favor of natural law and reason.[121] The debate Walwyn touched off went back and forth in the form of public broadsheets and pamphlets between the Leveller leaders, and drew ever more attention to their ideas.[122]

The Levellers rose to political prominence in the aftermath of Charles I's surrender in 1646. A peculiar stalemate between Royalist, Scottish Covenanter, Parliamentarian, and Army forces created a vacuum that allowed commoners to seize enough power to force their way to the decision-making table.[123] The contest between democratic radicalism and secular or religious authoritarianism culminated in the Putney Debates in 1647 where the Levellers sent chosen representatives called Agitators to speak on their behalf.[124] At those debates, the Agitators aired ideas about constitutional governance, natural rights, and democracy, which they asserted came directly from the soldiers who elected them.[125]

The Levellers' demands for responsive government and individual rights were written down in *The Case of the Armie Truly Stated*.[126] This manifesto was written to remind the participants at the Putney Debates of the "Demands of the Armie," and was embodied by a tract penned by the soldier John Wildman writing for the rank and file of the whole army.[127] Besides assurances of backpay, free elections, and keeping of public trust, the Demands prominently included "[t]hat all the antient rights and donations belonging to the poore, now imbezzled and converted to other uses, as inclosed Commons . . . throughout all parts of the land may be forthwith restored to the antient publique use and service of the poore."[128] The Levellers intended to ensure that their grievances were resolved by whatever agreement resulted from the debates and made it clear that they felt that their representatives were legally bound to uphold their legal rights.[129]

Wildman ultimately declared that enclosure amounted to theft of the poor peoples' subsistence for unjust monopolistic benefit.[130] Wildman also wrote that

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121. Rachel Foxley, *'More Precious in Your Esteem than it Deserveth'? Magna Carta and Seventeenth-Century Politics*, *in* MAGNA CARTA: HISTORY, CONTEXT, AND INFLUENCES 72 (Lawrence Goldman, ed. 2018).

122. *Id.* at 72–73

123. *See* GRAHAM EDWARDS, THE LAST DAYS OF CHARLES I 35–36 (1999).

124. LEVELLER TRACTS, *supra* note 50, at 1; *see generally* LINEBAUGH & REDIKER, *supra* note 75, at 104–23 (describing in detail the ramifications of the failure to ensure commonage for the poor at the Putney Debates, and arguing that one of those ramifications was the need for a transatlantic slave trade).

125. Sabine, *supra* note 60, at 2.

126. JOHN WILDMAN, THE CASE OF THE ARMIE, *reprinted in* LEVELLER TRACTS, *supra* note 50, at 65, 71.

127. *Id*. at 63.

128. *Id.* at 82; *see also* ORWIN & ORWIN, *supra* note 14, at 154 ("Originally, the right to graze on the two commons [in Laxton] was reserved to the cottars, or those who had no other land to pasture. . . .").

129. WILDMAN, THE CASE OF THE ARMIE, *reprinted in* LEVELLER TRACTS, *supra* note 50, at 80 ("[T]he people have bought their rights and freedomes [sic], by the price of blood . . . therefore it be demanded as the peoples due. . . ."); *see* BELLOC, *supra* note 118, at 196 ("[M]any of them [came] from contact with the army, underpaid, underfed, mutinous, and disappointed. . . .").

130. WILDMAN, THE CASE OF THE ARMIE, reprinted in LEVELLER TRACTS, supra note 50, at 81–82 (demanding that "all Monopolyes [sic] be forthwith removed").

commonage for public benefit is an ancient traditional right instated for the good of the commoners.[131] In the Levellers' opinion, without these 'social safety nets,' a just and lawful government could never be established.[132] Therefore, the Case of the Armie is the testament of a large portion of the English population, convinced that public usufructuary rights existed and that their leaders were obligated to guard those rights.

Over the next two years, the Levellers fought for commonage, suffrage, and a government limited by its trust responsibilities.[133] Through their elected Agitators, they castigated the Parliamentarians who claimed to represent the rank and file. Instead, the new Parliament aggrandized public resources while simultaneously refusing to make good on £10,000 of back pay owed to the soldiers who had sided with Parliament against the king.[134] The spark which lit the powder keg was the order, in 1648, to prepare an expedition to reconquer Ireland.[135]

In response to this infuriating order, Walwyn vented the frustrations of the army in his pseudonymous *The Bloody Project*.[136] Walwyn insisted that before a new war could begin, England's army should have, in hand, the goals for which it had fought so long and hard, including protection of public resources.[137] Any soldier who carried on a new war before securing their own liberty risked the wrath of God for exporting tyranny abroad.[138]

Walwyn's pamphlet circulated throughout the ranks. When the Army finally received orders to embark for Ireland, the troops instead elected a Council of Agitators to resist the expedition, at least until arrears were paid.[139] The mutiny escalated after the execution of Charles I, as Walwyn and three other Leveller leaders—John Lilburne, Richard Overton, and Thomas Prince—continued a veritable torrent of screeds against the faithless Parliament.[140] Eventually, all four were arrested in late March of 1649, but they continued to sneak pamphlets and manuscripts to sympathetic printers.[141]

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131. *Id*.

