

English Common Law Grants under Virginia Law: Rivers, Tides and the Taking Clause

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Abstract: The Commonwealth of Virginia assumes that it owns the lands underneath the waters of the state. By assuming ownership of submerged lands, which are often privately owned, the Commonwealth may affect a taking of private property. Further, the Commonwealth's assumption that it owns streambeds imposes costs on private landowners and the public and leads to conflicts between landowners and fishermen.

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I. Introduction

Legislators and departments regulating Virginia's tidal areas and waterways face an unusual problem: they cannot rest assured that the submerged lands and shores they regulate belong to the Commonwealth as opposed to private individuals, even where the General Assembly of Virginia has attempted to reserve those lands by statute.² Grants from the Crown of England to private individuals and grants from the early Virginia state government sometimes conveyed the ownership of the bed of

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² VA. CODE ANN. § 28.2-1200. ("All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish. No grant shall be issued by the Librarian of Virginia to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether or not it ebbs bare.") The difficulty, as this paper shall argue, is determining what was not previously granted.

waterways, including lands under navigable waterways.³ These grants, called Crown Grants and Commonwealth Grants, pepper the Commonwealth and are not easily identified. Crown grants often conveyed further rights, including the exclusive right to hunt and fish the waterway within the property granted.⁴

The potential problems faced by Virginia's lawmakers and regulators are heightened because, as this article argues, the administrative policy of Virginia's government assumes that the Commonwealth owns property that, under settled Virginia law, is privately owned. Further, the identity and scope of Crown Grants is difficult to ascertain. This creates the prospect that even carefully crafted statutes and regulations will create an actual or a regulatory taking of private property, subjecting the Commonwealth to litigation and the duty to compensate a private property owner for lost rights. This also burdens private landowners, who must prove title to their property on a case-by-case basis and face a presumption that their individually owned property belongs to the public.

This article begins by examining existing literature on Crown and Commonwealth Grants and the basic strictures of the Takings Clause. It then considers how Virginia's case law creates its own view of English common law as to colonial land grants. In particular, the article examines how that law resists clear categorization as to which lands carry ownership of the streambed. The article then compares the decisions of Virginia's courts with the policy announced by a Virginia Attorney General's Opinion and the Virginia Marine Resources Commission (VRMC), to show that the state government presumes to own property that the Supreme Court of Virginia has held is privately owned. The article concludes by analyzing the criteria used by Virginia courts to determine ownership of streambeds and attendant rights in the encompassed waterways.

While existing research has addressed the structure of property law on Virginia's shores, it has not addressed related Commonwealth Grants nor has it attempted to describe the differences between Crown Grants and other grants, and the steps necessary to distinguish the two.⁵ Further, the literature has not been updated in light of the Supreme Court of Virginia's landmark decision in *Kraft v. Burr*, which recognized a private landowners' right to exclude others from fishing on a navigable river.⁶ While the *Kraft* case has been discussed by those concerned with Virginia's resources,⁷ its broader implications for Virginia law on the ownership of submerged lands and the related process for

³ See, e.g., *Boerner v. McAllister*, 89 S.E.2d 23, 27 (Va. 1955) (noting that grants made prior to 1802 could convey streambed).

⁴ *Kraft v. Burr*, 476 S.E.2d 715 (Va. 1996).

⁵ For a discussion of the problem of movement of barrier islands, see Amy H. Moorman, *Let's Roll: Applying Land-Based Notions of Property to the Migrating Barrier Islands*, 31 WM. & MARY ENV'T'L L. & POL'Y REV. 459, 474, 485 (2007) (discussing movement of barrier island and public's right to use property in connection with *Bradford v. Nature Conservancy*). Similarly, for a description of the structure of Virginia property law concerning water rights on the Virginia shore, see Denis J. Brion, *The Unresolved Structure of Property Rights in the Virginia Shore*, 24 WM. & MARY L. REV. 727 (1983).

⁶ 476 S.E.2d at 718.

⁷ See, e.g., Elizabeth A. Murphy, *Inland Recreational Fishing Rights in Virginia: Implications of the Virginia Supreme Court Case Kraft v. Burr*, VIRGINIA WATER RESOURCES RESEARCH CENTER, VIRGINIA TECH (Mar. 1999).

determining ownership have not been explored.⁸ The process is particularly important because the costs associated with determining ownership are likely to be a burden on the Commonwealth and on private landowners who seek to control submerged lands.

II. The Takings Clause and Virginia's Administrative Presumption of Submerged Lands Ownership

Larry George, a former West Virginia Commissioner of the West Virginia Division of Energy, Deputy Director of the West Virginia Division of Natural Resources and former member of the West Virginia State Water Resources Board,⁹ has described Virginia and West Virginia law on submerged waters as "anachronistic."¹⁰ The application of contemporary takings law to Crown and Commonwealth grants necessarily creates an anachronism because there was no understanding that just compensation had to be provided for takings of private property during Virginia's Colonial era or early statehood.¹¹ Colonial and early state governments routinely seized private property for public purposes,¹² and early constitutions did not have just compensation clauses.¹³

The requirement that the federal government provide just compensation for takings came with the passage of the Bill of Rights.¹⁴ The Takings Clause was held to apply to the states in 1897.¹⁵ State constitutions later adopted their own protections.¹⁶ Significantly, takings may result from physical invasion or regulatory strictures (so-called "regulatory takings") that deprive an owner's use of their property.¹⁷

The concern regarding takings is twofold: first, the executive branch of Virginia's government presumes to own property that very likely is privately owned. This creates a situation in which the Commonwealth exercises ownership over property it does not own. Second, as understandings of

⁸ For a discussion of private ownership of watercourses, see Larry W. George, *Public Rights in West Virginia Watercourses: A Unique Legacy of Virginia Common Lands and the Jus Publicum of the English Crown*, 101 W.V. L. REV. 407, 410-25 (1998) (discussing Virginia and West Virginia law). Because West Virginia's early law originates in Virginia, this includes a discussion of what properties are privately owned under Virginia law. *Id.* at 410. However, our analysis differs from that of Larry George's in a few crucial dimensions, particularly as to what waters constitute "eastern" as opposed to "western" (*id.* at 410), as to when private title to watercourses could be obtained (*id.* at 413), and whether title to submerged lands along tidal watercourses was obtained (*id.*). Though this paper is concerned with the law of Virginia, other states including West Virginia and Kentucky have similar complications to their property law because land was granted in those states when they were part of Virginia. See *Berry v. Snyder*, 66 Ky. 266 (1867) (holding that the Ohio river conveyed to streambed by Commonwealth of Virginia, because English common law rule unchanged at time of conveyance); *Gaston v. Mace*, 10 S.E. 60, 66 (W.Va. 1889) (construing Virginia law and finding English common law unchanged as to western part of state until 1802).

⁹ George, *supra* note 8, at 468 n.1.

