RHINO CHASERS AND RIFLES: SURFING UNDER THE PUBLIC TRUST DOCTRINE

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Coastal development and erosion, rising seas and climate change, and alterations to watersheds threaten to decimate beach access the public has enjoyed for generations. Surfers and other recreational beachgoers have embraced the public trust doctrine as a legal theory that protects their continued access to beaches and submerged lands, even as beaches disappear. The doctrine has long been championed as the silver bullet for protecting natural resources in the face of environmental threats and development.

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While the doctrine imposes certain responsibilities and limitations on trustees of trust lands, and it protects certain public trust doctrine uses, it is not clear that surfing qualifies as a protected use. This uncertainty stems from the fact that there are at least fifty public trust doctrines in the United States, which developed independently based on the needs of each jurisdiction. These modern doctrines protect traditional uses, such as navigation and fishing, but also sometimes include recreation and other expanded uses under the doctrine.

This article investigates whether surfing is currently a protected use under these public trust doctrines. It first explains surfing's importance and value to the coastal United States, both economically and culturally. Next, it explains what the public trust doctrine is and traces its path from ancient Roman doctrine to modern environmental law cornerstone. Finally, it analyzes the coastal public trust doctrines and whether surfing fits within the scope of these jurisdictions' doctrines. This article looks both at whether states currently recognize surfing and whether they might under the bounds of their existing doctrines under case law.

I. INTRODUCTION

> *"[A] citizen of the state may walk along a beach carrying a fishing rod or a gun, but may not walk along that same beach empty-handed or carrying a surfboard."*[1]

> *"By the late fifties, big-wave disciples were viewing their sport in nothing but the hairiest terms. The big-wave surfboard was now called a 'rhino-chaser'. . . ."* [2]

Imagine driving hours to your favorite beach to surf or swim as you had done for decades, only to find that new owners had locked the road to the beach. This happened in 2010 when billionaire tech mogul Vinod Khosla locked the gate to the access road to Martin's Beach in northern California's San Mateo County, shuttering access to a beach and surf break that beachgoers and surfers had enjoyed for decades.[3] In 2011, on the other side of the country, the Maine Supreme Court found that the state's common law protects

1. Eaton v. Town of Wells, 760 A.2d 232, 248–49 (Me. 2000) (Saufley, J., concurring).
2. MATT WARSHAW, MAVERICK'S 35 (updated ed. 2003).
3. Julia Scott, *San Mateo County Seeks to Reopen Martin's Beach*, THE MERCURY NEWS (Jan. 21, 2011, 11:03 PM), http://www.mercurynews.com/2011/01/21/san-mateo-county-seeks-to-reopen-martins-beach/.

the right of its citizens to the intertidal zone of its beaches for the purposes of scuba diving, but not necessarily to surf.[4] This decision came more than a decade after the *Eaton* decision quoted above—a decision that highlighted the absurdity of allowing beach access for certain purposes, like hunting and fishing, while outlawing similar but non-extractive uses, such as surfing, on Maine's beaches. In 2014, Paradise Cove in Malibu, California banned surfers and surfboards at its pier located on state tidelands—an illegal action the pier operators reversed only after state regulators threatened legal action.[5]

These beach access clashes on opposite ends of the United States are examples of the mounting threats to the public beach access enjoyed by generations of Americans. But these disputes are not new, nor are they isolated. On the contrary, surfers have long had to fight surfing bans and attempts to foreclose beach access across the globe. Surfing is an important recreational activity and cultural pastime that generates millions of dollars for coastal communities throughout the United States and is deeply ingrained in several states' cultural identities, particularly California's and Hawaii's. Despite its importance, the California and Maine legal disputes discussed above show that surfing is often blocked or otherwise actively discouraged by coastal communities and private property owners.[6]

The public trust doctrine, an ancient legal tenet, might provide relief to beachgoers and surfers hoping to ensure continued beach access in the face of efforts to privatize and reduce beach access for non-coastal dwellers. The doctrine imposes certain responsibilities on public trust land trustees, while at the same time protecting certain uses of those public trust lands. While the doctrine traditionally protected only certain uses such as commerce and navigation, the doctrine is evolving independently in different states with some states extending it to include other uses, including recreational activities like surfing.

This article examines coastal state public trust doctrines to determine the uses they protect and whether surfing fits within

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4. *See* McGarvey v. Whittredge, 28 A.3d 620 (Me. 2011); *see also* Angela Howe, *Maine High Court Ruling – Scuba Diving: 6, Exclusive Intertidal Zone: 0*, SURFRIDER FOUNDATION COASTAL L. BLOG (Aug. 25, 2011), http://www.surfrider.org/coastal-blog/entry/maine-high-court-ruling-scuba-diving-6-exclusive-intertidal-zone-0.

5. Sarah Parvini, *Paradise Cove in Trouble Again for Charging for Beach Access*, L.A. TIMES (July 2, 2016, 6:00 AM), http://www.latimes.com/local/lanow/la-me-adv-malibu-beach-access-20160629-snap-story.html.

6. In the past, these actions were the rule rather than exceptions. *See infra* Section I.A. (recounting previous laws and ordinances outlawing surfing and how surfers were traditionally portrayed as unruly beach bums and reprobates).

those uses. Section I explores surfing's importance and sets out the threats facing beach access. Section II traces the public trust doctrine from ancient Roman tenet to modern U.S. common law principle. Section III provides a state-by-state analysis of the uses currently protected in each state, and considers whether surfing fits within any of these uses. Finally, Section IV looks to the future and explains how states can protect surfing under the doctrine and through other means.

II. SURFING

A. Surfing's Importance

Surfing is a popular leisure activity with deep roots in coastal culture,[7] significant economic[8] and cultural[9] impacts, and extensive, often profound, effects on its participants.[10] Surfing occurs in the nearshore waters of the coastal ocean where waves, generated in distant storms, are disrupted by the seafloor and break.[11] A "surf break" or "surf spot" is the "specific location where local conditions of bathymetry [i.e., seafloor depth contours] and coastal orientation shape waves in ways surfers favor for riding."[12] Surfing, therefore, takes place at the land-sea interface, "the point of greatest interest . . . where the land and water meet."[13] This is a complex zone, not only in terms of its physical environment and

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7. *See generally* MATT WARSHAW, THE HISTORY OF SURFING 18–89 (2010).

8. Neil Lazarow et al., *The Value of Recreational Surfing to Society,* 5 TOURISM IN MARINE ENV'TS 145, 145 (2008).

9. WARSHAW, *supra* note 7, at 10–11.

10. Dan Reineman & Nicole Ardoin, *The Sustainable Tourism Management of Nearshore Coastal Places: Surfers' Place Attachment and Disruption to Surf-Spots,* 26 J. SUSTAINABLE TOURISM 325, 334–35 (2017); Dan Reineman, *The Utility of Surfers' Wave Knowledge for Coastal Management,* 67 MARINE POL'Y 139, 144–45 (2016); Bron Taylor, *Surfing into Spirituality and a New, Aquatic Nature Religion,* 75 J. AM. ACAD. RELIGION 923, 943–51 (2007).

11. While the sweeping majority of surf breaks are situated in the coastal ocean, surf breaks, and thus surfing and surfers, can also be found in non-coastal ocean waters, lakes, rivers, and artificial pools, though in these cases, such as tidal bore waves, standing river waves, and artificial waves, the wave generation mechanisms differ from that of ocean waves. For a global overview of surf break locations see SURFLINE, www.surfline.com (last visited Jan. 16, 2019). For an overview of surfing wave physics see TONY BUTT, PAUL RUSSELL & RICK GRIGG, SURF SCIENCE: AN INTRODUCTION TO WAVES FOR SURFING (2d ed. 2004).

12. Dan Reineman, *The Human Dimensions of Wave Resource Management in California*, (Aug. 25, 2015) (unpublished Ph.D. dissertation, Stanford University), https://purl.stanford.edu/wf295wm6779; "Surf spots" are also referred to interchangeably as "surf breaks." Bradley E. Scarfe et al., *Sustainable Management of Surfing Breaks: Case Studies and Recommendations,* 25 J. COASTAL RESEARCH 533, 684 (2009).

13. RALPH WALDO EMERSON, *The Method of Nature, in* WORKS 588, 596 (1897).

ecology, but also in how lands and resources are managed,[14] a fact that makes surfing unique: it takes place in "the most dynamic field of play in all of sports."[15]

Historically, the act of riding waves—what today is referred to as surfing—was pioneered in two separate, distant cultures: Peru and Hawaii.[16] The historic purpose of Hawaiian surfing was strictly recreational, whereas Peruvian surfing was the practical method fishermen used to return to shore.[17] For this reason, and because of the differences in the specialized equipment (i.e., surfboards) utilized in Hawaii, the sport's[18] cultural origins are situated in Hawaii and so it is from Hawaii that surfing has spread around the globe over the past century to its present level of popularity.[19]

Surfing's popularity manifests in a variety of cultural and economic ways. Culturally, surfing and surfers frequently appear in marketing campaigns to sell everything from cars to online data storage, an impressive evolution since surfers were once considered cultural outcasts. Many coastal communities define themselves by the quality of their waves or the popularity of surfing among the residents. Huntington Beach, for example, proclaims itself "Surf City USA," a title for which it vied bitterly with another California town, Santa Cruz, for decades; the matter was finally settled with a lawsuit in 2008 that Huntington Beach won.[20] Individual surfers can also be profoundly affected by their participation in surfing, which can cause them to modify their schedules, their lifestyles, and their places of residence.[21]

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14. *See generally* Margaret Caldwell et al., *Coastal Issues, in* ASSESSMENT OF CLIMATE CHANGE IN THE SOUTHWEST UNITED STATES 168 (Gregg Garfin et al. eds., 2013); TOM GARRISON, OCEANOGRAPHY: AN INVITATION TO MARINE SCIENCE 231–251, 280–306 (3d ed. 2001).

15. Other recreational activities, e.g., swimming and surf-cast fishing also occur in this location, but they are not as popular nor dependent on waves. VERNON LEEWORTHY & PETER C. WILEY, CURRENT PARTICIPATION PATTERNS IN MARINE RECREATION 14–46 (2001); World Surf League, *Rich Porta Reveals: Judging Rio and Everything in Between,* WSL WORLD TOUR BLOG (May 6, 2014), http://www.worldsurfleague.com/posts/43384/rich-porta.

16. WARSHAW, *supra* note 7, at 19–28.

17. *Id.* at 21.

18. Whether or not surfing is actually a "sport" is contested within the surfing community. *See, e.g.*, Jaimal Yogis, *Is Surfing More Sport or Religion?*, THE ATLANTIC (July 23, 2017), https://www.theatlantic.com/entertainment/archive/2017/07/is-surfing-more-religion-than-sport/533721/; Brian Blickenstaff, *Is Surfing a Sport? An Investigation*, VICE SPORTS (Dec. 5 2014, 11:30 AM), https://sports.vice.com/en_us/article/d7b9v7/is-surfing-a-sport-an-investigation; Junior Faria, *Surfing Is Not a Sport*, THE INERTIA (Dec. 4, 2012), https://www.theinertia.com/surf/surfing-is-not-a-sport/.

19. *Id.*

20. Cindy Carcamo, *Huntington Beach Settles Surf City USA Lawsuit,* ORANGE COUNTY REGISTER (Jan. 22, 2008, 3:00 AM), https://www.ocregister.com/2008/01/22/huntington-beach-settles-surf-city-usa-lawsuit/.

21. Reineman & Ardoin, *supra* note 10, at 331–33.

The sport's increasing cultural appeal and participation rates over the last several decades have significant economic impacts.[22] There are currently millions of surfers in the United States[23] (and millions more globally[24]), and they annually directly inject billions of dollars into the U.S. economy.[25] These financial benefits are felt locally in the communities surrounding popular surf breaks, such as Trestles in Southern California or Mavericks in Half Moon Bay, California, which have been estimated at respectively generating $8 million to $13 million and $23.8 million annually.[26] Surfing also drives an international industry for surfboards, other surfing equipment, and apparel, estimated to top $13 billion in 2017.[27] Additionally, the presence of high quality surf breaks in coastal communities in the developing world has been found to spur economic growth and development in those communities at rates significantly higher than in communities not endowed with a surf break.[28]

In light of these factors alone, the relationship between waves, surf breaks, surfers, and the management of the coastline is worthy of consideration. However, here are several other factors that also warrant mention. The first is that because of its occurrence in and reliance on nearshore coastal waters,[29] surfing is unique among both recreational activities and coastal uses. The second is that this location—the nearshore coastal environment—is highly susceptible to environmental change.

Surfing almost exclusively occurs at ocean surf breaks where waves break appropriately for riding. The precise location is determined by the relationship between the size of the breaking wave and the water depth; both factors shift with every wave and also as the tide, season, and coastline cycle and change.[30] The precise location is also determined by the path taken by any surfer as he or she rides a wave—a factor that shifts based on the wave

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22. Lazarow et al., *supra* note 8, at 145.

23. LEEWORTHY & WILEY, *supra* note 15, at 20.

24. Jess Ponting & Matthew G. McDonald, *Performance, Agency, and Change in Surfing Tourist Space,* 43 ANNALS OF TOURISM RES. 415, 415 (2013).

25. G. SCOTT WAGNER, CHAD NELSEN & MATT WALKER, A SOCIOECONOMIC AND RECREATIONAL PROFILE OF SURFERS IN THE UNITED STATES 1 (2011).

26. Chad Nelsen, Linwood Pendleton & Ryan Vaughn, *A Socioeconomic Study of Surfers at Trestles Beach*, 75 SHORE & BEACH 32, 36 (2007); MAKENA COFFMAN & KIMBERLY BURNETT, THE VALUE OF A WAVE: AN ANALYSIS OF THE MAVERICKS REGION, HALF MOON BAY, CALIFORNIA 10 (2009).

27. GLOBAL INDUSTRY ANALYSTS, SURFING INDUSTRY GROWTH GIA REPORT (2014).

28. THOMAS MCGREGOR & SAMUEL WILLIS, NATURAL ASSETS: SURFING A WAVE OF ECONOMIC GROWTH 1 (2016).

29. *See* discussion *supra* note 11.

30. BUTT ET AL., *supra* note 11, at 50–94, 101–11.

itself and the surfer's skill, preference, mood, etc.[31] This path is incorporated into the area of the surf break itself and is necessarily situated in the surf-zone, a region lying wholly in the subtidal zone, the intertidal zone, or both, depending on the location and conditions.[32] The intertidal, or littoral, zone is the region bounded by the high and low tide lines; the subtidal zone lies beneath the low tide line.[33] Both are below the high tide line. With the exception of some specific strategies for fishing (e.g., "surfcasting"[34]) that likewise rely on the surf zone, surfing is unique in its complete reliance on this zone of the ocean. Furthermore, the use of this zone—and the waves that break in it—imparts to surfers a unique type of local ecological knowledge: wave knowledge.[35]

In addition to surfers being uniquely attuned to waves and to the coastal environment, waves themselves are uniquely attuned to the coastal environment and highly sensitive to its changes—natural and unnatural. This sensitivity is the result of the myriad factors that interact to control exactly how a wave breaks.[36] Because depth is one of the key physical features that governs wave breaking, factors that affect water depth are especially important. These factors span short and long time scales and can be both human-caused and naturally occurring. For example, the tidal cycle is a short-term and naturally occurring process that can change water depth over a fixed coastal location anywhere from millimeters to dozens of meters, depending on the coastline, time of month, and time of year.[37] California's tide range is roughly 1.6 m,[38] and the tide's height has a large impact on the quality of the surf.[39] On a still shorter time scale, coastal communities might sanction projects in the coastal zone that modify the zone's physical structure and drive changes in the supply of sediments (typically sand) to the seafloor, either choking off supply or adding to it, with diverse impacts on wave quality.[40] On a longer time

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31. DOUG WERNER, SURFER'S START-UP: A BEGINNER'S GUIDE TO SURFING (2d ed. 1999).

32. GARRISON, *supra* note 14.

33. *Id.*

34. *See, e.g., Surf Fishing*, WIKIPEDIA, https://en.wikipedia.org/wiki/Surf_fishing.

35. Reineman, *supra* note 10, at 144–45.

36. BUTT ET AL., *supra* note 11; *see also* GARRISON, *supra* note 14.

37. For a full treatment of tides, *see* GARRISON, *supra* note 14.

38. Dan Reineman, Leif N. Thomas, & Margaret Caldwell, *Using Local Knowledge to Project Sea Level Rise Impacts on Wave Resources in California,* 138 OCEAN & COASTAL MANAGEMENT 181, 183 (2017).

39. *Id.* at 186.

40. *Id.*; *see also* Scarfe et al., *supra* note 12; Nicholas P. Corne, *The Implications of Coastal Protection and Development on Surfing,* 252 J. COASTAL RES. 427 (2009).

scale, anthropogenic climate change is driving increases in sea level,[41] and will likely drive changes in wave quality.[42]

Despite its economic importance and general acceptance by modern society, surfing has been marginalized throughout its history. When Calvinists brought religion and colonialism to Hawaii in the 19th century, they sought to uproot surfing's place in Hawaiian society.[43] Even as it gained popularity and acceptance on the mainland in the late 20th century, surfing was sometimes targeted by mainstream society who viewed it as a radical subculture.[44] On some beaches, surfing was banned during certain hours of the day,[45] or even banned completely.[46] On other beaches, surfers were required to buy a license to surf.[47] Even during the "Gidget" and "Beach Blanket Bingo" days of modern surfing's cultural infancy, surfers were portrayed as reprobates and beach bums—elements respectable seaside communities sought to keep at bay.[48] While these eras have passed, surfers are still often portrayed as bums who should be shunned, lest a community risk seedier elements creeping in.[49] If nothing else, these sagas and

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41. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY 4–11 (Chris B. Fields et al. eds., 2014).

