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The Public Trust Doctrine and the Great Lakes Shores

Kenneth K. Kilbert
Toledo College of Law

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THE PUBLIC TRUST DOCTRINE AND THE GREAT LAKES SHORES

KENNETH K. KILBERT*

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* Kenneth K. Kilbert is an Associate Professor at the University of Toledo College of Law, where he also serves as director of its Legal Institute of the Great Lakes. The author expresses thanks to his colleagues at the University of Toledo College of Law, especially Professors Lee Strang and Robert Hopperton, and Professor Robert Abrams of Florida A & M University College of Law, for their helpful comments on drafts of this Article; the participants in the Ohio Legal Scholarship Workshop in June 2009 at Ada, Ohio, where an earlier version of this Article was presented; and Aditya Pawar and Thomas Driscoll, who provided valuable research assistance. The author also thanks the University of Toledo College of Law for generously funding a portion of this research with a Summer Research Grant.

I. INTRODUCTION

The shores of the Great Lakes may look serene, but they are a battleground. Members of the public enjoy using the shores for fishing, boating, birding, or simply strolling along and taking in the scenic vistas. Repeatedly, however, owners of land bordering the Great Lakes (i.e., littoral owners),¹ armed with deeds indicating they own the shore to the water's edge or even lower, have tried to stop members of the public from using their property above the water's edge. The right to exclude others from your property, the littoral owners argue, is one of the most important sticks in the bundle of property ownership rights and should be enforceable on the Great Lakes shores just as anywhere else. Members of the public, on the other hand, claim that such shores are common to all and cannot be the exclusive domain of a private landowner. Raising the "public trust doctrine" as a shield (or sword), these members of the public contend that the shores of the Great Lakes are held in trust by the state for use by the public, and therefore they have the right to walk along the shore above the water's edge.

Courts have been inconsistent, in approach and result, when determining the rights of the public to use the Great Lakes shores. The Michigan Supreme Court, in a controversial 2005 decision, largely sided with the walking public. In a 5-2 decision, the state high court reversed an intermediate appeals court and held that, pursuant to the public trust doctrine, the public has a right to walk along the Michigan shores of the Great Lakes up to the ordinary high water mark, even though the shore is privately owned.² Ohio to date, however, has largely sided with the littoral owners. An Ohio court of appeals in August 2009 ruled that the public trust stops at the water's edge and that members of the public have no right to use privately owned Lake Erie shore above the water's edge.³ In other Great Lakes states, the applicability of the public trust doctrine to the Great Lakes shores, and the public's right to use those shores, remain subjects of controversy and uncertainty.⁴

In general, the public trust doctrine provides that, primarily in recognition of the importance of navigable waters to society, a state holds the navigable waters within its borders, and the lands underlying them, in trust for the benefit of the public to use for certain purposes.⁵ Despite its deep roots and wide acceptance, however, the public trust doctrine remains controversial and somewhat amorphous. While some

¹ Land that borders a lake is known as "littoral property," and the owners of such property have certain littoral rights. See *infra* Part II. These rights are roughly equivalent to riparian rights enjoyed by riparian owners of land that borders flowing waters such as rivers and streams. JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 1083 (4th ed. 2006).

² *Glass v. Goeckel*, 703 N.W.2d 58, 78 (Mich. 2005).

³ *Merrill v. Ohio Dep't of Natural Res.*, Nos. 2008-L-007 & 2008-L-008, 2009 WL 2591758 (Ohio Ct. App., Aug. 21, 2009), *notices of appeal filed*, No. 2009-1806 (Ohio Oct. 7, 2009).

⁴ See *infra* Part III. There are eight Great Lakes states: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

⁵ See, e.g., DAVID C. SLADE ET AL., *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* 17-18 (2d ed. 1997); Stephen E. Roedy, *The Public Trust Doctrine*, in *OCEAN AND COASTAL LAW AND POLICY* 39, 41 (Donald C. Baur, Tim Eichenberg & Michael Sutton eds., 2008).

champion the public trust doctrine as a vital guarantee of the public's rights to use important natural resources,⁶ others urge that the doctrine is an ill-defined excuse for activist judges to override the actions of legislatures and to take private property rights without just compensation.⁷ Of particular relevance here is the considerable disagreement regarding the proper scope and effect of the public trust doctrine.⁸

This Article does not try to resolve every nuance of the public trust doctrine. Rather, it tries to sort through the cacophony of cases and commentary to identify core principles of the public trust doctrine relevant to the Great Lakes shores and to offer guidance regarding the public's right to use the shores of the Great Lakes, in relation to the rights and duties of littoral owners and the states. While acknowledging that ultimately the public trust doctrine may vary from state to state, this Article proposes a uniform legal framework for use by each Great Lakes state for ascertaining the proper scope and effect of the public trust doctrine relating to the shores of the Great Lakes. Although the Article uses the public's right to walk the shores as a focal point for analysis, the proper scope and effect of the public trust doctrine along the Great Lakes shores has importance far beyond beachwalking. At stake are thousands of miles of shore properties and their future uses (e.g., development of an economically valuable parcel, preservation of an ecologically rich beach).⁹

Part II of this Article sets the stage by discussing the public trust doctrine and other legal principles relevant to the Great Lakes shores. Part III explores how the Michigan and Ohio courts have grappled with whether, and to what extent, the public has a right to walk along the Great Lakes shores by virtue of the public trust doctrine, yielding widely divergent results. In Part IV, the Article proposes a uniform legal framework, grounded in the core principles of the public trust doctrine, for use in all Great Lakes jurisdictions to ascertain the public's rights to use the Great Lakes shores pursuant to the public trust doctrine. Specifically, the proposed framework provides a principled approach for determining the geographic scope of the public trust doctrine and the uses protected by the doctrine. Regarding the geographic scope, this Article invokes the equal footing doctrine to argue that each state should begin its analysis from a common starting point. Further, notwithstanding Supreme Court language saying each state can define the limits of the lands it holds in trust, the power of the states to do so should be limited by the public trust doctrine itself. Regarding uses protected by the public trust doctrine, this Article proposes criteria that allow a state to recognize protected uses beyond the traditional, but only where the uses are important to society and do not unreasonably intrude upon the rights of

⁶ See, e.g., Alexandra B. Klaas, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

⁷ See, e.g., James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 567 (1989) [hereinafter, Huffman, *Out of Water*]; Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 48, 54-58 (2006).

⁸ See Roady, *supra* note 5, at 42.

⁹ There are more than 10,000 miles of Great Lakes shoreline in the eight Great Lakes states. SLADE ET AL., *supra* note 5, at 2.

the littoral owners. Part V examines how the proposed framework could be applied in each of the Great Lakes states, consistent with the existing authorities in those states, to bring much-needed predictability to the public's right to use the Great Lakes shores.

II. BACKGROUND

The public trust doctrine has ancient roots. The Romans' codification of law, the Institutes of Justinian, recognized the public nature of rivers, the sea, and its shores: "By the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea."¹⁰

English common law similarly recognized the importance of maintaining navigable waters and the lands underlying them for common use. Control over navigable waters and the lands underlying them was considered an essential element of sovereignty, and therefore lands underlying navigable waters were owned by the crown in trust for use by the people. Both private, *jus privatum*, and public, *jus publicum*, interests were recognized in the lands underlying navigable waters. While legal title to the lands under navigable waters (*jus privatum*) could be transferred by the crown to a private party, the crown would continue to hold the public's interest in using the lands (*jus publicum*) in trust for the people. Thus, notwithstanding private ownership of lands underlying navigable waters, the government retained its trust obligation, and the public would continue to have the rights to make use of navigable waters and underlying lands.¹¹

The United States inherited the public trust doctrine from English common law. A series of nineteenth century U.S. Supreme Court cases made clear that the states owned the lands underlying navigable waters in trust for their people to use.¹² Public

¹⁰ INSTITUTES OF JUSTINIAN § 2.1.1, at 90 (Thomas Collett Sandars trans., 7th ed. 1922). Some scholars suggest that this statement was more aspirational than descriptive and that grants of land under navigable waters by the Roman government to private owners were not unknown. See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 9 & n.16 (1997).

¹¹ See *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894) (explaining English common law). The most influential discussion of the public trust doctrine in English common law was Lord Chief Justice Matthew Hale's *De Jure Maris*. Sir Matthew Hale, *De Jure Maris*, in A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370-413 (Stuart A. Moore ed., 3d ed. 1888). While Hale's treatise arguably may not have accurately reflected the English common law when it was written in the 17th Century, see Rasband, *supra* note 10, at 13-15, there is no question that it reflected the common law of England as of the early 19th Century and was extremely influential in shaping early American law. *Id.* For a more detailed discussion of the history of the public trust doctrine, see Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976).

¹² See *Shively*, 152 U.S. 1; *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842). Although actually navigable waters in England essentially were equivalent to waters subject to the ebb and flow of tides, in the United States many non-tidal rivers and lakes were actually navigable. Due to the importance of these non-tidal navigable waters in our new nation, the Supreme Court recognized that the reach of the public trust doctrine in the United States extended to non-tidal navigable waters as well. See *Barney v. City of Keokuk*, 94 U.S. 324, 337-38 (1876); see also *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443

use of navigable waters was deemed too important to be subject to private interference.¹³ While a state could transfer title (*jus privatum*) of lands underlying navigable waters to a private party, the underlying lands nevertheless remained subject to the public's rights to use the waters and underlying land (*jus publicum*) held by the state.¹⁴

The U.S. Supreme Court's decision in *Illinois Central Railroad Co. v. Illinois*¹⁵ is often referred to as the "lodestar" of American public trust law.¹⁶ In 1869, the Illinois legislature sold more than one thousand acres of lands underlying Lake Michigan along the Chicago waterfront in fee to the Illinois Central Railroad for development purposes. Four years later, the legislature repealed the grant and sought to have the original grant declared invalid. The Supreme Court invoked the public trust doctrine to invalidate the original legislative grant. While noting that the public trust doctrine in England was limited to waters affected by the tides, since non-tidal rivers and lakes there were not actually navigable, the Court held that the public trust doctrine in the United States equally applies to the lands underlying the Great Lakes.¹⁷ The Court ruled that the state not only held title to the lands under Lake Michigan in a proprietary capacity, but also in a sovereign capacity in trust for the people of the state to use for purposes of navigation, commerce, and fishing. In light of the trust obligation, the State of Illinois was not permitted to alienate the lands in a manner that did not preserve the waters for the use of the public. Because the grant to the railroad effectively would have placed a vast, key swath of Lake Michigan under private control and prevented the public from using it for navigation, fishing, and commerce, the Court struck the grant as violating the public trust doctrine.¹⁸

The public trust doctrine is now entrenched in American jurisprudence. The Supreme Court has reaffirmed its vitality,¹⁹ and the public trust doctrine has been

(1851) (deviating from English rule to hold that federal court admiralty jurisdiction under the Constitution is not limited to tidal waters).

¹³ See *Shively*, 152 U.S. at 57; *Ill. Cent.*, 146 U.S. at 436. Part of the impetus for recognition of the public trust doctrine also was that lands underlying waters cannot be cultivated or improved like uplands. See *Shively*, 152 U.S. at 57. Some have argued that the public trust doctrine has origins in natural law. See George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307 (2006).

¹⁴ See *Shively*, 152 U.S. at 12-13; *Ill. Cent.*, 146 U.S. at 458.

¹⁵ *Ill. Cent.*, 146 U.S. 387.

¹⁶ See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 640 (1986); Sax, *supra* note 6, at 489.

¹⁷ *Ill. Cent.*, 146 U.S. at 435-37. The Great Lakes are not appreciably affected by the ebb and flow of tides. *Id.* at 435-36.

¹⁸ *Id.* at 452-53. For an in-depth factual and historical discussion of *Illinois Central*, see 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).

¹⁹ See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

recognized across the nation, including in all of the Great Lakes states.²⁰ Historically a common law doctrine, the public trust doctrine can differ somewhat from state to state.²¹ But at its core, the public trust doctrine teaches that each state holds the navigable waters and lands underlying them in trust for use by the public for certain protected uses, traditionally navigation, fishing, and commerce.²² Not only does the public trust doctrine afford certain rights to the public, it imposes certain responsibilities on the state to protect the public's rights to use those waters and underlying lands.²³ The public trust doctrine can be employed to invalidate or stop both governmental and private actions that violate the doctrine.²⁴

Despite its long history and wide acceptance, the public trust doctrine remains controversial and less than sharply defined,²⁵ and it has spawned an immense amount of commentary.²⁶ Some commentators have focused on the source of the judiciary's power to overturn the legislature's grant in *Illinois Central*. The Supreme Court in a later opinion stated that the public trust doctrine articulated in *Illinois Central* was based on Illinois law.²⁷ But some commentators, perhaps noting the relative paucity of Illinois law cited in Justice Field's opinion and recognizing that state common law may not be a sound foundation for a doctrine that allows the judiciary to override the acts of a legislature, have differed widely in their efforts to explain the source of the public trust doctrine as articulated in *Illinois Central*.²⁸

²⁰ SLADE ET AL., *supra* note 5, at 3; Roady, *supra* note 5, at 41. See *infra* Part V for discussion of the public trust doctrine in the eight Great Lakes states.

²¹ SLADE ET AL., *supra* note 5, at 3; Roady, *supra* note 5, at 41-42. See also Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrine: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007) (state-by-state summary of the public trust doctrine in the Eastern United States).

²² SLADE ET AL., *supra* note 5, at 17-18; Roady, *supra* note 5, at 41.

²³ See *Ill. Cent.*, 146 U.S. at 452-53; SAX ET AL., *supra* note 1, at 590.

²⁴ SAX ET AL., *supra* note 1, at 590; Lazarus, *supra* note 16, at 645-46.

²⁵ See, e.g., Roady, *supra* note 5, at 39 ("The Public Trust Doctrine is controversial, and its contours are not sharply defined."); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989) ("[T]he public trust doctrine is one of the most controversial developments in modern American law, and perhaps the single most controversial development in natural resources law.").

²⁶ The volume of scholarly literature on the public trust doctrine was described as "vast" more than a decade ago, Rasband, *supra* note 10, at 3 n.2, and one commentator counted more than 1700 articles since 1990 that make reference to the public trust doctrine. James L. Huffman, *Speaking of Inconvenient Truth—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 13 n.59 (2007).

²⁷ *Appleby v. City of New York*, 271 U.S. 364, 395 (1926).

²⁸ Some have argued that the doctrine is rooted in the U.S. Constitution. See, e.g., Wilkinson, *supra* note 25, at 449-50 (Commerce Clause); Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411 (1987) (Due Process and Equal Protection Clauses). Others have suggested that *Illinois Central* was the product of federal common law, see Rasband, *supra* note 10, at 65, which presumably should relegate the doctrine to the legal scrap heap post-*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (rejecting federal common law as a

Substantial commentary also has focused on advocating, or criticizing, expansion of the public trust doctrine beyond its roots in navigable waters and underlying lands. Professor Joseph Sax in 1970 published an influential law review article that urged a more robust use of the public trust doctrine to preserve natural resources beyond navigable waters and submerged lands.²⁹ Subsequently, an expansive public trust doctrine has been championed by some as an effective tool to rein in the government and private developers, to protect the environment, and to ensure public access.³⁰

On the other hand, some commentators have criticized the public trust doctrine, claiming that it is an ill-defined excuse for judges to override the decisions of elected legislatures and to trample and take private property rights without due compensation to the owners, either by restricting the owners' ability to use their property or by forcing them to allow the public to use their property.³¹ The U.S. Constitution prohibits the government from taking private property for public use without just compensation to the owner.³² The public trust doctrine can be an effective bar to a taking claim. For example, if the government were to require a private property owner to open her property for use by the public, the property owner could claim that her property (e.g., her right to exclusive use of her property) has been taken by the government for public use and demand compensation. However, if her property were subject to the public trust doctrine, the public would have a right to use her property for at least certain protected uses (e.g., fishing). The government could successfully defend against a taking claim by arguing that she only held the *jus privatum* and the government still retained the *jus publicum*, and therefore allowing the public to fish on her property did not constitute a taking because there had been no change in her property rights.³³

basis to decide state law claims in federal courts). Still others have argued that, regardless of its original provenance, the public trust doctrine has been enshrined in many state constitutions. See, e.g., William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 438-51 (1997); Klaas, *supra* note 6, at 714-19.

²⁹ Sax, *supra* note 6. In short, Professor Sax advocated using the doctrine to allow citizens to gain access to courts, where the judiciary could enforce public trust rights against the government and private parties to protect natural resources. As Professor Sax observed, "Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." *Id.* at 474.

³⁰ See, e.g., David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 367-78 (1988); Klaas, *supra* note 6.

³¹ See, e.g., Huffman, *Out of Water*, *supra* note 7, at 567; see also Thompson, *supra* note 7, at 54-58 (articulating conservative worries).

³² U.S. CONST. amends. V, XIV.

³³ See James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines At Work*, 3 J. LAND USE & ENVTL. L. 171 (1987) [hereinafter, Huffman, *Takings Clause*]; Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421 (2005).

Some jurisdictions have interpreted the public trust doctrine somewhat more expansively in recent decades. But even these most expansive and controversial applications of the public trust doctrine have not strayed too far from navigable waters and the lands beneath them.³⁴

While much has been written about the public trust doctrine generally, and the propriety of expanding it beyond navigable waters and underlying lands in particular, less attention has been paid to defining the proper scope and effect of the public trust doctrine as applied to its more traditional milieu of navigable waters and underlying lands—e.g., where do underlying lands end and uplands begin; what uses are protected by the doctrine?³⁵ Resolution of these issues along the Great Lakes shores

Illustrative of concern about the public trust doctrine, and its effect upon private property rights and takings, is the brouhaha that led to a recent amendment of the Ohio Constitution. Opponents of ratification of the Great Lakes–St. Lawrence River Basin Water Resources Compact, designed to protect against diversion of Great Lakes waters out of the Great Lakes basin and to promote wiser use of water resources within the basin, claimed that passage of the Compact would extend the public trust doctrine to non-navigable waters and groundwater in Ohio, thereby jeopardizing private property rights in such waters. As a result of negotiations that allowed the Ohio legislature to ratify the Compact, a proposed constitutional amendment was added to the ballot in November 2008 that specified, *inter alia*, that landowners have property rights in non-navigable waters and groundwater in Ohio and that such waters are not subject to the public trust doctrine. S.J. Res. 8, 127th Gen. Assem., Reg. Sess. (Ohio 2008). The amendment passed by a landslide and took effect Dec. 1, 2008. OHIO CONST. art. I, § 19b.

³⁴ Among the most controversial and expansive applications of the public trust doctrine in recent decades are those in California and New Jersey. The California Supreme Court invoked the doctrine to protect non-navigable tributaries of navigable waters, adversely impacting holders of rights to appropriate waters from those tributaries. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983). The New Jersey Supreme Court held, in reliance on the doctrine, that the public had rights to use privately owned, dry sand ocean beaches above the high water mark. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984). See also *In re Water Use Permit Applications for the Waiahole Ditch*, 9 P.3d 409 (Haw. 2000) (applying public trust doctrine to groundwater connected to surface waters).

³⁵ This is not to say that books and articles have completely ignored these issues. Among those that address the geographic scope of, and uses protected by, the public trust doctrine, albeit not with a focus on the Great Lakes, is SLADE ET AL., *supra* note 5.

Additionally, in the aftermath of the Michigan Supreme Court's 2005 decision in *Glass v. Goeckel*, a number of articles addressed the public's right to walk along the shores of the Great Lakes, though primarily from a Michigan law perspective. See, e.g., Jonathan Burleigh, Note, *Don't Fence Me Out: What Are the Rights and Responsibilities of the Public and Riparian Landowners After Glass v. Goeckel?*, 84 U. DET. MERCY L. REV. 499 (2007); Eric Nelson, *The Public Trust Doctrine and the Great Lakes: Glass v. Goeckel*, 11 ALBANY L. ENVTL. OUTLOOK J. 131 (2006); Carl Shadi Paganelli, Note, *Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan*, 58 HASTINGS L.J. 1095 (2007); Nathan Piwowarski, Comment, *Trouble at the Water's Edge: Michigan Should Not Extend the Public Trust Doctrine of the Great Lakes*, 2006 MICH. ST. L. REV. 1045 (2006). One exception is Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 U. MICH. J.L. REFORM 861 (2007), in which Professor Abrams primarily argues that the Michigan Supreme Court's decision is correct based on the history of the public trust doctrine but also mentions that it is consonant with the law in other Great Lakes states. See also 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 (2007) (explores the public

will be the emphases of the remainder of this Article. Preliminarily, however, a brief discussion of some other legal principles relevant to the shores of the Great Lakes should help provide context for our evaluation of the scope and effect of the public trust doctrine.

In general, as will be discussed in more detail below, states own the beds of the Great Lakes,³⁶ and private parties often own the littoral lands bordering the lakes.³⁷ The boundary for title purposes between privately owned littoral lands and state-owned beds often is defined as the “ordinary high water mark” along the shore,³⁸ but depending upon the state and the parcel in question, the boundary may be defined differently (e.g., low water mark, water’s edge).³⁹

The levels of the Great Lakes are not appreciably affected by the tides, but rather rise and fall seasonally during the year.⁴⁰ The highest levels typically occur in the summer, with the lowest levels in the winter; the average difference in lake levels between summer and winter each year is about twelve to eighteen inches.⁴¹ Primarily due to changes in annual weather conditions, the levels of the Great Lakes also vary year to year; for example, the average levels of the lakes one year may be a foot higher or lower than the average levels the next year.⁴² As a result, the high

trust doctrine in the Great Lakes states more generally, and argues for a geographic scope including streams capable of recreational boating and for more protected uses); Diana V. Pratt, *The Legal Rights of the Public in the Foreshores of the Great Lakes*, 10 MICH. REAL PROP. REV. 237 (1983) (a brief, early exploration of the public’s rights to use the Great Lakes shores).

