

A Breach of Trust: *Rock-Koshkonong Lake District v. State Department of Natural Resources* and Wisconsin's Public Trust Doctrine

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**A BREACH OF TRUST:
ROCK-KOSHKONONG LAKE DISTRICT
V. STATE DEPARTMENT OF NATURAL
RESOURCES AND WISCONSIN’S PUBLIC
TRUST DOCTRINE**

Wisconsin has a particularly notable tradition of using the public trust doctrine aggressively to protect the state’s natural resources. The general thrust of the doctrine’s evolution in Wisconsin has been expansion beyond the doctrine’s traditional application to waters navigable for commercial purposes. Emblematic of such expansion is the Wisconsin Supreme Court’s decision in Just v. Marinette County, which scholars have characterized as a landmark extension of the public trust doctrine to non-navigable wetlands adjacent to navigable waters. In light of this tradition, it is unsurprising that the Wisconsin Supreme Court’s recent pronouncement that the Department of Natural Resources lacked public trust jurisdiction to regulate privately-owned wetlands adjacent to a navigable lake provoked strong reactions, not only by commentators but also by certain members of the court. This Comment asserts that the court’s opinion in Rock-Koshkonong Lake District v. State Department of Natural Resources mischaracterized 150 years of precedent and, in doing so, misconstrued Wisconsin’s public trust doctrine in a way that is potentially devastating to future use of the doctrine for environmental protection. By subtly re-casting the court’s precedents as delimiting rather than expanding the state’s public trust jurisdiction, the Rock-Koshkonong opinion undermines the particular adaptability of Wisconsin’s public trust doctrine, which has allowed the doctrine to evolve along with societal values and public needs, and which, for decades, has situated Wisconsin as a leader in using the public trust doctrine for environmental protection.

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I. INTRODUCTION

For nearly a decade, property owners along a 10,500-acre lake in Rock County, Wisconsin, have been engaged in a dispute with the Wisconsin Department of Natural Resources (WDNR) over what amounts to seven inches of water.¹ Individuals and businesses who own property along Lake Koshkonong complain that low water levels on the lake, which is just seven feet deep at its deepest, diminish the beauty of their lakeside properties and limit their ability to recreate on the water.² In response, the WDNR, which controls the dam that regulates water levels on the lake, cites the adverse impact that higher water levels would have on the more than twelve miles of wetlands that surround the lake and sustain diverse wildlife and plant species.³ Against this backdrop, a 2005 WDNR denial of the Rock-Koshkonong Lake District's request to raise water levels on Lake Koshkonong by 7.2 inches sparked a battle that eventually reached the Wisconsin Supreme Court.⁴

1. Scott Bauer, *Ruling Could Limit DNR Control Over Lake Levels*, WIS. STATE J., July 17, 2013, at A4.

2. Stacy Vogel, *Public, Private Interests Collide in Koshkonong Case*, GAZETTEEXTRA (Feb. 20, 2008), <http://gazetteextra.com/news/2008/feb/20/public-private-interests-collide-koshkonong-case/>, archived at <http://perma.cc/N4LW-AFZD>.

3. *Id.*

4. Bauer, *supra* note 1.

In *Rock-Koshkonong Lake District v. State Department of Natural Resources*, the Wisconsin Supreme Court held that the WDNR properly considered the environmental impact that higher lake levels would have on surrounding, privately-owned wetlands, but failed to consider adequately the economic impact of lower lake levels on riparian property owners.⁵ Accordingly, the court remanded the case to the state circuit court for further proceedings.⁶ Despite the seeming triviality of the controversy, not to mention the lack of any final resolution to the dispute, the court's decision in *Rock-Koshkonong* generated not only an outcry from environmentalists in the state but also a vigorous dissent from three members of the court.⁷ What provoked this response among environmental advocates and certain members of the court were statements in Justice Prosser's majority opinion—arguably dicta—regarding the scope of the WDNR's authority under Wisconsin's public trust doctrine.⁸ Specifically, while the court held that the WDNR possessed authority to consider the impact that higher lake levels would have on surrounding, privately-owned wetlands, the court emphasized that the WDNR exercised such authority pursuant to the state's police powers rather than its public trust jurisdiction.⁹

Courts and commentators have long acknowledged that Wisconsin has a particularly rich tradition of using the public trust doctrine aggressively to protect the state's natural resources.¹⁰ In 1970, Professor

5. *Rock-Koshkonong Lake Dist. v. State Dept. of Natural Res.*, 2013 WI 74, ¶¶ 11, 13, 350 Wis. 2d 45, 833 N.W.2d 800.

6. *Id.* ¶ 14.

7. Patrick Marley, *State Supreme Court Ruling in Lake-Level Case Stirs Concerns About Water Protections*, MILWAUKEE J. SENTINEL (July 17, 2013), <http://www.jsonline.com/news/statepolitics/supreme-court-ruling-in-lake-level-case-impacts-public-trust-doctrine-b9955578z1-215697151.html>, archived at <http://perma.cc/GL4D-3A4P>.

8. *Id.*; see also Melissa K. Scanlan, *It's Not Open Season on Wetlands: A Lot of Verbiage but Not Much Changes for Public Trust Doctrine*, MILWAUKEE J. SENTINEL (July 22, 2013), <http://www.jsonline.com/news/opinion/its-not-open-season-on-wetlands-b9959581z1-216520241.html>, archived at <http://perma.cc/L2ER-BCJK> (noting the media attention given to the court's discussion of the state's public trust doctrine and identifying this discussion as dicta).

9. *Rock-Koshkonong*, 2013 WI 74, ¶ 11.

10. See, e.g., *Diana Shooting Club v. Husting*, 156 Wis. 261, 267, 145 N.W. 816, 818 (1914) (“It will thus be seen that ever since the organization of the Northwest territory in 1787 to the time of the adoption of our constitution the right to the free use of the navigable waters of the state has been jealously reserved”); Melissa Kwaterski Scanlan, Comment, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 *ECOLOGY L.Q.* 135, 138 (2000) (“Wisconsin, a state containing over 1,200 lakes and bordered on the east and west by Lake Michigan and

Joseph Sax published what has come to be regarded as the seminal work on use of the public trust doctrine for environmental protection.¹¹ Professor Sax highlighted the doctrine's application to natural resource protection in three states, including Wisconsin.¹² Among the Wisconsin cases most frequently cited in connection with the public trust doctrine and its use for environmental protection is *Just v. Marinette County*, a 1972 decision in which the Wisconsin Supreme Court upheld a shoreland zoning ordinance that restricted use of privately-owned wetlands due to the impact that such use would have on adjacent navigable waters.¹³ Scholars have consistently characterized this decision as a landmark extension of the public trust doctrine beyond its traditional application to navigable waters, subsequently enabling the state to regulate adjacent non-navigable waters, such as wetlands, pursuant to its public trust jurisdiction.¹⁴

Within this context, reactions to the Wisconsin Supreme Court's pronouncement in *Rock-Koshkonong* that the WDNR lacked authority pursuant to the state's public trust jurisdiction to regulate privately-owned wetlands adjacent to navigable waters are readily understandable. The court's pronouncement would seem, as Justice Crooks asserted in his dissent, to "undermine . . . [the] court's precedent, recharacterize its holdings, and rewrite history."¹⁵ Given this

the Mississippi River, respectively, has a rich 150-year history of using the public trust doctrine to protect the natural heritage of the state.").

11. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); see also Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 667 (2012) (describing Professor Sax's article as the first to "identif[y] and propose[] the public trust doctrine as a key component of the then-new discipline of environmental law").

12. Sax, *supra* note 11, at 509.

13. *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 26, 201 N.W.2d 761, 772 (1972).

14. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 801 n.216 (2009); Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81, 95 n.80 (1995); Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1450 & n.108; Frank, *supra* note 11, at 668; Keith Hirokawa, *Some Pragmatic Observations About Radical Critique in Environmental Law*, 21 STAN. ENVTL. L.J. 225, 274 n.217 (2002); Paul Sarahan, *Wetlands Protection Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537, 569-70 (1994); Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 286-87 & n.14 (2014); Michael L. Wolz, Comment, *Applications of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?*, 6 BYU J. PUB. L. 475, 494 (1992).

15. *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 2013 WI 74, ¶ 154, 350 Wis. 2d 45, 833 N.W.2d 800 (Crooks, J., dissenting).

forceful statement by Justice Crooks, the question naturally arises: whose characterization of Wisconsin's public trust doctrine—majority or dissent—is more faithful to the state's heritage of aggressively executing its role as trustee of Wisconsin's water resources?

This Comment asserts that the Wisconsin Supreme Court's decision in *Rock-Koshkonong* re-characterized 150 years of precedent and, in doing so, misconstrued Wisconsin's public trust doctrine in a way that is potentially devastating to future use of the doctrine for environmental protection.¹⁶ Part II describes the dispute that gave rise to the *Rock-Koshkonong* decision, the reasoning underlying the court's holding, and the primary points of disagreement between the majority and the dissent. This discussion highlights the divergent ways in which the majority and dissent in *Rock-Koshkonong* interpreted Wisconsin's public trust doctrine. Part III then provides a brief overview of Wisconsin's public trust doctrine, including its historical origins, its statutory codification, and, in particular, its development through caselaw. This overview suggests that the general thrust of the doctrine's evolution in Wisconsin has been continuous expansion beyond the doctrine's traditional application to waters navigable for commercial purposes. Emblematic of such expansion is the Wisconsin Supreme Court's decision in *Just v. Marinette County*.

Against this backdrop, Part IV critically assesses the competing conceptions of the doctrine that the majority and dissent advanced in *Rock-Koshkonong*. In particular, Part IV demonstrates that the majority subtly but substantially re-characterized the court's precedents as delimiting rather than expanding the scope of the public trust doctrine. On the basis of this re-characterization, the majority incorrectly concluded that *Just* stands for the proposition that the state may regulate non-navigable wetlands adjacent to navigable waters only pursuant to its police powers, not its public trust jurisdiction. While the dissent correctly noted that this conclusion runs contrary to the plain language of *Just*, both the majority and the dissent failed to recognize that this distinction is logically untenable in light of the court's holding in *Just*.

16. Other early scholarly commentary on *Rock-Koshkonong* is similarly critical of the decision's characterization of precedent but more narrowly focused on the *Rock-Koshkonong* majority's treatment of *Just* in particular, as opposed to its interpretation of the state's public trust doctrine more broadly speaking. See generally Christian Eickelberg, *Rock-Koshkonong Lake District and the Surprising Narrowing of Wisconsin's Public Trust Doctrine*, 16 VT. J. ENVTL. L. 38 (2014).

