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Robin Kundis Craig

Articles

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ABSTRACT

Public trust doctrine literature to date has displayed two distinct tendencies, both of which limit comprehensive discussion of the American public trust doctrines. At one end of the spectrum, articles focus on broader legal principles and tend to discuss the public trust doctrine, as if only a single public trust doctrine pervades the United States. At the other end, articles focus on how one particular state implements its public trust doctrine. Few articles have grappled with the richness and complexity of public trust philosophies that more comparative approaches to the nation's public trust doctrines—emphasis

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* Attorneys' Title Insurance Fund Professor of Law, Florida State University College of Law, Tallahassee, FL. I originally presented portions of this paper at the 15th Annual Fall Meeting of the ABA Section on Environment, Energy, and Resources, held September 26-29, 2007, in Pittsburgh, Pennsylvania. My grateful thanks to my indefatigable research assistant, Alyssa Lathrop, who pulled together much of the basic information about each state's public trust doctrine. I would also like to thank my colleagues Donna Christie, Dave Markell, and J.B. Ruhl for their suggestions and comments. Additional comments may be sent to me at rcraig@law.fsu.edu.

on the plural—reveal.

This Article seeks to begin to restore that sense of comparative complexity to the discussion of public trust principles. It focuses on the public trust doctrines of thirty-one eastern states—all of the states east of the Mississippi River, plus the five states bordering the western bank of the Mississippi River—Minnesota, Iowa, Missouri, Arkansas, and Louisiana.

These eastern states provide a particularly rich subset of states for public trust discussion purposes. At its most basic, a state's public trust doctrine outlines public and private rights in water and submerged lands by delineating five definitional components of those rights: (1) the submerged lands subject to state/public ownership; (2) the line or lines dividing private from public title in those submerged lands; (3) the waters subject to public use rights; (4) the line or lines in those waters that mark the limit of public use rights; and (5) the public uses that the doctrine will protect in the waters where the public has use rights. The history of the eastern states' public trust doctrines has led to variations in how the states define and assemble these five components. In particular, public trust use rights in the East intrude—and for practical purposes always have intruded—upon privately owned riparian and littoral property far more often than in the later-settled West.

This Article includes an Appendix with state-by-state summaries of the public trust doctrines of each of the 31 eastern states examined.

Introduction

Since Professor Joseph Sax published his landmark article in 1970 arguing for revitalization of the public trust doctrine,[1] commentators have explored the potential implications of the "public trust" concept for natural resources, environmental, and property law.[2] However, there are two distinct, opposing, and limiting tendencies in this literature. The first is a tendency to generalize all public trust law into a single doctrine. The second and opposite tendency is to view each state's public trust doctrine

1. Joseph L. Sax, *The Public Trust Doctrine in National Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

2. *See* Marc R. Poirer, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SOUTHEASTERN. ENVTL. L.J. 71 (Fall 2006); J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223 (Fall 2006); Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322 (2006); Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421 (2005).

as unique.

Thus, at one end of the spectrum, commentators who focus on broader legal principles tend to discuss *the* public trust doctrine, as if a single public trust doctrine governs throughout the United States.[3] Even when such writers acknowledge differences in the state-law public trust doctrines, they tend to treat those differences as variations on a single theme and hence reduce the 50-state complexity of public trust law to sweeping pan-country generalizations.[4]

Conversely, other writers focus on how a particular state implements its particular public trust doctrine. Such articles tend either to intensely explore particular issues of state public trust law[5] or to provide summaries of a particular state's public trust doctrine.[6]

Both approaches contribute greatly to the ongoing debates regarding the "proper" role of public trust concepts in law. However, they also submerge the richness and complexity of public trust philosophies that more comparative approaches to the nation's public trust doctrines—emphasis on the plural—can reveal. Which states are most likely to expand their public trust doctrines to environmental and natural resources mandates, at the expense of (perceived) private property rights? Which states are most likely to limit their state public trust doctrine to the minimum public protections dictated by federal law? These questions are difficult to answer absent a comparative awareness of what the individual states actually do.

This Article seeks to begin to restore that sense of comparative complexity to the discussion of public trust principles. It focuses on the

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3. *See, e.g.*, Sax, *supra* note 1, at 471; Barton H. Thomson, *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47 (2006); *and* George D. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307 (2006).

4. *See, e.g.*, Ruhl & Salzman, *supra* note 2, at 228 (concluding that "the chief impact of the public trust doctrine is facilitating public access to and use of tidelands and beaches.").

5. *See, e.g.*, Carl Shadi Paganelli, *Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan*, 58 HASTINGS L.J. 1095 (2007) (exploring a recent Michigan public access case); Michael Seth Benn, *Toward Environmental Entrepreneurship: Restoring the Public Trust Doctrine in New York*, 155 U. PA. L. REV. 203 (2006) (discussing New York's application of its public trust doctrine to public parks); Stephanie Reckord, *Limiting the Expansion of the Public Trust Doctrine in New Jersey: A Way to Protect and Preserve the Rights of Private Ownership*, 36 SETON HALL L. REV. 249 (2005) (criticizing the New Jersey Supreme Court's expansion of public trust rights to the dry sand areas of beaches).

6. *See, e.g.*, Kenneth R. Moss, *The Public Trust Doctrine in South Carolina*, 7 S.C. ENVTL. L.J. 31 (1998); John Quick, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105 (1994); Rosanne Gervasi Capeless, *History of Florida Water Law: Tracing the Ebb and Flow of Florida's Public Trust Doctrine Through the Opinions of Justice James B. Whitfield*, 9 J. LAND USE & ENVTL. L. 131 (1993); James G. Wilkins, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861 (1992).

public trust doctrines of thirty-one eastern states—all of the states east of the Mississippi River, plus the five states—Minnesota, Iowa, Missouri, Arkansas, and Louisiana—bordering the western bank of the Mississippi River. All of these states ground their water law in riparianism.

The eastern states provide a particularly rich subset of states for public trust discussion purposes. At its most basic, a state's public trust doctrine outlines public and private rights in water and submerged lands by delineating five definitional components of those rights: (1) the beds and banks of waters that are subject to state/public ownership; (2) the line or lines dividing private from public title in those submerged lands; (3) the waters subject to public use rights; (4) the line or lines in those waters that mark the limit of public use rights; and (5) the public uses that the doctrine will protect in the waters where the public has use rights. The history of the eastern states' public trust doctrines has led to variations in how the states define and assemble these five components. In particular, far more often than occurs in the later-settled West, public trust use rights in the East intrude—and for practical purposes always have intruded—upon privately owned riparian and littoral property.

First, the eastern states became states over a period of time that ranged from the creation of the United States in 1787 to Minnesota's admission in 1858 and West Virginia's admission in 1863. Notably for the context of eastern state public trust legal development, the U.S. Supreme Court did not clearly articulate the federal public trust doctrine until 1892,[7] and its view of "navigable waters" evolved throughout the 19th century. As a result, many of the eastern states were grappling with issues of public and private rights in waters before the U.S. Supreme Court had provided clear guidance regarding the federal contours of public trust principles.

Second, the history of the public trust doctrines in many of the eastern states extends back to even before statehood, and those early developments continue to influence the implementation of their doctrines today. For example, 17th-century colonial ordinances remain relevant to the 21st-century public trust doctrines in Maine,[8] Massachusetts,[9] and Virginia.[10]

This Article begins in Part I with a brief overview of what this Article will refer to as the federal public trust doctrine—the doctrine as crafted by the U.S. Supreme Court, and the doctrine most writers have in

7. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

8. *See* Gerrish v. Proprietors of Union Wharf, 26 Me. 384, (1847); State v. Lemar, 147 Me. 405 (1952).

9. Trio Algarvio, Inc. v. Comm'r of the Dep't of Envtl. Prot., 795 N.E.2d 1148, 1151 (Mass. 2003).

10. Taylor v. Commonwealth, 47 S.E. 875, 880 (Va. 1904).

mind when they refer to "*the* public trust doctrine." As most commentators have acknowledged, when state law public trust doctrines vary from the U.S. Supreme Court's pronouncements, they almost always expand the federal public trust doctrine.[11] As such, this section considers the federal public trust doctrine the default minimum standard for the states.

Part II outlines some of the relevant classification issues and eastern states' resolutions of those issues in their public trust doctrines. These classification issues include how each eastern state dealt with the English common-law tidal test for sovereign ownership; the relationship between state title in submerged lands and public trust use rights; distinctions between the Great Lakes and the coastal waters and all other navigable waters; and the public uses that the state's doctrine protects.

Finally, Part III describes and classifies the eastern states' various attitudes about their public trust doctrines. Most significantly, several eastern states have embraced (at least rhetorically) a public trust concept that evolves and expands to fit the changing needs of society, while others remain fixed with the contours of the Supreme Court's articulation of the doctrine.

I. Background: The U.S. Supreme Court's Statements About the Public Trust Doctrine

As many writers have explained in varying degrees of detail, the public trust doctrine has an extensive history dating back to Roman law.[12] This Article, however, focuses on the transition of English common law to American law in the eastern states. While some eastern states can trace their state public trust doctrines directly to English common law, most transitions were mediated by the federal law of navigable waters, as progressively stated by the U.S. Supreme Court.

However, the U.S. Supreme Court's articulation of the public trust doctrine came fairly late for most eastern states. Before 1892, the eastern states worked from their own interpretations of English common law. While the U.S. Supreme Court also employed those same traditions, it was the Court's federal recognition of a public trust doctrine in 1892 in

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11. *E.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647-50 (1986) (detailing the expansions of geographic scope and uses protected).

12. For discussions of the public trust doctrine's history, *see* Thompson, *supra* note 3, at 50-54; Eric Nelson, *The Public Trust Doctrine and the Great Lakes:* Glass v. Goeckel, 11 ALB. L. ENVTL. OUTLOOK J. 131, 136-40 (2006); Smith & Sweeney, *supra* note 3, at 310-14; Henquinet & Dobson, *supra* note 2, at 324-30; Allan Kanner, *The Public Trust Doctrine,* Parens Patriae, *and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 61-86 (Fall 2005); Lazarus, *supra* note 11, at 633-36; Sax, *supra* note 1, at 471.

Illinois Central Railroad Co. v. Illinois[13] that reified the doctrine in United States law, adapted it to the particular conditions of the United States, and provided at least a perceived federal law basis for many later state pronouncements of their own public trust doctrines.

For convenience, this Article refers to the Supreme Court's pronouncements, collectively, as the federal public trust doctrine. The legal basis for some aspects of the U.S. Supreme Court's statements regarding the public trust doctrine, such as the alienability of public trust lands, is questionable.[14] Such ambiguity surrounding the legal source of the Supreme Court's holdings, however, did not prevent states from adopting the Court's statements as federally required law; as Richard Lazarus observed over two decades ago, "[s]tate courts have repeatedly turned to [federal pronouncements] in the late nineteenth and early twentieth centuries to justify rejecting or at least carefully scrutinizing shortsighted or even corrupt legislative attempts to convey into private hands critical coastal or inland waterway resources."[15] Moreover, the federal public trust doctrine has its basis in state ownership of the beds and banks of navigable waters, and, as between the federal and state governments, the question of title to these beds and banks is a matter of federal law. Nevertheless, once such title is conferred, states have broad authority to re-define the property rights as between themselves and their citizens.[16]

A. State Ownership of Submerged Lands

The original thirteen states own the beds and banks underlying tidal waters as a matter of their conquest of England.[17] All other states acquired ownership of these waters upon their obtaining statehood as a result of the Equal Footing Doctrine, which granted all subsequently admitted states the same rights as the original thirteen.[18] Each state's

13. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

14. *See, e.g.*, Lazarus, *supra* note 11, at 639 ("It is far from clear what source of law the Court was drawing upon to reach its result."); Appleby v. City of New York, 271 U.S. 364, 395 (1926) (stating that the alienability ruling in *Illinois Central* was based on state law).

15. Lazarus, *supra* note 11, at 640.

16. Hardin v. Jordan, 140 U.S. 371, 380 (1891); Packer v. Bird, 137 U.S. 661, 669 (1891); Shively v. Bowlby, 152 U.S. 1, 40 (1894).

17. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317-18 (1973); Utah v. United States, 403 U.S. 9, 10 (1971); Pollard's Lessee v. Hagan, 44 U.S. 212, 223 (1845).

18. Idaho v. United States, 533 U.S. 262, 272 (2001); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 283-84 (1997); United States v. Alaska, 521 U.S. 1, 5 (1997); Montana v. United States, 450 U.S. 544, 551 (1981); Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 317-18 (1973); United States v. Holt State Bank, 270 U.S. 49, 55 (1926); Shively v. Bowlby, 152 U.S. 1, 48-50 (1894); Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65-66 (1873); Mumford v. Wardell, 73 U.S. (6 Wall.) 423, 436

title to tidal and navigable waters is fixed as of the date of its admission to the United States.[19]

Under federal law, the default rule and strong presumption is that the relevant state owns the beds of the navigable waters within its borders.[20] Sovereign ownership of tidal waters—waters affected by the ebb and flow of the tide—arises as a direct adoption of English common law[21]:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.[22]

Moreover, the U.S. Supreme Court clarified in 1988 that states own the beds of *all* tidal waters, whether or not those waters are navigable-in-fact.[23]

In contrast, state ownership of non-tidal "navigable-in-fact" waters was a federal adaptation of English law to American realities. Thus, for example, the "tidal rule"

> is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty

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(1867).

19. Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370-71 (1977) (citing Wilcox v. Jackson, 13 Pet. 498 (1839)).

20. Idaho v. United States, 533 U.S. 262, 272-73 (2001); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 282 (1997); United States v. Alaska, 521 U.S. 1, 34 (1997); Utah Division of State Lands v. United States, 482 U.S. 193, 197-98 (1987); Montana v. United States, 450 U.S. 544, 552 (1981); Shively v. Bowlby, 152 U.S. 1, 26-50 (1894).

21. *Illinois Central R.R. Co.*, 146 U.S. at 435.

22. *Id.*; *see also* Pollard's Lessee v. Hagan, 44 U.S. 212, 223 (1845).

23. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476-81 (1988).

> over lands covered by the fresh waters of these lakes.[24]

Even earlier decisions of the U.S. Supreme Court established a "navigable-in-fact" test for inland rivers and streams.[25] However, for states to acquire title to the beds and the banks, waters must be navigable-in-fact as of the date of the state's admission into the union.[26]

B. The Federal Test of Navigability

State title to the beds and banks of navigable-in-fact waters is a question of federal law, determined in accordance with the federal Commerce Clause test of navigability.[27] Nevertheless, the Supreme Court has not been consistent in how it defines "navigable" waters for purposes of either state title or the federal government's Commerce Clause authority. Under the classic test of navigability from *The Daniel Ball*, waters

> are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[28]

Thus, the *Daniel Ball* test closely aligns navigability with usefulness in *interstate* commerce, suggesting that waterways must be navigable by fairly large boats and ships. Eastern states adhering to a strict interpretation of the *Daniel Ball* test therefore could adopt a fairly narrow view of navigable-in-fact waters.

However, at its most generous, the U.S. Supreme Court has found that such navigability exists when a waterway is useful for trade, agriculture, or commerce by any kind of vessel. For example, in *The Montello*—a case widely cited by eastern states' courts—the Supreme

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24. *Illinois Central R.R. Co.*, 146 U.S. at 435-37.

25. *See, e.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870) (holding that the English common law tidal test has no applicability in the United States).

26. *See* Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 14 (1935).

27. *See Utah v. United States*, 403 U.S. at 10 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563).

28. *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.

Court concluded:

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."[29]

Some eastern states have relied on the *Montello* test, sometimes with an emphasis on supporting commerce, to create more inclusive tests of navigability, including tests based on raft or log floatation. Moreover, many eastern states reached this result by adopting a broad view of water-based commerce, emphasizing that log floating or raft floatation of products downstream supports commercial activities.

Another issue regarding navigability is whether waters can become navigable-in-fact through artificial improvements. The *Daniel Ball* and *Montello* tests emphasize the water's "ordinary" or "natural" condition. However, for Commerce Clause purposes, the Supreme Court has held that artificial improvements can support a finding of navigability and that once a waterway is deemed navigable under for commerce, it remains navigable.[30] Eastern states have taken a variety of approaches to the improvements issue, although that issue tends to be of less importance because navigability for purposes of state title is judged by the river's condition on the date of statehood.

C. The Contours of the Federal Public Trust Doctrine

The U.S. Supreme Court most clearly announced the federal public trust doctrine in *Illinois Central Railroad Co. v. Illinois*.[31] According to

29. The Montello, 87 U.S. (20 Wall.) 430, 441-42 (1874).

30. *See* United States v. Appalachian Electric Power Co., 311 U.S. 377, 407-08 (1940).

31. 146 U.S. 387. For discussions of the history of this case and its relationship to

that decision, the state holds title to submerged lands,

> [b]ut it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.[32]

Thus, the federal public trust doctrine protects three public uses of waters: navigation, commerce, and fishing.[33] In addition, the doctrine acts as a restraint on the state's ability to alienate the beds and banks of navigable waters or to abdicate regulatory control over those waters:

> The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. . . . But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[34]

Different eastern states have emphasized different aspects of the federal doctrine. For example, case law in Illinois reveals an unusually strong focus on the state's ability to alienate public trust lands.[35]

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state public trust doctrines, *see generally* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004); Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849 (2001); Eric Pearson, Illinois Central *and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713 (1996).

32. *Illinois Central* R.R., 146 U.S. at 452.

33. *See id.*

34. *Id.* at 452-53.

35. *See, e.g.*, Friends of the Parks v. Chi. Park Dist., 786 N.E.2d 161, 169-70 (Ill. 2003); People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773, 780-81 (Ill. 1976).

However, as the Appendix indicates, most other eastern states have focused far more extensively on defining "navigable waters,"[36] clarifying the public uses protected,[37] or both.

II. Classification Issues in the Eastern States with Respect to Their Public Trust Doctrines

As a matter of state law, states can expand upon the federal public trust doctrine,[38] and they have done so in several ways. First, a state can apply its public trust doctrine to more waters than federal law requires, extending public rights upstream of tidal and navigable-in-fact waterways. Second, a state can protect more public uses than federal law requires. States exercising this prerogative, whether western or eastern, have done so most often to protect public rights of recreation. Finally, the state can extend the concept of a public trust to resources beyond surface water.

A. Eastern States and the English Common-Law Tidal Test

Unlike western states, courts and legislatures in many eastern states—particularly the original thirteen states—decided public trust issues and issues related to state title to submerged lands before the U.S. Supreme Court had clearly articulated the contours of federal law pertaining to the same subjects. Because those early state decisions established property rights, they can continue to influence how many eastern states apply their public trust doctrines.

As a result of sometimes wildly different decision-making timelines, eastern states vary considerably in what tests they will use to establish state title over the beds and banks of "navigable" waters. In fact, six categories of eastern states are discernible.

First, some eastern states—notably Maryland, Massachusetts, and New Jersey—use only the common-law tidal test for both title and state public trust purposes.[39] The Maryland courts in particular have repeatedly acknowledged that the "navigable-in-fact" test exists but have refused to apply it,[40] and they have apparently never adjudicated public

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36. Lazarus, *supra* note 11, at 647-48.

37. *See id.* at 649-50.

38. *See id.* at 647-48.

39. *See, e.g.*, Hirsch v. Md. Dep't of Natural Res., 416 A.2d 10, 12 (Md. 1980); Brosnan v. Gage, 133 N.E. 622, 624 (Mass. 1921); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 52 n.2 (N.J. 1972).

40. *See, e.g.*, *Hirsch*, 416 A.2d at 12 n.3; Wicks v. Howard, 388 A.2d 1250, 1251 (Md. Ct. Spec. App. 1978); Van Ruymbeke v. Patapsco Indus. Park, 276 A.2d 61, 64 (Md. 1971); Owen v. Hubbard, 271 A.2d 672, 676 n.1 (Md. 1970); Wagner v. City of Balt., 124 A.2d 815, 820 (Md. 1956).

rights in non-tidal navigable waters. Given the geography of these three states, however, it is unlikely that their legal adherence to the tidal test significantly limits their public trust doctrines.

Second, some eastern states recognize both the tidal test and the navigable-in-fact test in asserting state title to submerged lands[41] and adopted both tests at relatively the same time. Such dual adoptions are most common, and have the most import, in the coastal states that have significant, internal, non-tidal waters and that did not make important decisions regarding navigable waters before the 19th century. For example, Connecticut became a state in 1788, but its courts did not issue significant decisions about navigable waters until 1811. These early decisions clearly recognized public rights in tidal waters.[42] However, by 1845, the Connecticut Supreme Court had declared the Connecticut River a "navigable water," even above tide water.[43] By 1850, the Connecticut court had clearly articulated its adoption of a commerce-based navigable-in-fact test.[44] Within this second group of eastern states, two subgroups can also be discerned based on the type of "navigable-in-fact" test that the state uses. Alabama, for example, uses the federal commerce definition of "navigable."[45] In contrast, South Carolina, by statute, employs a "valuable floatage" test,[46] which its courts have interpreted "to include any 'legitimate and beneficial public use.'"[47]

Third, some eastern coastal states did not adopt the navigable-in-fact test for state law purposes until relatively late, after a long and clear reliance on the common-law tidal test. Delaware, for example, did not

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41. *See, e.g.*, Sullivan v. Spotswood, 2 So. 716, 717-18 (Ala. 1887). *Compare* Town of Orange v. Resnick, 109 A.2d 864, 866 (Conn. 1920), *with* Edward Balf Co. v. Hartford Elec. Light Co., 138 A. 122, 125 (Conn. 1927). *Compare* Walker Lands, Inc v. East Carroll Parish Police Jury, 871 So.2d 1258, 1265-66 (La. Ct. App. 2004), *with* State *ex rel.* Plaquemines Parish School Board v. Plaquemines Parish Gov't, 690 So.2d 232, 236 (La. Ct. App. 1997). *See* Moor v. Veazie, 32 Me. 343, 1850 WL 128, at *9-10 (Me. 1850). *Compare* Opinion of the Justices, 649 A.2d 604, 609 (N.H. 1994), *with* Concord Mfg. Co. v. Robertson, 25 A. 718, 720 (N.H. 1890). *Compare* Lowcountry Open Land Trust v. State, 552 S.E.2d 778, 783 n.6 (S.C. Ct. App. 2001), *with* White's Mill Colony, Inc. v. Williams, 609 S.E.2d 811, 815 (S.C. Ct. App. 2005).

42. *See, e.g.*, Peck v. Lockwood, 5 Day 22, 1811 WL 159, at *3-4 (Conn. 1811); Lay v. King, 5 Day 72, 1811 WL 162, at *4 (Conn. 1811); Chapman v. Kimball, 9 Conn. 38, 1831 WL 142, at *1, 4 (Conn. 1831).

43. Enfield Toll Bridge Co. v. Hartford & N. H. R.R. Co., 17 Conn. 40, 1845 WL 431, at *5 (Conn. 1845).

44. Town of Wethersfield v. Humphrey, 20 Conn. 218, 1850 WL 664, at *7 (Conn. 1850).

45. Bear Dredging L.L.C. v. Alabama Dept. of Rev., 855 So.2d 513, 519 (Ala. 2003).

46. S.C. CODE ANN. § 49-1-10 (1976).

47. White's Mill Colony, Inc. v. Williams, 609 S.E.2d 811, 815 (S.C. Ct. App. 2005) (quoting State *ex rel.* Medlock v. South Carolina Coastal Comm'n, 346 S.E.2d 716, 719 (S.C. 1986)).

explicitly adopt the navigable-in-fact test until 1988.[48] In such states, the late adoption of the navigable-in-fact test usually means that private landowners have more extensive rights in the non-tidal navigable waters. Thus, in Delaware, landowners own the beds of these non-tidal waters to the low-water mark, which the Delaware courts consider a long-standing property rule that cannot be changed without effectuating a taking of private property.[49]

Fourth, some states adopted the common-law tidal test early for purposes of state title, then later used the navigable-in-fact test to establish which waters are "navigable" for purposes of public trust rights. Kentucky and Vermont are two particularly distinctive examples of this approach. As late as 1934, Kentucky relied upon the common-law tidal test to declare that no waters in Kentucky are "navigable" for purposes of state title.[50] Nevertheless, public rights exist in any waterway that can float a log.[51] In contrast, according to the Vermont courts, the drafters of Vermont's Constitution recognized the common-law tidal test dilemma in 1777 and thus constitutionally assured public rights in all "boatable" waters, which the courts interpreted to mean "navigable-in-fact" waters; otherwise, there would be no public trust rights in Vermont, because no waters in Vermont are influenced by the ebb and flow of the tide.[52] Illinois[53] and New York[54] also fall into this group of states.

Fifth, some eastern states assert title to the beds and banks of waters *only* when those waters are navigable-in-fact under the federal commerce test. Predictably, this approach is most common among the later-admitted, non-coastal eastern states, such as Indiana, Tennessee, and Wisconsin.[55] However, two coastal states—Florida and North Carolina—have also rejected the pure common-law tidal test, requiring instead that tidal waters also be navigable-in-fact before the public trust doctrine applies.[56]

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48. Hagan v. Delaware Anglers & Gunners Club, 1988 WL 606, at *2-3 (Del. Ch. 1988).

49. Phillips v. State *ex rel.* Dep't of Natural Res. & Envtl. Control, 449 A.2d 250, 252 (Del. 1982).

50. Baxter v. Davis, 67 S.W.2d 678, 680 (Ky. 1934).

51. Floyd County v. Allen, 227 S.W. 994, 995 (Ky. 1921).

52. New England Trout & Salmon Club v. Mather, 35 A. 323, 324 (Vt. 1896).

53. Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905) (using a log floating test to establish public rights).

54. Fulton Light, Heat & Power Co. v. State, 94 N.E. 199, 202 (N.Y. 1911).

55. *See, e.g.*, State v. Kivett, 95 N.E.2d 145, 148 (Ind. 1950); Lamprey v. Metcalf, 53 N.W. 1139, 1143-44 (Minn. 1893) (rejecting the tidal test); Cooley v. Golden, 23 S.W. 100, 104-05 (Mo. 1893) (explicitly rejecting the English tidal test); Fulmer v. Williams, 15 A. 726, 727 (Pa. 1888) (rejecting the tidal test); Elder v. Burrus, 25 Tenn. (1 Hum.) 358, 1845 WL 1939, at *5-*7 (Tenn. 1845) (rejecting the tidal test); Meunch v. Pub. Serv. Comm'n, 53 N.W.2d 514, 516-19 (Wis. 1952).

56. *See, e.g.*, Clement v. Watson, 58 So. 25, 26-27 (Fla. 1912) (holding that tide

Finally, some eastern states use only a "navigable-in-fact" test, but their test is broader than the federal commerce test. For example, Michigan[57] and Missouri[58] use a log floatation test to determine whether waters are navigable-in-fact and hence subject to public rights.

B. The Relationship of State Title and the State Public Trust Doctrine

One of the basic assumptions of the federal public trust doctrine is that the public trust and public rights in water follow state title.[59] However, many eastern states impose a public trust on waters, and allow for public use, even when the state does not own the beds and banks of those waters.[60] These states often do so because *before* federal adoption of the navigable-in-fact test was clear, they were forced to wrestle with an apparently exclusive tidal test for title.

To add to the confusion, the states' approaches to public trust waters do not neatly track their approaches to state title. However, in states where public trust rights diverge from state ownership of submerged lands, three approaches are particularly important.

First, some states declare waters "navigable" for public trust purposes when those waters are useful only for recreation, even if the state otherwise adheres to the federal commerce test of navigability for title. For example, Arkansas adhered to the federal commerce test for both title and public trust purposes until 1980. However, in 1980, the Arkansas Supreme Court decided to follow broader public trust doctrines decisions in Massachusetts, Ohio, Michigan, California, Minnesota, and Oregon and extended public rights to waters that are useful only for recreational purposes.[61] Similarly, Ohio began with the federal "navigable-in-fact" test, but in 1955 the Ohio Supreme Court acknowledged a "gradually changing concept of navigability" and held that any water capable of supporting recreational uses is "navigable" for

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waters need to be navigable); Lopez v. Smith, 109 So.2d 176, 179 (Fla. Dist. Ct. App. 1959) (holding that waters subject to the ebb and flow of the tide are not "navigable" unless they are navigable-in-fact); Gwathmey v. State *ex rel.* Dep't of Env't, Health, & Natural Res. *ex rel.* Cobey, 464 S.E.2d 674, 677-81 (N.C. 1995); N.C. GEN. STAT. § 146-64 (1995).

57. *See, e.g.*, Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc., 709 N.W.2d 174, 218 (Mich. Ct. App. 2005), *rev'd in part for lack of standing*, 709 N.W.2d 447 (Mich. 2007), *reh'g denied*, 739 N.W.2d 332 (Mich. 2007).

58. *See, e.g.*, Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975, 976 (Mo. Ct. App. 1920).

59. *See* Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 202-06 (1984); *see also* Lazarus, *supra* note 11, at 648, n.2.

60. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378-79 (1977); *see also* Lazarus, *supra* note 11, at 648.

61. *See* State v. McIlroy, 595 S.W.2d 659, 665 (Ark. 1980).

public trust purposes.[62]

Second, many states extend public trust rights to the high-water mark even though they recognize upland private ownership down to the low-water mark. Massachusetts, for example, originally recognized that state ownership in tidal waters extended to the mean high tide line. However, through the Colonial Ordinance of 1641-1647, it conveyed title to private landowners to the low-tide line in order to encourage private construction of wharves, piers, and other aids to navigation.[63] Nevertheless, public rights continue to exist to the high tide line.[64] Louisiana similarly moved the title boundary for streams and rivers by statute from the high- to the low-water mark[65] but preserved public rights to the high-water mark.[66] Other states, such as Delaware, achieved this split through other means. The Delaware courts have held, from at least the 1850s, that private title to both riparian and littoral property extends to the low-water mark. Delaware considers this rule a long-standing property law principle that cannot be changed without unconstitutionally taking private property.[67] Nevertheless, the public retains limited rights to use the foreshore—the land between the high- and low-water marks.[68] Minnesota[69] and Pennsylvania[70] law are similar, although Minnesota recognizes much broader public rights in the foreshore.[71]

Third, and even more disjunctively, some states recognize public trust rights in waterways even where the bed and banks are entirely in private ownership. For almost all states that fall into this category, this split arises from the state's early adherence to the English common-law tidal test for purposes of establishing state title. For example, in 1905 the Illinois Supreme Court declared that the English common-law tidal test determined issues of boundary and title, with the result that riparian landowners own the entire beds and banks of the non-tidal navigable-in-fact waters.[72] Nevertheless, public rights exist in all Illinois waters that are navigable-in-fact waters.[73] Kentucky,[74] Maine,[75] Massachusetts,[76]

62. *See, e.g.*, Coleman v. Schaeffer, 126 N.E.2d 444, 445-47 (Ohio 1955).

63. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 359-60 (Mass. 1979).

64. *See id.*

65. McCormick Oil & Gas Corp. v. Dow Chemical Co., 489 So.2d 1047, 1049 (La. Ct. App. 1986) (citing State v. Placid Oil Co., 300 So.2d 154, 173 (La. 1974)).

66. LA. CIV. CODE ANN., art. 456 (2007).

67. Phillips v. State *ex rel.* Dep't of Natural Resources & Envtl. Control, 449 A.2d 250, 252 (Del. 1982); Bickel v. Polk, 5 Del. 325 (5 Harr 325), 326 (Del. Super. Ct. 1851).

68. Groves v. Sec'y, Dep't of Natural Resources & Envtl. Control, No. 92A-10-003, 1994 WL 89804, at *6 (Del. Super. Ct. Feb. 8, 1994).

69. Mitchell v. City of St. Paul, 31 N.W.2d 46, 49 (Minn. 1948).

70. Fulmer v. Williams, 15 A. 726, 727 (Pa. 1888).

71. State v. Slotness, 185 N.W.2d 530, 531 (Minn. 1971).

72. Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).

73. *Id.*

Mississippi,[77] New York,[78] Ohio,[79] and West Virginia[80] followed similar legal paths for their non-tidal, navigable-in-fact waters.

