Shoring Up the Limits of Rhode Island's Public Trust Doctrine: Greater Providence Chamber of Commerce v. State of Rhode Island Makes It Simple as One, Two, Fee

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INTRODUCTION

Most people think of coasts as fixed, enduring boundaries that mark the land’s end. Yet all coasts are constantly changing in an endless battle with the ocean.

Since ancient times, people have found food and hospitable climates along coasts. Throughout history, coasts have been gateways to exploration, trade, and settlement. Most of the world’s major cities lie along seacoasts or along rivers leading to coasts.\(^1\)

In addition to the natural forces of water, ice, wind and gravity changing the features of coastlines, people also have a dramatic effect on the coasts: more than half of the people in the United States live in coastal counties.\(^2\) Between 1960 and 1990, coastal population density increased from 106 to 152 people per square mile.\(^3\) Twelve of the first thirteen states were founded along the Atlantic coast, and today nearly one quarter of the population (60 million people) lives in coastal counties along the Atlantic Ocean.\(^4\) The benefits associated with water access and the metaphysical attraction to water’s inherent beauty are likely the forces creating

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2. Coastal Living: For Majority of U.S., It’s Home, Population Today, July/August 1993, at 4. The current definition of a coastal county, consistent with the one used by the National Ocean and Atmospheric Administration, is a county with 15% of its land area in coastal watershed. Id.
3. Id.
4. Id.
this gravitation toward coasts. But as the private interests en-
croach upon the water's natural boundaries, the public interest in
the natural resource is undermined.

Since the early 1970s, society has gained a heightened aware-
ness of the adverse impacts of environmental degradation and ex-
ploration. This has translated into increased efforts to conserve
water and shorelines in their pristine state.

While land of the type found under bays may not be a particu-
larly limited natural resource, the navigable waters of a bay
are limited. . . . This scarcity is critical to the special impor-
tance of the lands under or along the edges of those navigable
waters and justifies the development of a unique regime of
public property rights to protect them.

In their capacity as promoters and preservers of the public in-
terest, legislatures and courts play an active role to curtail private
interests that impinge on the public's right to enjoy natural re-
sources. This idea stems from "a belief that the public benefits
mightily from private development, but that the public interest is
in fact greater than the sum of the private interests." When pri-
ivate interests conflict with and are outweighed by the public inter-
est, the government needs a mechanism for defending the public
interest.

The public trust doctrine is an ancient weapon wielded by gov-
ernments to defend public interest from private usurpations of the
world's most essential natural resource: water. Simply stated,
the public trust doctrine provides that submerged and submersible
lands are preserved for public use in navigation, fishing or recrea-

5. See Richard J. Lazarus, Changing Conceptions of Property and Sover-
eignty in Natural Resources: Questioning the Public Trust Doctrine, 71 Iowa L.
Rev. 631 (1986); Scott W. Reed, The Public Trust Doctrine: Is It Amphibious?, 1 J.

6. See Lazarus, supra note 5; Reed, supra note 5.

7. Harrison C. Dunning, The Public Trust: A Fundamental Doctrine of Amer-

8. For an extensive discussion of the role of the judiciary and its interplay
with the legislature in developing public trust law, see Joseph L. Sax, The Public


10. George J. Demko et al., Why in the World: Adventures in Geography 160
(1992) ("absolutely essential to all life. . . . Water is life, wealth, and power. It is
far more rare, vulnerable, and precious than oil.").
tion, and the state, as trustee, bears the responsibility and possesses the authority to preserve and to protect the use of the waters for those purposes. The public trust doctrine can be traced back to the Justinian Institutes of Roman Law, where it is written "they (the shores) cannot be said to belong to anyone as private property." At common law, the King was considered to hold title to all lands beneath the sea and all lands subject to tidal flows for the benefit of his subjects. This common law doctrine has a vast history and is firmly infused in American jurisprudence.

Illinois Central Railroad v. Illinois, the "lodestar case" on public trust in the United States and the state of Rhode Island, delineates the three rights paramount to state retention of the title to submerged lands: "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." This triad, navigation, commerce and fishing, provides the basis for the tradi-

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13. Several jurisdictions have puzzled over whether the sea or waterway must be navigable in order to be subject to the public trust. This issue has not been addressed in Rhode Island and will receive no further discussion here. For a recent decision on the issue see Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988) (reaffirming longstanding precedent that the doctrine’s applicability is based upon a state's "ownership of all lands under waters subject to the ebb and flow of the tide") (emphasis added).
14. Many cases in various jurisdictions, including Rhode Island, have revolved around the delineation of land subject to tidal flows. Alternatives chosen for demarcation range from the high water mark to the low water mark and several points in between, such as mean high tide or a mathematical determination attained by complex scientific formulas. See generally Alfred A. Porro, Jr. & Lorraine S. Teleky, Marshland Tidal Dilemma: A Tidal Phenomenon, 3 Seton Hall L. Rev. 323 (1972). Rhode Island has chosen mean high tide ("high water mark" is used interchangeably) as the decisive line. See State v. Ibbison, 445 A.2d 728 (R.I. 1982) (discussing the meaning of "high water mark" and "mean high tide"). These distinctions, however, are not pertinent to the present discussion, so they will receive no further discussion here.
17. Sax, supra note 8, at 489.
tional doctrine. "For each category, the essence of the public use is related to the navigable water, not to the land under or alongside it."20

In the last twenty five years an increased number of litigants and courts have relied on the public trust doctrine,21 and many jurisdictions have extended the public uses covered by the trust.22 Yet, until a state affirmatively augments the scope of the doctrine, navigation, commerce and fishing remain the essential rights protected by traditional public trust precepts.

Historically, Rhode Island has consistently adhered to the traditional public trust doctrine.23 The three traditional precepts have been articulated by state common law and have provided the fulcrum upon which to balance the public and private interests in filled tidal lands. This treatment of the public trust which has repeatedly acknowledged the potentially paramount rights of private landowners in submerged lands was dramatically altered when the Rhode Island Supreme Court rendered its decision in Hall v. Nascimento24 in 1991. In a few paragraphs, the court aggrandized the influence of the public trust and held that private rights are "subservient" to public interests.25 Hall spurned confusion over the balance between public and private interests in tidal lands and it left private landowners to hypothesize whether they could ever acquire fee simple absolute by extinguishing the public trust. The obfuscation and uncertainty that Hall injected into the sphere of public trust was not left unresolved for long.

In direct response to the decision in Hall, four parties sought a declaratory judgment to determine the extent and vitality of Rhode Island's version of the public trust doctrine, and its specific effect

20. Dunning, supra note 7, at 518. See also Illinois Central, 146 U.S. 387 (emphasizing the importance of navigability as the crucial factor).

21. See Lazarus, supra note 5, at 644-47.

22. See Lazarus, supra note 5, at 649-50 (listing the expanded uses which include beaches, parklands, battlefields and cemeteries).


24. 594 A.2d 874.