Part V then considers reactions to the *Rock-Koshkonong* decision, both among members of the public and within the legal community. This Part asserts that many commentators, including critics, do not fully appreciate the decision's implications for continued use of the public trust doctrine as a tool for protecting Wisconsin's natural resources. Finally, Part VI concludes.

II. *ROCK-KOSHKONONG LAKE DISTRICT V. STATE DEPARTMENT OF NATURAL RESOURCES*

In July 2013, the Wisconsin Supreme Court addressed an ongoing dispute between the Rock-Koshkonong Lake District and the WDNR regarding water levels on Lake Koshkonong.¹⁷ While the court's decision did little to resolve the actual dispute, it did generate a significant amount of controversy due to the court's treatment of the state's public trust doctrine.¹⁸ Specifically, Justice Prosser's majority opinion and Justice Crook's dissent set forth characterizations of the court's public trust precedents that are diametrically opposed,¹⁹ leading many to view the decision as a cross-roads for the doctrine's future in Wisconsin.²⁰

A. *Lake Koshkonong, the Rock River, and the Indianford Dam*

Lake Koshkonong is a large but shallow inland lake located primarily in Jefferson County.²¹ A "natural widening of the Rock River," the lake is situated approximately "four miles downstream from the City of Fort Atkinson."²² With a surface area of approximately 10,460 acres, it is the sixth largest inland lake in Wisconsin, but its average depth is a mere five feet, with its deepest point being only about seven feet.²³ Due to the gradual descent of the lake's shoreline into deeper water, water depths of only one to two feet extend as far as "hundreds of feet into the lake."²⁴

17. *See infra* Part II.B.

18. *See supra* note 7 and accompanying text.

19. *See infra* Part II.C.

20. *See infra* Part V.

21. *Lake Koshkonong and the Indianford Dam*, Case No. 3-SC-2003-28-3100LR, at 4–5 (Dep't of Natural Res. Dec. 1, 2006) [hereinafter *Lake Koshkonong Review*] (review of decision).

22. *Id.* at 4.

23. *Id.* at 5.

24. *Id.*

With approximately twenty-seven miles of shoreline, Lake Koshkonong is currently surrounded by a combination of residential and commercial properties, as well as undeveloped wetlands.²⁵ The coverage of the riparian wetlands is between 3,000 and 4,000 acres.²⁶ Within this area are submerged aquatic beds, deep as well as shallow or emergent marsh, wet meadows, and floodplain forests, among other types of wetlands.²⁷ One of the largest wetlands surrounding Lake Koshkonong is the state-owned Koshkonong Wildlife Area, which is comprised of approximately 715 acres of shallow marsh and wet meadow.²⁸ Other riparian wetlands are owned by private parties such as the Carcajou Shooting Club and the Crescent Bay Hunt Club.²⁹

In 1843, the Wisconsin Territorial Legislature authorized construction of a dam across the Rock River approximately six miles upstream of Lake Koshkonong.³⁰ Since its construction, the dam's owners have included the Wisconsin Power & Light Co. and, from December 1965 until December 2004, Rock County.³¹ In December 2004, the county conveyed ownership of the dam to the Rock-Koshkonong Lake District, "a public inland lake protection and rehabilitation district," which presently owns and operates the dam.³²

The effect of the Indianford Dam is to alter upstream water levels on the Rock River and Lake Koshkonong.³³ While the initial authorization for the dam's construction included a provision prohibiting alterations in flowage that resulted in flooding of privately owned land without the owner's consent,³⁴ several modifications to the dam's structure between 1900 and 1910 raised water levels on Lake Koshkonong, leading to administrative appeals by property owners whose land flooded as a result.³⁵

25. *Id.*

26. *Id.*

27. *Id.* at 9.

28. *Id.*

29. *Id.* at 10.

30. Lake Koshkonong and the Indianford Dam, Case No. 3-SC-2003-28-3100LR, ¶¶ 4–5 (Dep't of Natural Res. Apr. 15, 2005) [hereinafter *Lake Koshkonong Decision*] (decision).

31. *Lake Koshkonong Review*, *supra* note 21, at 6.

32. *Id.* at 3.

33. *Id.* at 1.

34. *Id.* at 5.

35. *Lake Koshkonong Decision*, *supra* note 30, ¶¶ 6–7.

As a consequence of these disputes, the Wisconsin Railroad Commission³⁶ “issued the first water level order for the Indianford Dam in 1919.”³⁷ In 1939, the Public Service Commission of Wisconsin, which was the predecessor state agency to the WDNR, denied a request by over one hundred area landowners to raise the mandated maximum water level by six inches.³⁸ The Commission cited the objections of owners of low-lying properties and farms that would be subject to flooding as a result of raising water levels.³⁹

The 1919 water level order remained unchanged until 1982, when the WDNR issued a new order pursuant to its statutory authority.⁴⁰ While this order was contested, the compromise order issued in 1991 set the water levels for Lake Koshkonong at their current range.⁴¹ The WDNR’s primary concern in setting maximum water levels for Lake Koshkonong in its 1991 order was the degradation of the wetlands surrounding the lake due to increased water levels since construction of the Indianford Dam.⁴² According to the WDNR, “The most important ecological change for Lake Koshkonong has been the loss of wetlands and submergent plants. . . . [This loss] has resulted from the maintenance of higher water levels, increased nutrient loads from the watershed, and the introduction of common carp into the system.”⁴³ Nonetheless, due to the Indianford Dam falling into general disrepair between 1960 and 2001, lake levels consistently remained above the maximum set by the 1991 WDNR order and furthermore increased steadily over time.⁴⁴

36. The Wisconsin legislature initially charged the Wisconsin Railroad Commission with oversight of water levels at the Indianford Dam. *Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res.*, 2013 WI 74, ¶ 24 n.8, 350 Wis. 2d 45, 833 N.W.2d 800. Subsequently, the Public Service Commission and later the Wisconsin Department of Natural Resources assumed responsibility for issuing water level orders under Wisconsin Statutes section 31.02(1). *Id.*

37. *Id.* ¶ 25; *Lake Koshkonong Decision*, *supra* note 30, ¶ 7.

38. *Lake Koshkonong Review*, *supra* note 21, at 6.

39. *Id.*

40. *Rock-Koshkonong*, 2013 WI 74, ¶ 25.

41. *Id.* ¶ 28.

42. *Lake Koshkonong Review*, *supra* note 21, at 10 (noting that, “[i]n 1982, the DNR documented the loss of 52 acres of shoreline occurring between 1950 and 1963, and an additional 270 acres between 1963 and 1975”).

43. *Lake Koshkonong Decision*, *supra* note 30, ¶ 49.

44. *Lake Koshkonong Review*, *supra* note 21, at 7.

B. The Dispute

The dispute at the center of the *Rock-Koshkonong* decision arose as a result of repairs made to the Indianford Dam in 2002, which restored the dam to its full operating capacity and subsequently brought Lake Koshkonong water levels down to their lowest point since the 1930s but also more in line with the levels set by the WDNR's 1991 order.⁴⁵ On April 21, 2003, the Rock-Koshkonong Lake District filed a petition requesting that the WDNR raise water levels on Lake Koshkonong by approximately eight inches during the winter months and by over one foot during the summer months.⁴⁶

In its petition, the District cited concerns about the impact of lower lake levels on recreational activities on the lake.⁴⁷ A District survey of riparian property owners conducted in 2000 strongly suggested that a majority of both residential and commercial property owners on or near Lake Koshkonong believed that higher water levels would increase their use and enjoyment of their properties, allowing, among other things, for riparian property owners to maintain shorter piers to reach water depths capable of supporting boats.⁴⁸

After conducting an Environmental Assessment, as required by the Wisconsin Administrative Code, the WDNR issued a decision on April 15, 2005, granting certain requested changes in water levels during the winter months but denying the District's petition to raise water levels during the summer months.⁴⁹ In its decision, the WDNR acknowledged the benefits that higher summer water levels would have for riparian property owners with regard to the use of boats and shorter pier lengths.⁵⁰ The WDNR found, however, that raising summer water levels on Lake Koshkonong would have substantial negative effects on surrounding wetlands.⁵¹ Citing its statutory authority to regulate and control water levels, the WDNR concluded that granting the District's petition to raise summer water levels on Lake Koshkonong would be "inconsistent with the interest of public rights in Lake Koshkonong and

45. *Rock-Koshkonong*, 2013 WI 74, ¶ 27.

46. *Lake Koshkonong Review*, *supra* note 21, at 4.

47. *Rock-Koshkonong*, 2013 WI 74, ¶ 27.

48. *Lake Koshkonong Review*, *supra* note 21, at 22.

49. *Id.* at 4.

50. *Lake Koshkonong Decision*, *supra* note 30, ¶ 16.

51. *Id.* ¶¶ 17–24.

the Rock River and would not promote safety or protect life, health or property.”⁵²

In response to the WDNR’s decision, the District, together with the Rock River–Koshkonong Association, Inc., and the Lake Koshkonong Recreation Association, Inc., petitioned the WDNR for a contested hearing.⁵³ The WDNR granted this request, and on December 1, 2006, an administrative law judge sustained the WDNR’s decision.⁵⁴ In particular, the agency decision concluded that “[t]he great weight of the evidence support[ed] the DNR’s 2005 order and decision to maintain ‘summer’ water levels at the levels set in 1991 . . . as being ‘in the interest of public rights in navigable waters’ and ‘to promote safety and protect, life, health and property.’”⁵⁵

Following unsuccessful appeal of the agency decision to the Rock County Circuit Court and Wisconsin Court of Appeals,⁵⁶ the District petitioned the Wisconsin Supreme Court for review, which the court granted.⁵⁷

C. *The Wisconsin Supreme Court’s Decision*

On review, the Wisconsin Supreme Court considered four issues: (1) “what level of deference . . . should be accorded to the . . . [WDNR’s] conclusions of law”; (2) whether the WDNR had “exceed[ed] its authority in making a water level determination” on the basis of the assessed impact that water levels would have on adjacent, privately-owned wetlands; (3) whether the WDNR had exceeded its authority by considering the Wisconsin Administrative Code’s wetland water quality standards when making its water level determination; and (4) whether the WDNR had erred in “refusing to consider the impact[] of water levels on residential property values, business income, and public revenue.”⁵⁸

52. *Id.* ¶ 51.

53. *Lake Koshkonong Review*, *supra* note 21, at 1.

54. *Id.* at 1, 31.

55. *Id.* at 29 (quoting WIS. STAT. § 31.02(1) (2003–2004)).

56. *See generally* *Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res.*, 2011 WI App 115, 336 Wis. 2d 677, 803 N.W.2d 853.

