A QUICK-AND-DIRTY GUIDE TO THE EASTERN PUBLIC TRUST DOCTRINES: BASIC ISSUES, CLASSIFICATIONS OF STATES, AND STATE SUMMARIES

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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 focused on broader legal principles tend to discuss the public trust doctrine, as though a single public trust doctrine pervaded the United States. At the other end, articles focus on how one particular state implements its particular state 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 on the plural – can 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 31 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.

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 by delineating five definitional components of those rights: (1) the waters subject to state/public ownership; (2) the line or lines dividing private from public title in those waters; (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 multiple variations in how these states define and assemble these five components. In particular, far more often than is the case 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.

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

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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 and limiting tendencies in this literature.

At one end of the spectrum, commentators focused on broader legal principles tend to discuss the public trust doctrine, as though a single public trust doctrine pervaded 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 to boil the 50-state complexity of public trust law to sweeping pan-country generalizations.4

Conversely, other writers focus on how one particular state implements its particular state public trust doctrine. Such articles tend either to intensively explore particular issues of state public trust law5 or to provide summaries of a particular state’s public trust doctrine.6

All of these approaches provide valuable contributions 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

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4 See, e.g., J.B. Ruhl & James Salzman, Ecosystem Services and the Public Trust Doctrine: Working Change from Within, 15 SOUTHEASTERN ENVTL. L.J. 223, 228 (Fall 2006) (concluding that “the chief impact of the public trust doctrine is facilitating public access to and use of tidelands and beaches.”).
5 For recent examples, see, e.g., Carl Shadi Paganelli, Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan, 58 HASTINGS L.J. 1095 (May 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 (Nov. 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).
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 in the absence of comparative awareness of what individual states actually do and say.

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 31 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’ water law is grounded 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 by delineating five definitional components of those rights: (1) the waters subject to state/public ownership; (2) the line or lines dividing private from public title in those waters; (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 multiple variations in how these states define and assemble these five components. In particular, far more often than is the case 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 original 13 states creation of the United States in 1787 to Minnesota’s admission in 1858 and West Virginia’s admission in 1863. The U.S. Supreme Court did not clearly articulate the federal public trust doctrine until 1892, and its view of “navigable waters” had been evolving throughout the 19th century. As a result, many of the eastern 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 even before statehood, and those early developments continue to influence the implementation of their doctrines today. As one specific example, 17th-century colonial ordinances remain relevant to the 21st-century public trust doctrines in Maine, Massachusetts, and Virginia.

This Article begins in Part I with a brief overview of the federal public trust doctrine. As most commentators have acknowledged, when state law public trust doctrines vary from the federal, they are expansions of the federal public trust doctrine. As such, this section figures the federal public trust doctrine as the floor doctrine for the states.

7 Illinois Central Railroad Co. v. Illinois, 146 U.S. 387 (1892).
8 Gerrish v. Proprietors of Union Wharf, 26 Me. 384, 1847 WL 1382, at *1 (Me. 1847); State v. Lemar, 87 A.2d 886, 887 (Me. 1952).
10 Taylor v. Commonwealth, 47 S.E. 875, 880 (Va. 1904).
Part II outlines some of the relevant classification issues and state responses for the eastern states’ public trust doctrines. These classificatory 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 Great Lakes and coastal waters and all other navigable waters; and the public uses that the state public trust 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 federal doctrine.

I. BACKGROUND: THE FEDERAL 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. This Article, however, is most interested in the transition of English common law to American law in the eastern states. However, while some eastern states can trace their state public trust doctrines directly to English common law, most such transitions have been mediated by the United States federal law of navigable waters, as progressively announced by the U.S. Supreme Court.

However, the U.S. Supreme Court’s announcement of a federal public trust doctrine came fairly late for most eastern states. It was the U.S. Supreme Court’s recognition of the federal public trust doctrine in 1892 in Illinois Central Railroad Co. v. Illinois that both reified the doctrine in law and provided a federal law floor for state public trust protections. The federal public trust doctrine, in turn, has its basis in state ownership of the beds and banks of navigable waters.

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. All other states acquired ownership of these waters upon their statehood as a result of the Equal Footing Doctrine, under which all subsequent states were

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12 146 U.S. 387 (1892).

admitted with the same rights as the original thirteen.\textsuperscript{14} The state’s title to tidal and navigable waters is fixed as of the date of its admission to the United States.\textsuperscript{15}

Under federal law, the default rule and strong presumption is that the relevant state owns the beds of the navigable waters within its borders.\textsuperscript{16} Sovereign ownership of tidal waters – waters affected by the ebb and flow of the tide – arises as a direct adoption of English common law\textsuperscript{17}:

“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.”\textsuperscript{18}

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.\textsuperscript{19}

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 same doctrine 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...


\textsuperscript{17} Illinois Central Railroad Co. v. Illinois, 146 U.S. 387, 435 (1892).

\textsuperscript{18} Id.; see also Pollard’s Leesee v. Hagan, 44 U.S. 212, 223 (1845).


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applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.  

Even earlier decisions of the U.S. Supreme Court had announced a “navigable-in-fact” test for inland rivers and streams.

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. Under this test, 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.

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 – the Supreme 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

21 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).
22 Utah v. United States, 403 U.S. 9, 10 (1971) (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).
23 The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).
to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.”24

Similarly, 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.25

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.26 According to that decision, the state holds title to lands under 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 hold 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.”27

Thus, the three public uses of waters that the federal public trust doctrine protects are navigation, commerce, and fishing.28 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

27 Illinois Central R.R.,146 U.S. at 452.
28 Id.
Different eastern states have emphasized different aspects of this federal doctrine. For example, case law in Illinois reveals an unusually strong focus on the state’s ability to alienate public trust lands. Most other eastern states, as the Appendix indicates, have focused far more heavily on defining “navigable waters,” clarifying the public uses protected, 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, and there are several ways that they have done so. First, a state can apply its public trust doctrine to more waters than federal law would require, extending public rights upstream of tidal and navigable-in-fact waterways. Second, a state can protect more public uses than federal law would require. 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 on federal law on these 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 decisionmaking 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. The Maryland courts in particular have repeatedly acknowledged that the “navigable-in-fact” test exists but have refused to apply it, and they have apparently never adjudicated public rights in non-tidal navigable

29 Id. at 452-53.
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 and adopted both tests relatively at the same time. Such dual adoptions are most common, and have the most import, in the coastal states that also have significant internal non-tidal waters and that did not issue 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 earliest decisions clearly recognized public rights in tidal waters. However, by 1845, the Connecticut Supreme Court had also declared that the Connecticut River is a navigable water even above tide water, and by 1850, the court had clearly articulated its adoption of a commerce-based navigable-in-fact test.

Within this second group, 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.” In contrast, by statute, South Carolina uses a “valuable floatage” test, which its courts have interpreted “to include any ‘legitimate and beneficial public use.’”

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 explicitly adopt the navigable-in-fact test until 1988. 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. In Delaware, for example, 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.


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).


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


S.C. CODE ANN. § 49-1-10.


Phillips v. State ex rel. Department of Natural Resources & Environmental Control, 449 A.2d 250, 252 (Del. 1982).
Fourth, some states that early adopted the common-law tidal test 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. Nevertheless, public rights exist in any waterway that can float a log. 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. Illinois and New York 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. 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.

Finally, some eastern states use only a “navigable in fact” test, but their test is broader than the federal commerce test. Michigan, for example, uses a log floatation test for navigability. Missouri has also used a log floatation test to determine 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 doctrine, and public rights in water, follow state title. However, because many of the eastern states had to wrestle with an apparently exclusive tidal test for title before federal adoption of the

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45 Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905); & (using a log floating test to establish public rights).
47 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. 358, 1845 WL 1939, at *5-*7 (Tenn. 1845) (rejecting the tidal test); Meunch v. Public Service Comm’n, 53 N.W.2d 514, 516-19 (Wis. 1952).
48 See, e.g., Lopez v. Smith, 109 So.2d 176, 179 (Fla. 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 through Department of Environment, Health, & Natural Resources through Cobey, 464 S.E.2d 674, 677-81 (N.C. 1995) and N.C. GEN. STAT. § 146-64.
Navigable-in-fact test was clear, 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.

