COMMENT

WISCONSIN'S PUBLIC TRUST DOCTRINE: A NEW FRAMEWORK FOR UNDERSTANDING THE JUDICIARY'S ROLE IN PROTECTING WATER RESOURCES

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No matter how you slice it, development and conservation struggle to coexist. Some people want large buildings and others want public parks. This familiar pattern recently repeated itself in Milwaukee, Wisconsin. The city wanted a new, economy-boosting skyscraper where an advocacy group would have preferred a beautiful public park. But this was no ordinary spat between developers and environmentalists. Rather, the advocacy group Preserve Our Parks (POP) uncovered early nineteenth century maps and objected to the proposed skyscraper on the grounds that the project was sited on the former bed of Lake Michigan. "Nonsense!" cried the skyscraper proponents. "The law is clear!" asserted POP, citing the state constitution.

To the contrary, this peculiar local controversy raised critical and complicated issues regarding natural resource and separation of powers jurisprudence. Wisconsin's constitution, like the constitutions of many states, contains a provision requiring the waters of the state (and the land thereunder) to be held in trust by the state for the public. These provisions date back to ancient Rome, and their interpretation by courts constitutes the amorphous "public trust doctrine." Currently, the Wisconsin public trust doctrine is confusing—there is no clear framework to guide its application.

This Comment creates such a framework and applies it to the Milwaukee skyscraper controversy. By focusing on objective, physical criteria; the critical distinction between the legislature's *power* and its *obligations*; and a public-interest balancing test, this framework brings both clarity and flexibility to the public trust doctrine. Finally, this Comment urges the Wisconsin Supreme Court to adopt some version of this framework in order to prevent the legislature from shirking its constitutional duties as trustee of the public trust.

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* J.D. Candidate, May 2016, University of Wisconsin Law School. This Comment was made possible by the helpful comments and careful editing of my fellow *Wisconsin Law Review* members. I am also grateful to my dad, Mike Schinner, for presenting me with this topic, as well as the friends and family members who provided invaluable encouragement and support throughout the writing process. Finally, I would like to dedicate this piece to the late Wisconsin Supreme Court Justice N. Patrick Crooks, whose powerful dissent in *Rock-Koshkonong v. DNR*, 833 N.W.2d 800 (Wis. 2013), ultimately convinced me that the public trust doctrine was worth writing about.

INTRODUCTION

Conservation is a state of harmony between men and land.
—Aldo Leopold[1]

Wisconsin has one of America's richest histories of natural-resource preservation.[2] From the windswept beaches and cliffs of Lake Superior's Apostle Islands National Lakeshore to the scenic Lake Michigan shoreline of Door County, Wisconsin is home to over fifteen thousand lakes, sixty thousand acres of state parkland, and over eight hundred miles of beautiful—and valuable—Great Lakes' shoreline.[3] Thus, it is no surprise that Wisconsin courts have adopted and developed an ancient Roman legal doctrine to protect the state's water resources.[4] The doctrine is commonly known as the *public trust doctrine*. Unfortunately, the doctrine is as confusing and difficult to

1. ALDO LEOPOLD, ROUND RIVER 145 (1953).

2. *Turning Points in Wisconsin History: The Conservation Movement*, WIS. HIST. SOC'Y, https://www.wisconsinhistory.org/turningpoints/tp-033/?action=more_essay (last visited Oct. 9, 2015).

3. *Wisconsin Geography Statistics*, WIS. ST. CARTOGRAPHER'S OFF., http://www.sco.wisc.edu/mapping-topics/wisconsin-geography-statistics2.html (last updated Sept. 9, 2013); *Wisconsin Water Facts*, WIS. WATER LIBR., http://aqua.wisc.edu/waterlibrary/Default.aspx?tabid=74 (last visited Oct. 20, 2014).

4. *See infra* Part I.

apply as it is critical to protecting Wisconsin's water resources.[5] This Comment addresses a recent local controversy as an opportunity to propose and illustrate a new analytic framework for applying the public trust doctrine in a way that protects lakes without unduly stifling lakeshore development.

Like many legal doctrines—particularly those related to natural resources—the public trust doctrine represents, at first blush, an attempt to balance public and private interests. The doctrine's name alludes to the basic principle around which the doctrine has developed: "all navigable waters must be held in trust by the State for public use . . . ."[6] But while the doctrine that has sprouted from this ancient principle may represent a *balancing* of public and private interests, the principle itself is better understood as standing for the *separation* of public and private interests.

Thus, whenever a public, environmental interest and private, commercial interest collide or overlap, a critical opportunity exists not only to expand or constrict the public trust doctrine but also to further clarify or confuse its practical application. In Milwaukee, such an opportunity recently presented itself when an environmental group defied popular opinion and challenged the legislature's authority to enact Wisconsin Statutes section 30.2038, a peculiar law designed specifically to adjudicate a high-stakes local controversy with potentially far-reaching implications.[7] The law—enacted to clear the way for further development of Lake Michigan—has been nicknamed the "Fictitious Shoreline Act" (FSA) by activists who challenged its validity under the state constitution and public trust doctrine.[8]

The saga that led to the passing of the FSA began with an ambitious plan. Like many Rust Belt cities,[9] post-recession Milwaukee

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5. "Of all the difficult questions which have arisen in the application of the law to questions involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion, or produced more diverse results than that relating to the title to the land under the waters." HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 165 (1904).

6. LONG RANGE LAKEFRONT COMM., THE ENHANCEMENT OF MILWAUKEE'S MOST VALUABLE PROPERTY 4 (2011) [hereinafter LAKEFRONT COMMITTEE], http://county.milwaukee.gov/ImageLibrary/Groups/cntyParks/Planning/LRLPC/Long-RangeLakefrontPlanningCom.pdf.

7. *See* WIS. STAT. § 30.2038 (2013–14).

8. Sean Ryan, *Line in the Sand: Parks Group Contests Lakefront Plans*, MILWAUKEE BUS. J. (Aug. 29, 2014, 5:00 AM) http://www.bizjournals.com/milwaukee/print-edition/2014/08/29/line-in-the-sand-parks-group-contests-lakefront.html.

9. For a discussion of similar public trust issues involving Ohio's doctrine and Cleveland's lakefront, see Maia E. Jerin, *Paradise Lost? A Call to Clarify the Public Purpose Requirement in Ohio's Public Trust Doctrine*, 61 CLEV. ST. L. REV. 1075 (2013). NBA fans and those interested in a west coast example of the doctrine's

has focused on rejuvenation of its downtown as a way to spur economic growth and offset the slow but steady decline of its once-proud manufacturing industry.[10] This focus led to the Milwaukee County Board's 2011 creation of the thirteen-member Long-Range Lakefront Planning Committee, a group of city officials, politicians, and representatives from the business community charged with planning the enhancement of Milwaukee's most valuable property.[11]

The committee emphasized the importance of improving public access to Lake Michigan but anticipated "land use restrictions imposed by the public trust doctrine . . . ."[12] Nevertheless, after being assured by the Wisconsin Department of Natural Resources (DNR) that a proposed site was not located on former lakebed,[13] the Committee recommended the site be redeveloped into "multi-story, high-value use more appropriate to its location at the lakefront."[14] In response, the County Executive selected the forty-four-story Couture tower.[15] Preserve Our Parks (POP), a local non-profit organization, responded by challenging the validity of the DNR's finding, arguing that "most of the . . . site was at one time part of Lake Michigan."[16]

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implications should see Brian A. King, *The Public Trust Doctrine and Mixed-Use Development: The Proposed Golden State Warriors Arena and the Implications for Future Development on the San Francisco Bay*, 20 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 461 (2014).

10. Lisa Kaiser, *Mayor Tom Barrett on the Streetcar: 'I'm Betting on the Future of This City,'* SHEPHERD EXPRESS (Jan. 13, 2015), http://expressmilwaukee.com/article-permalink-24722.html. The controversy in this article is closely linked to an intense local debate concerning urban transit. *Id.*

11. LAKEFRONT COMMITTEE, *supra* note 6, at 3.

12. *Id.* at 4.

13. Paul Gores, *DNR Ruling Clears Lakefront Site for High-Rise Project*, MILWAUKEE J. SENTINEL (Sept. 28, 2012), http://www.jsonline.com/business/dnr-ruling-clears-lakefront-site-for-high-rise-project-d971l93-171834161.html.

14. LAKEFRONT COMMITTEE, *supra* note 6, at 2.

15. In addition to dramatically changing the Milwaukee skyline, the $122 million, 44-story Couture tower will include 302 luxury apartments and roughly 54,000 square feet of retail and restaurants and be surrounded by 81,000 square feet of public space, including a roof-top park, a light-rail transportation concourse, a bike-sharing station, a street-level outdoor plaza, and pedestrian bridges providing improved access to the lakefront. *See* Tom Daykin, *Couture Lakefront High-Rise Proposal Takes Big Step Forward*, MILWAUKEE J. SENTINEL (Dec. 8, 2014), http://www.jsonline.com/business/couture-lakefront-high-rise-proposal-takes-big-step-forward-b99405123z1-285101561.html; *Northwestern Mutual and Couture High-Rise Plans Both Move Forward*, ONMILWAUKEE.COM (Dec. 18, 2014, 5:36 PM), http://onmilwaukee.com/buzz/articles/couturenorthwesternmutual.html; *see also* COUTURE MILWAUKEE, http://www.thecouturemilwaukee.com/ (last visited Oct. 21, 2015).