³⁶ See *infra* Part V.

³⁷ The vast majority of lands bordering the Great Lakes are privately owned. SLADE ET AL., *supra* note 5, at 2 (ninety percent of all land in the United States bordering oceans and Great Lakes is privately owned).

³⁸ “Ordinary high water mark” is discussed in more detail in Part IV.A.1.a *infra*. In short, for purposes of the Great Lakes, the ordinary high water mark is the highest point on the shore where the water periodically stands and leaves a mark, not the highest point the water reaches during extraordinary events such as floods or severe storms.

³⁹ See *infra* Parts III-V. In short, the low water mark is the lowest point on the shore where the water periodically stands. The water’s edge has been interpreted to mean the point on the shore where the water currently stands.

⁴⁰ See *Ill. Cent.*, 146 U.S. at 435-36; *Glass*, 703 N.W.2d 58, 98-99 (Markman, J., dissenting).

⁴¹ U.S. ARMY CORPS OF ENG’RS & GREAT LAKES COMM’N, *LIVING WITH THE LAKES* 16 (1999).

⁴² See NOAA GREAT LAKES ENVIRONMENTAL RESEARCH LABORATORY, *WATER LEVELS OF THE GREAT LAKES* (Jan. 2009). The annual average lake levels over the past century vary less than two feet from highest to lowest. *Id.* Short-term fluctuations in lake levels can be more extreme than monthly or annual averages. Over the past century, the range from extreme high to extreme low water levels has been nearly four feet for Lake Superior and more than six feet for the other Great Lakes. U.S. ARMY CORPS OF ENG’RS & GREAT LAKES COMM’N, *supra* note 41, at 17.

water mark, low water mark, and water's edge are not permanent locations on the shore, but rather may move landward or lakeward.⁴³

At common law, the general rule is that gradual and imperceptible changes to the shoreline result in the boundary moving with those changes.⁴⁴ That is, the boundary is a movable freehold. Certain changes benefit the state and move the boundary landward: *erosion* is the gradual process of material being eroded from the shore, causing the shoreline to recede and water to invade the former upland, and *submergence* is the gradual disappearance of upland due to rising water. Other changes benefit the littoral owner and move the boundary lakeward: *reliction* (land that was once submerged becomes exposed through the gradual recession of water) and *accretion* (uplands enlarge through the gradual deposit of material by the water). By contrast, sudden changes in the shoreline (e.g., due to a major storm) are considered *avulsion*, and the property boundary does not move with such avulsive changes.⁴⁵ In general, a littoral owner cannot benefit from her own acts that result in artificial changes to the shoreline.⁴⁶

Although littoral owners typically do not own into the beds of the Great Lakes, they enjoy common law rights or privileges beyond those of the general public. These littoral rights typically include the right to access the lake, the right to wharf out to deeper water in order to use the lake for navigation, and the right to make reasonable use of the water. These rights are not absolute, however, and are subject to regulation, the rights of other littoral owners and the public, and they cannot interfere with navigation.⁴⁷

⁴³ Some states have defined the ordinary high water mark ("OHWM"), at least for certain purposes, as a specific elevation. For example, Indiana has administratively defined the OHWM for Lake Michigan to be 581.5 feet, International Great Lakes Datum 1985. While the OHWM in Indiana stays constant vertically, the location of the OHWM on the shore may horizontally change landward or lakeward due to physical changes to the shoreline caused by erosion or accretion. Ind. Dep't of Natural Res., Lake Michigan: Ordinary High Watermark, available at <http://www.in.gov/dnr/water/3658.htm> (last visited May 27, 2010). International Great Lakes Datum (IGLD) is a reference system by which Great Lakes water levels are measured. The most recent is IGLD 1985. Ind. Dep't of Natural Res., Lake Michigan: International Great Lakes Datum, available at <http://www.in.gov/dnr/water/3659.htm> (last visited May 27, 2010).

⁴⁴ SAX ET AL., *supra* note 1, at 535.

⁴⁵ BRUCE FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS §§ 3.11, 3.12 (2002); SAX ET AL., *supra* note 1, at 535-36; ABRAMS, *supra* note 35, at 898-902.

⁴⁶ FLUSHMAN, *supra* note 45, at § 3.12.2; SLADE ET AL., *supra* note 5, at 110.

⁴⁷ SAX ET AL., *supra* note 1, at 35. An alleged taking of littoral rights is the focus of a case currently pending before the U.S. Supreme Court. In *Stop the Beach Nourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, No. 08-1151 (U.S., argued Dec. 2, 2009), a group of Florida beachfront property owners are claiming that a state beach restoration statute unconstitutionally took without compensation their littoral right to have their properties contact the ocean water, and alternatively that the state supreme court engaged in a "judicial taking" by holding that such contact is not a constitutionally protected littoral right. See *Save Our Beaches, Inc. v. Florida Dep't of Env'tl. Prot.*, 2006 WL 1112700 (Fla. Dist. Ct. App. 2006), *rev'd sub nom. Walton County v. Stop the Beach Nourishment, Inc.*, 998 So.2d 1102 (Fla. 2008), *cert. granted*, 129 S.Ct. 2792 (June 15, 2009).

III. RECENT CASES ILLUSTRATE THE PROBLEM

At one level, the application of the public trust doctrine to the Great Lakes and its underlying lands is non-controversial. As early as *Illinois Central*, the Supreme Court expressly held that the public trust doctrine applies to the Great Lakes and the lands underlying them.⁴⁸ But as recent cases in Michigan and Ohio show, there is much controversy and uncertainty about whether, and to what extent and effect, the public trust doctrine applies to the shores of the Great Lakes.

A. *Michigan*

Michigan was the first Great Lakes state to squarely decide whether the public has a right to walk along the shores of the Great Lakes. The Michigan Supreme Court in *Glass v. Goeckel*⁴⁹ ruled in 2005 that the public trust protects the right of the public to walk on even privately owned property along the Great Lakes above the water's edge up to the ordinary high water mark.

Glass v. Goeckel began as a local dispute between neighbors and metastasized into a battle between private property rights groups and public interest organizations over Michigan's three thousand miles of Great Lakes shores.⁵⁰ Although the suit originally was commenced by plaintiff Glass to enforce an express easement elsewhere on Goeckel's lakefront property,⁵¹ at issue on appeal was Goeckel's claim that Glass was trespassing on Goeckel's private property by walking laterally along the Lake Huron shore near but above the water's edge.⁵² The State of Michigan owns the bed of Lake Huron, as it does the beds of all of the Great Lakes within its borders.⁵³ But for purposes of this appeal, it was undisputed that Goeckel's title to the property extended at least to the water's edge and that Glass was walking as a member of the public on Goeckel's property between the water's edge and the ordinary high water mark.⁵⁴ The Michigan court of appeals ruled in favor of defendant Goeckel, holding that the public trust was limited to submerged lands, as evaluated moment to moment; that the littoral owner held exclusive use of the shore

⁴⁸ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436-37 (1892).

⁴⁹ *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005).

⁵⁰ Amici curiae in the case included the Michigan Land Use Institute, Defenders of Property Rights, Save Our Shoreline, Great Lakes Coalition, Inc., Michigan Chamber of Commerce, National Federation of Independent Business Legal Foundation, Michigan Bankers Association, Michigan Hotel, Motel and Resort Association, Tip of the Mitt Watershed Council, National Wildlife Federation, Michigan United Conservation Clubs, and various members of the Michigan legislature, as well as the Michigan Departments of Environmental Quality and Natural Resources. *Id.* at 60-61.

⁵¹ *Id.* at 63.

⁵² *Id.*

⁵³ See, e.g., *Hilt v. Weber*, 233 N.W. 159 (Mich. 1930); *Nedtweg v. Wallace*, 208 N.W. 51 (Mich. 1926).

⁵⁴ *Glass*, 703 N.W.2d at 61-63.

above the water's edge; and that neither Glass nor any other member of the public had a right to traverse the shore above the water's edge.⁵⁵

The Michigan Supreme Court via a 5-2 decision reversed, holding that the public trust doctrine provides Glass and other members of the public with the right to walk along the shore of the Great Lakes up to the ordinary high water mark.⁵⁶ The Court ruled that the State of Michigan has a sovereign obligation to protect and preserve the waters of the Great Lakes and the land beneath them for the public, and that the state serves as the trustee of public rights in the Great Lakes for fishing, hunting, and boating for commerce or pleasure.⁵⁷ Further, the Court made clear that the geographic scope of the public's rights was not necessarily co-extensive with the boundary between publicly and privately owned land. Although the state has authority to convey title to lands underlying the Great Lakes to private parties (*jus privatum*), the private party takes such property subject to the public trust (*jus publicum*).⁵⁸

Noting that when applying the public trust doctrine to oceans courts traditionally have held that the public's rights extend up to the ordinary high water mark,⁵⁹ the Court acknowledged that the term "ordinary high water mark" has a less obvious meaning when applied to non-tidal waters like the Great Lakes.⁶⁰ Nevertheless, because the levels of the Great Lakes fluctuate, the Court reasoned that the public trust should similarly extend to the shores of the Great Lakes that are sometimes submerged, and the Court borrowed Wisconsin's definition of ordinary high water mark: the point on the shore up to which the presence of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics.⁶¹

The Michigan Supreme Court went on to hold that walking along the shore between the ordinary high water mark and the water's edge was a protected public trust activity. The traditionally articulated rights protected by the public trust doctrine in Michigan are fishing, hunting, and navigation for commerce or pleasure. Reasoning that the public must be able to walk below the ordinary high water mark in order to engage in such protected activities, the Court held that the right to walk along the shore below the high water mark likewise is protected by the public trust.⁶² The Court concluded with two caveats: the public trust doctrine does not protect every public use of private land below the ordinary high water mark, and exercise of protected public rights remains subject to regulation.⁶³

⁵⁵ *Id.* at 63. See also *Glass v. Goeckel*, 683 N.W.2d 719 (Mich. Ct. App. 2004) (court of appeals opinion).

⁵⁶ *Glass*, 703 N.W.2d at 62.

⁵⁷ *Id.* at 64-65.

⁵⁸ *Id.* at 64-66 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)).

⁵⁹ *Id.* at 68.

⁶⁰ *Id.* at 71.

⁶¹ *Id.* at 71-72 (quoting *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914)).

⁶² *Id.* at 74.

⁶³ *Id.* at 75.

The dissenting justices did not dispute the existence of the public trust with respect to the Great Lakes and its underlying lands, but urged that the public trust geographically extended only to the water's edge.⁶⁴ Both dissenters agreed, though, that the public trust afforded the public the right to walk along the shore below the water's edge, even if the shore were privately owned.⁶⁵

B. Ohio

In Ohio, by contrast, in *Merrill v. Ohio Department of Natural Resources*⁶⁶ the Ohio court of appeals in August 2009 held that the public has no right to use the shore of Lake Erie above the water's edge, because the public trust ends at the water's edge.

The *Merrill* case was initiated by lakefront property owners along Lake Erie, challenging an Ohio Department of Natural Resources policy requiring the littoral owners to obtain leases if they wanted to build structures (e.g., docks, wharves, piers) below the ordinary high water mark, even where the littoral owners' deeds indicated their title extended to the water's edge or lower.⁶⁷ The state claimed it owns the beds of Lake Erie and the shore up to the ordinary high water mark, urging that Ohio had held such land in trust since it became a state in 1803.⁶⁸ Plaintiffs sought a declaration that they own the shore below the ordinary high water mark, as described in their deeds, and furthermore that the public trust extends no further landward than the water's edge.⁶⁹ Environmental groups intervened as defendants, urging that their members have rights to make recreational use of the shore up to the ordinary high water mark pursuant to the public trust doctrine.⁷⁰

Ruling on cross motions for summary judgment, the Lake County Court of Common Pleas addressed the geographic scope of the public trust doctrine and the rights of the public, as well as the rights and duties of the state and littoral owners,

⁶⁴ *Id.* at 79-81 (Young, J., concurring in part and dissenting in part); *id.* at 81-107 (Markman, J., concurring in part and dissenting in part).

⁶⁵ *Id.* at 85 & n.10 (Markman, J., concurring in part and dissenting in part). Indeed, the dissenters seemingly would permit the public to walk on "wet sands" even slightly above the actual water's edge, because they are infused with water and constitute submerged lands. *Id.* at 101. Justice Young joined in most of Justice Markman's opinion. *Id.* at 81 (Young, J., concurring in part and dissenting in part).

⁶⁶ State *ex rel.* *Merrill v. Ohio Dep't of Natural Res.*, Nos. 2008-L-007 & 2008-L-008, 2009 WL 2591758 (Ohio Ct. App. Aug. 21, 2009), *notices of appeal filed*, No. 2009-1806 (Ohio Oct. 7, 2009). The Court of Appeals largely affirmed the 2007 decision in the case by the Lake County Court of Common Pleas, State *ex rel.* *Merrill v. Ohio Dep't of Natural Res.*, No. 04CV001080, 2007 WL 4910860 (Ohio Ct. Com. Pl. Dec. 11, 2007) (order granting plaintiffs' motions for partial summary judgment in part and denying defendants' motions for summary judgment).

⁶⁷ *Merrill*, 2009 WL 2591758, ¶¶ 2, 4, 28-30.

⁶⁸ *Id.* ¶ 6. The State of Ohio argued that the OHWM for Lake Erie had been administratively established as 573.4 feet (IGLD 1985) by the U.S. Army Corps of Engineers. *Id.* ¶ 2.

⁶⁹ *Id.* ¶¶ 2-5, 9-14, 24, 28-30.

⁷⁰ *Id.* ¶¶ 16, 46-49.

with respect to the shores of Lake Erie.⁷¹ The trial court held that the boundary line for purposes of title and the public trust is the water's edge, "wherever that moveable boundary may be at any given time."⁷² According to the trial court, the state owns below the water's edge and the littoral owners own above the water's edge; hence the court reformed the deeds and instructed that the state cannot require leases above the water's edge.⁷³ The trial court ruled that the public can boat, fish, and recreate below the water's edge pursuant to the public trust doctrine, but the public has no rights above the water's edge, and the littoral owners can lawfully exclude the public from the exposed shore above the water's edge.⁷⁴

The Ohio Court of Appeals for the Eleventh District, except for the deed reformation, affirmed the common pleas court decision.⁷⁵ Acknowledging that the case was one of first impression in Ohio,⁷⁶ the court of appeals held that the water's edge serves as the line of demarcation between the lands owned in trust by the state underlying Lake Erie and the privately owned lands of the littoral owners.⁷⁷ Looking to language from earlier Ohio Supreme Court cases,⁷⁸ as well as to the term "natural shoreline" in a statute it described as codifying the public trust doctrine,⁷⁹ the court of appeals concluded that the water's edge is the landward boundary for the public trust doctrine along the shore of Lake Erie in Ohio.⁸⁰ The court found the water's

⁷¹ *Id.* ¶¶ 18-31; *Merrill*, 2007 WL 4910860, ¶¶ 250-255.

⁷² *Merrill*, 2009 WL 2591758, ¶ 30; *Merrill*, 2007 WL 4910860, ¶ 243.

⁷³ *Merrill*, 2009 WL 2591758, ¶¶ 28-30; *Merrill*, 2007 WL 4910860, ¶¶ 250-251.

⁷⁴ *Merrill*, 2009 WL 2591758, ¶ 49; *Merrill*, 2007 WL 4910860, ¶¶ 250-252.

⁷⁵ The court of appeals vacated the common pleas court order only insofar as it reformed deeds, ruling that reformation of deeds was not before the trial court and the parties were not afforded the opportunity to argue their positions regarding the issue. *Merrill*, 2009 WL 2591758, ¶ 103. Otherwise, the court of appeals affirmed the common pleas court order. *Id.* ¶ 131. The court of appeals praised the "immensely scholarly opinion of the trial court," attaching it as an appendix to its own opinion. *Id.* ¶ 59.

⁷⁶ *Id.* ¶ 1.

⁷⁷ *Id.* ¶¶ 127-29. Interestingly, the majority in *Merrill* held that the State of Ohio lacked standing to pursue the appeal. *Id.* ¶¶ 41-44. In July 2007, the Ohio Department of Natural Resources, as directed by the governor, abandoned its policy that gave rise to the lawsuit—i.e., requiring Lake Erie littoral owners to lease land below the ordinary high water mark even if the land was within the terms of their deeds. Since "[t]he governor has ordered ODNR to cease those activities that made it a party to the action," the majority ruled that the Ohio Attorney General, who represented the State of Ohio in the case, lacked authority to proceed with the appeal. *Id.* ¶ 44. Because intervenors National Wildlife Federation and Ohio Environmental Council essentially had adopted the state's arguments, see *id.* ¶ 23, the court of appeals decided the appeal on the merits. One of the three judges concurred with the majority on the merits but dissented on the standing issue. *Id.* ¶ 134-36 (Cannon, J., concurring in part, dissenting in part). Both the State of Ohio and the environmental groups have sought review by the Ohio Supreme Court. *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, No. 2009-1806 (Ohio, notices of appeal filed Oct. 7, 2009).

⁷⁸ *Id.* ¶¶ 60-71, 123-27.

⁷⁹ *Id.* ¶ 67 (citing OHIO REV. CODE ANN. §§ 1506.10, 1506.11 (West 2009)).

⁸⁰ *Id.* ¶¶ 127-29.

edge to be synonymous with “shoreline,” which it defined as the line of actual physical contact by the water with the shore, undisturbed and under normal conditions.⁸¹ According to the court, the state owns the lakebed in trust below the water’s edge and the littoral owners own above the water’s edge.⁸² Reasoning that the littoral owner has the right to exclude the public from her property, the court held that the public has no right to use the privately owned shore of Lake Erie above the water’s edge.⁸³

The court of appeals acknowledged that the public trust doctrine affords the public a right to walk along the shore of Lake Erie, but only lakeward of the water’s edge.⁸⁴ That is, a member of the public is entitled to walk in the waters of Lake Erie, but he has no right to walk landward of the water’s edge on privately-owned, exposed shore.⁸⁵

C. The Problem

The Michigan and Ohio cases demonstrate that, when ascertaining the scope and effect of the public trust doctrine with respect to the public’s right to walk the shores of the Great Lakes, there is little consensus regarding approach or result. In the Michigan case, the trial court, the court of appeals, the supreme court majority, and the dissenting justices expressed at least four different viewpoints regarding the application of the public trust to the Great Lakes shores in the context of deciding whether the public had a right to walk along the shore above the water’s edge, with varying results.⁸⁶ The Ohio case reflected yet another approach to the application of the public trust doctrine to the Great Lakes shores, with still another result.⁸⁷

The confusion and controversy over the application of the public trust doctrine to the shores of the Great Lakes, including the public’s right to walk on privately owned land above the water’s edge, certainly is not limited to Michigan and Ohio. In Wisconsin, in the aftermath of Michigan’s *Glass v. Goeckel* decision, apparently many were surprised to learn that the Wisconsin Department of Natural Resources takes the position that, notwithstanding state ownership of the shores of the Great Lakes up to the ordinary high water mark, the public has no right to walk along the shores above the water’s edge because the littoral owner has exclusive right to use the shore between the ordinary high water mark and the water’s edge.⁸⁸ The

⁸¹ *Id.* ¶¶ 97, 127. The appeals court defined “shore” as the area between the high and low water marks. *Id.* ¶ 97.

⁸² *Id.* ¶¶ 127-29.

⁸³ *Id.* ¶ 89.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *Glass v. Goeckel*, 683 N.W.2d 719 (Mich. Ct. App. 2004), *rev’d*, 703 N.W.2d 58 (Mich. 2005).

⁸⁷ State *ex rel. Merrill v. Ohio Dep’t of Natural Res.*, Nos. 2008-L-007 & 2008-L-008, 2009 WL 2591758 (Ohio Ct. App. Aug. 21, 2009).

⁸⁸ See WIS. DEP’T OF NATURAL RES., THE ORDINARY HIGH WATER MARK, <http://dnr.wi.gov/org/water/wm/dsfm/shore/ohwm.htm> (last visited May. 27, 2010); see also Pratt, *supra* note 35, at 246-47. The rule enforced by the Wisconsin DNR is “keep your feet

agency's position is based on a 1923 Wisconsin Supreme Court case.⁸⁹ An editorial in one of Wisconsin's leading newspapers described the situation as "ridiculous" and called for a change in the law to allow the public to walk along the shores of the Great Lakes without the necessity of keeping their feet wet.⁹⁰

A decade ago in Pennsylvania, the Department of Environmental Protection published a Public Access Policy that stated the public had a right of foot access along privately owned shore of Lake Erie in the "public easement area" between the ordinary high and low water marks.⁹¹ However, the department continued to receive many questions regarding the public's right to walk the shore of Lake Erie, and it is not clear whether the policy is still in effect.⁹²

It is vital that the public trust doctrine be applied correctly to the Great Lakes shores. The public trust doctrine tries to strike a balance between the rights of the public to use important natural resources and the rights of littoral landowners to use their property.⁹³ Where the law tips too far in favor of the littoral landowners, important public resources effectively are monopolized by a few. Where the law tilts too far in favor of the public, valuable private property rights get trampled by the many. If the law is uncertain, the public may trespass on or interfere with private property rights by overestimating the public's rights to use the shore (e.g., walking too far from the water's edge, engaging in intrusive non-protected uses). Alternatively, the public may not fully exercise their rights to use the shore, and the state may fail to protect the shore from littoral owners who overestimate their own rights and interfere with the trust resources (e.g., erecting a structure).⁹⁴ Further, the federal government has predicted that global warming may cause nearly a two-foot drop in the average level of the Great Lakes by the end of this century.⁹⁵ As lake levels drop, there is significantly more exposed shore inviting public use. Plus, there is more impetus for littoral owners to construct new development (e.g., wharves) to

wet"—i.e., you can walk the shore, but only below the water's edge. The public trust doctrine regarding the Great Lakes in Wisconsin is discussed in Part V.H *infra*.