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. Ohio, similarly, began with the federal “navigable-in-fact” test, but by 1955 the Ohio Supreme Court acknowledged a “gradually changing concept of navigability” and considered any water that supports recreational uses “navigable” for public trust purposes.

Second, many states that recognize private ownership to the low-water mark nevertheless extend public trust rights to the high-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, its colonial government conveyed title to private landowners to the low-tide line in order to encourage private construction of wharves, piers, and other aids to navigation. Nevertheless, public rights continue to extend to the high tide line. Louisiana also moved the title boundary for streams and rivers by statute from the high- to the low-water mark but preserved public rights to the high-water mark.

Other states achieved this split through other means. The Delaware courts, for example, have since at least the 1850s held that private title to both riparian and littoral properties extends to the low-water mark, and they now consider this rule a long-standing rule of property law that cannot be changed without effecting an unconstitutional taking of private property. Nevertheless, the public retains limited rights to use the foreshore – the land between the high- and low-water marks. Minnesota and Pennsylvania law are similar, although Minnesota recognizes much broader public rights in the foreshore.

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51 State v. McIlroy, 595 S.W.2d 659, 665 (Ark. 1980).
54 Id.
58 Groves v. Secretary, Department of Natural Resources & Environmental Control, 1994 WL 89804, at *6 (Del. Super. Ct. 1994).
59 Mitchell v. City of St. Paul, 31 N.W.2d 46, 49 (Minn. 1948).
60 Fulmer v. Williams, 15 A. 726, 727 (Pa. 1888).
61 State v. Slotness, 185 N.W.2d 530, 531 (Minn. 1971).
Third, and more dramatically, 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 entirety of navigable-in-fact waters’ beds and banks. Nevertheless, public rights exist in all Illinois waters that are navigable-in-fact waters. 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 entirety of navigable-in-fact waters’ beds and banks. Nevertheless, public rights exist in all Illinois waters that are navigable-in-fact waters.

Kentucky, Maine, Massachusetts, Mississippi, New York, Ohio, and West Virginia 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, 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. The state owns the banks 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.

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 for public trust purposes than they treat other “navigable” waters. 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 to the high-water mark in tidal waters but only to the low-water mark in non-tidal navigable-in-fact waters. 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

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62 Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).
63 Id.
67 Ryals v. Pigott, 580 So.2d 1140, 1149 n.19, 1171 (Miss. 1990).
70 Gaston v. Mace, 10 S.E. 60, 63 (W. Va. 1889).
71 Elder v. Burrus, 25 Tenn. 358, 1845 WL 1939, at *5-*7 (Tenn. 1845).
73 Id.
after 1863. In Illinois, landowners own the beds of nontidal navigable-in-fact waters, but the state owns the bed of Lake Michigan to the high-water mark. 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 navigable streams and rivers to the low-water mark. In Mississippi, the state owns tidal waters to the high-water line but private landowners own the beds of non-tidal navigable waters. In North Carolina, the state owns to the high-water mark in coastal waters and the low-water mark in nontidal streams. Ohio treats Lake Erie as though it were part of the ocean, while all other navigable-in-fact rivers and streams are privately owned. Wisconsin owns 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.

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. Michigan treats the Great Lakes like the oceans and recognizes extensive public rights to use the Great Lakes, including recreational rights. 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. 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.

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 example, continue to limit their state public trust doctrines to the three federal uses – navigation, commerce, and fishing. Most, however, have broadened their doctrines to include recreational uses, variously phrased as swimming, bathing, recreation, pleasure boating, and so forth.

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75 Black v. Floyd, 603 S.E.2d 382, 382 (Ga. 2006); GA. CODE ANN. § 44-8-5(b).
76 Revell v. People, 52 N.E. 1052, 1055 (Ill. 1898).
77 McCormick Oil & Gas Corp. v. Dow Chemical Co., 489 So.2d 1047, 1049; LA. CIV. CODE ANN., art. 451.
78 Secretary of State v. Wiesenberg, 633 So.2d 983, 988 (Miss. 1994).
79 Comeaux v. Freeman, 918 So.2d 780, 784 (Miss. Ct. App. 2005).
81 State ex rel. Squire v. City of Cleveland, 82 N.E.2d 709, 719-20 (Ohio 1948).
82 Gavit’s Adm’rs v. Chambers, 3 Ohio 495, 497-98 (Ohio 1828).
83 FAS, L.L.C. v. Town of Bass Lake, 733 N.W.2d 287, 289, 292 (Wis. 2007).
84 Avenal v. State, 886 So.2d 1085, 1101-06 (La. 2004).
88 See, e.g., State v. Harrub, 10 So. 752, 753 (Ala. 1892).
In the states where it has arisen – notably Connecticut and New Jersey – public rights of access to the navigable waters has caused much deliberation and controversy. 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. 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.

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 early state 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.’” Louisiana’s statutes declare that the public rights in navigable waters include navigation, fishing, recreation, “and other interests.” The Massachusetts Supreme Judicial Court has stated that stating that the Massachusetts public trust doctrine “includes all necessary and proper uses, in the interest of the public,” 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” and the Ohio Court of Appeals has recently asserted that Ohio’s public trust doctrine extends to all “the public uses to which it might be adapted.” Finally, Wisconsin’s 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.”

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 to that question requires some general sense of the particular state’s “attitude” toward the 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.

90 See, e.g., Leydon v. Town of Greenwich, 777 A.2d 552, 557 n.17 (Conn. 2001).
94 LA. REV. STAT. ANN. § 14:1701.
98 Meunch v. Public Service Commission, 53 N.W.2d 514, 519 (Wis. 1952).
However, a state can also view its public trust doctrine as a comprehensive and evolving common-law protection of all public rights in waters. Moreover, 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, and the Hawaiian courts have explicitly extended this constitutionalized public trust doctrine to groundwater as well as surface water and to a variety of natural resources, including marine water quality and marine life. However, because of its grounding in the Hawaii 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 had some influence on the eastern states. In 1983, by common law, the California Supreme Court expanded the scope of the state’s public trust doctrine to water rights and ecological issues. The Mono Lake case in California, *National Audubon Society v. Superior Court,* which required state regulators to limit private water rights in order to protect the ecological resources and values of Mono Lake, has influenced at least the public trust rhetoric in several eastern states, and citations to California law are often an indication that eastern states are expanding their state public trust philosophies.

A. 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. The Court then explained:

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 reflect 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 . . .

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99 In re Water Use Permit Applications, 93 P.3d 643, 657-58 (Hawaii 2004); In re Water Use Permit Applications, 9 P.3d 409, 445 (Hawaii 2000).
100 658 P.2d 709, 728-31 (Cal. 1983).
102 Id.
Articles 1 and 2 of the Illinois Constitution declare the public’s right to a healthful environment. 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, avian, and marine life, sea agriculture, and no doubt others.” Moreover, in compiling its list of public trust rights, the Mississippi Supreme Court explicitly adopted California’s public trust law.

3. New Hampshire

In implementing the public trust doctrine, New Hampshire can regulate to prevent runoff and to protect marine fisheries and wildlife. Moreover, the state public trust doctrine extends to “all useful purposes.”

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 – like 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.” In 2005, the Supreme Court affirmed this basic principle.

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.”

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103 ILL. CONST., art XI, §§ 1, 2.
104 Cinque Bambini Partnership v. State, 491 So.2d 508, 512 (Miss. 1986); see also Secretary of State v. Wiesenb, 633 So.2d 983, 988-89 (Miss. 1994) (quoting the list of public rights from Cinque Bambini); Columbia Land Development L.L.C. v. Secretary of State, 868 So.2d 1006, 1012-13 (Miss. 2004) (summarizing the list of public trust rights from Cinque Bambini).
105 Cinque Bambini, 491 So.2d at 512 (citing Marks v. Whitney, 491 P.2d 374 (Cal. 1971)).
5. South Carolina

South Carolina has enshrined public trust protections in both its Constitution and its statutes. It holds all tidally influenced waters subject to the trust and uses a broad “valuable floatage” test to define the non-tidal waters subject to the public trust. 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.”

