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Haunted By History: Colonial Land Trusts Pose National Threat

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NOTES

HAUNTED BY HISTORY: COLONIAL LAND TRUSTS POSE NATIONAL THREAT

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INTRODUCTION

Eighty-five-year-old James O'Hara[†] of Yorktown, Virginia, may have uncovered a glitch in colonial land conveyances that could open a proverbial Pandora's box of litigation throughout the United States. In his pursuit of a claim of right to an abandoned street in historic Yorktown, O'Hara and his attorney have traced the title of many unoccupied lands of Yorktown back to 1691, the year of the town's establishment.¹ Relying on the abundance of historical documents he amassed for his suit over the abandoned road, O'Hara developed another theory—that all of the unoccupied lands of Yorktown rightfully belong to the individual inhabitants of the town, not the county itself.² O'Hara threatens to have a court of law validate this theory in an attempt to prevent the development of Yorktown's waterfront area.³

O'Hara's threatened suit brings to light the possibility that any current inhabitant of an area originally established similarly to Yorktown could bring such a suit. The potential ramifications of such suits are far reaching and would likely entangle cities and counties across the country in complex litigation to determine the true ownership of lands once thought to be public.

Virginia's Colonial Assembly, the pre-Revolution incarnation of the commonwealth's present law making body, founded Yorktown in 1691 by passing the Act for Ports.⁴ The Act for Ports set aside fifty-acre tracts of land in various port areas in southeastern Virginia, requiring that certain trustees be named in each desig-

† On July 14, 2006, prior to the publication of this Note but after its authorship, Mr. O'Hara passed away. Obituaries, *James Malcolm O'Hara*, DAILY PRESS (Newport News, Va.), July 18, 2006, at C5. Although James O'Hara can no longer bring suit, his wife and daughter zealously espouse similar beliefs as Mr. O'Hara and may very well pursue a suit in his stead. See *infra* notes 93-95 and accompanying text.

1. See Tara Hayden, *Yorktown Ownership Is at Root of Dispute*, VA. GAZETTE, July 21, 2004, at 1A; Kimball Payne, *Paved with Good Intentions: Divided by a Road*, DAILY PRESS (Newport News, Va.), May 19, 2005, at C1.

2. See Hayden, *supra* note 1.

3. Payne, *supra* note 1.

4. 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL OF THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 53-69 (William Waller Hening ed., reprint 1969) (1823) [hereinafter STATUTES AT LARGE].

nated area and assigning the trustees with dividing and selling the subject lands.⁵ One of these tracts became Yorktown.⁶

O'Hara's theory is that the Yorktown inhabitants are the beneficiaries of this "trust," and that, when an act of the Virginia Assembly dissolved the trust in 2003,⁷ the ownership rights in the public lands still held by the trustees vested in the town's inhabitants and not the county.⁸ Although O'Hara intends to prevent only the waterfront lands of Yorktown from being developed, Yorktown is only one of the approximately twenty towns the Act for Ports created.⁹ If O'Hara's theory is validated by a court of law, he will put all such towns at risk of similar claims. The potential repercussions of validating this theory would have an impact not only on the cities and towns of Virginia, but on any land in the United States ever set aside in trust for public use. Because of these latent ramifications, a court must find O'Hara's theory invalid.

This Note demonstrates that a theory such as O'Hara's must fail, not only as dictated by history and jurisprudence, but as a matter of public policy. Part I of this Note sets forth the origins and history of Yorktown and the board of trustees which governed it until the board was disbanded in 2003. Part II examines the political and social atmosphere in which the Yorktown Trust was established and postulates that the Colonial Assembly that formed the Yorktown Trust did not intend to make the residents of Yorktown the beneficiaries of the trust.¹⁰ Part III explains how land put in trust for public use and so used for an extended period of time reverts to the general public rather than only to the inhabitants living adjacent to the land, despite any reversionary rights the original grantor may have intended for the subject land. Part IV addresses the potential consequences of giving credence to a theory such as O'Hara's, both locally and nationally. Finally, this Note concludes that both law and public policy demand that lands subject to public trusts be left to the general public rather than revert to

5. *Id.* at 55-56.

6. *Id.* at 59.

7. 2003 Va. Adv. Legis. Serv. 747 (LexisNexis).

8. Hayden, *supra* note 1.

9. 3 STATUTES AT LARGE, *supra* note 4, at 58-60.

10. As part of their interpretation of written trusts, courts must consider such trusts in light of the intention of the trust's settlor. *See infra* text accompanying notes 105-06.

the private individuals whose property immediately surrounds the land.

I. ORIGINS OF THE COLONIAL LAND TRUST

A. *The General Assembly*

On April 10, 1606, King James I granted patents to the Virginia Company to establish two American colonies, one northern colony and one southern colony, both of which were governed by the Council of Virginia.¹¹ The council was to govern the colonies in accordance with the laws of England and was prohibited from passing any ordinances that would affect "life or limb,"¹² restrictions that were quite limiting. Within three years, however, a second charter was granted to the Company and the first legal code ever put into practice in English-speaking America was adopted.¹³ It was not until 1619, however, that Virginia's constitution began to take its existing form.¹⁴ In this year, the Company, "[i]n an effort to encourage immigration and to promote a better spirit among the colonists," reorganized the government.¹⁵ The Company established "The General Assembly," giving it the authority to "make, ordain, and enact ... general laws and orders."¹⁶ The original General Assembly membership was to consist of the Governor of Virginia, nineteen other members expressly named by the Company,¹⁷ and "two burgesses out of every town, hundred, or other particular plantation, to be respectively chosen by the inhabitants."¹⁸ Although

11. OLIVER PERRY CHITWOOD, *JUSTICE IN COLONIAL VIRGINIA* 9-10 (J. M. Vincent et al. eds., The Lawbook Exchange, Ltd. 2001) (1905).

12. *Id.* at 10.

13. *Id.* at 12-13.

14. *Id.* at 17.

15. CHESTER W. BAIN, "A BODY INCORPORATE": THE EVOLUTION OF CITY-COUNTY SEPARATION IN VIRGINIA 1-2 (1967).

16. 1 STATUTES AT LARGE, *supra* note 4, at 112.

17. *Id.* at 111.

18. *Id.* at 112. The term "hundred" is defined as "a part of a Shire so called; either because at first there were an hundred Towns and Villages in each Hundred, or because they did find the King 100 able Men for his Warrs." THOMAS BLOUNT, *NOMO-LEXIKON: A LAW DICTIONARY: INTERPRETING SUCH DIFFICULT AND OBSCURE WORDS AND TERMS, AS ARE FOUND EITHER IN COMMON OR STATUTE, ANCIENT OR MODERN LAWES* 112 (Law Book Exchange, Ltd. 2004) (1670).

the Company clearly gave the colonists a voice in the General Assembly through these burgesses, it expressly reserved not only the right to replace any of the nineteen members it placed on the board "from time to time,"¹⁹ but also the right of ultimate veto power, asserting that "no law or ordinance" made by the General Assembly had the authority of law without ratification by the King's Court in England.²⁰

The Virginia Company's role in the colony's governance, however, was short lived. By 1623, the Virginia Colony's operations were not yielding the profits that the Virginia Company originally expected, and representatives of the Company requested that the King form a commission to investigate the shortcomings of the undertaking and "recommend such changes in the government of Virginia" as required to punish those responsible and guarantee the future prosperity of the financial venture.²¹ After a trial based on the commission's findings, the King effectively revoked the Company's charter in 1624, placing its powers in his own hands.²² He assumed control of the colony by issuing a special commission to appoint a new governor, Sir Francis Wyatt, and establishing a council to exert his authority over the colony.²³

Although the King's replacement of the Company's government suggests that the General Assembly was dissolved, more likely the King-appointed governor and council merely took the place of the governor and council members that previously had been part of the General Assembly, leaving in place the burgesses elected from each town.²⁴ The fact that the Assembly did not lapse is evidenced by the King's acknowledgment of its competence by granting it authority

19. 1 STATUTES AT LARGE, *supra* note 4, at 111.

20. *Id.* at 112.

21. 3 HERBERT L. OSGOOD, THE AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 43 (1907).

22. *Id.* at 51-52.

23. EVARTS BOUTELL GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 3 (Russell & Russell 1966) (1898).

24. A correspondence from the General Assembly to the King suggests this notion, as the writers referred to themselves as "the Governor and Council, together with the Burgesses of the severall plantations assembled in Virginia." 1 STATUTES AT LARGE, *supra* note 4, at 134.

in 1627 with respect to the tobacco trade.²⁵ Although the manner in which counties elected burgesses eventually changed,²⁶ the General Assembly kept essentially the same form, and Virginia was run by colonial rule until the Revolution in 1776.

B. The Act for Ports

In 1655, the General Assembly first attempted to encourage the development of hubs for trade in Virginia by passing general legislation that required each county to establish "one or two places and no more" through which all trade was to pass.²⁷ The Virginia colonists essentially ignored this legislation because the lack of proper facilities in the designated areas made it impractical for masters of shipping vessels to unload their merchandise in these areas.²⁸ After this failure, and concerned with the fact that colonists refused to plant any other crop than tobacco (the price of which had greatly declined), the General Assembly made another attempt to establish a port town by mandate in 1662.²⁹

On its face, the General Assembly's 1662 Act appears less ambitious than earlier attempts to create port towns in that most of its language focuses on the endeavor to build a single port town in James City.³⁰ To that end, the Assembly instructed the building of thirty-two brick houses in the town,³¹ directing the counties to fund the construction by levying a tax of thirty pounds of tobacco on each inhabitant of the county.³² The Assembly induced the building of storehouses alongside homes by offering to those undertaking

25. GREENE, *supra* note 23, at 36-37 (relying on 1 STATUTES AT LARGE, *supra* note 4, at 129, 134).

26. In 1634, the colony was divided into eight "shires," later referred to as "counties," that were established to elect the burgesses in lieu of the prior system of allowing every large plantation, town, or hundred to elect the burgesses. 1 STATUTES AT LARGE, *supra* note 4, at 223-24. This system signified the emergence of counties in colonial Virginia. BAIN, *supra* note 15, at 3.

27. 1 STATUTES AT LARGE, *supra* note 4, at 412-14; see BAIN, *supra* note 15, at 5.

28. BAIN, *supra* note 15, at 6.

29. 2 STATUTES AT LARGE, *supra* note 4, at 172-76.

30. *Id.* at 172. This town is now known as Jamestown.

31. *Id.* at 174.

