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I. INTRODUCTION

The area of intertidal zone commonly referred to as the "shore" is the only category of real property which has attributes of both public and private ownership. From the earliest days of the Colony of Rhode Island and Providence Plantations, the shore has maintained this unique legal status, with colonial and now state officials charged with balancing the rights of the public and private property owners. This article will trace the evolution of those rights and attempt to establish their current relevance and legal status.

In the colonial era, Rhode Island's leaders encouraged wharf construction to enhance the public purpose of promoting commerce in our early ports. Throughout the nineteenth century, riparian owners could, as a matter of right, fill tidelands to the harbor line.[1] The government's only concern was whether such activity would adversely affect the "navigational servitude." The navigational servitude is the paramount right of the federal government, under the commerce clause of the United States Constitution,[2] to compel the removal of any obstruction to navigation, without paying just compensation which the fifth amendment ordinarily requires.[3] It has long been established that, if Congress has not exercised its power over a particular navigable waterway, the state may regulate

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1. The owner of land contiguous to a navigable body of water acquires by virtue of that ownership certain rights, termed riparian rights, which principally include: the right of access to the navigable waters; the right to build piers, wharves, docks, and other improvements to the line of navigation; the right to reclaim land; and the right to accretions to the owner's lands. 2 A. SHALOWITZ, SHORE AND SEA BOUNDARIES 534 (1964).

2. The power of the United States over waters within its boundaries which are capable of use as interstate highways arises from the commerce clause of the Constitution. United States v. Appalachian Power Co., 311 U.S. 377, 404 (1940). The commerce clause provides, in pertinent part, that "[t]he Congress shall have power . . . to regulate commerce . . . among the several States." U.S. CONST. art. 1, § 8, cl. 3.

3. The fifth amendment to the United States Constitution provides that the government

navigation in that waterway. The navigational servitude has been the predominant factor limiting the historic riparian right to wharf out from Rhode Island's first Harborline Act in 1815 to contemporary state and local efforts in harbor management.[4] The explosive growth of recreational boating in Rhode Island's waters, particularly in shallow-draft vessels, has substantially increased the total water area actually affected by the navigational servitude.

In 1971, the Rhode Island General Assembly introduced a more significant factor limiting riparian interests in the shore, with the creation of the Coastal Resources Management Council (CRMC).[5] As the group charged with maintaining the state's public trust responsibilities, the CRMC examines each proposed shoreline alteration for its impact on the coastal environment, not just its impact on navigation. Many of the CRMC's decisions have been controversial, and debates over shoreline rights are frequently emotionally charged and highly publicized.[6]

The central thesis of this article is that, just as the variety and intensity of uses of the shore have grown over time, so too has our recognition of the public interest in the shore and adjacent waters. The traditional common law riparian rights to fill and wharf out recently have been eroded by actions of the General Assembly, the CRMC, and the 1986 Rhode Island Constitutional Convention. The only "right" clearly left for the riparian property owner is the right to apply for a permit, from both the state and federal governments, when seeking shoreline alterations such as wharfing out or filling behind a bulkhead. In all other respects, the common-law rights have evolved into privileges which public trustees at the state and federal level may or may not choose to grant, based on the impact which the proposed development would have on the public's use and enjoyment of the shore and adjacent waters. Of particular interest is the expansion of the navigational servitude to include recreational boats of all sizes.

II. Colonial Development of Shoreline Rights

One of the greatest misconceptions about coastal zone law is that it is relatively recent in origin. Although much of the growth in statutory law admittedly has occurred in the past twenty years, the basic concepts of coastal law date back to some of the earliest legal codes. The Insti-

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shall not take private property for public purposes without payment of just compensation. U.S. Const. amend. V.

4. To wharf out means to construct and maintain a wharf, dock, or pier from an owner's land to the navigable portion of adjoining waters. A. Shalowitz, *supra* note 1, at 535.

5. *See* R.I. Gen. Laws § 46-23-1 (1979) (CRMC enabling legislation).