132. *Id.* at 81 ("[F]orrest [sic] lands . . . be immediately set apart for the arrears of the Army . . . only such part of the aforesaid lands be sold as necessity requires . . . the residue be reserved and improved for a constant revenue for the State that the people may not be burthened. . . ."). *But cf.* Rose, *supra* note 103, at 718 (claiming that reduction to possession is the classic common law manner of creating proprietary rights out of a "commons").

133. HILL, *supra* note 14, at 110.

134. BRAILSFORD, *supra* note 14, at 507–08.

135. *Id*. at 498–99; *see also* MARGARET MACCURTAIN, TUDOR & STUART IRELAND 109–110 (1972) (discussing Ireland's own struggle with enclosure, and English literature advertising Irish open fields as available for enclosure by planters).

136. BRAILSFORD, *supra* note 14, at 498–99; WILLIAM WALWYN, THE BLOODY PROJECT, *reprinted in* LEVELLER TRACTS, *supra* note 50, at 135.

137. *Id*. at 144 ("Parliaments should have no power . . . to take away general property. . . .").

138. BRAILSFORD, *supra* note 14, at 498.

139. *Id*. at 511–12 (describing the election of new Agitators and the formation of a Council of Agitators).

140. *Introduction*, *in* LEVELLER TRACTS, *supra* note 50, at 20–21.

141. HILL, *supra* note 14, at 108.

Among these pamphlets was the widely circulated tract, *England's New-Chaines Discovered*, penned by Lilburne, a popular and scholarly Lieutenant.[142] One of the most important uses of the commons at this time was tillage, or growing vegetables and grain.[143] Therefore, Lilburne spoke for many soldiers when he castigated Parliament for compounding the problem of enclosure by reducing the amount of farm-produce a poor laborer could use for subsistence.[144] Lilburne's was a persistent remonstrance against Parliamentary inaction which was echoed across the Leveller movement by those bent on securing the commons against privatization. For him and his fellow Levellers, a nation's claim to legitimacy depended on protecting public resources by, among other things, not frittering them away in support of a preaching class. Anything less required an insurrection.

In May 1649, the Leveller mutiny came to blows with the New Model Grandees.[145] The democratic deliberations of the Council of Agitators, combined with a distaste for murdering their former messmates, did not make the Leveller faction an effective fighting force.[146] After a daring initial victory, the Levellers were ultimately crushed at Burford during a night attack on the fourteenth of May.[147] The leaders were shuttered off from the public, their pens and paper confiscated for fear that they would martyr themselves and make their cause a rallying point for the increasingly disaffected lower classes.[148]

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142. *See id.* at 43–44 (detailing Lilburne's legal education and his study of Coke's commentary on Magna Carta); *see also* JOHN LILBURNE, ENGLAND'S NEW CHAINS DISCOVERED (1649), *reprinted in* LEVELLER TRACTS, *supra* note 50, at 157 (castigating Parliament for breaching the trust that the soldiers of the army had placed in their new representatives). Lilburne's bout with Star Chamber for unlicensed printing in 1637, during which he refused to give evidence against himself, was a major source of friction that led to the abolition of Star Chamber in 1641 and the Fifth Amendment to the United States Constitution. *See* Trial of Lilburne, 3 St. Tr. 1315, 1326 (S. Ch. 1637), *reprinted in* A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS: FROM THE EARLIEST PERIOD TO THE YEAR 1783, Vol. IV, at 1320 (Thomas B. Howell, 1811) ("[T]hey went about to make me betray my own innocency, that so they might ground the bill upon my own words."); *see also* Habeas Corpus Act, 1640, 16 Car. I, c. 10; Miranda v. Arizona, 384 U.S. 436, 459 (1966) (quoting Lilburne's assertion that swearing oaths against oneself is contrary to fundamental right); *cf.* Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 678 (1985) (describing royal use of Star Chamber to enforce printing laws).

143. *See* HILL, *supra* note 14, at 43–44 (noting the need for commons as spaces where agricultural goods could be grown by traditional subsistence farming methods); *see also* BELLOC, *supra* note 118, at 48 ("Outside [a] restricted urban population, all England was agricultural.").

144. *Cf.* HILL, *supra* note 14, at 63, 102; *see generally* JOHN LILBURNE, ENGLAND'S NEW CHAINS DISCOVERED (1649), *reprinted in* LEVELLER TRACTS, *supra* note 50, at 159 (stating the *Agreement of the People* "seems to be resolved to take away all known and burdensome grievances, as Tythes, that great oppression of the Countries industry and hindrance of Tillage").

145. BRAILSFORD, *supra* note 14, at 408.

146. *See* HILL, *supra* note 14, at 109; *see also* BRAILSFORD *supra* note 14, at 513, 517–18.

147. *See* HILL, *supra* note 14, at 87; *see also* BRAILSFORD *supra* note 14, at 518–519 (retelling the tale of Captain William Thompson's last stand).

148. *See generally* WILLIAM WALWYN, THE BLOODY PROJECT, *reprinted in* LEVELLER TRACTS, *supra* note 50, at 139 ("[H]ave they not openly professed themselves to be obliged to observe no other Rule then [sic] discretion.").