Tennessee has adopted a more complex classification scheme. Although Tennessee rejected the tidal test in 1845,[81] it discerned three categories of waters in the federal "navigable-in-fact" tests: (1) waters that are "essentially valuable" to commerce, like the Great Lakes and the Mississippi River; (2) waters that are navigable but not necessary for commerce; and (3) unnavigable waters.[82] The state owns the bed and banks only of waters in the first category, but there is nevertheless a public right of access to the privately owned waters in the second category.[83]

C. *Public Trust Distinctions Between Coastal and Great Lake Waters and Other Waters*

Eastern states often treat the oceans, coasts, and Great Lakes within their borders differently than they treat other "navigable" waters for public trust purposes. Again, in many states, such differences derive from the state's early handling of the English tidal test. Two types of differences are especially prevalent.

First, some eastern states recognize different ownership lines in the Great Lakes, oceans, and coasts than they do in streams, rivers, and other lakes. In Alabama, for example, the state owns up to the high-water mark in tidal waters but only to the low-water mark in non-tidal navigable-in-fact waters.[84] Historical statutes make Georgia slightly more complicated: the state owns beds of tidal waters to the high-water mark, while landowners own non-tidal navigable waters either entirely or to the low-water mark, depending on whether ownership arose before or after 1863.[85] In Illinois, landowners own the beds of non-tidal,

74. Pierson v. Coffey, 706 S.W.2d 409, 411 (Ky. Ct. App. 1985).
75. Stanton v. Tr. of St. Joseph's Coll., 233 A.2d 718, 721-22 (Me. 1967).
76. Brosnan v. Gage, 133 N.E. 622, 624 (Mass. 1921).
77. Ryals v. Pigott, 580 So.2d 1140, 1149 n.19, 1171 (Miss. 1990).
78. Adirondack League Club, Inc. v. Sierra Club, 615 N.Y.S.2d 788, 790 (N.Y. App. Div. 1994).
79. State *ex rel.* Brown v. Newport Concrete Co., 336 N.E.2d 453, 455 (Ohio Ct. App. 1975).
80. Gaston v. Mace, 10 S.E. 60, 63 (W. Va. 1889).
81. Elder v. Burrus, 1845 WL 1939, at *5-*7 (Tenn. 1845).
82. The Point, Ltd. Liab. Corp., et al. v. Lake Mgmt. Ass'n, Inc., 50 S.W.3d 471, 476 (Tenn. Ct. App. 2000).
83. *Id.*
84. Tallahassee Falls Mfg. Co. v. State, 68 So. 805, 806 (Ala. Ct. App. 1915), rev'd with respect to county boundary determinations by 69 So. 589 (Ala. 1915).
85. Black v. Floyd, 630 S.E.2d 382, 382 (Ga. 2006); GA. CODE ANN. § 44-8-5(b) (West 1982).

navigable-in-fact waters, but the state owns the bed of Lake Michigan to the high-water mark.[86] Louisiana recognizes three categories of waters in determining property lines: the state owns lake beds to the high-water mark, tidal waters to the highest winter tide line, and beds of non-tidal navigable-in-fact streams and rivers to the low-water mark.[87] In Mississippi, the state owns tidal waters to the high-water line[88] but private landowners own the beds of non-tidal navigable waters.[89] In North Carolina, the state owns up to the high-water mark in coastal waters and the low-water mark in non-tidal streams.[90] Ohio treats Lake Erie as though it were part of the ocean,[91] while all other navigable-in-fact rivers and streams are privately owned.[92] Wisconsin owns up to the high-water mark of navigable lakes and the Great Lakes, but competes with the private landowner's "qualified title" in navigable streams and rivers.[93]

Second, some states recognize more extensive public rights in the oceans, coasts, and Great Lakes than they recognize in other waters. For example, the Louisiana public trust doctrine gives the state, acting on behalf of the public, extensive authority to protect the Louisiana coast, even at the expense of oystermen's property rights.[94] Michigan treats the Great Lakes like the oceans and recognizes extensive public rights to use them, including recreational rights.[95] In contrast, Michigan limits public rights in other waters to fishing, commerce, and navigation and has explicitly refused to recognize a public right of recreation in them.[96] In New York, similarly, public rights in the foreshore of tidal waters appear to be broader than public rights in the privately owned, non-tidal navigable rivers and streams.[97]

D. Public Uses Protected by the State's Public Trust Doctrine

Eastern states vary widely in the breadth of public uses that they will protect through their public trust doctrines. A few states, for

86. Revell v. People, 52 N.E. 1052, 1055 (Ill. 1898).
87. McCormick Oil & Gas Corp. v. Dow Chem. Co., 489 So.2d 1047, 1049 (La. 1986); LA. CIV. CODE ANN., art. 451 (1980).
88. Sec'y of State v. Wiesenberg, 633 So.2d 983, 988 (Miss. 1994).
89. Comeaux v. Freeman, 918 So.2d 780, 784 (Miss. Ct. App. 2005) (citing Cox v. F-S Prestress, Inc., 797 So.2d 839, 843 (Miss. 2001)).
90. N.C. GEN. STAT. § 77-20 (2007); Neuse River Found., Inc. v. Smithfield Foods, Inc., 574 S.E.2d 48, 54-55 (N.C. Ct. App. 2002).
91. State *ex rel.* Squire v. City of Cleveland, 82 N.E.2d 709, 719-20 (Ohio 1948).
92. Gavit's Adm'rs v. Chambers, 3 Ohio 495, 497-98 (Ohio 1828).
93. FAS, L.L.C. v. Town of Bass Lake, 733 N.W.2d 287, 289, 292 (Wis. 2007).
94. Avenal v. State, 886 So.2d 1085, 1101-06 (La. 2004).
95. Glass v. Goeckel, 703 N.W.2d 58, 68-75 (Mich. 2005).
96. Bott v. Comm'n of Natural Res., 327 N.W.2d 838, 841 (Mich. 1982).
97. Arnold's Inn. Inc. v. Morgan, 63 Misc.2d 279, 283 (N.Y. Super. Ct. 1970).

example, continue to limit their state public trust doctrines to the three federal uses—navigation, commerce, and fishing.[98] Most states, however, have broadened their doctrines to include recreational uses, also phrased as swimming, bathing, recreation, pleasure boating, and other terms.[99]

Public rights of access to the navigable waters have caused much deliberation and controversy in some states – notably Connecticut and New Jersey.[100] Such access rights often grow out of recognized public recreation rights. For example, the Iowa Supreme Court held in 1996 that the public's right to recreate in the navigable waters requires that a right of public access be protected under the state public trust doctrine.[101] The New Jersey courts have gone even further, recognizing public trust rights to use the dry sand (above the high tide line) portions of both public and private beaches.[102]

Most enigmatic—and therefore potentially interesting for the future—are the eastern states that include broad generic statements about the public's use rights in their public trust statements. For example, the Florida courts stated early on and recently repeated that "[t]he public has the right to use navigable waters for navigation, commerce, fishing, and bathing and 'other easements allowed by law.'"[103] Louisiana's statutes declare that the public rights in navigable waters include navigation, fishing, recreation, "and other interests."[104] The Massachusetts Supreme Judicial Court has stated that the Massachusetts public trust doctrine "includes all necessary and proper uses, in the interest of the public,"[105] while the Justices of the New Hampshire Supreme Court have opined that New Hampshire holds the public trust waters for the benefit of the people "for all useful purposes"[106] and the Ohio Court of Appeals has recently asserted that Ohio's public trust doctrine extends to all "the

98. *See, e.g.*, State v. Harrub, 10 So. 752, 753 (Ala. 1892).

99. *See, e.g.*, State v. McIlroy, 595 S.W.2d 659. 664 (Ark. 1980); Larman v. State, 553 N.W.2d 158, 161 (Iowa 1996); Pierson v. Coffey, 706 S.W.2d 409, 412 (Ky. Ct. App. 1985); State v. Slotness, 185 N.W.2d 530, 531 (Minn. 1971); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972); Fabrikant v. Currituck County, 621 S.E.2d 19, 27-28 (N.C. Ct. App. 2005); State v. Central Vermont Railway, Inc., 571 A.2d 1128, 1131 (Vt. 1990).

100. *See, e.g.*, *Leydon v. Town of Greenwich*, 777 A.2d 552, 557 n.17 (Conn. 2001).

101. Larman v. State, 553 N.W.2d 158, 161 (Iowa 1996).

102. Raleigh Avenue Bean Ass'n v. Atlantis Beach Club, 879 A.2d 112, 121-24 (N.J. 2005) (building on Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972)).

103. Brannon v. Boldt, ___ So.2d ___, 2007 WL 162166, at *5 (Fla. Ct. App. Jan. 24, 2007) (quoting Broward v. Mabry, 50 So. 826, 830 (Fla. 1909)).

104. LA. REV. STAT. ANN. § 14:1701 (2007).

105. Home for Aged Woman v. Commonwealth, 89 N.E.124, 129 (Mass. 1909).

106. Opinion of the Justices, 649 A.2d 604, 609 (N.H. 1994).

public uses to which it might be adapted."[107] Finally, Wisconsin's already broad public trust doctrine is potentially even broader, because the Wisconsin Supreme Court stated in 1952 that the public can use the public trust waters for navigation, hunting, fishing, recreation "or any other lawful purpose."[108]

III. Eastern States' Attitudes About Their Public Trust Doctrines

Current interest in the public trust doctrine often centers on "how far" the states will push public trust rights. Predicting answers requires some general sense of the particular state's "attitude" toward its public trust doctrine. For example, several states view the public trust doctrine as being primarily concerned with navigation and commerce—the hearts of the federal public trust doctrine. However, a state can also view its public trust doctrine as a comprehensive and evolving common-law protection of all public rights in waters. Given the private property rights usually involved, only states taking this view are likely to extend their public trust doctrines to uncommon applications, such as environmental protection.

In the West, California and Hawaii have the most expansive public trust doctrines. Hawaii's broad public trust doctrine is based in the language of its constitution. The Hawaiian courts have explicitly extended this constitutionalized public trust doctrine to groundwater as well as surface water and to a variety of natural resource issues, including marine water quality and marine life.[109] However, because of its grounding in Hawaii's Constitution and because pronouncements of the Hawaiian courts are relatively recent, Hawaii's view of the public trust doctrine has not (yet) influenced eastern states.

California, however, *has* influenced some of the eastern states. In 1974, the California Supreme Court announced, in *Marks v. Whitney*, that the public trust uses of the state's tidewaters were inherently flexible.[110] Nine years later, the California Supreme Court expanded the scope of the state's public trust doctrine to water rights and ecological issues in *National Audubon Society v. Superior Court*,[111] which required state regulators to limit private water rights in order to protect the ecological resources and values of Mono Lake. Both of these California decisions have influenced at least the public trust rhetoric in several

107. Beach Cliff Bd. of Trustees v. Ferchill, Ohio App., 2003 WL 21027604, at *2 (Ohio Ct. App. 2003).

108. Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 519 (Wis. 1952).

109. In re Water Use Permit Applications, 93 P.3d 643, 657-58 (Haw. 2004); In re Water Use Permit Applications, 9 P.3d 409, 445 (Haw. 2000).

110. 491 P.2d 374, 380 (Cal. 1971).

111. 658 P.2d 709, 728-31 (Cal. 1983).

eastern states, and citations to California law are often an indication that eastern states are expanding their state public trust philosophies.

A. States with Constitutional Public Trust Protections

One sign that a state takes its public trust provisions seriously is its decision—as in Hawaii—to constitutionalize those protections. Such constitutional provisions, when they exist in the east, are of basically two types: constitutional provisions that protect the public's freedom to navigate; and constitutional provisions that provide broader protections. States with a constitutional provision to protect the public's freedom to navigate include Alabama,[112] Minnesota,[113] Mississippi,[114] South Carolina,[115] Tennessee,[116] and Wisconsin.[117]

States with broader constitutional public trust protections take a variety of approaches. Florida's Constitution, for instance, has declared since 1970 that "[t]he title to land under navigable waters, within the boundaries of the state, which have not been alienated, including the beaches below mean high water line, is held by the state, by virtue of its sovereignty, in trust for all the people," and then restricts further alienation of those lands.[118]

In contrast, Illinois, which also amended its constitution in 1970, declares that "[t]he public policy of the State and duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations," and that "[e]ach person has the right to a healthful environment."[119] The Illinois Supreme Court has explicitly connected these provisions to the state's public trust doctrine,[120] suggesting a potentially very broad reach for this constitutionalized public trust. Similarly, the Louisiana Constitution states that "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected,"[121] and the Louisiana courts have identified this provision as outlining the state's public trust doctrine.[122]

In 1971, Pennsylvania amended its constitution to provide that

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112. ALA. CODE art. I, § 24 (2007).
113. MINN. STAT. ANN. art II, § 2 (West 2007).
114. MISS. CONST. art. 4, § 81.
115. S.C. CONST. art. XIV, §§ 1, 4.
116. TENN. CONST. art. I, § 20.
117. WIS. CONST. art. IX, § 1.
118. FLA. CONST. art. 10, § 11.
119. *See* ILL. CONST. art. XI, §§ 1, 2.
120. People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).
121. *See* LA. CONST. art. IX, § 1.
122. *See, e.g.*, Louisiana Seafood Mgmt. Council v. Louisiana Wildlife & Fisheries Comm'n, 719 So. 2d 119, 124 (La. Ct. App. 1998).

"[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and aesthetic values of the environment. . . . As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."[123] The Pennsylvania Supreme Court has determined that this amendment "installs the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity."[124] Similarly, the Virginia Constitution states that, "[t]o the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, . . . it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth."[125]

Rhode Island's constitution spells out specific public trust rights that its citizens enjoy, "including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore," and "it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral, and other natural resources of the state. . . ."[126] According to the Rhode Island Supreme Court, moreover, this constitutional provision codifies the state's public trust doctrine.[127] Similarly, Vermont's constitution recognizes citizens' rights "to hunt and fowl on the lands they hold, and on other lands not included, and in like manner to fish in all boatable and other waters (not private property). . . ."[128]

B. Eastern States that (at Least Rhetorically) View the Public Trust Doctrine as an Evolving Public Protection

1. Illinois

In 1976, the Illinois Supreme Court adopted expansive language from New Jersey that the public trust doctrine must evolve to meet public needs under changing conditions.[129] The Court then explained:

123. PA. CONST. art. I, § 27.

124. Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 (Pa. 1973) (Jones, C.J., dissenting) (emphasis omitted).

125. VA. CONST. art. XI, § 1.

126. R.I. CONST. art. I, § 17.

127. State *ex rel.* Town of Westerly v. Bradley, 877 A.2d 601, 606 (R.I. 2005).

128. VT. CONST. ch. II, § 67.

129. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (quoting *Borough of Neptune City*, 294 A.2d at 54-55).

> On this question of changing conditions and public needs, it is appropriate to observe that there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment. The public has become increasingly concerned with dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources. This is reflected in the enactment of the Illinois Environmental Protection Act . . . in 1971 and in the ratification by the people of this State of sections 1 and 2 of article XI of the 1970 Constitution. . . .[130]

As noted above, Articles 1 and 2 of the Illinois Constitution declare the public's right to a healthful environment.[131] Thus, the Illinois courts have both adopted an expansive and evolutionary approach to the public trust doctrine and explicitly connected Illinois' public trust doctrine to broader public concerns for health and environmental protection.

2. Mississippi

In 1986, and repeatedly since, the Mississippi Supreme Court recognized an expansive list of public trust rights: navigation and transportation; commerce; fishing; bathing, swimming, and other recreational activities; development of mineral resources; environmental protection and preservation; and "enhancement of aquatic, avarian, and marine life, sea agriculture, and no doubt others."[132] Moreover, in compiling its list of public trust rights, the Mississippi Supreme Court explicitly adopted California's public trust law.[133]

3. New Hampshire

In implementing the public trust doctrine, New Hampshire permits regulation to prevent runoff and to protect marine fisheries and wildlife.[134] Moreover, the state public trust doctrine extends to "all useful purposes."[135]

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130. *Id.*

131. ILL. CONST., art XI, §§ 1, 2.

132. Cinque Bambini P'ship v. State, 491 So.2d 508, 512 (Miss. 1986); *see also* Sec'y of State v. Wiesenberg, 633 So.2d 983, 988-89 (Miss. 1994) (quoting the list of public rights from *Cinque Bambini*); Columbia Land Dev. L.L.C. v. Sec'y of State, 868 So.2d 1006, 1012-13 (Miss. 2004) (summarizing the list of public trust rights from *Cinque Bambini*).

133. *Cinque Bambini*, 491 So.2d at 512 (citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971)).

134. Sibson v. State, 259 A.2d 397, 399-400 (N.H. 1969).

135. Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604, 609 (N.H. 1994) (quoting Concord Co. v. Robertson, 25 A. 718, 721 (N.H. 1889)).

4. New Jersey

In 1972, the New Jersey Supreme Court issued one of the strongest statements recognizing an evolving state public trust doctrine, which several other eastern states—such as Illinois—have adopted. "The public trust doctrine, like all common law principles, should not be considered fixed or static but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[136] In 2005, the Supreme Court affirmed this basic principle.[137]

Moreover, the New Jersey Superior Court has extended the public trust doctrine to drinking water supply protection. The court reasoned that "since water is essential for human life, the public trust doctrine applies with equal impact upon the control of our drinking water supplies."[138]

5. South Carolina

South Carolina has enshrined public trust protections in both its Constitution[139] and its statutes.[140] It holds in its trust all tidally influenced waters and uses a broad "valuable floatage" test to define the non-tidal waters subject to the public trust.[141] Moreover, in 1995, the South Carolina Supreme Court greatly broadened the scope of South Carolina's public trust doctrine, declaring that:

> The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail; and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.[142]

Moreover, "[t]he State . . . cannot permit activity that substantially

136. *Borough of Neptune City*, 294 A.2d at 54-55.

137. Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005) (quoting *Borough of Neptune City*, 294 A.2d at 54-55).

138. Mayor & Municipal Council of City of Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760. 765 (N.J. Super. Ct. 1987).

139. S.C. CONST., art. XIV, § 4.

140. S.C. CODE ANN. § 49-1-10 (2006).

141. Lowcountry Open Land Trust v. State, 552 S.E.2d 778, 783 n.6 (S.C. Ct. App. 2001); White's Mill Colony, Inc. v. Williams, 609 S.E.2d 811, 815 (S.C. Ct. App. 2005).

142. Sierra Club v. Kiawah Resort Ass'n, 456 S.E.2d 397, 402 (S.C. 1995) (emphasis added) (quoting Syridon & Leblanc, *The Overriding Public Trust in Privately Owned Natural Resources: Fashioning a Cause of Action*, 6 TUL. ENVTL. L.J. 287 (1993)).

impairs the public interest in marine life, water quality, or public access."[143]

6. Vermont

As noted above, the Vermont Supreme Court interprets Vermont's constitution as purposely protecting public rights in "boatable" (navigable-in-fact) waters, even though Vermont has no tidal waters for ownership purposes under the test in place in 1777, when it became a state.[144] In 1990, moreover, the court explicitly adopted broad public trust law from both New Jersey and California (including the Mono Lake case), stating that:

> The public trust doctrine retains an undiminished vitality. The doctrine is not "fixed or static," but one to "be molded and extended to meet changing conditions and needs of the public it was intended to benefit." "The very purposes of the trust have evolved in tandem with the changing public perception of the values and uses of waterways."[145]

C. *States that Have Limited Their Public Trust Doctrines*

Alabama has a poorly developed public trust doctrine that has never been expanded beyond the basic federal doctrine. Similarly, while recognizing log floatation, Missouri has not otherwise expanded its public trust doctrine beyond the federal test.

Finally, although West Virginia has barely developed its public trust doctrine, it is clearly and strongly based on the federal public trust doctrine. In addition, West Virginia views the public trust properties as public lands and manages them as such,[146] promoting extractive commercial uses of these submerged lands instead of ecological protection.

Conclusion

As this Article demonstrates, there is no common "eastern public trust doctrine." Instead, the eastern states vary widely in the tests they employ in asserting state title, the lines they draw between public and

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143. McQueen v. S. C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003).

144. New Eng. Trout & Salmon Club v. Mather, 35 A. 323, 324-26 (Vt. 1896).

145. State v. Central Vt. Ry, Inc., 571 A.2d 1128, 1130 (Vt. 1990) (quoting Matthews Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (quoting *Borough of Neptune City*, 294 A.2d at 54; Nat'l Audubon Society v. Super. Ct. of Alpine County, 658 P.2d 709, 719 (Cal. 1983) (*en banc*)).

146. Campbell Brown & Co. v. Elkins, 93 S.E.2d 248, 260-61 (W. Va. 1956).

private title in submerged lands, the relationship between title to submerged lands and public trust rights, and the public uses of the relevant waters that they protect.

For persons interested in the precise property rights that riparian and littoral landowners enjoy—whether from the perspective of regulatory takings or from a more general interest in how to balance public and private rights in natural resources—this Article reveals that such property rights are a matter of individual state law. Depending on the state and the exact characteristics and type of water involved, the public may well have long-established rights to use what is otherwise considered private property, emasculating any attempts to physically and legally separate public and private rights. In other words, in many eastern states, navigable waters—however defined—are examples of natural resources subject to what Professor Daniel Cole has called "mixed" property regimes[147]—that is, property that "is an admixture of public and private rights."[148]

However, the significant differences among the eastern public trust doctrines extend beyond the property rights components of those doctrines. States' overall public trust philosophies—what this article has referred to as state "attitudes" toward the public trust doctrine—vary widely, both rhetorically and in application. This attitudinal variation among the states sets the stage for the development of even broader disparities among the eastern public trust doctrines in response to new crises or new public demands. As one obvious example, climate change threatens water supplies and coasts throughout the United States. In light of such changes, coastal states that consider their public trust doctrines as evolutionary may well decide to follow Louisiana's lead and decide that the public trust doctrine gives the state extensive authority to override private interests in the name of protecting the coast.[149] Alternatively, or in addition, these states may decide to follow Mississippi's[150] and Hawaii's[151] lead and use the public trust doctrine to afford greater protections to marine species and marine ecosystems.

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147. DANIEL H. COLE, POLLUTION AND PROPERTY 12-14 (Cambridge University Press 2002).

148. *Id.* at 45.

149. Avenal v. State, 886 So.2d 1085, 1101-02 (La. 2004).

150. *Cinque Bambini*, 491 So.2d at 512; *see also* Sec'y of State v. Wiesenberg, 633 So.2d 983, 988-89 (Miss. 1994) (quoting the list of public rights from *Cinque Bambini*); Columbia Land Dev. v. Sec'y of State, 868 So.2d 1006, 1012-13 (Miss. 2004) (summarizing the list of public trust rights from *Cinque Bambini*).

151. In re Water Use Permit Applications, 93 P.3d 643, 657-58 (Haw. 2004); In re Water Use Permit Applications, 9 P.3d 409, 445 (Haw. 2000).

APPENDIX: STATE-BY-STATE SUMMARY OF EASTERN STATES' PUBLIC TRUST DOCTRINES

ALABAMA

Date of Statehood: 1819

Alabama Constitution: Article I, § 24 of the Alabama Constitution states that:

> [A]ll navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impose, or toll; and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters of any navigable streams, unless the same be expressly authorized by law.

This provision "is a clear dedication to the public use of the navigable waters within the State. . . ." *Pollard's Heirs v. Files*, 3 Ala. 47, 48 (1841), *rev'd on other grounds sub nom Pollard's Lessee v. Files*, 43 U.S. 591 (1844).

In addition, Article XI, § 219.07 of the Alabama Constitution allows for the acquisition, maintenance, and protection of unique land and water areas "to protect the natural heritage of Alabama for the benefit of present and future generations," "with full recognition that this generation is a trustee of the environment for succeeding generations." This provision establishes the Forever Wild Land Trust.

Alabama Statutes:

- Alabama Water Resources Act, ALA. CODE ANN. § 9-10B-1-9-10B-30 (2007).
- Navigable waters as public thoroughfares, ALA. CODE ANN. § 33-7-1 (2007).
- Engaging in Commercial Activities, ALA. CODE ANN. § 33-7-50-33-7-53 (2007): Lay out the rights of riparian landowners.
- Validity of leases, etc., by State Agencies, ALA. CODE ANN. § 35-4-383 (2007): Covers the validity of leases and conveyances by state agencies, including leases and conveyances of the lands beneath navigable waters.

Definition of "Navigable Waters": As early as 1835, the Alabama Supreme Court concluded that the Act of Congress of 1803 and other statutes demanded the application of a navigable in fact test. *See Bullock v. Wilsori*, 2 Port. 436 (Ala. 2007). Alabama still adheres to the federal commerce definition of "navigability" and continues to cite *The Daniel Ball. The Daniel Ball,* 77 U.S. 557 (1870); *Bean Dredging, L.L.C., and Midstream Fuel Servs., Inc. v. Ala. Dep't of Revenue*, 855 So. 2d 513 (Ala. 2003); *Wehby v. Turpin*, 710 So. 2d 1243 (Ala. 1998) (emphasizing the occasional use of the water by fishing boats and canoes is not enough to establish navigability); *Bayzey v. McMillan Mill Co.,* 105 Ala. 395 (1895) (emphasizing the need for a commercial use of water); *Olive v. State*, 86 Ala. 88 (1889) (emphasizing that seasonal floating of logs and flatboats is not enough to establish navigability in waters that are "above the ebb and flow of the tide").

However, Alabama also recognizes the tidal test of navigability. *Sullivan v. Spotswood*, 82 Ala. 163 (1887) (adopting the federal test but also noting that any waters subject to the ebb and flow of the tide are automatically navigable). "All tidal streams are, prima facie, public and navigable." *Sayre v. Dickerson*, 278 Ala. 477 (1965) (citing *Walker v. Allen*, 72 Ala. 456 (1882)).

Alabama appears to make no distinction between state-owned waters and public trust waters.

Rights in "Navigable Waters": In tidal waters, private landowners own only down to the high water mark. *Tallahassee Fall Mfg. Co. v. State*, 68 So. 805, 806 (Ala. 1915) *rev'd with respect to county boundaries*, 194 Ala. 554 (1915). In non-tidal navigable-in-fact waters, the line marking the boundary between state and private ownership is the low-water mark. *Tallahassee Fall Mfg. Co. v. State*, 68 So. 805, 806 (Ala. 1915) (citing *Mobil Transp. Co. v. Mobile*, 30 So. 645, 646-47 (Ala. 1900)); *Bullock v. Wilsori*, 2 Port. 436 (Ala. 1835).

Protected public uses of navigable waters are commerce, navigation, and fishing. In addition to owning the beds and banks of navigable waters, "the people of Alabama own absolutely the oyster-beds and oysters," and such resources may be fished only in accordance with the laws of the state. *State v. Harrub*, 95 Ala. 176 (1892). However, the public has no right to fish in privately owned waters. *City of Birmingham v. Lake*, 243 Ala. 367 (1942).

Alienability of publicly owned lands, included streets, alleys, public squares, and wharves is limited. *Douglas v. City Council of Montgomery*, 118 Ala. 599 (1898).

ARKANSAS

Date of Statehood: 1836

Arkansas Constitution: No relevant provisions.

Arkansas Statutes:

- ARK. CODE ANN. §§ 15-20-201 to 15-20-216 (2007): Establish the Arkansas Soil & Water Conservation Commission.
- ARK. CODE ANN. §§ 15-20-301 to 15-20-319 (2007): Codify the Arkansas Environmental Quality Act of 1973.
- ARK. CODE ANN. §§ 15-22-201 to 15-22-223 (2007): Codify the Arkansas Water, Waste Disposal, Pollution Abatement, Administrative and Research Facilities Financing Act of 1995, which governs the allocation and use of water resources.
- ARK. CODE ANN. §§ 15-22-301 to 15-22-304 (2007): Codify the Arkansas Water, Waste Disposal, Pollution Abatement, Administrative and Research Facilities Financing Act of 1995, which governs interstate waters and water transfers to non-riparians.
- ARK. CODE ANN. §§ 15-22-501 to 15-22-514 (2007): Codify the Arkansas Water, Waste Disposal, Pollution Abatement, Administrative and Research Facilities Financing Act of 1995, which governs water development projects.
- ARK. CODE ANN. §§ 15-22-601 to 15-22-622 (2007): Codify the Arkansas Water Resources Development Act of 1981.
- ARK. CODE ANN. §§ 15-22-901 to 15-22-916 (2007): Codify the Arkansas Groundwater Protection and Management Act.
- ARK. CODE ANN. §§ 15-23-301 to 15-23-317 (2007): Codify the Arkansas Natural and Scenic Rivers System Act.
- ARK. CODE ANN. § 15-44-111 (2007): Requires fish protections for withdrawals from public waters.
- ARK. CODE ANN. § 22-5-403 (2007): Establishes that lands formed in the navigable waters belong to the former owner.
- ARK. CODE ANN. § 22-5-815 (2007): Establishes that the State has no title to minerals lying under artificially created navigable waters.

- ARK. CODE ANN. §§ 22-6-201 to 22-6-203 (2007): Establishes that islands formed in the navigable waters are property of the State.

Definition of "Navigable Waters": "Determining the navigability of a stream is essentially a matter of deciding if it is public or private property. If a body of water is navigable, it is considered to be held by the State in trust for the public. Navigability is a question of fact." *Ark. River Rights Comm. v. Echubby Lake Hunting Club,* 126 S.W.2d 738, 743 (Ark. 2003) (citing *State v. McIlroy*, 595 S.W.2d 659 (Ark. 1980); *Hayes v. State*, 496 S.W.2d 372 (Ark. 1973); *Goforth v. Wilson*, 184 S.W.2d 814 (Ark. 1945)).

By 1890, the Arkansas Supreme Court had rejected the tidal test in favor of the navigable-in-fact test. *St. Louis. I.M. & S. Ry. Co. v. Ramsey*, 13 S.W. 931, 931-32 (Ark. 1890). Until 1980, Arkansas relied essentially on the federal definition of navigability, where navigability "'depends on the usefulness of the stream to the population of its banks, as a means for carrying off the products of their fields and forests, or bringing to them articles of merchandise.'" *State v. McIlroy*, 595 S.W.2d at 663 (quoting *Lutesville Sand & Gravel Co. v. McLaughlin*, 26 S.W.2d 892, 893 (Ark. 1930)). However, in 1980 the Arkansas Supreme Court followed decisions in Massachusetts, Ohio, Michigan, California, Minnesota, and Oregon to explicitly extend the state test for navigability for public trust purposes to waters that are useful only for recreational purposes. *Id.* at 664-65. *See also Ark. River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 -45 (Ark. 2003).

Meander lines "are considered prima facie evidence of navigability." *State v. McIlroy*, 595 S.W.2d at 663. While navigability for state ownership is determined as of the date of statehood, "navigability for other purposes may arise later." *Ark. River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d at 744-45. In addition, navigability can arise through artificial improvements to the waterway. *Id.* at 745. Finally, waters subject to the ebb and flow of the tide are also considered navigable. *St. Louis, I.M., & S. Ry. Co. v. Ramsey*, 13 S.W. at 931.

Rights in "Navigable Waters": The line between private ownership and public ownership is the high-water mark. *Ark. River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d at 741. *See also St. Louis I.M. & S. Ry. Co. v. Ramsey*, 13 S.W. at 932.

"It is the policy of this state to encourage the use of its water courses for any beneficial purposes." *State v. McIlroy*, 595 S.W.2d at 664 (quoting *Barboro v. Boyle*, 178 S.W. 378, 380 (Ark. 1915)). More

specifically, the public has a right to use the water and beds "for the purposes of bathing, hunting, fishing, and the landing of boats" in addition to navigation and commerce, and the right of navigation includes the right of anchorage, whether "for business purposes or for pleasure." *Anderson v. Reames,* 161 S.W.2d 957, 960-61 (Ark. 1942).

