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Shifting Standards: A Meta-Theory for Public Access and Private Property along the Coast

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

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Over half of 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 the ability 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 states lack 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 that state power includes the power to transfer public trust property into private ownership free of public rights view the public trust doctrine as an ownership doctrine, drawing a distinct line in the sand dividing public use from private fee simple estates. These courts tend to favor exclusive use of the beach by private landowners, asserting that 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 that public and private interests are best served by a historically grounded sovereignty theory—recognizing that 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 also provide greater clarity regarding 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 the public out.[1] Just across the Lake, adjacent to Michigan's Sleeping Bear Dunes National Lakeshore, a homeowners' association posted signs declaring the beach to be private property.[2] Moving out from the Great Lakes to the Pacific Ocean, the Los Angeles Urban Rangers educated 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 hiring private security guards and posting faux "private property" signs that adorn parking spaces and access roads.[3] On the Atlantic

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1. *See* Adam W. McCoy, *Shorewood Going to Plan B on Atwater Beach Security Fence*, SHOREWOOD PATCH (Nov. 10, 2011, 2:18 PM), http://shorewood.patch.com/groups/politics-and-elections/p/village-going-to-plan-b-on-atwater-beach-security-fence.

2. On May 10, 2011, the Author observed the posted signs while visiting Michigan's Sleeping Bear Dunes National Lakeshore.

3. *See* Jenny Price, *Guide to Malibu's Hidden Beaches*, LA OBSERVED (Aug. 11, 2006, 10:36 PM), http://www.laobserved.com/intell/2006/08/guide_to_malibus_hidden_beache.php. 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—

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.[4]

Beaches, whether they are along oceans or lakes, constitute an example of contentious property where private interests bump up against public interests.[5] Like other shared commons,[6] beaches can be public spaces that seem private, become private, or have no public access.[7] Conversely, coastal property owners may perceive beaches as private spaces in danger of redefinition as shared public spaces by eminent domain, by easements, or—unconstitutionally—through takings without just compensation.[8] In legal terms, the questions are: Does the public retain the right to use the beach despite the 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 a state's 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[9] is private and

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> 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, *Urban Rangers on 'Safari' in L.A.*, L.A. TIMES, Aug. 16, 2009, at E5.

4. *See* McGarvey v. Whittredge, 28 A.3d 620, 623 (Me. 2011).

5. *See* Stephanie Reckord, *Limiting the Expansion of the Public Trust Doctrine in New Jersey: A Way to Protect and Preserve the Rights of Private Ownership*, 36 SETON HALL L. REV. 249, 249 (2005) ("Oceanfront property presents unique conflicts between public and private notions of property law.").

6. Other shared commons include, but are not limited to, roads, sidewalks, alleys, the Internet, and fisheries. *See* Yochai Benkler, *Commons and Growth: The Essential Role of Open Commons in the Market Economies*, 80 U. CHI. L. REV. 1499, 1499 (2013).

7. *See, e.g.*, Adam Nagourney, *In Battle over Malibu Beaches, an App Unlocks Access*, N.Y. TIMES, June 13, 2013, at A14 (revealing that, even though the beaches of Malibu are public, only about seven of the twenty-seven miles of Malibu beaches are accessible by the public, and homeowners go to great lengths to make it appear that the beaches are private).

8. *See, e.g.*, Erika Kranz, *Sand for the People: The Continuing Controversy over Public Access to Florida's Beaches*, 83 FLA. B.J. 11, 11 (June 2009) (discussing the ownership issues that beachfront property owners may face).

9. *Ordinary* and *mean* are terms of art used to modify the terms *high-* and *low-water mark*. *See, e.g.*, N.C. GEN. STAT. § 77-20 (2011) ("The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high-water mark."); IDAHO CODE ANN. § 58-1302 (2012) ("'Natural or ordinary high-water mark' means the high water elevation in a lake over a period of years . . . ."). *Mean high-* and *low-water mark* are generally employed when discussing ocean beaches, while *ordinary high-* and *low-water mark* are generally used to refer to lake beaches. *See* JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 15 (1994). Because this Article discusses cases from oceans and lakes, the Author attempts to avoid confusion from these different terms of art by simply calling this zone between ordinary or mean high- and low-water marks the "public/private beach zone."

