SHIFTING SANDS: A META-THEORY FOR PUBLIC ACCESS AND PRIVATE PROPERTY ALONG THE COAST

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Abstract

Over half the United States population currently lives near a coast. As shorelines are used by more people, developed by private owners, and altered by extreme weather, competition over access to water and beaches will intensify, as will the need for a clearer legal theory capable of accommodating competing private and public interests. One such public interest is to walk along the beach, which seems simple enough. However, beach walking often occurs on this ambulatory shoreline where public rights grounded in the public trust doctrine and private rights grounded in property ownership intersect. To varying degrees, each state has a public trust doctrine that defines public rights on beaches. The extent to which a court subscribes to a sovereignty theory influences the outcome for public rights. Under this theory, the public trust doctrine is an attribute of state sovereignty, and as such, the state lacks the power to eliminate it. Applying a sovereignty theory leads courts to conceptualize public trust rights as an inalienable easement that burdens coastal private property regardless of its omission in the recorded deed. Courts that interpret coastal property in this way allow for a coexistence of public and private rights that accommodates shared uses of the beach, consistent with centuries of English common law. In contrast, courts that theorize state power includes the power to transfer public trust property into private ownership free of public rights leads courts to view the public trust doctrine as an ownership doctrine and draw a distinct line in the sand dividing public from private fee simple estates. These courts tend to favor exclusive use of the beach by private landowners by asserting the dividing line for title purposes is also the boundary for all public rights. This Article examines divergent approaches to public access to beaches across the United States, demonstrates how legal theory influences substantive public and private rights, and discusses takings considerations on beaches. The Article suggests public and private interests are best served by a historically grounded sovereignty theory that recognizes a public trust easement always burdens coastal private titles coupled with a theory of evolving public rights. These background principles not only protect shared uses of the beach, but provide greater clarity around what constitutes a taking of coastal property.

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I. INTRODUCTION

In a Wisconsin village on Lake Michigan’s coast, private property owners asked the village to fence off the beach to keep out the public. Just across the Lake, adjacent to Michigan’s Sleeping Bear Dunes National Lakeshore, a homeowner’s association posted signs declaring the beach is private property. Moving out from the Great Lakes to the Pacific Ocean, the Los Angeles Urban Rangers educate the public about beach access and how to react to private property owners’ efforts to dissuade the public from reaching the beach in Malibu, such as private security guards and faux “private property” signs that adorn parking spaces and access roads. On the Atlantic Ocean, a small business owner litigated a case to the Supreme Court of Maine to obtain recognition of the public right to simply cross the tidelands to scuba dive.

Beaches, whether they are along oceans or lakes, constitute an example of contentious property where private bumps up against public. Like other shared commons, beaches can be public spaces that seem private, become private, or have no public access. Conversely, coastal property owners may perceive beaches as private spaces in danger of redefinition as shared public spaces by eminent domain, easements, or, unconstitutionally, through takings without just compensation. In legal terms, the questions are: Does the public retain the right to use the beach despite legal title held by private landowners? Does private title determine all rights, or does private title to the beach contain inherent limitations in favor of the public? The answers to these legal questions are influenced by whether a court subscribes to a sovereignty theory of public trust property that restricts state power to privatize trust property and eliminate public rights.

As a general matter of property law across the United States, ownership of the dry uplands above the ordinary or mean high water mark is private property established in

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8 Author’s observation, May 10, 2011.
9 JENNY PRICE, MALIBU BEACH OWNERS MANUAL 2-5 (2007), http://laurbanrangers.org/site/tools/malibu-beaches-owners-manual. The Los Angeles Urban Rangers take groups on beach tours in which they instruct their participants to stake out spots on public easements -- the patch of sand between the ocean and private property that the public is legally permitted to occupy. Easements can be difficult to discern because they literally shift with the tide -- the official boundary is the mean high-tide line over the last several months. Once situated, participants are asked to perform typical ‘beach activities,’ such as yoga, building sand castles and reading trashy magazines. The intent, according to the Rangers, is for people to exercise their right to be on the beach as demonstratively as possible.” David Ng, Los Angeles Urban Rangers go on ‘Safari’ in the City, LA TIMES, Aug. 16, 2009, http://articles.latimes.com/2009/aug/16/entertainment/ca-rangers16 (last visited Aug. 23, 2012).
10 McGarvey v. Whittredge, 28 A.3d 620 (Me. 2011).
11 Other shared commons include, but are not limited to, roads, sidewalks, alleys, the internet, and fisheries.
12 Ordinary and mean are terms of art used to modify the terms high and low water mark. Mean high and low water mark is generally employed when discussing ocean beaches, while ordinary high and low water mark is generally used to refer to lake beaches. Since this article discusses cases from oceans and lakes, I attempt to avoid confusion by these different terms of art and simply call this zone between ordinary or mean high and low marks the “public/private beach zone.”
the upland owner’s fee to the land. Likewise, ownership below the mean or ordinary low water mark of tidal or “navigable” waters is uniformly in the state, and the public’s right to use the water part of the oceans and navigable lakes and rivers is rarely contested. However, the zone between ordinary or mean high and low water marks, which in this Article I refer to as the “public/private beach zone”, is subject to variable state interpretations of property rights that impact public access and private rights on the beach. In some states, the private owner of the upland takes title all the way to the low water mark. However, in most states, private property stops at the high water mark and the public has the fee below this line, subject to certain private riparian or littoral rights. It is this public/private beach zone and the scope of public rights within it that are the primary focus of this Article. The narrowness of this strip of beach belies the complexity and controversy that accompanies it.

Rules governing coastal property boundaries and legal rights are complex because of the variation among states based on the type of water body, navigability determinations, and changes based on nature and climate change (water level fluctuations, erosion, accretion). Unlike inland property boundaries, water boundaries adjacent to land are usually ambulatory. Water is always in motion, so property boundaries adjacent to water are also more fluid. In addition, private land ownership adjacent to navigable waters is always subject to the federal government’s navigation servitude, which allows government action in aid of navigation to destroy private property without compensation. Similarly, along navigable and tidal waters, private

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1 However, in states like New Jersey and Oregon, the upland owner’s fee does not include the right to exclude. *State ex rel. Thornton v. Hay*, 95 N.J. 306, 462 P.2d 671, 678 (Or. 1969) (basing holding on custom instead of the public trust doctrine); *Matthews v. Bay Head Improvement Ass’n, Inc.*, 95 N.J. 306, 471 A.2d 355 (1984) (basing holding on the public trust doctrine).
2 Navigable here refers to navigable for title waters. *The Daniel Ball*, 77 U.S. 557, 563-64 (1871). Rivers “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 on water.” *Id.* at 563. Some rare states have gone to great lengths to define most of the waters within their borders as non-navigable and not held in trust by the state. *Arizona Ctr. For Law in the Pub. Int. v. Hassell*, 172 Ariz. 356, 364-66, 837 P.2d 158, 166-68 (Ct. App. 1991); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (Ct. App. 2001) (rejecting legislative attempt).
7 After a storm altered a beach on the Gulf of Mexico so dramatically that the homes were completely seaward of the vegetation line, the State of Texas ordered the private property owners to remove the homes from the public beach. Celeste Pagano, Where’s the Beach? Coastal Access in the Age of Rising Tides, 41 SW. L.REV. __ 30 (forthcoming 2012) (critiquing *Severance v. Patterson*, 2012 WL 1059341 (Tex. 2012), for rejecting rolling easements in favor of the homeowner). *Id.* 41-55.
9 *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 312 U.S. 592 (1941) (holding navigation servitude extends up to the ordinary high water mark on a navigable stream); *Lewis Blue Point Oyster*
property rights are generally understood in relation to the state’s trustee role over those waters and the lands beneath them. Thus, private land adjacent to lakes and oceans is always, in many senses, ambulatory as well as contingent and subject to paramount public rights.

Perhaps because of this variability in the property boundaries and the state laws that govern it, scholarly work on the public trust doctrine and beach property tends to either focus on a single state’s laws or present comparative descriptions of a variety of state laws. A few scholars provide theoretical frames that aid in interpretation of the legal variability across jurisdictions. This Article builds on that scholarship by analyzing divergent state approaches to public access to coastal property through a theoretical lens, and argues for theories of state sovereignty, property, and public rights that strike a balance between being historically grounded yet flexible enough to meet the demands of contemporary society.

When states entered the Union on equal footing with the original thirteen states, the

*Cultivation Co. v. Briggs,* 229 U.S. 82 (1913) (denying compensation for destruction of private oyster beds destroyed pursuant to the navigation servitude by dredging Great South Bay in New York); *Scranton v. Wheeler,* 113 Mich. 565, 566, 71 N.W. 1091, 1092 (1897) (declaring interests of riparian owner in the submerged lands bordering on a public navigable water held subject to Government’s navigational servitude). The no takings/compensation rule does not apply to waters made navigable by private owner’s expense and alterations. *Kaiser v. United States,* 444 U.S. 164 (1979) (imposing navigational servitude on marina created and rendered navigable at private expense held to constitute a taking where the area had originally been a pond not considered navigable). This federal power under the navigational servitude to destroy property freed of a takings claim is similar to the takings immunity enjoyed by the states pursuant to the public trust doctrine. *JAMES RASBAND ET. AL., NATURAL RESOURCES LAW AND POLICY* 832-33 (2d ed. 2004). Further, although under the federal navigation servitude, there is some variability in the definition of the ordinary high water mark, 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.” Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores,* 58 CLEV. ST. L. REV. 1, 25 (2010).


27 Mackenzie S. Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark,* 16 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 165 (2010) (arguing for an amnibious extension of the public trust doctrine to uplands and parklands, which as public gathering spaces, are inherently public and valued for “sociability” purposes); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property,* 53 U. CHI. L. REV. 711 (1986)(urging that inherently public property doctrines such as dedication, custom, and the public trust doctrine, which have traditionally been used to ensure public access to roads and waterways, are equally applicable to lands customarily used for public gatherings because it increases the “sociability” value of those lands).
federal government transferred title to the states over the submerged lands beneath all navigable and tidal waters within their boundaries up to the ordinary or mean high water mark. To varying degrees, each state has defined a public trust doctrine under state law to govern the management of these waters and lands underlying them. Many states ground their public trust doctrine in English common law.

However, as in property law more generally, states diverge regarding the rights inherent in coastal private property titles and the degree to which private titles are, and always have been, subject to a public trust easement. Specifically, in determining public rights on beaches, states define the property at issue and the activities protected as public rights. A state that bases its public trust doctrine on English common law and an easement theory of overlapping rights in the public/private beach zone will protect the public’s right to walk freely along beaches. By contrast, states that ground their property rights in state law, without regard to English common law precedent, are more likely to draw a distinct line in the sand between public and private titles and favor exclusive use of the shoreline by private landowners. Thus, the key difference is whether courts view the dividing line for title purposes as the boundary for all public rights or whether courts recognize a public trust easement overlapping the private title. The meta-theory driving a court’s linear title versus easement approach is whether the public trust doctrine is considered an attribute of state sovereignty, so much so that it is beyond the power of the state to redefine public trust property as private property and eliminate public rights.

Additionally, whether a court views public rights as fixed or evolving influences the types of rights protected in the public/private beach zone. A few courts view public trust rights as fixed in time, usually the 17th century formation of the colonies; while most courts interpret public rights as evolving with society to encompass current public uses of the trust property. One might assume that courts that adopt a fixed 17th century approach to public rights would also adopt a more historically grounded approach to the property line question. However, the opposite is true: courts that adopt a fixed approach to public rights adopt a linear title approach to the property boundary that is not based on English common law. For those courts, the common thread is a focus on establishing fixed property lines and rights.

This Article examines public access to beaches across the United States and demonstrates how the court’s choice of legal theory influences the outcome. For instance, even when comparing two states that identically draw the private property boundary at the low water mark, the outcome for public rights differs based on the theories that undergird the decision. Section II frames the article by describing current controversies over beach access and the importance of coastal areas. Section III turns to the historic origins of beach property and the public trust doctrine in the United States and England. In order to provide context to understand current controversies and the sovereignty meta-theory, this section describes the equal footing doctrine and the federal

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20 Shively v. Bowlby, 152 U.S. 1, 57-58 (1894); see also Hardin v. Jordan, 140 U.S. 371, 381 (1891). This rule that states hold title to navigable and tidal waters in their sovereign capacity has its origins in English common law. PPL Montana v. Montana, 132 S.Ct. 1215, 1226 (2012) (citing Shively v. Bowlby, 152 U.S. 1, 13 (1894)). In PPL Montana the Supreme Court noted that under the equal footing doctrine, “a State’s title to these lands was ‘conferred not by Congress but by the Constitution itself.’” Id. at 1227 (quoting Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)).

21 PPL Montana v. Montana, 132 S.Ct. at 1235 (explaining, “[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”)

government’s transfer of navigable waters and their beds up to the ordinary or mean high water mark to each state as it entered the Union. Section IV identifies competing legal theories courts apply to resolve beach access controversies. Section V analyzes court decisions that apply these theories to beach property. This section clusters the case analysis around states that come from the same legal foundation, such as the Massachusetts Bay Colony and the Northwest Territories. It then explains the role of takings claims related to beach access. Section VI suggests public and private interests are best served by a historically grounded sovereignty theory that recognizes a public trust easement burdens coastal property coupled with a theory of evolving public rights. These background principles inform the coexistence of private and public rights on coastal properties, which lessens the need to discern the particulars of specific deeds or account for variations in boundary drawing by each state. Such a frame alerts property owners to the contingent and variable nature of coastal property and allows the law to more nimbly adapt to contemporary challenges rather than remain ossified in a context that has long since passed.

II. CONFLICTS ON THE SAND

A walk along a beach seems simple enough, and yet, if the walk is taken on a beach to which another holds title, it may result in a lawsuit for trespass. The United States Supreme Court decided over one hundred years ago, and affirmed most recently in PPL Montana v. Montana, that all states entered the union as sovereign owners of the beds of tidal and navigable waters for the use and enjoyment of the public. Although a variety of states recognize the public’s right to walk and recreate along these publicly-held shores in the public/private beach zone, some states exclude the public from this zone. The issue remains one vexed by uncertainty and controversy. At the root of the beach access issue are two competing values deeply entrenched in American legal traditions since the American Revolution: protections for private property and assertions of public trust interests in tidal and navigable waters.

There are inherent difficulties in accommodating even longstanding public and private property rights when they overlap or collide on the beach. As shorelands shift because of natural processes and climate change, population densities increase, and
more private developments spring up along ocean coasts and lakeshores, there will be more frequent competition and conflicts over accessing the beach. It is perhaps precisely because of this scarcity and competition that the public interest in beaches is more pronounced.

Two seminal beach access cases from the early 1970s arose from different coasts, but expressed similar sentiments about the public value of beaches amidst scarcity and competition in densely populated areas. In Borough of Neptune City v. Borough of Avon-By-The-Sea, the New Jersey Supreme Court was cognizant of the scarcity of public beaches along the Atlantic Ocean and stated the “demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent.” In Marks v. Whitney, the California Supreme Court similarly addressed competing uses of the coast along the Pacific Ocean and declared “[t]his matter is of great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property.”

The concerns expressed by these justices over forty years ago are even more pressing today. As of 2003, over half of the U.S. population lives in coastal counties, and 23 of the 25 most densely populated U.S. counties are coastal. These are “some of the most developed areas in the nation.”

Disputes regarding the boundary between public trust and private property arise in a variety of circumstances and jurisdictions. When the law is uncertain or vague, violations of legal rights can occur in either direction: members of the public trespass and diminish valuable private property rights, or private property owners erect signs and fences or hire private security guards that unreasonably exclude the public from exercising rights to use beaches, thereby privatizing land that belongs to all.

In 2003, approximately 153 million people (53 percent of the nation’s population) lived in the 673 U.S. coastal counties, an increase of 33 million people since 1980. Other notable findings from the updated population report include:

• By the year 2008, coastal county population is expected to increase by approximately 7 million.
• By the year 2008, the combined population increase of San Diego, San Bernardino, Orange and Riverside counties in California will account for 12 percent of the total U.S. coastal population increase.
• Los Angeles County, CA, Harris County, TX, and Riverside County, CA experienced the greatest increases in population from 1980 to 2003.
• In 2003, 23 of the 25 most densely populated U.S. counties were coastal.
• Almost one quarter of the nation’s seasonal homes are found in the coastal areas of Florida.

Id. 30 Coastal areas in the U.S. are “some of the most developed areas in the nation.” Id. 31 Robin Kundis Craig, Valuing Coastal and Ocean Ecosystem Services: The Paradox of Scarcity for Marine Resources Commodities and the Potential Role of Lifestyle Value Competition, 22 Fla. St. U. J. Land Use & Envtl. L. 355 (2007) (discussing competition and scarcity in the recognition and preservation of marine ecosystems and their associated services).
33 Marks v. Whitney, 491 P.2d 374, 378 (Cal. 1971) (expressing concerns about population density and development along California’s coasts forty years ago).
34 NOAA, supra note TBD.
35 Id.
In the Great Lakes states, for instance, the public beach access issue is far from settled. Only two of the eight Great Lakes states have published court decisions on the public’s right to walk on the public/private beach zone, with diametrically opposed results. This leaves most of the Great Lakes shoreline under a cloud of uncertainty as to expectations of private property owners and the public. For instance, in Wisconsin’s Doemel v. Jantz, the court recognized an exclusive right in the private property owner to use the beach that prohibits beach walking above the water line. By contrast, Michigan’s Supreme Court in Glass v. Goeckel resolved the beach walking controversy in favor of the public’s right to walk along the shores of the Great Lakes in the public/private beach zone. To some, Glass v. Goeckel is an “expansion” of public use rights along the Great Lakes shoreline and a “redefinition” of the scope of public trust property. To others, the decision is a predictable result of precedent, grounded in a public trust doctrine that has been a critical part of state sovereignty since the founding of the United States, based on an even earlier history in English and Roman law.

In ocean coastal areas, although public access to the public/private beach zone and even the dry uplands is well established in a few states, it is still in flux in others. As recently as 2011, Maine’s Supreme Court was called upon to decide whether the public has a right to simply walk across the public/private beach zone to reach the ocean to scuba dive. Even forty years after New Jersey famously struck down discriminatory residency requirements for beach access, courts continue to be engaged in reviewing the legality of new schemes, like that attempted by a local government in Connecticut, to keep certain classes of people off beaches. Courts resolving beach access conflicts diverge in their results depending on the particular legal theories they apply. Before delving into the legal theories at work, however, it is important to understand the historical origins of the property at issue in the public/private beach zone and the scope of the public trust doctrine.