6. Rubin & Nixon, *Shoreline Access in Rhode Island: A Case Study of Black Point*, 42 Me. L. Rev. 95, 100 (1990).

tutes of Justinian,[7] a compendium of early Roman law, contained one of the first references to public shoreline rights. Justinian stated that:

> [T]he public use of the sea-shore, as of the sea itself, is part of the law of nations . . . . But [the shores] cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.[8]

This philosophy of common ownership of submerged lands and shorelines became part of the common law of England, reinforced in the Magna Carta[9] and further strengthened after the publication of Sir Matthew Hale's treatise *De Jure Maris*[10] in 1670. Hale's work formed the basis for the common-law rule that the King held title to lands over which the tide ebbed and flowed in trust for the public for navigation and fishing uses.[11]

The Colony of Rhode Island and Providence Plantations initially adopted these principles, like many fundamental issues which the common law addressed. Founded by Roger Williams in 1636, the colony developed in a fragmentary manner, populated by groups of disaffected sectarians primarily from Massachusetts Bay and New Plymouth colonies.[12] Typically, a colony was first chartered by the King and then settled. Rather than following this procedure, Roger Williams went to London to seek recognition for the developing colony. In 1644, he returned with a rather brief "charter of civil incorporation" which created a colony named "Providence Plantations, in the Narragansett Bay in New England."[13] Upon restoration of the crown in 1646, King Charles II replaced it with a far more detailed royal charter.

The King Charles Charter (Charter) was best known for its remarkable dedication to freedom of religion, a key issue for many early Rhode Islanders who had been asked to leave other colonies because of their religious beliefs. It is, however, perhaps better known today, certainly among the state's commercial fishermen, for its explicit delineation of the rights of fishing and navigation. The Charter specified that:

> [O]ur Express Will and Pleasure is, and We do by these Presents for Us Our Heirs and Successors, ordain and Appoint, that these Presents shall not in any manner, hinder any of our Loving Subjects whatsoever

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7. INSTITUTES OF JUSTINIAN (J. Moyle trans. 5th ed. 1913).

8. *Id.* at 2:1:5.

9. W. SWINDLER, MAGNA CARTA 296 (1965).

10. M. HALE, DE JURE MARIS ET BRACHIORUM EJUSDEM (CONCERNING THE LAW OF THE SEA AND ITS ARMS) (1786), *reprinted in* S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 379 (1888).

11. J. KALO, COASTAL AND OCEAN LAW 73 (1990).

12. THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719 vii (J. Cushing ed. 1977) [hereinafter Cushing].

13. *Id.*

> from Using and Exercising the Trade of Fishing upon the Coast of *New England* in *America*; But that they, and every, or any of them shall have full and free power and liberty to Continue and Use the Trade of Fishing upon the said Coasts in any of the Seas thereunto Adjoining, or any Armes of the Seas, or Salt Water, Rivers and Creeks when they have been accustomed to Fish; and to Build and Set upon the Wast-Land belonging to the said Colony & Plantations, such Wharfs Stages and Work-Houses as shall be necessary for the Salting, Drying and Keeping of their Fish to be taken or gotten upon that Coast.[14]

The Charter also contained a restatement of those rights for whaling, and further noted that the colony would give "all due and fitting Encouragement" to any inhabitant "industrious in the Discovery of Fishing Banks in or about the said Colony."[15]

The Charter's explicit delineation of shore rights established three important principles which remain vital to this day. The first is the treatment of marine fisheries and whales as common property resources for anyone with the energy to catch them, a principle sharply distinguishable from the generally prevailing rule on land that game was the property of the landowner. The second principle clearly established the right of navigation from the "coasts . . . to rivers and creeks." The United States Supreme Court, in *Phillips Petroleum Co. v. Mississippi*,[16] recently reaffirmed this broad view of public ownership over navigable waters.

Finally, and most directly related to the thrust of this article, the Charter provided the first example of a public resource, coastal "waste lands," devoted to the water-dependent uses of wharves and fish processing to benefit the public by developing the resource. A continuing theme in the history of the American public trust doctrine is that the sovereign cannot wholly abandon tidelands for private gain. Development of specific tracts, however, is both necessary and appropriate where the resulting public benefit outweighs the loss of the tidelands. The Charter's phrase "waste land belonging to the said colony" clearly illustrates a claim of ownership coupled with the public desire to facilitate development of commercial fishing. These three principles embodied in the Charter collectively represent the historical basis for the public trust in Rhode Island.

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14. *Id.* at 132.

15. *Id.*

16. 484 U.S. 469 (1988). The issue in *Phillips Petroleum* was whether Mississippi's ownership of submerged lands extended only to those under navigable waters, or to those "washed by the ebb and flow of the tides." *Id.* at 472. By adopting the more expansive ebb and flow rule, the United States Supreme Court affirmed the right of the state to extend the public trust doctrine to an enormous network of tidally flushed non-navigable creeks, ditches, and wetlands. *See id.* at 490 (O'Connor, J., dissenting) (majority's holding broadens applicability of public trust doctrine).