32. *Id.* at 174; Edward M. Riley, *The Town Acts of Colonial Virginia*, 16 J. S. HIST. 306, 308 (1950).

such construction the land on which the buildings were erected free and in fee simple.³³ But the Act endeavored to do more; in the Act's last paragraph, the Assembly instructed that the thirty-pound levy be used to build towns on the York River, the Rappahannock River, the Potomac River, and at Accamack County, each in consecutive years.³⁴ This Act resulted only in the building of four or five houses in Jamestown, which the British head of Parliament seemed to believe was a success.³⁵ But this Act, too, was doomed to fail from the start, a failure which the Assembly apparently foresaw: the wording of the preamble demonstrated the Assembly's reluctance to adopt the enactment by drawing attention to the fact that it was under orders to do so.³⁶ Realizing the true need for port towns, and seemingly undaunted, the General Assembly made yet another attempt to mandate the creation of port towns in 1680.³⁷

Under the 1680 Act, sometimes referred to as the Cohabitation Act of 1680, the Assembly mandated that each county purchase fifty-acre tracts and put them under the control of designated "feoffees in trust ... to and for the use of the county," requiring that the feoffees sell these tracts only to those individuals that promised to build houses or warehouses on them.³⁸ Again, however, the strict requirements of this Act made complying with it economically "impracticable" for masters of shipping vessels,³⁹ resulting in the establishment of only two towns, which eventually became the cities of Hampton and Norfolk.⁴⁰ Apparently undaunted by its previous three failures, the General Assembly passed "An act for Ports, etc." in 1691, which contained provisions that closely paralleled those of the 1680 Act.⁴¹

The Act for Ports, like the 1680 Act, granted fifty-acre tracts to "feoffees in trust" to be divided into lots and only sold to those who

33. 2 STATUTES AT LARGE, *supra* note 4, at 174.

34. *Id.* at 176; Riley, *supra* note 32, at 308-09.

35. See Riley, *supra* note 32, at 309.

36. *Id.* at 308; see 2 STATUTES AT LARGE, *supra* note 4, at 172.

37. BAIN, *supra* note 15, at 6; Riley, *supra* note 32, at 309; see 2 STATUTES AT LARGE, *supra* note 4, at 471-78.

38. 2 STATUTES AT LARGE, *supra* note 4, at 473-74.

39. *Id.* at 508.

40. BAIN, *supra* note 15, at 6.

41. See 3 STATUTES AT LARGE, *supra* note 4, at 53-69.

promised to build on them.⁴² There was, however, one subtle difference in the language of the two acts. Under the 1680 Act, failing to build on purchased land resulted in the forfeiture of the land and its “rever[sion] to the *county*.”⁴³ In contrast, the Act for Ports established that failing to build on or pay taxes on purchased land caused a “forfeiture of the said lands to the *feoffees or trustees*.”⁴⁴ The legal significance of this difference is minimal because the result of both reversion clauses is to put the land back in the hands of the trusts to resell to other people.⁴⁵ But it is this subtle language difference that provides the foundation for O’Hara’s theory.

The Act for Ports was as unsuccessful as the General Assembly’s prior attempts to establish towns, but it was enough to aid in the formation of two more towns, Gloucestertown⁴⁶ and Yorktown,⁴⁷ on opposite sides of the York River. The General Assembly tried once more in 1705 to establish port towns by decree, even offering incentives such as exempting potential lot purchasers from certain levies on tobacco.⁴⁸ This attempt also failed, marking the General Assembly’s last express effort to create towns by mandate; thereafter, the Assembly enacted legislation for the establishment of towns only on an individual basis, as required.⁴⁹

C. Yorktown

The size and shape of Yorktown has changed significantly since it was first established in 1691. One must trace a confusing set of land transfers to determine what land the Yorktown trustees

42. *Id.* at 55-56.

43. *Id.* at 474 (emphasis added).

44. *Id.* at 56-57 (emphasis added).

45. This Note establishes that the General Assembly intended to make the individual counties in which these towns were created the beneficiaries of the trusts, and therefore it ultimately would not matter whether the land was to revert to the trust or directly to the county. Even if it reverted to the trust, the county would receive the lands as the beneficiary of that trust. See *infra* Part II.

46. See MARTHA W. MCCARTNEY, WITH REVERENCE FOR THE PAST 100 (2001).

47. See *History of York County in the Seventeenth Century*, 1 TYLER’S Q. & GENEALOGICAL MAG. 231, 256-58 (1920) [hereinafter *History of York County*].

48. BAIN, *supra* note 15, at 7 (citing 3 STATUTES AT LARGE, *supra* note 4, at 404-19).

49. *Id.* at 8.

actually held at the time of their dissolution in 2003. Unfortunately, the area with the most scattered history of ownership is Yorktown's waterfront area—the same area that is at the heart of O'Hara's potential claim.

Per the Act for Ports, the General Assembly bought a fifty-acre tract of land on the York River from Benjamin Read for 10,000 pounds of tobacco.⁵⁰ A colonist named Lawrence Smith completed and recorded the first survey of this land in the same year. Smith divided the fifty-acre tract into eighty-five half-acre lots,⁵¹ only two of which apparently were never purchased.⁵² The original survey, however, excluded approximately five acres of land on the bluff below the town, between the York River and the border of the northeastern-most lots.⁵³ Leaving such a buffer between a river and a platted tract of land was common practice in colonial times,⁵⁴ as such land was often thought of as having no value.⁵⁵

50. *History of York County*, *supra* note 47, at 258 ("The sum paid Benjamin Reade for the fifty acres was 10,000 pounds of tobacco and cask."); see 3 STATUTES AT LARGE, *supra* note 4, at 53-69.

51. See CHARLES E. HATCH, JR., *YORKTOWN UNDER THE HILL* 3 (1972) (citing York County Deeds, Orders, Wills No. 9, 42-43, 64, 69-70 (1691-1694)). A gully that runs through the northeast portion of the fifty-acre tract occupied some of the seven-and-a-half acres not used when dividing up the eighty-five half-acre lots. See York County Deeds, Orders, Wills No. 9, 70 (1691-1694) (labeling the gully in plat as "A Great Valley"). Land for streets and alleys occupied the rest. *Id.*

52. See 2 PHILLIP ALEXANDER BRUCE, *ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY* 557 (1907) ("Only two [of the eighty-five lots] appear to have remained without a purchaser.").

53. See *id.*; CLYDE F. TRUDELL, *COLONIAL YORKTOWN: BEING A BRIEF HISTORIE OF THE PLACE; TOGETHER WITH SOMETHING OF ITS HOUSES AND PUBLIC BUILDINGS* 46 (1938) (discussing the exclusion of five acres).

54. In *Morris v. United States*, the Supreme Court recognized this practice, stating:

When a town is situated on a navigable river, it is generally the custom to leave an open space between the line of the lots next the [sic] river and the river itself. This was done by William Penn in 1682 in the original plan of the city of Philadelphia on the Delaware River front, and he called it a top common

174 U.S. 196, 246 (1899) (finding that property owners had no claim of right to the lands between their lots and the Potomac River because such lands were designated for public use and the land office did not have the authority to grant the lands as the property owners asserted).

55. Lawrence Smith, in his original survey of Yorktown in 1691, described the bluff and shore area of Yorktown as having "noe value." HATCH, *supra* note 51, at 3 (citing York County Deeds, Orders, Wills No. 9, 42-43, 64, 69-70 (1691-1694)). As the Supreme Court of Virginia stated in *Miller v. Commonwealth*, such land was thought to have very little value compared with other lands because of the quit-rent system in place, which required a party

Despite the belief in 1691 that the land on the bluff below Yorktown was of little or no value, the land became quite valuable to Yorktown inhabitants in the decades that followed as the shipping activity in the town increased.⁵⁶ By 1738, ongoing disputes over the right to title in this waterfront land generated enough concern that the General Assembly had to call a special meeting to remedy the problem.⁵⁷ Although all indications suggest that Benjamin Read intended to include the bluff below the town in the original fifty-acre grant,⁵⁸ his son and heir to his estate, Gwyn Read, contended that Benjamin only owned the land in fee tail,⁵⁹ and therefore could not have conveyed more than the original fifty acres above the bluff as specified by the Assembly.⁶⁰ Although there were flaws in this reasoning, the people of Yorktown took the claim seriously enough to be "willing to pay ... a reasonable consideration ... for removing all doubts and controversies" with respect to the waterfront land.⁶¹ The General Assembly accepted the town's willingness to pay for this land and authorized the land's purchase for one hundred pounds, vesting title in the trustees and designating that the land remain "a common, for the use of the inhabitants

to pay the King one shilling annually for every fifty acres he owned; this policy made such inarable lands "practically worthless" for generating revenue to put toward quit-rents. 166 S.E.2d 557, 560-61 (Va. 1932). Although the strip of land in Yorktown was not marsh land like the land discussed in *Miller*, it was on a steep bluff, which similarly deprived it of economic utility.

56. See HATCH, *supra* note 51, at 7; TRUDELL, *supra* note 53, at 46.

57. See 5 STATUTES AT LARGE, *supra* note 4, at 68-71 (containing "An Act, for better securing the title of certain Lands to the feofees of the Town of York; and for settling the same, for a Common, for the use of the Inhabitants of the said Town").

58. For the forty years Benjamin Read lived after selling the fifty-acre tract, he never interfered with Yorktown's inhabitants' use of the land between their lots and the water. HATCH, *supra* note 51, at 7 (citing 5 STATUTES AT LARGE, *supra* note 4, at 70). Leaving such land to public use was a regular practice at the time. See *supra* note 54.

59. A fee tail is a grant of property to an individual and to that individual's descendants and is subject to a right of reversion or a remainder in the grantor if the tenant in tail dies with no lineal descendants. See *Jiggetts v. Davis*, 28 Va. (1 Leigh) 368, 418-20 (1829) (defining a fee tail while finding that such estates were prohibited by a 1785 act of the General Assembly). The term "fee tail" comes from the early modern English doctrine of entail, which arose out of the principle of primogeniture and required the current possessor of an estate to transmit the estate unimpaired to his heirs. See J. Bradford Delong, *A History of Bequests in the United States*, in *DEATH AND DOLLARS: THE ROLE OF GIFTS AND BEQUESTS IN AMERICA* 33, 34 (Alicia H. Munnell & Annika Sundén eds., 2003).

60. HATCH, *supra* note 51, at 7.

61. 5 STATUTES AT LARGE, *supra* note 4, at 71.

of the said town, from henceforth, for ever.”⁶² To raise the one hundred pounds for the land, the General Assembly gave the trustees the authority “to levy the said sum” against the inhabitants of the town “in such proportion as they shall think proper, having regard to the value of the lots.”⁶³ O’Hara’s theory is based on a claim that this levy and the 1691 Act’s language create a right of reverter in the waterfront lands once held by the trustees for public use.⁶⁴

Although the “commons” area was supposed to remain designated for public use “for ever,” this land was both privately and publicly used in the years to follow, as evidenced by the deeds of conveyance and lease of the subject lands appearing in the York County records during this time.⁶⁵ In fact, as author and historian Clyde Trudell so succinctly put it, “[f]orever, in this case, meant until 1785 when part of the commons was subdivided and sixty-four new lots were added to the eighty-five of the original 1691 survey.”⁶⁶ The event in 1785 to which Trudell referred was an act of the General Assembly authorizing the trustees “to lay out, allot, and dispose of” the commons area as they saw fit, with any unsold portions to remain as commons.⁶⁷

Keeping with the trend established in the first century of Yorktown’s existence, Yorktown’s waterfront property changed hands many times during the two centuries following the 1785 Act. In 1933, the trustees involved the National Park Service (NPS) in reconstructing a town wharf that had been destroyed in a storm,⁶⁸ offering to convey the land on which the wharf was located to the United States for constructing a Colonial National Monument and

62. *Id.*

63. *Id.*

64. See Hayden, *supra* note 1 (describing O’Hara’s theory).

65. HATCH, *supra* note 51, at 10. In 1716, the Executive Council of Virginia gave a patent to Charles Chiswell, granting him part of the waterfront area to build a wharf and a warehouse. 3 EXECUTIVE JOURNAL OF THE COUNCIL OF COLONIAL VIRGINIA, 426, 430 (H.R. McIlwaine ed., 1928) (1705-1721). And in 1728, the Executive Council gave patents to Richard Ambler, Thomas Nelson, Cole Digges, and John Ballard to build warehouses and wharfs on the waterfront. 4 *id.* at 183-84, 207-08 (1721-1739).

