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Sean Lyness
Faculty Fellow, New England Law

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Articles

A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine

Sean Lyness*

INTRODUCTION

Over thirty years ago, Rhode Island's public trust doctrine was altered dramatically. Delegates to the 1986 Constitutional Convention modified the provision codifying the state's public trust doctrine.[1] The new language was intended to overrule a then-recent Rhode Island Supreme Court case curtailing the scope of the doctrine and enshrining an earlier interpretation of the doctrine,

* Faculty Fellow, New England Law | Boston. J.D., 2015, Harvard Law School; B.A., 2012, Brown University. I would like to thank Richard Lazarus for initiating the spark and Robin Kundis Craig, Hope Babcock, and Michael Rubin for their thoughtful and thorough comments on an earlier draft.

1. *See* Elliot Andrews, Thomas Evans & Kenneth Carlson, *Rhode Island Constitutional Convention History*, R.I. FUTURE, http://www.rifuture.org/wp-content/uploads/RI-Constitutional-Conventions-History.pdf [perma.cc/6SMR-FLZJ] (last visited Apr. 29, 2021); *see also* R.I. CONST. art. I, § 17. In the modern era, constitutional conventions are relatively rare. *See* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL'Y SYMP. 1, 3 n.6 (1996) (noting that "constitutional conventions are not now commonly used in the states" (citing Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMPLE L. REV. 1291 (1995))).

guaranteeing more shoreline access to Rhode Islanders.[2] On November 4, 1986, the voters of the State of Rhode Island approved this constitutional change by a large margin.[3]

Nevertheless, despite this significant constitutional change, over the thirty years since the amendment, Rhode Island courts have not recognized the intended broadening of Rhode Island's public trust doctrine. Instead, Rhode Island courts have all but ignored the 1986 constitutional amendment and have continued to apply previous narrow understandings of the public trust doctrine. Indeed, Rhode Island courts still treat the public trust doctrine as a common law doctrine, with little recognition of its constitutional dimensions.[4] Without a grounding in its constitutional text, the Rhode Island public trust doctrine has become a doctrine untethered. The result is a doctrine amorphous in scope and susceptible to the quickening encroachment of climate change.

This Article sketches the story of this untethering, examining Rhode Island's public trust doctrine both before and after the 1986 constitutional amendment and offering a new formulation of the doctrine that is consistent with the constitutional change. Part I traces the origins of the Rhode Island public trust doctrine, its codification in the 1663 Charter, and its subsequent codifications in the Rhode Island State Constitution. It next examines the two leading cases in state public-trust-doctrine jurisprudence—*Jacknovy v. Powel* and *State v. Ibbison*—and discusses their impact on the doctrine. It finishes by evaluating the changes made by the 1986 Constitutional Convention and the Delegates' express intent in doing so.

Part II analyzes the status of the doctrine after 1986, in particular exploring how the Rhode Island Supreme and Superior Courts have responded to the 1986 Constitutional Convention's changes over the last three decades. This Article concludes that Rhode Island courts have not yet addressed the changed

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2. *See infra* Part I., Section D.

3. *Rhode Island Shore Use and Environmental Protection, Constitutional Amendment 9 (1986)*, BALLOTPEDIA, https://ballotpedia.org/Rhode_Island_Shore_Use_and_Environmental_Protection,_Constitutional_Amendment_9_(1986) [perma.cc/VN9H-2YE5] (last visited Apr. 29, 2021); *see* PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 110 (Oxford Univ. Press 2011) (2007).

4. *See infra* Part II., Section A.

constitutional text, failed to analyze or interpret key language, and continued to rely on outdated precedent.

Finally, Part III argues for a closer hewing to the constitutional text and offers a possible interpretation of the text that would create more stability and clarity in the doctrine. This interpretation would fulfill the amendment's goal of broadening Rhode Island's public trust doctrine, providing the public with greater access to Rhode Island's coast while simultaneously re-tethering the doctrine to its constitutional source.

I. THE PUBLIC TRUST DOCTRINE IN RHODE ISLAND BEFORE 1986

A. *From Common Law to Codification*

The conceptual basis for public trust doctrines traces its origins to English common law.[5] The underlying principle was that "the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation."[6] The public's use of these tidal waters for commerce, fishing, and navigation was more important than any individual's right to them.[7] 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."[8]

The creation of the United States did not change the contours or substance of the doctrine but simply changed the title-vested

5. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892) ("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))). Some courts, including the Rhode Island Supreme Court, trace the public trust doctrine back even further to Roman law. *See, e.g.*, Greater Providence Chamber of Com. v. State, 657 A.2d 1038, 1041–42 (R.I. 1995) ("The root concepts of the doctrine reach back to the very early years of Western civilization." (citing United States v. 1.58 Acres of Land Situated in Boston, 523 F.Supp. 120, 122–23 (D. Mass. 1981))). However, there is some scholarly debate over whether the various American public trust doctrines can be fairly attributed to Justinian law. *See* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 12–27 (2007); *see also generally* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117 (2020).

6. *See* Shively v. Bowlby, 152 U.S. 1, 57 (1894).

7. *See id.*

8. *Id.*

sovereign to the state.[9] Therefore, as recognized by the United States Supreme Court, the public trust doctrine is principally a matter of state law.[10] There is thus no single public trust doctrine, but there are instead numerous state-specific public trust doctrines.[11] The local customs, history, and usages relating to the doctrine in a particular state are accordingly important in determining the scope of its doctrine.[12]

The Rhode Island Supreme Court has long recognized the public trust doctrine as an "ancient and still vital doctrine[ ] of the law of this state."[13] It has even traced the doctrine's origins back to pre-colonial-era jurisprudence, looking at its use in ancient Greece and Rome.[14]

Despite these common law antecedents, the public trust doctrine in Rhode Island is *constitutional*—originally codified in the colony's 1663 founding Charter.[15] 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

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9. *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.").

10. *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)).

11. *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).

12. *See Shively*, 152 U.S. at 26.

13. Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999).

14. *See* Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1166 (R.I. 2003); *see, e.g.*, *Greater Providence Chamber of Com.*, 657 A.2d at 1041–42. Though, again, whether the public trust doctrine can and should be traced back that far has engendered scholarly debate. *See* Huffman, *supra* note 5, at 12–27.