The colony's early political system consisted of a collection of towns, distant by colonial standards, without a strong central government.[17] In 1651, the island towns of Portsmouth and Newport separated from the mainland and remained independent until 1654.[18] Thus, it is not surprising that, in 1707, the General Assembly delegated the colonial government's "public trusteeship" to the towns. The General Assembly granted each town full authority to:

> settle such coves, creeks, rivers, waters and banks bordering upon the respective townships, as they shall think fit for the promoting of their several towns and townships, by building houses, and warehouses, wharfs, laying out lots, or any other improvements . . . not prejudicing any particular person in their proper original grants or purchases upon any the aforesaid harbors, coves, & creeks . . . for the promoting of trade and navigation.[19]

The ability to fill tidelands and wharf out was critical for the development of Newport and Providence. Increasing ship traffic in the colony prompted greater demands for wharves and warehouses. Rather than spending tax dollars to develop public facilities, the towns willingly authorized riparian landowners to wharf out, thereby improving a harbor's marine facilities.[20] Determining title to those wharves today, after a long history of private investment, public use, and changing needs, has been a source of litigation and conflict.[21] The traditional form of local coastal management, with power vested in the towns to make coastal development decisions on public tidelands, is perhaps a precursor to the recent efforts to delegate harbor management responsibilities to local communities.

With independence, statehood, and ratification of the United States Constitution, the General Assembly slowly began to assert its authority over state waters and the adjacent tidelands which had not yet become wharves, warehouses, or building lots. Several pressures caused the state government to intervene. The filling of tidelands proceeded rapidly, particularly in Providence, and to a lesser extent in Newport. Land creation became the objective, and the ties to fishing and shipping began to fade. It also became apparent that, without any regulation at the state level, harbors would simply disappear as riparian owners continued their re-

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17. Cushing, *supra* note 12, at vii.

18. Cushing, *supra* note 12, at vii.

19. RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 24 (J. Bartlett ed. 1859).

20. Joseph Angell stated it best in his landmark treatise when he wrote "without wharves, a commercial town could never exist." J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND THE SOIL AND SHORES THEREOF 130 (1826).

21. Nixon, *Harborlines, Underwater Lots, and Coastal Development*, 33 R.I. B.J. 8 (Oct. 1984).

lentless march seaward. The right to freely navigate, protected by the navigational servitude, would be lost forever.

III. Harborlines and Coastal Development

During the nineteenth century, most coastal states, including Rhode Island, responded to these pressures by creating the "harborline." The harborline was the proverbial line in the sand beyond which coastal development could not take place.[22] It was the state's effort to preserve navigable waters for commerce, defining which waters should be protected for navigational use and which could be filled by riparian landowners. Harborlines were simple, relatively easy to establish and enforce, and at least initially effective in accomplishing their mission.

Contemporary coastal management virtually abandoned harborlines because, over time, filling out to the harborline even for a non-water-dependent use became a matter of right for the riparian landowner. Wholesale bulkheading and filling of tidelands had an enormous impact on coastal ecology. The state simply did not recognize the productive value of coastal wetlands until quite recently. It is ironic that the filling of tidelands, first endorsed in the Charter for fish houses and wharves, may have ultimately eliminated so much of the bay's reproductive capacity that the practice substantially devalued the fundamental right of fishing. In 1988, Rhode Island fishermen landed 106 million pounds of fish and shellfish.[23] They used powerful vessels, primarily offshore up to 200 miles and as far east as Georges Bank off Cape Cod. In 1889, by contrast, Rhode Island fishermen landed 128 million pounds of fish and shellfish, all from Narragansett Bay and Rhode Island Sound, using fish traps and sailboats.[24] Coastal pollution and overfishing admittedly contribute to the decline in the inshore catch. The loss of productive nursery areas, however, is a significant impediment to eventual recovery.

The abandonment of harborlines in favor of a more integrated coastal management process is discussed later in Section IV of this article. For better or worse, harborlines represented the boundary between public and private rights to the shore from 1815 until 1970. State and federal statutes which were enacted during the period and interpreted by the

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22. The Rhode Island Supreme Court has enunciated that:

> [t]he establishment of a harborline . . . means that riparian proprietors within the line are at liberty to fill and extend their land out to the line. A harbor line . . . marks the boundary of a certain part of the public waters which is reserved for a harbor. The rest is to be left to be filled and occupied by the riparian proprietors.

Engs v. Peckham, 11 R.I. 210, 224 (1875).

23. *See* National Marine Fisheries Service, Fisheries of the United States 1988 4 (1989) (chart on U.S. Commercial Landings).

24. *Id.*

Rhode Island and United States Supreme Courts set the stage for the modern era of shore rights in Rhode Island.