66. TRUDELL, *supra* note 53, at 46.

67. 12 STATUTES AT LARGE, *supra* note 4, at 218.

68. Minutes of Meeting of Yorktown Board of Trustees, in Yorktown, Va. at 1-3 (Oct. 14, 1933) (on file with Clerk of the Court, York County, Va.).

for the benefit of the trustees and the county.⁶⁹ By an act of the General Assembly less than one year later, the trustees rescinded their offer of conveyance to the United States and created a new deed by which they reserved a possibility of reverter for themselves, conveying the land subject to the condition that it be used only “for the use of the Colonial National Monument.”⁷⁰ Adding more confusion to the transfer of ownership to the United States, in 1956 the General Assembly amended its 1934 act to allow the United States to use the deeded portion of the land for an additional purpose: constructing a post office.⁷¹ Then, by deed of September 13, 1957, the United States conveyed the remaining portion of the waterfront parcel not being used for the post office back to the trustees, establishing a possibility of reverter in the trustees for the portion being used by the federal government for the post office if that land should ever cease being used for a post office or a public park.⁷² It is on these lands that Yorktown erected a \$24 million commercial waterfront area in 2005,⁷³ and, despite the complicated back-and-forth trail of title between the trustees and the United States, O’Hara claims a vested interest in these same lands as a resident of Yorktown and a beneficiary of the Yorktown Trust.⁷⁴

69. Minutes of Meeting of Yorktown Board of Trustees, in Yorktown, Va. at 1, 4-5 (Oct. 28, 1933) (on file with Clerk of the Court, York County, Va.); *see also* 1934 Va. Acts 6; Minutes of Meeting of Yorktown Board of Trustees, in Yorktown, Va. (Apr. 23, 1934) (on file with Clerk of the Court, York County, Va.); Minutes of Meeting of Yorktown Board of Trustees, in Yorktown, Va. (Feb. 6, 1934) (on file with Clerk of the Court, York County, Va.).

70. Minutes of Meeting of Yorktown Board of Trustees, in Yorktown, Va. (Aug. 20, 1934) (on file with Clerk of the Court, York County, Va.). The subject land is bounded on the southeast by a line running from Ballard Street to the low-water mark of the York River, on the southwest by Water Street, on the northeast by the York River, and on the northwest by the northwest limits of Yorktown. York County Deed Book No. 49, 188-90 (Nov. 27, 1934) (on file with Clerk of the Court, York County, Va.); Michael L. Wood, Attorney at Law, Report on Land Holdings of the Properties of the Yorktown Trustees (Dec. 4, 1989) (transcript at 5, on file with York County Attorney).

71. 1956 Va. Acts 1062.

72. *See* York County Deed Book No. 49, 191 (Nov. 13, 1957) (on file with Clerk of the Court, York County, Va.).

73. Hayden, *supra* note 1. On May 28, 2005, York County held the grand opening of Riverwalk Landing, a commercial waterfront area containing “a variety of shops, fine dining, a performance area, two-tier parking terrace, and two docks.” Press Release, Riverwalk Landing, Yorktown Celebrates Riverwalk Landing Grand Opening Memorial Day Weekend, May 28-30 (May 17, 2005), *available at* http://www.yorkcounty.gov/riverwalk/press/arch_2004/2005-008.htm.

74. Hayden, *supra* note 1.

D. The Yorktown Trustees

Land trusts were a common means of managing lands in the seventeenth century, and it is no surprise that the General Assembly used these same means to establish port towns throughout the Colony of Virginia. English Courts of Chancery first conceptualized, adopted, and enforced trusts in the fifteenth century.⁷⁵ At that time, land holdings were the primary form of wealth, and the channel through which the wealthy transferred their land to subsequent generations was the lineage of the oldest son.⁷⁶ This doctrine, known as primogeniture, survived to the 1700s.⁷⁷ Because mortality rates were high during this era, land trusts were the obvious solution to protect the lands that would otherwise transfer directly to orphaned infants and juveniles.⁷⁸ The idea of lands held in trust, therefore, was not a new concept to the General Assembly when, in its early attempts to create port towns, it placed the responsibility for setting up and managing them in trustees.⁷⁹

With this same knowledge of trusts, the General Assembly drafted the Act for Ports in 1691, thereby establishing the Yorktown trustees.⁸⁰ The General Assembly appointed the first two trustees of Yorktown, Joseph Ring and Thomas Ballard,⁸¹ and in 1699, authorized individual county courts to appoint new trustees to replace those who died or resigned.⁸² At the same time, the General Assembly took it upon itself to confirm that the trustees held title to Yorktown's public lands.⁸³ The General Assembly gave the town even more autonomy in 1757 when it granted the county

75. CHANTAL STEBBINGS, *THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND* 3 (2002).

76. *Id.* at 3-4.

77. See DeLong, *supra* note 59, at 34.

78. See STEBBINGS, *supra* note 75, at 3.

79. See *supra* text accompanying notes 38-49.

80. 3 STATUTES AT LARGE, *supra* note 4, at 56. Although there were earlier attempts to create a town in York County, this Act was the first successful attempt and thus the true origin of the trustees.

81. See *History of York County*, *supra* note 47, at 257.

82. 3 STATUTES AT LARGE, *supra* note 4, at 187-88.

83. *Id.* at 187.

court and trustee(s)⁸⁴ the municipal power to repair and maintain Yorktown's public property, including the commons area and the streets.⁸⁵ In 1786, the General Assembly incorporated Yorktown,⁸⁶ and Thomas Nelson was elected as the town's first mayor.⁸⁷

Although the town was incorporated, the trustees remained in control of Yorktown's public lands. Yorktown remained incorporated for only six years, during which time there were six different mayoral elections, the last of which was recorded in 1793.⁸⁸ The fact that the trustees maintained control of the public lands of Yorktown is evidenced by the General Assembly's continued recognition of the trustees over the next century and a half,⁸⁹ and by an 1806 act granting the trustees complete police powers, including the authority to make laws and levy taxes as required to maintain the town lands.⁹⁰ And, while the boundaries of the land owned and

84. Five men were entrusted with these municipal powers—William Nelson, Thomas Nelson, Dudley Digges, John Norton and Edmond Ambler. 7 *id.* at 138. In 1757, the justices of the county court were still responsible for appointing trustees, see 3 *id.* at 187-88, but the court records from at and around this time refer to only one of these men—Thomas Nelson—as a trustee. See York County Records, Judgments and Orders No. 1, 125 (1746-52). Thomas Nelson was likely the only trustee during this time as he was one of only two trustees when he was originally appointed as a trustee in 1738. See 5 STATUTES AT LARGE, *supra* note 4, at 71. What is perhaps more interesting is that three of the men named in the 1757 Act—Dudley Digges, John Norton, and Thomas Nelson, himself—were justices of the county court and therefore responsible for appointing trustees. See York County Records, Judgments and Orders No. 1, 194 (1746-52) (swearing in Norton); *id.* at 118 (listing Thomas Nelson as a presiding justice); York County Records, Judgments and Orders No. 4, 1 (1763-65) (listing Dudley Digges as a presiding justice). This not only suggests that the court and trustees were operating in lock-step in governing Yorktown, but it also explains why other trustees were not needed at the time, with Thomas Nelson's fellow justices appearing to unofficially fill any voids. This symbiotic relationship continued at least through 1761, when Digges and Norton were put in charge of the Board of Trustees' public wharf lands. See York County Records, Judgments and Orders No.3, 249 (1759-63).

85. See 7 STATUTES AT LARGE, *supra* note 4, at 138.

86. 12 STATUTES AT LARGE, *supra* note 4, at 376-80 ("An act for incorporating the town of York"); see HATCH, *supra* note 51, app. A at 91.

87. HATCH, *supra* note 51, app. A at 91.

88. See *id.*

89. The General Assembly named new trustees from time to time, always referencing earlier acts that addressed the Yorktown trustees and giving no indication that the trustees' power to control public lands had changed during or after Yorktown's experiment with incorporation. See 1918 Va. Acts 464 (granting new trustees "all the rights, powers and duties conferred on trustees" by earlier acts); 1900 Va. Acts 42-43 (same); 1872 Va. Acts 261 (same).

90. The General Assembly essentially granted the Yorktown trustees all of those powers typically conferred upon incorporated municipalities. See 3 THE STATUTES AT LARGE OF

managed by the trustees seemingly were in constant flux,⁹¹ the trustees owned and managed all of Yorktown's public lands until 2003. In 2003, the General Assembly finally dissolved the trust, mandating the transfer of all of the trustees' remaining property interests to the board of supervisors of the county.⁹²

E. The Claim

James O'Hara claims that, as present owners of the original eighty-five plots into which seaside Yorktown was divided in 1691, he and his neighbors are the rightful owners of the waterfront area that the county recently took painstaking efforts to develop. Although such a claim, coming from O'Hara and his wife Sarah, may seem surprising to some, it was not too surprising to the county officials of York County.⁹³ Opposing plans to expand Grace Episcopal Church, Yorktown's oldest church,⁹⁴ and with his "vociferous complaints" about the county's development of Yorktown's waterfront area, O'Hara is politely referred to by county officials as "persistent."⁹⁵ This persistence, however, may get more attention than just the County's if O'Hara succeeds in his current claim of right to an abandoned street behind his Yorktown residence. Although the Yorktown Board of Trustees sold the road to Mr. O'Hara and his neighbor for \$9,000 in 2003, just before the trust was dissolved, O'Hara now claims that as his father's heir he owns one-eighth of the entire strip, and that seven descendants of his father's business partners own the rest.⁹⁶ Some documentation

VIRGINIA, FROM OCTOBER 1792, TO DECEMBER SESSION 1806, INCLUSIVE, IN THREE VOLUMES, BEING A CONTINUATION OF HENING 332 (Samuel Shepherd ed., reprint 1970) (1835).

91. See *supra* text accompanying notes 57-74.

92. See 2003 Va. Adv. Legis. Serv. 747 (LexisNexis).

93. Even the O'Haras' daughter, Katie, has made news with her protests over York County's development of the Yorktown Waterfront. See Rusty Carter, *On the Waterfront, Strife over History*, VA. GAZETTE, May 18, 2005, at 1A.

