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GREATER PROVIDENCE CHAMBER OF COMMERCE V. STATE: BALANCING PRIVATE PROPERTY RIGHTS IN FILLED TIDAL LANDS UNDER THE RHODE ISLAND PUBLIC TRUST DOCTRINE

JOHN M. BOEHNERT*

I. INTRODUCTION

Unlike many other states that have grappled with the public trust doctrine in recent years, such as Massachusetts, Vermont, California, New Jersey, and Mississippi,1 the public trust doctrine in Rhode Island was largely a nineteenth century doctrine until the Rhode Island Supreme Court's decision in Hall v. Nascimento.2 In Hall, the Rhode Island Supreme Court considered a previously undecided question under Rhode Island public trust doctrine, namely, who owns title to land created by the placing of fill below mean high tide.3 Under Rhode Island's public trust doctrine law, the state owns all land below mean high tide in trust for citizens of the state for the purposes of fishery, commerce, and navigation,4 but Rhode Island courts had not addressed directly the ownership of land reclaimed from the sea by placing fill below mean high tide until Hall v. Nascimento.

Many individuals in Rhode Island state government and certain public interest groups asserted that, under the Rhode Island Supreme Court's

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2 See Hall v. Nascimento, 594 A.2d 874 (R.I. 1991) (holding that land created by placing fill in Mount Hope Bay belonged to the state, and not to an association of property owners nor to the owners of a beachfront residence claiming title).

3 See id.

decision in *Hall*, the state owned title to *all* filled tidal land throughout the state.\(^5\) Because Rhode Islanders have been reclaiming land from the sea since the early eighteenth century, this claim potentially affected thousands of parcels throughout the state, including land in much of downtown Providence’s financial district, land along tidal rivers, such as the Providence River, and land along the coast occupied by businesses, residences, summer cottages, and marinas.\(^6\)

The General Assembly considered legislation dealing with the issue, but given opposition to the proposed solution, which potentially involved property “owners” leasing back their land from the state, the General Assembly did not enact legislation in the 1992 session.\(^7\) With the issues still unresolved in 1994, a number of businesses and institutions in Rhode Island filed a declaratory judgment action against the State of Rhode Island, seeking clarification of the status of filled tidal lands.\(^8\) In *Greater Providence Chamber of Commerce v. State*,\(^9\) the Supreme Court of Rhode Island held that title to two parcels of real estate located in the former Great Salt Cove in

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\(^{5}\) *See* Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1043 (R.I. 1995).

\(^{6}\) *See generally* Committee to Mark Out and Define the Boundaries of the Harbor of the Town of Providence, Town Meeting 1, July 24, 1815, with supplemental material, Aug. 24, 1815 (discussing the general extent of filling in Providence as of 1815); Providence Steam-Engine Co. v. Providence & Stonington S.S. Co., 12 R.I. 348, 363-64 (1879) (Potter, J., concurring) (discussing general filling and wharfing in Rhode Island from its early history); Clarke v. City of Providence, 15 A. 763 (R.I. 1888) (discussing filling of the downtown Providence cove lands); Murphy v. Bullock, 37 A. 348 (R.I. 1897) (discussing filling of the downtown Providence cove lands); City of Providence v. Comstock, 65 A. 307, 308-09 (R.I. 1906) (quoting ANGELL, TREATISE ON TIDE WATERS (2d ed. 1847)); Rhode Island Historical Society, RHODE ISLAND HISTORY, Aug. 1990 (containing articles based on talks delivered at lecture series entitled “Harboring History: The Providence Waterfront”, cosponsored by the Rhode Island Historical Society and the Providence Preservation Society in 1988); JOHN HUTCHINS CADY, THE CIVIC AND ARCHITECTURAL DEVELOPMENT OF PROVIDENCE 1636-1950 (The Book Shop, Providence, R.I. 1957) (containing maps of areas in Providence that formerly were covered by tidal water and are now platted as streets).


\(^{8}\) *See* Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995).

\(^{9}\) *Id.*
downtown Providence was free of the public trust doctrine by virtue of an 1870 deed from the State of Rhode Island to the City of Providence, which effectively extinguished the public trust doctrine in the properties.\textsuperscript{10} The court also held that two properties created by the placing of fill to a harbor line in the Providence River, and extensively improved, were free of the public trust doctrine, and fee simple absolute title vested in the private record title holders.\textsuperscript{11} In rendering its decision, the court also established a test for clearing title to filled tidal land throughout the state that was filled with state acquiescence or approval, and that has been built upon or improved in reliance on such authorization.\textsuperscript{12}

In reaching its decision, the Rhode Island Supreme Court did not reject, but rather embraced, the public trust doctrine in Rhode Island.\textsuperscript{13} This article contends that the court’s decision in\textit{Greater Providence Chamber of Commerce v. State} is consistent with well over 100 years of past court decisions on the public trust doctrine. Furthermore, the court’s decision carefully and appropriately balanced private property rights in filled tidal land with the public’s rights under the public trust doctrine to land located below mean high tide. This article also asserts that the court’s careful balancing of private property owners riparian\textsuperscript{14} rights with the public trust rights of the public at large serves as a model for how other states may reconcile public trust rights with private property rights in developed former tidal lands. The apportionment of these rights has been a source of conflict in a number of states in recent years and no doubt will continue to be the subject of considerable controversy.

\textsuperscript{10} See generally id.
\textsuperscript{11} See id. at 1041.
\textsuperscript{12} See id. at 1044.
\textsuperscript{13} See id. at 1043.
\textsuperscript{14} This article uses the terms “riparian” and “littoral” interchangeably, as has been the Rhode Island Supreme Court’s custom in its public trust cases.)
II. THE PUBLIC TRUST DOCTRINE UNDER RHODE ISLAND LAW

The public trust doctrine as developed under Rhode Island law holds that the state owns title to all land below the high water mark in a proprietary capacity for the benefit of the public, to preserve the public rights of fishery, commerce, and navigation in such waters. Rhode Island cases addressing the public trust doctrine deal with tidal waters (i.e., waters subject to the ebb and flow of the tide), and Rhode Island courts have never held that nontidal waters are subject to the public trust doctrine. Moreover, under Rhode Island law, not all tidal waters are subject to the public trust doctrine: marshlands are not burdened by the public trust doctrine, even though they are subject to tidal influence.

The doctrine was a part of English common law, to which Rhode Island and the other original colonies acceded upon their independence. States subsequently admitted to the Union after adoption of the Constitution had the same rights as the original states in tide waters and the lands under them within their jurisdiction. Such common law is in force in Rhode

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16 There is no specific case reference holding that only tidal waters are subject to the public trust doctrine. This observation is based on the cases and other materials cited in this article.
18 At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States. Shively v. Bowlby, 152 U.S. 1, 57 (1894); see also New York, N.H. & H.R. Co., 56 A. at 180-81.
19 See Shively, 152 U.S. at 57.
Island "except as it has been changed by local legislation or custom."\(^{20}\)

The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States, or by the Constitution and laws of the United States.\(^{21}\)

English common law recognized that the Crown exercised ownership and jurisdiction over tidal water in a proprietary capacity for the benefit of the public.\(^{22}\) The Crown possessed the *jus privatum*, or private title, in such lands, as well as the *jus publicum*, or public title.\(^{23}\) The Crown held the public title to such public trust lands as representative of the nation and for the public benefit.\(^{24}\)

In essence, English public trust jurisprudence recognized the unique resource that tidal waters constitute and the necessity that the sovereign hold them in a trustee capacity for the use and benefit of all citizens, so as not to be appropriated by, or conferred upon, private individuals for purely private benefit.\(^{25}\) This principle underpins the public trust doctrine in Rhode Island and the other states.

Although the original thirteen colonies, and subsequent states, succeeded to the interest of the Crown in the tidal waters within their jurisdiction, no uniform public trust doctrine is applicable throughout all the states.\(^{26}\) Rather, public trust jurisprudence is peculiarly a doctrine of state law. As the United States Supreme Court noted in the seminal public trust case of *Shively v. Bowlby*:

\(^{20}\) *Comstock*, 65 A. at 308 (adopting lower court decision).
\(^{21}\) *Shively*, 152 U.S. at 14.
\(^{22}\) See id.
\(^{23}\) See id. at 11.
\(^{24}\) See id.
\(^{25}\) See id.
\(^{26}\) See id. at 26.
The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. *Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.*

III. HISTORY OF FILLING TIDAL LANDS IN RHODE ISLAND

It is common knowledge in Rhode Island that a significant part of the state's land has been reclaimed from the sea, beginning in the early 1700s when Rhode Island was still a colony. The Colonial General Assembly resolved in Newport on May 28, 1707 as follows:

> Be it enacted by the Honorable Governor and council and house of representatives convened in General Assembly, and by the authority of the same it is enacted, that each town in this colony now established, or that may hereafter be established, may be, and have hereby granted unto them full power and authority to settle such coves, creeks, rivers, waters, banks bordering upon their respective townships, as they shall think fit for the promotion of their several towns and townships, by building houses, and warehouses, wharfs, laying out lots, or any other improvements, &c., as the body of freeholders and freemen of each town shall see cause for, or the major part of them, for their most benefit, not

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27 Id. (emphasis added); *see also* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) (“[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”).
prejudicing any particular person in their proper original grants or purchases upon any the aforesaid harbors, coves, creeks, &c., which we doubt not but will much promote the interest of Her Majesty, and the good of her good subjects in said colony, for the promoting of trade and navigation.28

After statehood, the colonists of Rhode Island undertook filling of various coastal and tidal areas for establishing wharfs, docks and landings; laying out residential house lots; and constructing commercial buildings.29 In many instances there was no filling and upland owners would "wharf out" from their property, establishing wharfs on piles located below mean high tide.30 Frequently, buildings were constructed on these wharfs.31

The Rhode Island Supreme Court affirmed that the 1707 Resolution granted Rhode Island's colonial government full authority to regulate the use and improvement of such filled lands, including the right to grant such lands to private individuals.32 In City of Providence v. Comstock, the Rhode Island Supreme Court acknowledged the extensive filling that had occurred in Rhode Island, and focused on the various city approvals and resolutions authorizing such filling.33

In Armour & Co. v. City of Newport,34 the Rhode Island Supreme Court reviewed the 1707 resolution and held that the Colonial Act of 1707 "granted no title to land," but rather "conferred upon the various towns the

30 See Cady, supra note 6, at 106, 120, 178 (unnumbered photographs).
31 See id.
authority to settle and improve such lands by 'laying out lots,' 'by building houses, and warehouses, wharfs,' etc., and the authority to authorize such improvements to be made by others.' The court further stated that under the Resolution of 1707 a town "was by implication authorized to convey, subject to the title being defeated in [the] event the improvements were not made; but until improvements were made, or, at least, until some action was taken by the town, no title passed."

Accordingly, as early as 1707 in Rhode Island’s history, the authorization of wharfing and filling of coastal areas, rivers, and other waterways for the purpose of settlement was established. Given this authorization, it is not surprising that the Rhode Island colonists engaged in such activity, which continued after Rhode Island’s entry into the Union and well into the 19th century.