25. Id. at 877.
on the plaintiffs' parcels.\textsuperscript{26} In the resulting case of \textit{Greater Providence Chamber of Commerce v. State},\textsuperscript{27} the supreme court clarified the scope of public trust in Rhode Island. The court limited its holding to reflect the reluctance to cast off traditional public trust restraints idly, but the court also announced a test\textsuperscript{28} for establishing ownership rights in filled tidal lands.

The \textit{Chamber of Commerce} decision gathers lines of reasoning from the dicta and holdings of previous Rhode Island public trust cases and uses them to tie a strong slipknot. The slipknot is the two-part test for evaluating public trust cases in this state. It is strong because it brings together various historical lines of reasoning and uses them to form a consistent modern doctrine. It is a slipknot because the test is flexible enough to expand or constrict its impact based on the given parcel of land.

This Comment will present the evolution of Rhode Island's public trust doctrine and the various factors supporting the innovative solution announced in \textit{Chamber of Commerce}. Part I begins with a discussion of the origin of public trust law in the United States and demonstrates that it is largely a body of law subject to state control. Part I then examines the physical and legal characteristics unique to Rhode Island that have shaped Rhode Island's embodiment of the public trust doctrine. Part I concludes with a critique of \textit{Hall v. Nascimento},\textsuperscript{29} the Supreme Court of Rhode Island opinion that marked a departure from then existing law and precipitated the declaratory judgment action brought in \textit{Chamber of Commerce}. Part II presents the facts and procedural history of \textit{Chamber of Commerce}. Part III analyzes the court's treatment of the plaintiffs' parcels in \textit{Chamber of Commerce}, shows how the treatment of these parcels led to the creation of the test, and argues that the announced test is a cogent clarification of Rhode Island common law. Part III also includes a study of the contemporary movement in some states to limit the scope of the public trust doctrine. The states discussed will identify vindicating policy concerns underlying the \textit{Chamber of Commerce} test which now circumscribes the sphere of public trust in Rhode Is-

\textsuperscript{26} Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1039 (R.I. 1995).
\textsuperscript{27} Id.
\textsuperscript{28} See infra Part III.C.
\textsuperscript{29} 594 A.2d 874 (R.I. 1991).
I. TRADITIONAL PUBLIC TRUST THEORY AND ITS TREATMENT IN RHODE ISLAND

A. States May Individualize the Universal Concepts

When America gained its independence in 1776, the colonies adopted the common law of England and government control over submerged lands was thereby vested in the thirteen original colonies. By this time, Rhode Island was already operating under a theory of public trust because, as early as 1707, the Rhode Island General Assembly had passed a resolution granting to the towns the "full power and authority to settle such coves, creeks, rivers, waters, [sic] banks bordering upon their respective townships, as they shall think fit for the promotion of their several towns . . . ." In the authoritative early cases on public trust in the United States, Illinois Central Railroad v. Illinois and Shively v. Bowlby, the Supreme Court held that each state is sovereign over the tidal lands within its respective borders and that within constitutional limits, each state is allowed to determine the scope and particulars of the doctrine's applicability because there is no universal law of public trust. Thus, states have broad discretion to develop their own individual bodies of public trust law.

Despite this discretion, "[n]either the Supreme Court nor any state courts have disavowed the prohibition of 'substantial impairment' of public rights of navigation, commerce, and fishing announced in Illinois Central and Shively." States have fashioned their own interpretations of the public trust, but all within the latitude granted by this general standard. A 1981 advisory opinion

30. Martin v. Waddell, 41 U.S. 367 (1842). As other states were admitted into the union, they were given equal footing with the existing states, and thus attained the same status as sovereign in control of the tide lands. See Shively v. Bowlby, 152 U.S. 1 (1894).
32. 146 U.S. 387 (1892).
33. 152 U.S. 1 (1894).
35. Wilkinson, supra note 9, at 463-64.
36. Id. at 464.
from the Massachusetts Supreme Judicial Court\textsuperscript{37} stated, "[t]he
general view in this country is that constitutional considerations
do not bar legislative grants of absolute rights in submerged lands,
although a gross or egregious disregard of the public interest
would not survive constitutional challenge."\textsuperscript{38} Therefore, the gen-
eral conceptions of the doctrine are universal and constitutionally
mandated, but the particular applications are determined by each
individual state. The characteristics and customs peculiar to each
state should be the formative elements of that state's public trust
law.\textsuperscript{39}

B. \textit{The Rhode Island Approach}

An analysis of three characteristics peculiar to Rhode Island
eucidates the diacritical factors of Rhode Island's public trust law.
The state's distinguished constitution, differentiating geography,
and distinct common law are the three areas that comprise the
formative elements of Rhode Island's approach.

1. \textit{The Rhode Island Constitution}

One could seek out the work of cartoonist Don Bousquet for a
witty exploration of the eccentricities of Rhode Islanders and their
bizarre relationship with Narragansett Bay,\textsuperscript{40} but for an authori-
tative legal source one need look no further than the text of the
state constitution:

The people shall continue to enjoy and freely exercise all the
rights of fishery, and the privileges of the shore, to which they
have been heretofore entitled under the charter and usages of
this state, including but not limited to fishing from the shore,
the gathering of seaweed, leaving the shore to swim in the sea
and passage along the shore; and they shall be secure in their
rights to the use and enjoyment of the natural resources of
the state with due regard for the preservation of their values;

\textsuperscript{38} Id. at 1099. An example of a grant that did not survive constitutional
challenge is the grant in \textit{Illinois Central}. In that case the grant failed because the
state conveyed nearly the entire waterfront of Chicago, over 1,000 acres, to a pri-
ivate railroad, completely cutting off public access to Lake Michigan. \textit{Illinois Cen-
tral}, 146 U.S. 387.
\textsuperscript{39} See \textit{Shively v. Bowlby}, 152 U.S. 1 (1894).
\textsuperscript{40} See generally Don Bousquet, \textit{Quahog State of Mind} (1995); Don Bousquet,
and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state . . . \textsuperscript{41}

This section of the constitution is illustrative of the Rhode Island view of public trust for three reasons. First, while it does make explicit some protected rights of the public to the shore, it does not expand the rights as they existed at common law.\textsuperscript{42} This limitation is clear from the characterization that the people shall continue to enjoy the rights they have been entitled to under the charter and usages of the state.\textsuperscript{43} The latter part of this phrase also contains the second important guide to the Rhode Island approach: “usages of this state.”\textsuperscript{44} The people of the state have become accustomed to certain usages stemming from an accepted interpretation of the rights traditionally protected, and this constitutional provision recognizes the importance of those usages.\textsuperscript{45} Thirdly, this section expressly guarantees one extraordinary right: the right to gather seaweed.\textsuperscript{46} Collecting thalassic algae may be a privilege in need of protection, but affording it express constitutional protection is clearly atypical from other states. Since this right is not an expansion of the uses traditionally protected,\textsuperscript{47} it is merely an explicit statement of Rhode Island’s broad interpretation of a right traditionally protected, fishing.\textsuperscript{48} Therefore, by ratifying this provision, the legislature has not expanded the rights protected by the trust. This section of the constitution serves only to clarify some of the unusual interests consistently protected in

\textsuperscript{41} R.I. Const. art. I, § 17 (emphasis added).