36 Doemel v. Jantz 193 N.W. 393, 398 (Wis. 1923). This decision was wrongly decided as a matter of law, as will be explained below in Section V.
37 Glass, 703 N.W.2d at 75.
39 Abrams, supra note TBD at 892.
42 McGarvey, 28 A.3d at 636.
44 Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001) (holding residency requirement to use public park and beach violate the First Amendment of the U.S. Constitution); see also, State v. Town of Linn, 556 N.W.2d 394, 397-398(Wis. Ct. App. 1996)(charging non-residents higher fees).
III. FOUNDATIONAL DOCTRINES: PUBLIC TRUST AND EQUAL FOOTING

The public trust doctrine is that body of common, constitutional, and statutory law that generally provides that the state shall hold and manage tidal and navigable waters, and the lands beneath them, as a trust for the public. The property protected by the public trust and the scope of public rights that can be exercised on this property are key issues that define the contours of public and private rights on beaches. Originally, courts interpreted public trust rights as the rights to use these trust waters for navigation, commerce, and fishing. Some decisions include in these historic public rights the right of “passage and repassage,” which is interpreted today as walking along the beach. While some courts view public trust rights as fixed in those historically recognized public uses, other courts have developed the doctrine alongside the public’s changing uses of water to incorporate additional public purposes, including traveling, bathing, recreation, hunting, ecosystem protection, scenic beauty, and access to the waters. For the past ninety years, courts have been wrestling with whether beach access and walking along the shores of tidal and navigable waters are protected as public trust rights.

In the early 17th century, during the establishment of the original American colonies, the public trust doctrine was an important principle of English common law. After the American Revolution, courts in the United States referred to English common law as the “direct ancestor of, and thus the presumptive authority and precedent for, application of the common law in the United States.” Thus, the public trust doctrine under English law establishes the foundation of the American doctrine.

As to the original scope of property held in trust, under English common law, for all tidal waters, the “law recognized title in the crown up to the high water mark.” According to the Supreme Court in Shively v. Bowlby, the king had “both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and all of the lands below high-water mark, within the jurisdiction of the crown of England.” The king held the title absolutely, and in his role as sovereign he held the public rights in trust for the benefit of the public. The origins of a sovereignty meta-theory of the public trust can be found in these early cases describing the role of the King of England.

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45 E.g., Shively v. Bowlby, 125 U.S. 1, 10-12 (1894); Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914).
46 E.g., Shively, 125 U.S. at 12 (quoting Lord Hale as recognizing “the people have a public interest, a jus publicum, of passage and repassage with their goods by water, and must not be obstructed by nuisances.” even on land privately held in fee.); Glass, 703 N.W.2D at 74 (holding a “right of passage over land below the ordinary high water mark” is necessary in order to engage in other protected public rights of “fishing, hunting, and navigation for commerce or pleasure.”).
47 E.g., R.W. Docks & Slips v. Dep’t of Natural Res., 628 N.W.2d 781, 788 (Wis. 2001); Marks v. Whitney, 6 Cal.3d 374, 259 -260 (Cal. 1971).
49 ARCHER, supra note TBD, at 5. English common law on this subject was influenced by earlier Roman law articulated in the Institutes of Justinian. Abrams, supra note TBD, at 880.
50 ARCHER, supra note TBD, at 6.
51 Kilbert, supra note TBD, at 22; Shiveley, 125 U.S. at 13 (describing this as the settled law of England).
52 Shiveley, 152 U.S. at 11.
53 Id. at 11.
related to trust property.

Such waters, and the lands which they cover . . . are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands . . . belongs to the King as the sovereign; and the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit . . . That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances.\(^{54}\)

As successors in sovereignty to the English Crown, the original thirteen states assumed ownership of all tidal waters and the beds beneath them.\(^{55}\) According to the equal footing doctrine, when additional states joined the Union, they did so on equal footing with the original states and hence received “title to the lands underlying navigable and tidal waters within its boundaries, absent a clear pre-statehood grant or reservation by the federal government.”\(^{56}\) In *Pollard v. Hagan*,\(^ {57}\) the United States Supreme Court voided a patent the federal government issued to a private landowner for property below the ordinary high water mark of a navigable river after Alabama became a state.\(^ {58}\) This is because the “shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively.”\(^ {59}\) The States hold these lands and waters in trust for the benefit of all citizens.\(^ {60}\)

At the end of the 1800s, the United States Supreme Court had several occasions to elaborate on the equal footing doctrine and the transfer of water-related property from the federal government to the states upon their entrance into the Union. In 1876 in *Barney v. Keokuk*, the Court explained the American departure from the English rule limiting Crown ownership to the beds under *tidal* waters. In the United States, the settled law of this country recognized that the states obtained the lands under navigable *freshwater* lakes and rivers, as well as lands under tidal waters, when they entered into the Union, subject only to the federal navigation servitude and commerce power of Congress.\(^ {61}\) The Court famously described this initial federal grant of navigable waters and the lands

\(^{54}\) *Id.* at 10-12 (italics added).

\(^{55}\) *Id.* at 14; ARCHER, *supra* note TBD, at 3 (1994).

\(^{56}\) Kilbert, *supra* note TBD, at 19 (citing *Shively v. Bowlby*, 152 U.S. 1 (1894)). The equal footing doctrine is a constitutional doctrine determined by federal law. The states’ title to these lands was “‘conferred not by Congress but by the Constitution itself.’” *PPL Montana v. Montana*, 132 S.Ct. at 1227 (citing *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977)).

\(^{57}\) Pollard v. Hagan, 44 U.S. 212 (1845).

\(^{58}\) *Id.*, 44 U.S. at 215, 230; see also, *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842).

“In cases like *Martin v. Waddell*, the thrust of public trust as it both benefited and burdened the later-formed states had become very clear—the foreshore was trust property in the hands of the United States, so the national government was not competent to impair the trust and all states succeeded to the interest of the previous foreign sovereign.” Abrams, *supra* note TBD, at 892.


\(^{61}\) *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876).
beneath them in *Illinois Central R.R. Co. v. Illinois* in 1892, and then again in *Shively v. Bowlby* in 1894.

In *Illinois Central*, the Court ultimately upheld the Illinois Legislature’s rescission of a grant to a railroad corporation of the bed of Lake Michigan at the Chicago Harbor because such a grant would be void under the public trust doctrine. In reaching its holding, the *Illinois Central* Court clarified that all navigable waters and the lands under them, which had been in the public domain prior to the formation of states, were vested in each new state when it entered the Union to be used for public purposes. Indeed, the Court articulated a uniform doctrine based on the notion that states entered the Union on equal footing:

> There can be no distinction between the several states of the Union in the character of their jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the state were prescribed by congress and accepted by the state in its original constitution.

Two years later, the United States Supreme Court in *Shively v. Bowlby* built on the *Illinois Central* foundation and identified the boundary of the original grant from the federal government to the states as covering “…soil below [the] high water mark…” This demarcation line was consistent with English common law, in which the king’s trust holdings went up to the high water mark on the shore. Thus, when the federal government granted navigable and tidal waters to the states as they entered the Union, it did so up to the ordinary high water mark.

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62 *Illinois Cent. R. Co.*, 146 U.S. 387, 434-35 (1892). The public trust and equal footing doctrines are legally distinct. *PPL Montana v. Montana*, 132 S.Ct. at 1234-35. 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. *Id.* at 1228. While the public trust doctrine is the body of law that describes how these waters and lands must be managed in trust for the public. *Id.*


64 *Illinois Cent. R. Co.*, 146 U.S. at 434-435, 460 (holding the attempted conveyance of lakebed was inoperative).

65 *Id.* at 434-35.

66 *Id.* at 434.

67 *Shively v. Bowlby*, 152 U.S. at 57-58; see also *Hardin v. Jordan*, 140 U.S. 371, 381 (1891). However, the court also explained that riparian and littoral private property rights are governed by state law. *Id.* Consistent with this demarcation line at the ordinary high water mark, the federal navigation servitude along rivers and streams also extends to the same mark. United States v. Chicago, Milwaukee, St Paul & Pacific Railroad, 312 U.S. 592 (1941) (holding navigation servitude extends up to the ordinary high water mark on a navigable stream).

68 Kilbert, *supra* note TBD, at 22.

69 *Shively*, 152 U.S. at 57-58; see also *Hardin*, 140 U.S. at 381 (1891); Kilbert, *supra* note TBD, at 22. For oceans, this may be called the mean high tide line and is defined as “the average height of all the high waters” over the lunar cycle of 18.6 years that governs the tides. *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22-23, 26-27 (1935). This line can change significantly over the years. For inland lakes, water levels fluctuate based on forces that lack the regularity of lunar tides, such as precipitation and barometric pressure. *Glass v. Goeckel*, 703 N.W.2D at 71. “This fluctuation results in temporary exposure of land that may then remain exposed above where water currently lies. This land, although not immediately and presently submerged, falls within the ambit of the public trust because the lake has not
Since *Illinois Central* and *Shively v. Bowlby*, the United States Supreme Court has been relatively silent on the equal footing doctrine. However, it more recently reaffirmed in *Phillips Petroleum v. Mississippi*\(^{70}\) in 1988 and *Montana PPL v. Montana*\(^{71}\) in 2012 that under the equal footing doctrine, the federal government transferred to the states ownership over all lands subject to tidal influence, regardless of navigability,\(^{72}\) and all lands under rivers navigable in fact at the time of statehood.\(^{73}\) These decisions underscore the distinct quality of the equal footing doctrine from the public trust doctrine. The equal footing doctrine, defined by federal law, describes the original grant of water-related property to the states as determined at the time of statehood; these waters are referred to as navigable for title purposes.\(^{74}\) Hence, the original demarcation line for trust lands and waters is the same for all states, consistent with the equal footing doctrine, and is set at the ordinary high water mark pursuant to federal law.\(^{75}\) By contrast, the public trust doctrine, as well as property law generally, are defined by state law.\(^{76}\) Today, most states recognize public trust rights in the public/private beach zone, but vary as to the scope of those rights and the meaning of private titles showing private property lines below the ordinary high water mark.\(^{77}\)

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permanently receded from that point and may yet again exert its influence up to that point.” *Id.* The physical location of the ordinary high water mark on lakes is often a discernible line landward of the point at which the water is in contact with the shore. Some courts describe the ordinary high water mark as the line where “the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.” *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914) (internal citations omitted); *State v. Trudeau*, 408 N.W.2d 337 (Wis. 1987); *see also* *Glass v. Goeckel*, 703 N.W.2d at 62, 72-73 (adopting Wisconsin’s definition of ordinary high water mark).


\(^{72}\) *Phillips Petroleum v. Mississippi*, 484 U.S. at 793-797. Private property owners claimed title to lands underlying non-navigable waters influenced by the tide that they traced back to a pre-statehood Spanish land grant. While the State of Mississippi claimed title to the same land based on the original grant of land underlying tidal waters when they entered the union on equal footing with the other states. 484 U.S. at 472. The private property owners argued they had record title for these lands and had paid taxes on them for more than a century. 484 U.S. at 482. The Court stated that it honors “reasonable expectations in property interests,” but found these expectations were not reasonable given Mississippi law has consistently held the state has title to all public trust lands, including all the land under tidewater. *Id.*

\(^{73}\) *PPL Montana v. Montana*, 132 S.Ct. 1215 (2012). “[R]ivers 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 on water.” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563-564 (1871).

\(^{74}\) *PPL Montana v. Montana*, 132 S.Ct. at 1227.

\(^{75}\) Kilbert, *supra* note TBD at 20-24. This is also called the mean high tide. *Borax*, 296 U.S. at 22-23, 26-27.

\(^{76}\) *Id.* at 1235.

States have the power to expand the resources and rights protected by the public trust doctrine. However, state power to contract and relinquish ownership of property the federal government transferred at statehood is limited; but courts diverge on the nature and extent of that limitation. And therein lies the root of why some states allow the public to access the public/private beach zone for walking and general recreation and other states protect the exclusive use of this zone by private property owners.

IV. SOVEREIGNTY META-THEORY, PROPERTY AND PUBLIC RIGHTS

78 Id. at 1235 (explaining, “[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”).
As to the question of locating the line where the coastal private fee title ends, there is a division among the states. Most fall into the mean or ordinary high water mark group,\(^{79}\) consistent with the original federal grant of property to the states; while a minority fall into the mean or ordinary low water mark group.\(^{80}\) Here, they are simply called high water or low water states. High water states fix the boundary at the mean or ordinary high water mark; private property in the uplands ends at the ordinary high water mark, while the state holds the property below that mark into the sea or lake. Low water states, as the term indicates, fix the private property boundary at the mean or ordinary low water mark; private property in the uplands ends at the low water mark.

Yet, even in the low water states, the existence of private property to the low water boundary alone does not determine the shared versus exclusive nature of the property between the high and low water marks or the scope of public rights in that public/private beach zone.\(^{81}\) More surprising, perhaps, is that even in high water states, there may be deeds that grant title to an individual private property owner down to the low water mark or beyond.\(^{82}\) Thus, while all states have relatively clear rules regarding the dividing line between state and private title on the shore, the particular legal theory undergirding the court’s decision is far more important to determining the contours of public and private rights.

A fundamental difference in the beach access cases is whether courts view the dividing line for title purposes as the boundary for all public rights or whether courts recognize a public trust easement overlapping the private title. The meta-theory driving a court’s linear title versus easement approach is whether the public trust doctrine is considered an attribute of state sovereignty. If so, the court will conclude that it is beyond the power of the state to redefine public trust property as private property and eliminate public rights. In other words, even if the state redrew the private property boundary at the low water mark and was silent about the impact on public trust rights, a public trust easement must continue to exist up to the ordinary high water mark because the state lacks the power to extinguish it.

Secondly, after determining the linear title or easement approach to the public/private beach property, the court defines the scope of public rights on the property. Whether a court views public rights as fixed or evolving influences the types of rights protected in the public/private beach zone.

\(^{79}\)E.g., Bloom v. Water Res. Comm’n, 254 A.2d 884, 887 (1969) (“The state, as the representative of the public, is the owner of the soil between high- and low-water mark upon navigable water where the tide ebbs and flows.”); Van Ruymbeke v. Patapsco Indus. Park, 261 Md. 470, 276 A.2d 61, 64-65 (1971) (stating that private landowners bordering tidal waters own to the mean high-water mark); West v. Slick, 313 N.C. 33, 326 S.E.2d 601, 617 (1985)(“In North Carolina private property fronting coastal water ends at the high-water mark and the property lying between the high-water mark and the low-water mark known as the ‘foreshore’ is the property of the State.”); Opinion of the Justices, 649 A.2d 604, 608 (N.H. 1994), (citing Concord Mfg. Co. v. Robertson, 66 N.H. 1, 25 A. 718, 730-31 (1890) (noting New Hampshire has rejected the “Massachusetts law that adopted the low water mark as the boundary between public and private ownership.”)).

\(^{80}\) E.g., McGarvey v. Whittredge, 2011 ME 97, 28 A.3d 620, 626 (2011). Explaining how ownership to the low water mark originated in the Colonial grant of property from England, which diverged from 17\(^{th}\) century English common law of private ownership ending at the high tide line.

\(^{81}\) State v. Korrer, 148 N.W. 617, 621 (Minn. 1914) (private property on lakes extends to the low water mark, subject to public rights up to the high water mark).

\(^{82}\) Marks v. Whitney, 6 Cal. 3d at 257-58, n.5 (defining tidelands as the land extending up to the mean high tide, explaining that California holds the tidelands in trust, but still recognizing private patents to some tidelands to the low tide).
A. Sovereignty Theory and Implications for Public Trust Easement or Lineal Title

The extent to which the public trust doctrine protects public uses of the beach up to the ordinary high water mark depends on whether the court is persuaded by an overarching sovereignty meta-theory: the public trust doctrine is an attribute of state sovereignty, and as such, the state lacks the power to eliminate it. According to this theory, it is “beyond the power of the state” to completely abdicate trust responsibility over lands and waters the federal government originally transferred at statehood to be held in trust.83

Given strong protections for exclusive use of private property in the U.S., Professor Carol Rose highlighted this anomalous approach to public trust property: “Most property is not impressed with a ‘public trust’ allowing access; why should the beaches be?”84 Drawing on the definitional/historical approach to understanding property that the Supreme Court takes in Phillips Petroleum and Lucas v. South Carolina Coastal Council, courts motivated by a sovereignty theory view public access as inherent in the title to the public/private beach zone even when the terms of the deed are silent about the existence of an easement.85 In takings terms, as will be discussed below, this forms the foundation of background principles to understand property rights. Some courts have concluded that they cannot take what they already own and never had the power to diminish. Consistent with this concept, Professor Rose describes the public trust as being “in the nature of an inalienable easement, assuring public access.”86

In support of this unique approach to public trust property, Professor Abrams provides rich and layered historical precedent for an easement approach based on a sovereignty theory. He shows that although quite different from the protections afforded other property in the U.S., the existence of overlapping public and private rights is grounded in many centuries of precedent in English common law.87

English law drew heavily on an even earlier legal framework that existed under Roman law. For the Romans, private title in the shore area did not exist:

To what extent were the public rights to the foreshore among those things that were inalienable? Under Roman law, this was not an open question because the great waters and the lands below the highest tide were not

84 Rose, supra note TBD, at 716.
85 For an exploration of this definitional/historical approach contrasted against one focused on terms of deeds and expectations, see, Sax, supra note TBD, at 944; Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449, 1523 (1990).
86 Rose, supra note TBD, at 728.
87 Abrams, supra note TBD, at 861.
only publicly owned, but they were considered in the class of things incapable of private ownership.\(^{88}\)

England continued to use a similar property construction, but it substituted the king as steward of resources for the Roman concept of the laws of nature.\(^{89}\) However, unlike Roman natural law, title in the crown did not mean that the foreshore area was incapable of private ownership, but rather that private title was severed from and needed to coexist along with public rights. The English common law concepts of \textit{jus privatum} and \textit{jus publicum} describe what is understood today as an easement that protects overlapping property rights. \textit{Jus privatum} is the legal title to the land, which the crown may transfer to a private owner.\(^{90}\) \textit{Jus publicum}, however, is the sovereign’s duty to hold property in trust for the public benefit.\(^{91}\) One can see in these English common law descriptions a sovereignty theory that led to conclusions that the king could not convey the public trust easement or \textit{jus publicum}.

Although the king could convey the lands below the high water mark, any conveyance to a private individual was subject to the \textit{jus publicum}. The \textit{jus publicum} included uses ‘for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King’s subjects.’\(^{92}\)

Under English common law the dividing line for private title was not the same as the line for public rights. Put another way, the holder of the \textit{jus privatum} (title) in the public/private beach zone could not “impede the public’s customary use of public trust land . . .”\(^{93}\)

During the early development of the public trust doctrine in the United States, this sovereignty theory permeates some of the landmark Supreme Court cases. For instance, in \textit{Pollard v. Hagan} the Supreme Court described the “right to the shore between high and low water-mark” as “an attribute of sovereignty.”\(^{94}\) The \textit{Pollard} Court declared: “Rivers must be kept open; they are not land, which may be sold, and the right to them passes with a transfer of sovereignty [from the United States to the states].”\(^{95}\)

Similarly, the Court in \textit{Illinois Central} explained that ownership of the navigable waters and lakebeds is a “subject of public concern to the whole people of the state.”\(^{96}\) The Court continued: ‘The sovereign power itself, therefore, cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of their common

\(^{88}\) Abrams, \textit{supra} note TBD, at 880.

