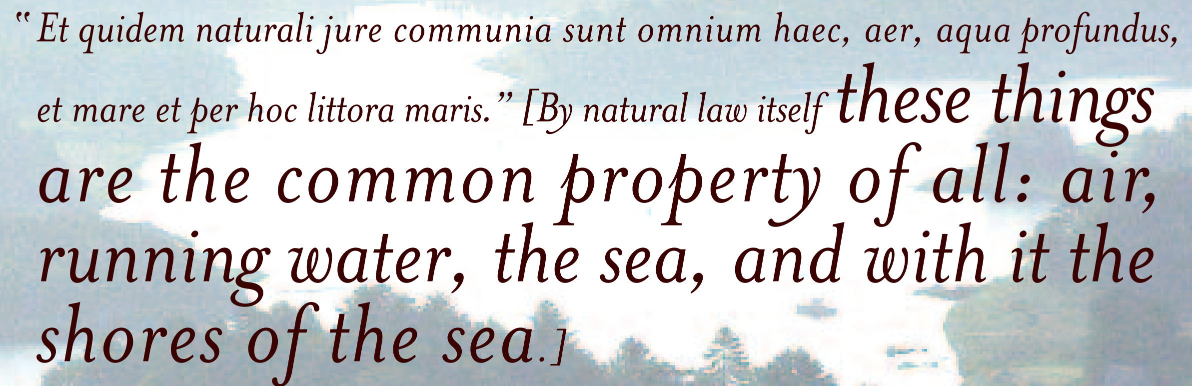

"Et quidem naturali jure communia sunt omnium haec, aer, aqua profundus, et mare et per hoc littora maris." [By natural law itself ***these things are the common property of all: air, running water, the sea, and with it the shores of the sea****.]*

–Institutes of Justinian, Book II, c.1, s.1 (circa 530 AD)

"…the state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties…than it can abdicate it[s] police powers in the administration of government and the preservation of peace."

–United States Supreme Court
Illinois Central Railroad v. Illinois (1892)

Photo: Stephen Gersh

The Public Trust Doctrine In Massacusetts Coastal Law

By Dennis Ducsik, CZM

No place on Earth is so supremely public as the open ocean. Where else can it be said that the overall well-being of society has never been subordinated to that of any individual or special interest group? The sea is a commons, as open to everyone as any town square in New England, and it is fortunate that we have at our disposal a powerful tool to keep it so—the Public Trust Doctrine.

Grounded in Greek philosophy, as ancient as western civilization itself, this doctrine originated in the second century writings of a Roman jurist whose pronouncements were later codified into Roman civil law by the Emperor Justinian. [See quote, left.] In turn, Roman civil law influenced the jurisprudence of England after the Magna Carta, when the courts embraced the notion that while the Crown had general power of ownership over the realm, any lands under the ocean lying seaward of the high tide mark were an exception. Such lands—we call them "tidelands" in Massachusetts—were declared to be held in trust for the common benefit of the public, for commerce, fishing, and other activities in which all citizens were free to engage. As a fixture of English "common law" (i.e., judge-made), the doctrine was brought to the American colonies and ultimately inherited by every coastal state as it came into the Union.

Today, the 1900-year-old concept of sovereign ownership of tidelands subject to a public trust is still among the most important and far-reaching doctrines in American property law, for two reasons. First, by virtue of holding public property rights out to the 3-mile limit of the U.S. territorial sea, each coastal state has far greater latitude in protecting societal interests than is generally the case on land, where most property is owned privately and government regulation must operate within the constitutional limits of the so-called "police power." Second, American courts for more than three centuries have reiterated that the trust, as the word implies, is so solemn an obligation of government that it cannot be extinguished, even though title to the lands in question might be conveyed to private parties in certain circumstances. [See quote, left.]

Here in seafaring Massachusetts, the Public Trust Doctrine has had a profound influence on our law of the sea and shore. From the Great Colony Ordinance of 1641-47, to General Law Chapter 91 of 1866, to the Ocean Sanctuaries Act of 1970, to the Public Waterfront Act (amending Chapter 91) in 1983, and most recently to the Oceans Act of 2008, our Legislature has always been in the forefront nationally by enacting progressive legislation on behalf of trust-protected rights. The same holds true for the Massachusetts Supreme Judicial Court, which has issued a long series of landmark decisions reaffirming the solemnity of the trust, from *Commonwealth v. Alger* (1851) to *Boston Waterfront Development Corp. v. Commonwealth* (1979) to *Moot v. DEP* (2007), with scores of other important rulings in between.

Imagine Justinian's satisfaction, had he had even an inkling of how his words would survive through the ages, and especially so here in the Commonwealth of Massachusetts!