The result is that today significant parts of downtown Providence are located on filled tidal land, including the 67-acre Capitol Center Special Development District, significant portions of the downtown financial district, areas of India Point, much of the land between Allens Avenue and the Providence River, areas between Eddy Street and the Providence River, and areas fronting on portions of numerous streets, including Friendship Street, Dyer Street, Orange Street, Point Street, and Clifford Street.

Such filling was not confined to Providence, but occurred along Rhode Island’s entire coastline as it was settled, including on Aquidneck Island, particularly in Newport. Much of the significant filling of tidal land which occurred in Rhode Island’s past was performed by upland owners adjacent to their individual properties. Most of this activity was done on an

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35 Id. at 647.
36 Id.
37 See 4 RHODE ISLAND COLONIAL RECORDS, supra note 28, at 23-25.
38 See Tidal Trauma, PROVIDENCE J.-BULL., Apr. 17, 1992, at 14; Holleran, supra note 29, at 66-68; Krausse, supra note 29, at 102; CADY, supra note 6, at 164 (unnumbered photograph).
individual, rather than a wholesale, basis.\textsuperscript{40}

IV. THE EFFECT OF FILLING TIDAL LANDS UNDER RHODE ISLAND LAW

A. Title to Lands Filled to a Harbor Line or the Equivalent of a Harbor Line

Prior to \textit{Hall v. Nascimento},\textsuperscript{41} perhaps the two Rhode Island Supreme Court decisions most frequently cited in seeking to understand the ownership status of filled tidal lands in Rhode Island were \textit{Allen v. Allen}\textsuperscript{42} and \textit{Engs v. Peckham}.\textsuperscript{43}

In \textit{Allen}, the court was confronted with a trespass action in which the upland owner asserted trespass against another for the digging of clams adjacent to his property \textit{below} the high water mark.\textsuperscript{44} The court held that the fee of the shore (i.e., the land below high water mark) is in the state as trustee for the public, that the upland owner's riparian rights between high and low water mark are in the nature of franchises or easements, and that any Rhode Island inhabitant may take shellfish from anywhere on the shore of Narragansett Bay below high water mark without being guilty of trespass.\textsuperscript{45}

In its decision, the court summarized its understanding, as of 1895, regarding the right of a riparian upland owner to fill land below mean high tide or to wharf out into the bay, and the legal effect of such activity as follows:

\begin{quote}
The State holds the legal fee of all lands below high-water mark, as at common law, as has been uniformly and repeatedly decided by this court . . . . This right of the state is held, however, by virtue of its sovereignty, and in trust for all . . . .
\end{quote}

\textsuperscript{40} This conclusion is drawn generally from language in the cases cited in this article, which refer to the right of riparian owners wharfing or filling out from their property.


\textsuperscript{42} \textit{Allen v. Allen}, 32 A. 166 (R.I. 1895).

\textsuperscript{43} \textit{Engs v. Peckham}, 11 R.I. 210 (1875).

\textsuperscript{44} \textit{See Allen}, 32 A. at 166.

\textsuperscript{45} \textit{See id. at} 166-67.
the inhabitants,—not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend, even in Massachusetts, to all land below high-water mark, unless it has been so used, built upon, or occupied as to prevent the passage of boats, and the natural ebb and flow of the tide. The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and, while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea. Until actual filling out, the public rights exist as before.  

The court's statement in Allen is a clear and unequivocal declaration that public trust rights are extinguished in land reclaimed from the sea upon filling, but only as to the reclaimed land. Public trust rights continue in force below the new high water mark created by filling. The court recognized in Allen that when land is reclaimed from the sea, a new high water mark is established, and the court concluded from this reality that it is below the new high water mark that the public trust rights continue to exist, not below the former high water mark.

Those who seek to extend public trust jurisdiction over such filled tidal lands dismiss the court's clear declaration in Allen as dicta. Because there is no evidence in the court's decision to indicate that the property in question was formerly filled tidal land, it would appear that the court's statements in Allen are in fact dicta. Nevertheless, as will be discussed below, their status as dicta does not mean they are incorrect statements, or that these statements are unsupported by other Rhode Island Supreme Court decisions.

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46 Id. at 166 (emphasis added) (citations omitted).
47 See id.
48 See id. at 167.
The Rhode Island Supreme Court engaged in a more extensive discussion of the relationship of the public trust doctrine to filled tidal lands in Engs v. Peckham. In Engs, two private individuals owned adjoining wharfs projecting into Newport Harbor. Between the two wharfs was open water, utilized as a dock. When a harbor line was established for Newport Harbor, the owner of the upland facing the open water dock began to extend his upland by filling, thereby filling in the dock and making it unusable for the other wharf owner. The disadvantaged wharf owner sought an injunction, which was denied by the Rhode Island Supreme Court.

In its opinion, the court acknowledged that each party was the "owner" of his respective wharf, and that if the dock was filled in, the complainant's wharf would be "valueless." However, despite the fact that the filling of the dock would render complainant's wharf valueless, the court refused to enjoin the filling, some of which already had occurred, and it refused to order removal of the partially-filled area within the dock. The court determined that although the dock constituted public waters of the state, which the complainant had a right to use without any grant, the use did not give the complainant wharf owner any right in these unfilled public waters.

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50 See id.
51 See id.; a dock is the open water adjacent to a pier or bulkhead where a ship or boat may park.
52 See id. at 221-23.
53 See id. at 221, 225.
54 See id. at 222.
55 See id. at 225.
56 See id. at 222-23. The court then explained the impact of the establishment of a harbor line on the upland owner's right to fill out into the dock:

At common law the erection of a wharf in tide waters is not indictable as a nuisance unless it obstructs navigation. In this state this doctrine has been liberally applied for the benefit of riparian proprietors. Such proprietors have been very freely permitted to erect wharves, and even to make new land by filling the flats in front of their land. We are not aware that the state has ever laid claim to any wharf so built, or any land so made, unless the cove lands filled by the city of Providence can be
In referring to an unreported decision, which counsel for the respondents in *Engs* asserted stood for the proposition that the establishment of a harbor line was a conveyance to the upland owner of all land between high water mark and the harbor line, the court said:

We think, however, it would be going too far to hold that the mere establishment of a harbor line conveys all within the line absolutely to the riparian proprietors. This would make all within the line private property, and extinguish the public rights of navigation and fishery. *We think the establishment of a harbor line, if it is to be construed as a conveyance, is to be construed as a conveyance which at least is subject to those rights, until they are excluded by filling or wharfing out.* But it is not necessary for us to go even so far as that in the case at bar. It is enough for the respondents if we hold that the establishment of a harbor line operates as a license or invitation to the riparian proprietor to fill or wharf out to that line. *We think it has at least such an effect.* Whether the riparian proprietor, who has filled or wharfed out, has as against the state the same absolute

*considered an exception. Our harbor line acts are to be construed in the light of this doctrine and practice.* The establishment of a harbor line, when so construed, means that riparian proprietors within the line are at liberty to fill and extend their land out to the line. A harbor line is in fact what it purports to be, the line of a harbor. It marks the boundary of a certain part of the public waters which is reserved for a harbor. The part so reserved is to be protected from encroachments. The rest is to be left to be filled and occupied by the riparian proprietors. Its establishment is equivalent to a legislative declaration that navigation will not be straitened or obstructed by any such filling out.

*Id.* at 223-24 (emphasis added).
dominion over the wharf and new-made land as over
his upland, is a question which we need not now
determine.\textsuperscript{57}

The court therefore clearly stated its judgment (in dicta) that
filling below mean high tide extinguished the public trust rights in
such land, though it reserved that decision because it was not
necessary to resolution of the issue presented.\textsuperscript{58} Again, those who
urge public trust jurisdiction over such filled land also dismiss this
language as dicta.

To understand the significance of the court’s statements in
\textit{Allen} and \textit{Engs}, Rhode Island Supreme Court decisions prior and
subsequent to these cases must be examined carefully. This
examination reveals that the dicta in \textit{Allen} and \textit{Engs} were entirely
consistent with both prior and subsequent decisions and statements
of the Supreme Court. The decisions of the court, when read
together, establish a clear, consistent, and cogent position that in
Rhode Island, by custom and usage authorized by legislative acts,
Rhode Island citizens extended the title to their upland property by
filling out below mean high tide, and in doing so extinguished the
public trust rights in these filled tidal lands.

For example, it was common in the early history of Rhode
Island to plat land for lots and streets, even though at the time of the
platting the land was flowed by tide water.\textsuperscript{59} Purchasers would buy
these submerged lots and reclaim them by filling.\textsuperscript{60} Such platted land
was at issue in \textit{Simmons v. Mumford}.\textsuperscript{61} Although the City Council
had approved the plat at issue in that case, it had deferred final

\textsuperscript{57} \textit{Id.} at 224-25 (emphasis added).
\textsuperscript{58} See \textit{id}.
\textsuperscript{59} See generally Dawson v. Broome, 53 A. 151 (R.I. 1902); Providence Steam-Engine Co.
(1876).
\textsuperscript{60} See Simmons v. Mumford, 2 R.I. 172 (1852).
\textsuperscript{61} See \textit{id}. 
acceptance of the streets until the streets were shown to be passable (i.e., until they were reclaimed by filling). 62 Thirty years later, after such streets had been filled, the Board of Aldermen attempted to accept such streets on behalf of the City. 63 The court held that the Board of Aldermen did not have this authority. 64 The court then turned its attention to the dispute between two landowners on either side of the platted street. One of the landowners sought to extend his property line to the middle of the platted street, excluding passage by erection of a fence. 65 The other property owner contended that the entire forty-foot way had to be kept open as a street. 66 The court never questioned that the plaintiff and defendant were in fact “owners” of their respective lots, formerly submerged land, and found that both lot owners owned the street abutting their property as “tenants in common.” 67 The court found that because the platted street was not dedicated as a public way, there was no evidence in the record to prevent the plaintiff from claiming ownership to the middle of the platted street. 68 Additionally, the court did not induce the other party to refrain from occupying any portion of the street adjacent to his boundary line. 69 Accordingly, the court recognized private title to submerged tidal lands. 70

In 1870, the Rhode Island Supreme Court decided another case involving tidal lands, and the facts reinforced the prevalent custom and usage in Rhode Island of filling tidal lands and of wharfing out into the harbor. 71 In Clark v. Peckham, a private individual brought an action against the City of Providence for

62 See id. at 175-76.
63 See id. at 176.
64 See id. at 182.
65 See id. at 178.
66 See id.
67 See id. at 187.
68 See id. at 186.
69 See id. at 190.
70 See id.
71 See Clark v. Peckham, 9 R.I. 455 (1870), aff’d, 10 R.I. 35 (1871).
alleged harm to a private wharf caused by filling from city sewer runoff that occurred in the dock adjacent to the wharf.\textsuperscript{72} The Dorrance Street Wharf was a part of the "Dorrance Street Estate," which the Dorrance Street Association had formed by agreement and which consisted of land, stores, wharfs, docks, and other improvements.\textsuperscript{73} Title to lots was held individually and title to certain common areas, such as open spaces on the side of each of the thirteen lots, was held by the lot owners as tenants in common.\textsuperscript{74}

In discussing the property rights of filled tidal lands, the court noted:

\begin{quote}
The plaintiff derived his title to the dock and wharf from certain parties known as the Dorrance street [sic] Association, who after the establishment of a harbor line for the city of Providence, filled up land formerly flowed by tide water, and entered into an agreement respecting this dock and wharf and the adjacent premises . . . .\textsuperscript{75}
\end{quote}

The Dorrance Street Association agreement is laced throughout with grants of fee simple title in the filled lands, none of which was noted or objected to by the court.\textsuperscript{76}

The court stated that title to the dock was in the state, and action could not be maintained for filling it and the Dorrance Street Association could not convey title to the open water.\textsuperscript{77} The court noted, however, that "[t]he agreement of the association provided for a division, and the deeds convey simply the land, real estate not flowed by the sea, conveying with it whatever may be properly

\footnotesize
\textsuperscript{72} See id. at 456.
\textsuperscript{73} See id. at 457.
\textsuperscript{74} See id. at 458-59, 469.
\textsuperscript{75} Id. at 457.
\textsuperscript{76} See id. at 457-61.
\textsuperscript{77} See id. at 471.
appurtenant. The court therefore clearly recognized the right of conveying private title in filled tidal lands. Accordingly, the court recognized that while an action could not be maintained merely for filling a dock, an action could be maintained for harm done to the Dorrance Street wharf as a result of the filling.