¹⁰ *Id.* at 409. West Virginia law on submerged lands turns in part on Virginia law on Crown Grants because of the states' shared colonial past.

¹¹ William Michael Treanor, *The Origins & Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694, 697-98 (1985).

¹² *Id.* at 695.

¹³ *Id.* at 700-01.

¹⁴ *Id.* at 714.

¹⁵ *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

¹⁶ Treanor, *supra* note 11, at 714.

¹⁷ See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that whether there is a regulatory taking depends on extent of diminution of value of property); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that a local restriction which deprived landowner of ability to construct houses on property was a taking because destroyed any economic value).

Virginia's rivers, their public uses, and navigability have evolved, so too has the legal definition of what is a navigable river. The term "navigability" under Virginia law has multiple meanings, each tied to a particular use of waterways. When a Virginia court seeks to determine property rights using concepts of navigability, it may improperly apply modern, more expansive definitions of navigability to Crown or Commonwealth grants, thereby eradicating or limiting private rights conveyed by the grant. This can mean a legal property right will be extinguished by exercise of a common law decision. The General Assembly can make the same error. This is a potential judicial or legislative taking: "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."¹⁸

III. The Lingering Uncertainty of Ownership Under Some Very Old Law

A. Crown Grants and Commonwealth Grants, Defined

A Crown Grant, sometimes also called a Crown Patent, is generally understood to be a grant to a private individual from the British Crown.¹⁹ Virginia has also recognized grants from the London Company, which held power to convey land until Virginia became a colony in 1624.²⁰ Until the Revolution, the British Crown could grant property to private individuals in the Colony of Virginia.²¹ Grants made by the King of England were in the form of grants or letters of patent that were recorded in central bound volumes now under the custody of the Library of Virginia. These volumes were handwritten, and clerks frequently abbreviated the language of the grant by noting "etc." within the language of the grant and referencing a form page in the margin of the grant.²² The form of the grant made varied; whether a grant conveyed ownership of a streambed is determined by English common law or, sometimes, the particular language of the grant or the composition of its accompanying plat.

It is difficult to state precisely when the Crown ceased to have the power to grant land in Virginia. Sources generally refer to this as the time of the Revolution or at the time of Virginia's "independence."²³ As a practical matter, the political disruptions surrounding the Revolutionary War made it difficult for individuals to record their land grants so that surveys made in connection with Crown Grants were not recorded.²⁴ The royal government of Virginia recorded the last patent under Crown authority on December 7, 1774.²⁵ The first Commonwealth Grant was not recorded until over four years later in October 1779.²⁶ The confusion regarding land grants stemming from the Revolutionary Era was part of the impetus behind the creation of Virginia's Land Office and related statutes that permitted individuals with existing claims to prove up their grants.²⁷

¹⁸ *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S.Ct. 2592, 2602 (2010) (Scalia, J., for Roberts, C.J. and Alito, J.) The full quote applies this prohibition to courts as well. This point is disputed in the other justices' separate opinions.

¹⁹ See, e.g., *Miller v. Commonwealth*, 166 S.E. 557, 558-59 (Va. 1932); *Kraft v. Burr*, 476 S.E.2d 715, 715-16 (Va. 1996).

²⁰ *Miller*, 166 S.E. at 559.

²¹ *Id.*

²² *Kraft*, 476 S.E.2d at 718 n.5; 4 DENNIS RAY HUDGINS, CAVALIERS AND PIONEERS: ABSTRACTS OF VIRGINIA LAND PATENTS AND GRANTS xv-xvii, xxvii-xxviii (1994).

²³ 4 HUDGINS, *supra* note 22; George, *supra* note 8, at 417.

²⁴ 8 DENNIS RAY HUDGINS, CAVALIERS AND PIONEERS: ABSTRACTS OF VIRGINIA LAND PATENTS AND GRANTS vii (2005).

²⁵ *Id.* at vii.

²⁶ *Id.*

²⁷ *Id.* at vii-xii.

The term Commonwealth Grant is less commonly used, but as used here, it refers to grants of land made to individuals from the Commonwealth of Virginia. Commonwealth Grants were initially made under the same law as Crown Grants because the common law of England remained in force and effect in the Commonwealth of Virginia until changed by statute.²⁸ Virginia began reserving ownership of submerged lands to the state in the late eighteenth century.²⁹

Crown and early Commonwealth Grants can convey ownership of submerged lands: whether they do so turns on whether the submerged lands or shore are along a navigable river, and for grants along tidal waters the plat and text of the grant, and when the grant was made.³⁰ Because the term navigability is difficult to define,³¹ the next section begins this discussion with grants along tidal and non-tidal rivers. This is a matter of state law, but federal and state law have defined those terms to have different meanings, leading to confusion.

B. *Whose Law Governs Anyway and What Does Navigability Mean?*

Rights to submerged lands in Virginia's waterways and along the coast are subject to seemingly contradictory federal and state law provisions, with a waterway being held to be navigable for purposes of federal law, but non-navigable under state law. State and federal law create separate spheres of influence, with private property rights determined by state law, but doctrines such as the navigational servitude determined by federal law.³²

1. The Separate Spheres of State and Federal Law

Whether submerged lands are privately owned is a question of state law.³³ In determining whether the Jackson River in western Virginia is subject to the federal right of navigation, the Fourth Circuit explicitly noted a separation between federal and state questions of law. "[T]he use of its [the Jackson River's] bed and its banks are matters of state law, subject only, so far as the United States is concerned here, to the navigational servitude and whatever regulation Congress may lawfully impose."³⁴ To that end, the federal government does not claim an ownership in the beds. "The technical title to the beds of the navigable rivers of the United States is either in the states in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law."³⁵

Virginia law provides a similar outcome, leaving the question of ownership to its own precedents and English common law for the time periods when the common law remained in force.³⁶ Thus, the question of who owns submerged lands in a waterway becomes a question of state law.

2. A Navigable Non-Navigable Waterway (Or A Non-Navigable Navigable Waterway)

Though state law controls questions regarding ownership, federal interpretations of navigability

²⁸ *Miller v. Commonwealth*, 166 S.E. 557, 559 (Va. 1932).

²⁹ See discussion *infra* Section III.E.

³⁰ See *infra* Section III.C.

³¹ See discussion *infra* Section III.E.

³² 42 U.S.C. § 1331 (2006); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 60 (1913); *Loving v. Alexander*, 745 F.2d 861, 868 (4th Cir. 1984); *Kraft v. Burr*, 476 S.E.2d 715, 716-17 (Va. 1996); *Commonwealth v. Morgan*, 303 S.E.2d 899, 901-02 (Va. 1983).

³³ *Loving*, 745 F.2d at 868; *Kraft*, 476 S.E.2d at 716-17.

³⁴ *Loving*, 745 F.2d at 868.