94. Constructed around 1697, Yorktown's Grace Church is of particular historical significance because its walls were not made of brick but rather of marl cut from the cliffs on the Yorktown bluff. Despite the church being rebuilt several times, some of these walls remain today. See George Carrington Mason, *The Colonial Churches of York County, Virginia*, 19 WM. & MARY C.Q. HIST. MAG. 159, 164-66 (1939) (describing the architecture and history of Grace Church).

95. Hayden, *supra* note 1.

96. Payne, *supra* note 1.

conveying at least part of the road to O'Hara's father and his father's business partners exists, but the parties involved in O'Hara's case all acknowledge the difficulty in tracing the title of a parcel with such ancient roots.⁹⁷ O'Hara's ability to trace title to Yorktown's waterfront area will certainly be made even more difficult by the numerous transfers between the trustees and the federal government.⁹⁸

Despite his potential claim to the abandoned road as part of an inheritance from his father, O'Hara's more recent claim of right to the waterfront area of Yorktown relies on a trust theory. Protesting York County's \$24 million waterfront redevelopment, O'Hara claims that he and the other Yorktown residents have a vested right in the waterfront area because Yorktown lot owners paid into the land when it was purchased for the town's use as a commons area in 1738, thereby vesting a right in the present lot owners.⁹⁹ After this land was purchased, a group known as the Yorktown trustees owned and managed it, along with Yorktown's streets, until the General Assembly dissolved the trust in 2003.¹⁰⁰ Upon the trust's dissolution, all of the property held was supposed to be "transferred to the board of supervisors of the county."¹⁰¹

For O'Hara to succeed in establishing a vested interest in the waterfront area of Yorktown, he must ultimately establish that he and the other residents of Yorktown are the intended beneficiaries of the Yorktown Trust, and that when the trust was dissolved in 2003, all of the property held by the trustees reverted to inhabitants of Yorktown. Under this theory, if the abandoned road O'Hara's neighbors purchased was never open to the public, then the trustees would not have actually owned it and could not have sold it as they did in 2003;¹⁰² if true, this strengthens O'Hara's individual claim to

97. *Id.*

98. *See supra* text accompanying notes 65-74.

99. Hayden, *supra* note 1.

100. *See* 2003 Va. Adv. Legis. Serv. 747 (LexisNexis).

101. *Id.*

102. In Virginia, if the road was abandoned and never open to the public, rights therein would have vested in the abutting landowners and passed to any subsequent purchaser of those abutting lands. *See Tidewater Area Charities, Inc. v. Harbour Gate Owners Ass'n*, 396 S.E.2d 661, 664-65 (Va. 1990) (discussing fee rights in abandoned streets). By this measure, the trustees would not have owned the abandoned road if it was never used as a public thoroughfare, and O'Hara's claim to the road would therefore become stronger.

the road through private conveyance. Similarly, because the *waterfront area* was opened to the public, under O'Hara's theory the trustees did own it, and the 2003 dissolution therefore effected the reversion to O'Hara and the other inhabitants of Yorktown. And, while it is too late for O'Hara to stop the development of the waterfront area, County Attorney James E. Barnett fears that O'Hara is using the pending suit for the abandoned road as a litmus test for his theory and will eventually bring suit on his claim of right in the commons area should he prevail.¹⁰³ While the outcome of any potential suit by O'Hara is uncertain, the potential litigation that could arise if his theory succeeds would have negative implications for land trusts nationally.

II. LEGISLATIVE INTENT OF THE YORKTOWN TRUST

The history, text, and structure of the acts that created the Yorktown Trust and similar trusts establish that the General Assembly's intent in drafting these acts was to benefit the Crown and the counties of Virginia, not the individual inhabitants of the towns that the acts created. When the United States Supreme Court interprets the Constitution, generally it analyzes its history, text, structure, and precedent to determine the drafter's intent.¹⁰⁴ The Supreme Court applied a similar form of analysis to determine whether a trust had been created by a testator in *Colton v. Colton*, establishing that a court must "ascertain the intention of the testator, according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument

103. E-mail from James E. Barnett, County Attorney, York County, Va., to author (Oct. 31, 2005, 09:21 EST) (on file with author).

104. See, e.g., *Printz v. United States*, 521 U.S. 898, 905-29 (1997) (relying on the history, text, structure, and precedent of the dual sovereignty system established by the Constitution while analyzing gun control legislation). Although some scholars may disagree about methods of constitutional interpretation, there is a widespread consensus that "constitutional text, history, structure, and precedent are valid sources for constitutional advocacy and judicial decisionmaking." MICHAEL J. GERHARDT ET AL., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 1 (2d ed. 2000). For a general discussion of this method of analysis and its effectiveness, see David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

was framed.”¹⁰⁵ The Supreme Court has given similar consideration to contract interpretation,¹⁰⁶ and while the Act of the General Assembly that created the Yorktown Trust does not fit perfectly into any of these three categories—it is neither a constitutional provision, a will, nor a contract—it nevertheless falls somewhere in the ether among them.¹⁰⁷ As such, this Part will examine the General Assembly’s intent in drafting the Act for Ports using a historical, textual, and structural analysis.¹⁰⁸

A. History

When the Act for Ports is analyzed against the historical backdrop in which the General Assembly drafted it, it becomes clear that the Assembly’s intent was to make the counties in which the port towns were established the beneficiaries of the trust, not the individual landowners in those towns. From their very founding to their independence from England in 1776, the colonies’ primary objective was to generate revenue for the Crown. By creating port towns, the General Assembly hoped to force traders to execute all their importing and exporting through designated areas so taxes

105. 127 U.S. 300, 310 (1888) (finding that, despite the testator’s use of the term “request” in a will asking that his wife take care of his mother and sister, the circumstances surrounding the drafting of the will created a trust for the testator’s mother and sister).

106. In *Firestone Tire & Rubber Co. v. Bruch*, the Supreme Court applied a similar analysis to a trust established as part of an employee benefit plan, relying on circumstances outside of the written text of the trust contract to find that the fiduciaries of the trust did not have the discretionary authority to determine issues of eligibility for the plan. 489 U.S. 101, 112 (1989). In making this determination, the Court established that “[t]he terms of trusts created by written instruments are ‘determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.’” *Id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 4 cmt. d (1959)).

107. Indeed, it is not entirely uncommon for courts to treat statutes like these as contracts. In *United States Trust Co. v. New Jersey*, the Supreme Court stated that “a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.” 431 U.S. 1, 17 n.14 (1977) (finding the repeal of a state statute to be a violation of the Contract Clause of the Constitution because it impaired a state contractual obligation).

108. This Part does not apply a precedential analysis because there is no existing state or federal case law regarding claims to land held in trust for public use. Perhaps the most relevant case law is that applied in Part III of this Note. Otherwise, this is a case of first impression, and a court must rely only on the history, text, and structure of the acts used to establish port towns in identifying the intended beneficiaries of the trusts.

could be levied on these commercial activities. While the King was the primary beneficiary of the exercise of taxation, the counties in which these tax hubs were located were the primary beneficiaries of the lands themselves.

The history of the Americas is replete with colonization endeavors embarked on almost entirely for the purpose of financial gain. Even the great explorer Christopher Columbus's voyage discovering the Americas in 1492 was fueled by a greed for gold rather than a desire for freedom, discovery, or adventure.¹⁰⁹ While much of Columbus's exploratory activity was consumed by a search for the somewhat legendary gold of the Indies,¹¹⁰ the later ventures of the early seventeenth century were embarked on with the knowledge that the Americas were not in fact the Indies and with more ambition than merely finding gold and spices.¹¹¹ In its colonization efforts, England hoped to strengthen the entire empire not only by finding a faster route to the gold and spices of the Indies through the westward expansion of the colonies, but also by using colonization as a source of naval stores such as timber, cordage, canvas and pitch.¹¹² With this vision of the economic potential of the Americas, King James granted charters to various companies of investors, allowing them to colonize the Americas as financial ventures.

The Virginia Company attracted "investors on [both] patriotic and financial grounds,"¹¹³ but it ultimately failed to generate substantial profits, and the King revoked its charter after an investigation into the company's operations.¹¹⁴ But before the King revoked the Virginia Company's charter in 1624, thereby placing it

109. See HANS KONING, *COLUMBUS: HIS ENTERPRISE, EXPLODING THE MYTH* (1991) (averring that a desire to send "mountains of gold" back to Spain was not only the driving force in Columbus's attempts to discover a faster route to the Indies, but a driving force for his entire life). Columbus's overwhelming desire to discover gold is evidenced by the last sentence of only his second journal entry after landfall in the Americas, which read plainly: "I was attentive and labored to find out if there was any gold." WILLIAM LEAST HEAT-MOON, *COLUMBUS IN THE AMERICAS* 37 (2002).

110. See HEAT-MOON, *supra* note 109, at 42 (describing Columbus's search for gold).

111. JAMES A. WILLIAMSON, *A SHORT HISTORY OF BRITISH EXPANSION* 156-57 (2d ed. 1931) (discussing the motives for British exploration of the New World).

112. *Id.* Although accessing the gold and spices of the Far East ultimately never materialized in Virginia, orders from England for cargoes of shipbuilding material proved fruitful and eventually led to a shipbuilding industry in the New England colonies. *Id.* at 157.

113. *Id.* at 159.

114. OSGOOD, *supra* note 21, at 43-44.

under direct control of the Crown, a commission was sent to evaluate the economic shortcomings of the colony with the express instruction to determine whether "unnecessary hindrances to trade within Virginia existed."¹¹⁵ The King's concern with the condition of trade in the British colonies, as well as his ultimate revocation of the Virginia Company's charter, demonstrate the economic motives driving England's efforts at colonization. By 1637, the King recognized the value of tobacco as a trade good in Virginia.¹¹⁶ The strength of the tobacco trade eventually caused the General Assembly to draft the various acts by which it attempted to create port towns throughout the colony.

Despite the King's desire for Virginia colonists to diversify their crops, tobacco eventually revealed itself as the only profitable crop suitable to Virginia's land conditions.¹¹⁷ As early as 1621, the King illustrated his recognition of tobacco as a valuable export, requiring planters to send all of their tobacco through England to be taxed before it could be exported elsewhere.¹¹⁸ The Acts of Navigation of 1651 further required that all goods from America, as well as Asia and Africa, be transported to England only in English ships with English crews—another attempt to capture wealth from the colonies' products.¹¹⁹ These restrictions were put in place because the King believed that unregulated trade with other countries was either decreasing revenue generated for England or was discouraging colonists from building English vessels.¹²⁰ Although it is unclear exactly which of these two reasons motivated the King, there is little doubt that one of the underlying reasons for the prohibition was to financially injure the Dutch, with whom Virginia had been trading freely. The King was apparently successful in his supercilious efforts, because the Act precipitated a war between England and Holland.¹²¹ This war may have provided a sufficient diversion for the King, as the colonists seemingly ignored the Act without

115. *Id.* at 43.

116. As late as 1637, the King expressed his desire that the colony export a better crop than tobacco. *Id.* at 28.

117. 1 BRUCE, *supra* note 52, at 321.