15. *See* CONLEY & FLANDERS, *supra* note 3, at 110; *see also Rhode Island Royal Charter, 1663*, at 1, R.I. STATE ARCHIVES, https://www.sos.ri.gov/assets/downloads/documents/RI-Charter-annotated.pdf [perma.cc/WYT3-68X7] (last visited Apr. 29, 2021). As a founding and organizing document, the 1663 Charter may be considered "constitutional" in nature. Indeed, the 1663 Charter remained the governing document for Rhode Island until 1843, long after Rhode Island's entrance into the Union. CONLEY & FLANDERS, *supra* note 3, at 24–26.

> 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.[16]

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. It is important to note that the codification was deliberately written so as to not disturb current practices; the phrase "to continue and use" indicates that despite Rhode Island's founding only several decades earlier in 1636, settlers in Rhode Island had been accessing and would continue to be able to access the shoreline.[17] 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.

Unlike other colonies that wrote state constitutions in the latter half of the eighteenth century, Rhode Island persisted under the 1663 Charter until 1843.[18] Even then, the public trust doctrine

16. *See Rhode Island Royal Charter, 1663*, *supra* note 15, at 11 (emphasis added).

17. *See id.*

18. Most of the thirteen colonies wrote their state constitutions soon after the start of the American Revolutionary War in 1776. *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). Rhode Island and Connecticut were the only two states that remained governed by their royal charters beyond 1780. *Id.* 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

in Rhode Island was codified into the State's 1843 Constitution with the goal of changing precisely nothing:

> 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.[19]

It is worth noting that almost half of the words of the text seek to alter nothing about the then-existing status quo.[20] Nevertheless, the text does more than lock in the status quo—it broadens the scope of the right. No longer focused on a purely fishing context, the framers included in the 1843 Constitution the key (and amorphous) phrase, "privileges of the shore."[21]

B. Jackvony v. Powel

The import of the inclusion of "privileges of the shore" remained hidden for almost a century.[22] In 1941, the Rhode Island Attorney General, Louis V. Jackvony, sued three members of the Easton Beach Commission of the City of Newport.[23] 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 belonging to the city of Newport."[24] The *Jackvony* court centered its analysis on the 1843 Constitution's added phrase:

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.*

19. R.I. CONST. art I, § 17 (1843) (emphasis added) (amended 1986).

20. *See id.*

21. *Id.*

22. Jackvony v. Powel, 21 A.2d 554, 556 (R.I. 1941).

23. *Id.* at 554.

24. *Id.* The axiom "good fences make good neighbors," though popular in other property cases, seems to be inapplicable in the shoreline-access context. *Cf.* Nye v. Brousseau, 992 A.2d 1002, 1004–06 (R.I. 2010) (controversy over a boundary line between two properties where the opinion invoked the axiom).

> 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.[25]

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*.[26]

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."[27] Indeed, the state legislature had not opined on what the constitutional language was intended to encompass.[28]

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25. *Jackvony*, 21 A.2d at 556. This passage recognizes a key result of codification—the elevation of certain practices into "rights."

26. *Id.* (emphasis added).

27. *Id.*

28. *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."). As explained *infra* in Section I., Part D., the framers of the 1986 constitutional amendment did not make this same mistake; the Annotated 1986 Constitution provides detailed reasoning behind the textual changes.

To illuminate the constitutional phrase, the court looked to dicta in cases dealing with the shoreline.[29] Three cases from the nineteenth century and one from the early twentieth century suggested that a public right of passage existed between the high-water mark and low-water mark.[30] Such language was "entitled to much consideration, especially as they seem to have been acquiesced in ever since they were stated."[31]

Having grounded itself as much as possible in the common law and relevant case law, 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.[32]

Jackvony is important for three reasons. First, it unequivocally established that the constitutional codification did more than just preserve the status quo; it transformed the public trust doctrine into a constitutional right.[33] Despite the constant hedging in the constitutional language that the provision changed nothing, the very act of codification did transform the nature of the doctrine into an enforceable public right.[34]

Second, and as a necessary corollary, *Jackvony* established that the specific wording of the constitutional text is paramount in interpreting the scope of the public trust doctrine.[35] Indeed, the

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29. *Id.* at 557–58.
30. *Id.* (examining *R.I. Motor Co. v. City of Providence*, 55 A. 696, 697–98 (R.I. 1903); *Allen v. Allen*, 19 R.I. 114, 115 (1895); *Providence Steam-Engine Co. v. Providence & S.S.S. Co.*, 12 R.I. 348, 357 (1879); and *Clark v. Peckham*, 10 R.I. 35, 38 (1871)).
31. *Id.* at 558.
32. *Id.* (first emphasis added).
33. *See id.* at 556.
34. *See id.*
35. *See id.*

entire constitutional analysis in *Jackvony* centers on the meaning of the phrase "the privileges of the shore."[36]

Third, and perhaps most consequentially, *Jackvony* recognized a public right of passage along the shoreline.[37] However, in so doing, the *Jackvony* court neglected to define the precise contours of that right. At various points in the opinion, the court referred to the high-water mark and mean high tide line but never explicitly placed the public trust doctrine at a specific point.[38] This nebulousness proved susceptible to future encroachment.

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 calculated by some phase of the tide.[39] The high-water mark is the mark left upon the shore indicating the highest elevation of the tidal water.[40] Typically, this is described as the seaweed line—the visible line of debris left by the sea.[41] The mean high water line is an average of the high-water mark calculated over a tidal epoch, typically a period of nineteen years.[42] As an average, the mean high water line is further into the

36. *See id.*

37. *Id.* at 558.

38. *Id.* at 557 (using both "high-water mark" and "mean high tide"). As explained, *infra* note 42, "mean high tide" and "mean high water" are synonymous.

39. *See Tidal Datums*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://tidesandcurrents.noaa.gov/datum_options.html [perma.cc/X2YC-NBMS] (last visited Apr. 29, 2021).