³⁵ See *also*, *Chandler-Dunbar Water Power Co.*, 229 U.S. at 60.

³⁶ *Miller v. Commonwealth*, 166 S.E. 557, 559 (Va. 1932).

distort the categorization of land as public or private as cases involving particular bodies of water tend to refer both to state and federal decisions. This is because, in determining the extent of federal control of a waterway, a federal court will ask if the water is navigable.³⁷ Federal decisions become intertwined in the common law style reasoning of Virginia courts, thereby importing decisions made on different tests into Virginia cases.³⁸ Further, federal and state tests for navigability are different, and Virginia's has changed over time.³⁹

For example, in *Loving v. Alexander*, individual landowners along the Jackson River challenged the U.S. Army Corps of Engineers and opposed allowing the public access to the surface of the river by claiming that the Jackson River was non-navigable.⁴⁰ By tradition, landowners believed that they owned the Jackson River's riverbed as a result of early Crown grants and indeed many had paid local property taxes on the streambed.⁴¹ The U.S. District Court for the Western District of Virginia reviewed the record of three cases from the Supreme Court of Virginia, each of which had dealt with either whether the Jackson River was floatable or whether it was navigable.⁴² The District Court determined that the Jackson River was navigable for purposes of a federal navigational servitude, while under state law the Jackson River was non-navigable.⁴³ These findings meant that under state law, private ownership of the streambed was possible, but that private ownership would be subject to a federal navigable servitude that required permitting the public access to the surface of the river.⁴⁴ Further, the Court found that requiring access was not a taking because there was no private property right in the flow of the river.⁴⁵ Thus, in Virginia, land may be privately owned, yet still require some public access.

With regard to the Jackson River, this led to an even more confusing situation. During the 1990s, landowners brought civil suit against those accused of trespassing on portions of the Jackson River that the owners asserted they owned in *Kraft v. Burr*.⁴⁶ The Circuit Court of Alleghany County determined that under English common law, the Jackson River was non-navigable and thus capable of private ownership.⁴⁷ Yet, in reviewing the appeal, the Supreme Court of Virginia phrased the question before it as whether a navigable river could be privately owned.⁴⁸ Virginia's Supreme Court determined that private ownership over the stream was possible, but never distinguished between the meanings of navigability on the river.⁴⁹

Under early English common law, navigable rivers were those rivers "wherein *the tide ebbs and flows*."⁵⁰ Minor on Real Property refers to such rivers as "public" rivers or navigable rivers and other rivers as private rivers. The Supreme Court of Virginia has incorporated this early distinction in a

³⁷ See generally, *Loving*, 745 F.2d at 861.

³⁸ See discussion in *Loving v. Alexander*, 548 F.Supp. 1079 (W.D. Va. 1982). See also, *Kraft*, 476 S.E.2d at 715 (referring to Jackson River as navigable).

³⁹ Compare *Mead v. Haynes*, 24 Va. 33 (1824), with *Ewell v. Brock*, 13 S.E.2d 333 (Va. 1941).

⁴⁰ 548 F.Supp. at 1081.

⁴¹ *Id.* at 1091.

⁴² *Id.* at 1083-84.

⁴³ *Id.* at 1089-90.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Burr v. Kraft*, 37 Va. Cir. 513, at * 1 (1993).

⁴⁷ *Id.*

⁴⁸ *Kraft v. Burr*, 476 S.E.2d 715, 715 (Va. 1996).

⁴⁹ *Id.* (referring to navigable river that was at trial level determined to be non-navigable for purposes of permitting ownership.)

⁵⁰ 1 MINOR ON REAL PROPERTY § 58 (2nd ed.) ("At common law, navigable or public waters are those wherein *the tide ebbs and flows*.").

number of its cases.⁵¹ Because this article addresses ownership under Virginia's application of English common law, we employ the terms non-tidal and tidal to distinguish between the two big classifications of conveyances.

C. *Ownership of Virginia's Shores and Crown Grants Along Non-Tidal Waters*

Presumptions regarding land underneath non-tidal waters in Virginia are less complicated than those along tidal waters. As set forth elsewhere, the crux of the debate regarding non-tidal rivers has been over navigability and what rivers fall within the General Assembly's reservations of property from the late 1700s and 1802.

Virginia has held that grants from the Crown of England carry ownership of submerged lands where those lands run along a non-tidal stream or river.⁵² Grants whose description run to a riverbank on a non-navigable water necessarily include the streambed to the middle of the stream, unless expressly excluded.⁵³ Similarly, where a piece of property encompasses both sides of a non-tidal river, the soil under the river is presumed to belong to the owner of the banks.⁵⁴ Several cases set out how a public's right to access a river and how the landowner's rights are determined on non-tidal rivers in Virginia.

1. *Hot Springs Lumber & Mfg. Co. v. Revercomb*

Use of the Jackson River was contested in the early 1900s because of a dispute over whether a logging company could use the Jackson River to drive logs downriver, thereby having logs come ashore in a manner that sometimes destroyed the banks.⁵⁵ Though the *Revercomb* case has been examined extensively in cases determining ownership of non-tidal waters, Revercomb's ownership of the riverbanks and soil underneath the Jackson River was not at issue. Rather, the case turned on the uses of property to which Revercomb, as landowner, had to submit:

The right of floatage is one of the innumerable limitations or qualifications by which, in a state of civilized society, we are compelled to yield something of our absolute rights with respect both to person and property, and to enjoy those rights in some degree in subordination to the rights of others. The owner of timber, for instance, upon the upper reaches of a stream, would find his property diminished in value were he not permitted to use the waterway which nature

⁵¹ Mead v. Haynes, 24 Va. 33 (1824); Miller v. Commonwealth, 166 S.E. 557, 558-59 (Va. 1932) ("[The English common law doctrine was] applicable to grants made by the company, the Crown, or the Commonwealth, of lands along the tidal waters in Virginia, unless and until changed, modified, or in effect abrogated by some duly constituted authority."); James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 122 S.E. 344, 346 (Va. 1924) (recognizing English common law rule that grant of non-tidal water extends to thread of stream). See also, Gaston v. Mace, 10 S.E. 60, 66 (W.Va. 1889) (construing Virginia law and finding English common law unchanged as to western part of state until 1802); Berry v. Snyder, 66 Ky. 266, (1867) (holding that the Ohio river conveyed to streambed by Commonwealth of Virginia, because English common law rule unchanged at time of conveyance).

⁵² Kraft, 476 S.E.2d at 716-17; Commonwealth v. Morgan, 303 S.E.2d 899, 901-02 (Va. 1983); Miller v. Commonwealth, 166 S.E. at 558-59; James River & Kanawha Power Co., 122 S.E. at 346 (recognizing English common law rule that grant of non-tidal water extends to thread of stream); 1 MINOR, supra note 50; Shively v. Bowlby, 152 U.S. 1 (1894).