118. *Id.* at 347-48.

119. *Id.* at 348-49.

120. *Id.* at 348.

121. *Id.* at 349.

repercussion.¹²² An act of the General Assembly effectively repealed the prohibition in 1660, asserting that “the restriction of trade hath appeared to be the greatest impediment to the advance of the estimation and value of our present only commodity tobacco.”¹²³ Between the time of adoption and repeal of this trade restriction, the General Assembly drafted the first act for creating port towns.

In 1655, the year the first legislation mandating the establishment of port towns in Virginia appeared,¹²⁴ a petition to the British head of Parliament, Oliver Cromwell, recognized that, despite the restrictions on trade, tobacco growth in the petitioner’s county was the greatest it had ever been.¹²⁵ This was surely the situation in most counties,¹²⁶ because although the General Assembly’s Act of 1655 appears to have ignored the trade restriction, the language of the Act clearly illustrates the Assembly’s concern with the over trading of tobacco that caused its price to drop drastically. Looking at this Act through a lens colored by the tumultuous economic times in which the General Assembly drafted it, the desire to create a mechanism to control trade and ensure the colony’s main source of income is evident. The Assembly made five more attempts to mandate the creation of port towns from 1662 to 1705, each of which also reflected the Assembly’s continuing desire to obtain control of the tobacco trade within the colony and to obtain the financial benefits that would come with that control.¹²⁷ While

122. William Hill, *Colonial Tariffs*, 7 Q. J. ECON. 78, 90 (1892) (citing 2 STATUTES AT LARGE, *supra* note 4, at 450).

123. 1 STATUTES AT LARGE, *supra* note 4, at 540.

124. *See id.* at 412-14 (“An Act for regulateing of Trade and establishing Ports and Places for Markets”).

125. 1 BRUCE, *supra* note 52, at 364.

126. Throughout 1654 and 1655, merchants and planters petitioned British Parliament to stop growing tobacco in England because of the potentially damning effects on the already over-grown plantations of Virginia. *See* CALENDAR OF STATE PAPERS, COLONIAL SERIES: 1574-1660, 417, 422-24 (W. Noel Sansbury ed., Kraus Reprint Ltd. 1964) (1860).

127. *See* 2 STATUTES AT LARGE, *supra* note 4, at 172-76 (“An act for building a towne”); *id.* at 471-78 (“An act for cohabitation and encouragement of trade and manufacture”); 3 *id.* at 53-69 (“An act for Ports”); and *id.* at 404-19 (“An act for establishing ports and towns”). One of these five additional attempts to establish port towns occurred in 1685 but was not recorded in Hening’s Statutes because it appears that the proposed act never became law, likely due to an ongoing disagreement over how to designate tax collection officers and how to compensate them. For this reason, the King never signed the Assembly’s proposed bill into law. *See* 1 LEGISLATIVE JOURNALS OF THE COUNCIL OF VIRGINIA 77-78, 95-106 (H.R. McIlwaine ed., 1918) (cataloging the debate over the bill).

regulating trade helped drive up the price of tobacco and create market stability for the colonists planting the crop,¹²⁸ the revenues the colonists generated from the crop paled in comparison to those that England enjoyed.¹²⁹ The clear disparity between the Crown's profits and the colony's profits cannot be ignored as one of the Assembly's motivating factors in drafting these acts, especially considering that the King was in charge of appointing a large number of the Assembly's members and ultimately had to approve each of the Assembly's acts.¹³⁰ The King's financial interests and control over the Assembly provide explicit examples of his authority and the structure he used within the colonies to generate more wealth and power for the Crown, but there is also intrinsic evidence of the King's financially driven design.

In the 1700s, there was a quit-rent, or head-right, system in place in the American colonies, under which colonists had to pay an annual fee of one shilling to the King for every fifty acres they occupied.¹³¹ The quit-rent system arose out of the feudal system of England, which provided that inhabitants of land had to pay a fixed amount to the lord of the manor on which that land was located in lieu of paying them with food or labor.¹³² Besides causing colonists to inhabit only arable lands that could be used to generate funds to put toward this quit rent,¹³³ this system also established the "feudal" manner in which the colonists were viewed and treated as indentured to the Crown. This feudal mentality must be considered when analyzing the intent of the Act for Ports and other acts of the Assembly that mandated the creation of port towns.

128. See *supra* text accompanying notes 117-20.

129. At its peak, the revenue generated by tobacco sales in Virginia was around £5000, while England generated between £200,000 and £300,000 in revenue from tobacco each year. See Hill, *supra* note 122, at 91.

130. See *supra* text accompanying notes 23-24.

131. See *Miller v. Commonwealth*, 166 S.E. 557, 559-61 (Va. 1934) (asserting that early Virginia settlers would not lay off their tracts of land on marsh areas, because such areas were not arable and could not be used to generate revenue with which to meet the quit-rent requirement).

132. BEVERLEY W. BOND, JR., *THE QUIT-RENT SYSTEM IN THE AMERICAN COLONIES* 25 (1919) (describing the origins of the quit-rent system).

133. See *supra* note 55.

From the founding of the colonies¹³⁴ to the various acts of the General Assembly to encourage trade,¹³⁵ it is clear that the intent of the Act for Ports was to generate revenue for the Crown. The mere use of trust language in some of these acts does not negate the underlying message that the Crown was meant to benefit from the creation of these towns. The General Assembly meant to create focal points through which to force all trade, whereby it could exercise political and economic control over both trade and the individual colonists. The economic circumstances surrounding the acts which mandated the creation of port towns point toward only the selfish motives of the Crown, not the selfless motives that one would expect to accompany a private land trust. Considering that tobacco, or any other crop for that matter, could not be grown within the half-acre plots in the towns these acts created, the General Assembly appears to have been least concerned with benefitting the actual inhabitants of the towns. Rather, the inhabitants were put into the position of stewards for the Crown, carrying out the regulation of trade in these areas. At most, the General Assembly hoped to help the plantation owners in counties surrounding the respective towns, which is further evidenced by the text of the acts.

B. Text

An analysis of the actual language employed by the General Assembly in the Act for Ports indicates that the Assembly did not intend to create a trust of which the people of the towns newly formed were the intended beneficiaries. The language of the acts themselves indicates a financial motive of the Assembly in drafting them rather than a motive to create towns for the sake of their inhabitants. While the text appears to create a trust for the good of the towns, the reversionary text used by the Assembly creates a right of reverter in the counties, which is contrary to the idea that the individual inhabitants of the towns were the intended beneficiaries of the trust.

134. See *supra* text accompanying notes 109-16.

135. See *supra* text accompanying notes 117-27.

The opening sentences of all of the General Assembly's acts for creating port towns evince the atmosphere of economic turmoil and duty to the Crown in which these acts were drafted.¹³⁶ The Act of 1655 opens by establishing its purpose "[to] prevent the great inconveniencies of trade and comerce in this collony, the long demorage of shipps with the greate abuse of fforestallers whereby the poor inhabitants of this collony are greatly impoverished."¹³⁷ This phrase reveals the Assembly's concern with the effect "forestallers," who traded without paying taxes, were having on the colony's income.¹³⁸ In its 1662 attempt at creating port towns, the Assembly noted that, in addition to the King's express mandate of the creation of towns, the Assembly's "own conveniencies of profit and securitie" also provided motivation.¹³⁹ By the 1680 Act, the Assembly focused its concern more specifically on the effect of the ungoverned trade of tobacco, asserting that the Act was drafted out of concern for "the greate extremities his majesties subjects here must necessarily fall under by the present and continued lownes of the price of tobacco, the only comodity and manufacture of this country."¹⁴⁰ This is a clear reference to the falling value of tobacco and the Assembly's hopes to help farmers stabilize its price.

The 1691 Act, however, illustrates that the financial woes of tobacco farmers were not the General Assembly's only concerns. The Assembly clearly established the crown's interest in laying its hands on the tax revenues from the tobacco trade, stating that the failure to establish port towns had "rendered impossible to be secured [the customs and revenues from trade goods that were] to be duly paid into the hand of their majesties respective collectors, and other officers thereto appointed."¹⁴¹ The General Assembly expressed similar concern with its ability to tax trade goods in its last attempt at mandating the creation of port towns in 1705; it recognized that port towns would "be particularly usefull and serviceable to her majesty, in bringing our people to a more regular

136. See *infra* text accompanying notes 137-42.

137. 1 STATUTES AT LARGE, *supra* note 4, at 412.

138. See *id.* at 412-13.

139. 2 *id.* at 172.

140. *Id.* at 471-72.

141. 3 *id.* at 53.

settlement and of great advantage to trade.”¹⁴² Here, within the text of the acts of the Virginia Assembly, is evidence of the atmosphere in which these acts were drafted and of the true motive behind the acts: to control the price of tobacco and establish a means to levy taxes against its trade.

Although the text places the acts in the context of the financial concerns surrounding their drafting, the acts also have language that suggests the creation of a trust. All of the language used by the Assembly to mandate the creation of towns from 1680 to 1705 designated that the lands were to be held by “feofees” for the sole purpose of establishing towns in the respective counties.¹⁴³ During the 1700s, the term “feoffee” was defined as a party who receives property in fee simple, that is, “to him and his heirs forever.”¹⁴⁴ The Acts of 1680 and 1691 designated that the lands were to be held by “feofees in trust,”¹⁴⁵ while the Act of 1705 completely excludes the term “trust” from all its provisions.¹⁴⁶ Even though the term “trust” disappeared from the latter Act of Assembly, the general language, and therefore intent, of the Act remained the same. The intent of the acts was to control trade, which in turn was meant to generate tax revenues for the Crown and stabilize the tobacco trade to protect the plantation owners in the colony.

The various restrictions the General Assembly placed in the language of the respective acts mandating the building of towns further evince the economic motive behind the acts, establishing that the intended beneficiaries of the trusts were the surrounding counties and the Crown, not the individual inhabitants of the towns created by the acts. The 1662 Act required that any party failing to build a house on his property within two years must pay fifteen thousand pounds of tobacco to the town for use in further developing the town.¹⁴⁷ Becoming somewhat more impatient in its 1680 Act, the General Assembly required that the town land be used “for the ... county” and that upon a purchaser’s failure to build on his lot

142. *Id.* at 404.

143. See 2 *id.* at 418; 3 *id.* at 56; and *id.* at 473.

144. JOHN COWELL, *THE INTERPRETER: OR BOOKE CONTAINING THE SIGNIFICATION OF WORDS* (Law Book Exchange, Ltd. 2002) (1607); see also BLOUNT, *supra* note 18.

145. See 2 *STATUTES AT LARGE*, *supra* note 4, at 473; and 3 *id.* at 56.

146. See 3 *id.* at 418.

147. 2 *id.* at 174.

within three months, the land would “revert to the county.”¹⁴⁸ The 1691 Act required that the lands be built on within four months or else the trustees could take the land and sell it to “any other persons.”¹⁴⁹ The 1705 Act was nearly identical to the 1691 Act; the only change was that it extended the amount of time allowed for building from four months to twelve months.¹⁵⁰ If the Assembly intended to make the individual inhabitants of the port towns the beneficiaries of the trusts formed to distribute and manage the land in these towns, the Assembly would not have created a right of reverter in anyone but those inhabitants. Instead, the Assembly chose to expressly include language creating a right of reverter in the trustees. The Assembly’s immediate desire to use the lots in the towns for economic purposes is evinced from the language of the acts, and this fiscally driven desire clearly eclipses any language that might suggest a trust was created for the benefit of the town’s inhabitants.