⁸⁹ *Doemel v. Jantz*, 193 N.W. 393 (Wis. 1923) (involving Lake Winnebago).

⁹⁰ Ricardo Pimentel, Editorial, *Lake Michigan Beaches: What Is a 'Public Use'?*, MILWAUKEE J. SENTINEL, Apr. 20, 2006, at A16.

⁹¹ See PA. DEP'T OF ENVTL. PROT., PENNSYLVANIA COASTAL ZONE MANAGEMENT PROGRAM HIGHLIGHTS 2000-2001, available at <http://www.dep.state.pa.us/dep/subject/advoun/czac/CZAC00hilites.html> (last visited May. 27 2010).

⁹² PA. DEP'T OF ENVTL. PROT., PENNSYLVANIA COASTAL ZONE MANAGEMENT PROGRAM HIGHLIGHTS 2001-2002, at 5-6 (Jul. 17, 2002), available at <http://www.dep.state.pa.us/dep/subject/advoun/czac/2002/czac0102hilites.pdf> (last visited May. 27, 2010).

⁹³ See Smith & Sweeney, *supra* note 13, at 309; Thompson, *supra* note 7, at 59-60.

⁹⁴ See Hannah Jacobs Wiseman, *Notice and Expectation Under Bounded Uncertainty: Defining Evolving Property Rights Boundaries Through Public Trust and Takings*, 21 TUL. ENVTL. L.J. 233 (2008) (describing similar problems for the state, public, and private owners due to uncertainty regarding the public trust doctrine).

⁹⁵ U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 119 (Karl et al. eds., 2009) (higher temperatures mean greater evaporation). Due to the slope of the shore in many places along the Great Lakes, a one-foot drop in water level can mean a significant increase in newly exposed shore. *Id.*

access the more distant water, and there is more room on the shore for them to develop, all of which could interfere with public use of the shore. Accordingly, a principled legal approach that leads to the proper and predictable application of the public trust doctrine along the Great Lakes shores is critical.

IV. THE PROPOSED FRAMEWORK

Public trust law is not uniform throughout the Great Lakes region because, at least in part, the scope of the doctrine in each state is a function of that individual state's laws. Indeed, as discussed in more detail below, the Supreme Court has stated that "the individual [s]tates have the authority to define the limits of the lands held in public trust."⁹⁶ Nevertheless, as also discussed below, states are not unfettered in establishing the scope of the public trust doctrine. This part of the Article argues that the scope of the public trust doctrine with respect to the Great Lakes shores in each state should be determined by using a uniform analytical framework, based on the core principles of the public trust doctrine. The dispute regarding the public's right to walk along the shores of the Great Lakes serves as the focal point for discussion of my proposed framework.

The public trust doctrine, as mentioned above, traditionally has applied to navigable waters and their underlying lands, to protect their use by the public for navigation, fishing, and commerce.⁹⁷ But, as reflected by *Glass v. Goeckel* in Michigan and *Merrill v. Ohio Department of Natural Resources* in Ohio, whether the public trust doctrine provides the public a right to walk along the shore of the Great Lakes above the water's edge is hotly disputed. Using my proposed framework, resolution of the dispute in each state requires an examination of two questions: (1) Does the public trust geographically extend to Great Lakes shores above the water's edge? (2) Is walking the shore a public use protected by the public trust doctrine?

A. Geographic Scope

Preliminarily, it is important to emphasize that the scope of the public trust doctrine does not depend on whether the land is currently owned by the state. In general, the beds of the Great Lakes are owned by the states, not private parties.⁹⁸ The landward boundary between state-owned beds and privately owned uplands differs from state to state. As discussed in Part V below, some states recognize ownership in the state up to the high water mark on the shore,⁹⁹ while other states own only up to the low water mark.¹⁰⁰ The boundary for public trust purposes, though, need not be the same as the boundary for title purposes.

⁹⁶ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988); *see also Shively v. Bowlby*, 152 U.S. 1, 40 (1894).

⁹⁷ *See Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436-37, 452 (1892); *SAX ET AL.*, *supra* note 1, at 590.

⁹⁸ *See infra* Part V.

⁹⁹ For example, Indiana and Wisconsin recognize ownership up to the high water mark. *See infra* Parts V.D. & V.H.

¹⁰⁰ For example, Pennsylvania and Minnesota recognize ownership only up to the low water mark. *See infra* Parts V.G & V.E.

English common law centuries ago established that the public trust doctrine can apply to lands no longer owned by the crown. Differentiating between the *jus privatum* and the *jus publicum*, English common law made clear that although the crown could transfer title to lands underlying navigable waters to a private party, the crown continues to hold the land in trust for the people to use.¹⁰¹ The U.S. Supreme Court in the Nineteenth Century likewise recognized that while the states could transfer title to lands underlying navigable waters to a private party, the lands remained subject to the public trust for the people to use for purposes including navigation and fishing.¹⁰²

1. The Starting Point

But what defines the landward boundary of the lands underlying navigable waters subject to the public trust doctrine, if not state ownership? In my framework, the starting point for the analysis is the lands that passed to the Great Lakes states in trust when they first became states. As previously mentioned, lands subject to the public trust doctrine underlying navigable waters have both *jus privatum* and *jus publicum* interests. While the *jus privatum* can be transferred by the government to a private party, the *jus publicum* remains with the government to hold in trust for the people. That the land was burdened with the *jus publicum* before the private party acquired the *jus privatum* is what makes the public trust doctrine such an effective shield against a takings claim. If the private title holder claims her property has been taken because she is forced to allow the public to use the property (or because the state restricts her use of the property in order to preserve a protected public use), the state can urge that there has been no taking because her property always has been subject to the public's right to use the land and thus there has been no change in her private property rights in the land.¹⁰³ Hence, to avoid any argument that by recognizing the public trust doctrine the state is taking private property without compensation, the starting point for ascertaining the current scope of the public trust doctrine in a state should begin with those lands that the state originally held in trust.¹⁰⁴

¹⁰¹ Hale, *supra* note 11; see *Shively*, 152 U.S. at 11-13.

¹⁰² *Shively*, 152 U.S. at 56; *Ill. Cent.*, 146 U.S. at 452-54.

¹⁰³ See, e.g., Kleinsasser, *supra* note 33, at 437-38; Lazarus, *supra* note 16, at 649; Klass, *supra* note 6, at 739-42. It is more problematic and controversial to impose anew a *jus publicum* interest on privately owned land that was never before subject to this public interest. See James Huffman, Phillips Petroleum Co. v. Mississippi: *A Hidden Victory for Private Property?*, 19 *Env'tl. L. Rptr.* 10051, 10055-56 (1989) (arguing that recognition of public trust in properties beyond what states originally owned constitutes a taking) [hereinafter, Huffman, *Hidden Victory*]. However, the public trust doctrine is dynamic, see *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) ("sufficiently flexible to encompass changing public needs"), and the U.S. Supreme Court has recognized that background principles can evolve for purposes of takings analysis, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) ("changed circumstances or new knowledge may make what was previously permissible no longer so").

¹⁰⁴ Where the land is now owned by the state, however, the state could choose to apply the public trust doctrine to lands not originally subject to the public trust. For example, in some states, state-owned parks can be subject to the public trust. See, e.g., *Paepcke v. Pub. Bldg. Comm'n*, 263 N.E.2d 11 (Ill. 1970); *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050 (N.Y. 2001).

a. The Equal Footing Doctrine

Identifying those lands that originally passed to a state in trust implicates the equal footing doctrine. Both the equal footing doctrine and the public trust doctrine are grounded in the importance of navigable waters and the lands underlying them, and several of the same Supreme Court cases have shaped and linked both doctrines.¹⁰⁵ The equal footing doctrine provides that each new state that enters the Union receives title to the lands underlying navigable and tidal waters within its boundaries, absent a clear pre-statehood grant or reservation by the federal government.¹⁰⁶ The equal footing doctrine originated in *Pollard v. Hagan*,¹⁰⁷ in which the Court held that Alabama had obtained title to the lands underlying tidal waters within its borders when it was admitted to the Union. The *Pollard* Court based its decision, in part, upon the statehood clause of the U.S. Constitution¹⁰⁸ and the terms of the Northwest Ordinance of 1787, which provided that new states would enter the Union “on an equal footing with the original States.”¹⁰⁹ The Supreme Court earlier, in *Martin v. Waddell’s Lessee*,¹¹⁰ had held that the original thirteen states acquired from the crown upon the American Revolution lands underlying tidal waters, which the crown had held in trust for use by the people for navigation and fishing. Due to the importance of navigable waters, the *Pollard* Court held that for Alabama to enter the Union on an equal sovereign footing with the original states, it must have received ownership of the lands underlying such tidal waters when it became a state; hence the Court ruled that the federal government had no power to transfer land underlying tidal water in Alabama post-statehood since the land already

¹⁰⁵ See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Shively*, 152 U.S. 1. A number of commentators have noted a strong link between the equal footing doctrine and the public trust doctrine. See, e.g., Huffman, *Hidden Victory*, *supra* note 103, at 10053-56; Rasband, *supra* note 10; Wilkinson, *supra* note 25, at 426-27.

¹⁰⁶ See, e.g., *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987).

¹⁰⁷ *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

¹⁰⁸ U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union . . .”).

¹⁰⁹ Northwest Ordinance of 1787, ch. 8, art. V, 1 STAT. 50, 53 (1789). The Northwest Ordinance further specified that “[t]he navigable waters leading into the Mississippi and St. Lawrence, . . . shall be common highways, and forever free.” Northwest Ordinance of 1787, ch. 8, art. IV, 1 STAT. 50, 52 (1789). The Northwest Ordinance created the Northwest Territory from lands northwest of the Ohio River and east of the Mississippi River. The original states relinquished their claims to the lands in the Northwest Territory to the federal government, and the Northwest Ordinance set forth the terms and process by which new states would be created from the Northwest Territory. Originally enacted in 1787 pursuant to the Articles of Confederation, the Northwest Ordinance was re-adopted by Congress following ratification of the Constitution. See Northwest Ordinance of 1787, ch. 8, 1 STAT. 50-53 (1789); Rasband, *supra* note 10, at 31-33.

¹¹⁰ *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367 (1842). The *Illinois Central* Court relied heavily upon *Martin v. Waddell’s Lessee* and an earlier New Jersey Supreme Court case, *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821), to support its finding that Illinois held the beds of Lake Michigan in trust. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 456-57 (1892).

had passed to the state.¹¹¹ It is now well settled that the equal footing doctrine applies to all new states entering the Union,¹¹² and that new states received title to lands underlying waters actually navigable as well as those subject to the ebb and flow of tides.¹¹³

The Court in *Shively v. Bowlby*,¹¹⁴ correcting dicta in *Pollard*, clarified that states received title to lands underlying navigable waters upon entering the Union, absent a clear pre-statehood grant or reservation by the federal government. The *Shively* Court was faced with the question of whether the United States had made a pre-statehood grant of land below the high water mark of the Columbia River to plaintiff, or whether such land had passed to the defendant State of Oregon when it entered the Union. Re-affirming the equal footing doctrine, the Court held that title to the lands underlying navigable waters passed to newly admitted states, absent a clear pre-statehood grant or reservation by the federal government of such lands.¹¹⁵ The Court found no such clear pre-statehood grant in this case and ruled the State of Oregon owned the riverbed.¹¹⁶ Importantly, the Court ruled that, prior to Oregon becoming a state, the federal government held the lands underlying navigable waters in trust for the future state. Contrary to *Pollard* dicta, the Court ruled that the federal government had the power to make pre-statehood grants of land below the high water mark of navigable waters, at least under certain exceptional circumstances.¹¹⁷ The Court, though, found that in light of the public trust interest in such lands and navigable waters—for commerce, navigation, and fishing—the policy of the United States had been not to make such pre-statehood grants.¹¹⁸ Since then, only rarely have pre-statehood grants or reservations by the federal government been found to defeat title passing to the new states under the equal footing doctrine for lands underlying navigable waters.¹¹⁹

¹¹¹ *Pollard*, 44 U.S. at 230.

¹¹² Although the Northwest Ordinance of 1787 applied by its terms only to those states formed from the Northwest Territory (i.e., Indiana, Illinois, Ohio, Michigan, and Wisconsin), its “equal footing” language became a model for the enabling acts of all new states. See SLADE ET AL., *supra* note 5, at 19.

¹¹³ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Barney v. City of Keokuk*, 94 U.S. 324 (1876).

¹¹⁴ *Shively v. Bowlby*, 152 U.S. 1 (1894).

¹¹⁵ *Id.* at 26, 48, 57-58.

¹¹⁶ *Id.* at 58.

¹¹⁷ The Court stated:

[C]ongress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

Id. at 48.

¹¹⁸ *Id.* at 48-49.

¹¹⁹ See *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197-98 (1987) (general rule); *Idaho v. United States*, 533 U.S. 262 (2001) (rare exception).

Perhaps even more importantly, the *Shively* Court identified a further link between the public trust doctrine and the lands underlying navigable waters, which the states received pursuant to the equal footing doctrine. Acknowledging that states could choose to cede title to lands underlying navigable waters to private parties, the Court also recognized that the states retained a trust obligation for those lands and the public still had rights to make use of those lands, even where the states no longer owned those lands. The *Shively* Court traced the history of the public trust doctrine, and the concepts of *jus publicum* and *jus privatum*, from England to the United States, and the Court noted that in states where title was privately owned to the low water mark, the public continued to have rights to navigate and fish up to the high water mark.¹²⁰ Although the holding in *Shively* was based on the equal footing doctrine, the Supreme Court has termed *Shively* the “seminal case in American public trust jurisprudence.”¹²¹

More recently, the Court re-affirmed the linkage between lands passing pursuant to the equal footing doctrine and the public trust doctrine. In *Phillips Petroleum Co. v. Mississippi*,¹²² the Court held that the State of Mississippi received title to tidelands pursuant to the equal footing doctrine since they were subject to the ebb and flow, even though the waters overlying the tidelands were not actually navigable. The Court found that Mississippi had acquired title to the tidelands when it entered the Union, continued to hold the tidelands in trust thereafter, had not relinquished title to the tidelands, and hence was still the owner of the tidelands— notwithstanding that private owners had held record title and paid taxes on the tidelands for decades.¹²³ In so ruling, the Court acknowledged that although some states have chosen to recognize private title to such tidelands, those lands nevertheless had passed to the states pursuant to the equal footing doctrine, and the public still had rights to use those lands for protected uses under the public trust doctrine.¹²⁴

So, what does the equal footing doctrine instruct regarding the lands underlying navigable waters received in trust by the states when they joined the Union? First,

¹²⁰ *Shively*, 152 U.S. at 11-25.

¹²¹ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988).

¹²² *Id.*

¹²³ *Id.* at 483-84 & n.12. Mississippi wanted to lease the tidelands to another private party for mineral exploration. Because mineral exploration is not a protected use under the public trust doctrine, the state needed to claim ownership of the tidelands, whereupon it could lease them for mineral development as a permissible public purpose consistent with the public trust doctrine. The Court held that whether events subsequent to statehood had transferred title to the record owners was a matter of state law, and the Court upheld the Mississippi Supreme Court’s determination that no such transfer had occurred under Mississippi law. *Id.* at 483-85.

¹²⁴ *Id.* at 483-84 & n.12. Commentators, even those hostile to the public trust doctrine, have recognized the link between the lands that passed to the states pursuant to the equal footing doctrine and the lands the states hold in trust for use by the people. Huffman, *Hidden Victory*, *supra* note 103, at 10053-56 (equating geographic scope of public trust doctrine to lands states acquired pursuant to the equal footing doctrine, and arguing states cannot extend public trust doctrine to lands not previously in state ownership). See also Sylvia Quast & Michael Mantell, *Role of the States*, in *OCEAN AND COASTAL LAW AND POLICY* 67, 69 (Donald C. Baur, Tim Eichenberg & Michael Sutton eds., 2008); Wilkinson, *supra* note 25, at 426-27.

navigable waters for purposes of the equal footing doctrine mean waters that were navigable in fact, or were subject to the ebb and flow of the tides, at the time of the state's admission.¹²⁵ Waters are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel.¹²⁶ The Great Lakes unquestionably are navigable waters for purposes of the equal footing doctrine.

Second, my research indicates that the boundary for lands underlying navigable waters for purposes of the equal footing doctrine is, as a matter of federal law, the "ordinary high water mark" (OHWM). That is, the lands underlying navigable waters that passed from the federal government to each new state at the time of admission extended to the OHWM.

Multiple Supreme Court cases teach that the boundary between the underlying lands passed to the state pursuant to the equal footing doctrine and the uplands retained by the federal government is the OHWM.¹²⁷ For example, the *Pollard* Court held that Alabama received title to all lands under navigable waters up to the "usual high water-mark,"¹²⁸ and the federal government had no power to grant such lands following Alabama's admission to the Union.¹²⁹ In *Phillips*, the Court ruled that pursuant to the equal footing doctrine, Mississippi acquired title upon statehood to all tidelands inland to the mean high water mark,¹³⁰ which the state then held in trust pursuant to the public trust doctrine. In *Shively*, Oregon acquired title to lands under tidal waters up to the high water mark under the equal footing doctrine, and title to these lands passed in trust to the states.¹³¹ In so ruling, the Court noted that English common law recognized title in the crown up to the high water mark and that lands below the high water mark are incapable of cultivation or improvement in the same manner as uplands.¹³² While many of its decisions involved the shores of tidal waters, the Court also has held that the boundary for lands passing pursuant to the equal footing doctrine underlying navigable freshwaters is the OHWM.¹³³ For

¹²⁵ *Phillips Petroleum*, 484 U.S. at 476 (waters subject to ebb and flow of tides passed to states pursuant to equal footing doctrine, irrespective that not navigable in fact); *Utah v. United States*, 403 U.S. 9, 10 (1971) (whether lake was navigable in fact under federal law determines whether lakebed passed to state upon admission pursuant to equal footing doctrine).

¹²⁶ *Utah*, 403 U.S. at 10; *The Daniel Ball*, 77 U.S. 557, 563 (1870). If a water body is navigable, that the water is too shallow near shore to float a boat does not render that portion of the water body non-navigable. See *Phillips Petroleum*, 484 U.S. at 480.

¹²⁷ See, e.g., *Phillips Petroleum*, 484 U.S. 469; *Shively v. Bowlby*, 152 U.S. 1 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845).

¹²⁸ *Pollard*, 44 U.S. at 220.

¹²⁹ *Id.* at 230. Indeed, the *Pollard* Court described the lands passing to the states as "[t]he shores of navigable waters, and the soils under them." *Id.*

¹³⁰ *Phillips Petroleum*, 484 U.S. at 473.

¹³¹ *Shively*, 152 U.S. at 26, 51, 57-58.

¹³² *Id.* at 57-58.

example, in *Barney v. City of Keokuk*,¹³⁴ the Court held that Iowa took title below the OHWM along the Mississippi River when it was admitted to the Union, relying upon the common law and the Court's decisions in *Martin v. Waddell's Lessee* and *Pollard*.¹³⁵ The Court went on to explain that, even if a state permitted the shore below OHWM to be privately owned, it would still be subject to public use.¹³⁶

The equal footing doctrine and public trust doctrine cases in the Supreme Court, although they frequently use the term "high water mark" or "ordinary high water mark" in describing the boundary, do not provide much detail regarding how to determine the location of such mark on the shore.¹³⁷ However, other authorities fill in the details. In England at common law, the boundary between uplands privately owned and tidelands owned by the crown was the medium high tide line.¹³⁸ That is, the shore "over which the daily tides ebb and flow," "the land between ordinary high and low water mark[s]," was owned by the crown.¹³⁹ When determining the boundary of a federal grant of uplands along tidal waters, the federal government uses the mean high tide line, determined as the average of all high tides over a period of 18.6 years.¹⁴⁰

For navigable waters not impacted by tides, early American common law generally defined OHWM as the point on the shore where the presence and action of the water are so common and usual as to leave a distinct mark.¹⁴¹ As with oceans,

¹³³ See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997) (beds of navigable lake below high water mark passed in trust to state pursuant to equal footing doctrine); *Montana v. United States*, 450 U.S. 544, 551 (1981) (beds of navigable river below high water mark were not reserved by Congress via treaty from passing to state upon admission).

¹³⁴ *Barney v. City of Keokuk*, 94 U.S. 324 (1876).