⁵³ Hayes's Ex.'or v. Bowman, 22 Va. 417 (1823); A.E. Ewell v. Lambert, 13 S.E.2d 333, 336 (Va. 1941).

⁵⁴ See, supra note 52.

⁵⁵ Hot Springs Lumber & Mfg. Co. v. Revercomb, 55 S.E. 580, 581 (Va. 1906), rev'd on other grounds 65 S.E. 557 (Va. 1909).

has provided. Riparian owners, therefore, upon the lower parts of the stream, must submit to this use as an incident of their ownership of lands situated upon a navigable stream.⁵⁶

The Court ultimately found that the river was not floatable, because logs could not be moved down the Jackson River unless the water was high.⁵⁷ Interestingly, the record from this case was used at the district court level in *Loving v. Alexander* to support a finding that the river was used for commerce and thus navigable under the federal test for navigability.⁵⁸ *Revercomb* is at odds with *Loving*, as it decided that the Jackson River did not have commercial use requiring a right to public access. *Revercomb* is interesting in that private ownership of part of the river was presumed.

2. *Boerner v. McAllister*

In *Boerner v. McAllister*, a landowner along the Jackson River sought a permanent injunction to bar a third party from fishing on his property.⁵⁹ The fisherman challenged whether the landowner actually owned the land under the river and asserted that he had a right to fish in the Jackson River because it is a navigable stream.⁶⁰ The Supreme Court of Virginia found that the river was capable of private ownership on the basis of English common law.

At the time of the grant (between 1749 and 1751) there was no law preventing the conveyance of 'the rivers, waters and water courses therein contained', therefore the grantee took title under the grant in this case to that part of Jackson River within the grant. The common law of England continues in force in this jurisdiction except as altered by the General Assembly. § 1-10, Code of Virginia, 1950. It has not been changed by statute so as to affect the ownership of the beds of streams granted prior to 1780 where the land lies in the eastern or tidewater section, or granted prior to 1802 where the land lies in the western part of the State, the situs of the present proceeding.⁶¹

Boerner is notable for covering both Crown and Commonwealth grants as the 1802 date quoted carries such grants past Virginia's colonial era and into early statehood. Further, *Boerner* also provided a framework for understanding Virginia's reservation of common lands by stating that the Jackson River falls in the western part of the state under the 1802 statute reserving submerged lands.

The owner of the riverbank argued that the Jackson River was floatable and thus fishing could not be restricted. The Supreme Court found that whether the river was floatable was a question of fact, but even if the river were floatable, there was persuasive authority to the effect that fishing could still be restricted.⁶² This latter question foreshadows confusion over whether rivers are navigable and the intersection between federal and state law.

3. *Kraft v. Burr*

In *Kraft v. Burr*, the Supreme Court of Virginia held that even where a river is navigable, a Crown

⁵⁶ *Id.* at 583.

⁵⁷ *Id.* at 557.

⁵⁸ *Loving v. Alexander*, 548 F.Supp. 1079, 1084 n.4 (W.D. Va. 1982).

⁵⁹ 89 S.E.2d 23, 24 (Va. 1955).

⁶⁰ *Id.* at 24.

⁶¹ *Id.* at 26.

⁶² *Id.* at 27.

Grant may convey exclusive fishing rights. Kraft, who was charged with fishing on private property, claimed that the right to fish could not have been conveyed away because the King held the right to fish and other rights in trust for the public, *jus publicum*.⁶³

Interestingly, instead of relying on the rationale that the river was non-navigable, the Court relied on the proposition that the King also had the power to grant land under navigable waters, and the power to grant away fishing rights.⁶⁴ The Court then relied on *Boerner* to find also that the Crown had the power to grant the land at issue at the time the grant was made.⁶⁵ *Kraft* then also contributes to confusion over navigability, by labeling the Jackson River navigable and for discussing whether the river is navigable in addition to relying on *Boerner*.

D. Ownership of Virginia's Shores and Crown Grants Along Tidal Waters

More complicated questions surround grants along tidal waters. A trio of cases set forth Virginia's law on Crown and Commonwealth Grants along tidal waters. The cases demonstrate the ways in which Virginia courts created their own view of English common law, as the Supreme Court of Virginia was required to resolve the question whether the British sovereign could convey land under navigable rivers. It used its own interpretation of English common law in reaching its decision. The Supreme Court of Virginia often relied on *American* interpretations of English common law rather than looking at the common law itself. Indeed, in *Miller v. Commonwealth*, the Supreme Court of Virginia undertook an extensive discussion of English common law without substantial reliance on sources and without citation.⁶⁶

Crown and Commonwealth Grants along tidal rivers may convey to the high water mark, but whether such a conveyance may be presumed from a Crown or Commonwealth Grant has varied among Virginia decisions.⁶⁷ Central to the disagreement among Virginia cases regarding the presumptions attached to a Crown or Commonwealth grant on tidal waters is the Case (or Rule) of Robert Liny recorded in 1679, which Virginia courts have treated as a legislative change to English common law.⁶⁸ The Case of Robert Liny provides as follows:

ROBERT Liny haveing complained to this grand assembly, that whereas he had cleared a ffishing place in the river against his owne land to his greate cost and charge supposing the right thereof in himselfe by virtue of his pattents, yett neverthelesse severall persons have frequently obstructed him in his just priviledge of ffishing there, and in despight of him came upon his land and hale their sceanes on shore to his greate prejudice, aleading that the water was the kings majesties, and not by him granted away in any pattent, and therefore equally free to all his majesties subjects to ffish in and hale their sceanes on shore, and praying for releife therein by a declaratory order of this grand assembly; it is ordered and declared by this grand assembly that every mans right by vertue of his pattent extends into the rivers or creekes soe farre as low water marke, and it is a priviledge granted to him in and by his pattent, and that therefore noe person ought to come and ffish there above low water marke or hale their

⁶³ Kraft v. Burr, 476 S.E.2d 715, 716 (Va. 1996).

⁶⁴ *Id.* at 716-17.

⁶⁵ *Id.* at 717.

⁶⁶ See discussion *infra* Section II.D.2.

⁶⁷ See discussion *infra* Sections II.D.1-3.

⁶⁸ Taylor v. Commonwealth, 47 S.E. 875, 880 (Va. 1904) (referring to the Order of Robert Liny as a statute and not mentioning by name). See also, Waverly Water-Front & Imp. Co. v. White, 33 S.E. 534, 536 (Va. 1899) (referring to Order of Robert Liny as a statute).

sceanes on shore (without leave first obtained) under the hazard of committing a trespasse, for which he is sueable by law.⁶⁹

Debate over the Case of Robert Liny turns on whether the Case is simply a decision regarding a particular dispute or a legislative enactment.⁷⁰ The text supports an idea of general applicability stating, "it is ordered and declared by this grand assembly that every mans right by vertue of his pattent extends into the rivers or creekes soe farre as low water marke..."⁷¹ Yet the Supreme Court of Virginia first relied on the decision in *Taylor v. Commonwealth* and then reversed course, declaring the Case of Robert Liny to be without force and effect.