In July and August of 1815, the town of Providence established a harborline below Weybosset Bridge.[25] Since the town's only right to proceed derived from the colonial ordinance of 1707, the town's leaders recognized the need to have their act sanctioned by the new holders of the public trust, the General Assembly.[26] They sought and received approval of the state's first harborline in 1816.[27] The law purported to serve the dual civic purposes of promoting development and preserving enough of the harbor waters to allow navigation by commercial vessels.[28] Rhode Island maintained the traditional common law rights of the shore. Angell, the leading authority of the era, noted that:

> [I]n this State, there has never been any adjudication, establishing any new or important principle at variance with the common law. The general understanding has, however, been that the proprietors of land bounded on the tide waters, may embank the same, and hold and occupy such embankments, as a part and parcel of their conterminous upland *if no detriment to the navigation*.[29]

The highlight was added by Angell in 1826. It clearly indicates the importance of the navigational servitude even in the early years of the state's development. Although the General Assembly assumed the right to pass harborline acts and to allow the filling of tidelands upon independence (such right passing from the crown to the new political leadership of the state), federal law did not firmly establish the state's right to draw harborlines until a series of United States Supreme Court cases addressed the issue. In *Martin v. Lessee of Waddell*,[30] the Court held that:

> when the revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.[31]

Martin clearly established that title to the submerged lands in a state's coastal waters rested with the state, subject to the navigational servitude

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25. W. STAPLES, COVE LANDS 16 (1869).

26. *See generally* Armour & Co. v. City of Newport, 43 R.I. 211, 213, 110 A. 645, 646 (1920).

27. W. STAPLES, *supra* note 25, at 16.

28. W. STAPLES, *supra* note 25, at 15-16.

29. J. ANGELL, *supra* note 20, at 116. The Rhode Island Supreme Court has referred to Angell's treatise as "a work which embodied the results of accurate research and discriminating judgment, and which must be considered good authority as to the law of Rhode Island from the earliest times." Carr v. Carpenter, 22 R.I. 528, 531-32, 48 A. 805, 806 (1901).

30. 41 U.S. (16 Pet.) 367 (1842).

31. *Id.* at 410.

which the commerce clause of the federal Constitution imposes. The Court, however, did not give the states any guidance regarding the character of that ownership. The Court focused on that issue in *Illinois Central Railroad Company v. Illinois*,[32] the landmark case decided in 1892. *Illinois Central* is considered the foundation of the public trust doctrine in United States law, and consequently is one of the most widely discussed and heavily cited cases in property law.[33]

Illinois Central involved a grant by the Illinois legislature to the railroad of virtually all of the submerged lands of Chicago's waterfront. Several years later, a newly elected legislature revoked the grant and the railroad brought suit. The Supreme Court upheld the revocation because the state, although capable of granting parcels of submerged lands for building wharves and docks in furtherance of the public interest in navigation and commerce, may not alienate the submerged lands of an entire harbor. The Court found that the state's ownership of submerged lands "is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[34] The Court held that the legislature's grant was an abdication, "[in]consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."[35]

The Court considered the issue of state alienation of trust lands again in 1926, in *Appleby v. City of New York*.[36] In *Appleby*, New York City, with approval of the state legislature, sold submerged lands under the Hudson River to private parties to be filled for development and wharf construction. This time, the Court found the grant valid because the state clearly considered the public interest when making the grant. Although restating its skepticism toward legislative grants of trust lands, the Court held that the sovereign can convey trust property when public benefits associated with private ownership are significant. At least one commentator saw the *Appleby* decision as a "retreat" from *Illinois Central*.[37] The cases, however, are consistent because a state must thoroughly analyze the public interest before making any grant of submerged lands.

Rhode Island's colonial charter contained a strong statement of the public trust doctrine, with specific claims for freedom of navigation, com-

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32. 146 U.S. 387 (1892).

33. *See generally* Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970).

34. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. at 452.

35. *Id.* at 453.

36. 271 U.S. 364 (1926).

37. R. HILDRETH & R. JOHNSON, OCEAN AND COASTAL LAW 83 n.6 (1983).

mon fisheries, and public ownership of tidelands. The charter remained Rhode Island's "unofficial" constitution until ratification of the state constitution in 1843. Article I, section 17 of the Rhode Island Constitution reiterated that "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state . . . ."[38] The widespread use of harborlines, however, substantially impeded the full use of those "privileges of the shore" because, although designed to prevent encroachment on navigable waters, it really encouraged filling and development out to those lines.