The General Assembly not only created a right of reverter in the trustees or the county if the lots of the port towns were not built on, it also required the counties in which these towns lay to provide the funding for the initial tracts of land on which the towns were to be laid out.¹⁵¹ In circumstances like these—a case in which one party, here the county, purchases property but legal title is placed in another party, here the trustees—the Supreme Court has held that an implied trust arises; “the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds.”¹⁵² The reason for this rule is “the natural presumption ... that he who supplies the purchase money intends the purchase to be for his own benefit.”¹⁵³

148. *Id.* at 473-74.

149. 3 *id.* at 56. This Act more specifically required that the houses built on the lots be at least twenty feet square. *Id.*

150. *See id.* at 418.

151. *See* 2 *id.* at 174; *id.* at 473; 3 *id.* at 56; and *id.* at 417. The 1655 Act was different in that it demanded that the port areas be laid out “with the consent of the [present] inhabitants” of those areas, without actually purchasing the subject lands. 1 *id.* at 412. The 1662 Act did not go so far as to obtain the consent of inhabitants and even imposed fines on county commissioners who refused to abide by the Act’s express instructions. 2 *id.* at 173-74.

152. *Smithsonian Inst. v. Meech*, 169 U.S. 398, 407 (1898).

153. *Id.*

Even though some limited linguistic evidence of the acts suggests that the inhabitants of the towns may have been the intended beneficiaries of the trusts, the counties in which they lay provided the consideration for the lands' initial purchase, which, under the Supreme Court's rubric, thereby places the trust under the control of the county. The trust, therefore, was to be managed per the county's, not the town's, desires. When viewed in conjunction with the reversion language of the acts, the trustees should have been acting as the counties desired, with each party retaining a possibility of reverter if the lands were not so used.

Finally, even the language of the titles of the various acts used to create port towns evinces the General Assembly's economic motive in passing them, further evidencing the intent to create hubs for trade to benefit the Crown rather than to benefit the individual inhabitants of the towns. In temporal order from 1655 to 1705,¹⁵⁴ the titles of the acts were as follows: "An Act for regulateing of Trade and establishing Ports and Places for Marketts,"¹⁵⁵ "An act for cohabitation and encouragement of trade and manufacture,"¹⁵⁶ "An act for Ports, &c.,"¹⁵⁷ and "An act for establishing ports and towns."¹⁵⁸ While the term "trade" disappears from the titles of the latter two acts, the term "ports" appears in its stead, which surely has the same import as the term "trade." Implicit in all these titles is the General Assembly's interest in generating trade revenues, which benefit not only the King, but also the plantation owners in the county lands surrounding the individual towns.

The inhabitants of the counties of Virginia were predominantly large plantation owners,¹⁵⁹ and they were the intended recipients of any benefit derived from the creation of port towns not taken by

154. Excluded from the list is the 1662 Act, the title of which, "An Act for Building a Towne," was not actually given to the act by the Assembly, but rather by editors of later publications of the acts. See 2 STATUTES AT LARGE, *supra* note 4, at 172 (noting titles in margins).

155. 1 *id.* at 412.

156. 2 *id.* at 471.

157. 3 *id.* at 53.

158. *Id.* at 404.

159. Unlike the colonies of New England, which were well-suited for towns, "the economic, climatic, and geographical conditions in the area of Virginia were considerably different" and resulted in the predominant distribution of landowners in a plantation format. AARON M. SAKOLSKI, LAND TENURE AND LAND TAXATION IN AMERICA 33 (1957).

the Crown. The creation of port towns was intended to establish a central location for plantation owners to bring their crops and to provide a vehicle through which the trade of the crops could be controlled, and the price thereby sustained at a fiscally sound level.¹⁶⁰ The Assembly was so concerned with guaranteeing the use of the lands for this cause that, if the lands were not built on in a commercial manner, the various town acts required that the lands revert to the respective county or trustees.¹⁶¹ The text of the acts clearly points to the conclusion that the only intended beneficiaries were the Crown and the plantation owners, not the individual inhabitants of the towns created by the acts. The inhabitants were merely intended, it seems, as pawns to carry out the duties laid upon them by the acts to ensure the financial health of the King and the planters, providing the King with the tax revenues from fungible goods and creating a stable market for these goods.

C. Structure

The structure of the individual acts that the General Assembly adopted to create port towns illustrates the Assembly's economic goals and its ultimate desire to benefit the counties surrounding the towns, not a desire to benefit the individual inhabitants of the towns as O'Hara might suggest.¹⁶² When viewed within the structure of the entire textual body of the acts of the Virginia Assembly, at least those drafted around the time when the Assembly drafted the acts for creating port towns, it is evident that the Assembly intended to generate finances for farmers and the Crown, not to benefit the persons that would eventually inhabit these towns. The bulk of the text of these acts is dedicated to the manner of levying taxes while only a minor portion is dedicated to actually setting up the towns.¹⁶³ The manner in which the General Assembly drafted the acts for creating port towns clearly evinces their financial concerns and the insignificant, if not nonexistent, thought given to the formation of actual trusts.

160. See *supra* Part II.A.

161. See *supra* text accompanying notes 147-50.

162. See *infra* text accompanying notes 164-94.

163. See *infra* text accompanying notes 195-98.

The first act among those adopted by the General Assembly on March 31, 1655 provided that persons that relocated to remote areas to avoid paying taxes should be returned to the county in which the debt was owed and jailed until the debt was paid.¹⁶⁴ In order of their appearance in the statute book, the succeeding acts provided that, among other things, Indian children could be taken as servants,¹⁶⁵ no tobacco exports were subject to custom payments,¹⁶⁶ all coinage would be valued at five shillings,¹⁶⁷ courts had the authority to license tavern keepers and ferries,¹⁶⁸ Irish servants that were not indentured would be released from service at a set time,¹⁶⁹ and sheriffs would conduct the elections of burgesses.¹⁷⁰ The act for creating port towns immediately followed these clearly commercial acts,¹⁷¹ either dealing with taxes or servitude.¹⁷² Although O'Hara would suggest that it is technically possible, it can hardly be imagined that, sitting among these other acts, the General Assembly would have placed an act with such a philanthropic purpose as creating a public land trust, especially since the term "trust" is mentioned nowhere therein.

164. See 1 STATUTES AT LARGE, *supra* note 4, at 409.

165. The Act requires the court's permission to do so, but its clear import is to permit colonists to take Indian children as servants, a source of free labor and increased productivity for those permitted. See *id.* at 410. In fact, "although hedged about with provisions for their religious instruction and the safeguarding of their rights," acts such as this were meant to degrade the social status of Indians by putting them on par with indentured servants. Theodore Stern, *Chickahominy: The Changing Culture of a Virginia Indian Community*, 96 PROC. AM. PHIL. SOC'Y NO. 2, 157, 188 (1952).

166. See 1 STATUTES AT LARGE, *supra* note 4, at 410.

167. The purpose of this act appears to be to encourage trade by stabilizing the value of coinage. See *id.* at 410-11.

168. See *id.* at 411.

169. Unindentured Irish servants younger than sixteen were to be released from service at the age of twenty-four, and those older than that were to serve only six more years. See *id.* Even this freeing of servants had an economic overtone; servants were being replaced by slaves during this time as the colonists realized the economic "benefits" of slavery. See JACK P. GREENE, PURSUITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE 83 (1988) (discussing why servitude was abandoned for slavery).

170. See 1 STATUTES AT LARGE, *supra* note 4, at 411-12.

171. See *supra* notes 167-73.

172. While the act regulating the election of burgesses is not on its face one of economic concern, it is riddled with threats of penalties for disobeying its mandates, which suggests that its purpose is at least somewhat focused on generating revenue.

In 1662, the General Assembly's acts were replete with economically centered legislation. In fact, the act for creating port towns drafted that year is the first in a long list of acts centered around commerce. Six of the seven acts following the Port Act deal with taxes, duties, or levies, on everything from killing wolves to encouraging colonists to build ships.¹⁷³ One cannot ignore the financial connection the 1662 Act has with the acts drafted immediately after it, especially when the act for port towns concludes with the statement that the purpose of the towns was for "the advancement of the [tobacco] markett."¹⁷⁴ This concluding sentence is the perfect lead-in to the remaining economic legislation enacted by the General Assembly in that session, linking them in both motive and language.

On June 18, 1680, the Assembly again decided to draft an act to mandate the creation of port towns. Of the sixteen other acts drafted on this day, at least half of them dealt directly with the colony's economy.¹⁷⁵ From clearing logs to enabling trade ships to pass safely¹⁷⁶ to setting the value of the export duty of tobacco,¹⁷⁷ the concerns of the General Assembly during the drafting of these acts are clear—to create an avenue for trade and to exert both fiscal and political control over the avenues of trade. The other acts drafted on this day seem primarily concerned with maintaining social order within the colony, providing for the maintenance of forts,¹⁷⁸ prohibiting slaves from carrying weapons,¹⁷⁹ and even

¹⁷³ See 2 STATUTES AT LARGE, *supra* note 4, at 176-79.

¹⁷⁴ *Id.* at 176.

¹⁷⁵ Although Act II dealt with the naturalization of colonists as a means to encourage more settlers to come to the colonies and could be viewed as an economic motive, it was not counted among the acts dealing with the colony's economy. The following acts, however, were counted as focusing on the colony's economy: Act III, which dealt specifically with levying taxes on trade; Act VI, which set the rate for attorney's fees; Act VII, which set the age at which slaves became taxable; Act VIII, which permitted free trade with Indians; Act IX, which set the taxable rate on casks of tobacco; Act XII, which created a penalty for exporting untanned deer hides; Act XV, which provided for the clearing of debris from the rivers to allow trade ships better access; and Act XVI, which set the fee rates to be charged for services of the county courts. See 2 *id.* at 466-87.

¹⁷⁶ *Id.* at 484-85 (containing Act XV).

¹⁷⁷ *Id.* at 466-69 (containing Act III).

¹⁷⁸ *Id.* at 469-71 (containing Act IV).