42. Reineman et al., *supra* note 39, at 187–89.

43. Charles Wilkes, *Narrative of the United States Exploring Expedition, in* PACIFIC PASSAGES 96, 96–97 (Patrick Moser ed. 2008)

> Since the introduction of Christianity, these amusements have been interdicted; for, although the missionaries were somewhat averse to destroying those of an innocent character, yet, such was the proneness of all to indulge in lascivious thoughts and actions, that it was deemed by them necessary to put a stop to the whole, in order to root out the licentiousness that pervaded the land."); *but see* PETER WESTWICK & PETER NEUSHUL, THE WORLD IN THE CURL 19 (2013) (explaining that, after initially supporting the view that they had suppressed surfing, "[t]he missionaries themselves, however, denied that they caused surfing's decline.

44. MATT WARSHAW, THE HISTORY OF SURFING 190–91 (2010) (recounting newspaper coverage of surfing as a "cult" and surfers as criminals).

45. State v. Zetterberg, 109 N.H. 126, 244 A.2d 188 (1968).

46. Carter v. Town of Palm Beach, 237 So. 2d 130 (Fla. 1970) (finding total ban on surfboards arbitrary and unreasonable); *see also* Damon Schmidt, *Wiping out the Ban on Surfboards at Panic Point,* 27 U. HAW. L. REV. 303 (2004) (arguing that the ban on surfboards at Point Panic, Hawaii is illegal because it is arbitrary and capricious).

47. WARSHAW, *supra* note 7, at 194; *see also* People v. McGuire, 63 Misc. 2d 639, 313 N.Y.S.2d 56, 58 (City Ct. 1970).

48. This view was sometimes deserved. *See* WARSHAW, *supra* note 7, at 192 ("Mickey Dora, the Windansea gang, and plenty of other surfing trendsetters were all proud open reprobates.").

49. *See* Dylan Heyden, *The World's Most Infamous Surf Gangs,* The Inertia (June 23, 2016), https://www.theinertia.com/surf/the-worlds-most-infamous-surf-gangs/; *see also* Jacob Harper, *A Gang of Rich, White Surfer Dudes is Terrorizing a California Beach Town*, Vice (Aug. 4, 2015, at 4:30 PM), https://www.vice.com/en_us/article/nn9eed/a-gang-of-rich-white-surfer-dudes-is-terrorizing-a-california-beach-town-721.

legacy biases highlight why surfing might benefit from being recognized as a protected use under the public trust doctrine.

B. Beach Access Under Attack

While surf break protection and preservation generally continue to be important topics, beach access is similarly threatened.[50] Climate change threatens access as seas rise and beaches erode and otherwise recede and disappear.[51] This "coastal squeeze"—habitat loss in the intertidal zone due to rising seas and erosion—is only expected to increase pressure on beaches as seas rise at increasing rates and winter storms continue to batter coastlines.[52] Development also threatens beach access, sometimes closing beaches previously open to the public. Because surfing is a recreational activity that typically requires beach access, surfers and other beachgoers are increasingly worried about disappearing beach access.

Beaches face similar threats and pressures as other public lands. They are susceptible to so-called "tragedy of the commons" concerns.[53] Waves are common-pool resources, and are therefore susceptible to increasing pressures as coastal populations increase.[54] Despite these increasing pressures, surfing is a non-extractive use of these resources—i.e. it uses waves, but does not reduce the stock or quality of that resource.[55]

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50. *See* Jesse Reiblich, *Greening the Tube: Paddling Toward Comprehensive Surf Break Protection*, 37 ENVIRONS ENVTL. L. & POL'Y J. 45, 51–55 (2013). However, beach access is protected by statute, and even constitutionally, in some jurisdictions, such as California. CAL. CONST. art. 4, § 10; CAL PUB. RES. CODE § 30210 (West 2018). Still, issues persist, such as what beach access means and perhaps should mean under these protections. *See generally* Dan R. Reineman et al., *Coastal Access Equity and the Implementation of the California Coastal Act,* 36 STAN. ENVTL. L.J. 89 (2016).

51. CALIFORNIA COASTAL COMMISSION, SEA LEVEL RISE POLICY GUIDANCE 59 (2015) (explaining that "public access is . . . one of the coastal resources most at risk from accelerating sea level rise.").

52. *See, e.g.,* GARY GRIGGS ET AL., RISING SEAS IN CALIFORNIA: AN UPDATE ON SEA-LEVEL RISE SCIENCE (2017).

53. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243–45 (1968); *see also* Haochen Sun, *Toward a New Social-Political Theory of the Public Trust Doctrine,* 35 VT. L. REV. 563, 619–21 (2011) (responding to concerns about the public doctrine's susceptibility to tragedy of the commons concerns).

54. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); *see also* Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L. J. 762, 762 (1970) (recognizing beach as limited resource that becomes scarcer as population grows); *see also* CHRIS LAFRANCHI & COLLIN DAUGHTERY, NON-CONSUMPTIVE OCEAN RECREATION IN OREGON: HUMAN USES, ECONOMIC IMPACTS & SPATIAL DATA 1–2 (2011), http://surfridercdn.surfrider.org/images/uploads/publications/OR_rec_study.pdf.

55. *But see* THE ENDLESS SUMMER II (New Line Cinema 1994) (Cape St. Francis wave quality deteriorated after surfers flocked to the area and buildings were built that blocked the offshore winds after the release of Endless Summer).

Surfers are perhaps uniquely situated to face these mounting pressures and issues due to their frequent interactions with intertidal zones.[56] While surfers, and the surfing industry, have a checkered environmental legacy, they are usually champions of the environment, and of oceans specifically.[57] Furthermore, surfers have shown that they are willing to fight back against efforts to foreclose beach access.[58] They have availed themselves of several tools to fight this battle, including litigation and lobbying.[59] Litigation will probably only increase as pressures mount on beach access. The public trust doctrine has been, and will continue to be, a centerpiece of these efforts to ensure beach access for beachgoers.[60]

III. THE PUBLIC TRUST DOCTRINE

The public trust doctrine originated in Roman law and came to the United States via British common law.[61] During this trek, the doctrine's geographic scope and the uses it protects have evolved. This section traces the public trust doctrine's evolution from ancient Roman tenet to modern American doctrine.

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56. PETER WESTWICK & PETER NEUSHUL, THE WORLD IN THE CURL 315 (2013) ("Because surfers sit at the very interface between civilization and wilderness—between human communities and the oceanic frontier—they are ideally placed to reveal the increasing encroachments of modern industrial society on the natural world.").

57. *But see* WARSHAW, *supra* note 7, at 396–97 (explaining the surfing community's environmental victories but also its ambivalence about environmentalism).

58. This movement dates back at least to the 1970s. Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 720–21 (1996); *see also* Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. C.R. & C.L. 143, 180–81 (2005).

59. While beach access is a central issue for beachgoers and surfers, even access and use of the water over sovereign and privatized submerged lands has been questioned recently. Aaron Kinney, *Martin's Beach: Vinod Khosla's Claim to Land Beneath Pacific Ocean Appears Dead,* THE MERCURY NEWS (Mar. 23, 2016, 4:44 PM), https://www.mercurynews.com/2016/03/23/martins-beach-vinod-khoslas-claim-to-land-beneath-pacific-ocean-appears-dead/ (recounting plaintiff in the Martin's Beach litigation's "extraordinary claim to own the tidelands and submerged lands off his property on the San Mateo County.").

60. However, because access means different things in different jurisdictions the public trust doctrine might prove useful in some but not others. DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 209–27 (2d ed. 1997) (explaining the public trust doctrine and access to public trust lands and waters). For an investigation of beach access and public trust issues and arguments for extending the doctrine above the high-water mark, see Mackenzie S. Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark*, 16 HASTINGS W.-NW. J. ENVT'L L. & POL'Y 165, 165–82 (2010).

61. It probably goes back even further than that, perhaps to ancient Greece. *See* SLADE ET AL., *supra* note 6060, at 4 (arguing that "[t]he sixth century Romans who wrote the Institutes must have regarded the Institutes of Justinian as the re-codification of ancient law.").

A. The Ancient Doctrine

The public trust doctrine was codified in Roman law by the Byzantine emperor Justinian.[62] Roman law recognized certain elements as common to all and not capable of private ownership.[63] These elements included the air, running water, the sea, and the seashore.[64] Though Roman law classified the seashore as common to all and not subject to private ownership, it explicitly recognized and authorized certain private uses of the seashore and certain exceptions to the shore's generally common status.[65]

The public trust doctrine reemerged in medieval Great Britain, where its spirit is reflected in the Magna Carta.[66] While the Roman doctrine's spirit is reflected in Great Britain's public trust doctrine, the British doctrine is distinct in several key ways. First, the British doctrine tweaked the "common to all" aspect of the seas and seashore and instead put them under the ownership of the sovereign.[67] Additionally, the British doctrine applied geographically to only tidally influenced waters—a characteristic that makes it distinct from the American doctrine as well.[68]

British government structure also made the doctrine distinct from its forbears. Specifically, the British public trust doctrine recognized the Crown as the trustee of trust lands. In this role, the English monarch held trust lands for all its citizenry. Similarly, the sovereign held title to the fisheries as part of its dominion of

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62. Justinian based his civil law code on work of Gaius, a previous Roman jurist, who himself codified existing Greek natural law. SLADE ET AL., *supra* note 60, at 4.

63. W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 182–83 (Peter Stein rev., 3rd ed. 1963) (explaining that the res communes are things "[o]pen to every one: the air, running water, the sea, and in later law, the seashore to the highest winter floods.").

64. THE INSTITUTES OF JUSTINIAN 90 (Thomas Collett Sandars trans., Longmans Green & Co. 1905) ("By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.").

65. SLADE ET AL., *supra* note 60 at 4 (listing public rights in the use of the seashore). The sea and seashore's common status reflected the paramount importance of public lands in the Roman Empire and would influence Continental European civil law, British and American common law, and what would become international law. *See, e.g.,* Edward D. Re, *The Roman Contribution to the Common law,* 29 FORDHAM L. REV. 447, 457 (1961).

66. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989); but see James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 10 (2007).

67. Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 197–98 (1980) (explaining that "the common law introduced into the public trust a concept less important in Roman times: ownership. The common law abhorred ownerless things.").

68. *See, e.g.,* Ill. Cent. R.R. Co. v. State, 146 U.S. 387 (1892) ("At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition.").

the seas.[69] While the British doctrine restricted the Crown from alienating trust lands, the British Parliament did not have this same restriction. Instead, the Parliament could enlarge or lessen the public rights for a legitimate public purpose under its police powers.[70]

B. The American Doctrine

The British public trust doctrine followed the colonizing British to what were then the American colonies in the seventeenth century.[71] When the United States declared its independence, and established its own government and Constitution, the newly formed states recognized England's pre-1776 common law as their common law as well.[72] This recognition effectively adopted England's public trust doctrine, with state governments taking the place of the English crown as trustees of public trust lands.[73] However, the doctrine's reception into American law has produced great confusion, owing to the distinctions in British government discussed above.[74]

The U.S. Supreme Court established the public trust doctrine's stateside applicability in several cases.[75] In the most prominent of these cases, *Illinois Central Railroad v. Illinois*, the Court voided an Illinois law that purported to convey public trust lands from the state to a railroad company. While the Court acknowledged that

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69. SLADE ET AL., *supra* note 60, at 185 ("Under English common law, the right of fishery was an exclusive royal right based on the dominion of the king over the seas. The king possessed this right in all tidal waters. In non-tidal waters riparian owners had a right of exclusive fishery.").

70. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970).

71. *See* Shively v. Bowlby, 152 U.S. 1, 24 (1894) (recounting the doctrine's American history).

72. States did this through statute or in their state constitutions. Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 STETSON L. REV. 295, 300–07 (2017) (explaining the various ways the common law is received by U.S. jurisdictions); see also *Shively*, 152 U.S. at 14 ("The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several Colonies and States, or by the Constitution and laws of the United States.").

73. Tidelands and sovereign submerged lands transferred to the States when they attained statehood under the equal footing doctrine. The U.S. Supreme Court clarified this fact in a decision. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

74. Sax, *supra* note 70, at 476.

75. Martin v. Waddell's Lessee, 41 U.S. 367, 38 (1842) ("Again, the sea and its arms are peculiarly and pre-eminently in the king in respect to their uses; all of which, at common law, are public, and they are held by the king for the public benefit, viz., navigation, fishery, the mooring of vessels, which is subject to the *jus preventionis*.") (citation omitted); Ill. Cent. R.R. Co. v. State of Illinois, 146 U.S. 387 (1892); *Phillips Petroleum*, 484 U.S. at 469.

the state has the right to dispose of its lands, even submerged tidelands, certain conditions must be met under the state's responsibilities under the public trust doctrine to legally do so. Specifically, such a disposition of lands is permissible "when [it] can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states."[76]

The *Illinois Central* Court proffered at least three uses that are protected by the public trust doctrine: navigation, commerce, and fishing.[77] This "triad" of uses forms the foundation of uses protected by the doctrine.[78] Bathing is another use that the Supreme Court has recognized as protected under the doctrine.[79] Subsequently, in *Phillips Petroleum*, the Court recognized mineral development as a valid public trust use.[80]

While the public trust doctrine has recently been applied to protect natural resources, it was traditionally used to foster commercial interests and the freedom of movement in pursuit of those interests.[81] This legacy continues to this day, with certain controversial commercial construction projects still justified on public trust grounds.[82] The doctrine's shift to natural resources

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76. *Ill. Cent.,* 146 U.S. 414.

77. *Id.* at 452 (explaining that the state's title is "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.").

78. Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast,* 26 J. LAND USE & ENVTL. L. 395, 403 (2011) (describing the traditional uses as a "triad.").

79. *See* W. Roxbury v. Stoddard, 89 Mass. 158, 167 (1863); *see also* Martin v. Waddell's Lessee, 41 U.S. 367, 414 (1842). Explaining that:

> [T]he men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another.

See also Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957).

80. *Phillips Petroleum*, 484 U.S. at 482 (identifying uses in tidelands, including "bathing, swimming, recreation, fishing and mineral development.").

81. *See, e.g.,* Carstens v. Cal. Coastal Comm'n, 227 Cal. Rptr. 135, 143 (Cal. Ct. App. 1986) (finding that the Commission may consider "commerce as well as recreational and environmental needs in carrying out the public trust doctrine."); State v. Bleck, 114 Wis. 2d 454, 465 (Wis. 1983) (explaining that the doctrine was "originally designed to protect commercial navigation.").

82. The doctrine has been used to justify building a new sports arena in San Francisco and for locating an airport in Coos Bay Oregon. *See* Morse v. Or. Div. of State Lands, 590

protection, on the other hand, is still evolving.[83] Further, courts have recognized that the doctrine is meant to protect the most important values society places on tidelands, and these societal values have evolved to recognize more spiritual and recreational uses of the shore.[84] Surfing is one such modern public use.

Along with the doctrine's expanded focus has been an expansion of the public trust uses protected under the doctrine beyond the traditionally protected triad. For example, California's public trust doctrine now recognizes preservation as a public trust doctrine protected use.[85] Hawaii's doctrine protects traditional and customary Hawaiian rights, including customary water rights.[86] Other states have protected varying degrees of recreational uses.[87] Importantly, American courts have upheld the discretion of states to expand their respective public trust doctrines beyond the original bounds of the doctrine at common law.[88]

Despite a certain degree of understanding about the doctrine and how courts have construed it, some questions persist. The doctrine's outer bounds are unknown, with recent commentators arguing for recognition of an "atmospheric public trust doctrine"[89] and a "blue water public trust doctrine."[90] Further, while the Supreme Court has repeatedly written about the public trust doctrine, the doctrine remains mostly a state property law principle.[91] Despite its enduring mysteries, certain elements of the American public trust doctrine can be noted. The doctrine is multidimensional, encompassing certain boundaries of the trust

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P.2d 709 (1979); *but see* Richard Frank, *Is the Golden State Warriors' Proposed Basketball Arena a Proper Public Trust Use?,* LEGALPLANET (July 25, 2013), http://legal-planet.org/2013/07/25/is-the-golden-state-warriors-proposed-basketball-arena-a-proper-public-trust-use/.

83. Beginning, perhaps, with Professor Sax's watershed law review article. Sax, *supra* note 70.

84. *See* Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

85. *Id.* at 381.

86. In re Water Use Permit Applications, 9 P.3d 409, 446–47 (Haw. 2000).

87. *See, e.g.,* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) (explaining that "the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.").

88. *Marks*, 491 P.2d at 380 ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs" including preservation).

89. *See, e.g.,* MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2013).

90. Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine,* 36 ECOLOGY L.Q. 1, 1 (2009).

91. Sierra Club v. Andrus, 487 F.Supp. 443, 449 (D.D.C. 1980) (granting a motion to dismiss as to federal trust duties). RANDAL DAVID ORTON, INVENTING THE PUBLIC TRUST DOCTRINE: CALIFORNIA WATER LAW AND THE MONO LAKE CONTROVERSY 24 (1992); *see also* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law,* 14 U.C. DAVIS L. REV. 269 (1980) (arguing that federal courts should apply the public trust doctrine).

res and permitted uses on public trust lands.[92] It is a dynamic common law tenet which is flexible and not rigidly fixed in time. The doctrine has an ancient pedigree, reaching back at least to Roman civil law. While it came to the United States via British common law, the American and British doctrines feature several important distinctions. Public trust doctrine skeptics assail the doctrine for being hijacked by environmentalists as a broad supposed silver bullet and salve, and claim that it is being stretched beyond its intended bounds.[93] But the doctrine's common law roots afford it the flexibility it has enjoyed for centuries, and countless courts have cemented the doctrine's legitimacy and applicability in the United States.