An illustration is *Engs v. Peckham*,[39] a leading case in Rhode Island harborline law, which involved a dispute in Newport Harbor in 1875. Engs and Peckham owned adjacent wharves in Newport. Peckham also owned the land adjacent to the open water area between the two wharves. In 1873, the General Assembly approved a Harborline Act for Newport. Peckham thereafter began filling the water between the wharves out to the new harborline, which would have eliminated half of Engs' wharf capacity. The Supreme Court of Rhode Island found that Peckham could fill out to the harborline, despite the fact that Engs' wharf had served the interests of commerce and navigation since the colonial era, and without finding that Peckham's act would better serve the public interest than the continued use of Engs' wharf. The court stated that the establishment of a harborline "is equivalent to the legislative declaration that navigation will not be straitened or obstructed by any such filling out . . . . We hold that the establishment of a harborline operates as a license or invitation to the riparian proprietor to fill or wharf out to that line."[40]

Since the court found the drawing of a harborline equivalent to a "legislative declaration" of the public trust, the question of whether this case passes the Supreme Court's standards enunciated in *Illinois Central* and *Appleby* is raised. The facts of *Peckham*, and many other harborlines cases, seem to fall squarely between the two Supreme Court decisions. Like *Illinois Central*, the state made a large grant of submerged lands in a harbor. The state, however, allocated the land among all the riparian proprietors, not a single party. Like *Appleby*, the grant served the public purpose of promoting navigation within the harbor. The riparian proprietors who benefited from this license to fill, however, did not have to compensate the state in any way.

One could argue that the General Assembly's use of harborlines was

38. R.I. CONST. art. 1, § 17.
39. 11 R.I. 210 (1875).
40. *Id.* at 224.

an example of painting with too broad a brush. The method was indeed simple and did protect navigable waters necessary for commerce from encroachment. Harborlines, however, did not allow for the parcel-by-parcel analysis of whether each act of filling would serve the public interest. The widespread use of harborlines may be an impermissible legislative "short cut" of a state's public trust responsibilities. The necessity of performing that level of detailed analysis was certainly a key factor in the later delegation of authority by the Congress to the Army Corps of Engineers, and by the Rhode Island General Assembly to the CRMC.

Recognizing the federal interests involved in establishing harborlines, Congress passed the Rivers and Harbors Act of 1899,[41] which authorized the Secretary of the Army to establish harborlines where necessary to preserve and protect harbors. With federal lines now drawn over state lines, the stage was set for a conflict between federal and state governments. In *Philadelphia Co. v. Stimson*,[42] the Supreme Court answered the call to resolve a dispute between the Commonwealth of Pennsylvania and the Secretary of War over the location of harborlines drawn around an island in the Ohio River near Pittsburgh. The Court held that Pennsylvania's establishment of harborlines, however effective as between the state and riparian owners, was necessarily subject to the paramount power of Congress. The Court found that the Secretary of War's action was not a taking under the fifth amendment, since title to submerged soil is always subject to the federal navigational servitude. The Secretary, therefore, could establish harborlines and later change them in order to more fully protect the rivers from obstruction. By the time of this decision in 1911, it was quite clear that state legislatures crafting harborlines, in many instances, were more interested in coastal real estate development than in protecting public navigational interests.

IV. The Modern Era — From Harbor Lines to Harbor Management

In light of the broad acceptance integrated coastal management has achieved over the past twenty years, it is remarkable that filling out to harborlines or wharfing out to a navigable channel was largely unregulated and simply considered a riparian right until 1970. It is safe to say that the law has evolved more rapidly in this field over the past twenty years than it had in the previous two hundred. At both state and federal levels, there have been significant clarifications and restatements of the public trust doctrine, with the public interest now very broadly defined. Increasing levels of public resources are now devoted to the role of

41. Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 404 (1988).
42. 223 U.S. 605 (1912).

trustee. New concepts such as harbor management have been developed, and old doctrines like the navigational servitude have been redefined to meet contemporary needs.

