The Rhode Island Public Trust Doctrine: 1663–1982

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Madam Chair, Mister Vice Chair, distinguished members of the commission, it is my privilege and honor to speak with you today. My name is Sean Lyness. I am a Faculty Fellow at New England Law Boston where I teach a number of courses and conduct research. While I am not a historian by trade, I am a legal researcher and I have spent a considerable amount of time investigating a legal doctrine called the public trust doctrine and, in particular, its Rhode Island form.

Few things are dearer to Rhode Islanders than the beautiful shoreline we call home. But the shoreline is also a collision point between two "treasured sets of expectancy interests": private property rights and public access rights.[1] This has led to significant shoreline conflicts throughout this state's history, including prior to its entrance into the Union.

At the risk of either retreading ground you already know or boring you with an abundance of details, I wish to discuss two things today. First, I'll give a brief overview of the public trust doctrine *writ large*—what it is, how it functions, and why it matters. Second, I'll give a legal history of the public trust doctrine in Rhode Island up to (and including) the famous 1982 Rhode Island Supreme

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[1] Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989).

Court case *State v. Ibbison*. It is my understanding that the next crucial element of the story—the 1986 Constitutional Convention which amended the state's codified form of the public trust doctrine—is being handled by another presenter.

I. A BRIEF BACKGROUND ON THE PUBLIC TRUST DOCTRINE

Let us begin, then, with the public trust doctrine itself. The doctrine is a simple but radical idea: certain resources are held by the government in trust for the people.[2] Simple enough. Some things are so important to society that we entrust them to our government to maintain for the people. Accordingly, the government has a responsibility to prevent impairment of those public trust resources.[3] In other words, the public trust doctrine functions as a check on democratic institutions, ensuring that their actions maintain and preserve public trust resources.[4]

This idea—state ownership of important resources—has its roots in a number of different legal systems. Most often referenced are the doctrine's Roman roots, which understood some resources as *res communes omnium* ("things common to all") as well as *res publicae* ("public things").[5] The Institutes of Justinian—compiled Roman

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[2] *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892); *see also* Wilkinson, *supra* note 1 at 425–27.

[3] *See* Wilkinson, *supra* note 1, at 452 (noting that the Supreme Court in *Ill. Cent.* "left no doubt that the traditional public trust doctrine imposes obligations on the states[.]").

[4] *See id.*

[5] J.B. Ruhl and Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L. Q. 117, 168 (2020) ("The result is that the Romans offer two diverse yet closely associated models of

laws from the early sixth century—tells us that "[t]hings common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea."[6]

All of which is to say that the doctrine is very old. Courts treat the vintage of this idea with reverence, calling the doctrine "mythic[,]"[7] "ancient[,]"[8] and "reach[ing] back to the very early years of Western civilization[.]"[9]

For our purposes, it suffices that the doctrine was well-established by the seventeenth century in England.[10] There, under English common law, "the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation."[11] To properly protect the public's ability to use these tidal waters, the title to the land was "vested in the sovereign for the benefit of the whole people."[12]

When the United States declared its independence, the public trust doctrine did not change its contours or substance. Instead, the title-vested sovereign changed

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property law regimes for the contemplation of modern jurists and policy makers.").

[6] J. INST. 2.1.1, in *The Institutes of Justinian, With Notes* (Thomas Cooper ed. & trans., 3d ed. 1852) 67.

[7] City of Montpelier v. Barnett, 49 A.3d 120, 127 (Vt. 2012).

[8] Lawrence v. Clark Cnty., 254 P.3d 606, 609 (Nev. 2011).

[9] Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995).

[10] *See, e.g.*, Ill. Cent. R.R. Co., 146 U.S. at 458 ("The title to lands under tide waters, within the realm of England, were by common law to be vested in the King as a public trust[.]" (quoting People v. N.Y. & Staten Island Ferry Co., 68 N.Y. 71, 76 (1877))); *see also* PPL Montana, LLC v. Montana, 565 U.S. 576, 589–93 (2012) (same).

[11] *See* Shively v. Bowlby, 152 U.S. 1, 57 (1894).