C. State Doctrines

Because the public trust doctrine is a state property law tenet, each state in the Union has its own respective public trust doctrine. This means that there are at least fifty-one public trust doctrines in the United States alone.[94] While these doctrines vary from state to state, the U.S. Supreme Court has identified a minimum triad of traditional public trust doctrine uses—navigation, commerce and fishing.[95] These uses are a good starting point, or "floor," for minimum public trust uses. It is less clear, however, which, if any, "incidental" uses beyond this triad are also included in this minimum.[96] Furthermore, as states have

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92. Ill. Cent. R.R. Co. v. State of Illinois, 146 U.S. 387, 453 (1892) ("It is a title held in trust for the people of the State that they may . . . have liberty of fishing.").

93. *See, e.g.,* Huffman, *supra* note 66, at 11.

94. That is if you believed there is a federal public trust doctrine. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989). There are more than fifty-one if you count the public trust doctrines in the U.S. Territories. *See, e.g.,* W. Indian Co. v. Gov't of Virgin Islands, 643 F. Supp. 869, 875 (V.I. 1986), *aff'd*, 812 F.2d 134 (3d Cir. 1987) (recognizing the public trust doctrine in the U.S. Virgin Islands); *see also* SLADE ET AL., *supra* note 60, at 3 (explaining that "there are over fifty different applications of the doctrine, one for each State, Territory or Commonwealth, as well as the federal government.").

95. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries,* 16 PENN STATE ENVTL. L. REV. 1, 5 (2007) ("As most commentators have acknowledged, when state law public trust doctrines vary from the U.S. Supreme Court's pronouncements, they almost always expand the federal public trust doctrine.") (citing Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647–50 (1986)).

96. *See, e.g.,* Diana Shooting Club v. Husting, 145 N.W. 816, 818–19 (Wis. 1914) (explaining that "[a]t common law the rights of hunting and of fishing were held to be incident to the right of navigation.").

broadened the scopes of their doctrines independently of one another, the distinctions between the doctrines and their applications have widened.[97]

Surfers and other beachgoers are undoubtedly primarily interested in the public trust doctrine as a method of ensuring their access to beaches and the intertidal areas of a coastline. But like the permissible uses that vary across jurisdictions, the boundary between public and private coastal properties also varies from state to state. To further complicate matters, while these boundaries typically divide the public trust tidelands from the private uplands, they do not necessarily delineate the areas where public trust uses are permitted from those where they are not. Instead, different jurisdictions permit varying degrees of access based on the purpose of the access. For instance, the boundary between private and public beaches in Maine is the mean low tide line. But Maine law allows access to the private seashore up to the high tide line for certain permissible uses, including fishing, fowling, navigation, and scuba diving. Surfing is not necessarily a permissible use, however.[98] Similar distinctions between permitted uses of private lands persist throughout various United States jurisdictions.

Different jurisdictions also treat submerged lands differently. These distinctions are important for delineating public and private lands, but also for delineating uses allowed on the waters above submerged lands. Some states allow public trust uses to endure on previously submerged lands, even after they have been filled.[99] Others do not allow any public trust uses to continue on submerged lands that have been transferred to private ownership.[100] The tests for determining whether submerged lands are public or private and whether they are subject to public trust uses vary across jurisdictions.[101]

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97. Shively v. Bowlby, 152 U.S. 1, 26 (1894) (explaining that "[g]reat caution, therefore, is necessary in applying precedents in one state to cases arising in another.").

98. *See infra* section 3.A.10.

99. *See, e.g.,* Florida. Jesse Reiblich, *Private Property Rights Versus Florida's Public Trust Doctrine: Do any Uses Survive a Transfer of Sovereign Submerged Lands from the Public to Private Domain?*, ENVTL. & LAND USE L. SEC. REP. FLA. BAR (2013) (arguing that public trust uses may persist on submerged lands deeded to private individuals).

100. *See, e.g.,* Texas. Robin Kundis Craig, *Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 182 (2010) (explaining that "when the State of Texas does grant submerged lands to individuals, there is no implied reservation in favor of the public trust, despite the ruling in Illinois Central Railroad.") (citations omitted).

101. While tidelands are typically public trust lands, there are exceptions. One is if the submerged lands are not navigable or do not satisfy another state test for determining whether the lands qualify as trust lands. Another is if the tidelands were transferred to private property before statehood. Nonetheless, even private submerged lands are

Despite its confusing features, the public trust doctrine endures to vigorously protect publicly valued uses of trust lands. It is one of the general public's most robust bulwarks against the pernicious aspects of Lockean Anglo-American privatization and modern society's capitalistic tendencies. From its inception to its enduring fortitude, the public trust doctrine reflects certain public policy values. It embodies the principle that certain resources should not be put solely to private use. The doctrine similarly serves as a mediating force between public and private parties and lands. It imposes limits on what a government can do with certain public resources. The doctrine also imposes certain responsibilities on governments, while at the same time conferring rights to the public at large.[102] Finally, it is a formidable weapon in the fight to preserve beach access in the face of mounting threats.

IV. SURFING UNDER THE DOCTRINE: A STATE-BY-STATE ANALYSIS

The modern United States public trust doctrine does at least two things. First, it imposes certain responsibilities and limitations on what trustees of public trust lands can do with those lands. The doctrine also protects the public's use of and access to trust lands, and sometimes the use of and access to trust lands that have been transferred to private ownership, for certain recognized public trust uses. These protected uses have evolved along with the doctrine itself. Originally, navigation, commerce, and sometimes uses incident to these, such as fishing and hunting, were protected uses under the doctrine.[103] As uses of trust lands evolved, so did these protections. Because of these independent evolutions, the uses protected vary across jurisdictions. Some states protect a wide array of recreational activities, while others—wary of expanding beyond the fundamental protected uses—limit the doctrine's application to traditional uses.

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sometimes subject to protected public trust doctrine uses. For more on this complicated topic *see* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975); *see also* G. Graham Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335 (1958).

102. In re Water Use Permit Applications, 9 P.3d 409, 448 (Haw. 2000) (explaining that "[t]he public trust is a dual concept of sovereign right and responsibility.").

103. *See, e.g.,* Diana Shooting Club v. Husting, 145 N.W. 816, 818–19 (Wis. 1914) (explaining that "[a]t common law the rights of hunting and of fishing were held to be incident to the right of navigation.").

Regardless, the uses protected by the modern state public trust doctrines include many uses not originally recognized at common law.[104]

As surfing has become more and more popular, development has proliferated along the country's coastlines, sometimes prompting clashes between surfers and private coastal landowners. In response, surfers have embraced the public trust doctrine as a means of ensuring their continued use of public trust lands, particularly the sovereign submerged lands where waves break. Some jurisdictions have overtly recognized surfing as a protected public trust use, while others have not. This section investigates how surfing fits into the public trust puzzle. First, the section identifies the protected public trust uses recognized in different state jurisdictions. It also identifies the applicable divisions between private and public lands and public trust properties in each state. Next, it notes whether the jurisdiction has explicitly protected surfing as a public trust use. If not, this section analyzes whether surfing could be included within the protected public uses that are recognized, such as navigation, swimming or recreation. Finally, it identifies any specific rights-of-passage to the intertidal zone in the jurisdiction, as well as any coastal protection laws or policies that might protect access.

A. Atlantic, Pacific, and Gulf States

1. Alabama

Alabama has a relatively undeveloped public trust doctrine.[105] It is rooted in common law,[106] but it is also reflected in the Alabama Constitution, which protects the public's right to navigate.[107] Furthermore, the doctrine is embodied in at least one Alabama law.[108] Alabama's public trust doctrine protects at least some traditional trust uses, particularly commerce and

104. SLADE ET AL., *supra* note 60, at 171–72 (listing "[a]mong these are boating, hunting, bathing, swimming, nude bathing, skating, cutting sedge, cutting ice, pushing a baby carriage, washing, watering cattle, preparation of flax, and sustenance.").

105. Craig, *supra* note 78, at 404.

106. Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, 109 (2011).

107. ALA. CONST, art. I, § 24.

108. ALA. CODE § 9-10B-2.

navigation.[109] The doctrine protects fishing as well.[110] Private coastal landowners own down to the high water mark in Alabama's tidal waters.[111]

While the Gulf of Mexico lacks the swells of the Pacific and Atlantic Oceans, surfing is a cherished Alabama pastime. Surfing along Alabama's coastline is concentrated on Dauphin Island and near the towns of Gulf Shores and Orange Beach.[112] Because Alabama's common law public trust doctrine has not been developed much beyond the traditional uses and the doctrine's common law ambit, it is unclear whether and to what extent it can be applied to protect surfing as a public trust use. The best bet for arguing that surfing is a protected use under Alabama's doctrine is probably to argue that surfing is a form of navigation. Alternatively, arguing that the state should recognize recreational uses, such as surfing, in addition to the use currently recognized—fishing—is another option. There is no known theory of legally permissible access to the privately owned dry sand portion of Alabama's beaches.

2. Alaska

Alaska has a robust public trust doctrine, which is unsurprising for a state that featured an astounding 99% public lands when it entered statehood.[113] Alaska's public trust doctrine is rooted in its constitution and reflected in its statutory law.[114] The doctrine protects the traditional triad of public uses: navigation, commerce, and fishing.[115] Additionally, Alaskan courts have protected at least some recreational uses under the doctrine.[116] An Alaskan Attorney General Opinion noted that hunting, bathing, and swimming are protected uses under the

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109. Mobile Transp. Co. v. City of Mobile, 44 So. 976, 978–79 (Ala. 1907) (recognizing commerce and navigation).

110. Craig, *supra* note 95, at 27 ("Protected public uses of navigable waters are commerce, navigation, and fishing.").

111. Tallahassee Fall Mfg. Co. v. State, 68 So. 805, 806 (Ala. 1915).

112. *Alabama*, SURFLINE, https://www.surfline.com/surf-reports-forecasts-cams-map/@30.25788100800988,-87.86727905273439,10z (last visited Jan. 16, 2019).

113. *See* ALASKA OFFICE OF TECH. ASSESSMENT, ANALYSIS OF LAWS GOVERNING ACCESS ACROSS FEDERAL LANDS: OPTIONS FOR ACCESS IN ALASKA at 44 (1979).

114. ALASKA CONST., art. VIII, § 3; *see, e.g.,* ALASKA STAT. § 38.05.127; *see also* Gregory F. Cook, *The Public Trust Doctrine in Alaska*, 8 J. ENVTL. L. & LITIG. 1 (1993).

115. CWC Fisheries v. Bunker, 755 P.2d 1115, 1118 (1988) (explaining that the public trust doctrine includes "continuing public trust 'easements' for purposes of navigation, commerce, and [fishing].").

116. *See, e.g., CWC Fisheries*, 755 P.2d at 1121 n.14 (noting that the public trust doctrine guarantees fishermen access to public resources for recreation purposes)

doctrine.[117] Commentators have called Alaska's doctrine the "[m]ost expansive in terms of resource coverage."[118] This coverage includes the protected use of waters in their natural state.[119] One Alaskan statute explains that ownership of lands bordering navigable or public waters "is subject to the rights of the people of the state to use and have access to the water for recreational purposes or other public purposes for which the water is used or capable of being used consistent with the public trust."[120] The State of Alaska generally owns the beds of navigable waters to the ordinary high-water mark.[121]

Alaska features an astounding 33,000 miles of coastline. Despite this bounty, Alaska's remoteness makes it unlikely to ever produce a crowded surf lineup.[122] Alaska's surf breaks are focused in the Sitka, Kodiak Island and Yakutat regions.[123] Alaska's courts and legislature have not addressed whether surfing is a protected use under the public trust doctrine. Nonetheless, the state's willingness to protect recreational uses might portend a willingness to include surfing under the doctrine. Specifically, because the state recognizes swimming, bathing, and recreational purposes under the doctrine, it is possible that the state's doctrine would recognize surfing as well. Alaskan law features no known legal theory for accessing the state's beaches via dry sand.

3. California

California's public trust doctrine is arguably rooted in statutory law, Spanish and British common law, and the California Constitution.[124] The uses it protects are perhaps the broadest in the United States. California's doctrine initially protected the traditional uses of navigation and fishing.[125] Early proclamations

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117. Alaska Att'y Gen., No. 3, Opinion Letter on Management and Use of Submerged Lands Granted Under Section 6(m) of the Statehood Act (July 14, 1982) (opining that the public trust doctrine extends to hunting, bathing, and swimming).

118. Peloso & Caldwell, *supra* note 106, at 96 (stating that Alaska's doctrine "may be the most expansive in terms of resource coverage.").

119. ALASKA STAT. § 46.15.030 (2010).

120. *Id.* at § 38.05.126(c).

121. Dep't of Nat. Res. v. Pankratz, 538 P.2d 984, 988 (Alaska 1975); *see also* Pankratz v. Dep't of Highways, 652 P.2d 68, 73 (Alaska 1982) (noting that "it is clear that a state has title to land underlying navigable waters up to the mean high water mark").

122. *Alaska Surf Reports and Surf Forecasts*, MAGICSEAWEED, https://magicseaweed.com/Alaska-Surf-Forecast/82/ (last visited Jan. 16, 2019).

123. *Id.*

124. CAL. PUB. RES. CODE §§ 3011–12; CAL. CONST. art. X, sec. 4; *see* Dion G. Dyer, *California Beach Access: The Mexican Law and the Public Trust,* 2 ECOLOGY L.Q. 571 (1972).

125. People ex rel. Webb v. Cal. Fish Co., 138 P. 79, 82 (Cal. 1913).

of California's trust uses also included commerce.[126] A California Supreme Court decision explained that the doctrine protects at least "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[127] But the court made it clear that California's doctrine is broad and capable of being expanded further.[128] Immediately making good on that proposition, the court recognized preservation as an additional protected use.[129] Courts have continued to expand California's doctrine.[130] To date, California's doctrine protects at least navigation, commerce, fishing, hunting, bathing, swimming, boating, general recreation, conservation, and scientific study.[131]

California's tidally influenced land is owned by the public, from the mean high tide to mean low tide.[132] Waters subject to tidal influence are subject to the public trust doctrine, regardless of navigability.[133] One exception to the public trust doctrine prevailing on private properties is when the properties were conveyed under navigation or commercial purposes.[134]

California's coastline ranks behind only Alaska and Florida in total length. The state's close association with surfing is second perhaps only to Hawaii's, and the state legislature has declared

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126. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521 (Cal. 1980) ("Although early cases expressed the scope of the public's rights in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader. . . .").

127. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

128. *Id.* at 380 ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.").

129. *Id.* ("There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state. . . .").

130. Nat'l. Audubon Soc' v. Superior Ct., 658 P.2d 709, 719 (Cal. 1983) ("The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways.").

131. Peloso & Caldwell, *supra* note 106, at 109 (listing the specific public trust rights recognized in California).

132. California v. Superior Ct., 625 P.2d 239, 241 (Cal. 1981); People ex rel. Webb v. Cal. Fish Co., 138 P. 79, 82 (Cal. 1913) ("It is a well established proposition that the lands lying between the lines of ordinary high and low tide, as well as that within a bay or harbor and permanently covered by its waters, belong to the state in its sovereign character and are held in trust for the public purposes of navigation and fishery.").

133. Golden Feather Cmty. Assn. v. Thermalito Irrigation Dist., 257 Cal. Rptr. 3d 836, 840 n.3 (Cal. Ct. App. 1989) ("An alternative basis for finding a public trust is that the water is affected by tidal action. Waters which are subject to tidal influence are subject to the public trust regardless whether they are navigable.") (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988)); Wright v. Seymour, P. 323 (Cal. 1886)).

134. *See* City of Berkeley v. Superior Ct., 606 P.2d 362, 363–69 (Cal. 1980); San Diego Cty. Archeological Soc'y, Inc. v. Compadres, 146 Cal. Rptr. 786, 787–88 (Cal. Ct. App. 1978); People v. Sweetser, 140 Cal. Rptr. 82, 85 (Cal. Ct. App. 1977); Marks v. Whitney, 491 P.2d 374, 378–79 (Cal. 1971).

surfing the state's official sport.[135] Surfable breaks pepper the coastline, with most popular breaks occurring from the San Francisco Bay area south to the Mexican border and crowd sizes typically mirroring population centers. While California's public trust doctrine has not explicitly been expanded to include surfing as a protected use, the state's doctrine appears supple enough to include it. Specifically, California courts have explained that the public trust doctrine protects "all recreational purposes."[136] Accordingly, surfing could be a protected use under California's public trust doctrine under multiple accepted uses. Surfing's cultural importance in California is a public policy reason California courts might recognize it if the issue is litigated.[137] California's Coastal Act offers a potential way for surfers to access beaches over dry sand.[138] Specifically, the state may require beach access easements in exchange for coastal development permits.[139] The locations of these beach access locations are catalogued by the state.[140] The Coastal Act also protects public access to the state's beaches.[141]

4. Connecticut

Connecticut's public trust doctrine is rooted in common law and evident in several of its statutes.[142] Courts have recognized several

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135. Andrea Romano, *California Declares Surfing the Official State Sport*, (Aug. 27, 2018), https://www.travelandleisure.com/travel-news/california-declares-surfing-official-state-sport; Liam Dillon, *Surf's up Forever: California Could Make Surfing the Official State Sport,* L.A. TIMES (Jan. 17, 2017), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-surf-s-up-forever-california-could-make-1516213217-htmlstory.html.

136. People ex rel Baker v. Mack, 97 Cal. Rptr 448, 451 (Cal. Ct. App. 1971) ("It hardly needs citation of authorities that the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes.").

137. *See supra* section I.A.; *see also* efforts to make surfing the state's official sport. Dillon, *supra* note 135.