¹³⁵ *Id.* at 337-38. The Court acknowledged that some states had followed the English common law rule and recognized private ownership of beds of actually navigable, non-tidal rivers. But the Court emphasized that while such states could "choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity," the beds and shores of navigable rivers "properly belongs to the States by their inherent sovereignty." *Id.* at 338. The Court also noted that the federal government observed the high water mark when making surveys and grants. *Id.*

¹³⁶ *Id.* at 339. See Huffman, *Takings Clause*, *supra* note 33, at 185-86 ("When states joined the Union, they acquired title to the submerged lands between the high water marks on navigable waters pursuant to the equal footing doctrine. Subject to the limits of the public trust doctrine, the states were then free to dispose of the submerged lands or to recognize a different border between the publicly owned submerged lands and private riparian lands. . . . Whether the private riparian's title extends to the high or low water mark, the rights associated with that title, including the right to exclude others, have always been subject to the same public rights that limit the rights of water users.").

¹³⁷ See FLUSHMAN, *supra* note 45, at 301 ("[T]he United States Supreme Court has not given the term 'ordinary high-water mark' any precise meaning.").

¹³⁸ See *Attorney General v. Chambers*, 43 Eng. Rep. 486 (1854); see also *Borax Consol. Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935).

¹³⁹ *Borax*, 296 U.S. at 22-23.

¹⁴⁰ See *id.* at 27.

¹⁴¹ See *Howard v. Ingersoll*, 54 U.S. 381, 427 (1852) (Curtis, J., concurring); 2 HENRY FARNHAM, *THE LAW OF WATER & WATER RIGHTS* § 417, at 1461 (1904); FLUSHMAN, *supra*

OHWM along shores of non-tidal waters refers to the highest level of the water under normal conditions, not the highest level reached during extraordinary conditions such as floods.¹⁴² OHWM is a visible mark, such as the line where terrestrial vegetation ends or the soil changes character.¹⁴³

While certain states recognized private title below the OHWM,¹⁴⁴ it does not change the fact that the lands underlying those navigable waters up to the OHWM passed to the states pursuant to the equal footing doctrine. As the Court explained in *Shively*, the “title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states.”¹⁴⁵ However, the initial determination of the boundary, which passed to the state pursuant to the equal footing doctrine, is a matter of federal law.¹⁴⁶ Hence, federal law, not state law, governs what the states acquired pursuant to the equal footing doctrine.¹⁴⁷ Indeed, it would be somewhat of a misnomer if the equal footing doctrine provided that some states received lands up to the OHWM upon admission to the Union while other states did not.

The conclusion that the OHWM serves as the boundary under federal law for lands underlying navigable waters which passed to states pursuant to the equal footing doctrine is buttressed by the fact that the OHWM also serves as the boundary along navigable waters under federal law in other contexts. The boundary between uplands and state-owned tidelands or river beds for purposes of a federal grant is the OHWM as a matter of federal law.¹⁴⁸ The federal Submerged Lands Act confirmed that the federal government has no claim to lands underlying non-tidal navigable waters below the OHWM.¹⁴⁹

note 45, at § 7.10; A. DAN TARLOCK, *LAW OF WATER RIGHTS & RESOURCES* § 3.09(3)(d) (1988).

¹⁴² Legal Institute of the Great Lakes, *Public Trust Doctrine in Ohio* 28 (1999).

¹⁴³ See *Howard*, 54 U.S. at 427; 2 FARNHAM, *supra* note 141, at 1461 (1904); TARLOCK, *supra* note 141, at § 3.09(3)(d); 1 WATERS AND WATER RIGHTS § 6.03(a)(2), at 175-77 (Robert E. Beck ed., 1991). Where the nature of the shore is such that a line may not be visible (*e.g.*, a rocky bluff), other information can be used to help determine OHWM. See *State v. Trudeau*, 408 N.W.2d 337 (Wis. 1987) (compare to other places on the shore of the same lake); FLUSHMAN, *supra* note 45, at § 8.7.2 (lake level statistical data).

¹⁴⁴ A few coastal states recognize title in the state for tidelands only up to the low water mark, and several states follow the so-called English rule by which the beds of navigable rivers are owned by riparians rather than the state. See *Shively v. Bowlby*, 152 U.S. 1, 18-26, 31 (1894); SLADE ET AL., *supra* note 5, at 70-72.

¹⁴⁵ *Shively*, 152 U.S. at 40.

¹⁴⁶ *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977) (boundary of lands underlying navigable river which passed to state pursuant to equal footing doctrine is determined by federal law, but federal law does not govern title issues for such lands following a state's admission).

¹⁴⁷ *Id.*; see also *Utah v. United States*, 403 U.S. 9, 10 (1971).

¹⁴⁸ See *Oregon*, 429 U.S. 363 (riverbed); *Borax Consol. Ltd. v. City of Los Angeles*, 296 U.S. 10 (tidelands).

¹⁴⁹ 43 U.S.C. §§ 1301(a), 1311(a) (2006). The Submerged Lands Act was enacted in response to *United States v. California*, 332 U.S. 19 (1947), and relinquishes federal claims to

Further, the boundary recognized for the federal navigational servitude is the OHWM. The federal navigational servitude, premised on Congress's Commerce Clause power to regulate navigable waters,¹⁵⁰ permits the federal government to displace or destroy property rights, which would ordinarily be compensable as takings of private property without just compensation, in order to promote navigability.¹⁵¹ As a matter of federal law, the navigational servitude extends to the OHWM along navigable waters. Although there may not be one uniform definition of OHWM for purposes of the navigational servitude, it essentially means the point on the shore where the water stands sufficiently long to destroy vegetation below it or otherwise create a visible line.¹⁵²

Moreover, that some states did not recognize title in the states up to the OHWM certainly does not mean that the trust obligations passed to the states upon their admission did not extend to the OHWM. As discussed above, the federal government held the lands underlying navigable waters in trust for future states. Consistent with the concepts of *jus privatum* and *jus publicum*, a state could choose to relinquish title below the OHWM to a private party. But the state could not simply relinquish the trust obligation inherited from the federal government, and the state continued to hold the shores up to the OHWM in trust, notwithstanding title to those shores were held by the riparian or littoral landowner.¹⁵³

Lastly, as previously noted, the equal footing doctrine provides that land underlying navigable waters did not pass to the state where the federal government made a clear, pre-statehood grant or reservation of such underlying land. Such pre-statehood grants or reservations must be abundantly clear, and only rarely has the federal government actually made such a pre-statehood grant or reservation of lands below the OHWM of navigable waters.¹⁵⁴ Theoretically, though, if the federal

title to lands beneath navigable waters, including the Great Lakes to the international border. 43 U.S.C. §§ 1311, 1312; *see also* Quast & Mantell, *supra* note 124, at 69.

¹⁵⁰ *See* U.S. CONST. art. I, § 8.

¹⁵¹ *See* SAX ET AL., *supra* note 1, at 540. Navigable waters for purposes of the navigational servitude are defined similarly, but not identically, to navigable waters under the equal footing doctrine. The former, sometimes referred to as navigable-in-fact, depends on whether the waterway previously, presently, or in the future was/is/will be capable of sustaining commerce with reasonable improvements. The latter, sometimes referred to as navigable-for-title, depends on whether the waterway in its natural condition was capable of being used for commerce at the time of statehood by then customary modes of transport. *See* JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* 832 (2004). The immunity from takings claims afforded the federal government by the navigational servitude is similar to the takings immunity provided to states by the public trust doctrine. *Id.* at 833.

¹⁵² *See* Gollatee v. Harrell, 731 F. Supp. 453, 461 (S.D. Ala. 1989).

¹⁵³ *See* Huffman, *Hidden Victory*, *supra* note 103, at 10055 n.46 ("The public trust doctrine would justify public rights in privately owned submerged lands where those lands were previously held by the state and were alienated subject to the public trust. Thus the public trust applies to private lands between the low and high water marks on navigable waters because those lands were part of what the state acquired at the time of statehood.").

¹⁵⁴ *See* Utah Div. of State Lands v. United States, 482 U.S. 193, 197-98 (1987); Montana v. United States, 450 U.S. 544, 552 (1981). "[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless

government made a grant of land below the OHWM along the Great Lakes to a private party before that state was admitted to the Union, the land subject to the federal grant would be privately owned and title would not pass into the state's hands pursuant to the equal footing doctrine. Even in those circumstances, however, the land below OHWM that the private party received via a pre-statehood federal grant still should have been within the scope of the public trust doctrine at the time the state was admitted to the Union. Recall that pre-statehood, the federal government held those lands underlying navigable waters in trust, just as the crown previously had held such lands in trust. When the federal government made its pre-statehood grant to a private party, only the *jus privatum* should have been transferred; the *jus publicum* should have remained with the federal government, consistent with its trust obligation. Therefore, when the state entered the Union, the *jus publicum* in such land underlying navigable waters would have passed to the state, which then continued to hold the land in trust pursuant to the public trust doctrine, irrespective that the state never received title to such land.¹⁵⁵

b. The Original States

Two Great Lakes states, New York and Pennsylvania, were among the original thirteen states, and hence they were not subject to the equal footing doctrine applicable to newly admitted states.¹⁵⁶ Although lands underlying navigable waters did not pass from the federal government to the original states, it nevertheless is my conclusion that the original states received lands underlying navigable waters, including the Great Lakes, in trust when they became states.

As discussed above, in England at common law, the crown owned the lands underlying navigable waters in trust for the people up to the ordinary high water mark.¹⁵⁷ In *Martin v. Waddell's Lessee*,¹⁵⁸ the U.S. Supreme Court held that the crown's interests in the tidelands off New Jersey passed to the state upon the American Revolution, thus making the state the owner in trust of the tidelands below the ordinary high water mark. Although a few of the original states recognized title for oceanfront landowners down to the low water mark of tidal waters, the Supreme Court nevertheless observed that the privately owned shore between low and high water mark was subject to the public's use for navigation and fishing.¹⁵⁹ That is, although *jus privatum* in tidelands may have been transferred to private parties below OHWM, the *jus publicum* remained with the state in trust up to OHWM.¹⁶⁰

the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

¹⁵⁵ See *Hogg v. Beerman*, 41 Ohio St. 81 (1884) (finding that even if there had been an express pre-1803 grant of a parcel under Lake Erie to a private party by Connecticut that was authorized by the federal government, the grant was subject to the public's rights to navigate and fish). But see *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198 (1984) (federal patent pursuant to treaty obligation extinguished public trust easement).

¹⁵⁶ SLADE ET AL., *supra* note 5, at 18.

¹⁵⁷ See *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

¹⁵⁸ *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842).

¹⁵⁹ *Phillips Petroleum*, 484 U.S. at 483-84 & n.12; *Shively*, 152 U.S. at 18-26.

¹⁶⁰ See *Shively*, 152 U.S. at 18-26, 57; SLADE ET AL., *supra* note 5, at 70.

The analysis becomes somewhat more complicated in the original states, however, when focusing on non-tidal waters. In England, with few exceptions, only tidal waters were actually navigable, and therefore tidal waters and navigable waters were synonymous terms under English common law; accordingly, rivers above the ebb and flow of the tides were not viewed as navigable waters and their beds were privately owned.¹⁶¹ In America, some jurisdictions followed the so-called English rule of title and did not recognize state ownership of the beds of non-tidal waters, even though such rivers were actually navigable.¹⁶² Although Pennsylvania rejected the so-called English rule and recognized title in the state for lands underlying actually navigable rivers,¹⁶³ New York followed the English rule in part: most actually navigable rivers in New York were deemed non-navigable for purposes of title, and their beds became privately owned.¹⁶⁴ Hence, in contrast to the new states subject to the equal footing doctrine, it is not as easy to say that the original states received title to lands underlying all non-tidal, navigable-in-fact waters at the time of the Revolution. Nevertheless, in both New York and Pennsylvania, the state apparently has always owned the lands under the Great Lakes.¹⁶⁵

Regardless of title, however, it is fair to conclude that the starting point for purposes of the geographic boundary of the public trust doctrine along the Great Lakes shores in New York and Pennsylvania should be the OHWM, just as it is for the other Great Lakes states. First, the Supreme Court in *Illinois Central* made clear that the limitation of navigability to tidal waters, as in England, was inapplicable to the United States for purposes of the public trust doctrine, and hence ruled that the Great Lakes and their underlying lands were subject to the public trust doctrine.¹⁶⁶ Second, the Supreme Court has instructed, albeit in dicta, that just as the lands along tidal waters are owned in trust by the states up to the high water mark, the same rule applies to the Great Lakes, “which are treated as inland seas.”¹⁶⁷ Third, since the equal footing doctrine provides that the new states received lands underlying all navigable waters up to the OHWM in order to be on equal sovereign footing with the original states,¹⁶⁸ it would be odd to conclude that the original states themselves did not have the same sovereign rights and duties, including the public trust doctrine, up to the OHWM along the Great Lakes. Fourth, as discussed in Part V below,

¹⁶¹ See *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-55 (1851).

¹⁶² See *Shively*, 152 U.S. at 31.

¹⁶³ *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810). In Pennsylvania, the state owns up to the low water mark, but the riparian’s title between the low and high water marks is subordinate to the public trust. See, e.g., *Fulmer v. Williams*, 15 A. 726 (Pa. 1888); see also *infra* Part V.G.

¹⁶⁴ See *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192 (N.Y. 1998); *Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201 (N.Y. 1997).

¹⁶⁵ *People ex rel. Burnham v. Jones*, 20 N.E. 577 (N.Y. 1889); see also *Sprague v. Nelson*, 6 Pa. D. & C. 493 (Erie C.P. 1924).

¹⁶⁶ *Ill. Cent. R.R. Co., v. Illinois*, 146 U.S. 387, 435-36 (1892).

¹⁶⁷ *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). The Court did not apply the same rules to rivers. *Id.*

¹⁶⁸ See *supra* Part IV.A.1.a.

recognizing the public trust doctrine up to the OHWM along the Great Lakes shores is consistent with both New York and Pennsylvania law.¹⁶⁹

In sum, the Great Lakes states, upon admission to the Union, received at least a *jus publicum* interest in the land underlying the Great Lakes up to the ordinary high water mark in trust for the people of their states. As discussed below, however, that is just the starting point and does not necessarily mean that the same boundary for the public trust doctrine persists today along the Great Lakes shores.

2. Changes in the Boundary

a. By the State

Language in two important Supreme Court decisions, one from the Nineteenth Century and one of recent vintage, arguably instructs that each state may re-define the scope of the public trust doctrine in that state. The *Shively* Court, explaining why new states admitted to the Union did not necessarily claim title to all lands underlying navigable waters up to the OHWM, said that “[t]he title and rights of riparian or littoral proprietors in the soil below high water mark . . . are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.”¹⁷⁰ In *Phillips Petroleum Co. v. Mississippi*,¹⁷¹ the Court held that states acquired at the time of statehood and held in public trust all land underlying waters influenced by the tide, as well as actually navigable waters. Noting that the original states did not uniformly claim title to all non-navigable tidal waters, the Court in *Phillips* said that “it has been long established that the individual States have the authority to *define the limits of the lands held in public trust* and to recognize private rights in such lands as they see fit.”¹⁷²

Some have read these passages as empowering states to expand the scope of the public trust doctrine beyond lands underlying navigable waters.¹⁷³ Others have responded that such expansion of the public trust doctrine would effect an uncompensated taking of private property in violation of the Constitution.¹⁷⁴ Less attention has been paid to the prospect that the language in *Shively* and *Phillips* could authorize a state to *shrink* the lands subject to the public trust doctrine. Tellingly, both *Merrill* and the dissent in *Glass v. Goeckel*, en route to opining that the boundary of the public trust doctrine along the Great Lakes shores is the water’s edge rather than the OHWM, cited *Shively* as teaching that “state law determined the scope of the public trust in land beneath navigable waters” and “the scope of lands subject to the public trust is determined by state law,” respectively.¹⁷⁵

¹⁶⁹ See *infra* Parts V.F and V.G.

¹⁷⁰ *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894).

¹⁷¹ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

¹⁷² *Id.* at 475 (citing *Shively*, 152 U.S. at 26) (emphasis added).

¹⁷³ See, e.g., Laura H. Kosloff, Comment, *Phillips Petroleum Co. v. Mississippi: Is the Public Trust Becoming Synonymous With the Public Interest?*, 18 ENVTL. L. REP. 10200 (1988).

¹⁷⁴ See, e.g., Huffman, *Hidden Victory*, *supra* note 103, at 10054-56.

¹⁷⁵ *Ohio ex rel. Merrill v. State of Ohio Dept. of Natural Resources*, Nos. 2008-L-007, 2008-L-008, 2009 WL 2591758 (Ohio Ct. App. Aug. 21, 2009), ¶ 77; *Glass*, 703 N.W.2d at

The language of *Shively* and *Phillips* should not be read as a free ticket for a state to draw a line anywhere it chooses as defining the limits of the public trust. For example, what if the Illinois legislature were to define the public trust as excluding the submerged beds of Lake Michigan in the Chicago harbor? This would allow the legislature to evade the public trust doctrine, and the holding in *Illinois Central* voiding the grant of such submerged lands to the railroad, simply by declaring beforehand that those submerged lands were no longer subject to the public trust. By re-defining the geographic scope of the public trust doctrine, the state effectively would emasculate the public trust doctrine that otherwise could be—and was—used to invalidate transfer of those same submerged lands to the railroad.

One way of reconciling the Court's statements in *Shively* and *Phillips* with *Illinois Central* is to view *Shively* and *Phillips* as speaking solely to the issues of title and riparian or littoral rights. Both cases essentially were quiet title actions, deciding whether title to tidelands should be in the state or in private parties.¹⁷⁶ While both cases discuss the public trust doctrine, the equal footing doctrine was dispositive in both cases.¹⁷⁷ Neither case involved a state trying to terminate the public's rights to use lands underlying navigable waters. Further, the quoted language from *Shively* does not actually say that the state's ability to terminate the *jus publicum* for lands it holds in trust is the subject of state law; rather, it is the "title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters" that are governed by state laws.¹⁷⁸ Thus, that a state may recognize title to the shore in a private party, or recognize that the upland owner may have littoral rights such as water access or wharfing out, would not be inconsistent with the state retaining a *jus publicum* interest in the shore for use by the public.

The language in *Phillips* is somewhat harder to reconcile in the same manner, as the Court expressly said that states "have the authority to define the limits of the lands held in public trust."¹⁷⁹ However, the Court cited *Shively* for this proposition,¹⁸⁰ and as discussed above, *Shively* neither holds nor teaches that states could shrink the lands subject to the public trust. Further, the language in *Phillips* is in the midst of an explanation that not all states claim title to all lands under tidelands and navigable waters, en route to the Court's holding that Mississippi

87 n.12 (Markman, J., dissenting). The *Glass v. Goeckel* majority also cited *Shively* and *Phillips Petroleum*, to support its conclusion that recognition of the public's right to walk along the shore above the water's edge, on private property, was a matter of state law and did not constitute a taking. *Glass*, 703 N.W.2d at 78 n.35.

¹⁷⁶ *Phillips Petroleum*, 484 U.S. at 472; *Shively*, 152 U.S. at 9; see also Wilkinson, *supra* note 25, at 462.

¹⁷⁷ *Phillips Petroleum*, 484 U.S. at 484 (tidelands at issue became property of Mississippi upon its admission to the Union, even though not actually navigable); *Shively*, 152 U.S. at 57-58 (tidelands at issue became property of Oregon upon its admission to the Union, and were not subject to a pre-statehood grant by the federal government).

¹⁷⁸ *Shively*, 152 U.S. at 40 (emphasis added).

¹⁷⁹ *Phillips Petroleum*, 484 U.S. at 475.

¹⁸⁰ *Id.*

acquired title to lands underlying non-navigable tidal waters pursuant to the equal footing doctrine.¹⁸¹

But a corollary to such a reconciliation would be that the states only have power to transfer *jus privatum* and that the public's right to use the shore could never be abrogated; once a state acquires land underlying navigable waters in trust, it must always maintain that land for the uses protected by the public trust doctrine. That is, forever into the future, every inch of the shore must be kept open to the public for protected uses such as navigation, fishing, and commerce. Future changes in uses of the shores that may be beneficial to the public—say, using a portion of the shore to construct a public aquarium—would be foreclosed, because the change would render a portion of the shore no longer available for navigation, fishing, and commerce by the public. Use of the shores would become ossified, ultimately to the public's detriment.¹⁸²

A closer look at *Illinois Central*, however, reveals another way of reconciling its teachings with the language of *Shively* and *Phillips*. In short, states have some ability to re-define the limits of the lands subject to the public trust, but their ability to do so is circumscribed by the public trust doctrine itself.

The Court in *Illinois Central* did not flatly prohibit sale of lands underlying navigable waters to private parties. On the contrary, the Court recognized that states may lawfully, and consistent with the public trust, grant parcels of submerged land to private parties.¹⁸³ This, of course, is consistent with the concepts of *jus privatum* and *jus publicum* under the public trust doctrine. Title may be transferred to a private party, but the private party's rights in the property are subordinate to the public rights to use the property protected by the public trust doctrine.¹⁸⁴ Put another way, a transfer of an underlying parcel to a private party that does not impair the public's rights to engage in protected uses of that parcel is appropriate under the public trust doctrine.

What the Court found objectionable as violating the public trust in *Illinois Central* was the state's transfer to the railroad of such a vast swath of Lake Michigan

¹⁸¹ *Id.* at 475-76.