[12] *Id.*

from the King to the state.[13] Therefore, as recognized by the United States Supreme Court, the public trust doctrine is principally a matter of state law.[14] There is thus no single public trust doctrine but instead fifty-one state-specific public trust doctrines, each with their own idiosyncrasies.[15] To understand the Rhode Island public trust doctrine, then, we must examine it on its own terms.

II. THE RHODE ISLAND PUBLIC TRUST DOCTRINE

A. Charter to Constitution (1663–1843)

Despite these common law antecedents, the public trust doctrine in Rhode Island is *codified*—originally contained in the colony's 1663 founding Charter.[16] Issued

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[13] *See id.* ("Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.").

[14] *See id.* at 57–58; *see also* Greater Providence Chamber of Com., 657 A.2d at 1042 (discussing the latitude that the *Shively* case affords each state in its articulation of the public trust doctrine (citing *Shively*, 152 U.S. at 26)).

[15] *See* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1 (2007) (comparing and contrasting various states' public trust doctrines); *see also* Wilkinson, *supra* note 1, at 425 ("The public trust doctrine is complicated—there are fifty-one public trust doctrines in this country alone.").

[16] *See* Patrick T. Conley & Robert G. Flanders, Jr., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE (OXFORD UNIV. PRESS 2011) AT 110; *see also Rhode Island Royal Charter, 1663*, at 1, R.I. STATE ARCHIVES (available at https://www.sos.ri.gov/assets/downloads/documents/RI-Charter-annotated.pdf). As a founding and organizing document, the 1663 Charter may be considered "constitutional" in nature.

by King Charles II, the 1663 Charter is the foundational document for the colony of Rhode Island.[17] Coming less than thirty years after the founding of Providence in 1636, the Charter set forth a series of rights and principles for the colony.[18] As it relates to the public trust doctrine, the text of the 1663 Charter provides that:

> [O]ur express will and pleasure is, and we do, by these presents, for us, our heirs and successors, ordain and appoint that these presents, shall not, in any manner, hinder any of our loving subjects, whatsoever, *from using and exercising the trade of fishing upon the coast of New England*, in America; but that they, and every or any of them, shall have full and free power and liberty *to continue and use the trade of fishing upon the said coast*, in any of the seas thereunto adjoining, or any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish; and *to build and set upon the waste land belonging to the said Colony and Plantations*, such wharves, stages and workhouses as shall be necessary for the salting, drying and keeping of their fish, to be taken or gotten upon that coast.[19]

What should we make of this? Though the Charter is clearly aimed at protecting the public's right to fish, the resulting effect is nonetheless a guarantee of public access to the shore. After all, Rhode Islanders have the right to

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Indeed, the 1663 Charter remained the governing document for Rhode Island until 1843, long after Rhode Island's entrance into the Union.

[17] *See id.*

[18] *See id.*

[19] *See Rhode Island Royal Charter, 1663*, *supra* note 16, at 11 (emphasis added).

"use the trade of fishing" and they can even "build" on tidal lands to do so.[20] A necessary implication is public access to the shore. Additionally, the codification was deliberately written so as to not disturb current practices.[21] And the fact that the public's rights were codified at all—and, at that, just a few decades after the colony's founding—is telling as to their significance.

It is useful to compare Rhode Island's charter to that of our neighbors. Just a year before Rhode Island received its charter, King Charles II granted the Connecticut Charter of 1662 which included some familiar language:

> "Our express Will and Pleasure is, and We do by these Presents for Us, Our Heirs; and Successors, Ordain and Appoint, that these Presents shall not in any Manner hinder any of Our loving Subjects whatsoever to use and exercise the Trade of Fishing upon the Coast of New-England, in America, but they and every or any of them shall have full and free Power and Liberty, *to continue, and use the said Trade of Fishing upon the said Coast*, in any of the Seas thereunto adjoining, or any Arms of the Seas, or Salt Water Rivers where they have been accustomed to fish, and to build and set up on the waste Land belonging to the said Colony of Connecticut, such Wharves, Stages, and Work-Houses as shall be necessary for the salting, drying, and keeping of their Fish to be taken, or gotten