138. The Coastal Act specifically protects recreation on the California coast. Cal. Pub. Res. Code. §§ 30220 – 30224.

139. However, there must be an essential nexus between a legitimate state interest in requiring the easement and the permit condition. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

140. CALIFORNIA COASTAL COMMISSION, CALIFORNIA COASTAL ACCESS GUIDE (7th ed. 2014).

141. CAL. PUB. RES. CODE. §§ 30000 – 30900.

142. *See, e.g.,* CONN. GEN. STAT. ANN. §§ 22a-16 to 22a-17; *but see* Craig, *supra* note 95, at 32 (explaining that "[t]he Connecticut Supreme Court has carefully distinguished the statutory public trust created in the Connecticut Environmental Policy Act (CEPA), CONN. GEN. STAT. ANN. §§ 22a-16, 22a-17 (2000), from the common law public trust doctrine related to navigable waters.") (citing Fort Trumbull Conservancy, L.L.C. v. City of New London, 925 A.2d 292 (Conn. 2007); Fort Trumbull Conservancy, L.L.C. v. Alves, 815 A.2d 1188, 1193 n.4 (Conn. 2003); Leydon v. Town of Greenwich, 777 A.2d 552, 557 n.17 (Conn. 2001)).

public uses in Connecticut, including "fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge, and of passing and repassing."[143] Connecticut divides private and public rights at the high-water mark—the ordinary high water line.[144] Furthermore, the state has recognized the rights of members of the public to access the beach between the mean high tide line and the water, but the public does not have a right to access that area by crossing landward of the line.[145] Further, Connecticut's highest court has declared that "[t]he only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation."[146]

Connecticut's beaches are largely blocked from swells by other states, especially New York's Long Island.[147] Regardless, it is sometimes possible to surf on the state's beaches, particularly during large storms. Connecticut courts and its legislature have not declared whether surfing is a use protected under the state's public trust doctrine. As explained, the Connecticut courts have found navigation to be a paramount right under the doctrine, but have been willing to put the same label on other uses in the state. The best chance to establish surfing as a protected public use in Connecticut would be to argue that surfing is a form of navigation. Regardless, access to Connecticut's intertidal zone will likely be an issue because of the court's proclamations on the topic.[148] Finally, there is no known alternate method of legally accessing Connecticut's beaches over private dry sand.

5. Delaware

Delaware's public trust doctrine is rooted in common law. Several Delaware statutes also purport to protect public trust

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143. Town of Orange v. Resnick, 109 A. 864, 865–66 (Conn. 1920); *see also* State v. Brennan, 3 Conn. Cir. 413 (Conn. Cir. Ct. 1965) ("It is settled in Connecticut that the public has the right to boat, hunt, and fish on the navigable waters of the state"); *see also* Chapman v. Kimball, 9 Conn. 38 (Conn. 1831) (endorsing the right of the public to gather seaweed between ordinary high water and low water marks); Adams v. Pease, 2 Conn. 481, 483 (Conn. 1818) (explaining that "the public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats or any watercraft.").

144. *Chapman*, 9 Conn. at 38; Mihalczo v. Borough of Woodmont, 400 A.2d 270, 271–72 (Conn. 1978).

145. *Leydon*, 777 A.2d at 564 n.17.

146. *Resnick*, 109 A. at 866.

147. *Cape Cod*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=2145 (last visited Jan. 16, 2019).

148. *See* Resnick, 109 A. at 864. For further reading on the beach access movement in Connecticut, *see* Marc. R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996).

resources.[149] Delaware courts have deemed the state's doctrine to include the state's exercise of its police powers, particularly "the protection of life, health, comfort, and property or the promotion of public order, morals, safety, and welfare."[150] Other decisions have similarly countered the assumption that the public trust uses protected in Delaware were limited to uses such as fishing and navigation.[151] Delaware courts have endorsed a flexible public trust doctrine wherein the state has the right to amend public trust uses.[152] Delaware's littoral public landowners own title down to the low-water mark.[153]

Delaware courts have at times delimited the doctrine's reach, particularly in response to statutory directives. For instance, a Delaware statute explicitly requires the definition of "navigable waters" be tied to commerce.[154] This statute prompted a court to find that recreational use is not sufficient to prove that a waterway is navigable.[155] The legislature responded by removing the definition of navigability in 2000.[156]

Groves v. Secretary of Department of Natural Resources and Environmental Control is an important Delaware beach access case. In it, the plaintiff argued that the construction of riprap on a beach violated the public trust doctrine. The *Groves* court found that "[t]here does not and never has existed, as part of this [public trust] doctrine in Delaware, a right of the public superior to the landowner to access the foreshore for walking and/or recreational activities."[157] Further, the court remarked that recognition of this right would effect a taking.[158]

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149. *See, e.g.,* DEL. CODE tit. 7, § 6604(a) (1953) (requiring that that the Department of Natural Resources and Environmental Control must consider the effect of proposals on public access to tidal waters and recreational areas).

150. Groves v. Sec'y, Dep't of Nat. Res. & Envtl. Control, 1994 WL 89804, at *6 (Del. Super. Ct. Feb. 8, 1994).

151. State ex rel. Buckson v. Pa. R.R. Co., 228 A.2d 587, 603–05 (Del. Super. Ct. 1967).

152. Bailey v. Pa., W. & B.R. Co., 4 Del. 389, 389 (Del. 1846) ("Such rivers are public highways, and open to all for navigation and fishery; but the legislature may impair or take away these public rights for public purposes.").

153. Phillips v. State ex rel. Dep't of Nat. Res. & Envtl. Control, 449 A.2d 250, 252 (Del. 1982); *see also Buckson*, 267 A.2d at 457–59; *but see* Harlan & Hollingsworth Co. v. Paschall, 1882 WL 2713, at *1 (Del. Ch. 1882) (remarking that the state ownership is to the high water mark).

154. Craig, *supra* note 95, at 33 (citing DEL. CODE tit. 7, § 7202 (1997)).

155. *Id.* (citing Hagan v. Del. Anglers' & Gunners' Club, 655 A.2d 292, 293–94 (Del. Ch. 1995) (citing Tulou v. Anderson, 1994 WL 374311 (Del. Ch. June 20, 1994)).

156. *Id.*

157. Groves v. Sec'y, Dep't of Nat. Res. & Envtl. Control, 1994 WL 89804, at *5–6 (Del. Super. Ct. Feb. 8, 1994).

158. *Id.* at *6 (remarking that if the legislature made the public right of access to the "foreshore"—the land between the high and low water marks—publicly available for recreational purposes, like walking, the statute would be a taking). However, this case flies in the face of the proposition that the public trust doctrine is a background principle of

Delaware's Atlantic coast is a mere twenty-five miles long.[159] Regardless, this region features several popular surf breaks. Delaware courts and lawmakers have not specifically confronted the issue of whether surfing is protected by the state's public trust doctrine. However, the proclamations that Delaware courts have made regarding the scope of the doctrine make it unlikely that surfing would be protected. First, coastal landowners in Delaware own down to the low water mark. Second, while certain uses are allowed on the private beaches above the low water mark, the rights to walk on the beach and recreate on it have not been protected by Delaware's doctrine. Based on these proclamations, it is unlikely that surfing is a protected public trust use in Delaware under existing precedent and statutes. However, the state's doctrine is flexible enough to expand to include surfing in the future. There are no known legal methods of accessing the beaches over dry sand in Delaware.

6. Florida

Florida's public trust doctrine is codified in its Constitution.[160] The doctrine is also reflected in the Florida Statutes.[161] Florida's Supreme Court has explained that the doctrine has its roots in English common law.[162] Florida courts have recognized the doctrine's traditional uses since the nineteenth century.[163] The Florida Supreme Court has declared that Florida's doctrine protects uses including navigation, commerce, fishing, as well as "other useful purposes afforded by the waters in common to and for the people of the States."[164] The right to fish extends even to those submerged lands where the rights to plant have been given to

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property rights. *See* John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation,* 45 U.C. Davis L. Rev. 931 (2012).

159. SURFRIDER FOUNDATION DELAWARE CHAPTER, THE STATE OF SURFING IN DELAWARE, https://delaware.surfrider.org/wp-content/uploads/2014/01/The-State-of-Surfing-in-Delaware-2.pdf.

160. FLA. CONST. art. X, § 11; *see also* Krieter v. Chiles, 595 So. 2d 111, 111 (Fla. 3d DCA 1992) (explaining that "the common law Public Trust Doctrine was codified in Article X, Section 11 of the Florida Constitution.").

161. FLA. STAT. § 253.034(1).

162. Brickell v. Trammell, 82 So. 221 (Fla. 1919); Broward v. Mabry, 50 So. 826, 829–30 (Fla. 1909).

163. State v. Black River Phosphate Co., 13 So. 640, 643 (Fla. 1893) (explaining that "since Magna Charta the king has had no power to obstruct navigation or grant an exclusive privilege of fishing; and the right of the people in this respect cannot be restrained or counteracted by the sovereign as the legal and sole proprietor.").

164. State ex rel. Ellis v. Gerbing, 56 Fla. 603, 608–09 (1908) ("purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters in common to and for the people of the States.").

certain users.[165] Florida court decisions have also enumerated bathing as a protected use under the doctrine.[166] Interestingly, Florida's courts have recognized bathing as a protected use due to its universal recreational appeal, as well as for other factors making it worthy of protection under the doctrine.[167]

Florida's public trust doctrine is broad and flexible. Decisions have delimited its bounds to "easements allowed by law."[168] Other decisions similarly leave the door open for expanding the doctrine to other uses not explicitly enumerated to date.[169] Commentators have posited that such language "leaves open the possibility that protected uses could be expanded."[170] Florida traditionally owns title to its sovereign submerged lands.[171] The boundary between private and public property in Florida is the mean high-water mark.[172]

Florida boasts surfing along its Atlantic, Gulf and Panhandle coastlines. Florida is also the birthplace of the most decorated surfer of all time, Kelly Slater. While Florida courts have not

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165. State v. Gerbing, 47 So. 853, 857 (Fla. 1908) (finding that state conveyance of the right to plant oyster beds did not impair the public's right to fish the same oyster beds).

166. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974); *see also* White v. Hughes, 190 So. 446, 448 (Fla. 1939) (explaining that the Florida Supreme Court has "held many times" that littoral owners share rights in common with the public below the high water mark including rights of bathing, fishing, and navigation).

167. *White*, 190 So. at 448–51 ("There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the life-giving touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same. This primeval quality appeals to us. 'Changeless save to the wild waves play, time writes no wrinkles on thine azure brow; such as creation's dawn beheld, thou rollest now.' The attraction of the ocean for mankind is as enduring as its own changelessness.").

168. Brannon v. Boldt, 958 So.2d 367, 372 (Fla. 2d DCA 2007) ("The public has the right to use navigable waters for navigation, commerce, fishing, and bathing and 'other easements allowed by law.'" (citing Broward v. Mabry, 50 So. 826, 830 (1909)).

169. Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957) (explaining that the state's title "is held in trust for the people for purposes of navigation, fishing, bathing, and similar uses"); *Mabry*, 50 So. at 830 (recognizing that the public trust doctrine extends to "other easements allowed by law); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643, 645 (Fla. 1909) (recognizing "rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing.").

170. Craig, *supra* note 95, at 38.

171. Geiger v. Filor, 8 Fla. 325, 338 (1859) (explaining that "[o]n the change of government which took place by the treaty of Spain transferring Florida to the United States, and afterwards on the assumption by the people of a State government, the right to the shores of navigable waters and the soils under them enured, first to the General Government and then to the State, according to the decisions made by the Supreme Court of the United States in various cases before them.").

172. *Hayes*, 91 So.2d at 799 (Fla. 1957). However, much of previously public submerged lands were filled and passed to private ownership. *See* Michael L Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 587–88 (1982); *see also* Reiblich, *supra* note 99.

specifically considered whether surfing is a protected public trust use in the state, the state's broad and flexible doctrine allows at least the possibility that surfing can be included within its protected uses. In particular, surfing seems to fit within the doctrine's protected recreational uses, particularly bathing. Florida is one state that has protected access to its beaches via dry sand private property based on the legal theory of custom.[173] For this doctrine to apply, historical use must be proved. Also, Florida courts have upheld local governments' efforts to maintain public beach access by local ordinance in Florida, again based on custom.[174] However, Florida's legislature kneecapped these efforts through legislation taking this power away from the state's local governments.[175] Local governments may still recognize, protect and regulate customary use rights by going to court and having these rights declared protected under a process established by the legislature.[176] Under this process, affected beachfront owners have the right to intervene.[177]

7. Georgia

Georgia's public trust doctrine is rooted in the Georgia Constitution and common law.[178] Despite certain legislative pronouncements purporting to privatize the state's tidelands,[179] the public possesses rights in the state's tidewaters, including traditional public trust uses, under a 1970 statute.[180] Statutory law protects "fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine."[181] Commentators have noted that Georgia's doctrine

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173. *See* City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974).

174. *See* Staley Prom, *Florida County's Right to Protect Beach Access Upheld,* Surfrider (Dec. 1, 2017) (recounting the Alford v. Walton County custom law case in which the U.S. District Court for the Northern District of Florida upheld Walton county's customary use ordinance) https://www.surfrider.org/coastal-blog/entry/florida-countys-right-to-protect-beach-access-upheld.

175. H.B 631, 2018 Leg. (Fla. 2018).

176. *Id.*

177. *Id.*

178. *See* 1983 GA. CONST. art. I, § III, ¶ 3; *see also* 1976 GA. CONST., art. I, § III, ¶ 2; *see also* 1945 GA. CONST., art. I, § VI, ¶ 1.

179. GA. CODE ANN. §§ 85-1307–1309 (1970) (enacted as Boundaries of Lands on Tidewaters Act, 1902 Ga. Laws 108); *see also generally* J. Owens Smith & Jack L. Sammons, *Public Rights in Georgia's Tidelands,* 9 GA. L. REV. 79 (1974).

180. Craig, *supra* note 95, at 42. Furthermore, "[d]espite this 1902 statutory distinction between navigable and nonnavigable tidewaters, the Code itself explicitly preserves public rights of navigation in all tidewaters." *Id.* at 43 (citing GA. CODE ANN. § 44-8-8).

181. GA. CODE. ANN. § 52-1-2. These uses were previously protected for the public under common law. Craig, *supra* note 95, at 42.

protects at least commerce, navigation, fishing, and bathing.[182] Furthermore, Georgia protects the rights of access to the foreshore—from the low to the high tide line—for recreation.[183]

Georgia's coastline offers limited surfing options, owing to its diminutive length and inconvenient distance from the continental shelf.[184] Regardless, several surf breaks endure the state's shortcomings, particularly on Georgia's barrier islands. Georgia's statutes specifically enumerate protected uses, but Georgia has not declared whether its public trust doctrine protects surfing. However, surfing might fit within a protected use, such as navigation or bathing, especially if the latter includes recreational swimming. Surfers hoping to access Georgia's beaches across dry sand may be able to via easement.[185]

8. Hawaii

Hawaii features one of the broadest public trust doctrines in the country. It is based in Hawaii's constitution,[186] but also found in its statutes and case law.[187] Courts have remarked that the Hawaiian doctrine is derived from the common law, and have acknowledged the U.S. Supreme Court's influence in developing the state's doctrine.[188] Decisions have described Hawaii's doctrine as a constitutional mandate.[189] The Hawaiian doctrine protects the traditional public trust uses.[190] Hawaiian court decisions have

182. Peloso & Caldwell, *supra* note 106, at 110 (summarizing the specific public trust rights recognized in Georgia).

183. Godinho v. City of Tybee Island, 231 Ga. App. 377, 378, 499 S.E.2d 389, 391 (1998), rev'd, 270 Ga. 567, 511 S.E.2d 517 (1999), and vacated, No. A97A1703, 1999 WL 144577 (Ga. Ct. App. Mar. 18, 1999) (explaining that "the beaches are the property of the State to which all have right of access for recreation or other purposes provided by the State.").

184. *Georgia*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=3697 (last visited Jan. 16, 2019).

185. Peloso & Caldwell, *supra* note 106, at 110.

186. In re Wai'ola O Moloka'i, Inc., 83 P.3d 664, 684 (Haw. 2004) (explaining that "[t]he public trust . . . is a state constitutional doctrine.").

187. HAW. REV. STAT. § 190D-11(d)(1) (2017) (requiring the Board to consider "[t]he extent to which the proposed activity may have a significant adverse effect upon any existing private industry or public activity, including the use of state marine waters for the purposes of navigation, fishing, and public recreation."); Stop H-3 Ass'n v. State Dep't of Transp., 706 P.2d 446, 451 (Haw. 1985) (finding that HAW. REV. STAT. § 183-41(c)(3) includes trust language); *see also* State v. Zimring, 566 P.2d 725, 737 (Haw. 1977).

188. King v. Oahu Railway & Land Co., 11 Haw. 717, 725 (1899) (citing Ill. Cent. R.R. v. State of Illinois, 146 U.S. 387 (1892)).

189. In re Water Use Permit Applications, 9 P.3d 409, 443 (Haw. 2000) (explaining that Hawaii's Constitution mandates application of the public trust doctrine) (citing HAW. CONST. art. XI, § 1).

190. *Id.* at 449 (citing *Illinois Central*).

additionally declared that recreation is a trust purpose.[191] Furthermore, native Hawaiian and traditional and customary rights have been recognized as trust purposes.[192] The Hawaiian doctrine additionally recognizes resource protection as a doctrine use.[193] Hawaiian law fixes private boundaries along beaches at the upper reaches of the wash of waves, represented by the vegetation line.[194] Additional statutory law reinforces the right of the public to lateral beach access.[195]

Since Hawaii is the birthplace of surfing,[196] the sport is perhaps more important to Hawaii's identity than it is to any other state. Hawaiians and visitors alike flock to the state's beaches to surf its winter swells. Several of Hawaii's islands are suitable for year-round surfing.[197] Hawaiian courts and the legislature have not specifically protected surfing as one of the state's public trust doctrine uses.[198] Regardless, a very strong case could be made for protecting surfing under the state's public trust doctrine, under a variety of currently recognized uses. Likewise, because the state has a broad public trust doctrine and because surfing is so closely tied to the state's cultural identity, a very strong argument could

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191. Kuramoto v. Hamada, 30 Haw. 841, 845 (1929) (including recreation as a trust purpose); *see also* Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, 900 P.2d 1313 (Haw. Ct. App. 1993) (recognizing special rights of access and of native rights in Hawaii).