Moreover, “[t]he State . . . cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access.”

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. 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.”

111 S.C. CONST., art. XIV, § 4.
112 S.C. CODE ANN. 49-1-10.
B. States that Have Limited Their Public Trust Doctrines

Alabama has a poorly developed public trust doctrine that has never been expanded beyond the federal basics. 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, that doctrine 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, promoting extractive commercial uses of these submerged lands instead of ecological protection.

CONCLUSION

As the above survey demonstrates, there is no common “eastern public trust doctrine.” Instead, the eastern states vary widely in the tests they employ to establish state title, the lines they draw between public and 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 will 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 survey reveals that such property rights are intensely a matter of individual state law. Depending on the state and the exact 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.

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 effects threaten coasts throughout the United States. In light of such changes, coastal states viewing their public trust doctrines as evolutionary may well decide to follow Louisiana’s lead and conclude that the public trust doctrine gives the state extensive authority to override

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119 DANIEL H. COLE, POLLUTION AND PROPERTY 12-14, 45 (2002).
private interests in the name of protecting the coast. Alternatively, or in addition, these states may decide to follow Mississippi’s and Hawaii’s leads and used the public trust doctrine to afford greater protections to marine species and marine ecosystems.

120 Avenal v. State, 886 So.2d 1085, 1101-02 (La. 2004).
121 Cinque Bambini Partnership v. State, 491 So.2d 508, 512 (Miss. 1986); see also Secretary of State v. Wiesenber, 633 So.2d 983, 988-89 (Miss. 1994) (quoting the list of public rights from Cinque Bambini); Columbia Land Development L.L.C. v. Secretary of State, 868 So.2d 1006, 1012-13 (Miss. 2004) (summarizing the list of public trust rights from Cinque Bambini).
122 In re Water Use Permit Applications, 93 P.3d 643, 657-58 (Hawaii 2004); In re Water Use Permit Applications, 9 P.3d 409, 445 (Hawaii 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:

- ALA. CODE 1975 §§ 9-10B-1 to 9-10B-30: Alabama Water Resources Act
- ALA. CODE 1975 § 33-7-1: Emphasizes that the navigable waters are public thoroughfares.
- ALA. CODE 1975 §§ 33-7-50 to -53: Lay out the rights of riparian landowners.
- ALA. CODE 1975 § 33-4-383: 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 the Act of Congress of 1803 and other statutes demanded the application of a navigable in fact test. Bullock v. Wilsoire, 2 Port. 436, 1835 WL 1127, at *4-*6 (Ala. 1835). Alabama still adheres most prominently to the federal commerce definition of “navigability” and continues to cite to The Daniel Ball, 10 Wall. 557, 560 (1870). Bear Dredging L.L.C. v. Alabama Dept. of Revenues, 855 So.2d 513, 519 (Ala. 2003); Wehby v. Turpin, 710 So.2d 1243, 1250 (Ala. 1998) (also emphasizing that occasional use of the water by fishing boats and canoes is not enough to establish navigability), Bayzey v. McMillan Mill Co., 16 So. 923, 925 (1894) (emphasizing the need for a commercial use of the water); Olive v. State, 5 So. 653, 656 (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, 2 So. 716, 717-18 (Ala. 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, 179 So.2d 57, 70 (Ala. 1965) ( citing Walker v. Allen, 72 Ala. 456, 1882 WL 1384 (Ala. 1882)).

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

Rights in “Navigable Waters”: In tidal waters, landowners own only to the high water mark. Tallahassee Falls Mfg. Co. v. State, 68 So. 805, 806 (Ala. App. 1915), rev’d with respect to county boundaries, 69 So. 589 (Ala. 1915). In nontidal navigable-in-fact waters, the line between state and private ownership is the low-water mark. Id. (citing Mobile Transp. Co. v. Mobile, 30 So. 645. 646-47 (Ala. 1900)); Bullock v. Wilsoire, 2 Port. 436, 1835 WL 1127, at *7 (Ala. 1835).
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*, 10 So. 752, 753 (Ala. 1892). However, the public has no right to fish in privately owned waters. *City of Birmingham v. Lake*, 10 So.2d 24, 27-28 (Ala. 1942).


**ARKANSAS**

**Date of Statehood:** 1836

**Arkansas Constitution:** No relevant provisions

**Arkansas Statutes:**

- ARK. CODE ANN. §§ 15-20-201 to 15-20-216: Arkansas Soil & Water Conservation Commission
- ARK. CODE ANN. §§ 15-22-901 to 15-22-916: Arkansas Groundwater Protection and Management Act
- ARK. CODE ANN. §§ 15-23-301 to 15-23-317: Arkansas Natural and Scenic Rivers System Act
- ARK. CODE ANN. § 15-44-111: Fish protections for withdrawals from public waters
- ARK. CODE ANN. § 22-5-403: Lands formed in the navigable waters belong to the former owner.
- ARK. CODE ANN. § 22-5-815: The State has no title to minerals lying under artificially created navigable waters.
- ARK. CODE ANN. §§ 22-6-201 to 22-6-203: 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.” *Arkansas River Rights Committee v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 743 (Ark. App. 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 263 (quoting *Lutesville Sand & Gravel Co. v. McLaughlin*, 26 S.W.2d 892 (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 665; see also *Arkansas River Rights Committee v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 744 (Ark. App. 2003) (“Under McIlroy, it is apparent that navigability may be established by recreational usefulness as well as commercial usefulness.”).

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.” *Arkansas River Rights Committee*. 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. 931, 931-32 (Ark. 1890).

“It is the policy of this state to encourage the use of its water courses for any beneficial purposes.” *Barboro v. Boyle*, 178 S.W.2d 478, 382-83 (Ark. 1915), quoted in *State v. McIlroy*, 595 S.W.2d at 664, for authority to extend the public trust doctrine to recreational uses. 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, 960-62 (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 Ass’n*, 288 S.W.2d 942, 943 (Ark. 1956); *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:** Requires coordination of water resources policy
- **CONN. GEN. STAT. ANN. § 7-151a:** Defines “state waters”
- **CONN. GEN. STAT. ANN. § 7-147:** Regulates obstructions in waterways
- **CONN. GEN. STAT. ANN. § 15-12:** Regulates obstructions on lands bordering navigable waters
- **CONN. GEN. STAT. ANN. § 15-140d:** Prohibits obstructions to navigation or public use of waters
- **CONN. GEN. STAT. ANN. § 19a-209a:** Requires permits for wells
- **CONN. GEN. STAT. ANN. §§ 22a-16 to 22a-17:** 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 question; 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-341 to 22a-349a:** Provisions governing channel access and channel lines
- **CONN. GEN. STAT. ANN. §§ 22a-350 to 22a-354bb:** Provides for an inventory of and water resources planning for the state’s aquifers
- **CONN. GEN. STAT. ANN. §§ 22a-359 to 22a-363f:** Regulates dredging and erections of structures in tidal, coastal, and navigable waters
- **CONN. GEN. STAT. ANN. §§ 22a-365 to 22a-379:** Connecticut Water Diversion Policy Act
- **CONN. GEN. STAT. ANN. §§ 22a-380 to 22a-381d:** 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).

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. 1845). The man-made status of waterways doesn’t matter for purposes of the public trust doctrine – only navigability. *Ace Equipment 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 for waters not subject to the ebb and flow of the tide. See *Edward Ball 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 nontidal 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. 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. 1831), which means 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, boiling, 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, 557 n.17 (Conn. 2001).


**DELAWARE**

**Date of Statehood:** 1787

**Delaware Constitution:** No relevant provisions.

**Delaware Statutes:**

- 7 DEL. CODE §§ 6002-6042: 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.” 7 DEL. CODE § 6003(a)(3). In addition, increases in water use are prohibited without the Department’s prior approval, 7 DEL. CODE § 6030, and the
Definitions of “Navigable Waters”

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, and these public rights are superior to the private owner’s interests.”