57. *Order Granting Petition for Review of Rosh-Koshkonong Lake Dist. v. DNR*, 339 Wis. 2d 734, 810 N.W.2d 221 (unpublished table order).

58. *Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res.*, 2013 WI 74, ¶¶ 4–8, 350 Wis. 2d 45, 833 N.W.2d 800.

Of these four issues, only the second is germane to the present discussion. Although the court held that the WDNR possessed statutory authority to consider the impact that raising lake levels would have on adjacent, privately-owned wetlands, Justice Prosser, writing for the court, discussed at length the conclusion that the WDNR lacked such authority under Wisconsin's public trust doctrine as enshrined in the state's constitution, implemented in the state's statutory scheme, and interpreted by the court's earlier decisions.⁵⁹ It was, in large part, this discussion that provoked Justice Crooks's highly critical dissent, which two other members of the court joined.⁶⁰

1. Majority

The majority began its discussion of the WDNR's authority to consider the impact of lake levels on adjacent, privately-owned wetlands by noting that the agency decision confirming the WDNR order explicitly identified Wisconsin's public trust doctrine as the source of the WDNR's authority.⁶¹ The majority further noted that, in its brief to the court, the District specifically argued that the WDNR had exceeded its authority under the public trust doctrine when it considered the impact of lake levels on adjacent, privately-owned wetlands.⁶² On these grounds, the majority launched into a lengthy discussion of Wisconsin's public trust doctrine, including its constitutional and statutory bases, and, in particular, the evolution of the doctrine through the court's precedents.⁶³

The majority cited Article IX, Section 1 of the Wisconsin Constitution as the basis for the state's regulatory authority, noting that the constitution "commands that the state hold navigable waters in trust

59. *Id.* ¶ 11.

60. *Id.* ¶¶ 153, 189 (Crooks, J., dissenting). The dissenting justices also disagreed with the majority on the issue of whether the WDNR erred in excluding evidence of the secondary economic impact of water levels from its consideration, which formed the basis for the court's decision to remand the case to the state circuit court for further proceedings. *Id.* ¶ 152 (majority opinion); *id.* ¶ 155 (Crooks, J., dissenting).

61. *Id.* ¶ 67 (majority opinion) (citing to the paragraph in the agency decision that identifies "the public trust doctrine as authority for the DNR to regulate wetlands and near shorelands, wildlife habitat, and scenic beauty").

62. *Id.* ¶ 65 ("The District is also concerned about the application of the public trust doctrine to any wetlands that are not navigable in fact unless those wetlands are below the [ordinary high-water marks]. The District asserts that the DNR's position significantly expands the scope of the DNR's public trust jurisdiction.").

63. *Id.* ¶ 69.

for the public.”⁶⁴ The majority went on to acknowledge that the court’s prior decisions had interpreted this directive broadly to recognize “more than just commercial navigability rights.”⁶⁵ Rather, the state’s public trust doctrine affords protection even for “purely recreational purposes such as boating, swimming, fishing, hunting, . . . and . . . preserv[ing] scenic beauty.”⁶⁶

Despite this expansive interpretation of the rights secured to the public under Wisconsin’s public trust doctrine, the majority explained, the state’s regulatory jurisdiction under the doctrine has always been strictly confined to a limited geographic area—to navigable waters between the boundaries of the ordinary high-water marks.⁶⁷ On this basis, the majority concluded that the WDNR lacked authority to consider the impact of lake levels on adjacent, privately-owned wetlands *pursuant to its public trust jurisdiction* because the wetlands surrounding Lake Koshkonong are neither navigable nor below the original high-water marks of the lake.⁶⁸

The primary concern that more expansive exercise of the state’s public trust authority would raise, according to the majority, involves questions of ownership.⁶⁹ As the majority explained,

Contemplating the question of ownership is important because the public trust doctrine implicates state ownership or virtual state ownership—by virtue of its trust responsibility—of land under navigable waters. If the public trust were extended to cover wetlands that are not navigable, it would create significant questions about ownership of and trespass on private land, and it would be difficult to cabin expansion of the state’s new constitutionally based jurisdiction over private land.⁷⁰

64. *Id.* ¶ 71.

65. *Id.* ¶ 72.

66. *Id.* (alterations in original) (quoting *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 19, 244 Wis. 2d 497, 628 N.W.2d 781) (internal quotation marks omitted).

67. *Id.* ¶¶ 76, 91 (citing *Muench v. Pub. Serv. Comm’n*, 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1952); *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816, 820 (1914)). The test for whether a body of water is “navigable” is whether it is “navigable in fact for any purpose.” *Muench*, 261 Wis. at 505–06 (emphasis omitted) (quoting WIS. STAT. § 30.01(1) (1951)). “Ordinary high-water marks” refer to the distinct marks that the continuous presence of water leaves on the shoreline or bank. *Diana Shooting Club*, 156 Wis. at 272.

68. *Rock-Koshkonong*, 2013 WI 74, ¶¶ 77, 93.

69. *Id.* ¶¶ 77–78.

70. *Id.* ¶ 84 (emphasis omitted).

Because the public trust doctrine vests ownership of land beneath navigable bodies of water in the state, allowing the WDNR to consider the impact of lake levels on surrounding wetlands pursuant to its public trust jurisdiction would, in the majority's view, call into question the ownership of such wetlands.⁷¹

Critical to the majority's conclusion that the WDNR lacked authority to consider the impact of lake levels on adjacent, privately-owned wetlands pursuant to its public trust jurisdiction was its treatment of *Just v. Marinette County*, in which the court dealt explicitly with the state's authority to regulate privately-owned wetlands adjacent to a navigable lake.⁷² As the majority explained, *Just* upheld a shoreland zoning ordinance that required a permit for the filling of wetlands on privately-owned property adjacent to a navigable lake as an exercise of the state's police powers, not its public trust authority.⁷³ The majority based this interpretation primarily on the fact that, in *Just*, the property to which the zoning ordinance applied extended 1,000 feet beyond the ordinary high-water marks of any navigable body of water.⁷⁴ Accordingly, the majority stated, "It should be obvious that the state does not have *constitutional public trust jurisdiction* to regulate land a distance of more than three football fields away from a navigable lake or pond."⁷⁵

On the basis of this analysis, the majority held that the WDNR possessed statutory authority to consider the impact of lake levels on adjacent, privately-owned wetlands under Wisconsin Statutes section 31.02(1), but that such authority existed pursuant only to the state's police powers.⁷⁶ Essential to this holding was the majority's construction of Wisconsin Statutes section 31.02(1) as codifying only in

71. *Id.*

72. *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 12–13, 201 N.W.2d 761, 766 (1972). As the dissenting justices in *Rock-Koshkonong* noted, scholars have frequently cited *Just* as extending the state's public trust jurisdiction to non-navigable waters above the ordinary high-water marks. *Rock-Koshkonong*, 2013 WI 74, ¶ 170 n.4 (Crooks, J., dissenting); see also *supra* note 14 and accompanying text. As such, it was essential to the majority's reasoning that it redefined *Just* as an exercise of the state's police power as opposed to its public trust jurisdiction, an interpretation of *Just* that is ultimately unconvincing. See *infra* Part IV.B.

73. *Rock-Koshkonong*, 2013 WI 74, ¶ 96.

74. *Id.* ¶ 100.

75. *Id.*

76. *Id.* ¶¶ 109–10 ("The DNR may emphasize some rights over others in its water level determinations, and its exercise of discretion will normally be upheld so long as it considers all property rights and so long as it does not accord some non-navigable land or water above the [ordinary high-water marks] a *constitutional* preference as trust land . . .").

part the state's public trust doctrine.⁷⁷ Specifically, the majority focused on the disjunctive "or" in section 31.02(1) as authorizing regulation in part pursuant to the state's public trust jurisdiction (regulation "in the interest of public rights in navigable waters") and in part pursuant to the state's police powers (regulation "to promote safety and protect life, health and property").⁷⁸ The implications of this distinction in the context of the Lake Koshkonong dispute are, from the majority's perspective, clear:

[T]he distinction between the DNR's constitutionally based public trust authority and the DNR's police power-based statutory authority is that the latter is subject to constitutional and statutory protections afforded to property, may be modified from time to time by the legislature, and requires some balancing of competing interests in enforcement.⁷⁹

2. Dissent

Three justices dissented from the judgment remanding the case to the state circuit court for further proceedings consistent with the holding that the WDNR may not exclude evidence of the secondary economic impact of lake levels on adjacent property owners.⁸⁰ While the dissenting justices agreed with the majority's conclusion that the WDNR possessed authority to consider the impact of lake levels on adjacent, privately-owned wetlands under Wisconsin Statutes section 31.02(1), they strongly disagreed with the majority's discussion of the limitations of the state's public trust jurisdiction.⁸¹ In this regard, the dissent's criticisms of the majority opinion were twofold: (1) that the present controversy could be (and was) resolved through statutory construction alone, without the need to reach the constitutional issue of the scope of the state's public trust doctrine; and (2) that the majority needlessly raised the public trust doctrine in a way that mischaracterized the court's precedent and significantly weakened the doctrine as enshrined

77. *Id.* ¶ 102.

78. *Id.* ¶ 103 (quoting WIS. STAT. § 31.02(1) (2009–2010)) (internal quotation marks omitted).

79. *Id.* ¶ 101.

80. *Id.* ¶¶ 153, 155, 189 (Crooks, J., dissenting).

81. *Id.* ¶¶ 153–54.

in the Wisconsin Constitution.⁸² The consequence, according to the dissent, is “a significant and disturbing shift in Wisconsin law.”⁸³

The dissent’s statutory argument is simple: based on the plain language of Wisconsin Statutes section 31.02(1), the WDNR has clear authority to consider the impact that water levels on Lake Koshkonong will have on adjacent, privately-owned wetlands.⁸⁴ As the dissent acknowledged, the majority did not dispute this assertion⁸⁵; what the majority did dispute was the source of authority that this statutory provision embodies.⁸⁶ The dissent thus went on to argue that the majority’s interpretation of Wisconsin Statutes section 31.02(1) as codifying only in part the state’s public trust doctrine was a novel interpretation without support in the court’s precedents.⁸⁷

The dissent took issue with the majority’s characterization of the court’s public trust precedents in general and with its treatment of *Just* in particular. Specifically, the dissent argued that the overall thrust of the court’s precedents had been expansion of the state’s public trust jurisdiction, with *Just* standing for the proposition that the state may regulate non-navigable waters to the extent that such waters affect adjacent navigable waters.⁸⁸ By re-characterizing *Just* as an exercise of the state’s police powers rather than its public trust jurisdiction, the majority, in the words of the dissent, “untethers our constitutional jurisprudence from its foundation and attempts to transform 165 years

82. *Id.* ¶¶ 154, 168 (“Instead of limiting itself to addressing only what must be addressed, the majority seizes this opportunity to limit the public trust doctrine in an unforeseen way, transforming the state’s affirmative duty to protect the public trust into a legislative choice.”).