40. STEACY D. HICKS ET AL., NAT'L OCEANIC & ATMOSPHERIC ADMIN., TIDE AND CURRENT GLOSSARY 11 (1999), https://tidesandcurrents.noaa.gov/publications/glossary2.pdf [perma.cc/8TK2-MK6D].

41. *See State of the Beach/State Reports/RI/Beach Access*, BEACHAPEDIA, http://www.beachapedia.org/State_of_the_Beach/State_Reports/RI/BeachAccess [perma.cc/YG4H-7EZT] (last updated June 13, 2014).

42. HICKS, *supra* note 40, at 15–16. Confusingly, the Rhode Island Supreme Court uses 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 40, 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, http://www.beachapedia.org/Beach_Access (last updated Aug. 26, 2019) ("The mean high tide line is actually the arithmetic average of high-water heights."). For clarity's sake, this Article uses the accepted phrase "mean high water line."

water. The measurable difference between the two lines became important just four decades later.

C. State v. Ibbison

Jackvony's holding remained good law until the 1982 Rhode Island Supreme Court case *State v. Ibbison*.[43] *Ibbison* took a sparse record and used it as a springboard to significantly alter *Jackvony*'s holding.[44] For a case involving the public trust doctrine, it is hard to imagine a fact pattern more sympathetic than the one presented in *Ibbison*. There, six defendants were convicted of criminal trespass for traveling along a beach during a beach clean-up operation.[45] A littoral owner—along with a conveniently present patrolman of the Westerly Police Department—stopped the defendants who were between the high-water mark and the mean high water line.[46] 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."[47] 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."[48] Believing that his land extended down to the mean high water line—i.e., under water—the littoral owner informed the

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43. 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.

44. *See Ibbison*, 448 A.2d at 730.

45. *Id.* at 729.

46. *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.

47. *Id.*

48. *Id.* at 730.

beach cleaners that they were trespassing.[49] The defendants disagreed and were arrested.[50] The *Ibbison* court began grandly:

> In this case we consider a question involving the interpretation of a provision of our state constitution. Article I, section 17 of the Rhode Island Constitution, as amended by Art. XXXVII, secs. 1–2, provides that the people of the state "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." The question raised is this: To what point does the shore extend on its landward boundary? The setting of this boundary will fix the point at which the land held in trust by the state for the enjoyment of all its people ends and private property belonging to littoral owners begins.[51]

Yet, despite this avowed fidelity to the constitutional provision, and unlike *Jackvony*, the text of the provision itself was neither analyzed nor even considered at all in the court's analysis.[52] The court began by quickly addressing and dismissing *Jackvony*'s holding and reasoning.[53] 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."[54]

This conclusion obfuscates *Jackvony*'s central holding: that the "privileges of the shore" specifically included "a public right of passage along the shore."[55] While the term "mean high tide" does make an appearance in the decision, the *Jackvony* court consistently used the term "high-water mark" to describe the right afforded by the constitutional provision.[56] Indeed, the *Ibbison* court had already noted that the high-water mark allowed the beach

49. *Id.* at 729.
50. *Id.*
51. *Id.*
52. *Id.* at 730–33; *Cf.* Jackvony v. Powel, 21 A.2d 554, 556–57 (R.I. 1941) (examining the public trust doctrine's constitutional origin).
53. *Ibbison*, 21 A.2d at 730.
54. *Id.*
55. *Jackvony*, 21 A.2d at 558.
56. *Id.* at 557–58.

cleaners to perform their clean-up, and that the mean high water line would have submerged the clean-up operation.[57] 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.[58] Pretending that *Jackvony* was imprecise in its language deliberately dismisses its core holding regarding passage along the shore.

Having dispensed with *Jackvony*, the *Ibbison* court continued by resolving to "affix the boundary as was done at common law."[59] It turned to English understandings of shorelines and a United States Supreme Court case, *Borax Consolidated Ltd. v. City of Los Angeles*.[60] The *Ibbison* court noted that the *Borax* Court found the "mean high tide line" through the 18.6-year metonic cycle.[61] 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 purposes of the privileges guaranteed to the people of this state by our constitution."[62]

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

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

58. *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).

59. *Ibbison*, 448 A.2d at 730.

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

61. *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 [perma.cc/7XF5-YFV7] (last visited Apr. 29, 2021).

62. *Ibbison*, 448 A.2d at 732.

> line represents the point that can be determined scientifically with the greatest certainty.[63]

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.[64] 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.[65]

Ibbison is striking for both its reasoning and result. The court offered little consideration and no textual interpretation of the constitutional text at issue.[66] Indeed, for a decision interpreting a state constitutional provision, the *Ibbison* court paid curiously little attention to Rhode Island-specific case law and practice. After quickly dispensing with *Jackvony*, the *Ibbison* court spent considerable time discussing the English antecedents of the public trust doctrine.[67] Then, the *Ibbison* court relied on *Borax* to select the mean high water line as the demarcation of public trust land.[68] The *Ibbison* court even went on to justify its decision by stating that it "brings us in accord with many of the other states."[69] The *Ibbison* court spent almost its entire discussion on sources from other jurisdictions.[70] This focus on outside jurisdictions is countered by the fact that the public trust doctrine is a state law doctrine.[71] The result is a cobbled together determination untethered from the constitutional text.

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63. *Id.*

64. *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.").

65. *Id.* at 733.

66. *Id.* at 729.

67. *Id.* at 730–31.

68. *Id.*

69. *Id.* at 732–33.

70. *Id.* at 731–32.

71. *See* Hope M. Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change*, 95 NEB. L. R. 649, 651 (2017) ("The public trust doctrine is firmly embedded in state law and has been used at the state level for centuries . . . .").

Additionally, and perhaps most importantly, *Ibbison* swept aside *Jackvony's* holding regarding passage along the shore.[72] With only a cursory examination of *Jackvony*'s holding, reasoning, and application to the case at hand, *Ibbison*, in essence, overruled *Jackvony* through quiet dismissal.[73] 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 shoreline that was, by the *Ibbison* court's own admission, often submerged.[74]

The *Ibbison* court did so even despite its acknowledgment that "this point is not readily identifiable to the casual observer."[75] Thus, *Ibbison* left the beach-going public with a difficult-to-identify and often unusable public trust doctrine.