However, the public trust status of the waters does not confer a right of access over private lands. *State v. McIlroy*, 595 S.W.2d at 665. Moreover, the State's title to the beds and banks, and the public trust rights, cease when the navigability of the waterway ceases. *Five Lakes Outing Club v. Horseshoe Lake Protective Assoc.,* 288 S.W.2d 942, 943-44 (Ark. 1956). *See also Parker v. Moore,* 262 S.W.2d 891, 893 (Ark. 1953).

CONNECTICUT

Date of Statehood: 1788

Connecticut Constitution: No relevant provisions.

Connecticut Statutes:

- CONN. GEN. STAT. ANN. § 4-67e (2000): Requires coordination of water resources policy.
- CONN. GEN. STAT. ANN. § 7-151a (2000): Defines "state waters."
- CONN. GEN. STAT. ANN. § 7-147 (2000): Regulates obstructions in waterways.
- CONN. GEN. STAT. ANN. § 15-12 (2000): Regulates obstructions on lands bordering navigable waters.
- CONN. STAT. ANN § 15-140d (2000): Prohibits obstructions to navigation or public use of waters.
- CONN. GEN STAT. ANN § 19a-209a (2000): Requires permits for wells.
- CONN. GEN. STAT. ANN. §§ 22a-16 to 22a-17 (2000): Codify the Connecticut Environmental Policy Act, which declares "the public trust in the air, water and other natural resources of the state" and creates a broad citizen suit provision that allows any member of the public to sue to protect these resources "from unreasonable pollution, impairment, or destruction." The Connecticut Supreme Court has determined that "unreasonable impairment" of this public trust is to be judged by the relevant statutes governing the activity in questions; thus, the state's minimum flow statute, which protects fish populations, was

the relevant measure of whether a dam unreasonably impaired the public trust in a river. *City of Waterbury v. Town of Washington*, 800 A.2d 1102, 1130-40 (Conn. 2002).

- CONN. GEN. STAT. ANN § 22a-349a (2000): Governs channel access and channel lines.
- CONN. GEN. STAT. ANN. §§ 22a-350 to 22a-354bb (2000): Provide for an inventory of and water resources planning for the state's aquifers.
- CONN. GEN. STAT. ANN. §§ 22a-359 to 22a-363f (2000): Regulate dredging and erections of structures in tidal, coastal, and navigable waters.
- CONN. GEN. STAT. ANN. §§ 22a-365 to 22a-379 (2000): Codify the Connecticut Water Diversion Policy Act.
- CONN. GEN. STAT. ANN. §§ 22a-380 to 22a-381d (2000): Provide the water resources policy with respect to invasive plants.

Definition of "Navigable Waters": "A distinction is always maintained between rivers navigable and those not navigable. Of the former the public alone has the right;—of the latter, individuals may and generally do own the same right as over other real estate." *Chapman v. Kimball*, 9 Conn. 38, 1831 WL 142, at *3 (Conn. 1831).

Connecticut recognizes both the tidal and navigable-in-fact tests. Connecticut case law tends to focus on coastal waters, and "all tidewater is prima facie navigable. . . ." *Town of Orange v. Resnick*, 109 A. 864, 866 (Conn. 1920). "The state, as representative of the public, is the owner of the soil between the high- and low-water mark upon navigable waters where the tide ebbs and flows." *Bloom v. Water Res. Comm'n*,, 254 A.2d 884, 887 (Conn. 1969).

Nevertheless, when faced in 1845 with the issue of whether the Connecticut River was to be considered a public river, the Connecticut Supreme Court adopted the navigable-in-fact test and concluded that the Connecticut River is navigable even above tide water influence. *Enfield Toll Bridge Co. v. Hartford N.H.R. Co.*, 17 Conn. 40, 1845 WL 431, at *5 (Conn. June 1845). The man-made status of waterways doesn't matter for purposes of the public trust doctrine—only navigability. *Ace Equip. Sales, Inc. v. Buccino*, 869 A.2d 626, 631 n.7 (Conn. 2005). However, Connecticut does not seem to have otherwise modified the federal test for navigability regarding waters not subject to the ebb and flow of the tide. *See Edward Balf Co. v. Hartford Elec. Light Co.*, 138 A. 122, 125 (Conn. 1927); *Nies v. Bulkey*, 132 A. 873, 874-75 (Conn. 1926) (both applying the federal test of navigability). The most complete

statement of non-tidal navigability dates to 1850: Navigation "only is such, and those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations. There must be some commerce or navigation which is essentially valuable. A hunter or fisherman, by drawing his boat through the waters of a brook or shallow creek, does not create navigation, or constitute their waters channels of commerce." *Town of Wethersfield v. Humphrey*, 20 Conn. 218, 1850 WL 664, at *7 (Conn. Aug. 1850).

Rights in "Navigable Waters": The line between public and private rights is the high-water mark, *Chapman v. Kimball*, 9 Conn. 38, 1831 WL 142, at *2 (Conn. July 1831), which is the line of ordinary high water. *Mihalczo v. Borough of Woodmont*, 400 A.2d 270, 271-72 (Conn. 1978). Early cases established the public's right to fish in and to take shellfish from, *Lay v. King*, 5 Day 72, 1811 WL 162, at *4 (Conn. 1811), and to harvest seaweed from the navigable waters. *Chapman v. Kimball*, 9 Conn. 38, 1831 WL 142, at *1, *4 (Conn. 1831). By 1920, the public had established "rights of fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge. And of passing and repassing. . . ." *Town of Orange v. Resnick*, 109 A. 864, 865 (Conn. 1920). However, all of these rights "are necessarily extinguished, pro tanto, by any exclusive occupation of the soil below the high-water mark by the riparian owner. The only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation." *Id.* at 865-66.

"Under the public trust doctrine, members of the public have the right to access the portion of any beach extending from the mean high tide line to the water, although it does not give a member of the public the right to gain access to that portion of the beach by crossing the beach landward of the mean high tide line." *Leydon v. Town of Greenwich*, 777 A.2d 552, 564 n.17 (Conn. 2001).

NOTE: The Connecticut Supreme Court has carefully distinguished the statutory public trust created in the Connecticut Environmental Policy Act (CEPA), CONN. GEN. STAT. ANN. §§ 22a-16, 22a-17 (2000), from the common law public trust doctrine related to navigable waters. *Fort Trumbull Conservancy, L.L.C. v. City of New London*, 925 A.2d 292 (Conn. 2007); *Fort Trumbull Conservancy, L.L.C. v. Alves*, 815 A.2d 1188, 1193 n.4 (Conn. 2003); *Leydon v. Town of Greenwich*, 777 A.2d 552, 557 n.17 (Conn. 2001).

DELAWARE

Date of Statehood: 1787

Delaware Constitution: No relevant provisions.

Delaware Statutes:

- DEL. CODE ANN. tit. 7, §§ 6002-6042 (1997): Codify the Department of Natural Resources and Environmental Control's environmental permitting authority, which extends to permitting any activity that "may cause or contribute to withdrawal of ground water or surface water or both." DEL. CODE ANN. tit. 7, § 6003(a)(3) (1997). In addition, increases in water use are prohibited without the Department's prior approval, DEL. CODE ANN. tit. 7, § 6030 (1997), and the Department may reduce water use when there is depletion or exhaustion of water resources. DEL. CODE ANN. tit. 7, § 6031 (1997).
- DEL. CODE ANN. tit. 7, §§ 6101-6143 (1997): Govern the extraction of minerals in submerged lands.
- DEL. CODE ANN. tit. 7, §§ 7201-7217 (1997): Govern the Department of Natural Resources and Environmental Control's authority to permit activities that could affect subaqueous lands. NOTE: In 1992, the Delaware Legislature amended DEL. CODE ANN. tit. 7, § 7202 (1997) to define "navigable waters" as requiring a connection to commerce, which led the Delaware Court of Chancery to conclude that mere private recreational use was insufficient to establish the navigability of a waterway in Delaware. *See Hagan v. Delaware Anglers' & Gunners' Club*, 655 A.2d 292, 293-94 (Del. Ch. 1995) (citing *Tulou v. Anderson*, 1994 WL 374311 (Del. Ch. June 20, 1994)). However, in 2000, the legislature entirely removed the definition of "navigable waters."

Definition of "Navigable Waters": Delaware's definition of "navigable waters" originally depended almost entirely on the ebb and flow of the tide. *Bickel v. Polk*, 5 Harr. 325, 1851 WL 602, at *1 (Del. 1851) (noting that "public streams" are "where the tide ebbs and flows"); *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 437, 1882 WL 2713, at *1 (Del. Ch. 1882) (explicitly extending the ebb-and-flow test to fresh waters, concluding that public ownership extends to "all rivers connected with the sea, so that the tide ebbs and flows therein, [which] are to be treated as arms of the sea"). Not until 1988 did Delaware explicitly adopt the navigable-in-fact test for navigability. *Hagan v. Delaware*

Anglers & Gunners Club, 1988 WL 606, at *2-*3 (Del. Ch. Jan. 5, 1988); *but see Cummins v. Spruance*, 4 Harr. 315, 1845 WL 510, at *4 (Del. Super. Ct. 1845) (protecting the right of navigation in Duck Creek, which the court recognized as a "common highway.").

Delaware uses the federal test of navigability-in-fact. *Hagan v. Delaware Anglers' & Gunners' Club*, 655 A.2d 292, 293 (Del. Ch. 1995) (citing *Hagan v. Delaware Anglers' & Gunners' Club*, 1988 WL 606 (Del. Ch. Jan. 5, 1988) (quoting *The Daniel Ball*, 77 U.S. (10 Wall) 557, 563 (1870))). While "[l]ack of commercial traffic does not preclude a finding of navigability," the clearest case law indicates that "mere private, not-for-profit recreational use of a body of water" is insufficient to establish navigability. *Id.* at 293-94 (citing *Tulou v. Anderson*, 1994 WL 374311 (Del. Ch. June 20, 1994)). However, this decision rested on a statutory definition of "navigable water" that no longer exists.

Rights in "Navigable Waters": Riparian and littoral owners both hold title to the low-water mark in Delaware, which the Delaware courts now consider a long-standing rule of property law that cannot be changed without effectuating a taking of private property. *Phillips v. State* ex rel. *Dep't of Natural Res. & Envtl. Control*, 449 A.2d 250, 252 (Del. 1982); *State ex rel. Buckson v. Pennsylvania R.R. Co.*, 267 A.2d 455, 457-59 (Del. 1969); *Groves v. Sec'y, Dep't. of Natural Res. & Envtl. Control*, 1994 WL 89804, at *5 (Del. Super. Ct. Feb. 8, 1994); *State* ex rel. *Buckson v. Pennsylvania R. R. Co.*, 228 A.2d 587, 600 (Del. Super. Ct. 1967); *State v. Reybold*, 5 Harr. 484, 1854 WL 847, at *3 (Del. Gen. Sess. 1854); *Bickel v. Polk*, 5 Harr. 325, 1851 WL 602, at *1 (Del. Super. 1851); *but see Harlan & Hollingsworth Co. v. Paschall*, 1882 WL 2713, at *1 (Del. Ch. 1882) (repeatedly stating that state ownership in the navigable waters extends to the high water mark). The low water mark is the "mean low water mark, which is the average daily height of all low water marks" over a substantial period of time. *State* ex rel. *Buckson v. Pennsylvania R.R. Co.*, 228 A.2d 587, 601 (Del. Super. Ct. 1967).

Despite this private ownership, the public has the right to fish and to navigate over the foreshore between the low and high water marks, and these public rights are superior to the private owner's interests. *Groves v. Sec'y, Dep't of Natural Res. & Envtl. Control*, 1994 WL 89804, at *6 (Del. Super. Ct. Feb. 8, 1994); *Bickel v. Polk*, 5 Harr. 325, 1851 WL 602, at *1 (Del Super. Ct. 1851). However, "[t]here does not and never has existed, as part of this [public trust] doctrine in Delaware, a right of the public superior to the landowner to access the foreshore for walking and/or recreational activities," and any recognition of such a right would be a taking. *Groves v. Sec'y, Dep't of Natural Res. & Envtl. Control*, 1994 WL 89804, at *6 (Del. Super. Ct. Feb. 8, 1994). Moreover, the

Delaware Superior Court concluded in 1967 that Delaware's statutes governing the regulation of fishing, DEL. CODE ANN. tit. 7, §§ 901, 902 (1997), which were enacted in 1905, eliminated the public's right to fish over the foreshore in the Delaware River. *State ex rel. Buckson v. Pennsylvania R.R. Co.*, 228 A.2d 587, 603 (Del. Super. Ct. 1967).

Unusually, the Delaware courts consider the Delaware public trust doctrine as including the state's police powers to regulate, "including the protection of life, health, comfort, and property or the promotion of public order, morals, safety, and welfare." *Groves v. Sec'y, Dep't of Natural Res. & Envtl. Control*, 1994 WL 89804, at *6 (Del. Super. Ct. Feb. 8, 1994); *State* ex rel. *Buckson v. Pennsylvania R.R. Co.*, 228 A.2d 587, 603-05 (Del. Super. Ct. 1967) (expressing dissatisfaction with the argument that fishing and navigation were the *only* public uses allowed and surmising that the State had more authority to regulate in the public interest than just that); *see also Bailey v. Philadelphia, W. & B.R. Co.*, 4 Harr. 389, 1846 WL 726, at *1 (Del. 1946) ("The State has the right of a proprietor over navigable streams entirely within its borders; and may obstruct, or (unless where restricted by the Constitution of the United States), may close up, such streams at pleasure. Such rivers are public highways, and open to all for navigation and fishery; but the legislature may impair or take away these public rights for public purposes.").

FLORIDA

Date of Statehood: 1845

Florida Constitution: Since 1970, the Florida Constitution has provided that:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

FLA. CONST., art. 10, § 11. This constitutional provision embodies the common-law public trust doctrine. *Krieter v. Chiles*, 595 So.2d 111, 111 (Fla. Dist. Ct. App. 1992).

Florida Statutes:

- FLA. STAT. ANN. § 253.034 (West 2007): Provides that

public lands "shall be managed to serve the public interest by protecting and conserving land, air, water, and the state's natural resources, which contribute to the public health, welfare, and economy of the state." The statute proclaims a stewardship ethic and declares that such lands are held in a public trust.

- FLA. STAT. ANN. § 253.68 (West 2007): Governs use of submerged lands for aquaculture.
- FLA. STAT. ANN. §§ 373.01 to 373.201 (West 2007): Codify the State Water Resources Plan.
- FLA. STAT. ANN. §§ 373.202 to 373.301 (West 2007): Govern permitting of consumptive uses of water.
- FLA. STAT. ANN. §§ 373.403 to 373.472 (West 2007): Govern management of surface waters.
- FLA. STAT. ANN. § 403.0615 (West 2007): Codifies the Water Resources Restoration and Preservation Act.

Definition of "Navigable Waters": Waters are navigable for purposes of the public trust doctrine if they are "navigable in fact." *Broward v. Mabry*, 50 So. 826, 829 (Fla. 1909). This test applies to both tidewaters and fresh waters, *id.*; waters subject to the ebb and flow of the tide are *not* automatically deemed "navigable" for public trust purposes. *Lopez v. Smith*, 109 So.2d 176, 179 (Fla. Dist. Ct. App. 1959); *City of Tarpon Springs v. Smith*, 88 So. 613, 619 (Fla. 1921). "The determination of navigability is to be made as of 1845, the date Florida became a state." *Brevard County v. Blasky*, 875 So.2d 6, 13 (Fla. Dist. Ct. App. 2004); *Board of Trustees of Internal Improvement Trust Fund v. Florida Public Utility Co.*, 599 So.2d 1356, 1357 n.1 (Fla. Dist. Ct. App. 1992) , *review denied* 613 So.2d 4 (Fla. 1992). Moreover, the common law navigability-in-fact test probably trumps legislative attempts to declare certain waters non-navigable. *Biscayne Co. v. Martin*, 116 So. 66, 66 (Fla. 1927).

Florida courts assert the federal title test for navigability. *Board of Trustees of Internal Improvement Trust Fund v. Florida Public Utility Co.*, 599 So.2d 1356, 1357 n.1 (Fla. Dist. Ct. App. 1992), *review denied* 613 So.2d 4 (Fla. 1992) ("Florida's test for navigability is similar, if not identical, to the federal title test" (citations omitted)); *Anderson v. Bell*, 411 So.2d 948, 949 (Fla. Dist. Ct. App. 1982) ("The test for navigability in Florida is whether the waterway in its natural state can potentially provide for commercial use."); *Odom v. Deltona Corp.*, 341 So.2d 977, 988 (Fla. 1976) (noting that navigability is a federal question).

However, in application, Florida's test is broader than the federal test. First, "[c]apacity for navigation, not usage for that purpose,

determines the navigable character of waters. . . ." *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). Second, interstate navigation or actual use for commerce are not required; instead, a water will be navigable if it is useful for public purposes by the local community. *Broward v. Mabry*, 50 So. 826, 830-31 (Fla. 1909). Finally, the Florida courts have deemed many waters navigable on the basis of limited navigability-in-fact or uses other than navigation and commerce. *See McDowell v. Trustees of Internal Improvement Fund*, 90 So.2d 715, 716 (Fla. 1956) (declaring a lake to be navigable when it was useful for fishing); *Baker v. State ex rel. Jones*, 87 So.2d 497, 497 (Fla. 1956) (suggesting that navigability would be established if the water "is desirable for navigation purposes, that anyone attempted to use it for commercial water transportation *or that it is suitable for pleasure boating or that it is desirable for bathing or fishing*" (emphasis added)); *Broward v. Mabry*, 50 So. 826, 830-31 (Fla. 1909) (deeming Lake Jackson to be navigable despite it being inches deep and subject to disappearance as a result of a sinkhole); *Bucki v. Cone*, 6 So. 160, 162 (Fla. 1889) (declaring a river to be navigable when it was useful for floating logs); *Board of Trustees of Internal Improvement Trust Fund v. Florida Public Utilities Co.*, 599 So.2d 1356, 1358-59 (Fla. Dist. Ct. App. 1992) (refusing to grant summary judgment on the issue of nonnavigability when the flowage from Blue Springs and Spring Creek could power a mill and the public used the area for swimming, bathing, and other amusement); *Lopez v. Smith*, 145 So.2d 509, 514 (Fla. Dist. Ct. App. 1962) (holding that evidence of pleasure boating was enough to establish navigability, especially when the water body was meandered).

Rights in "Navigable Waters": "The public has the right to use navigable waters for navigation, commerce, fishing, and bathing and 'other easements allowed by law.'" *Brannon v. Boldt*, 958 So.2d 367, 2007 WL 162166, at *5 (Fla. Dist. Ct. App. Jan. 24, 2007) (quoting *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909)). These rights include use of the foreshore and "derive[] from the public trust doctrine," and riparian owners share in these rights with the public. *Id.* (citing and quoting *State v. Black River Phosphate Co.*, 13 So. 640, 643 (Fla. 1893); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909); *Hayes v. Bowman*, 91 So.2d 795, 799 (Fla. 1957)). The high-water mark is the border between public and private rights. *Id.*; *see also Hayes v. Bowman*, 90 So.2d 795, 799 (Fla. 1957); *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 845 (Fla. 1927); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 644 (Fla. 1909); *State v. Gerbing*, 47 So. 353, 355 (Fla. 1908). Public rights of navigation and commerce are superior to private riparian rights; all other public rights

are concurrent with private riparian rights. *Ferry Pass*. 48 So. at 645.

Florida case law leaves open the possibility that protected uses could be expanded. *See, e.g., Brannon v. Boldt*, 958 So.2d 367, 2007 WL 162166, at *5 (Fla. App. 2d DCA Jan. 24, 2007) (emphasizing that the public trust doctrine extends to "other easements allowed by law"); *Hayes v. Bowman*, 91 So.2d 795, 799 (Fla. 1957) (noting that the state's title "is held in trust for the people for purposes of navigation, fishing, bathing, *and similar uses*" (emphasis added)); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909) (extending the public trust doctrine to "other easements allowed by law); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 644 (Fla. 1909) (noting that the public has rights "to fishing and bathing *and the like*" (emphasis added)). Lands beneath navigable waters are "trust property and should be devoted to the fulfillment of the purposes of the trust, to wit: the service of the people." *Hayes v. Bowman*, 90 So.2d at 799.

The existence of Florida's public trust doctrine protects certain legislative enactments from regulatory takings claims. For example, when the Florida legislature in 1990 prohibited oil and gas development in certain submerged lands despite existing leases and permits, no taking liability arose: "a mere license or permit to use land was not a protected property right which could be taken where the interest was obtained subject to the public trust doctrine." *Coastal Petroleum v. Chiles*, 701 So.2d 619, 625 (Fla. Dist. Ct. App. 1997) (citing *Marine One, Inc. v. Manatee County*, 898 F.2d 1490, 1492-93 (11th Cir. 1990)). Similarly, because of the public trust doctrine, the denial of a permit to construct a private dock in navigable waters was not a taking. *Krieter v. Chiles*, 595 So.2d 111, 112 (Fla. Dist. Ct. App. 1992).

However, public rights in navigable waters are complicated in Florida by three historically progressive statutes that conveyed title to some portions of the navigable waters to private riparian landowners if private riparian owners filled or bulkheaded those lands: the Riparian Act of 1856; the Butler Act of 1921; and the Bulkhead Act of 1957. Early case law suggests that even when title passed to private owners as a result of these statutes, the waters remained impressed with a public trust and that the private rights are subject to those public rights. *State v. Black River Phosphate Co.*, 13 So. 640, 648-50 (Fla. 1893) (holding that, despite the operation of the Riparian Act of 1856, the public trust doctrine was not destroyed and privately acquired sovereignty lands remained subject to the public trust); *Deering v. Martin*, 116 So. 54, 61 (Fla. 1928) (noting that the state can make "limited disposition" of public trust lands so long as the public's rights are not impaired); *see also Coastal Petroleum v. American Cyanamid Co.*, 492 So.2d 339, 342 (Fla. 1986) (holding that a grant of swamp and overflowed lands did *not* grant

title to sovereignty submerged lands, and hence that public rights continued). However, when the Florida Department of Environmental Protection attempted to clarify that public trust rights had been reserved in these filled or bulkheaded lands, its rule was declared invalid. *Anderson Columbia Co., Inc. v. Board of Trustees of Internal Improvement Trust Fund of State of Florida*, 748 So.2d 1061, 1065-66 (Fla. Dist. Ct. App. 1999); *see also Odom v. Deltona Corp.*, 341 So.2d 977, 989 (Fla. 1976) ("An examination of the Constitution and statutes indicates that both the people and the Legislature strongly feel that valid federal and state grants to title to real property without any reservation of public rights in and to waters thereon should not be upset because of new standards of value relating to ecology and other matters created by population growth, recreational needs and other issues of current importance in Florida."). The effect of these statutes is important because there are no public rights—not even for fishing or passage—in private waters in Florida. *Odom v. Deltona Corp.*, 341 So.2d at 989; *Osceloa County v. Triple E Development Co.*, 90 So.2d 600, 602-03 (Fla. 1956).

GEORGIA

Date of Statehood: 1788

Georgia Constitution: Since 1945, Georgia's Constitution has stated that:

> The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark, is hereby ratified and confirmed.

1983 GA. CONST., art. I, § III, ¶ 3; 1976 GA. CONST., art. I, § III, ¶ 2; 1945 GA. CONST., art. I, § VI, ¶ 1. Nevertheless, in 1976, the Georgia Supreme Court traced the statutory history leading to this provision and concluded that the state owns all navigable tidewaters to the high-water mark. *State v. Ashmore*, 224 S.E.2d 334, 336-41 (Ga. 1976).

Georgia Statutes:

- GA. CODE ANN. § 12-5-31 (West 2007): Establishes that permits are required for the use of surface waters.
- GA. CODE ANN. §§ 12-5-210 to 12-5-213 (West 2007): Govern planning for coastal and offshore lands, waters, and resources of the State.
- GA. CODE ANN. §§ 12-5-230 to 12-5-248 (West 2007):

Codify the Shore Protection Act, which establishes that activities require a permit from the Georgia Department of Natural Resources.

- GA. CODE. ANN. §§ 12-5-280 to 12-5-297 (West 2007): Codify the Coastal Marshlands Protection Act of 1970, which requires permits for activities that could affect coastal marshes.
- GA. CODE. ANN. §§ 12-5-310 to 12-5-312 (West 2007): Govern sea oats and protective vegetative cover to protect sand and the coasts.
- GA. CODE. ANN. §§ 12-5-320 to 12-5-329 (West 2007): Codify the Georgia Coastal Management Act, which sunsets on July 1, 2009.
- GA. CODE ANN. §§ 12-5-520 to 12-5-525 (West 2007): Codify the Comprehensive State-Wide Water Management and Planning Act.
- GA. CODE. ANN. §§ 44-8-1 to 44-8-10 (West 2007): Codify Georgia's water rights. These provisions define "navigable stream" (§ 44-8-5) and "navigable tidewater" (§ 44-8-7) and delineate private ownership rights in navigable and non-navigable streams and navigable and non-navigable tidewaters.
- GA. CODE ANN. §§ 52-1-1 to 52-1-10 (West 2007): Codify the Protection of Tidewaters Act. GA. CODE ANN. § 52-1-2 creates a statutory public trust doctrine in the tidewaters, declaring that "[t]he State of Georgia, as sovereign, is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine." Protection of tidewaters is "of state-wide concern" and hence tidewaters can be regulated pursuant to the state's police powers. GA. CODE ANN. § 52-1-2 (West 2007). GA. CODE ANN. § 52-1-4 declares that any structures in the tidewaters are public nuisances and must be removed.

Definition of "Navigable Waters": Georgia originally used the tidal test of navigability. *Charleston & Savannah Ry. v. Johnson*, 73 Ga. 306, 1884 WL 2370, at *3 (Ga. 1884); *Boardman v. Scott*, 30 S.E. 982, 983 (Ga. 1897); *James v. Oemler*, 35 S.E. 375, 77 (Ga. 1900).

In 1863, the Georgia legislature defined a navigable-in-fact test for state ownership and public rights, and that definition has persisted unchanged (although renumbered) into the current Code. Under these

provisions, a "navigable stream" is "a stream which is capable of transporting boats loaded with freight in the regular course of trade either for the whole or a part of the year. The mere rafting of timber or the transportation of wood in small boats shall not make a stream navigable." GA. CODE ANN. § 44-8-5(a)(West 2007). This statutory definition of "navigable stream" now controls all public trust determinations of navigability in non-tidal waters. *Givens v. Ichauway, Inc.*, 493 S.E.2d 148, 150-51 (Ga. 1997) (citing *Parker v. Durham*, 365 S.E.2d 411 (Ga. 1988); *Bosworth v. Nelson*, 158 S.E. 306 (1931); *Bosworth v. Nelson.* 152 S.E. 575 (1930)). However, historical navigability may be relevant in determining current navigability. *Id.* at 151.

Several courts have suggested (but not conclusively determined) that Georgia law differs from federal law on the definition of "navigability." *Givens v. Ichauway, Inc.*, 493 S.E.2d 148, 152 (Ga. 1997); *Georgia Canoeing Ass'n v. Henry*, 482 S.E.2d 298, 299 (Ga. 1997) (interpreting the federal test as requiring a stream to support interstate commerce, suggesting but declining to decide that Georgia's test is different).

In 1902, the Georgia Legislature defined "navigable tidewaters." This definition has persisted into the current Code, which defines "navigable tidewater" as:

> any tidewater, the sea or any inlet thereof, or any other bed of water where the tide regularly ebbs and flows which is in fact used for the purposes of navigation or is capable of transporting at mean low tide boats loaded with freight in the regular course of trade. The mere rafting of timber thereon or the passage of small boats thereover, whether for transportation of persons or freight, shall not be deemed navigation within the meaning of this Code section and shall not make tidewaters navigable.

GA. CODE ANN. § 44-8-7(a).

Rights in "Navigable Waters": Because Georgia originally used only the ebb-and-flow tidal test for navigability, under pre-1863 Georgia common law, private landowners owned the entirety of non-tidal navigable streams. *Jones v. Water Lot. Co. of Columbus*, 18 Ga. 539, 1855 WL 1731, at *2 (Ga. 1855) (citing *Young v. Calhoun & Harrison*, 6 Ga. 130, 141 (Ga. 1849)); *Hendrick v. Cook*, 4 Ga. 241, 1848 WL 1490, at *3 (Ga. 1848). For lands granted from the state before 1863, such complete title persists. *Parker v. Durham*, 365 S.E.2d 411, 412-13 (Ga. 1988); *Florida Gravel Co. v. Capital City Sand Co.*, 154 S.E. 255 (Ga. 1930). Nevertheless, although property rights may be governed by pre-1863 grants, navigability for public trust rights is still governed by the

Code. *Givens v. Ichauway, Inc.*, 493 S.E.2d 148, 152 (Ga. 1997). Moreover, a riparian landowner's title to and possession of nonnavigable streams is exclusive. GA. CODE ANN. § 44-8-3 (West 2007).

For lands granted along non-tidal navigable waters after 1863, private landowners hold title down to the low-water mark. GA. CODE ANN. § 44-8-5(b) (West 2007). Thus, the 1863 Code expanded public rights in non-tidal navigable streams by eliminating exclusive private ownership of the entire streambed. *Parker v. Durham*, 365 S.E.2d 411, 412-13 (Ga. 1988). If the river is navigable under § 44-8-5(a), the public has a right of passage. *Id.* at 413. Moreover, obstruction of the public's right of navigation in a navigable stream is an abatable public nuisance. *Charleston & Savannah Ry. v. Johnson*, 73 Ga. 306, 1884 WL 2370, at *3 (Ga. 1884); *South Carolina R. Co. v. Moore*, 28 Ga. 398, 1859 WL 2583, at *11 (Ga. 1859).

Public rights in non-tidal waters are governed exclusively by the Code, and "no servitude of public passage is imposed upon a stream unless it is navigable under the Code." *Givens v. Ichauway, Inc.*, 493 S.E.2d 148, 151-52 (Ga. 1997); *see also Georgia Canoeing Ass'n v. Henry*, 482 S.E.2d 298, 299 (Ga. 1997) (holding that there is no public right to canoe in a nonnavigable stream); *Seaboard Air Line Ry. v. Sikes*, 60 S.E. 868, 869 (Ga. Ct. App. 1908) ("In this state, under our Code, this public right of floatage or raftage exists only in streams that are navigable."); *but see Florida Gravel Co. v. Capital City Sand & Gravel Co.*, 154 S.E. 255, 256-57 (Ga. 1930) (citing *Young v. Harrison*. 6 Ga. 130 (Ga. 1849), for the proposition that the public retains a right of passage non-tidal waterways that are navigable-in-fact, even if the landowner does own to the middle of the stream). Similarly, the right to fish in private streams is exclusive. *Parker v. Durham*, 365 S.E.2d 411, 413 (Ga. 1988); *Bosworth v. Nelson*, 152 S.E. 575 (Ga. 1930); *West v. Baumgartner*, 184 S.E.2d 213 (Ga. Ct. App. 1971), *rev'd on other grounds*, 187 S.E.2d 665 (Ga. 1972).

The public possesses greater rights in tidewaters. Since 1970 by statute, and before 1970 under common law, the State of Georgia holds these waters in trust for the people "for fishing, passage, navigation, commerce, and transportation. . . ." GA. CODE. ANN. § 52-1-2. These rights include a right of access to the foreshore (the section of beach between the low- and high-tide lines) "for recreation or other purposes." *Godhinho v. City of Tybee Island*, 499 S.E.2d 389, 391 (Ga. Ct. App. 1984) (citing *Lines v. State of Georgia*, 264 S.E.2d 891 (Ga. 1980); *State of Georgia v. Ashmore*, 224 S.E.2d 334 (Ga. 1976)).

The legislature's 1902 pronouncements regarding private title to tidewaters caused some legal consternation. The Georgia Code proclaims that "[t]he title to the beds of all nonnavigable tidewaters

where the tide regularly ebbs and flows shall vest in the owner of the adjacent land for all purposes, including, among others, the exclusive right to the oysters, clams, and other shellfish therein and thereon." GA. CODE ANN. § 44-8-6. In navigable tidewaters, in contrast, the owner's "rights" extend to the low-water mark. GA. CODE ANN. § 44-8-7(b).