1. *Taylor v. Commonwealth*

In *Taylor v. Commonwealth*,⁷² the Supreme Court considered what it called a question of first impression: "In this case, for the first time, this court has been called upon to deal with conflicting rights of the riparian proprietor and the commonwealth..."⁷³ A private landowner sought to claim land between the low water mark and line of navigability, or channel, under a crown grant on the York River in Gloucester County.⁷⁴ The Commonwealth argued that the private landowner owned only to the high watermark.⁷⁵ The parties did not appear to challenge the navigability of the river.⁷⁶

The Supreme Court of Virginia began by considering "the power and authority, the interest and the title, of the English crown in the soil under the tidal waters of that realm" and the power of the Crown to grant such lands after the Magna Carta.⁷⁷ Interestingly, the Court drew this analysis not from English sources, but began with a discussion of *Martin v. Waddell*,⁷⁸ Virginia cases, and cases from other states.⁷⁹ The Court's discussion foreshadowed future assertions of the public trust doctrine, in questioning whether the Commonwealth could grant away land that would be useful to the public.⁸⁰ Only after reviewing English common law through the lens of federal and state cases did the *Taylor* Court confirm its reasoning with reference to decisions from the House of Lords.⁸¹

The *Taylor* Court considered the Case of Robert Liny without questioning whether the Case was a statute, and determined that English common law had been varied and that "[t]he fee-simple title, therefore, of a riparian owner ends with [the] low-water mark."⁸² In a move that foreshadowed the division between state and federal law, the *Taylor* Court also drew a difference between state

⁶⁹ 2 WILLIAM WALLER HENING, THE STATUTES AT LARGE 456 (1823). The Case of Robert Liny was put in the text of April, 1679 in Hening's statutes, published 1823.

⁷⁰ See *infra* Sections III.D.1-3.

⁷¹ 2 HENING, *supra* note 69, at 456.

⁷² 47 S.E. 875 (Va. 1904).

⁷³ *Id.* at 882. The matter also concerned a claim by the landowner against an artesian water company that had drilled a well in land claimed by the private landowner, and the landowner's claim to be able to take additional lands under an unrelated statute. *Id.*

⁷⁴ *Id.* at 876.

⁷⁵ *Id.* at 879.

⁷⁶ *Id.*

⁷⁷ *Id.* at 878.

⁷⁸ 41 U.S. 367, 410-11 (1942). (holding in relevant part that the King of England had the power after the Magna Carta to grant submerged lands to private individuals).

⁷⁹ *Taylor*, 47 S.E. at 878-80.

⁸⁰ *Id.* at 779-80.

⁸¹ *Id.* at 881.

⁸² *Id.* at 780.

ownership of lands and the right of navigation that had been granted to the federal government.⁸³ The Court determined that the private landowner possessed the real property at issue up to the low water mark and that she had a limited right to access the river up to the line of navigation. Though not explicitly stated as a presumption, the message of *Taylor* is that ownership to the low water mark is part and parcel of the English common law rights that accompany a Crown grant.⁸⁴

2. *Miller v. Commonwealth*

The Supreme Court of Virginia took up a similar question in *Miller v. Commonwealth*, but its interpretation of English common law and the Case of Robert Liny led it to impose a very different analysis. *Miller* involved an appeal from a criminal prosecution for hunting on private property, and turned on whether one of the parties could prohibit others from “hunting (fowling)” on land between the high and low water marks of an island in a tidal section of the James River.⁸⁵

The *Miller* Court began by reviewing English common law and the powers of the Crown without significant citation to English authority and concluded:

the presumption was that the king had not granted, and did not intend to include within the limits of a grant made by him, lands lying between high and low-water marks, where the grant called for the sea, or a tidal bay, river or creek, as the boundary of the land granted...⁸⁶

The *Miller* Court founded its reasoning on the system of head, treasury, and military rights in Colonial Virginia, which permitted an individual to receive a certain acreage of land from the Crown.⁸⁷ An individual receiving such a grant had to pay a quit rent every year on their acreage, and thus the incentive to early recipients of land grants would have been to claim arable land.⁸⁸

The *Miller* Court further departed from the reasoning of the *Taylor* Court with its interpretation of the Case of Robert Liny. It stated “we are of opinion that the Robert Liny order was not a legislative enactment which changed the rules of the common law relative to crown grants of land on tidal waters.”⁸⁹ By viewing the Case of Robert Liny as the resolution of a particular dispute, rather than a legislative enactment, the *Miller* Court did not read any presumption of ownership to the low water mark into English common law.

In spite of its substantial deviation from the reasoning of *Taylor*, the *Miller* court ultimately concluded that the particular grant at issue extended below the high water mark, noting:

[S]ome grants were made, the line of which crossed tidal rivers and creeks, and clearly ‘comprised within the limits’ thereof all or a portion of a tidal river or creek. Such grants at common law passed the title to the land between high and low-water marks within the limits thereof, and were clearly recognized as having done so by the act of February 16, 1819, and subsequently legislation on this subject.⁹⁰

⁸³ *Id.* at 878.

⁸⁴ *Id.* at 882.

⁸⁵ 166 S.E. 557, 558 (Va. 1932).

⁸⁶ *Id.*

⁸⁷ *Id.* at 560.

⁸⁸ *Id.*

⁸⁹ *Id.* at 562.

⁹⁰ *Id.* at 559.

Thus, under *Miller*, a normal Crown or Commonwealth Grant conveys to the high water mark and a Crown or Commonwealth Grant may be shown by its terms to extend further.⁹¹

Miller also appears to acknowledge a third category of Crown/Commonwealth Grants. The *Miller* Court noted in brief that it had discovered grants in its research that conveyed to the low water mark or into salt marshes by their terms.⁹² Yet, the Court is unclear on what distinguishes these grants from those made under treasury, military, and head rights, or those that extend beyond the low water mark because of the property description. This last, inchoate category of land grants remains a question mark in Virginia law. It may have been the *Miller* Court simply attempting to leave further room for development of the common law, or there may in fact be some third type of conveyance.