D. *The 1986 Constitutional Amendments*

In timing that can only be characterized as, in part, a reaction to *Ibbison*, the Rhode Island General Assembly passed a resolution in 1983 creating a Bi-Partisan Preparatory Committee to assemble information for a constitutional convention, and then placed the constitutional convention question on the ballot for November 6, 1984.[76] Rhode Islanders approved the ballot question in November of 1984 and, after selecting delegates, the Constitutional Convention began on January 6, 1986.[77]

Of the two-hundred and eighty-eight resolutions considered by the Constitutional Convention, fourteen were passed and sent to the November ballot.[78] One of these ballot questions—ballot question nine—was entitled "Shore Use and Environmental Protection."[79] On November 4, 1986, Rhode Islanders overwhelmingly approved this ballot question by a vote of 183,021 (67.5%) to 88,046 (32.5%)—leading one Rhode Island historian to note that the public trust doctrine amendment received "a level of

72. *See supra* Part I., Section B.
73. *See Ibbison*, 448 A.2d at 730.
74. *Id.* at 729–30 (noting that at the time of the arrest the mean high tide line was submerged).
75. *Id.* at 732.
76. *See* Andrews, et al., *supra* note 1.
77. *Id.*
78. *Id.*
79. *Id.*

acceptance higher than any of the [other] substantive ballot questions."[80]

This ballot question amended article I, section 17 of the Rhode Island Constitution as follows:

> 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 natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.[81]

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80. CONLEY & FLANDERS, *supra* note 3, at 110.

81. R.I. CONST. art. I, § 17 (changes italicized). Interestingly, the public trust doctrine is mentioned in article I, section 16 as well. *See* R.I. CONST. art. I, § 16. As an addendum to the Rhode Island Constitution's Takings Clause contained in article I, section 16, the text qualifies:

> 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 and 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. Read in tandem, sections 16 and 17 provide a strong constitutional foundation for the public trust doctrine.

Curiously, the Rhode Island public trust doctrine is *also* codified in statute. 46 R.I. GEN. LAWS § 46-5-1.2(a). The statute notes that article I, section 17 of the Rhode Island Constitution codifies the public trust doctrine, and adds that the state:

What did this amendment accomplish? This change enumerated four specific rights guaranteed by the constitution as non-exclusive examples of the "privileges of the shore": (1) the right to fish from the shore; (2) the right to gather seaweed from the shore; (3) the right to leave the shore to swim in the sea; and (4) the right to passage along the shore.[82] Most significant among these is the right of "passage along the shore."[83]

However, we need not delve into the murky depths of surmising legislative intent;[84] in the *Constitution of the State of Rhode Island and Providence Plantations: Annotated Edition*, completed on December 4, 1986, after the convention had concluded, the convention delegates provide a fascinating and clear insight into their reasoning for each constitutional change, including the change of the constitutional provision containing the public trust doctrine.[85] Coming so soon after the public's ratification of these amendments, and having been written by the drafters of the language, this commentary may fairly be termed the definitive guide to the meaning of the constitutional changes.[86]

> [H]as 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, except those portions of tidal lands or filled tidal lands in respect to which the state has formally granted title in fee simple to private individuals or to which title has been otherwise acquired by private individuals by judicially recognized mechanisms prior to the effective date of this section [July 18, 2000]. . . .

Id.

82. R.I. CONST. art I, § 17.

83. *Id.*

84. Determining legislative intent provokes considerable disagreement. *See, e.g.*, Burt Neuborne, *Serving the Syllogism Machine: Reflections on Whether Brandenburg is Now (or Ever Was) Good Law*, 44 TEX. TECH. L. REV. 1, 37 (2011) ("It is hard enough to derive a collective intent about legislative meaning from a single body of contemporaneous legislators . . . ."). In particular, Justice Scalia found fault with utilizing legislative history to give meaning to legislation. *See* John F. Manning, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 33–36 (2006).

85. CONSTITUTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS: ANNOTATED EDITION 8–10 (1988), helindigitalcommons.org/cgi/viewcontent.cgi?article=1026&context=lawarchive [perma.cc/7WJE-ZSMC] [hereinafter ANNOTATED CONSTITUTION].

86. As a contemporaneous document written by the Constitutional Convention delegates, the commentary is about as good as extrinsic sources get.

The commentary is unequivocal in describing the changes to the Rhode Island public trust doctrine.[87] Citing *Ibbison*, the commentary notes that "[t]he [Rhode Island Supreme] [C]ourt has determined that the landowned boundary of the shore is the mean high tide line . . . and not at the highest tide ever reached along the shore."[88] The commentary then notes that "[t]he committee was concerned with the absence of [a] constitutional definition of the 'privileges of the shore' to which Rhode Islanders are entitled."[89] It expressly states that "[t]he case of [*Jackvony*] . . . was central to the deliberations of the committee."[90] In particular, "[t]he [*Jackvony*] court specifically recognized a public right of passage along the shore . . . ."[91] Accordingly, "[t]he committee *strongly affirmed* that the [*Jackvony*] case accurately reflected those shore privileges which have been in place in Rhode Island historically. The resolution reflected that sentiment."[92]

The commentary on this constitutional change is clear: the language was changed to modify *Ibbison* and reinstate *Jackvony*.[93] By expressly adding the right of "passage along the shore," and, by implication, knowing that passage along the shore was often impossible under the *Ibbison* rule, the framers of the constitutional amendment codified *Jackvony* and all but explicitly overruled *Ibbison*.[94]

Notwithstanding the express description of their intentions, the framers hedged slightly: "[t]he committee also considered clarifying the definition of the term 'shore' as used in the Constitution. After long deliberation, the committee left the definition of the term 'shore' for judicial determination."[95] There is some indication that the framers indulged this hesitation to fully

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At least to the extent that any extrinsic source is helpful in determining the plain meaning of the changed constitutional provisions.