Despite this 1902 statutory distinction between navigable and nonnavigable tidewaters, the Code itself explicitly preserves public rights of navigation in *all* tidewaters. GA. CODE ANN. § 44-8-8. Moreover, the Georgia courts, often relying on the common-law public trust doctrine or, more recently, § 52-1-2, have generally preserved state title to, and the public trust rights in, the tidewaters. *See Black v. Floyd*, 630 S.E.2d 382, 383 (Ga. 2006) (holding that, under § 52-1-2, the State holds title to the beds of *all* tidewaters in the state to the high-water mark, unless a conveyance from the Crown *explicitly* conveyed those beds before statehood, and explicitly eliminating the relevance of navigability to the state's title to tidewaters); *Dorroh v. McCarthy*, 462 S.E.2d 708, 710 (Ga. 1995) ("The state owns fee simple title to the foreshore on navigable tidal waters. . . . As a result, the state owns the [tidally influenced] river's water bottoms up to the high water mark and may regulate these tidelands for the public good.") (citing *State of Georgia v. Ashmore*, 224 S.E.2d 334, 412-13 (Ga. 1976)); *Rolleston v. State*, 266 S.E.2d 189, 192 (Ga. 1980) ("The state owns the foreshore to the high water mark" and can exercise permitting power over these lands); *State of Georgia v. Ashmore*, 224 S.E.2d 334, 339, 412-413 (Ga. 1976), *cert. denied*, 429 U.S. 820 (1976) (concluding that the 1902 enactment was a reaction by the legislature to *Johnson v. State*, 40 S.E. 807, 808 (1902), which held that the statutory provisions governing navigable streams did not apply to tidal waters and forbade trespass prosecutions when members of the public "stole" the landowners oysters in the foreshore; as a result, the "rights" given to adjacent owners in the 1902 statute were "agricultural" rights—that is, the right to plant and exclusively harvest oysters in the foreshore—not title, and the State still had fee simple title to the foreshore); *but see Rauers v. Persons*, 86 S.E. 244, 245 (Ga. 1915) (holding that, under the 1902 Act, in nonnavigable inlets, the landowner can exclude others from standing above the low-water mark). "We adopt the definition of mean high tide or water given by the U.S. Coast and Geodetic Survey and hold that the mean high water at any given point along the coast is the elevation of the mean level of high water calculated by averaging the height of all the high waters at that place over a period of 19 years." *Smith v. State of Georgia*, 282 S.E.2d 76, 81 (Ga. 1981).

Georgia's public trust doctrine and its statutory embodiments can protect the State from regulatory takings claims. Thus, for example, in 1999 the Georgia Supreme Court upheld the constitutionality of the

Protection of Tidewaters Act and held that an order requiring the removal of a houseboat did not constitute a regulatory taking. *Rouse v. Department of Natural Resources*, 524 S.E.2d 455, 459-61 (Ga. 1999).

ILLINOIS

Date of Statehood: 1818

Illinois Constitution: As a result of 1970 amendments, the Illinois Constitution declares that "[t]he public policy of the State and duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations." ILL. CONST., art XI, § 1. In addition, "[e]ach person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private. . . ." ILL. CONST., art XI, § 2. In 1976, the Illinois Supreme Court explicitly connected these provisions to the state's public trust doctrine. *People* ex rel. *Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 780 (Ill. 1976).

Illinois Statutes:

- 5 ILL. COMP. STAT. ANN. §§ 605/0.01 to 605/02 (West 2005): Codify the Submerged Lands Act. "The State of Illinois for the benefit of the People of the State and in pursuance of protecting the trust wherein the State holds certain lands for the People, hereby elects and determines to assert and reclaim the title to lands of the State of Illinois now submerged and lands that were formerly submerged, but that have been illegally filled in, reclaimed and occupied, and also any lands that may have been allotted to any person or corporation, public or private, and which have been illegally filled in, reclaimed and occupied, or which are not used and occupied for the purposes for which they were allotted." § 605/1.
- 20 ILL. COMP. STAT. ANN. §§ 801/5-5 to 801/5-10 (West 2001): Establish the Office of Water Resources.
- 70 ILL. COMP. STAT. ANN. §§ 1815/2.5, 1820/2.14, 1821/2.14, 1835/2.14, 1845/2.14, 1850/2.14, 1855/2.14 (West 2005): Define, for the various Regional Port Districts, "navigable waters" to be "any public waters which are or can be made usable for water commerce."
- 70 ILL. COMP. STAT. ANN. § 1835/18 (West 2005): Prohibits obstruction of the navigable waters without a

permit.

- 70 ILL. COMP. STAT. ANN. §§ 805/52 to 805/5d (West 2005): Codify the Downside Forest District Act, which allows Forest Districts, with the approval of the state, to fill in submerged lands "not fit for navigation." § 805/5a. However, the Districts cannot interfere with navigation or cut off public access. § 805/5d.
- 70 ILL. COMP. STAT. ANN. §§ 1550/0.01 to 1555/1.1 (West 2005): Codify the Chicago Submerged Lands Acts.
- 70 ILL. COMP. STAT. ANN. §§ 1575/0.01 to 1575/2 (West 2005): Codify the Lincoln Park Submerged Lands Act.
- 525 ILL. COMP. STAT. ANN. §§ 45/1 to 45/7 (West 2004): Codify the Water Use Act of 1983.
- 615 ILL. COMP. STAT. ANN. §§ 5/4.9 to 5/30 (West 2007): Codify the Rivers, Lakes, and Streams Act, part of which prevents encroachments on state-owned waters. § 5/7.
- 615 ILL. COMP. STAT. ANN. §§ 10/0.01 to 10/28 (West 2007): Codify the Illinois Waterways Act.
- 615 ILL. COMP. STAT. ANN. §§ 20/1 TO 20/5 (WEST 2007): Codify the Navigable Waterways Obstruction Act.
- 615 ILL. COMP. STAT. ANN. §§ 50/1 to 50/14 (West 2007): Codify the Level of Lake Michigan Act, which regulates consumptive use of and diversions from Lake Michigan.

Definition of "Navigable Waters": The Northwest Ordinance of 1787 gave Illinois jurisdiction over all navigable waters in the territory. *DuPont v. Miller*, 141 N.E. 423, 425 (Ill. 1923). The English common-law tidal test remained in force with respect to boundary and ownership, *Schulte v. Warren*, 75 N.E. 783, 785 (Ill. 1905), but in determining what waters are "navigable" for purposes of public rights, the ebb-and-flow tidal test does not apply. *Id.*; *DuPont*, 141 N.E. at 425. Instead, the federal commerce test of navigability from *The Daniel Ball* and *The Montello* determine navigability. *DuPont*, 141 N.E. at 425; *State of Illinois v. New*, 117 N.E. 597, 599 (1917) (citing *Wilton v. Van Hessen*, 94 N.E. 134 (Ill. 1911)). "[T]he test has been whether or not the water in its natural state is used or is capable of being used as a highway for commerce, over which trade and travel may be conducted in the customary modes of travel on water." *DuPont*, 141 N.E. at 425.

Log floatation is not enough to establish navigability. *Schulte*, 75 N.E. at 785. Moreover, lakes that were never meandered in federal government surveys of swamp and overflowed lands are presumed to be non-navigable for purposes of public rights. *Leonard v. Pearce*, 181 N.E. 399, 400-01 (Ill. 1932) (citing *New*, 280 Ill. at 403-06).

The Illinois public trust doctrine applies to parks and conservation areas as well as to submerged lands. *Timothy Christian Schools v. Village of Western Springs*, 675 N.E.2d 168, 174 (Ill. App. Ct. 1996); *see also Friends of the Parks v. Chicago Park Dist.*, 786 N.E.2d 161, 169 (Ill. 2003) (noting that Burnham Park was a public trust property); *Wade v. Kramer*, 459 N.E.2d 1025 (Ill. App. Ct. 1984) (applying the doctrine to a conservation district). However, it does not apply to empty lots. *Timothy Christian Schools*, 675 N.E.2d at 174.

Rights in "Navigable Waters": Because the English common law applies to ownership of submerged lands, riparian landowners own to the middle of navigable waterways. *Schulte*, 75 N.E. at 785; *City of Peoria v. Balance*, 61 Ill. App. 369, 1895 WL 2637, at *2 (Ill. App. Ct. 1895) (citations omitted). However, the private ownership is subject to public trust rights. *Id.* Moreover, the line between public and private ownership in Lake Michigan is the high-water mark. *Revell v. People*, 52 N.E. 1052, 1055 (Ill. 1898) (citing *People v. Kirk*, 45 N.E. 830, 133 (Ill. 1896); *Shively v. Bowlby*, 152 U.S. 9 (1894); *Illinois Central Railroad Co.*, 146 U.S. at 152).

Illinois was the subject of the U.S. Supreme Court's announcement of the federal public trust doctrine, *Illinois Central Railroad Co.*, 146 U.S. at 452-53, and Illinois views the public trust doctrine as being created in that case. *Timothy Christian Schools*, 675 N.E.2d at 173-74. In accord with *Illinois Central*, Illinois cases focus on state conveyances of submerged lands and the fact that the state trust cannot be relinquished. *Friends of the Parks*, 786 N.E.2d at 169 (citing *Illinois Central*, 146 U.S. at 453).

The public trust is violated if a state grant of submerged lands has only a private purpose. *Id.* at 169-70 (citing *People* ex rel. *Scott* , 360 N.E.2d at 780-81). Moreover, the public purpose must be direct, not just an economic benefit to the state. *People* ex rel. *Scott*, 360 N.E.2d at 781. Under this test, a grant to a steel plant to expand its facilities had only private purposes, would impair the public uses, and hence violated the public trust doctrine. *Id.* at 780-81. In contrast, the Sports Facilities Authority Act, which allowed a new stadium for the Chicago Bears to be built in Burnham Park, did not involve a conveyance of land or control to the Bears and hence did not violate the public trust doctrine. *Friends of the Parks*, 786 N.E.2d at 170.

For many years, Illinois limited public uses to the traditional navigation, commerce, and fishing. *DuPont* , 141 N.E. at 425; *Schulte*, 75 N.E. at 787 (also holding that the right to fish is subordinate to the right of navigation). However, in 1976, the Illinois Supreme Court greatly expanded the public uses protected to adapt to changing

conditions. *People* ex rel. *Scott*, 360 N.E.2d at 780 (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54-55 (N.J. 1972)). According to the Court:

> On this question of changing conditions and public needs, it is appropriate to observe that here has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment. The public has become increasingly concerned with dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources. This is reflected in the enactment of the Illinois Environmental Protection Act . . . in 1971 and in the ratification by the people of this State of sections 1 and 2 of article XI of the 1970 Constitution. . . .

People ex rel. Scott, 360 N.E.2d at 780.

The public trust doctrine also creates a private right of action. *Timothy Christian Schools*, 675 N.E.2d at 173-74; *Paepcke v. Public Building Comm'n of Chicago*, 263 N.E.2d 11, 18 (Ill. 1970) (overruling *Droste v. Kerner*, 217 N.E.2d 73 (Ill. 1966)).

INDIANA

Date of Statehood: 1816

Indiana Constitution: No relevant provisions.

Indiana Statutes:

- IND. CODE §§ 2-5-25-1 to 2-5-25-7 (2003): Create the Water Resources Study Committee.
- IND. CODE §§ 14-25-1-1 to 14-25-1-11 (2003): Govern water rights in surface waters. "Water in a natural stream, natural lake, or another natural body of water in Indiana that may be applied to a useful and beneficial purpose" is "a natural resource and public water of Indiana." IND. CODE § 14-25-1-2(a) (2003).
- IND. CODE §§ 14-25-2-1 to 14-25-2-11 (2003): Govern minimum stream flow and water sale contracts.
- IND. CODE §§ 14-25-5-1 to 14-25-5-15 (2003): Govern emergency regulation of surface water rights.
- IND. CODE §§ 14-25-7-1 to 14-25-7-17 (2003): Govern water resource management.
- IND. CODE §§ 14-25-9-1 to 14-25-9-4 (2003): Govern

water resources investigation and measurement.
- IND. CODE §§ 14-25-14-1 to 14-25-14-6 (2003): Create the Water Shortage Task Force.
- IND. CODE § 14-26-2-5 (2003): Govern power and control of public freshwater lakes in state.

Definition of "Navigable Waters": Despite having no tidal waters, Indiana recognizes—and distinguishes between—the tidal and "navigable-in-fact" tests for navigability. *Irvin v. Crammond*, 108 N.E. 539, 540-41 (Ind. App. 1915); *Ross v. Faust*, 54 Ind. 471, (Ind. 1876); *Stinson v. Butler*, 4 Blackf. 285, 285 (Ind. 1837); *Cox v. State*, 3 Blackf. 193, 1833 WL 2170, at *4 (Ind. 1833). For Indiana's non-tidal rivers, "[w]hether or not the waters of a state are navigable presents a question which must be decided under federal law and under federal law, the rule is that a river is navigable in law which is navigable in fact." *State v. Kivett*, 95 N.E.2d 145, 148 (Ind. 1950) (citing *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1870); *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *Shively v. Bowlby*, 152 U.S. 1 (1894)); *see also Neaderhouser v. State*, 28 Ind. 257, 1867 WL 2968, at *5 (Ind. 1867) (holding that navigable streams are "such as are navigable, in fact, for vessels of commerce coming out of, and returning into, by continuous voyages, the navigable waters of other States."). Specifically, the test is capacity for navigation in interstate commerce at the time Indiana was admitted to the Union, regardless of actual use at the time or current navigability. *Id.*; *see also Bissell Chilled Plow Works v. South Bend Mfg. Co.*, 111 N.E. 932, 935, 939 (1916) (affirming the navigability of the St. Joseph River despite a lack of navigation since 1852); *but see State v. Wabash Paper Co.*, 51 N.E. 949, 950 (Ind. App. 1898) (suggesting that navigability at the time of the Act of March 26, 1804, 2 Stat. 279, might also be relevant, because Section 6 states that "all navigable rivers, creeks and waters within the Indiana territory shall be deemed to be and remain public highways."). Statutory declarations or non-declarations of navigability are largely irrelevant to determining whether the state has title. *Seymour Water Co. v. Leblime*, 144 N.E. 30, 35 (Ind. 1924); *Martin v. Bliss*, 5 Blackf. 35, 1838 WL 1931, at *1 (Ind. 1838). Moreover, meander lines are not conclusive evidence of navigability. *Ross v. Faust*, 54 Ind. 471, 1876 WL 6583, at *3 (Ind. 1876).

As for lakes, since 1947, the Indiana Code has explicitly provided for public rights in lakes, declaring that the "natural resources and natural scenic beauty of Indiana are a public right." IND. CODE § 14-26-2-5(c)(1) (2003). To protect these rights, the State "has full power and control of all the public freshwater lakes in Indiana both meandered and

unmeandered" and "holds and controls all public freshwater lakes in trust for the use of all the citizens of Indiana for recreational purposes." IND. CODE § 14-26-2-5(d) (2003).

The Indiana Court of Appeals has emphasized that "[a]ccording to the governing statute, the State of Indiana holds in trust for public use and enjoyment all freshwater lakes; it makes no distinction between a navigable lake and a non-navigable lake. . . ." *Bath v. Courts*, 459 N.E.2d 72, 75 (Ind. Ct. App. 1984). Nevertheless, a later Indiana Supreme Court opinion indicated that the difference between a public and private lake still depends on navigability. *Carnahan v. Monah Property Owners Ass'n, Inc.*, 716 N.E.2d 437, 440-41 (Ind. 1999). Even so, "Indiana courts have not clearly defined 'navigable.'" *Berger Farms, Inc. v. Estes*, 662 N.E.2d 654, 656 (Ind. Ct. App. 1996); *see also Bath*, 459 N.E.2d at 75 ("Indiana courts have failed to clearly define 'navigable'" for lakes, but declining to rule that use for fishing and recreation is sufficient). Several opinions have indicated that "[a] nonnavigable lake is one 'enclosed and bordered by riparian landowners.'" *Carnahan*, 716 N.E.2d at 441 (quoting *Berger Farms*, 662 N.E.2d at 656). The Indiana Court of Appeals has also suggested that the test is navigability in fact. *Bath*, 459 N.E.2d at 75.

Rights in "Navigable Waters": Because Indiana distinguishes between tidal and non-tidal navigable waters, riparian owners along non-tidal rivers in Indiana (which were not subject to the English common-law test) own to the low-water mark. *Irvin* , 108 N.E. at 540-41, 542-43; *Ross v. Faust*, 54 Ind. 471, 1876 WL 6583, at *2 (Ind. 1876); *Sherlock v. Bainbridge*, 41 Ind. 35, 1872 WL 5531, at *3 (Ind. 1872); *Martin v. City of Evansville*, 32 Ind. 85, 1869 WL 3312, at *1 (Ind. 1869); *Bainbridge v. Sherlock*, 29 Ind. 364, 1868 WL 2977, at *2 (Ind. 1868); *Stinson v. Butler*, 4 Blackf. 285, 1837 WL 1870, at *1 (Ind. 1837). However, the public may use these waters for navigation and fishing and, apparently, for sand and gravel mining, unless the state regulates these other activities. *Lake Sand Co. v. State*, 120 N.E. 714, 715-16 (Ind. App. 1918). The public right of navigation is superior to the riparian rights of the landowner. *Bissell Chilled Plow Works v. South Bend Mfg. Co.*, 111 N.E. 932, 939 (Ind. App. 1916); *Martin v. City of Evansville*, 32 Ind. 85, 1869 WL 3312, at *1 (Ind. 1869). Moreover, obstructions in navigable waterways and other interferences with navigation are public nuisances. *Id.*; *Peck v. City of Michigan City*, 49 N.E. 800, 804 (Ind. 1898); *Sherlock v. Bainbridge*, 41 Ind. 35, 1872 WL 5531, at *4 (Ind. 1872); *Martin v. Bliss*, 5 Blackf. 35, 1838 WL 1931, at *1 (Ind. 1838); *Cox v. State*, 3 Blackf. 193, 1833 WL 2170, at *3-*4 (Ind. 1833). Public rights extend over accretions to public submerged land. *Town of Freedom v.*

Norris, 27 N.E. 869, 870-71 (Ind. 1891).

However, the public has no right to use the banks of the river above the low-water mark. *Clarke v. Evansville Boat Club*, 88 N.E. 100, 101 (Ind. App. 1909); *Bainbridge v. Sherlock*, 29 Ind. 364, 1868 WL 2977, at *2-*3 (Ind. 1868). Public rights also do not extend to foreign corporations that are not citizens of the state. *Lake Sand Co.*, 120 N.E. at 716.

The public appears to have broader rights in public lakes. By statute, the "public of Indiana has a vested right in . . . [t]he preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state," including "[t]he use of the public freshwater lakes for recreational purposes." IND. CODE § 14-26-2-5(c)(2)(2003); *see also Parkinson v. McCue*, 831 N.E.2d 118, 130 (Ind. Ct. App. 2005) (noting that under § 14-26-2-5, "citizens may enjoy public waters for recreational purposes."). If private owners surround these lakes, their rights to use the lakes are not exclusive. IND. CODE § 14-26-2-5(e) (2003). Indeed, the Indiana Court of Appeals has indicated that the State of Indiana holds title to any lake that is a public lake. *Parkinson*, 831 N.E.2d at 130.

IOWA

Date of Statehood: 1846

Iowa Constitution: No relevant provisions.

Iowa Statutes:

- IOWA CODE § 11.2.461A.18 (2006): Assigns jurisdiction over meandered streams and lakes to the Iowa Department of Natural Resources.
- IOWA CODE § 11.2.462A.2 (2006): Defines "navigable waters."

Definition of "Navigable Waters": In 1856, faced with the fact that its section of the Mississippi River was unnavigable under the English common-law tidal test, the Iowa Supreme Court adopted a navigable-in-fact test for state title purposes. *McManus v. Carmichael*, 3 Clarke 1 (Iowa 1856). The court slowly expanded this test beyond the Mississippi, applying it to the Des Moines River in 1883. *Wood v. Chicago R.I. & P.R. Co.*, 60 Iowa 456 (1883). *See also Musser v. Hershey*, 42 Iowa 356, 3 (1876) (stating the Mississippi River rule as a general principle of Iowa law).

For public trust purposes, Iowa uses a use-based test that has evolved beyond basic federal navigability. "The term *navigable*, embraces within itself, not merely the idea that the waters could be navigated, but also the idea of publicity, so that saying waters are public, is equivalent, in legal sense, to saying that they are navigable. *McManus v. Carmichael*, 3 Clarke 1, 1 (Iowa 1856). "The real test of navigability in this country, is ascertained by *use*, or by public act or declaration." As such, "[t]he public trust doctrine originally applied to the beds of navigable waters, but has now expanded to embrace the public's use of lakes or rivers for recreational purposes as well. . . . As a consequence, the public's right of access to public waters is part of the public trust." *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996) (citing *State v. Sorenson*, 436 N.W.2d 358, 361 (Iowa 1989). *See also, Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 299 (Iowa 1994). "Nevertheless, access is protected only to the extent the land providing such access is owned by the State." *Id.* (citing *Sorenson*, 436 N.W.2d at 363). Moreover, the public trust doctrine does not apply to property that is not owned by the State. *Schaller v. State*, 537 N.W.2d 738, 743 (Iowa 1995).

It is an open question whether Iowa's public trust doctrine extends to other publicly owned resources. "The public trust doctrine 'is based on the notion that the public possesses inviolable rights to certain natural resources.'" *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996) (citing *Sorenson*, 436 N.W.2d at 361). However, the Iowa Supreme Court has recently emphasized that the state's public trust doctrine is "narrow." As a result, the doctrine "does not serve as an impediment to legally sanctioned management of forest areas by public bodies entrusted by law with their care." *Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 498 (Iowa 2002). Similarly, the doctrine does not extend to a publicly owned alley that does not provide access to waters, and the court has strongly suggested that it should not apply to parklands, battlefields, or archeological remains. *Fenci v. City of Harpers Ferry*, 620 N.W.2d 808, 813-14 (Iowa 2000). "Simply stated, an alley is not a natural resource. Unlike the unique nature of the Missouri River, an alley exists merely where the governmental entity chooses to place it." *Id.* at 814.

Rights in "Navigable Waters": The line between public and private ownership, and the line for the public trust doctrine, is the high-water mark. *Orr v. Mortvedt*, 735 N.W.2d 610, 615 (Iowa 2007) (citing *State v. Nichols*, 241 Iowa 952, 967 (1950)). *See also Musser v. Hershey*, 42 Iowa 356 (1876); *McManus v. Carmichael*, 3 Clarke 1, 8 (Iowa 1856).

In navigable waters, the public has the rights of navigation,

commerce, fishing, recreational uses, and access. *See Fenci v. City of Harpers Ferry*, 620 N.W.2d 808, 813-14 (Iowa 2000); *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996); *Robert's River Rides, Inc. v. Steamboat Development Corp.*, 520 N.W.2d 294, 299 (Iowa 1994) (noting that the doctrine 'has been expanded to safeguard the public's use of navigable waters for recreation and non-pecuniary purposes"); *Sorenson,* 436 N.W.2d at 363 ("The public trust doctrine, however, is not limited to navigation or commerce; it applies broadly to the public's *use* of property, such as waterways, without ironclad parameters on the types of uses to be protected"; "[f]ishing and navigation are among the expressly recognized uses protected by the public trust doctrine," "whether of a commercial or recreational nature," and include a means of access over state-owned lands.). In addition, "[t]he State has very limited power to dispose of [public trust] property." *See Fenci v. City of Harpers Ferry*, 620 N.W.2d 808, 813 (Iowa 2000); *see also Bushby v. Washington County Conservation Bd.*, 654 N.W.2d 494, 497 (Iowa 2002) (citing *Fenci v. City of Harpers Ferry*, 620 N.W.2d 808 (Iowa 2000)); *Robert's River Rides, Inc. v. Steamboat Development Corp.*, 520 N.W.2d 294, 299 (Iowa 1994).

KENTUCKY

Date of Statehood: 1792

Kentucky Constitution: No relevant provisions.

Kentucky Statutes:

- KY. REV. STAT. ANN. §§ 146.200 to 146.360 (2007): Establish Kentucky's wild rivers program. The Act declares the Legislature's intent "to impose reasonable regulations as to the use of private and public land within the authorized boundaries of wild rivers for the general welfare of the people of the Commonwealth, and where necessary, to enable the department to acquire easements or lesser interests in or fee title to lands within the authorized boundaries of wild rivers, *so that the public trust in these unique natural rivers might be kept.*" KY. REV. STAT. ANN. § 146.220 (emphasis added).
- KY. REV. STAT. ANN. §§ 151.100 to 151.200 (2007): Govern water resources and water supply, including water withdrawal permits. Section 151.120 defines the public waters of the Commonwealth.

Definition of "Navigable Waters": For purposes of establishing title to the beds and banks of waterways, Kentucky adheres to the English common law "ebb and flow of the tide" test. *See Baxter v. Davis*, 67 S.W.2d 678, 680 (Ky. 1934); *Ford v. Commonwealth*, 160 S.W. 1080, 1081 (Ky. 1913); *Wilson v. Watson,* 132 S.W. 563, 564 (Ky. 1910); *Stonestreet v. Jacobs*, 82 S.W. 363, 363 (Ky. 1904). As a result, all rivers in Kentucky are non-navigable for title purposes. *Robinson v. Wells*, 135 S.W. 317, 318 (Ky. 1911).

Nevertheless, the public can acquire rights in navigable-in-fact rivers. Early cases stated that if a stream were "capable of navigation by boats or the floating of logs," regardless of prior use, the public had rights to use the stream. *See Floyd County v. Allen*, 227 S.W. 994, 995 (Ky. 1921) ("If the stream in its natural condition is capable of being used to float rafts, logs, etc., and has in fact been used for that purpose[,] the public has an easement in it and the right to use it, but not in such manner as to destroy by neglect or wantonly the property of those on its banks."); *Warner v. Ford Lumber & Mfg. Co.*, 93 S.W. 650, 651 (Ky. 1906); *see also Ireland v. Bowman & Cockrell*, 113 S.W. 56, 59 (Ky. 1908) (upholding navigability for public use when a stream could float logs). Conversely, if the stream would not float logs or staves without human aid, it was not "navigable" for purposes of public rights. *Asher v. McKnight*, 112 S.W. 647, 647 (Ky. 1908); *Banks v. Frazier*, 64 S.W. 983, 984 (Ky. 1901); *Murray v. Preston*, 50 S.W. 1095, 1096 (Ky. 1899).

Nevertheless, in 1936, the Kentucky Court of Appeals redefined the navigability test to emphasize its commerce connections:

> In the legal test of navigability of a stream, it is generally held that the fact of its sufficiency for pleasure boating or for hunters or fishermen to float their skiffs or canoes does not make it navigable in law as "to be navigable a water course must have a useful capacity as a public highway of transportation." . . . The true criterion of navigability of a river is whether it is generally and commonly useful for some purpose of trade or commerce of a substantial and permanent character, for, if this were not so, "then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States."

Natcher v. City of Bowling Green, 95 S.W.2d 255, 259 (Ky. 1936) (citations omitted).

Rights in the "Navigable Waters": Because Kentucky uses the tidal test for title, landowners own to the center of the stream. *See Pierson v. Coffey*, 706 S.W.2d 409, 411 (Ky. Ct. App. 1985); *Whitson v. Morris*,

201 S.W.2d 193, 195 (Ky. 1947). However, their riparian rights are subordinate to the public right of navigation. *See Pierson*, 706 S.W.2d at 411; *Commonwealth Dep't of Highways v. Thomas*, 427 S.W.2d 213, 215-16 (Ky. 1968); *Paducah Sand & Gravel Co. v. Cent. Home Tel. & Tel. Co.*, 273 S.W. 481, 482 (Ky. 1925) ("[T]he right of navigation is paramount to any other rights that may be acquired in the use of such streams."). Moreover, this public right extends to the ordinary high-water mark of the stream or river, *Natcher*, 95 S.W.2d at 256 (Ky. 1936); *Terrell v. City of Paducah*, 92 S.W. 310, 313 (Ky. 1906), but not further up the banks. *See Smith v. Atkins*, 60 S.W. 930, 930-31 (Ky. 1901).

The Kentucky courts did not fully define the "public right of navigation" until 1985. As declared by the Kentucky Court of Appeals:

> The "public right of navigation" includes the right to navigate the waterways in the strictest sense, that is, for travel and for transportation. The right also includes the right to use the public waterways for recreational purposes such as boating, swimming, and fishing. Moreover, the "public right of navigation," whether for commercial or recreational purposes, necessarily includes the right of temporary anchorage and the right of incidental use of the riverbed.

Pierson, 706 S.W.2d at 412 (citing *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356, 359 (5th Cir. 1931); *Warner v. Ford Lumber & Mfg. Co.*, 93 S.W. 650, 651 (Ky. 1906); *Munninghoff v. Wis. Conservation Comm'n*, 38 N.W.2d 712, 715 (Wis. 1949); *Hall v. Wantz*, 57 N.W.2d 462, 464 (Mich. 1953)). However, the "public right of navigation" does not extend to the permanent anchorage of barges. *Pierson*, 706 S.W.2d at 412.

LOUISIANA

Date of Statehood: 1812

Louisiana Constitution:

The Louisiana Constitution provides explicitly for the protection of environmental values:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.

LA. CONST. art IX, § 1. The Louisiana Court of Appeals has identified this provision as the state's public trust doctrine. *La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n*, 719 So. 2d 119, 124 (La.

Ct. App. 1998). In addition, the Louisiana Constitution restricts the State's ability to alienate navigable waters:

> The legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion. This Section shall not prevent the leasing of state lands or water bottoms for mineral or other purposes. Except as provided in this Section, the bed of a navigable water body may be reclaimed only for public use.

LA. CONST. art. IX, § 3.

Louisiana Statutes:

- LA. CIV. CODE ANN. art. 450 (2007): "Public things that belong to the state are such as running waters, the waters and bottoms of natural navigable water bodies, the territorial sea, and the seashore."
- LA. CIV. CODE ANN. art. 451 (2007): "Seashore is the space of land over which the waters of the sea spread in the highest tide during the winter season."
- LA. CIV. CODE ANN. art. 452 (2007): "Public things and common things are subject to public use in accordance with applicable laws and regulations. Everyone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of adjoining owners."
- LA. CIV. CODE ANN. art. 455 (2007): "Private things may be subject to public use in accordance with law or by dedication."
- LA. CIV. CODE ANN. art. 456 (2007): "The banks of navigable rivers or streams are private things that are subject to public use. The bank of a navigable river or stream is the land lying between the ordinary low and ordinary high stage of the water. Nevertheless, when there is a levee in proximity to the water, established according to law, the levee shall form the bank."
- LA. CIV. CODE ANN. art. 505 (2007): "Islands, and sandbars that are not attached to a bank, formed in the beds of navigable rivers or streams, belong to the state."
- LA. CIV. CODE ANN. art. 665 (2007): "Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on

the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works. Such servitudes also exist on property necessary for the building of levees and other water control structures on the alignment approved by the U.S. Army Corps of Engineers as provided by law, including the repairing of hurricane protection levees. All that relates to this kind of servitude is determined by laws or particular regulations."