\textsuperscript{42} R.I. Const. art. I, § 17, n.1, “Construction and Purpose” (citing State v. Medbury, 3 R.I. 138 (1855) (“This section neither grants nor takes away rights of fishery and privileges of the shore but leaves such rights unaffected . . . .”)). See Clark v. City of Providence, 15 A. 763, 765 (1888) (“It is clear that this section [Article I, Section 17] leaves the rights of the people as they existed previously to the constitution.”).

\textsuperscript{43} R.I. Const. art. I, § 17.

\textsuperscript{44} Id.

\textsuperscript{45} See discussion infra pp. 193-94.

\textsuperscript{46} R.I. Const. art. I, § 17.

\textsuperscript{47} See Carr v. Carpenter, 48 A. 805 (R.I. 1901) (affirming right to collect seaweed on the shore).

\textsuperscript{48} For other cases broadly interpreting the right of “fishing”, see Allen v. Allen, 32 A. 166 (R.I. 1895) (noting accepted right to take shellfish from the waters and the shore below high water mark); Clarke v. City of Providence, 15 A. 763, 766 (R.I. 1888) (acknowledging the right to clam by saying, “It is common knowledge that the citizens of the state have always been accustomed to dig clams freely along the shores of the bay and river . . . .”).
Rhode Island because of the state's unique relationship with the water.

2. **State Geography**

The citizens of Rhode Island have a special relationship with Narragansett Bay because of the bay's geographical prominence. Rhode Island only encompasses twelve hundred square miles, but it has over four hundred miles of shoreline. Providence harbor was the essential element in Rhode Island’s industrial development of the late 1800s and early 1900s. The harbor is still commercially active and the bay is utilized not only for commercial fishing and quahogging, but also for recreation. Cities such as Newport and Providence manifest the extensive wharving into the bay and filling along the shoreline that has existed since at least the time of the colonial statute in 1707. For over 200 years, Rhode Island has been concerned with the preservation of its biggest natural asset: the bay.

Despite all of these facts, it is interesting to note there have been few public trust based actions with regard to wharving and filling. This suggests that communities, citizens and legal intelligentsia did not believe such activity alone constituted actionable harm. With the salient importance of the bay, more authoritative action surely would have been utilized if it was a valid means of preserving the resource. The bay is a striking feature of the state's geography, and the treatment of the public and private interests in the bay is a striking feature of the state common law.

3. **State Decisional Law**

Rhode Island's tack through the course of public trust law may be plotted by pinpointing three buoys: 1) dicta, 2) custom and usage, and 3) expectation.

The first mark is dicta. Prior to *Chamber of Commerce*, the Rhode Island Supreme Court had never directly ruled on the fundamental elements of public trust, but several cases contain dicta.

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that provide valuable guidance. The most explicit language comes from an 1895 per curiam decision of the court:

The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. . . . Until actual filling out, the public rights exist as before.53

Though this passage is not part of the holding in Allen,54 it does express the sentiment of the court that filling and extending the upland creates a new high-water mark and extinguishes the public rights between the old and new lines.

An earlier case which the Allen court cited three times in its two column opinion contains additional elucidating dicta.55 Twenty years prior to Allen, the court stated:

The establishment of a harbor line, when so construed, means that riparian proprietors within the line are at liberty to fill and extend their land out to the line. . . . The part so reserved is to be protected from encroachments. The rest is to be left to be filled and occupied by the riparian proprietors.

. . . We think the establishment of a harbor line, if it is to be construed as a conveyance, is to be construed as a conveyance which at least is subject to those rights [navigation and fishing], until they are excluded by filling or wharfing out.56

The court went on to say "it is not necessary for us to go even so far as that in the case at bar,"57 thus specifying the language as dicta. However, the import of the passage is clear: rights of the public in the bay may be subordinated to private interests in areas where wharfing and filling predicate private ownership. When Allen was before the court twenty years later, the court reiterated its dicta and solidified it with a per curiam decision.58

54. The holding was that any inhabitant may take shellfish from the waters and shores below the high-water mark without being guilty of trespass. Id.
56. Engs, 11 R.I. at 224 (emphasis added).
57. Id.
58. Allen, 32 A. 166.
Amidst the dicta in Engs, the court harkened upon the second buoy of Rhode Island public trust law: custom and usage. The court asserted:

[Proprietors have been very freely permitted to erect wharves, and even to make new land by filling the flats in front of their land. We are not aware that the state has ever laid claim to any wharf so built, or any land so made, unless the cove lands filled by the city of Providence can be considered an exception. Our harbor line acts are to be construed in the light of this doctrine and practice.]

The definition of “custom and usage” is a practice of the people which, by common adoption and unvarying habit has acquired the force of a law with respect to the place or subject-matter to which it relates. The Rhode Island General Assembly has recognized common usage as a means of modifying the interpretation of common law, and in public trust cases, the Rhode Island Supreme Court has repeatedly shown deference to the established customs of the state.

In the early case of Aborn v. Smith, the court decided the issue of how much filling a littoral owner is entitled to do and never questioned the generally accepted custom of allowing the filling to occur. Several other early cases involved controversies over the ownership of lots submerged at the time of platting, and the court repeatedly recognized the practice of platting and conveying submerged lots without raising the possibility of state ownership of the lands. Additionally, the right to fill and wharf out has

61. See discussion supra part I.B.1.
62. See, e.g., Nugent v. Vallone, 161 A.2d 802 (R.I. 1960) (recognizing long established right to wharf out when not interfering with navigation or other riparian proprietors); Providence Steam-Engine Co. v. Providence and Stonington S.S. Co., 12 R.I. 348 (1879) (Potter, J., concurring) (believing there has never been an instance of the State interfering to prevent the common practice of wharfing and filling); Simmons v. Mumford, 2 R.I. 172 (1852) (recognizing conveyances for lots submerged at time of platting as customary).
63. 12 R.I. 370 (1879).
64. Id.
65. Providence Steam-Engine, 12 R.I. 348 (upholding the validity of lots and a street platted below the high water mark); Bailey v. Burges, 11 R.I. 330 (1876) (deciding the impact of the establishment of a harbor line on previously platted submerged lots); Simmons, 2 R.I. 172 (recognizing conveyances for lots submerged at time of platting as customary).
been a longstanding accepted custom,\textsuperscript{66} and "it is believed there has never been an instance of the State interfering to prevent it."\textsuperscript{67}

When customs are followed for long periods of time, people gain reasonable expectations in the status of their property interests; these expectations are the third mark. In \textit{Aborn}, the Rhode Island Supreme Court showed a willingness to preserve property expectations by refusing to reapportion established fronts along the harbor line even though "originally it would have been right and expedient."\textsuperscript{68} Then, just after the turn of the century, the court gave its most forceful defense of expectations:

To alter the rule after it has been so well settled and so long acquiesced in would disturb rights of property which in many cases have largely fixed the values given and received for littoral estates, and this alone would forbid the court to make such change without the clearest proof of error.\textsuperscript{69}

This affirmation combined with the dicta and custom espoused in other early cases substantiated people's expectations in the stability of their property interests as private littoral owners. These reasonable expectations were reinforced by the standing decisional law in Rhode Island for nearly the entire twentieth century.\textsuperscript{70} This ended when \textit{Hall v. Nascimento}\textsuperscript{71} was decided in 1991.