Ultimately, the Levellers rejected, clashed with, and were subdued by Cromwell's new form of absolutism.[149] The Levellers aimed for an ambitious revolution in the sense of returning to a prelapsarian state. They tempered their longing for Eden with a belief that private property in itself was not evil and should be protected where it did not infringe on access-rights to the commons. The Levellers' theoreticians viewed the redress of this grievance not only as foundational to liberty, but also as legal rights that were enforceable against the sovereign.[150] The trick was enforcing these rights. Their story should remind modern analysts that the freedom to till common land was a fundamental concern for the English peasantry.[151]

B. Diggers: The Spade & The Land

The slow pace of change which frustrated the Levellers prompted the rise of an even more radically egalitarian group among the disaffected lower classes. The Diggers largely believed that any alienation of the *res* was illegal, both according to customary common law, and natural law as revealed by God.[152] The Digger, or 'True-Leveller,' movement took place between 1649 and 1652. They practiced active tillage and levelling of enclosures by tearing down fences and filling in ditches. Like the Levellers, the Diggers left a voluminous body of tracts behind. This movement should not be ignored in the discourse on the public trust doctrine because of its important contribution to the debate about communal property that precipitated the English Civil War, which was so pivotal in Hale's intellectual development.[153]

Gerrard Winstanley was a poor former cloth merchant, bankrupted by the collapse of the Irish cloth trade at the start of the Civil War, who served as the mouthpiece and theoretician of the Diggers.[154] He took the Levellers' radical opposition to enclosure beyond their vision of an improved and communally sensitive constitution and reformulated it into a doctrine diametrically opposed to the very concept of private property. He appeared to have been particularly inspired by

149. *See* CHRISTOPHER HIBBERT, CHARLES I 255–56 (1968) (describing Cromwell's purge of the House of Commons in 1649 and the Levellers' condemnation of Cromwell's dictatorial trial of Charles I as a means of diverting public attention from Parliament's failure to deliver on their promises).

150. Michael Kent Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENT. 359, 367 (1991) ("To the extent that the acts of Parliament violated the rights or interests of the people, they were void because they violated the trust that was the basis of the agency."); Rachel Foxley, *John Lilburne and the Citizenship of 'Free-born Englishmen'*, 47 HIST. J. 849, 871 (2004) (describing Leveller theories of the rights and duties governors and governed owed each other in reciprocal relationship).

151. *See* BRAILSFORD, *supra* note 14, at 42–43 (reminding the reader that any account of the seventeenth century common law must cognize the influence of religious reasoning and natural law on the rights that people believed they held); *see also* HALE, *supra* note 60, at 66 (grouping usage, custom, and practice as one of the three authoritative sources of legal rights and responsibilities); *cf.* PAUL BRAND, THE MAKING OF THE COMMON LAW 78 (1992) (describing Hale as "the first lawyer in England to write a coherent history of the Common Law"); *see generally* R.H. HELMHOLZ, THE *IUS COMMUNE* IN ENGLAND 14 (2001) (remarking on the importance of the Natural law School to the character of English common law).

152. *See generally* Sabine, *supra* note 60, at 251.

153. *See generally id*. at 2.

154. *See id.* at 11.

William Walwyn and Richard Overton.[155] Drawing from popular conceptions about the legitimacy of English government, Winstanley styled himself a proponent of a common law tradition of governmental reciprocity rooted in ancient Saxon democracy.[156]

Winstanley claimed his ideas were inspired by divine revelation. This vision revealed that communal work and living would be the nation's glory, ending inequality in society.[157] In April 1649, Winstanley and William Everard "led a little band of some half dozen poor men . . . [to] the common land at St. George's Hill and began to dig the ground and to prepare it for sowing parsnips, carrots, and beans."[158] The first Diggers were humble and did not want to violently expropriate the landlords, but instead desired to be an exemplary community asserting their usufructuary rights to the commons.[159]

In *The True Leveller's Standard Advanced*, first published in 1649, a month before the Leveller's destruction at Burford, Winstanley made the desires of the community at St. George's Hill plainly known.[160] Although the title indicates that the Diggers took their inspiration from the Levellers' tenets, they thought the 'constitutional' Levellers were not aggressive enough because they relied on legislation and pamphlets rather than direct action.[161] According to the Diggers, the Levellers should have asserted that all the farmland in England be levelled as a commons—free for the use of all the public.[162]

Like the Levellers, the Diggers believed that "[t]he Earth [was] made to be a Common Treasury of relief for all."[163] However, Winstanley interpreted the introduction of hierarchically divided property as the true Fall from God's grace.[164] This belief caused him to despise all property institutions, including money, as the cause and result of humanity's curse.[165] Therefore, the Leveller call for equity in the *jus publicum*'s distribution was not enough for Winstanley.

Winstanley claimed that God would not reward anyone with status over another person, whether they were saint or sinner. Indeed, the Diggers believed that the ownership of private land was not a reward but rather a hell of unrighteousness.[166]

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155. *See id*. at 21 (arguing, nevertheless, that "Winstanley was no scholar, and probably had little occasion to be critical about the origins of his ideas").

156. *See id*. at 251 ("In the beginning of time, the great Creator Reason, made the Earth to be a Common Treasury.").

157. *See* HILL, *supra* note 14, at 103.

158. Sabine, *supra* note 60, at 11.

159. *See* WINSTANLEY, NEW LAW OF RIGHTEOUSNES BUDDING FORTH, TO RESTORE THE WHOLE CREATION FROM BONDAGE OF THE CURSE (1649), *reprinted in* Sabine, *supra* note 60, at 147, 222.