\(^{89}\) \textit{Id}. at 877-881.

\(^{90}\) \textit{ARCHER}, \textit{supra} note TBD, at 6-7 (1994).

\(^{91}\) \textit{Id}.

\(^{92}\) New Hampshire Op of Justices, 649 A.2d 604, 607-08 (N.H. 1994) (citing Shively v. Bowlby, 152 U.S. 1, 13 (1894)), “Both private, \textit{jus privatum}, and public, \textit{jus publicum}, interests were recognized in the lands underlying navigable waters. While legal title to the lands under navigable waters (\textit{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 (\textit{jus publicum}) in trust for the people.” Kilbert, \textit{supra} note TBD, at 4-5; see also Craig, \textit{supra} note TBD, at 59-61.

\(^{93}\) \textit{ARCHER}, \textit{supra} note TBD, at 7; see also Marks v. Whitney, 6 Cal.3d at 259.

\(^{94}\) Pollard, 44 U.S. at 215-16.

\(^{95}\) \textit{Id}.

\(^{96}\) \textit{Ill. Cent.}, 146 U.S. at 455.
right.” Thus, according to a sovereignty theory, if after being admitted into the Union, a state chooses to transfer to private owners the title to the public/private beach zone between ordinary high and low water marks, those lands are still burdened with a public trust easement. State power to redefine property does not include state power to extinguish the public trust easement on public trust property it grants to private owners. English common law informed the holding in Illinois Central. The Court recognized that under English common law while the king could grant soil under tidal waters to a private party, that grant was “subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge.” The Court quoted Lord Hale to underscore this point:

“The jus privatum that is acquired by the subject, either by patent or prescription, must not prejudice the jus publicum, wherewith public rivers and the arms of the sea are affected to public use.”

While the Illinois Central Court ultimately held that a grant of Lake Michigan’s lakebed under most of the Chicago Harbor to a private entity would be void or subject to revocation, it also explained when such a grant of title to a private party would be in consistent with the public trust doctrine. That explanation accords with finding an easement in the public/private beach zone. Such an approach does not outright prohibit all private ownership in this area, but does maintain public rights if the property’s title is conveyed into private ownership. The Supreme Court limited situations where a state may make valid grants of trust property to situations where parcels “are used in promoting the interests of the public” or “can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”

According to Professor Robert Abrams, the holding in Illinois Central “clearly announced the burden on states: the foreshore was trust property, not only while it was in the hands of the federal government in the pre-statehood period, but also when it was in the hands of the states after statehood.” He argues that public trust rights along the United States’ “great waters, including the Great Lakes, derive from the very essence of sovereignty as it is embedded in the American system of government.” In other words, although a state may convey title under limited circumstances, it cannot legislatively

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97 Ill. Cent. 146 U.S. at 456 (quoting Chief Justice Taney in Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 418 (1842)).
98 Below the ordinary high water mark, states may alienate trust lands but such grants cannot interfere with the superior rights of public use and navigation. See, Shively, 152 U.S. at 57-58 (permitting small grants). In Shively, the court did not need to address whether a state must maintain public rights on trust lands conveyed or granted to private owners. There, the Oregon law that allowed for the sale of tidelands down to the low water mark expressly stated that the grant was subject to the public easement. Shively, 152 U.S. at 6, n.1.
99 E.g., Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914) (declaring it “beyond the power of the state to alienate [river bed] freed from such [public trust] rights.”).
101 Id. at 458 (quoting Lord Hale in his treatise De Jure Maris (page 22)).
102 Id. at 453. The U.S. Supreme Court described the trust as essentially prohibiting a state from abdicating its general control over lands under navigable waters.
103 Id. at 452–53.
104 Abrams, supra note TBD, at 892. Foreshore is “That part of the land adjacent to the sea which is alternately covered and left dry by the ordinary flow of the tides; i.e., by the medium line between the greatest and least range of tide, (spring tides and neap tides.)” BLACK’S LAW DICTIONARY (2nd ed. 1910). In this article I refer to the foreshore as the public/private beach zone.
105 Id. at 861.
remove the public trust easement from the public/private beach zone; such an action is either void or voidable according to *Illinois Central.*

Similarly, state courts that see the public trust doctrine as inherent in state sovereignty divide property into public and private or *jus publicum* and *jus privatum* estates—in effect, differentiating lines for title purposes from rights to use. This approach accommodates the coexistence of public and private rights in the same property along the shoreline, much as easement law accommodates differences between ownership rights and use rights.

For instance, the California Supreme Court’s decision in *Marks v. Whitney* typifies a sovereignty theory and easement construct. There the court rejected an attempt by a landowner to fill tidelands based on an understanding that the beach property was a divided estate where the private title was burdened by public rights that “restrained private development . . .”

*Marks v. Whitney* is an excellent example of how an easement approach allows a court to simultaneously recognize the state’s sovereign ownership of tidelands up to the mean high tide line and not disturb individual patents that grant private ownership in land to the mean low tide line. In accounting for the sale of tidelands to private owners, the court asserted the “only practicable theory” is to recognize that the sale of these lands did not divest the public of their rights. In this way, an easement accommodates multiple interests and harmonizes otherwise discordant laws. Drawing upon English common law, the California Supreme Court restated: ‘Our opinion is that * * * the buyer of land under these statutes receives the title to the soil, the *jus privatum*, subject to the public right of navigation, and in subordination to the right of the state to take possession and improve it for that purpose, as it may deem necessary. In this way the public right will be preserved, and the private right of the purchaser will be given as full effect as the public interests will permit.’

Another state court example of the sovereignty theory comes out of Wisconsin. When Wisconsin entered the Union on equal footing with the original states and obtained title to all navigable waters and the lands beneath them, it incorporated the language of the Northwest Ordinance into the State Constitution as follows:

The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.

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106 *Id.*
108 *Marks v. Whitney*, 6 Cal.3d at 257-58, n.5
109 *Marks v. Whitney*, 6 Cal.3d at 259-260 (quoting *People v. California Fish Co.*, 138 P. 79, 87 (Cal. 1913)). Despite the California Supreme Court’s opinion recognizing *jus publicum* on privately held tidelands, it leaves the door open for the state to remove the public trust easement. For instance, the court opined that the Legislature could convey tidelands into private absolute ownership freed of the public trust if the Legislature finds the lands are “no longer useful for trust purposes” and “not subject to the constitutional prohibition forbidding alienation. . .” *Id.*, 6 Cal.3d at 260. The court describes such a decision as a “political question” for the Legislature. *Id.*
110 *Marks v. Whitney*, 6 Cal.3d at 259 (quoting *People ex inf. Webb v. California Fish Co.*, 138 P. 79, 87 (Cal. 1913)).
111 WIS. CONST., art. IX, § 1.
Following *Illinois Central* and *Shively*, the Wisconsin Supreme Court interpreted this provision to form the foundation of the public trust doctrine, which it applied to the original federal grant of trust property to the state. It also articulated this doctrine as a limitation on its sovereignty: the state holds title to navigable waters and the lands beneath them “solely for . . . trust purposes, and . . . any conveyance in violation of such trust is necessarily void.”

The Wisconsin Supreme Court’s seminal public trust case, *Diana Shooting Club v. Husting*, illustrates how a sovereignty theory allows a court to reconcile the concepts of maintaining the public trust doctrine with state power to define property rights. In *Diana Shooting Club v. Husting*, the court explained that although Wisconsin decided to divest its ownership of the beds of navigable rivers and allow private ownership, public rights must limit that private title.

As long as the state secures to the people all the rights they would be entitled to if it owned the beds of navigable rivers, it fulfills the trust imposed upon it by the organic law, which declares that all navigable waters shall be forever free. As far as public trust rights go, according to Wisconsin’s Supreme Court, “it is entirely immaterial who holds the title, the state or the riparian owners. . . . It is beyond the power of the state to alienate [beds underlying navigable waters] freed from such rights.”

Thus, the *Diana Shooting Club* court viewed public trust rights as a kind of easement that burdened the private estate and could never be eliminated. This prevents the state from conveying the typical ownership right to exclude along with the private title to riverbed; ultimately, the court rejected the trespassing claim before it and held the public maintains a public trust right to hunt on river bed up to the ordinary high water mark despite it being privately owned.

Moreover, the coexistence of public and private rights on the same property accommodates the various rights at issue in contemporary beach access controversies. A court can recognize overlapping rights in this area: the private landowner's *jus privatum* may include rights such as possession and alienation, while the public’s *jus publicum* still

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112 *E.g.*, Illinois Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901).
113 *E.g.*, Illinois Steel Co. v. Bilot, 84 N.W. at 856. Similarly, Michigan’s Supreme Court recognized: “The state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources.” *Glass*, 703 N.W.2D at 65. Additionally, the Great Lakes and the lands beneath them remain subject to the federal navigational servitude, which preserves federal government control “for the purpose of regulating and improving navigation.” *Gibson v. United States*, 166 U.S. 269, 271-72 (1897).
114 *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914).
115 *Id.*
116 *Id.*
117 *Diana Shooting Club v. Husting*, 145 N.W. at 819, (citing) Priewe v. Wisconsin State Land & Improvement Co., 103 Wis. 537 (Wis. 1899)). The limited power of the state to alienate waters freed of the trust stands in contrast to the power of the state to dispose of other lands the federal government granted to it at the time of statehood. The federal government granted to Wisconsin 10,200,000 acres or about 29% of the whole area of Wisconsin. *James Willard Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836-1915* 10 (Harvard University Press 1964). The State of Wisconsin was to hold these public lands in a “trust” capacity to be used for purposes delineated by Congress, such as to establish schools, reclaim swamplands, or build canals and railroads. *Id.* at 17. State sale of these lands in violation of Congressional purposes, however, did not result in automatic reversion of the title back to the United States, but required Congress to take legal action to assert a violation, which it never did. *Id.* at 18, n.7.
118 *Diana Shooting Club*, 145 N.W. at 819.
burdens the beachfront estate and allows for public access. In reviewing the beach access cases that follow, a primary difference emerges between courts that view the public trust doctrine as limited to lands the state owns and courts that recognize the *jus publicum/privatum* distinction is more like an inalienable public trust easement.

When courts understand the public trust as an easement on the public/private beach zone, the boundary of private title may not be the same as the boundary for public trust rights. For instance, a state may redefine the original grant of trust property and draw the private title line at the low instead of ordinary high water mark. Nonetheless, a public trust easement continues to protect public rights to the high water mark. Thus, the public trust easement on the private fees protects public usufructuary rights just like riparian or littoral rights extend private rights into public waters. Under an easement approach, private property holders have weaker rights to exclude the public from exercising public trust uses on the property.

In contrast to the sovereignty theory that leads to an easement approach, a competing theory is that the state has ultimate control to define (shrink) the scope of trust property, subject only to the rights granted by the Constitution to the federal government to control commerce and navigation. Support for that theory is found in the fact that some states have conveyed trust property to private owners, effectively free of public rights. \(^{119}\)

The Supreme Court has never directly addressed this issue, but has muddied the waters in dicta. Although the holding in *Phillips Petroleum* arguably focused on an expansion of public trust property, in defense of its holding the court acknowledged that some states have reduced trust property. In *Phillips Petroleum* the Court endorsed Mississippi’s assertion of public trust ownership of non-navigable tidal waters and lands beneath them despite the terms of title and expectations Phillips developed around holding title and paying taxes over the course of a century. \(^{120}\) In response to arguments that the Court’s decision to recognize Mississippi’s ownership of non-navigable tidal waters would upset property ownership in other coastal states, the Court countered that some states had already:

> granted all or a portion of their tidelands to adjacent upland property owners long ago. Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here. \(^{121}\)

The Court went on that, “even where States have given dominion over tidelands to private property owners, some States have retained for the general public the right to fish, hunt, or bathe on these lands.” \(^{122}\) This Supreme Court discussion indicates that states *may*, but not necessarily *must* retain a public trust easement on those trust lands. \(^{123}\)

Professor Kenneth Kilbert puts a finer point on the debate. He describes the original federal grant as only the “starting point” for the demarcation line between public and private, and suggests states are able to change the boundaries of private title to extend


\(^{122}\) *Id.* at 483-484.

\(^{123}\) *See id.* at 483.
below the high water mark, within certain limited circumstances.\textsuperscript{124} He argues that consistent with \textit{Shively} and \textit{Phillips Petroleum}, the states “have some authority to redefine the geographic scope of the lands held in public trust,” but that authority is neither boundless nor ossified in the original purposes of the public trust doctrine.\textsuperscript{125} He asserts that consistent with \textit{Illinois Central}, a state can only contract the scope of lands protected by the public trust doctrine when: 1) the legislature’s intent to do so is clear, 2) the public’s rights to engage in uses protected by the public trust doctrine are not substantially impaired, and 3) an important public interest is promoted.\textsuperscript{126}

Courts that reject a sovereignty theory in favor of a more absolute state power to define property rights tend to focus on a lineal title interpretation of the property boundaries.\textsuperscript{127} Under a lineal title approach, the dividing line for title purposes is exactly the same as the dividing line for public rights. This approach views the public trust doctrine as rooted in ownership; these courts divide coastal property into public and private fee simples. Thus, there are no public rights on the private property side of the line.

Courts that follow a lineal title approach draw a bright line between private and public property, both for title and for use rights. This approach is a double-edged sword, however, that can also limit private rights.\textsuperscript{128} For instance, the New Jersey Supreme Court followed a lineal title approach in \textit{Arnold v. Mundy} to deny private rights to harvest oysters. According to Professor Michael Blumm, that approach led the court to conclude the “beds of waters influenced by the tides or that are navigable-in-fact were state-owned in trust for the public, while lands submerged beneath non tidal, non-navigable waters could be privately owned. Sovereign lands and private lands existed side-by-side, with the lands critically important for navigation and fishing in public hands.”\textsuperscript{129}

\section*{B. Fixed Versus Evolving Theories of Public Rights}

After determining the property boundaries and whether a public trust easement exists, courts must then define the scope of uses protected by the public trust doctrine in the public/private beach zone. While a minority of courts apply what I call a “fixed” theory of public trust rights, a majority of courts apply an “evolving” theory.\textsuperscript{130} Under a fixed theory, courts freeze public rights as those recognized in 17\textsuperscript{th} century England and at the founding of the United States to the triumvirate of commerce, navigation, and fishing.\textsuperscript{131} By contrast, under an evolving theory, courts reject the notion that public trust

\textsuperscript{124} See, e.g., Kilbert, \textit{supra} note TBD, at 20-25.

\textsuperscript{125} \textit{Id.} at 33. In \textit{Shively} the situation involved a state law that allowed private conveyance below the ordinary high water mark, but subject to the “paramount right of navigation inherent in the public,” \textit{Shively}, at 52. So that decision did not involve whether a state could extinguish the public trust easement when it conveyed trust lands into private ownership.

\textsuperscript{126} Kilbert, \textit{supra} note TBD, at 33.

\textsuperscript{127} Here, I build on terms advanced by Professors Blumm and Rose, and distinguish courts that take a “lineal title” approach from courts that take an “easement” approach. Professor Michael Blumm described these property theories as lineal versus overlapping. Blumm, \textit{supra} note TBD, at 655-59 (2010).

\textsuperscript{128} Professor Blumm describes the New Jersey Supreme Court’s approach in \textit{Arnold v. Mundy} as typifying a lineal approach where the court drew a bright property line and held that “Mundy had no title to the submerged land in question because the sovereign owned the beds of tidal waters in New Jersey, just as it did in England. Blumm, \textit{supra} note TBD, at 655 (citing Arnold v. Mundy, 6 N.J.L. 1 (N.J. 1821)).

\textsuperscript{129} Blumm, \textit{supra} note TBD, at 657.
rights are strictly enumerated and define these rights to reflect society’s values, needs, and current uses of trust property.

The decision by Maine’s Supreme Court in *Bell v. Town of Wells (Bell II)* exemplifies a fixed theory of common law public rights. The court explained that public rights in Maine historically included fishing, fowling, and navigation (whether for recreation or business) and any other uses reasonably incidental or related to those rights. The court saw these public rights as “established property rights” in the form of an easement on private fees that the state could not simply alter to accommodate new public needs. According to *Bell II*, to do so may run afoul of constitutional prohibitions on the taking of private property without compensation. Referring to the public rights of fishing, fowling and navigation as “the ancient easement,” the court rejected the assertion that adding rights for bathing, sunbathing, and recreational walking is “no more burdensome” on the private landowner.

The rationale that undergirds this fixed theory of public uses is that it reasonably anchors public rights and does not burden private property by requiring accommodations for “new recreational needs.” It critiques an evolving public rights theory on the grounds that such an open-ended interpretation of public uses would make private property rights on beaches ephemeral and uncertain. For instance, the court in *Bell II* was concerned that if it recognized a new general recreation easement that allows the public to not only walk, but sunbathe, picnic, play sports, or swim, this would make private beaches indistinguishable from public beaches specifically acquired by the government for those general purposes. As will be explained further in section V, in addition to Maine’s *Bell II* decision, courts in Massachusetts have similarly applied a fixed theory of public trust rights to deny public beach walking in the public/private beach zone.

Nevertheless, the application of a fixed theory of public trust rights is not as determinative of public beach access for beach walking as it may seem. While some courts apply a fixed theory of public rights to deny the public the right to walk on

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130 *E.g.*, Marks v. Whitney, 6 Cal.3d 251, 259-60 (Cal. 1971) (applying evolving theory).
131 *E.g.*, Bell v. Town of Wells (Bell II), 557 A.2d 168, 172-73 (Me. 1989) (explaining why it fixed public rights in the 17th Century: “the Colonial Ordinance of 1641-47 of the Massachusetts Bay Colony “reserved out of the fee title granted to the upland owner a public easement only for fishing, fowling, and navigation.”)
132 Bell v. Town of Wells (Bell II), 557 A.2d 168 (Me. 1989).
133 Bell II, 557 A.2d at 169.
134 *Id.*
135 *Id.* at 176-77 (invalidating Maine’s Public Trust in Intertidal Land Act, which declared an unlimited right in the public to use the intertidal land for “recreation” as an unconstitutional taking without compensation because it expands the common law easement).
136 *Id.* at 175.
137 *Id.* at 169.
138 *Id.* at 174 (noting that Maine has “no reported case where a claim of a public easement for general recreation such as bathing, sunbathing, and walking on privately owned intertidal land has even been asserted.”)
139 *Id.* at 176.
140 *Bell II*, 557 A.2d at 169 (invalidating as unconstitutional Maine’s Public Trust in Intertidal Land Act, which declares an unlimited right in the public to use the intertidal land for “recreation” —hinged on fixed theory); Opinion of the Justices, 365 Mass. 681, 684-85 (Mass. 1974) (new right of passage on foot law unconstitutional taking —hinged on fixed theory).
beaches, others, such as courts in Michigan and North Carolina, include beach walking in the fixed historic rights of “passage and repassage.”