In 1871, the Rhode Island Supreme Court again considered Clark v. Peckham after remand for a new trial. At the new trial, the trial court instructed the jury that, if the City did not own the land adjoining the dock, the City did not have the authority to fill up the dock with discharges from its sewer system. Again, the trial court found for the plaintiff, with damages against the City. On appeal, the Supreme Court found that the plaintiff had pursued its riparian rights and built wharfs out to the harbor line. The court held that because the City did not have title to the upland bordering the dock, it could not fill out with deposits from the sewer pipe, and the plaintiff was entitled to any damages it may have incurred by reason of such filling.

Importantly, in its decision the court again recognized (in dicta) that public trust rights are extinguished upon the filling of tidal water by the upland owner. “So long as the dock is not filled by the owner of the bank, it is subject to the jus publicum of being used for passage by the whole public.” Consequently, it is apparent that in the Rhode Island Supreme Court’s view, the jus publicum, or the public’s rights under the public trust doctrine, were extinguished upon filling by the upland owner.

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78 Id. at 471.
79 See id.
80 See id. at 471-72.
81 Clark v. Peckham, 10 R.I. 35 (1871).
82 See id. at 37.
83 See id. at 39.
84 See id. at 37.
85 See id. at 38-39.
86 See id. at 38.
87 Id.
In another case involving the subdivision of house lots below the high water mark, a trustee asked the Rhode Island Supreme Court to give instructions as to the impact of the establishment of a harbor line on these submerged lots. In that case, the platted lots were sought to be sold for reinvestment. The trustee sought instructions because of doubts concerning the ownership of the submerged land between the high water line, which was the westerly line of the lots, and the newly established harbor line, whether or not it formed part of the trust estate. The harbor line apparently was established after the lots were platted. In advising the trustee, the court said:

It is true the riparian proprietor may fill out in front of his land, but, if he does so, he fills out by the permission or acquiescence of the state,—the establishment of a harbor line being at the least equivalent to such a permission expressly given ... The fact that the lots are defined by strict boundary lines is of no consequence; for, if the grantee fills out in front of them, he will do so not under the deed, but by virtue of his riparian ownership, and he will take the land so filled not from Tristam Burges or his heirs or devisees, but from the state.

Accordingly, the court instructed the trustee that in selling for reinvestment he should not sell any lot bordering upon the high water mark “for a price below what he would sell it for, upon the supposition that the purchaser will be at liberty to fill out to the harbor line any part of such lot which extends to or below high

89 See id.
90 See id. at 331.
91 See id.
92 Id. at 331-32 (emphasis added).
The court further instructed the trustee that "if he cannot procure purchasers upon such terms, to sell only upland lots, until he has further orders or instructions from the court." The court therefore treated the purchaser's title from the seller as equivalent to title taken from the State by virtue of filling out. The court expressed no reservation to the trustee that the purchasers buying lots abutting high water mark might not be entitled to extend their lots to the harbor line, or that if they did so they would not own such reclaimed land. Rather, the court instructed the trustee to sell for a price based upon the right of the purchaser to acquire title to the land reclaimed up to the harbor line.

The Supreme Court also determined the specific manner in which upland owners have the right to fill out to a harbor line in a dispute between two adjoining upland owners. In Aborn v. Smith, both owners already had partially filled out to a harbor line. The land fronted on the Providence River, with one owner's boundary being relatively straight, and the other's boundary being curved, giving the owner of the irregular parcel a greater length of shoreline. The owner with a longer shoreline sought a declaration from the court that its boundary at the harbor line, to which it intended to fill out, should be the same length as its upland boundary. The court recognized that to allow such a rule would necessitate changing the boundary lines of other upland owners all along the same harbor line:

Under the rule contended for, the proprietor of the elbow in the shore, having a long shore line, will be entitled to a long frontage which will swing the dividing line between him and
the next proprietor aslant, and the result will be a corresponding obliquity on all the water fronts and dividing lines above it.\textsuperscript{101}

The court held that filling out to a harbor line should be directly out from the upland property owner’s boundaries so as to intersect the harbor line at a right angle.\textsuperscript{102} “It would be impracticable now, after so many fronts have been filled, to allow it to affect the apportionment along the whole harbor line, even if originally it would have been right and expedient.”\textsuperscript{103}

Significantly, the Aborn court declined to give effect to a decision that would alter previously established property boundaries, demonstrating appropriate deference to the settled expectations of property owners.

The nature and extent of riparian rights in filled tidal lands was discussed extensively in \textit{Providence Steam-Engine Co. v. Providence & Stonington Steamship Co.}\textsuperscript{104} The case involved land that was platted into lots in India Point, where a street extended from below the then-high water line to the newly-established harbor line.\textsuperscript{105} The dispute arose when the owner who had purchased all lots fronting on a platted street closed the street after it was filled.\textsuperscript{106} Another property owner in the plat objected, and the owner closing the street argued that platting a street below mean high tide water was invalid and, alternatively, that as a sole owner of lots on the platted street he was entitled to close the street.\textsuperscript{107}

The court found that the street could not be closed by the lot owner because the street was a right appurtenant to all lots in the

\textsuperscript{101} \textit{Id.}\textsuperscript{.}
\textsuperscript{102} See \textit{id.} at 372-73.
\textsuperscript{103} \textit{Id.} at 372.
\textsuperscript{104} See \textit{Providence Steam-Engine Co. v. Providence & Stonington Steamship Co.}, 12 R.I. 348 (1879).
\textsuperscript{105} See \textit{id.} at 353.
\textsuperscript{106} See \textit{id.} at 348.
\textsuperscript{107} See \textit{id.} at 349.
The court placed little reliance on the new harbor line act, finding that it "amounts simply to a license to him to fill out to the harbor line, or to an implied declaration that in filling out to it he will commit no encroachment."\textsuperscript{109} However, the court found that a street platted below tide water came into existence when it was filled, and owners of the platted lots were estopped from denying the use and designation of the land in question as a street.\textsuperscript{110}

This decision was important to Justice Potter's concurring opinion.\textsuperscript{111} In addressing the argument that "platting and conveyance of lots and of any rights in any supposed streets was totally invalid as to that portion of the platted land then under water," Justice Potter examined common law.\textsuperscript{112} He noted that English common law, which subjected all land flowed by tide to the public trust, had been modified by Rhode Island to exempt marshes.\textsuperscript{113} He then discussed the English common law doctrine underlying public trust principals, and noted that it is common "to speak of the right of the State in the shores as a fee," with the shores being defined as the area between high and low water mark.\textsuperscript{114} He stated that "[t]his is proper only by analogy,"\textsuperscript{115} and explained that to consider the state as the literal owner of the shore in fee effectively could eliminate upland owners riparian rights:

To hold that the State holds the fee of the shore in such a sense that it can sell the shores would deprive nearly half of the land in this small State of a large portion of its value derived from bounding on the shore. The city of Newport is the owner of Easton's

\textsuperscript{108} See id. at 356.
\textsuperscript{109} Id. at 355.
\textsuperscript{110} See id.
\textsuperscript{111} See id. at 356.
\textsuperscript{112} Id.
\textsuperscript{113} See id. at 357.
\textsuperscript{114} Id. at 357-58.
\textsuperscript{115} Id. at 358.
Beach. For the State to sell the shore would take away almost its whole value.

As there is no statute of limitations against the State, especially so far as public rights are concerned, the State would still own large tracts of filled lands in Providence, Newport, and other towns, unless the State has done some act which would justify the courts in holding it to be private. And even if the private title to land so filled should be held good, the State might still sell out a strip of land at the head of any wharf and so cut off the owner from navigation. It might sell off the whole shore so as to cut off the present owners from access to the water.

The monstrous injustice that would result if such a doctrine was established as law is enough to show that it ought not to be recognized as law.\textsuperscript{116}

Justice Potter then asserted that it is for this reason that the state holds title to the shore not as private property, but as property held for the benefit of the public.\textsuperscript{117} Justice Potter clearly was concerned by the concept that an upland owner's riparian rights could be extinguished by the state's sale of shore land for private purposes.\textsuperscript{118} As Justice Potter concluded after discussing English common law and decisions of other states:

The language of many of the decisions can be reconciled by holding that while the State does not own the shore in fee, properly speaking, and therefore cannot sell the shore to be held as private property, and so cut off the riparian owner from the water, it has the complete regulation and control of it for public

\textsuperscript{116} Id. at 358-59.
\textsuperscript{117} See id.
\textsuperscript{118} See id. at 361.
purposes.\textsuperscript{119}

Justice Potter then noted that some states have held that there can be no private riparian rights in tide flowed land, but these decisions largely involve railroad cases, and they "have been made in States peculiarly situated as to railroad corporations."\textsuperscript{120} Justice Potter then discussed cases that have criticized cutting off a riparian proprietor from access to navigable water.\textsuperscript{121}

Continuing his analysis of the strong riparian rights recognized by Rhode Island courts, custom, and usage, Justice Potter said:

In this State it has always been understood that the riparian owner has the right to wharf or embank against his land, and so make land from tide-water, and this without license, provided he does not interfere with the navigation . . . . In very few instances was there any legislating by the State, and notwithstanding the common practice of wharfing and filling, it is believed there has never been an instance of the State interfering to prevent it. There has, indeed, been a good deal of legislation regulating the Long Wharf in Newport.

. . . .

Up to 1815, we had no Harbor Line Act, and for a large portion of the shore have none now. But no Rhode Islander ever thought he was obliged to petition the General Assembly for leave to build a wharf on his own land, and the records of our General

\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} See id. at 361-62.
Assembly and courts will, we think, be searched in vain for any attempt to interfere with this privilege so generally used.

From the very first settlement of the State, our people have claimed and held property in tide-waters.

And the fact that from the first settlement of the State, down to 1815, no act was ever passed even to limit and restrain this ancient practice, is significant. The Harbor Line Act of 1815 does not profess to grant any rights, but only to prevent encroachments by wharves beyond the established line.