160. HILL, *supra* note 14, at 91.

161. *Id*. (discussing the division between "constitutional Levellers" and "radical Levellers").

162. *Id*. at 92.

163. WINSTANLEY, THE TRUE LEVELLERS STANDARD ADVANCED (1649), *reprinted in* Sabine, *supra* note 60, at 245, 252.

164. *Id*. (keeping the "[C]ommon Store-house for all . . . in the hands of a few, whereby the great Creator is mightily dishonored. . . ." is the "[C]oming in of Bondage").

165. *Id*.

166. *Id*. at 253 ("[T]he Earth that was made a common Treasury for all to live comfortably upon, is become through mans [sic] unrighteous actions one over another, to be a place, wherein one torments another.").

According to Winstanley's philosophy, which aligns the Diggers with a Lollard tradition dating back to fourteenth century rural England, God had mandated an expansive *jus publicum*.[167] Winstanley and the Diggers emphatically believed:

> That this Civil Propriety is the Curse, is manifested thus, Those that Buy and Sell Land, and are landlords have got it either by Oppression, or Murther [sic], or Theft; and all landlords live in the breach of the Seventh and Eighth Commandments, *Thou shalt not steal, nor kill*.[168]

Private property, especially that of people who force others to pay rent in order to work the soil, could only be obtained and held by sin.[169] Thus, any alienation of public property into the hands of a private individual reflected the Fall from grace. Accumulating wealth did not exhibit God's favor, but instead resulted from machinations and cunning which flouted God's laws.[170] Winstanley also believed that the creation of monopolies in common resources would bring England to a state of servitude similar to that experienced by slaves in Turkey.[171] Winstanley represents a strain of thought in English society that believed it a sin to impair the *jus publicum* in any way because God's laws were the ultimate authority and source of the common law.[172] Indeed, the *jus privatum* was entirely subservient to the needs of the public.[173]

Despite these radical views on the sinfulness of enclosure, *The True Leveller's Standard Advanced* concluded "[t]hat there is no intent of Tumult or Fighting" at St. George's Hill, "but only to get Bread to eat, with the sweat of our brows; working together in righteousness, and eating the blessings of the Earth in peace."[174] The Diggers refused to engage in a "tumult" against the government in order to ensure the Digger community's endurance over time.[175] Longevity, they hoped, would provide a reinforcing precedent to the common law's stricture that the commons were to be left open to benefit everyone, regardless of any current rights

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167. *See* CURTIS V. BOSTICK, THE ANTICHRIST AND THE LOLLARDS: APOCALYPTICISM IN LATE MEDIEVAL AND REFORMATION ENGLAND, 144 (1998) (describing the endurance of Lollardy in the English lower classes).

168. WINSTANLEY, THE TRUE LEVELLERS STANDARD ADVANCED, *in* Sabine, *supra* note 60, at 258 (emphasis in original).

169. *Cf.* WINSTANLEY, A NEW-YEERS GIFT, *reprinted in* Sabine, *supra* note 60, at 385 ("[T]he god from whome theyclaim Title to the Land . . . was Covetousnesse the Murderer . . . that great red Dragon. . . .").

170. HILL, *supra* note 14, at 106–7.

171. *Id*.

172. WINSTANLEY, THE NEW LAW OF RIGHTEOUSNES, *reprinted in* Sabine, *supra* note 60, at 196 ("[W]ho can be offended at the poor of doing this [saying that the fruits of the earth are common to all]? None but the covetous, proud, lazy pamper'd flesh, that would have the poor stil [sic] to work for that devil (particular interest) to maintain his greatnesse [sic], that he may live at ease."); HILL, *supra* note 14, at 104–5.

173. Sabine, *supra* note 60, at 197 ("Did the light of Reason make the earth for some men to ingrosse [sic] up into bags and barns, that others might be opprest with poverty? . . . [R]eason was not the God that made that law . . . . ").

174. WINSTANLEY, THE TRUE LEVELLERS STANDARD ADVANCED, *reprinted in* Sabine, *supra* note 60, at 266.

175. *Id*.

in the *jus privatum*.[176] Winstanley's community was not merely a fringe movement. Rather, they planned an economic revolution that would force the government to safeguard farmland as a public resource or starve by depriving the propertied class of a labor force.[177]

To Winstanley, human reason was the one true god. This led him to a principled opposition to enclosure.[178] As a prologue to *The Law of Freedom in a Platform or True Magistracy Restored*, Winstanley wrote a remonstrance entitled, *To his Excellency Oliver Cromwel, General of the Commonwealths Army in England, Scotland, and Ireland*. Winstanley informed Oliver Cromwell that his revolution was only partial and that much work needed to be done to fully remove the "Norman yoke."[179] To Winstanley, the Norman yoke manifested in legal titles, which lords used to exclude the citizens of England from the commons.[180]

Winstanley felt that he solved the old Leveller problem of tithes with "commonage," or in other words, this and usufructuary rights to the *jus publicum*.[181] Winstanley told Cromwell that farming the waste lands would provide enough of a surplus that "though you do take away Tythes [sic] . . . yet there will be no want to them, for they have the freedome [sic] of the Common stock."[182] A public trust in communal farmland would obviate the need for taxes to support the clergy because everyone would have rights to sow and harvest the basic necessities of life on common property.