- LA. REV. STAT. ANN. § 9:1101 (2007): "The waters of and in all bayous, rivers, streams, lagoons, lakes and bays, and the beds thereof, not under the direct ownership of any person on August 12, 1910, are declared to be the property of the state." This statute also revokes all transfers and conveyances of navigable waters and their beds to any levee district.
- LA. REV. STAT. ANN. § 9:1107 (2007): "It has been the public policy of the State of Louisiana at all times since its admission into the Union that all navigable waters and the beds of same within its boundaries are common or public things and insusceptible of private ownership. . . ."
- LA. REV. STAT. ANN. § 9:1108 (2007): Declares all patents or transfers of navigable waters and their beds invalid.
- LA. REV. STAT. ANN. § 9:1109 (2007): Declares that statutes cannot validate purported transfers of navigable waters and their beds.
- LA. REV. STAT. ANN. § 41:1701 (2007): Declaration of Policy: Public Trust: "The beds and bottoms of all navigable waters and the banks or shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes belong to the state of Louisiana, and the policy of this state is hereby declared to be that these lands and water bottoms, hereinafter referred to as 'public lands', shall be protected, administered, and conserved to best ensure full public navigation, fishery, recreation, and other interests."
- LA. REV. STAT. ANN. §§ 38:30-38:34 (2007): Establish the state water resources program.
- LA. REV. STAT. ANN. § 41:14 (2007): "No grant, sale or conveyance of the lands forming the bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state shall be made by the secretary of the Department of Natural Resources or by any other official or by any subordinate political subdivision,

except pursuant to R.S. 41:1701 through 1714. Any rights accorded by law to the owners or occupants of lands on the shores of any waters described herein shall not extend beyond the ordinary low water mark. No one shall own in fee simple any bottoms of lands covering the bottoms of waters described in this Section."

- LA. REV. STAT. ANN. § 49:3 (2007): "The State of Louisiana owns in full and complete ownership the waters of the Gulf of Mexico and of the arms of the Gulf and the beds and shores of the Gulf and the arms of the Gulf, including all lands that are covered by the waters of the Gulf and its arms either at low tide or high tide, within the boundaries of Louisiana."
- LA. REV. STAT. ANN. § 56:3 (2007): Declares that the state of Louisiana owns all wild birds, wild quadrupeds, fish, and other aquatic life in the waters bordering or connecting with the Gulf of Mexico within the jurisdiction or territory of the state, including oysters and shellfish, and that no one can take or eat such resources except as allowed by law and the Wildlife and Fisheries Commission.

Definition of "Navigable Waters": Louisiana recognizes both the "ebb and flow" tidal test and the navigable-in-fact tests for navigability. *See Walker Lands, Inc. v. E. Carroll Parish Police Jury*, 871 So.2d 1258, 1264-65 (La. Ct. App. 2004) ("A body of water is navigable in fact if it is capable of being used for a commercial purpose over which trade and travel are or may be conducted in the customary modes of trade and travel."); *see also State* ex rel. *Plaquemines Parish Sch. Bd. v. Plaquemines Parish Gov't*, 690 So. 2d 232, 235 (La. Ct. App. 1997) (holding that lands subject to the ebb and flow of the tide were sovereignty lands); *Ramsey River Rd. Prop. Owners Ass'n v. Reeves*, 396 So. 2d 873, 875-76 (La. 1981) (same navigable-in-fact test as *Walker Lands*); *State v. Bayou Johnson Oyster Co.*, 58 So. 405, 407 (La. 1912) (declaring that Louisiana has sovereign ownership of all tidal lands); *Orleans Navigation Co. v. Schooner Amelia*, 7 Mart. (o.s.) 570, 604 (La. 1820) (declaring Bayou St. John "navigable" because it was subject to the ebb and flow of the tide and used for commercial purposes). Navigability is based on the status of the water in 1812, when Louisiana became a state. *Ramsey River Rd.*, 396 So. 2d at 875; *State* ex rel. *Plaquemines*, 690 So. 2d at 235.

However, Louisiana common law emphasizes that "[n]avigability is a question of whether a waterbody is capable of sustaining commerce." *Arkla Exploration Co. v. Delacroix Corp.*, 650 So. 2d 777, 780 (La. Ct.

App. 1995) (citing *Ramsey River Rd.*, 396 So. 2d at 875). As a result, "[a] body of water not connected to a navigable body of water and surrounded by land can serve no useful commercial purpose" and is not navigable. *Walker Lands*, 871 So. 2d at 1266 (citing *Fitzsimmons v. Cassity*, 172 So. 2d 824, 829 (La. Ct. App. 1937)). Moreover, "[r]ecreational use of a body of water alone is not enough to say that the body of water is being used for a commercial purpose." *Id.* Similarly, prior to statutory declaration of state ownership, freshwater bayous that drained prairies and were not used by watercraft were not navigable waters, even if the tide affected them. *Burns v. Crescent Gun & Rod Club*, 41 So. 249, 251 (La. 1906).

The critical date for the statutory declaration of ownership is August 12, 1910. LA. REV. STAT. ANN. § 9:1101.

When land becomes "a part of the bed of a navigable stream it becomes the property of the State as a public thing, and the former owner is divested of title." *City of Shreveport v. Noel Estate, Inc.*, 941 So. 2d 66, 78 (La. Ct. App. 2006); *see also Miami Corp. v. State*, 173 So. 315, 318 (La. 1936) (holding that ownership had changed after a river changed course); *Fradella Constr., Inc. v. Roth*, 503 So. 2d 25, 27 (La. Ct. App. 1986). Nevertheless, the state retains ownership of lands that were navigable in 1812 but no longer are, but in its private capacity. *Shell Oil Co. v. Pitman*, 476 So. 2d 1031, 1034 (La. Ct. App. 1985).

Rights in "Navigable Waters": Originally, as of Louisiana's statehood in 1812, the boundary between public ownership and private ownership in all navigable bodies of water was the high-water mark. *McCormick Oil & Gas Corp. v. Dow Chem. Co.*, 489 So.2d 1047, 1049 (La. Ct. App. 1986) (citing *State v. Placid Oil Co.*, 300 So.2d 154, 172 (La. 1974)). However, for navigable streams and rivers, early versions of articles 450, 455, and 457 gave title to the land between the low- and high-water marks to the riparian landowner. *See id.* (citing *Placid*, 300 So.2d at 173); *see also Mathis v. Bd. of Assessors*, 16 So. 454, 454 (La. 1894) (holding that the landowners hold title to the low-water mark); LA. CIV. CODE ANN. art. 456 (2007). "As to lakes, however, the State still holds the land all the way up to the ordinary high-water mark." *McCormick Oil & Gas*, 489 So.2d at 1049 (citing *Placid*, 300 So.2d at 173); *see also Fradella Constr.*, 503 So.2d at 27 (citing *Placid*, 300 So. 2d at 173). By statute, the state owns the seashore up to the highest winter tide, LA. CIV. CODE ANN. art. 450-451 (2007), which is lower than the mean high tide.

As declared by statute, public rights in navigable waters include navigation, fishing, recreation, "and other interests." LA. REV. STAT. ANN. § 41:1701 (2007). In addition, "[e]veryone has the right to fish in the rivers, ports, roadsteads, and harbors, and the right to land on the

seashore, to fish, to shelter himself, to moor ships, to dry nets, and the like, provided that he does not cause injury to the property of adjoining owners." LA. CIV. CODE ANN. art. 452 (2007); *see also State v. Barras*, 615 So. 2d 285, 288 (La. 1993). These public trust rights apply to the privately owned bank of navigable streams and rivers, between the high- and low-water marks. LA. CIV. CODE ANN. art. 456; *McCormick Oil & Gas*, 489 So. 2d at 1049.

While the constitutional public trust doctrine preserves the right to fish, Louisiana's Marine Resources Conservation Act, which banned gill netting, did not violate that public trust doctrine. "In order to fulfill the mandate of the Public Trust Doctrine, given the very nature of natural resources, the Legislature may find it necessary from time to time to make adjustments to previously[]enacted laws in response to the changes in the variations of natural resources resulting from the use or conservation of those resources." *La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n*, 719 So. 2d 119, 125 (La. Ct. App. 1998). However, state leases of water bottoms for gambling facilities did not implicate the public trust doctrine. *See Neighborhood Action Comm. v. State*, 652 So.2d 693, 696-97 (La. Ct. App. 1995).

The public trust doctrine allows the state to protect its coastline from erosion, even when such diversion measures damage oyster bed leases, and clauses in such leases protecting the state's rights were valid. *See Avenal v. State*, 886 So. 2d 1085, 1101-02 (La. 2004). Moreover, because, under statute, the state owns the water bottoms, the waters, and the oysters at issue, the Caernarvon coastal diversion project did not constitute a regulatory taking of the oystermens' property rights. *Id.* at 1106. However, under statutory law, the State cannot condition the renewal of existing and productive oyster leases on the inclusion of new clauses to protect navigation and oil exploration, nor does the public trust doctrine support such amendments. *See Jurisich v. Jenkins*, 749 So.2d 597, 600, 604-05 (La. 1999).

MAINE

Date of Statehood: 1820

Maine Constitution: The Maine Constitution states that "[t]he Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." ME. CONST., art. 4, pt. 3, § 1. The Maine Supreme Judicial Court has suggested that this provision may embody the public trust doctrine. *Opinion of the Justices*, 437 A.2d at

606-07; *but see Harding v. Comm'r of Marine Resources*, 510 A.2d 533, 537 (Me. 1986) (declining to clarify the constitutional basis of the public trust doctrine).

Maine Statutes:

- ME. REV. STAT. ANN. tit. 12, §§ 571-573 (2002): Codify the Public Trust in Intertidal Lands Act. "The Legislature finds and declares that the intertidal lands of the State are impressed with a public trust and that the State is responsible for protection of the public's interest in this land." § 571. The Act declares that "The public trust is an evolving doctrine reflective of the customs, traditions, heritage and habits of the Maine people" and that the uses protected "include, but are not limited to, fishing, fowling, navigation, use as a footway between points along the shore and use for recreational purposes." § 571. "Intertidal land" is "all land of this State affected by the tides between the mean high watermark and either 100 rods seaward from the high watermark or the mean low watermark, whichever is closer to the mean high watermark." § 572. However, the Maine Supreme Judicial Court has declared the Act unconstitutional to the extent that it creates unlimited recreational rights on intertidal lands. *See Bell v. Town of Wells*, 557 A.2d 168, 173-76 (Me. 1989).
- ME. REV. STAT. ANN. tit. 12, § 1846 (2002): Governs access to public reserved lands.
- ME. REV. STAT. ANN. tit. 12, § 1862 (2002): Allows the State to lease submerged and intertidal lands owned by the state, unless "the lease will unreasonably interfere with customary or traditional access ways to or public trust rights in, on or over that intertidal or submerged lands and the waters above those lands. . . ."
- ME. REV. STAT. ANN. tit. 12, § 1865 (2002): Declares that filled intertidal and submerged lands are still impressed with a public trust.
- ME. REV. STAT. ANN. tit. 36, § 6855 (2002): Authorizes a specific conveyance of 15 acres of submerged and intertidal lands along the Kennebec River for a shipbuilding facility.
- ME. REV. STAT. ANN. tit. 38, § 435 (2002): In promotion of the public trust in shoreland areas, declares zoning and land use controls for shoreland areas to be in the public interest. "Shoreland areas include those areas within 250 feet of the

normal high-water line of any great pond, river or saltwater body, within 250 feet of the upland edge of a coastal wetland, within 250 feet of the upland edge of a freshwater wetland [with exceptions], or within 75 feet of the high-water line of a stream."

- ME. REV. STAT. ANN. tit. 38, §§ 470(a)-(h) (2002): Codify the Water Withdrawal Reporting Program.
- ME. REV. STAT. ANN. tit. 38, § 1841 (2002): Provides for protection of Maine's lakes.

Definition of "Navigable Waters": Because Maine originated as part of Massachusetts, the early principles of its public trust doctrine follow Massachusetts law. Thus, for title purposes, Maine uses the tidal test. *Stanton v. Treasurers of St. Joseph's College*, 233 A.2d 718, 721-22 (Me. 1967) (quoting *In re Opinions of the Justices*, 106 A. 865, 868 (Me. 1919)). However, for public trust purposes, Maine recognizes both the ebb-and-flow tidal and the navigable-in-fact tests of navigability. *Compare Moor v. Veazie*, 32 Me. 343, 1850 WL 128, at *9-*10 (Me. 1850), *with Brown v. Chadbourne*, 32 Me. 9, 1849 WL 1797, *1-*2 (Me. 1849).

Navigable waters include tidal waters, lakes or ponds whose surface area is greater than 10 acres, and waters suitable for having property transported on them. *Stanton*, 233 A.2d at 720-21 (listing all three categories); *Flood v. Earle*, 71 A.2d 55, 57 (Me. 1950) ("Ponds containing more than ten acres are known as 'great ponds.' They are public ponds. The state holds them and the soil under them in trust for the public."). Under the navigable-in-fact test, "[b]odies of water are navigable when they are used, or are capable of being used, in their ordinary condition as highways." *Flood v. Earle*, 71 A.2d at 57; *see also Brown v. Chadbourne*, 31 Me. 9, 21 (Me. 1849) (holding that the test of navigability is "whether a stream is inherently and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs.").

Rights in the "Navigable Waters": Given the public trust doctrine's origins in the ebb and flow of the tide, private landowners generally own the beds of non-tidal navigable waters. *Stanton,* 233 A.2d at 721-22 (quoting *In re Opinions of the Justices*, 106 A. at 868). However, such ownership is subject to the public's use of the river or stream as a public highway. *Id.* Indeed, the public rights in non-tidal navigable waters are the same as those in tidal waters. *Brown v. Chadbourne*, 32 Me. 9, 1849 WL 1797, at *1-*2 (Me. 1849).

As a result of the Massachusetts colonial ordinance of 1641, private

landowners own the intertidal lands between the high- and low-water marks, not to extend more than 100 rods from the high-water mark. *State v. Lemar*, 87 A.2d 886, 887 (Me. 1952); *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384, 1847 WL 1382, at *1 (Me. 1847); *Duncan v. Sylvester*, 24 Me. 482, 1844 WL 1267, at *4 (Me. 1844); *Lapish v. President of Bangor Bank*, 8 Greenl. 85, 1831 WL 549, at *1 (Me. 1831). However, "[t]he public trust doctrine means, for the owner of coastal property, that the owner's property rights in the intertidal zone are subject to the public's rights to fishing, fowling, and navigation. However, the public's rights in these activities have always been subject to the owner's 'right to wharf out to the navigable portion of the body of water.'" *Conservation Law Foundation, Inc. v. Department of Environmental Protection*, 823 A.2d 551, 563 (Me. 2003) (quoting *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91, 95 (Me. 1996)). As a result, the Department of Environmental Protection's rule allowing the construction of docks on the intertidal lands did not violate the public trust doctrine. *Id.* at 562-63.

Much of the controversy in Maine has focused on whether the public trust doctrine protects public rights of recreation. The Maine public trust doctrine most clearly protects the public's right to fish, fowl, and navigate in the navigable waters. *See Conservation Law Foundation, Inc*, 823 A.2d at 562; *Town of Wells*, 557 A.2d at 171-76; *Harding v. Commissioner of Marine Resources*, 510 A.2d 533, 537 (Me. 1986); *Opinion of the Justices*, 437 A.2d at 607; *Shively*, 152 U.S. 1, 18-19 (1884); *Moulton v. Libbey*, 37 Me. 472, 1854 WL 1967, at *10 (Me. 1854) (recognizing the common right of fishing); *Moor v. Veazie*, 32 Me. 343, 1850 WL 128, at *9 (Me. 1850) ("All the citizens of a country have by the common law a right in common to navigate its navigable waters."); *Lapish v. Bangor Bank*, 8 Me. 85, 93 (1831); *Storer v. Freeman*, 6 Mass. 435 (1810). However, in the "great ponds," the public has the right to cut ice, (*Flood*, 71 A.2d at 57; ME. REV. STAT. ANN. tit. 38, § 1841), and rights of swimming, boating, fishing, fowling, bathing, skating, riding upon the ice, and taking water for domestic or agricultural purposes or for use in the arts. *Gratto v. Palangi*, 147 A.2d 455, 458 (Me. 1958).

In 1981, in an advisory opinion, the Maine Supreme Judicial Court suggested that the public trust doctrine could and should evolve to include recreational uses. *Opinion of the Justices*, 437 A.2d at 607. However, that opinion was focused on the reasonableness of legislative action that sought to *burden* the public trust in submerged and intertidal lands; hence, in evaluating the reasonableness of legislative action "[i]n dealing with public trust properties, the standard of reasonableness must change as the needs of society change." *Id.*

In 1985, the Maine Legislature accepted what it saw as the Court's invitation and enacted the very broad public trust doctrine now embodied in the Public Trust in Intertidal Lands Act. ME. REV. STAT. ANN. Tit. 12, §§ 571-573. However, in 1989, the Maine Supreme Judicial Court determined that the broad protection of public recreation rights in privately owned intertidal lands violated the prohibition on takings of private property without compensation. "Although contemporary public needs for recreation are clearly much broader [than traditionally allowed], the courts and the legislature cannot simply alter these long-established property rights to accommodate new recreational needs. . . ." *Town of Wells*, 557 A.2d at 169. While the rights of fishing, fowling, and navigation can include pleasure uses as well as commercial uses, there is no public right to bathing, sunbathing, or recreational walking on privately owned intertidal lands. *Id.* at 173-76. As a result, "[r]ecreational activities of the public on privately-owned intertidal land are limited to fishing, fowling, and navigation, or other activities with the permission of the landowner." *Conservation Law Foundation, Inc*, 823 A.2d at 562; *see also Norton v. Town of Long Island*, 883 A.2d 889, 891-901, n.6 (Me. 2005).

In addition, leases of submerged lands for aquaculture facilities did not violate the doctrine. *Harding*, 510 A.2d at 537. In particular, the state does not have to consider "private land values . . . before it can grant aquaculture leases in the state's submerged lands." *Id.*

MARYLAND

Date of Statehood: 1788

Maryland Constitution: The Maryland Supreme Court has indicated that the general Declaration of Rights in the Maryland Constitution includes the public trust doctrine. *Dep't of Natural Res. v. Mayor & Council of Ocean City*, 332 A.2d 630, 633 (Md. 1975) (referencing MD. CONST., Declaration of Rights, Art. 5).

Maryland Statutes:

- MD. CODE §§ 5-101 to 5-204 (West 2008): Govern water resources management.
- MD. CODE §§ 5-501 to 5-514 (West 2008): Govern regulation of appropriations.
- MD. CODE §§ 5-5B-01 to 5-5B-05 (West 2008): Govern water conservation.
- MD. CODE § 75-82 (West 2008): Establishes that counties

with jurisdiction over navigable waters have jurisdiction to the center of those waters.

Definition of "Navigable Waters": Although the Maryland courts have acknowledged the "navigable-in-fact" test, they have repeatedly refused to adopt it and have thus relied on the "ebb and flow of the tide" test for both state title and the public trust doctrine. *Hirsch v. Maryland Dep't of Natural Res.*, 416 A.2d 10, 12 (Md. 1980); *Wicks v. Howard*, 388 A.2d 1250, 1251 (Md. Ct. Spec. App. 1978); *Van Ruymbeke v. Patapsco Indus. Park*, 276 A.2d 61, 64 (Md. 1971); *Owen v. Hubbard*, 271 A.2d 672, 676 n.1 (Md. 1970); *Green v. Eldridge*, 187 A.2d 674, 676 (Md. 1963); *Wagner v. City of Baltimore*, 124 A.2d 815, 820 (Md. 1956). The Maryland courts have apparently never adjudicated public rights in non-tidal navigable waters.

Rights in the "Navigable Waters": Maryland has long recognized a public trust doctrine in the navigable waters, extending to the mean high-water mark. *Mayor & Council*, 332 A.2d at 633; *Van Ruymbeke,* 276 A.2d at 64; *Wagner*, 124 A.2d at 820; *Toy v. Atlantic Etc. Co.,* 4 A.2d 757, 763 (Md. 1939); *Linthicum v. Shipley*, 116 A. 873 (Md. 1922); *Sollers v. Sollers*, 26 A. 188, 188 (Md. 1893); *Hess v. Muir*, 6 A. 673 (Md. 1886); *Smith v. Maryland*, 59 U.S. 71, 74-75 (1855). As a result, private landowners along tidal waters own only down to the high-water mark. *Van Ruymbeke,* 276 A.2d at 64.

The public has the following rights in publicly owned tidal waters: (1) the right of navigation, *Becker v. Litty*, 566 A.2d 1101, 1104-05 (Md. 1989); (2) the right to use the foreshore, *Mayor & Council*, 332 A.2d at 633 (citing *Shively*, 152 U.S.); and (3) the rights of "fishing, boating, hunting, bathing, taking shellfish and seaweed and of passing and repassing." *Id.* at 634. However, submerged lands granted to private owners before 1862 are held by those private owners, subject only to the public's rights of fishing and navigation. *Stansbury v. MDR Dev., L.L.C.*, 871 A.2d 612, 620-21 (Md. Ct. Spec. App. 2005).

In addition, "[t]he crab and oyster resources found in the tidal waters are common property held in trust by the State for all of its citizens. . . ." *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 275 A.2d 200, 211 (Md. 1971).

MASSACHUSETTS

Date of Statehood: 1788

Massachusetts Constitution: Although not specifically a public trust

provision, the Massachusetts Constitution provides:

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development, and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.

MASS. CONST., art. XCVII.

Massachusetts Statutes:

- MASS. GEN. LAWS ANN. ch. 21, §§ 8 to 8D (2002): Establish the Water Resources Division and govern interbasin transfers.
- MASS. GEN. LAWS ANN. ch 21, § 17C (2002): Limits landowners' liability if they allow the public to use, free of charge, "wetlands, rivers, streams, ponds, lakes, and other bodies of water" "for recreational, conservation, scientific, educations, environmental, ecological, research, religious, or charitable purposes."
- MASS. GEN. LAWS ANN. ch. 21G (2002): Codifies the Massachusetts Water Management Act, which covers water planning, withdrawal limits, and registration of withdrawals.
- MASS. GEN. LAWS ANN. ch. 91, § 1 (2001): Defines "tidelands" to be "present and former submerged lands and tidal flats lying below the mean high water mark." "Commonwealth tidelands" are "tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose." "Chapter 91 finds its history in the public trust doctrine. . . ." *Moot v. Dep't of Envtl. Prot.*, 861 N.E.2d 410, 412 (Mass. 2007).
- MASS. GEN. LAWS ANN. ch. 91, § 10D (2001): Guarantees access to commonwealth tidelands for SCUBA and skin diving.

Definition of "Navigable Waters": Both state title to the bed and banks and the public trust doctrine are based on the English common law "ebb and flow" tidal test. *Brosnan v. Gage*, 133 N.E. 622, 624 (Mass. 1921); *Commonwealth v. Vincent*, 108 Mass. 441, 447 (Mass. 1871). No actual

commercial use is required. *Att'y Gen. v. Woods*, 108 Mass. 436, 436 (Mass. 1871) ("Tide water navigable for pleasure is navigable water, although the craft on it have never been used for purposes of trade or agriculture.").

However, "great ponds" of 20 acres or more are also owned by the Commonwealth, so long as the Commonwealth did not grant away title. *Commonwealth v. Vincent*, 108 Mass. at 441.

Rights in the "Navigable Waters": Because Massachusetts uses the tidal test for both title and the public trust doctrine, private landowners own the beds and banks and have the exclusive rights to fish and collect ice in non-tidal navigable-in-fact waters. *Brosnan v. Gage*, 133 N.E. 622, 624 (Mass. 1921); *Commonwealth v. Vincent*, 108 Mass. 441, 446 (1871). However, these non-tidal navigable-in-fact waters are subject "to an easement or right of passage up and down the stream in boats or other craft for purposes of business, convenience, or pleasure." *Brosnan v. Gage*, 133 N.E. 622, 624 (Mass. 1921).

In accord with English common law, Massachusetts originally recognized that the state's title in tidal lands extended to the high-water mark. However, the Colonial Ordinance of 1641-1647 gave private landowners title to the low-water mark to encourage the private construction of wharves to aid in commerce. *Trio Algarvo, Inc. v. Comm'r of the Dep't of Envtl. Prot.*, 795 N.E.2d 1148, 1151 (Mass. 2003). However, those landowners could not materially impair navigation. *Id.* In addition, statutes in 1866 and 1874 required landowners to pay compensation fees for tidewater displacement and to pay occupation fees, respectively. *Id.* at 1153.

Nevertheless, the land between the high- and low-water marks remains subject to the public trust. *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 359-60 (Mass. 1979). "All tidelands below high water mark are subject to this trust, which may be extinguished only, in the case of tidal flats, by lawful filling, or, in the case of submerged land, by express legislative authorization." *Trio Algarvo, Inc. v. Comm'r of the Dep't of Envtl. Prot.*, 795 N.E.2d 1148, 1151 (Mass. 2003). The legislature must be explicit if it intends to relinquish public rights in the tidelands. As a result, a regulation of the Department of Environmental Protection stating that landlocked tidelands were excluded from the licensing requirements was invalid. *Moot v. Dep't of Envtl. Prot.*, 861 N.E.2d 410, 413-17 (Mass. 2007).

In addition, only the Commonwealth can grant the land below the low-water mark, and only for a public purpose. *Waterfront Dev. Corp.*, 393 N.E.2d at 365-66 (citing *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892)). Such granted lands also remain subject to the public trust.

Id. at 367.

While the traditional uses of the tidelands are "fishing, fowling, and navigation," *Moot v. Dep.t of Envtl. Prot.*, 861 N.E.2d 410, 412 (Mass. 2007), the Massachusetts Supreme Judicial Court has also suggested that the public trust doctrine in Massachusetts "is wider in its scope [than just navigation], and it includes all necessary and proper uses, in the interest of the public," *Home for Aged Women v. Commonwealth*, 89 N.E. 124, 129 (Mass. 1909), including any "natural derivative" of the right to fish. *Pazolt v. Dir. of Div. of Marine Fisheries*, 631 N.E.2d 547, 551 (Mass. 1994). The right includes access to tidal flats for fishing, fowling, and navigation, but not a right of perpendicular access across private property. *Sheftel v. Lebel*, 689 N.E.2d 500, 505 (Mass. Ct. App. 1998) (citing *Michaelson v. Silver Beach Improvement Ass'n*, Inc., 173 N.E.2d 273, 275 (Mass. 1961)). However, "[w]hile the public clearly has the right to take shellfish on tidal flats, there is no general right in the public to pass over the land, or to use it for bathing purposes. Nor may the public take soil or seaweed resting on the soil of the flats." *Town of Wellfleet v. Glaze*, 525 N.E.2d 1298, 1301 (Mass. 1988) (citations omitted). In addition, "[a]quaculture is not fishing, nor can it legitimately be considered a "natural derivative' of the right to fish. . . ." *Pazolt*, 631 N.E.2d at 572.

The Massachusetts Supreme Judicial Court has described the public rights in the seashore as "limited" and has refused to explicitly recognize a right to recreation. *Opinion of the Justices*, 424 N.E.2d 1092, 1099 (Mass. 1981); *Opinion of the Justices to Senate*, 313 N.E.2d 561, 567 (Mass. 1974). Other cases, however, have stated that, if the public has a right of access to a beach—defined as the land between the low- and high-water lines where the tide ebbs and flows—the public can use the entire beach, including for bathing and swimming. *Anderson v. De Vries*, 93 N.E.2d 251, 255-56 (Mass. 1950), *abrogated by M.P.M. Building L.L.C. v. Dwyer*, 809 N.E.2d 1053 (Mass. 2004). *But see Butler v. Att'y Gen.*, 80 N.E. 688, 689 (Mass. 1907) (holding that there are no bathing rights on the beach; however, swimming and floating on the tidal waters is a right incidental to the other rights).

The public also has rights of fishing, fowling, and navigation in the "great ponds." *Commonwealth v. Vincent*, 108 Mass. 441, 446 (Mass. 1871). However, the public trust is not "co-terminus" with the public interest. *Moot*, 861 N.E.2d at 412.

There was no violation of the public trust doctrine when construction activities did not materially impact the navigability of the Mystic River, especially when it was not clear that the lands in question had ever been tidal flats, let alone submerged lands. *Rauseo v. Commonwealth*, 838 N.E.2d 585, 589-90 (Mass. App. Ct. 2005).

Because the public trust doctrine inheres in the Commonwealth, municipalities are limited in their abilities to regulate to preserve or to abrogate the public trust doctrine. However, municipal regulations affecting the public trust are often upheld on other grounds. *Fafard v. Conservation Comm'n of Barnstable*, 733 N.E.2d 66, 70-72 (Mass. 2000) (declaring that a municipality could not enact a wetlands by-law in furtherance of the public trust but upholding the by-law as a recreational regulation); *Mad Maxine's Watersports, Inc. v. Harbormaster of Provincetown*, 858 N.E.2d 760, 766-67 (Mass. App. Ct. 2005) (upholding town's regulation of personal watercraft on the ground that the legislature had specifically delegated authority to regulate vessels); *Commonwealth v. Muise*, 796 N.E.2d 1289, 1290-91 (Mass. App. Ct. 2003) (upholding a lobstering regulation on the grounds that it was a police power safety regulation).

MICHIGAN

Date of Statehood: 1837

Michigan Constitution: The Michigan Constitution provides that:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction.

MICH. CONST., art IV, § 52. While this provision is not a constitutional public trust doctrine *per se*, the Michigan courts have used it as support for the public trust. *See, e.g.*, *People* ex rel. *MacMullan v. Babock*, 196 N.W.2d 489, 497 (Mich. Ct. App. 1972) ("The importance of this trust is recognized by the People of Michigan in our Constitution. . . .").

Michigan Statutes:

- MICH. COMP. LAWS ANN. § 324.1705 (2001): Codifies the Michigan Environmental Protection Act.
- MICH. COMP. LAWS ANN. § 324.30301 (2001): Codifies the Wetlands Protection Act.
- MICH. COMP. LAWS ANN. §§ 324.30101 to 324.30323 (2001): Govern habitat protection in inland waters.
- MICH. COMP. LAWS ANN. §§ 324.32501 to 324.32502 (2001): Codify the Great Lakes Submerged Lands Act.

- MICH. COMP. LAWS ANN. §§ 324.32701 to 324.32728 (2001): Govern Great Lakes preservation.
- MICH. COMP. LAWS ANN. §§ 324.32801 to 324.32803 (2001): Govern aquifer protection.
- MICH. COMP. LAWS ANN. § 324.34105 (2001): Provides that irrigation district contracts and agreements "shall not in any manner infringe upon or invade the state's public trust in its waters."
- MICH. COMP. LAWS ANN. § 324.45301 (2001): "In any of the navigable or meandered waters of this state where fish have been or are propagated, planted, or spread at the expense of the people of this state or the United States, the people have the right to catch fish with hook and line during the seasons and in the waters that are not otherwise prohibited by the laws of this state."

Definition of "Navigable Waters": With respect to state title to streams and rivers, in 1860, the Michigan Supreme Court emphasized that the public trust doctrine originated in waters that were subject to the ebb and flow of the tide and that there were no tidal waters in the state. *Lorman v. Benson*, 8 Mich. 18, 1860 WL 4665, at *3, *5 (Mich. 1860). However, Michigan treats the Great Lakes like the oceans, subjecting them to state ownership and a public trust despite the lack of tidal influence. *Glass v. Goeckel*, 703 N.W.2d 58, 68-69 (Mich. 2005).

Nevertheless, Michigan also uses a "log floatation" test for navigability to establish public rights in streams and rivers. *Mich. Citizens for Water Conservation v. Nestle Waters N. Am., Inc.*, 709 N.W.2d 174, 218 (Mich. Ct. App. 2005), *MEPA claims rev'd on standing grounds*, 737 N.W.2d 447 (Mich. 2007); *Bott v. Natural Res. Comm'n*, 327 N.W.2d 838, 841 (Mich. 1982); *Moore v. Sanborne*, 2 Mich. 519, 1853 WL 1958, at *1 (Mich. 1853). In 1982, the Michigan Supreme Court explicitly rejected a recreational boating test. *Bott*, 327 N.W.2d at 841. Michigan's navigability test emphasizes that it is the value of the capacity of use that determines navigability and public rights, not the continuity of that use; as a result, rivers do not have to be able to float logs all year. *Moore v. Sanborne*, 1853 WL 1958, at *1. A river's or stream's capacity to float logs can be established in three ways: (1) the waterway was historically used for such purposes; (2) tests demonstrate the capacity for actual use; or (3) the waterway compares favorably to other waterways that have already been demonstrated to be navigable. *Mich. Citizens for Water Conservation*, 709 N.W.2d at 218-19.