In contrast, courts that apply an evolving theory of public rights recognize protections for beach walking, access for scuba diving, or general recreation, in the public/private beach zone, and even beyond that zone into the privately held uplands. In situations where a private property owner takes title to the low water mark, courts apply an evolving theory of public rights to protect public rights in the public/private beach zone for multiple uses, ranging from access for scuba diving to ecological protections.

For example, in determining whether Marks could fill and develop tidelands to which he had title and cut off his neighbor’s access to the ocean, Marks v. Whitney exemplifies an evolving theory of common law public rights. The California Supreme Court described public rights as “sufficiently flexible to encompass changing public needs” and held that the court is “not burdened with an outmoded classification” of rights. The court included as protected public trust rights, based on “a growing public recognition” of its importance, “the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” Thus, the California Supreme Court applied an evolving theory of public rights along with an easement approach based on a sovereignty theory, and held that Marks did not have the right to fill and develop tidelands to which he held title. This was because Marks’ jus privatum was subject to public rights to protect the area as an open natural space. Similarly, and as explained further in section V, courts in New Jersey, New Hampshire, Maine, Minnesota, and Wisconsin have explicitly adopted an evolving theory of public trust rights.

V. BEACH ACCESS CASES

141 Id.
144 McGarvey v. Whittridge, 28 A.3d 620, 628-29 (Me. 2011) (allowing access for scuba diving in low water state); Marks v. Whitney, 6 Cal.3d 251, 259-260 (Cal. 1971) (denying tideland development that would limit public access to land to which owner had title in a high water state).
145 Marks v. Whitney, 6 Cal.3d at 259-260.
146 Id.
147 Id. The court similarly noted that it was not necessary for it to “define precisely all the public uses which encumber tidelands.” Id.
148 Id. at 261.
149 Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54-55 (N.J. 1972); Matthews v. Bay Head Imp. Ass’n, 471 A.2d 355, 365 (N.J. 1984); McGarvey v. Whittridge, 28 A.3d at 628-29; State v. Korreer, 127 Minn. 60, 148 N.W. 617, 623 (Minn. 1914) (describing how public rights evolve in a case that did not involve beach walking or access); R.W. Docks & Slips v. Dept. of Nat. Res., 244 Wis.2d at 510 (explaining in a non-beach walking case that “[a]lthough the public trust doctrine originally existed to protect commercial navigation, it has been expansively interpreted to safeguard the public’s use of navigable waters for purely recreational purposes . . . and to preserve scenic beauty.”).
A majority of states maintain the division of title between private owners and the state at the mean or ordinary high water mark, consistent with the property the federal government transferred to the states when they entered the Union; in these high water states, beach walking is usually allowed in the public/private beach zone. Even in high water states, however, boundary issues arise when individual deeds purport to grant title to land within or below the public/private beach zone. In those cases, the court’s theory of coastal property rights will influence how the court interprets the deeds. Recall, the California Supreme Court in Marks v. Whitney applied a sovereignty theory and found an easement existed in the public/private beach zone in order to reconcile a patent of land to the low tide line in a state where tidal property is held by the state up to the high tide line. Choice of theory also influences the outcome for public rights in low water states. A state’s recognition of private title to the low water mark does not automatically extinguish all public rights in the public/private beach zone.

Beach access in the United States varies not only between states broadly, but also

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150E.g., West v. Slick, 326 S.E.2d 601, 617 (N.C. 1985). North Carolina is an example of a state where the right of public access to beaches for walking as well as all forms of recreation has long been recognized and protected. N.C. GEN. STAT. § 1-45.1 (2007) (declaring the “public trust rights” “include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches.”); Fabrikant v. Currituck Cnty., 621 S.E.2d 19, 27-28 (N.C. 2005). The dividing line of ownership is the mean high tide line on the North Carolina coast. West v. Slick, 326 S.E.2d 601, 617 (N.C. 1985); N.C. GEN. STAT. § 17-20 (2010). In West v. Slick, the North Carolina Supreme Court referred to this demarcation line as a “long established rule that littoral rights do not include ownership of the foreshore.” West, 326 S.E.2d at 617. This case was not directly about beach walking, but revolved around a dispute about property owners’ ability to establish a neighborhood public road or public road by prescription or by dedication across neighboring land. After drawing this boundary line in the sand, and without reference to English common law, the court nonetheless acknowledged the existence of overlapping rights in the public/private beach zone. For instance, although the beach below the mean high tide line is public property, a littoral owner has a right to place a pier in this area. Id. These littoral rights are like a private easement on public land. However, the owner must ensure that “passage under the pier must be free and substantially unobstructed over the entire width of the public/private beach zone.” Id. This means that from mean low to high tide, the pier must be at such a height that “the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high.” Id. Without explanation or references, the court simply declared that: The long standing right of the public to pass over and along the strip of land lying between the high-water mark and the low-water mark adjacent to respondents’ property is well established beyond need of citation. Id.

Then, the court affirmed “once again” the rule that “passage by the public by foot, vehicle and boat must be free and substantially unobstructed over the entire width of the foreshore . . .” Id., at 618. Interestingly, there are very few piers along North Carolina’s ocean coast and North Carolina’s “Coastal Area Management Act (CAMA) regulations implicitly prohibit” the construction of private ocean piers. Joseph J. Kalo, North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century, 83 N.C. L. REV. 1427, 1501, 1503 (2005). After West v. Slick, North Carolina N.C. GEN. STAT. § 77-20(d) - (e) (2003) codified the “customary free use and enjoyment of the ocean beaches” enjoyed by the people of the State of North Carolina “from time immemorial.” When faced with a constitutional challenge to this provision, the North Carolina Court of Appeals did not reach the merits because the litigants voluntarily dismissed the claim based on the State’s litigation position that the provision does not create a public easement over the dry sand area of the beach. Fabrikant v. Currituck Cnty., 621 S.E.2d 19, 24, 31 (N.C. 2005). However, professor Joseph Kalo asserts that in North Carolina there is a common law customary right to use dry sand oceanfront beaches regardless of title. Kalo, at n.13.

151Marks v. Whitney, 6 Cal.3d 251, 257-58, n.5 (Cal. 1971).

152Marks v. Whitney, 6 Cal.3d 251, 257-58, n.5 (Cal. 1971) (defining tidelands as the land extending up to the mean high tide, explaining that California holds the tidelands in trust, but still recognizing private patents to some tidelands to the low tide).
within the same state.\textsuperscript{153} As noted, the property and common law theories a court applies, and the extent a court relies on English common law, influences the outcome of public beach access. This is most readily observed when comparing decisions from states that share common legal foundations. This section demonstrates this point by analyzing cases from the former Massachusetts Bay Colony and from the former Northwest Territory around the Great Lakes.

\textbf{A. Former Massachusetts Bay Colony: Maine and Massachusetts}

The beach access cases from Maine and Massachusetts present a rich comparative body of state law because their intertidal property law is built on a shared legal foundation in the Massachusetts Bay Colony’s Colonial Ordinance of 1641-47.\textsuperscript{154} Under the Colonial Ordinance, private property ownership extended from the uplands to the low tide mark. The Ordinance modified 17th-century English common law in the intertidal area,\textsuperscript{155} or public/private beach zone, in order “to encourage commercial wharf development at private expense.”\textsuperscript{156} When Maine separated from Massachusetts in 1820 to become an independent state, Maine expressly followed Massachusetts’ property law and extended private title to the ordinary low tide line.\textsuperscript{157}

From that common legal foundation, one might expect that state court resolution of disputes over public access to the public/private beach zone would be uniform. In fact, the Supreme Courts in Maine and Massachusetts have followed different legal theories, which have produced divergent results. Maine’s Supreme Court took a strong easement approach along with an evolving common law public rights theory in \textit{McGarvey v. Whittredge}\textsuperscript{158} and allowed public access for scuba diving. However, previously Maine’s Supreme Court and Massachusetts’ Supreme Court took a lineal title approach and a fixed common law public rights theory in \textit{Bell v. Town of Wells (Bell II)},\textsuperscript{159} \textit{Michaelson v. Silver Beach Imp. Ass’n, Inc.},\textsuperscript{160} and \textit{Opinion of the Justices},\textsuperscript{161} and denied public access for recreation as well as simply for beach walking.

In 2011, in \textit{McGarvey v. Whittredge}, Maine’s Supreme Court addressed the question of whether the public had the right to walk across the public/private beach zone to reach the ocean for scuba diving. The court traced the legal development of private ownership and public rights in this zone back to its origins in English common law and its easement approach of finding overlapping \textit{jus privatum} and \textit{jus publicum}.\textsuperscript{162} After recounting the transfer of property under the equal footing doctrine, the court explained

\begin{footnotes}
\item \textsuperscript{154} \textit{Michaelson v. Silver Beach Imp. Ass’n, Inc.}, 173 N.E.2d at 275; \textit{McGarvey v. Whittredge}, 28 A.3d at 628-29.
\item \textsuperscript{155} This is the zone between ordinary high and low tides.
\item \textsuperscript{156} McGarvey, 28 A.3d at 626. Interestingly, New Hampshire has rejected the “Massachusetts law that adopted the low water mark as the boundary between public and private ownership.” \textit{Opinion of the Justices}, 649 A.2d 604, 607 (N.H. 1994) (citing Concord Mfg. Co. v. Robertson, 25 A. 718, 729 (N.H. 1890)).
\item \textsuperscript{157} \textit{McGarvey}, 28 A.3d at 629-30.
\item \textsuperscript{158} \textit{McGarvey}, 28 A.3d 620.
\item \textsuperscript{159} \textit{Bell v. Town of Wells (Bell II)}, 557 A.2d 168 (Me. 1989).
\item \textsuperscript{160} \textit{Michaelson} 173 N.E.2d 273 (Mass. 1961).
\item \textsuperscript{161} \textit{Opinion of the Justices}, 365 Mass. 681, 689, 313 N.E.2d 561 (Mass. 1974).
\item \textsuperscript{162} McGarvey, 28. A.3d at 628 (citing Shivley v. Bowlby, 152 U.S. 1, 11-13 (1894)).
\end{footnotes}
that Maine modified its common law to allow private ownership to the low water mark; however, like English common law, this property is “subject to the public trust rights reserved to the State.” The court sought a legal interpretation that balanced what it called the “solidly established” rights of private property owners in the intertidal zone and the public’s “uninterrupted right to make appropriate use of those lands.” The court explicitly highlighted the public trust easement:

Important to this analysis is our conclusion that nothing in the Colonial Ordinance, or the pronouncements of the common law . . . evidenced an intent to change or limit the *jus publicum*—the public’s rights in the intertidal lands—except to the extent that those rights might interfere with the right of the landowner to wharf out. This interpretation of the Colonial Ordinance presumes the continued existence of a public trust easement unless explicitly altered. Just as the United States Supreme Court had in *Illinois Central*, Maine’s Supreme Court in *McGarvey* cited to Sir Matthew Hale’s Treatise from 1787 to describe in greater detail the *jus privatum* and *jus publicum* distinction between private title and public use rights.

After finding a public trust easement and establishing that public rights are not extinguished even when title to the low water mark is in the private property owner, the court determined what public uses of this zone are protected within the *jus publicum*. Dating back to the Colonial Ordinance, the reserved public trust rights in the intertidal zone were rights connected to fishing, fowling, and the passage of boats. However, unlike Maine’s Supreme Court decision in *Bell v. Town of Wells (Bell II)*, highlighted in the section above as exemplifying a fixed theory of common law public rights, the *McGarvey* court underscored the need for the common law to be flexible in order to maintain its relevance to contemporary life.

Our interpretation of the public trust rights has recognized that some intertidal activities have come into favor and eventually fallen out of use. . . such as the use of the intertidal lands for pre-automobile travel and the use of those lands for driving and resting cattle. The court recounted that Maine’s court decisions have recognized a variety of public trust rights that bear little direct connection to the traditional rights, such as crossing intertidal lands by riding or skating on the ice, landing a boat and freely passing to the lands and houses, digging for worms, and activities undertaken for pleasure as well as business or sustenance.

Despite these expansions of the traditional scope of public rights, the *McGarvey*
court was mindful to not “unreasonably interfere” with riparian rights.\textsuperscript{171} Maine’s Supreme Court had previously applied a fixed common law theory in \textit{Bell II} and held that intertidal lands did not include a general recreation easement.\textsuperscript{172} By contrast, the \textit{McGarvey} court rejected the notion that public trust rights are strictly enumerated rights.\textsuperscript{173} To limit public uses forever to those uses that were in favor in the 17\textsuperscript{th} century, as the \textit{Bell II} court did, would severely restrict the use of this public/private beach zone to a person who walks “with a fishing rod, a gun, or a boat . . .”\textsuperscript{174} Instead, the \textit{McGarvey} court focused on whether crossing the intertidal zone for scuba diving was “among the purposes consistent with the common law of the \textit{jus publicum}, even when such access is for activities that do not strictly fall within the triumvirate of descriptors.”\textsuperscript{175} The \textit{McGarvey} court reasoned that the \textit{jus publicum} included the public’s right of passage and repassage, and held public rights include the right to walk across the intertidal zone to access the ocean for scuba diving.\textsuperscript{176} Thus, while the court made the case for an evolving theory of common law public rights, it was careful to link back the new use – crossing the public/private beach zone for scuba diving – to the historic use of this zone for “passage”.\textsuperscript{177} Comparing the \textit{McGarvey} and \textit{Bell II} decisions of Maine’s Supreme Court demonstrates the power of legal theory to influence the outcome of decisions even within the same state.

Analyzing the beach access cases from Massachusetts further elucidates this point. Just like Maine, littoral owners hold title to the low water mark in Massachusetts.\textsuperscript{178} However, the reasoning and outcome for public beachgoers’ rights was markedly different in \textit{Michaelson v. Silver Beach Imp. Ass'n, Inc.} than Maine’s \textit{McGarvey} decision. The coastal property in question in \textit{Michaelson} contained a sea wall at the low water mark.\textsuperscript{179} Applying a lineal title theory, the state’s property began where private property ended at the seawall and extended into the ocean.\textsuperscript{180} The Massachusetts Supreme Court decided \textit{Michaelson} in 1961, eleven years after the State of Massachusetts had added sand below this sea wall and built a beach that the Silver Beach Improvement Association’s members and others used for “usual beach purposes, such as sun-bathing, bathing, and picnicking.”\textsuperscript{181} Despite the state investment in building the beach and its public use for over a decade, the Massachusetts Supreme Court enjoined the beach association from continued use of the area for beach activities and held that the littoral owners became the owners of the new beach down to the new low water mark.\textsuperscript{182}

The \textit{Michaelson} court was silent on English common law and the concept of a \textit{jus...
publicum easement burdening the private estate. Instead, the court relied exclusively on state law, and likened the state action of adding sand to build out the beach to natural accretion; just as under the law of accretion, the littoral owners obtained title to the new beach area down to the new low water mark.\textsuperscript{183} This is an unusual analysis for a beach renourishment project paid for by the state; such projects are typically defined as avulsion instead of accretion, which puts the newly created property in the state’s domain.\textsuperscript{184}

Also motivating the decision was the court’s view of public rights as fixed in the 17\textsuperscript{th} century; the only specific powers of the state to alter the shoreline without compensation to private parties are those “to regulate and improve navigation and the fisheries.”\textsuperscript{185} There is “no power to build beaches for bathing purposes without compensating the littoral owners. . .”\textsuperscript{186} This is a particularly striking opinion given the facts that the state had added sand to property clearly in the public domain below the low tide line. The Michaelson decision highlights the power of a fixed theory of common law public rights to favor private property owners’ exclusive use of the shore, even in the face of facts that would indicate a different result.

Similarly, in an advisory opinion, the Massachusetts Supreme Court considered whether a proposed bill that would create an “on foot right of passage” in the intertidal zone was permissible.\textsuperscript{187} The Opinion of the Justices turned on a fixed theory of common law public rights solidified in the terms of the Colonial Ordinance that allowed the public to use the public/private beach zone for fishing and navigation.\textsuperscript{188} “We are unable to find any authority that the rights of the public include a right to walk on the beach.”\textsuperscript{189} The court indicated that in other states, where the property boundary between public and private is drawn at the high water mark, public rights in the beach are broader.\textsuperscript{190} However, where private property runs to the low water mark and beach walking is not seen as fitting within 17\textsuperscript{th} century public uses for navigation and fishing, the justices opined that a new statute allowing beach walking would be a physical taking of private property.\textsuperscript{191}

\begin{itemize}
\item \textsuperscript{183} Michaelson, 173 N.E.2d at 276.
\item \textsuperscript{184} The U.S. Supreme Court affirmed the Florida Supreme Court’s determination that under Florida law, which draws the private property boundary at the high tide line, the state action of adding sand to create a beach on land that had previously been covered by ocean was an avulsion and not an accretion, thus the newly created land did not belong to the littoral property owner. Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot., 130 S.Ct. 2592, 2611-12 (2010). Unlike an accretion, which is a gradual build up of land, a sudden build up is an avulsion, which does not entitle the littoral property owner to a change in the property boundary. “[I]f an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner’s contact with the water.” Id. The U.S. Supreme Court, unlike the Massachusetts Supreme Court in Michaelson, 173 N.E.2d 273, based its decision entirely on finding this action was an avulsion, without regard to whether the public trust rights included beach recreation and bathing. Additionally, many beach renourishment projects now involve federal funding and the Army Corps of Engineers, which require public access easements for all nourished beaches. Jeffrey S. Chiesa, et. al., v. D. Lobi Enterprises, et. al., Docket # A-6070-09T3, at 4 (NJ Ct. App. 2012)(unpublished decision).
\item \textsuperscript{185} Michaelson, 173 N.E.2d at 277.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Opinion of the Justices, 365 Mass. 681, 313 N.E.2d 561 (Mass. 1974).
\item \textsuperscript{188} Opinion of the Justices, 365 Mass. at 686.
\item \textsuperscript{189} 365 Mass. at 687.
\item \textsuperscript{190} Id. at 688.
\item \textsuperscript{191} Id. at 689. The Supreme Court of Maine similarly held that Maine’s Public Trust in Intertidal Land Act, which creates a comprehensive recreational easement recognizes public rights beyond the traditional scope of the Colonial Ordinance and is an unconstitutional taking without compensation. Bell v. Town of Wells
\end{itemize}
Thus, although both Maine and Massachusetts draw the private title line at the
ordinary low tide line, in Maine the public has a right to cross the public/private beach
zone for scuba diving based on a public trust easement in this zone that evolves over time
to remain relevant to contemporary society. However, in Massachusetts, where the court
views public rights as fixed in the 17th century uses, the public does not even have the
right to walk in this zone, nor does the state have the power to create public beaches
below the low water mark by state-funded beach renourishment projects without paying
compensation to adjacent private property owners.