Secretary, Department of Natural Resources & Environmental Control (1994). Moreover, the Delaware Superior Court concluded in 1967 that Delaware’s statutes governing the regulation of fishing, 7 Del. Code §§ 901, 902, which were enacted in 1905, eliminated the public’s right to fish over the foreshore in the Delaware River. 

Effective as of 1992, the Delaware Legislature amended 7 Del. Code § 7202 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. 1994) (citing Tulou v. Anderson, 1994 WL 374311 (Del. Ch. 1994)). However, in 2000, the legislature entirely removed the definition of “navigable waters.”


Rights in “Navigable Waters”


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. Secretary, Department of Natural Resources & Environmental Control, 1994 WL 89804, at *6 (Del. Super. 1994); Bickel v. Polk, 5 Harr. 325, 1851 WL 602, at *1 (Del Super. 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. Secretary, Department of Natural Resources & Environmental Control, 1994 WL 89804, at *6 (Del. Super. 1994). Moreover, the Delaware Superior Court concluded in 1967 that Delaware’s statutes governing the regulation of fishing, 7 Del. Code §§ 901, 902, 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 Railroad Co., 228 A.2d 587, 603 (Del. Super. 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,

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morals, safety, and welfare.” *Groves v. Secretary, Department of Natural Resources & Environmental Control*, 1994 WL 89804, at *6 (Del. Super. 1994); *State ex rel. Buckson v. Pennsylvania Railroad Co.*, 228 A.2d 587, 603-05 (Del. Super. 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 that 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 streams 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.


**Florida Statutes:**

- *Fla. Stat. Ann.* § 253.034: 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.

**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. 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. App. 5th DCA 2004); *Board of Trustees of Internal Improvement Trust Fund v. Florida Public Utility Co.*, 599 So.2d 1356, 1357 n.1 ( Fla. App. 1st DCA), 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 that Florida uses 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. App. 1st DCA), 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. App. 1st DCA 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 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 (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. App. 1st DCA 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. App. 2d DCA 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 --- So.2d ---, 2007 WL 162166, at *5 (Fla. App. 2d DCA 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, --- So.2d ---, 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 ofFlorida’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. App. 1st DCA 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. App. 3rd DCA 1992).

However, public rights in navigable waters are complicated in Florida by three historically progressive statutes that operated to convey 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 remain 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. App. 1st DCA 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.


**Georgia Statutes:**

- GA. CODE ANN. § 12-5-31: Permits required for the use of surface waters
- GA. CODE ANN. §§ 12-5-210 to 12-5-213: Planning for coastal and offshore lands, waters, and resources of the State.
- GA. CODE ANN. §§ 12-5-230 to 12-5-248: Shore Protection Act. Activities require a permit from the Georgia Department of Natural Resources.
- GA. CODE ANN. §§ 12-5-310 to 12-5-312: Governs sea oats and protective vegetative cover to protect sand and the coasts.
- GA. CODE ANN. §§ 44-8-1 to 44-8-10: Water Rights. Defines “navigable stream” (§ 44-8-5) and “navigable tidewater” (§ 44-8-7) and delineates 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: 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. *Id.* Section 52-1-4 declares that any structures in the tidewaters are public nuisances and must be removed.

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In 1863, the Georgia legislature 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” to be “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). 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 a “navigable tidewater” to be:

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).


For lands granted along nontidal navigable waters after 1863, landowners hold title to the low-water mark. GA. CODE ANN. § 44-8-5(b). Thus, the 1863 Code expanded public rights in nontidal 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 nontidal 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, 152 (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. 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 (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. 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. 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.), 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: Submerged Lands Act of 1937. “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: 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: Submerged Lands Act of 1937. “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: Office of Water Resources.
- 70 ILL. COMP. STAT. ANN. §§ 805/52 to 805/5d: Downside Forest District Act. 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: Chicago Submerged Lands Acts.
- 70 ILL. COMP. STAT. ANN. §§ 1575/0.01 to 1575/2: Lincoln Park Submerged Lands Act.
- 525 ILL. COMP. STAT. ANN. §§ 45/1 to 45/7: Water Use Act of 1983.
- 615 ILL. COMP. STAT. ANN. §§ 10/0.01 to 10/28: Illinois Waterways Act.
- 615 ILL. COMP. STAT. ANN. §§ 20/1 TO 20/5: Navigable Waterways Obstruction Act.

**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 tidel 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 v. Miller, 141 N.E. at 425. Instead, the federal commerce test of navigability from The Daniel Ball and The Montello determine navigability. DuPont v. Miller, 141 N.E. at 425; State of Illinois v. New, 280 Ill. 393, 399-400 (1917) (citing Wilton v. Van Hessen, 249 Ill. 182). “[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 v. Miller, 141 N.E. at 425.

Log floatation is not enough to establish navigability. Schulte v. Warren, 75 N.E. at 786. Moreover, lakes that were never meandered in federal government surveys of swamp and overflowed lands are presumed to be unnavigable for purposes of public rights. Leonard v. Pearce, 181 N.E. 399, 401 (Ill. 1932) (citing State of Illinois v. 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. 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. 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 v. Warren, 75 N.E. 783, 785 (Ill. 1905); City of Peoria v. Balance, 1895 WL 2637, at *2 (Ill. App. 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*, 162 Ill. 138, 146-47 (1896); *Shively v. Bowlby*, 152 U.S. 9 (1894); *Illinois Central Railroad Co.*, 146 U.S. at 152).


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 v. Chicago Park Dist.*, 360 N.E.2d 773, 780-81 (Ill. 1976)). 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 v. Miller*, 141 N.E. 423, 425 (Ill. 1923); *Schulte v. Warren*, 75 N.E. 783, 787 (Ill. 1905) (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 . . . .

*Id.*


**INDIANA**

**Date of Statehood:** 1816

**Indiana Constitution:** No relevant provisions.

**Indiana Statutes:**

- IND. CODE §§ 2-5-25-1 to 2-5-25-7: Water Resources Study Committee
- IND. CODE §§ 14-25-1-1 to 14-25-1-11: Water rights in surface waters. “Water in a natural stream, natural lake, or other 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).
- IND. CODE §§ 14-25-7-1 to 14-25-7-17: Water resource management.
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, 1876 WL 6583, at *2 (Ind. 1876); Stinson v. Butler, 1837 WL 1870, at *1 (Ind. 1837); Cox v. State, 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 (1893)); 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, 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). To protect these rights, the State “has full power and control of all the public freshwater lakes in Indiana both meandered and unmeandered” and “hold 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).

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 nonnavigable lake . . . .” Bath v. Courts, 459 N.E.2d 72, 75 (Ind. 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. Este, 662 N.E.2d 654, 656 (Ind. App. 1996); see also Bath v. Courts, 459 N.E.2d 72, 75 (Ind. App. 1984) (“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] navigable 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 v. Courts, 459 N.E.2d at 75.

Rights in “Navigable Waters”: Because Indiana distinguishes between tidal and nontidal 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 v. Crammond, 108 N.E. 539, 540-41, 542-43 (Ind. App. 1915); 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, 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 (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.; Park 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.

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). Moreover, public rights do not extend to foreign corporations that are not citizens of the state. Lake Sand Co. v. State, 120 N.E. 714, 716 (Ind. App. 1918).

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); see also Parkinson v. McCue, 831 N.E.2d 118, 130 (Ind. 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). 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 ANN. § 461A.18: Assigns jurisdiction over meandered streams and lakes to the Iowa Department of Natural Resources.
- IOWA CODE ANN. § 462A.2: 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, 1856 WL 139, at *1, *3-*5 (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. & R.R. Co., 15 N.W. 284, 285 (Iowa 1883); see also Musser v. Hershey, 42 Iowa 356, 1876 WL 377, at *3 (Iowa 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, 12856 WL 139, at *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.” Larson v. State, 553 N.W.2d 158, 161 (Iowa 1996) (citing State v. Sorensen, 436 N.W.2d 358, 363 (Iowa 1989); 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 Sorensen, 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.’” Larson v. State, 553 N.W.2d 158, 161 (Iowa 1996) (quoting State v. Sorensen, 436 N.W.2d 358, 361 (Iowa 1989)). 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 Board, 654 N.W.2d 494, 497
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.