The year 1970 was a watershed year for the environment in the United States. The popular environmental movement, symbolized by Earth Day, galvanized public opinion and created a window of opportunity to substantially revise and upgrade the nation's environmental laws. Congress enacted much of the federal statutory environmental law during the 1970-72 period. One of the most significant developments in coastal law occurred when the Army Corps of Engineers, long-maligned for their perceived lack of environmental sensitivity in coastal areas, announced a dramatic change in policy in their enforcement of the Rivers and Harbors Act of 1899.[43] The Corps recognized that, under previous policies, riparian owners could construct open pile structures or solid fill construction shoreward of established harborlines without obtaining a Corps permit. It found that this could result in construction without appropriate consideration of the impact such work might have on the environment and without a judgment on whether the work was in the public interest. The Corps, in order to protect public interest, declared all existing and future harborlines guidelines for defining the offshore limits of piers of wharves.[44] Congress further clarified the concept of "public interest review" by adopting additional rules in 1982. In particular, the rules required that any decision on a federal permit must be consistent with the approved coastal zone management program of the state in question.[45]

Rhode Island began its own efforts in coastal management in 1971, a year before the enactment of federal coastal management legislation. The General Assembly created the CRMC to preserve and protect the state's shore and to act as its public trustee.[46] The act creating the CRMC addressed a wide range of planning and regulatory functions. Specifically, it gave CRMC the power to: grant licenses, permits, and easements for the use of coastal resources which are held in trust by the state for all its citizens, and impose fees for private use of the resources; determine the need for and establish pierhead, bulkhead, and harborlines; and enforce and implement riparian rights in the tidal waters after judicial decisions.[47] Through this act, the CRMC clearly assumed the

43. Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1988). The change was announced on May 26, 1970, as amendments to the rules regulating dredge and fill activities in navigable waters.

44. 33 C.F.R. § 209.120(d) (1970).

45. 33 C.F.R. § 320.4(0) (1982).

46. R.I. GEN. LAWS § 46-23-1 (1979).

47. The language in section 46-23-6(C)(5) is new. The General Assembly added the new language during the 1990 creation of the Department of the Environment. The original sec-

role of public trustee for the state's coastal resources. Subsequent judicial decisions upheld the law as a permissible delegation of legislative authority,[48] and permitted the CRMC to single out coastal areas for specific regulation.[49]

The federal Coastal Zone Management Act of 1972[50] gave critical support to the state effort, providing both planning and management funds to get the program underway. The Act continues to assist in the operational costs through a grant program. The federal act also altered a key factor in the state-federal relationship with a concept known as "consistency," which requires the federal government, upon approving a state program, to remain consistent with that program in all of its subsequent dealings with the state.[51] Any permit issued under federal law by the Corps, for example, must now be consistent with the state program. The provision, heralded as an example of "new federalism" when enacted, was substantially strengthened in the Coastal Zone Management Reauthorization Act of 1990[52] after being weakened by *Secretary of Interior v. California*,[53] which the Supreme Court decided in 1984. In a sense, Congress simply returned to the basic premise of the *Martin* opinion that "the people of each state . . . hold the absolute right to all their navigable waters and the soils under them for their own common use . . . ."[54]

As a practical matter, the state program focuses on the day-to-day management issues, while the federal program's primary concern is with broader policy issues and compliance with grant conditions. The CRMC has regulatory authority over land areas up to 200 feet from the coastal physiographic feature,[55] or to the point necessary to carry out effective

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tion read "Investigating complaints alleging violations of state laws or riparian rights in the state's tidal waters." The change was made to both strengthen the CRMC's enforcement powers and to make it clear that the proper forum for deciding boundary issues in riparian rights cases is the superior court.

48. *See* Milardo v. Coastal Resources Mgmt. Council, 434 A.2d 266, 269 (R.I. 1981).

49. *See* Santini v. Lyons, 448 A.2d 124, 127-28 (R.I. 1982).

50. 16 U.S.C. § 1451 (1988).

51. Section 307(c)(1) of the Coastal Zone Management Act provides that "[e]ach federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1) (1988).

52. Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508, § 6201, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 763.

53. 464 U.S. 312 (1984). In that case, the Court held that the Secretary of Interior's sale of outer continental shelf oil and gas leases was not an activity "directly affecting" the coastal zone within the meaning of the statute. *Id.* at 342.

54. Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410 (1848).

55. The General Assembly added the phrase "200 feet from the coastal physiographic feature" in the 1990 reenactment, presumably to answer the charge that this section was too vague to withstand judicial scrutiny as originally drafted. *See* R.I. GEN. LAWS § 46-23-

resource management programs. The definition of "shore" for purposes of determining the constitutional privileges of the shore, however, remained unclear until the Rhode Island Supreme Court addressed the issue in 1982. In *State v. Ibbison*,[56] the court found that a long line of cases consistently recognized that the shore lies between high and low water, but that none of those cases defined how the high water mark was to be calculated. A group of recreational fishermen on a beach cleanup in Westerly raised the issue when they insisted on their right to pass along the shore up to the high-water mark, known as the "wash" line where seaweed marks the highest recent tide. A waterfront property owner insisted that the boundary was seaward at the mean high-water mark, and had the fishermen arrested on the charge of criminal trespass.