The pamphlet contained a detailed and elaborate account of Winstanley's vision for a true commonwealth, including ordinances derived from Winstanley's religious gloss on the Leveller constitution.[183] Winstanley's common law was not just for England—although Cromwell and the Rump Parliament were his primary

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176. *Id*. at 260 ("England is not a Free People, till the Poor that have no Land, have a free allowance to dig and labour the Commons . . . .") (emphasis omitted); *contra* Rose, *supra* note 103, at 713–16 (noting that in many beachfront cases, a court's recognition of the *jus publicum* turns public access rights into a commons in contravention of "efficient" common law doctrines).

177. LINEBAUGH & REDIKER, *supra* note 75, at 117–18 (commenting on the Diggers' plan to overturn tyrannical laws through humble gestures).

178. HILL, *supra* note 14, at 112-14 (attributing to Winstanley the idea that if the earth is held in common by all, men will not need to wait for a Heaven in the hereafter).

179. WINSTANLEY, THERE ARE SOME OF THE NORMAN LAWS WHICH WILLIAM THE CONQUEROR BROUGHT INTO ENGLAND (1649), *reprinted in* Sabine, *supra* note 60, at 311 (blaming William the Conqueror for upsetting the Saxon custom of free common land); *see also* HILL, *supra* note 14, at 107 (noting that Winstanley and his followers went beyond Leveller democracy to espouse the view that all power that does not safeguard the commons must fall if English freedom was to be secured).

180. WINSTANLEY, A NEW-YEERS GIFT FOR THE PARLIAMENT & THE ARMIE (1649), *reprinted in* Sabine, *supra* note 60, at 363–64 ("That you should buy and sell our crown Lands and waste Lands [is] Oppression, it is our own . . . [they were] taken from us [by] the Norman conquest . . . therefore you cannot in Equity take it from us. . . .").

181. WINSTANLEY, THE LAW OF FREEDOM, (1652) *reprinted in* Sabine, *supra* note 60, at 500, 510 (answering what may be interpreted as a "takings" argument with the logic that there can be no "scruple of conscience to make restitution of this which hath been so long stoln [sic] goods"); *see also* LILBURNE, LEGALL FUNDAMENTALL LIBERTIES, *reprinted in* LEVELLER TRACTS, *supra* note 50, at 400 (claiming also the importance of the commons as a resource in need of stewardship for public benefit).

182. WINSTANLEY, THE LAW OF FREEDOM, (1652) *reprinted in* Sabine, *supra* note 60, at 510 (describing further the commons as stolen goods).

183. Sabine, *supra* note 60, at 428 ("[T]hese fore-mentioned Scriptures [give] full warrant to all poore [sic] men, to build them houses, and plant them corne [sic] upon the Commons . . . .").

audience—but for every place on earth, which in due time, would follow the Digger's example.[184] Winstanley's law of freedom included: his egalitarian religious principles; universal suffrage; aspects of particular English customs that benefitted the governed; charities for the poor; and expanding the public's traditional usufructuary rights to every member of society.[185] Indeed, these would be the primary foundations of freedom for his true commonwealth. Winstanley and the Diggers wished to enshrine as the true law, customary rights—including those lost in the Fall from Paradise—to use the *jus publicum,* represented by the public commons.

IV. MADE BY MEN IN COMMON

Many of these customary rights were familiar to the colonists in America because American history is influenced by the refuse of the English Civil War.[186] Professor Huffman elided this historical fact in critiquing the American courts for misunderstanding Hale when they used his treatise to fashion the public trust doctrine.[187] Huffman acknowledged that the American revolutionaries "sought to guarantee for themselves the rights of Englishmen," including the proposition that just power can only be derived from the consent of the governed.[188] In fact, the common widespread sentiment of the era against monopolization of public resources ran deep in the English population.[189] This sentiment made its way across the Atlantic when the Levellers, Diggers, and regicides fled the persecution that accompanied Charles II's return to power.[190]

For example, Edward Whalley protested the enclosure of lands he received as the spoils of war to Parliament and took a radical solution to this violation of public lands into his own hands.[191] Parliament did not take kindly to this war-hero

184. *Id.* at 257.

185. *Id.* at 656 ("Because there is no Statute-Law in the Nation that doth hinder the common people from seizing upon their own Land . . . and therefore where there is no Law, there is not transgression.").

186. *See*, *e.g.*, ARENDT, *supra* note 67, at 206; HILL, *supra* note 14, at 20, 380–81; John Philip Reid, *The Jurisprudence of Liberty: The Ancient Constitution on the Legal Historiography of the Seventeenth & Eighteenth Centuries*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, & THE ANGLO-AMERICAN TRADITION OF THE RULE OF LAW, 147, 194–95 (Ellis Sandoz ed., 1993) (contending that even if the American colonies "were not looking back to the ancient constitution," they were at least "looking back to the constitution . . . that had triumphed over Charles I").

187. Huffman, *Speaking of Inconvenient Truths*, *supra* note 17, at 54 (claiming that Hale is part of the common law foundation of the public trust doctrine only because his work has been misunderstood and distorted).