In navigable waters, the public has the rights of navigation, commerce, fishing, recreational uses, and access. *Fenci v. City of Harpers’s Ferry*, 620 N.W.2d 808, 813-14 (Iowa 2000); *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996); *Robert’s Boat 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 recreational and non-pecuniary purposes”); *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) (“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.” *Fenci*, 620 N.W.2d at 813; see also *Bushby v. Washington County Conservation Board*, 654 N.W.2d 494, 497 (Iowa 2002) (citing *Fenci* for the point that “[t]he purpose of the public-trust doctrine is to prohibit states from ‘conveying important natural resources’ to private parties.”); *Robert’s Boat Rides, Inc. v. Steamboat Development Corp.*, 520 N.W.2d 294, 300 (Iowa 1994).

**KENTUCKY**

**Date of Statehood:** 1792

**Kentucky Constitution:** No relevant provisions.

**Kentucky Statutes:**

- KY. REV. STAT. ANN. §§ 146.220 to 146.360: Kentucky Wild Rivers System. 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.” § 146.220 (emphasis added).
- KY. REV. STAT. ANN. §§ 151.100 to 151.200: Water resources and water supply provisions, including water withdrawal permits. Section 151.120 defines the public waters of the Commonwealth.


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. *Floyd County v. Allen*, 227 S.W. 994, 995 (Ky. App. 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 a 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. App. 1906); see also *Ireland v. Bowman v. Cockrell*,

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113 S.W. 56, 59 (Ky. App. 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. App. 1908); *Banks v. Frazier*, 64 S.W. 983, 984 (Ky. App. 1901); *Murray v. Preston*, 50 S.W. 1095, 1096 (Ky. App. 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 or 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. App. 1936) (citations omitted).

**Rights in the “Navigable Waters”:** Because Kentucky uses the tidal test for title, landowners own to the center of the stream. *Pierson v. Coffey*, 706 S.W.2d 409, 411 (Ky. App. 1985); *Whitson v. Morris*, 201 S.W.2d 193, 195 (Ky. 1947); *Commonwealth Dept. of Highways v. Thomas*, 427 S.W.2d 213, 215-16 (Ky. 1968). However, their riparian rights are subordinate to the public right of navigation. *Pierson v. Coffey*, 706 S.W.2d at 411; *Commonwealth Dept. of Highways v. Thomas*, 427 S.W.2d at 215-16; *Paducah Sand & Gravel Co. v. Central Home Telephone & Telegraph Co.*, 273 S.W. 481, 482 (Ky. App. 1925) (“[T]he right of navigation is paramount to any other rights that may be acquired in the use of the streams.”). Moreover, this public right extends to the ordinary high-water mark of the stream or river, *Natcher v. City of Bowling Green*, 95 S.W.2d 255, 256 (Ky. App. 1936); *Terrell v. City of Paducah*, 92 S.W. 310, 313 (Ky. App. 1906), but not further up the banks. *Smith v. Atkins*, 60 S.W. 930, 930-31 (Ky. App. 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 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 v. Coffey*, 706 S.W.2d at 412 (citing *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356 (5th Cir. 1931), cert. denied, 284 U.S. 649; *Warner v. Ford Lumber & Mfg. Co.*, 93 S.W. 650 (Ky. 1906); *Munninghoff v. Wisconsin Conservation Comm’n*, 38 N.W.2d 712 (Wis. 1942); *Hall v. Wanz*, 57 N.W.2d 462 (Mich. 1953)). However, the “public right of navigation” does not extend to the permanent anchorage of barges. *Id.*

**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. *Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Comm’n*, 719 So.2d 119, 124 (La. App. 1st Cir. 1998). In addition, it 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: “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: “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: “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: “Private things may be subject to public use in accordance with law or by dedication.”
- *LA. CIV. CODE ANN.*, art 456: “The banks of navigable rivers or streams are private things 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: “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: “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: “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: “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: Declares all patents or transfers of navigable waters and their beds invalid.
- *LA. REV. STAT. ANN.*, § 9:1109: Declares that statutes cannot validate purported transfers of navigable waters and their beds.
- *LA. REV. STAT. ANN.*, § 14:1701: Declaration of Policy: Public Trust: “The beds and bottoms of all navigable waters and the banks and shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes belongs to the state of Louisiana, and the policy of the 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 to 38:34: State Water Resources Program

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o **L.A. REV. STAT. ANN. § 41:14**: “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.”

o **L.A. REV. STAT. ANN. § 49:3**: “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, 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.”

o **L.A. REV. STAT. ANN. § 56:3**: 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, 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. *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 871 So.2d 1258, 1265-66 (La. App. 2d Cir. 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.”); *State ex rel. Plaquemines Parish School Bd. v. Plaquemines Parish Government*, 690 So.2d 232, 236 (La. App. 4th Cir. 1997) (holding that lands subject to the ebb and flow of the tide were sovereignty lands); *Ramsey River Road Property Owners 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. Sch’r Amelia*, 7 Mart. 570, 1820 WL 1905, at *1 (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 Road Property Owners*, 396 So.2d at 875; *State ex rel. Plaquemines Parish School Bd.* 690 So.2d at 236.

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. App. 4th Cir. 1995) (citing *Ramsey River Road Property Owners*, 396 So.2d at 875-76). 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. App. 2d Cir. 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. *L.A. REV. STAT. ANN. § 9:1101*.

When land becomes “a part of the bed or 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. App. 2d Cir. 2006); see also *Miami Corp. v. State* 173 So. 315, 318 (La. 1936) (holding that ownership had changed after a river changed course); *Fradelia Const., 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. Pitmand*, 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 Chemical Co.*, 489 So.2d 1047, 1049 (La. App. 1st Cir. 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 settled title to the land between the low- and high-water marks in the riparian landowner. *Id.* (citing *State v. Placid Oil Co.*, 300 So.2d at 173); see also *Mathis v. Board 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. “As to lakes, however, the State still holds the lands all the way up to the ordinary high-water mark.” McCormick Oil & Gas, 489 So.2d at 1049 (citing State v. Placid Oil Co., 300 So.2d at 173); see also Fradella Const., Inc. v. Roth, 503 So.2d 25, 27 (La. Ct. App. 1986) (same). By statute, the state owns the seashore up to the highest winter tide, LA. CIV. CODE ANN. art 451, 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. § 14:1701. 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; see also State v. Barras, 615 So.2d 285, 288 (La. 1993) (same). These public trust rights applied 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 Corp., 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.” Louisiana Seafood Management Council v. Louisiana Wildlife & Fisheries Comm’n, 719 So.2d 119, 125 (La. App. 1st Cir. 1998). However, state leases of water bottoms for gambling facilities did not implicate the public trust doctrine. Neighborhood Action Committee v. State, 652 So.2d 693, 969-97 (La. App. 1st Cir. 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. 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. Jurisich v. Jenkins, 749 So.2d 597, 600, 604-05 (La. 1999).

SUMMARY: Louisiana’s public trust doctrine is now mainly statutory and constitutional. While the waters subject to the public trust doctrine are the traditional navigable waters, with an emphasis on commercial use, the uses protected are already broader than the traditional public trust doctrine and subject to potential expansion.

MAINE

Date of Statehood: 1820

Maine Constitution: The Maine Constitution states that “[t]he Legislature, with the exceptions hereinafter state, 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 595, 606-07 (Me. 1981); but see Harding v. Commissioner 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: 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 “[t]he 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. *Bell v. Town of Wells*, 557 A.2d 168, 173-76 (Me. 1989).