established in the upland owner's fee to the land.[10] Likewise, ownership below the mean or ordinary low-water mark of tidal or "navigable"[11] waters is uniformly in the state, and the public's right to use the water in the oceans and navigable lakes and rivers is rarely contested.[12] However, the zone between the ordinary or mean high- and low-water marks, referred to as the "public/private beach zone" in this Article, is subject to variable state interpretations of property rights that impact public access and private rights on the beach.[13] In some states, the private owner of the upland takes title all the way to the low-water mark.[14] 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.[15] This public/private beach zone, as well as the scope of public rights within it, is the primary focus of this Article. The narrowness of this strip of beach belies the complexity and controversy that accompany it.[16]

Rules governing coastal property boundaries and legal rights are complex because of the variation among states[17] in types of water bodies, navigability determinations, and alterations based on nature and climate change—water level

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10. *See* Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEV. ST. L. REV. 1, 17 (2010). However, in states like New Jersey and Oregon, the upland owner's fee does not include the right to exclude. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (basing its holding on the public trust doctrine); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 673, 678 (Or. 1969) (basing its holding on custom instead of the public trust doctrine).

11. *Navigable*, as it is used here, means navigable for title waters. 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." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). While uncommon, a few states—such as Arizona—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. *See* Defenders of Wildlife v. Hull, 18 P.3d 722, 737 (Ariz. Ct. App. 2001) (rejecting a legislative attempt to increase the standard of proof required for the state to determine that a river is navigable); Tracey Dickman Zobenica, *The Public Trust Doctrine in Arizona's Streambeds*, 38 ARIZ. L. REV. 1053, 1064 (1996) (citing ARIZ. REV. STAT. ANN. § 37-1128(H), (I) (1995)) ("The law required legislative approval of any determination of navigability.").

12. *See* Kilbert, *supra* note 10, at 17.

13. *See generally* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007) (discussing the public trust doctrines of thirty-one eastern states).

14. *See, e.g.*, Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 275 (Mass. 1961) (drawing the private property boundary at the low-water mark).

15. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3:35 (2013) (citations omitted). *See, e.g.*, Dorroh v. McCarthy, 462 S.E.2d 708, 710 (Ga. 1995) (drawing state property boundary at the high-water mark).

16. *See* Kilbert, *supra* note 10, at 2 ("The shores of the Great Lakes may look serene, but they are a battleground.").

17. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010) ("Generally speaking, state law defines property interests . . . including property rights in navigable waters and the lands underneath them . . . ." (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998))).

fluctuations, erosion, and accretion.[18] Unlike inland property boundaries, water boundaries adjacent to land are usually ambulatory.[19] Because water is always in motion, property boundaries adjacent to water are also more fluid.[20] In addition, ownership of private land adjacent to navigable waters is always subject to the federal government's navigation servitude, which allows the government to destroy private property without compensation in aid of navigation.[21] Similarly, along navigable and tidal waters, private property rights are generally understood in relation to the state's trustee role over those waters and the lands beneath them.[22] Thus, private land adjacent to lakes and oceans is always, in many senses, ambulatory as well as contingent and subject to paramount public rights.[23]

Perhaps because of this variability in the property boundaries and the state laws that govern them, scholarly work on the public trust doctrine and beach

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18. 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*, 42 SW. L. REV. 1, 36 (2012) (critiquing the Texas Supreme Court for rejecting rolling easements in favor of the homeowner (citing Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012))).

19. *See* Shasta Greene, *Book Review: Water Boundaries: Demystifying Land Boundaries Adjacent to Tidal or Navigable Waters*, 30 ECOLOGY L.Q. 207, 208 (2003).

20. *See Severance*, 370 S.W.3d at 722.

21. United States v. Chi., Milwaukee, St. Paul & Pac. R.R., 312 U.S. 592, 596–97 (1941) (citations omitted) (holding that the navigation servitude extends up to the ordinary high-water mark on a navigable stream); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 88 (1913) (denying compensation for private oyster beds that were destroyed pursuant to the navigation servitude for dredging Great South Bay in New York); Scranton v. Wheeler, 71 N.W. 1091, 1092 (Mich. 1897) (declaring the interests of a riparian owner in the submerged lands bordering on public navigable water held subject to government's navigational servitude). The no takings/compensation rule does not apply to waters made navigable by a private owner's expense and alterations. Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (holding that imposing a navigational servitude on a marina that was created and rendered navigable through private expense constituted a taking when the area had originally been a pond that was not considered navigable). This federal power under the navigational servitude to destroy property free 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 (2004) (citing *Chi., Milwaukee, St. Paul & Pac. R.R.*, 312 U.S. at 596–97). Further, although some variability exists 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" under the federal navigation servitude. Kilbert, *supra* note 10, at 25.