The right to wharf out or reclaim is a valuable right even before its exercise. It constitutes a part of the value and sometimes nearly the whole value of the upland.¹²²

Justice Potter continued his lengthy discussion of riparian rights by discussing the laws of various other states, English common law, and Scottish law.¹²³ He noted “[t]hat where land is reclaimed from the tide-waters it may be held, at least to a certain extent, as private property, cannot well be doubted.”¹²⁴ Justice Potter’s concurring opinion is a strong statement of riparian property rights, which included the right to fill out below the high water mark and to acquire title by so doing.¹²⁵

Justice Potter previously had cited Bell v. Gough, noting that “some of the judges expressed very strongly the view I have here

¹²² Id. at 363-64.
¹²³ See id. at 365-69.
¹²⁴ Id. at 369 (citing Bell v. Gough, 23 N.J.L. 624 (1852)).
¹²⁵ See id. at 363.
taken as to the riparian right to wharf out and occupy, and that it was a sort of a customary law there. 126

In *Bell*, the court held that where a riparian owner makes improvement on the shore or reclaims the shore adjoining his land, the part of the shore reclaimed or improved belongs to the upland owner and cannot be granted by the state.127 In that case, the facts limited the holding to filled land between the high water mark and the low water mark.128

A report by the City of Providence Committee responsible for recommending the 1815 Harbor Line in Providence is noted in Justice Potter's concurring opinion, and is very important to understanding the custom in Rhode Island of upland owners acquiring title to land reclaimed from the sea.129 The committee's report noted encroachments on the Providence River by upland owners, stating that "our united opinion is that the original rights of Individuals have been extended beyond the original intention of the proprietors when the lots were first laid out as appears by Plats defining the bounds of the channel ...."130 The report noted that "our citizens have been permitted by the Town thus to extend their claims over the waters," and then went on to recommend a harbor line, which was adopted at the town meeting, and which would allow for more filling out to the harbor line.131 Interestingly, it was adopted despite concern voiced at the town meeting that there had been too much encroachment on the harbor:

126 Id. at 362.
128 See id. at 625.
129 See *Providence Steam-Engine Co. v. Providence & Stonington S.S. Co.*, 12 R.I. at 363-64.
130 Committee to Mark Out and Define the Boundaries of the Harbor of the Town of Providence, *Town Meeting 1, July 24, 1815*, with supplemental material, August 24, 1815.
131 See id. at 1, 6-7.
And this meeting taking into consideration the said report after an elaborate discussion of its merits though with the conviction and under a Sense, that the said Harbor, to which the Town is indebted in a great measure for its rank and importance has been too much contracted for its future interests, misfortune the more to be deplored as it seems almost without remedy.\textsuperscript{132}

Thus, although the town thought there had been too much private encroachment on the harbor, the town also felt that it could not undo such encroachment, presumably because the property so filled was seen to be owned by the upland landowner. This was noted by Justice Potter in his concurring opinion in \textit{Providence Steam-Engine}, as follows:

The State never undertook to regulate this right [i.e., wharfing and filling into the harbor] till 1815, and then did not profess to grant a right, but only to prevent encroachment to save the harbor; and it is noticeable here that the business was first taken up in town meeting, and a committee of five of the most respectable citizens appointed, men old enough to be well acquainted with the usages of our ancestors and the shore rights claimed by them, and who died before most of the present members of the bar were born. And this committee reported that in their opinion “the rights of individuals have been extended beyond the original intention of the proprietors when the lots were first laid out, as appears by plats,” \&c. And the town proceeded to vote in town meeting that the plat reported by the committee be “established as

\textsuperscript{132} \textit{Id.} at 4.
containing the boundary lines of the harbor aforesaid," and for greater security that application be made to the General Assembly.\(^\text{133}\)

Thus, Justice Potter recognized what the "men old enough to be well acquainted with the usages of our ancestors and the shore rights claimed by them" had recognized, and what the town meeting of 1815 had recognized: In Rhode Island filling out was a valuable property right of riparian owners, and when they reclaimed such property it became theirs.\(^\text{134}\) If filling was too extensive, the remedy was to regulate further filling, not to dispossess the upland owners of their reclaimed land.\(^\text{135}\)

In still another case involving disputed boundaries of filled tidal land among adjoining private landowners, the Rhode Island Supreme Court affirmed that a grantor can convey his inchoate right to fill out below high water mark to a harbor line.\(^\text{136}\) In settling the boundary dispute, the court found that the lots which were conveyed were "lots extending indefinitely out into the river between parallel lines forty feet apart."\(^\text{137}\) The court noted that such grants could not pass title to the submerged lands, because such title was in the state, but went on to say that,

> the grantor, though he had no actual title, and accordingly could convey none, yet had a sort of inchoate or potential title by virtue of his right to fill out under leave of the state, and this, under deeds purporting to convey the lots as platted, would enure to the benefit of the grantees...\(^\text{138}\)

\(^{133}\) Providence Steam-Engine Co., 12 R.I. at 363.

\(^{134}\) See id.

\(^{135}\) See id.

\(^{136}\) See id.

\(^{137}\) See Brown v. Goddard, 13 R.I. 76, 81-82 (1880).

\(^{138}\) Id. at 81.

\(^{139}\) Id.
The court noted that such grants "were all subject to an implied contract or assurance on his part, that his grantees should have not only the upland, but also whatever right or privilege he himself had to fill it out, and incorporate with it the tide-flowed flats and river bed as platted . . . ." 139

In *Gerhard v. Seekonk River Bridge Commissioners*, 140 the court reaffirmed the ownership of soil under tide water when it found that a lessee of tidelands who had been dispossessed by the erection of an embankment supporting a bridge was not entitled to claim damages. 141

In 1888 the Rhode Island Supreme Court expressly addressed extinguishment of public trust rights in tidal lands by filling the land. 142 In *Clarke v. City of Providence*, the court clearly stated that public rights could be extinguished by filling, as to a harbor line, even if such filling was not made for public trust purposes. 143

This dispute involved the tidal basin in downtown Providence, in the former cove lands. 144 The land, then a public park, had been reclaimed by filling the cove, and in 1870 had been conveyed by the state to the city. 145 In 1888, the General Assembly passed legislation authorizing the City of Providence to discontinue use of the land as a public park and fill the cove basin, creating channels through it for the Woonasquatucket and Moshassuck Rivers and allowing the land to be sold for railroad or other purposes. 146 Certain Providence residents sought to enjoin the filling on several grounds. 147 One of the grounds asserted was that because the area in question formerly had

139 *Id.* at 82.
141 See *id.*
143 See *id.* at 765-67.
144 See *id.* at 763-64.
145 See *id.*
146 See *id.* at 764; 1888 R.I. Pub. Laws 722.
147 See *Clarke*, 15 A. at 764.
been covered by tide water, the General Assembly could not authorize the filling of the land which would extinguish the constitutional right accorded citizens to “enjoy and freely exercise all the rights of fishery and privileges of the shore to which the people of the State have been heretofore entitled under the charter and usages of the State,” and that the act of the General Assembly authorizing the filling was in conflict with the Rhode Island Constitution, Article I, Section 17.  

In its analysis, the court noted that the constitutional provision “leaves the rights of the people as they existed previously to the Constitution . . . [and] neither diminishes nor adds to them . . . .” Accordingly, the court inquired into the rights and privileges of the people “under the charter and usages of this State before the Constitution was adopted, in order to decide whether they are infringed by the act of the General Assembly.” The court then stated:

It is common knowledge that the citizens of the State have always been accustomed to dig clams freely along the shores of the bay and river wherever they could be found, and, subject to some legislative regulations, to fish in the deeper waters; and because this has been so, and because formerly citizens were accustomed to clam and fish in the cove, the complainants take it for granted that they are entitled, under section 17, to clam and fish there in the same manner forever, and that therefore any act of the General Assembly which authorizes the filling, or partial filling of the cove, thus lessening their ability to do so, must be unconstitutional and void. But it is also common knowledge that there are many places where fish and clams were formerly taken which are

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148 See id. at 765.
149 Id.
150 Id. (emphasis added).
now solid land made by filling out the shores, either with the tacit acquiescence or with the implied or express consent of the General Assembly. The acts of the General Assembly establishing, or authorizing the establishing, of harbor lines, some of which existed before the Constitution, Digest of 1822, pp. 484, 485, go to show that the assumption of the complainants is too broad, and that these rights of clamming and fishing are enjoyed in subordination to the paramount authority of the General Assembly to regulate and modify, and, to some extent at least, to extinguish them. The counsel for the complainants, in view of these acts, concedes that the General Assembly has power to authorize encroachments upon the tide-waters, where they are made in the interests of navigation, for the erection of wharves, or are effected for other public purposes. But there is nothing in the acts, so far as we are aware, imposing any such limit, and it is well known, as a matter of fact, that no such limit has been observed. Moreover, in the case at bar, the evidence introduced by the complainants, while it shows that citizens did many years ago fish and clam in the cove, does not show that any such fisheries now exist there, and, considering the extensive changes which are shown to have been made, it is inferable that such fisheries, if they have not wholly ceased to exist, have at least ceased to have any substantial value, and, indeed, some of the affidavits imply as much; so that, really, the second ground on which the injunction is asked does not rest so much on any existing fact as on a fact which it is supposed the court will treat as existing, because it formerly existed. We are not satisfied that
the second ground is tenable either in law or fact.\textsuperscript{151}

\textit{Clarke v. City of Providence} is a strong statement that public rights in filled tidal land may be extinguished, not just by an express grant of the General Assembly, but also by “tacit acquiescence or with the implied or express consent of the General Assembly,” such as the harbor line statutes, including the 1815 Providence harbor line legislation.\textsuperscript{152} Moreover, the court rejected the contention that encroachments on tide water and the extinguishment of public rights in filled tidal lands are limited to activities done in the interest of navigation, the erection of wharfs, or activities otherwise effected for public purposes.\textsuperscript{153}

The court also acknowledged that rights change as reality changes.\textsuperscript{154} Where lands have been filled, built upon, or improved as to be impractical or unusable for public purposes, the rights to such public purposes are extinguished.\textsuperscript{155}

The court reinforced a riparian owner’s right to fill in \textit{Prior v. Comstock}.\textsuperscript{156} The Rhode Island Supreme Court expressly held that where the upland has been extended by filling below mean high tide, and there is no evidence that any other party filled under a claim of ownership, the law assumes that such filling was done by the title holder’s predecessors in title under claim of ownership.\textsuperscript{157} “Although it is not shown that the riparian owners, predecessors in title to the plaintiff, did any filling, nevertheless, in the absence of evidence that it was done by any other party under a claim of ownership, such filling inures to the benefit of the riparian owner.”\textsuperscript{158}

\textsuperscript{151} \textit{Id.} at 766 (emphasis added).
\textsuperscript{152} \textit{See id.}
\textsuperscript{153} \textit{See id.}
\textsuperscript{154} \textit{See id.}
\textsuperscript{155} \textit{See id.} at 766-67.
\textsuperscript{156} \textit{Prior v. Comstock}, 19 A. 1079 (R.I. 1889).
\textsuperscript{157} \textit{See id.}
\textsuperscript{158} \textit{Id.} at 1079.
In *Carr v. Carpenter*, which dealt with the rights of taking seaweed stranded on the beach, the court reviewed a number of prior cases involving seaweed and privileges of the shore. The court quotes with approval its earlier decision in *Engs v. Peckham* regarding the strong tradition of riparian property rights recognized by the Rhode Island Supreme Court, including the right "even to make new land by filling the flats in front of their land." The court notes that in *Engs* it stated that it is "not aware that the state has ever laid claim to any wharf so built, or any land so made, unless the cove lands can be considered an exception." In *Carr*, the court also noted the long-standing decisions in Rhode Island allowing the taking of seaweed stranded on the beach by the littoral or riparian owner, and refused to alter the rule saying:

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

The court found no such error and therefore the rule remained good law. Perhaps more importantly, the court recognized that where there was long-standing custom and usage regarding riparian rights, such custom and usage affected the value of the riparian estate, and the court would not change this tradition without it being a manifest error of law. Again, as in *Aborn v. Smith*, the court demonstrated

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160 See id. at 805-08.
163 *Id.* (quoting *Engs*, 11 R.I. at 210).
164 *Id.* at 808.
165 See id.
sensitivity to the importance of preserving the settled expectations of property owners based upon generations of custom and usage. The court's position obviously indicates that the long history in Rhode Island of recognizing the ownership of filled tidal lands in the private owner would not be abandoned, absent a manifest error of law.