\section{Hall Leads to Consternation and Incertitude}

\textit{Hall} began as a minor dispute between two private property owners over a 270-foot strip of land created by the dredging of Mount Hope Bay.\textsuperscript{72} However, the decision handed down by the Supreme Court of Rhode Island seemed to be a radical departure

\begin{itemize}
\item \textsuperscript{66} \textit{Nugent}, 161 A.2d at 805 (citing \textit{Providence Steam-Engine}, 12 R.I. 348; Engs v. Peckham, 11 R.I. 210 (1875)).
\item \textsuperscript{67} \textit{Providence Steam-Engine}, 12 R.I. at 363 (Potter, J., concurring).
\item \textsuperscript{68} \textit{Aborn} v. \textit{Smith}, 12 R.I. 370, 372 (1879) (acknowledging the impracticability of reparation of the rights of littoral owners along the harbor line to be proportionate with the length of coastline owned by each respective proprietor).
\item \textsuperscript{69} \textit{Carr} v. \textit{Carpenter}, 48 A. 805, 808 (R.I. 1901) (permitting the continuance of the longstanding custom of gathering seaweed stranded on the shore).
\item \textsuperscript{70} In addition, the United States Supreme Court recently affirmed "the importance of honoring reasonable expectations in property interests." \textit{Phillips Petroleum Co. v. Mississippi}, 484 U.S. 469, 482 (1988) (permitting the reclamation of lands by the state only after concluding that the contrary expectations of the private land owners were not reasonable in light of Mississippi law) (emphasis added).
\item \textsuperscript{71} 594 A.2d 874 (R.I. 1991).
\item \textsuperscript{72} \textit{Id.} at 875.
\end{itemize}
from the course of the state's public trust law. The following lan-
guage from the case is disconcerting:

It is well settled in Rhode Island that pursuant to the public
trust doctrine the State maintains title in fee to all soil within
its boundaries that lies below the high-water mark, and it
holds such land in trust for the use of the public. . . .

Such filled or submerged land owned in fee by the State
and subject to the public trust doctrine may be conveyed by
the State to a private individual by way of legislative grant,
provided the effect of the transfer is not inconsistent with the
precepts of the public trust doctrine.

. . . [W]e find that defendants continue to maintain rights
in that area as long as their use of the area is not inconsistent
with the public trust. The defendants' rights, however, are
subservient to the State's rights in the property because the
State holds title in fee subject to the public trust
doctrine.

In one page of the opinion, the court seemed to wash away the
dicta, custom and usage, and reasonable expectations that had
been the mainstay of public trust in Rhode Island for over a
century.

The decision is disturbing because the court looked to many of
the same cases herein discussed to reach these conclusions. 74
While the court was willing to acknowledge some rights adhering
in the littoral owners, the repeated emphasis was on the para-
mount rights of the state as trustee. The court characterized the
defendants' rights as "subservient", 75 and cited Carr v. Carpenter 76
for the proposition that littoral owners only "enjoy what remains
of the rights and privileges in the soil beyond their strict boundary
lines, after giving to the public the full enjoyment of their
rights." 77 Additionally, the court stated twice that it would only
validate rights to submerged lands in private owners when the ef-

73. Id. at 877 (citations omitted).
74. Id. (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988);
    (1892); State v. Ibbison, 448 A.2d 728 (R.I. 1982); Nugent v. Vallone, 161 A.2d 802
    (R.I. 1960); Carr v. Carpenter, 48 A. 805 (R.I. 1901); Allen v. Allen, 32 A. 166 (R.I.
    1895); Bailey v. Burges, 11 R.I. 330 (1876); Engs v. Peckham, 11 R.I. 210 (1875)).
75. Id.
76. 48 A. 805 (R.I. 1901).
77. Hall, 594 A.2d at 877 (quoting Carr v. Carpenter, 48 A. 805, 805 (R.I.
    1901)).
fect is not inconsistent with the public trust.\textsuperscript{78} This condition is discomfiting because it begs the question of what constitutes an encroachment inconsistent with the public trust. \textit{Hall} is even more disconcerting because the case appears to dramatically alter Rhode Island's interpretation of the scope of the public trust doctrine.

The outcome of \textit{Hall} rippled through the real estate community and mobilized a gamut of forces: some seeking to maximize and others to minimize the effect of the opinion.\textsuperscript{79} The decision beleaguered title companies because they were unsure how to react to the decision.\textsuperscript{80} The consequences were potentially devastating because billions of dollars in property could be affected.\textsuperscript{81}

In an attempt to quiet title to filled lands throughout the state, and to determine the state of title to certain parcels possibly subject to reclamation under the \textit{Hall} interpretation of the public trust

\begin{itemize}
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} Friends of the Waterfront became active to find ways the public could benefit, such as gaining greater access to the water and imposing a moratorium on all coastal building until a final determination of the ownership of the lands was established. The General Assembly created a legislative task force to investigate various options the state could pursue such as reclaiming the filled lands and then leasing the land back to the current occupants. In the private sector, downtown businesses such as Fleet National Bank, Johnson & Wales University, Capital Properties, Inc., Citizens Savings Bank and Rhode Island Hospital Trust National Bank examined the potential impact of the decision and investigated alternative solutions from a class action suit to an action for declaratory judgment. Many businesses were willing to participate in a lawsuit, despite the possibility that their title to the property could be revoked by an unfavorable outcome. Interview with John M. Boehnert, Esq., Plaintiff's Attorney in \textit{Chamber of Commerce} case, in Providence, R.I. (Nov. 7, 1995).
  \item \textsuperscript{80} The validity of all titles composed wholly or partially of filled land became uncertain. It was unclear how broadly the holding would be interpreted and how actively the state would attempt to reassert its public trust rights. Title insurance companies faced higher risks of loss, and they would potentially deny coverage altogether for certain parcels. Telephone Interview with Michael B. Mellion, Rhode Island State Counsel, Commonwealth Land Title Insurance Company (Dec. 19, 1995).
  \item \textsuperscript{81} For instance, the majority of downtown Providence, including the business district, lies on filled land. If parcels composed of filled land could revert back to the state because of an inappropriate alienation of the public trust, title to those parcels would become practically unmarketable. To ensure the security of their funds, most banks will not grant mortgages unless the property is covered by title insurance. But the title companies would not be able to guarantee coverage if the state had the power to reacquire the filled lands. Thus, it would be much harder for property to be sold because banks would not be willing to finance the transactions. \textit{Id.}
\end{itemize}
doctrine, a declaratory judgment action was brought against the state in Greater Providence Chamber of Commerce v. State. 82