83. *Id.* ¶ 154.

84. *Id.* ¶ 167 (“Both the majority and the petitioner agree that a simple reading of § 31.02(1) demonstrates that the statute allows for consideration of private wetlands.”). Wisconsin Statutes section 31.02(1) provides, in relevant part, that the DNR, “in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters” WIS. STAT. § 31.02(1) (2013–2014). As the majority in *Rock-Koshkonong* notes, the District did not contest that privately owned wetlands adjacent to Lake Koshkonong constitute “property” subject to regulation within the meaning of the statute. *Rock Koshkonong*, 2013 WI 74, ¶ 109. The majority thus concludes, “There can be no dispute that the DNR can consider water level impact on all adjacent property under *Wis. Stat. § 31.02(1)*.” *Id.* (emphasis added).

85. *Rock-Koshkonong*, 2013 WI 74, ¶ 167 (Crooks, J., dissenting).

86. *See supra* Part II.C.1.

87. *Rock-Koshkonong*, 2013 WI 74, ¶ 168 (Crooks, J., dissenting).

88. *Id.* ¶¶ 164–65.

of constitutional precedent into a mere legislative exercise of the state's police power."⁸⁹

3. Divergent Interpretations of Wisconsin's Public Trust Doctrine

The fundamental disagreement between the majority and the dissent in *Rock-Koshkonong* thus concerned how the court's public trust precedents should be characterized. The majority relied on *Diana Shooting Club v. Husting*⁹⁰ and *Muench v. Public Service Commission*⁹¹ to define the public trust doctrine as applying only to navigable bodies of water up to the ordinary high-water mark.⁹² In this context, the majority concluded that *Just* could not have upheld the shoreland zoning ordinances at issue in that case pursuant to the state's public trust jurisdiction because the shoreland in question did not fall within the ordinary high-water marks of a navigable body of water.⁹³ By contrast, the dissent viewed *Just* as the culmination of a series of earlier decisions expanding the public trust doctrine beyond its initial application to waters navigable for commercial purposes only.⁹⁴ In assessing the *Rock-Koshkonong* decision, then, the fundamental question that arises is which side—majority or dissent—set forth a more plausible interpretation of the state's public trust doctrine?

III. WISCONSIN'S PUBLIC TRUST DOCTRINE

At its most basic level, the public trust doctrine “provides that certain natural resources are held by the government in a special status—in ‘trust’—for current and future generations.”⁹⁵ The origins of the public trust doctrine are ancient, traceable to Roman law that defined certain types of property, including the sea, seashore, and rivers, as permanently preserved for public use due to the particularly public benefits like navigation and fishing that are derived from such

89. *Id.* ¶ 166.

90. 156 Wis. 261, 145 N.W. 816 (1914).

91. 261 Wis. 492, 53 N.W.2d 514 (1952).

92. *Rock-Koshkonong*, 2013 WI 74, ¶ 86.

93. *See supra* notes 74–75 and accompanying text.

94. *Rock-Koshkonong*, 2013 WI 74, ¶¶ 160–61 (Crooks, J., dissenting) (noting the “growth of the public trust doctrine over time” with reference to *Diana Shooting Club*, *Muench*, and *Just*).

95. Frank, *supra* note 11, at 667.

property.⁹⁶ Under English common law, the monarch held title to the land beneath any waters influenced by the tide to preserve for the public a right to navigation and fishing on such waters.⁹⁷ The so-called “lodestar” in American public trust law is *Illinois Central Railroad Co. v. Illinois*,⁹⁸ in which the United States Supreme Court provided the foundational articulation of the public trust doctrine in the United States.⁹⁹ Specifically, the Court in *Illinois Central Railroad Co.* affirmed the American common law principle that the state holds title to the land beneath navigable bodies of water, including inland bodies of water not affected by the tide, to preserve the public rights to navigation, commerce, and fishing on such waters.¹⁰⁰

Notwithstanding this “lodestar,” the public trust doctrine has evolved along lines distinct to each state.¹⁰¹ In *Phillips Petroleum Co. v. Mississippi*, the Supreme Court expressly recognized that states possess authority to define the limits of their respective public trust doctrines.¹⁰² In exercising this latitude, states have largely tended to expand on the doctrine as defined in *Illinois Central Railroad Co.*, often by extending the geographic scope of the doctrine’s applicability and by recognizing public uses protected under the doctrine beyond the rights to navigation, commerce, and fishing.¹⁰³ Wisconsin has consistently been at

96. Sax, *supra* note 11, at 475. For further discussion of the origins of the public trust doctrine in Roman and English law, see *id.* at 475–78; Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322, 324–26 (2006).

97. See Henquinet & Dobson, *supra* note 96, 325–29.

98. 146 U.S. 387 (1892).

99. *Id.* at 452; Sax, *supra* note 11, at 489. For an in-depth examination of *Illinois Central Railroad Co.* and its role in defining the public trust doctrine in the United States, see generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004).

100. *Ill. Cent. R.R. Co.*, 146 U.S. at 452; see also Henquinet & Dobson, *supra* note 96, 328–29; Sax, *supra* note 11, at 489–90.

101. Henquinet & Dobson, *supra* note 96, at 323 (noting that “fairly substantial differences exist in the interpretation of the doctrine between jurisdictions even given guiding light cases like *Illinois Central*”); Robin Kundis Craig, *A 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, 55–56 (2010) (emphasizing that “the states have progressed and diverged in interesting ways beyond the precepts of the U.S. Supreme Court’s seminal discussion of the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*”).

102. *Phillips Petrol. Co. v. Miss.*, 484 U.S. 469, 475 (1988).

103. See David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis)use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 357 (2002) (“In the last thirty

the forefront of this expansion, particularly with respect to defining navigability in more expansive terms and recognizing additional rights preserved to the public under the doctrine.¹⁰⁴ The state's public trust doctrine is thus best characterized as not only expansive but also elastic, capable of being stretched to address changing social norms and emergent public concerns.¹⁰⁵

A. *Origins of the Public Trust Doctrine in Wisconsin*

Wisconsin's public trust doctrine originated in the Northwest Ordinance of 1787, whereby the Virginia legislature ceded control of the

years, many state courts have expanded the geographical reach and substantive scope of the public trust doctrine. In particular, a spate of recent decisions have extended it to cover resources beyond navigable waterways, while also finding that the trust protects public uses in such resources other than the traditional triad of commerce, navigation, and fishing.”); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 11 (2007) (noting the ability of states to “expand upon the federal public trust doctrine” and the ways in which they have done so); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 705 (2006) (citing *Phillips Petroleum Co.* as “allowing states a wide berth to expand the [public trust] doctrine’s protection beyond a federal minimum”).

104. Craig, *supra* note 103, at 18–19 (“Wisconsin’s already broad public trust doctrine is potentially even broader, because the Wisconsin Supreme Court stated in 1952 that the public can use the public trust waters for navigation, hunting, fishing, recreation ‘or any other lawful purpose.’” (quoting *Muench v. Pub. Serv. Comm’n*, 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1952))); Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 942–43 (2007) (“Of all the Great Lakes states, Wisconsin’s public trust doctrine is the most expansive in scope.”); *id.* at 914–15 (“Wisconsin courts have been leaders in applying a very broad definition of navigability, which includes streams capable of floating a recreational boat of the shallowest draft, certain artificial waters connected to navigable waters, and, in some instances, non-navigable streams that impact navigable waters.”); Henquinet & Dobson, *supra* note 96, at 352 (“Wisconsin probably has the strongest public trust doctrine in the [Great Lakes] basin . . .”).

105. Because the focus of the present discussion is on the *Rock-Koshkonong* decision and its interpretation of Wisconsin’s public trust doctrine, this Comment takes no position on whether an expansive public trust doctrine is normatively desirable. It is worth noting, however, that the topic has received considerable scholarly attention, particularly in the wake of Professor Sax’s call for liberal application of the doctrine for environmental protection. See Sax, *supra* note 11, at 556–57 (calling for application of the public trust doctrine beyond its “quite narrow” traditional scope). For a critical discussion of expansion of the public trust doctrine, see generally James L. Huffman, *Speaking of Inconvenient Truths — A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1 (2007). For a response to Professor Huffman’s criticisms that acknowledges the doctrine’s expansion beyond its traditional scope but defends such expansion as a useful means of filling regulatory gaps, see generally Hope M. Babcock, Essay, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393 (2009).

Northwest Territory on two conditions: (1) that the states newly admitted to the Union would be sovereign entities to the same extent as the original members of the Union; and (2) that the navigable waters connected with the Mississippi and St. Lawrence rivers would be permanently and freely accessible to the public.¹⁰⁶ Wisconsin, which was located within the Northwest Territory, was admitted to the Union as a state in 1848 and, upon admission, directly adopted the language of the Northwest Ordinance as Article IX of the Wisconsin Constitution.¹⁰⁷ Specifically, Section 1 of Article IX provides:

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.¹⁰⁸

On this constitutional basis, the Wisconsin legislature, the WDNR, and the Wisconsin Supreme Court have, over the past 150 years, defined the contours of the state's public trust doctrine.¹⁰⁹

106. *Muench*, 261 Wis. at 499. The Northwest Ordinance provided, in relevant part: The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor.

Diana Shooting Club v. Husting, 156 Wis. 261, 266–67, 145 N.W. 816, 818 (1914) (quoting An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, art. 4 (1787), as adopted by An Act to Provide for the Government of the Territory North-West of the River Ohio, 1 Stat. 50, 52 n.a (1789)) (internal quotation marks omitted).

107. *Muench*, 261 Wis. at 499–500.

108. WIS. CONST. art. IX, § 1.

109. See Scanlan, *supra* note 10, at 138 (describing the “three state institutions [that] have been instrumental in defining the scope of public rights and the responsibility of the state trustee” in Wisconsin).