[20] *Id.*

[21] *See id.*

> upon that Coast, any Thing in these Presents contained to the contrary notwithstanding."[22]

This language is strikingly similar to that in the Rhode Island charter of just one year later. Interestingly, Connecticut courts have expressly cited the 1662 Connecticut Charter as the source of the state's public trust doctrine.[23] Although the language used has been, at times, imprecise, Connecticut courts have delineated the Charter's grant of public trust title to "below the high water mark."[24]

So too for the commonwealth next door. Under King William III (William of Orange), the Massachusetts Bay colony received a Charter in 1691. It features the by-now familiar language:

> "Our expresse Will and Pleasure is And Wee doe by these present for Vs Our Heires and Successors Ordaine and appoint that these Our Letters Patents shall not in any manner Enure or be taken to abridge bar or hinder any of Our loveing Subjects whatsoever to use and exercise the Trade of Fishing upon the Coasts of New England but that they and every of them shall *have full and free power*

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[22] "Charter of Connecticut, 1662," *The Avalon Project* (available at https://avalon.law.yale.edu/17th_century/ct03.asp) (emphasis added).

[23] State v. Hooper, 209 A.2d 539, 543 (Conn. App. 1965).

[24] *Id.*; *see also* State v. Sargent & Co., 45 Conn. 358, 363 (1877) ("The state, in its sovereign character, owns the bed of navigable streams to high-water mark[.]) (quotation omitted); *but see* Shoreline Shellfish, LLC v. Town of Branford, 246 A.3d 470, 476 (Conn. 2020) (citing *Sargent* for the inaccurate proposition that the public trust applies to "grounds located below the *mean* high watermark, which are subject to the public trust doctrine[.]") (emphasis added).

> *and Libertie to continue and use their said Trade of Fishing upon the said Coasts* in any of the seas thereunto adjoyning or any Arms of the said Seas or Salt Water Rivers where they have been wont to fish and to build and set upon the Lands within Our said Province or Collony lying west and not then possesst by perticuler Proprietors such Wharfes Stages and Workhouses as shall be necessary for the salting drying keeping and packing of their Fish to be taken or gotten upon that Coast."[25]

But in Massachusetts the state legislature has stepped in to define the tidelands subject to the public trust.[26] By statute, "tidelands" are defined to be "present and former submerged lands and tidal flats lying below the *mean* high water mark[.]"[27] Massachusetts courts have accordingly placed its public trust doctrine at the mean high water mark, subject to some inconsistencies.[28]

A brief primer on tidal data is warranted to illuminate this point. In descending order, the high-water mark and the mean high water line are levels of tidal waters

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[25] "The Charter of Massachusetts Bay – 1691," *The Avalon Project* (available at https://avalon.law.yale.edu/17th_century/mass07.asp) (emphasis added)

[26] Mass. Gen. Laws Ch. 91, § 1.

[27] *Id.* (emphasis added).

[28] *See* Arno v. Commonwealth, 931 N.E.2d 1, 4 (Mass. 2010) (citing the relevant statute and identifying the trust as extending to the "mean high water mark"); *but see* Trio Algarvio, Inc. v. Comm'nr of Dept. of Envtl. Protec., 795 N.E.2d 1148, 1151 (Mass. 2003) (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.").

calculated by some phase of the tide.[29] The high-water mark is the mark left upon the shore indicating the highest elevation of the tidal water.[30] Typically, this is described as the seaweed line—the visible line of debris left by the sea.[31] The mean high water line is an average of the high-water mark calculated over a tidal epoch, typically a period of nineteen years.[32] As an average, the mean high water line is further into the water. In other words, there is a measurable and practical different between the high water mark and the mean high water mark. So Connecticut's public trust doctrine extends farther onto the shore (the high water mark) than Massachusetts' doctrine does (the mean high water mark).

The point of these comparisons is to show that Rhode Island was by no means unique in receiving a codified

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[29] *See Tidal Datums*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., (available at https://tidesandcurrents.noaa.gov/datum_options.html).

[30] STEACY D. HICKS ET AL., NAT'L OCEANIC & ATMOSPHERIC ADMIN., TIDE AND CURRENT GLOSSARY 11 (1999), (available at https://tidesandcurrents.noaa.gov/publications/glossary2.pdf).