16. Gores, *supra* note 13. The DNR eventually conceded that the transit site *may* have once been lakebed but maintained, after analyzing the site's chain of title in a brief but convoluted memorandum, that the site should not be *considered* lakebed because of longstanding reliance on rough boundaries drawn as part of a 1913

As the development plans languished while the parties argued over one-hundred-year-old maps, County Supervisor Patricia Jursik, an attorney, backed a resolution to bring a quiet title action to determine the public trust issue and get the project moving one way or another.[17] Instead, the County successfully persuaded the state legislature to step in and attempt to settle the matter once and for all.[18] The FSA was proposed in late January of 2014 and signed into law less than two months later after passing with broad bi-partisan support in both houses of the state legislature.[19] Bluntly entitled "Milwaukee shoreline established," the FSA declares, "The shoreline of Lake Michigan in the city of Milwaukee is fixed and established . . ." precisely where it needs to be in order for the Couture (and future similarly located developments) to avoid the public trust doctrine's restrictions.[20]

The FSA drew strong responses. Unfazed by what POP board member and prominent environmental attorney Charles Kamps called "an attempt by the Legislature to trump the constitutional provisions related to the public trust doctrine," POP remained steadfast in its intent to block the sale of the land.[21] According to Kamps, "going to the Legislature [was] an indication that they are very weak under the facts."[22] Supporters of the FSA, on the other hand, say the law simply makes clear what people have always known—and relied upon for

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agreement between the City of Milwaukee and the Chicago and Northwestern Railway Company regarding breakwaters and submerged land grants. PRESERVE OUR PARKS, THE COUTURE AND THE PUBLIC TRUST DOCTRINE: PRESERVE OUR PARKS' POSITION 2–3 (n.d.), http://www.preserveourparks.org/sites/default/files/uploads/documents/The Couture and the Public Trust Doctrine.pdf; *see also* PROCEEDINGS OF THE COMMON COUNCIL OF THE CITY OF MILWAUKEE FOR THE YEAR ENDING APRIL 14, 1913, at 1437–38 (1913).

17. Tom Daykin & Steve Schultze, *Milwaukee County Board Won't Seek Court Ruling on Couture Project*, MILWAUKEE J. SENTINEL (Mar. 21, 2014), http://www.jsonline.com/business/milwaukee-county-board-wont-seek-court-ruling-on-couture-project-b99229841z1-251357981.html; *see also* 2013 Wis. Act 140.

18. *Id.*

19. *Id.*; Tom Daykin, *New Legislation Seeks to Settle Dispute Over Couture Development Site*, MILWAUKEE J. SENTINEL (Jan. 16, 2014), http://www.jsonline.com/business/new-legislation-seeks-to-settle-dispute-over-couture-development-site-b99185882z1-240612841.html.

20. *See* WIS. STAT. § 30.2038 (2013–14).

21. Jason Stein & Steve Schultze, *Scott Walker Signs Bill on Milwaukee Couture Plan*, MILWAUKEE J. SENTINEL (Mar. 17, 2014), http://www.jsonline.com/news/statepolitics/scott-walker-signing-bills-on-worker-training-milwaukee-couture-plan-b99227214z1-250651301.html.

22. Sean Ryan, *Shoreline Legal Debate over Downtown Transit Center Clear as Mud*, MILWAUKEE BUS. J. (Aug. 30, 2014), http://www.bizjournals.com/milwaukee/blog/real_estate/2014/08/shoreline-legal-debate-over-downtown-transit.html.

decades—regarding the lakeshore boundary and is well within the state's authority.[23]

Understanding the relationship between the public trust doctrine, the public interest, and the state's authority—as opposed to its *obligations*—as trustee is critical if Wisconsin is to stay true to its historic environmental ethic while at the same time maximizing the economic value of its unique natural resources. POP is not anti-development.[24] Rather, its concern is that allowing *ad hoc*, legislative deactivation of the public trust doctrine weakens the doctrine in a way that leaves part of the state's longstanding cultural *identity*—environmental conservation—vulnerable to the fickle tides of public opinion and political expedience.[25] Thus, while perhaps not 2016 stump-speech material, this is an important Wisconsin issue. Regardless of how one may feel about the Couture, lawyers, judges, developers, environmentalists, and citizens all have a vested interest in clear and flexible application of the public trust doctrine.

This Comment proposes a three-step analytic framework for deciding when the legislature impermissibly ducks its public trust obligations. If adopted by the Wisconsin Supreme Court,[26] this new framework would provide the public trust doctrine with a much-needed combination of clarity and flexibility. Part I traces the public trust doctrine's historical development. Part II analyzes Wisconsin's public

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23. *Id.*

24. E-mail from John Lunz, President, Preserve our Parks, to author (Oct. 11, 2014, 4:34 PM CST) (on file with author) ("[W]e are not opposed to the development, only the sale of the land to a private entity.").

25. *Id.* ("We regret being viewed as anti-development, but we do take the Public Trust Doctrine seriously, and making an exception just opens the door for more exploitation of public land that is now protected.").

26. While this Comment was being drafted, motions for summary judgment were pending in the Milwaukee County Circuit Court. *Milwaukee Cnty. v. Preserve Our Parks LLC*, No. 15CV1536 (Milwaukee Cnty. Cir. Ct. Aug. 3, 2015); *see also* Sean Ryan, *DOT Asks to Join Lakefront Lawsuit to Protect Right to Sell Clybourn Site to Johnson Controls*, MILWAUKEE BUS. J. (May 21, 2015), http://www.bizjournals.com/milwaukee/blog/real_estate/2015/05/dot-asks-to-join-lakefront-lawsuit-to-protect.html. On June 26, 2015, Judge Christopher Foley granted the City's summary judgment motion, clearing the way for the development after finding that POP could not establish more than a "negligible impact" on "water interests." *See* Don Behm & Tom Daykin, *Judge Clears Way for County Land Sale for Couture High-Rise*, MILWAUKEE J. SENTINEL (June 26, 2015), http://www.jsonline.com/news/milwaukee/judge-clears-way-for-county-land-transfer-for-couture-high-rise-b99527381z1-310088541.html. On August 15, 2015, POP decided not to appeal the decision. Tom Daykin, *Couture Legal Challenge Ends, Clearing Way for Lakefront High-rise*, MILWAUKEE J. SENTINEL (Aug. 18, 2015), http://www.jsonline.com/blogs/business/322207581.html. This author believes the decision was driven by the risk of an adverse decision further restricting the public trust doctrine. Nonetheless, the framework set forth in this Comment could be adopted in any future public trust doctrine decision.

trust doctrine jurisprudence and distills it into a coherent three-step framework based on determinations regarding the physical properties of the trust asset, the obligations and authority of the legislature, and the nature of the public interests involved. Part III applies this new framework to the FSA, concludes that a court should hold the FSA unconstitutional, and suggests that such a holding would have allowed the Couture development to proceed without diluting the public trust doctrine's efficacy or legitimacy as a part of the organic law of the state.

I. THE MYSTERIOUS ORIGIN OF WISCONSIN'S PUBLIC TRUST DOCTRINE

A proper background of the public trust doctrine of any state must start by paying tribute to the eco-friendly legal system of sixth-century Roman Emperor Justinian I, which recognized the public nature of water resources by declaring them to be "common to mankind . . . ."[27] The idea made its way to the United States by way of English common law, where the King held navigable waters and the beds under them in trust for public uses related to commerce and navigation.[28] The trust then passed to the individual governments of the first thirteen states and to Wisconsin by way of the state constitution's verbatim adoption of the Northwest Ordinance's provision that all "navigable waters . . . shall be common highways, and forever free."[29] Thus, in Wisconsin, as in many states, the doctrine is derived from both common law and the state constitution.[30] This dual origin is a key source of confusion regarding courts' abilities to use the public trust doctrine to define how the "trusteeship constrains the states in their dealings" and imposes "restrictions on governmental authority . . . ."[31]

A. Constitutional vs. Common Law

Unlike the federal Constitution, which focuses primarily on the *process* of government, most state constitutions "contain a myriad of

27. THE INSTITUTES OF JUSTINIAN § 2.1.1, at 90 (Thomas Collett Sandars trans., 7th ed. 1922).

28. Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 4 (2010).

29. *Diana Shooting Club v. Husting*, 145 N.W. 816, 818 (Wis. 1914) (quoting WIS. CONST. art. IX, § 1; An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, art. 4 (July 13, 1787)).

30. *Menzer v. Vill. of Elkhart Lake*, 186 N.W.2d 290, 296 (Wis. 1971).

31. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 476–77 (1970).

policy-specific substantive provisions . . . ."[32] These provisions range from general principles meant to guide policymaking to lengthy and detailed provisions better described as "superlegislation."[33] While most state constitutions do not specifically mention the public trust doctrine, many contain a general provision affording various degrees of protection to the public's right to use navigable waters.[34]

When courts interpret these general provisions broadly in order to "constitutionalize" the public trust doctrine, they create "a curious and unique hybrid, borne purely of customary law but constitutional in character."[35] Despite the relevance of the doctrine's hybrid nature to the scope of its application, its legal underpinnings remain unclear and its reach remains a "paradox," "murky and confined to a subset of resources which modern scholars deem as arbitrarily limited in scope."[36] Adopting a nebulously broad legal origin of the public trust doctrine has freed courts to expand the doctrine but also led to litigation and criticism by stakeholders who believe that the doctrine has become "a license for free-ranging judicial constitution-making in the environmental field."[37]

Unfortunately, the common law origin of the public trust doctrine—as represented by the "lodestar" United States Supreme Court case *Illinois Central Railroad Co. v. Illinois*[38]—is hardly any clearer than the doctrine's purported constitutional underpinnings. On the contrary, scholars have identified *Illinois Central* as a "source of multiple doctrinal uncertainties" regarding the origin and scope of the public trust doctrine.[39] Others have criticized the case more pointedly, attacking Justice Stephen Field's landmark opinion as "remarkably free of supporting authority . . . ."[40] Nevertheless, *Illinois Central* remains the leading case establishing the legitimacy of the public trust doctrine

32. Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 863–64 (1996).

33. *See* Lawrence M. Friedman, *State Constitutions in Historical Perspective*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1988, at 33, 36.

34. Thompson, *supra* note 32, at 866, 869–70.

35. *Id.* at 877.

36. William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 695–96 (2012).

37. Thompson, *supra* note 32, at 879–80.

38. 146 U.S. 387, 434–37 (1892).

39. *See, e.g.*, 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, 803 (2004).

40. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 737 (1986).

in America, and state courts generally cite its holding as a starting point for their own common law development of the doctrine.[41]

In the 1860s, the Illinois legislature granted part of Chicago's lakeshore and over one thousand acres of submerged Lake Michigan lakebed to the Illinois Central Railroad Company for the construction of a depot and harbor.[42] The dispute that precipitated the Court's invocation of the public trust doctrine arose after the legislature repealed the grant four years later—in alleged violation of the Contract Clause.[43] The Court held that because the state of Illinois held the bed of Lake Michigan in trust for the people, the original grant to the railroad violated the public trust and was thus invalid.[44] The Court famously reasoned that:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.[45]

By restricting the state's ability to alienate land held in trust, the Court's holding marked a major change from earlier interpretations of the doctrine which merely subjected such land to permanent public easements.[46] In any event, the Court later explicitly left the details of the doctrine's implementation to the states.[47]

B. Wisconsin's Interpretation of "Navigable": Expansion vs. Constriction

Wisconsin's public trust doctrine is better developed than most states'.[48] But to mistake a surfeit of case law for a clear framework is to mistake quantity for quality. Indeed, the incredible variety of factual and procedural backgrounds in Wisconsin's leading public trust cases

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41. Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849, 850 (2001).

42. Kearney & Merrill, *supra* note 39, at 800–01.

43. *Id.* at 801.

44. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455–56 (1892).

45. *Id.* at 453.

46. Kearney & Merrill, *supra* note 39, at 802.

47. *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) ("[T]here is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy . . . .").

48. Sax, *supra* note 31, at 509.

have spun a web of holdings and created a hodgepodge of rights, obligations, rules, and tests that overlap with other areas of substantive law and reflect political issues ranging from separation of powers to budgetary concerns. One thing is clear, however: Wisconsin courts throughout the past century have held that authority for the public trust doctrine is found in the state's constitution, which states that all "navigable waters . . . shall be common highways and forever free . . . to the inhabitants of the state . . . ."[49]

In general, Wisconsin has expanded the public trust doctrine by broadly interpreting the definition of "navigable waters." Beginning in 1877 with the "saw-log test," the Wisconsin Supreme Court held that a stream was navigable within the meaning of the public trust doctrine if its flow was sufficient to support the seasonal floatation of logs.[50] The court reasoned that the transportation of logs was "essential to the public interest . . . ."[51] Thus, the interplay between public and commercial interests was evident even in the earliest applications of the doctrine.

Next, the Wisconsin Supreme Court used the navigability concept to bring recreational public use within the protection of the public trust doctrine. In *Diana Shooting Club v. Husting*,[52] the court upheld a hunter's right to hunt duck in a wetland created by the low water levels of the Rock River.[53] The court held that the character of the water was "immaterial" and that it would be considered navigable regardless of whether it was "deep or shallow, clear or covered with aquatic vegetation."[54]

Today, the test for navigability is whether a body of water is "*navigable in fact for any purpose*."[55] A body of water is navigable in fact if it is "capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes."[56] The degree to which this definition constitutes an expansion of the public trust doctrine has been rendered unclear by the recent, controversial opinion of the

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49. *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 516 (Wis. 1952) (quoting WIS. CONST. art. IX, § 1).

50. *Olson v. Merrill*, 42 Wis. 203, 212 (1877); *see also Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800, 818 (Wis. 2013).

51. *Olson*, 42 Wis. at 212.

52. 145 N.W. 816 (Wis. 1914).

53. *Id.* at 818, 820.

54. *Id.* at 820.

55. *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 519 (Wis. 1952) (quoting Act of July 12, 1911, ch. 652, 1911 Wis. Sess. Laws 905, 905).

56. *Id.*

Wisconsin Supreme Court in *Rock-Koshkonong Lake District v. State Department of Natural Resources*.[57]

The dispute in *Rock-Koshkonong* arose after the Department of Natural Resources (DNR) denied a request by a recreational association and other groups (the District) to raise the water level of Lake Koshkonong.[58] The District argued that a higher water level (which the DNR controlled via a dam) would have a positive impact on lakefront property values and commercial activity.[59] The DNR, relying on a broad interpretation of its authority under the public trust doctrine, concluded that the economic impact of the water level was irrelevant and denied the request because of the adverse impact higher water levels would have on adjacent, *non-navigable* wetlands.[60] The Wisconsin Supreme Court reversed the DNR's ruling in a 4–3 decision.[61]

According to the majority, the element of navigability is a "pre-requisite[] for the DNR's *constitutional basis* for regulating and controlling water and land" pursuant to the public trust doctrine.[62] Because the wetlands at issue were neither navigable nor below the "ordinary high water mark" (OHWM), the court reasoned, the DNR erred in relying on the public trust doctrine and instead was limited to authority based on the state's police powers.[63] Observing that "[p]ublic trust jurisdiction has always been confined to a limited geographic area," the court made it clear that:

> There is no constitutional foundation for *public trust* jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream. Applying the state's police power to land above or beyond the OHWM of navigable waters—to protect the public interest *in navigable waters*—is different from asserting public trust jurisdiction over non-navigable land and water.[64]

After making this distinction, the court went on to discuss the DNR's statutory, police-power authority, reassuringly adding, "This

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57. 833 N.W.2d 800 (Wis. 2013).

58. *Id.* at 807–08, 810.

59. *Id.* at 807, 809–10.

60. *Id.* at 811–12.

61. *Id.* at 835.

62. *Id.* at 818.

63. *Id.* at 820–21. The OHWM has been defined 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." *Diana Shooting Club v. Husting*, 156 Wis. 261, 272 (1914).

64. *Rock-Koshkonong*, 833 N.W.2d at 820–21.

review of the constitutionally based public trust doctrine does not disarm the DNR in protecting Wisconsin's valuable water resources."[65] By broadly interpreting the statute's requirement that the DNR "protect . . . property" when regulating dams, the court further held that the DNR erred in refusing to consider the economic impacts urged by the District and remanded the case for further proceedings.[66]

Although *Rock-Koshkonong* has yet to be applied in another public trust case, many observers have agreed with Justice N. Patrick Crooks' powerful dissent, in which he accuses the majority of unnecessarily "constricting the doctrine . . . ."[67] According to Crooks, the majority opinion constitutes "a significant and disturbing shift in Wisconsin law" and an attempt "to undermine this court's precedent, recharacterize its holdings, and rewrite history."[68] Asserting that the court could have resolved the issue without addressing the constitutional basis of the doctrine, Crooks concludes, "The majority untethers our constitutional jurisprudence from its foundation and attempts to transform 165 years of constitutional precedent into a *mere legislative exercise of the state's police power*."[69]

In contrast, other commentators (including, somewhat ironically, a leading Wisconsin public trust doctrine expert who happens to have represented the District in *Rock-Koshkonong* but the POP in the Couture case) have argued that *Rock-Koshkonong* leaves "the bedrock principles" of the doctrine "firmly intact" and "is better understood as confirming the primacy of the legislature, not the executive branch, as the trustee under the public trust."[70] It is likely that the truth lies somewhere between "firmly intact" and "a disturbing shift." But regardless of what one believes about the state of the law prior to or after *Rock-Koshkonong*, there are two clear and crucial takeaways from the case: (1) the public trust doctrine is not *solely* constitutional in nature; and (2) there is no constitutional basis for applying the doctrine to *non-navigable* land lying *above the ordinary high water mark*.[71] Further clarification lies in the answer to the question posed by the Couture case: what about non-navigable land lying below the ordinary high water mark, i.e., filled lakebed?