188. *Id.* at 27; *see* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

189. *See supra* Section III. A; *cf.* Christopher W. Brooks, *The Ancient Constitution in Sixteenth-Century Legal Thought*, *in* Sandoz, *supra* note 182, at 75 (describing Magna Carta as a statute rather than a charter of customary liberties until its meaning shifted in the legal profession in the 1590s).

190. HILL, *supra* note 14, at 384 (discussing the ex-membership of the Levellers and Diggers); A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA & CONSTITUTIONALISM IN AMERICA, 263 (1968) ("The grievances which induced them to separate from the mother country [England] were considered as violations of the *common law* . . . the *common law* was claimed by a unanimous voice as the *birth right* of American citizens . . . .") (emphasis in original).

191. BRAILSFORD, *supra* note 14, at 430 ("[T]wo parts in three of their arable land should for ever be kept in tillage, [sic] that the state not [be] damnified.") (quoting Colonel Whalley).

airing his sense of justice.[192] When Whalley tried to introduce a bill against enclosure in 1656, a landed member of Parliament condemned it as "the most mischievous bill that ever was offered to this House."[193] At the Restoration in 1660, Whalley lost his estates because he was a regicide, and was forced to flee across the Atlantic where he received a hearty welcome in Boston before ultimately settling in Rhode Island among other regicides with his fellow officer and son-in-law William Goffe.[194]

America's constitutional cornerstones—freedom of the press, freedom of religion, the warrant requirement, and the writ of habeas corpus—grew directly from the demands of the Levellers in the New Model Army. Many of these demands were codified in the 1688 Declaration of rights.[195] For the founding generation of Americans, consent to be governed was contingent on guarantees that the government would not violate their rights. This included their rights to exploit common resources managed by the sovereign for the citizens' protection.[196] For people like Benajah Mundy, this guarantee existed in the common law's public trust doctrine.[197]

An old Maryland case, *Brown v. Kennedy,* decided the rights of the state to alienate title to the soil under non-navigable riverbeds in the same year as *Arnold v. Mundy*.[198] Huffman relied on the dissent in *Brown* for the proposition that vesting title to waste lands in private owners was necessary to avoid "contention and

192. *See* EDWARDS, *supra* note 123, at 63–64, 65–66 (describing Whalley's role in Charles I's imprisonment); ROBERTSON *supra* note 98, at 247 (recounting Whalley's communications with Cromwell regarding a supposed Leveller assassination plot against Charles I's life).

193. Representative Fowley, *quoted in* BRAILSFORD, *supra* note 14, at 431; *see also* GEOFFREY HOLMES, THE MAKING OF A GREAT POWER: LATE STUART & EARLY GEORGIAN BRITAIN 1660–1722, 50 (1993) ("The defeat in 1656 of the last parliamentary attempt to regulate enclosures set the tone for the new era.").

194. BRAILSFORD, *supra* note 14, at 431 (recounting a local legend that the two officers donned their New Model Army uniforms to fight in King Phillip's War).

195. *Compare* THE HUMBLE PETITION (1648), *reprinted in* LEVELLER TRACTS, *supra* note 50, at 147, 151–54, *with* U.S. CONST. amend. I–X, *and* THE DECLARATION OF RIGHTS, *in* C. GRANT ROBERTSON, SELECT STATUTES, CASES, & DOCUMENTS TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY, 1660-1832, at 129 (1923); *see also* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L. J. 1651, 1700 (1994); *cf.* Watts & Richard, *supra* note 62, at 796–97 (describing the origins of property law in Hugo Grotius' natural law philosophy).

196. U.S. CONST. amend. V; Juliana v. United States, 217 F. Supp. 3d 1224, 1260–61 (D. Or. 2016) (noting that "[t]he Social Contract theory . . . provides that people possess certain inalienable rights, and that governments were established by the consent of the governed for the purpose of securing those rights. [an example of which] . . . is the status as trustee pursuant to the public trust doctrine") (citing *Illinois Cent.* 146 U.S. at 459–60); Robinson Twp., Washington Cty. v. Pennsylvania, 83 A.3d 901, 947–48 (2013) ("[T]he Commonwealth's declaration of rights, which delineates the terms of the social contract . . . assumes that the rights of the people articulated in Article I of our constitution—vis-à-vis the government created by the people—are inherent in man's nature and preserved rather than created."); *see also* Rebecca L. Brown, *Accountability, Liberty & the Constitution*, 98 COLUM. L. REV. 531, 533 (1998).

197. MCCAY, *supra* note 1, at 68; *see Act Against Monopolies*, *in* Adams & Stephens, *supra* note 49, at 337 (describing the context of the populist anti-monopoly sentiment).