3. *Morgan v. Commonwealth*

The Supreme Court of Virginia most recently addressed private ownership of land between the low and high water marks in *Morgan v. Commonwealth*.⁹³ *Morgan* involved a declaratory judgment action between individuals and the Commonwealth over who owned certain oyster beds on Carter's Cove, a tributary of the Rappahannock River.⁹⁴

The *Morgan* Court explicitly noted that Virginia had created its own common law on English common law, stating that Virginia had already sided with the portion of the debate over English common law that determined that beds of navigable waters could be granted.⁹⁵ The *Morgan* Court did not directly discuss the Case of Robert Liny, but applied *Miller* and not *Taylor*.⁹⁶

The evidence brought by the party claiming private landownership included copies of the land patents as well as the testimony of a land surveyor that the cove fell within the land described by the colonial patents and an 1815 plat made of the property.⁹⁷ The Court credited that evidence and found that the landowner possessed real property to the low water mark.⁹⁸

E. *Until Altered by Statute*

The common law of England remained in force in Virginia until it was altered by statute. The Virginia legislature enacted a string of limitations on the power of the Land Office, the arm of the early Commonwealth charged with granting land.⁹⁹ In 1792, the legislature limited the power of the state to grant certain submerged lands in the eastern part of the state and by 1802 the state had reserved all ungranted streambeds to itself.¹⁰⁰

The Commonwealth's reservation of land around waters began with a 1780 statute that is more limited on its face than future reservations:

⁹¹ Notably, in 1819, the Virginia General Assembly extended landownership rights from the high water mark to the low water mark. However, whether that ownership is a product of a Crown grant or a Commonwealth grant matters as at least with regard to the Crown Grant, a landowner has the power to exclude certain public uses, including hunting, fishing, and fowling. See *Kraft v. Burr*, 476 S.E.2d 715, 718 (Va. 1996).

⁹² *Miller*, 166 S.E. at 559 n.1 & 3.

⁹³ 303 S.E.2d 899 (Va. 1983).

⁹⁴ *Id.* at 899.

⁹⁵ *Id.* at 901.

⁹⁶ *Id.*

⁹⁷ *Id.* at 900.

⁹⁸ *Id.*

⁹⁹ *Miller v. Commonwealth*, 166 S.E. 557, 565 (Va. 1932) (quoting statutes); 1802 Va. Acts 423 (Appendix B).

¹⁰⁰ 1802 Va. Acts 423 (Appendix B).

Whereas certain unappropriated lands on the bay, sea, and river shores, in the eastern parts of this commonwealth, have been heretofore reserved as common to all the citizens thereof, and whereas by the act of general assembly entitled 'An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands,' no reservation thereof is made, but the same is now subject to be entered for and appropriated by any person or persons; whereby the benefits formerly derived to the public therefrom will be monopolized by a few individuals, and the poor laid under contribution for exercising the accustomed privilege of fishing: Be it therefore enacted by the General Assembly, That all unappropriated lands on the Bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth, which have remained ungranted by the former government, and which have been used as common to all the good people thereof, shall be, and the same are hereby excepted out of the said recited act, and no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law, to pass any estate or interest therein.¹⁰¹

This statute reserved common lands only "on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth." By its very terms it does not reserve the streambeds of waters.¹⁰²

In 1792 the General Assembly reserved the submerged lands, adding the language "and the bed of any river or creek" to the statute:

That all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek, and the bed of any river or creek in the eastern parts of this Commonwealth, which have remained ungranted by the former government, and which have been used as a common to all the good people thereof, shall be, and the same are hereby excepted out of this act; and no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law to pass any estate or interest therein.¹⁰³

In 1802 the legislature extended its reservation to the western part of the state:

I. WHEREAS it hath been represented to this present General Assembly, that many persons

¹⁰¹ *Miller*, 166 S.E. at 565 (quoting statutes).

¹⁰² Parties and courts have attempted to read into the 1780 statutes a reservation of streambeds. The Supreme Court of Virginia's most recent statement directly on this issue has been to treat the 1780 statute as its language would require: as only reserving the banks of waterways. *Id.* at 566. This fits with the principle of judicial restraint and modern principles of statutory interpretation, which in Virginia assume that a legislature in fact meant what it said. See *Grillo v. Montebello Condominium Unit Owners Association*, 416 S.E.2d 444, 445 (Va. 1992) (stressing that courts will not adopt a construction which amounts to holding that the legislature did not mean what it actually expressed); *Turner v. Wexler*, 418 S.E.2d 886, 87 (Va. 1992); *Equity Investors Ltd. v. West*, 425 S.E.2d 803, 804 (Va. 1993).

There has also been significant debate as to the meaning of "unappropriated lands" and lands used as commons in this and related statutes. In *Miller v. Commonwealth*, the court concluded that commons were lands designated as commons or well understood to be commons, and thus a "restricted" set of lands as opposed to all lands that might be used as commons. 166 S.E. at 565. By contrast, similar language as to commons in a related 1888 statute was understood to apply to a much broader class of lands. See *generally*, *Bradford v. Nature Conservancy*, 294 S.E.2d 866 (Va. 1982).

¹⁰³ *Miller*, 166 S.E. at 565-66.

have located, and lay claim in consequence of such location, to the banks, shores and beds of the rivers and creeks in the western parts of this commonwealth, which were intended and ought to remain as a common to all the good people thereof: II. *Be it therefore enacted*, That no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law to pass any estate or interest therein

II. THIS act shall commence and be in force, from and after the passing thereof.¹⁰⁴

Notably, the 1802 Act does not purport to apply retroactively, but rather by its express terms only is in force “after the passing thereof.” It thus leaves the terms of prior grants untouched. Some form of the reservation of submerged lands statute has remained in force since that time.¹⁰⁵

The Supreme Court of Virginia in *Boerner v. McCallister* adopted a rule whereby the Jackson River falls in the western part of the state.¹⁰⁶ The *Boerner* Court’s ruling is consistent with a 1779 statute governing the Land Office that divided the state into eastern and western divisions.¹⁰⁷

F. Summary

Under Virginia law, whether land under a stream is susceptible to private ownership depends on its geographic location and the time period of conveyance (Table 1). Before 1780, English common law governed all parts of the state. By 1792, the legislature reserved the streambed in the eastern part of the state and thus such ownership is governed at least in part by statute. From 1792 to 1802, the eastern and western parts of the state were subject to different law on conveyances. By 1802, the legislature reserved all ungranted parcels of property.

Table 1. Law Applicable to Waterways

	Pre-1780	1780-1792	1792-1802	After 1802
Eastern Part of State	English Common Law	Statute as to Banks of Land Used in Common; Otherwise English Common Law	Statute	Statute
Western Part of State	English Common Law	English Common Law	English Common Law	Statute

Under existing interpretations of the English common law as to tidal waters, land is presumptively conveyed to the high water mark. A conveyance of mud flats, tidal marshes, and land below the low water mark may be proved by a property description or by extrinsic evidence. The Case of Robert Liny, though it pops up in various Virginia cases, does not appear to be good law based on *Miller and Morgan*. For non-tidal rivers, an owner of one bank of a river or stream owns one side of the river or streambed; the owner of both banks owns the entirety of the bed.

¹⁰⁴ 1802 Va. Acts 423 (Appendix B). The reservation of commons as areas that “were intended ... to remain as a common” is interesting in light of the difference in interpretative approach between the *Miller* Court and the *Bradford* Court. It is unclear whether “intended” commons were areas specifically known or whether a particular class of land such as riverbeds was known to be intended as commons.