[31] *See State of the Beach/State Reports/RI/Beach Access*, BEACHAPEDIA, (available at http://www.beachapedia.org/State_of_the_Beach/State_Reports/RI/BeachAccess).

[32] HICKS, *supra* note 30, at 15–16. Confusingly, the Rhode Island Supreme Court has used the term "mean high *tide* line" to refer to the mean high water line. *Cf. Jackvony*, 21 A.2d at 554–58. The phrase "mean high tide line" is not recognized by the National Oceanic & Atmospheric Administration as a tidal datum. *See* HICKS, *supra* note 30, at 15–16. Both phrases refer to the same point—the average of the high water mark calculated over a tidal epoch. *See id.*; *see also Surfrider Foundation's Stance on Beach Access*, BEACHAPEDIA, (available at http://www.beachapedia.org/Beach_Access) ("The mean high tide line is actually the arithmetic average of high-water heights.").

public trust in its charter. What is unique, however, is how long Rhode Island's Charter was in effect.

Unlike other colonies that wrote state constitutions in the latter half of the eighteenth century, Rhode Island persisted under the 1663 Charter until 1843.[33] Most of the thirteen colonies wrote their state constitutions soon after the start of the American Revolutionary War in 1776. Rhode Island and Connecticut were the only two states that remained governed by their royal charters beyond 1780.[34] Connecticut ratified a state constitution in 1818.[35] Rhode Island, then, stood alone without a new state constitution until the Dorr Rebellion of 1841–42 forced its creation in 1843.[36]

When the drafters of the 1843 Rhode Island constitution met, they sought to maintain the Charter's guarantee of a public trust doctrine; the language they used shows that their goal was to change precisely nothing:

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[33] *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 60 (2000) (noting that, by 1777, ten of the thirteen original colonies had already adopted state constitutions, and Massachusetts adopted its state constitution by 1780).

[34] *Id.*

[35] "Constitution of Connecticut," (available at https://www.cga.ct.gov/asp/content/constitutions/1818_Constitution.pdf).

[36] In Rhode Island, this lack of an updated state constitution—and the accompanying disenfranchisement it wrought—was one of the driving forces behind the Dorr Rebellion of 1841 to 1842. *See generally* RORY RAVEN, THE DORR WAR: TREASON, REBELLION & THE FIGHT FOR REFORM IN RHODE ISLAND (2010). The Dorr Rebellion was an attempt by disenfranchised citizens to remove restrictions on voting. SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787, 169 (2011). As a result, the state constitution was written and codified in 1843. *Id.*

> "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. But no new right is intended to be granted, nor any existing right impaired, by this declaration."[37]

It is worth noting that almost half of the words of the text seek to alter nothing about the then-existing status quo.[38] However, the text does more than lock in the status quo. No longer focused on a purely fishing context, the framers included in the 1843 Constitution the key (and amorphous) phrase, "privileges of the shore."[39]

I should also pause here to note that our sister states already discussed—Massachusetts and Connecticut—do *not* have a comparable codified public trust doctrine in their respective state constitutions.[40] In fact, it appears that the states that *do* have a codified public trust doctrine—Pennsylvania, Hawaii, and Illinois, for example—have all done so through later amendments to the state constitution, often coterminous with the environmental movements of the latter half of the twentieth century.[41] In this regard, Rhode Island is again

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[37] R.I. CONST. art I, § 17 (1843) (emphasis added) (amended 1986).

[38] *See id.*

[39] *Id.*

[40] "Massachusetts Constitution," *Mass.gov* (available at https://malegislature.gov/laws/constitution); "Constitution of the State of Connecticut," *CGA.gov* (available at https://www.cga.ct.gov/asp/Content/constitutions/CTConstitution.htm).

[41] *See, e.g.*, "Constitution of the Commonwealth of Pennsylvania," Art. I, § 27 (available at https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/00/00.HTM) ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values

unique in maintaining a codified public trust doctrine from the start.