87. *See* ANNOTATED CONSTITUTION, *supra* note 85, at 8–10.
88. *Id.* at 9 (citing State v. Ibbison, 448 A.2d 728 (R.I. 1982)).
89. *Id.*
90. *Id.* (citing Jackvony v. Powel, 21 A.2d 554 (1941)).
91. *Id.*
92. *Id.* (emphasis added).
93. *See id.* at 8–10.
94. *See id.*
95. *Id.* at 10.

define the term to avoid any constitutional "takings" challenges.[96] In any event, despite a seemingly clear intention to codify *Jackvony*, at least some component of the constitutional change contemplated future judicial interpretation.

II. THE PUBLIC TRUST DOCTRINE AFTER 1986

Despite the significant changes intended by the 1986 constitutional amendment, Rhode Island courts have not updated or modified Rhode Island's public trust doctrine jurisprudence accordingly. This Part examines the more than thirty years of Rhode Island Supreme and Superior Court decisions that followed the 1986 constitutional amendment. Three conclusions emerge: (1) the Rhode Island Supreme Court has not interpreted the changed constitutional language; (2) *Ibbison* remains good law; and (3) the public trust doctrine continues to be described as a common law doctrine.

A. *Rhode Island Supreme Court Cases After 1986*

In over thirty years of public trust doctrine decisions, the Rhode Island Supreme Court has not once grappled with the new language added by the 1986 constitutional amendment. Since 1986, the Rhode Island Supreme Court has discussed the state's public trust doctrine in six cases.[97] Some of these cases were high

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96. *See* CONLEY & FLANDERS, *supra* note 3, at 111. This issue raises the interesting and unexplored question: whether a constitutional amendment that physically alters property rights can be a compensable "taking" under the Fifth Amendment of the United States Constitution or article I, section 16 of the Rhode Island Constitution. To the author's knowledge, no literature exists on this admittedly rare issue. As further described in this Part, the Rhode Island judiciary's failure to interpret the word "shore" at all after the 1986 constitutional amendment forecloses any real-world consideration of the "constitutional takings" issue.

97. *See* State *ex. rel.* Town of Westerly v. Bradley, 877 A.2d 601, 606–07 (R.I. 2005); Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1165–67 (R.I. 2003); Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259–60 (R.I. 1999); Providence & Worcester R.R. Co. v. Pine, 729 A.2d 202, 204–05 (R.I. 1999); Greater Providence Chamber of Com. v. State, 657 A.2d 1038, 1041–45 (R.I. 1995); Hall v. Nascimento, 594 A.2d 874, 876–77 (R.I. 1991). Several other cases mention the public trust doctrine but do not discuss it at length. Specifically, in *Providence & Worcester R.R.*, the court noted its prior precedent in *Greater Providence Chamber of Commerce* and *Hall*, but did so to explain the procedural travel, not to rule on the merits of the case. *See* 729 A.2d at 204–05. Other cases cite the constitutional provision for other afforded

profile cases that attracted significant attention from Rhode Island residents, legal practitioners, and academics.[98]

Of those six cases that explicitly discuss the public trust doctrine, only three even cite to the relevant constitutional provision.[99] Not one of those three cases makes any note of the added language nor purports to interpret that language.[100]

And while, surely, not all six cases that came before the Rhode Island Supreme Court squarely presented the issue of the change in the public trust doctrine's scope after the 1986 constitutional amendments, the court's failure to even recognize the change is notable. This is particularly so in light of the Rhode Island Supreme Court's scrutiny of other contemporaneous constitutional changes from the 1986 Constitutional Convention.[101] And, in other contexts, the court has extensively discussed the import of statutory amendments.[102] Nevertheless, over thirty years after the constitutional amendment, and despite ample opportunity to do so, the Rhode Island Supreme Court has not acknowledged that the public trust doctrine was changed.

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rights, most notably the public's right of fishery. *See* Riley v. R.I. Dept. of Envt'l Mgmt., 941 A.2d 198, 208 (R.I. 2008).

98. In particular, *Greater Providence Chamber of Commerce* attracted significant scholarly attention (at least, as far as Rhode Island Supreme Court cases go). No fewer than two law review articles and one case comment were written on it. *See* John M. Boehnert, Greater Providence Chamber of Commerce v. State*: Balancing Private Property Rights in Filled Tidal Lands Under the Rhode Island Public Trust Doctrine*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 637, 637–42 (1997); Matthew D. Slepkow, *Shoring Up the Limits of Rhode Island's Public Trust Doctrine:* Greater Providence Chamber of Commerce v. State of Rhode Island *Makes it Simple as One, Two, Fee*, 1 ROGER WILLIAMS U. L. REV. 183, 184–89 (1996); Karen Hambleton, Comment, *Property Law—State Cannot Reacquire Title to Filled Tidal Land Solely on Basis of Public Trust Doctrine*—Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995), 30 SUFFOLK U. L. REV. 489, 489–97 (1997).

99. *See Bradley*, 877 A.2d at 606; *Champlin's Realty Assocs.*, 823 A.2d at 1166; *Thornton-Whitehouse*, 740 A.2d at 1259.

100. *See Bradley*, 877 A.2d at 606; *Champlin's Realty Assocs.*, 823 A.2d at 1166; *Thornton-Whitehouse*, 740 A.2d at 1259.

101. *See, e.g.*, Irons v. R.I. Ethics Comm'n, 973 A.2d 1124, 1132 (R.I. 2009) (analyzing the Ethics Amendment passed after the 1986 Constitutional Convention).

102. *See*, *e.g.*, Direct Action for Rights & Equality v. Gannon, 819 A.2d 651, 657–59 (R.I. 2003) (addressing subsequently passed amendments to the state's Access to Public Records Act).

Instead, the Rhode Island Supreme Court has done the very opposite of what the framers of the 1986 constitutional amendment intended: it has continued to cite *Ibbison*'s holding and ignored *Jackvony*. Three of the six public trust doctrine cases since 1986 have cited *Ibbison* favorably.[103] One of these cases, *Champlin's Realty Associates L.P., v. Tillson*, connects *Ibbison* to the mean high water line.[104]

Conversely, only one public trust doctrine case cited *Jackvony*, and it did so in passing.[105] As noted above, the commentary to the Annotated 1986 constitutional amendments makes clear that *Ibbison* was intended to be overruled and *Jackvony* codified.[106] It appears the Rhode Island Supreme Court has done the opposite.