B. Codification of the Public Trust Doctrine in Wisconsin Statutes

Under the state's public trust doctrine, the Wisconsin legislature is the primary trustee of the state's water resources.¹¹⁰ The Wisconsin Supreme Court has defined the legislature's obligations under the public trust doctrine as an affirmative duty to not only safeguard but also enhance the public's rights in the state's navigable waters: "[T]he trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust but to promote it."¹¹¹ Accordingly, the legislature has passed a series of statutes that regulate use of the state's navigable waters and delegate enforcement to the WDNR.¹¹² Chapter 30 of the Wisconsin Statutes, which governs "navigable waters, harbors and navigation,"¹¹³ "embodies a system of regulation of Wisconsin's navigable waters pursuant to the public trust doctrine" and "delegate[s] to the DNR broad authority to regulate under the public trust doctrine."¹¹⁴ Similarly, Chapter 31 of the Wisconsin Statutes regulates dams and bridges affecting navigable waters and likewise delegates administration of these regulations to the WDNR.¹¹⁵

C. Development of the Public Trust Doctrine Through Caselaw

Scholars have long acknowledged Wisconsin to have a particularly well-developed body of caselaw interpreting the state's public trust doctrine.¹¹⁶ Early in the state's history, the Wisconsin Supreme Court

110. *City of Milwaukee v. State*, 193 Wis. 423, 449, 214 N.W. 820, 830 (1927) ("The trust reposed in the State is not a passive trust; it is governmental, active, and administrative. Representing the State in its legislative capacity, the legislature is fully vested with the power of control and regulation.").

111. *Id.* at 449.

112. Bridget Donegan, Comment, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. ENVTL. L. & LITIG. 455, 479 (2009).

113. WIS. STAT. §§ 30.01–30.99 (2013–2014) (capitalization omitted).

114. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 2002 WI 106, ¶¶ 11–12, 255 Wis. 2d 486, 648 N.W.2d 854.

115. WIS. STAT. §§ 31.01–31.99. Of particular importance to the present discussion, Wisconsin Statutes section 31.02 delegates authority to the WDNR to regulate water levels in all navigable bodies of water. The statute provides in relevant part that "[t]he department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters." *Id.* § 31.02(1).

116. Henquinet & Dobson, *supra* note 96, at 350 (indicating that "Wisconsin has not surprisingly entertained a substantial amount of public trust litigation" due to the prevalence

declared that “the state is the owner of the fee of all lands under navigable waters in the Great Lakes, but in trust only, for the public uses and purposes of navigation and fishing.”¹¹⁷ Of particular importance to the present discussion are a series of cases decided in the wake of this early pronouncement that clarified the scope of the state’s powers and duties under the public trust doctrine.¹¹⁸

In *Diana Shooting Club v. Husting*, the Wisconsin Supreme Court addressed both the scope of the waters that the state holds in trust and the rights secured to the public in those waters.¹¹⁹ *Diana Shooting Club* involved an action for trespass against a hunter who had pushed his boat into vegetation growing on the plaintiff’s property while duck hunting on the Rock River.¹²⁰ The defendant hunter maintained that he had remained on waters held in trust for the public and that such waters were held in trust not only for purposes of navigation, but also for hunting, fishing, and other recreational purposes.¹²¹ In holding that the defendant had not trespassed on the plaintiff’s property, the court declared that the waters held in trust by the state extend to the ordinary high-water marks on the shores or banks of any navigable body of water.¹²² The court defined “ordinary high-water mark” as “the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.”¹²³

of Great Lakes shoreline, inland lakes, and navigable rivers within the state); Sax, *supra* note 11, at 509 (citing Wisconsin as among those states that have “the most amply developed case law in the public trust area”); Donegan, *supra* note 112, at 460 (stating that Wisconsin has “some of the richest law in the region concerning the public trust doctrine”).

117. *McLennan v. Prentice*, 85 Wis. 427, 443, 55 N.W. 764, 770 (1893).

118. Because the focus of this Comment is the Wisconsin Supreme Court’s decision in *Rock-Koshkonong*, a comprehensive overview of Wisconsin’s public trust caselaw is beyond the scope of the present discussion. For a more complete treatment of Wisconsin cases addressing the public trust doctrine, see Craig, *supra* note 103, at 11–13 (outlining key cases addressing the public trust doctrine in Wisconsin); Donegan, *supra* note 112, at 478–84 (discussing in detail the scope of Wisconsin’s public trust doctrine as defined through caselaw, including the state’s obligations as trustee, as well as citizen standing to enforce Wisconsin’s public trust doctrine). For a thorough historical examination of earlier cases addressing the public trust doctrine in Wisconsin, see Sax, *supra* note 11, at 509–23.

119. 156 Wis. 261, 272, 145 N.W. 816, 820 (1914).

120. *Id.* at 265.

121. *Id.*

122. *Id.* at 272.

123. *Id.*

The court in *Diana Shooting Club* further held that members of the public retain the right to hunt so long as they remain between the boundaries of the ordinary high-water marks.¹²⁴ In reaching this conclusion, the court defined the rights preserved to the public under the public trust doctrine more broadly than navigation, commerce, and fishing: “[Navigable waters] should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation.”¹²⁵ The court reasoned that this broad interpretation was necessary to give effect to the purpose underlying the state’s public trust doctrine—to preserve to the public the “full and free use of public waters.”¹²⁶

While *Diana Shooting Club* thus expanded the rights preserved to the public under the public trust doctrine to include all recreational uses, *Muench v. Public Service Commission* similarly expanded the definition of “navigable waters” that fall within the scope of the state’s trust.¹²⁷ *Muench* addressed a challenge by a conservation group and private citizens to the Public Service Commission’s grant of approval for construction of a hydroelectric dam on the Namekagon River in Washburn County.¹²⁸ In the context of this challenge, the *Muench* court defined “navigable waters” as any body of water “which is capable of floating any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.”¹²⁹ The court situated this definition in an extended discussion of the historical test for navigability, which turned on whether or not the body of water in question was usable for commercial purposes.¹³⁰ In departing from this historical test, the court cited *Diana Shooting Club* and its expansion of the rights secured to the public under the public trust doctrine.¹³¹ Because *Diana Shooting Club* had interpreted the rights secured to the public in broad terms that

124. *Id.* (“Hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of the ordinary high-water marks.”).

125. *Id.* at 271.

126. *Id.*

127. *Muench v. Pub. Serv. Comm’n*, 261 Wis. 492, 506, 53 N.W.2d 514, 519 (1952).

128. *Id.* at 497–98.

129. *Id.* at 506.

130. *Id.* at 500–01 (discussing Wisconsin’s early use of the “saw-log” test for navigability and indicating that this test was based on “commercial considerations”).

131. *Id.* at 504–05 (“[*Diana Shooting Club*] is significant in that the navigability was established not through any commercial use, such as floating of logs, but through the use of shallow draft boats for purposes of recreation.”).

extended beyond mere navigation or fishing for commercial purposes, the test for navigability, the court reasoned, should likewise extend beyond navigability for commercial purposes.¹³² The court thus characterized its definition of “navigable waters” as “keeping with the trend manifested in the development of the law of navigable waters in this state to extend the rights of the general public to the recreational use of the waters of this state, and to protect the public in the enjoyment of such rights.”¹³³

Together, *Diana Shooting Club* and *Muench* clarify the scope of the state’s powers and duties under the public trust doctrine by defining two key elements of the doctrine: navigability and the rights preserved to the public in the state’s navigable waters. After *Diana Shooting Club* and *Muench*, it is clear that, at a minimum, the state holds in trust for the public any body of water that is capable of floating any vessel used for recreational purposes, and that the state’s trust extends to the ordinary high-water marks of such bodies of water.¹³⁴ Beyond merely clarifying these particular aspects of the public trust doctrine, however, both *Diana Shooting Club* and *Muench* set a course for expansive application of the doctrine. Indicative of this course are several key cases decided in the decades following *Diana Shooting Club* and *Muench*, which rely on these earlier decisions to suggest that the public trust doctrine may apply to certain non-navigable bodies of water to protect public interests as varied as preventing pollution and preserving the state’s scenic beauty.

More than two decades after *Muench*, in *De Gayner & Co. v. Department of Natural Resources*, the Wisconsin Supreme Court revisited the test for navigability.¹³⁵ The court in *De Gayner* addressed the issue of whether a creek on which a developer sought to build a dam was navigable, which would in turn require the developer to obtain a permit prior to constructing the dam.¹³⁶ The developer in this case was the sole riparian owner of the creek.¹³⁷ Testimony by various individuals indicated that it was possible to traverse the creek by canoe due primarily to the presence of a number of beaver dams, which had the

132. *Id.* at 512.

133. *Id.*

134. *See id.* at 506.

135. *De Gayner & Co. v. Dep’t of Natural Res.*, 70 Wis. 2d 936, 938, 236 N.W.2d 217, 218 (1975).

136. *Id.* at 938–39.

137. *Id.* at 938.

effect of raising water levels on the creek.¹³⁸ Accordingly, the developer argued that the creek was not navigable in its natural condition but only as a result of being altered by the beaver dams.¹³⁹ In holding that the creek was in fact navigable, the court applied the test for navigability as outlined in *Muench*.¹⁴⁰ The court further noted, “[T]here are no requirements in the Wisconsin law that only ‘normal or natural conditions’ are to be considered in determining navigability.”¹⁴¹ Rather, the court explained, artificial conditions may render a body of water navigable so long as those conditions have “existed for a period of time.”¹⁴²

While the court thus further clarified the test for navigability as established in *Muench*, the court also suggested that the “modern test” for navigability that *Muench* set forth may in fact be even broader than navigability per se.¹⁴³ Specifically, the court noted that *Muench* had ultimately been remanded to the Public Service Commission for a determination of “whether public rights for the recreational enjoyment of the stream in its present natural condition outweigh the benefits to the public which would result in the construction of the dam.”¹⁴⁴ On this basis, the court proposed that the test for applicability of the public trust doctrine under *Muench* might extend beyond navigability altogether: “Under that broader test foreshadowed by *Muench*, the question would appear to be whether any beneficial interest whatsoever of the public will be served by the continued existence of the original stream.”¹⁴⁵

In the same way that *De Gayner* revisited the question of navigability, *Wisconsin’s Environmental Decade, Inc. v. Department of Natural Resources* dealt once again with the question of what rights are preserved to the public under the public trust doctrine.¹⁴⁶ *Wisconsin’s Environmental Decade* involved a city resolution that prohibited the use

138. *Id.* at 940–43.

139. *Id.* at 940–42.

140. *Id.* at 945 (noting that *Muench* “established the modern test of navigability” and applying that test to the facts of the present case).

141. *Id.*

142. *Id.* at 946.

143. *Id.* at 948–49 (“We are not, however, unmindful of the broad sweep of the modern test hinted at in *Muench v. Public Service Comm’n.*”).

144. *Id.* at 949 (quoting *Muench v. Pub. Serv. Comm’n.*, 261 Wis. 492, 515b, 53 N.W.2d 514, 525 (1952)) (internal quotation mark omitted).