The court upheld the dismissal of the criminal charges on due process grounds because, given the ambiguity of the meaning of the term shore, the fishermen could not be held criminally responsible for conduct that "[they] could not reasonably understand to be proscribed."[57] The court cautioned that a municipality, before attempting to impose criminal trespass charges for walking along waterfront property, must prove beyond a reasonable doubt that the defendant knew the location of the boundary line and intentionally trespassed across it. The court then agreed with the property owner that a correct reading of state and federal law puts the landward boundary of the shore at mean high-water, which the United States Coast and Geodetic Survey defines as the average height of all the high waters over the astronomical cycle of 18.6 years.[58] The court recognized that the principal flaw with this reading is that the mean-high water mark "is not readily identifiable by the casual observer,"[59] although it represents the point that can be determined with the greatest scientific certainty.

Shortly thereafter, the state convened a constitutional convention. Two items of discussion were the definition of the "privileges of the shore" found in the state constitution, and whether a constitutional amendment could overturn *Ibbison*'s definition of the boundaries of the shore. The convention delegates defined the privileges of the shore as those that Rhode Island courts historically had accepted, such as fishing from the shore, gathering seaweed, leaving from the shore to swim in the

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6(B)(3) (1990 Supp.) (authorizing CRMC to regulate areas above mean high water mark limited from coastal physiographic feature).

56. 448 A.2d 728 (R.I. 1982).

57. *Id.* at 733.

58. *Id.* at 732 (citing Borax Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10, 26-27 (1935)).

59. *Id.*

sea, and passing along the shore.[60] More problematic was the issue of expanding the definition of the shore. Popular sentiment sought to move the landward boundary shoreward, such as to the "vegetation line," "extreme high water mark," "dry sands," or "one rod landward of mean high water."[61] After substantial debate and research, the delegates decided not to increase the geographic scope of the shore because of the likelihood that a court would find such an action a taking without just compensation.[62] Groups representing builders, realtors, and developers lobbied against the amendment, which left the term shore undefined but listed the four privileges. The amendment ultimately won approval by the voters, receiving the highest plurality of any of the fourteen constitutional amendments on the ballot.[63]

Several recent cases are noteworthy in the discussion of Rhode Island contemporary shore rights. In *Northeastern Corporation v. Zoning Board of Review*,[64] a developer of a hotel-marina complex did not have the minimum square footage of land to allow his project to proceed. He argued that, as a riparian property owner, he was entitled to land beneath Trim's Pond as part of his overall square footage to meet the zoning requirement. The Supreme Court of Rhode Island summarily dismissed that imaginative claim, noting that the developer's "underwater approach overlooks the well established principle that in this jurisdiction the line of demarcation that separates the property interests of the waterfront owners from the remaining populace of this state is the mean high tide line."[65]

A recent superior court decision utilized the public trust doctrine in its reasoning. In *Massasoit Historical Association v. Coastal Resources Management Council*,[66] the plaintiff sought to invalidate a CRMC permit granted to the Wharf Tavern to build a deck over the Warren River. The plaintiff argued that the public trust doctrine prohibited locating the deck over the river because "some property rights in certain lands can never be alienated from the general public."[67] The court, however, correctly rejected that absolutist approach and applied the balancing test endorsed in the *Illinois Central* and *Appleby* line of decisions. The Court found

60. *See* Jackvony v. Powell, 67 R.I. 218, 223, 21 A.2d 554, 556 (1941) (describing common law rights of public access to shore).

61. COMMITTEE ON THE EXECUTIVE BRANCH AND INDEPENDENT AGENCIES, COMMITTEE REPORT ON CONVENTION RESOLUTION 86-00003, 1986 RHODE ISLAND CONSTITUTIONAL CONVENTION 4.

62. *Id.*

63. *See Election 86*, The Providence Journal, Nov. 5, 1986, at 1, col. 1 (chart listing 1986 election results).

64. 534 A.2d 603 (R.I. 1987).

65. *Id.* at 606.

66. No. PC 86-0706 (R.I. Sup. Ct. Feb. 13, 1987).

67. *Id.* at 6.

that the deck was only .1 acre in size, would not affect water quality, and could be removed if it later became a hazard to navigation. More importantly, the court found that CRMC's condition that the deck be permanently posted as available for use by the general public was a significant benefit, and thus a permissible trade-off for the private use of public submerged lands. Remarkably, the court cited the 1960 case of *Nugent v. Vallone*[68] for the proposition that wharfing out is a common law right, but did not mention the substantial number of statutes, regulations, and cases which have limited that right to the point that it is more properly considered a privilege.