¹⁸² See Sax, *supra* note 6, at 477 (criticizing such a view of the public trust doctrine as rendering lands unchangeable in use and extraordinarily restraining government in ways neither Roman nor English law ever contemplated).

One might argue that different uses of the shore in the future could be allowed, consistent with this view of the public trust doctrine, simply by enlarging the types of uses protected by the doctrine. There is a difference, however, between a use *protected* by the public trust doctrine and a use *permitted* by the public trust doctrine. The former requires the state to maintain the public's right to use the land for that protected use; the latter allows the state to use (or transfer) the land for some purpose despite adverse impact on the public's right to use the land. Using the example above, recognizing an aquarium as a protected use would mean that the state must allow the public to build an aquarium on the land. This is different from saying that an aquarium is a permissible public purpose and thus the state could allow building an aquarium on underlying land without violating the public trust doctrine.

¹⁸³ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435, 452-56 (1892).

¹⁸⁴ The *Illinois Central* Court quoted Hale's *De Jure Maris* regarding the concepts of *jus privatum* and *jus publicum*, and stated that lands underlying navigable waters could be transferred subject to the public trust. *Id.* at 458.

beds under terms that rendered virtually the entire Chicago harbor no longer available for use by the public for navigation, fishing, and commerce.¹⁸⁵ The *Illinois Central* Court signaled, however, that an alienation of lands underlying navigable waters under certain circumstances would not run afoul of the public trust doctrine, even though it resulted in an impairment of the public's rights to use such lands.

First, the Court gave examples of grants of submerged parcels that did not violate the public trust: "grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not *substantially impair* the public interest in the lands and waters remaining."¹⁸⁶ Second, after articulating the general rule that the state has an obligation to preserve navigable waters and their underlying lands for use by the public and that the state's control over such lands cannot be relinquished by a transfer of the property, the Court specifically recognized exceptions to that general rule: "The control of the state for the purposes of the trust can never be lost, *except* as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any *substantial impairment* of the public interest in the lands and waters remaining."¹⁸⁷

The Supreme Court subsequently has not further specified the circumstances by which a state, consistent with the public trust doctrine, could lawfully transfer or otherwise alienate land underlying navigable waters in a manner that would impair or terminate the public's right to use such lands and waters. It is fair to say that commentators and lower courts have been less than uniform in determining what constitutes such acceptable circumstances.¹⁸⁸ Based on the core principles of the public trust doctrine, drawn from the teachings of *Illinois Central* and other cases, I propose that the public's right to engage in uses protected by the public trust doctrine

¹⁸⁵ *Id.* at 454-56. The planned use by the railroad of the granted submerged lands presumably would have substantially interfered with the public's continued ability to use the waters and lands of Chicago harbor for navigation, fishing, and commerce.

¹⁸⁶ *Id.* at 452 (emphasis added).

¹⁸⁷ *Id.* at 453 (emphases added). The Court subsequently repeated the same exceptions: 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, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains . . .

Id.

¹⁸⁸ See, e.g., Epstein, *supra* note 28, at 426 (transfer of public property to private party requires compensation to the public); Rasband, *supra* note 10, at 85 (as long as legislative intent is clear); Wilkinson, *supra* note 25, at 461-62 (if the transfer advances navigation or does not substantially impair the public's rights to engage in protected uses). Professor Sax, in an oft-quoted passage, generally outlined the circumstances as follows:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

Sax, *supra* note 6, at 490.

on a parcel underlying the Great Lakes should be permitted to be impaired or terminated only under the following circumstances:

(1) The legislature's intent to impair or terminate the public's right to use the land must be clear. There is a longstanding presumption that a transfer of the *jus privatum* interest in land will not affect the public's right to continue to use that land.¹⁸⁹ This presumption is well grounded in the importance of the public's rights to use such land and associated navigable waters. Hence, the legislature's intent to overcome that well-founded presumption, and impair or terminate the public's right to continue making protected uses of such land, must be clear.¹⁹⁰

(2) The impairment of public use must not be substantial. The state has a trust obligation to preserve the navigable waters and underlying lands for certain protected public uses, and allowing substantial impairment of those public rights would breach that trust.¹⁹¹ Whether the impairment is substantial should involve weighing at least two considerations. First, the *amount of land* impaired or relinquished must not be substantial. Only relatively small parcels of underlying lands can be relinquished from protected public use without substantially impairing the rights of the public to engage in protected uses.¹⁹² Second, the *effect* of the impairment or termination must not be substantial. In some situations, the termination of even relatively small parcels from the geographic scope of the public trust may substantially impair the public's rights, either due to the importance of that parcel to such rights or the effect it has on the public's rights to engage in protected uses of the remaining waters and lands.

(3) The impairment must advance an important public interest. The public is the beneficiary of the public trust; an impairment of the public's rights guaranteed by the public trust doctrine should only be permitted where it is in the public interest to do so.¹⁹³ There is a split of authority regarding whether the public interests justifying impairment of the public's rights to use underlying land are limited to those which advance uses protected by the public trust doctrine or include a broader category of public interests.¹⁹⁴ On one hand, limiting the public interests to those advancing uses protected by the public trust doctrine would, as mentioned above, tend toward ossification of the shores. On the other hand, allowing impairment or termination of the public's rights to make protected uses of underlying lands merely because a legislature or judge deems it to be in the public interest could eviscerate the public trust doctrine. For example, the public trust doctrine under this view might allow a state to relinquish the important public rights protected by the doctrine in return for

¹⁸⁹ See *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 411 (1842) (A grant of an exclusive fishery will not be presumed "unless clear and especial words are used to denote it.").

¹⁹⁰ Where the action is taken by a state agency, the delegation of its authority to take such action likewise must be clear. See Lazarus, *supra* note 16, at 654.

¹⁹¹ *Ill. Cent.*, 146 U.S. at 452-56.

¹⁹² See *id.* at 452 (wharves, docks, and piers).

¹⁹³ *Id.* at 453-56.

¹⁹⁴ See SLADE ET AL., *supra* note 5, at 232-33; Lazarus, *supra* note 16, at 651-53.

short-term economic benefits (e.g., increased tax revenue, more jobs) that arguably serve a public interest.¹⁹⁵

A better view is that the proposed alienation can be for an important public purpose beyond protected uses, but it must primarily benefit the public and relate to its location on land underlying navigable waters. In general, an alienation that primarily benefits a private party, or excludes the public from the land, is not advancing an important public purpose.¹⁹⁶ For instance, transferring land to lure a new business to the region may have public benefits, such as increased employment opportunities for local residents and enhanced tax revenue, but the primary beneficiary of the transfer is the private business, not the public.¹⁹⁷ Similarly, building a prison may be important to the state, but a prison could be built virtually anywhere. It need not be built adjacent to navigable waters and thus lacks the requisite nexus to its location on the underlying land.¹⁹⁸

In sum, a state does have some authority to redefine the geographic scope of the lands held in public trust, as *Shively* and *Phillips* suggest. But as *Illinois Central* teaches, the state's ability to do so is circumscribed by the parameters of the public trust doctrine itself. A state should only be permitted to relinquish lands from the scope of the protections afforded by the public trust doctrine where the legislature's intent to do so is clear, where the public's rights to engage in uses protected by the public trust doctrine are not substantially impaired, and where an important public interest is promoted.¹⁹⁹

¹⁹⁵ See Sax, *supra* note 6, at 477.

[I]f the trust in American law implies nothing more than that state authority must be exercised consistent with the general police power, then the trust imposes no restraint on government beyond that which is implicit in all judicial review of state action—the challenged conduct, to be valid, must be exercised for a public purpose and must not merely be a gift of public property for a strictly private purpose.

Id.; see also SLADE ET AL., *supra* note 5, at 233.

¹⁹⁶ Sax, *supra* note 6, at 490.

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

Id.

¹⁹⁷ See *People ex rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773 (Ill. 1976). A narrow exception could be recognized, however, for private wharves, piers, docks, and similar structures advancing navigation and commerce. See *Ill. Cent.*, 146 U.S. at 452.

¹⁹⁸ See SLADE ET AL., *supra* note 5, at 233 (“[A] conveyance of trust lands should be related to the lands and waters remaining, not simply any interest that would further the general common good of the public.”).

To avoid permanently relinquishing land from the scope of the public trust, a state could choose to lease the land to the private party. See, e.g., OHIO REV. CODE ANN. § 1506.11 (West 2009) (authorizing the director of natural resources to lease lands underlying Lake Erie). Alternatively, a state could impose a requirement that the land, or at least the *jus publicum*, revert to the state once the proposed use deemed to be in the public interest ceases.

¹⁹⁹ SLADE ET AL., *supra* note 5, at 231-35 (suggesting similar criteria for limiting a state's power to convey the *jus publicum* in public trust lands); but cf. *id.* at 240-42 (suggesting different criteria for terminating the public interest).

Importantly, it should be noted that, consistent with the public trust doctrine, a state could redefine “ordinary high water mark” rather than continue to follow the common law definition. For example, a state could redefine OHWM, via legislation or authorized regulation, to establish a “brighter line” boundary for the public trust along the shore—i.e., one more readily identifiable or ascertainable by the public, littoral owners, and the state.²⁰⁰ Examples could include redefining OHWM as a specific elevation above sea level or as a particular horizontal distance from the water’s edge.

In redefining the scope of the public trust doctrine, though, the state remains bound by the restrictions of the public trust doctrine itself, outlined above. Legislatively redefining the boundary of the public trust doctrine to make it more readily ascertainable could be viewed as promoting an important public interest, because doing so would facilitate public use of the lands and the state’s obligation to protect such lands. As long as the amount of lands and waters subject to the public trust would not be substantially diminished, and the public’s rights to make use of the lands and waters would not be substantially impaired, the fact that in certain areas the new public trust boundary might be set more lakeward than at common law should not prevent the state from legislatively redefining the boundary.²⁰¹

²⁰⁰ One of the dissent’s key criticisms of the majority opinion in *Glass v. Goeckel* was that the water’s edge is a more readily identifiable boundary than the common law OHWM, which “requires littoral property owners and the public to guess” its location. *Glass v. Goeckel*, 703 N.W.2d 58, 102-03 (Mich. 2005) (Markman, J., concurring in part and dissenting in part). Similarly, the *Merrill* court asserted that “[t]he water’s edge provides a readily discernible boundary for both the public and littoral landowners.” *State ex rel. Merrill v. Ohio Dept. of Natural Res.*, Nos. 2008-L-007, 2008-L-008, 2009 WL 2591758, ¶ 128 (Ohio Ct. App. Aug. 21, 2009).

²⁰¹ The public trust doctrine also serves to restrict the state’s ability to *expand* its geographic scope. For example, setting the boundary of the public trust doctrine ten miles more landward than at common law would be an unreasonable, unlawful interpretation of OHWM. Such a government action would not be protected by the public trust doctrine from a takings claim.

A number of states, including Ohio, have recognized the public’s right to recreationally boat on streams that are not navigable-for-title: that is, streams that were not actually navigable for commercial purposes at the time of the state’s admission to the Union. *See, e.g.*, *Coleman v. Schaeffer*, 126 N.E.2d 444 (Ohio 1955); *State ex rel. Brown v. Newport Concrete Co.*, 336 N.E.2d 453 (Ohio Ct. App. 1975). Typically, the beds of non-navigable streams are privately owned and not subject to the public trust doctrine; the riparian owners can exclude the public from access to such non-navigable waters and underlying private lands. *See, e.g.*, *East Bay Sporting Club v. Miller*, 161 N.E. 12 (Ohio 1928). Some have criticized the recognition of the public right to recreationally boat in waters that are not navigable-for-title as an unlawful expansion of the public trust doctrine and a taking of private property without just compensation. *See, e.g.*, Huffman, *Hidden Victory*, *supra* note 103, at 10055-56. On the other hand, it could be argued that such an “expansion” to include streams capable of floating a canoe or kayak is in fact a lawful, reasonable re-definition of the term “navigable” for purposes of the public trust doctrine. As the Supreme Court acknowledged in an important takings case, background principles of state law can evolve. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (“[C]hanged circumstances or new knowledge may make what was previously permissible no longer so.”). The Great Lakes unquestionably are navigable-for-title.

Yet if the state legislature impairs or terminates the *jus publicum* for a vast swath of lands, whether via express legislation or under the guise of redefinition, what will empower a court to invalidate the legislative act? This question, of course, has vexed courts and commentators ever since the *Illinois Central* Court voided the legislature's grant of Lake Michigan beds to the railroad more than a century ago. Although the Supreme Court subsequently described *Illinois Central* as being grounded in state law,²⁰² some have argued that the public trust doctrine is rooted in the U.S. Constitution.²⁰³ Others view the public trust doctrine as a unique species of common law, one that cannot be undone by state legislation.²⁰⁴ Today regarding the Great Lakes shores, however, arguably the question is more easily answered. Virtually all of the Great Lakes states have constitutional provisions pursuant to which courts could base decisions to invalidate legislative acts that violate the public trust doctrine.²⁰⁵ Some states have specific constitutional provisions aimed at protecting natural resources or the environment.²⁰⁶ Other state constitutions repeat language from the Northwest Ordinance providing that the Great Lakes and certain other navigable waters shall be "common highways and forever free."²⁰⁷ In Ohio, a recent constitutional amendment specifically recognizes the public trust doctrine as it applies to Lake Erie and navigable waters of the state.²⁰⁸ Hence, there should be no doubt about a court's power to void state actions that violate the public trust doctrine with respect to the shores of the Great Lakes.

b. Physical Changes to the Shore

Like the boundary for title purposes,²⁰⁹ the common law boundary of the public trust doctrine along the Great Lakes shore is a movable freehold. That is, the OHWM is not forever fixed as of the date of statehood. Rather, the OHWM may move lakeward due to accretion and lower lake levels and may move landward due to erosion and higher lake levels. This ambulatory boundary ensures that the public

²⁰² *Appleby v. City of New York*, 271 U.S. 364, 395 (1926).

²⁰³ See Epstein, *supra* note 28, at 427-28 (equal protection and due process clauses); Wilkinson, *supra* note 25, at 459 (commerce clause).

²⁰⁴ See David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 715 (2008).

²⁰⁵ See Araiza, *supra* note 28, at 438-51; Klass, *supra* note 6, at 719, 728-30; see also *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991) (legislation relinquishing Arizona's interests in navigable riverbeds held invalid under the common law public trust doctrine and so-called gift clause of the state constitution).

²⁰⁶ ILL. CONST. art. XI, §§ 1-2; MICH. CONST. art. IV, § 52; N.Y. CONST. art. XIV, § 4; PA. CONST. art. I, § 27.

²⁰⁷ "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free" Northwest Ordinance of 1787, art. IV, 1 Stat. 50, 52 (1789). For state constitutions embodying such language, see MINN. CONST. art. II, § 2; WIS. CONST. art. IX, § 1.

²⁰⁸ OHIO CONST. art. I, § 19(B).

²⁰⁹ See *supra* Part II.

retains the rights to use the waters and shores of the Great Lakes, and the littoral owner retains her littoral rights, regardless of physical changes to the shore.²¹⁰

Sudden avulsive changes to the shore, however, should not result in loss of public trust lands. Neither should artificial changes (e.g., filling submerged lands) deprive the public of the right to use lands protected by the public trust.²¹¹

B. Protected Public Uses

Not every use of public trust waters and lands is protected by the public trust doctrine. The Supreme Court in *Illinois Central* instructed that the State of Illinois held the waters of Lake Michigan and the underlying land in trust for the public to use for navigation, fishing, and commerce.²¹² Subsequently, navigation, fishing, and commerce have come to be viewed as the traditional triad of public trust protected uses.²¹³ Some courts have limited protected uses to the traditional triad and uses “incidental” to one or more of these triad of uses. That is, uses incidental to navigation, fishing, or commerce are afforded public trust protection, but those that are not incidental to one of the triad are not subject to the public trust.²¹⁴

But in many jurisdictions uses beyond—and not necessarily incidental to—the traditional triad have long been recognized as subject to the protection of the public trust doctrine. Protected uses long recognized by various courts include bathing, hunting, ice cutting, and skating.²¹⁵ In *Phillips*, the Supreme Court noted that even where tidelands are privately owned, “public rights to use the tidelands for the

²¹⁰ See Abrams, *supra* note 35, at 898-902.

²¹¹ See SLADE ET AL., *supra* note 5, at 108-17. Changes in legal status of the shore due to adverse possession, prescription, or similar state law principles of property law are beyond the scope of this Article. In general, however, in most states a private party cannot gain title to state-owned land via adverse possession or acquire rights to use state-owned lands via prescription. Even where adverse possession or prescription is recognized against the state, the dominant *jus publicum* interest should not be extinguished. *Id.* at 238-40; see also Oregon *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969) (common law doctrine of custom allows public to obtain easement for recreational use of privately owned dry sand ocean beach).

²¹² Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

²¹³ See, e.g., SLADE ET AL., *supra* note 5, at 170-71. At least one commentator has disputed that the *jus publicum* under English common law preserved any public right beyond navigation. See Deveney, *supra* note 11, at 46-48. The Nineteenth Century Supreme Court, however, clearly viewed the public trust doctrine in England as protecting fishing as well as navigation and commerce. See Shively v. Bowlby, 152 U.S. 1, 13 (1894). As the Twentieth Century Supreme Court noted in a related context, “[W]e do not intend to get involved in the historical debate over what the English common law was [O]ur concern is with how that law was understood and applied by this Court in its cases.” Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 478 n.7 (1988).

²¹⁴ See Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (public’s rights to use privately owned tidelands are limited to fishing, fowling, and navigation, or uses incidental thereto, and do not include general recreational uses).

²¹⁵ See, e.g., Nedtweg v. Wallace, 208 N.W. 51, 54 (Mich. 1926) (hunting); Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893) (bathing, skating, ice cutting, etc.).

purposes of fishing, hunting, bathing, etc., have long been recognized,” terming them “traditional privileges.”²¹⁶

Recent decades have seen an increase in the types of uses protected by the public trust doctrine in multiple jurisdictions, including the Great Lakes states. For example, recreational boating is now recognized as a protected use in many states.²¹⁷ A number of states have employed the public trust doctrine to preserve the scenic, ecological, and environmental values of the waters and lands within the geographic scope of the public trust.²¹⁸ Some have criticized this “expansion,” urging that forcing private owners to allow “new” uses of their property by the public constitutes a physical or regulatory taking of private property without just compensation.²¹⁹ As reflected above, however, protected public trust uses clearly need not be limited to navigation, fishing, and commerce. That triad became protected uses under the public trust doctrine because they were the uses of navigable waters important to the public during past centuries. The public trust doctrine is a dynamic doctrine that should be able to evolve to protect uses of navigable waters and underlying lands that are important for the public today.²²⁰

But just as clearly, there must be some limit on the types of public uses protected by the public trust doctrine. Merely because the land geographically is subject to the public trust should not mean that members of the public have an enforceable right to make whatever use they want of such land, over the objections of the state or private landowner. Should there be a public right, for example, to use the privately owned shore to play beach volleyball?

While public trust protected uses need not be static, the scope of protected uses should be true to the principles of the public trust doctrine. The public trust doctrine balances the need to keep certain lands and waters available for important common uses with the rights of the property owner, state or private, to make use of its property.²²¹ Just as completely excluding the public from use of such lands and

²¹⁶ *Phillips Petroleum*, 484 U.S. at 483 n.12.

²¹⁷ See, e.g., *Lamprey*, 53 N.W.1139; *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192 (N.Y. 1998); *Coleman v. Schaeffer*, 126 N.E.2d 444 (Ohio 1955); *Muench v. Pub. Serv. Comm’n*, 53 N.W.2d 514 (Wis. 1952).

²¹⁸ See, e.g., *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (environmental and ecological values); *Muench*, 53 N.W.2d 514, 522 (scenic beauty).

²¹⁹ See, e.g., Huffman, *Takings Clause*, *supra* note 33.

²²⁰ See *Marks*, 491 P.2d at 380 (“The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.”); cf. *Ohio ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709, 730 (Ohio 1948) (refusing to allow “dead hand of the past” to limit public trust doctrine, explaining that “the law should be flexible enough to be applied to a constantly progressive civilization”).

²²¹ See Thompson, *supra* note 7, at 59-60 (arguing that “[t]he public trust doctrine at its core opposes excess” and noting that most major public trust opinions balance the value of private property with the protection of public resources).

waters would violate the public trust, the balance likewise is violated by opening those lands and waters to any and all public uses.²²²

Accordingly, to allow states to preserve the balance between evolving public needs and the needs of the landowner, I propose the following framework for evaluating whether a use should be protected by the public trust doctrine: In addition to navigation, fishing, and commerce, and uses incidental thereto, protected uses (a) should be sufficiently important as to justify public trust protection, with a nexus to the public trust lands or waters, and (b) should not substantially interfere with the property rights of the owner in ways beyond what would result from the exercise of protected uses already recognized.²²³ For example, the erection of housing for low income persons may be important, but it should not be a protected use because low-income housing could be located anywhere and such permanent structures would cause substantial additional interference with the rights of the littoral owner, including her right to access the lake and to use her shore. Playing beach volleyball should not be sufficiently important to the public as to justify public trust protection.