- **ME. REV. STAT. ANN. tit. 12, § 1846**: Access to public reserved lands.
- **ME. REV. STAT. ANN. tit. 12, § 1862**: 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**: Declares that filled intertidal and submerged lands are still impressed with a public trust.
- **ME. REV. STAT. ANN. tit. 12, § 1862**: 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. 36, § 6855**: 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. 36, § 435**: 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 to 470-H**: Water Withdrawal Reporting Program.
- **ME. REV. STAT. ANN. tit. 38, § 1841**: 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 test of navigability. *Moor v. Veazie*, 32 Me. 343, 1850 WL 128, at *9-*10 (Me. 1850); *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 v. Treasurers of St. Joseph’s College*, 233 A.2d 718, 720-21 (Me. 1967) (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 (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 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, such ownership is subject to the public’s use of the river or stream as a public highway. *Id*. Indeed, the public rights in nontidal navigable waters are the same as those in tidal waters. *Brown v. Chadbourne*, 32 Me. 9, 1849 WL 1797, *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, *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 Recreation*, 823 A.2d 551, 563 (Me. 2003))
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. *Conservation Law Foundation, Inc*, 823 A.2d at 562; *Bell v. Town of Wells*, 557 A.2d 168, 171-76 (Me. 1989); *Harding v. Commissioner of Marine Resources*, 510 A.2d 533, 537 (Me. 1986); *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981); *Shively v. Bowlby*, 152 U.S. 1, 18-19 (1884); *Moulton v. Libbey*, 37 Me. 472, 1854 WL 1667, 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 v. Earle*, 71 A.2d 55, 57 (Me. 1950); 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 597, 607 (Me. 1981). 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 . . . .” *Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989). 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, *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989), 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, 889-901 n.6 (Me. 2005).

In addition, leases of submerged lands for aquaculture facilities did not violate the public trust doctrine. *Harding v. Commissioner of Marine Resources*, 510 A.2d 533, 537 (Me. 1986). 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. Department of Natural Resources 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: Water resources management.
- MD. CODE §§ 5-501 to 5-514: Regulation of appropriations.
- MD. CODE §§ 5-5B-01 to 5-5B-05: Water conservation.
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 Department of Natural Resources*, 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. *Department of Natural Resources v. Mayor & Council of Ocean City*, 332 A.2d 630, 633 (Md. 1975); *Van Ruymbeke v. Patapsco Indus. Park*, 276 A.2d 61, 64 (Md. 1971); *Wagner v. City of Baltimore*, 124 A.2d 815 (Md. 1956); *Toy v. Atlantic Etc. Co.*, 4 A.2d 757 (Md. 1939); *Linthicum v. Shipley*, 116 A. 871 (Md. 1922); *Sollers v. Sollers*, 26 A. 188 (Md. 1893); *Hess v. Muir*, 6 A. 673 (Md. 1886); *Smith v. Maryland*, 59 U.S. 71, 74075 (1855). As a result, landowners along tidal waters own only 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, *Department of Natural Resources v. Mayor & Council of Ocean City*, 332 A.2d 630, 633 (Md. 1975) (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)); and (3) the rights of “fishing, boating, hunting, bathing, taking shellfish and seaweed and of passing and repassing.” *Id.* 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 Development, 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. Director, 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.

MA. CONST., art. XLIX.

**Massachusetts Statutes:**

- MASS. GEN. LAWS ANN. ch. 21, §§ 8-8D: Water Resources Division and interbasin transfers.
- MASS. GEN. LAWS ANN. ch 21, § 17C: 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.”

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MASS. GEN. LAWS ANN. ch. 91, § 1: 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. Department of Environmental Protection, 861 N.E.2d 410, 412 (Mass. 2007).

MASS. GEN. LAWS ANN. ch. 91, § 10D: 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 (1871). No actual commercial use is required. Attorney General v. Woods, 108 Mass. 436, 1871 WL 8841, at *1 (Mass. 1871) (“Tidewater 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 446.

Rights in the “Navigable Waters”: Because Massachusetts uses the tidal test for 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 nontidal 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. Commissioner of the Department of Environmental Protection, 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. Commissioner of the Department of Environmental Protection, 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. Department of Environmental Protection, 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. Id. at 365-66 (citing Illinois Central 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. Department of Environmental Protection, 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. Director of Division 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, 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,
“[aquaculture 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, 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), other parts of decision abrogated, M.P.M. Building L.L.C. v. Dwyer, 809 N.E.2d
1053 (Mass. 2004). But see Butler v. Attorney General, 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 (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

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 Commission 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
on the ground that the legislature had specifically delegated authority to regulate vessels); Commonwealth v. Muise,
796 N.E.2d 1289, 1290-91 (Mass. Ct. App. 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 provisions 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:
  o Mich. Comp. Laws Ann. § 324.1705: Michigan Environmental Protection Act

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o MICH. COMP. LAWS ANN. §§ 324.32701 to 324.32728: Great Lakes preservation.
o MICH. COMP. LAWS ANN. §§ 324.32801 to 324.32803: Aquifer protection.
o MICH. COMP. LAWS ANN. § 324.34105: Irrigation district contracts and agreements “shall not in any manner infringe upon or invade the state’s public trust in its waters.”
o MICH. COMP. LAWS ANN. § 324.45301: “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 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. Glass v. Goeckel, 703 N.W.2d 58, 68-69 (Mich. 2005).

   However, for public trust purposes, Michigan exclusively uses a “log floatation” test for navigability to establish public rights in streams and rivers. Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc., 709 N.W.2d 174, 218 (Mich. App. 2005), MEPA claims rev’d on standing grounds, --- N.W.2d --- 2007 WL 2126497 (Mich. July 25, 2007); Bott v. Natural Resources Commission, 327 N.W.2d 838, 841 (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. The 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. Michigan 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 Resources Commission, 327 N.W.2d 838, 841 (1982) (citing Winans v. Willetts, 163 N.W. 993, 994-95 (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 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 Department of Natural Resources, 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 Resources Commission, 327 N.W.2d 838, 841 (1982); Kerley v. Wolfe, 84 N.W.2d 748 (Mich. 1957); Attorney General ex rel. Director 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, 1860 WL 4665, at *6, *8 (Mich. 1860).

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**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 . . . 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. II, § 14.

**Minnesota Statutes:**

- MINN. STAT. ANN. §§ 103A.001-103A.43: 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. §§ 103F.201 to 103F.225: Shoreland Development.
- MINN. STAT. ANN. §§ 103F.612 to 103F.616: Wetlands Preservation Areas.
- MINN. STAT. ANN. §§ 103F.801 to 103F.805: Lake Preservation and Improvement.
- MINN. STAT. ANN. §§ 103F.901 to 103F.905: Wetland Establishment and Restoration Program.
- MINN. STAT. ANN., Chapter 103G: 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.” § 103G.711. In addition, this chapter establishes procedures for designating public waters, §§ 103G.201 to 103G.215; and regulates diversions and appropriations and establishes a permitting program, § 103G.255. 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 that river navigable in law because it was navigable in fact for purposes of commerce. *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, *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. State v. Adams, 89 N.W.2d 661, 665 (Minn. 1958); State by Burnquist v. Bollenbach, 63 N.W.2d 278, 286-87 (Minn. 1954); Bingemeiner v. Diamond Iron Mining Co., 54 N.W.2d 912, 915-16 (Minn. 1952); State v. Longyear Holding Co., 29 N.W.2d 657, 662-63 (Minn. 1947); see also 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. Pratt v. State Department of Natural Resources, 309 N.W.2d 767, 771 (Minn. 1981); Herschman v. State, 225 N.W.2d 841 (Minn. 1975); State v. Longyear Holding Co., 29 N.W.2d 657, 672 (Minn. 1947); Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893).

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); see also Lamprey v. Metcalf, 53 N.W. 1139, 1140-43 (Minn. 1893) (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. Sible County, 170 N.W. 883, 884-85 (Minn. 1919) (citing “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. Larson v. Sando, 505 N.W.2d 782, 787 (Minn. Ct. App. 1993). As a result, the sale of land designated as a state wildlife management area do not violate the public trust doctrine. 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, In re Union Depot St. Railway & Transfer Co. of Stillwater, 317 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. Id.; Reads Landing Campers Ass’n, Inc. v. Township of Pepin, 546 N.W.2d 10, 13 (Minn. 1996); Larson v. Sando, 508 N.W.2d 782, 787 (Minn. Ct. App. 1993); State v. Slotness, 185 N.W.2d 530, 532 (Minn. 1971); State v. Korrer, 148 N.W. 617, 623 (Minn. 1914) (and cases cited therein); Schurmeier v. St. Paul & P.R. Co., 10 Minn. 282, 1865 W.L. 43, at *10 (Minn. 1865). Nevertheless, the private landowner’s title between the low- and high-water marks is limited by public rights. Mitchell v. City of St. Paul, 31 N.W.2d 46, 49 (Minn. 1948); State v. Korrer, 148 N.W. at 623; Lamprey v. Metcalf, 53 N.W. 1139, 1140 (Minn. 1893).