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65. *Id.* at 822.

66. *Id.* at 832 (quoting WIS. STAT. § 31.02(1) (2013–14)).

67. *Id.* at 835 (Crooks, J., dissenting); *see also* Andrew C. Cook, *New Limits on the Public Trust Doctrine*, WIS. L.J. (Nov. 29, 2013, 9:35 AM), http://wislawjournal.com/2013/11/29/new-limits-on-the-public-trust-doctrine/.

68. *Rock-Koshkonong*, 833 N.W.2d at 836 (Crooks, J., dissenting).

69. *Id.* at 838–39 (Crooks, J., dissenting) (emphasis added).

70. Mary Beth Peranteau & William P. O'Connor, *Public Trust and Agency Discretion Principles Intact*, WIS. LAW., Mar. 2014, at 34, 35.

71. *Rock-Koshkonong*, 833 N.W.2d at 818–21.

II. THE LAW OF THE (SUBMERGED) LAND: A BETTER FRAMEWORK

The importance of the navigability "trigger" to the application of the public trust doctrine to filled lakebed should be obvious: barring some sort of apocalyptic flood or major reverse reclamation project, most filled lakebeds will never again be navigable. Thus, a more nuanced, multi-faceted analysis is necessary if the doctrine is to meaningfully constrain the legislature's ability to carve up and release public trust assets using slipshod, arbitrary, politically drawn, or hotly disputed geographic boundaries.[72] Such an analysis is facilitated by a three-step framework focused on pinpointing the nature and location of the land at issue; distinguishing state obligations from state authority; and evaluating the public's interest in the land potentially affected by the proposed action.

A. Step 1: The Physical Characteristics of Public Trust Lands

Any public trust application analysis necessarily addresses the doctrine's geographic scope. It is important to recognize that the geographic scope of the doctrine can, in a broad sense, be synonymous with the scope of the doctrine's application. Indeed, an analysis of the scope of the public trust doctrine's application is essentially a determination of its geographic boundaries.[73] Thus, to avoid oversimplification and circularity, the first step of this analysis determines the importance of the physical characteristics of the land in question to the application of the public trust doctrine. This determination includes two interrelated factors best described as both factual and legal: navigability and the ordinary high water mark (OHWM). The OHWM, although a legal term, is primarily a scientific determination made by measuring things like erosion and elevation and

72. Many scholars have criticized the navigability test as too outdated and inflexible. *See, e.g.*, Brent R. Austin, *The Public Trust Misapplied:* Phillips Petroleum v. Mississippi *and the Need to Rethink an Ancient Doctrine*, 16 ECOLOGY L.Q. 967, 1018 (1989) (arguing that public trust doctrine should be viewed "as a flexible tool of judicial intervention, rather than merely as a means of establishing state ownership" because while "trust boundaries remain static," state policies do not); 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, 912 (2007) (arguing that state navigability tests have become outdated because they equate "the public nature of a waterway with navigability for commercial purposes").

73. Kilbert, *supra* note 28, at 17–18 (emphasizing the geographic scope of the public trust doctrine as the first step in a framework for the application of the doctrine in public use cases).

predictably amounts to a "battle of the experts."[74] Navigability, on the other hand, is a thinly disguised policy decision concerning wetlands.

1. HOW WET MUST A WETLAND BE FOR TRUST PROTECTION?

While navigability may typify an ambiguous legal term, it is better understood as a helpful analytical medium. The navigability concept is both descriptive and flexible enough to capture both the subtle and obvious policy implications of the answer to the question, "How much water must be present to require public trust protection?" Such policy implications often revolve around a state or community's dedication to the conservation of wetlands.[75]

In Wisconsin, where wetlands are especially prized for their recreational value, navigable waters are currently defined as those "capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes."[76] This definition of the public trust doctrine's constitutional "navigable waters" requirement seems in harmony and coextensive with Wisconsin's relatively recent constitutional amendment guaranteeing the public right to fish and hunt.[77] Nevertheless, language in the celebrated 1972 Wisconsin Supreme Court case *Just v. Marinette County*[78] suggests that the public trust doctrine also encompasses non-navigable wetlands.[79]

Just was a takings case involving Marinette County's state-mandated shoreland zoning ordinance requiring a conditional use permit for the filling of non-navigable and navigable wetlands.[80] In

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74. *See, e.g.*, *Rock-Koshkonong*, 833 N.W.2d at 808–10 (reviewing the surfeit of expert testimony).

75. For example, Mississippi, a state with a complex wetlands ecosystem adjoining the dynamic Mississippi River Delta, has chosen to require only enough water in its definition of navigability to allow one to "hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat . . . ." *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 515 (Miss. 1986). In contrast, Illinois' doctrine does not use the "floatable" navigability test and instead focuses on whether the water is deep enough to sustain water commerce. *Du Pont v. Miller*, 141 N.E. 423, 425 (Ill. 1923) (citing *Schulte v. Warren*, 75 N.E. 783, 785 (Ill. 1905)). *See generally* Michael L. Wolz, *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 (1992) (detailing the many ways the public trust doctrine can impact wetland conservation).

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

77. WIS. CONST. art. I, § 26.

78. 201 N.W.2d 761 (Wis. 1972).

79. *Id.* at 768. The interpretation of *Just* was the key public trust issue in *Rock-Koshkonong*, the most recent case to define the scope of the public trust doctrine's applications. *Rock-Koshkonong*, 833 N.W.2d at 822–24.

80. *Just*, 201 N.W.2d at 764–66.

conceded violation of the ordinance, Ronald Just filled over five hundred square feet of wetlands with sand along the shore of Lake Noquebay.[81] The court held that the ordinance was a proper exercise of the police power of the state and did not amount to a constructive taking of Just's land without compensation.[82] In its police power/takings analysis, the court noted that Wisconsin has an "active public trust duty" which "requires the state not only to promote navigation" but also to "eradicate the present pollution" and "protect and preserve those waters for fishing, recreation, and scenic beauty."[83] Considering the ordinance reflective of this duty, the court famously recognized that while wetlands were once considered undesirable wasteland, they are now understood as a "necessary part of the ecological creation" and critical to "the purity of the water and to such natural resources as navigation, fishing, and scenic beauty."[84]

By using the public trust doctrine to support the constitutionality of an ordinance regulating non-navigable wetlands, the *Just* court extended the doctrine to such lands—at least that is what the DNR, environmental *amici*, court of appeals, and dissent argued in *Rock-Koshkonong*.[85] But the court disagreed, persuasively distinguished *Just* as a "textbook example of using the state's police power," and held that there is no "question that the [*Just*] court was not relying on the public trust doctrine . . . ."[86] The court's distinction is valid because *Just*, despite its inspirational language, ultimately cites the public trust doctrine only as the basis for the state's authority to regulate wetlands.[87] In other words, the public trust doctrine represents a minimum constitutional protection that the state may expand through legislation. Thus, *Rock-Koshkonong* based its decision to reverse and remand the case not on the public trust doctrine itself, but on its interpretation of the trust-enabled dam-regulation statute at issue.[88]

Does this mean that all natural resources must be navigable in order to fall under the public trust doctrine? It does not, because navigability is only half the analysis. Despite strong language focusing

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81. *Id.* at 766.

82. *Id.* at 772.

83. *Id.* at 768 (citing *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 514 (Wis. 1952)).

84. *Id.*

85. *See, e.g.*, *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800, 836, 843–44 (Wis. 2013) (Crooks, J., dissenting); Joint Brief of *Amici Curiae* Clean Wisconsin, Wisconsin Wetlands Association, and Wisconsin Lakes at 8–9, *Rock-Koshkonong*, 833 N.W.2d 800 (No. 08-AP-1523).

86. *Rock-Koshkonong*, 833 N.W.2d at 824.

87. *Just*, 201 N.W.2d at 768.

88. *Rock-Koshkonong*, 833 N.W.2d at 824–35.

on the navigability requirement, *Rock-Koshkonong* held only that the public trust doctrine does not apply to non-navigable land "*above or beyond the OHWM*" and is better understood as reaffirming the state's authority, as opposed to its obligations, as trustee.[89]

2. NAVIGABILITY AND THE OHWM: A SPECTRUM OF PUBLIC TRUST APPLICATION

The OHWM plays the critical role of the closest thing to a potential bright-line rule in public trust doctrine jurisprudence. Below the OHWM, the public trust doctrine may *require* the state or an individual to take or forgo certain actions depending on navigability and other factors discussed in steps two and three of this analysis.[90] Above the OHWM, the doctrine merely *authorizes* the state to take or forgo action based on its police power.[91] Together, the OHWM and navigability factors create a public trust doctrine spectrum. On one end are non-navigable lands above the OHWM. These lands clearly fall outside the scope of the doctrine and include dry, landlocked real estate as well as certain non-navigable wetlands. On the other end are navigable waterways below the OHWM, i.e., rivers and lakes, which are obviously covered by the doctrine.