¹⁰⁵ See VA. CODE ANN. § 28.2-1200.

¹⁰⁶ 89 S.E.2d 23, 26-27 (Va. 1955) (citing *Gaston v. Mace*, 10 S.E. 60, 66 (W.Va. 1889)).

¹⁰⁷ 2 Va. Rev. Code of 1819 354-65; see also 8 HUDGINS, *supra* note 24, at vii-xix.

Table 2. Presumptions Associated with Classes of Rivers

	English Common Law
Tidal	<ul style="list-style-type: none"> • Conveys to high water mark by common law; • 1815 extended some property rights to low water mark; • Particular grants may be show to convey farther.
Non-Tidal	<ul style="list-style-type: none"> • Owner of one stream/riverbed owns to middle thread of water; • Owner of both sides of waterway owns entirety of streambed.

IV. Virginia's Administrative Law and the Executive Presumption of Ownership

In 1982 the Virginia Attorney General, John Coleman, set out the executive department of Virginia's presumptions with regard to land ownership of submerged land in an Attorney General's Opinion defining the jurisdiction of the Virginia Marine Resources Commission (VRMC).¹⁰⁸ The Opinion provides that the jurisdiction of the VRMC is based on the Commonwealth's title and "extends to the beds of all the bays and ocean, rivers, streams and creeks in every part of the Commonwealth unless they have been lawfully granted to others."¹⁰⁹ The presumption is that "[s]ince the Commonwealth has title unless it has been lawfully conveyed, the Commission should presume that it has jurisdiction over any subaqueous bed in the Commonwealth until someone else shows title to the bed derived from a grant from the king or the Commonwealth."¹¹⁰ Landowners bear the burden of proving their ownership of private lands, as the position of the Commission is to "assume that the Commonwealth does own the bottom until it receives proof ... that the Commonwealth no longer has title to the parcel in question."¹¹¹

The Attorney General's Opinion classifies submerged lands in Virginia under a system that ignores or is in direct conflict with the decisions of the Supreme Court of Virginia. It provides:

1. Under tidal waters. The Commission has jurisdiction over the beds of all tidal waters except where a final court decision has otherwise determined, and the Commission should be prepared to defend its jurisdiction in court if necessary.
2. Under non-tidal waters. The Commission should assume that all streams above some administratively determined minimum size are navigable-in-fact until evidence is presented proving non-navigability.

The question of navigability is a question of fact as to whether a stream is being or has been historically used as a highway for trade and travel or whether it is capable of such use in its ordinary and natural condition (*i.e.*, disregarding artificial obstructions such as dams which could be abated). *Ewell, supra*, at 228; *Crenshaw v. The Slate River Company*, 27 Va. (6 Rand.) 271 (1828).

A. Navigable-in-fact. The Commission should assume jurisdiction unless the landowner can show title to the riparian land acquired by grant prior to July 4, 1776.

¹⁰⁸ Op. Va. Atty. Gen. 242 (1981-82). There is also persuasive authority to the effect that the VMRC's power is rooted in the state police power. See Keith Warren Davis, *The Role of the Virginia Marine Resources Commission in Regulating and Zoning the Water Bodies of the Commonwealth*, 16 WM. & MARY ENVTL. L. & POL'Y REV. 81, 84-86 (1992).

¹⁰⁹ Op. Va. Atty. Gen. 242 at *1

¹¹⁰ *Id.*

¹¹¹ *Id.* at *2-3.

B. Non-Navigable-in-fact. The Commission should assume jurisdiction unless the landowner can show a grant prior to 1792 in that part of the State draining toward the Atlantic Ocean, or prior to 1802 in that part of the State draining toward the Gulf of Mexico.¹¹²

The scope and nature of the Opinion and the VRMC authority is of import because the Attorney General is claiming title for the Commonwealth through this opinion and because the VRMC has broad regulatory authority to zone watercourses, issue permits allowing uses of the submerged lands, disallow uses, and may limit the construction of piers, wharves, and dams.¹¹³

By using the navigable-in-fact test, the Attorney General's Opinion ignores that the test for determining the rights conveyed with a Crown or early Commonwealth Grant turns on whether a river is navigable or non-navigable under English common law.¹¹⁴ Use of the Attorney's General Opinion will, in some cases, classify lands that are privately owned as public.

The precedent relied upon by the Opinion is not on point. The cases cited do not purport to concern a Crown Grant or do not expressly deal with tests for public use of the flow of the river as opposed to private ownership of submerged lands.¹¹⁵ The Attorney General's Opinion cites to a secondary source, Embrey's Water's of the State, for the division of the state between eastern and western parts.¹¹⁶ It ignores the Supreme Court's classifications in *Boerner*, which is both more recent and better authority, and the statute regarding the Land Office which specifically sets out eastern and western divisions of the state.¹¹⁷

Finally, the Attorney General's opinion fails to acknowledge that the Commonwealth could and did grant lands under what are in contemporary terms "navigable lands." The Supreme Court of Virginia expressly acknowledged this in *Boerner v. McCallister*.¹¹⁸ And while this may once have been a question of law, it has now been settled many times by the Supreme Court of Virginia that Commonwealth

¹¹² *Id.* at *3.

¹¹³ See, e.g., VRMC, *Subaqueous Guidelines*, http://www.mrc.state.va.us/regulations/subaqueous_guidelines.shtm (last visited Dec. 1, 2012); 4 VA. ADMIN. CODE § 20-120-10 *et. seq.* ("Pertaining to the Promulgation of a Public Notice on Applications to Encroach In, On, or Over Subaqueous Lands of the Commonwealth").

¹¹⁴ See, e.g., *Mead v. Haynes*, 24 Va. 33, 33 (1824).

¹¹⁵ The opinion relies on *Ewell v. Brock* for the proposition that navigability-in-fact is the appropriate test. But *Ewell* did not state whether the grant at issue was a Crown grant or some other form of grant. But understandings of what is navigable have evolved over time. Compare *Mead*, 24 Va. at 33 (highlighting distinction between tidal and non-tidal rivers), with *Boerner v. McCallister*, 89 S.E.2d 23, 23 (Va. 1955) (noting floatable rivers and those navigable-in-fact). However, that it has evolved does not mean that grants from a prior time period should be judged on the basis of later law. As argued elsewhere, to do so is to effectuate a taking. The Attorney General's Opinion erroneously relied on *Old Dominion Iron & Nail Co. v. Chesapeake and Ohio Ry. Co.*, 81 S.E. 108 (Va. 1914), for the proposition that later Virginia law applies to determining whether a river is navigable under a Crown Grant as proposed to English common law. The Supreme Court of Virginia in *Old Dominion Iron & Nail Co.* expressly declined to rule on the question of what law applied, but decided the matter on the grounds that the private landowner had waited too long to raise their claim to private property in light of historical exercises of use by the Crown. *Id.* at 108-09. Finally the Attorney General's Opinion relies on *Crenshaw v. The Slate River Company*, 27 Va. 245 (1828). However, *Crenshaw* expressly dealt with the public use of the river and explicitly distinguished this use of the river from the question of ownership of submerged lands. *Id.* at 262.