B. *Interpreting the 1843 Constitution*

The import of the inclusion of "privileges of the shore" remained hidden for decades.[42] But a few Rhode Island Supreme Court opinions from the turn of the twentieth century show that the doctrine remained robust and vital.

Take *Allen v. Allen*, for example.[43] In that 1895 case, the defendant was found to have trespassed across the plaintiff's property while digging for clams.[44] Overturning the finding of liability by the lower court and granting a new trial, the Rhode Island Supreme Court made plain that the public trust doctrine guarantees public rights, among these, "the rights of passage, of navigation, and of fishery[.]"[45] The state "by virtue of its sovereignty" "holds the legal fee of all lands below [the] high-water mark" for the benefit of the public.[46] Repeatedly using the term "high-water mark," the Court held that "any inhabitant may take shellfish anywhere in the waters of the state, and on the shores below high-water mark as it exists from time to time."[47]

This is a full-throated endorsement of the state's public trust rights. And the inclusion of the right "of passage"

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of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

[42] *See* Jackvony v. Powel, 21 A.2d 554, 556 (R.I. 1941).

[43] Allen v. Allen, 19 R.I. 114, 32 A. 166 (1895).

[44] *Id.* at 166.

[45] *Id.*

[46] *Id.*

[47] *Id.*

appears to reference the "privileges of the shore" guaranteed in the then-operative 1843 state constitution.

Look also to *Narragansett Real Estate Co. v. Mackenzie*, a 1912 case involving land in Little Compton.[48] Students of Rhode Island history will recall that the far eastern portion of Rhode Island was disputed for several decades with Massachusetts, finally settled in Rhode Island's favor in the mid-eighteenth century. In this particular action for trespass on land once disputed, the plaintiff argued that it owned the land to the "low water mark" as it would have in Massachusetts.[49] The Rhode Island Supreme Court disagreed, noting that Rhode Island's success in contesting Massachusetts' claims of ownership signified "the rightfulness of Rhode Island's claim from the outset[.]"[50] As such, "the plaintiff *** has title in fee *only to ordinary high-water mark*, and that the fee of the land below ordinary high-water mark is *in the state*."[51]

These cases set the stage. But the major interpretive work on the public trust doctrine provision of the 1843 constitution did not come until nearly a century later in the famous *Jackvony v. Powell.*[52] In 1941, the Rhode Island Attorney General, Louis V. Jackvony, sued three members of the Easton Beach Commission of the City of Newport.[53] In a classic example of a lawsuit involving public access to the shoreline, the Attorney General sought to enjoin the Easton Beach Commission "from erecting or causing to be erected a fence or other barrier on such portion of the shore between the high and low water lines as lies to the south of the property known as Easton's Beach, situated in and

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[48] 34 R.I. 103, 82 A. 804 (1912).
[49] *Id.* at 805.
[50] *Id.*
[51] *Id.* at 806 (emphases added).
[52] 67 R.I. 218, 21 A.2d 554 (1941).
[53] *Id.* at 554.

belonging to the city of Newport."[54] The Commission had been granted authority by statute over "control and charge" of the beach, "including the shores thereof between high and low water marks."[55]

The *Jackvony* court centered its analysis on the 1843 Constitution's added phrase:

> "The above provision of the constitution does not define what, at the time of the adoption of the [1843] constitution, were 'the privileges of the shore' to which the people of the state had been theretofore entitled. But it seems clear to us that there must have been some such 'privileges', which were then recognized as belonging to the people and which the framers and adopters of the constitution intended to change into 'rights', beyond the power of the general assembly to destroy."[56]

To decipher what "privileges" the constitutional framers intended, the court began its analysis by turning to common law understandings of the phrase:

> "Among the common-law rights of the public in the shore *** are rights of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and also, as *necessary for the enjoyment of any of these rights*, and perhaps as a separate and independent right, that of *passing along the shore*."[57]

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[54] *Id.*

[55] *Id.* at 555 (quotations omitted).

[56] *Id.* at 556. This passage recognizes a key result of codification—the elevation of certain practices into "rights."

[57] *Id.* (emphases added).