Finally, the Rhode Island Supreme Court has emphasized the common law origins of the public trust doctrine. This focus necessarily comes at the expense of the constitutional text. Despite the fact that the public trust doctrine is constitutionally codified, the Rhode Island Supreme Court has, again and again, posited the doctrine as a common law doctrine.[107] For example, in its discussion of the public trust doctrine under the sub-heading "The Public Trust Doctrine as a Doctrine of State Law," the *Greater Providence* court failed to cite or even mention the relevant constitutional provision.[108] Instead, the court treated the doctrine in express common law terms: "this inquiry will focus on the laws of Rhode Island and will include the customs and usages relating to

103. *See Champlin's Realty Assocs.*, 823 A.2d at 1164 n.3; Greater Providence Chamber of Com. v. State, 657 A.2d 1038, 1043 (R.I. 1995); Hall v. Nascimento, 594 A.2d 874, 877 (R.I. 1991).

104. *See Champlin's Realty Assocs.*, 823 A.2d at 1164 n.3 (citing State v. Ibbison, 448 A.2d 728, 730 (R.I. 1982)). Interestingly, the two other cases, *Greater Providence Chamber of Commerce* and *Hall*, cite *Ibbison* for the proposition that the state holds title below the "high-water mark," suggesting some confusion between the terms "high-water mark" and "mean high water line." *See Greater Providence Chamber of Com.*, 657 A.2d at 1043 (citing *Ibbison*, 448 A.2d at 731); *Hall*, 594 A.2d at 877 (citing, *inter alia*, *Ibbison*, 448 A.2d at 730, 730–32).

105. *See* Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999) (briefly cataloguing some of the "privileges of the shore" (citing Jackvony v. Powel, 21 A.2d 554, 558 (R.I. 1941)).

106. *See supra* Part II., Section A.

107. *See, e.g.*, *Hall*, 594 A.2d at 876–77; *see also Greater Providence Chamber of Com.*, 657 A.2d at 1041–42.

108. *See Greater Providence Chamber of Com.*, 657 A.2d at 1042–43.

the public trust doctrine from our early colonial history to the present, and we shall refer to other state and federal decisions where helpful."[109]

In *Champlin's Realty Associates*, the Rhode Island Supreme Court maintained this common law framework.[110] There, the court considered the Greek and English common law origins of the public trust doctrine, and again cited federal courts and sister jurisdictions in its consideration of the doctrine's scope.[111]

The court's emphasis on the common law nature of the doctrine conflicts with the fact that the doctrine is constitutionally codified. Although the history of a constitutional provision surely informs the doctrine's interpretation, the Rhode Island Supreme Court has focused on the common law underpinnings to the neglect of the constitutional text.[112]

As a result, with no interpretation of the new constitutional language, no consideration of what the constitutional amendment did to change the doctrine, and no fidelity to the controlling constitutional provision, the Rhode Island public trust doctrine has become divorced from its constitutional language. Unconnected to its codifying text, it has become a doctrine untethered.

B. *Rhode Island Superior Court Cases After 1986*

The Rhode Island Supreme Court's approach to the state's public trust doctrine has, naturally, influenced the superior court's treatment. An analysis of over thirty years of superior court cases demonstrates that the superior court has largely corroborated and reiterated the supreme court's precedent.

Six additional superior court cases over this time period substantively address the state's public trust doctrine.[113] These

109. *Id.* at 1042.

110. *See* Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1165–67 (R.I. 2003).

111. *See id.* at 1166–67 (citing State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1130 (Vt. 1989); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892)).

112. Rhode Island is one of the relatively few states that has codified the provision in its constitution. *See* Craig, *supra* note 11, at 4, 20–21 (noting that of the thirty-one states studied, only twelve states had codified the public trust doctrine into their respective state constitutions).

113. Baird Props., L.L.C. v. Town of Coventry, No. KC-2015-0313, 2015 WL 5177710, at *8 n.10 (R.I. Super. Aug. 31, 2015); Humphrey v. Coastal Res.

cases demonstrate that the superior court routinely cited *Ibbison* as good law.[114] Indeed, *Ibbison*'s holding remains undisturbed; the mean high water line is still cited as the landward boundary of the shore.[115] Correspondingly, *Jackvony* is often overlooked or ignored altogether.[116]

The superior court has also taken the same tack the Rhode Island Supreme Court has, over-relying on common law and sister state jurisdictions at the expense of the constitutional text.[117] For example, the superior court in *Palazzolo v. State* explicitly recognized that the public trust doctrine has been codified in the constitution, but then it restated the doctrine in common law terms, quoting the Rhode Island Supreme Court to term it "common law."[118] In *Night Sisters Corporation v. Hog Island, Inc.*, the superior court described the public trust doctrine and its application to the case at hand without once citing the relevant constitutional language.[119] Like the Rhode Island Supreme Court, therefore, the superior court largely fails to tether their analysis of the state's public trust doctrine to its constitutional codification.[120]

Mgmt. Council, Nos. PC 10-1317, PC 10-1384, 2011 WL 3153309, at *3 (R.I. Super. June 28, 2011); Night Sisters Corp. v. Hog Island, Inc., No. 04-0380, 2007 WL 711822, at *11 (R.I. Super. Feb. 26, 2007); Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, at *7 (R.I. Super. July 5, 2005); Cavanaugh v. Town of Narragansett, No. WC 91-0496, 1997 WL 1098081, at *6–7 (R.I. Super. Oct. 10, 1997); DeLeo v. Coastal Res. Mgmt. Council, No. C.A. NO. 86-5127, 1988 WL 1016794, at *11 (R.I. Super. Aug. 9, 1988).

114. *See Baird Properties*, 2015 WL 5177710, at *8 n.10; *Cavanaugh*, 1997 WL 1098081, at *7; *cf. Night Sisters*, 2007 WL 711822, at *11 (citing *Ibbison* incorrectly for the proposition that "the state maintains title in fee to all soil within its boundaries that lies below the *high-water mark*" (citing State v. Ibbison, 448 A.2d 728, 730, 732–33 (R.I. 1982)) (emphasis added)).

115. *See Baird Properties*, 2015 WL 5177710, at *8 n.10.