22. *See* ARCHER ET AL., *supra* note 9, at 9 (citing Hardin v. Jordan, 140 U.S. 371, 382 (1981)).

23. *See* Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of the Littoral Owners in the Twenty-First Century*, 83 N.C. L. REV. 1427, 1438 (2005) ("Thus, an oceanfront property owner's seaward boundary is not a fixed boundary line, but an ambulatory one." (citing JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS § 155 at 310–11 (Chicago, Callagan & Co. 2d ed. 1891))).

property tends to either focus on a single state's laws[24] or present comparative descriptions of a variety of state laws.[25] A few scholars provide theoretical frameworks that aid in interpreting the legal variability across jurisdictions.[26] This Article builds upon that scholarship by analyzing divergent state approaches to public access to coastal property through a theoretical lens. The Article 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 new states entered the Union on equal footing with the original thirteen states, the federal government transferred title to the new states over the submerged lands beneath all navigable and tidal waters within their boundaries up to the ordinary or mean high-water mark.[27] To varying degrees, each state

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24. *See, e.g.*, Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 ECOLOGY L.Q. 123 (2012) (focusing primarily on Wisconsin's public trust doctrine).

25. *See, e.g.*, Sidney F. Ansbacher et al., Stop the Beach Renourishment *Stops Private Beachowners' Right to Exclude the Public*, 12 VT. J. ENVTL. L. 43, 44–45 (2010) (citing Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010)) (discussing the public trust doctrine in Florida, Montana, Hawaii, and Texas); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 84–198 (2010) (comparing the application of the public trust doctrine in nineteen western states); Craig, *supra* note 13 (conducting a coastal state survey related to public trust rights); Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907 (2007) (comparing the Great Lakes states' doctrinal approaches).

26. *See, e.g.*, Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in* Glass v. Goeckel, 40 U. MICH. J.L. REFORM 861, 869–902 (2007) (citations omitted) (providing the historical basis for the overlapping rights theory); Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 655–65 (2010) (citations omitted) (drawing out divergent legal theories); 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, 189–91 (2010) (citations omitted) (arguing for an amphibious extension of the public trust doctrine to uplands and parklands, which as public gathering spaces, are inherently public and valued for "sociability" purposes); Kilbert, *supra* note 10, at 17 (calling for consistent theory across the Great Lakes); Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, 61–63 (2011) (citations omitted) (exploring the theoretical basis for how states—as sovereigns and holders of the public trust—possess the ability to limit coastal development while avoiding regulatory takings liability); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 722–23 (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 they increase the "sociability" value of those lands).

27. Shively v. Bowlby, 152 U.S. 1, 57–58 (1894); *see also* Hardin v. Jordan, 140 U.S. 371, 381 (1891) (stating that when the federal government granted newly formed states title to submerged land, the boundary for the title was from the submerged land to the high-water mark). The rule that states hold title to navigable and tidal waters in their sovereign capacity has its origins in English common law. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1226 (2012). In *PPL Montana*, the Supreme Court noted that, under the equal footing doctrine, "a State's title to these

has defined a public trust doctrine under state law to govern the management of these waters and the lands underlying them.[28] Many states ground their public trust doctrine in English common law.[29]

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.[30] Specifically, in determining public rights on beaches, states define the property at issue and the activities protected as public rights.[31] 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.[32] In 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.[33] 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.[34] The meta-theory driving a court's decision to use a lineal title or an easement approach considers whether the public trust doctrine is an attribute of state sovereignty such that it is beyond the power of the state to redefine public trust property as private property and eliminate public rights.[35]

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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, 374 (1977)) (internal quotation marks omitted).

28. *See PPL Mont., LLC*, 132 S. Ct. at 1235 ("Under 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.").

29. ARCHER ET AL., *supra* note 9, at 6.

30. *See generally* Peloso & Caldwell, *supra* note 26, at 57–58 (citations omitted) (noting that states vary in their treatment of public trust rights and private rights in coastal property).

31. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2597 (2010) ("Generally speaking, state law defines property interests, . . . including property rights in navigable waters and the lands underneath them . . . ." (citing Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1925))).

32. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005) (basing the public trust doctrine on sovereignty theory in holding that the public has a right to walk along the shoreline of Lake Huron).