II. CHAMBER OF COMMERCE FACTS AND PROCEDURAL HISTORY: TWO BY TWO THEY BOARD IN SEARCH OF SOLID GROUND

Four owners of filled land properties brought a declaratory judgment action against the State for a determination of the underlying fee. 83 Rhode Island School of Design (RISD) and the Greater Providence Chamber of Commerce were two plaintiffs with ownership interests in parcels located within an area known as the "Cove Lands." 84 The Cove Lands were conveyed to the city of Providence by a grant from the state duly authorized by an act of the General Assembly, and the two Cove Land plaintiffs received title from the city of Providence via subsequent recorded deeds. 85 Both of these plaintiffs are legislatively chartered, non-profit organizations which suggests they operate generally to benefit the public. 86 Neither of the two Cove Lands parcels currently borders on tidal water. 87

Narragansett Electric Company and the Providence Gas Company were two plaintiffs with ownership interests in harbor line parcels. 88 Both abut the current harbor line, and neither ever received an express legislative grant to fill to that line. 89 These plaintiffs are private, profit seeking corporations, but they also confer substantial benefits upon the public. 90

The four plaintiffs were not chosen because they confer public benefits, 91 but this common attribute may have facilitated a ruling in their favor. A declaratory judgment was sought because it

82. 657 A.2d 1038 (R.I. 1995).
83. Id. at 1039.
84. Id. The Great Salt Cove was a tidal saltwater cove encompassing several hundred acres until it was completely filled in by 1892. It included a major portion of downtown Providence.
85. Id. at 1040.
86. Id.
87. Id.
88. Id. at 1041.
89. Id. The gas company did receive some permits for filling issued by the Rhode Island Board of Harbor Commissioners, but these permits were not equivalent to legislative grants or conveyances. Id.
90. Id.
seemed to be the most effective and efficient way to resolve the community-wide dilemma. The hope was that a satisfactory judgment would be broad enough to quiet title to other similarly situated parcels, or even better, that a superlative judgment would create a broad standard for settling nearly every public trust case that may arise in the state. The following pages seek to demonstrate that the Chamber of Commerce decision meets that superlative standard. The holding provides the definitive statement forever quieting title to all Cove Lands parcels in the private record owners. As for the harbor line parcels, the court specifically limited its holding to the two plaintiffs. However, the court did devise a positive two-pronged test for establishing title in other filled lands.

III. COVE LANDS AND HARBOUR LINES STEER RHODE ISLAND TO A TEST FOR EVALUATING PUBLIC TRUST

In an attempt to balance individual freedoms with public interests, states have placed themselves all along the spectrum regarding alienation of lands subject to the public trust. Some seemingly forbid alienation under any circumstances. Others allow alienation only under express grants supported by manifest legislative intentions. Still others allow complete relinquish-

92. Id. Pursuant to Rhode Island General Laws § 9-24-25, a petition and agreed statement of facts was filed with the superior court for certification to the Rhode Island Supreme Court. See R.I. Gen. Laws § 9-24-25 (1985).
95. Id. at 1039.
96. Id. at 1044.
97. Mobile Transp. Co. v. City of Mobile, 44 So. 976, 978 (Ala. 1907) ("The shore and bed of a navigable stream being strictly trust property, ... are as inalienable and as incapable of being severed from public use as the streets in a city ... "); State v. Cleveland & P. R. Co., 113 N.E. 677, 682 (Ohio 1916) ("[T]he title to the subaqueous soil is held by the state as trustee for the public, and that nothing can be done by him [the littoral owner] that will destroy or weaken the rights of the beneficiaries of the trust estate. ... An individual may abandon his private property, but a public trustee cannot abandon public property."). cited with approval in Thomas v. Sanders, 413 N.E.2d 1224 (Ohio 1979).
ment of filled land even though the filling was unauthorized.99 Chamber of Commerce gave the Rhode Island Supreme Court an opportunity to solidify the state's position on the spectrum.

The court declared that Rhode Island's public trust doctrine is "pervasively embedded in American jurisprudence."100 The court began its inquiry by stating, "Rhode Island decisional law and this court have never cast aside the public-trust doctrine. As a matter of fact, this court has consistently cited federal decisions that embrace this well-articulated body of general law."101 The Chamber of Commerce decision is consistent with the doctrine's past treatment in Rhode Island, and its effect will govern the future of public trust in Rhode Island.

The effect will be explained by an analysis of the three classes of potential public trust lands in Rhode Island: 1) lands made by the filling of the Great Salt Cove, i.e., the Cove Lands, 2) lands made by filling to a harbor line, and 3) other lands made by filling where no harbor line is involved.

A. Class 1. The Cove Lands: Necessity and Appropriateness of Grant Validates the Conveyance Forever Vesting Fee Simple in the Private Record Holders

The most straightforward way to extinguish the public trust is by express legislative grants of fee simple absolute.102 While some


102. But legislative grants do not automatically extinguish the trust, because the grant could be invalidated by the judiciary. Illinois Central, 146 U.S. 387 (invalidating the legislative grant to the railroad because of egregious disregard of the public interest); City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362 (Cal. 1980) (balancing interests at stake to determine if part or all of an 1870 act conveying tidelands should be invalidated). See also Wilkinson, supra
limitations remain on the types and extent of the grants, the principle is well established in Rhode Island and other jurisdictions that valid legislative state grants extinguish the public trust.\textsuperscript{103} Even \textit{Hall v. Nascimento} acknowledged that land owned in fee by the state as trustee could be deeded to individuals by way of legislative grant, provided “the transfer is not inconsistent with the precepts of the public trust doctrine.”\textsuperscript{104}

The court in \textit{Chamber of Commerce} laid out four reasons why the Cove Lands Grant\textsuperscript{105} was a necessary and appropriate legislative grant: 1) supposed sanitary and hydraulic reasons directed filling in the cove, 2) unique circumstances surrounding railroad purposes required some filling of the cove, 3) all littoral rights to the cove had been extinguished by the laying out of public streets along the boundaries of the cove and 4) “the General Assembly in 1867 revoked all grants of any portions of the Cove Lands that had not been accepted and the conditions of which had not been fulfilled.”\textsuperscript{106} These four reasons, especially the last which limited the extent of the grant to those portions used to promote the purpose of the grant, distinguish the Cove Lands Grant from the sweeping grant in \textit{Illinois Central}.\textsuperscript{107} In \textit{Illinois Central}, the Court invalidated the grant because it was overly broad, and the legislature had apparently made the grant without properly considering the


\textsuperscript{104} \textit{Hall v. Nascimento}, 594 A.2d 874, 877 (R.I. 1991). This offers leeway for some grants, but begs the question of whether the grants are consistent with the precepts of public trust.

\textsuperscript{105} The grant conveyed title from the State of Rhode Island to the City of Providence by deed recorded in 1870. This transfer was authorized by a General Assembly Resolution. \textit{Chamber of Commerce}, 657 A.2d at 1040. \textit{See} 1870 R.I. Acts and Resolves 213 (Addendum).

\textsuperscript{106} \textit{Chamber of Commerce}, 657 A.2d at 1040.

interests of the public. In Chamber of Commerce, the four reasons explicitly stated show the Cove Lands Grant was an appropriate, necessary and calculated action by the General Assembly; it was a valid, express legislative grant. Therefore, the record titleholder of any parcel within the bounds of that grant, including the plaintiffs RISD and Chamber of Commerce, holds title in fee simple absolute.