145. *De Gayner*, 70 Wis. 2d at 949.

146. See *Wisconsin’s Env’tl. Decade, Inc. v. Dep’t of Natural Res.*, 85 Wis. 2d 518, 526, 271 N.W.2d 69, 72–73 (1978).

of chemical treatments on lakes in Madison despite the WDNR's issuance of a blanket permit allowing such treatments.¹⁴⁷ The chemical treatments were intended to eliminate weeds in Lakes Mendota and Monona that made various recreational activities difficult and dangerous.¹⁴⁸ The Wisconsin Supreme Court ultimately invalidated the city resolution.¹⁴⁹ The court reasoned that, although the state legislature had delegated to the city the power to prohibit chemical treatments, that power was subject to any other statutory provisions limiting or withdrawing such power.¹⁵⁰ Because Wisconsin Statutes section 144.025(2) expressly authorized the WDNR to supervise chemical treatment of waters in the state, and because the city's resolution was inconsistent with the WDNR's order granting a permit in this case, the court held that the city's power to issue such a resolution was effectively revoked.¹⁵¹

Although *Wisconsin's Environmental Decade* thus struck down a city resolution that provided more aggressive environmental protection because it conflicted with the legislative grant of authority to the WDNR, the decision is significant precisely because the court identified protection of natural resources as a public interest that the state is required to preserve under the public trust doctrine.¹⁵² The court noted that its earlier decisions had recognized recreational interests beyond commercial navigation and fishing.¹⁵³ The court then went on to indicate that societal changes had created new interests over time:

[I]ncreased leisure time, improved transportation facilities, the consequent growth of Wisconsin's water-centered recreation industry, and the continued deterioration of the quality of the

147. *Id.* at 523.

148. *Id.* at 523–24.

149. *Id.* at 539.

150. *Id.* at 534.

151. *Id.* at 535.

152. See Henquinet & Dobson, *supra* note 96, at 351 (“Ironically, or perhaps wrongly, the court struck down a more protective environmental regulation by the City of Madison, because it conflicted with the authority delegated to the Wisconsin Department of Natural Resources as part of the affirmative duty of the State to protect the environment under the public trust doctrine. Regardless, this is probably the most pro-environmental protection statement that one will find in the public trust doctrine decisions that apply to the Great Lakes.” (footnote omitted)).

153. *Wisconsin's Envtl. Decade*, 85 Wis. 2d at 526 (acknowledging that the state's public trust obligations “require[] the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty”).

waters of the state have awakened widespread interest in all Wisconsin's waters and have served to underscore the fact that maintaining pure and attractive rivers, lakes and streams is a matter of statewide concern.¹⁵⁴

On the basis of this analysis, the court concluded that “[p]reventing pollution and protecting the quality of the waters of the state are valid police-power concerns, as well as being part of the state’s affirmative duty under the ‘public trust’ doctrine.”¹⁵⁵

Thus, in the wake of *Diana Shooting Club* and *Muench*, the Wisconsin Supreme Court not only continued to clarify its definition of the public trust doctrine but furthermore suggested a much broader scope for the doctrine than its historical application to waters navigable for commercial purposes. The public trust doctrine as articulated by the court in *De Gayner* and *Wisconsin’s Environmental Decade* would seemingly enable the state to regulate non-navigable waters to the extent necessary to protect public interests in the environmental well-being and scenic beauty of the state’s natural resources.¹⁵⁶ Nowhere is this potentially expansive scope of Wisconsin’s public trust doctrine more apparent than in the Wisconsin Supreme Court’s 1972 decision upholding a shoreland zoning ordinance in *Just v. Marinette County*.

D. Just v. Marinette County

In *Just v. Marinette County*, the Wisconsin Supreme Court addressed the issue of whether a shoreland zoning ordinance constituted a regulatory taking of private property requiring compensation.¹⁵⁷ The county ordinance in question required property owners to obtain a permit prior to filling, draining, or dredging any wetlands within 1,000 feet of a navigable lake or 300 feet of a navigable river.¹⁵⁸ The Justs, who owned a parcel of designated wetlands adjacent to a navigable lake in Marinette County, challenged the ordinance after attempting to fill a portion of their property without the required permit.¹⁵⁹ The Justs alleged that the ordinance amounted to a constructive taking of their

154. *Id.*

155. *Id.* at 533.

156. *See supra* Part III.C.

157. *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 9, 14, 201 N.W.2d 761, 764, 767 (1972).

158. *Id.* at 12.

159. *Id.* at 14.

private property by denying them all beneficial use of the wetland.¹⁶⁰ Marinette County and the State of Wisconsin argued, in turn, that the shoreland zoning ordinance constituted a reasonable exercise of the state's police powers to protect navigable waters from the harmful effects of uncontrolled use and development of the shoreland.¹⁶¹

The court in *Just* held that the Marinette County ordinance did not rise to the level of a taking requiring compensation.¹⁶² In reaching this conclusion, the court undertook a lengthy discussion of not only regulatory takings jurisprudence but also Wisconsin's public trust doctrine.¹⁶³ The court first highlighted the distinction between an exercise of the state's police power (not requiring compensation) and an exercise of the government's power of eminent domain (requiring compensation):

The protection of public rights may be accomplished by the exercise of the police power unless the damage to the property owner is too great and amounts to a confiscation. The securing or taking of a benefit not presently enjoyed by the public for its use is obtained by the government through its power of eminent domain.¹⁶⁴

The court then went on to consider whether preventing alterations to the natural condition of the state's lakes and rivers constituted protection of public rights from harm or the securing of a benefit not presently enjoyed.¹⁶⁵ Central to the court's reasoning was its recognition of the interconnectedness of navigable bodies of water and adjacent, non-navigable wetlands.¹⁶⁶ Specifically, the court expressly stated that its analysis would have been substantially different if the privately-owned wetlands in question were not adjacent to a navigable lake or stream, the change of which would cause no harm to public rights.

160. *See id.*

161. *Id.*

162. *Id.* at 26 (holding that "the prohibition in the ordinance against the filling of wetlands is constitutional").

163. *See id.* at 14–19.

164. *Id.* at 15.

165. *Id.* at 16.

166. *Id.* at 16–17 ("What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty.").

Lands adjacent to or near navigable waters exist in a special relationship to the state.¹⁶⁷ Because changes to adjacent wetlands inevitably impact navigable lakes and rivers, the court explained, such changes necessarily implicate the public's rights in the state's navigable waters—as well as the state's duty to protect and promote those rights—under the public trust doctrine.¹⁶⁸

Consequently, the public trust doctrine assumed a key role in the court's reasoning. Specifically, the court stated: “In the instant case we have a restriction on the use of a citizens' property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property.”¹⁶⁹ The court then characterized prevention of such harm as a right presently enjoyed by the public under the state's public trust doctrine:

The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural *status quo* of the environment.¹⁷⁰

Because the rights preserved to the public under the state's public trust doctrine include the right to unpolluted navigable waters, a restriction on the use of private property intended to prevent despoliation of adjacent navigable waters constitutes an exercise of the state's police power intended to prevent harm to rights currently enjoyed, as opposed to an exercise of the government's power of eminent domain meant to secure new benefits for the public.¹⁷¹ On this basis, the court held that the county's shoreland zoning ordinance constituted a valid exercise of the state's police powers intended to prevent harm to public rights in the state's navigable waters:

The shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right. The ordinance does not create or improve the public condition but only preserves nature

167. *Id.* at 18.

168. *See id.* at 16–17.

169. *Id.* at 16.

170. *Id.*

171. *Id.*

from the despoilage and harm resulting from the unrestricted activities of humans.¹⁷²

IV. A BREACH OF TRUST

The foregoing examination leads to the conclusion that the *Rock-Koshkonong* majority incorrectly characterized the court's prior decisions as delimiting rather than expanding the scope of the state's public trust doctrine. In this respect, the dissent in *Rock-Koshkonong* set forth the more accurate portrayal of the court's public trust precedents. However, what both the majority and the dissent failed to recognize is that the underlying premise of the court's opinion in *Rock-Koshkonong* is an artificial distinction between the state's exercise of its police powers and its affirmative duties under the public trust doctrine that is logically untenable within the context of the court's holding in *Just*.

A. A Mischaracterization of the Court's Precedent

The *Rock-Koshkonong* majority characterized the court's public trust precedents as rigidly restricting the doctrine's applicability to navigable bodies of water up to the ordinary high-water marks.¹⁷³ In doing so, the majority relied on both *Diana Shooting Club* and *Muench*: the public trust doctrine, the majority explained, is "premised upon the existence of 'navigable waters,'" which *Muench* defined as "navigable in fact for any purpose"¹⁷⁴ and which *Diana Shooting Club* "confined to a limited geographic area" between the ordinary high-water marks on the bank or shore.¹⁷⁵ This depiction of the court's precedents is not incorrect; *Diana Shooting Club* and *Muench* did, in fact, define "navigable waters" as the *Rock-Koshkonong* majority described.¹⁷⁶ Nonetheless, the majority mischaracterized these cases as delimiting rather than expanding the scope of the state's public trust doctrine.¹⁷⁷

172. *Id.* at 23–24 (footnote omitted).

173. *See supra* note 67 and accompanying text.

174. *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 2013 WI 74, ¶ 76, 350 Wis. 2d 45, 833 N.W.2d 800 (emphasis omitted) (quoting *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 505–06, 53 N.W.2d 514, 519 (1952)) (internal quotation marks omitted).

175. *Id.* ¶ 91.

176. *See supra* Part III.C.

177. *Rock-Koshkonong*, 2013 WI 74, ¶ 93 (describing "the limitation thus stated in the cases" cited above (emphasis added)).

This interpretation is inconsistent not only with the language of *Diana Shooting Club* and *Muench* but also with the court's previous readings of these cases. In holding that hunting on navigable waters up to the ordinary high-water marks is a right secured to the public under the state's public trust doctrine, the court in *Diana Shooting Club* expressly cautioned against a limiting construction of the doctrine: "The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions."¹⁷⁸ Similarly, in defining "navigable waters" as waters navigable in fact for any recreational purpose, the *Muench* court was clearly conscious that it was not only altering but furthermore expanding prior definitions of navigability, which had focused on navigability for commercial purposes.¹⁷⁹ The *Muench* court highlighted, for example, "the trend to *extend* and protect the rights of the public to the recreational enjoyment of the navigable waters of the state."¹⁸⁰

Later decisions reinforce the assertion that *Diana Shooting Club* and *Muench* sought to expand rather than delimit the scope of Wisconsin's public trust doctrine through their definition of "navigable waters."¹⁸¹ The *Rock-Koshkonong* majority's mischaracterization of these decisions is more pronounced. Specifically, the majority cited *De Gayner* in support of the proposition that the "court has rejected theories that attempt[ed] to extend the public trust doctrine beyond its historical limitations."¹⁸² The majority went on to state that *De Gayner* "rejected a theory offered by an amicus that a stream should be considered 'as a navigable water [irrespective of any other finding], because it is a tributary of a natural and valuable navigable resource, the Namekagon river.'"¹⁸³

This description entirely ignores the *De Gayner* court's consideration of the implications of the new test for navigability that *Muench* established.¹⁸⁴ As the *De Gayner* court expressly noted, "[I]t

178. *Diana Shooting Club v. Husting*, 156 Wis. 261, 271, 145 N.W. 816, 820 (1914).