Public rights in navigable waters are paramount. 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. State v. Slotness, 185 N.W.2d 530, 531 (Minn. 1971); Nelson v. De Long, 7 N.W.2d 342, 346 (Minn. 1942); Lamprey v. Metcalf, 53 N.W. 1139, 1140-43 (Minn. 1893); Miller v. Mendenhall, 44 N.W. 1141, 1141 (Minn. 1890).

MISSISSIPPI

Date of Statehood: 1817


Mississippi Statutes:

- MISS. CODE ANN. § 1-3-31: 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: Allows the Secretary of State, with the approval of the Governor, to rent or lease state-owned tidelands or submerged lands.
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); Secretary 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. This test clearly expands beyond commercial navigation and will support public rights 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 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. Limits the state’s liability. Id.

Rights in the “Navigable Waters”:

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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 Partnership v. State*, 491 So.2d 508, 517 (Miss. 1986)).

In tidal waters, the state’s ownership extends to the high-water line. *Secretary of State v. Wiesenberg*, 633 So.2d 983, 988 (Miss. 1994); *Wiesenberg*, 633 So.2d at 989; *Cinque Bambini Partnership 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, avian, and marine life, sea agriculture, and no doubt others.” *Cinque Bambini Partnership 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); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971)); see also *Wiesenberg*, 633 So.2d at 988-89 (quoting the list from *Cinque Bambini Partnership*); *Columbia Land Development L.L.C. v. Secretary of State*, 868 So.2d 1006, 1012-13 (Miss. 2004) (summarizing the list from *Cinque Bambini Partnership*). “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: 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 WL 8976, at *3 (Mo. App. 1877); *Benson v. Morrow*, 61 Mo. 345, 1875 WL 8052, at *3-*5 (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 v. Delcour*, 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

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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 v. Delcour, 269 S.W.2d 17, 24 (Mo. 1954)).

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 v. Osage County, 822 S.W.2d 437, 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 v. Golden, 23 S.W. 100, 104 (Mo. 1893); Benson v. Morrow, 61 Mo. 345, 1875 WL 8052, at *4 (Mo. 1875).

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, 1880 WL 9581, at *5-*6 (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 v. Delcour, 269 S.W.2d 17, 26 (Mo. 1954); Hickey v. Hazard, 3 Mo. App. 480, 1877 WL 8976, at *3 (Mo. Ct. App. 1877); to boat and wade, City of Springfield v. Mecum, 320 S.W.2d at 744; to cut ice, Hickey v. Hazard, 1877 WL 8976, at *4; and to float logs. 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).

NEW HAMPSHIRE

Date of Statehood: 1788

New Hampshire Constitution: No relevant provisions.

New Hampshire Statutes:

- N.H. REV. STAT. ANN. § 233-A:1: Access to Public Waters. 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: “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: “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: “[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-B:1 to 483-B:20: Comprehensive Shoreland Protection Act. 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: Public Use of Coastal Shorelands. Purpose 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

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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.”


**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, 1825 WL 502, at *3-*4 (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 Board*, 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. 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.* at 838.

**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 604, 608 (N.H. 1994); *State v. George C. Stafford & Sons Co.*, 105 A.2d 569, 573 (N.H. 1954).


The state hold 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 604, 609 (N.H. 1994) (quoting *Concord Co. v. Robertson*, 25 A. 718, 721 (N.H. 1889), and citing *St Regis Paper Co. v. N.H. Water Resources Board*, 26 A.2d 832, 837-38 (N.H. 1942) (“all useful and lawful purposes”); *State v. Sunapee Dam Co.*, 50 A. 108, 110 (N.H. 1900). “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. *Id.; see also N.H. REV. STAT. ANN. § 483-C:1* (codifying these rights); *Sibson v. State*, 259 A.2d 397, 400 (N.H. 1969) (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 v. State*, 259 A.2d 397, 399-400 (N.H. 1969). 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:** “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:** 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 . . . .”


**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 v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 52 (N.J. 1972). 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).


The public trust doctrine most basically protects navigation, commerce, and fishing. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 52 (N.J. 1972); *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 definitely 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. *Id.* 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 v. Atlantis Beach Club*, 879 A.2d 112, 121-24 (N.J. 2005) (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 v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972) (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 v. Atlantis Beach Club, 879 A.2d 112, 121 (N.J. 2005) (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: 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: 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: Marine and Coastal Resources.
- N.Y. ENVTL. CONSERVATION LAW § 15-1601: “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: “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: 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: 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. System 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 ad 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.

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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 act a lake or stream must have practical usefulness to the public as a highway for transportation.” N.Y. NAV. LAW § 2. 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. System Properties*, 120 N.Y.S.2d 269, 278-80 (N.Y. App. Div. 1953). In addition, emphasizing commerce, New York at common law has used a log floatation test of navigability. *Adirondack League Club, Inc. v. Sierra Club*, 615 N.Y.S.2d 788, 790-92 (N.Y. App. Div. 1994) (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. Department of Envtl. Conservation*, 132 Misc. 2d 850, 851-52 (N.Y. Sup. Ct. 1986).


Thus, if the waterway is navigable in fact, the public trust doctrine applies. *Adirondack League Club, Inc. v. Sierra Club*, 615 N.Y.S.2d 788, 792 (N.Y. App. Div. 1994). “[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 199, 207 (N.Y. Sup. Ct. 1978). Therefore, although the court did not conclusively decide 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 is “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 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, openlands, 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. App. 2005); see also N.C. GEN. STAT. §§ 77-20, 113A-113.

North Carolina Statutes:

- N.C. GEN. STAT. § 1-45.1: “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: Establishes the mean high water mark as the seaward property boundary of all private property that adjoins the ocean. Preserves the “customary free use and enjoyment of the ocean beaches . . . .”
- N.C. GEN. STAT. ch. 13, subch. IV: 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.” § 113-131(a). “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 . . . .” § 113-133. Registration of private interests in these waters and lands is required. § 113-205. Dredge and fill permits are required for estuarine waters, tidelands, and state-owned lakes. § 113-229.
- N.C. GEN. STAT. § 113A-113(5): “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: In authorizing coastal reserves, recognizes “public trust rights such as hunting, fishing, navigation, and recreation.”
- N.C. GEN. STAT. § 113A-134.1: 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: Registration of surface water withdrawals and regulation of surface water transfers.
- N.C. GEN. STAT. §§ 143-215.11 to 143-215.22F: Regulation of use of water resources.
- N.C. GEN. STAT. § 146-6: Title to publicly financed filling in the Atlantic Ocean vests in the state; otherwise, the adjoining landowner gets title.
o N.C. GEN. STAT. § 146-64: 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 (1852), the North Carolina Supreme Court has conclusively determined that North Carolina uses only the navigable-in-fact test. *Gwathmey v. State through Dept. of Environment, Health & Natural Resources 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 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).


**OHIO**

**Date of Statehood:** 1803

**Ohio Constitution:** No relevant provisions.

**Ohio Statutes:**

- OHIO REV. CODE ANN. § 721.04: 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. §§ 1501.30-1501.35: Diversion of Waters. The Ohio Department of Natural Resources regulates such diversions.
- OHIO REV. CODE ANN. §§ 1506.01-1506.24: 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 Trustess v. Fenchill, 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**: 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, 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 (Ohio 1828); *Blanchard’s Lessee v. Porter*, 11 Ohio 138, 142-43 (Ohio 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 (Ohio 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 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. *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 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 (Ohio 1842); *Walker v. Board of Public Works*, 16 Ohio 540, 543-44 (Ohio 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 453, 455 (Ohio App. 1975).