Other nearby jurisdictions have held that even when an express legislative grant is given, the recipient does not receive fee simple absolute. These jurisdictions focus on the paramount rights of the public to the lands and construe the grants strictly in favor of the state. This alternate solution raises a variety of different concerns ranging from determining what uses are considered to be in the public interest to what constitutes a breach of the conditions subsequent. Most significantly, owners of land subject to conditions subsequent do not enjoy the freedom to use or dispose of their property as they desire. This causes the land to be far less valuable because of the state's superior right to reclaim the land upon breach of the conditions subsequent.

But this alternative is not instructive as to the past, present or future cases in Rhode Island. The crucial dogma is to remain consistent with the distinctive law of Rhode Island, including the dicta, customs and expectations. Vermont and Massachusetts have had several occasions to interpret the public trust, but their development of the doctrine has been far different from Rhode Island's. Traditionally, Rhode Island has embraced the principle

108. Id.
110. Id. at 1040-41.
111. State v. Central Vermont Ry., 571 A.2d 1128 (Vt. 1989) (determining the fee still subject to a condition subsequent); United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981) (holding that the fee can only be held by the sovereign); Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979) (granting lands to private individuals transfers fee simple subject to condition subsequent).
112. For a discussion of the uses which could be attached to the contemporary public trust doctrine, see Marc J. Hershman, A Word of Caution: The Public Trust Doctrine and Coastal Zone Management, 8 J. Envtl. L. & Litig. 237, 245-47 (1993).
113. Central Vermont, 571 A.2d 1128.
114. See supra part I.B.3.
115. For example, Vermont has never espoused the granting of submerged parcels for purposes of aiding commerce or promoting the public interest. Central Vermont, 571 A.2d at 1133. Massachusetts has held that the lands may only be
that public lands may be alienated as long as they are not "appropriated by, or conferred upon, private individuals for purely private benefit."\textsuperscript{116} In comparison to the nearby states, Rhode Island allows lands to be alienated by the state more liberally. Vesting fee simple absolute in all Cove Land parcels is an example of the liberal alienation, and the court's resolution of the harbor line parcels is illustrative of its willingness to further deflate the public trust doctrine as a preserver of natural resources.

B. Class 2. The Harbor Line Parcels: To A Certain Extent, Filling Has Implicit Approval

The harbor line plaintiffs did not receive express legislative grants to fill in front of their lands.\textsuperscript{117} The gas and electric company each filled up to, but not beyond established harbor lines.\textsuperscript{118} Although there were no legislative grants or conveyances of these filled lands, the court examined state case law and made the logical inference necessary to establish title in fee simple absolute in the plaintiffs.\textsuperscript{119}

When the filling of these parcels occurred, the filled land did not extend beyond the established harbor line seaward of the property, and the lands do not extend beyond the harbor line as it exists today.\textsuperscript{120} This fact alone, by the very definition of a harbor line, gives credence to the court's ruling that the public trust does not protect those lands.\textsuperscript{121} If the public trust doctrine is limited by the policies from which it originated, viz., to prohibit interference with navigation, commerce and fishing, then all filled lands up to but not beyond a harbor line are \textit{a priori} outside the public trust.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{116} Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1042 (R.I. 1995).
\item\textsuperscript{117} \textit{Id.} at 1041.
\item\textsuperscript{118} \textit{Id.}
\item\textsuperscript{119} \textit{Id.}
\item\textsuperscript{120} \textit{Id.}
\item\textsuperscript{121} \textit{See} Engs v. Peckham, 11 R.I. 210, 224 (1875) ("A harbor line is in fact what it purports to be, the line of a harbor. It marks the boundary of a certain part of the public waters which is reserved for a harbor. . . . Its establishment is equivalent to a legislative declaration that navigation will not be straitened [sic] or obstructed by any such filling out.").
\end{itemize}
\end{footnotesize}
"The harbor lines were a legislative determination . . . that encroachment on the waters to the harbor line would not constitute interference with fishery, commerce, or navigation."122

The harbor line holding is fortified by the Court's reasoning in Illinois Central which establishes the basic principle for evaluating public trust cases:

The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.123

Since the Court in Illinois Central held the legislative grant to the railroad invalid, many subsequent litigants have used the decision to support the thesis that the public trust may not be extinguished.124 But in fact, the holding is much more limited because the grant was held invalid to the extent it cut off the city’s access to Lake Michigan and gave a private party unfettered control of the entire waterfront of Chicago.125

The phrase "substantial impairment" in Illinois Central sets the standard from which may spring exceptions to traditional public trust; this phrase is used no less than three times throughout the opinion.126 Typically, the public interests that cannot be substantially impaired are the ancient rights to use the waters for fishing, navigation and commerce; therefore, the line for substantial impairment may be drawn at the level of navigability.127 In Illinois Central, the Court restored title in the bed of Lake Michigan to the state, but as for parcels that had been improved with piers, the case was remanded for a determination of the points at which the line of navigability was broached, "and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess."128 The necessary implication of

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122. Chamber of Commerce, 657 A.2d at 1044.
126. Id. at 435, 452-53.
127. See id. This is consistent with the policy of the rights being associated with the water more than with the land. See supra pp. 184-86.
this argument is that lands filled to a harbor line, i.e., a preestablished and legislatively approved line demarcating navigable waters, are not a substantial impairment of the public interest. This remains true whether the lands were filled in accordance with the express approval or mere acquiescence of the legislature. Quieting title in fee simple absolute in the gas and electric companies was analytically correct because of the prior existence of the harbor line.

Having resolved the specific issues presented by each plaintiff, the Chamber of Commerce court could have ended its inquiry at this point. Instead, the court propounded a two-part test to be applied to establish ownership rights in any filled tidal lands.\(^{129}\)

C. Class 3. Other Lands Covered by The Two-Part Test

The test reads:

A littoral owner who fills along his or her shore line, whether to a harbor line or otherwise, with the acquiescence or the express or implied approval of the state and improves upon the land in justifiable reliance on the approval, would be able to establish title to that land that is free and clear.\(^ {130}\)

This test goes beyond what was required to resolve the issues before the court in Chamber of Commerce, and it goes beyond what other jurisdictions have been willing to do, but it does not go beyond the dialectic of Rhode Island public trust law. A positive test was needed to clarify the murkiness created by Hall, and the test is a logical extension from the court's holding regarding the harbor line parcels.

The same reasoning utilized to analyze the harbor line parcels justifies the Chamber of Commerce test. The test extends the principle of permitting alienation of lands within certain limits approved by the state, such as harbor lines, but the extension does not violate the logic. A parcel of filled tidal lands "whether to a harbor line or otherwise" may satisfy the test.\(^ {131}\) The insertion of this phrase acts as a limitation because courts could apply the test more broadly if the phrase were left out completely. However, the phrase also acts as an extension from the court's holding regarding the harbor line parcels because it allows the test to be applied to other

\(^{129}\) Chamber of Commerce, 657 A.2d at 1044.

\(^{130}\) Id.