B. **Former Northwest Territory Around the Great Lakes: Wisconsin,
Michigan, Ohio, and Minnesota**

Like Maine and Massachusetts’ shared historical origins in the Massachusetts Bay
Colony’s Colonial Ordinance of 1641-47, the Great Lakes states of Wisconsin, Michigan,
Ohio, and Minnesota have mutual origins in the Northwest Territory. For places that
were part of the Northwest Territory before statehood, the Northwest Ordinance of 1787
is generally considered part of the foundation of each state’s public trust doctrine because
this Ordinance, in essence, required each state to hold all navigable waters and the lands
beneath and between them in trust for the public’s shared use and enjoyment. Specifically, the Northwest Ordinance declared navigable waters and “the carrying
places” between them as “common highways” that are “forever free” for all inhabitants
of the territory.

Despite, their common legal foundation in the Northwest Ordinance, the Great
Lakes states vary considerably in their approaches to private property ownership and
public access along their navigable waters. Like Maine, Wisconsin’s decisions are
internally inconsistent in theory, law, and results. Michigan and Minnesota clearly find a
public trust easement in the public/private beach zone. And Ohio provides a distinct
outlier example of a lineal title approach at work.

Michigan’s *Glass v. Goeckel* is the first – and still the only - case among the Great
Lakes states to directly decide whether the public has a right to walk the shores of any of
the Great Lakes. With 3,288 miles of Great Lakes coastline, Michigan has more

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*(Bell II)*, 557 A.2d at 179. The court grounded its decision in the terms of the Colonial Ordinance, and interpreted public rights as an easement limited to fishing, fowling, and navigation. *Id.*, at 174. A Delaware court also mirrored the Massachusetts Supreme Court’s analysis in *Groves v. Sec’y, Dep’t of Natural Res. & Envtl. Control*, where the state law recognizes private littoral title to the low water mark. *Groves v. Sec’y, Dep’t of Natural Res. & Envtl. Control*, 1994 WL 89804, at *5-6 (Del. Super. Ct. 1994) (unpublished decision) The *Groves* court stated that the public trust rights in states in which littoral owners’ title stops at the high water mark are “of no value at all [to decide this case].” *Id.* at 5. While private property owners in Delaware need to accommodate the “superior” public rights to navigate and fish in the foreshore, these
did not refer to English common law and the rights included in the *jus publicum* in
this public/private beach zone. It also ascribed to a fixed theory of the common law, one that recognizes
public rights related only to navigation and fishing.
coastline than any state other than Alaska\textsuperscript{195} so the decision has extensive impact within its borders, and provides a modern and historically-grounded template for other states wrestling with beach access disputes.

Glass \textit{v. Goeckel} upheld the public’s right to enjoy beach walking in the public/private beach zone along Michigan’s vast Great Lakes coastline.\textsuperscript{196} An easement approach based on a sovereignty theory infused this decision; however, rather than rely on an evolving common law theory, the court grounded beach walking rights in traditional public trust rights of “passage.”\textsuperscript{197}

The dispute in Glass \textit{v. Goeckel} arose when a lakefront property owner brought a trespass claim against a neighbor for walking along the public/private beach zone.\textsuperscript{198} In this case, the private landowner along Lake Huron held “title to the water’s edge.”\textsuperscript{199} Given that this deed expressed title below the ordinary high water mark, the issue before the court was “how the public trust affects that title.”\textsuperscript{200} The Michigan Supreme Court drew the line between public and private property along the Great Lakes at the ordinary high water mark and explained that all land below that mark is held in trust for the public.\textsuperscript{201} However, the court acknowledged that some lakeshore property deeds, such as the one before it, describe private property boundaries below this mark. Like the deed involved in California’s Marks \textit{v. Whitney},\textsuperscript{202} or Ohio’s Merrill case (discussed below), deeds in Michigan may set the private property boundary at the low water mark or water’s edge, which are somewhere below the ordinary high water mark.\textsuperscript{203} However, unlike the Ohio Supreme Court, Michigan rejected the lineal title approach that “private title necessarily ends where public rights begin.”\textsuperscript{204}

Given the existence of these variable terms in deeds, the court needed a legal theory that reconciled private title descriptions seemingly at odds with state ownership of navigable waters up to the ordinary high water mark.\textsuperscript{205} Glass \textit{v. Goeckel} applied a


\textsuperscript{196} Glass, 703 N.W.2D at 62.

\textsuperscript{197} \textit{Id.} at 73-74.

\textsuperscript{198} \textit{Id.} at 61.

\textsuperscript{199} \textit{Id.}

\textsuperscript{200} \textit{Id.} at 63, n.5.

\textsuperscript{201} \textit{Id.} at 62. “Michigan’s courts have adopted the ordinary high water mark as the landward boundary of the public trust.” \textit{Id.} at 69.

\textsuperscript{202} Marks \textit{v. Whitney}, 6 Cal.3d 251, 257-58 (Cal. 1971).

\textsuperscript{203} \textit{Id.} at 69-70.

\textsuperscript{204} \textit{Compare Glass, 703 N.W.2D at 70, with Merrill, 955 N.E.2d at 948.}

\textsuperscript{205} If the issue of validity of private ownership lakeward of the OHWM had been brought in Wisconsin, the court’s reasoning may have varied because of Wisconsin’s clear prohibition against any conveyance of lakebed for purely private purposes. Although Wisconsin’s legislature has made grants of public trust property, this property may only be used for public purposes and this type of grant does not operate to transfer the legal title from the state. City of Madison \textit{v. State}, 83 N.W.2d 674, 678 (Wis. 1957) (holding that any grant of property for purely private purposes will be void); \textit{see also} Priewe \textit{v. Wisconsin State Land and Improvement Co.}, 67 N.W. 918, 921 (Wis. 1896). Further, the rights vested in grantees of trust property are extremely limited. The state is merely giving the grantee the ability to use the property, a privilege that is revocable at any time. \textit{City of Madison}, 83 N.W.2d at 678. For instance, the legislature gave the City of Madison permission to use trust property to build a civic center on Lake Monona, while continuing to vest ownership and trust responsibilities in the state. Continued use of that trust property does not give Madison title to the property. \textit{Id.} A lakebed grant in Wisconsin is conceptually like the state granting a private easement on public lands.
sovereignty theory that led to the finding of a public trust easement. It distinguished private title from public rights. Just as the California Supreme Court had in Marks v. Whitney, the Michigan Supreme Court reasoned that although the state may “convey lakefront property to private parties, it necessarily conveys such property subject to the public trust.”

Similar to Wisconsin’s Supreme Court in R.W. Docks (discussed below), Michigan’s Supreme Court highlighted this as “vital” to public trust law: on navigable waters, public rights limit private title. The Michigan Supreme Court based its holding on a view of the public trust doctrine as a limitation on state sovereignty; in other words, because the state cannot abdicate its trustee responsibilities over public rights in the Great Lakes and its beaches up to the ordinary high water mark, even if the state had issued patents to private parties that extended below the high water mark, it could not have conveyed away the public trust easement. The court declared, “the sovereign must preserve and protect navigable waters for its people.”

Thus, the Michigan Supreme Court reconciled potential conflicts between private title and public rights by finding an easement that accommodates the coexistence of private title and public rights. Drawing on historic English common law concepts of jus privatum and jus publicum, the court dissolved the potential dissonance. To this court, whether private property extends to the high or low water mark is irrelevant to the question of public rights: “Because the public trust doctrine preserves public rights separate from a landowner’s fee title, the boundary of the public trust need not equate with the boundary of a landowner’s littoral title.” Private title and public rights “may overlap” as they did under English common law. Thus, the Glass v. Goeckel court concluded, “private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark.” In so doing, the court noted that recognizing what is essentially a public trust easement is not “novel” because other states, such as Minnesota, North Dakota, South Dakota, Pennsylvania, and California, “have similarly accommodated the same practical challenge of fixing boundaries on shifting waters: they acknowledged the possibility of public rights coextensive with private title.”

Based on finding an inalienable public trust easement, the Michigan Supreme Court rejected the state Court of Appeal’s lineal title approach to coastal rights, which,

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206 Glass, 703 N.W.2D at 70.
207 Glass, 703 N.W.2D at 65 (emphasis in original). In Wisconsin, the state cannot convey property to the lakebed below the OHWM. Illinois Steel Co. v. Bilot, 184 N.W. 855, 856 (Wis. 1901). Wisconsin did allow private title to river beds, and like Michigan, only did so while preserving public trust protections. Diana Shooting Club v. Husting, 145 N.W. at 819.
208 Compare Glass, 703 N.W.2D at 68, with R.W. Docks & Slips, 628 N.W.2d at 787-788.
209 In another part of the decision, the court clearly stated: “the state lacks the power to diminish those [public trust] rights when conveying littoral property to private parties.” Glass, 703 N.W.2D at 62.
210 Id. at 63.
211 Id. at 70.
212 Id. at 70, 76.
213 Id. at 71, 73.
214 Id. at 70-71 (citing State v. Korrer, 148 N.W. 617 (Minn. 1914); North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 301 (N.D., 1995) (stating that neither the state nor the riparian owner held absolute interests between high and low water mark); Shaffer v. Baylor's Lake Ass'n, 141 A.2d 583 (Pa. 1958) (subjecting private title held to low water mark to public rights up to high water mark); Flisrand v. Madson, 35 S.D. 457, 470-72 152 N.W. 796 (1915) (same as Korrer, supra); Bess v. Humboldt Co., 3 Cal.App.4th 1544, 1549, 5 Cal.Rptr.2d 399 (1992) (noting that it is “well established” that riparian title to the low water mark remained subject to the public trust between high and low water marks).
just like Wisconsin’s 1920s decision in *Doemel v. Jantz*,\(^{215}\) granted the private property owner exclusive use of the beach.\(^{216}\) The Michigan Supreme Court described “exclusive use” in the private title holder as an erroneous decision that “upset the balance between private title and public rights along our Great Lakes and disrupted a previously quiet status quo.”\(^{217}\)

Additionally, *Glass v. Goeckel* provides a window into the Michigan Supreme Court’s view of the takings provision and whether littoral rights include the right to exclude the public from the public/private beach zone. Although the court considered littoral rights to be property, these rights are subject to the “paramount” public trust, the exercise or protection of which does not require the state to pay compensation to the landowner.\(^{218}\) The court expounded that “[b]ecause private littoral title remains subject to the public trust, no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine.”\(^{219}\) Its rationale is nearly identical to the Wisconsin Supreme Court’s in *R.W. Docks* regarding the limitations of riparian rights that overlap with public rights in the water.\(^{220}\) Thus, *Glass v. Goeckel* and *R.W. Docks & Slips* stand for the proposition that a private property owner’s takings claim related to activity in the public/private beach zone or the water beyond is very weak in states that subscribe to a sovereignty theory and find an inalienable public trust easement; a state cannot take what it already holds in trust.

After determining that regardless of who holds title in the public/private beach zone, a public trust easement will always exist, the *Glass v. Goeckel* court explained that “walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation.”\(^{221}\) Because of Article IV of the Northwest Ordinance of 1787 (the “forever free” provision), “we must protect the Great Lakes as ‘common highways.’” Hence, “our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark.”\(^{222}\)

The court described this public trust right as a “common sense assumption” and noted agreement among the litigants that walking along the shore falls within traditionally protected public trust rights.\(^{223}\) A “right of passage over land below the ordinary high water mark” is necessary in order to engage in other protected public rights of “fishing, hunting, and navigation for commerce or pleasure.”\(^{224}\) The court noted that other states, such as New Jersey and Connecticut, have likewise recognized a right of “passing and repassing” as part of the public use of waters.\(^{225}\) The court reasoned that:

\(^{215}\) *Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923).

\(^{216}\) *Glass*, 703 N.W.2D at 61; see also *id.* at 71.

\(^{217}\) *Id.* at 61; see also *id.* at 71.

\(^{218}\) *Id.* at 73.

\(^{219}\) *Id.* at 78.


\(^{221}\) *Glass*, 703 N.W.2D at 62.

\(^{222}\) *Id.* at 62. The court held that private property owners would contravene the public trust if they excluded beach walking below the ordinary high water mark and concluded that “plaintiff does not interfere with defendants' property rights when she walks within the public trust.” *Id.* at 75.

\(^{223}\) *Id.* at 73-74.

\(^{224}\) *Id.* at 74.

\(^{225}\) *Id.* (citing Arnold v. Mundy, 6 N.J.L. 1, 12 (1821)); Town of Orange v. Resnick, 94 Conn. 573, 578, 109 A. 864 (1920).

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gaining access to the Great Lakes to hunt, fish, or boat required walking to reach the water. Consequently, the public has always held a right of passage in and along the lakes.\textsuperscript{226} Similar to Maine’s Supreme Court \textit{McGarvey} decision, the \textit{Glass v. Goeckel} decision focused on the traditional rights of passage and repassage contained within the public trust easement.\textsuperscript{227} However, while the Maine Supreme Court more clearly endorsed an evolving theory of the common law in order to recognize a newer public use for scuba diving, the Michigan Supreme Court couched its holding squarely in traditional public trust uses because traveling by foot along beaches is both an historic and contemporary use of the public/private beach zone. \textit{Glass v. Goeckel} exemplifies how a fixed common law theory can be applied to allow beach walking based on the traditional public right of passage. However, Michigan does not extend this traditional right to include a perpendicular right of passage across private property to reach lands and waters held in trust.\textsuperscript{228} Establishing its decision as one based on tradition and stability, the court concluded: “In this way, we preserve littoral title as landowners have always held it, and we preserve public rights always held by the state as trustee.”\textsuperscript{229}

In a contrasting decision in another former Northwest Territory state, the Ohio Supreme applied a lineal title approach and favored exclusive use by private property owners along Lake Erie. This case addressed docks, but implicated beach walking.\textsuperscript{230} Lake Erie lakefront property owners sued to prevent the Ohio Department of Natural Resources from requiring leases to build structures, such as docks, below the ordinary high water mark.\textsuperscript{231} Like Michigan’s \textit{Glass v. Goeckel} private property owner, these lakefront property owners claimed their deeds showed their boundaries extended further into the lake than this mark.\textsuperscript{232} In 2011, the Ohio Supreme Court determined in \textit{State ex rel. Merrill v. Ohio Dep’t of Natural Resources} that the public trust on Lake Erie does not extend to the ordinary high water mark, but instead stops at the natural shoreline,\textsuperscript{233} which is below the ordinary high water mark. The \textit{Merrill} court took a lineal title approach, and made no reference to the \textit{jus publicum} easement or English common law.

One may infer from \textit{Merrill} that the Ohio Supreme Court, contrary to the U.S. Supreme Court in \textit{Illinois Central} or the Michigan Supreme Court in \textit{Glass v. Goeckel} or the Wisconsin Supreme Court in \textit{Diana Shooting Club}, does not view the public trust doctrine as inherent in state sovereignty; the opinion lacks any justification or rationale.

\begin{itemize}
  \item \textsuperscript{226} \textit{Glass}, 703 N.W.2d at 74.
  \item \textsuperscript{227} \textit{McGarvey v. Whittredge}, 28 A.3d 620, 636 (Me. 2011); \textit{Glass}, 703 N.W.2D at 74.
  \item \textsuperscript{228} \textit{Glass}, 703 N.W.2D at 74, n.26. By contrast, New Jersey protects public rights in private uplands based on the public trust doctrine.
  \item \textsuperscript{229} \textit{Glass}, N.W.2D at 76.
  \item \textsuperscript{230} Although the Ohio Supreme Court decision in \textit{Merrill} did not directly address beach walking, intervenors National Wildlife Federation and Ohio Environmental Council argued about beach walking in the lower courts, the Ohio Court of Appeals opinion in \textit{Merrill} discussed beach walking (i.e., the public has a right to walk the shore but only lakeward of the water’s edge), and the Ohio Supreme Court ultimately held that the public has no public trust right to use the shore above the natural shoreline.
  \item \textsuperscript{231} \textit{State ex rel. Merrill v. Ohio Dep’t of Natural Res.}, Nos. 2008-L-007 & 2008-L-008, 2009 WL 2591758, ¶ 2, 4, 28-30 (Ohio Ct. App. 2009).
  \item \textsuperscript{232} \textit{Id}.
  \item \textsuperscript{233} The court defined this as “the line at which the water usually stands when free from disturbing causes.” \textit{State ex rel. Merrill v. Ohio Dep’t of Natural Res.}, 955 N.E.2d 935, 948 (Ohio 2011). This demarcation line is somewhat vague, but is probably somewhere below the ordinary high water mark. Ohio’s approach is idiosyncratic and based on a codification of the boundary line by Ohio’s General Assembly at the “natural shoreline.” \textit{Id}.
\end{itemize}
for its variance from keeping in the public domain lands the federal government transferred to Ohio when it entered the Union. Instead, the court simply used a lineal title lens and applied a kind of quid pro quo reason that “if a littoral owner has no property rights lakeward of the natural shoreline, then the territory of the public trust does not extend landward beyond the natural shoreline.”234 The Ohio Supreme Court defined the title boundary as the same as the boundary for public rights; thus, the decision would likely preclude beach walking above the “natural shoreline.”235

Minnesota has similarly drawn the private property boundary below the ordinary high water mark; private property runs to the low water mark.236 However, unlike the Merrill decision in Ohio, Minnesota’s Supreme Court recognizes a public trust easement in the public/private beach zone.237 State v. Korrer did not involve beach walking, but rather the rights of a riparian to mine ore in the public/private beach zone.238 Its relevance here, however, is to illustrate another application of a public trust easement coupled with an evolving public rights theory in a state that draws the riparian property boundary at the low water mark.

The Minnesota Supreme Court described Minnesota’s property law as informed by English common law, but also clearly declared that each state is free to determine property rights suitable to each state’s conditions. “It is now well settled . . . that this is not a federal question, but that each state must determine for itself the question of the ownership of the soil underlying its public waters.”239 The court analyzed English common law to assist in shaping Minnesota’s property rules related to lakefront properties.240 However, the court could find no judicial decisions “clearly defining rights in fresh water lakes or rivers prior to the separation of the colonies from England.”241

After concluding that there was no uniformity among the states on these property rules, the court determined that in Minnesota “the title of the proprietor of lands abutting upon navigable waters extends to low-water mark.” Nonetheless, the court found an easement in the public/private beach zone. Although the riparian enjoys “proprietary privileges” in this zone, the state retains a superior right:242

The state may use [the public/private beach zone] for any . . . public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation.