33. *See, e.g.*, Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 275, 278 (Mass. 1961) (relying on state statutes to extend littoral owners' property boundary to the low-tide mark of a newly formed beach extending from the original property, thereby enjoining public use of the newly formed beach).

34. *Compare Glass*, 703 N.W.2d at 78 (holding that public trust doctrine allows public use of shoreline from high-water mark and below, which overlaps with riparian owners' private property rights), *with* Doemel v. Jantz, 193 N.W. 393, 398 (Wis. 1923) ("The riparian owner's rights to the shore are exclusive as to all the world, excepting only where those rights conflict with the rights of the public for navigation purposes.").

35. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360–63, 365 (N.J. 1984) (citations omitted) (relying on state sovereignty and the public trust doctrine to decide a private beachfront club to open up to the public).

Additionally, whether a court views public rights as fixed or evolving influences the types of rights protected in the public/private beach zone.[36] A few courts view public trust rights as fixed in time, usually at a point during the seventeenth century formation of the colonies, while most courts interpret public rights as evolving with society to encompass current public uses of the trust property.[37] One might assume that courts adopting a fixed seventeenth century approach to public rights would also adopt a more historically grounded approach to the property line question. However, the opposite is true: courts adopting a fixed approach to public rights adopt a lineal title approach to the property boundary that is not based on English common law.[38] For those courts, the common thread is a focus on establishing fixed property lines and rights.[39]

This Article examines public access to beaches across the United States and demonstrates how a 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 undergirding courts' decisions. Part II frames the Article by describing current controversies over beach access and the importance of coastal areas. Part III turns to the historical origins of beach property and the public trust doctrine in the United States and England. To provide context to current controversies and the sovereignty meta-theory, this Part describes the equal footing doctrine and the federal 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. Part IV identifies the competing legal theories courts apply to resolve beach access controversies. Part V analyzes court decisions that apply these theories to beach property. This Part 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

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36. *Compare* Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 179 (Me. 1989) (declaring legislation that gave the public the right to use private littoral owners' intertidal land for purposes other than fishing, fowling, and navigation was an unconstitutional taking), *with* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54, 55 (N.J. 1972) (extending the application of the public trust doctrine to recreational uses and precluding a municipality from discriminating against nonresidents using the public beach).

37. *See* Benjamin Donahue, Comment, McGarvey v. Whittredge*: Continued Uncertainty in Maine's Intertidal Zone*, 64 ME. L. REV. 593, 599 (2012) ("Few states have limited the scope of the public's easement within the intertidal zone to traditional uses.").

38. *See, e.g.*, *Bell II*, 557 A.2d at 169 (adopting a fixed approach to public rights and a lineal title approach to property boundaries); Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 277, 278 (Mass. 1961) (adopting a fixed approach to public rights and a lineal title approach to property boundaries); *Doemel*, 193 N.W. at 395, 398 (adopting a fixed approach to public rights and a lineal title approach to property boundaries).

39. *See Bell II*, 557 A.2d at 180 ("[O]wners, occupiers, buyers, and sellers of shorefront land were entitled to rely upon their property rights as so defined."); *Michaelson*, 173 N.E. 2d at 278 ("A littoral owner takes his property with the knowledge that the boundary may change by accretion or reliction. This is a necessary condition of owning property along tidal waters."); *Doemel*, 193 N.W. at 398 ("[W]e cannot disturb the interests which have become so vested.").

related to beach access. Part VI suggests public and private interests are best served by a historically grounded sovereignty theory recognizing that 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 framework 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 or criminal prosecution for trespass.[40] The United States Supreme Court decided over one hundred years ago, and affirmed most recently in *PPL Montana, LLC v. Montana*,[41] 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.[42] 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,[43] some states exclude the public from this zone.[44] The issue remains vexed by uncertainty and controversy.[45] 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.[46]

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40. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 61 (Mich. 2005) (discussing a lawsuit for trespass that arose from a walk along a shoreline).

41. 132 S. Ct. 1215 (2012).

42. *See id.* at 1226, 1227, 1235 (citing Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)) (explaining the English common law origins that states, in their capacity as sovereigns, hold title to the beds under navigable waters); Shively v. Bowlby, 152 U.S. 1, 57 (1894) (stating that title and control of lands under tide waters "are vested in the sovereign for the benefit of the whole people"); Hardin v. Jordan, 140 U.S. 371, 381 (1891) (citing Weber v. Bd. of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65–66, 69 (1873); Goodtitle v. Kibbe, 50 U.S. (9 How.) 471, 477–78 (1850); Pollard v. Hagan, 44 U.S. (3 How.) 212, 230–31 (1845)) (explaining that title to the shore and lands under water belongs to the state in trust for the public's navigation and fishery purposes).