The court further clarified rights to filled tidal lands in *Dawson v. Broome*, which involved a residential subdivision platted on submerged land. In that action, the court recognized that filling in tidal water with the permission of a harbor master was the equivalent of filling to a harbor line. The court then quoted with approval prior court decisions, including *Engs* and *Bailey*, in reaching its decision.

However, the authority of a harbor master is not unlimited, at least where a harbor line is involved. In *Rhode Island Motor Co. v. City of Providence*, the harbor master gave approval for the City of Providence to establish in tidal water a walkway and beach house located on piles, which extended beyond the harbor line. Despite the harbor commissioner's approval, the Rhode Island Supreme Court held the assent invalid, and ruled that the harbor commissioner had no right to allow encroachments beyond the harbor line.

In reaching its decision, the court cited *Allen* and reiterated that:

> The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend to all land below high-water mark, unless it has been so used, built upon, or occupied as

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167 See Carr, 48 A. at 806, 808.
169 See id. at 158.
171 Rhode Island Motor Co. v. City of Providence, 55 A. 696 (1903).
172 See id.
173 See id. at 698.
to prevent the passage of boats and the natural ebb and flow of the tide. . . . Until actual filling out, the public rights exist as before.\textsuperscript{174}

The court also quoted Clark v. Peckham, stating that "[s]o long as the dock is not filled by the owner of the bank, it is subject to the \textit{jus publicum} of being used for passage by the whole public."\textsuperscript{175}

Clearly, the court reaffirmed in 1903 its view that filling of tidal land extinguished public trust rights in the reclaimed land.\textsuperscript{176}

The extent of colonial Rhode Island's authority to govern the land below the high water mark was at issue in New York, N.H. & H.R. Co. v. Horgan.\textsuperscript{177} In that action, two private parties asserted title to filled tidal land in Newport.\textsuperscript{178} Plaintiffs based their title to the disputed land on an 1863 deed from the City, which expressly excepted from the operation of the deed any private rights included in the land described.\textsuperscript{179} The deed was preauthorized and subsequently ratified by the General Assembly.\textsuperscript{180}

The defendant offered evidence of a 1739 meeting of the freemen of Newport, where they voted to convey to defendant's predecessor in title certain land for construction of a wharf, including all rights held by the Town of Newport in certain tide-flowed land.\textsuperscript{181} The lower court concluded that the Town of Newport had no power to grant title to land flowed by tide water, such power having been delegated to the General Assembly by the Charter of 1663.\textsuperscript{182}

The Supreme Court noted that tidal land below mean high

\textsuperscript{174} Id. at 697.
\textsuperscript{175} Id. (quoting Clark v. Peckham, 10 R.I. 35 (1871)).
\textsuperscript{176} See id.
\textsuperscript{177} New York, N.H. & H.R. Co. v. Horgan, 56 A. 179 (R.I. 1903).
\textsuperscript{178} See id. at 179.
\textsuperscript{179} See id.
\textsuperscript{180} See id.
\textsuperscript{181} See id. at 180.
\textsuperscript{182} See id.
water had been held in the crown until the state became independent, and since then had resided in the General Assembly. It also noted that the 1663 Charter "was ample to endow the colony with full dominion and royalty over the shore and tide-flowed land . . . so that, acting by the express authority of the crown, the colonial General Assembly had good right to regulate the use and improvement of this portion of their domain."

The court stated that because towns and private individuals merely assumed the right to occupy tidal-flowed lands without specific authorization from the King or his colonial government, they may have acquired no rights below the high water mark. However, the court then stated that counsel in the trial court had neglected to introduce the 1707 Resolution of the General Assembly, and that by this resolution "the General Assembly of the colony, in 1707, by a statute . . . saw fit to grant these very powers to the several towns." The court concluded that "[t]aking into account, then, the law of 1707, we find that the land in question was private property at the time of the grant to the plaintiff's predecessor, and hence was not included in the grant. The plaintiff's title therefore fails . . . ."

Thus, the court recognized that colonial grants of tide-flowed lands to private individuals were valid to convey private property interests, given the authority of the 1707 Resolution, and that a subsequent state grant, given under the terms that it would not impair private property rights, could not affect these rights.

In *City of Providence v. Comstock*, the court detailed the early history of filling in the state, and particularly in the City of Providence. In its survey, the court noted:

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183 See id.
184 Id. at 180-81.
185 See id.
186 Id. at 181.
187 Id.
188 See id.
189 See *City of Providence v. Comstock*, 65 A. 307 (R.I. 1906).
And the common law in this regard is in force in this country except as it has been changed by local legislation or custom.

There is a general impression, arising from some remarks by Angell in his Treatise on Tide Waters (2 Ed.) 1847, that the power of this state over tide-flowed lands is less than was originally given it by the common law, in that in Rhode Island a littoral proprietor has the natural right to extend his wharves and to fill flats into the salt water until he is stopped by the demands of navigation. Mr. Angell says (page 236): ‘In Rhode Island an opinion has long prevailed throughout the portion of the State contiguous to tide water, that the proprietor of an estate adjoining the salt water might lawfully augment it, by embanking in and upon the water, so long as he did not encroach upon nor obstruct what is generally denominated the channel, or, in other words, so long as he did no injury whatever to the public. Hence it is that the custom has been general to make accessions of land in this manner without any suspicion of the want of right and authority so to do, and consequently without obtaining any formal and express sanction of the sovereign or legislative power.’ But Mr. Angell immediately proceeds to quote a colonial statute of May, 1707, found in R.I. Col. Rec. vol. 4, p. 24 (printed since he wrote), which gave to the several towns the right to license such wharves and extensions of the shore in their respective borders, and very well accounts for the absence of applications to the General Assembly for such permission. This court has, however, affirmed the view taken by Angell, and confirmed the privilege of the littoral proprietor to fill out flats or build wharves until forbidden by the
The court then went on to note that in Providence wharfing and filling was regulated since its early history, adding:

In Providence, at least, the riparian owners did not assume the right to build wharves without permission of the authorities. The power to regulate the building of wharves may have been assumed originally by the town without warrant, but it was apparently acquiesced in by the state, and from 1707, as we have seen, it was exercised under the express grant of power from the General Assembly which was then made. From that time on the town counsel exercised full authority to define the lines of the cove, and to limit the extension of wharves or permanent filling by littoral proprietors, and to check encroachments upon the public waters.191

The court’s statement in City of Providence v. Comstock clearly appraised Rhode Island’s extensive history of filling under authority of the 1707 Resolution, and subsequently the history of filling in Providence under the town’s authority.192

At issue in Armour and Co. v. City of Newport193 was the 1739 grant that had been at issue in New York, N.H. & H.R. Co. v. Horgan194 from the Town of Newport to certain individuals, which included tidal lands. The first question presented to the court was whether the grant conveyed a fee simple interest.195 The court

190 Id. at 308-09 (emphasis added).
191 Id. at 309 (emphasis added).
192 See id.
195 See Armour, 110 A. at 646.
reviewed the language of the grant, noting that it was a vote of the freemen of the town, and there was no recorded deed. The court also noted that "public grants of this nature are to be construed most favorably to the grantor." Nevertheless, the court found that despite the absence of specific language conveying a fee simple interest, the intention of the town appeared to be to convey an estate in fee.

The court then turned to the primary question at issue, whether certain language in the grant established a public easement that continued in effect and could be enforced against a private owner of buildings in the easement area.

Noting that the language of the vote shows a "clear intention to reserve an easement for the public," the court was cautious in finding an easement existed, and investigated evidence of "contemporaneous construction." The court recited evidence that suggested a history of attempts to leave the thirty foot way open, or not to materially obstruct it, examined deeds, and concluded that "the various grantors were not overbold in asserting full title to the land in question until Patrick H. Horgan became interested in the property." Given all the facts, the court found that the grant established a thirty foot public easement, which continued to remain for the benefit of the public.

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196 See id. at 647.
197 Id.
198 See id.
199 See id. at 646. The following language was at issue in the grant:

and always leaving thirty feet in width of the said wharf on the south side free and clear of buildings & other incumbrances for the better landing of all sorts of wood lumber &c. for the benefit of the inhabitants according to the grant in the year 1702 (1707?), excepting the building of cranes &c. for conueniency of unloading vessels &c.

200 Id. at 647-48.
201 Id.
202 See id. at 649.
The most striking aspect of Armour is that the court did not assert, or even suggest, that title to the entire wharf would be in the state; or that under the public trust doctrine the state would maintain ownership rights in the wharf; or that the state retained the right under the public trust doctrine to use the wharf for public purposes.\textsuperscript{203} The court did not even raise these issues, its sole focus having been whether the original grant contained an easement, and if so, whether the easement was still enforceable.\textsuperscript{204} The court’s failure to raise these issues indicates that construction of the wharf over tidal waters extinguished the public trust rights in the wharf, and the only public rights that remained were those explicitly conditioned in the grant.

Similarly, public rights to wharfage in Newport were at issue in Thompson v. Sullivan.\textsuperscript{205} In that action, certain citizens of Newport sought to block a lease between the City of Newport and Newport Yacht Club.\textsuperscript{206} The lease in question involved Gravelly Point, the easterly point of which was a city wharf.\textsuperscript{207} One of the allegations was that the proprietors of Long Wharf, who platted Gravelly Point, dedicated the wharf for public use.\textsuperscript{208} The court observed:

There is nothing in the record from which it can be determined that the proprietors of Long Wharf before or after the allotment of Gravelly Point in 1757, either jointly or severally, ever took steps to construct a wharf or dock. Assuming that they did, it is not likely that they did so with the intention of dedicating it to a public use and thus deny to themselves and their heirs the full fruits of their efforts.