Between these two poles are two overlapping categories wherein application of the doctrine is less clear. The first category is "navigable land" above the OHWM. This would include navigable wetlands or waterways created by the high water levels of an adjacent navigable waterway. Such land may, under the right circumstances, be covered by the public trust doctrine under *Just*'s reasoning that "[l]ands adjacent to or near navigable waters exist in special relationship to the state" because of the interrelated effects they may have on the adjacent navigable body of water.[92]

The second category is non-navigable land or water below the OHWM. Such land includes land or water between the OHWM and the actual water line and has commonly been the confusing and controversial subject of cases involving the public's right to walk along beaches exposed by lower water levels—much to the dismay of riparian

89. *Id.* at 820–21 (emphasis added); *see also* Peranteau & O'Connor, *supra* note 70, at 35.

90. *See generally State v. Trudeau*, 408 N.W.2d 337 (Wis. 1987).

91. *See generally Rock-Koshkonong*, 833 N.W.2d 800.

92. *Just*, 201 N.W.2d at 769. This "effects test" was used similarly to apply the public trust doctrine to groundwater in a case involving high capacity wells. *See* Christian Eickelberg, Rock-Koshkonong Lake District *and the Surprising Narrowing of Wisconsin's Public Trust Doctrine*, 16 VT. J. ENVTL. L. 38, 59–60 (2014).

owners.[93] Professor Kenneth Kilbert, director of the Great Lakes Legal Institute, has concluded that, in Wisconsin, "it is far from clear what public uses are protected by the public trust doctrine with respect to the state-owned shore of the Great Lakes between the OHWM and the water's edge."[94] Because a 1923 Wisconsin Supreme Court case held that the riparian owner had an exclusive right to the exposed bed of Lake Winnebago subject only to the public right to navigate,[95] the DNR has accordingly applied a "keep your feet wet" policy limiting the public's right to walk along the Great Lakes to areas covered at least partially by water.[96]

However, as Kilbert points out, this logic may no longer hold true, because more recent Wisconsin public trust cases make it clear that "public trust uses . . . are no longer directly tied to navigation" but instead include recreation and scenic beauty.[97] Indeed, two cases cited favorably by the court in *Rock-Koshkonong* clearly stand for the rule that the public trust applies to lakebed regardless of navigability.[98] In *State v. Trudeau*,[99] the state brought an action against condominium project developers and local zoning officials for illegally allowing construction of condominiums on the bed of Lake Superior.[100] In remanding the case for determination of the OHWM, the court held that non-navigable land remains held in trust when below the ordinary high water mark because it remains "part of the lake . . . ."[101]

Moreover, in *Illinois Steel Co. v. Bilot*,[102] a case often cited for its foundational explanation of the origin of Wisconsin's public trust doctrine, the Wisconsin Supreme Court reversed a judgment granting a plaintiff's adverse possession claim.[103] In remanding the case to determine which of the portions of Milwaukee's Jones Island at issue were originally Lake Michigan lakebed and which were created by filling, the court held that the "state has not and cannot abdicate its

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93. Kilbert, *supra* note 28, at 2 (describing how this issue has turned the Great Lakes' shores into a veritable "battleground").

94. *Id.* at 57.

95. *Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923).

96. Kilbert, *supra* note 28, at 57 (citing *Doemel*, 193 N.W. at 398).

97. *Id.* at 58.

98. *See Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800, 822 (Wis. 2013) (citing *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987), for the rule that lakebeds are owned by the state and land below the OHWM is held in public trust); *id.* at 819 (citing *Illinois Steel Co. v. Bilot*, 84 N.W. 855, 856–57 (Wis. 1901), for the origin of the state public trust title).

99. 408 N.W.2d 337 (Wis. 1987).

100. *Id.* at 339–40.

101. *Id.* at 343.

102. 84 N.W. 855 (Wis. 1901).

103. *Id.* at 858.

trust."[104] The court further announced that "title to land held by the state in trust to preserve to the people thereof the enjoyment of lakes and ponds does not change by artificial filling so as to raise the surface above the level of the water."[105] Thus, although it is non-navigable, dry land below the OHWM enjoys public trust protection similar to that of wetlands.

B. Step 2: Authority vs. Obligation: Who is Suing Whom, and Why?

Once the physical characteristics of a parcel have been categorized according to navigability and the OHWM, it is tempting to skip directly to the public-interest analysis. However, a complete analysis of the value of alleged public trust land can only be conducted after an analysis of the nature of the proposed action affecting the land and the challenges to that action.[106] In other words, issues regarding standing, the procedural posture of the case, and the identities and claims of the parties must be fully understood before the land can be meaningfully evaluated. Critical to this understanding is the foundational concept of the state as the trustee, or administrator, of the public trust.[107]

As trustee, the state has both constitutional obligations and legislative authority. In applying the public trust doctrine to a large-scale conveyance of Lake Michigan lakebed to a private party in the early twentieth century, the Wisconsin Supreme Court described the state's role as follows:

> 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. The equitable title to those submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.[108]

Thus, while the public trust doctrine is a "matter of statewide concern that 'cannot be delegated by the state legislature to any group

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104. *Id.* at 857.

105. *Id.* at 855.

106. *See* Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 ECOLOGY L.Q. 123, 131–34 (2012) (discussing obligations and authority).

107. *Id.*

108. *City of Milwaukee v. State*, 214 N.W. 820, 830 (Wis. 1927).

which is less broadly based,'" effective administration of the trust necessarily involves executive agencies, municipalities, and private citizens.[109]

In what may be considered both the fulfillment of its public trust duties and the exercise of its public trust authority, the Wisconsin State Legislature enacted chapter 30, a comprehensive regulatory scheme governing public rights in navigable waters, harbors, and navigation.[110] "The legislature has delegated to the DNR broad authority to regulate under the public trust doctrine" and enforce chapter 30.[111] Yet, DNR does not have standing to challenge the constitutionality of chapter 30. For example, in *Silver Lake Sanitary District v. Wisconsin Department of Natural Resources*,[112] the DNR challenged the legislature's statutory determination of Big Silver Lake's OHWM.[113] The circuit court agreed with the DNR, but the Wisconsin Court of Appeals reversed, holding that the DNR did not have standing since "[a]gencies, municipal corporations and quasi-municipal corporations are all creatures of the state" and, thus, "[t]hey have no standing to challenge the actions of their creator . . . ."[114] Narrow exceptions to this rule exist in cases in which a private litigant is involved and either "the issue is of 'great public concern'" or it is the agency's "official duty to [question the constitutionality of the statute] . . . ."[115]

Private citizens, on the other hand, may "sue on behalf of, and in the name of, the State 'for the purpose of vindicating the public trust.'"[116] The legislature codified this rule of standing in Wisconsin Statutes section 30.294, declaring "any person" may bring a public nuisance action to prohibit or abate any violation of chapter 30.[117] However, it is important to note that "[t]he public trust doctrine itself does not provide a plaintiff with an affirmative cause of action."[118] Rather, it simply exists as a jurisdictional nexus, providing standing for

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109. *See* Scanlan, *supra* note 106, at 133 n.50 (quoting Sax, *supra* note 31, at 523).

110. *See* WIS. STAT. ch. 30 (2013–14).

111. *ABKA Ltd. P'ship v. Wis. Dep't of Natural Res.*, 648 N.W.2d 854, 858 (Wis. 2002).

112. 607 N.W.2d 50 (Wis. Ct. App. 1999).

113. *Id.* at 51–52.

114. *Id.* at 52.

115. *Id.* (quoting *State v. Rothwell*, 130 N.W.2d 806, 808–09 (Wis. 1964) (alteration in original)).

116. *Gillen v. City of Neenah*, 580 N.W.2d 628, 633 (Wis. 1998) (quoting *State v. Deetz*, 224 N.W.2d 407, 413 (Wis. 1974)).

117. *Id.* (citing WIS. STAT. § 30.294 (2013–14)).

118. *Pappas v. Cnty. of Milwaukee*, 819 N.W.2d 562, 2012 WL 2300082, at *3 (Wis. Ct. App. 2012).

a person to "assert a cause of action recognized by the existing law of Wisconsin."[119]

Most cases involving private parties and the public trust doctrine can be roughly placed in one of two categories. On one hand are cases in which private parties, oftentimes riparian owners, argue that the state has gone too far in regulating navigable waters or misapplied a statute in a way that constitutes a taking or violation of some other property-based constitutional right.[120] While the statutes in such cases may have been enacted pursuant to the public trust doctrine, they are better understood, as stated in *Rock-Koshkonong*, as police power cases.[121] On the other hand are cases in which private parties argue that the state has not gone far enough to safeguard public trust lands.[122] In such cases, a plaintiff may argue that the state or the DNR violated a public trust *statute* or failed to prosecute a statutory violation by another private party.[123]

For example, *Gillen v. City of Neenah*[124] involved part of the bed of Little Lake Butte des Morts granted by the legislature to the City of Neenah in 1952 "for a public purpose."[125] The City allowed a paper plant to fill the area and, in 1995, agreed to lease the reclaimed land to a commercial waste-treatment facility.[126] A joint stipulation between the DNR, the City, and the facility provided that although the DNR recognized that both the proposed and past operations were impermissible public trust uses of the lakebed, the DNR "would not seek equitable relief" or "pursue enforcement action" based on its "enforcement discretion" and "the historical development of the Grant Area . . . ."[127] A local environmental group sued, claiming that the public trust violations rendered the lease null and void.[128] The court held that the environmentalists were entitled to seek injunctive relief because "the public trust doctrine enables a citizen to directly sue a

119. *Id.* (quoting *Deetz*, 224 N.W.2d at 413).