192. *In re Water Use Permit Applications*, 9 P.3d at 449 (explaining that the court continues "to uphold the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose.").

193. *Id.* at 448.

194. Application of Sanborn, 562 P.2d 771, 779 (1977) (finding that the proper beachfront title line is "[t]he 'debris and vegetation line', found by the land court to reflect the upper annual reaches of the wash of the waves.").

195. Public Access to Coastal and Inland Recreational Areas Act. HAW. REV. STAT. § 115-10 (2010) ("The purpose of this Act is to reaffirm a longstanding public policy of extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible by ensuring the public's lateral access along the shoreline, by requiring the removal of the landowners' induced or cultivated vegetation that interferes or encroaches seaward of the shoreline.").

196. Joel Bourne, Jr., *Inside the Curl: Surfing's Surprising History*, NATIONAL GEOGRAPHIC (August 4, 2013) https://news.nationalgeographic.com/news/2013/08/130803-surfing-surprising-history-hawaiian-culture-extreme-sports/.

197. *When is the Best Time to Surf in Hawaii?*, SURFERTODAY, https://www.surfertoday.com/surfing/13935-when-is-the-best-time-to-surf-in-hawaii (last visited Jan. 16, 2019) ("Roughly, it's fair to say that of the eight main islands of Hawaii, only two-to-four are suitable for surfing all year-round - Oahu, Maui, Kauai, and Big Island.").

198. *See* Stephanie Haughey, *How the Legal System Saves the Surf*, SURFRIDER (July 31, 2012), https://www.surfrider.org/coastal-blog/entry/how-the-legal-system-saves-the-surf ("Courts should be more flexible in their interpretation of laws that govern coastal development and the protection of surfing resources. For example, courts could expand their interpretation of the Public Trust Doctrine so that it protects surf breaks.").

be made that the doctrine should protect the sport if it does not already. Hawaii is one of a handful of states that provide access to its beaches via the legal theory of custom.[199]

9. Louisiana

Louisiana is the only nominally civil law jurisdiction in the United States.[200] While Louisiana's civil law tradition does not make its public trust doctrine wholly distinctive from its fellow common law states, it does make its path from Continental Europe to the United States different.[201] Louisiana's Constitution reflects various public trust doctrine values.[202] The trust is similarly found in statutes.[203] One statute explicitly lists certain uses that Louisiana's public trust doctrine protects. These uses include "public navigation, fishery, recreation, and other interests."[204] The boundary between public and private ownership of navigable waterbodies is the high-water mark.[205] A statute provides that the state of Louisiana owns the seashore to the highest winter tide[206]—a line lower than the mean high tide.[207]

Surfing is not a popular sport in Louisiana. In fact, the Mississippi delta stamps out most any swells that might otherwise produce surfable waves before they reach Louisiana's beaches.[208] However, there are accounts of surfable waves on the state's outer barrier islands, presumably only accessible by boat.[209] Similar to neighboring states, the remoteness of possible surf breaks in Louisiana means the public trust doctrine will have less of a role regarding access to them.[210] Regardless, the state's broad public trust doctrine is probably expansive enough to include surfing as a

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199. City of Hawaii v. Sotomura, 517 P.2d 57, 61 (Haw. 1973) (explaining that the "long-standing public use of Hawaii's beaches . . . has ripened into a customary right.") (citing Oregon ex rel. Thorton v. Hay, 462 P.2d 671 (Or. 1969)); *see also* In re Application of Ashford, 440 P.2d 76 (Haw. 1968).

200. Agustín Parise, *Private Law in Louisiana: An Account of Civil Codes, Heritage, and Law Reform*, *in* 32 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE, THE SCOPE AND STRUCTURE OF CIVIL CODES, 429, 429–50 (Julio In César Rivera, ed., 2014).

201. *See generally* James G. Wilkins & Michael Wascom, *The Public Trust Doctrine in Louisiana*, 52 LA. L. REV. 861, 868 (1992).

202. LA. CONST. art IX, § 1.

203. LA. CIV. CODE ANN. art. 450 (1978); LA. CIV. CODE ANN. art. 452 (1978).

204. LA. REV. STAT. ANN. § 41:1701 (2001).

205. McCormick Oil & Gas Corp. v. Dow Chem. Co., 489 So.2d 1047, 1049 (La. Ct. App. 1986) (citing State v. Placid Oil Co., 300 So.2d 154, 172 (La. 1974))

206. LA. CIV. CODE ANN. art. 450–51.

207. Craig, *supra* note 95, at 58.

208. *Mississippi/Louisiana*, SURFLINE, http://www.surfline.com/travel/surfmaps/surfmap.cfm?id=25 (last visited Jan. 16, 2019).

209. *Id.*

210. *See infra* section 3.A.13 (Mississippi).

protected use. There are no known legal theories of access over private dry land in Louisiana.

10. Maine

While it is unclear whether Maine's constitution embodies the public trust doctrine,[211] several Maine statutes reflect it.[212] However, statutes declaring certain public uses in the intertidal lands of the state were declared unconstitutional by Maine's highest court.[213] The state's boundary between private and public intertidal lands is based on the Massachusetts Colonial Ordinance of 1641. Under that law, private landowners own title to the intertidal lands beyond the high water mark, not more than 100 "rods" from the high-water mark.[214] Practically speaking, this means that private landowners sometimes own the entire intertidal zone of Maine's beaches.

Maine features perhaps the most extensive case law regarding the evolution of recreational use under the public trust doctrine, particularly as it pertains to use of Maine's intertidal zone. But this evolution, as the quote that began this article suggested,[215] might have evolved arbitrarily, or at least might merit further evolution.[216] In the 1980s, the Maine Supreme Court relied on the Colonial Ordinance to limit the protected public trust uses in the state's intertidal zones in two cases, collectively known as the *Bell* cases. In *Bell I*, the court explained that the Colonial Ordinance

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211. ME. CONST., art. 4, pt. 3, § 1. The Maine Supreme Judicial Court has suggested that this provision may embody the public trust doctrine. Opinion of the Justices, 437 A.2d 597, 606 (1981); *but see* Harding v. Comm'r of Marine Res., 510 A.2d 533, 537 (Me. 1986) ("We need not decide, however, the precise scope of the public trust doctrine nor whether the doctrine achieves constitutional status under ME. CONST. art. IV, pt. 3, § 1 as intimated by the Justices").

212. *See, e.g.,* ME. REV. STAT. tit. 12, § 1846 (1997) ("[I]t is the policy of the State to keep the public reserved lands as a public trust and that full and free public access to the public reserved lands to the extent permitted by law, together with the right to reasonable use of those lands, is the privilege of every citizen of the State.").

213. *See, e.g.,* ME. REV. STAT. tit. 12, § 573(1)(A)-(B) (2010) ("The public trust rights in intertidal land include the following: A. The right to use intertidal land for fishing, fowling and navigation; . . . B. The right to use intertidal land for recreation.") (legislative action declared unconstitutional by McGarvey v. Whittredge, 28 A.3d 620 (Me. 2011)).

214. ME. REV. STAT. tit. 12, § 572 (1985) (explaining that "'intertidal land' means all land of this State affected by the tides between the mean high watermark and either 100 rods seaward from the high watermark or the mean low watermark, whichever is closer to the mean high watermark."); *see also* State v. Lemar, 87 A.2d 886, 887 (Me. 1952).

215. Eaton v. Town of Wells, 760 A.2d 232, 248–49 (Me. 2000) (Saufley, J., concurring) (". . .a citizen of the state may walk along a beach carrying a fishing rod or a gun, but may not walk along that same beach empty-handed or carrying a surfboard.") (footnote omitted).

216. *See* Orlando E. Delogu, *Friend of the Court: An Array of Arguments to Urge Reconsideration of the Moody Beach Cases and Expand Public Use Rights in Maine's Intertidal Zone*, 16 OCEAN & COASTAL L.J. 47, 99 (2010).

protected the rights to fish and fowl in the intertidal zone.[217] The Ordinance also declared a public right of navigation.[218] Subsequently, in *Bell II,* the court specifically found that recreation is not a protected use within the public uses listed in the Colonial Ordinance—i.e. fishing, fowling and navigation.[219] The court specifically rejected the town's argument for an evolving set of permissible trust uses, explaining that "[a]lthough contemporary public needs for recreation are clearly much broader, the courts and the legislature cannot simply alter these long-established property rights to accommodate new recreational needs."[220]

While not explicitly relying on the public trust doctrine, Maine courts have shown a willingness to extend recreational rights through prescription. In *Eaton v. Town of Wells*, the court found that the public had acquired a prescriptive right to use the intertidal areas in dispute for recreational purposes.[221] As the court explained, "the Eatons acquiesced, rather than gave permission, to the public's right to use Wells Beach for a broad range of recreational purposes, ranging from strolling to sunbathing, picnicking, and swimming and all other recreational beachfront activities both on the dry sand and the intertidal zone."[222] Commentators, however, warn that this decision was the product of fortuitous circumstances and favorable facts, and that it is probably the exception rather than an emerging rule in the jurisdiction.[223]

Maine has become a surf destination in recent years, with waves ranging from longboard specials to rocky-bottom breaks accessible only by boat.[224] The state has been called one of the last frontiers of surfing in the continental United States due to its expanses of undeveloped coastline.[225] Maine's courts have weighed

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217. Bell v. Town of Wells, 510 A.2d 509, 514 (Me. 1986) ("The Ordinance initially provides that every inhabitant has a right of fishing and fowling in the intertidal zone.") (citation omitted).

218. *Id.* at 515.

219. Bell, 557 A.2d at 173 (explaining that "the general recreational easement claimed by the Town of Wells cannot be justified as encompassed within or reasonably related to fishing, fowling, or navigation.").

220. *Id.* at 169.

221. Eaton v. Town of Wells, 2000 ME 176, ¶ 34, 760 A.2d 232, 244 (Me. 2000).

222. *Id.*

223. Orlando E. Delogu, *Eaton v. Town of Wells: A Critical Comment*, 6 OCEAN & COASTAL L. J. 225, 228 (2001); *see also* Orlando E. Delogu, Maine's Beaches are Public Property (2017).

224. Porter Fox, *The New Waves*, NEW YORK TIMES MAGAZINE (May 21, 2006), http://www.nytimes.com/2006/05/21/travel/tmagazine/21T-MAINE.html.

225. *New Hampshire – Maine*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=20897 (last visited Jan. 16, 2019).

in on the extent of the state's public trust doctrine regarding recreational uses. In *McGarvey v. Whittredge,* Maine's high court found that scuba divers could use the intertidal zones of the state's beaches to access the ocean.[226] The court explicitly refused to decide whether the public trust doctrine afforded similar rights to surfers, despite an amicus curiae brief filed by the Surfrider Foundation making this argument.[227] Accordingly, it is yet to be seen whether the doctrine protects surfing or whether it will in the future. There is no known alternate theory of accessing the state's beaches through private dry sand properties.

11. Maryland

Maryland's public trust doctrine is rooted in common law. Furthermore, Maryland's highest court has explained that the doctrine is reflected in the state's Declaration of Rights.[228] The state's statutory code specifically protects "maritime commerce, recreation and aesthetic enjoyment."[229] Commentators have remarked that Maryland's public trust doctrine remains largely undefined.[230] Additionally, they explain that decisions on record might suggest that the public trust doctrine will be a limited legal tool in the state.[231] Regardless, the doctrine at least protects the traditional uses of navigation and fishing, even in private submerged lands.[232] The public enjoys additional rights in publicly owned tidal waters.[233] Despite the state's limited recognized uses, at least one opinion has hinted at protecting recreational uses under the state's public trust doctrine.[234] Private landowners own tidal waters in Maryland down to the high-water mark.[235]

Maryland features a relatively short coastline, bookended by Virginia and Delaware. The state's surf is centered around the

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226. McGarvey v. Whittredge, 28 A.3d 620, 636 (Me. 2011) (finding that "pursuant to the common law of Maine, the public trust rights are at least broad enough to allow the public to walk across the intertidal lands to enter the water and scuba dive.").

227. *Id.* at 624 (explaining that "we do not determine whether other, additional uses of the intertidal zone fall within the public trust rights, including the uses related to surfing presented by amicus curiae Surfrider Foundation. Instead, we leave the next question in the evolution of this area of common law for future determination") (footnote omitted).

228. Dep't of Nat. Res. v. Ocean City, 332 A.2d 630, 633 (Md. Ct. App. 1975).

229. MD. NAT. RES. CODE ANN § 9-102.

230. *MD Public Trust Doctrine: What does it Mean?*, CHESAPEAKE LEGAL ALLIANCE (May 22, 2014), http://www.chesapeakelegal.org/index.php?/articles/entry/md-public-trust-doctrine-what-does-it-mean.

231. *Id.*

232. Stansbury v. MDR Dev., L.L.C., 871 A.2d 612, 620 (Md. Ct. Spec. App. 2005).

233. Craig, *supra* note 95, at 64.

234. Clickner v. Magothy River Ass'n, 424 Md. 253, 268, 35 A.3d 464, 473 (Md. Ct. App. 2012).

235. Van Ruymbeke v. Patapsco Indus. Park, 276 A.2d 61, 64 (Md. 1971).

Ocean City area.[236] Maryland's courts and legislature have not addressed whether surfing is protected by the public trust doctrine. Further, while Maryland's highest court has acknowledged the right of the public to use the foreshore, it has been hesitant to acknowledge any rights in the dry sand littoral areas, except for limited circumstances for navigation and fishing.[237] However, at least one dissenting justice in that case that seemed willing to extend the public's use of the beach to the dry sand for recreational purposes.[238] Another reason the state might be willing to change its current stance is that it flies in the face of the majority rule in the United States.[239] Accordingly, there is hope and there are public policy arguments for the state changing the status quo. Maryland features no known alternative legal methods for accessing its beaches over privately owned dry sand areas.

12. Massachusetts

Massachusetts' public trust doctrine is based in common law and was codified in its Colonial Ordinances of 1641-1647.[240] The state holds the waters above its submerged lands for the interest of its people.[241] While the Colonial Ordinances ensured that the doctrine applied in the Colony and subsequently in the state, it also severely restricted the public's continued use of the shoreline in a key way. Specifically, it granted title to the area between high tide and low tide to shorefront property owners.[242] This grant made Massachusetts one of a handful of states that demarcates its

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236. *Atlantic States Surf Reports and Surf Forecasts*, MAGICSEAWEED, https://magicseaweed.com/Atlantic-States-Surf-Forecast/23/ (last visited Jan. 16, 2019).

237. Dep't. of Nat. Res. v. Ocean City, 332 A.2d 630, 634 (Md. Ct. App. 1975).

238. *Id.* at 642 (Eldridge, J., dissenting) ("The various factors listed above, taken together, lead me to the conclusion that the landowner and his predecessors in title have recognized the public's right to use and the public's use of the dry sand beach to such an extent, that an implied easement to the public for recreational purposes has been created.").

239. *Id.* at 639. The majority and dissenting opinions both acknowledged this point.

240. Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance,* 62 ALBANY L. REV. 623, 623–24 (1998); *see also* Heather J. Wilson, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF. L. REV. 839 (1984).

241. McCarthy v. Town of Oak Bluffs, 643 N.E.2d 1015, 1020 (Mass. 1994) ("The waters and the land under them beyond the line of private ownership are held by the State, both as owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public.") (citation omitted).

242. Limited to a maximum width of "one hundred rods." Commonwealth v. City of Roxbury, 75 Mass. 451, 474 (1857) ("By the common law of Massachusetts, the Commonwealth has jurisdiction and dominion of the seashore and the land where the tide ebbs and flows below one hundred rods from high water mark, for public uses only; but does not own and has no exclusive right to the soil as private property.").

private property boundary all the way down to the low-water mark.[243] However, the Ordinances specifically reserved the traditional public trust uses of fishing, fowling and navigation in the intertidal areas.[244] Further, these core traditional uses include their "natural derivatives."[245] But Massachusetts courts have found no authority for the right to walk along the beach nor to use private beaches for bathing.[246] Nevertheless, Massachusetts' highest court hinted that the doctrine might be broader than this, explaining that "[i]t is wider in its scope, and it includes all necessary and proper uses, in the interest of the public."[247]

Massachusetts' long coastline offers many surf breaks,[248] but the state also features the largest population in the New England region.[249] However, its beaches are often less crowded than New Hampshire's or Rhode Islands.[250] Massachusetts' courts and legislature have not addressed whether surfing is a public trust use in the state. It is unclear whether the courts would protect surfing as a public trust use for several reasons. First, Massachusetts shares the same colonial ordinance heritage as Maine[251]—a state that seems unwilling to expand the protected public trust uses in that state to include surfing. This common lineage might even cause Massachusetts courts to look to Maine as persuasive authority on the issue.[252] While Massachusetts' Colonial Ordinances reserved certain traditional public trust doctrine uses, surfing was not one of them, and it is unclear whether the courts would allow surfing within the scope of a

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243. Trio Algarvo, Inc. v. Comm'r of the Dep't of Envtl. Prot., 795 N.E.2d 1148, 1151 (Mass. 2003) (explaining that this deviation from the English common law rule was out of perceived necessity).

244. Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 69–70 (1851) (finding public rights of fishing, fowling and navigation in intertidal lands between the high and low water marks).

245. Pazolt v. Dir. of Div. of Marine Fisheries, 631 N.E.2d 547, 551 (Mass. 1994).

246. Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974) ("We are unable to find any authority that the rights of the public include a right to walk on the beach. In a case presenting a very similar question to that raised by the bill, it was held that the public rights in the seashore do not include a right to use otherwise private beaches for public bathing.") (citation omitted).

247. Home for Aged Women v. Commonwealth, 202 Mass. 422, 435, 89 N.E. 124, 128 (1909).

248. *Massachusetts North-South Shore*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=107563 (last visited Jan. 16, 2019).