Moving to state-specific authority, the court noted that despite writing the *Jackvony* opinion in 1941, nearly three centuries after the 1663 Charter and almost a century after the 1843 Constitution, there was "no decision by the supreme court of this state, nor *** any decision by any court of Rhode Island while it was a colony, in which it was decided what these privileges were."[58] Indeed, the state legislature had not opined on what the constitutional language was intended to encompass.[59]

The court finally staked out a firm position on the language:

> "[W]e are of the opinion that at the time of the adoption of our constitution there was, among the 'privileges of the shore', to which the people of this state had been theretofore entitled under the 'usages of this state', *a public right of passage along the shore*, at least for certain proper purposes and subject, very possibly, to *reasonable* regulation by acts of the general assembly in the interests of the people of the state."[60]

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[58] *Id.*

[59] *See id.* at 557 ("But we have not found, nor has there been called to our attention, any instance in which the general assembly, before the adoption of the constitution, legislated with regard to the privileges of the people of this state in its shores bordering on tidewaters and lying between the lines of mean high tide and mean low tide, privileges which have been commonly believed to include the above-mentioned privileges of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and of passage along the shore.").

[60] *Id.* (first emphasis added).

Thus, *Jackvony* recognized a public right of passage along the shoreline.[61] This passage along the shoreline could not be infringed, not even through acts of the General Assembly.[62] However, the *Jackvony* court neglected to define the precise contours of that right.

C. State v. Ibbison

Jackvony's holding remained good law until the 1982 Rhode Island Supreme Court case *State v. Ibbison*.[63] There, six defendants were convicted of criminal trespass for traveling along a beach during a beach clean-up operation.[64] A littoral owner—along with a conveniently present patrolman of the Westerly Police Department—

[61] *Id.* at 558.

[62] *Id.*

[63] State v. Ibbison, 448 A.2d 728 (R.I. 1982). That is, the holding in *Jackvony* regarding the meaning of the "privileges of the shore" remained good law up to and until *Ibbison* was decided in 1982. This is so despite the 1969 constitutional amendments, which changed the constitutional provision codifying the public trust doctrine in two important ways. First, the 1969 amendments removed the phrase "no new right is intended to be granted, nor any existing right impaired, by this declaration." R.I. CONST. of 1843, art. I, § 17. Second, the 1969 amendments added the phrase "[t]he people *** shall be secure in their rights to the use and enjoyment of the natural resources of the state." R.I. CONST. art. I, § 17 (1969). These two changes undoubtedly strengthened the public trust doctrine. But, despite giving the constitutional provision more heft, they did little to change the substantive scope of the doctrine itself. This is perhaps best illustrated by the fact that no major Rhode Island Supreme Court case interpreted this 1969 language until *Ibbison* in 1982.

[64] *Id.* at 729.

stopped the defendants who were between the high-water mark and the mean high water line.[65]

As described by the *Ibbison* Court, the high water mark was "a visible line on the shore indicated by the reach of an average high tide and further indicated by drifts and seaweed along the shore."[66] The mean high water line, referred to by the court as the "mean high tide line," was, "at the time of the arrest *** under water."[67] Believing that his land extended down to the mean high water line—i.e., under water—the littoral owner informed the beach cleaners that they were trespassing.[68] The defendants disagreed and were arrested.[69]

The court began its opinion by quickly addressing and dismissing *Jackvony*'s holding and reasoning.[70] The court noted that "[a]t various times in the *Jackvony* case, the court referred to the high-water line or mark, and at other times it referred to the mean high tide **** We find that the *Jackvony* court used the two terms interchangeably."[71]

But this conclusion obfuscates *Jackvony*'s central holding: that the "privileges of the shore" specifically included "a public right of passage along the shore."[72] While the term "mean high tide" does make an appearance in *Jackvony*, the *Jackvony* court consistently used the term "high-water mark" to describe the right afforded by the

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[65] *Id.* Justice Shea tells us that the littoral owner had previously marked out his estimation of where the mean high water line was. *Id.* Such conduct, along with the presence of the local police officer, suggests that the littoral owner was considerably litigious.

[66] *Id.*

[67] *Id.* at 730.

[68] *Id.* at 729.

[69] *Id.*

[70] *Ibbison*, 21 A.2d at 730.