179. *See supra* Part III.C.

180. *Muench v. Pub. Serv. Comm'n*, 261 Wis. 492, 508, 53 N.W.2d 514, 521 (1952) (emphasis added).

181. *See supra* Part III.C.

182. *Rock-Koshkonong*, 2013 WI 74, ¶ 77 n.29.

183. *Id.* (alteration in original) (quoting *De Gayner & Co. v. Dep't of Natural Res.*, 70 Wis. 2d 936, 948, 236 N.W.2d 217, 223 (1975)).

184. *See supra* Part III.C.

appears, under *Muench*, that navigability, *i.e.*, the ability to float a skiff of even the lightest nature, ought not to be the sole test to be applied in determining whether natural beauty should be supplanted by some man-made project.”¹⁸⁵ The *De Gayner* court went on to describe the broader test of navigability that *Muench* foreshadowed as “whether any beneficial interest whatsoever of the public will be served by the continued existence of the original stream.”¹⁸⁶ Under this test, the *De Gayner* court stated, the position urged in the amicus brief would have “great merit.”¹⁸⁷ Although the *De Gayner* court ultimately declined to apply this “broader test of navigability,” it did so because the parties to the case had agreed to the more traditional test of navigability at the outset of the dispute.¹⁸⁸ In this context, the *De Gayner* court can hardly be said to have “rejected theories that attempt[ed] to extend the public trust doctrine beyond its historical limitations,” as the majority in *Rock-Koshkonong* contended.¹⁸⁹ To the contrary, the *De Gayner* court clearly recognized and even highlighted the potential implications of the court’s decision in *Muench* to expand the scope of the public trust doctrine beyond its historical applicability to navigable waters.¹⁹⁰

Thus, while the *Rock-Koshkonong* majority’s treatment of caselaw defining “navigable waters” is perhaps technically accurate, the court mischaracterized the general thrust of its precedents in this area. Consequently, the majority arrived at a conception of Wisconsin’s public trust doctrine that cannot accommodate any regulation of non-navigable waters pursuant to the state’s public trust jurisdiction.¹⁹¹

B. A Misunderstanding of *Just v. Marinette County*

This newly rigid interpretation of Wisconsin’s public trust doctrine led the majority to construe *Just v. Marinette County* as a “textbook

185. *De Gayner*, 70 Wis. 2d at 949.

186. *Id.*

187. *Id.*

188. *Id.* at 949–50 (“That position is, however, more properly tested in subsequent proceedings to determine whether a permit to obstruct the stream should be granted. It is not embraced in the traditional concept of ‘navigability,’ which the parties agreed at the outset was the only one to be considered in these declaratory proceedings.”).

189. *Rock-Koshkonong Lake Dist. v. State Dep’t of Natural Res.*, 2013 WI 74, ¶ 77 n.29, 350 Wis. 2d 45, 833 N.W.2d 800.

190. *See supra* Part III.C.

191. *Rock-Koshkonong*, 2013 WI 74, ¶ 86 (“There is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the [ordinary high-water marks] of a navigable lake or stream.” (emphasis omitted)).

example” of the state’s exercise of its police powers entirely detached from the state’s public trust jurisdiction.¹⁹² The majority reasoned that the court in *Just* could not have upheld the shoreland zoning ordinance at issue in that case under the public trust doctrine because the shoreland in question did not constitute a navigable body of water as defined in earlier cases.¹⁹³ As the dissent noted, the majority’s reasoning has a circular quality that is clearly problematic.¹⁹⁴ Even more problematic is the fact that “[t]he clear language of *Just* rebuts the majority’s conclusion” that the *Just* court did not rely on the public trust doctrine.¹⁹⁵ The court in *Just* expressly cited “the active public trust duty of the state of Wisconsin in respect to navigable waters” that “requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty.”¹⁹⁶ Nonetheless, the *Rock-Koshkonong* majority was, again, not incorrect in noting that *Just* upheld the shoreland zoning ordinance at issue in that case as a valid exercise of the state’s police power; indeed, the *Just* court explicitly stated: “Wisconsin has long held that laws and regulations to prevent pollution and to protect the waters of this state from degradation are valid police-power enactments.”¹⁹⁷

That both the majority and the dissent were able to point to specific language in *Just* in support of their conflicting conclusions highlights the fundamental problem underlying both opinions: failure to recognize that the public trust doctrine was inseparable from and essential to the court’s holding in *Just* that the shoreland zoning ordinance at issue constituted a valid exercise of the state’s police powers. It is worth emphasizing here that *Just* was particularly noteworthy at the time it was decided in part because courts in other states had, around the same time, struck down similar ordinances as unconstitutional takings of

192. *Id.* ¶ 95–96 (“This review of the constitutionally based public trust doctrine does not disarm the DNR in protecting Wisconsin’s valuable water resources. For instance, the DNR has broad statutory authority grounded in the state’s police power to protect wetlands and other water resources.”) (citing *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 10, 201 N.W.2d 761, 765 (1972)).

193. *See supra* notes 73–75 and accompanying text.

194. *See Rock-Koshkonong*, 2013 WI 74, ¶ 171 (Crooks, J., dissenting) (“The majority imports its conclusion from earlier in the opinion—that the public trust does not extend beyond the ordinary high water mark—and applies it to support its subsequent conclusion.”).

195. *Id.* ¶ 170.

196. *Just*, 56 Wis. 2d. at 18.

197. *Id.*

private property.¹⁹⁸ By contrast, the *Just* court upheld the ordinance at issue against the plaintiffs' takings claim based on the public trust doctrine.¹⁹⁹ Because Wisconsin's public trust doctrine recognizes a public interest in the enjoyment of unpolluted navigable waters and because navigable waters are inextricably connected to adjacent, non-navigable wetlands, the court in *Just* concluded that the shoreland zoning ordinance at issue did not restrict the use of private property to secure new benefits for the public but rather to prevent harm to a right currently enjoyed.²⁰⁰

In this respect, the court in *Just* can be said to have anticipated the notion of the public trust doctrine as a governmental defense to a takings claim,²⁰¹ a notion that has garnered significant attention since the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.²⁰² In *Lucas*, the Supreme Court recognized that regulations duplicating restrictions imposed by "background principles of the State's law of property and nuisance" will not constitute a taking, even where the regulation results in a complete deprivation of all beneficial use of the property.²⁰³ Foremost among the background principles that scholars and courts have looked to in the wake of *Lucas*

198. See Patrick O. Dunphy, *The Public Trust Doctrine*, 59 MARQ. L. REV. 787, 789 n.12 (1976).

199. See *Just*, 56 Wis. 2d. at 18; see also Alexandra B. Klass, *Property Rights on the New Frontier: Climate Change, Natural Resource Development, and Renewable Energy*, 38 ECOLOGY L.Q. 63, 89 (2011) (noting that the court in *Just* rejected the plaintiff's takings claim in holding that regulation at issue "was a valid exercise of the police power based on the public trust doctrine").

200. See *supra* notes 166–68 and accompanying text; see also Klass, *supra* note 199, at 89 (highlighting the *Just* court's reliance on the public trust doctrine based on "the interrelationship between preserving the natural status of wetlands and preventing pollution of navigable waters"); Sarahan, *supra* note 14, at 568 (describing the *Just* court as "approving wetlands regulations premised on the physical interrelationship between the wetlands and the public trust lands").

201. See Klass, *supra* note 103, at 739 (citing *Just* as an early example of the "idea of the public trust as a background limitation on private property rights"); Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1119–20 & n.128 (2012) (identifying the public trust doctrine as a possible defense against a takings claim where the government engages in environmental protection regulation, and citing *Just* as an early example of the use of the doctrine for this purpose); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 358–59 (1998) (discussing the public trust doctrine as a governmental defense against takings claims and noting that a "trace of this idea appeared in *Just v. Marinette County*").

202. 505 U.S. 1003 (1992).

203. *Id.* at 1029.

is the public trust doctrine.²⁰⁴ The basic contours of the doctrine as a defense to a regulatory takings claim have been clearly articulated: to the extent that the public trust doctrine prohibits harm to resources held in trust for the public, any regulation that functions to prohibit such harm cannot constitute a taking.²⁰⁵ Restated in these terms, the court in *Just* upheld the shoreland zoning ordinance against the plaintiffs' takings claim because the regulation was intended to prevent harm to adjacent navigable waters; insofar as the public trust doctrine prohibited such harm, the regulation did not constitute a taking.²⁰⁶

While the scope and viability of the public trust doctrine as a governmental defense to a takings claim remains unsettled,²⁰⁷ the

204. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 342 (2005); Klass, *supra* note 103, at 740–41; Timothy M. Bagshaw, Note, *Unintended Consequences: Lucas, The Public Trust Doctrine, and the Erosion of Private Property Rights Under the Takings Clause*, 2013 UTAH L. REV. 1687, 1688–89; Julia K. Bramley, Note, *Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust Doctrine*, 38 B.C. ENVTL. AFF. L. REV. 445, 455–56 (2011).

205. Callies & Breemer, *supra* note 103, at 369 (“If otherwise confiscatory regulations avoid the compensation requirement as should common law limitations, traditional custom and public trust are clearly appropriate candidates for identification as categorical takings exceptions.”); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 955 (2012) (“Because no water right holder can claim an entitlement to exercise its water right in a fashion that harms public trust resources, a regulation designed to prevent such harm does not impair a protected property right and, therefore, cannot provide the basis for a successful takings claim.”).

206. Some commentators have explicitly framed the *Just* decision in these terms, see Sarahan, *supra* note 14, at 568–69, while others have asserted more generally that the *Lucas* background principles defense applies where the government seeks to protect public trust resources by regulating adjacent, privately-owned property, see Archer & Stone, *supra* note 14, at 113.