249. *Id.*

250. *Id.*

251. *See* JOHN DUFF, UNIVERSITY OF MAINE SEA GRANT COLLEGE PROGRAM, PUBLIC SHORELINE ACCESS IN MAINE: A CITIZEN'S GUIDE TO OCEAN AND COASTAL LAW 4 (Catherine Schmitt ed., 2016) ("The references to fishing, fowling, and navigation can be found in the Colonial Ordinances of the 1640s that governed the colony of Massachusetts and the district of Maine before they became states").

252. *See, e.g.,* Sheftel v. Lebel, 44 Mass. App. Ct. 175, 183, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998) (citing Bell v. Wells, 557 A.2d 168, 173–76 (Me. 1989)).

specified protected use, such as navigation.[253] Furthermore, there are no known legally permissible alternative theories of access to the state's beaches over otherwise private lands.

13. Mississippi

Mississippi's public trust doctrine is rooted in common law and reflected in its Public Trust Tidelands Act.[254] While Mississippi law protects private property rights more than even the U.S. Constitution, it also broadly defines the uses it protects under the public trust doctrine.[255] Mississippi's doctrine protects the following uses at a minimum: navigation and transportation;[256] commerce;[257] fishing;[258] bathing, swimming and other recreational activities;[259] development of mineral resources;[260] environmental protection and preservation;[261] and the enhancement of aquatic, avarian and marine life, sea agriculture and others.[262] The state of Mississippi owns tidal waters and intertidal zones to the high-water line.[263]

The Mississippi Supreme Court has pointed out that its public trust doctrine is flexible.[264] Further, the court cited California's flexible doctrine to support the idea that its doctrine can evolve.[265] Specifically, the court explained that the doctrine is capable of

253. Home for Aged Women v. Commonwealth, 202 Mass. 422, 427, 89 N.E. 124, 125 (Mass. 1909) (explaining that under the colonial ordinance of 1647 "title to low-water mark, or to the distance of 100 rods, is subject to rights of navigation, and fishing and fowling.").

254. MISS. CODE ANN. §§ 29-15-1 – 29-15-7 (2013).

255. Craig, *supra* note 78, at 412.

256. Rouse v. Saucier's Heirs, 146 So. 291, 291-92 (1933) ("this title of the state being held for public purposes, chief among which purposes is that of commerce and navigation.").

257. *Id.*; *see also* Martin v. O'Brien, 34 Miss. 21 (1857).

258. State ex rel. Rice v. Stewart, 184 So. 44, 50 (1938).

259. Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So.2d 627, 632–33 (Miss. 1967) (explaining that "the State may dispose of submerged lands under tidal waters to the extent that such disposition will not interfere with the public's right of navigation, swimming and like uses") (quoting Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957)).

260. *Id.* at 633.

261. MISS. CODE ANN. §§ 49-27-3 & 49-27-5(a) (2013).

262. Cinque Bambini P'ship v. State, 491 So. 2d 508, *aff'd sub nom.* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (citing Marks v. Whitney, 6 Cal.3d 251 (1971)).

263. Sec'y of State v. Wiesenberg, 633 So.2d 983, 988 (Miss. 1994) (recognizing the federal grant in trust lands to the state to include "title to all land under tidewater, including the spaces between ordinary high and low water marks.") (quoting Rouse v. Saucier's Heirs, 16 Miss. 704, 713 (1933)).

264. *Id.* at 994 ("Public trust must not be equated to stagnation or nonuse but is indeed subject to our stewardship and may be used to meet changing needs.").

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

evolving with "the needs and sensitivities of the people."[266] Other decisions have similarly recognized the Mississippi doctrine's ability to evolve with the times.[267]

Like Louisiana, surfing is not known to be a popular sport in Mississippi.[268] Mississippi's surfable breaks are likely limited to its barrier islands, accessible only by boat.[269] Instead, most Mississippians travel to Alabama to catch waves.[270] Accordingly, it is no surprise that Mississippi's courts and legislature have not addressed whether surfing is a protected public trust doctrine use. Regardless, surfing likely fits within one of the state's existing recognized uses. In particular, surfing probably qualifies as a protected recreational activity under the state's doctrine. Furthermore, because surf breaks in Mississippi would likely require boats to access, lateral access across private property will likely not be an issue in the state. Nevertheless, there are no known alternative theories of legally protected access to beaches across private property in the state.

14. New Hampshire

New Hampshire's doctrine is based in the common law and statutory law. A New Hampshire statute recognizes and confirms "the historical practice and common law right of the public to enjoy the greatest portion of New Hampshire coastal shoreland, in accordance with the public trust doctrine subject to those littoral rights recognized at common law."[271] Another section of New Hamphire statutory law explains that the state "holds in 'public trust' rights in all shorelands subject to the ebb and flow of the tide to the high water mark and subject to those littoral rights recognized at common law."[272] A further provision declares that "[a]ny person may use the public trust coastal shorelands of New Hampshire for all useful and lawful purposes, to include recreational purposes, subject to the provisions of municipal

266. *Wiesenberg*, 633 So.2d at 989 (quoting Cinque Bambini, 491 So. 2d at 512).

267. *See, e.g.,* Treuting v. Bridge & Park Comm'n., 199 So. 2d 627, 633 (Miss. 1967) ("When the common law of England developed with reference to a public trust, navigation and fisheries were perhaps the only considerations. The values of the underlying mineral estate were not involved. No thought was given to the dredging and filling in of mud flats and other marginal submerged lands, unsuitable for navigation, for commercial, industrial, recreational and residential use. In fact, there was no machinery capable of such work.").

268. *Mississippi/Louisiana*, *supra* note 208.

269. Jessie Zenor, *Mississippi Stoke: Surfing Along the Mississippi Coast*, MISSISSIPPIFOLKLIFE (Aug. 10, 2017), http://www.mississippifolklife.org/photo-essays/mississippi-stoke.

270. *Id.*

271. N.H. REV. STAT. ANN. § 483-C:1 I. (2018).

272. *Id.* at II.

ordinances relative to the 'reasonable use' of the public trust shorelands."[273] New Hampshire's Supreme Court established that "[a]ny member of the public may exercise a common-law right to boat, bathe, fish, fowl, skate and cut ice in and on its public waters."[274] Courts have echoed the statutory provision establishing that New Hampshire's doctrine also protects "all useful and lawful purposes."[275] New Hampshire's public trust doctrine extends to the high water mark, and the boundary between private and public tidal lands is the high-water line.[276]

New Hampshire's seventeen-mile coastline features what has been called "the most action-packed stretch of surf on the whole [sic] East Coast."[277] However, it also features hazards that make its breaks more advanced than other jurisdictions.[278] New Hampshire's courts and lawmakers have not explicitly protected surfing under the public trust doctrine. However, surfing might fit under one of the currently recognized protected uses. Particularly, surfing likely qualifies as a lawful recreational purpose under the state's existing doctrine. There are no known theories of beach access providing surfers access over dry sand areas in New Hampshire.

15. New Jersey

New Jersey's public trust doctrine is based in common law, but it is also reflected in several of its statutes.[279] Peculiarly, New Jersey's Constitution actually limits rather than expands the state's ownership of trust lands.[280] The boundary between public and private ownership of public trust tidelands in New Jersey is

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273. *Id.* at III.

274. Hartford v. Gilmanton, 101 N.H. 424, 425–26 (N.H. 1958) (citation omitted).

275. State v. Sunapee Dam Co., 50 A. 108, 108 (N.H. 1900) (explaining that "such use and benefit is not limited to navigation and fishery, but include all useful and lawful purposes.").

276. Opinion of the Justices, 649 A.2d at 608 ("the public trust in tidewaters in this State extends landward to the high water mark"); New Hampshire's legislature attempted to extend the boundary for public trust uses to the highest high tide line by statute. N.H. REV. STAT. ANN. § 483-C:1(V) (2018). The Supreme Court of New Hampshire invalidated the statute as a taking. Purdie v. Attorney General, 732 A.2d 442, 445–47 (N.H. 1999) (citing 649 A.2d at 609 (N.H. 1994).

277. *New Hampshire Surfing*, MAGICSEAWEED, https://magicseaweed.com/New-Hampshire-Surfing/266/ (last visited Jan. 16, 2019).

278. *New Hampshire Travel & Surf Guide*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=20897 (last visited Jan. 16, 2019) ("New Hampshire is loaded with picturesque pointbreaks, but the dry paddle isn't as easy as you'd think: the restrictive rubber is amplified by tricky currents and heavy water that make most spots too dangerous for all but the most advanced surfers. Also, rocks are always a consideration.").

279. *See, e.g.,* N.J. STAT. ANN. § 23:9–4 (West 2018).

280. N.J. CONST., art. VII, § 1.

the high-water mark.[281] However, public trust uses are protected on the dry sand beaches up to the first line of vegetation, making New Jersey's doctrine the most geographically expansive as it pertains to beaches.[282] However, the state's beaches feature certain public use hindrances, such as fees and efforts by certain towns to curtail public access to their beaches.[283]

New Jersey's public trust doctrine protects the triad of traditional uses.[284] One of the most influential U.S. public trust doctrine cases is a New Jersey Supreme Court case recognizing that the doctrine protects "passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products."[285] Subsequent cases recognized that New Jersey's doctrine has evolved beyond the traditional uses.[286]

In *Matthews v. Bay Head Improvement Association,* New Jersey's Supreme Court used the public trust doctrine to establish perhaps the broadest beach access rights of any state in the country. In that case, the court explained that extending the doctrine "to include bathing, swimming and other shore activities is consonant with and furthers the general welfare."[287] Furthermore, the court required reasonable access across the dry sand to access the beach, explaining that "[w]ithout some means of access the public right to use the foreshore would be meaningless."[288] The *Matthews* court further established the New

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281. Panetta v. Equity One, Inc., 920 A.2d 638, 644–45 (N.J. 2007).

282. Peloso & Caldwell, *supra* note 106, at 92 ("New Jersey has the most geographically expansive reading of the public trust doctrine. It is the only state that recognizes that the public trust encompasses the dry sand beach up to the first line of vegetation.") (citing Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984)). However, North Carolina's Supreme Court has also recognized that public trust rights attach to the sandy beach in that state. Angela Howe, *North Carolina Supreme Court Confirms State's Sandy Beach is Accessible for All,* Surfrider Foundation Coastal Blog (Dec. 15, 2016), https://www.surfrider.org/coastal-blog/entry/north-carolina-supreme-court-confirms-sandy-beach-is-accessible-for-all.

283. Tim Hawk, *Here's How Much a Beach Badge Costs in Every Jersey Shore Town, 2018 Edition,* NJ.COM (May 24, 2018), https://www.nj.com/entertainment/index.ssf/2018/05/2018_beach_tag_costs.html.

284. Borough of Neptune City v. Borough of Avon-by-the Sea, 294 A.2d 47, 52 (N.J. 1972) ("The original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce, waterways being the principal transportation arteries of early days, and for fishing, an important source of food."); *see also* Cobb v. Davenport, 32 N.J.L. 369, 378 (N.J. 1867) ("The title of the sovereign being in trust for the benefit of the public--the use, which includes the right of fishing and of navigation, is common. The title of the individual being personal in him, is exclusive--subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact.").

285. Arnold v. Mundy, 6 N.J.L. 1, 12 (1821).

286. *Borough of Neptune City* 61 N.J. at 309 ("We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogative of navigation and fishing . . .").

287. *Matthews*, 95 N.J. at 321.

288. *Id.* at 323.

Jersey doctrine's flexibility, explaining that that the doctrine is capable of adapting to changing times and societal needs, and may be "molded and extended to meet changing conditions and needs of the public it was created to benefit."[289]

New Jersey's coastline is flush with waves suitable for surfing,[290] but good waves and a densely-populated state combine to make crowded surf breaks.[291] New Jersey is one of a handful of jurisdictions that explicitly protects surfing under its public trust doctrine.[292] New Jersey recognizes surfing as a form of navigation, subject to the public trust doctrine.[293] The geographically expansive region of New Jersey's coastline subject to the trust also fosters surfing and public access for surfers. Despite the state's recognition of surfing under its public trust doctrine, surfers face some issues on New Jersey's coastline. For instance, surfing was banned at Asbury Park until 2003.[294] Further, there are still some highly-publicized obstacles to beach access in the state.[295] There are no known alternative theories of legal access to New Jersey's coastline.

16. New York

New York's public trust doctrine is based in common law and reflected in its statutes.[296] New York courts have explained that "[t]he foreshore, the land lying between the high- and low-water marks of navigable waters, is subject to the rights of several

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289. *Id.* at 326 (citation omitted); *see also* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005).

290. *See New Jersey Travel & Surf Guide*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=2147 (last visited Jan. 16, 2019).

291. *Id.*

292. *See* Van Ness v. Borough of Deal, 139 N.J. Super. Ct. Ch. Div. 83, 93–97, 352 A.2d 599 (1975) (Surfing and other recreational uses held protected under the public trust doctrine); *see also* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, PUBLIC ACCESS IN NEW JERSEY: THE PUBLIC TRUST DOCTRINE AND PRACTICAL STEPS TO ENHANCE PUBLIC ACCESS 38, http://www.state.nj.us/dep/cmp/access/public_access_handbook.pdf (listing surfing as a public use of the ocean shoreline).

293. SUSAN M. KENNEDY, A PRACTICAL GUIDE TO BEACH ACCESS AND THE PUBLIC TRUST DOCTRINE IN NEW JERSEY 23 (Tony MacDonald ed. 2017).

294. *Beach Access*, SURFRIDER FOUNDATION, http://www.surfrider.org/initiatives/beach-access (last visited Jan. 16, 2019).

295. *See, e.g.,* Gerry Mullany, *Chris Christie Hits a Closed State Beach, and Kicks Up a Fury*, N.Y. TIMES (July 3, 2017), https://www.nytimes.com/2017/07/03/nyregion/chris-christie-beach-new-jersey-budget.html (Governor Chris Christie using a beach that had been closed to the public due to a government shutdown).

296. *See, e.g.,* N.Y. PUB. LANDS LAW § 75 (McKinney 2014). The doctrine is also reflected in the state's nonbinding Coastal Policies as well. NEW YORK DEPARTMENT OF STATE, STATE COASTAL POLICIES 24–29 (2017), https://www.dos.ny.gov/opd/programs/pdfs/CoastalPolicies.pdf.

classes of persons."[297] Specifically, New York recognizes certain rights for the riparian landowners, as well as the rights of all to navigate over the waters covering the foreshore at high tides, and access to the foreshore "for fishing, bathing or any lawful purpose."[298] Another decision reaffirmed the common law rule that New York's tidal waters are "devoted to the public use, for all purposes, as well for navigation as well as for fishing."[299] Commentators have posited that the boundary between state and private ownership in New York is the high-tide line, but there is no case law unequivocally supporting this proposition.[300]

New York features surfing on its Long Island beaches. Surfing in the state is centered around Rockaway, Long Beach, and Montauk. Surfing was banned on Rockaway Beach as recently as 2005.[301] New York's courts and legislature have not specifically weighed in on whether surfing is a protected public trust use in the state. However, case law protecting access to the foreshore for any lawful purpose appears to be broad enough to include surfing as a potentially protected use.[302] Specifically, the supposition that the doctrine protects any lawful purpose makes it likely that the doctrine includes surfing within its ambit. However, the uncertain boundary between state and private ownership, and the state's occasional criminalization of surfing, makes this questionable. There is no known alternative theory of access for surfers to access the state's beaches across the dry sand areas.

17. North Carolina

North Carolina's public trust doctrine is primarily reflected in its statutes, but it is also reflected in its constitution and in case law.[303] North Carolina's Supreme Court has recognized the doctrine since the early twentieth century.[304] Court opinions have established that the state protects the traditional triad of public

297. Arnold's Inn, Inc. v. Morgan, 310 N.Y.S.2d 541, 547 (N.Y. Sup. Ct. 1970).

298. *Id.*

299. Douglaston Manor, Inc. v. Bahrakis, 678 N.E.2d 201, 203 (N.Y. 1997) (citation omitted) (emphasis omitted).

300. Craig, *supra* note 95, at 87. Case law, seems to support this proposition. *See, e.g., Arnold's Inn*, 310 N.Y.S.2d at 547; *see also* Shively v. Bowlby, 152 U.S. 1, 20–21, (1894).

301. *Beach Access*, *supra* note 294.

302. Tucci v. Salzhauer, 40 A.D.2d 712, 713 (N.Y. App. Div. 1972) (recognizing "fishing, bathing, boating and other lawful purposes and, when the tide is out, the right of the public of access to the water for fishing, bathing, boating and other lawful purposes, to which the right of access over the beach may be a necessary incident.")

303. N.C. CONST. art 14, § 5; Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. Ct. App. 2015), *cert. denied*, 138 S. Ct. 75 (2017).

304. State ex rel. Rohrer v. Credle, 322 N.C. 522 (N.C. 1988).

trust uses.[305] North Carolina statutory law specifically sets out certain protected public trust rights, including navigation, swimming, hunting, fishing, and all recreational uses.[306] North Carolina's courts have similarly recognized these statutory trust uses, explaining that the public enjoys the right to "navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches."[307] This list is non-exhaustive.[308] The same statute protects "the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches."[309] State ownership of the tidelands extends to the mean high water line of North Carolina's beaches.[310] Furthermore, North Carolina's Supreme Court has explained that "[t]he long standing right of the public to pass over and along the strip of land lying between the high-water mark and the low-water mark adjacent to respondents' property is well established beyond need of citation."[311]

Surfing has been called North Carolina's most valuable commodity.[312] The sport is centered around the state's Outer Banks. This region features a narrow continental shelf allowing swells to reach its coast unimpeded, in stark contrast to most of the East Coast.[313] North Carolina's courts and legislature have not specifically said whether the public trust doctrine protects surfing. The state's doctrine does, however, encompass recreational activities. Accordingly, because the state's public trust doctrine is broad and protects recreational uses generally, and because there are no obvious countervailing reasons for extending this protection

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305. Parker v. New Hanover County, 619 S.E.2d 868, 875 (N.C. Ct. App. 2005) (quoting State ex rel. Rohrer v. Credle, 369 S.E.2d 825, 828 (N.C. 1988)).