Private title is “limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose.”243 The addition of the term “other public purpose” is consistent with an evolving theory of public rights. The Minnesota Supreme

234 Id.
235 Id. at 949.
236 State v. Korrer, 148 N.W. 617, 623 (Minn. 1914).
238 Id.
239 Id. at 619 (citing Barney v. City of Keokuk, 94 U.S. 324 (1876)). Further, the court reasoned that because the U.S. never owned the land under “public waters” but held it until it could transfer it to the newly formed states, the federal government could not patent any land under these waters into private ownership. Korrer, 148 N.W. at 617, 621. “This belonged to the states, and if the riparian owner has acquired it all it is by the favor or concession of the state.” Id. at 617.
240 Id. at 619.
241 Id.
242 Id. at 623.
243 Id. at 623 (emphasis added).
Court viewed the law as evolving to encompass waters valuable to the public for multiple purposes beyond one of the original public trust purposes of commercial navigation. For example, in rejecting a commercial navigation test for whether the state held a water body in trust, the court reconfirmed: “‘To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot perhaps be now even anticipated.’”

Although there have been no contemporary court decisions involving beach walking in Wisconsin, controversies over public access continue to emerge outside the courthouse. In a Milwaukee suburb, for instance, private property owners along Lake Michigan urged the local government to fence off and post no trespassing signs on the beach. The legal rights at issue in this and other controversies are confused by a Wisconsin Supreme Court decision issued about a decade after Diana Shooting Club that erroneously drew the private property boundary at the low water mark of a lake but has not been explicitly overruled. Doemel v. Jantz still stands as Wisconsin’s singular published court decision on the right of the public to walk along lakeshores and exemplifies how a lineal title approach and a fixed theory of the common law favors exclusive private use of the shore.

Doemel v. Jantz arose when a riparian landowner brought a claim for trespass against a beach walker who traveled along the public/private beach zone adjacent to the landowner’s property along Lake Winnebago. The Wisconsin Supreme Court began its analysis by emphasizing the benefits of riparian ownership and underscoring the importance of the private property right to exclude. It then identified seemingly

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244 Id. at 618 (quoting Mitchell, J., in Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893). Although the state did not obtain title to all waters regardless of navigability at the time of statehood, it is free to define property rights and expand the scope of waters covered by the public trust doctrine, as it has done here. PPL Montana v. Montana, 132 S.Ct. at 1235 (explaining “[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”)

245 McCoy, supra note TBD.

246 Doemel, 193 N.W. 393. In Wisconsin it has long been settled that the state holds title in lakebed up to the Ordinary High Water Mark and Wisconsin does not recognize any deeds that purport to convey private property below the ordinary high water mark of a lake or pond; “A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high water mark.” E.g., Illinois Steel Co., 84 N. W. at 856; State v. Trudeau, 408 N.W.2d 337, 342 (Wis. 1987); see also, Glass, 703 N.W.2D at 69; Illinois Steel Co. v. Bilot, 84 N. W. 855, 857 (1901) (citing McLennan v. Prentice, 85 Wis. 427, 55 N. W. 746; Priewe v. Improvement Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; Ne-pe-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. 661; Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. 436; Barney v. City of Keokuk, 94 U. S. 324, 24 L. Ed. 224; Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Yates v. City of Milwaukee, 10 Wall. 497, 19 L. Ed. 984). By 1901, the Wisconsin Supreme Court had addressed this issue “many times.” Illinois Steel Co., 84 N.W. at 856, (citing, McLennan v. Prentice, 85 Wis. 427, 55 N. W. 746; Priewe v. Improvement Co., 93 Wis. 534, 67 N. W. 918, 33 L. R. A. 645; Ne-pe-nauk Club v. Wilson, 96 Wis. 290, 71 N. W. 661; Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Village of Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. 436; Barney v. City of Keokuk, 94 U. S. 324, 24 L. Ed. 224; Railroad Co. v. Schurmeir, 7 Wall. 272, 19 L. Ed. 74; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Yates v. City of Milwaukee, 10 Wall. 497, 19 L. Ed. 984.).

247 Doemel, 193 N.W. at 394.

248 In Wisconsin, riparian ownership includes the right to build piers in aid of navigation, use waters for domestic and agricultural purposes, and protect upland soil from erosion. Id. at 395-96.

249 Id. at 396.
conflicting decisions, some in which the state held title to the high water mark, such as *Illinois Steel v. Bilot*, \(^{250}\) and others in which the private landowner held title to the low water mark, such as *Mariner v. Schulte*. \(^{251}\) While these cases could have been harmonized by applying a sovereignty theory that recognizes an inalienable public trust easement as the court had previously done in *Diana Shooting Club*, the *Doemel v. Jantz* court viewed the law through a lineal title property lens. When a court applying a lineal title lens is faced with a case that holds the state boundary extends to the high water mark and another case that holds the private property extends to the low water mark, one case must be minimized, ignored, or otherwise distinguished. *Doemel v. Jantz* distinguished the *Illinois Steel v. Bilot* precedent that the state holds title to the ordinary high water mark by taking the extraordinary step of adding a new legal requirement that water must be present to the high water mark in order for the public to assert any protected public trust rights.

Ultimately, the *Doemel v. Jantz* court erroneously concluded: “[T]his court . . . has firmly declared that the title of a riparian owner on a navigable inland meandered lake extends to [the] low-water mark.” \(^{252}\) The court gave the drawing of this private title line to the low water mark considerable weight in the outcome of the decision, explaining that “[i]f the rights of riparian owners had not attached or been declared by the courts [to go to the low water mark], a different situation would be presented.” \(^{253}\) Based on a lineal title approach, when the court drew the private property boundary at the low water mark, the court asserted that a 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.” \(^{254}\)

The court then applied a fixed theory of public rights, focused on the original “navigation purposes” of the public trust doctrine, to explain that the public had no rights in the public/private beach zone unless water was present to facilitate navigation. \(^{255}\) The court reasoned that since water is necessary for navigation, when water extends to the ordinary high water mark, public rights extend accordingly to navigate on that water, but when the waters recede so do public rights. \(^{256}\) The court held that beach walking in the

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\(^{250}\) *Id.* at 397, (citing Illinois Steel Co. v. Bilot, 109 Wis. 418, 426, 84 N.W. 855 (1901)).

\(^{251}\) *Doemel*, at 193 N.W. at 397-98 (citing , Mariner v. Schulte, 13 Wis. 692 (Wis. 1861) and Slauson v. Goodrich Transportation Co., 69 N. W. 990 (Wis. 1897) (holding private property boundary is the low water *Illinois Steel Co.*, 84 N. W. at 856; C. Beck Co. v. Milwaukee, 120 N. W. 293 (Wis. 1909), and Diana Shooting Club v. Husting, 145 N.W. 816 (Wis. 1914) (holding the state does not convey title below the OHWM)). The *Doemel v. Jantz* court explained *Diana Shooting Club* as standing for the proposition that the “the public right to pursue the sport of hunting to the ordinary high-water mark of a navigable river [exists] while the waters of the river actually extended to such mark.” *Doemel*, 193 NW at 398. However, this explanation ignores the explicit statement by the court in *Diana Shooting Club*: “Whether the right exists in the public to hunt on a navigable stream, between ordinary high-water marks, which, owing to a low stage of water, is unnavigable, or on land between such marks which has become dry or exposed, is not involved in this case, and is not decided.” *Id.* at 820. Further, the *Diana Shooting Club* case involved a navigable river where the private riparian held title to the center, and was not a case involving state title to lakebed up to the OHWM. Further, the *Doemel* court misstated the holding in *Mariner v. Schulte*, which involved a dispute on a river where private property boundaries run to the center of the river; the statement in that case about property boundaries on ponds and lakes is dicta.

\(^{252}\) *Doemel*, 193 N.W. at 398.

\(^{253}\) *Id.*

\(^{254}\) *Id.*

\(^{255}\) *Id.*

\(^{256}\) *Id.*
public/private beach zone without water present was a trespass on the private riparian owner’s property.  

If a beach walking dispute were revisited today in Wisconsin, a different situation would be presented; the Doemel v. Jantz court’s application of a lineal title theory to exclude all public rights in the public/private beach zone is inconsistent with most of the other Wisconsin Supreme Court cases, and certainly at odds with all contemporary decisions. The Wisconsin Supreme Court has confirmed in numerous cases that the state holds title to the beds of navigable lakes up to the ordinary high water mark. Moreover, although there may be individual deeds showing property boundaries at the low water mark or the water’s edge of lakes, Wisconsin does not recognize the validity of those deeds, and on navigable rivers the court has clearly applied a public trust easement to private title.

Indeed, in the present-day decision of R.W. Docks & Slips v. Dept. of Nat. Resources, the Wisconsin Supreme Court reiterated that the state has held title to the lakebed up to the high water mark since “the instant of its admission into the Union.” While riparian rights below that mark may co-exist and overlap with public rights, they are limited by the public trust doctrine. Although not a beach-walking case, this public trust case provided important analysis and insight regarding property rights on state-held lakebed and beaches and implications for related takings claims.

In R.W. Docks, riparian landowners’ qualified rights to use the lakebed “strongly influenced” the court’s evaluation of landowner R.W. Docks’ “investment backed expectations” for property that was located below the high water mark and, thus, “encumbered by the public trust doctrine and heavily regulated from the get-go.” The court reasoned that “[i]f Docks had no private property right to place boat slips on the lakebed at the marina, it cannot have suffered an unconstitutional taking.” While Wisconsin recognizes long-standing riparian rights, these rights are “qualified, subordinate, and subject to the paramount interest of the state and the paramount rights of the public in navigable waters.”

The court illuminated its role: “We have ‘jealously guarded the navigable waters of this state and the rights of the public to use and enjoy them.’” Given the established relationship of private rights overlapping with, but subordinate to, public rights in the public/private beach zone and into the lake, the court held the DNR’s denial of a permit to dredge lakebed and construct 71 boat slips on Lake Superior was not an unconstitutional taking.

257 Id.  
258 R.W. Docks & Slips, 628 N.W.2d at 787; Muench, 53 N.W.2d at 517; Trudeau, 408 N.W.2d at 342; Diana Shooting Club, 45 N.W. at 820; Illinois Steel Co., 84 N.W. at 856; see also Wis. Dep’t of Natural Res., The Ordinary High Water Mark, http://dnr.wi.gov/org/water/wm/dsfmi/shore/ohwm.htm (last visited May 14, 2011). Even with rivers and streams, where the private riparian holds title to the center of the stream, that title is not absolute, but is qualified and must give way to public rights when a conflict arises. E.g., Muench, 53 N.W.2d at 517.  
259 Illinois Steel Co., 84 N.W. at 856. The Wisconsin Supreme Court explained in 1901 that “[a] government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high-water mark.” Id.  
260 Diana Shooting Club, 145 N.W. at 819.  
261 R.W. Docks & Slips, 628 N.W.2d at 787.  
262 Id. at 790-91.  
263 Id. at 790.  
264 Id. at 787.  
265 Id. at 788.  
266 Id. at 790 (quoting Delta Fish and Fur Farms v. Pierce, 203 Wis. 519, 523, 234 N.W. 881 (1931).
unconstitutional taking of property. The Wisconsin Supreme Court’s analysis of riparian rights below the ordinary high water mark as limited and subordinate to public trust rights may inform future resolution of any beach walking disputes in Wisconsin in the public/private beach zone.

The conceptualization of the court’s role as guardian of the public’s interests in navigable waters as well as finding an easement that recognizes overlapping public and private rights was similarly echoed by Michigan’s Supreme Court in its 2005 beach walking decision in Glass v. Goeckel:

[T]he sovereign must sedulously guard the public's interest in the seas for navigation and fishing—passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan.

In sum, the states formed out of the former Massachusetts Bay Colony (Massachusetts and Maine) and formed out of the former Northwest Territory (Michigan, Ohio, Minnesota, and Wisconsin) lack uniformity in how they address public beach access despite their shared legal foundations. Maine’s McGarvey decision, Wisconsin’s R.W. Docks and Diana Shooting Club, Michigan’s Glass v. Goeckel, and Minnesota’s Korrer decisions all apply a sovereignty theory that leads to finding an inalienable public trust easement in the public/private beach zone. This easement accommodates shared uses and public access. Ohio’s Merrill decision provides a contemporary example of how a lineal title approach favors exclusive use of the public/private beach zone by private property owners. Further, in understanding the scope of public trust rights, Maine’s Bell II, Massachusetts’ Michaelson and Opinion of the Justices, and Wisconsin’s Doemel v. Jantz decisions all apply a fixed theory of public rights to deny beach walking and general recreation in the public/private beach zone where private title extends to the low water mark or tide line.

These different approaches underscore that even in states with the same property laws, the results diverge depending on the legal theory animating the decisions. Hence, in the low water states of Maine and Massachusetts, a court that finds an inalienable public trust easement and applies an evolving common law theory holds in favor of the public’s right to cross the intertidal zone to scuba dive; while a court that takes a lineal title approach and applies a fixed public rights theory advises that a proposed statute to secure beach walking rights is an unconstitutional taking. Similarly, in a Wisconsin decision that drew the private property boundary at the low water mark and applied a fixed common law theory, the court denied the public’s right to beach walking unless walking in the water. However, in a Minnesota decision, the court recognized a public trust easement up to the high water mark and understood the common law as evolving to protect multiple public purposes beyond commercial navigation.

As such, these cases show that in low water states or when faced with deeds that

267 Id. at 778-89, 791.
269 Glass v. Goeckel, 703 N.W.2d at 64.
270 McGarvey v. Whittredge, 28 A.3d at 636.
271 Opinion of the Justices, 313 N.E.2d at 567; Bell II, 557 A.2d at 179.
272 Doemel v. Jantz, 193 N.W. at 398.
contain boundaries below the ordinary high water mark, if justices see a singular dividing line for title and public rights, the decisions tend to favor private property owners’ exclusive use of the public/private beach zone. \(^{274}\) By contrast, when justices see the line for title purposes is not the same as the line for public rights purposes, and recognize a public trust easement, the decisions accommodate multiple shared uses of the public/private beach zone. \(^{275}\) If the justices follow a sovereignty theory, they will inevitably find a public trust easement in the public/private beach zone. The justices’ choice of theory also influences the efficacy of a takings claim. The recognition of an inalienable public trust easement weakens takings claims related to public use of this area, even in low water states or when the particulars of a deed indicate exclusive private ownership. \(^{276}\)

Moreover, the application of a fixed theory of common law public rights can strengthen private property rights vis a vis the public. Under this theory, public use rights are limited to those originally recognized at the time the colonies separated from England. If a court describes these original rights as only encompassing fishing, fowling and navigation, it may then conclude, as the Supreme Courts of Maine and Massachusetts did, that new statutes to allow beach walking or public recreation are an expansion of these fixed public rights and require compensation to private property owners. \(^{277}\) However, a fixed theory does not necessarily exclude beach walking. Michigan’s *Glass v. Goeckel* decision also applied a fixed public rights theory to uphold beach walking rights as a traditional public right included in a right of “passage” and as necessary to effectuate other rights of fishing and navigation. Michigan’s court holds that beach walking has always been recognized within the historic right of passage and the Northwest Territory’s “common highways” and “forever free” protections for navigable waterways. In so doing, Michigan provides an example that is both contemporary and historically grounded.

**C. Takings and Public Rights Beyond the Public/Private Beach Zone**

In addition to the divergent approaches to allowing beach walking in the public/private beach zone, several high water states have expanded protections for public access and recreation onto beach uplands above the public/private beach zone. This section highlights examples from New Hampshire, New Jersey, and California, to demonstrate the potential 5\(^{th}\) and 14\(^{th}\) Amendment constitutional takings limitations on public beach access. States’ interests in creating comprehensive legislation to protect public access for beach walking or general recreation on the coasts must be carefully crafted to avoid running afoul of constitutional protections of private property. Although a state statute creating a comprehensive beach program is a lawful exercise of the state's police power, the scope of the property involved in the program and the methods employed to facilitate public access impact whether it is an unconstitutional “taking”

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\(^{274}\) E.g., *Doemel*, 193 NW at 398; *Michaelson v. Silver Beach Imp. Ass'n, Inc.*, 173 N.E.2d at 278; *Merrill*, 955 N.E.2d at 948.

\(^{275}\) E.g., *McGarvey*, 28 A.3d at 636; *Korrer*, 148 N.W. at 618-21.

\(^{276}\) *Opinion of the Justices*, 313 N.E.2d at 567-68 (advising that proposed beach walking statute would be an unconstitutional taking); *Bell II*, 557 A.2d at 179 (holding that Maine’s Public Trust in Intertidal Land Act, which creates a comprehensive recreational easement, recognizes public rights beyond the traditional scope of the Colonial Ordinance and is an unconstitutional taking without compensation).
under the Fifth and Fourteenth Amendments, thus requiring the payment of just compensation.

The Supreme Court has identified two categories of per se regulatory takings: regulations that compel a permanent physical “invasion” of property, and regulations that deny “all economically beneficial or productive use of land.” 278 It is highly unlikely that legislation providing public access and recreation on beaches could be shown to deny “all economically beneficial or productive use” of private property. A more likely scenario is an argument that such regulation compelled a permanent physical invasion of the property. Government-compelled permanent physical occupations are per se takings because they strike at the heart of the right to exclude others, which is considered a fundamental property interest. 279 The Supreme Court clarified that an easement that allows the public the right to pass may be considered a permanent physical invasion despite the variable public usage and regardless of the economic impact. 280

Like total regulatory takings, there is a background principles defense to a permanent physical invasion takings claim. Thus, the decision in Lucas v. South Carolina Coastal Council is relevant. In Lucas, the Supreme Court held that a state regulation that deprives land of all economically beneficial use will not be a taking if “the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.” 281 A primary issue in the beach access context is whether the statute is merely codifying an existing public right and corresponding limitation on the private estate. Such a background principles defense could bar a takings claim brought on a permanent physical invasion theory. 282 The Lucas Court explained that “we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner’s title.” 283


281 Id. at 1027 & 1031-32 (remanding to state court to determine whether takings claim based on new coastal setback rules which prevented claimant from building on two coastal lots was barred based on background principles of state law).


283 Id. at 1028-29, (citing compare Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (interests of “riparian owner in the submerged lands ... bordering on a public navigable water” held subject to Government's navigational servitude), with Kaiser Aetna v. United States, 444 U.S. 164, 178-80 (1979) (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a
This opens up an inquiry into background principles of the state’s property laws. As Professor Echeverria has observed, the public trust doctrine provides a background principles defense to a takings claim. The public trust doctrine protects public rights to access and use those resources to varying degrees based on state law. So the public trust laws of each state shape a background principles defense to a takings claim related to public beach access. Likewise, the federal equal footing doctrine and a sovereignty theory are relevant to this defense because it informs the threshold question of whether the plaintiff had the property right alleged to be taken.

A consideration related to such a defense is whether background principles evolve over time or are fixed at a certain point. Lucas did not necessarily adopt a static view of background principles because the court observed that “changed circumstances or new knowledge may make what was previously permissible no longer so.”

Additionally, “there is no physical taking when the plaintiff voluntarily entered into a highly regulated field in which there was no reasonable expectation of being free of invasion when certain events occur.” The fact that coastal property is highly regulated, contingent on public trust rights and the federal navigation servitude, as well as continually being reshaped by natural forces, should inform whether a property owner has a reasonable expectation of being free from invasion.