207. Although the Supreme Court in *Lucas* provided minimal guidance regarding what constitutes a “background principle,” the general consensus among scholars appears to be that the public trust doctrine should provide a defense to a takings claim under *Lucas*. See Blumm & Ritchie, *supra* note 204, at 343–44 (“Therefore, in states that have adopted an expansive view of public rights, the public trust doctrine can be effectively used as a defense to takings claims in a variety of situations.”); Callies & Breemer, *supra* note 103, at 372–73 (“It is fair to say that states can, therefore, prohibit land uses inconsistent with the traditional public trust without paying just compensation.”); Echeverria, *supra* note 205, at 955 (“[C]ourts should readily acknowledge that the public trust doctrine provides a background principles defense to a takings claim based on regulatory restrictions on the use of water designed to protect fish or other trust resources from harm.”). Nonetheless, commentators recognize that the scope of the public trust doctrine varies widely from state to state, and there remains significant disagreement regarding the extent to which the doctrine should provide a defense to a takings claim. See Blumm & Ritchie, *supra* note 204, at 343 (acknowledging gradual expansion of the public trust doctrine beyond its traditional scope but asserting that *Lucas* permits evolution of background principles); Callies & Breemer at

general framework illustrates the fundamental illogic of distinguishing between regulation pursuant to the public trust doctrine and regulation pursuant to the state's police powers within the context of the *Just* decision. Toward the end of its discussion of *Just*, the *Rock-Koshkonong* majority attempted to establish a clear distinction between the state's public trust jurisdiction and its police powers, describing the latter as "subject to constitutional and statutory protections afforded to property."²⁰⁸ What both the majority and the dissent failed to recognize is that this distinction is untenable when applied to the type of shoreland regulation at issue in *Rock-Koshkonong* and upheld by the court in *Just*. Put differently, the *Just* court upheld the state's exercise of its police powers against the "constitutional and statutory protections afforded to property" because Wisconsin's public trust doctrine not only allowed but compelled the state to protect and promote the public's interest in adjacent navigable waters.²⁰⁹

A proper understanding of the relationship between the state's public trust jurisdiction and its police powers renders unfounded the majority's concern that reliance on the public trust doctrine to regulate non-navigable wetlands would call into question the private ownership of such wetlands. As the dissent pointed out, and as *Just* itself made clear, regulation of non-navigable bodies of water pursuant to the public trust doctrine does not assert state ownership.²¹⁰ Rather, such regulation merely recognizes the interconnectedness of the state's water resources and, consequently, the state's occasional need to restrict some uses of private property in order to fulfill its affirmative obligations as trustee of the state's navigable waters under the public trust doctrine.²¹¹

357, 372–73 (citing state court expansion of the geographic and substantive scope of the public trust doctrine over the last three decades and arguing that the doctrine as a defense to a takings claim should be limited to its more traditional, historical scope); Echeverria, *supra* note 205, at 951, 954–55 (noting that "the actual contours of the [public trust] doctrine remain somewhat uncertain" but concluding that these distinctions are largely irrelevant in the context of a takings claim).

208. *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 2013 WI 74, ¶ 101, 350 Wis. 2d 45, 833 N.W.2d 800.

209. See *supra* Part III.D.

210. See *Rock-Koshkonong*, 2013 WI 74, ¶ 173 (Crooks, J., dissenting); *Just v. Marinette Cnty.*, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767 (1972) (noting that the dispute in this case "causes us to reexamine the concepts of public benefit in contrast to public harm and *the scope of an owner's right to use of his property*" (emphasis added)).

211. *Just*, 56 Wis. 2d at 18 ("This is not a case of an isolated swamp unrelated to a navigable lake or stream . . . which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state.").

V. THE FUTURE OF WISCONSIN'S PUBLIC TRUST DOCTRINE

In the wake of the Wisconsin Supreme Court's decision in *Rock-Koshkonong*, reactions have been mixed. While business lobbying groups have praised the decision as clarifying "a lot of ambiguity that has resulted over the years in case law," environmental advocates have raised concerns that the decision "backtrack[s] on [Wisconsin's] . . . strong history" of protecting its waters as a public resource.²¹² Reactions within the legal community have been similarly equivocal. While there appears to be a general consensus that the majority's interpretation of *Just* represents a notable departure from previous interpretations,²¹³ commentators have disagreed on what the long-term implications of the *Rock-Koshkonong* decision will be. Specifically, while some have described the decision as "a significant reversal in thinking by one of the most traditionally protective states in terms of an environmental public trust doctrine,"²¹⁴ others have noted that the court's commentary on the public trust doctrine in *Rock-Koshkonong* is largely dicta that future courts are not required to follow.²¹⁵

The extent to which the *Rock-Koshkonong* decision might lead to Wisconsin courts refusing to uphold regulation of non-navigable waters pursuant to the state's public trust jurisdiction cannot be known, and the point that *Rock-Koshkonong* did not actually overturn any of the court's public trust precedents is an important one. Nonetheless, to discount the *Rock-Koshkonong* majority's characterization of these precedents as

212. See Marley, *supra* note 7 (quoting Scott Manley, vice president of government relations for Wisconsin Manufacturers & Commerce, and Elizabeth Wheeler, an attorney with Clean Wisconsin).

213. See Scanlan, *supra* note 8 (discussing the Wisconsin Supreme Court's decision in *Just* and the *Rock-Koshkonong* majority's extensive commentary reinterpreting this decision); Robin Kundis Craig, *Wisconsin Backs off Its Public Trust Doctrine*, ENVTL. L. PROF. BLOG (Aug. 12, 2013), http://lawprofessors.typepad.com/environmental_law/2013/08/wisconsin-backs-off-its-public-trust-doctrine.html, archived at <http://perma.cc/5MDK-5ZQ8> (indicating that "the *Rock-Koshkonong* majority reinterpreted a classic public trust doctrine case, *Just v. Marinette County*, to be a police power case" (citations omitted)). But see Mary Beth Peranteau & William P. O'Connor, *Public Trust and Agency Discretion Principles Intact*, WIS. LAW., Mar. 2014, at 34, 35 (asserting that the *Rock-Koshkonong* decision is "consistent with a long line of cases that limit the scope of delegated authority under separation-of-powers principles").

214. Craig, *supra* note 213.

215. Scanlan, *supra* note 8 ("[T]he muddying of the water on public trust jurisprudence should not be overblown. As this reasoning was unnecessary to the outcome of the decision, it can be properly characterized as dicta that future courts aren't bound to follow." (emphasis omitted)).

confusing but harmless dicta is to ignore what has been the true hallmark of Wisconsin's public trust doctrine: the doctrine's particular "elasticity,"²¹⁶ which has allowed Wisconsin courts to "continually expand[] what they recognize as the public's interest in public trust resources to include everything from the right to hunt to the right to maintain pollution-free water."²¹⁷ As early as 1927, the Wisconsin Supreme Court itself recognized this "elastic" quality of the state's public trust doctrine, stating, "The term 'navigation' itself in its definition is quite as indefinite and shifting as the so-called trust title."²¹⁸ Later courts have seized upon this notion and consistently demonstrated a willingness to redefine key concepts such as navigability and public rights in the state's navigable waters as societal needs and values have changed.²¹⁹

As recently as 2011, the Wisconsin Supreme Court availed itself of the particular adaptability of the state's public trust doctrine in upholding the WDNR's authority to regulate drilling of a high capacity well pursuant to the state's public trust jurisdiction.²²⁰ In *Lake Beulah Management District v. State Department of Natural Resources*, the court addressed the question of whether the WDNR, in issuing drilling permits, could consider the environmental impact that a municipal well with a capacity of 1.4 million gallons per day would have on Lake Beulah, a navigable body of water located 1,200 feet from the site of the proposed well.²²¹ In holding that the WDNR possessed authority to consider the environmental impact of the proposed well, the court in *Lake Beulah* identified the state's public trust doctrine as the source of that authority.²²² More specifically, the court relied implicitly on the notion—first recognized in *Just*²²³—that the state's water resources are interconnected, and that the state's affirmative duty to protect its navigable waters under the public trust doctrine necessarily requires some regulation of non-navigable waters such as the underground water

216. Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 *ECOLOGY L.Q.* 123, 129 (2012).

217. See Scanlan, *supra* note 10, at 137.

218. *City of Milwaukee v. State*, 193 Wis. 423, 446–47, 214 N.W. 820, 829 (1927).

219. See *supra* Parts III.C–D.

220. See *Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.*, 2011 WI 54, ¶ 3, 335 Wis. 2d 47, 799 N.W.2d 73.

221. *Id.* ¶¶ 9–10, 12, 30.

222. *Id.* ¶ 62.

223. See *supra* Part III.D.

at issue in this case.²²⁴ In the wake of the *Rock-Koshkonong* decision, the court's continued willingness to extend the public trust doctrine in a similar fashion is at best questionable and at worst foreclosed by the decision's ossification of the doctrine's scope.

VI. CONCLUSION

In the context of the Wisconsin Supreme Court's public trust precedents, the most notable feature of the *Rock-Koshkonong* decision is its re-casting of the state's public trust doctrine as static and settled, with clearly delineated boundaries. As certain proponents of the decision have noted, perhaps with unintentional insight, "[T]he decision creates a bright line that makes clear the public trust doctrine applies only to navigable waterways."²²⁵ While those who contend that *Rock-Koshkonong* does not overturn any of the court's public trust precedents are correct, they fail to consider fully the implications of the case going forward. By subtly re-characterizing the court's precedents as delimiting rather than expanding the state's public trust jurisdiction, the *Rock-Koshkonong* decision undermines the particular adaptability of Wisconsin's public trust doctrine, which has allowed the doctrine to evolve along with societal values and public needs and which, for decades, has situated Wisconsin as a leader in using the public trust doctrine for environmental protection. After *Rock-Koshkonong*, the state's future as a leader in this area appears as unsettled as the ongoing dispute over those seven inches of water on Lake Koshkonong.

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224. See *Lake Beulah*, 2011 WI 54, ¶ 34 (noting that "the legislature has delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells and *their potential effect on navigable waters* such as Lake Beulah" (emphasis added)). For additional discussion of the Wisconsin Supreme Court's prior willingness to continually expand the scope of the state's public trust jurisdiction in light of the interconnectedness of the state's water resources, see Scanlan, *supra* note 216, at 138–40 (noting that "[t]he extent to which Wisconsin's public trust doctrine influences state management of additional, nonnavigable, artificial, or underground water is based on the interactions between these waters and navigable waters").

225. See Marley, *supra* note 7 (citing Scott Manley, vice president of government relations for Wisconsin Manufacturers & Commerce).

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