[71] *Id.*

[72] *Jackvony*, 21 A.2d at 558.

constitutional provision.[73] Indeed, the *Ibbison* court had already noted that the high-water mark would have allowed the beach cleaners to perform their clean-up, and that the mean high water line would have submerged the clean-up operation.[74] Therefore, the only possible application of *Jackvony* to *Ibbison*'s facts would conclude that the public trust land must be located at the high-water mark to preserve the right of passage along the shore.[75]

Nonetheless, the *Ibbison* court continued by resolving to "affix the boundary as was done at common law."[76] It turned to English understandings of shorelines and a United States Supreme Court case, *Borax Consolidated Ltd. v. City of Los Angeles*.[77] The *Ibbison* court noted that the *Borax* Court found the "mean high tide line" through the 18.6-year metonic cycle.[78] The *Ibbison* court "concur[red] in this analysis and app[lied] the mean-high-tide line as the landward boundary of the shore for the

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[73] *Id.* at 557–58.

[74] *Ibbison*, 448 A.2d at 730 ("[A]t the time of the arrest, the mean-high-tide line was under water.").

[75] *Cf. Jackvony*, 21 A.2d at 558 (holding that the "privileges of the shore" included "getting seaweed," a similar activity to collecting garbage washed up on the shore).

[76] *Ibbison*, 448 A.2d at 730.

[77] *Id.* at 730–32 (refencing Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10 (1935)).

[78] *Id.* at 732 (quoting *Borax*, 296 U.S. at 26–27); *see* Bernard R. Goldstein, *A Note on the Metonic Cycle*, 57 ISIS, 115, 115–16 (1966) (explaining that the metonic cycle is a period of 18.6 years wherein the new moon occurs on the same day of the year as it does at the beginning of the cycle). The metonic cycle is close, though not identical, to the 19-year National Tidal Datum Epoch used by the National Ocean Service. *See Tidal Datums*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://tidesandcurrents.noaa.gov/datum_options.html.

purposes of the privileges guaranteed to the people of this state by our constitution."[79]

Curiously, the *Ibbison* court did note that in fixing the boundary at the mean high water line:

> "[W]e are mindful that there is a disadvantage in that this point is not readily identifiable by the casual observer. We doubt, however, that any boundary could be set that would be readily apparent to an observer when we consider the varied topography of our shoreline. The mean-high-tide line represents the point that can be determined scientifically with the greatest certainty."[80]

This is an odd comment from a court that had just finished noting that the high-water mark could be identified by seaweed and debris.[81] In resolving the case at hand, however, the court recognized that it was setting a new limit on the public trust doctrine and accordingly dismissed the criminal trespass charges because of due process concerns.[82]

Whether you agree with *Ibbison*, there is no denying that *Ibbison* swept aside *Jackvony*'s holding regarding passage along the shore.[83] *Ibbison*, in essence, overruled *Jackvony* through quiet dismissal.[84] No longer would the public trust doctrine guarantee a right to passage along the shore; *Ibbison* affixed the public trust line to a point on the

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[79] *Ibbison*, 448 A.2d at 732.
[80] *Id.*
[81] *Id.* ("Presumably, the point reached by the spring tides is the same point as that argued by defendants as being the high-water mark evidenced by drifts and seaweed.").
[82] *Id.* at 733.
[83] *See supra* Part I., Section B.
[84] *See Ibbison*, 448 A.2d at 730.

shoreline that was, by the *Ibbison* court's own admission, often submerged.[85]

The *Ibbison* court did so even despite its acknowledgment that "this point is not readily identifiable to the casual observer."[86] Thus, *Ibbison* left the beach-going public with a difficult-to-identify and often unusable public trust doctrine.

CONCLUSION

Here, just after *Ibbison*, is where I leave the story. As you know, the 1986 Constitutional Convention responded to *Ibbison* and the resulting constitutional changes reflect that. But I will save that discussion for another presenter. I appreciate your time and attention and I look forward to any questions you have.

[85] *Id.* at 729–30 (noting that at the time of the arrest the mean high tide line was submerged).
[86] *Id.* at 732.