Finally, the Supreme Court's 1988 *Phillips Petroleum* decision,[69] which expanded the scope of the public trust doctrine, may have important implications for Rhode Island. The *Phillips Petroleum* Court held that the public trust doctrine extends to all the tidal waters of the states, regardless of their navigability. In rejecting navigability as the standard for applying the public trust doctrine, the Supreme Court noted a wide variety of public trust interests, such as bathing, swimming, recreation, and mineral development, all of which extend beyond the traditional common law rights of navigation, commerce, and fishing. The decision appears to give states substantial flexibility in the definition and scope of their public trust authority.

Harbor management has created the most recent controversy over shore rights. Harbor management represents an extension of coastal management in two distinct ways. First, just as problems ashore created the need for coastal management, so too have problems increased in Rhode Island's harbors. Overcrowding, multiple-use conflicts, and pollution have created problems which traditional, informal management systems cannot solve. Second, just as coastal management represents a certain transferral of power from the federal to the state governments, so too is harbor management a transferral of authority from the state to the local governments. In both cases, a program must satisfy federal or state standards before approval and operation. The disadvantage to communities is that programs cost money, and typically require financing through new mooring fees. The advantage is that the communities, for the first time, have the legal ability to exert some measure of control over their adjacent coastal waters.

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68. 91 R.I. 145, 161 A.2d 802 (1960). The *Nugent* case is the last in a long line of Rhode Island cases which held that the only restriction on a riparian owner's right to wharf out was its potential effect on navigation. The public trustee of that era was the Department of Public Works. The creation of the CRMC in 1971 transferred the trustee role to the new agency which substantially expanded the scope of review to include a wide range of environmental factors in addition to the navigational servitude.

69. *See supra* note 16 (discussing *Phillips Petroleum* decision).

Another problem area has been the relationship between harbor management and the traditional view of riparian rights. Riparian property owners within a harbor area have argued that they are burdened with still another set of regulations. Some mooring ordinances provide preferences for riparian owners while others do not. Furthermore, it is unclear what kind of riparian ownership qualifies if the ordinance does provide a preference. Surely the owner who lives on his property qualifies, but the qualification of the part-owner of a strip of beach owned in common with fifty other families remains questionable.

One impact of the heavy development of harbor and mooring areas is the progressive loss of the traditional riparian right to wharf out by individual homeowners. The cause of the loss is not harbor management or coastal management, but the existing limitation of the navigational servitude. An individual's right to wharf out has always been subject to the public's right to navigate, which historically meant commercial vessels seeking access to a channel and then distant waters. Wharfing out to enhance that purpose accommodated a public need. Today, however, the nation's commercial shipping is conducted by larger but fewer ships operating from larger but fewer ports.

In most coastal areas, the predominant user of the navigational servitude is the recreational boater. Since the bulk of recreational boating is done in small boats of little draft, every proposal for an individual pier or dock in an area used by recreational boats represents a significant loss of navigational area. If Rhode Island accepts the modern view that "navigation for pleasure and recreation is as important in the eyes of the law as navigation for a commercial purpose,"[70] and also accepts *Phillip's Petroleum*'s expanded geographic scope of the public trust doctrine, CRMC will have difficulty justifying the grant of a permit for an individual homeowner's pier or dock, particularly if a mooring, a far less intrusive option, would satisfy the applicant's needs.

V. CONCLUSION

Rhode Island has a long and detailed history of shore rights befitting its moniker of the "Ocean State." From colonial times to the present, a common theme exists that the shore is a special place, both in spirit and law. The challenge that faces any legal doctrine is the ability to grow and evolve with the times. Principles used to promote commerce and navigation, such as the right to wharf out, must be reexamined in light of the

70. *See* Mentor Harbor Yacht Club v. Mentor Harbor Lagoons, 170 Ohio St. 193, 200, 163 N.E.2d 573, 578 (1959). The *Mentor Harbor* court rejected the commercial usage test of navigability, finding that it failed to take into account the tremendous increase in use of waterways by the public. The court also noted that the capacity of a watercourse for recreational boating was a factor which should be considered in any analysis of navigability.

contemporary use of our coastal waters. So much has happened in the past twenty years of coastal zone law and management that we must realistically expect developments to occur at an accelerating pace for years to come. As more and more people move close to the shore, their desire to share in our coastal resources will continue to drive the evolution of shoreline rights law in Rhode Island and other coastal states. The challenge for the state as public trustee is to balance the evolving needs of the public in the context of the historical relationship of public and private shoreline rights.