306. N.C. GEN. STAT. § 1-45.1 (1994).

307. Fabrikant v. Currituck County, 621 S.E.2d 19, 27–28 (N.C. Ct. App. 2005) (quoting friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation v. Coastal Res. Comm'n, 452 S.E.2d 337, 348 (N.C. Ct. App. 1995) (quoting N.C. GEN. STAT. § 1-45.1 (1994))).

308. N.C. GEN. STAT. § 1-45.1 (1994) (explaining that the protected trust uses include but are not limited to the enumerated uses).

309. *Id.*; *see also* N.C. GEN. STAT. § 77-20(d) (1988) (ensuring the "customary free use and enjoyment of the ocean beaches.").

310. West v. Slick, 326 S.E.2d 601, 617 (N.C. 1985); N.C. GEN. STAT. § 77-20(a) (1988) ("The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark.").

311. *West*, 326 S.E.2d at 617.

312. *Northern Outer Banks*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=2150 (last visited Jan. 16, 2019).

313. *Id.*

to the sport of surfing, North Carolina's doctrine probably protects surfing. Custom also can provide legal access to North Carolina's beaches across private property.[314]

18. Oregon

Oregon's public trust doctrine is embodied in case law and reflected in its constitution and statutes.[315] Oregon statutes protect "navigation, fishing and public recreation."[316] The state's Supreme Court has explained that "[t]he law regarding the public use of property held in part for the benefit of the public must change as the public need changes."[317] Another decision recognized several public uses on the state's waters, including "sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated."[318]

Additionally, the Oregon Supreme Court has found that the general public holds a recreational easement in the dry-sand beach area along the Oregon coast.[319] The court found this right was conferred through custom rather than the public trust doctrine.[320] But custom and the doctrine are not so easily separated, nor are they mutually exclusive.[321] In fact, commentators have argued that the public trust doctrine is complementary to custom, and perhaps a better justification for the state's traditional public easement on its coastline.[322]

Oregon's coastline features fertile surfing for the adventurous wave seeker. Further, its breaks are deserted enough that avoiding crowds is not an issue in Oregon.[323] Nonetheless, certain locales

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314. Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. Ct. App. 2015), *cert. denied*, 138 S. Ct. 75 (2017).

315. *See* Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375, 408 (2012).

316. OR. REV. STAT. § 196.825(1)(b) (2015).

317. State ex rel. Thornton v. Hay, 462 P.2d 671, 679 (Or. 1969) (Denecke, J., concurring).

318. Guilliams v. Beaver Lake Club, 175 P. 437, 442 (Or. 1918).

319. *Thornton v. Hay*, 462 P.2d at 673 ("The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history.").

320. *Id.* at 676 ("We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom."); *see also* DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 76–79 (2010).

321. *See generally* Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton v. Hay*, 4 ENVTL. L. 383 (1974).

322. Blumm & Doot, *supra* note 315, at 408.

323. *Oregon*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=2138 (last visited Jan. 16, 2019).

feature established local crews.[324] Oregon does not clearly recognize surfing as a protected public trust doctrine use, but the broad uses the state recognizes make it likely that surfing fits within the state's current doctrine, perhaps as a recreational use. Regardless, the state's strong beach law and its recognition of customary uses of its beaches make the recognition of surfing as a doctrine use less important than in other states. Because Oregon recognizes custom as a way to access its beaches, this is perhaps the best option for gaining access in the state across otherwise private dry sand. Oregon's Beach Bill further protects the coast for its citizens.[325]

19. Rhode Island

Rhode Island's public trust doctrine derives from English common law[326] and is codified in the state's constitution.[327] It explicitly protects certain uses, including fishing from the shore, gathering seaweed, leaving the shore to swim in the sea, passage along the shore, and the use of natural resources.[328] These public trust use rights are repeated in Rhode Island's general laws.[329] While enumerated, these uses are not an exhaustive list.[330] Navigation and the other traditional uses are protected as well.[331] Court decisions have also protected the right of nude bathers to use the beach below the mean high-tide line and beach access points as within the doctrine.[332] The state owns title to the seashore to the high water mark in Rhode Island, which means the high tide line.[333]

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324. *Id.*

325. Oregon Beach Bill, H.B. 1601, 34th Legis. Assemb. (Or. 1967).

326. Hall v. Nascimento, 594 A.2d 874, 876–77 (R.I. 1991) ("At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . 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 of the United States.") (quoting Phillips Petroleum Co. v. Miss., 484 U.S. 469, 473–74 (1988)).

327. R. I. CONST. art. I, §§ 16–17.

328. *Id.* at § 17.

329. R.I. GEN. LAWS § 46-23-1.

330. RHODE ISLAND CONST. art. I, § 17 (explaining that this list is not exhaustive).

331. Champlin's Realty Ass., L.P. v. Tilson, 823 A.2d 1162, 1165–66 (R.I. 2003); Greater Providence Chamber of Commerce v. State, 657 A.2d 1038, 1041 (R.I. 1995) (citing Nugent ex rel. Collins v. Vallone, 161 A.2d 802, 805 (R.I. 1960)).

332. New England Naturist Ass'n v. Larsen, 692 F. Supp. 75, 80 (D.R.I. 1988) (finding that the right to use the beach "extends only to the area below the mean high-tide line and recognized points of access thereto.").

333. State v. Ibbison, 448 A.2d 728, 731 (R.I. 1982) (citing Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 22–23 (1935)); *see also* Bradley, 877 A.2d 601, 606 (R.I. 1982); Champlin's Realty, 823 A.2d at 1165; Town of Warren v. Thornton-Whitehouse, 740 A.2d

Rhode Island receives the "lion's share of Southern New England surf."[334] The state is divided into two surf zones, Narragansett and Newport, which are separated by Narragansett Bay.[335] Rhode Island's courts and legislature have not addressed whether surfing is a protected public trust doctrine use in the state. But the state's recognized protected uses make it likely that surfing would be protected by the doctrine. Specifically, because the state protects the right to leave the shore to swim in the sea and the right to pass along its shores, it seems likely it would protect surfing as well. However, there do not appear to be any currently recognized theories of access protecting the rights of surfers to cross private properties to enter the beaches in Rhode Island.

20. South Carolina

South Carolina features public trust protections in its Constitution and in its statutes.[336] Commentators note that the South Carolina Supreme Court broadened the scope of its public trust doctrine in a 1995 case. In that case, the court explained that while the doctrine has traditionally protected natural resources, such as air, water, and land, it also protects the public's "inalienable right to breathe clean air; to drink safe water; to fish and sail; and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks."[337] Additionally, a South Carolina Attorney General Opinion opined that the states tidelands, submerged lands and navigable waters are trust property "to be held by the State for the benefit of the public at large for the development of fishing, recreation and other public purposes."[338]

South Carolina features surf breaks along its coastline, particularly on its barrier islands.[339] While the state's surf breaks are not typically world class, hurricanes can produce very good waves on South Carolina's beaches.[340] While not specifically protected so far, South Carolina's public trust doctrine is broad

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1255, 1259 (R.I. 1999); Dawson v. Broome, 53 A. 151, 157–58 (R.I. 1902); Allen v. Allen, 32 A. 166 (R.I. 1895); R.I. GEN. LAWS § 46-5-1.2 (2018).

334. *Rhode Island Travel & Surf Guide*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=20914 (last visited Jan. 16, 2019).

335. *Id.*

336. Craig, *supra* note 95, at 23.

337. *Id.* (citing Sierra Club v. Kiawah Resort Ass'n, 456 S.E.2d 397, 402 (S.C. 1995)).

338. Op. S.C. Att'y. Gen. 329, 334 (December 10, 1970).

339. *South Carolina Travel & Surf Guide*, SURFLINE, http://www.surfline.com/travel/index.cfm?id=2152 (last visited Jan. 16, 2019).

340. *Id.*

enough to include surfing within its recognized uses. Particularly, the state's recognition of recreation likely includes surfing. There are no other existing legal theories that allow access to the state's beaches over private property.

21. Texas

Texas courts have found the public trust to be embedded in the state's constitution,[341] and it appears in the Texas Open Beaches Act.[342] Statutes protect the "public interest in navigation in the intracoastal water."[343] "Coastal public land"[344] and "submerged land"[345] are defined by statute. Texas state law prioritizes uses that the public at large may participate in over those limited to fewer individuals.[346] Statutes provide for leasing of coastal public lands, but these leases may not exclude the public from using these lands for recreational purposes.[347] Texas has specifically protected certain public trust doctrine uses on its shores. These include the right of passing and repassing, navigation, fishing, among others, but these rights are subject to general regulations.[348] Hunting is similarly protected, along with "other lawful purposes."[349]

Under common law, the title to Texas's shore belongs to the state and is defined as the stretch of land between the high and low water marks.[350] These boundaries might vary depending on when a tidal property was granted to a private landowner.[351] Importantly for surfers, Texas submerged lands that have been transferred to private property owners do not reserve public trust

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341. Cummins v. Travis Cty. Water Control & Improvement Dist. No. 17, 175 S.W.3d 34, 49 (Tex. App. 2005) (citing TEX. CONST. art. XVI, § 59(a)) ("The importance of the State's duty to protect its natural resources is demonstrated by article 16, section 59 of the Texas Constitution, which provides that '[t]he conservation and development of all of the natural resources of this State, . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties.'").

342. TEX. NAT. RES. CODE ANN. § 61.011(a) et seq.

343. § 33.001(d).

344. § 33.004(6).

345. § 33.004(11).

346. § 33.001(c).

347. § 33.108.

348. City of Galveston v. Menard, 23 Tex. 349, 362 (Tex. 1859) (citations omitted).

349. Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Tex. 1935).

350. *City of Galveston*, 23 Tex. at 358 ("The shore, is that ground that is between the ordinary high-water and low-water mark, whether on the coast, or in the arms of the sea, such as bays, navigable rivers, etc., in which the tide flows and reflows.").

351. City of Corpus Christi, 622 S.W.2d at 643 (citing Rudder v. Ponder, 293 S.W.2d 736 (Tex. 1956)); TH Invs., Inc. v. Kirby Inland Marine, 218 S.W.3d 173,184 (Tex. App. 2007).

uses.[352] Texas's Open Beaches Act protects the "free and unrestricted right of ingress and egress to and from the state owned beaches,"[353] effectively creating a public easement over dry sand beaches. Under this Act, Texas features one of the most geographically expansive public trust coastlines.[354]

Texas beaches receive limited swells, similar to the other Gulf States. A listing of the best surf breaks in Texas include South Padre Island, Mansfield Jetty, Matagorda, Surfside Beach, and, remarkably, the Galveston Shipping Channel.[355] Like most states, the Texas legislature and its courts have not spoken to whether surfing is a protected public trust use in the state. The doctrine seems robust enough to include surfing within its ambit. Specifically, the proclamation that "lawful uses" are protected by the doctrine make it possible that surfing can be included in the state's doctrine.[356] However, recent court decisions limiting beach access—at least future access—make it unclear whether the courts would be willing to expand the doctrine to include surfing, or clarify that its reach already protects the sport.[357] The state's seemingly robust Open Beaches Act might provide beach access where the state can prove public beaches exist.[358]

22. Virginia

Virginia's public trust doctrine is evident in its Constitution.[359] It specifically mandates the right of its citizens to have the "use and enjoyment for recreation of adequate public lands, waters, and other natural resources."[360] Another constitutional provision requires that the state's natural oyster beds, rocks and shoals in its waters be held in trust for its people.[361] Finally, an additional section protects the rights of Virginians to hunt, fish, and harvest game.[362] One court opinion cited statutory law to establish that the

352. Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 59–60 (Tex. App. 1993) (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473, 481–84 (1988); Shively v. Bowlby, 152 U.S. 1, 26 (1894); City of Galveston v. Menard, 23 Tex. 349 (1859); State v. Lain, 349 S.W.2d 579 (Texas 1961)).

353. TEX. NAT. RES. CODE ANN. § 66.011.

354. Peloso & Caldwell, *supra* note 106, at 57–58.

355. Cyrus Saatsaz, *These Are 5 of the Best Places to Surf in Texas*, ADVENTURE SPORTS NETWORK (July 12, 2016), https://www.adventuresportsnetwork.com/sport/surf/these-are-5-of-the-best-places-to-surf-in-texas/.

356. *See* Diversion Lake Club v. Heath, 86 S.W.2d 441, 444 (Tex. 1935).

357. Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).

358. Open Beaches Act, TEX. NAT. RES. CODE ANN. § 61.011.

359. VA. CONST. art. XI, § 1.

360. *Id.*

361. *Id.* at art. XI, § 3.

362. *Id.* at art. XI, § 4.

public has rights in "fishing, fowling, hunting, and taking and catching oysters and other shellfish."[363] Like other former pre-Revolution Colonies, Virginia extends private title on its coastline to the mean low water mark.[364]

Much of Virginia's public trust doctrine has been codified in its statutes.[365] Virginia places authority in the Virginia Marine Resources Commission to oversee permitting of structures on state subaqueous lands.[366] This agency's regulations further make it clear that "the state is responsible for proper management of the resource to ensure the preservation and protection of all appropriate current and potential future uses, including potentially conflicting uses, by the public."[367]

Virginia claims it is the birthplace of East Coast surfing.[368] Its surf scene is centered around Virginia Beach. While the area is not known for big waves, it does have a solid crowd of core devotees. Because of its colonial lineage, it is unlikely that Virginia's public trust doctrine currently recognizes surfing within its protected public trust doctrine uses. Like other states that featured colonial ordinances, Virginia extends its private property to the low water mark. Furthermore, it recognizes limited public trust uses on these private lands. Unless surfing qualifies as one of these protected uses, it might not be protected under the doctrine. The best argument that it is protected is that surfing is a form of navigation or another protected use under the doctrine. Finally, there are no known alternative legal theories for access over Virginia's uplands to access its beaches.

23. Washington

Washington's public trust doctrine is reflected in the state's constitution, its common law, and its statutes.[369] Washington law protects the classic trust uses of commerce, navigation, and fisheries, as well as several others. Courts have explicitly

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363. Evelyn v. Commonwealth, 621 S.E.2d 130, 134 (Va. Ct. App. 2005) (citing VA. CODE ANN. § 28.2-1200).

364. Shively v. Bowlby, 152 U.S. 1, 24–25 (1894) ("In Virginia, by virtue of statutes beginning in 1679, the owner of land bounded by tide waters has the title to ordinary low-water mark, and the right to build wharves, provided they do not obstruct navigation."); *see also* Peloso & Caldwell, *supra* note 106, at 112.

365. Craig, *supra* note 95, at 105.

366. VA. CODE ANN. § 28.2-1205(A) (outlining factors the Commission considers).

367. Virginia Marine Res. Comm'n, Subaqueous Guidelines, 21 Va. Reg. Regs. 1708 (Feb. 21, 2005).

368. Stewart Ferebee, *The Surfing Life,* VIRGINIA LIVING (Aug. 4, 2011, 1:13 PM), http://www.virginialiving.com/travel/the-surfing-life/.

369. WASH. CONST. art. 17, § 1.

recognized water skiing and swimming, as well as "other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."[370] Commentators have remarked that the doctrine also protects "boating, bathing, fishing, fowling, skating, cutting ice, water skiing, and skin diving."[371] Courts, however, have explicitly said that the doctrine does not include the right to gather clams.[372]

After Washington's tidelands transferred to the state upon its entry to the United States, the state transferred a majority of these lands to private ownership.[373] This mass privatization makes Washington's public trust doctrine and the uses it protects that much more important for its citizens.[374] The dividing line between state and private ownership of navigable waters in Washington is the ordinary high water mark.[375] However, the public maintains the right to go where navigable waters lie over private submerged lands.[376]

Washington features well-known and lesser-known surf breaks along its more than 150-mile coastline.[377] While Washington state courts and its legislature have not explicitly protected surfing under the public trust doctrine, there is reason to think that surfing might already be protected in the state. For instance,

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370. Caminiti v. Boyle, 107 Wash. 2d 662, 669 (1987) (citing Wilbour v. Gallagher, 77 Wash. 2d 306, 316 (1969)) *cert. denied*, 400 U.S. 878 (1970) (explaining that otherwise private submerged "land is subjected to the rights of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.").

371. Craig, *supra* note 100, at 193 (citing Wilbour, 462 P.2d at 239 n.7).

372. Washington v. Longshore, 982 P.2d 1191, 1195 (Wash. App. 1999), *aff'd*, 5 P.3d 1256, 1259–63 (Wash. 2000) (en banc) ("Longshore relies on the public trust doctrine and the common law regarding animals ferae naturea [sic] in arguing that the ownership interests of a private tidelands owner do not include ownership of a natural bed of clams. Neither theory supports his position.").

373. Ewa M. Davison, *Enjoys Long Walks on the Beach: Washington's Public Trust Doctrine and the Right of Pedestrian Passage over Private Tidelands*, 81 WASH. L. REV. 813, 816 (2006) (citing Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 552–53 (1992)).

374. Even when Washington conveys trust tidelands and shorelands to private individuals, those lands are still imbued with trust limitations, including trust uses by the public.

375. WASH. CONST. art. 17, § 1 ("The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."); Brace & Hergert Mill Co. v. State, 95 P. 278, 281 (Wash. 1908) (explaining that "[Washington] state asserted its right to these shores and beds of its navigable waters in its Constitution. There can be, therefore, no question that its right thereto is paramount to any claim made by an upland owner in virtue of his patent from the United States.").

376. Wilbour v. Gallagher, 462 P.2d 232, 238 (Wash. 1969).

377. Justin W. Coffey, *Yes, it is Possible to Surf in the Pacific Northwest,* OUTDOOR MAGAZINE ONLINE (Mar. 25, 2016), https://www.outsideonline.com/2064161/yes-it-possible-surf-pacific-northwest.