Thus, in low water states or even in high water states where a private title sets boundaries below the ordinary high water mark, the existence of a public trust easement in the public/private beach zone would be such a pre-existing limitation on the private title. The issue is inextricably tied to the concept that the state’s trust responsibilities are a limit on its sovereignty that prevent it from completely divesting trust property. As noted, some state supreme courts assert that it is beyond the power of the state to pass trust property into private ownership freed of public rights. Several key state supreme court decisions have addressed how this public trust easement weakens takings claims in the public/private beach zone because the private coastal estate has always been conditioned, limited, and regulated. The Michigan Supreme Court summed it up: “The state cannot take what it already owns.” Following the Michigan approach, background principles of property and public trust law inhere in the title and therefore limit a private property owner’s right to exclude the public from the public/private beach zone.
This section begins by focusing on a New Hampshire Supreme Court advisory opinion about a proposed state statute that impacts both the public/private beach zone as well as the dry uplands above the high tide line. Opinion of the Justices analyzes each zone differently, which demonstrates the divergent property interests in each. Then, the section focuses on beach access cases in New Jersey and California to show how two densely populated high water states have attempted to manage competing private property and public rights on the beaches, as well as the United States Supreme Court’s reaction to California’s approach in Nollan v. California Coastal Comm’n. This discussion illuminates the boundaries of takings claims related to public beach access and recreation on the uplands and the public/private beach zone.

1. New Hampshire

Unlike its neighboring states of Maine and Massachusetts, New Hampshire draws the private property boundary at the high tide line. Two years after the Supreme Court decided Lucas, the New Hampshire Supreme Court rendered its Opinion of the Justices with its analysis of a proposed state statute that aimed to “recognize and confirm the historical practice and common law right of the public to enjoy the existing public easement” along New Hampshire’s coasts. To this end, the legislation articulated a recreational easement in the public/private beach zone and a separate public easement in the dry sand area above the high water mark.

As to the recreational easement in the public/private beach zone, the justices grounded their analysis in English common law and easement concepts of a divided estate with separate jus privatum and jus publicum. After the court declared that New Hampshire has always recognized public ownership below the high water mark, it explained that public ownership overlaps with private littoral owners’ rights to use this zone and access the water. While overlapping, the court clarified that private rights may not “unreasonably interfere with the rights of the public.”

Further, public rights in New Hampshire are not restricted to traditional navigation and fishing, as they are in neighboring Massachusetts. The New Hampshire Supreme Court embraced an evolving theory of common law public rights; it explained that these traditional public rights “are not the whole estate” but rather the public trust lands are held “for the use and benefit of all the [public], for all useful purposes . . .” Since “all useful purposes” is broad enough to encompass the right to recreate, the proposed statute would merely codify the existing common law.

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293 Opinion of the Justices, 649 A.2d at 606.
294 Id.
295 Id. at 607-08.
296 “The introduction of any line other than high-water mark as the marine boundary would overturn common-law rights that had been established here, by a usage and traditional understanding of two hundred years’ duration.” Id. at 608 (quoting Concord Co. v. Robertson, 66 N.H. 1, 25 A. 718, 730-31 (1890)).
297 Opinion of the Justices, 649 A.2d at 609 (N.H. 1994) (citing Concord Co. v. Robertson, 66 N.H. 1, 7 (1890)).
298 Id.
300 Opinion of the Justices, 649 A.2d at 609.
301 Opinion of the Justices, 139 N.H. at 91.
In addition to recreation fitting within the contours of a public use right “for all useful purposes,” the court reasoned that a recreational right in the public/private beach zone is the same as previously-recognized public rights on the water to “boat, bathe, fish, fowl, skate, and cut ice.” Thus, while New Hampshire applies an evolving theory of common law public rights by employing the open-ended concept of using the lands “for all useful purposes,” the court also ties the recreational use to already recognized, albeit not necessarily the traditional triumvirate, uses. The court framed a recreational public use as a pre-existing burden on private title, and concluded that this part of the proposed legislation was simply a codification of the common law: “Where private title to tidelands is already burdened by preexisting public rights, a regulation designed to protect those same rights will not constitute a taking of property without just compensation.”

Thus, in New Hampshire, a statute may recognize recreational rights in the public/private beach zone based on the public trust doctrine; however, a statute opening lands above this line is an unconstitutional taking because the public trust easement does not similarly burden uplands. Instead of attempting to open the dry sand uplands based on the public trust doctrine, the proposed New Hampshire statute aimed to protect recreation across the dry sand area above the public/private beach zone based on a public prescriptive easement. If a prescriptive easement existed, it may well represent a background principle that would defeat a takings claim.

The justices examined the factual difficulties in establishing a statewide prescriptive easement, which requires a showing of adverse use on each tract for 20 years, and stated that such an assertion was not within the power of the legislature but was rather reserved to the judiciary to decide on a case-by-case basis. Because this part of the proposed law denied private property owners the right to exclude others from property that was not burdened by a background principle of state law, the New Hampshire Supreme Court concluded this section of the statute would be a taking without just compensation. In coming to this conclusion, the court relied on the Supreme Court’s Nollan v. California Coastal Commission, which will be discussed below. The justices suggested that if the state wanted to create a comprehensive beach access program for the upland portion of beaches, the legislature had to use its powers of eminent domain and compensate private property owners.

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302 “These uses include recreational uses. See Hartford v. Town of Gilmanton, 146 A.2d 851, 853 (N.H. 1958) (public waters may be used to boat, bathe, fish, fowl, skate, and cut ice).” Opinion of the Justices, 649 A.2d at 609.

303 Opinion of the Justices, 139 N.H. at 91. Interestingly, this decision came two years after Lucas but does not cite this U.S. Supreme Court takings decision.

304 “To establish a prescriptive easement, the plaintiff must prove by a balance of probabilities twenty years’ adverse, continuous, uninterrupted use of the land [claimed] in such a manner as to give notice to the record owner that an adverse claim was being made to it.” Id. at 610 (quoting Mastin v. Prescott, 444 A.2d 556, 558 (N.H. 1982)).

305 Opinion of the Justices, 649 A.2d at 610.


307 Opinion of the Justices, 139 N.H. at 94. Current New Hampshire law regulating beach access follows the 1994 Opinion of the Justices. “Public access to public waters means legal passage to any of the public waters of the state by way of designated contiguous land owned or controlled by a state agency, assuring that all members of the public shall have access to and use of the public waters for recreational purposes.” N.H. REV. STAT. ANN. § 271:20-A (2007). In N.H. REV. STAT. ANN. § 483-C:1 (2007), which regulates public use of coastal shorelands, the purpose of this provision is “to recognize and confirm the historical practice and common law right of the public to enjoy the greatest portion of New Hampshire coastal
2. **New Jersey**

In contrast to New Hampshire, New Jersey recognizes broad public recreational rights on the upland portion of beaches and grounds under the public trust doctrine. In New Jersey, the state holds tidal lands in trust up to the mean high tide line. However, New Jersey has gone farther than most other states in articulating a public trust doctrine that protects public recreational rights not only in the public/private beach zone, but also on private upland beach areas above the high tide line under some circumstances.

New Jersey’s courts have produced a collection of beach access decisions that arise out of various scenarios whereby the entity controlling the beach opens it to recreational use by some people and seeks to give preference to residents or to entirely exclude non-residents. In *Borough of Neptune City v. Borough of Avon-By-The-Sea*, the court held that “while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents.” The New Jersey Supreme Court based this holding on the public trust doctrine, which it described as a “deeply inherent right of the citizenry.” In this case, a municipality owned a beach park and boardwalk located on the dry uplands part of the beach, while the state held in trust the beach from the high tide line to the ocean. The municipality charged more to non-residents to access its municipal beach, access to which was necessary in order to reach the state-held public/private beach zone.

The court rooted its decision in English common law and accounted for the original federal transfer of property to New Jersey. The case provides an important articulation of the scope of public rights protected by the trust doctrine in New Jersey. Unlike courts that fix public rights for all times as those recognized at the time of statehood or earlier, or courts that describe beach walking as part of the traditional shoreland, in accordance with the public trust doctrine subject to those littoral rights recognized at common law.”

“Any person may use the public trust coastal shorelands of New Hampshire for all useful and lawful purposes, subject to the provisions of municipal ordinances relative to the ‘reasonable use’ of public trust shorelands.” *Id.*

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309 *Avon*, 294 A.2d at 55 (municipality charged higher beach usage fee to non-residents); Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978) (municipality dedicated beach for residents only); Matthews, 471 A.2d at 358 (NJ (1984), cert. denied, *Bay Head Improvement Ass'n v. Matthews*, 469 U.S. 821 (1984) (non-profit association restricted beach to members who were residents of Bay Head).


311 *Avon*, 294 A.2d at 55. “[W]here the upland sand area is owned by a municipality—a political subdivision and creature of the state—and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.” *Id.*, at 54.

312 *Id.*, at 53.

313 *Id.*, at 49.

314 *Id.*

315 *Id.*, at 51-53.

316 *E.g.*, Opinion of the Justices, 313 N.E.2d at 565-66; Bell II, 557 A.2d at 169; Groves v. Sec'y, Dep't of Natural Res. & Envtl. Control, 1994 WL 89804, at *5-6.
public right of passage,\textsuperscript{317} New Jersey explicitly subscribes to a common law that evolves along with a changing society:

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.\textsuperscript{318}

Following this evolving theory of public rights, the New Jersey Supreme Court affirmed the inclusion of shore activities and recreation as public rights in its subsequent decision in Matthews v. Bay Head Improvement Association.\textsuperscript{319} In this case, the New Jersey Supreme Court retraced the origins of public rights to access the sea through ancient Roman law and English common law.\textsuperscript{320} It affirmed Avon-By-The-Sea’s “extension” of the public trust doctrine to include bathing, swimming and other shore activities as consonant with and furthering the “general welfare of a well-balanced state.”\textsuperscript{321} It also quoted approvingly from the Florida Supreme Court as follows:

The constant enjoyment of this privilege [bathing in salt waters] of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has.\textsuperscript{322}

The New Jersey Supreme Court understood the import of its prior decision in Avon-By-The-Sea as recognizing that in order to exercise the recreational rights guaranteed by the public trust doctrine, “the public must have access to municipally-owned dry sand areas as well as the foreshore.”\textsuperscript{323} These areas of the beach are “inseparable.”\textsuperscript{324} Similarly, Van Ness v. Borough of Deal\textsuperscript{325} decided only a few years after Avon-By-The-Sea, stands for the proposition that the public trust doctrine requires “the public be afforded the right to enjoy all dry sand beaches owned by a municipality.”\textsuperscript{326}

In these cases, the New Jersey Supreme Court is not only moved by an evolving theory of public rights on trust property, but it also articulated a doctrine that burdens adjacent municipal upland beaches that may be necessary to access and exercise public recreational rights. Then, in Matthews v. Bay Head Improvement Association, the court went beyond municipally-owned upland beaches and considered whether the public trust doctrine similarly requires either a right of passage across private uplands in order to access the public/private beach zone or recreational use of the dry upland beach owned

\textsuperscript{317} Glass v. Goeckel, 703 N.W.2d at 62-63; West v. Slick, 326 S.E.2d at 617.
\textsuperscript{318} Avon, 294 A.2d at 54-55 (citing N.J.S.A. 12:3-33, 34); see also Matthews v. Bay Head Imp. Ass’n, 471 A.2d 355, 365 (N.J. 1984) (citing Avon, 294 A.2d. 355, approvingly and rejecting “archaic judicial responses” to “modern social problems.”)
\textsuperscript{320} Matthews, 471 A.2d at 360-63.
\textsuperscript{321} Id. at 363.
\textsuperscript{322} Id., (quoting White v. Hughes, 1190 So. 446, 449 (Fla. 1939)).
\textsuperscript{323} Matthews, 471 A.2d at 363.
\textsuperscript{324} Id.
\textsuperscript{326} Matthews, 471 A.2d at 363 (citing, Van Ness, 78 N.J. 174, 393 A.2d 571 (1978)).
by a non-profit beach club. This beach club owned or leased the dry sand beach uplands and limited membership to municipal residents. The club controlled public access to much of the beach along the Atlantic Ocean in the Borough of Bay Head because it owned beachfront adjacent to seven of the nine roads in the Borough that ended at the beach.

In reaching its landmark holding extending the public trust doctrine to private upland beaches, the court was persuaded by a dissenting opinion in an English case from 1821, Blundell v. Catterall, in which Justice Best described bathing in tidal waters as similar to navigation, and “passage to the seashore” as “essential to the exercise of that right.” The Blundell dissent called disrupting this passage a public nuisance. And memorably warned if the English court restricted the public’s right to walk across the beach to access the water, “‘it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours.’”

The court cautioned, however, that this rule does not mean the public has an “unrestricted right to cross at will over any and all property bordering on the common property.” The determination of what privately owned beaches are “required to satisfy the public’s rights” depends on balancing multiple factors aimed at determining whether the public has “reasonable access” to the foreshore. These factors include the location of the dry sand area in relation to the foreshore, the extent and availability of publicly-owned upland sand area, the nature and extent of the public demand, and usage of the upland beach by the owner. This ruling did not open all privately-owned beaches to the public,

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327 Matthews, 471 A.2d at 358. The court characterized the beach club as a “quasi-public body.” Id.
328 Matthews, 471 A.2d at 365-66.
329 Id. at 359.
331 Matthews, 471 A.2d at 364 (quoting Blundell, 173 Eng. Rep. at 1194 (Best, J., dissenting)).
332 Matthews, 471 A.2d at 364, (citing Blundell, 173 Eng. Rep. at 1194 (Best, J., dissenting)).
333 Paradoxically, the majority opinion in Blundell was often cited in U.S. courts of that time for the position that “recreation was not a trust purpose that would support public use of waterways or adjacent riparian tidelands.” Carol Rose, supra TBD, at 757.
334 Id. at 364-65 (quoting Blundell, 173 Eng. Rep. at 1197)).
335 Id. at 365-66.
336 Id. at 364.
337 Id. at 365.
338 Id. at 365.
339 Id. at 365.
340 Id. Applying these factors, the court held that the Bay Head Improvement Association had to open up its membership to all and eliminate its residency requirement. Id. at 368.
but it did expose private beaches to a possible right of access or right of use incidental to the bathing and swimming right, dependent on the circumstances. 341

An evolving theory of common law public rights clearly motivated the New Jersey Supreme Court in Matthews, just as it had in Avon-By-The-Sea. The court saw the public trust doctrine as malleable enough to retain relevancy to changing social conditions: “[a]rchaic judicial responses are not an answer to a modern social problem.” 342 However, the heavy emphasis on English common law indicates that the New Jersey Supreme Court, similar to courts in New Hampshire and Michigan, wanted to anchor public rights in more traditional legal bases.

None of these cases, however, directly addressed a takings claim in relation to public trust access to private lands. In National Association of Homebuilders v. New Jersey DEP, the court faced the meaning of the Matthews factor test in relation to a takings claim under the U.S. Constitution. 343 The Homebuilders Association brought a takings challenge to a New Jersey rule requiring property owners to construct and maintain a 30-foot wide public walkway along the entire waterfront of their property as a condition of obtaining a development permit. 344 Most of the land on which the walkway was to be constructed was former trust land that had been filled, but some of the land had not previously been trust land; the court applied a different standard based on that distinction.

As to the filled trust lands, the court subscribed to a sovereignty theory. It held that this land was still burdened by the trust and the private owner did not have the right to exclude the public from this property: private owners’ “bundle of rights is limited by the public’s right to use and enjoy this portion of the property under the public trust doctrine.” 345 The court denied a takings challenge to the public trust portion of the property. 346 As to the non-trust uplands where the state required perpendicular access in order to reach the waterway, the court held the applicable analysis was the Matthews’ “reasonably necessary” factors instead of the Supreme Court’s takings test in Dolan v. Tigard. 347

In summary, New Jersey’s decisions are heavily infused with a sovereignty theory that finds an inalienable public trust easement coupled with a theory of evolving public rights. In New Jersey, public trust rights include a general right to recreate on state-held trust lands in the public/private beach zone, a right to access upland municipal beaches subject to reasonable regulation, 348 a right of passage as well as a right to recreate on privately owned beaches in accordance with a multifactor test aimed at determining whether use of private lands is necessary for “reasonable access” to the public/private

341 Id. at 369.
342 Id. at 365 (rejecting the need to justify its decision based on prescription, dedication, or custom instead of the public trust doctrine).
344 National Association of Homebuilders, 64 F.Supp.2d at 356.
345 National Association of Homebuilders, 64 F.Supp.2d at 358.
346 Id., 64 F.Supp.2d at 359.
347 Id., 64 F.Supp.2d at 359. The court then held it lacked the factual record to determine whether the Matthews’ “reasonably necessary” test had been met. Id.
348 Avon, 294 A.2d at 55. “[W]here the upland sand area is owned by a municipality—a political subdivision and creature of the state—and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.” Id., at 54.
Further, even on filled trust lands, the public trust is not extinguished and still provides background principles of state law that not only limit a landowner’s ability to exclude the public, but authorize the state to require the landowner to construct and maintain public walkways along the waterfront.  

3. **California**

In California, the state clearly holds in trust all tidelands between the mean high tide and low tide lines, submerged lands, and the beds of inland navigable waters; and this trust for public uses goes well beyond the traditional triumvirate of fishing, navigation, and commerce to include “nature preserves, swimming, boating, and walking.” The California Constitution guarantees the public’s right of access to tidelands, subject to reasonable regulation. Through the state constitution, moreover, private property owners are also put on notice that no one possessing the “frontage” of any “navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose.” Finally, the California Constitution directs the legislature “shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.” Thus, California goes further than most other states in providing protections for the public’s right to access and walk along the public/private beach zone.

In furtherance of these state constitutional rights, the California Coastal Act establishes a state goal and directive in the coastal zone to:

Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resource conservation principles and constitutionally protected rights of private property owners.

To this end, the California Coastal Commission operates a Coastal Access Program that includes creating a California Coastal Trail to increase public access to the entire California Coast. The Commission researches and records prescriptive public access easements, obtains easements from private property owners across the dry sand.

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349 *Matthews*, 471 A.2d at 365. Applying these factors, the court held that the Bay Head Improvement Association had to open up its membership to all and eliminate its residency requirement. *Id.* at 368. A takings issue was not analyzed or decided by any of these New Jersey cases. Although *Matthews* involved privately owned beach, the owner was a beach club and the remedy was opening the club membership to non-residents of the municipality.


352 *Id.*

353 *Id.*

354 Cal. Coastal Act, § 30001.5(c).


356 “California law provides that under certain conditions, long term public access across private property may result in the establishment of a permanent public easement. This is called a public prescriptive right of access.” [California Coastal Comm’n, *Coastal Access Program: Prescriptive Rights Program*, http://www.coastal.ca.gov/access/prc-access.html] [last visited Oct. 15, 2012].
beaches, and produces maps showing the public the location of these access points. Additionally, the legislature enacted a statute expressly providing, with some exceptions, “[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects.”