However, Michigan also follows the "dead-end lake" rule: "although there is a navigable means of access, the littoral owner of all

the land surrounding a small inland dead-end lake has the sole right to use it." *Bott v. Natural Res. Comm'n*, 327 N.W.2d 838, 841 (Mich. 1982) (citing *Winans v. Willetts*, 163 N.W. 993, 994-95 (Mich. 1917)).

Rights in the "Navigable Waters": Michigan law draws a distinction between the public trust doctrine in the Great Lakes and the public trust doctrine in other navigable waters. In the Great Lakes, while private landowners may own to the low-water mark, the public trust doctrine extends to the high-water mark. *Glass v. Goeckel*, 703 N.W.2d 58, 69-70 (Mich. 2005). Michigan adopted Wisconsin's definition of "high-water mark" for the Great Lakes, which emphasizes the "distinct mark" resulting from the fairly continuous presence or action of water. *Id.* at 71-72. In the Great Lakes, the State "has an obligation to protect and preserve the waters of the Great Lakes and the lands beneath them for the public" so that the public can exercise rights of "fishing, hunting, and boating for commerce or pleasure," cutting ice, boating, bathing and wading, taking shellfish, gathering seaweed, cutting sedge, and fowling. *Id.* at 64-65. Moreover, the public trust doctrine in these lakes protects the right to walk along the shore below the high water mark. *Id.* at 73-75. While the Great Lakes Submerged Lands Act is consistent with the public trust doctrine, *Superior Public Rights, Inc. v. State Dep't of Natural Res.*, 263 N.W.2d 290, 295-96 (Mich. Ct. App. 1977), the Act does not define the limit of the public trust in the Great Lakes. *Glass v. Goeckel*, 703 N.W.2d at 68-69.

Other navigable waters are more limited. Because Michigan used the tidal test for title, "[t]he established law of this state is that the title of a riparian or littoral owner includes the bed to the thread or midpoint, subject to a servitude for commercial navigation of ships and logs, and, where the waters are so navigable, for fishing." *Bott v. Natural Res. Comm'n*, 327 N.W.2d 838, 841 (Mich. 1982); *Kerley v. Wolfe*, 84 N.W.2d 748 (Mich. 1957); *Att'y Gen.* ex rel. *Dir. of Conservation v. Taggart*, 11 N.W.2d 193 (Mich. 1943); *Collins v. Gerhardt*, 211 N.W. 115 (Mich. 1926); *Rice v. Ruddiman*, 10 Mich. 125, 1862 WL 2476, at *7-*8 (Mich. 1862); *Lorman v. Benson*, 8 Mich. 18, 1860 WL 4665, at *6, *8 (Mich. 1860).

In these non-tidal navigable waters, the public has rights of fishing and navigation. *Kelley* ex rel. *MacMullan v. Hallden*, 214 N.W.2d 856, 860 (Mich. Ct. App. 1974) (citing *Collins v. Gerhardt*, 211 N.W. 115 (Mich. 1926)). As such, the public trust doctrine warranted an injunction against the diking and filling of the Detroit River when that river was being used for public boating and fishing. *Grosse Ile Twp. v. Dunben & Sullivan Dredging Co.*, 167 N.W.2d 311, 313 (Mich. Ct. App. 1969).

The Michigan Supreme Court has declared that the only recognized

recreational rights in navigable streams and rivers are fishing rights. *Bott v. Natural Res. Comm'n*, 327 N.W.2d 838, 841 (Mich. 1982). However, other cases have listed rights of boating, fishing, swimming, and other reasonable uses of the surface of the water. *Higgins Lake Prop. Owners Ass'n v. Gerrish Twp.*, 662 N.W.2d 387, 402 (Mich. Ct. App. 2003) (citing *Thies v. Howland*, 380 N.W.2d 463, 466 (Mich. 1985)); *Jacobs v. Lyon Twp.*, 502 N.W.2d 382, 384 (Mich. Ct. App. 1993). Moreover, several cases have suggested that the public trust doctrine protects fish and game habitat. *Friends of Crystal River v. Kuras Properties*, 554 N.W.2d 328, 335 (Mich. Ct. App. 1996), *rev'd on other grounds*, 577 N.W.2d 684 (Mich. 1998); *People* ex rel. *MacMullan v. Babcock*, 196 N.W.2d 489, 497 (Mich. Ct. App. 1972); *Grosse Ile Twp. v. Dunben & Sullivan Dredging Co.*, 167 N.W.2d 311, 313 (Mich. Ct. App. 1969).

MINNESOTA

Date of Statehood: 1858

Minnesota Constitution: The Minnesota Constitution declares that "[n]avigable waters leading into the [state's boundary waters] shall be common highways and forever free to the citizens of the United States within any tax, duty, impost, or toll therefor." MINN. CONST. art. II, § 2. Moreover, the Minnesota Constitution establishes:

> A permanent environment and natural resources trust fund is established in the state treasury. . . . The assets of the fund shall be appropriated by law for the public purpose of protection, conservation, preservation, and enhancement of the state's air, water, land, fish, wildlife, and other natural resources.

MINN. CONST. art. XI, § 14.

Minnesota Statutes:

- MINN. STAT. ANN. §§ 103A.001 to 103A.43 (West 2007): Codify Minnesota's water policy. This chapter establishes a policy "[t]o conserve and use water resources of the state in the best interests of its people, and to promote the public health, safety, and welfare" by subjecting the public waters to regulation. § 103A.201.
- MINN. STAT. ANN. §§ 103B.3361 to 103B.355(West 2007): Establish the Water Resources Protection and Management Program.
- MINN. STAT. ANN. §§ 103F.201 to 103F.225(West 2007):

Govern shoreland development.

- MINN. STAT. ANN. §§ 103F.612 to 103F.616(West 2007): Govern Wetlands Preservation Areas.
- MINN. STAT. ANN. §§ 103F.801 to 103F.805(West 2007): Govern lake preservation and improvement.
- MINN. STAT. ANN. §§ 103F.901 to 103F.905(West 2007): Establish the Wetland Establishment and Restoration Program.
- MINN. STAT. ANN. §§ 103G.001 to 103G.801(West 2007): Govern waters of the State. This chapter declares that

> [t]he ownership of the bed and the land under the waters of all rivers in the state that are navigable for commercial purposes are in the state in fee simple, subject only to the regulations made by the United States with regard to the public navigation and commerce and the lawful use by the public while on the waters.

MINN. STAT. ANN § 103G.711(West 2007). In addition, this chapter establishes procedures for designating public waters, MINN. STAT. ANN §§ 103G.201 to 103G.215 (West 2007); and regulates diversions and appropriations and establishes a permitting program, MINN. STAT. ANN § 103G.255 (West 2007). The chapter defines "public waters" in section 103G.005.

Definition of "Navigable Waters": Recognizing in 1865 that Minnesota's section of the Mississippi River was not navigable under the English common-law tidal test, the Minnesota Supreme Court nevertheless declared the river to be navigable in law because it was navigable in fact for purposes of commerce. *See, e.g., Schurmeier v. St. Paul & P.R. Co.*, 10 Minn. 82, 1865 WL 43, at *3 (Minn. 1865). By 1893, the court had explicitly rejected the tidal test for purposes of establishing state title to the navigable waters, *see, e.g., Lamprey v. Metcalf*, 53 N.W. 1139, 1143-44 (Minn. 1893), and instead uses the federal "navigable in fact" test for all waters, requiring established commercial use as of the date of statehood. *See State v. Adams*, 89 N.W.2d 661, 665 (Minn. 1958); *see also State by Burnquist v. Bollenbach*, 63 N.W.2d 278, 287 (Minn. 1954); *Bingenheimer v. Diamond Iron Mining Co.*, 54 N.W.2d 912, 921 (Minn. 1952); *State v. Longyear Holding Co.*, 29 N.W.2d 657, 662-63 (Minn. 1947); MINN. STAT. ANN. § 103G.711. Lakes and streams are treated the same for public trust purposes under Minnesota law. *Lamprey v. Metcalf*, 53 N.W. at 1143. The state's ownership is *not* proprietary but rather in trust

for the people. *See, e.g., Pratt v. State Dep't of Natural Res.*, 309 N.W.2d 767, 771 (Minn. 1981); *see also Herschman v. State*, 225 N.W.2d 841, 844 (Minn. 1975); *State v. Longyear Holding co.*, 29 N.W.2d 657, 672 (Minn. 1947); *Lamprey*, 53 N.W. at 1143.

Nevertheless, the public can acquire use rights in waters floatable by logs and pleasure boats. "Navigability for pleasure is as sacred in the eye of the law as is navigability for any other purpose." *State v. Korrer*, 148 N.W. 617, 618 (Minn. 1914) (citing *City of Grand Rapids v. Powers*, 50 N.W. 661, 662 (Mich. 1891)); *see also Lamprey*, 53 N.W. at 1140-43 (indicating that log floatation and pleasure boating are enough to give the public rights in a river or lake); *In re Country Ditch No. 34 Erickschen v. Sibley County*, 170 N.W. 883, 884 (Minn. 1919) ("a settled policy designed to preserve inland waters which afford recreation to the public, as well as waters susceptible of use for commercial purposes").

The public trust doctrine applies only to the state's management of the waterways—not to its management of land. *See Larson v. Sando*, 508 N.W.2d 782, 787 (Minn. Ct. App. 1993). As a result, the sale of land designated as a state wildlife management area does not violate the public trust doctrine. *See id.*

Rights in the "Navigable Waters": Although the Minnesota Supreme Court recognized a split in the states regarding the border between public and private ownership in non-tidal navigable waters, *see In re Union Depot St. Ry. & Transfer Co. of Stillwater*, 17 N.W. 626, 628 (Minn. 1883), it nevertheless adopted the low-water mark as the border between state and public ownership in the navigable waters. *See id.*; *see also Reads Landing Campers Ass'n, Inc. v. Twp. of Pepin*, 546 N.W.2d 10, 13 (Minn. 1996); *State v. Slotness*, 185 N.W.2d 530, 532 (Minn. 1971); *Korrer*, 148 N.W. 617, 623 (Minn. 1914); *Schurmeier v. St. Paul & P.R. Co.*, 10 Minn. 82, 1865 WL 43, at *10 (Minn. 1865). Nevertheless, the private landowner's title between the low- and high-water marks is limited by public rights. *See Mitchell v. City of St. Paul*, 31 N.W.2d 46, 49 (Minn. 1948); *see also Korrer*, 148 N.W. at 623; *Lamprey*, 53 N.W. at 1140.

Public rights in navigable waters are paramount. *See Nelson v. De Long*, 7 N.W.2d 342, 346 (Minn. 1942). These public rights include commercial and recreational navigation/boating, fowling, skating, bathing, taking water for domestic or agricultural purposes, fishing, hunting, and cutting ice. *See Slotness*, 185 N.W.2d at 531; *see also Nelson*, 7 N.W.2d at 346; *Lamprey*, 53 N.W. at 1140-43; *Miller v. Mendenhall*, 44 N.W. 1141, 1141 (Minn. 1890).

MISSISSIPPI

Date of Statehood: 1817

Mississippi Constitution: The Mississippi Constitution protects the navigable waters from obstruction. MISS. CONST., art. 4, § 81.

Mississippi Statutes:

- MISS. CODE ANN. § 1-3-31 (West 2007): Defines "navigable waters" to be "all rivers, creeks, and bayous in this state, twenty-five (25) miles in length, and having sufficient depth and width of water for thirty (30) consecutive days in the year to float a steamboat with carrying capacity of two hundred (200) bales of cotton. . . ." Such waters "are navigable waters of this state and public highways."
- MISS. CODE ANN. § 27-1-107 (West 2007): Allows the Secretary of State, with the approval of the Governor, to rent or lease state-owned tidelands or submerged lands.
- MISS. CODE ANN. §§ 29-15-1 to 29-15-7 (West 2007): Codify the Public Trust Tidelands Act, which defines "tidelands" and "submerged lands" with reference to the ebb and flow of the tide and defines "mean high water." § 29-15-1. The Act also declares "the public policy of this state to favor the preservation of the natural state of the public trust tidelands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific public trust tidelands would serve a higher public interest in compliance with the public purposes of the public trust in which such tidelands are held." § 29-15-3. It establishes that landowners have rights that extend to and beyond the low-tide line, § 29-15-5, and recognizes that the public trust boundary is ambulatory. § 29-15-7. The Mississippi Supreme Court has twice upheld the Public Trust Tidelands Act's constitutionality. *Columbia Land Dev. L.L.C. v. Sec'y of State*, 868 So.2d 1006, 1016-17 (Miss. 2004); *Sec'y of State v. Wiesenberg*, 633 So.2d 983, 996 (Miss. 1994).
- MISS. CODE ANN. §§ 49-27-1 to 49-27-5 (West 2007): Codify the Coastal Wetlands Protection Act, which declares "the public policy of this state to favor the reservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them,

except where a specific alteration of specific coastal wetlands would serve a higher public purpose in compliance with the public purposes of the public trust in which coastal wetlands are held." § 49-27-3. The Act also defines "coastal wetlands" as the publicly owned wetlands, with reference to the tides. § 49-27-5.

- MISS. CODE ANN. §§ 51-1-1 to 51-1-4 (West 2007): Govern navigable waters. "[A]ll rivers, creeks and bayous in this state, twenty-five (25) miles in length, that have sufficient depth and width of water for thirty (30) consecutive days in the year for floating a steamboat with carrying capacity of two hundred (200) bales of cotton are hereby declared to be navigable waters of this state." § 51-1-1. In addition, "[s]uch portions of all natural flowing streams in this state having a mean annual flow of not less than one hundred (100) cubic feet per second . . . shall be public waterways of the state on which the citizens of this state and other states shall have the rights of free transport in the stream and its bed and the right to fish and engage in water sports." § 51-1-4. These provisions also limit the state's liability. § 51-1-4.
- MISS. CODE ANN. §§ 51-4-1 to 51-3-55 (West 2007): Govern water resources regulation and control.

Definition of "Navigable Waters": In early cases, the Mississippi courts adopted the English tidal test for title purposes and explicitly rejected the navigable-in-fact test for title purposes. *The Magnolia v. Marshall*, 10 George 109, 1860 WL 4829, at *4 (Miss. Err. App. 1860); *see also Bayview Land Ltd. v. State* ex rel. *Clark*, 950 So.2d 966, 972 (Miss. 2006); *Sec'y of State v. Wiesenberg*, 633 So.2d 983, 987 (Miss. 1994); *State* ex rel. *Rice v. Stewart*, 184 So. 44, 49 (Miss. 1938). This common-law definition is now evident in the statutory definitions of tidelands and submerged lands. MISS. CODE ANN. § 29-15-1(g), (h).

Nevertheless, at common law Mississippi also employs a broad navigability test for determining whether the public has rights in a waterway. Mississippi clearly expanded this test beyond commercial navigation, and public rights exist when the waterway can be used by canoes, motorboats, or flatboats, or for log floating, fishing, transportation, commerce, tourism, or recreation. *Ryals v. Pigott*, 580 So.2d 1140, 1145-46, 1150-52 (Miss. 1990).

Mississippi statutes now twice define "navigable waters" to be "all rivers, creeks, and bayous in this state, twenty-five (25) miles in length, and having sufficient depth and width of water for thirty (30) consecutive

days in the year to float a steamboat with carrying capacity of two hundred (200) bales of cotton. . . ." MISS. CODE ANN. §§ 1-3-31; 51-1-1. In addition, by statute, the public acquires rights in "[s]uch portions of all natural flowing streams in this state having a mean annual flow of not less than one hundred (100) cubic feet per second. . . ." § 51-1-4. However, these statutory definitions are not "the only criteria for identifying the public waters of the State of Mississippi." *Ryals v. Pigott*, 580 So.2d 1140, 1154 (Miss. 1990). Thus, the common-law tests remain relevant.

The Mississippi public trust doctrine also applies to "sixteenth section" school lands. *Bayview Land Ltd. v. State* ex rel. *Clark*, 950 So.2d 966, 972 (Miss. 2006); *Wiesenberg*, 633 So.2d at 987; *Turney v. Marion County Bd. of Educ.*, 481 So.2d 770 (Miss. 1985); *State* ex rel. *Rice v. Stewart*, 184 So. 44, 49 (Miss. 1938).

Rights in the "Navigable Waters": Because of the state's use of the tidal test for title purposes, private landowners own the beds of non-tidal navigable waters. *Comeaux v. Freeman*, 918 So.2d 780, 784 (Miss. Ct. App. 2005) (quoting *Cox v. F-S Prestress, Inc.*, 797 So.2d 839, 843 (Miss. 2001) (citing *Wilson v. St. Regis Pulp & Paper Corp.*, 240 So.2d 137, 139 (Miss. 1970))); *Ryals v. Pigott*, 580 So.2d 1140, 1149 n.19 (Miss. 1990); *The Magnolia v. Marshall*, 10 George 109, 1860 WL 4829, at *4 (Miss. Err. App. 1860). Nevertheless, "the landowner took the land subject to the common law easement for navigation and other uses incidental thereto" and has no right to exclude the public from the water's surface. *Ryals v. Pigott*, 580 So.2d at 1171 (citing *Cinque Bambini P'ship v. State*, 491 So.2d 508, 517 (Miss. 1986)).

In tidal waters, the state's ownership extends to the high-water line. *Sec'y of State v. Wiesenberg*, 633 So.2d 983, 988 (Miss. 1994); *Wiesenberg*, 633 So.2d at 989; *Cinque Bambini P'ship v. State*, 491 So.2d at 510-11, 514-15; *Rouse v. Saucier's Heirs*, 146 So. 291, 292 (Miss. 1933); *The Magnolia v. Marshall*, 10 George 109, 1860 WL 4829, at *4 (Miss. Err. App. 1860).

Mississippi recognizes a long list of public purposes protected under the public trust doctrine, especially in the tidelands and submerged lands. These public purposes and uses include navigation and transportation, commerce, fishing, bathing, swimming, and other recreational activities, development of mineral resources, environmental protection and preservation, and "enhancement of aquatic, avarian, and marine life, sea agriculture, and no doubt others." *Cinque Bambini P'ship v. State*, 491 So.2d at 512 (citing *Rouse v. Saucier's Heirs*, 146 So. 291 (1933); *Martin v. O'Brien*, 34 Miss. 21 (1857); *State* ex rel. *Rice v. Stewart*, 184 So. 44, 50 (Miss. 1938); *Treuting v. Bridge & Park Comm'n of City of*

Biloxi, 199 So.2d 627, 632-33 (Miss. 1967); MISS. CODE ANN. §§ 49-27-3, 49-27-5(a) (West 2007); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971)); *see also Wiesenberg*, 633 So.2d at 988-89 (quoting the list from *Cinque Bambini P'ship*); *Columbia Land Development L.L.C. v. Secretary of State*, 868 So.2d 1006, 1012-13 (Miss. 2004) (summarizing the list from *Cinque Bambini P'ship*). "Suffice to say that the purposes of the trust have evolved with the needs and sensitivities of the people—and the capacity of trust properties through proper stewardship to serve those needs." *Wiesenberg*, 633 So.2d at 989.

MISSOURI

Date of Statehood: 1821

Missouri Constitution: No relevant provisions.

Missouri Statutes:

- MO. STAT. ANN. §§ 256.400 to 256.430 (West 2007): Water usage provisions.

Definition of "Navigable Waters": Missouri rejected the English common-law "ebb and flow" tidal test for title as being impractical in the United States. *Cooley v. Golden*, 23 S.W. 100, 104-05 (Mo. 1893); *Hickey v. Hazard*, 3 Mo. App. 480 (1877); *Benson v. Morrow*, 61 Mo. 345, 1875 (Mo. 1875). Instead, for title purposes, Missouri uses the federal commerce test:

> A river is "navigable," with title to its bed in the State, if, in its ordinary condition, it is or may be used as a "highway for commerce." Stated otherwise, a river is navigable if, in its ordinary condition, it "has [the] capacity and suitability for the usual purpose of navigation, ascending or descending, by vessels such as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail vessels.

Skinner v. Osage County, 822 S.W.2d 437, 444 (Mo. Ct. App. 1991) (quoting *Elder v. Delcour*, 269 S.W.2d 17, 22 (Mo. 1954)). "This definition of 'navigable' does not include, as it does in some other states, rivers which may only be floatable by small crafts like rowboats and canoes." *Id.* (citing *Elder*, 269 S.W.2d at 23). Capacity for use, and not actual use, is all that is required. *Id.* (citing *Tonkins v. Monarch Bldg. Materials Corp.*, 347 S.W.2d 152, 157 (Mo. 1961)). The same test is used to determine navigable lakes. *Sneed v. Weber*, 307 S.W.2d 681,

689-90 (Mo. Ct. App. 1958).

Nevertheless, earlier Missouri court decisions recognized public rights in waterways in which logs could float, distinguishing between state title and public rights. *Hobart-Lee Tie Co. v. Grabner*, 219 S.W. 975, 976 (Mo. Ct. App. 1920); *McKinney v. Northcutt*, 89 S.W. 351, 354 (Mo. Ct. App. 1905). "[T]he owner of land through which a nonnavigable stream flows is 'subject to the burdens imposed by the river,' and is subject to certain limitations imposed in the public interest in the use of the water and the control of the land constituting the bed and banks of the stream." *Bollinger v. Henry*, 375 S.W.2d 161, 165 (Mo. 1964) (citing *Elder,* 269 S.W.2d at 24).

Rights in the "Navigable Waters": If the waterway is navigable, the landowner's and state's titles divide at the low-water mark; otherwise, the landowner holds title to the middle of the stream. *E.D. Mitchell Living Trust v. Murray*, 818 S.W.2d 326, 328-29 (Mo. Ct. App. 1991); *Skinner,* 822 S.W.2d at 444 (Mo. Ct. App. 1991); *Conran v. Girvin*, 341 S.W.2d 75, 80 (Mo. 1960) (*en banc*); *Bratschi v. Loesch*, 51 S.W.2d 69, 70 (Mo. 1932); *Sibley v. Eagle Marine Ind., Inc.*, 607 S.W.2d 431, 435 (Mo. 1980) (*en banc*); *Cooley,* 23 S.W. at 104 (Mo. 1893); *Benson,* 61 Mo. at 345.

Navigable rivers are public highways for travel and passage, *City of Springfield v. Mecum*, 320 S.W.2d 742, 744 (Mo. Ct. App. 1959); *Meyers v. City of St Louis*, 8 Mo. App. 266 (Mo. Ct. App. 1880), and obstruction of the navigable waters is a public nuisance. *Weller v. Missouri Lumber & Mining Co.*, 161 S.W. 853, 855 (Mo. Ct. App. 1913). The public also has rights to fish, *Elder,* 269 S.W.2d at 26; *Hickey*, 3 Mo. App. at 480; to boat and wade, *City of Springfield*, 320 S.W.2d at 744; to cut ice, *Hickey,* 3 Mo. App. at 480; and to float logs. *Hobart-Lee Tie Co.*, 219 S.W. at 976; *McKinney*, 89 S.W. at 354.

NEW HAMPSHIRE

Date of Statehood: 1788

New Hampshire Constitution: No relevant provisions.

New Hampshire Statutes:

- N.H. REV. STAT. ANN. § 233-A:1(2007): Governs access to public waters and defines "public bodies of water" to be public waters defined in Section 271:20 "and any impoundment of a stream; lake; pond, or tidal or marine

waters of 10 acres or more, or any other body of water owned by the state or by a state agency or department."

- N.H. REV. STAT. ANN. § 271:20(2007): "All natural bodies of fresh water situated entirely in the state having an area of 10 acres or more are state-owned public waters, and are held in trust by the state for public use. . . ."
- N.H. REV. STAT. ANN. § 271:20-a(2007): "Public access to public waters means legal passage to any of the public waters of the state by way of designated contiguous land owned or controlled by a state agency, assuring that all members of the public shall have access to and use of the public waters for recreational purposes."
- N.H. REV. STAT. ANN. § 481:1(2007): "[T]he water of New Hampshire whether located above or below ground constitutes a limited and, therefore, precious and invaluable public resource which should be protected, conserved and managed in the interest of present and future generations. The state as trustee of this resource for the public benefit declares that it has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries."
- N.H. REV. STAT. ANN. §§ 483:1 to 483:15(2007): Establishe the New Hampshire Rivers Management and Protection Program.
- N.H. REV. STAT. ANN. §§ 483-A:1 to 483-A:9(2007): Establish the New Hampshire Lakes Management and Protection Program.
- N.H. REV. STAT. ANN. §§ 483-B:1 to 483-B:20(2007): Codify the Comprehensive Shoreland Protection Act, which recognizes that "[t]he shorelands of the state are among its most valuable and fragile natural resources and their protection is essential to maintain the integrity of public waters." § 483-B:1. In addition, "[t]he public waters of New Hampshire are valuable resources held in trust by the state. The state has an interest in protecting those waters and has jurisdiction to control the use of public waters and the adjacent shoreland for the greatest public benefit. *Id.*
- N.H. REV. STAT. ANN. § 483-C:1(2007): Governs public use of coastal shorelands. The purpose of this provision is "to recognize and confirm the historical practice and common law right of the public to enjoy the greatest portion of New Hampshire coastal shoreland, in accordance with the public trust doctrine subject to those littoral rights

recognized at common law." "Any person may use the public trust coastal shorelands of New Hampshire for all useful and lawful purposes, to include recreational purposes, subject to the provisions of municipal ordinances relative to the 'reasonable use' of public trust shorelands."

- N.H. REV. STAT. ANN. § 498:16(2007): Governs enforcement of water rights.

Definition of "Navigable Waters": New Hampshire recognizes both the tidal test and the navigable-in-fact test for both title and the public trust doctrine. *Opinion of the Justices*, 649 A.2d 604, 609 (N.H. 1994) (tidal test); *Sibson v. State*, 259 A.2d 397, 399-400 (N.H. 1969) ("tide waters are public waters"); *Concord Mfg. Co. v. Robertson*, 25 A. 718, 720 (N.H. 1890) (recognizing both tests and concluding that both tidal waters and large ponds are impressed with the public trust); *Scott v. Wilson*, 3 N.H. 321 (N.H. 1825) (determining that the Connecticut River was navigable even though it is not subject to the ebb and flow of the tide).

"[L]akes, large natural ponds, and navigable rivers" are all owned by the people and held in trust by the state. *St. Regis Paper Co. v. N.H. Water Resources Bd.*, 26 A.2d 832, 837-38 (N.H. 1942). The distinction between public and private ponds depends on acreage, *id.*, now defined by statute to be 10 acres. N.H. REV. STAT. ANN. § 271:20 (2007). The distinction of public and private streams and rivers is a question of fact. *St. Regis Paper Co.*, 26 A.2d at 838. "When a river or stream is capable in its natural state of some useful service to the public because of its existence as such, it is public. Navigability is not the sole test, although it is an important one." *Id.*

Rights in the "Navigable Waters": In 1889, New Hampshire explicitly rejected Massachusetts' extension of private title to the low-water mark, and thus the title boundary is the high-water line for both tidal waters and lakes and great ponds. *Opinion of the Justices*, 649 A.2d at 608; *State v. George C. Stafford & Sons Co.*, 105 A.2d 569, 573 (N.H. 1954).

Similarly, the boundary of the public trust doctrine is the mean high tide line, and the legislature's attempt to extend the boundary to the highest high tide line constituted an unconstitutional taking of private property, invalidating N.H. REV. STAT. ANN. 483-C:1(V). *Purdie v. Attorney General*, 732 A.2d 442, 445-47 (N.H. 1999) (citing *Opinion of Justices*, 649 A.2d at 609 (N.H. 1994); *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 22-23 (1935)); *Sibson*, 336 A.2d at 243; *Allen v. Wetlands Bd.*, 577 A.2d 92, 93 (N.H. 1990); *George C. Stafford & Sons Co.*, 105 A.2d at 572-73).

The state holds public trust waters for the benefit of the public "'for all useful purposes,'" not just fishing and navigation. *Opinion of the Justices*, 649 A.2d at 609 (quoting *Concord Co.*, 25 A. at 721, and citing *St Regis Paper Co.*, 26 A.2d at 837-38 ("all useful and lawful purposes")); *State v. Sunapee Dam Co.*, 50 A. 108, 110 (N.H. 1901). "These uses include recreational uses." *Id.* (citing *Hartford v. Gilmanton*, 146 A.2d 851, 853 (N.H. 1958) (listing boating, bathing, fishing, fowling, skating, and cutting ice)). These public rights are paramount to private rights, and hence there is no taking of public property if the legislature codifies them. *Opinion of the Justices*, 649 A.2d at 609; *see also* N.H. REV. STAT. ANN. § 483-C:1 (codifying these rights); *Sibson*, 259 A.2d at 400 (public rights are paramount). In pursuit of the public trust doctrine, the state can regulate to prevent runoff and to protect marine fisheries and wildlife. *Sibson,* 259 A.2d at 399-400. However, the creation of a public easement in the dry sand area of the beach *would* constitute a taking of private property rights. *Opinion of the Justices*, 649 A.2d at 609-11.

NEW JERSEY

Date of Statehood: 1787

New Jersey Constitution: The New Jersey Constitution actually diminishes the potential reach of state ownership:

> No lands that were formerly tidal flowed, but which have not been tidal flowed at any time for a period of 40 years, shall be deemed riparian lands, or lands subject to a riparian claim, and the passage of that period shall be a good and sufficient bar to any such claim, unless during that period the State has specifically defined and asserted such a claim pursuant to law. This section shall not apply to lands which have not been tidal flowed at any time during the 40 years immediately preceding adoption of this amendment with respect to any claim not specifically defined and asserted by the State within 1 year of the adoption of this amendment.

N.J. CONST., art. VII, § 1.

New Jersey Statutes:

- N.J. STAT. ANN. § 23:9-4 (West 2007): "The inhabitants of the commonwealth of Pennsylvania and of the state of New Jersey shall have and enjoy a common right of fishery throughout, in and over the waters of the Delaware river

above and below Trenton falls, between low-water mark on each side of said river between said states except so far as either state may have heretofore granted valid and subsisting private right of fishery."

- N.J. STAT. ANN. § 58:11A-2 (West 2007): Water quality regulation is "to restore and maintain the chemical, physical and biological integrity of the waters of the State, including groundwaters, and the public trust therein. . . ."
- N.J. STAT. ANN. §§ 58:22-1 to 58:22-19 (West 2007): Codify the New Jersey Water Supply Law.

Definition of "Navigable Waters": "New Jersey early limited [both state ownership and the public trust doctrine] to tidal waters and does not apply the navigability test." *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 52 n.2 (N.J. 1972) (citing *Cobb v. Davenport*, 32 N.J.L. 369 (N.J. Sup. Ct. 1867)).

Rights in the "Navigable Waters": "There is not the slightest doubt that New Jersey has always recognized the public trust doctrine." *Borough of Neptune City*, 294 A.2d at 52. Moreover, in New Jersey, "[t]he public trust doctrine, like all common law principles, should not be considered fixed or static but should be molded and extended to meet challenging conditions and needs of the public it was created to benefit." *Id.* at 54-55, quoted in *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121 (N.J. 2005).

In tidal waters, the line between public and private ownership and for the public trust doctrine is the mean high water mark. *Panetta v. Equity One, Inc.*, 920 A.2d 638, 644-45 (N.J. 2007); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 358 (N.J. 1984); *O'Neill v. State Highway Dept.*, 235 A.2d 1, 9-10 (N.J. 1967). As the New Jersey Constitution indicates, however, ownership changes when the mean high tide changes. *Gormley v. Lan*, 436 A.2d 535, 538 (N.J. Sup. Ct. 1981). In non-tidal waters, landowners own to the middle of the stream. *Baker v. Normanoch Assoc.*, 136 A.2d 645, 651 (N.J. 1958) (citing *Arnold v. Mundy*, 6 N.J.L. 1 (1821)).