\textsuperscript{203} See id.
\textsuperscript{204} See id.
\textsuperscript{206} See id. at 132.
\textsuperscript{207} See id. at 133.
\textsuperscript{208} See id. at 132-33.
The trial justice commented on the cost of such construction, and coupling this with the importance of transportation by water in colonial days he concluded that the proprietors would not have subjected these valuable rights to pre-emption by the public. We are of the opinion that in the absence of evidence to the contrary the conclusion reached by the trial justice is not unreasonable.  

Because the public was challenging the exclusive nature of the lease to the Newport Yacht Club, it is again noteworthy that neither the public trust doctrine nor the assertion that the state actually owned fee-simple title to the wharf for the benefit of the public was raised by any of the litigants or the court. The absence of such arguments is completely consistent with over a century of court decisions indicating that upland owners hold title to wharves and reclaimed tidal lands.

In *Nugent ex rel. Collins v. Vallone*, the court rejected a contention that the construction of a 900-foot pier into Narragansett Bay would interfere with the rights of the public in tidal waters and would unlawfully appropriate submerged land. The court upheld the common law right to wharf out in the absence of interference with navigation or the rights of other riparian proprietors, and it found erection of the pier accorded with public trust rights.

In *State v. Ibbison*, the Supreme Court relied on common law to fix the boundary at the shore between public land and private land. The court found that prior cases, such as *Allen v. Allen*, had
relied upon common law and that "the only permissible action for us to take is to affix the boundary as was done at common law and which this court in *Allen* declared to be the settled policy of this state."216 In setting that boundary, the court rejected for such boundary "a visible line on the shore indicated by the reach of an average high tide and further indicated by drifts and seaweed along the shore."217 The court clearly was concerned with ensuring fairness to private property owners as well as recognizing the common law upon which the Rhode Island courts have relied in public trust matters.218

Once again, the court successfully balanced the interests of private shorefront owners and the interests of the public in establishing the boundary between private and public property.

It is against this rich history of Rhode Island jurisprudence

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216 *Ibbison*, 448 A.2d at 730.
217 *Id.* at 729.
218 The court stated:

In fixing the landward boundary of the shore at the mean-high-tide line, we are mindful that there is a disadvantage in that this point is not readily identifiable by the casual observer. We doubt, however, that any boundary could be set that would be readily apparent to an observer when we consider the varied topography of our shoreline. The mean-high-tide line represents the point that can be determined scientifically with the greatest certainty. Clearly, a line determined over a period of years using modern scientific techniques is more precise than a mark made by the changing tides driven by the varying forces of nature

Additionally, we feel that our decision best balances the interests between littoral owners and all the people of the state. Setting the boundary at the point where the spring tides reach would unfairly take from littoral owners land that is dry for most of the month. Similarly, setting the boundary below the mean-high-tide line at the line of the mean low tide would so restrict the size of the shore as to render it practically nonexistent.

*Id.* at 732.
that the dicta in *Allen v. Allen*\(^{219}\) and *Engs v. Peckham*\(^{220}\) must be evaluated. When considered together, what emerges from these decisions is that, over its long history, the Rhode Island Supreme Court was well aware of the English common law antecedents to Rhode Island's public trust doctrine and how this doctrine was modified in Rhode Island's early history, and that the court was very careful to balance the property rights of the riparian upland owner with the rights of the public under the public trust doctrine. As recently as the court's decision in *State v. Ibbison* and as early as its decision in *Clark v. Peckham* the Rhode Island Supreme Court was concerned with the private property rights of upland owners.\(^{221}\) The court apparently recognized that reclaiming land from the sea by filling below mean high tide constituted the early public works projects of the state. However, the state did not have the funds to pay for these improvements.\(^{222}\) For example, it was not uncommon for the General Assembly to authorize a lottery to pay for the filling of tidal land, as was done for the construction of the Market House in Providence in 1773.\(^{223}\) However, most of the filling below mean high tide was done at the expense of private individuals.\(^{224}\) By reclaiming such tidal lands, these riparian owners provided for needed housing in Rhode Island by platting lots below mean high tide.\(^{225}\) They fostered the commercial development of the state by constructing market houses, fish processing facilities, trading facilities, stores, and other commercial establishments, and they fostered navigation and commerce in the state by constructing wharves, docks, and other shipping facilities.\(^{226}\)


\(^{222}\) *See Cady*, *supra* note 6, at 33-35.

\(^{223}\) *See id.* at 48-50

\(^{224}\) *See supra* note 29.

\(^{225}\) *Id.*

\(^{226}\) *See generally Holleran*, *supra* note 29; *Cady*, *supra* note 6, at 106, 120, 178 (unnumbered photographs).
Nowhere in the court’s decisions prior to *Hall v. Nascimento*\(^{227}\) was it held, or even stated, that land created by private filling that was built upon and improved, was actually in state, not private, ownership. Nowhere do the legislative enactments, from the Resolution of 1707 to the numerous harbor line ordinances, indicate that title to the land acquired was conditional on being used for public trust purposes, was revocable at the will of the state, or was held by the state.

The discussions by the Rhode Island Supreme Court, and the dicta in such cases as *Allen v. Allen*,\(^ {228}\) *Engs v. Peckham*,\(^ {229}\) and others, clearly set forth the court’s judgment of the status of filled tidal lands. The court properly reserved deciding issues where not necessary to resolution of the case. However, the court stated “in the absence of any decision by this court . . . we are of the opinion that . . . dicta are entitled to much consideration, especially as they seem to have been acquiesced in ever since they were stated.”\(^ {230}\)

2. **Title To The Former Cove Lands.**

Although the prior discussion has focused largely on land filled to a harbor line, or to the equivalent of a harbor line,\(^ {231}\) the same general principles deduced from these cases apply to the title to lands created by the filling of the former Providence Cove or Great Salt Cove, as it was known.\(^ {232}\) This area, known as the Cove Lands, was a tidal cove of several hundred acres and now is much of downtown Providence.


\(^{228}\) Allen v. Allen, 32 A. 166 (R.I. 1895).


\(^{231}\) Such as land filled with state authorization or acquiescence.

\(^{232}\) *See generally* City of Providence v. Comstock, 65 A. 307 (R.I. 1906) (referring to *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892), which generally affirms public trust doctrine principles). Note that in the cases discussed in this section the court relied heavily on the fact that a state grant conveyed the cove lands to the City of Providence.
Providence’s prime business and commercial real estate. With regard to the former Cove Lands, there is also specific case law which is determinative.

The State of Rhode Island conveyed “to the City of Providence, of all the right, title and interest that the State has in and to the Cove Lands, (so-called,) in said City, being the lands now or heretofore flowed by tide water above Weybosset Bridge, in said City . . . .” The Cove Lands Grant was authorized by General Assembly Resolution approved by the House of Representatives February 23, 1870, and by the Senate March 2, 1870.

In 1888, the General Assembly authorized the filling of the Cove Basin, and in 1889, the Providence City Council authorized the selling of the Cove Basin, the Cove Promenade, and the Cove Lands to the railroads for construction of a new railroad terminal building. In 1890 the General Assembly authorized construction of a passenger terminal by several railroads.

As previously discussed in Clarke v. City of Providence, the Rhode Island Supreme Court soundly rejected in 1888 a challenge from a property owner in the vicinity of the Cove Basin to the state’s efforts to fill the basin, discontinue the park, and sell the Cove Lands.

In doing so, the court stated that public rights could be extinguished by filling tidal lands not only by express grant from the state, but also by tacit acquiescence or implied or express consent of the General Assembly, and that the filling need not be for public trust.

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233 See Holleran, supra note 29, at 65.
235 See id.
236 See Holleran, supra note 29, at 81.
237 See id.
238 See id.
purposes in order to extinguish such public rights. The court rejected the assertion that the Cove Lands Grant did not extinguish rights of fishery and privileges of the shore in the former Cove Lands.

The following year the court again was faced with a challenge to the Cove Lands Grant. In Mowry v. City of Providence, a resident tried to prevent the city from selling any portion of the Cove Promenade or Cove Basin or filling the basin on the ground that although the state conveyed title to the property "it has not alienated, and could not, by so doing, alienate the beneficial rights of the people without a vote of the people authorizing such alienation, which vote has never been had." In essence, the challenge was that the General Assembly could not convey the property free of public trust rights without a vote of the citizens.

The court found that a private individual did not have the right to maintain such an action and the General Assembly clearly had the right to relinquish such public rights in the former Cove Lands:

We held in that case [Clarke v. City of Providence] that the state, or the general assembly as the organ of the state, is the representative of the public or people as to the public right, and as such has power to release the right; the general assembly having in the matter the authority, not simply of the English crown, but of both crown and parliament, except so far as it has been limited by the constitution of the state, or by the constitution and laws of the United States. There is no precedent for the claim that the proper mode of relinquishing such a public right is by popular vote.

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240 See id. at 765-66.
241 See id. at 766-67.
242 Mowry v. City of Providence, 16 A. 511 (R.I. 1889).
243 Id. at 511.
244 Id.
In *Murphy v. Bullock*, the court again had occasion to consider the Cove Lands Grant. In that action, private party plaintiffs attempted to assert rights against the city to lands the city claimed were former Cove Lands, and conveyed to the city by the state in 1870. In construing the 1870 grant, the Rhode Island Supreme Court stated that in 1870 the state owned the Cove Lands, and the deed conveying the Cove Lands “now or heretofore flowed by tide water” pertained to land then flowed by the tide as well as to a large tract of land that formerly had been a part of the cove but where the tide had ceased to flow because of filling by the city in 1857. The court found that the Cove Lands Grant encompassed “land that was then flowed by the tide and land which had been part of the cove, and was still traceable as such, and which had not been already made the subject of legal grant or appropriation.” The court found the land in question to be former Cove Lands, and thus the private party could not sustain title against the city, which held title by virtue of the 1870 deed.