In the dispute that gave rise to the United States Supreme Court decision in *Nollan v. California Coastal Commission*, the Commission argued it was carrying out its guidelines to further these constitutional and statutory objectives. When reviewing the proposal to rebuild and expand a home along the Pacific Coast, the Coastal Commission conditioned its approval on the property owner granting an easement for the public to cross a strip of private beach above the mean high tide line but below a seawall that ran parallel to the ocean.

The Supreme Court reviewed this action in *Nollan* and ultimately held that the conditioned easement was a taking of property. The decision is as important for what it held as for what it ignored. Justice Scalia’s majority opinion simply mentioned at the outset that the border of the private property is the “historic mean high tide line” at the ocean, with no reference to the public trust doctrine. Although property law is defined by the state, the opinion largely dismissed California’s constitutional guarantees of public access to the ocean.

Instead, the Court focused on the existence of a physical occupation of land. Had the Coastal Commission simply required the Nollans to provide a public easement, extinguishing their right to exclude on the easement path, “we have no doubt there would have been a taking.” The question the Court wrestled with was whether requiring an easement as a condition for issuing a land use permit was a taking. The court assumed without deciding that it is a legitimate state interest to allow the public to see the beach, overcome the “psychological barrier” to using the beach created by a developed shorefront, and prevent congestion on the public beaches. However, the Court stated there must be a “nexus” between the land use condition and the legitimate public purpose. Given the facts of this case, the Court held there was a taking because it was “quite impossible” to see a nexus between a permit condition that allows people who are “already on the public beaches [to] be able to walk across the Nollans’ property” and the

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357 California Coastal Comm’n, Coastal Access Program, http://www.coastal.ca.gov/access/accndx.html [last visited 8/26/12].
360 Id. at 827.
361 Id. at 838.
362 Id. at 837.
363 Id. at 857-58 (Brennan Dissent). The majority opinion dismisses California law on this point by stating “[m]ost obviously, the right of way sought here is not naturally described as one to navigable water (from the street to the sea) but along it.” Id. at 832.
364 Id. at 831; Justice Brennan’s dissent disagreed on this point, characterizing such an easement as “a mere restriction” on the property’s use. Id. at 846-57, n.3.
365 Id. at 834.
366 In *Nollan* the court emphasized a land use regulation “does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’” Id. at 834 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). However, the court subsequently excised this standard from takings litigation in *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005); see also Meltz, Supra Note TBD, at 2-3.
367 Nollan, 483 U.S. at 835.
368 Id. at 837.
stated purpose of reducing “obstacles to viewing the beach created by the new house.”\textsuperscript{369}

In establishing a nexus test, the Supreme Court did not foreclose a state’s ability to impose land use conditions that expand public access to privately-owned beaches above the public/private beach zone. Since \textit{Nollan}, the California Coastal Commission has continued to require the dedication of easements or payment of mitigation fees as a condition of building permits, but it requires the dedications to meet the Supreme Court’s essential nexus test.\textsuperscript{370} In addition to an essential nexus, if such conditions are placed on land use decisions, there also needs to be a “rough proportionality” between the condition and the nature and extent of the proposed development’s impact.\textsuperscript{371} This does not go as far as the court did in New Jersey, which will not find a taking if the state action is in accord with the “reasonably necessary” factors established by \textit{Matthews’} public trust doctrine decision.\textsuperscript{372}


Heavily populated ocean coastal states have been the most active in defining public access to beaches. The above examples from New Hampshire, New Jersey, and California illustrate divergent approaches and analyses of state action to provide public access to beaches within and above the public/private beach zone. These cases also articulate an approach to public trust rights that is expansive enough to go beyond beach walking in order to encompass general beach recreation. While New Hampshire applies an evolving theory of public rights to protect “all useful purposes” on trust lands and New Jersey explicitly rejects an “archaic judicial response,”\textsuperscript{373} both state supreme courts are unwilling to completely abandon tradition. Even assuming courts have authority to revise background principles of state law, consistent with \textit{Lucas}, when they assert that authority, it is prudent to ground revised, modern conceptions of background principles in traditional rules as much as possible. To the extent the common law can evolve to stay relevant, it should evolve in gradual, incremental steps.

Thus, New Hampshire describes the recreational right in the public/private beach zone as one that has always existed, reasoning a statute that codifies that right could not give rise to a takings claim by adjacent private property owners because the new law would not change any burdens on private property.\textsuperscript{374}

Although the New Jersey Supreme Court declared it was not bound by tradition, it too searched for traditional support for a recreational right and a right of access to cross privately-owned upland beaches. The New Jersey Supreme Court found such support in a dissenting opinion, that does not reflect the accepted English common law in the 1800s, but nonetheless provides an argument that historically the public had been able to cross private land to reach the sea for bathing. In holding that public trust rights may burden privately-owned beaches above the mean high tide line, New Jersey anchors its holding in the public trust doctrine and rejects theories based on prescription, dedication or

\textsuperscript{369} \textit{Id.} at 838.
\textsuperscript{370} Peloso & Caldwell, \textit{supra} note TBD, at 93-94.
\textsuperscript{371} Dolan v. City of Tigard, 512 U.S. 374, 387-93 (1994) (rejecting condition of permit approval that land owner dedicate portion of land to public open space and bike path to offset impacts of development).
\textsuperscript{372} National Association of Homebuilders, 64 F.Supp.2d at 359.
\textsuperscript{373} Matthews v. Bay Head Imp. Ass’n, 471 A.2d at 365.
\textsuperscript{374} Opinion of the Justices, 139 N.H. 82, 91.
Unlike New Jersey, New Hampshire’s Supreme Court advised that private uplands are not burdened with the public trust and opening these lands to the public would take from the private owner the right to exclude others. Cognizant of the U.S. Supreme Court’s Nollan decision, the New Hampshire Supreme Court reasoned that while the court could determine that private uplands were open to the public based on a prescriptive easement, this had to be a fact-specific inquiry at each beach and not accomplished through statewide legislation.

The discussion of property rights on the coast in Nollan applies a lineal title approach to property, but unlike the other cases examined in this article, the Court in Nollan applied the theory above rather than below the high tide line: the state-held trust lands end and private property begins at the high tide line. Any crossing of that line onto private property is either a physical taking if a direct public easement or a regulatory taking if the land use restriction does not have a “nexus” with a legitimate public purpose that is roughly proportionate to that purpose. Lucas adds another layer of complexity to this analysis, which should arguably be the starting point: whether a public trust easement is a pre-existing condition burdening private coastal titles. Hence, if a state wants to create a comprehensive beach access program, the methods used must be consistent with background principles of each state’s property and public trust laws. This does not imply that the law must be fixed for all time to constitute a background principle. Lucas does not require that background principles must be fixed, but instead leaves space for the law to evolve with society.

VI. TOWARDS A THEORY THAT ACCOMODATES SHARED BEACHES

Property in land may be seen as consisting of a group of rights, including the right to possess, use and dispose of the thing. The United States Supreme Court considers “as to property reserved by its owner for private use, ‘the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property’ ....” However, beachfront property and the rights associated with it cannot be accurately understood in isolation from the long-standing public significance of beaches, background principles of public trust and property law that inhere in the title, and natural forces that constantly reshape beaches. This property exists in relation to other

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375 Matthews, 471 A.2d at 365 (rejecting the need to justify its decision based on prescription, dedication, or custom instead of the public trust doctrine).
376 Opinion of the Justices, 649 A.2d at 611.
377 Id.
378 Nollan v. California Coastal Comm’n, 483 U.S. at 831; Justice Brennan’s dissent disagreed on this point, characterizing such an easement as “a mere restriction” on the property’s use. Id. at 847, n.3.
379 Nollan, at 837 (providing nexus test); Dolan v. City of Tigard, 512 U.S. at 387-93 (providing rough proportionality test).
381 The New Jersey decision in Homebuilders Association provides an example where state-court developed public trust factors override the Nollan/Dolan takings tests, but this is an outlier.
382 The Lucas court observed that “changed circumstances or new knowledge may make what was previously permissible no longer so.” Lucas, 505 U.S. at 1031, citing, Restatement (Second) of Torts 827.
383 Opinion of the Justices, 649 A.2d at 611 (citing Burrows v. City of Keene, 432 A.2d 15, 19 (N.H. 1981)).
384 Nollan, 482 U.S. at 831-32.
385 Lucas, 505 U.S. at 1026-31.
parcels, the water, and the public who use coastal areas. As Professor Sax observed about property generally:

> Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user.  

Although this observation applies to all property in land, the network concept is even more pronounced when applied to coastal property. This is because coastal property is the place where private land ownership (primarily in uplands) exists along side the clearly publicly-held lake and ocean commons. It is the public/private beach zone of coastal property where these interests overlap and intersect. Consider a few examples of this network concept applied to coastal properties:

- A lakefront property owner who launches fireworks from the portion of the beach she owns to explode and deposit the refuse into the lake necessarily invades the quiet experience of neighboring lakefront property owners on their private land and deposits waste into the shared public lake.
- Similarly, a lakefront property owner who removes all coastal vegetation and fertilizes a grass lawn down to the shore accelerates algae growth in the lake, thus using her property in a way that degrades the common lake property and impairs the rights of the public and neighboring private property owners to enjoy clean water.
- Conversely, an All Terrain Vehicle enthusiast drives on the public/private beach zone, disturbing private property abutting the shore as well as other members of the public who share use and enjoyment of the beach.
- Lastly, the state creates a harbor and installs docks to aid in the public’s navigation, while simultaneously increasing the value of neighboring properties.

These examples show that, especially in the public/private beach zone, public and private property uses interact with and burden one another. A legal theory that acknowledges the notion of intertwined and networked uses of this shared property is more compatible with the need to accommodate different, yet interconnected, public and private uses of the public/private beach zone.

Such a theory will also be more amendable to mediating conflicting and damaging uses of coastal property. One of the values of the sovereignty theory, which leads to finding an inalienable public trust easement, is that it places an obligation on the state to prevent and protect the public from offending property uses in the public/private beach zone and in the water commons. This protection of the public interest has a spill over positive effect on protecting private property interests as well. Unlike relying on litigating nuisance claims, this can lend itself to proactive preventive state action to regulate multiple uses of the beach rather than relying on after the fact litigation.

All of the cases analyzed in this article involve conflicts between the public’s ability to enjoy beaches and a private property owner’s right to exclude. Often

387 City of Milwaukee v. State, 214 N.W. 820, 830 (Wis. 1927).
unrecognized is the impact these public trust decisions have on other coastal property owners. A lineal title approach has disturbing implications for private coastal landowners. Although riparian/littoral rights include shared use of the waters of a lake or ocean with other riparians, they do not include shared use of the shoreline. Paradoxically, decisions that favor the private fee owner’s right to exclude others from the public/private beach zone, grant fewer use rights to littoral or riparian owners. Consider that private owners of coastal property have the most frequent access to the beach; yet, these fee owners are restricted to the frontage they own rather than granted use of the entire beach in a state that does not recognize the coexistence of the public trust easement with private title. Further, if a single border is both the end of private property and the beginning of public rights, a strict lineal title approach would weaken the existence of riparian rights below the border and into the state-held trust waters.

A lineal title approach to understanding the relationship between public and private property along lakeshores and oceans should be only the starting point, a method of dividing legal title between the state and private landowners. This approach should be followed by finding a public trust easement that protects public usufructuary rights even when the public/private beach zone is privately owned. Such recognition is particularly important in low water states, where a strict lineal title approach serves to extinguish traditional public rights in the public/private beach zone. The better view, consistent with hundreds of years of precedent both in America and English common law, is one informed by a sovereignty theory: it is not within the power of the state to extinguish public rights in the public/private beach zone.

Additionally, even in high water states there may be deeds at variance with this title division at the mean high tide line or ordinary high water mark, and an inalienable public trust easement is better suited to simultaneously recognize individual deeds while not privatizing that which belongs to all, public trust rights. The variety of water border descriptions in individual deeds in high water states presents a situation conceptually similar to private ownership claims in low water states. In both situations, by applying an easement, the state may maintain public trust rights in the public/private beach zone without extinguishing private title. Especially in these situations, the English common law concept of overlapping *jus privatum* and *jus publicum* is instructive as to how to accommodate the coexistence of multiple rights on the same property, and has been a serviceable approach throughout the centuries.

Thus, the coastal estate is best understood as involving severable private and public rights. Even when a private owner holds title below the high water or high tide line, the state does not extinguish public trust rights, which the state holds in its sovereign capacity as trustee of the property the federal government granted to it under the equal

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388 Kalo, *supra* note TBD, at 1435 (listing littoral rights and not including right of shared use of shore with other littoral owners).
389 Blumm, *supra* note TBD, at 655-657 (discussing how lineal theory precluded Mundy from protecting oysters he planted in Raritan Bay, as decided by Arnold v. Mundy, 6 N.J.L. 1, 8, 32 (1821)).
390 This is the approach taken by the Ohio Supreme Court in State ex rel. Merrill v. Ohio Dep’t of Natural Res., slip op. 2011-OHIO-4612 (Sept. 14, 2011), ¶ 54. The court erred in assuming, without analysis, that the property line for private title must be the same as the boundary for public trust purposes.
391 This is the position of the Michigan Supreme Court in Glass v. Goeckel, 703 N.W.2d 58 (Mich. 2005), the United State Supreme Court in *Illinois Central*, and legal scholars including Professor Robert Abrams. See also Echeverria, *supra* note TBD, at 951-952 (viewing public trust doctrine as constraint on government authority anchored in *Illinois Central*).
392 Glass, 703 N.W.2D at 70, 76.
footing doctrine. A sovereignty theory is also most consistent with U.S. Supreme Court precedent in *Illinois Central* and *Shively*, which acknowledged state power to alter the state title boundaries after entering the Union, but conditioned that power on the preservation of public rights.

The public/private beach zone is suitable to usufructuary rights, but not to private possession in the sense of landowners retaining the ability to exclude the public. That is not to say, however, that all usufructs should be allowed in this zone; that determination is bounded by recognized public trust and riparian/littoral rights. Of the competing theories undergirding the common law of public trust rights, an evolving theory is most amenable to ensuring that the public trust doctrine is relevant to society as a modern reconception of traditional rules. Beach walking has been recognized as a traditional public trust right of “passage and repassage” by courts applying a fixed theory of the common law and it has been rejected under the same theory. Not only does a fixed theory provide inconsistent results, the idea advanced by a small minority of states that public rights are forever locked in as those uses that were most important to society in the 17th century is too rigid a theory to ensure the continued ability of the law to accommodate future societal needs that are not even imaginable today.

Although an evolving theory of public trust rights makes private property in this zone less certain, coastal private rights are less certain than other land ownership by its very nature. Even before the public trust easement is considered, coastal private lands have ambulatory boundaries that change over time by forces of nature, some of which are gradually adding or removing land (accretion and erosion) or suddenly eliminating large swaths or the entirety of the private parcel by completely submerging it under water (avulsion) or a retreat of water that undermines investments in piers left high and dry (reliction). With the climate-influenced rise of sea levels and lowering of certain lake levels, the ambulatory nature of coastal property boundaries are even more visible in a shorter timeframe.

**VII. CONCLUSION**

Coastal properties are in flux due to the forces of nature to which they’re subjected and their relationship to state and federal protections for the public. They are always subject to the federal government’s navigation servitude that allows private property to be destroyed without compensation. In addition, they are subject to the state’s public trust doctrine. Against this universally understood backdrop of uncertainty

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393 E.g., *Arnold v. Mundy*, 6 N.J.L. 1, 70-71 (N.J. 1821)(applying concept to reject trespassing claim on oyster bed); *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914)(applying concept to reject trespassing claim on navigable rivers up to ordinary high water mark); *Matthews*, 471 A.2d at 365 (applying concept to dry upland beaches to ensure public has “reasonable access” to public/private beach zone).

394 Compare *Glass*, 703 N.W.2d at 62-63 (recognizing beach walking contained within traditional public trust rights), with Opinion of the Justices, 313 N.E.2d at 565-66 (rejecting Massachusetts right of passage on foot law as not part of traditional public trust rights).


396 University of Colorado Sea Level Research Group, 2012 Global Mean Sea Level Time Series, [http://sealevel.colorado.edu](http://sealevel.colorado.edu) [last visited 10/19/12].

397 NOAA, Great Lakes Environmental Research Laboratory, Interactive Great Lakes Water Level Dashboard, [http://www.glerl.noaa.gov/data/now/wlevels/levels.html](http://www.glerl.noaa.gov/data/now/wlevels/levels.html) (showing Lakes Huron/Michigan below average) [last visited 10/19/12].
in coastal private land ownership, public trust rights are simply one more acknowledgement that coastal property is unusually dynamic and the public/private beach zone is unsuitable to permanent, exclusive private ownership.

To view coastal private property rights in isolation from the rights of neighboring private property owners and adjacent public trust lands is a legal fiction. The better reasoned beach access cases tend to view coastal property rights as conditioned and contingent on an inalienable public trust easement. As observed by Wisconsin’s Supreme Court, these coastal properties are “encumbered by the public trust doctrine and heavily regulated from the get-go.”

Thus, a sovereignty theory of the public trust doctrine and state power ensure that there is an inalienable public trust easement in the public/private beach zone regardless of variable terms of individual deeds. This approach allows for consistency across and between states, and puts private property owners on notice that coastal property is treated differently under the law. Once coastal property is understood as contingent on the public trust doctrine and variable by the forces of nature, it is easier to see that an evolving theory of public rights is most capable of the flexibility the common law needs to adapt to contemporary challenges.

Finally, the need to protect the public’s right to use and enjoy trust lands and waters must be balanced against the need for private property protections. States under increasing pressure to open up more beach property to the public are bounded by the constitutional protections that prohibit a taking of private property without just compensation. Although not as relevant in the public/private beach zone, the takings prohibition serve to limit the state from encroaching above this zone, unless allowed by background principles of state property and public trust law. A sovereignty theory that finds an inalienable public trust easement and an evolving common law of public rights is flexible enough to accommodate shared beaches, while the prohibitions against takings of property properly prevent the state from overreaching.

398 R.W. Docks & Slips v. State, 628 N.W.2d at 790.
399 McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 118-20 (S.C. 2003)(rejecting takings claim by landowner when Coastal Council denied approval to build on oceanfront land that had become submerged by erosion, because it is protected by the public trust doctrine); Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 980-987 (9th Cir. 2002)(rejecting takings claim by private developer when city denied approval to build on tidelands in the public/private beach zone protected by the public trust doctrine); Nat’l Ass’n of Homebuilders v. N.J. Dep’t of Envtl. Prot., 64 F. Supp 2d 354, 356-58 & 360 (D. N.J. 1999)(rejecting takings claim by homebuilders association when state agency rule required developers to provide public walkways along the coast based on the public trust doctrine).