The public trust doctrine most basically protects navigation, commerce, and fishing. *Borough of Neptune City*, 294 A.2d at 52; *Mayor & Municipal Council of City of Clifton v. Passaic Valley Water Comm'n*, 539 A.2d 760, 765 (N.J. Sup. Ct. 1987). In pursuit of these rights, members of the public "may clear and improve fishing places, to increase the product of the fishery; [and] may create, enlarge, and improve oyster beds, by planting oysters therein in order to procure a more ample supply." *Arnold v. Mundy*, 6 N.J.L. 1, 78 (N.J. Sup. Ct.

1821). In addition, the doctrine ensures "public accessibility to and use of such lands for recreation and health, including bathing, boating and associated activities." *Borough of Neptune City*, 294 A.2d at 53. The New Jersey doctrine includes "recreational uses, including bathing, swimming, and other shore activities." *Id.* at 54; *see also Matthews v. Bay Head Improvement Ass'n*, 471 A.2d at 358 (citing *Borough of Neptune City* for the rule that "[t]he public's right to use the tidal lands and the water encompasses navigation, fishing, and recreational uses, including bathing, swimming, and other shore activities."). The alienability of such lands is limited, but the State can convey them in furtherance of the doctrine's public purposes. *Borough of Neptune City*, 294 A.2d at 53-54.

The public trust doctrine requires that the public be allowed to access at least some portions of the dry sand areas of both municipally owned and private beaches. *Raleigh Ave. Beach Ass'n*, 879 A.2d at 121-24 (private beach); *Lusardi v. Curtis Point Property Owners' Ass'n*, 430 A.2d 881, 886 (N.J. 1981) (municipally owned beach); *Van Ness v. Borough of Deal*, 393 A.2d 571, 572-74 (N.J. 1978) (municipally owned beach); *Borough of Neptune City*, 294 A.2d at 55 (municipally owned dry sand immediately adjacent to high-water line). The public is entitled to "reasonable access to the sea," and the extent of the public's right in the dry sand depends on the particular facts of each beach and is determined according to the *Matthews* factors: "Location of the dry sand areas in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand area by the owner. . . ." *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 364, 365 (N.J. 1984); *see also Raleigh Ave. Beach Ass'n*, 879 A.2d at 121 (applying the *Matthews* factors). However, the public trust doctrine does not prevent the municipality from exercising its police powers, such as to prohibit beach nudity. *State v. Vogt*, 755 A.2d 551, 561 (N.J. Sup. Ct. 2001).

The New Jersey Superior Court has extended the public trust doctrine to drinking water. "[I]t is clear that since water is essential for human life, the public trust doctrine applies with equal impact upon the control of our drinking water supplies." *Mayor & Municipal Council of City of Clifton v. Passaic Valley Water Comm'n*, 539 A.2d 760, 765 (N.J. Sup. Ct. 1987).

NEW YORK

Date of Statehood: 1788

New York Constitution: No relevant provisions.

New York Statutes:

- N.Y. PUB. LANDS LAW § 75 (West 2008): Authorizes grants and leases of state-owned submerged lands "consistent with the public interest in the use of state-owned lands underwater for purposes of navigation, commerce, fishing, bathing, and recreation; environmental protections, and access to the navigable waters of the state. . . ."
- N.Y. NAV. LAW §§ 37-30 to 37-39 (West 2008): Govern navigable waters of the state. Section 2 defines "navigable waters of the state" to be "all lakes, rivers, streams and waters within the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters bordering on and lying within the boundaries of Nassau and Suffolk counties." "Navigable in fact" means "navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode or trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation."
- N.Y. ENVTL. CONSERVATION LAW, Chap. 13 (West 2008): Governs marine and coastal resources.
- N.Y. ENVTL. CONSERVATION LAW § 15-1601 (West 2008): "All the waters of the state are valuable public natural resources held in trust by this state, and this state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment. . . ."
- N.Y. ENVTL. CONSERVATION LAW § 15-1713 (West 2008): "The waters impounded by any dam hereafter constructed for power purposes on any stream or waterway in the state, shall be impressed with a public interest and open to the public to fish thereon. . . ."
- N.Y. ENVTL. CONSERVATION LAW, Chap. 15 (West 2008): Codifies the Water Resources Law. According to section 15-0103, "[a]ll fish, game, wildlife, shellfish, crustacea and protected insects in the state . . . are owned by the state and held for the use and enjoyment of the people of the state. . . ." Article 5, sections 15-0501 to 15-0516 deal

specifically with protection of water. Article 6, sections 15-0601 to 15-0607, deal with water efficiency and reuse. Section 15-0701 governs private rights in waters. Article 29, sections 15-2901 to 15-2913, lay out the Water Resources Management Strategy.

- N.Y. EXEC. LAW §§ 42-910 to 42-923 (West 2008): Govern waterfront revitalization of coastal areas and inland waterways.

Definition of "Navigable Waters": New York is struck with the ebb-and-flow tidal test for title purposes. *Fulton Light, Heat & Power Co. v. State of New York*, 94 N.E. 199, 202 (N.Y. 1911); *People v. Sys. Properties*, 120 N.Y.S.2d 269, 280 (N.Y. App. Div. 1953) (noting that the tidal rule for title was wrong but that "it is a settled rule of property law and we must respect it as such."). There are two exceptions: the Hudson River and the Mohawk River have always been considered to be publicly owned. *Fulton Light, Heat, & Power*, 94 N.E. at 202-03.

Nevertheless, navigability determines the public right of use. *Adirondack League Club, Inc. v. Sierra Club*, 615 N.Y.S.2d 788, 790 (N.Y. App. Div. 1994). For purposes of the public trust doctrine, New York also embraces the navigable-in-fact rule. *Fulton Light, Heat & Power Co.*, 94 N.E. at 202; N.Y. NAV. LAW § 2. "A stream, to be exclusively owned by the riparian owner, must be too small to be navigable, in fact." *Fulton Light, Heat & Power Co.*, 94 N.E. at 202. In addition, New York has declared its ownership of navigable-in-fact lakes like Lake George. *People v. Sys. Properties*, 120 N.Y.S.2d at 275-76.

By statute, a waterway is "navigable-in-fact" if "navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode or trade and travel on water. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient, but to be navigable in fact a lake or stream must have practical usefulness to the public as a highway for transportation." N.Y. NAV. LAW § 2 (West 2008). Case law indicates that slight deepening by dynamite and occasional interruptions in the river's navigability are not enough to make the river non-navigable. *People v. Sys. Properties*, 120 N.Y.S.2d at 278-80. In addition, emphasizing commerce, New York at common law has used a log floatation test of navigability. *Adirondack League Club*, 615 N.Y.S.2d at 790-92 (citing *Morgan v. King*, 8 Tiffany 454, 459 (N.Y. 1866)). Recreational use is "relevant evidence of the stream's suitability and capacity for commercial use" but not independent grounds for finding navigability. *Id.* at 791.

In addition, the public trust doctrine and the state Freshwater

Wetlands Act have "resulted in the imposition of a special duty upon the [Department of Environmental Conservation] to safeguard wetlands within the State." *Bisignano v. Dep't of Envtl. Conservation*, 132 Misc. 2d 850, 851-52 (N.Y. Sup. Ct. 1986).

New York also applies its public trust doctrine to parkland. *Brooklyn Bridge Park Legal Defense Fund, Inc. v. N.Y. State Urban Development Corp.*, 825 N.Y.S.2d 347, 354-55 (N.Y. Sup. Ct. 2006); *Landmark West! v. City of New York*, 802 N.Y.S.2d 340, 349 (N.Y. Sup. Ct. 2005); *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1055 (N.Y. 2001); *Brooklyn Park Comm'rs v. Armstrong*, 6 Hand. 234, 1871 WL 9691, at *1 (N.Y. 1871). This doctrine can extend to city parking lots. *10 East Realty L.L.C. v. Incorporated Village of Valley Stream*, 793 N.Y.S.2d 122, 123-24 (N.Y. App. Div. 2005). However, this part of the doctrine does not extend to buildings designated as landmarks. *Landmark West!*, 802 N.Y.S.2d at 349.

The public trust doctrine does not apply to non-navigable waterways or to the air over cities. *Evans v. City of Johnstown*, 410 N.Y.S.2d 199, 207 (N.Y. Sup. Ct. 1978).

Rights in the "Navigable Waters": Because of New York's tidal test, private landowners own the beds of non-tidal navigable waters. *People v. Sys. Properties*, 120 N.Y.S.2d at 279-80. However, the riparian owners' rights in these waters are subordinate to the public rights of navigation and commerce. *Adirondack League Club*, 615 N.Y.S.2d at 790; *Fulton Light, Heat & Power Co.*, 94 N.E. at 203.

Thus, if the waterway is navigable in fact, the public trust doctrine applies. *Adirondack League Club*, 615 N.Y.S.2d at 792. "[T]he public's right to navigate includes the right to use the bed of the river or stream to detour around natural obstructions and to portage if necessary." *Id.* at 793. However, the public trust doctrine is violated only if there is interference with the public's right to fish or public's right of access for navigation. *Evans v. City of Johnstown*, 410 N.Y.S.2d at 207. Therefore, although the courts have not conclusively decided the issue, it is doubtful that New York's public trust doctrine extends to environmental issues such as sewage pollution. *Id.* at 207-08.

Public rights in the foreshore may be slightly broader. Here, the *jus publicum* includes "the right shared by all to navigate upon the waters covering the foreshore at high tide and, at low tide, to have access across the foreshore to the waters for fishing, bathing, or any other lawful purpose." *Arnold's Inn, Inc. v. Morgan*, 63 Misc. 2d 279, 283 (N.Y. Sup. Ct. 1970); *see also Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201, 203 (N.Y. 1997) (holding that tidal waters are "devoted to the public use, for all purposes, as well for navigation as well as for

fishing."). Thus, the line between state ownership and private ownership appears to be the high-tide line, although New York case law has not been crystal clear regarding this point.

NORTH CAROLINA

Date of Statehood: 1789

North Carolina Constitution: The North Carolina Constitution provides for the conservation of natural resources:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, open lands, and places of beauty.

N.C. CONST., art. XIV, § 5. While this provision does not encapsulate or create a public trust doctrine, it has been cited in support of the public trust doctrine. *Parker v. New Hanover County*, 619 S.E.2d 868, 875 (N.C. Ct. App. 2005); *see also* N.C. GEN. STAT. §§ 77-20, 113A-113.

North Carolina Statutes:

- N.C. GEN. STAT. § 1-45.1 (2007): "Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession." In addition, the "public trust rights" "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches."
- N.C. GEN. STAT. § 77-20 (2007): Establishes the mean high water mark as the seaward property boundary of all private property that adjoins the ocean and preserves the "customary free use and enjoyment of the ocean beaches. . . ."
- N.C. GEN. STAT. § 113-141 (2007): Governs conservation of marine and estuarine and wildlife resources. "The marine and estuarine and wildlife resources of the State

belong to the people of the State as a whole." N.C. GEN. STAT. § 113-131(a) (2007). "The enjoyment of the marine and estuarine resources of the State belongs to the people of the State as a whole and is not properly the subject of local regulation. . . ." N.C. GEN. STAT. § 113-133 (2007). Registration of private interests in these waters and lands is required. N.C. GEN. STAT. § 113-205 (2007). Dredge and fill permits are required for estuarine waters, tidelands, and state-owned lakes. N.C. GEN. STAT. § 113-229 (2007).

- N.C. GEN. STAT. § 113A-8:1 (2007): Establishes that the North Carolina Environmental Policy Act requires an environmental assessment for surface water transfers.
- N.C. GEN. STAT. § 113A-113(5) (2007): "Areas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Sec. 5 of the North Carolina Constitution" are areas of environmental concern.
- N.C. GEN. STAT. § 113A-129.1(a) (2007): In authorizing coastal reserves, recognizes "public trust rights such as hunting, fishing, navigation, and recreation."
- N.C. GEN. STAT. § 113A-134.1(b) (2007): In establishing the Public Beach and Coastal Waterfront Access Program, finds that "[t]he public has traditionally fully enjoyed the State's beaches and coastal waters and public access to and use of the beaches and coastal waters. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the state."
- N.C. GEN. STAT. §§ 143-22G to 143-22K (2007): Govern registration of surface water withdrawals and regulation of surface water transfers.
- N.C. GEN. STAT. §§ 143-215.11 to 143-215.22F (2007): Govern regulation of use of water resources.
- N.C. GEN. STAT. § 146-6 (2007): Provides that title to publicly financed filling in the Atlantic Ocean vests in the state; otherwise, the adjoining landowner gets title.
- N.C. GEN. STAT. § 146-64 (2007): Defines "navigable waters" to be "all waters which are navigable in fact."

Definition of "Navigable Waters": Although North Carolina flirted with the ebb-and-flow tidal test, *see Hatfield v. Grimstead*, 29 N.C. 139

(1846); *Resort Dev. Co. v. Parmele*, 71 S.E.2d 474 (N.C. 1852), the North Carolina Supreme Court has conclusively determined that North Carolina uses only the navigable-in-fact test. *Gwathmey v. State* ex rel. *Dept. of Env't, Health & Natural Res. through Cobey*, 464 S.E.2d 674, 677-81 (N.C. 1995) (citing *State v. Baum*, 38 S.E. 900, 901 (N.C. 1901); *State v. Narrows Island Club*, 5 S.E. 411, 412 (N.C. 1888); *State v. Glen*, 52 N.C. 321 (1859); *Collins v. Benbury*, 25 N.C. 277, 282 (1842); *Wilson v. Forbes*, 13 N.C. 30, 34, 38 (1828)). Cases using the tidal test were "erroneously" analyzed, and the tidal test is obsolete and has no part in North Carolina common law. *Id.* at 679-80. N.C. GEN. STAT. § 146-64 now defines "navigable waters" to be "all waters which are navigable in fact."

"The test is the capability of being used for purposes of trade and travel in the usual and ordinary mode . . . and not the extent and manner of such use." *Steel Creek Dev. Corp. v. James*, 294 S.E.2d 23, 27 (N.C. Ct. App. 1982) (citations omitted). Navigation by small craft used for pleasure is enough to make a body of water navigable. *Gwathmey*, 464 S.E.2d at 682; *but see Steel Creek Dev. Corp.*, 294 S.E.2d at 27 (holding that a lake used for recreational boating and occasional water plane landings was not navigable).

Rights in the "Navigable Waters": The dividing lines of ownership are the high-water mark on the coast, *West v. Slick*, 326 S.E.2d 601, 617 (N.C. 1985); N.C. GEN. STAT. § 77-20, and the low-water mark on non-tidal streams. *Shannonhouse v. White*, 86 S.E. 168, 169-70 (N.C. 1915). Public rights in these waters limit riparian and littoral rights. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 574 S.E.2d 48, 54-55 (N.C. Ct. App. 2002).

North Carolina recognizes the traditional uses of navigation, fishing and commerce. *Parker v. New Hanover County*, 619 S.E.2d 868, 875 (N.C. Ct. App. 2005) (quoting *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 828 (N.C. 1988)). However, case law and statutes also recognize the public's rights to "'navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.'" *Fabrikant v. Currituck County*, 621 S.E.2d 19, 27-28 (N.C. Ct. App. 2005) (quoting *friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation v. Coastal Resources Comm'n*, 452 S.E.2d 337, 348 (N.C. Ct. App. 1995) (quoting N.C. GEN. STAT. § 1-45.1 (1994))); *see also* N.C. GEN. STAT. § 113A-129.1 (recognizing "public trust rights such as hunting, fishing, navigation, and recreation.").

OHIO

Date of Statehood: 1803

Ohio Constitution: No relevant provisions.

Ohio Statutes:

- OHIO REV. CODE ANN. § 721.04 (Lexis Nexis 2007): Governs the use and control of waters and soil of Lake Erie. "All powers granted by this section shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory. All mineral rights or other natural resources existing in the soil or waters in such territory, whether now covered by water or not, are reserved by the state."
- OHIO REV. CODE ANN. §§ 1501.30 to 1501.35 (Lexis Nexis 2007): Govern diversion of waters. The Ohio Department of Natural Resources regulates such diversions.
- OHIO REV. CODE ANN. §§ 1506.01 to 1506.24 (Lexis Nexis 2007): Govern the Coastal Management Program (Lake Erie). In particular, Section 1506.10 embodies the public trust doctrine for Lake Erie: "It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state . . . together with the soil beneath their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adopted, subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands." *See also Beach Cliff Board of Trustees v. Ferchill*, 2003 WL 210227604, at *2 (Ohio App. 2003) (noting that Section 1506.10 codifies the public trust doctrine for Lake Erie).
- OHIO REV. CODE ANN. § 1531.02 (Lexis Nexis 2007): Declares that ownership of and title to all wild animals in Ohio, not legally confined or held in private ownership, is in the state, which holds such title in trust for the benefit of all the people.

Definition of "Navigable Waters": Ohio law treats rivers and Lake Erie differently.

Early Ohio cases construed the England-derived common law strictly, so as to give the state title only to tidal waters—those influenced by the ebb and flow of the tide. *Gavit's Adm'rs v. Chambers*, 3 Ohio 495, 496-97 (1828); *Blanchard's Lessee v. Porter*, 11 Ohio 138, 142-43 (1841). Nevertheless, for purposes of the public trust doctrine in streams and rivers, Ohio courts adopted the "navigable in fact" test fairly early. *Hickok v. Hine*, 23 Ohio 523, 527-28 (1872).

While the courts' interpretation of "navigable in fact" initially tracked the federal navigation test, *id.*, the Ohio courts have also been comfortable with a "gradually changing concept of navigability." *Coleman v. Schaeffer*, 126 N.E.2d 444, 445 (Ohio 1955). As a result, since at least 1955 the Ohio courts have progressively expanded that test so that now, any river or stream that supports recreational uses will be considered navigable. *Id.* at 445-47 (indicating that recreational boating makes a river navigable); *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373, 375 (Ohio 1959) (noting that "naturally navigable" waters are public waters and that boating for recreation and pleasure count); *State* ex rel. *Brown v. Newport Concrete Co.*, 336 N.E.2d 453, 455-457 (Ohio Ct. App. 1975) (tracing the evolution of the test from federal law and determining that because the Little Miami River was in fact used for recreational purposes, "the state of Ohio holds the waters of the Little Miami River in trust for the people of Ohio."). Moreover, rivers made navigable by human effort and declared to be navigable by the legislature will be treated as "navigable" rivers for public trust purposes. *Guthrie v. McConnell*, 1859 WL 4442, at *2-*3 (Ohio Com. Pleas 1859); *Mentor Harbor*, 163 N.E.2d at 375.

In contrast, Lake Erie is treated as though it were a tidal water. *East Bay Sporting Club v. Miller*, 161 N.E. 12, 13 (1928); *Winous Point Shooting Club v. Slaughterbeck*, 117 N.E. 162, 164 (Ohio 1917); *Bodi v. Winous Point Shooting Club*, 48 N.E. 944, 944 (Ohio 1897). The establishment of the public trust doctrine in Lake Erie followed naturally from the Supreme Court's decision in *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892). *State v. Cleveland & Pittsburgh R. Co.*, 113 N.E. 677, 680-81 (Ohio 1916). "It is clear that the trust doctrine of state control over the submerged lands of Lake Erie and its bays from the beneficial ownership of the public, which originated in England and has been reinforced in this country by judicial decision, has existed in this state since Ohio was admitted to the Union in 1803." *Thomas v. Sanders*, 413 N.E.2d 1224, 1228 (Ohio Ct. App. 1979).

Rights in the "Navigable Waters": Because inland "western" rivers

were not affected by the ebb and flow of the tide, riparian landowners hold title to the middle of navigable rivers. *Gavit's Adm'rs*, 3 Ohio at 497-98; *Blanchard's Lessee*, 11 Ohio at 143-44; *Lamb v. Rickets*, 11 Ohio 311, 315 (1842); *Walker v. Board of Public Works*, 16 Ohio 540, 543-44 (1847); *Day v. Pittsburgh, Youngstown & Chicago R.R. Co.*, 7 N.E. 528, 534-35 (Ohio 1886); *State* ex rel. *Anderson v. Preston*, 207 N.E.2d 664, 666 (Ohio App. 1963); *State* ex rel. *Brown v. Newport Concrete Co.*, 336 N.E.2d at 455.

Nevertheless, the public has rights in navigable rivers and lakes even though the beds are privately owned. *State* ex rel. *Brown*, 336 N.E.2d at 455-457 (noting that even though beds of navigable rivers are privately owned, the public has a right of navigation in the waters). Moreover, the public trust doctrine applies to "all legitimate uses, be they commercial, transportational, or recreational." *Id.* at 457-58; *see also Thomas v. Sanders*, 413 N.E.2d 1224, 1231 (Ohio App. 1979) (holding that the public has the traditional rights, including fishing and navigation, in navigable lakes). The riparian owner's title to the subaqueous soil under a navigable stream is subject to these public uses. *State ex rel. Brown*, 336 N.E.2d at 455. However, the public is not entitled to access the water over private land. *Pollock v. Cleveland Ship Building Co.*, 47 N.E. 582, 583-84 (Ohio 1897). Moreover, the public has *no* rights to boat upon or fish in nonnavigable lakes and rivers. *Akron Canal & Hydraulic Co. v. Fontaine*, 50 N.E.2d 897, 901 (Ohio App. 1943) (citing *Lembeck v. Nye*, 24 N.E. 686 (Ohio 1890)).

In contrast, "[t]he title of land under the waters of Lake Erie within the limits of the state of Ohio is in the state as trustee for the benefit of the people, for the public uses for which it may be adapted," *State* ex rel. *Squire v. City of Cleveland*, 82 N.E.2d 709, 719-20 (Ohio 1948), and the public's right to fish and to navigate in Lake Erie and its bays "is as fixed and complete as if those waters were subject to the ebb and flow of the tide." *East Bay Sporting Club*, 161 N.E. at 13; *Winous Point Shooting Club*, 117 N.E. at 164; *Bodi v. Winous Point Shooting Club*, 48 N.E. at 944. The line between public and private ownership is the high-water mark. *Toledo v. Kilburn*, 654 N.E.2d 202, 203 (Ohio Mun. 1995). As noted, these public trust rights are now codified, OHIO REV. CODE ANN. § 1506.10, and clearly include the rights of navigation, commerce, and fishing. More recent case law suggested broad public rights extending to all "the public uses to which it might be adapted." *Beach Cliff Board of Trustees v. Ferchill*, 2003 WL 21027604, at *2 (Ohio App. 2003). Moreover, the State cannot "'abandon the trust property [under Lake Erie] or permit a diversion of it to private uses different from the object for which the trust was created.'" *State* ex rel. *Squire*. 82 N.E.2d at 720 (quoting *State v. Cleveland & Pittsburgh R. Co.*, 113 N.E. at 680-81).

PENNSYLVANIA

Date of Statehood: 1787

Pennsylvania Constitution: On May 8, 1971, the Pennsylvania Constitution was amended to provide that:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all of the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

PA. CONST. art. I, § 27. According to the Pennsylvania Supreme Court, this constitutional "amendment thus installs the common law public trust doctrine as a constitutional right to environmental protection susceptible to enforcement by an action in equity." *Commonwealth by Shapp v. Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 596 (Pa. 1973) (Jones, B., dissenting).

Pennsylvania Statutes:

- 27 PA. CONS. STAT. ANN. §§ 3101 to 3136 (West 2007): Govern water resources planning.
- 32 PA. CONS. STAT. ANN. §§ 631 to 641 (West 2007): Govern water rights.
- 32 PA. CONS. STAT. ANN. § 675 (West 2007): "Any right, grant or privilege heretofore or hereafter granted or given, by the Commonwealth of Pennsylvania, in the bed of any navigable waters within or on the boundaries of this Commonwealth, is hereby declared void, whenever the same becomes or is deemed derogatory or inimical to the public interest, or fails to serve the best interests of the Commonwealth."

Definition of "Navigable Waters": Pennsylvania rejected the ebb-and-flow tidal test. *Fulmer v. Williams*, 15 A. 726, 727 (Pa. 1888); *Appeal of Gilchrist*, 109 Pa. 600, 604-05 (Pa. 1885); *Carson v. Blazer*, 1810 WL 1292, at *4-*6 (Pa. 1810). Instead, for all waters, the Commonwealth uses the navigable-in-fact test for both state title and the public trust doctrine. *Mountain Props., Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1099-110 (Pa. Super. Ct. 2001); *Pennsylvania Power & Light Co.*

v. Maritime Mgmt., Inc., 693 A.2d 592, 594 (Pa. Super. Ct. 1997).

"The rule for determining whether bodies of water are navigable is whether they are 'used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes and trade and travel on water.'" *Mountain Props., Inc.*, 767 A.2d at 1100 (quoting *Lakeside Park Co. v. Forsmark*, 153 A.2d 486, 487 (Pa. 1959)). "The basic difference is that between a trade-route and a point of interest. The first is a public use and the second private." *Lakeside Park Co.*, 153 A.2d at 489. Moreover, a waterway is not navigable because of recreational or tourism use. *Mountain Props., Inc.*, 767 A.2d at 1100; *Pennsylvania Power & Light Co.*, 693 A.2d at 595-96.

"Rivers are not determined to be navigable on a piecemeal basis. It is clear that once a river is held to be navigable, its entire length is encompassed." *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 722 (Pa. Super. Ct. 1999).

Rights in the "Navigable Waters": Riparian landowners own to the low-water mark in navigable waterways and to the middle of nonnavigable waterways. *Fulmer*, 15 A. at 727-28; *Black v. Am. Int'l Corp.*, 107 A. 737, 738 (Pa. 1919); *Shaffer v. Baylor's Lake Ass'n*, 141 A.2d 583, 585 (Pa. 1958). However, public rights in navigable waterways extend to the high-water mark. *Fulmer*, 15 A. at 727; *Black*, 107 A. at 738; *Shaffer*, 141 A.2d at 585.

The primary rights recognized are the public rights to fishing and navigation. *See Shrunk v. President, Managers & Co. of Schuylkill Navigation Co.*, 1826 WL 2218 (Pa. 1826). The right of navigation is paramount to the right of fishing and all other rights. *Yoffee v. Pennsylvania Power & Light Co.*, 123 A.2d 636, 644 (Pa. 1956) (quoting *Flanagan v. City of Philadelphia*, 42 Pa. 219, 228 (Pa. 1862)); *Hunt v. Graham*, 1900 WL 5301, at *3 (Pa. Super. Ct. 1900). Other rights that have been recognized in case law include the right to gather stones, gravel and sand; the right to take fish, ice, or driftwood; and, with certain limitations, the right to bathe. *Hunt v. Graham*, 1900 WL 5301, at *3-*4; *Solliday v. Johnson*, 1861 WL 5929, at *2 (Pa. 1861). In addition, the public retains property rights in the sand and gravel, despite public investment. *Warren Sand & Gravel Co., Inc. v. Commonwealth Dep't of Envtl. Res.*, 341 A.2d 556, 560 (Pa. Commw. Ct. 1975).

RHODE ISLAND

Date of Statehood: 1790

Rhode Island Constitution: Rhode Island has enshrined its public trust doctrine in its constitution. First:

> The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.

R.I. CONST., art. I, § 16. Second:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the national environment of the people of the state by providing adequate resource planning for the control and regulation of the use of natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

Id. art. I, § 17. The section codifies Rhode Island's public trust doctrine. *State ex rel. Town of Westerly v. Bradley*, 877 A.2d 601, 606 (R.I. 2005); *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003). Moreover, it restricts the state's authority regarding public trust lands. *Bradley*, 877 A.2d at 606-07; *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999).

Rhode Island Statutes:

- R.I. GEN. LAWS §§ 22-7.1-1 to 22-7.1-7 (West 2007): Establish the Joint Committee on Water Resources.
- R.I. GEN. LAWS § 46-5-1.2 (West 2007): "The state of Rhode Island, pursuant to the public trust doctrine long recognized in federal and Rhode Island case law, and to article I, § 17 of the constitution of Rhode Island as

originally adopted and subsequently amended, has historically maintained title in fee simple to all soil within its boundaries that lies below the high water mark and to any land resulting from any filling of any tidal area. . . . Subsequent to the effective date of this section [July 18, 2000], no title to any freehold estate in any tidal land or filled land can be acquired by any private individual unless it is formally conveyed by explicit grant of the state by the general assembly for public trust purposes."

- R.I. GEN. LAWS §§ 46-15-7 (West 2007): Govern authority to enter upon lands and waters for purpose of survey.
- R.I. GEN. LAWS § 46-15-13 (West 2007): Governs water supply planning.
- R.I. GEN. LAWS § 46-15-23 (West 2007): Establishes the Coastal Resources Management Council.
- R.I. GEN. LAWS § 46-23-1 (West 2007): Repeats public rights from § 17 of Article I of the Constitution for purposes of the Coastal Resources Management Council.
- R.I. GEN. LAWS § 46-23-6 (West 2007): Establishes that the Council can lease filled lands to the riparian or littoral owner.
- R.I. GEN. LAWS § 46-23-16 (West 2007): Establishes that the Council can grant permits, licenses and easements.

Definition of "Navigable Waters": Rhode Island uses the tidal test for both title and the public trust doctrine. *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1042 (R.I. 1995); *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895); *Bailey v. Burges*, 1876 WL 4788, at *2 (R.I. 1876); *Engs v. Peckham*, 1875 WL 4157, at *12 (R.I. 1875).

Rights in the "Navigable Waters": The state owns to the high water mark. *Bradley*, 877 A.2d at 606; *Champlin's Realty*, 823 A.2d at 1165; *Thornton-Whitehouse*, 740 A.2d at 1259; *Dawson v. Broome*, 53 A. 151, 157-58 (R.I. 1902); *Allen*, 32 A. at 166; R.I. GEN. LAWS § 46-5-1.2 (West 2007). This means the mean high tide line. *State v. Ibbison*, 448 A.2d 728, 731 (R.I. 1982) (citing *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 22-23 (1935)).

Case law emphasizes "the public rights of fishery, commerce, and navigation in these waters." *Champlin's Realty*, 823 A.2d at 1165; *Greater Providence Chamber of Commerce*, 657 A.2d at 1041 (R.I. 1995) (citing *Nugent ex rel. Collins v. Vallone*, 161 A.2d 802, 805 (R.I. 1960)). *See also City of Providence v. Comstock*, 65 A. 307 (R.I. 1906); *New York, N.H. & H.R. Co. v. Horgan*, 56 A. 179 (R.I. 1903). The

public right of fishing is paramount. *Allen*, 32 A. at 167. The privileges of the shore include "a public right of passage along the shore," barring fencing. *Jackvony v. Powel*, 21 A.2d 554, 558 (R.I. 1941).

The Rhode Island Constitution recognizes several public rights, "including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore. . . ." R.I. CONST., art. I, § 17. *See also* R.I. GEN. LAWS § 46-23-1 (West 2007) (repeating these rights). However, a prohibition on swimming in a breachway did not violate the public trust doctrine because public trust rights were not implicated. *Bradley*, 877 A.2d at 607.

A littoral owner who fills to the harbor line with the permission of the state extinguishes both the state's title and the public trust doctrine. *Greater Providence Chamber of Commerce*, 657 A.2d at 1044.

The Coastal Resources Management Council exercises exclusive jurisdiction in purely tidal areas, and the public trust doctrine limits municipalities' authority to regulate tidal lands. *Thornton-Whitehouse*, 740 A.2d at 1259.

SOUTH CAROLINA

Date of Statehood: 1788

South Carolina Constitution: The South Carolina Constitution specifies that:

> All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost, or toll imposed. . . .

S.C. CONST., art XIV, § 4. Similarly, the boundary waters of the state, "together will all navigable waters within the limits of the State, shall be common highways and forever free. . . ." S.C. CONST., art XIV, § 1.

South Carolina Statutes:

- S.C. CODE ANN., Title 49 (West 2007): Governs waters, water resources, and drainage. "All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free. . . ." § 49-1-10. The title regulates log obstructions to navigation,

49-1-20; the duty of landowners to clean out their stream, § 49-1-30; and obstruction of streams generally. § 49-1-40.