Washington's Seashore Conservation Act specifically lists surfing among its list of recreational activities for which the Act seeks to protect Washington's beaches.[378] While the courts have not explicitly recognized surfing under the state's doctrine, they have found that the Seashore Conservation Act complies with the public trust doctrine.[379] It also features strong language dedicating the state's beaches to public usage and access.[380] Furthermore, scholars have argued that Washington's doctrine is already much broader than has been judicially recognized, especially regarding recreational uses.[381] Finally, a Washington Attorney General Opinion concluded that the public has the right to use the dry area of the state's beaches for recreational purposes.[382]

B. Other States

Surfing is not only practiced on the outer coasts of the United States. It has also found a home in certain landlocked states, especially in the Great Lakes region and on some rivers. This section considers the public trusts of some of these states, as well as others that are particularly interesting in how they treat recreation. While the public trust doctrines in landlocked states are similar to those of coastal states, the bounds of the physical trust lands are different. Regardless, examining these states' doctrines can help inform the discussion about recognizing surfing as a protected use. The following section collects potentially helpful persuasive case law and statutes in non-coastal states for arguing that surfing should be a protected public trust use.

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378. WASH. REV. CODE ANN. § 79A.05.600 (declaring that Washington's beaches "provide the public with almost unlimited opportunities for recreational activities, like swimming, surfing and hiking.").

379. Caminiti v. Boyle, 107 Wash. 2d 662, 670, 732 P.2d 989, 995 (1987) (noting "that the requirements of the 'public trust doctrine' are fully met by the legislatively drawn controls imposed by the Shoreline Management Act of 1971.").

380. WASH. REV. CODE ANN. § 79A.05.693 (emphasizing that the ocean shores "are hereby declared a public highway and shall remain forever open to the use of the public.").

381. Davison, *supra* note 373.

382. 27 Wash. Op. Att'y Gen. 27, http://www.atg.wa.gov/ago-opinions/water-public-lands-rights-public-use-ocean-beaches (relying on the Oregon Supreme Court Opinion *State ex rel. Thornton v. Hay*, 89 Ore. 887, 462 P.2d 671 (1969), and explaining that "[t]he public's use of the ocean beaches in this state has been substantially the same as that found to exist by the Oregon Supreme Court on the beaches of that state. The fact of such use, along with its nature and continuity, is a matter of such general public knowledge in this state, that we have no hesitation in taking notice of its existence.").

1. Illinois

Illinois served as the location for perhaps the most famous American public trust doctrine case.[383] The doctrine is evident in the state's constitution and statutes.[384] The doctrine creates a cause of action in Illinois.[385] The state's doctrine originally only protected the traditional triad of uses.[386] However, the Illinois Supreme Court explicitly expanded the doctrine due to "changing conditions and public needs."[387] Under that decision, the doctrine also includes conserving natural resources and protecting the environment.[388] The line between private and public ownership of Lake Michigan is the high-water mark.[389]

Surfing is practiced in Illinois, particularly on Chicago's Lake Michigan shores. Surfing was banned completely in Chicago's portion of Lake Michigan until 2009.[390] Recent arrests of surfers in the prohibited areas highlight the importance of this issue in the region.[391] While it is unclear whether Illinois' public trust doctrine includes surfing, and the state has not specifically stated whether it does, the case could be made that the doctrine protects surfing under a traditional doctrine use or under the expanded doctrine.

2. Michigan

Michigan's public trust doctrine is reflected in its constitution and enshrined in its statutes. Michigan treats the public trust doctrine on its Great Lakes differently than its other navigable waters. On the Great Lakes, the public trust doctrine continues to

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383. Ill. Cent. R.R. Co. v. State of Illinois, 146 U.S. 387 (1892).

384. ILL. CONST., art XI, § 2 ("Each person has the right to a healthful environment."); *see also* People ex rel. Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976); 70 ILL. COMP. STAT. ANN. 805/5d (restricting districts from interfering with navigation or public access).

385. Timothy Christian Schools v. Village of W. Springs, 675 N.E.2d 168, 173–74 (Ill. App. Ct. 1996); Paepcke v. Public Bldg. Comm'n of Chicago, 263 N.E.2d 11, 18 (Ill. 1970) (overruling Droste v. Kerner, 217 N.E.2d 73 (Ill. 1966)).

386. DuPont v. Miller, 141 N.E. 423, 425 (Ill. 1923); Schulte v. Warren, 75 N.E. 783, 787 (Ill. 1905).

387. *People ex rel. Scott*, 360 N.E.2d at 780 (citation omitted).

388. *Id.*

389. Revell v. People, 52 N.E. 1052, 1055 (Ill. 1898) (citing People v. Kirk, 45 N.E. 830, 833 (Ill. 1896); Shively v. Bowlby, 152 U.S. 1, 9 (1894).

390. *Beach Access,* SURFRIDER FOUNDATION, http://www.surfrider.org/initiatives/beach-access (last visited Jan. 16, 2019) (describing Chicago as among its top campaigns and explaining that "Surfrider Foundation Chicago Chapter has been committed to opening up opportunities to surf in Lake Michigan.").

391. Bernie Tafoya, *Oak Street Beach Arrest Infuriates Surfing Community*, CBS CHI. (Jan. 20, 2012, 8:42 AM), http://chicago.cbslocal.com/2012/01/20/oak-street-beach-arrest-infuriates-surfing-community/.

the high-water mark even though the line between public and private lands might be the low-water mark.[392] Michigan protects various use rights in the Great Lakes, including "fishing, hunting, and boating for commerce or pleasure."[393] The doctrine similarly protects cutting ice, boating, bathing and wading, taking shellfish, gathering seaweed, cutting sedge, and fowling.[394]

Michigan features surfing on its Great Lakes as well as on at least one of its rivers. The state has not clearly protected surfing in its judicial opinions or in its statutes. However, the state protects similar recreational uses, including pleasure boating and bathing. Accordingly, the argument could be made that the doctrine should or already does protect surfing in the state.

3. Minnesota

Minnesota's constitution features public trust protections for its citizens.[395] Minnesota's public trust doctrine protects a variety of uses. It has listed several of these uses, including commercial and recreational navigation and boating, fowling, skating, bathing, taking water for domestic and agricultural purposes, fishing, hunting, and cutting ice.[396] However, the state has explained that all of the uses it protects cannot be listed or anticipated.[397] A guiding tenet for determining a protected use is that it is suitable for a group of people having a common interest.[398] Skating is a noteworthy protected use because of its similarity to surfing. Minnesota recognizes the low water mark as the border between public and private ownership in navigable waters.[399]

Surfing in Minnesota is centered on Lake Superior. While the state has not explicitly protected surfing, it has protected similar uses. Skating is a particularly applicable analog protected use. The fact that private property extends to the low water mark in Minnesota makes the public trust doctrine's applicability that much more important for the state's surfers.

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392. Glass v. Goeckel, 703 N.W.2d 58, 69–70 (Mich. 2005).

393. *Id.* at 64–65.

394. *Id.* at 74 (citing Orange v. Resnick, 109 A. 864, 866 (Conn. 1920)).

395. MINN. CONST. art. II, § 2; *see also* MINN. CONST. art. XI, § 14 (establishing "A permanent environment and natural resources trust fund . . . [t]he assets of the fund shall be appropriated by law for the public purpose of protection, conservation, preservation, and enhancement of the state's air, water, land, fish, wildlife, and other natural resources.").

396. Nelson v. Delong, 213 Minn. 425, 431 (1942) ("not only navigation by water craft for commercial purposes, but the use also for the ordinary purposes of life such as boating, fowling, skating, bathing, taking water for domestic or agricultural purposes, and cutting ice.").

397. Lamprey v. Metcalf, 52 Minn. 181, 199–200 (1893).

398. *Id.* at 200.

399. In re Union Depot St. Ry. & Transfer Co., 31 Minn. 297, 301 (1883).

4. Montana

Montana's constitution and statutes feature public trust language.[400] Montana statutory laws protect recreation, navigation and fishing rights in navigable and public waters.[401] An Attorney General Opinion identified that the permissible recreational uses in the state include trapping.[402] The line between private and state navigable waters is the high water mark or meander line.[403] Public rights of Montana's waterways extends to the high water mark.[404]

Montana features surfing in its rivers. While the state's public trust doctrine has not been explicitly applied to surfing, surfing likely fits within the protected uses in the state. Specifically, surfing is a recreational use protected in the state. Furthermore, Montana's Stream Access Law might allow for access through private property to pursue recreational activities like surfing in the state.[405]

5. Wisconsin

Wisconsin's public trust doctrine has its foundation in the Wisconsin Constitution.[406] Courts have remarked that the doctrine was originally designed to protect commercial navigation.[407] A Wisconsin statute declares the enjoyment of natural scenic beauty and environmental quality to be public rights.[408] Wisconsin's public trust doctrine is noteworthy because it is also a cause of action.[409] The uses protected under Wisconsin's public trust doctrine are broad. The doctrine protects many uses on navigable waters,

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400. MONT. CONST. art. IX, § 3 (establishing state ownership of Montana waters); MONT. CODE ANN. § 85-16-107; Galt v. Mont. Dep't of Fish, Wildlife, & Parks, 731 P.2d 912, 915 (Mont. 1987).

401. MONT. CODE ANN. § 23-2-301 (2017) ("'Recreational use' means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses."); *Id.* at § 23-2-302 (listing exceptions and limits to recreational uses).

402. 41 Mont. Att'y Gen. Op. 36 (1985).

403. Montgomery v. Gehring, 400 P.2d 403, 405 (Mont. 1965) (citing MONT. REV. CODE. § 70-16-201 (2017)).

404. Gibson v. Kelly, 39 P. 517, 519–20 (Mont. 1895).

405. MONT. CODE ANN. § 23-2-301.

406. WIS. CONST., art. IX, § 1; Hilton ex rel. Pages Homeowners Ass'n v. Dep't of Nat. Res., 717 N.W.2d 166, 173 (Wis. 2006) (explaining that the public trust doctrine is "rooted in Article IX, Section 1 of the Wisconsin Constitution.").

407. State v. Bleck, 338 N.W.2d 492, 497–98 (Wis. 1983) (explaining that the doctrine was "originally designed to protect commercial navigation . . . ").

408. WIS. STAT. ANN. § 31.06.

409. Craig, *supra* note 95, at 112–13 ("The public trust doctrine also creates a cause of action"). Timm v. Portage Cty. Drainage Dist., 429 N.W.2d 512, 516 n.8 (Wis. Ct. App. 1988) (citing State v. Deetz, 224 N.W.2d 407, 413 (Wis. 1974))).

including "boating, bathing, fishing, hunting and recreation."[410] The doctrine also protects "any other lawful purpose."[411] Navigation includes uses incident to that right,[412] as well as uses of the bottom of navigable waters.[413]

Wisconsin has been called the Malibu of the Midwest due to its ideal conditions for surfing along the western shore of Lake Michigan.[414] Wisconsin's courts and legislature have not specifically included surfing within the state's doctrine. However, it appears that surfing could fit within at least one of the currently enumerated uses. For instance, surfing seems to qualify as a recreational use. Surfing is also likely a lawful purpose under the doctrine.

V. SYNTHESIS: THE FUTURE OF SURFING UNDER THE DOCTRINE

The foregoing reveals several themes and generalities regarding beach access, surfing, and the public trust doctrine. West Coast states are generally very protective of the public's beach access rights, including possibly embracing surfing within their public trust doctrines. The Northeast United States is less friendly to beach access, owing to its colonial past, and particularly the perceived necessity of turning over its shorelines to private property owners who would make the most efficient use of them. The South is protective of public use rights, perhaps to a surprising degree for a region so closely linked to private property rights. However, how protective these states will be in the future is in question due to recent decisions that have been hostile to public beach rights like the *Severance* decision in Texas.[415] Overall, there remains hope that hostile decisions in places like Maine will

410. Munninghoff v. Wis. Conservation Comm'n, 38 N.W.2d 712, 715 (Wis. 1949).

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

412. Nekoosa-Edwards Paper Co. v. R. R. Comm'n, 201 Wis. 40, 46, 228 N.W. 144 (Wis. 1929) ("Being navigable, the public may use it for the public rights incidental thereto of hunting, fishing, or pleasure boating."); *see also* Doemel v. Jantz, 180 Wis. 225, 234 (Wis. 1923) ("fishing, recreation, boating, bathing, hunting, etc., which are denominated incident to the right of navigation. Therefore, the use of these waters for the various purposes enumerated and referred to is open to the public when exercising the right of navigation.").

413. Craig, *supra* note 95, at 112 (citing Munninghoff v. Wis. Conservation Comm'n, 38 N.W.2d 712, 716 (Wis. 1949)) ("The right of navigation includes the incidental use of the bottom where the use is connected to navigation, 'such as walking as a trout fisherman[,] . . . boating, standing on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, walking on the ice if the river is frozen, etc.'").

414. *Surfing in Sheboygan: The Malibu of the Midwest*, TRAVELWISCONSIN.COM, https://www.travelwisconsin.com/article/canoeing-kayaking-sup/article/canoeing-kayaking-sup/surfing-in-sheboygan-the-malibu-of-the-midwest (last visited Jan. 16, 2019).

415. Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).

eventually be overturned, and decisions elsewhere give reason to remain optimistic about these issues going forward.[416] The following section identifies several themes regarding surfing and the public trust doctrine, including how the doctrine might evolve further in the future and what other legal tenets might need to be applied to ensure beach access rights for surfers and other beachgoers into the future.

A. The Public Trust Doctrine is Sufficiently Flexible to Recognize Surfing

The public trust doctrine is a flexible legal tool capable of recognizing surfing as a protected use. While the doctrine traditionally protected only certain limited uses, most states have recognized and embraced the doctrine's ability to evolve and expand as the needs of society change. This means that the doctrine can evolve to protect surfing regardless of whether it currently does, if, by virtue of its cultural and economic importance, surfing is recognized as a protected public use by the states. Accordingly, there may be a strong argument in certain states to protect surfing under the doctrine.

B. Surfing Might Fit Within the Scope of an Existing Public Trust Use

Surfing might already be protected under an existing public trust use. Particularly, certain existing protected uses might already include surfing within them. For instance, surfing might qualify as a form of navigation under the doctrine. Alternatively, surfing could be recognized as a recreational use under the doctrine. While recreation and navigation are the two likeliest existing uses that might include surfing, there are other options, including swimming and bathing. While this option is promising, it will be more challenging to prove surfing fits within the currently protected uses of jurisdictions that have enumerated uses, such as those states that have colonial ordinances like Massachusetts and Maine. Further, it has sometimes been necessary to argue that surfing is not swimming to protect it as a right.[417]

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416. Surfrider Found. v. Martin's Beach 1, LLC, 221 Cal. Rptr. 3d 382, 388 (Ct. App. 2017); Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. Ct. App. 2015), *cert. denied*, 138 S. Ct. 75 (2017).

417. Angela Howe, *Montauk 8 – A Legal Perspective: Surfing vs. Swimming,* BEACHAPEDIA, http://www.beachapedia.org/Montauk_8_-_A_Legal_Perspective.

C. Even if Surfing is a Protected Use, Enforcement Might be a Challenge

Some states currently recognize surfing as a protected doctrine use, and others feature doctrines broad enough for the use to fall within its protected uses. But even where surfing is a protected use, enforcement of this right might be an issue. To address this concern, states can make the public trust doctrine a cause of action like several states have done to date. Additionally, states can protect surfing and other recreational uses in the face of problematic enforcement through educating the public and law enforcement officers on these issues.

There are practical issues with enforcement as well. Beaches are dynamic, and the lines defining the public trust beaches shift daily in some geographies. Furthermore, surveying by state agencies charged with enforcing the doctrine is usually not up to date, certainly not to the day. Seasonal tides and erosive events further complicate delineating trust beaches and coastal areas, making it challenging for beachgoers who depend on public beaches. Finally, the definitions of mean high tide and other water lines of delineation have been challenging to establish.

D. Beach Access Might Remain a Challenge Even if Surfing is Recognized as a Protected Use, but Alternative Theories of Access Exist

Whether or not the public trust doctrine protects surfing as a public trust use, beach access might remain an issue. The doctrine typically only protects the rights of the public to use the intertidal zone, between the high and low water marks of a beach. While some jurisdictions have shown a willingness to extend the doctrine to the "dry sand" portions of the beach, increasing development and other pressures on beaches might necessitate alternative theories of access for surfers hoping to reach surf breaks. However, there are three additional alternative legal theories that might provide access. Custom, an ancient legal principle providing access by proving prior use, is perhaps the most promising of these options because it allows access to anyone for a specific location based on historical use. Alternatively, dedication is an option, but it typically requires compensation of some sort and has had a checkered past when challenged in court. Finally, prescription is an option, but might only apply narrowly, such as to specific persons who have established use under that doctrine.

VI. CONCLUSION

Surfing is a sometimes transcendent culturally and economically significant pursuit. It is practiced in the coastal United States, but also on the shores of the Great Lakes and on some rivers. As development threatens coastlines, and as climate change causes seas to rise, access to beaches and lakes is similarly endangered. The public trust doctrine is an ancient legal principle that traditionally protected navigation and other uses on certain waterways and common areas. The doctrine has evolved to double as a tool to protect the environment. It also protects the public's uses along traditionally public areas, including beaches. Accordingly, the doctrine offers one possibility for ensuring beach access for surfers and other beachgoers. But because the coverage offered by the doctrine varies across jurisdictions, some states explicitly protect surfing under their public trust doctrines, while others are silent on the matter. Some of these states probably protect surfing under certain recognized uses. Other states might not recognize surfing but could do so in the future, as the doctrine evolves. Regardless of whether a state's doctrine recognizes surfing, because surfing goes hand-in-hand with ensuring adequate beach access in the face of population pressures, development and rising seas will necessitate embracing alternative access theories, such as custom, dedication, and easements.