120. *E.g.*, *Just v. Marinette Cnty.*, 201 N.W.2d 761 (Wis. 1972).

121. It is important to note that the defendant landowner in *Just* was not arguing that the ordinance in its entirety was unconstitutional. Rather, he was arguing that the ordinance went too far as applied to his land. Thus, despite the celebrated case's language, *Just* was about the extent of state authority created by the public trust doctrine, not the extent of its obligations.

122. *See, e.g.*, *Gillen*, 580 N.W.2d 628.

123. *Id.* at 631.

124. 580 N.W.2d 628, 633 (Wis. 1998).

125. *Id.* at 630.

126. *Id.*

127. *Id.*

128. *Id.* at 631.

private party whom the citizen believes was inadequately regulated by the DNR."[129]

Like *Just*, *Gillen* contains eloquent dicta suggesting the general importance of the public trust doctrine to its holding.[130] But also like *Just*, *Gillen* concerns notions of *authority* under the public trust doctrine, not *obligation*. Indeed, the DNR in *Gillen* did nothing wrong.[131] The state's trust obligation was met upon its enactment of the statutes at issue and delegation of its *discretionary* enforcement authority to the DNR. *Gillen* simply extended such authority to private citizens.[132]

So how does one circumvent the pesky layer of public trust *authority* exercised through the police power and cut to the heart of the matter—the trustee *obligations* imposed by the public trust doctrine? The answer lies in the rare breed of cases that constitute a direct challenge to state action (or inaction) based on the state's failure to adequately administer the public trust.[133] Today, such cases are rare because of the abundance of environmental statutes and regulations enacted under public trust doctrine authority.[134] To find such a case, one must look to cases involving the ugly cousins of these statutory cases—cases involving statutes enacted *despite* the public trust doctrine. In Wisconsin, the best example of statutes expressly enacted as exceptions to the public trust doctrine are those granting areas of lakebed for public use.

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129. *Id.* at 636, 638.

130. *Id.* at 633 (noting "the crux of this case is the state public trust doctrine").

131. *Baer v. Wis. Dep't of Natural Res.*, 724 N.W.2d 638, 646 (Wis. Ct. App. 2006) ("[T]he legislature intended to imbue the [DNR] with a degree of prosecutorial discretion by permitting it, in individual cases, to achieve compliance with WIS. STAT. ch. 30 by means other than administrative enforcement actions. Such case-by-case discretion also allows the Department to prioritize potential enforcement actions . . . .").

132. *Gillen,* 580 N.W.2d at 638.

133. Only two cases have involved such facial challenges to chapter 30 provisions, and both were resolved without the appellate court addressing the issue. *See State v. City of Oak Creek*, 605 N.W.2d 526 (Wis. 2000); *Silver Lake Sanitary Dist. v. Wis. Dep't of Natural Res.*, 607 N.W.2d 50 (Wis. Ct. App. 1999).

134. Indeed, such cases would be newsworthy. For example, recently filed cases have received attention for the claim that the public trust doctrine should apply to the atmosphere. *See, e.g.*, Cole Mellino, *Teens Sue Government for Failing to Address Climate Change for Future Generations*, ECOWATCH (Feb. 23, 2015, 11:43 AM), http://ecowatch.com/2015/02/23/teens-sue-government-climate-change/ (describing an unsuccessful case at the federal level and cases "pending in Oregon, New Mexico, Pennsylvania, Massachusetts, Washington and Colorado" in which plaintiffs made such a claim).

C. Step 3: Balancing the Public Interest

At this final stage of the analysis, it is critical to understand the fine distinction between this framework and the analysis applied in most public trust cases. Here, the issue is whether land is public trust land. In most cases, the issue is how public trust land may be used.[135] In other words, most public trust analyses presuppose that the trust applies to the land at issue and balance the public interest only to determine whether a proposed use is permissible under the public trust doctrine. Thus, logically, the balance required for whether land is even held in public trust should be significantly higher than that required to allow certain uses of land that is concededly held in trust. Fortunately, Wisconsin has a well-developed line of cases stretching back over a century that, together, articulate a public interest balancing test that can be adopted and modified to help determine whether land is public trust land in the first place.

In 1896, the Wisconsin Supreme Court held, in *Priewe v. Wisconsin State & Improvement Co.*[136] (a case containing a "strong implication of legislative corruption"), that the purpose of a proposed use of public trust land was a judicial, not legislative determination.[137] Rejecting the argument of a promoter who had somehow obtained passage of a law allowing him to drain Muskego Lake, the court reasoned that a legislative determination of public purpose was not binding on the judiciary and overruled the state by finding that the drainage was "for private purposes, and for the sole benefit of private parties."[138] Although an old and extreme case, *Priewe* remains recognized precedent for the court's role in protecting public interests though the public trust doctrine.[139]

Further extrapolating from the public interest limitation placed on lakebed grants in *Illinois Central*, the Wisconsin Supreme Court fashioned a five-factor test for determining legitimate public trust use of lakebeds. In *State v. Public Service Commission*,[140] the State challenged the Commission's approval of the City of Madison's request to fill and use a portion of Lake Wingra.[141] The City wanted to use the land for a park and other recreational activities.[142] In holding that the purpose of

135. *See* Scanlan, *supra* note 106, at 137–40 (discussing development of doctrine to reflect usage).

136. 67 N.W. 918 (Wis. 1896).

137. Sax, *supra* note 31, at 509–10 (discussing *Priewe*, 67 N.W. 918).

138. *Priewe*, 67 N.W. at 922.

139. Sax, *supra* note 31, at 509–10.

140. 81 N.W.2d 71 (Wis. 1957).

141. *Id.* at 71–73.

142. *Id.* at 71–72.

the lakebed grant did not violate the obligations of the public trust, the court considered whether:

> 1. Public bodies will control the use of the area. 2. The area will be devoted to public purposes and open to the public. 3. The diminution of lake area will be very small when compared with the whole of Lake Wingra. 4. No one of the public uses of the lake as a lake will be destroyed or greatly impaired. 5. The disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.[143]

Of course, an effective balancing test must account for the inherently wide variety—and occasionally divergent—public interests in public trust land. Indeed, public interests may even overlap substantially with private interests. For example, in *State v. Village of Lake Delton*,[144] the court was forced to balance the public's traditional, recreational interest against the public's broader *economic* interest in allowing the lake to be used by a famous water ski show.[145] In holding that such a private use did not violate the trust, the court reasoned that the public interest is not "absolute" and that sometimes "public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis."[146]

By allowing the effect of a private interest on the general public interest to control its analysis, the *Lake Delton* court epitomized what the court fifty-two years earlier called "a new phase of the so-called trust doctrine."[147] In *City of Milwaukee v. State*,[148] the Wisconsin Supreme Court dealt with lakebed granted to a large steel company as part of a deal between Milwaukee and the steel company to help Milwaukee develop a Lake Michigan harbor.[149] In upholding the validity of the grant, the court noted that although the steel company was "a private corporation, operated for profit," it was also "an important factor in the industrial life of the city . . . ."[150] The court

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143. *Id.* at 73–74.

144. 286 N.W.2d 622 (Wis. Ct. App. 1979).

145. *Id.* at 624–25, 629–30.

146. *Id.* at 632.

147. *Id.* at 631 (quoting *City of Milwaukee v. State*, 214 N.W. 820, 821 (Wis. 1927)).

148. 214 N.W. 820 (Wis. 1927).

149. *Id.* at 821–23.