- S.C. CODE ANN. §§ 49-3-10 to 49-3-50 (West 2007): Codify the Water Resources Planning and Coordinating Act.
- S.C. CODE ANN. §§ 49-4-10 to 49-4-90 (West 2007): Codify the South Carolina Surface Water Withdrawal and Reporting Act.
- S.C. CODE ANN. §§ 48-39-10 to 48-39-360 (West 2007): Govern coastal tidelands and wetlands. These provisions define "coastal waters" as "the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark." § 48-39-10.

Definition of "Navigable Waters": South Carolina recognizes both the tidal and the navigable-in-fact tests. In 1822, the South Carolina Constitutional Court recognized that the tidal test was not sufficient because "our rivers are navigable several hundred miles above the flowing of the tide." *Cates' Executors v. Wadlington*, 1 McCord 580, 1822 WL 696, at *2 (S.C. Const. 1822); *see also State v. Pacific Guano Co.*, 22 S.C. 50, 1884 WL 4224, at *4 (S.C. 1884) (acknowledging both tests).

In tidal waters, "the public trust doctrine applies to '*all* lands beneath waters influenced by the ebb and flow of the tide.'" *Lowcountry Open Land Trust v. State*, 552 S.E.2d 778, 783 n.6 (S.C. Ct. App. 2001) (quoting and emphasizing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479-80 (1988)). Otherwise, if "the waterway in question has the capacity to support 'valuable floatage,' . . . it is deemed navigable and thus open to the public." *White's Mill Colony, Inc. v. Williams*, 609 S.E.2d 811, 815 (S.C. Ct. App. 2005) (applying S.C. CONST., art XIV, § 4, and S.C. CODE ANN. § 49-1-10).

> "Valuable floatage" is not determined by resort to generic guidelines as to what specific size or class of vessel or object can achieve buoyancy in the waterway. Rather, the term is defined broadly to include any "legitimate and beneficial public use." Such public use includes all varieties of commercial traffic, ranging from passage of the largest freighter to the floating of raw timber downstream to mill. Recreational uses are no less important—boating, hunting, and fishing have all been found to fall within the ambit of valuable floatage. In this vein, considerations such as whether the waterway is natural or man-made or whether it is impassable by any vessel at certain times of year have been found to have no bearing on the

> question of navigability. The focus remains strictly on the capacity, irrespective of actual use.

Id. (quoting *State* ex rel. *Medlock v. South Carolina Coastal Commission*, 346 S.E.2d 716, 719 (S.C. 1986), and citing *Hughes v. Nelson*, 399 S.E.2d 24, 25 (S.C. Ct. App. 1990); *State v. Head*, 498 S.E.2d 389, 394-95 (S.C. Ct. App. 1997)). Nevertheless, connection to commerce and travel is important, and isolated inland lakes and ponds are *not* navigable. *Id.* at 816-17.

Rights in the "Navigable Waters": The state presumptively holds title in the navigable tidal waters to the high-water mark. *Slau v. Kaseel*, 632 S.E.2d 888, 892 (S.C. Ct. App. 2006); *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116, 119 (S.C. 2003); *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397, 402 (S.C. 1995); *State v. Hardee*, 193 S.E.2d 497 (S.C. 1972); *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884). This presumptive title "applies to tidelands. . . ." *McQueen*, 580 S.E.2d at 120. Moreover, "wetlands created by the encroachment of navigable tidal water belong to the State." *Id.* (citing *Coburg Dairy, Inc. v. Lesser*, 458 S.E.2d 547 (S.C. 1995)). The landowner owns to the middle of non-navigable (non-tidal) streams. *State v Hardee*, 193 S.E.2d 497, 499 (S.C. 1972); *Cape Romain Land & Improvement Co. v. Georgia Carolina Canning Co.*, 146 S.E. 434, 436 (S.C. 1928); *State v. Pacific Guano Co.*, 22 S.C. 50, 1884 WL 4224, at *3 (S.C. 1884); *McCullough v. Wall*, 4 Rich. 68, 1850 WL 2895, at *10 (S.C. Ct. App. 1850).

Traditional common law rights include commerce and public access to the navigable waters, *White's Mill Colony*, 609 S.E.2d at 815, 816; and navigation and fishery. *McQueen*, 580 S.E.2d at 120 (citing *Cape Romain Land & Improvement Co.*, 146 S.E. 434). In 1995, the South Carolina Supreme Court greatly broadened the scope of South Carolina's public trust doctrine, declaring that:

> The underlying premise of the Public Trust Doctrine is that some things are considered too important to society to be owned by one person. Traditionally, these things have included natural resources such as air, water (including waterborne activities such as navigation and fishing), and land (including but not limited to seabed and riverbed soils). Under this Doctrine, everyone has the unalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks.

Sierra Club v. Kiawah Resort Assocs., 456 S.E.2d at 402 (quoting Syridon & Leblanc, *The Overriding Public Trust in Privately Owned*

Natural Resources: Fashioning a Cause of Action, 6 TUL. ENVTL. L.J. 287 (1993)). Moreover, the Coastal Tidelands and Wetlands Act "implicitly charges the Coastal Council with administering the Public Trust lands in connection with coastal waterways." *Id.*

"The State has the exclusive right to control land below the high water mark for the public benefit, and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *McQueen*, 580 S.E.2d at 119 (citing *Port Royal Mining co. v. Hagwood*, 9 S.E. 686 (S.C. 1889); *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397; *Heywood v. Farmers' Mining Co.*, 19 S.E. 963 (S.C. 1884); *Cape Romain Land & Improvement Co.*, 146 S.E. at 434). However, the construction of docks did not violate the public trust doctrine when "the docks would not substantially impair marine life, water quality, or public access to the area. . . ." *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d at 402.

TENNESSEE

Date of Statehood: 1796

Tennessee Constitution: The Tennessee Constitution states "[t]hat an equal participation in the free navigation of the Mississippi, is one of the inherent rights of the citizens of this State; it cannot, therefore, be conceded to any prince, potentate, power, person or persons whatever." TENN. CONST., art. I, § 29.

Tennessee Statutes:

- TENN. CODE ANN. § 68-221-702 (West 2007): Codifies the Safe Drinking Water Act, which recognizes "that the waters of the state are the property of the state and are held in public trust for the benefit of its citizens" and declares "that the people of the state are beneficiaries of this trust and have a right to both an adequate quantity and quality of drinking water."
- TENN. CODE ANN. §§ 69-1-101 to 69-1-117 (West 2007): Govern watercourses. "All navigable waters are public highways, including those declared navigable by special law." § 69-1-101. In addition, these provisions govern diversions and obstructions.
- TENN. CODE ANN. § 69-3-102 (West 2007): Codifies the Water Quality Control Act, which recognizes "that the waters of Tennessee are the property of the state and are

held in public trust for the use of the people of the state" and declares "the public policy of Tennessee that the people of Tennessee, as beneficiaries of this trust, have a right to unpolluted waters."

- TENN. CODE ANN. §§ 69-7-101 to 69-7-104 (West 2007): Establish the Water Resources Division.
- TENN. CODE ANN. §§ 69-7-201 to 69-7-212 (West 2007): Govern inter-basin water transfers.
- TENN. CODE ANN. §§ 69-7-301 to 69-7-309 (West 2007): Codify the Tennessee Water Resources Information Act.

Definition of "Navigable Waters": Tennessee rejected the ebb-and-flow tidal test of navigability. *Elder v. Burrus*, 25 Tenn. 358, 1845 WL 1939, at *5-*7 (Tenn. 1845). Instead, it uses the navigable-in-fact test for state ownership. *State* ex rel. *Cates v. Western Tennessee Land Co.*, 158 S.W. 746, 748-49 (Tenn. 1913).

Tennessee essentially recognizes three categories of waters. First are the waters that are "essentially valuable" to commerce, which are considered legally navigable and cannot be privately owned. *The Point, L.L.C. v. Lake Management Ass'n*, 50 S.W.3d 471, 476 (Tenn. Ct. App. 2001). Examples include the Great Lakes and the Mississippi River. *Id.* at 476 n.3. Log floatage is not enough to make a river commercially navigable. *Allison v. Davidson*, 39 S.W. 905 (Tenn. Ct. App. 1896).

However, navigability for commerce "serves only to determine ownership in the land underneath the water," not to determine public rights. *The Point, L.L.C.*, 50 S.W.3d at 476; *American Red Cross v. Hinson*, 122 S.W.2d 433, 435 (Tenn. 1938) (citing *Sigler v. State*, 66 Tenn. 493 (1874)); *Miller v. State*, 137 S.W. 760, 761-62 (Tenn. 1911). Thus, second, "a body of water which is navigable but not necessary for commerce may be privately owned, subject to a right of access in the public." *The Point, L.L.C.*, 50 S.W.3d at 476.

Third, "[a] lake or stream which is considered unnavigable may be privately owned and controlled." *The Point, L.L.C.*, 50 S.W.3d at 476.

Rights in the "Navigable Waters": The division between state and private ownership is the low-water mark. *Uhlhorn v. Keltner*, 637 S.W.2d 844, 846 (Tenn. 1982); *Cunningham v. Prevow*, 192 S.W.2d 338, 341 (Tenn. Ct. App. 1946); *Elder v. Burrus*, 25 Tenn. 358, 1845 WL 1939, at *7 (Tenn. 1845).

At common law, Tennessee recognizes the rights of navigation, fishing, fowling, hunting, and "everything of value incident to the right of soil." *State ex rel. Cates v. Western Tennessee Land Co.*, 158 S.W. 746, 749-50 (Tenn. 1913). Statutes now connect the public trust doctrine

to both a right to an adequate quantity and quality of drinking water and to unpolluted water, TENN. CODE ANN. §§ 68-221-702, 69-3-102, but case law has not further developed these purported "public trust water rights."

VERMONT

Date of Statehood: 1791

Vermont Constitution: Since 1777, the Vermont Constitution has recognized rights that have been linked to the public trust doctrine. In its current form:

> The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.

VT. STAT. ANN. tit. II § 67 (2007). The phrase "not private property" modifies only "other waters" and not "boatable waters," preserving public rights in any privately owned boatable waters. *State v. Central Vt. Ry., Inc.*, 571 A.2d 1218, 1131, n.2 (Vt. 1989) (citing *New England Trout & Salmon Club v. Mather*, 35 A. 323 (Vt. 1896)). "In Vermont, the critical importance of public trust concerns is reflected both in case law and in the state constitution. [Section 67] underscores the early emphasis placed upon the public interest in Vermont's navigable waters." *Id.* at 1130-31.

Vermont Statutes:

- VT. STAT. ANN. tit. 10, §§ 901 to 924 (2007): Govern water resources management.
- VT. STAT. ANN. tit. 10, §§ 1031 to 1032 (2007): Govern regulation of stream flow.
- VT. STAT. ANN. tit. 10, §§ 1421 to 1426 (2007): Govern protection of navigable waters and shorelands. These provisions allow regulation "to further the maintenance of safe and healthful conditions, prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structures, and land uses, preserve shore cover and natural beauty, and provide for multiple use of the waters in a manner to provide for the best interests of the citizens of the state." § 1421. They

also define "navigable waters" to be "Lake Champlain, Lake Memphremagog, the Connecticut River, all natural inland lakes within Vermont and all streams, ponds, flowages and other waters within the territorial limits of Vermont, including the Vermont portion of the boundary waters, which are boatable under the laws of this state." § 1422. Requires a water resources and shoreland use plan. § 1423. Regulates use of public waters. § 1424. Finally, they allow for designation of outstanding resource waters. § 1424a.

- VT. STAT. ANN. tit. 29, § 301 (2007): "All mines or quarries discovered upon any public land belonging to the people of the state, or upon land beneath public waters, are the property of the people of this state in their right of sovereignty."
- VT. STAT. ANN. tit. 29, § 401 (2007): "Lakes and ponds which are public waters of Vermont and the lands lying thereunder are a public trust, and it is the policy of this state that these waters and lands shall be managed to serve the public good, as defined by section 405 of this title, to the extent authorized by statute.

Definition of "Navigable Waters": Vermont applies the English tidal test for purposes of title. *New England Trout & Salmon Club*, 35 A. at 324.

However, recognizing this common-law limitation and the fact that no waters in Vermont are subject to tidal influence, the drafters of Vermont's Constitution, in 1777, used the word "boatable" in Chapter II, § 67 in order to preserve public rights in non-tidal, navigable-in-fact waters. *New England Trout & Salmon Club*, 35 A. at 325. "Boatable" is essentially the same as the federal commerce definition of "navigable in fact": "whether [the waterway] can be used in its ordinary condition as a highway for commerce, conducted in the customary mode of trade and travel on the water. . . ." *Id.* (citing *The Daniel Ball*, 10 Wall. 557, 560 (1870); *The Montello*, 11 Wall. 411 (1874)). Capacity for use in its natural state, not actual use, is what matters. *Id.* at 326. The waterway does not have to be navigable all year, and navigability for either commerce or pleasure is sufficient. *Id.* However, there is a presumption that non-tidal waters are private. *Id.*

Vermont statutes more specifically provide that navigable waters are "Lake Champlain, Lake Memphremagog, the Connecticut River, all natural inland lakes within Vermont and all streams, ponds, flowages and other waters within the territorial limits of Vermont, including the

Vermont portion of the boundary waters, which are boatable under the laws of this state." VT. STAT. ANN. tit. 10, § 1422 (2007).

Rights in the "Navigable Waters": Because of the English tidal test, the Vermont Supreme Court originally suggested that private landowners own the beds and banks of navigable in fact rivers, and that no such rivers are in public ownership. *New England Trout & Salmon Club*, 35 A. at 324-25. However, the Vermont Supreme Court now states that if a waterway is navigable-in-fact, the landowner owns to the low-water mark. *State v. Central Vt. Ry.*, 571 A.2d at 1131 (quoting and citing *Hazel v. Perkins*, 105 A. 249, 250-51 (Vt. 1919)).

"The purpose of the [public trust] doctrine is to preserve the public's interest in Vermont's navigable waterways." *Parker v. Town of Milton*, 726 A.2d 477, 481 (Vt. 1998) (citing VT. STAT. ANN. tit. 29, § 401). As a result, the state probably cannot convey submerged lands free of the public trust. *State v. Central Vt. Ry.*, 571 A.2d at 1131 (citing *Nat'l Audubon Soc'y v. Super. Ct. of Alpine County*, 658 P.2d 709, 712 (Cal. 1983) (*en banc*); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453-54 (1892)). The public has "'rights of navigation, passage, portage, commerce, fishing, recreation, conservation, and aesthetics.'" *Id.* (quoting *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 122-23 (D. Mass. 1981)).

The public trust doctrine provides the state and citizens acting on behalf of the state with a cause of action, but individuals still have to show injury for standing purposes. *Parker v. Town of Milton*, 726 A.2d 477, 481 (Vt. 1998) (citing *Hazen v. Perkins*, 105 A. 249, 251-52 (Vt. 1918)).

The Vermont Supreme Court suggested that § 67 of the Vermont Constitution limits the evolution of Vermont's common law. *Cabot v. Thomas*, 514 A.2d 1034, 1038 (Vt. 1986). Four years later, however, it cited to broad public trust statements from New Jersey and California to emphasize that:

> "[T]he public trust doctrine retains an undiminished vitality. The doctrine is not "'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was intended to benefit.'" "The very purposes of the trust have evolved in tandem with the changing public perception of the values and uses of waterways."

State v. Central Vt. Ry., 571 A.2d at 1130 (quoting *Matthews Bay Head Improvement Ass'n*, 471 A.2d at 365 (quoting *Borough of City of Neptune v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972)); *Nat'l Audubon Soc'y v. Super. Ct. of Alpine County*, 658 P.2d 709, 719

(Cal. 1983) (*en banc*)).

VIRGINIA

Date of Statehood: 1788

Virginia Constitution: The Virginia Constitution contains several provisions related to the public trust doctrine. First:

> To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

VA. CODE ANN. art. XI, § 1. Second:

> The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be held in trust for the benefit of the people of the Commonwealth, subject to such regulations and restriction as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise.

VA. CODE ANN. art. XI, § 3. Finally, "[t]he people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law." VA. CODE ANN. art XI, § 4.

Virginia Statutes: Virginia has largely codified its public trust doctrine in statutes. The Code dates to 1887 and codifies the common law. *Taylor v. Commw.*, 47 S.E. 875, 877, 878-80 (Va. 1904).

- VA. CODE ANN. § 1-302 (West 2007): "The ownership of the waters and submerged lands . . . shall be in the Commonwealth unless it shall be, with respect to any given parcel or area, in any other person or entity by virtue of a valid and effective instrument of conveyance or operation of law."
- VA. CODE ANN. § 10.1-402 (West 2007): Codifies the Scenic Rivers Act.
- VA. CODE ANN. § 28.2-1200: "All beds of the bays, rivers,

creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish. No grant shall be issued by the Librarian of Virginia to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether or not it ebbs bare."

- VA. CODE ANN. § 28.2-1200.1 (West 2007): "In order to fulfill the Commonwealth's responsibility under Article XI of the Constitution of Virginia to conserve and protect public lands for the benefit of the people, the Commonwealth shall not convey fee simple title to state-owned bottomlands covered by waters," unless they have been lawfully filled.
- VA. CODE ANN. § 28.2-1201 (West 2007): "[A]ll ungranted islands which rise by natural or artificial causes from the beds of bays, rivers and creeks that are ungranted under § 28.2-1200 shall remain the property of the Commonwealth. . . ." However, in case of conflict, the common law of reliction, accretion, and avulsion controls.
- VA. CODE ANN. § 28.2-1202 (West 2007): The boundary of riparian and littoral properties, and the limit of the landowners' rights and privileges, is the mean low-water mark.
- VA. CODE ANN. § 28.2-1203 (West 2007): "It shall be unlawful for any person to build, dump, trespass or encroach upon or over, or to take or use any materials from the beds of the bay, ocean, rivers, streams, or creeks which are the property of the Commonwealth" without a permit, with exceptions.
- VA. CODE ANN. § 28.2-1205 (West 2007): In issuing permits, "the [Marine Resources] Commission shall be guided . . . by the provisions of Article XI, Section I of the Constitution of Virginia." In addition the Commission must exercise its authority "consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to § 1-200 in order to protect and safeguard the public right to the use and enjoyment of subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the

public trust doctrine and the Constitution of Virginia."

- VA. CODE ANN. § 28.2-1208 (West 2007): The Marine Resources Commission may lease the beds of the waters of the Commonwealth outside of the Baylor Survey, with the Attorney General's and Governor's approval.
- VA. CODE ANN. §§ 62.1-10 to 62.1-13 (West 2007): Govern state policy as to waters. Section 62.1-11 imposes limitations on the right to use.
- VA. CODE ANN. §§ 62.1-44.15:20 to 62.1-44.15:23 (West 2007): Establish the Virginia Water Resources and Wetlands Protection Program.
- VA. CODE ANN. § 62:1-44.36 to 62.1-44.44 (West 2007): Govern water conservation and planning.
- VA. CODE ANN. §§ 62.1-243 to 62.1-247 (West 2007): Govern surface water management areas.
- VA. CODE ANN. § 62.1-164 (West 2007): Governs a riparian owner's right to wharf out.

Definition of "Navigable Waters": At early common law, the English common law tidal test determined some of Virginia's law. *See Taylor v. Commw.*, 47 S.E. at 880 (tracing the evolution of colonial title in tidal lands). However, Virginia also used the navigable-in-fact test for title and application of the public trust doctrine. *Boerner v. McCallister*, 89 S.E.2d 23, 27 (Va. 1955) (citing *Ewell v. Lambert*, 13 S.E.2d 333, 335 (Va. 1941)). "The question of navigability is one of fact. . . . The test is whether the stream is being used or is susceptible of being used, in its natural and ordinary condition, as a highway for commerce, on which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Ewell*, 13 S.E.2d at 335.

Now, however, the statutory list is more apt to control the application of the public trust doctrine. "All beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth. . . ." VA. CODE ANN. § 28.2-1200. As a result, a navigable-in-fact lake was held to not be subject to the public trust because lakes are not enumerated in section 28.2-1200. *Smith Mt. Lake Yacht Club v. Ramaker*, 542 S.E.2d 392, 395-96 (Va. 2001).

Rights in the "Navigable Waters": The border between the landowners' rights and public ownership and rights is the low-water mark. *Evelyn v. Commw.*, 621 S.E.2d 130, 133-34 (Va. Ct. App. 2005); VA. CODE ANN. §§ 28.2-1202. The Commonwealth initially recognized

state title to the high-water mark in tidal lands, but in 1679 it extended private title to the low-water mark to encourage private development of wharves and commerce. *Taylor v. Commw.*, 47 S.E. at 880. The landowner also has qualified rights to the line of navigability, now listed in VA. CODE ANN. § 62.1-164. *Id.* at 880-81 (listing the rights).

The public's rights include fishing, fowling, hunting, and taking and catching oysters and other shellfish. *Evelyn v. Commw.*, 621 S.E.2d at 134 (citing VA. CODE ANN. § 28.2-1200); *Taylor v. Commw.*, 47 S.E. at 877-79).

The Marine Resources Commission must consider the public trust doctrine when issuing permits for the use of state-owned bottomlands. *Palmer v. Commw. Marine Res. Comm'n*, 628 S.E.2d 84, 89 (Va. Ct. App. 2006) (citing VA. CODE ANN. § 28.2-1205(A)). Specifically, the Commission must ensure the preservation and protection of all current and future uses of the bottomlands. *Id.* at 89-90.

In addition, "[u]nder the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people." *In re Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980).

WEST VIRGINIA

Date of Statehood: 1863

West Virginia Constitution: No relevant provisions.

West Virginia Statutes:

- W. VA. CODE ANN. § 5A-11-1 (West 2007): Establishes the Public Land Corporation, which holds title to all of West Virginia's public lands, including the submerged lands, except those submerged lands owned and/or managed by the Division of Natural Resources.
- W. VA. CODE ANN. § 5A-11-3 (West 2007): Governs the powers of the Public Land Corporation.
- W. VA. CODE ANN. § 20-2-3 (West 2007): "The ownership of and title to all wild animals, wild birds, both migratory and resident, and all fish, amphibians, and all forms of aquatic life in the State of West Virginia is hereby declared to be in the State, as trustee for the people. . . . Provided, however, that all fish, frogs, and other aquatic life in privately owned ponds are, and shall remain, the private

property of the owner or owners of such privately owned ponds. . . ."

- W. VA. CODE ANN. §§ 22-26-1 to 22-26-6 (West 2007): Codify the Water Resources Protection Act.

Definition of "Navigable Waters": West Virginia rejected the tidal test as the sole test of navigability. Purporting to follow federal law, West Virginia recognizes three classes of navigable streams: (1) tidal waters, whether navigable-in-fact or not; (2) non-tidal waters that are navigable-in-fact for commercial purposes, following the federal commerce test of navigability established in *The Daniel Ball*, 77 U.S. 557, 560 (1870), *United States v. The Montello*, 87 U.S. 430, 430-31 (1874), and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 405-06 (1940); and (3) waterways that are otherwise floatable by logs and rafts but not useful in commerce. *Campbell Brown & Co. v. Elkins*, 93 S.E.2d 248, 262 (W. Va. 1956) (quoting *Gaston v. Mace*, 10 S.E. 60, 62 (W. Va. 1889)).

For the second category, waterways are navigable if they are "in fact navigable for boats or lighters, and susceptible of valuable use for commercial purposes in their natural state, unaided by artificial means or devices. The stream, too, to belong to this . . . class of navigable streams, must thus be capable of being navigable, not all the time, for such length of time during the years as will make such stream valuable to the public as a public highway." *Campbell Brown*, 93 S.E.2d at 262 (citations omitted). Navigability is determined as of the date of West Virginia's admission as a state. *Id.* at 266 (citing *State v. Longyear Holding Co.*, 29 N.W.2d 657, 662-63 (Minn. 1947)).

Rights in the "Navigable Waters": The state would own tidal waters, if there were any in West Virginia, to the high-water mark. *Gaston*, 10 S.E. at 62-63. The private landowner owns non-tidal, non-commercially navigable floatable waterways, subject to an easement for public floatage. *Id.* at 63. The West Virginia courts have apparently not clearly decided the border for the second class of waterway, but the heavy reliance on federal law suggests that it should be the high-water mark.

In addition to rights of navigation, *Campbell Brown*, 93 S.E.2d at 262 (citations omitted), the public has rights of fishing and bathing in the navigable-in-fact waters. *International Shoe Co. v. Heatwole*, 30 S.E.2d 537, 540 (W. Va. 1944).

The State of West Virginia manages the submerged lands as public lands. *Campbell Brown*, 93 S.E.2d at 259, 260-61.

WISCONSIN

Date of Statehood: 1848

Wisconsin Constitution: Since 1848, the Wisconsin Constitution has provided that:

> The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

WIS. CONST., art. IX, § 1. This constitutional provision provides the foundation for the public trust doctrine in Wisconsin. *Hilton* ex rel. *Pages Homeowners Ass'n v. Dep't of Natural Res.*, 717 N.W.2d 166, 173 (Wis. 2006); *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 787 (Wis. 2001).

Wisconsin Statutes:

- WIS. STAT. ANN. §§ 30.01 to 30.99 (West 2007): Govern navigable waters, harbors, and navigation. "All lakes wholly or partly within this state which are navigable in fact are declared to be navigable and public waters, and all persons have the same rights therein and thereto as they have in and to any other navigable or public waters." § 30.10(1). "[A]ll streams, sloughs, bayous, and march outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state." § 30.10(2).
- WIS. STAT. ANN. § 31.06 (West 2007): "The enjoyment of natural scenic beauty and environmental quality are declared to be public rights to be considered along with other public rights and the economic need of electric power for the full development of agricultural and industrial activity and other useful purposes in the area to be served." § 31.06(3)(c).
- WIS. STAT. ANN. §§ 33.01 to 33.60 (West 2007): Govern

public inland waters.

- WIS. STAT. ANN. §§ 281.11 to 281.35 (West 2007): Govern water resources. Section 281.31 defines "navigable waters" to mean "Lake Superior, Lake Michigan, all natural inland lakes within this state and all streams, ponds, sloughs, flowages and other waters within the territorial limits of this state, including the Wisconsin portion of boundary waters, which are navigable under the laws of this state." § 281.31.

Definition of "Navigable Waters": Wisconsin uses the navigable-in-fact test for both title and application of the public trust doctrine. In early cases, Wisconsin recognized a saw-log test of navigability. *Meunch v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 516-17 (Wis. 1952). However, in 1911, the state Water Power Act fixed the definition of "navigable water" to include all rivers and streams that had been meandered and all navigable-in-fact waters. *Id.* at 519. A water is navigable-in-fact if it is "capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes." *Id.*; *see also FAS, L.L.C. v. Town of Bass Lake*, 733 N.W.2d 287, 292 n.8 (Wis. 2007) (quoting *State v. Kelly,* 629 N.W.2d 601, 607 (Wis. 2001)). No prior commercial use is required. *Meunch*, 53 N.W.2d at 520. Moreover, with respect to lakes, "[i]f the land is part of the navigable lake, then the fact that the specific area cannot be navigated is irrelevant to the state's claim." *State v. Trudeau*, 408 N.W.2d 337, 342 (Wis. 1987). The public trust doctrine applies only so long as the water remains navigable. *Meunch*, 53 N.W.2d at 518. Moreover, the state does not own, and there are no public trust rights in, artificial bodies of water. *Mayer v. Grueber*, 138 N.W.2d 197, 203 (Wis. 1965); *State v. Bleck*, 338 N.W.2d 492, 496 (Wis. 1983).

Rights in the "Navigable Waters": The line between state and private ownership of the navigable lakes and the Great Lakes is the high-water mark. *In re Annexation of Smith Prop.*, 634 N.W.2d 840, 843 (Wis. Ct. App. 2001) (citations omitted); *R.W. Docks & Slips v. State,* 628 N.W.2d 781, 787 (Wis. 2001) (citations omitted). In navigable streams and rivers, the riparian owner holds qualified title to the bed. *FAS, L.L.C. v. Town of Bass Lake*, 733 N.W.2d at 289, 292 (citing *Trudeau*, 408 N.W.2d at 341). It is a "qualified title" because "the state holds the beds underlying navigable waters in trust for all of its citizens. . . ." *Trudeau,* 408 N.W.2d at 341.

Wisconsin recognized the public trust doctrine early in its history. *Meunch*, 53 N.W.2d at 517 (citing *McLennan v. Prentice*, 55 N.W. 764, 770 (Wis. 1893); *Ill. Steel Co. v. Bilot*, 84 N.W. 855, 856 (Wis. 1901);

Fanzini v. Layland, 97 N.W. 499, 502 (Wis. 1903)). "The public trust doctrine originated in the Northwest Ordinance of 1787 and the Wisconsin Constitution, Article IX, Section 1." *R.W. Docks & Slips*, 628 N.W.2d at 787 (citing *Gillen v. City of Neenah*, 580 N.W.2d 628, 633 (Wis. 1978)). Riparian rights are subordinate to the public trust rights and limited by the public trust doctrine. *R.W Docks & Slips,* 628 N.W.2d at 787.

The public trust doctrine extends to the ordinary high water mark. *Id.* (quoting *Trudeau*, 408 N.W.2d at 341 (quoting *Ill. Steel Co. v. Bilot*, 84 N.W.2d at 856)). Moreover, "[t]he public trust doctrine, to be effective, must also extend to public, artificial waters that are directly and inseparably connected with natural, navigable waters." *Kligeisen v. Wis. Dep't of Natural Res.*, 472 N.W.2d 603, 606 (Wis. Ct. App. 1991).

The public can use the public trust waters for navigation, hunting, fishing, recreation "or any other lawful purpose." *Meunch*, 53 N.W.2d at 519 (citations omitted). Public rights also include the enjoyment of scenic beauty. *Id.* at 521 (citing WIS. STAT. ANN. § 31.06 (1923)); *see also Trudeau*, 408 N.W.2d at 343 (noting scenic beauty, navigation, swimming, hunting, and the right to "preserve natural resources such as wetlands") (citing *Just v. Marineete County*, 201 N.W.2d 761, 768 (Wis. 1972)). The right of navigation includes the incidental use of the bottom where such use is connected to navigation, "such as walking as a trout fisherman[,] . . . boating, standing on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, walking on the ice if the river is frozen, etc." *Munninghoff v. Wis. Conservation Comm'n*, 38 N.W.2d 712, 716 (Wis. 1949). Finally, the public has an "interest in navigable waters, including promoting healthful water conditions conducive to protecting aquatic life and fish." *FAS, L.L.C.*, 733 N.W.2d at 295.

The Wisconsin Department of Natural Resources regulates and enforces the public trust doctrine. *See Hilton* ex rel. *Pages Homeowners Ass'n*, 717 N.W.2d at 174. Thus, "Chapter 30 embodies a system of regulation of Wisconsin's navigable waters pursuant to the public trust doctrine." *ABKA Ltd. P'ship v. Wis .Dep't. of Natural Res.*, 648 N.W.2d 854, 858 (Wis. 2002) (citing *Gillen v. City of Neenah*, 580 N.W.2d at 636; *Waukesha County v. Seitz*, 409 N.W.2d 403, 407 (Wis. Ct. App. 1987)). Moreover, "[t]he state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters." *Just*, 201 N.W.2d at 768.

The public trust doctrine also creates a cause of action. *Timm v. Portage County Drainage Dist.*, 429 N.W.2d 512, 516 n.8 (Wis. Ct. App. 1988) (citing *State v. Deetz*, 224 N.W.2d 407, 413 (Wis. 1974)). "[T]he state, or any person suing in the name of the state, may use the public

trust doctrine to attempt to establish standing. . . ." *State v. City of Oak Creek*, 605 N.W.2d 526, 541 (Wis. 2000) (citing *State of Wis. Pub. Intervenor v. Wis. Dep't of Natural Res.*, 339 N.W.2d 324, 328 (Wis. 1983)).