¹¹⁶ Compare Op. Va. Atty. Gen. 242 at *1 (dividing state based on whether water drains to the west (Mississippi River) or east (Atlantic Ocean)), with *Boerner*, 89 S.E.2d at 26 (Jackson River in western part of state).

¹¹⁷ 2 Va. Rev. Code of 1819 354-65; 8 HUDGINS, *supra* note 24, at vii-xix.

¹¹⁸ *Boerner*, 89 S.E.2d at 26.

Grants could and did convey submerged lands in tidal waters.¹¹⁹

In short, the Attorney General's Opinion adopts views directly contrary to settled Virginia law and ignores a decision by the Supreme Court of Virginia in order to rely upon a secondary source. The thirty-year-old opinion remains the source of the VMRC's regulations and its classification system of land.¹²⁰ This places administrative policy on a collision course with individuals' private rights by requiring individuals to prove up their ownership. By incorrectly classifying land as incapable of private ownership, the state government sets up not only conflict with private landowners but burdensome litigation.

V. Process makes Imperfect

Virginia substantive and procedural law require a case-by-case analysis as to the ownership of parcels of Crown or Commonwealth grants. The level of proof required by a court varies depending on the parties to the case, and the questions at issue. Where two parties claim to have title to an action, a landowner will need to demonstrate superior title in the form of chain of title tracing back to a Crown or Commonwealth Grant.¹²¹ This is most likely to arise in a dispute between the Commonwealth of Virginia and a private landowner, given the Commonwealth's presumption of ownership of many submerged lands. In a suit against a trespasser who claims no right of title in himself, a landowner need only show *prima facie* title.¹²² Within the context of a Crown or Commonwealth Grant, this requires a showing of prior possession under color of title and a showing that the Crown or Commonwealth Grant was capable of conveying the land.¹²³ Where a landowner lays claim to more than is presumed to have been conveyed under English common law, as in *Miller*, additional evidence such as surveys may be required.¹²⁴ Finally, additional litigation is likely required to determine whether some land grants convey beyond the high-water mark on tidal waters by their terms and do not require proof by extrinsic evidence, as hinted at in *Miller*.¹²⁵

VI. Conclusion: The Increased Cost of Regulation

The likelihood that the state will treat privately owned land as public and the state's failure to acknowledge certain lands as susceptible to private ownership leads to the likelihood that the state will effectuate an actual or regulatory taking. Quite simply, if policy makers do not know what land is public and what land is private, they cannot accurately predict the costs of their legislation or regulations. For example, if rivers were to swell as a result of rising waters due to global warming, the state may prohibit

¹¹⁹ Notably these decisions predate the Attorney General's Opinion. *City of Roanoke v. Elliott*, 96 S.E. 819 (Va. 1918) ("Undoubtedly there are certain public uses of navigable waters which the state does hold in trust for all the public, and of which the state cannot deprive them, such as the right of navigation, but, subject to these public rights, there is no reason why the beds of navigable streams may not be granted, unless restrained by the Constitution."); *James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 122 S.E. 344, 346-47 (Va. 1924) ("[T]he Legislature has the power to dispose of such beds and the waters flowing over them subject to the public use of navigation, and such other public use, if any, as is held by the state for the benefit of all the people.").

¹²⁰ See VRMC, *Subaqueous Guidelines*, http://www.mrc.state.va.us/regulations/subaqueous_guidelines.shtm (last visited Dec. 1, 2012).

¹²¹ *Kraft v. Burr*, 476 S.E.2d. 715, 719 (Va. 1996).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *supra* Section III.D.2.

¹²⁵ *Miller v. Commonwealth*, 166 S.E. 557, 559 n. 1 & 3 (Va. 1932).

the construction of any structures that extend into the water.¹²⁶ This could amount to a regulatory taking, requiring the Commonwealth to expend large amounts of money.

The Virginia courts' case-by-case analysis of Crown and Commonwealth grants imposes costs on private landowners by requiring them to establish what they own. Interestingly, in spite of the direct conflict between the Attorney General's Opinion and settled law on property ownership, the Commonwealth has not been a party to a case regarding Crown or Commonwealth Grants that has gone to the Virginia Supreme Court since *Commonwealth v. Morgan* in 1983.¹²⁷ Contests involving Crown and Commonwealth Grants have instead involved landowners and alleged trespassers. For example, *Kraft v. Burr* involved landowners and trespassers.¹²⁸ Two private parties, landowners and alleged trespassers, thus pay the costs of the Attorney General's Opinion. However, a direct challenge to the Commonwealth is likely to occur if the state enacts systematic legislation to address changes in river levels or the erosion of the sea shore in the eastern parts of the state while still presuming ownership of all land under "navigable" waters.

Finally Virginia's treatment of Crown and Commonwealth Grants is necessarily static, pun intended, in the fluid world of rivers, streams, and shores. By recognizing early Commonwealth and Crown Grants as occurring under English common law, the Supreme Court of Virginia effectively has frozen English common law under the Takings Clause. Virginia's subsequent common law evolution as to rivers and streams, if applied to early grants, potentially deprives individuals of their land rights. More fundamentally, these are decisions that regulators and legislators must come to terms with before imposing broad authority.

Virginia has further used a static view of land and shores in attempting to locate boundaries of property. For example, in *Bradford v. Nature Conservancy*, the Supreme Court of Virginia determined property rights over a barrier island along Virginia's coast with reference to the location of marshes.¹²⁹ However, marshes, coastlines, and mudflats can relocate on an island.¹³⁰ This problem is heightened in the face of potential climate change, erosion, and rising tides. Movement and change in geographic features can create difficulty in locating traditional commons and boundary lines.

An important first step in approaching these problems is to bring Virginia state policy in line with the decisions of the Virginia courts. While this will not alleviate the costs of the case-by-case analysis required by Virginia law and will not eliminate some of the doubt and unpredictability as to the location of Crown and Commonwealth Grants, it will lessen some of the collisions between state policy and the rights of private landowners.

¹²⁶ Pressing private property into a public reservation of property may amount to a taking. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

¹²⁷ *Commonwealth v. Morgan*, 303 S.E.2d 899 (Va. 1983); see also *Moorman*, *supra* note 5.

¹²⁸ 476 S.E.2d 715.

¹²⁹ 294 S.E.2d 866 (Va. 1982).

¹³⁰ *Moorman*, *supra* note 5, at 474, 485 (noting that island at issue had drastically changed as a result of storms).