150. *Id.* at 830.

found that the conveyance itself was "part and parcel of [a] larger scheme, purely public in its nature . . . ."[151] Finally, the court justified its reasoning with a prescient and powerful statement:

> Our present day conditions must therefore meet with a public judicial policy commensurate with the progressive age in which we now live; and, if a modification of the early doctrines be deemed necessary, the Legislature and courts should not hesitate to adopt an extension of the early principles to meet and to harmonize with the spirit of this modern, progressive age. *We say "extension" of the doctrine, not "abrogation."* We are dealing here with the future as well as the past. . . . That the "Great Lakes-to-ocean" waterway will find its realization in the very near future is not doubted by any enlightened, patriotic citizen of this state. The progress of the age demands it; the material welfare of the public requires it; and this state will not be found lacking when the proper time comes. . . . *The spirit of the American people, when it once becomes aroused, cannot and will not be stifled, and it will be guided solely by a consideration of the public welfare*.[152]

Within the holding of *City of Milwaukee* (on which the Wisconsin State Legislature expressly based its authority to enact the FSA)[153] lies much ambiguity. For instance, how does one define "a larger scheme, purely public in nature"? Furthermore, how can such a scheme be logically described as purely public in nature when it inherently relies on and benefits private parties? Moreover, although *City of Milwaukee* couches its holding in terms of abdication of the public trust and alienation of trust lands, the court has since made it clear that even when valid under the five-factor public interest analysis, a lakebed grant in reality is "merely revocable permission to use the property . . . not a grant of title."[154]

III. VIOLATION BY ABDICATION: APPLYING THE FRAMEWORK TO THE FSA

Applying the case of the Couture to the three levels of this new framework, it is clear that the Fictitious Shoreline Act—but not

151. *Id.*
152. *Id.* at 831 (emphasis added).
153. 2013 Wis. Act 140 § 2(6)(a).
154. *City of Madison v. State*, 83 N.W.2d 674, 678 (Wis. 1957).

necessarily the Couture development—violates the Wisconsin Constitution by effectively abdicating the obligations imposed on the State through the public trust doctrine. First, the physical characteristics of the land affected by the FSA are similar to the characteristics of land typically held in trust. Second, the FSA is a statute enacted expressly to avoid the public trust. Third, the public interest implicated by the FSA is the very existence of the public trust protections afforded to every lake and lakebed in the state. In light of such an encroachment, any court deciding the validity of the FSA should strike it down by using this three-step analysis. Such a court would reinforce the role of the judiciary in American government: "to combat the tendency of the legislature . . . to subordinate diffuse public advantages to pressing private interests."[155]

A. Applying Step 1: The Physical Nature of the Trust Asset

The land impacted by the FSA (assuming that the maps presented by POP are accurate) falls within the second most protected of the four combinations of navigability and the OHWM. Why should non-navigable land below the OHWM be given more public trust protection than navigable land above the OHWM? Though not always the case, the answer is generally that the former is seen as "part of the lake."[156]

Usually, people want to do one of two things with lakebed that implicate the public trust doctrine: place something on it, like a pier; or get rid of the water and create more land. As technology advanced and populations grew, land reclamation became an important aspect of frontier life.[157] Filling a lake is clearly not keeping it "forever free."[158] If the trust ceased to apply to the reclaimed land after the filling, its entire purpose would be defeated. For example, one could conceivably obtain initial permission to fill the land for a public purpose, and then simply wait for the public trust to effectively expire.[159] Thus, the fact that the land affected by the FSA was filled in many years ago should

155. Sax, *supra* note 31, at 513.

156. *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987).

157. Thomas E. Dahl & Gregory J. Allord, *History of Wetlands in the Conterminous United States*, *in* NATIONAL WATER SUMMARY ON WETLAND RESOURCES 19, 19–26 (1996), http://pubs.usgs.gov/wsp/2425/report.pdf.

158. WIS. CONST. art. IX, § 1.

159. *See W.H. Pugh Coal Co. v. State*, 312 N.W.2d 856, 858–59 (Wis. Ct. App. 1981) (suggesting that such a scheme may be plausible under the accretion doctrine discussed *infra* in notes 163–68).

not have a dispositive bearing on whether the land is within the geographic scope of the public trust.[160]

However, the circumstances surrounding the filling of a lake may be relevant to the City's case in two ways. First, if the City could have shown that many other privately-owned properties are unwittingly located on former lakebed, the City could have argued that the FSA is in the public interest because it provides valuable certainty without which the doctrine would create chaos by subjecting such properties to "significant questions of ownership of and trespass."[161] Indeed, proponents of the FSA and the Couture, like Governor Scott Walker, argued that the FSA simply codifies what most people *consider* to be the shoreline.[162] This argument is addressed in Step 3's public interest analysis.

Second, if the FSA were struck down, the City could use the circumstances of the filling to support an ownership claim under the accretion doctrine. Generally, the accretion doctrine grants ownership of filled public trust land to the riparian owner, displacing the trust, when the filling was performed *by a third party*.[163] Thus, assuming the City can show that the land was originally filled by a third party, like the railroad, the City may be able to use this doctrine to wrest the property from public trust. It bears remembering that this argument, as well as other arguments concerning bulkhead lines,[164] adverse possession,[165] or takings,[166] (1) presupposes that the land is or was trust land[167] and (2) could and should have been brought before a court at the beginning of the controversy.[168] Instead, the City chose to go to the

160. *See Ill. Steel Co. v. Bilot*, 84 N.W. 855, 857 (Wis. 1901) (holding that artificial land reclamation had no bearing on the State's public trust title in a twenty-year adverse possession case brought by a private party).

161. Peranteau & O'Connor, *supra* note 70, at 36 (quoting *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800, 820 (Wis. 2013)).

162. Ryan, *supra* note 22.

163. *W.H. Pugh Coal*, 312 N.W.2d at 857–58.

164. *See generally Town of Ashwaubenon v. Pub. Serv. Comm'n*, 125 N.W.2d 647, 651, 653–54 (Wis. 1963) (discussing bulkhead statute and public trust doctrine).

165. *See* WIS. STAT. §§ 893.26–893.29 (2013–14) (adverse possession statutes); *see also Ill. Steel*, 84 N.W. at 856–57 (dicta suggesting adverse possession could displace public trust ownership).

166. *See, e.g.*, *Zinn v. State*, 334 N.W.2d 67, 73–74 (Wis. 1983) (suggesting a private party may state a takings claim where the State has asserted public trust ownership).

167. For a useful summary of these arguments and their potential importance, see Arthur J. Harrington, *The "Invisible Lien": Public Trust Doctrine Impact on Real Estate Development in Wisconsin*, WIS. LAW., May 1996, at 10.

168. This was the route urged by Patricia Jursik. *See supra* note 17 and accompanying text.

legislature for what it assumed would be a quick fix to a complicated problem.[169]

B. Applying Step 2: The Nature of the Legislative Action

The FSA differs immensely from the vast majority of statutes enacted pursuant to the legislature's authority as trustee. By redrawing the Lake Michigan shoreline, the legislature is all but expressly relinquishing its public trust obligations.[170] Unlike statutes enacted under the State's trustee authority, the FSA includes no provisions requiring any sort of public interest analysis, environmental report, or any other requirement—it is purely a declaration. While chapter 30 contains statutes similar to the FSA in that they clearly address a discreet local issue, these statutes either contain some protective DNR regulations[171] or have had their constitutionality placed in doubt.[172]

In addition to codifying factual findings that, according to the legislature, are supported by "the best available evidence," the FSA purports to limit judicial review and eliminate the role of the DNR. For example, subsection 3 of the FSA states, "The declarations under sub. (1) are made in lieu of, and have the same effect as, a final judgment entered by a court under ch. 841."[173] Additionally, the legislature relieves the DNR of its statutory duty to conduct a public-purpose

169. The City ended up having to go to court to enforce the FSA anyway—instead, the City's petition for original action was still pending more than a year after Jursik's advice. Sean Ryan, *Milwaukee County Takes Couture Land Sale Dispute to Supreme Court with Legal Filing*, MILWAUKEE BUS. J. (Dec. 23, 2014, 9:18 PM), http://www.bizjournals.com/milwaukee/blog/real_estate/2014/12/county-takes-couture-land-sale-dispute-to-supreme.html.

170. § 30.2038(2) ("Any restrictions, conditions, reverters, or limitations imposed on the use of land or conveyance of land under [nine different lakebed grants going back to 1909] and any other act conveying a part of the lake bed of Lake Michigan do not apply to land located to the west of the shoreline described under sub. (1) (a).").

171. *E.g.*, §§ 30.2025, 30.2026, 30.203 (each authorizing particular filling projects for specific lakes subject to many DNR determinations and requirements).

172. Wisconsin Statutes section 2027 sets the OHWM of Big Silver Lake and was challenged by the DNR on constitutional public trust grounds. *Silver Lake Sanitary Dist. v. Wis. Dep't of Natural Res.*, 607 N.W.2d 50 (Wis. 2000). The circuit court agreed with the DNR and struck down the statute, but the court of appeals reversed, holding that the DNR did not have standing to challenge the legislature. *Id.* at 51–55. That statute has since remained, unchallenged. Indeed, it is a common but critical observation that dubious statutes, if kept out of the public eye, may often go unchallenged when enacted as "rider" legislation. *See Rider*, U.S. SENATE, http://www.senate.gov/reference/glossary_term/rider.htm, (last visited Nov. 10, 2015) (defining "rider" as a "nongermane amendment to a bill"). The FSA was slyly included as part of the 2013 omnibus budget bill. *See* 2013 Wis. Act 20 § 575ac.

173. § 30.2038(3).

analysis of legislative conveyances of lakebed under Wisconsin Statutes section 13.097.[174] This provision is superfluous, as the entire purpose of the Act is to declare that the land is no longer lakebed, but its inclusion underscores the reality that the FSA is expressly relinquishing its trust obligations and confirms the appropriateness of its nickname.