198. Brown v. Kennedy, 5 H. & J. 195, 200 (1821) (stating that title to alluvial accretion has no regard for navigability inquiries).

strife."[199] However, the facts surrounding *Arnold v. Mundy* refute that position.[200] The *Brown* majority concluded that although in England the King could alienate the riverbed, the grant of a private right had to be explicit to be enforceable.[201] Nevertheless, the *jus publicum* "cannot be prejudiced by the *jus privatum* acquired under grant."[202]

The U.S. Supreme Court, in *Morris v. United States,* rejected *Brown*'s holding as an alteration of America's common law rule and overturned the case.[203] In *Morris*, the descendants of James Marshall attempted to monopolize the Potomac Riverbed by claiming title to waterfront property in Washington D.C.[204] Writing for the court, Justice Shiras rejected this claim and looked to the grant from the king, who just so happened to be Charles I:

> dominion and propriety in the navigable waters, and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community about to be established as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property, to be parceled out and sold for his own individual emolument.[205]

The seven-to-two Court concluded that the Maryland Court of Appeals decision "can only be considered as affecting private rights and controversies between individuals. They cannot be given effect to control the policy of the United States in dealing with property held by it under public trusts."[206] The Court remanded the *Morris* case to the Maryland courts for reconsideration, suggesting that the public trust limits the government's ability to alienate property held by the public in common and is therefore subject to the *jus publicum*.[207] This case was one of many refusing to privatize trust resources because such monopolization would be contrary to the very purpose of government.[208]

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199. *Id*. at 208 (Earle, J. dissenting) ("It is a principle based on the soundest policy. Its purpose is to assign a particular proprietor to every thing capable of ownership, leaving as little as may be in common, to be the source of contention and strife.").

200. *See supra* Section I; *see also* WINSTANLEY, THE LAW OF FREEDOM, *reprinted in* Sabine, *supra* note 60, at 520 ("Surely then, oppressing Lords of Manors, exacting landlords . . . say, their brethren shall not breathe in the ayr [sic] . . . nor have the moyst waters to fall upon them in showres, unless they will pay them Rent. . . .").

201. *See Brown*, 5 H. & J. at 203.

202. *Id*. (explaining that the *jus publicum* may be a right to fish, a right of navigation, or a similar public use).

203. Morris v. United States, 174 U.S. 196, 238 (1899).

204. *Id*. at 222–23.

205. *Id*. at 227 ("the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use.").

206. *Id*. at 240.

207. *Id*. at 291.

208. Geer v. Connecticut, 161 U.S. 519, 529 (1896) *overruled in part by* Hughes v. Oklahoma, 441 U.S. 322 (1979) (holding that a state's sovereign ownership of resources "is to be exercised, like all other

This anti-monopolization principle was commonplace in the United States during the nineteenth century, reflecting a deeply ingrained anti-monopoly sentiment.[209] Perhaps the most important of these anti-monopoly cases was *Illinois Central Railroad v. Illinois*, where the Illinois legislature challenged a monopoly that a previous legislature granted to Illinois Central Railroad Company.[210] Upholding the legislature's challenge, Justice Field's majority opinion held that the grant was never valid in the first place because the lakebed was public property subject to a trust.[211] This trust responsibility to all of its citizens was an inalienable obligation on the government of Illinois, an obligation the Court placed on the same level of sovereign responsibilities as the police power.[212] The case epitomizes the suspicion with which courts viewed abdications of the trust responsibility when private monopoly threatened public resources.[213]

To the *Illinois Central* Court, allowing a legislature to use the public trust lands to benefit a private railway company, either for their own emolument, or to merely balance a budget, "would place every harbor in the country at the mercy of a majority of the legislature of the state."[214] The danger to national defense, the infringement on public rights, and the violation of the public trust foreclosed this scenario, both as a matter of law and public policy.[215] As the Court declared, "[t]he state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers."[216] However, the public trust is not only akin to the police power insofar as it creates an inalienable duty in

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powers of government, as a trust for the benefit of the people"); *see*, *e.g.*, The Daniel Ball, 77 U.S. 557, 563 (1870) (discussing access to navigable-in-fact waters); *cf.* Blumm & Moses, *supra* note 33, at 4 ("By the dawn of the twentieth century, American law had evolved to recognize sovereign responsibilities to protect public rights in both navigable waters and their underlying beds, as well as in wildlife.").

209. *See*, *e.g.*, *Geer*, 161 U.S. at 529 (stating that management of the wildlife is "a trust for the benefit of the people, and not [a] prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good"); Shively v. Bowlby, 152 U.S. 1, 16 (denying that the beds of navigable waters passed to grantees as unencumbered *jus privatum*); Martin v. Waddell, 41 U.S. 367, 410 (1842) (holding that the British crown held title "in trust for the whole nation"); Hooker v. Cummings, 20 Johns. 90 (N.Y. 1822) (holding that even where rivers are non-navigable, the public still has an easement as highways); *see also* DAVID C. SLADE, THE PUBLIC TRUST DOCTRINE IN MOTION, 2–10 (2008) (synthesizing the case law).

210. Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 433 (1892); *see* Sax, *supra* note 10, at 489; Blumm & Engel, *supra* note 110, at 13.

211. *Illinois Cent. R. Co.* 146 U.S. at 453; *see supra* Section I.

212. *Illinois Cent. R. Co.* 146 U.S. at 455–57.

213. Blumm & Engel, *supra* note 110, at 9 (asserting public trust resources to be "not subject to any landowner's exclusive control because doing so would result in monopoly control of a resource on which the whole people depended for transport and other vital services"); *cf.* Blumm & Moses, *supra* note 33, at 15 (describing *Illinois Central* as a progenitor of the restriction on privatization of trust resources).