Walking along the shore of the Great Lakes, between the ordinary high water mark and the water's edge, could easily qualify as a protected public trust use. First, walking can be considered incidental to protected uses such as navigation or fishing.²²⁴ Second, walking the shore of the Great Lakes is important, bears a close nexus to the protected lands and waters, and does not substantially interfere with the rights of the littoral owner in ways beyond what results from protected uses now. Many courts have long recognized that walking along the ocean shore between the

²²² To the extent that a use is consistent with the public trust doctrine, recognition of the public's right to engage in such use on private property, which is subject to the *jus publicum*, should not constitute a taking. *See supra* Part II.

²²³ These factors faintly echo criteria relevant to regulatory takings. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (recognizing import of restrictions that background principles of state law already place upon the land); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (balancing magnitude of economic impact of regulation, degree of interference with investment-backed expectations, and character and purpose of government regulation). But the factors I propose are tailored to the unique setting of lands within the geographic scope of the public trust doctrine.

As Professor Sax has opined, "The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title. The function of the public trust as a legal doctrine is to protect such public expectations against destabilizing changes . . ." Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188 (1980) (footnote omitted).

²²⁴ In *Glass v. Goeckel*, both the majority and dissenting justices agreed that walking along the shore was a protected use under the public trust doctrine; the only dispute was whether the public had a right to walk above the water's edge, as even the dissenting opinions acknowledged the public's right to walk at or below the water's edge. *Glass v. Goeckel*, 703 N.W.2d 58, 62, 73-74 (Mich. 2005); *id.* at 85 n.10 (Markman, J., concurring in part and dissenting). Similarly, the *Merrill* court recognized that walking was a protected use, albeit lakeward of the water's edge. *Ohio ex rel. Merrill v. Ohio Dept. of Natural Res.*, Nos. 2008-L-007, 2008-L-008, 2009 WL 2591758, ¶ 89 (Ohio Ct. App. Aug. 21, 2009). *But see Bell v. Town of Wells*, 557 A.2d 168, 175 (Me. 1989) (walking is not incidental to fishing, fowling, or navigation).

ordinary high water mark and the water's edge is a protected use under the public trust doctrine.²²⁵ A concomitant right to walk along the shores of our "inland seas" is just as important and should be protected by the public trust doctrine as well. Although walking can be done almost anywhere, walking along the Great Lakes shore offers unparalleled and unique opportunities to enjoy and experience the Great Lakes waters and shore that cannot be replicated by walking elsewhere.²²⁶ Lastly, walking along the Great Lakes shore does not permanently or unreasonably interfere with the private rights of the littoral owner. Persons walking slightly above the water's edge would pose little or no more interference with the owner's use of the shore property, or her littoral rights, than would persons fishing or boating a few feet below the water's edge.²²⁷

V. APPLYING THE FRAMEWORK TO THE GREAT LAKES SHORES

This part begins by showing that application of my proposed framework regarding the public's right to walk the Great Lakes shores would reach the same result in Michigan as did *Glass v. Goeckel*, albeit by somewhat different means, while in Ohio both the means and end would differ from that of the court in *Merrill v. Ohio Department of Natural Resources*. This part then discusses the remaining Great Lakes states. No reported decision in any other Great Lakes state appears to have squarely addressed the public's right to walk along the shores of the Great Lakes. Most states, however, have a fairly well developed public trust doctrine by virtue of case law and, in some instances, statutory and constitutional provisions. Utilization of my framework would be consistent with, or at least not inconsistent with, existing public trust doctrine in these other Great Lakes states and would, I submit, bring a principled approach and salutary results to questions regarding the public's right to use the Great Lakes shores.

²²⁵ See, e.g., *Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821) (public right to pass and re-pass along the shore); *Barnes v. Midland R.R. Terminal Co.*, 85 N.E. 1093, 1097 (N.Y. 1908) (public right to pass along the shore between low and high water marks); *Caminiti v. Boyle*, 732 P.2d 989, 996 (Wash. 1987) (recognizing that landowners' docks cannot interfere with the public right to pass along the shore); SLADE ET AL., *supra* note 5, at 210 ("In nearly all States the Public Trust Doctrine provides the public a right to pass and repass over public trust tidelands."). But see *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (statute providing for the public right to use shore up to high water mark for recreation declared unconstitutional taking); *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974) (declaring unconstitutional a bill that included public right to pass along shore between high and low water lines).

While "lateral" access along the ocean shores is widely protected by the public trust doctrine, a right of "perpendicular" access—i.e., walking perpendicularly to the ocean across private property—is seldom protected by the public trust doctrine. See SLADE ET AL., *supra* note 5, at 210.

²²⁶ See *Abrams*, *supra* note 35, at 861-63 & n.6.

²²⁷ See *Merrill*, 2009 WL 2591758, ¶ 89 ("[T]he public does not interfere with littoral property rights when their recognized, individual rights are exercised within the public trust; that is, lakeward of the shoreline as defined herein."). The public's right to walk along the shore, like all uses protected by the public trust doctrine, is not unfettered and is subject to regulation. See *Glass*, 703 N.W.2d at 75.

A. Michigan

The *Glass v. Goeckel* majority opinion in many ways followed the analytical framework this Article proposes. The Michigan Supreme Court examined the public's right to walk along the shore of the Great Lakes by evaluating both the public trust doctrine's geographic scope and the uses it protects.²²⁸ The majority concluded that the geographic reach of the public trust doctrine for the Great Lakes in Michigan extended to the ordinary high water mark and adopted the common law definition of OHWM.²²⁹ Although Michigan common law had not defined the OHWM, the *Glass v. Goeckel* court looked to Wisconsin case law to hold that the OHWM is defined as the point on the shore where the presence and action of the water has left a distinct mark.²³⁰ The majority adopted the distinction between *jus privatum* and *jus publicum*, recognizing that the public trust doctrine can extend to privately owned land acquired from the sovereign.²³¹

However, the majority did not expressly look to the equal footing doctrine in determining the starting point for the geographic scope of the public trust doctrine.²³² Rather, it looked to earlier Michigan case law and analogized to ocean precedents that indicated the public trust should extend to lands submerged on a regular basis.²³³ While the grounds relied upon by the Michigan Supreme Court were neither incorrect nor unpersuasive, earlier Michigan case law was not directly on point and some would argue, as the dissenting justices did, that ocean shores subject to the tides are an imperfect analogy to the Great Lakes shores because of the irregular nature of lake level fluctuations.²³⁴ Per my proposed framework, a court would have reasoned as follows: As a matter of federal law, lands underlying the Great Lakes up to the ordinary high water mark passed to Michigan in trust when it joined the Union, in accordance with the equal footing doctrine; while the state may have relinquished title below the OHWM to private parties, the state did not relinquish

²²⁸ *Glass*, 703 N.W.2d at 66-75.

²²⁹ *Id.* at 69-73.

²³⁰ *Id.* at 72 (quoting *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914) (defining OHWM for a river)). The majority also pointed to *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781 (Wis. 2001), and *Wisconsin v. Trudeau*, 408 N.W.2d 337 (Wis. 1987), in which the Wisconsin Supreme Court defined OHWM for Lake Superior. *Id.* The majority did not address *Doemel v. Jantz*, 193 N.W. 393 (Wis. 1923), in which the Wisconsin Supreme Court held that the public did not have a right to walk along the shore of a smaller, navigable inland lake above the water's edge, even though the state owned up to the OHWM. The dissent criticized the majority for "adopt[ing] only a part of the law of that other state, again without much explanation as to why it has chosen to adopt only parts of that other state's law." *Id.* at 96 (Markman, J., concurring in part and dissenting).

²³¹ *Glass*, 703 N.W.2d at 65-66.

²³² The court did note that "when the state (or entities that predated our state's admission to the Union) conveyed littoral property to private parties, that property remained subject to the public trust." *Id.* at 62.

²³³ *Id.* at 68-71.

²³⁴ *Id.* at 100 (Markman, J., concurring in part and dissenting) ("[W]hile the 'ordinary high water mark' makes sense in tidal waters, it does not make sense in the nontidal Great Lakes because of the irregular nature of lake level fluctuations.").

any portion of the shore below OHWM from the scope of the public trust doctrine; and therefore the geographic scope of the public trust doctrine remains at the common law OHWM.²³⁵

The *Glass v. Goeckel* court rejected the argument, voiced by the plaintiff, that the Michigan Great Lakes Submerged Lands Act²³⁶ had legislatively defined the landward boundary of the public trust doctrine. The statute describes various regulatory authorities of the Michigan Department of Environmental Quality for lands owned or held in trust by the state lakeward of the natural ordinary high water mark of the Great Lakes, with each lake's ordinary high water mark defined as a specific elevation above sea level.²³⁷ As discussed in Part IV.A.1 above, a state does have the power to redefine the geographic boundary of the public trust doctrine, at least to some extent. Here, however, it appears the Michigan Supreme Court correctly determined that the legislature had not clearly intended to redefine the boundaries of the public trust pursuant to the Great Lakes Submerged Lands Act.²³⁸

As the dissenting justices in *Glass v. Goeckel* legitimately point out, the common law ordinary high water mark is not always readily visible or easily determined.²³⁹ Rocky shores, for example, may bear no distinct mark. Unlike ocean shores where twice a day the tides cover the shore to approximately the same point, the levels of the Great Lakes vary seasonally within the year, from year to year, and even decade to decade. Annually, the water levels in the lakes are usually highest during the summer and lowest during the winter. But due to a variety of factors, the average lake levels may vary from one year to the next by a foot or more, and it is not uncommon for average lake levels to remain, compared to normal, relatively high or low for several years in a row.²⁴⁰ Thus, it is more difficult to ascertain at what point the water's presence is sufficiently continuous. Setting the boundary at the water's

²³⁵ In *Hilt v. Weber*, 233 N.W. 159 (Mich. 1930), the Michigan Supreme Court, reversing prior precedent, held that the state did not own shore between the meander line and the water's edge, but rather the private owner held title to the water's edge. *Id.* at 230-31. As a result, in that case the private owner was entitled to land formed through reliction as a riparian right. The *Hilt* case did not establish the boundary of the public trust doctrine as the water's edge. To the extent *Hilt* indicated that upon admission to the Union, only land below the water's edge passed to Michigan as a matter of federal law, I respectfully contend that the court was in error. More accurately, as described in Part IV.A.1 *supra*, the state received land up to the OHWM as a matter of federal law under the equal footing doctrine, but as a matter of state law, Michigan chose to recognize title in the state only up to the water's edge.

²³⁶ MICH. COMP. LAWS §§ 324.32501-324.32516 (2009).

²³⁷ Using International Great Lakes Datum of 1955, the statute sets OHWM for Lake Superior, 601.5 feet; Lakes Michigan and Huron, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet. MICH. COMP. LAWS § 324.32502 (2009).

²³⁸ *Glass*, 703 N.W.2d at 67-68.

²³⁹ *Id.* at 102-03 & n.47 (Markman, J., concurring in part and dissenting in part).

²⁴⁰ See NOAA GREAT LAKES ENVTL. RESEARCH LAB., MONTHLY BULLETIN OF LAKE LEVELS FOR THE GREAT LAKES (Jan. 2009); U.S. ARMY CORPS OF ENG'RS & GREAT LAKES COMM'N, LIVING WITH THE LAKES 16-18 (1999). For example, water levels for Lakes Michigan and Huron reached record highs in 1986. During this decade, lake levels dropped through 2007 to near record lows, but they have been climbing the past two years. NOAA, *supra*.

edge does have the virtue of a bright-line rule, readily ascertainable by the public, littoral landowners and the state. But it is important to realize that the advantages of such a bright-line boundary come at a high cost: the protection of the Great Lakes shores and the public's rights to use them. The state, of course, could still regulate the littoral owner's use of the shore above the water's edge pursuant to its police powers. In the absence of the public trust, however, the public has no *right* to use the privately owned shores. Perhaps even more importantly, the state has no *duty* to regulate private use of the shores pursuant to its police powers, and without the public trust doctrine, the public is left with little recourse where the state fails to protect the shores from private or state actions. If a state considers the common law OHWM too indefinite, it can redefine OHWM, subject to the constraints of the public trust doctrine, to establish a brighter-line boundary that would still protect the shores and guarantee the public's right to use them (e.g., ten yards horizontally from the water's edge, specific elevation above sea level which could be adjusted every few years based on recent data).²⁴¹

With respect to uses protected by the public trust, the *Glass v. Goeckel* majority determined that walking was a protected use, primarily because it is necessary to walk in order to engage in traditional protected uses such as fishing, hunting, and boating for pleasure or commerce.²⁴² Although the dissent limited the geographic scope of the public trust doctrine to the water's edge, the dissent likewise agreed that walking was a protected use, if done below the water's edge.²⁴³ The court, however, punted on providing guidance for what uses are protected, merely offering a caveat that not every use of public trust lands is protected and there is not an unlimited right of access to private land below the OHWM.²⁴⁴ As discussed in Part IV.B above, additional uses would be protected under my framework if they are important to society, closely related to the protected waters and lands, and do not substantially interfere with the rights of the littoral owner in ways beyond what previously recognized protected uses do.

B. Ohio

The approach of the Ohio court of appeals in *Merrill v. Ohio Department of Natural Resources* in determining the scope of the public trust doctrine along the Ohio shores of Lake Erie differed from that of the Michigan Supreme Court, as did its result. Ohio long has recognized that the state owns the waters and beds of Lake Erie in trust for its people to use for navigation, fishing, and commerce.²⁴⁵ Ohio

²⁴¹ See *supra* Part IV.A.2.

²⁴² *Glass*, 703 N.W.2d at 73-75. The majority noted that Michigan case law had recognized that ice cutting and log floating were uses protected by the public trust doctrine, too. *Id.* at 74 n.25. Such uses are not necessary to engage in navigation, commerce, or fishing, so some other criteria are needed to explain why they are protected by the public trust doctrine.

²⁴³ *Glass*, 703 N.W.2d at 100-01 (Markman, J., concurring in part and dissenting in part). The parties did not contest that walking was a protected use under the public trust doctrine. *Id.* at 73-74 (majority opinion).

²⁴⁴ *Glass*, 703 N.W.2d at 75.

²⁴⁵ See *Ohio ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709 (Ohio 1948); *Winous Point Shooting Club v. Slaughterbeck*, 117 N.E. 162 (Ohio 1917); *State v. Cleveland & Pittsburgh*

courts previously, however, had not expressly ruled on the location of the landward boundary of the public trust along the Lake Erie shore nor on whether walking the shore is a protected use.

Geographically, the *Merrill* court essentially equated the scope of the public trust doctrine with the lands owned in fee by the state. That is, according to the court of appeals, the landward boundary of the public trust doctrine along the Lake Erie shore is the same as the title boundary dividing the state-owned lakebed from the privately owned uplands.²⁴⁶ No distinction was made between *jus privatum* and *jus publicum* interests.

The *Merrill* court specifically rejected the view that the geographic scope of the public trust doctrine was or is linked to the equal footing doctrine or federal law.²⁴⁷

R.R. Co., 113 N.E. 677 (Ohio 1916); Sloan v. Biemiller, 34 Ohio St. 492 (1878); OHIO REV. CODE ANN. § 1506.10 (West 2009).

²⁴⁶ Ohio *ex rel.* Merrill v. State Dep't of Natural Res., Nos. 2008-L-007, 2008-L008, 2009 WL 2591758, ¶¶ 1, 2, 6, 127-29 (Ohio Ct. App. Aug. 21, 2009). Perhaps this focus was the result of the state's claim to own up to the OHWM, so that it could require littoral owners to lease land below OHWM if they wanted to wharf out, *id.* ¶ 2, and of the landowners' claims that their ownership extended to the water's edge or to the low water mark. *Id.* ¶¶ 50-52, 94-95. The trial court noted, "The parties also appear to agree that, whatever the proper boundary is between the public trust territory and the title rights of littoral landowners, that boundary is always coterminous and never overlaps." *Merrill*, 2007 WL 491086, ¶ 16 n.9.

²⁴⁷ *Merrill*, 2009 WL 2591758, ¶¶ 75-82. Intervenor National Wildlife Federation and Ohio Environmental Council argued that, as a matter of federal law, the landward boundary of the public trust along the Lake Erie shore in Ohio must be the ordinary high water mark. *See id.* ¶ 76. While my framework provides that the starting point for determining the geographic scope of the public trust doctrine along the Ohio shore of Lake Erie is the OHWM as a matter of federal law by virtue of the equal footing doctrine, I do not concur that federal law mandates that the OHWM is the landward boundary for the public trust today along the Lake Erie shore. *See supra* Part IV.2.

The common pleas court in *Merrill* asserted another reason for finding the equal footing doctrine irrelevant to the geographic scope of the public trust doctrine or the dividing line between public and private title along the Lake Erie shore. The trial court reasoned that much of the land along Lake Erie did not pass from the federal government to Ohio upon its statehood in 1803, because such lands were previously subject to conflicting claims by Connecticut, Virginia, and New York. *Merrill*, 2007 WL 4910860, ¶ 235. The trial court's reasoning, however, seemingly misconstrued the effects of both the equal footing doctrine, by which title to lands underlying navigable waters pass to new states absent a grant or reservation by the federal government, *see, e.g.*, Utah Div. of State Lands v. United States, 482 U.S. 193, 195-98 (1987), and the Northwest Ordinance of 1787, by which the original states relinquished their claims to lands in the Northwest territories, including Ohio, to the federal government. *See* Northwest Ordinance of 1787, ch.8, 1 Stat. 50-53 (1789); Rasband, *supra* note 10, at 30-34. As a result, unless the federal government had expressly authorized grants to private parties by the original colonies of lands underlying Lake Erie prior to 1803, those lands should have passed to the State of Ohio upon its admission to the Union. *See supra* Part IV.A.1.a.

Moreover, the lands underlying navigable waters were subject to the public trust doctrine when the original colonies acquired them from the crown. That is, just as the crown and federal government retained *jus publicum* in such lands when *jus privatum* was transferred to a private party, the original colonies likewise would retain *jus publicum* if *jus privatum* were transferred to a private party prior to Ohio becoming a state. Hence, the *jus publicum* would

Rather, the court invoked *Shively* to assert that state law determines the scope of the public trust in land underlying navigable waters such as Lake Erie.²⁴⁸

The court of appeals then proceeded to try to divine what Ohio law says about the scope of the public trust doctrine along the Lake Erie shore. Relying primarily on language from a few Ohio Supreme Court decisions and the term “natural shoreline” in Ohio Revised Code sections 1506.10 and .11,²⁴⁹ the court concluded that state law sets the landward boundary of the public trust doctrine along the Lake Erie shore at the water’s edge.²⁵⁰ Rejecting the defendants’ argument that the public trust extends to the OHWM, the *Merrill* court stated that the public trust doctrine “cannot be improperly extended in violation of littoral property owners’ rights.”²⁵¹

I respectfully submit that the Ohio court of appeals erred in *Merrill*, in assuming that the boundary for title must equate with the boundary for the public trust, in assuming that the state is free to draw the public trust boundary wherever it chooses, and in its analysis of Ohio law. Rather, as discussed in Part IV.A.1 above, the boundary for the public trust doctrine need not be the same as the boundary between private littoral property and the state-owned bed of Lake Erie. The starting point for the court’s determination of the geographic scope of the public trust doctrine along the Lake Erie shore should be the common law ordinary high water mark, because the state received the shore in trust up to the OHWM upon statehood. From that point, the court should have analyzed whether the Ohio General Assembly had clearly relinquished any land from the scope of the public trust, or clearly redefined the boundary of the public trust, in a manner consistent with the core principles of the public trust doctrine, as discussed in Part IV.A.2 above. In my view, as discussed below, the Ohio legislature has not done so, and the landward boundary of the public trust doctrine along the Lake Erie shore remains the ordinary high water mark.

Preliminarily, it should be emphasized that no Ohio Supreme Court case has decided the boundary of the public trust along the Lake Erie shore, as the *Merrill* court itself acknowledged when it described the issue before it as one of first impression.²⁵² The court of appeals nevertheless seemed to place considerable weight on language from the syllabus of *Sloan v. Biemiller*,²⁵³ decided by the Ohio Supreme Court in 1878, which describes the boundary for purposes of a conveyance of land bordering Lake Erie as “the line at which the water usually stands when free from disturbing causes.”²⁵⁴ As the *Merrill* court recognized, *Sloan* had borrowed this

not have been relinquished in the shores of the Great Lakes prior to Ohio statehood, even if the original colonies had the authority to make a pre-statehood grant of title to private parties. *See Hogg v. Beerman*, 41 Ohio St. 81 (1884) (holding that even if there had been an express pre-1803 grant of a parcel under Lake Erie to a private party by Connecticut that was authorized by the federal government, the grant was subject to the public’s right to navigate and fish).

²⁴⁸ *Merrill*, 2009 WL 2591758, ¶¶ 76-77, 84.

²⁴⁹ *Id.* ¶¶ 58-71, 123-29.

²⁵⁰ *Id.* ¶¶ 127-29.

²⁵¹ *Id.* ¶ 84.

²⁵² *Id.* ¶ 1.

²⁵³ *Sloan v. Biemiller*, 34 Ohio St. 492 (1878).