Finally, and most importantly, the characterization of the FSA as an abdication of the State's public trust obligation, as opposed to an exercise of public trust authority, is supported by both *Rock-Koshkonong* and *Gillen*. While the dissent in *Rock-Koshkonong* chastises the majority for turning "the state's affirmative duty to protect the public trust into a legislative choice," the case is better understood as reaffirming the respective roles of the legislature.[175] Regardless of ubiquitous, flowery dicta to the contrary, "it is not clear that the trust doctrine imposes an affirmative duty on the part of the legislature to enact laws that best promote ecological values . . . ."[176] Rather, the doctrine is best characterized as a constitutional rule of standing, with the judiciary as its "ultimate guardian . . . ."[177]

Thus, it is critical to appreciate the subtle difference between dubious claims that legislative inaction constitutes a breach of an affirmative public trust duty and meritorious claims that the legislature has *actively* abdicated its trust obligations. The former resemble a sort of breach-of-fiduciary-duty claim and would run into conceptual problems and other hurdles, like sovereign immunity.[178] The latter, however, are expressly authorized by *Deetz* and *Gillen*.[179] One may therefore say that while the State may have no real affirmative duty under the public trust doctrine beyond a general duty of environmental stewardship, it may be said to have a negative duty, or "a duty not to do something, a duty of omission."[180] The negative duty concept aptly captures the way in which the FSA shirks the State's public trust obligation. While the County correctly asserted that the legislature has "paramount authority . . . in the area of the public trust doctrine," this

174. § 30.2038(2).

175. Peranteau & O'Connor, *supra* note 70, at 37–38 (quoting *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800, 836 (Wis. 2013) (Crooks, J., dissenting)).

176. *Id.* at 37.

177. *Id.*

178. *Id.*

179. *Gillen v. City of Neenah*, 580 N.W.2d 628, 633 (Wis. 1998) ("The public trust doctrine allows a person to sue on behalf of, and in the name of, the State 'for the purpose of vindicating the public trust.'" (quoting *State v. Deetz*, 224 N.W.2d 407, 413 (Wis. 1974))).

180. *See* Marcus G. Singer, *Negative and Positive Duties*, 15 PHIL. Q. 97, 98–103 (1965) (discussing the logical implications of positive and negative duties).

argument is off point insofar as it fails to address the legislature's *obligations*, ignores the role of the judiciary, and fails to recognize the law as quoted in its own brief: that the legislatures "edicts are supreme" *only when they are* "*not violative of the provisions of the . . . state constitution[] . . . .*"[181]

Citing no authority, the closest the City came to addressing the State's obligations is its circular assertion that the FSA is constitutionally sound because the public trust doctrine clause does not expressly prohibit the effective elimination of the public trust.[182] Article IX, section 1 of the Wisconsin Constitution provides that all navigable waters "shall be common highways and forever free."[183] Surely this clause, as part of the Wisconsin Constitution, cannot be edited through legislation.[184] Indeed, the City's interpretation ignores the fact that legislatively excepting a piece of land from the application of this clause effectively replaces the word "shall" with "need not."

Finally, while the State argues that the FSA should be characterized as an act of public trust–granted authority because it was passed with the public's interest in mind,[185] this argument is misplaced and confuses two distinct factors. Public interest is Step 3 in this analysis because while it is central to determining *how* the public trust doctrine applies, it is peripheral to *when* it applies.[186] In other words, an appellate court would likely have seen through the legislature's attempt to claim that, because the trust's elimination was in the public's interest, its effective elimination of the public trust was done pursuant to public trust authority. Such a distorted interpretation strips the public trust doctrine of its essential function as a judicial check on the

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181. *See* Memorandum in Support of Petition for Leave to Commence an Original Action at 16, 18, *Milwaukee Cnty. v. Preserve Our Parks, Inc.*, 862 N.W.2d 605 (Wis. 2015) (No. 2014AP2957-OA) [hereinafter Memorandum] (emphasis added) (quoting *City of Milwaukee v. State*, 214 N.W. 820, 821 (Wis. 1927)).

182. *Id.* at 15.

183. WIS. CONST. art. IX, § 1.

184. *See* STEVE MILLER, WIS. LEGISLATIVE REFERENCE BUREAU, GOVERNING WISCONSIN FROM THE WISCONSIN LEGISLATIVE REFERENCE BUREAU: AMENDING THE WISCONSIN CONSTITUTION 1 (2008) ("A constitution differs from other laws of the state because it creates more general, timeless mandates and restrictions than do statutes, and the legislature cannot change it without the people's approval. Unlike statutes, the constitution broadly sets the duties of the legislature . . . ."); *see also* Jason J. Czarnezki, *Environmentalism and the Wisconsin Constitution*, 90 MARQ. L. REV. 465, 473–74 (2007) (arguing for an expansion of the public trust doctrine via the constitutional amendment process).

185. Memorandum, *supra* note 181, at 17 (citing *State v. Bleck*, 338 N.W.2d 492, 497–98 (Wis. 1983)).

186. *See infra* Part III.C.

legislature and ignores its constitutional status.[187] If the legislature had wanted to exercise its trust authority, it could and should have passed a statute creating a specialized regime of DNR regulations governing use and sale of filled lakebed that recognizes both Milwaukee's unique situation and the importance of the doctrine's statewide vitality.[188]

C. Applying Step 3: The Nature of the Public Interest

In what might be considered a curiously inserted "back-up plan," the FSA contains numerous "non-statutory provisions" including:

> (6) If a court finds . . . [that the Couture site] was lake bed of Lake Michigan, the legislature declares all of the following:
>
> (a) That the legislature has the authority as representative of the trustee of the public trust in navigable waters to convey a nominal area of lake bed to a private party for private purposes if such conveyance furthers the public trust and the conveyance is part and parcel of the larger scheme, purely public in its nature, as declared by the Wisconsin Supreme Court in *City of Milwaukee v. State of Wisconsin, 193 Wis. 423 (1927)*.[189]

What the legislature failed to realize is that although the FSA's redrawing of the shoreline may be for a similar public purpose as the lakebed grant in *City of Milwaukee*, only the former completely extinguishes the public trust. Thus, the public interest at stake in *City of Milwaukee* and other lakebed grant cases are those specific to the grant at issue as balanced by the public trust doctrine, whereas the interest implicated by the FSA is the very existence of the public trust.

Although it is tempting to think of the public interests implicated by the FSA as those specific to the Couture development,[190] such interests, while relevant, only become the touchstone when considering

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187. Sax, *supra* note 31, at 476–77, 509–10 (discussing court's role and origin of the doctrine).

188. *See supra* text accompanying notes 108–09.

189. 2013 Wis. Act 140 § 2(6)(a).

190. FSA proponents cite the certainty created by the FSA and assert that chaos may ensue without it. *See supra* note 161 and accompanying text. While valid, this argument may lack a sufficient basis in reality, and would need to be supported both by evidence that other properties would indeed be suddenly subject to the public trust and by evidence that a burdensome number of assertions of public ownership are likely to be brought and sustained. Again, there is no indication that POP is on a mission to turn the entire Milwaukee Lakefront into a giant park. *See supra* notes 24–25 and accompanying text.

what the public trust doctrine *allows*, as opposed to considering when it *applies*. Thus, because the five-factor balancing test set out in *State v. Public Service Commission* assumes the doctrine applies,[191] the test cannot be dispositive in determining whether the trust has been impermissibly abdicated. Indeed, the public interest at stake in such cases is the very existence of *any* public trust protection, and, by implication, the vulnerability of every public trust asset to statewide legislative abandonment. In light of such an encroachment, any court faced with a challenge to the FSA should strike it down by using this three-step analysis and invoking its historical ability to "combat the tendency of the legislature . . . to subordinate diffuse public advantages to pressing private interests."[192]

CONCLUSION

Even if the court declines to expressly adopt this framework, the three steps still provide an effective way of analyzing whatever structural (or normative) reasoning the court does eventually adopt. Step 1 of the analysis provides clarity—the physical reality of a piece of land's OHWM and navigability depends on objective facts. Step 3 of the analysis provides flexibility—Wisconsin case law allows courts to consider a number of factors in determining public interest on a case-by-case basis. Thus, it is Step 2—characterizing the legislature's action or inaction as either obligation- or authority-based—that encompasses fundamental legal arguments concerning the respective roles of the legislature and judiciary.

Federalist No. 10 addresses the dangerous potential for state governments, because of their smaller size, to fall victim to special interests and local factions.[193] The FSA embodies this danger. When a county board can go to its state legislator and so easily procure a local bill written with so little respect for a complex constitutional doctrine, the welfare of its fellow counties, or the cultural identity of its state, a court must remember one of its most essential functions: acting as a check on the legislative branch.[194] In doing so, Wisconsin courts should adopt the framework set forth in this Comment and thereby transform a confusing doctrine into what Professor Sax famously believed would one day become "useful as a tool of general application for citizens

191. *See supra* notes 140–46 and accompanying text.
192. Sax, *supra* note 31, at 513.
193. THE FEDERALIST NO. 10 (James Madison).
194. Peranteau & O'Connor, *supra* note 70, at 37.

seeking to develop a comprehensive legal approach to resource management problems."[195]

195. Sax, *supra* note 31, at 474.