214. *Illinois Cent. R. Co.*, 146 U.S. at 455; *see* Robinson Tp., Washington Cty v. Com., 83 A.3d 901, 965 (Pa. 2013); Crystal S. Chase, *The* Illinois *Central Public Trust Doctrine & Federal Common Law: An Unconventional View*, 16 HASTINGS W-NW. J. ENVTL. L. & POL'Y 113, 153 (describing 29 state courts considering *Illinois Central* to be controlling).

215. *Illinois Cent. R. Co.*, 146 U.S. at 460 ("There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust.").

216. *Id*. at 453; *see also* Coquillette, *supra* note 30, at 814 ("[A] vague, apparently limitless doctrine of public trust, neither clearly nor historically based, stands far less chance of court acceptance than one firmly founded on ancient property notions.").

governments as sovereigns, but also the public trust duties trigger the state's police powers *because* they concern the public welfare. Therefore, states are required to act to protect that trust and the public's right to use the trust resources in common.[217]

Privatization of public lands—the modern enclosure movement—received serious skepticism from the judiciary in the nineteenth century.[218] This disapproval stemmed from the view that in a democracy, sovereignty carried obligations to the people.[219] This meant that sovereignty was not a one-sided prerogative, but rather a duty to act to protect public interests.[220] Enclosure by any name was a violation of the public trust where no reciprocal provision was made for the people.

In Alexander Hamilton's explanation of Impeachment, he states that officials who abuse or violate some public trust are within the jurisdiction of Congress to be removed from office because they are perpetrators of high crimes and treason.[221] This condemnation only made sense in the context of a nation founded on the idea that the people are the sovereign, and betraying the public trust should be considered tantamount to betraying the nation. Therefore, the public trust must be enforceable by the public through the courts, or it will be enforced by self-help and direct action. It is not anti-democratic to enforce the public trust doctrine; it is anti-democratic to abandon it.

V. CONCLUSION

Restricting the public trust doctrine's sources to Justinian's Institutes and Hale's *De Jure Maris* ignores the doctrine's rich and dynamic history. Commoners fought and died to ensure that their rights to access public lands could never be alienated. Although commoners were not always successful, the battle to define the public trust raged far beyond navigable waters into agricultural land and commodities.[222] The people's felt necessities during the latter half of the seventeenth century created a popular conception of common law rights. Examining that conception reveals a powerful strain of thought convinced that much of England's farm and forest land—not just the foreshore—was a common resource incapable of legal alienation for private gain.[223] Mundy's oyster harvest followed the pattern of

217. *Id*. at 459 ("The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state.").

218. MCCAY, *supra* note 1, at 141. Even Justice Shiras, who authored the dissent in *Illinois Central*, did not suppose that a state could part "by contract, with her sovereign powers." *Illinois Cent. R. Co.*, 146 U.S. at 474 (Shiras, J., dissenting).

219. Victoria Nourse, *Toward a Due Foundation for the Separation of Powers:* The Federalist Papers *as Political Narrative*, 74 TEX. L. REV. 447, 473–74 (1996); *see also*, Kramer, *supra* note 43, at 423 (observing that, in the Early Republic, "[f]inal interpretative authority rested with 'the people themselves'. . .").

220. *See* Mohan, *supra* note 23, at 1095 (rejecting the view that plenary executive authority exists in Article II).

221. THE FEDERALIST No. 65, at 330–31 (Alexander Hamilton) (Ian Shapiro ed., 2009).

222. NEESON, *supra* note 32, at 259.

223. Thompson, *supra* note 50, at 87 (describing several insurrections in response to the use of a necessity resource—bread—for private gain alone); *cf.* Blumm & Moses, *supra* note 33, at 52 ("The American PTD is rooted in long-held antimonopoly sentiment.").

direct action inspired by this concept. Thus, it only makes sense that Justice Kirkpatrick turned to English precedents written during a bitter struggle over public resources to formulate a legal rule in *Arnold v. Mundy*.

In other contexts, the public trust may operate with a similar force.[224] First Amendment rights rely on public spaces, and at one time the radio spectrum was also held in trust.[225] Lawyers and courts have often overlooked the conceptual framework behind the struggle over the English commons, but this should not dissuade the public from asserting their rights to ensure that trust resources are safeguarded. The Levellers and Diggers were not so easily dissuaded.

Professor Huffman's article provided a friction point that should lead legal scholars to examine the history of the public trust doctrine more carefully and broaden their conceptions of public rights when considering who the stakeholders are, and what resources were meant to be protected. The doctrine's history shows that the American populace has an ancient right to insist that public resources remain unencumbered by monopolies. In fact, this sentiment is as old as the Magna Carta and the English Civil War. Freedom in the common stock is an ancient public right that cannot be taken away from present or future generations. Rather than dismissing the doctrine as musty and too narrowly cabined to serve a modern purpose in American democracy, courts should instead recognize that the public trust *res* was always meant to include lands, wildlife, and all things needed to secure the basics of survival, perhaps even the air.[226]

224. *Cf*. Watts & Richard, *supra* note 62, at 773 (advocating for a property conception of cyberspace in order to support a territorial sovereignty defense against internationally wrongful acts).

225. Patrick S. Ryan, *Application of the Public-Trust Doctrine & Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285, 347 (2004).

226. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1253–54 (D. Or. 2016) *rev'd* 947 F.3d 1159 (9th Cir. 2020) (stating that the natural resources trust operates to impose upon the government a fiduciary duty to protect the *res*).