²⁵⁴ *Merrill*, 2009 WL 2591758, ¶ 61 (quoting *Sloan*, 34 Ohio St. 492, 492 (syllabus)).

language from an Illinois Supreme Court opinion.²⁵⁵ But the definition of a boundary line was not at issue in *Sloan*. Rather, the *Sloan* court held that a littoral owner does not have the exclusive right to fish in Lake Erie waters opposite his property. In so holding, the Ohio Supreme Court ruled that the beds of Lake Erie are owned by the state, not littoral owners, and that the public has a right to fish in Lake Erie and cannot be excluded from doing so by a littoral owner.²⁵⁶ The *Sloan* court employed the Illinois case to support its ruling that the state, not private littoral owners, owned the lands underlying Lake Erie, and the opinion should not be viewed as authority for the boundary of the public trust doctrine.²⁵⁷

²⁵⁵ *Sloan*, 34 Ohio St. at 512-13 (quoting *Seaman v. Smith*, 24 Ill. 521, 524-25 (1860)); see *Merrill*, 2009 WL 2591758, ¶¶ 62-65.

²⁵⁶ *Sloan*, 34 Ohio St. at 514-15.

²⁵⁷ As discussed in Part V.C. *infra*, *Seaman v. Smith* and its Illinois progeny speak to the boundary for title purposes, not for the public trust, and Illinois has not specifically altered the boundary for the public trust along Lake Michigan.

The *Merrill* court also relied on snippets from two other Ohio Supreme Court cases: a sentence in the syllabus of *Ohio v. Cleveland & Pittsburgh R.R. Co.*, 113 N.E. 677 (Ohio 1916) saying the state holds title to the “land under the waters of Lake Erie” in trust for the public, and language in *Ohio ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709, 710, 725 (Ohio 1948), saying that the state holds title to “the subaqueous soil of Lake Erie” in trust for the public and that littoral owners do not have title beyond the “natural shore line” of Lake Erie. *Merrill*, 2009 WL 2591758, ¶¶ 125, 126. Neither case should be viewed as guidance for the boundary of the public trust doctrine along the Lake Erie shore. At issue in *Cleveland & Pittsburgh Railroad* was whether the littoral owner was entitled to wharf out to deeper, actually navigable water by filling in the submerged state-owned bed of Lake Erie. *Cleveland & Pittsburgh R.R.*, 113 N.E. at 679. Invoking *Shively* and *Illinois Central*, the *Cleveland & Pittsburgh Railroad* court emphasized the importance of the public trust doctrine, but the court held that, in the absence of legislation, the littoral owner had a right to wharf out to the harbor line, provided he did not interfere with the public rights of navigation and fishing. *Id.* at 680-83. In *Squire*, the issue was whether the government had authority to build a road on land that had been created by the littoral owner depositing fill on the formerly submerged, state-owned bed of Lake Erie. *Squire*, 82 N.E.2d at 717-19. In neither case was Ohio’s high court trying to limit the scope of the public trust to lands that are literally under water; there was no dispute over the boundary of the public trust in either case, because the fills indisputably had occurred on state-owned lakebed. By reciting that the littoral owner has no title beyond the “natural shoreline,” the *Squire* court was saying that the littoral owner could not acquire title to land created artificially by fill. *Id.* at 730 (since littoral owner did not own filled land, case turned on whether littoral owner had filled land for purposes of wharfing out; if so, government had “taken” his littoral right by building a public highway on filled land).

Contrary to the court of appeals, *Ohio ex rel. Duffy v. Lakefront E. Fifty-Fifth St. Corp.*, 27 N.E.2d 485 (Ohio 1940) was not a public trust case and was not describing where the public trust territory commenced when it referenced “shoreline.” See *Merrill*, 2009 WL 2591758, ¶ 68. Rather, at issue in *Duffy* was whether the state or the littoral owner had title to land recently formed by accretion. *Duffy*, 27 N.E.2d at 485. The Ohio Supreme Court ruled in favor of the private owner, concluding *inter alia* that the Fleming Act had not altered the common law of accretion along Lake Erie. *Id.* at 486.

The court of appeals also pointed to 1993 Ohio Op. Att’y Gen. No. 93-025 (Oct. 27, 1993), which opined that littoral owners own above the “natural shoreline” of Lake Erie, that the “shoreline” is the line marking the edge of a body of water, and that “the shoreline of a

The *Merrill* court also looked to the Fleming Act, now codified at Ohio Revised Code sections 1506.10 and .11.²⁵⁸ According to the court, the General Assembly had via the Fleming Act in 1917 “codified” the public trust doctrine and defined “the state’s rights in Lake Erie.”²⁵⁹ Focusing primarily on the statute’s use of the term “natural shoreline,”²⁶⁰ the court invoked the Fleming Act to support its holding that the water’s edge serves as the landward boundary of state ownership and the public trust doctrine along the shore of Lake Erie.

The Fleming Act “declared that the waters of Lake Erie . . . , together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state”²⁶¹ Pursuant to the statute, the Ohio Department of Natural Resources may lease or permit uses of the land underlying Lake Erie by private parties, for purposes of development or improvement, provided doing so does not impair the public’s rights of navigation, commerce, and fishing.²⁶²

As discussed in Part IV.A.2 above, it is possible for a legislature to re-define the boundary of the public trust doctrine, subject to restrictions imposed by the doctrine itself. However, in my view the Fleming Act should not be interpreted as legislatively relinquishing the public trust below the common law OHWM to the water’s edge. First, the Fleming Act does not unambiguously evince legislative intent to alter the boundary of the public trust doctrine along the Great Lakes shore set by the common law. The Fleming Act was passed in the wake of *Ohio v. Cleveland & Pittsburgh Railroad*, where the Ohio Supreme Court in 1916 held that the Lake Erie waters and underlying lands were subject to the public trust doctrine, but that the railroad had a littoral right to wharf out, provided it did not interfere with the public’s rights to use the lake.²⁶³ Noting the absence of state legislation regulating the littoral owner’s right to wharf out, the court ruled that the railroad could wharf out to the harbor line established by the federal government.²⁶⁴ The court invited the General Assembly to enact legislation regulating the exercise of the

body of water is in a constant state of change.” *Id.* at 5, 7; *see Merrill*, 2009 WL 2591758, ¶ 72. That opinion acknowledged that no case had directly addressed the issue of a littoral owner’s title boundary along Lake Erie, 1993 Ohio Op. Att’y Gen. No. 93-025, at 3, and it did not purport to address the boundary of the public trust doctrine. Obviously disagreeing with the former attorney general’s opinion, the current Ohio attorney general argued in *Merrill* that the state owns up to the OHWM. *Merrill*, 2009 WL 2591758, ¶ 2.

Lastly, the *Merrill* court referenced regulations defining “beach,” “shore,” and “shoreline.” OHIO ADMIN. CODE § 1501-6-10 (E), (T) & (U) (2009). *See Merrill*, 2009 WL 2591758, ¶ 73. Those regulations were not issued pursuant to the Fleming Act and do not indicate that the water’s edge should be the boundary for the public trust.

²⁵⁸ OHIO REV. CODE ANN. §§ 1506.10, 1506.11 (West 2009).

²⁵⁹ *Merrill*, 2009 WL 2591758, ¶ 67.

²⁶⁰ OHIO REV. CODE ANN. §§ 1506.10, 1506.11(A).

²⁶¹ *Id.* § 1506.10.

²⁶² *Id.* § 1506.11.

²⁶³ *Ohio v. Cleveland & Pittsburgh R.R. Co.*, 113 N.E. 677 (Ohio 1916).

²⁶⁴ *Id.* at 682.

littoral right to wharf out in Lake Erie, by articulating what littoral owners can lawfully do without interfering with the public's rights protected by the public trust doctrine.²⁶⁵ In response, the Ohio legislature enacted the Fleming Act the following year.²⁶⁶ By using the term "natural shoreline" in the Fleming Act, the legislature seemingly merely intended to assure that formerly submerged lands that had been artificially filled would not be excluded from public use and state control.²⁶⁷ The statute was not an attempt by the General Assembly to codify all aspects of the public trust doctrine in Ohio with respect to Lake Erie and its shores.²⁶⁸

Second, relinquishing the entire two hundred and sixty-two miles of Ohio shore below the OHWM to the water's edge would seem to violate the substantive tenets of the public trust doctrine. Not only would the loss of such a massive amount of shore from public trust protection constitute a substantial impairment to the public's rights to use Lake Erie waters and the lands underlying them, it is difficult to see

²⁶⁵ The court explained:

It is to be presumed that the Legislature, in the enactment of legislation on the subject, will appropriately provide for the performance by the state of its duty as trustee for the purposes stated; that it will determine and define what constitutes an interference with public rights, and that it will likewise, in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners.

Id. at 683.

²⁶⁶ See *Ohio ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709, 721 (Ohio 1948); *Thomas v. Sanders*, 413 N.E.2d 1224, 1227 (Ohio Ct. App. 1979).

²⁶⁷ Section 1506.10 of the Ohio Revised Code states:

Any *artificial* encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills or otherwise, beyond the *natural shoreline* of those waters, not expressly authorized by the general assembly . . . shall not be considered as having prejudiced the rights of the public in such domain.

OHIO REV. CODE ANN. § 1506.10 (emphases added).

Similarly, Section 1506.11 provides: "'Territory,' as used in this section, means the waters and the lands *presently* underlying the waters of Lake Erie and the lands *formerly* underlying the waters of Lake Erie and now *artificially* filled, between the *natural shoreline* and the international boundary line with Canada." OHIO REV. CODE ANN. § 1506.11(A) (emphases added).

The trial court in *Merrill* recognized that artificial filling of the lakebed would not diminish lands subject to the public trust and expand littoral property. *Merrill*, 2007 WL 4910860, ¶ 250 (interpreting Ohio Revised Code § 1506.11(A) "territory" as including all lands formerly beneath the waters of Lake Erie "notwithstanding any subsequent artificial filling of those lands"). The court of appeals, however, indicated that the actual water's edge is the line between public trust lands underlying Lake Erie "and those natural *or filled in* lands privately held by littoral owners." *Merrill*, 2009 WL 2591758, ¶ 127 (emphasis added). Allowing a littoral owner to expand her property—and diminish the public trust lands—by depositing fill on the lakebed to create more land above the water's edge would be contrary to Ohio law. OHIO REV. CODE ANN. §§ 1506.10, 1506.11(A); *Squire*, 82 N.E.2d at 730.

²⁶⁸ Cf. *Squire*, 82 N.E.2d at 725 ("It is obvious that [the Fleming Act] does not change the concept of the declaration of the state's title as found in the [*Cleveland & Pittsburgh R.R.*] case."); *Ohio ex rel. Duffy v. Lakefront E. Fifty-Fifth St. Corp.*, 27 N.E.2d 485, 486 (Ohio 1940) ("[N]othing in the Fleming Act . . . alters the common-law doctrine of accretion.").

how relinquishing such lands to private littoral owners could promote an important public interest.²⁶⁹ Echoing a point made by the dissent in *Glass v. Goeckel*, the *Merrill* court sought to help justify its holding by asserting that “[t]he water’s edge provides a readily discernible boundary for both the public and littoral landowners.”²⁷⁰ As discussed in Part V.A above regarding that Michigan case, the state can choose to establish a brighter-line boundary, but not at the expense of the protection of the Great Lakes shores and the public’s right to use them.

As a final point with respect to geographic scope, even if the Ohio Supreme Court or General Assembly had adopted the water’s edge as the boundary between the state-owned bed of Lake Erie and private littoral property for purposes of title, the shore of Lake Erie should remain subject to the public trust up to the OHWM. Although the state may transfer *jus privatum* below the OHWM to littoral owners, the state retains the *jus publicum* encompassing the public’s rights to use the shore for protected purposes.²⁷¹ As set forth more fully in Part IV.2.a above, the *jus publicum* can be relinquished only in limited circumstances, where the legislation is clear, impairment of the public use is not substantial, and an important public interest is advanced.

Although the court of appeals held that the public has no right to walk the shore of Lake Erie on privately owned property *above* the water’s edge, the *Merrill* court did recognize that the public has a right to walk along the shore *below* the water’s edge. That is, the court recognized that walking along the shore, albeit below the water’s edge, is a public use protected by the public trust doctrine.²⁷² The court specifically stated that public walking lakeward of the water’s edge does not interfere with the rights of the littoral owner.²⁷³

The *Merrill* court’s finding that walking the shore of Lake Erie is a protected use under the public trust doctrine has a strong foundation in Ohio law. Both judicially and statutorily, Ohio has recognized that the public uses protected by the public trust doctrine extend beyond the traditional triad. Cases hold that recreational boating is a protected public use,²⁷⁴ and the Fleming Act provides that the state holds the waters

²⁶⁹ See *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 837 P.2d 158 (Ariz. Ct. App. 1991) (court invalidated legislation that relinquished state’s claim to riverbeds). *But cf.* *Opinion of Justices*, 313 N.E.2d 561 (Mass. 1974) (colonial ordinance granted oceanfront landowners title to low water mark, subject only to public rights of fishing, fowling and navigation).

²⁷⁰ *Merrill*, 2009 WL 2591758, ¶ 128; see *Glass v. Goeckel*, 703 N.W.2d 58, 102-03 & n.47 (Mich. 2005) (Markman, J., concurring in part and dissenting in part).

²⁷¹ See *Merrill*, 2009 WL 2591758, ¶ 84 (recognizing that “the public trust in Lake Erie cannot be abandoned . . .”). Although paragraph 6 of the syllabus in *Ohio ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709, 710 (Ohio 1948) recites flatly that the state, as trustee with respect to the waters of Lake Erie and underlying land, “cannot abandon the trust property,” the opinion cites *Illinois Central* favorably and should not be viewed as an absolute bar to relinquishment of land subject to the public trust doctrine. *Id.* at 729.

²⁷² *Merrill*, 2009 WL 2591758, ¶ 89.

²⁷³ *Id.*

²⁷⁴ *Coleman v. Schaeffer*, 126 N.E.2d 444 (Ohio 1955); *Thomas v. Sanders*, 413 N.E.2d 1224 (Ohio Ct. App. 1979).

and underlying lands of Lake Erie in trust “for the public uses to which they may be adapted” as well as navigation, commerce, and fishing.²⁷⁵

In sum, despite the opinion of the Ohio Court of Appeals for the Eleventh District in *Merrill*, there is ample support for another Ohio court to hold that the geographic scope of the public trust doctrine along the shore of Lake Erie extends to the common law OHWM and that the right to walk along the shore of Lake Erie below the OHWM is a protected use in Ohio.

C. Illinois

As early as *Illinois Central*, Lake Michigan and its beds were recognized as being owned by the State of Illinois and held in trust for the benefit of the public.²⁷⁶ Subsequently, Illinois has statutorily reaffirmed that title to the beds of Lake Michigan, and all other meandered lakes in Illinois, are held in trust for the people of the state.²⁷⁷

Indeed, the Illinois Supreme Court has continued to wield the public trust doctrine to void legislative grants of land underlying Lake Michigan, as reflected by *People ex rel. Scott v. Chicago Park District*.²⁷⁸ In 1963, the Illinois General Assembly passed a bill, signed by the governor, conveying one hundred and ninety-five acres of land submerged in Lake Michigan near Chicago to the U.S. Steel Corporation, which proposed to reclaim the land and build a steel plant, in return for a payment of \$19,460 by the corporation.²⁷⁹ When U.S. Steel eventually tendered payment, it was refused by the state treasurer, and the state attorney general filed suit seeking to declare the legislation granting the land to the corporation void. Affirming the trial court, the Illinois Supreme Court held that the legislative grant was void because it violated the public trust doctrine. Tracing cases involving legislative grants of submerged lands under Lake Michigan since *Illinois Central*, the court found only one instance where a legislative grant of submerged land under Lake Michigan did not violate the public trust: where the sale of a strip of shore was upheld in order to facilitate the extension of Lake Shore Drive over the reclaimed land, because the grant did not substantially interfere with navigation, commerce, or

²⁷⁵ OHIO REV. CODE ANN. § 1506.10 (West 2009); see OHIO REV. CODE ANN. § 1506.11(G) (recognizing “public right of recreation”); see also *Squire*, 82 N.E.2d at 729-30 (teaching that the “dead hand of the past” should not limit the protections afforded by the public trust doctrine to “obsolete and antiquated public uses,” but instead the “law should be flexible enough to be applied to a constantly progressive civilization”).

²⁷⁶ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436-37 (1892).

²⁷⁷ 615 Ill. Comp. Stat. 5/24 (2009). The beds of actually navigable streams and rivers in Illinois, however, can be privately owned. Illinois follows the so-called English rule as to ownership of beds of navigable-in-fact rivers and streams not subject to the ebb and flow of tides. The public has an easement for purposes of navigation in waters that are navigable-in-fact, regardless of the ownership of the underlying soil, but the riparian owner has the exclusive right to fish in the waters covering the soil he owns. *Schulte v. Warren*, 75 N.E. 783 (Ill. 1905).

²⁷⁸ *People ex rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773 (Ill. 1976).

²⁷⁹ The Chicago Park District had received an interest in the same parcel by earlier legislation, and re-conveyed the land to the state as part of the sale. *Id.* at 774.

fishing and the benefit to the private interest was incidental.²⁸⁰ By contrast, the Illinois Supreme Court held that the grant to U.S. Steel primarily benefitted a private interest, would irretrievably remove one hundred and ninety-five acres of Lake Michigan from public use, and would have an adverse effect on public use of adjacent waters. That the legislature in the bill had articulated that the grant did not impair the public interest and that commercially developing the submerged land would benefit the people of Illinois was not conclusive. Likewise, claimed benefits to the public of increased local employment and economic improvement were too indirect, as virtually every grant of submerged lands arguably could make a similar claim. Quoting Professor Sax, the court stated: “When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.”²⁸¹

Neither Illinois cases nor statutes expressly state that the public trust extends geographically to the ordinary high water mark along the shores of Lake Michigan. The Illinois Supreme Court, though, has recognized that at English common law the crown held title to land underlying navigable waters up to the high water mark in trust for the people, that the state became vested with such title when admitted to the Union pursuant to the equal footing doctrine, and that the state holds such lands in trust for the people.²⁸²

Case law indicates that, with respect to Lake Michigan, the state’s title extends to the water line as it naturally exists free from disturbing causes.²⁸³ Although the state may have relinquished title to some of the shore below the ordinary high water mark, there is no indication that the state has relinquished the public trust for such shore. Hence, the geographic scope of the public trust doctrine along the shore of Lake Michigan in Illinois should remain the common law OHWM.

The U.S. Supreme Court in *Illinois Central* expressly identified navigation, fishing, and commerce as uses protected by the public trust doctrine in the waters and beds of Lake Michigan.²⁸⁴ In addition to this traditional triad of protected uses, the Illinois Supreme Court has recognized that the interests protected by the public trust doctrine for Lake Michigan “extend as well to recreational uses, including bathing, swimming and other shore activities.”²⁸⁵ No reported Illinois case directly discusses the right of the public to walk along the shore of Lake Michigan. In light of the broad recognition of recreational uses and “shore activities” as protected by the public trust doctrine in Illinois, though, there should be no barrier to recognizing

²⁸⁰ *People v. Kirk*, 45 N.E. 830 (Ill. 1896).

²⁸¹ *Scott*, 360 N.E.2d at 780 (quoting Sax, *supra* note 6, at 490).

²⁸² *Wilton v. Van Hessen*, 94 N.E. 134, 136-37 (Ill. 1911) (holding that non-navigable lake was not owned by the state).

²⁸³ *Brundage v. Knox*, 117 N.E. 123, 130-31 (Ill. 1917); *Seaman v. Smith*, 24 Ill. 521, 525 (1860).

²⁸⁴ *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892).

²⁸⁵ *Scott*, 360 N.E.2d at 780 (quoting *Neptune City v. Avon-By-the-Sea*, 294 A.2d 47, 54-55 (N.J. 1972)).

the public's right to walk along the shore of Lake Michigan in Illinois below the ordinary high water mark.

D. Indiana

In Indiana, the state holds Lake Michigan and its beds in trust for the public.²⁸⁶ Indiana owns the beds of Lake Michigan up to the "ordinary highwater mark," which is administratively defined as a specific elevation.²⁸⁷ By contrast, for other waterways, "ordinary highwater mark" is administratively defined as the "line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics," including the line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation, and the presence or absence of debris.²⁸⁸ Various activities by shore owners require a permit below the OHWM.²⁸⁹

Indiana has not expressly addressed the geographic scope of the public trust doctrine along its Lake Michigan shore. Because the state has not, by statute or regulation, redefined the geographic scope of the public trust doctrine, the geographic scope of the public trust doctrine along the Lake Michigan shore may remain the OHWM under common law, rather than the administrative definition.

Indiana also has not expressly discussed the public uses of Lake Michigan or its shores protected by the public trust doctrine. The state, though, has defined protected public trust uses broadly with respect to navigable inland lakes. Specifically, a member of the public has a statutory right to walk the lakebed of a "public freshwater lake" in Indiana. The Lakes Preservation Act expressly provides that the state holds and controls all public freshwater lakes in trust for the use of Indiana citizens, and that the public has the right to use freshwater lakes for "recreational purposes," including fishing, boating, and swimming.²⁹⁰ The Indiana court of appeals, interpreting the Lakes Preservation Act, has held that any member of the public could "walk in the shallow waters" of a public freshwater lake.²⁹¹ The Lakes Preservation Act, by its terms, does not apply to Lake Michigan.²⁹² However, in light of the statutory recognition of recreational uses as among those protected by the public trust doctrine in the state, and judicial recognition of walking as being within the scope of protected uses, there seems to be no barrier to finding that walking along the Great Lakes shores below the OHWM would be a protected use.