43. *See, e.g.*, *Glass*, 703 N.W.2d at 74 (finding that the public can walk "the lakeshore below the ordinary high-water mark").

44. *See, e.g.*, *Michaelson*, 173 N.E.2d at 277–78 (holding that the public could not use the beach zone associated with privately owned property along tidal waters).

45. *Compare Glass*, 703 N.W. at 74 (recognizing the public's right to walk along public shores), *with Michaelson*, 173 N.E.2d at 277–78 (excluding the public from the beach zone).

46. *See* ARCHER ET AL., *supra* note 9, at 6–7 (citing Matthew Hale, *De Jure Maris et Brachiorum ejusdem*, *in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 84, 89 (Francis Hargrave ed., 1787)). Beach access controversies are often brought by diametrically opposed advocates of these competing values, as exemplified by the Surfrider Foundation on the

Accommodating even longstanding public and private property rights becomes inherently difficult when they overlap or collide on the beach.[47] As shorelands shift because of natural processes and climate change,[48] as population densities increase,[49] and as more private developments spring up along ocean coasts and lakeshores,[50] competition and conflicts over accessing the beach will become more frequent.[51] It is perhaps because of this scarcity and competition that the public interest in beaches has become more pronounced.[52]

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public trust side and the Pacific Legal Foundation on the private property side. *Compare* SURFRIDER FOUNDATION, http://www.surfrider.org/programs/entry/beach-access (last visited Oct. 18, 2013) (promoting "low-impact, free and open [beach] access to . . . all people"), *with* PACIFIC LEGAL FOUNDATION, http://www.pacificlegal.org/page.aspx?pid=640 (last visited Oct. 18, 2013) (describing the Coastal Land Rights Project created on behalf of coastal property owners).

47. *See, e.g.*, *Glass*, 703 N.W.2d at 70 (stating that public access and private rights to title in beach property may overlap).

48. Robin Kundis Craig, *A Public Health Perspective on Sea-Level Rise: Starting Points for Climate Change Adaptation*, 15 WIDENER L. REV. 521, 522–23 (2010) (citations omitted); Pagano, *supra* note 18, at 6 (citing Megan Higgins, *Legal and Policy Impacts of Sea Level Rise to Beaches and Coastal Property*, 1 SEA GRANT L. & POL'Y J., June 2008, at 49; *Climate Impacts on Coastal Areas*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/climatechange/impacts-adaptation/coasts.html (last visited Nov. 4, 2013)).

49. In the National Oceanic and Atmospheric Administration's 2005 report on coastal population trends in the United States from 1980 to 2008, the Administration described "the narrow coastal fringe that makes up 17 percent of the nation's contiguous land area" as where more than half of the population lives. KRISTEN M. CROSSETT ET AL., *Coastal Trends Report Series: Population Trends Along the Coastal United States: 1980–2008*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA) (2004), *available at* http://oceanservice.noaa.gov/programs/mb/pdfs/coastal_pop_trends_complete.pdf [hereinafter *Coastal Trends Report*]. According to the report, "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." *Coastal Trends Report* at 1. The updated population report also included the following findings:

- 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.

Coastal Trends Report Series: Population Trends Along the Coastal United States: 1980–2008, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA), http://oceanservice.noaa.gov/programs/mb/supp_cstl_population.html (last updated Oct. 30, 2013).

50. *See Coastal Trend Reports*, *supra* note 49, at 3.

51. *See* Pagano, *supra* note 18, at 7 ("The complexity of beaches gives rise to a complex set of physical, social, and legal tensions.").

52. 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 J. LAND USE & ENVTL. L. 355, 407 (2007) (discussing competition and scarcity in the recognition and preservation of marine ecosystems and their associated services (quoting Jeffrey A.

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.[53] In *Borough of Neptune City v. Borough of Avon-by-the-Sea*,[54] the New Jersey Supreme Court—cognizant of the scarcity of public beaches along the Atlantic Ocean—stated that 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."[55] In *Marks v. Whitney*,[56] the California Supreme Court similarly addressed competing uses of the coast along the Pacific Ocean, declaring that "[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."[57] 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 lived in coastal counties, and twenty-three of the twenty-five most densely populated U.S. counties were coastal.[58] These are "some of the most developed areas in the nation."[59]

Increased coastal population density has led to disputes regarding the boundary between public trust and private property in a variety of circumstances and jurisdictions.[60] When the law is uncertain or vague, violations of legal rights can occur on either side: members of the public can trespass and diminish valuable private property rights,[61] or private property owners can 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.[62]

Krautkraemer, *Economics of Natural Resource Scarcity: The State of the Debate* 5 (Resources for the Future, Discussion Paper 05–14, 2005))).