Yet another challenge to the Cove Lands Grant was before the court in 1906, and it appears that the court had by that time had quite enough of such challenges. In *City of Providence v. Comstock*, private party defendants were lessees of land covered by tide water, which they occupied as a warehouse supported on piles driven into the ground. The defendants’ primary claim was that their lessor had acquired ownership of the original shore and therefore acquired title to the filled land, and that this gave them riparian rights entitling them to occupy the bed of the river, notwithstanding the conveyance of this river bed by the state to the City of Providence by the 1870

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246 See id.
247 See id. at 349.
248 Id.
249 See id. at 350.
251 See id. at 307.
The court specifically addressed the United States Supreme Court decision in *Illinois Central Railroad Co. v. Illinois*\(^2\)\(^5\)\(^3\)\(^2\) noting that the United States Supreme Court found that a state "may convey parcels of tide-flowed lands to individuals for the promotion of navigation or 'when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.'\(^2\)\(^5\)\(^4\) The Rhode Island Supreme Court flatly held that "the defendants are in error in their notion that the State was not competent to give a clear title to the plaintiff free of all servitudes or rights in the nature of public trusts . . . ."\(^2\)\(^5\)\(^5\)

The court continued with an elaborate and detailed discussion of the degree to which the City of Providence historically has regulated the filling of tidal lands, clearly demonstrating that such lands were not filled without public consideration and were not filled indiscriminately.\(^2\)\(^5\)\(^6\)

The court also noted that the draw of the Weybosset Bridge, which separated the Cove Lands from the access to Narragansett Bay and the ocean beyond, was discontinued in approximately 1816 and that from that time the waters of the cove ceased to be actually navigable from the sea and the "public right of commercial navigation has ceased, and the private riparian right of mere access to the salt water, if any still existed, became of no appreciable value."\(^2\)\(^5\)\(^7\)

Finally, the court noted that at the January 1867 session "the General Assembly passed a resolution revoking all grants of any portion of the cove lands which had not been accepted and the conditions of which had not been complied with."\(^2\)\(^5\)\(^8\) The court then

\(^{252}\) See id. at 307-08.
\(^{255}\) Id. at 308 (emphasis added).
\(^{256}\) See id. at 310-11.
\(^{257}\) Id. at 311.
\(^{258}\) Id. at 312.
stated:

This court has repeatedly held that by this deed [i.e.,
the 1870 Grant] the State conveyed to the city the
lands described therein in fee simple. The land in
dispute in this case is, and in 1870 was, flowed by tide
water, and is a portion of the lands described in said
deed. I find that this title in fee simple is not modified
or restricted by any littoral or other rights appertaining
to the land leased to the defendants on the east bank of
the present channel of the Moshassuck river, or to the
land of said lessors on the east side of Canal street.259

Accordingly, no less than three times the court has affirmed
its judgment that the grant by the State of Rhode Island to the City of
Providence in 1870 conveyed the Cove Lands in fee simple absolute
to the City of Providence, unburdened by any public trust rights.

V. HALL V. NASCIMENTO

Against this background the Rhode Island Supreme Court in
1991 was presented with its first public trust case since State v.
Ibbison.260

In Hall v. Nascimento, the Rhode Island Supreme Court
decided a title dispute regarding land at Common Fence Point in
Portsmouth.261 At issue was title to ten feet of former beach area and
260 feet of contiguous land created by the placing of fill below mean
high tide.262 The court found that the trial court erred in awarding
title of a portion of the 270-foot area to an adjacent lot owner, holding
that any such claim must be based on littoral rights to the tide lands

259 Id. (citations omitted).
260 State v. Ibbison, 448 A.2d 728 (R.I. 1982).
262 See id. at 875.
that were filled.263 Because the lot owner’s predecessors in title never abutted the former high water mark, the lot owner could claim no such littoral rights.264 The court also found that the association of landowners in the plat abutting the filled land, whose predecessor in title held the littoral rights, did not acquire title to the filled tidal lands.265 Rather, the court held that ownership of the filled tidal land was in the State of Rhode Island:

It is well settled in Rhode Island that pursuant to the public trust doctrine the State maintains title in fee to all soil within its boundaries that lies below the high-water mark, and it holds such land in trust for the use of the public. The high-water mark on the original shoreline that existed prior to the 1948 dredge and fill was located within the bounds of the ten-foot strip of beach area... retained by the association... In Carr v. Carpenter, 22 R.I. 528, 529, 48 A. 805, 805 (1901), this court established that the owners of lands adjoining navigable waters have the right to “enjoy what remains of the rights and privileges in the soil beyond their strict boundary lines, after giving to the public the full enjoyment of their rights.” The association, therefore, as owner of the land adjoining the waters, does not automatically lose all rights to the submerged soil and subsequently the filled area.266

The court’s decision in Hall v. Nascimento generated tremendous concern throughout Rhode Island by casting into doubt the status of title to the literally thousands of private properties throughout the State that are located on filled tidal land (i.e., land

263 See id.
264 See id. at 876.
265 See id.
266 Id. at 877 (citations omitted).
created by the placing of fill below mean high tide).\textsuperscript{267}

As discussed above, prior to \textit{Hall} the Rhode Island Supreme Court had never asserted that title to filled tidal lands is in the State of Rhode Island.\textsuperscript{268} Rather, the writings of the court, for well over 100 years, have been to the contrary.\textsuperscript{269} As a result of the \textit{Hall} decision, some elements of Rhode Island state government took the position that the State of Rhode Island holds title to \textit{all} filled tidal lands in trust for the public for public trust purposes.\textsuperscript{270}

As a result of the decision in \textit{Hall}, the General Assembly created a Legislative Task Force on Filled Tidal Lands in the 1992 legislative session.\textsuperscript{271} That task force drafted a bill, which was based on a “legislative finding” that “in the case of \textit{Hall v. Nascimento} the Rhode Island Supreme Court held that, pursuant to the public trust doctrine, the State of Rhode Island holds the title in fee to filled tidal lands within its borders and it holds such lands in trust for the benefit of the public.”\textsuperscript{272}

The draft legislation went on to propose extensive regulation of what formerly had been considered private property.\textsuperscript{273} The legislation drafted by the Task Force proposed to make a distinction between “privately filled tidal land” (i.e., tidal land filled under color of state law or with authority of a state or municipality) and “state filled tidal land” (i.e., all other filled tidal land).\textsuperscript{274} Under the draft legislation, privately filled tidal land would have been burdened with a perpetual easement allowing public access across the land to the

\textsuperscript{267} See \textit{Tidal Trauma}, supra note 38, at 14; Frederiksen, supra note 7, at 5; \textit{Help Protect the Public Trust, SAVE THE BAY ISSUE BRIEF} (Save the Bay, Providence, R.I.), undated leaflet.

\textsuperscript{268} See supra text accompanying notes 219-30

\textsuperscript{269} See \textit{id.}


\textsuperscript{271} See \textit{id.}

\textsuperscript{272} See \textit{id.} § 46-29-2(a). As discussed below, the language in the draft bill misstates the holding of \textit{Hall v. Nascimento}.

\textsuperscript{273} See H. 9262A.

\textsuperscript{274} See \textit{id.} §§ 46-29-5, 46-29-4 to 46-29-11.
This would apparently constitute an easement for lateral access to the shore as well as an easement to cross private property perpendicular to the shore in order to reach the water. This was proposed without regard for the current use of such property.

Under the proposed legislation, a property owner must produce evidence that the land was filled under color of state law or the authority of a state or municipality to establish that such land was “privately” filled tidal land. Because much filling occurred in the 1700s and early 1800s, when records were poorly kept, or no longer available, this could be difficult or impossible to establish. Additionally, much filling occurred by custom, with the knowledge and acquiescence of the government, but generally without a formal permit or approval.

Under the proposed legislation, if a landowner could not demonstrate that his property was privately filled, the filled land would be deemed to be state filled land, and the property owner would be required to lease such property back from the state. There was considerable objection to the draft legislation, and the General Assembly adjourned without taking action on it. Nevertheless, the activities of the Task Force and its proposals were well-known in the business community, including: lenders, who may have mortgages on property deemed to be state lands; title insurers, who may be at risk on titles they insured on land determined to be filled tidal land;

275 See id. § 46-29-6.
276 See id.
277 See id. § 46-29-3.
279 See H. 9262A § 46-29-3.
and businesses located on filled tidal land. The proposals also were known generally among property owners near or adjacent to the shore.

Considerable media comment and speculation on the impact of this decision resulted, a result of much of downtown Providence being located on filled tidal land. Additionally, special interest groups asserted that the "momentous" decision in Hall "will be the ultimate touchstone for preserving Newport's historic waterfront and assuring public access and usage of our precious coastal resources for decades to come." The Friends of the Waterfront suggested a moratorium on all building on coastal tidal lands, a survey of all such lands and a state lease of such lands. Such a moratorium and survey could take years and effectively freeze development, substantial rehabilitation and even sales of lands determined or suspected to be filled tidal lands, particularly if bank financing was involved.

VI. GREATER PROVIDENCE CHAMBER OF COMMERCE v. STATE OF RHODE ISLAND

Given the questions raised by Hall v. Nascimento, many institutions in the Rhode Island business community sought clarification of the Rhode Island Supreme Court's position on the public trust doctrine. On March 18, 1994, plaintiffs Greater Providence Chamber of Commerce, Rhode Island School of Design, Narragansett Electric Company, and Providence Gas Company, and Providence Gas Company, and

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281 See Tidal Trauma, supra note 38, at 14; Hirsch, supra note 280, at 13.
282 Hirsch, supra note 280, at 13. The author has been contacted by concerned property owners for legal advice regarding property on filled tidal land.
283 See Tidal Trauma, supra note 38, at 14 (editorializing against legislation proposed in response to Hall v. Nascimento, 594 A.2d 874 (R.I. 1991)).
285 Id.
defendant State of Rhode Island and Providence Plantations filed a Joint Petition and Agreed Statement of Facts pursuant to R.I. Gen. Laws section 9-30-1 for a declaratory judgment regarding the effect of the public trust doctrine on certain interests each plaintiff had in real property. Pursuant to Rhode Island General Laws section 9-24-25, the Agreed Statement of Facts ("Agreed Statement") was filed with the Providence County Superior Court clerk for certification of this action to the Rhode Island Supreme Court for determination. Certification was granted by order entered March 21, 1994.

The Attorney General, Jeffrey Pine, and his Environmental Advocate, Michael Rubin represented the State and consented to the expedited procedure and filing of a joint petition to facilitate resolution of the issue, given its importance to the citizens of the state. Absent such cooperation, a resolution of the issues could have taken several more years.

On June 20, 1994, plaintiffs and defendant filed a Supplemental Agreed Statement of Facts with the Rhode Island Supreme Court. Four properties were at issue in the Greater Providence Chamber of Commerce litigation; two were parcels located in the former Cove

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290 See id.
292 See Entry of Appearance, Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995) (No. 94-1476). The agreement to the expedited procedure and filing of a joint petition was made at a meeting with Attorney General Pine, Environmental Advocate Michael Rubin, Rhode Island Hospital Trust National Bank President Frederick Lorham, Providence Gas Company President James Dodge, and the author. Rhode Island Hospital Trust National Bank filed an amicus brief on the case.
Lands and two were created by the placing of fill to a harbor line.\textsuperscript{294} The two properties located in the former Great Salt Cove are the former "West Building" of the Union Station Complex, which was built between 1896 and 1898 and is now a three-story office building occupied by the Greater Providence Chamber of Commerce, and the former Providence Market House, constructed in 1773 and now utilized by the Rhode Island School of Design for classrooms and offices.\textsuperscript{295}

An approximately 8.31 acre parcel owned by Narragansett Electric Company, currently used to distribute electrical energy to downtown Providence, and an approximately 16.5 acre parcel owned by Providence Gas Company that currently consists of a facility that converts liquefied natural gas and distributes natural gas, both are located on land created by the placing of fill to a harbor line in the Providence River.\textsuperscript{296}

In its Brief, the State conceded that the 1870 Cove Lands Grant extinguished public trust rights in the Greater Providence Chamber of Commerce property and the Rhode Island School of Design property.\textsuperscript{297}

The State raised several primary arguments in their defense of the declaratory judgment action. First, the State argued that in \textit{Hall v. Nascimento} the court had made it clear that, notwithstanding the dicta of \textit{Allen v. Allen}\textsuperscript{298} and \textit{Engs v. Peckham},\textsuperscript{299} the state retained ownership of all filled tidal land, absent a deed from the state clearly conveying its public trust interest in tidal land.\textsuperscript{300} Secondly, and most importantly, the State asserted that the public trust rights can be extinguished \textit{only} by a valid legislative grant from the General

\textsuperscript{294} See Agreed Statement, \textit{supra} note 288, at 4, 8, 10-11.
\textsuperscript{295} See \textit{id.}
\textsuperscript{296} See \textit{id.} at 5-8, 11-14.
\textsuperscript{297} Brief of the State of Rhode Island at 3 n.2, 41, Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995)(No. 94-0153) [hereinafter State's Brief].
\textsuperscript{298} Allen v. Allen, 32 A. 166 (R.I. 1895).
\textsuperscript{299} Engs v. Peckham, 11 R.I. 210 (1875).
\textsuperscript{300} See State's Brief, \textit{supra} note 297, at 16-34.
Assembly clearly and unequivocally conveying public trust rights. Finally, the State argued that the Rhode Island Supreme Court's decision in *Jackvony v. Powell* established access along the shore as a public trust right, and that the public continues to have access across filled tidal lands.