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 v. Newport Concrete Co.*, 336 N.E.2d 453, 455 (Ohio App. 1975). 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 1897)).
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 v. Miller, 161 N.E. 12, 13 (Ohio 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 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. Fenchill, 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. 677, 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.


**Pennsylvania Statutes:**

- 32 PA. CONS. STAT. ANN. § 675: “Any right, grant, or privilege heretofore or hereafter granted or give, 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.”


“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, 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 592, 595-96 (Pa. Super. Ct. 1997).
“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).


**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.


**Rhode Island Statutes:**
o R.I. GEN. LAWS §§ 22-7.1-1 to 22-7.1-7: Joint Committee on Water Resources.

o R.I. GEN. LAWS § 46-5-1.2: “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.”


o R.I. GEN. LAWS § 46-23-1: Repeats public rights from § 17 of Article I of the Constitution for purposes of the Coastal Resources Management Council.

o R.I. GEN. LAWS § 46-23-6: The Council can lease filled lands to the riparian or littoral owner.

o R.I. GEN. LAWS § 46-23-16: The Council can grant permits, licenses and easements.


However, 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 (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. *State ex rel. Town of Westerly v. Bradley*, 877 A.2d 601, 607 (R.I. 2005);

However, 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 v. State*, 657 A.2d 1038, 1040, 1044 (R.I. 1995).


**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: 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 watersources 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 the stream, § 49-1-30; and obstruction of streams generally. § 49-1-40.
- S.C. CODE ANN. §§ 49-3-10 to 49-3-50: Water Resources Planning and Coordination Act.
- S.C. CODE ANN. §§ 49-4-10 to 49-4-90: South Carolina Surface Water Withdrawal and Reporting Act.
- S.C. CODE ANN. §§ 48-39-10 to 48-39-360: Coastal Tidelands and Wetlands. Defines “coastal waters” to be “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).


“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 passable by any vessel at certain times of year have been found to have no bearing on the question of navigability. The focus remains on the capacity, irrespective of actual use.


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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: Water Resources Division.
- TENN. CODE ANN. §§ 69-7-201 to 69-7-212: Interbasin Water Transfers.
- TENN. CODE ANN. §§ 69-7-301 to 69-7-309: Tennessee Water Resources Information Act.


*State ex rel. Cates v. Western Tennessee Land Co.*, 158 S.W. 746, 748-49 (Tenn. 1913).

Tennessee essential 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).


Third, “[a] lake or stream which is considered unnavigable may be privately owned and controlled.” *The Point, L.L.C. v. Lake Management Ass’n*, 50 S.W.3d 471, 476 (Tenn. Ct. App. 2001).

**Rights in the “Navigable Waters”:** The division between state and private ownership is the low-water mark.


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, 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 included, 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. CONST., ch. II, § 67. 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 Vermont Railway, Inc.*, 571 A.2d 1228, 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 interest placed upon the public interest in Vermont’s navigable waters.” *Id.* at 1130-31.

**Vermont Statutes:**

- VT. STAT. ANN. tit. 10, §§ 1421-1426: Protection of Navigable Waters and Shoreland. Allows 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 uses of the waters in a manner to provide for the best interests of the citizens of the state.” § 1421. Defines “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. Allows for designation of outstanding resource waters. § 1424a.
- VT. STAT. ANN. tit. 29, § 301: “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: “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.


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 v. Mather*, 35 A. 323, 325 (Vt. 1896). “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). 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 nontidal waters are private. *Id.*

Vermont statutes not 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.

**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 v. Mather*, 35 A. 323, 324-25 (Vt. 1896). 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 Vermont Railway, Inc.*, 571 A.2d 1128, 1131 (Vt. 1990) (quoting and citing *Hazel v. Perkins*, 105 A. 249, 250-51 (Vt. 1919)).

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.”


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. CONST., 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. CONST., 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. CONST., art XI, § 4.

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

- VA. CODE ANN. § 1-302: “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. § 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: “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: “[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: 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: “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: 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: 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. § 62.1-44.36 to 62.1-44.44: Water Conservation and Planning.


VA. CODE ANN. § 62.1-164: 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. Commonwealth*, 47 SE. 875, 880 (Va. 1904) (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. Commonwealth*, 621 S.E.2d 130, 133-34 (Va. 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. Commonwealth*, 47 S.E. 875, 880 (Va. 1904). 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. Commonwealth*, 621 S.E.2d at 134 (citing VA. CODE ANN. § 28.2-1200); *Taylor v. Commonwealth*, 47 S.E. 875, 877-79 (Va. 1904)).


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 Trasportation 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: 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. § 20-2-3: “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 the 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 . . . .”

**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) nontidal 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.*, 11 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 259, 261, 262 (W. Va. 1956) (citing and 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.

**Rights in the “Navigable Waters”**: The state would own tidal waters, if there were any in West Virginia, to the high-water mark. *Gaston v. Mace*, 10 S.E. 60, 62-63 (W. Va. 1889). The private landowner owns nontidal, 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. Department of Natural Resources*, 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. §§ 30.01-30.99: 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: “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.”
- WIS. STAT. ANN. §§ 33.01-33.60: Public Inland Waters.
- WIS. STAT. ANN. §§ 281.11-281.35: 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.”

**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. Public Service 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 is 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, 289, 292 (Wis. 2007) (quoting this exact language). 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, 341 (Wis. 1987). The public trust doctrine.
applies only so long as the water remains navigable. *Meunch v. Public Service Comm’n*, 53 N.W.2d 514, 518 (Wis. 1952). 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, 204 (Wis. 1965); *State v. Bleck*, 338 N.W.2s 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 Property*, 634 N.W.2d 840, 843 (Wis. Ct. App. 2001) (citations omitted); *R.W. Docks & Slips v. State Department of Natural Resources*, 628 N.W.2d 781, 787 (Wis. 2001). 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 287, 289, 292 (Wis. 2007) (citing *State v. Trudeau*, 408 N.W.2d 337 (Wis. 1987)). It is a “qualified title” because “the state holds the beds underlying navigable waters in trust for all of its citizens . . . .” *Id.*

Wisconsin recognized the public trust doctrine early in its history. *Meunch v. Public Service Comm’n*, 53 N.W.2d 514, 517 (Wis. 1952) (citing *McLennan v. Prentice*, 55 N.W. 764 (Wis. 1893); *Illinois 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 v. State*, 628 N.W.2d 781, 787 (Wis. 2001) (citing *Gillen v. City of Neenah*, 580 N.W.2d 628 (Wis. 1978)). Riparian rights are subordinate to the public trust rights and limited by the public trust doctrine. *Id.*


The public can use the public trust waters for navigation, hunting, fishing, recreation “or any other lawful purpose.” *Meunch v. Public Service Comm’n*, 53 N.W.2d 514, 519 (Wis. 1952) (citations omitted). Public rights also include the enjoyment of scenic beauty. *Id.* at 521 (citing WIS. STAT. ANN. § 31.06 (1923)); see also *State v. Trudeau*, 408 N.W.2d at 343 (scenic beauty, navigation, swimming, hunting, and the right to “preserve natural resources such as wetlands”) (citing *Just v. Marinette County*, 201 N.W.2d 761 (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 be poling against the bottom, walking on the ice if the river is frozen, etc.” *Munninghoff v. Wisconsin 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. v. Town of Bass Lake*, 733 N.W.2d 287, 289, 295 (Wis. 2007).

The Wisconsin Department of Natural Resources regulates and enforces the public trust doctrine. *Hilton ex rel. Pages Homeowners Ass’n v. Department of Natural Resources*, 717 N.W.2d 166, 173 (Wis. 2006) (citing *ABKA Ltd. Partnership v. Wisconsin Department of Natural Resources*, 648 N.W.2d 854, 858-59 (Wis. 2002)). Thus, “Chapter 30 embodies a system of regulation of Wisconsin’s navigable waters pursuant to the public trust doctrine.” *ABKA Ltd. Partnership*, 648 N.W.2d at 858 (citing *Gillen v. City of Neenah*, 580 N.W.2d 628 (Wis. 1998); *Waukesha County v. Seitz*, 409 N.W.2d 403 (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 v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972).