53. *See* Marks v. Whitney, 491 P.2d 374, 378 (Cal. 1971) (discussing the public importance of property issues "in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property"); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 49–50, 53 (N.J. 1972), *rev'd* 294 A.2d 47 (N.J. 1972) (discussing the effects of scarcity and competition on the public's ability to use beaches).

54. 294 A.2d 47.

55. *Id.* at 53.

56. 491 P.2d 374.

57. *See id.* at 378 (expressing concerns about population density and development along California's coasts in 1971).

58. *Coastal Trends Reports*, *supra* note 49, at 1.

59. *Id.* at 3.

60. *See, e.g.*, Pagano, *supra* note 18, at 8–9 (explaining that beaches generate tensions between the property rights of private landowners and the public when private landowners assert a right to exclude).

61. *See, e.g.*, Diana Shooting Club v. Husting, 145 N.W. 816, 817 (Wis. 1914) (alleging that trespass of private property injured the vegetation on the property, disturbed the plaintiff's use of the property, and interfered with the plaintiff's exclusive hunting and shooting rights).

62. *See, e.g.*, LT–WR, LLC v. Cal. Coastal Comm'n, 60 Cal. Rptr. 3d 417, 444 (Cal. Ct. App. 2007) (holding that the commission could not deny the permit for gates and no trespassing signs due to the possibility of public prescriptive rights of access to the privately owned property);

In the Great Lakes states, for instance, the public beach access issue is far from settled.[63] Only two of the eight Great Lakes states have published court decisions concerning the public's right to walk on the public/private beach zone, with diametrically opposed results.[64] This leaves most of the Great Lakes shoreline under a cloud of uncertainty regarding the expectations of private property owners and the public.[65] For instance, in the Wisconsin case of *Doemel v. Jantz*,[66] the court recognized an exclusive right of the private property owner to use the beach that prohibits beach walking above the water line.[67] In contrast, Michigan's Supreme Court in *Glass v. Goeckel*[68] 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.[69] To some, *Glass v. Goeckel* was an "expansion" of public use rights along the Great Lakes shoreline and a "redefinition" of the scope of public trust property.[70] To others, the decision was a predictable result of precedent, grounded in a public trust doctrine that has been a critical component of state sovereignty since the founding of the United States that is based on even earlier precedent from English and Roman law.[71]

With regard to ocean coastal areas, although public access to the public/private beach zone—and even the dry uplands—is well-established in many states,[72] it is still in flux in others.[73]

Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 124 (N.J. 2005) (holding that the public trust doctrine applied to protect public use of the "upland sands" when a beach club attempted to restrict the land to members only).

63. Kilbert, *supra* note 10, at 2 ("Courts have been inconsistent, in approach and result, when determining the rights of the public to use the Great Lakes shores.").

64. *Compare* Glass v. Goeckel, 703 N.W.2d 58, 75 (Mich. 2005) (recognizing the public's right to walk along the beach shores in the public/private beach zone), *with* Doemel v. Jantz, 193 N.W. 393, 398 (Wis. 1923) (recognizing exclusive right of private property owner against beach walkers above the water line).

65. *See* Kilbert, *supra* note 10, at 15 (stating that courts have reached "little consensus regarding approach or result" in the cases deciding public rights along the Great Lakes' shores).

66. 193 N.W. 393 (Wis. 1923).

67. *See id.* at 398. This case was wrongly decided, as a matter of law, as will be explained below in Section V.

68. 703 N.W.2d 58 (Mich. 2005).

69. *Id.* at 75.

70. Nathan Piwowarski, Comment, *Trouble at the Water's Edge: Michigan Should Not Extend the Public Trust Doctrine of the Great Lakes, as Reinterpreted in* Glass v. Goeckel, *to Its Navigable Inland Rivers and Lakes or to Grant the Public Lateral Access to Trust Properties*, 2006 MICH. ST. L. REV. 1045, 1047 (2006) (citing *Glass*, 703 N.W.2d at 62).