¹⁷⁹ *Id.* at 481-82 (containing Act X).

prohibiting outbursts during church services.¹⁸⁰ But while the Assembly showed concern for social order by these acts, the language adopted by the Assembly in the act for creating port towns most closely comports with those acts dealing with trade and taxes. The abundance of acts expressly aimed at generating and controlling trade suggests that the act for creating port towns fits within the economic motives behind the acts as a whole. The only beneficiaries the Assembly could have had in mind in drafting the act for port towns were the surrounding counties and the Crown.¹⁸¹

By April 16, 1692, the General Assembly's focus had not changed significantly, as it demonstrated by drafting a majority of its acts that year with a focus on commerce. From protecting crops from wolves¹⁸² to amending the 1686 tax placed on tobacco,¹⁸³ the concern of the acts of this session as a whole demonstrate the Assembly's overwhelming concern for the financial well-being of the colony. In fact, even the acts seemingly concerned with social order are mired by an overriding focus on finances, such as the act empowering sheriffs to collect "publique dues"¹⁸⁴ and the act for appointing a treasurer to keep an account of "every sum and sums of money raised or to be raised by force."¹⁸⁵ The Act for Ports itself falls between an act amending the tobacco tax and an act providing for free trade with Indians.¹⁸⁶ Based on its position in the acts drafted in April of 1691 and the substance of the entire body of the acts, the Act for Ports was clearly meant to create a center for trade to benefit the entire colony, not to create a small self-sustaining town to be managed by trustees for the benefit of the town's inhabitants. The trustees were merely an instrument, like the sheriff and treasurer, through which the Assembly controlled trade and collected revenues for the Crown.

180. *Id.* at 483-84 (containing Act XIII).

181. Although the Crown would also indirectly benefit from any well-being created by the acts for port towns, one can hardly imagine the Assembly had enough foresight to envision the eventual dissolution of the trusts hundreds of years later and any benefits the Crown would receive indirectly thereby. Just as the General Assembly dissolved the trust in 2003, it could have done so at any time prior had the Assembly so desired.

182. 3 STATUTES AT LARGE, *supra* note 4, at 42-43 (1691).

183. 2 *id.* at 51-53.

184. *Id.* at 47-50.

185. *Id.* at 92-94.

186. 3 *id.* at 51-69.

The General Assembly's responsibilities had expanded considerably by 1705. That year, the Assembly drafted fifty-eight acts,¹⁸⁷ as compared to the mere eight acts it drafted in its 1654-55 session.¹⁸⁸ The acts of 1705 contained many of the same acts as the 1691 session of the Assembly,¹⁸⁹ but included even more acts concerned with the financial development of the colony, such as prohibiting the importation of tobacco from outside of Virginia,¹⁹⁰ setting a standard size and quality for barrels of certain trade goods,¹⁹¹ and placing controls on houses that weighed trade goods.¹⁹² While all these acts further evince the economic nature of the General Assembly's concern in all of its actions, what is most significant in this set of acts, perhaps, is an act confirming the title of town lands in the counties that purchased them. The act expressly stated:

[W]here any county or counties have purchased, laid out, and paid for any lands, for ports or towns, pursuant to the said act, for ports, &c. or to *any other act of assembly*, and have vested the same in feoffees or trustees, according to the said act or acts; such feoffees or trustees so invested, are hereby declared to have a good, absolute, and indefeasible estate in fee, in such lands respectively, which have not been disposed of by the former trustees¹⁹³

By drafting, in the same body of acts that mandated the purchase of land by a county for the creation of port towns, an act that vested all lands purchased by counties in those same counties, the General Assembly established its clear intent that the lands not vest in the individual inhabitants of the towns. In fact, this act even had a

187. See *id.* at 227-481. The General Assembly's role was seen as expansive and important enough at this time that the acts themselves mandated the creation of a town around the capitol in Williamsburg, not only to help support "his majesty's roial college of *William & Mary*," but also because "the general assemblies ... cannot possibly be held and kept at the said capitol, unless a good town be built and settled adjacent to the said capitol." *Id.* at 422.

188. See 1 *id.* at 409-14.

189. Like the 1691 acts, the 1705 acts provided for a tax on liquors, sheriffs' collection of duties, the appointment of a treasurer, promotion of the killing of wolves, etc. Compare 3 *id.* at 42-97 (including the 1691 acts), with *id.* at 250-481 (including the 1705 acts).

190. *Id.* at 253-54.

191. *Id.* at 254-58.

192. *Id.* at 395-401.

193. *Id.* at 432 (emphasis added).

retroactive effect on all of the "other act[s] of assembly" that created port towns.¹⁹⁴ The Assembly seems to have been clarifying, for all of its history, that it never intended the land of the port towns it created by mandate to vest in the inhabitants of those towns, but rather that it always meant for those lands to vest in the counties in which those towns were created. This final attempt at mandating the creation of port towns in 1705 is also the final nail in the proverbial coffin in which this Note argues O'Hara's theory, and those like it, should lie.

Not only do the acts drafted the same years as the port acts illustrate the Assembly's intent to use the ports to generate revenue to benefit the Crown and the surrounding counties, but so does the text within the very acts for creating port towns.¹⁹⁵ All the acts creating port towns begin with an explanation of the purpose of the towns, which was to create a central area in each county through which all trade was meant to travel.¹⁹⁶ The text concerning the formation of trusts, if such language was even present in the act, was subsequent and certainly of lesser importance than that regarding trade.¹⁹⁷ The drafters of the acts not only choose to address the actual manner in which the towns would be formed after addressing the manner and means of taxing and controlling trade, but they also devoted considerably less text to the minutia of town formation.¹⁹⁸ This is further structural evidence that the Assembly's intent in creating the towns was purely economic and not the more generous intent of forming self-sustaining towns for the benefit of the towns' inhabitants. Such a philanthropic desire would certainly have had to exist for the Assembly to have intended to make the individual inhabitants of the port towns the beneficiaries of the trusts formed to maintain and distribute the lands of those towns.

Looking at the structure of the acts of Assembly in each year the acts for port towns were drafted, the structure of the individual acts for port towns themselves, and the structure of the acts of Assembly

194. *Id.*

195. See Part II.B.

196. See 1 STATUTES AT LARGE, *supra* note 4, at 412; 2 *id.* at 172; *id.* at 471; 3 *id.* at 53-54; and *id.* at 404-19.

197. See *supra* text accompanying notes 164-94.

198. See *id.*

from 1655 to 1705, the pattern of concern for and control over trade is evident while a concern for creating trusts for the inhabitants of those towns is absent. The acts became increasingly more focused on trade and taxation through the years, which left little room for focus on individual colonists—a focus that was never there to begin with. When analyzed among the acts of Assembly as a whole, there is no way around the fact that the Assembly was concerned with only one goal: bolstering the economy of Virginia through trade. At no time was the General Assembly concerned with creating land trusts for the benefit of the individual colonists that had yet to occupy the towns the Assembly wished to use as tools to strengthen trade.

III. CONTINUOUS PUBLIC USE DESTROYING RIGHT OF REVERTER

Private trusts can become public trusts when the private trustees act in a manner that essentially makes them instrumentalities of the state, or when the lands with which they are entrusted have been used by the public in such a manner that it would be contrary to public policy to revert them to some alternate use.¹⁹⁹ Under this rubric, even if O'Hara is correct that the intent of the Act for Ports was to vest title to the public land held by the Yorktown Trustees in the individual inhabitants of Yorktown, the constant public use of the lands held by the trustees over the past three-hundred-plus years, in conjunction with the trustees' role as an instrumentality of the state, would override any right of reverter placed in those townspeople. There is a strong case against an O'Hara-esque theory in the history, text, and structure of the acts of the General Assembly, but even without this evidence against it, O'Hara's claim would fail because when trustees govern like a municipality and when lands are openly designated and used for public purposes, as is the case in Yorktown, those lands cannot later fall subject to a private claim of right.²⁰⁰

199. See *infra* text accompanying notes 201-09.

200. See *Evans v. Newton*, 382 U.S. 296, 301 (1966) (holding that "where the tradition of municipal control [of a park held in trust by the city] had become firmly established," substituting private trustees for the city was insufficient to "transfer[] this park from the public to the private sector" and that the donee of the land, who conditioned its use as a "whites only" park, no longer had a possibility of reverter).

The Yorktown trustees may indeed have played a municipal role. Trustees are deemed to have become instrumentalities of the state, and in a sense quasi-municipalities, when their conduct becomes "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."²⁰¹ In *Evans v. Newton*, the United States Supreme Court stated that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State."²⁰² The trustees of Yorktown were just such private individuals, and their functions were undeniably governmental. As early as 1757, the General Assembly gave the Yorktown County Court and trustees the municipal authority to repair, widen and maintain the public streets of Yorktown.²⁰³ In the years 1807 to 1925, the Assembly continued to increase the trustees' governmental powers,²⁰⁴ which ultimately led the Supreme Court of Virginia to conclude that the trustees were a "quasi-municipal corporation."²⁰⁵ The court made this determination in the 1926 case *Shield v. Peninsula Land Co.*, relying on the "functions of public authority" carried out by the Yorktown trustees and asserting that "the [Virginia Assembly] has kept in force for Yorktown a board of trustees in whom is vested the title to its public property and upon whom necessarily fall some of the functions of local government."²⁰⁶ The court not only reinforced the fact that title to the public property of Yorktown was vested in the trustees,²⁰⁷ but it also recognized the governmental character of the trustees. This governmental character sufficiently pervaded the trustees' conduct to subject the trustees to the constitutional protections established in *Evans*, thereby removing any right of reverter that may have

201. *Id.* at 299.

202. *Id.*

203. See *supra* notes 84-85 and accompanying text.

204. See *supra* notes 90-91 and accompanying text.

205. *Shield v. Peninsula Land Co.*, 133 S.E.2d 586, 593 (Va. 1926) (finding that no claim in equity could be brought against the trustees because it was within their authority as a quasi-municipality to allow a party to build on the lands owned by the trustees).

206. *Id.* at 592.

207. Although land is designated as "vested" in a trustee, this is not repugnant to a trust in which the true beneficiary of the land is someone other than the trustees, so this fact alone does not defeat O'Hara's theory.

been attached to the land before its open and constant public use under the trustees' rule.

Not only will public use of land governed by a quasi-municipal body destroy a right of reverter, but such a right of reverter in lands held by an incorporated municipality and utilized for a public purpose for a long period of time will revert to the state before reverting to some other nonpublic use.²⁰⁸ When a private trust that held the city of Memphis's public land was dissolved in 1879 after the city become insolvent, the Supreme Court stated in *Meriwether v. Garrett* that "[i]t would be a perversion of that trust to apply [the lands] to [nonpublic] uses."²⁰⁹ The lands of Yorktown, and any other public trust, must be protected from being applied to nonpublic uses, just as the Supreme Court recognized in *Meriwether*. It would be an even greater "perversion" than the Court found in *Meriwether* to turn over the historic lands of the port towns of Virginia to private individuals, or to even put them at risk of this fate.