²⁸⁶ *Lake Land Co. v. State ex rel. Attorney Gen.*, 120 N.E. 714, 715 (Ind. Ct. App. 1918) (preventing foreign corporation from dredging sand and gravel from lakebed).

²⁸⁷ 312 IND. ADMIN. CODE 1-1-26(2) (2009) (581.5 feet IGLD 1985).

²⁸⁸ *Id.* at 1-1-26(1). Indiana does not follow the so-called English rule of title, and the beds of navigable rivers are owned by the state. *Indiana ex rel. Ind. Dep't of Conservation v. Kivett*, 95 N.E.2d 145, 148 (Ind. 1950).

²⁸⁹ *See* 312 IND. ADMIN. CODE 6-1-1.

²⁹⁰ IND. CODE ANN. § 14-26-2-5 (West 2009). Indiana law appears to treat navigable rivers differently from inland lakes. Although the state owns the beds of navigable-in-fact rivers, the public has no right to use the shores of rivers, except in the event of emergency. *Bainbridge v. Sherlock*, 29 Ind. 364, 370 (1868).

²⁹¹ *Parkinson v. McCue*, 831 N.E.2d 118, 130 (Ind. Ct. App. 2005).

²⁹² IND. CODE ANN. § 14-26-2-1.

E. Minnesota

Minnesota courts repeatedly have recognized a strong public interest in navigable waters and the lands underlying them. The state owns and holds all navigable rivers and lakes, and their beds, in trust for “public use,”²⁹³ which has been broadly defined by the Minnesota Supreme Court. In an early case, the court observed that public trust uses extended beyond commercial navigation to recreational boating, “fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.”²⁹⁴ Specifically, with respect to Lake Superior, the Supreme Court of Minnesota has recognized uses protected by the public trust include “commercial navigation, the drawing of water for various private and public purposes, recreational activity, and similar water-connected uses.”²⁹⁵ Although the public trust doctrine is broad with respect to navigable waters and underlying lands in Minnesota, it is not unlimited. The Minnesota Supreme Court has held that the state does not have the power to take without compensation reclaimed land from Lake Superior for purposes of constructing a public highway, because such a public use is not “connected with navigation or any other water-connected public use.”²⁹⁶

The boundary between state-owned beds and privately owned uplands along Lake Superior and navigable lakes and rivers is the ordinary low water mark. But it is well settled that the private owner’s title is absolute only to the ordinary high water mark. Between the low and high water marks, the private title is qualified, subject to the rights of the public.²⁹⁷ Accordingly, the geographic scope of the public trust doctrine along the shores of the Great Lakes in Minnesota extends to the ordinary high water mark.

What constitutes the ordinary high water mark along navigable waters in Minnesota has been described both judicially and statutorily. Courts describe it as a water mark, coordinate with the limit of the bed of the water; the “bed” is where the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes. It is determined by examining the beds and banks, and ascertaining where the presence and action of the water are so common and usual, and so long-continued in all ordinary years, as to mark upon the soil of a bed a character distinct from the banks, in respect to vegetation and the

²⁹³ See, e.g., *Minnesota v. Longyear Holding Co.*, 29 N.W.2d 657, 670 (Minn. 1947); *Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942); *Minnesota v. Korrer*, 148 N.W. 617, 621 (Minn. 1914); see also MINN. STAT. ANN. § 103G.711 (West 2008) (ownership of beds and lands under the waters of all rivers navigable for commercial purposes are owned by the state in fee simple). Non-navigable waterways and their beds, however, are neither owned by the state nor held in trust for the public. *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893).

²⁹⁴ *Lamprey*, 53 N.W. at 1143 (emphasis added).

²⁹⁵ *State v. Slotness*, 185 N.W.2d 530, 532 (Minn. 1971).

²⁹⁶ *Id.* at 534 (riparian had created new dry land by artificially filling the lakebed of Lake Superior out to the point of navigability; state was not permitted to take such new dry land without compensation to build public highway).

²⁹⁷ *Id.* at 533 (Lake Superior); *Mitchell v. City of St. Paul*, 31 N.W.2d 46, 49-50 (Minn. 1948); *Korrer*, 148 N.W. at 621-22 (dicta about Lake Superior).

nature of the soil itself.²⁹⁸ The legislature has defined “ordinary high water level” as an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, commonly the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial.²⁹⁹

There appears to be no reported case in Minnesota addressing the right of the public to walk along the shore of Lake Superior between the high and low water marks. However, because the public trust doctrine extends to the ordinary high water mark and protects a broad range of uses, a court should be free to hold that the public has a right to walk along the Minnesota shores of Lake Superior up to the ordinary high water mark.

F. New York

Unquestionably, New York law recognizes the public trust in the Atlantic Ocean and its shore up to the high water mark, and walking along the seashore between the low and high water marks clearly is protected by the public trust. New York courts have upheld the public’s right of passage along the seashore as incident to the purposes of navigation, fishing, and bathing.³⁰⁰ Even lounging, pushing a baby carriage, and setting up a beach umbrella on the seashore have been protected by the public trust.³⁰¹

As a general rule, the State of New York holds title to the ocean seashore below high water mark, but the state can transfer title to private hands. Even where the *jus privatum* is privately owned, the shore below high water mark remains subject to the *jus publicum* interest of navigation, fishing, bathing, and other lawful purposes.³⁰² The legislature is empowered to terminate even the *jus publicum* interest of small portions of protected lands, provided the legislative grant is clear, advances the public purpose, and does not substantially impair the public interest.³⁰³

By contrast, the public’s rights to use navigable rivers and streams in New York are more limited. New York in part followed the so-called English common law rule with respect to title, and the beds of various non-tidal rivers and lakes that are navigable in fact are owned by the riparian landowners rather than the state.³⁰⁴ Even so, the public retains the right of navigation on such navigable-in-fact waterways, including the incidental privilege to walk on the bed and banks of the river, but only when necessary to navigation, including portage onto riparian lands to circumvent

²⁹⁸ See *Mitchell*, 31 N.W.2d at 48-49.

²⁹⁹ MINN. STAT. ANN. § 103G.005(14) (West 2008).

³⁰⁰ *Barnes v. Midland R.R. Terminal Co.*, 85 N.E. 1093, 1096 (N.Y. 1908); *Arnold’s Inn, Inc. v. Morgan*, 310 N.Y.S.2d 541, 547 (N.Y. Sup. Ct. 1970).

³⁰¹ *Tucci v. Salzhauer*, 336 N.Y.S.2d 721, 724 (N.Y. App. Div. 1972); *Johnson v. May*, 178 N.Y.S. 742, 742 (N.Y. App. Div. 1919).

³⁰² *Arnold’s Inn*, 310 N.Y.S.2d at 547.

³⁰³ See *People v. Steeplechase Park Co.*, 113 N.E. 521, 526-27 (N.Y. 1916); *Saunders v. N.Y. Cent. & Hudson River R.R.*, 38 N.E. 992, 994 (N.Y. 1894).

³⁰⁴ *Douglastown Manor, Inc. v. Bahrakis*, 678 N.E.2d 201, 204-05 (N.Y. 1997); *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998).

obstacles.³⁰⁵ However, the public has no right to fish in navigable-in-fact rivers where the beds are privately owned, and the owners can exclude the public from fishing and other uses not incidental to navigation.³⁰⁶

New York courts, though, departed from the English rule of title with respect to the Great Lakes, major rivers, and large inland lakes, as the beds are owned by the state. New York has recognized that navigable waters and beds of major rivers and lakes are held in trust by the state.³⁰⁷

New York courts have not directly addressed the scope of the public trust doctrine as it relates to the shores of the Great Lakes. In *Burnham v. Jones*,³⁰⁸ the Court of Appeals recognized that the state's title underlying Lake Ontario extended to the high water mark. Subsequently, however, in *Stewart v. Turney*,³⁰⁹ the Court of Appeals held that the state's title underlying Cayuga Lake, one of the largest Finger Lakes, extended to the low water mark.³¹⁰ A later decision by an intermediate appellate court relied on *Stewart* to find that the state's title to the beds of Lake Ontario extended only to the low water mark, without citation to or discussion of *Burnham*.³¹¹ In *Stewart*, the court held that persons who walked upon the shore of Cayuga Lake above ordinary low water mark were trespassers. However, there was no mention of the public trust doctrine, and the court seemed to equate title with the ability to exclude the public.³¹²

Those cases, however, preceded the enactment of a New York statute defining "public trust lands" in a manner that supports the public's right to walk along the shore of the Great Lakes up to the high water mark. "Public trust lands" are defined as:

those lands below navigable waters, with the upper boundary normally being the mean high waterline, or otherwise determined by local custom and practice. Public trust lands, waters, and living resources are held in trust by the state or by the trustees of individual towns for the people to use for walking, fishing, commerce, navigation, and other recognized uses of public trust lands.³¹³

In short, a robust public trust doctrine exists in New York with respect to the ocean and its shores, specifically upholding the right of the public to walk along the shore below the high water mark. The public trust doctrine has been applied to the

³⁰⁵ *Adirondack League*, 706 N.E.2d at 1194-97.

³⁰⁶ *Douglstown Manor*, 678 N.E.2d at 203-05. The Hudson and Mohawk Rivers are exceptions. See *Smith v. City of Rochester*, 92 N.Y. 463 (1883).

³⁰⁷ *Saunders*, 38 N.E. at 994; N.Y. COMP. CODES R. & REGS. tit. 19, § 600.2(z) (2009).

³⁰⁸ *Burnham v. Jones*, 20 N.E. 577, 577 (N.Y. 1889).

³⁰⁹ *Stewart v. Turney*, 142 N.E. 437, 442 (N.Y. 1923).

³¹⁰ The *Stewart* opinion indicated that the line between public and private was neither contested nor material in *Burnham*. *Id.*

³¹¹ *Ransom v. Shaeffer*, 274 N.Y.S. 570, 573 (N.Y. Sup. Ct. 1934).

³¹² See *Stewart*, 142 N.E. at 442.

³¹³ N.Y. COMP. CODES R. & REGS. tit. 19, § 600.2(z).

Great Lakes by New York courts and the legislature. Notwithstanding an apparent split in the case law regarding whether the state's title to lands underlying the Great Lakes extends to the high or low water marks, there is no indication that the state has relinquished the *jus publicum* interest in the Great Lakes shore below the common law OHWM, so geographically the public trust doctrine should extend to that OHWM. Given the longstanding rights of the public to walk the ocean shores protected by the public trust, and the statutory recognition of walking as a protected use, the right to walk should be a protected use along the shores of the Great Lakes as well.

G. Pennsylvania

Pennsylvania rejected the so-called English common law rule governing title to non-tidal waters, and the commonwealth owns the beds of rivers and lakes that are navigable in fact, not just those that are subject to the ebb and flow of the tides. The boundary line for title purposes along navigable rivers and lakes is the low water mark; the commonwealth holds title below the low water mark, with riparian and littoral owners holding title above the low water mark. But between the low and high water marks along navigable waters, the private owner's title is not absolute. Rather, the private owner's rights are subject to the public's rights of navigation, fishing, and other public trust uses up to the high water mark.³¹⁴

Pennsylvania's appellate courts seemingly have not squarely decided the scope of the public trust as it relates to Lake Erie. At least one trial court, though, has applied to Lake Erie the same rules with respect to title and the public trust as followed for navigable rivers and lakes. That is, the littoral owner's deed was interpreted to make the low water mark the boundary between privately owned uplands and state-owned beds underlying Lake Erie, but the private owner's rights up to the high water mark were subject to the public's rights to navigation, fishing, and other unspecified protected uses.³¹⁵ For purposes of regulating fill or encroachments upon submerged lands along Lake Erie, the state has administratively defined both the high water mark and the low water mark.³¹⁶

Pennsylvania courts have not addressed the public's right to walk along Lake Erie. In general, Pennsylvania recognizes that broad uses are protected by the public trust doctrine. The highest court has stated that public rights in navigable rivers include, in addition to navigation and fishing, the rights to gather stones, gravel and

³¹⁴ *Black v. Am. Int'l Corp.*, 107 A. 737, 738 (Pa. 1919); *Freeland v. Pa. R.R. Co.*, 47 A. 745, 746 (Pa. 1901); *Conneaut Lake Ice Co. v. Quigley*, 74 A. 648, 650 (Pa. 1909); *Fulmer v. Williams*, 15 A. 726, 728 (Pa. 1888); *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 719 (Pa. Super. Ct. 1999); *see also* 1977 Pa. Op. Att'y Gen. No.73 (riparian's title between low and high water marks on navigable rivers is "qualified").

³¹⁵ *Sprague v. Nelson*, 6 Pa. D. & C. 493, 494 (Erie C.P. 1924). The court held a member of the public liable for trespass for removing sand and gravel from the privately owned shore, ruling that the littoral owner had the right to make use of the sand and gravel between the low and high water marks, and apparently concluding that removing sand and gravel from the shore was not a protected use like navigation and fishing. *Id.* at 494-97.

³¹⁶ The high water mark for Lake Erie is 572.8 feet IGLD, and the low water mark is 568.6 feet IGLD. 25 PA. CODE § 105.3(b) (2009).

sand; to take ice and driftwood; and to bathe.³¹⁷ Statutorily and administratively, “recreation” is recognized as a protected public trust use.³¹⁸ The Pennsylvania Department of Environmental Protection has published a Public Access Policy providing that the public has a right of foot access along the Lake Erie shore in the “public easement area” between the ordinary high and low water marks.³¹⁹

In sum, Pennsylvania’s public trust doctrine extends geographically to the high water mark along Lake Erie and protects a broad range of public uses. While Pennsylvania courts have not squarely addressed the public’s right to walk along the shore of Lake Erie, there seems to be no barrier to recognition of a public right to walk the shore of Lake Erie below the high water mark in Pennsylvania.

H. Wisconsin

The Wisconsin Supreme Court repeatedly has said that the state owns the beds of the Great Lakes up to the ordinary high water mark in trust for its people.³²⁰ Wisconsin took title to all navigable waters within the state up to the OHWM when it was admitted to the Union, pursuant to the equal footing doctrine, including the Great Lakes as well as lesser inland waters.³²¹

The OHWM has been defined judicially as the point on the bank or shore where the presence or action of the water is so continuous as to leave a distinct mark, by erosion, vegetation, or other easily recognized characteristic. Where the bank or shore at any particular place is of such character that it is difficult to ascertain such a point, recourse to other places on the bank or shore of the same water body is appropriate to determine the OHWM. This same definition of OHWM applies to

³¹⁷ *Solliday v. Johnson*, 38 Pa. 380, 381 (1861). While removing sand and gravel from the bed of a river apparently is a protected use, removing them from the privately owned shore between the low and high water mark apparently is not protected. See *Sprague*, 6 Pa. D. & C. at 496. It should be noted that the Pennsylvania Supreme Court in a criminal case found a defendant property owner who had erected a building and deposited fill between the high and low water marks not guilty of obstructing navigation on a river, stating “[t]here is no highway for travel on foot, by horse or carriage, along the shore of a navigable stream, by force merely of the public right of navigation.” *Zug v. Commonwealth*, 70 Pa. 138, 141 (1871). *Zug* was quoted in *Sprague v. Nelson* in support of that court’s finding that the public had no right to take sand and gravel from the privately owned shore along Lake Erie. *Sprague*, 6 Pa. D. & C. at 496.

³¹⁸ 32 PA. STAT. ANN. § 693.15 (b)(2) (West 2009) (including “recreation, fishing or other public trust purposes” among the list of purposes for which the state can grant authorization for a dam, obstruction or encroachment upon lands underlying navigable waters); 25 PA. CODE § 105.31 (same).

³¹⁹ See PA. DEP’T OF ENVTL. PROT., PENNSYLVANIA COASTAL ZONE MANAGEMENT PROGRAM HIGHLIGHTS 2000-2001 (2001), <http://www.dep.state.pa.us/dep/subject/advoun/czac/CZAC00hilites.html> (last visited May, 27, 2010).

³²⁰ *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781, 787-88 (Wis. 2001); *Wisconsin v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987).

³²¹ *Trudeau*, 408 N.W.2d at 343.

Lakes Superior and Michigan, as well as to navigable rivers and other inland lakes in Wisconsin.³²²

Hence, the geographic scope of the public trust doctrine in Wisconsin along the Great Lakes shores seems clear: the state owns the shore below the OHWM along Lakes Superior and Michigan in trust for the people. But 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.

The Wisconsin Supreme Court in 1923 held that the public has no right to walk along the state-owned shore of a navigable inland lake between the water's edge and the OHWM. In *Doemel v. Jantz*,³²³ the court held liable for trespass a defendant who had walked along the shore of Lake Winnebago between the ordinary high and low water marks. Although the shore was owned by the state in trust for the public, the court found that the rights of the public to use the shore were limited to those incident to navigation. "The riparian owner's rights to the shore are exclusive as to all the world, excepting only where those rights conflict with the rights of the public for navigation purposes."³²⁴ When the water is at the high water mark, the shore beneath the water is subject to the rights of the public for navigation purposes. But when the water recedes to the low water mark, the riparian has exclusive rights to use the shore up to the OHWM.³²⁵

Although the rule of *Doemel v. Jantz* apparently has never been applied in a case involving the Great Lakes shores, the Wisconsin Department of Natural Resources, charged with enforcing the public trust doctrine, follows *Doemel v. Jantz* with respect to the Great Lakes shores, too. That is, the littoral owner has the exclusive right to use the shores of the Great Lakes below the OHWM and above the water's edge, subject only to the public's right to navigate. The WDNR employs a "keep your feet wet" policy: the public's right to walk on the lakebed is limited to below the water's edge.³²⁶

³²² *Id.* at 341-43; *R.W. Docks*, 628 N.W.2d at 790 (Great Lakes); *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914) (navigable stream).

³²³ *Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See WIS. DEP'T OF NATURAL RES., THE ORDINARY HIGH WATER MARK—WHAT IS IT? (2008), <http://dnr.wi.gov/org/water/wm/dsfm/shore/ohwm.htm> (last visited May 27, 2010); see also Pratt, *supra* note 35, at 246-47; Ricardo Pimentel, Editorial, *Lake Michigan Beaches: What Is a 'Public Use'?*, MILWAUKEE SENTINEL J., April 20, 2006, at A16.

A decade ago, the Wisconsin legislature enacted the Stream Access Law, which authorized members of the public to use any exposed shore area of a stream between the OHWM and the water's edge, without the permission of the riparian, to engage in water-related recreational activity. 1999 Wis. Act 9, § 793t (repealed 2001). While popular with anglers, canoeists, and kayakers, the statute ignited a firestorm of protest among riparian owners. Two years later, the statute was amended to eliminate the statutory right of the public to use the shore of streams and to revert to prior traditional law—the public can use the exposed shore area between the OHWM and the water's edge without permission of the riparian only if necessary to bypass an obstruction. 2001 Wis. Act 16, § 1255d-1255v (codified as amended at WIS. STAT. ANN. § 30.134 (West 2009)) (effective Sept. 1, 2001).

In my view, following the *Doemel v. Jantz* rule with respect to the Great Lakes shores in Wisconsin is at odds with the state supreme court's more recent pronouncements regarding the public trust doctrine and the Great Lakes. In *R.W. Docks & Slips v. Wisconsin*,³²⁷ the Wisconsin Supreme Court in 2001 acknowledged that the uses protected by the public trust in Wisconsin originally focused on commercial navigation, but public trust uses have been expanded to include purely recreational purposes such as boating, swimming, fishing, hunting, and preserving scenic beauty.³²⁸ Since protected public trust uses in Wisconsin are no longer directly tied to navigation, the logic of *Doemel v. Jantz* no longer holds true. A Wisconsin court should be free to hold that the public has the right to use the shore of the Great Lakes below OHWM for the full panoply of public trust uses, including walking.

VI. CONCLUSION

The shores of the Great Lakes need not be a battleground. This Article proposes a uniform analytical framework for use by each Great Lakes state in determining the public's right to use the Great Lakes shores. Flexible enough to allow each state to strike its own balance between the public interest and those of private landowners, the proposed framework provides a predictable approach to questions regarding use of the Great Lakes shores, grounded in the core principles of the public trust doctrine.

The proposed framework employs a two-prong approach. First, it determines the geographic scope of the public trust doctrine applicable to the shores of the Great Lakes. The starting point is the lands the states acquired in trust when they became states, which the Article concludes is the lands underlying the Great Lakes up to the ordinary high water mark, a conclusion informed in large measure by the equal footing doctrine. While the geographic scope of the public trust doctrine can be changed in each state, the ability to effect change is circumscribed by the principles of the public trust doctrine itself. Second, the framework determines the types of uses protected by the public trust doctrine along the shores of the Great Lakes. These protected uses should include both traditional uses of navigation, fishing, and commerce, and additional uses of the shore that are important to the public today, but which do not unreasonably interfere with the rights of littoral owners.

The proposed framework is consistent with the laws of each Great Lakes state, as well as the core principles of the public trust doctrine, and its adoption would bring a consistent, well-founded approach to deciding disputes regarding use of the Great Lakes shores, including whether and where the public has a right to walk.

³²⁷ *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781 (Wis. 2001).

³²⁸ *Id.* at 787-88. The court held that denial of a permit to dredge the state-owned bed of Lake Superior was not a regulatory taking of riparian rights, which were subordinate to the public trust doctrine. *Id.* at 791. The *R.W. Docks* court also grounded the public trust doctrine in the Northwest Ordinance of 1787 and Wisconsin Constitution article IX, § 1. *Id.* at 787.