116. *See*, *e.g.*, *Night Sisters*, 2007 WL 711822, at *11 (making no mention of *Jackvony*). *But see Baird Props.*, 2015 WL 5177710, at *8 n.10 (citing *Jackvony* for the proposition that passage along the shore was one of the "privileges of the shore," in the same footnote it cites *Ibbison*, apparently unaware of the contradiction (citing State v. Ibbison, 448 A.2d 728, 732 (R.I. 1982); Jackvony v. Powel, 21 A.2d 554, 558 (R.I. 1941))).

117. *See Palazzolo*, 2005 WL 1645974, at *7.

118. *Id.* (quoting Greater Providence Chamber of Com. v. State, 657 A.2d 1038, 1042 (R.I. 1995)).

119. *See Night Sisters*, 2007 WL 711822, at *11.

120. *See supra* Part II., Section A.

However, one superior court case—*Cavanaugh v. Town of Narragansett*—bucks the trend.[121] There, the superior court not only recognized that the 1986 amendment materially changed the scope of the public trust doctrine—something no other Rhode Island court has acknowledged—but it also took the next step of attempting to grapple with and interpret the added constitutional language.[122] The case arose when Mr. Cavanaugh, a private citizen, brought a suit with several other private citizens on behalf of the public against the Town of Narragansett and the State of Rhode Island alleging that the practice of charging a fee for access to Narragansett Town Beach violated statutory and constitutional rights, among them the public trust doctrine.[123] Specifically, the plaintiffs asserted that the constitutional provision codifying the public trust doctrine granted them a right of perpendicular access along the shore.[124] The superior court looked at the plain and ordinary meaning of the language of the constitutional provision and compared it with the pre-1986 language.[125] The superior court also examined the constitutional committee report and findings from the 1986 Constitutional Convention.[126] Ultimately, the superior court declined to find a right of perpendicular access across property to the shore in the constitutional language, explaining that:

> [T]he record supports a finding that the Constitutional Convention members were more than aware of the fact that in some circumstances they were creating a right that could not be vindicated or exercised by the Constitution alone but rather required state legislative action to also take place so as to create legally enforceable access points.[127]

Despite the substantial interpretive effort, this decision is not binding on any court and, indeed, has not been cited by another

121. *See* Cavanaugh v. Town of Narragansett, No. WC 91-0496, 1997 WL 1098081, at *5–*8 (R.I. Super. Oct. 10, 1997).
122. *See id.* at *5–7.
123. *See id.* at *1.
124. *See id.* at *3.
125. *See id.* at *6 (discussing the language of the 1663 Charter as well).
126. *See id.* at *7.
127. *See id.* at *8.

court since it was decided twenty years ago.[128] Nevertheless, it provides an interesting counterpoint to the numerous other superior and supreme court decisions on the public trust doctrine since 1986—a glimpse of what an interpretation of the constitutional amendment could look like. However, *Cavanaugh* remains the exception that proves the rule.

In sum, the Rhode Island Superior Court has, with one notable exception, followed the supreme court's example.

III. THE PUBLIC TRUST DOCTRINE RECONSTITUTED

The Rhode Island public trust doctrine needs to be reconstituted to give full force and effect to the amended constitutional provision. This Article proposes three changes. First, and most obviously, the Rhode Island Supreme Court needs to make explicit that the 1986 constitutional amendment overruled *Ibbison* and enshrined *Jackvony*. Even the superior court in *Cavanaugh*—the only Rhode Island court that has addressed the substantive constitutional change—failed to recognize this point.[129] The 1986 Constitutional Convention delegates were clear that they viewed the mean high water mark holding from *Ibbison* with skepticism.[130] They also made plain that the *Jackvony* ruling concerning "passage along the shore" was the foundation for the added language in the amendment.[131] Any consideration of the post-1986 constitutional text must, therefore, recognize the intent of the provision to overrule *Ibbison* and codify *Jackvony*. Anything less ignores the intent of the drafters.

Second, the Rhode Island public trust doctrine needs to resume constitutional dimensions. By codifying the common law doctrine, the drafters of the Rhode Island Constitution elevated the doctrine

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128. *See* Citing References for Cavanaugh v. Town of Narragansett, WESTLAW, https://1.next.westlaw.com/RelatedInformation/Id1083476371f11d986b0aa9c82c164c0/kcCitingReferences.html?originationContext=docmentTab&transitionType=CitingReferences&contexData=(sc.Search)&docSource=795c41ce8b6b446dbd49cd5451c9c53a&rank=5&rulebookMode=false (on WestLaw, narrow search jurisdiction to Rhode Island; then enter "Cavanaugh v. Town of Narragansett" in search field; select "Cavanaugh v. Town of Narragnasett"; follow "Citing References") (showing that *Cavanaugh* has not been cited to in any other judicial decision to date).

129. *See Cavanaugh*, 1997 WL 1098081, at *5–7.

130. *See* ANNOTATED CONSTITUTION, *supra* note 85, at 9.

131. *See id.*

from common law to a constitutional guarantee.[132] The Rhode Island public trust doctrine has been codified since 1663[133] and modern public trust doctrine jurisprudence in Rhode Island can be traced at least as far back as *Jackvony* in 1941;[134] it is not as if the public trust doctrine was only recently codified. As a constitutional provision, the public trust doctrine needs to be treated as such. This means that sister jurisdictions and English and Roman antecedents are of little precedential value.[135] The actual words of the constitution are of paramount importance; the public trust doctrine must be tethered to its constitutional text.

Third, and relatedly, the Rhode Island Supreme Court needs to fulfill its interpretive duty as intended by the 1986 constitutional committee and define the word "shore" in the phrase "passage along the shore," which was specifically left open to judicial interpretation by the drafters of the provision.[136] This ill-defined word means that the public trust doctrine's boundary could be at the low-water mark or all the way up to the high-water mark, a huge gap.[137] *Jackvony* had sought to place the line at or near the high-water mark.[138]

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132. Certainly, the *Jackvony* court believed that the act of codification itself accomplished this. *See* Jackvony v. Powel, 21 A.2d 554, 556 (R.I. 1941).