\(^{131}\) Id. (emphasis added).
parcels. The standard is made even more expansive by allowing
the approval of the state to be express, implied or a mere acquies-
cence. But even with these two flexible notions, the test pro-
vides solid grounds for evaluating public trust rights, and two
distinct arguments shore the test's validity: one is an ancient pillar
grounded in traditional public trust and the other is a hoist from
contemporary public trust theory.

1. Rhode Island's Case Law: A Stalwart Pillar

The pillar supporting the Chamber of Commerce test is the un-
derlying policy from which Rhode Island public trust evolved. The
Sovereign holds the lands as trustee to ensure that public interests
in the lands are protected. The rights Rhode Island has long
recognized as protected were those of fishing, commerce and
navigation. Whenever these rights have not been substantially
impair, ipso facto there has been no violation of the public trust.
The Chamber of Commerce test is the means for determining the
existence of a substantial impairment. When a parcel satisfies
both prongs of the test, then there is no substantial impairment.

The proviso attached to the test expresses further textual sup-
port for this result. The proviso reads that one may only "become
owner in fee-simple absolute provided that the littoral owner has
not created any interference with the public-trust rights of fishery,
commerce, and navigation." The proviso is not an additional
part of the test, but merely an explicit recitation of the test's pur-
pose. The purpose is to protect the unextended triad of rights

132. Id.
133. See supra pp. 184-85.
134. Interpreted broadly to include the indigenous harvesting of quahogs and
gathering of seaweed. See supra notes 47-48.
without interfering with navigation); New York, N.H. & H.R.R. v. Horgan, 56 A.
179 (R.I. 1903) (showing the intent of the Resolution of 1707 was to foster com-
merce); Carr v. Carpenter, 48 A. 805 (R.I. 1901) (verifying right to collect seaweed
on the shore); Allen v. Allen, 32 A. 166 (R.I. 1895) (noting rights to clamming and
right to wharf provided navigation not impeded); Clarke v. City of Providence, 15
A. 763 (R.I. 1888) (acknowledging rights of clamming but affirming that the rights
and privileges preserved in article I, section 17 do not create any new rights not
held prior to the constitution); Engs v. Peckham, 11 R.I. 210 (1875) (protecting flow
of commerce and navigation by adherence to harbor lines).
136. Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1044
(R.I. 1995).
which attached at common law and have always been the mainstay of Rhode Island's public trust doctrine.\textsuperscript{137}

A recent Vermont case\textsuperscript{138} with similar facts to \textit{Chamber of Commerce}, suggests this reasoning is flawed by reaching an entirely opposite result, but it is one of the most "regressive"\textsuperscript{139} public trust cases. The State of Vermont and City of Burlington petitioned for a declaratory judgment to divest the railroad of filled lands it had acquired pursuant to an 1827 Act.\textsuperscript{140} The railroad had filled and improved the land, using it for railroad purposes for more than a century, but when it tried to sell the property the state brought an action claiming the public trust had not been extinguished.\textsuperscript{141}

Vermont's Constitution has a provision\textsuperscript{142} similar to Rhode Island's article I, section 17, which "underscores the early emphasis placed upon the public interest in Vermont's navigable waters."\textsuperscript{143} But the case history in Vermont "stands for the proposition that the legislature cannot grant rights in public trust property for private purposes."\textsuperscript{144} The Vermont Supreme Court admits that grants of submerged parcels for purposes of aiding commerce or promoting the public interest were recognized by the Court in \textit{Illinois Central} as an exception "to the general rule against legislative alienation of trust property."\textsuperscript{145} But the Vermont Supreme Court

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\item \textsuperscript{137} \textit{E.g.}, Providence Steam-Engine Co. v. Providence and Stonington S.S. Co., 12 R.I. 348 (1879) (Potter, J., concurring) (noting that not all tide lands are subject to the trust); City of Providence v. Comstock, 65 A. 307 (R.I. 1906) (clarifying that public trust rights have been altered by local custom). \textit{See also} Clarke v. City of Providence, 15 A. 763 (R.I. 1888) (lowering the criterion further by allowing potential exceptions to even these protected rights). \textit{See supra} part I.B.
\item \textsuperscript{138} \textit{State} v. \textit{Central Vermont Ry.}, 571 A.2d 1128 (Vt. 1989).
\item \textsuperscript{139} Hershman, \textit{supra} note 112, at 242.
\item \textsuperscript{140} \textit{Central Vermont}, 571 A.2d at 1129.
\item \textsuperscript{141} \textit{Id.}.
\item \textsuperscript{142} \textit{Vt. Const.} ch. II, § 67 ("The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.").
\item \textsuperscript{143} \textit{Central Vermont}, 571 A.2d at 1131.
\item \textsuperscript{144} \textit{Id.} (citing Hazen v. Perkins, 105 A. 249, 251 (Vt. 1918) ("the General Assembly cannot grant to private persons for private purposes")). \textit{See also} \textit{In re Lake Seymour}, 91 A.2d 813, 818 (Vt. 1952) (no right to control water level of lake can be granted to private persons for private purposes); State v. Malmquist, 40 A.2d 534, 540 (Vt. 1944) (same).
\item \textsuperscript{145} \textit{Central Vermont}, 571 A.2d at 1133.
\end{itemize}
states unequivocally that this exception has "never been espoused by this Court." 146 This strict interpretation leads the court to conclude that the preservation of the public interest must be served by granting the railroad fee simple subject to the condition subsequent that it be used for the public purposes intended at the time of the grant. 147 This may be a proper interpretation of Vermont's public trust law and it retains greater state control over tidal lands; but it severely limits private proprietors' freedom to control the uses of their own lands.

In stark contrast, the Rhode Island Supreme Court has consistently adhered to the exception for aiding commerce and otherwise promoting the public interest. 148 Even in the early cases, the complainants "concede[d] that the general assembly has power to authorize such encroachments upon the tide-waters, where they are made in the interest of navigation, for the erection of wharves, or are affected for other public purposes." 149 The court went on to say "there is nothing in the acts, so far as we are aware, imposing any such limit; and it is well known, as a matter of fact, that no such limit has been observed." 150

The more recent case of Nugent v. Vallone says, "[i]ndeed it appears to have been long recognized in this state that this right to wharf out is a common-law right which, in the absence of statute to the contrary, will not be denied, provided that the exercise thereof does not interfere with navigation . . . ." 151 The Nugent opinion clarifies the limited purpose of the public trust doctrine in Rhode Island: "[The state] holds such title not as a proprietor but only in trust for the public to preserve their rights of fishery, navigation and commerce in such waters." 152 When these itemized rights have not been substantially impaired, Rhode Island's judiciary has

146. Id.
147. Id. at 1135.
148. See supra note 135.
150. Id.
152. Nugent, 161 A.2d at 805. But cf. Lazarus, supra note 5, at 647-50 (explaining the public trust doctrine's expansion and adaptability to broader environmental concerns such as aesthetics and recreation); Reed, supra note 5, at 116 (approving the trend in some states to broaden the applicability of public trust to inland lakes and bays and even mountain streams).
refused to allow the public trust doctrine to be utilized to adversely affect the title of the private littoral owner. This hallowed pillar anchors the Chamber of Commerce test in Rhode Island public trust law.