The authority that the General Assembly granted to the Yorktown trustees over the centuries made the trustees a municipality of the state. Municipalities of the state may not be divested of their property without state action. The General Assembly took just such action in 2003 when it transferred all the property interests of the Yorktown trustees to York County.²¹⁰ It would be a violation of the Yorktown Trust to allow the lands to revert to the inhabitants of Yorktown upon the dissolution of the trust, and a court hearing O'Hara's claim should find that where the land held by the trustees did not revert to the county, it must revert to the State. The Yorktown Trustees were in fact a quasi-municipal corporation clothed in the powers of government, and the lands they held were continuously and openly used for the public's benefit. Even if the intention of the General Assembly was to create a private trust for the individual inhabitants of the port towns they

208. In *Meriwether v. Garrett*, the Supreme Court passed all the city of Memphis's property into the State's immediate control when the city became insolvent. 102 U.S. 472, 512-13 (1880). It did so purely because of the lands' open and continuous prior public use despite the city's status as incorporated and despite a private trust holding the lands. *Id.*

209. *Id.* at 513. The Supreme Court here was concerned with the defunct municipal corporation selling the lands held in public by the trust to pay off its debts, stating that "[t]he dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt." *Id.*

210. 2003 Va. Adv. Legis. Serv. 747 (LexisNexis).

created, jurisprudence and public policy demand that the lands remain public, rather than reverting to private individuals.

IV. POTENTIAL CONSEQUENCES

If courts validate O'Hara's theory that the inhabitants of Yorktown are the beneficiaries of the trust created to found the town, they could set a precedent that wherever a land trust was formed to benefit the inhabitants of the lands surrounding the trust lands, those inhabitants would have a potential claim to those lands should the trust ever be dissolved. Trusts such as these were common during the colonization of America, and they have even found a modern incarnation—the conservation trust.²¹¹ From claims based on colonial land trusts formed as early as the 1700s to those that may arise from land conservation trusts, courts will be swamped with litigation and title offices will be tangled in a web of ownership confusion if a theory such as O'Hara's is given credence.

The General Assembly created at least twenty towns through a variety of legislation, all of which relied on the trust system to divide and sell the town lands and maintain the remaining public lands.²¹² In many of the locations where towns were to be started, lots were likely sold to individuals from trusts that gradually dissolved as the town failed to ever become economically viable. Landowners' fates would be uncertain in a town that "was absorbed into the countryside which surrounded it," like Gloucestertown on the opposing bank of the York River from Yorktown.²¹³ If O'Hara succeeds, the heirs to any original lot owners in such failed towns could potentially claim not only their original lots, but all other lands within the original fifty-acre tract that remained undeveloped and "public." Several towns did, however, become economically viable and eventually became incorporated. This was the case for

211. See *infra* text accompanying notes 218-20.

212. See 1 STATUTES AT LARGE, *supra* note 4, at 412-14; 2 *id.* at 471-78; 3 *id.* at 53-69; and *id.* at 404-19.

213. Karen B. Fisher, Community in Gloucestertown, Virginia: The Context and Archeology of Town Development in 17th and 18th Century Virginia 167 (1986) (unpublished M.A. thesis, College of William & Mary) (on file with Swem Library, College of William & Mary).

Norfolk²¹⁴ and Hampton,²¹⁵ which still exist today. Whatever lands were turned over to the municipality by the trustees when they were dissolved could be the source of a claim of right by an inhabitant of the city under O'Hara's trust theory. On an even larger scale, the entire state of Georgia was established in the form of a trust in 1732,²¹⁶ and although the trustees forfeited their charter to the King in 1752,²¹⁷ the success of O'Hara's theory could give rise to potential ancient claims based on this colonial land trust. By recognizing the intent of these types of land trusts through an analysis like that performed in Part II of this Note, courts should strike down any private claims arising out of these trusts.

Under the same analysis, the intent of modern land trusts, and therefore their intended beneficiaries, can be determined, and claims based on a theory similar to O'Hara's can be thwarted. The land trust movement has gained strength in modern America as a means to conserve natural resources.²¹⁸ Many of these land trusts place lands in the ownership of private individuals and designate the public as the beneficiary of the trusts.²¹⁹ Because these trusts are so similar to the ones used in colonial Virginia, successfully proving O'Hara's theory could even result in negative and unintentional repercussions for these conservancy trusts.²²⁰ This Note seeks to prevent these repercussions by offering a form of analysis and

214. Norfolk became the colony's third city to incorporate, in 1736, when the General Assembly authorized Norfolk to adopt a municipal government, which included a mayor, a recorder, eight aldermen, and sixteen common councilmen. THOMAS C. PARRAMORE, *NORFOLK: THE FIRST FOUR CENTURIES* 72 (1994).

215. Hampton had such economic success that in 1716 it was described as the "place of the greatest trade in all of Virginia." John C. Rainbolt, *The Absence of Towns in Seventeenth-Century Virginia*, in 35 J. S. HIST. 343, 349 (1969) (quoting JACQUES FONTAINE, *MEMOIRS OF A HUGUENOT FAMILY* 292-93 (1853)). Hampton was finally incorporated in 1849. CAROL MCGINNIS, *VIRGINIA GENEALOGY: SOURCES & RESOURCES* 228 (1993).

216. The Georgia charter identifies twenty-four gentlemen, naming them the "Trustees for establishing the Colony of Georgia in America" and giving them the authority to divide and sell all of the land for the purpose of "settling and supporting, and maintaining the said colony." Charter of the Colony of Georgia, *reprinted in* 1 *THE COLONIAL RECORDS OF THE STATE OF GEORGIA* 12-13 (Allen D. Candler ed., 1970).

217. E. MERTON COULTER, *A SHORT HISTORY OF GEORGIA* 74 (1933).

218. RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 36-40 (2003).

219. *See id.* at 19, 24-26, 31.

220. This result would be fatefully ironic since O'Hara claims the only reason he wishes to prove such a theory is to preserve the historic waterfront area of Yorktown. Hayden, *supra* note 1.

applicable jurisprudence by which to negate any claimed private right of reverter in such lands.

Due to the rapid development of lands throughout our country, the conservation of land is of the utmost importance. To give credence to a theory such as O'Hara's might have a deterrent effect on those who would otherwise create such trusts. Both the government and private individuals should be encouraged in, not deterred from, creating conservation trusts. O'Hara's theory would prevent a government from taxing inhabitants of an area for the purchase and preservation of lands that would ultimately benefit those inhabitants as well as the nation, because such a theory would create the risk that, at some time in the future, a claim of reverter could be made to the lands purchased with the subject tax revenues. Further, the theory would allow the heirs of private individuals to stake a private claim to lands that had been in continuous public use per the trust settlor's wishes by merely dissolving the trust and claiming a right of reverter as the heir to the party who financed the purchase of the trust lands. This is essentially O'Hara's theory, and it must fail.

CONCLUSION

The trust formed to establish Yorktown is not only identical to trusts used to form many other towns and cities in coastal Virginia, but also similar to those used in modern days to create conservation trusts. Validating O'Hara's theory of resident beneficiaries could lead to a plethora of unwarranted litigation over lands that were clearly not intended to vest in the citizens living around them. This was not the General Assembly's intent, and, as a matter of both interpretation and public policy, cannot be recognized as its intent.

An analysis of history, structure, and text of the acts that formed these colonial land trusts reveals the General Assembly's intent to vest the trust property in the surrounding counties upon dissolution of the trusts. As recognized by the Supreme Court in *Firestone Tire*

*& Rubber Co. v. Bruch*²²¹ and *Colton v. Colton*,²²² courts should resolve doubts as to trusts with regard not only to the words by which they were formed, but with respect to the circumstances and situations surrounding their formation. The colonial trusts at issue here were drafted at a time when the tobacco trade needed to be reined in and protected because the colonies were not generating the wealth the investors in these "ventures" had expected.²²³ The text of the subject acts is riddled with language concerned only with commerce,²²⁴ and the acts themselves are drafted among other acts which are similarly focused on generating revenue and maintaining control of trade.²²⁵ Under these circumstances, a court could not reasonably infer that the intent of the General Assembly was anything other than to bolster the financial health of the entire colony—rather than to increase the property value of the individuals living in the port towns they created. These towns were merely places to police and encourage trade, to sustain the overproducing tobacco plantations surrounding them, and ultimately to generate revenue for England. It is arduous to imagine that the trustees designated to manage the public lands of these towns were meant to do so in any manner other than that which would generate the most revenue for the entire colony. But a theory such as O'Hara's can only survive if one establishes that the trustees were meant to hold the public lands of these towns in trust, preserving their value, until some future time at which they would revert to the town's inhabitants. Surely, the General Assembly could not have had such foresight or been concerned with such trivial things as creating a trust for the individual inhabitants of these towns. By all accounts, the inhabitants of these towns themselves were to be nothing but stewards of the Crown—levying taxes, regulating trade, and providing other purely commercial services. If the General Assembly was concerned with bolstering the landholdings of the towns'

221. 489 U.S. 101, 112 (1989) (asserting that doubts as to the identification of a trust's beneficiaries are to be resolved in light of circumstantial evidence of the trust's settlor's intentions).

222. 127 U.S. 300, 309 (1888) (interpreting a testator's will to determine the beneficiary of the trust established thereby based on both the words of the document as well as the circumstances surrounding the testator's commissioning the will).

223. See *supra* Part II.A.

224. See *supra* Part II.B.

225. See *supra* Part II.C.

inhabitants, it would not have included a right for the trustees to take the land from any person who did not put it to such a commercial use.²²⁶

Public land trust jurisprudence also dictates that these lands remain in the control of the municipalities in which they lie so that they may continue to be used for the public's benefit as the municipality sees fit. As evidenced by the recent holding in *Kelo v. New London*, municipalities are even justified in their conversion of certain private lands to private uses if the overall benefit is for the common good.²²⁷ When even private uses can trump a private landowner's rights to property, a private landowner's claim to lands used by a municipality for public purposes cannot have much force.

But, perhaps the most analogous example of these arguments in modern property jurisprudence applies to land held by homeowners' associations. Although land held by homeowners' associations is typically donated by the developer of a subdivision as opposed to being purchased by the landowners in the subdivision, the value of the commonly held land is reflected in the value of lots within the subdivision. This same argument could be applied to the public lands purchased and held by the Yorktown Trustees. Virginia has codified this idea of mutual benefit, providing that

[a]ll real property used for open or common space [in a planned development] shall be construed as having no value in itself for assessment purposes. Its only value lies in the value that is attached to the residential or commercial property which has a right by easement, covenant, deed or other interest.²²⁸

Just as modern-day statutes treat common areas in planned developments as investments in the privately held property in the development, the purchase of the public lands of Yorktown can be construed as made with identical intent.

A claim to the public property once held by the Yorktown trustees, or any trust similarly created, cannot stand. Any such

226. See *supra* text accompanying notes 147-50.

227. 125 S. Ct. 2655 (2005) (allowing a municipality to condemn properties that were not blighted as part of an overall development plan for the area, despite the potential that the properties might be sold for private use as part of that plan).

228. VA. CODE ANN. § 58.1-3284.1 (West 2004).

trust created in the developmental stages of the colonies, as was the one in Yorktown, should be interpreted as just what they were: mechanisms for controlling trade and protecting English investments in the colonies. There was no intent whatsoever to create private trusts for the inhabitants of port towns, rather only an intent to create a body to ensure the King's will was carried out in the manner prescribed by the acts that created the towns. Even if such a trust could be found, the continuous public use of the land essentially changes its nature under modern property jurisprudence, and such public use takes priority over the directions of any trust that once governed the use of the subject lands. As such, O'Hara's theory should be rejected, and all such public trust lands should be recognized as vested in the municipalities in which they lie.

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