133. *See Rhode Island Royal Charter, 1663*, *supra* note 15, at 11.

134. *See Jackvony*, 21 A.2d at 556. Rhode Island courts, of course, interpreted and applied earlier versions of the public trust doctrine. *See, e.g.*, Allen v. Allen, 32 A. 166, 166 (R.I. 1895). The role of *Jackvony* as a touchstone of Rhode Island public trust doctrine jurisprudence is evidenced by the 1986 Constitutional Convention's explicit reference to it. *See* ANNOTATED CONSTITUTION, *supra* note 85, at 9.

135. *See* Greater Providence Chamber of Com. v. State, 657 A.2d 1038, 1041–43 (R.I. 1995).

136. *See* ANNOTATED CONSTITUTION, *supra* note 85, at 10. The superior court in *Cavanaugh* also neglected to do this, instead focusing on the meaning of the word "along." *See* Cavanaugh v. Town of Narragansett, WC 91-0496, 1997 WL 1098081, at *3–7 (R.I. Super. Oct. 10, 1997).

137. For a general description of the differences between the tidal data, see *Tidal Datums*, *supra* note 61. In *Black's Law Dictionary* "shore" is defined as: "[l]and lying between the lines of high- and low-water mark; lands bordering on the shores of navigable waters below the line of ordinary high water," and "[l]and adjacent to a body of water regardless of whether it is below or above the ordinary high- or low-water mark." *Shore*, BLACK'S LAW DICTIONARY (11th ed. 2019).

138. *Jackvony*, 21 A.2d at 558.

Ibbison placed the line at the mean high tide line.[139] The difference between even these two close lines is significant.[140]

Given *Ibbison*'s fact pattern, where the mean high water line was submerged during the alleged trespass, any logical reading of the addition of "passage along the shore," properly understood as an intentional change to *Ibbison*, must place the public trust doctrine's protections above the mean high water line.[141] But where exactly should that line be drawn?

Interpretation of the word "shore" must necessarily look at the word in context. "Passage" is commonly defined as "a way of exit or entrance: a road, path, channel, or course by which something passes."[142] A plain understanding of this term suggests that the path must be accessible to anyone to walk along. Additionally, there is no temporal limit on this word; the Rhode Island Constitution does not say "often" or "sometimes" there must be "passage along the shore."[143] The word thus connotes a sense of access along the shoreline that is always available to the public, regardless of the tide.

Interpretation of the word "shore" can also be helped by a look at the other enumerated rights added by the 1986 constitutional amendment: "fishing from the shore, the gathering of seaweed, [and] leaving the shore to swim in the sea."[144] Of these, "the gathering of seaweed" is most helpful, as the constant waves often place a seaweed "line" along the beach.[145] Although there is some disagreement as to where, exactly, the seaweed line corresponds with tidal data,[146] logically the seaweed line is at least as far inland as the tide will go. Guaranteeing the public the right to gather this seaweed suggests that the "shore" must be closer to the high-water mark.

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139. State v. Ibbison, 448 A.2d 728, 731 (R.I. 1982).

140. *See supra* Part I., Section C.

141. *See id.*

142. *Passage*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/passage [perma.cc/HCD3-FKAY] (last visited Apr. 29, 2021).

143. *See* R.I. CONST. art I, § 17.

144. *Id.*

145. *See State of the Beach/State Reports/RI/Beach Access*, *supra* note 41.

146. For example, the *Ibbison* court did not believe the seaweed line corresponded with the high-water mark but indicated they did not have enough of a record to know. *See* State v. Ibbison, 448 A.2d 728, 730 (R.I. 1982).

With these points in mind, this Article proposes that the "shore" should be interpreted as a flexible line slightly above wherever the shoreline may be at a particular time, provided that at all times the public may pass along the shore. In times of low tide, the ability to walk along the shore will encroach less upon shoreline property owners. In times of high tide, the ability to walk along the shore will encroach more.

This flexible demarcation of the public trust doctrine makes practical sense. For the public, the right is easy to understand and use: one must simply walk along the water's edge. For shoreline property owners, the ever-moving target still allows for some modicum of certainty. Indeed, shoreline property owners can still place fences and signs *above* the high-water mark if they wish.

Placing the public trust doctrine along the water's edge also fixes any potential disputes like the one that occurred in *Ibbison*.[147] No shoreline property owner need argue with a member of the public about where, precisely, the public trust doctrine extends. The instantly knowable line solves this problem.

Moreover, this flexibility allows the public trust doctrine to weather the instant and coming effects of global climate change.[148] A public trust doctrine tethered to a particular tidal datum will necessarily grow obsolete. *Ibbison*'s mean high water line was calculated using the Metonic cycle, an 18.6-year averaging of tidal data.[149] While this may have made sense years ago, global climate change is shifting the contours of tidal lines faster than any multi-year average can capture. An 18.6-year average would be helplessly swallowed by sea-level rise.[150] A flexible standard allows the public trust doctrine to adapt to constantly changing circumstances.

In sum, a flexible definition of "shore" provides for "passage along the shore" with certainty, practicality, and adaptability, all important facets of a reconstituted public trust doctrine.

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147. *See id.* at 729–30.

148. For a general explanation of the expected impacts of climate change to Rhode Island specifically, see Grover Fugate, *Implications of Climate Change for Rhode Island*, SHELDON WHITEHOUSE, http://www.whitehouse.senate.gov/imo/media/doc/Grover%20Powerpoint.pdf [perma.cc/Q2VX-J47N] (last visited Apr. 29, 2021).

149. *Ibbison*, 448 A.2d at 730.

150. *See* Fugate, *supra* note 148.

CONCLUSION

For over three hundred years, Rhode Islanders have enjoyed a codified public trust doctrine. Despite a broadening of this codification in 1986, the Rhode Island public trust doctrine has languished in jurisprudential neglect, untethered to its constitutional text. This state of affairs can be remedied by a full recognition of the changes intended by the 1986 constitutional amendment and a new demarcation of the public trust doctrine's scope—one that is easy to understand, intuitive to use, and adaptable to the inevitable changes ahead. Doing so would at last fulfill the substantive changes intended by the 1986 constitutional amendment.