The State also asserted, without citing authority, that plaintiffs Narragansett Electric Company and Providence Gas Company have a "license to exclusively occupy the premises (subject, of course, to existing regulatory schemes)," and that the public rights in the Narragansett Electric property and the Providence Gas property "are not self-executing, but must await affirmative legislative action in order to be exercised."

The Rhode Island Supreme Court held that a deed from the State of Rhode Island to the City of Providence in 1870, conveying all of the Cove Lands to the City, extinguished public trust rights in the Greater Providence Chamber of Commerce and Rhode Island School of Design properties located in the former Providence Cove Lands. As Justice Shea, writing for the court, stated:

> The question pertaining to these two Cove Lands parcels is whether the public-trust doctrine was extinguished in the Cove Lands by the state's express grant of those lands to the city of Providence in 1870. We hold that it was extinguished. The Cove Lands grant is an example of the principle that the public-trust doctrine can be extinguished by a valid legislative state grant. This court's decision in *City of Providence v. Comstock*, 27 R.I. 537, 65 A. 307 (1906), aptly...

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301 See id. at 37-40.
303 See State's Brief, supra note 297, at 10.
304 Id. at 75.
demonstrates why, in the instances of the Cove Lands parcels, an express legislative grant was appropriate.\textsuperscript{306}

The court went on to note that in \textit{City of Providence v. Comstock}\textsuperscript{307} no legislation had recognized any riparian or littoral rights in the owners of the land bordering on the original lines of the salt water, and that streets had been laid out around it for the express purpose of excluding such claims by cutting off access to the water.\textsuperscript{308} The court also noted that there was much special legislation pertaining specifically to the Cove Lands, unlike other filled land areas.\textsuperscript{309} The court then observed, "an express legislative grant was necessary and appropriate to convey an interest in the Cove Lands free of the public-trust doctrine."\textsuperscript{310} Accordingly, the Court's holding leads to the conclusion that all properties located in the former Providence Cove Lands are no longer subject to a claim of state ownership under the public trust doctrine.

With regard to the two harbor line parcels, the Providence Gas Company and Narragansett Electric Company properties, the Rhode Island Supreme Court demonstrated concern that its decision in \textit{Hall v. Nascimento}\textsuperscript{311} not be interpreted beyond its narrow scope.\textsuperscript{312} The court specifically affirmed its decision in \textit{Hall}: "This Court continues to support the opinion rendered in \textit{Hall}. It was correct at the time it was made and it is still appropriate."\textsuperscript{313} However, the court distinguished \textit{Hall} from the properties at issue in the Chamber of Commerce litigation:

\textsuperscript{306} \textit{Id.} at 1040.
\textsuperscript{307} \textit{City of Providence v. Comstock}, 27 R.I. 537 (1906).
\textsuperscript{308} \textit{See Greater Providence Chamber of Commerce}, 657 A.2d at 1040.
\textsuperscript{309} \textit{See id.}
\textsuperscript{310} \textit{Id.}
\textsuperscript{312} \textit{See Greater Providence Chamber of Commerce}, 657 A.2d at 1043.
\textsuperscript{313} \textit{Id.}
Let us state now, unequivocally, that Hall has no application to the situation of the Cove Lands in this case or to the gas company’s or the electric company’s properties landward of the Harbor Lines. Hall involved filling in an area with no harbor line and no legislative authorization. Although there was a permit from the Rhode Island Department of Public Works, Division of Harbors and Rivers, the actual filling was more than five times as extensive as that authorized by the permit.314

Noting that the Providence Gas Company parcel had been filled with express state approval, and the Narragansett Electric Company parcel had been filled with the state’s tacit or implied approval, and that both properties had been improved substantially, the court stated “these factors establish that the fee-simple absolute title rests in the title holders, the electric company and the gas company.”315 The court thus effectively reaffirmed dicta in Engs v. Peckham316 and Allen v. Allen317 that when land is created by the placing of fill to a harbor line, or the equivalent of a harbor line, and improved, the land becomes private property.318 However, the court was careful to note that its decision regarding parcels created by the placing of fill to a harbor line only affected title to the two harbor line properties at issue in the Chamber of Commerce litigation.319

In its decision, the court emphatically embraced the public trust doctrine, recognizing its firm establishment in the law. As the Court summarized:

314 Id.
315 Id. at 1043-44.
318 See Greater Providence Chamber of Commerce, 657 A.2d at 1044.
319 See id. at 1039.
The principle espoused by the English common-law public trust jurisprudence recognizes the unique resource that tidal waters constitute and the necessity that they be held by the sovereign in a trustee capacity for the use and benefit of all citizens. Thus these lands below the high-water mark will not be appropriated by, or conferred upon, private individuals for purely private benefit. It is this principle that forms the foundation of the public-trust doctrine in Rhode Island as well as in other states.\textsuperscript{320}

The court also noted that “Rhode Island decisional law and this court have never cast aside the public-trust doctrine.”\textsuperscript{321}

The court also recognized that \textit{Hall v. Nascimento}\textsuperscript{322} “does not hold that if there is no valid legislative state grant, public trust rights exist in land filled to a harbor line,” but rather that the “decision [i.e., \textit{Hall}] only acknowledges that the state may grant property free of the public-trust doctrine, but there was no evidence of such a grant in that [sic] record of that case.”\textsuperscript{323}

The court specifically recognized the dicta in \textit{Engs v. Peckham}\textsuperscript{324} and \textit{Allen v. Allen}\textsuperscript{325} that the filling to a harbor line “excluded” or “extinguished” the public trust rights in such property.\textsuperscript{326} The \textit{Chamber of Commerce} court then went on to state its understanding of the meaning of harbor lines:

\begin{itemize}
\item \textsuperscript{320} \textit{Id.} at 1042.
\item \textsuperscript{321} \textit{Id.}
\item \textsuperscript{322} \textit{Hall v. Nascimento}, 594 A.2d 874 (R.I. 1991).
\item \textsuperscript{323} \textit{Greater Providence Chamber of Commerce}, 657 A.2d at 1043.
\item \textsuperscript{324} \textit{Engs v. Peckham}, 11 R.I. 210 (1875).
\item \textsuperscript{325} \textit{Allen v. Allen}, 32 A. 166 (R.I. 1845)
\item \textsuperscript{326} See \textit{Greater Providence Chamber of Commerce}, 657 A.2d at 1044.
\end{itemize}
The harbor lines were drafted in cooperation between state and local authorities to establish the point beyond which fill, wharves, and other structures would create an obstruction to navigation, commerce and fishery. The opinions just referred to [i.e., Engs v. Peckham and Allen v. Allen] reflect the state of mind in those who created harbor lines, and they confirm our conclusion that the state is in error in arguing that only an express legislative grant can extinguish the public trust in filled land. The state is correct in its assertion that harbor lines establish boundaries up to which filling could occur. The harbor lines were a legislative determination, generally made in conjunction with the local government, that encroachment on the waters to the harbor line would not constitute interference with fishery, commerce, or navigation.327

The court also recognized the importance of resolving the issue for the thousands of filled tidal land properties throughout the state by establishing a test as to when the public trust doctrine has been extinguished in filled tidal land.328 The test applies not just to land filled to a harbor line but to land filled where no harbor line existed:

A littoral owner who fills along his or her shore line, whether to a harbor line or otherwise, with the acquiescence or the express or implied approval of the state and improves upon the land in justifiable reliance on the approval, would be able to establish title to that land that is free and clear . . . . Once the littoral owner acquires title to the land in this manner, the state cannot reacquire it on the strength of the

327 Id.
328 See id.
This holding is predicated upon non-interference with the public trust rights of fishery, commerce and navigation. The court specifically provided that under such circumstances the littoral owner "may pursue a course of action seeking to convey the deed to that property to himself or herself and become owner in fee simple absolute ... " Title insurers doing business in Rhode Island now are considering what information they will require to issue title insurance policies insuring that the filled tidal land at issue is free of any claim of state ownership pursuant to the public trust doctrine.

VII. CONCLUSION

Greater Providence Chamber of Commerce v. State is an important decision that should allow owners to remove the cloud over private title to the thousands of Rhode Island business, residences, and commercial establishments located on filled tidal lands, allowing them to be used, bought, sold, mortgaged, and insured without fear that the state could sometime in the future claim an ownership interest under the public trust doctrine.

The court's decision represents a careful balance of the public's rights under the public trust doctrine and private property rights. The court expressly reaffirmed the validity and the vitality of the public trust doctrine in Rhode Island, under which the state continues to hold all land below mean high tide for the benefit of the public for purposes of fishery, commerce and navigation. However, the court balanced this right with the rights of ownership of private property.

329 Id. (emphasis in original).
330 See id.
331 Id.
332 The author gained this information from interviewing lawyers and officials of local title insurance companies.
333 See Greater Providence Chamber of Commerce, 657 A.2d at 1041-44.
Many of the properties at issue have been held in private ownership for generations, if not hundreds of years, have been built upon and improved at private, not public expense, and have been subject to the assessment of property taxes.\(^{334}\)

By its decision, the Rhode Island Supreme Court recognized that the limits of state power need not extend beyond the boundary of legitimate private property rights to protect the public’s interest under the public trust doctrine. In doing so, the Rhode Island Supreme Court avoided the turmoil and trauma which has occurred in other states in recent years. In Massachusetts and Mississippi, state law was interpreted to vest title in filled tidal lands (Massachusetts) and tidal waters (Mississippi) in the state under the public trust doctrine rather than in the private owners who had occupied those properties under a claim of ownership for generations.\(^{335}\) In Massachusetts legislation was necessary to clear title to Boston’s Back Bay,\(^{336}\) and in Mississippi a special commission was established in the Secretary of State’s Office to lease back the lands at issue.\(^{337}\)

Rhode Island’s balancing of public trust rights with private property rights in filled tidal land is a model of how to reconcile these potentially conflicting interests.

\(^{334}\) See, e.g., Agreed Statement, supra note 288, at 5, 7; Greater Providence Chamber of Commerce, 657 A.2d at 1043-44.