2. A Modern Trend Hoists Chamber of Commerce By Supplying Support for Unstated Fundamental Principles

The innovative test is buttressed by one vein of the progressive movement in modern trust law. The underlying current in Chamber of Commerce reveals the court's disposition to narrow the scope of the traditional public trust in favor of a more pragmatic approach to filled tidal lands. Other jurisdictions have begun to submerge the public trust doctrine, and while none has pronounced such a succinct and positive test, they have expressed the entailed policies in more detail.153

In 1980, the California Supreme Court overturned precedent154 that had stood for more than sixty years in favor of a more modern approach:

We choose, instead, an intermediate course: the appropriate resolution is to balance the interests of the public in tidelands conveyed pursuant to the 1870 act against those of the landowners who hold property under these conveyances. In the harmonizing of these claims, the principle we apply is that the interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.155

The court succumbed to realism, and balanced external factors and competing interests against the inherent rights secured by the public trust. Within a year of this watershed decision in California, advisory opinions were handed down in Maine156 and Massa-

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154. Berkeley, 606 P.2d 362 (overturning Knudson v. Kearney, 152 P. 541 (Cal. 1915) and Alameda Conservation Ass'n v. City of Alameda, 70 Cal. Rptr. 264 (1968)).
155. Id. at 373.
agreeing with and further rationalizing this modern trend.\textsuperscript{158}

The Maine advisory opinion, coming within 70 days of the opinion of Massachusetts, referred to that opinion favorably and proceeded to throw the strict principles of the ancient doctrine overboard. The court recognized the legislature's power to terminate the public trust because "[i]n dealing with public trust properties, the standard of reasonableness must change as the needs of society change."\textsuperscript{159} The justices articulated five factors that combined to show it was within the power of the legislature to pass an act abdicating the public trust in vast amounts of lands once subject to tidal flows: 1) the assurance that commercial and other activity may go forward unimpaired, 2) the filled lands are now substantially valueless for public trust uses, 3) the use of remaining intertidal and submerged lands would not be impaired, 4) the expectations of private ownership developed by private parties over long periods and 5) the state's retention of its broad regulatory authority over the parcels.\textsuperscript{160} Although these factors are announced in support of an express legislative act to grant lands within the public trust, they all apply with equal force to implied state approval and even mere state acquiescence. Each factor offers an independent basis for modernizing the public trust doctrine by narrowing its applicability, and each factor applies to filled land whether acquired by express, implied or acquiesced approval.

Immediately after its discussion of these factors, the Maine court cited \textit{Illinois Central} where "the Court specifically and repeatedly stated that a grant under other circumstances might be valid—for example, where public rights in adjacent lands and waters were in no way impaired."\textsuperscript{161} The court would not have cited \textit{Illinois Central} at this juncture unless it believed its decision was within the boundaries erected by that seminal case. Rhode Island,
a state that has numerously and consistently cited *Illinois Central* as persuasive authority, has avowed the Chamber of Commerce test which is substantiated by the same factors and arguments set forth in the Maine advisory opinion.

The Massachusetts advisory opinion attempts to create a standard for weighing the key factors by saying, "where there may be benefits to private parties, those private benefits must not be primary but merely incidental to the achievement of the public purpose." This offers some guidance as to which interests will be favored, but the ambiguous and ever-expanding definition of "public purpose" impairs the desired accuracy of predicting public trust cases. The states of Maine, Massachusetts and California have articulated the fact that modern public trust cases require a balancing of interests. Yet this alone is not sufficient to predict which interests will be deemed superior when conflicts arise because there is little guidance for the balancing procedure. In contrast, the Chamber of Commerce test is a mechanical method for predicting outcomes in public trust cases. The test provides some bright lines for determining when private interests are sufficient to outweigh the public interests, while remaining flexible enough to adapt to extenuating circumstances. When an owner fills land with the implied approval of the state and subsequently improves upon the land, it is clear that she may establish title to the filled land in fee simple absolute in herself. But when there is a question of whether the state has acquiesced in the filling of the lands, there is room to maneuver the answer to maximize the utility of the competing interests.

The factors set forth in the modern analysis of the other states herein discussed supports the general principle of creating a standard test for resolving public trust cases. While other states have not yet adopted a clear standard, Rhode Island has been able to

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163. Id. at 1110-11 (Liacos, J. and Abrams, J., dissenting).
164. While the test does provide unequivocally for the land to be entirely freed from the public trust, the real estate industry has not yet determined the practical procedures requisite for establishing title in fee simple absolute in the private owners. The test clearly sets forth the elements that must be shown in order to quiet title, but title companies have yet to formalize the criteria for satisfying the test in practice. Telephone Interview with Michael B. Mellion, Rhode Island State Counsel, Commonwealth Land Title Insurance Company (Dec. 19, 1995).
deduce a methodical test from the consistent decisional law rulings on classes of parcels with shared distinctive attributes.

CONCLUSION

In addition to establishing title for the four plaintiffs, *Chamber of Commerce* pronounced a test for determining the state of title in filled lands of any class. The two elements of the test, filling along the shore with the acquiescence or express or implied approval of the state and then improving the filled land, are flexible enough to handle unique cases which may arise. And yet, they are firm enough to predict accurately the ownership of the vast majority of filled lands. When the test is applied to an improved parcel within the Cove Lands, fee simple absolute will be vested in the private party; the Cove Land parcels were part of an express grant and have been substantially improved upon for over one hundred years. When the test is applied to an improved parcel filled to a harbor line, fee simple absolute will likely vest in the private party because a harbor line is an implied approval from the state. The harbor line plaintiffs in *Chamber of Commerce* met both prongs and were vested with fee simple absolute because they had tacit approval to fill to the harbor line, and they had substantially improved upon the parcels for many years. When the test is applied to an improved parcel filled without the benefit of a harbor line and without express legislative authorization, the private party will have to show implied approval or state acquiescence via other means, in order to satisfy the first prong.

The precise alternative means which will be sufficient to satisfy a showing of state acquiescence has not yet been determined, but at least littoral owners know the standard they must achieve in order to establish fee simple.

*Hall* is an example of a case that fails the first prong because the filling was not to a harbor line, and it was not expressly authorized. Even if *Hall* could satisfy the first prong by showing that the permits from the Rhode Island Department of Public Works,

166. *Id.* at 1043-44.
167. *Id.* at 1043.
Division of Harbors and Rivers establish state acquiescence,\textsuperscript{168} Hall would still fail the test. Hall does not satisfy the second prong because the filled land was left as open space and never improved upon.\textsuperscript{169} The test unequivocally confirms the result reached in Hall, but shuns the reasoning of that opinion.

Other states may have more difficulty developing and justifying the implementation of similar methodical tests because they lack the special circumstances which exist in Rhode Island. The Chamber of Commerce test derives legitimacy from its consistency with the long history of public trust in Rhode Island, and its compatibility with contemporary public trust theory. The test shores the limits of Rhode Island's public trust doctrine with clarity, validity and reliability.

Matthew D. Slepkow

\textsuperscript{168} Id. This may be a difficult argument since the filling was more than five times as extensive as authorized by the permit. Id.
\textsuperscript{169} Id.