71. *See* Abrams, *supra* note 26, at 868.

72. *See, e.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974) (stating that, as a matter of custom, the public may use the "sandy area adjacent to mean high tide"); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 124 (N.J. 2005) (holding that the public trust doctrine allows public use of the upland sands); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363, 365–66 (N.J. 1984) (finding that the public trust doctrine justified the public's right to the public and private dry sand areas); State *ex rel.* Thorton v. Hay, 462 P.2d 671, 678 (Or. 1969) (stating that the custom of using "the dry sand as a public recreation area is so notorious" that it should be presumed).

As recently as 2011, the Maine 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.[74] Even forty years after New Jersey famously struck down discriminatory residency requirements for beach access,[75] courts continue to review the legality of new schemes—like that attempted by a local government in Connecticut—to keep certain groups of people off of the beaches.[76] 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, as well as the scope of the public trust doctrine.

III. FOUNDATIONAL DOCTRINES: PUBLIC TRUST AND EQUAL FOOTING

The public trust doctrine is the body of common, constitutional, and statutory law that generally provides that the state shall hold and manage tidal and navigable waters, along with the lands beneath them, in trust for the public.[77] The property protected by the public trust doctrine, as well as the scope of the public rights that can be exercised on this property, are key issues that define the contours of public and private rights on beaches.[78] Originally, courts interpreted public trust rights as the rights to use trust waters for navigation, commerce, and fishing.[79] Some decisions include in these historical public rights the right of "passage and repassage," interpreted today as the right to walk along the beach.[80]

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73. *See, e.g.*, Leydon v. Town of Greenwich, 777 A.2d 552, 557–58, 565–66 (Conn. 2001) (stating that the public may or may not have a right to use the beach property at issue and refusing to resolve the public trust issues); Fabrikant v. Currituck Cnty., 621 S.E.2d 19, 22, 28 (N.C. Ct. App. 2005) (citing N.C. GEN. STAT. § 41-10.1 (2011)) (dismissing private property owners' action to prevent the public from using the dry sand area because the plaintiffs failed to prove waiver of sovereign immunity and failing to resolve the public trust issue).

74. McGarvey v. Whittredge, 28 A.3d 620, 623 (Me. 2011).

75. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972).

76. *See Leydon*, 777 A.2d at 557–58 (discussing the legality of a town ordinance created to restrict the use of a beachfront to residents and their guests).

77. *See* Frey & Mutz, *supra* note 25, at 918–19 (citations omitted).

78. *See* Craig, *supra* note 13, at 58 (proposing that states first determine the scope of the public trust doctrine and then determine the uses protected by the public trust doctrine).

79. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 11 (1894) (explaining that the primary use of tidal lands is public in nature and for "highways of navigation and commerce, domestic and foreign, and for the purpose of fishing"); Diana Shooting Club v. Hunting, 145 N.W. 816, 820 (Wis. 1914) (determining that public navigable waters should be free to the public for commerce, travel, recreation, hunting, and fishing).

80. *See, e.g.*, *Shively*, 152 U.S. at 12 (recognizing 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" even on land privately held in fee (quoting Hale, *supra* note 46, at 36)) (internal quotation marks omitted); Glass v. Goeckel, 703 N.W.2d 58, 74 (Mich. 2005) (stating that a "right of passage over land below the ordinary high-water mark," which includes walking, is necessary to

While some courts view public trust rights as fixed in those historically recognized public uses,[81] other courts have developed the doctrine alongside the public's changing uses of water to incorporate additional public purposes, including traveling, bathing, recreating, hunting, protecting the ecosystem, preserving scenic beauty, and maintaining access to the waters.[82] For the past ninety years, courts have been wrestling with the question of whether beach access and walking along the shores of tidal and navigable waters are protected as public trust rights.[83]

In the early seventeenth century, during the establishment of the original American colonies, the public trust doctrine was an important principle of English common law.[84] 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."[85] Thus, the public trust doctrine under English common law established the foundation of the American doctrine.[86]

As for 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 . . . ."[87] According to the Supreme Court in *Shively v. Bowlby*,[88] 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 of all the lands below high-water mark, within the jurisdiction of the Crown of England . . . ."[89] The King held the

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engage in other protected public rights of "fishing, hunting and navigation for commerce or pleasure").

81. *See, e.g.*, Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (applying a fixed theory of public rights to determine that the new right of passage on foot constituted an unconstitutional taking).

82. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (describing public trust easements as including fishing, hunting, bathing, swimming, boating, general recreation, scientific study, and ecosystem protection); R.W. Docks & Slips v. Wisconsin, 628 N.W.2d 781, 788 (Wis. 2001) (noting that the public trust doctrine has been expansively interpreted to include uses such as "boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty").

83. *See, e.g.*, LT–WR, LLC v. Cal. Coastal Comm'n, 60 Cal. Rptr. 3d 417, 444 (Cal. Ct. App. 2007) (discussing whether a possibility of prescriptive rights should preclude the granting of a permit for gates and no trespassing signs on beach property); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974) (allowing the public to use dry sand area for recreational activities); Fabrikant v. Currituck Cnty., 621 S.E.2d 19, 22 (N.C. Ct. App. 2005) (discussing whether a county could be held liable for encouraging the public to use private beach property); State *ex rel.* Thorton v. Hay, 462 P.2d 671, 678 (Or. 1969) (discussing whether the public has a right to use the shore for recreation); Doemel v. Jantz, 180 193 N.W. 393, 394 (Wis. 1983) (discussing whether "a member of the public can legally enter upon and use [the shore] for the purposes of public travel").

84. ARCHER ET AL., *supra* note 9, at 5. Earlier Roman law, articulated in the Institutes of Justinian, influenced English common law on this subject. Abrams, *supra* note 26, at 877.

85. ARCHER ET AL., *supra* note 9, at 6.

86. *Id.*

87. Kilbert, *supra* note 10, at 22 (citing Shively v. Bowlby, 152 U.S. 1, 57–58 (1894)).

88. 152 U.S. 1 (1894).

89. *Id.* at 11.

title absolutely, and in his role as sovereign, he held the public rights in trust for the benefit of the public.[90] The origins for a sovereignty meta-theory of the public trust may be found in early cases describing the role of the King of England related to trust property.[91]

> 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.[92]

As successors in sovereignty to the English Crown, the original thirteen states assumed ownership of all tidal waters and the beds beneath them.[93] According to the equal footing doctrine, when additional states joined the Union, they did so on an 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."[94] In *Pollard v. Hagan*,[95] the United States Supreme Court voided a patent issued by the federal government to a private landowner for property below the ordinary high-water mark of a navigable river after Alabama became a state.[96] The Court

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90. *Id.*

91. *See, e.g.*, *id.* (describing the King of England as sovereign representative for the public benefit).

92. *Id.* at 11, 12 (quoting Hale, *supra* note 46, at 36).

93. *See id.* at 14–15 (citations omitted); ARCHER ET AL., *supra* note 9, at 3.

94. Kilbert, *supra* note 10, at 19. The equal footing doctrine is a constitutional doctrine determined by federal law. *See* ARCHER ET AL., *supra* note 9, at 9. The states' title to these lands was "conferred not by Congress but by the Constitution itself." PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1227 (2012) (quoting Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977)) (internal quotation marks omitted).

95. 44 U.S. (3 How.) 212 (1845).

96. *Id.* at 230. *See generally* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 420 (1842) ("The sovereign power itself, therefore, cannot . . . make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right."). According to one scholar:

> 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

voided the patent 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."[97] The states hold these lands and waters in trust for the benefit of all citizens.[98]

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.[99] In its 1876 decision in *Barney v. Keokuk*,[100] the Court explained the American departure from the English rule limiting Crown ownership to the beds under *tidal* waters.[101] In the United States, settled law recognizes 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.[102] The Court famously described this initial federal grant of navigable waters and the lands beneath them in *Illinois Central R.R. Co. v. Illinois* in 1892,[103] and then again in *Shively v. Bowlby* in 1894.[104]

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 in the Chicago Harbor because such a grant would be void under the public trust

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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 26, at 892.

97. *Pollard*, 44 U.S. (3 How.) at 230.

98. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) ("[T]he State holds the title to the lands under the navigable waters . . . .").

99. *See* Shively v. Bowlby, 152 U.S. 1 (1894); *Ill. Cent. R.R. Co.*, 146 U.S. at 387; Barney v. Keokuk, 94 U.S. 324 (1876).

100. 94 U.S. at 324.

101. *Id.* at 337–38 (citing Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Goodtitle v. Kibbe, 50 U.S. 471 (1850); *Pollard*, 44 U.S. (3 How.) 212; *Martin*, 41 U.S. (16 Pet.) 367).

102. *See Ill. Cent. R.R. Co.*, 146 U.S. at 435 (citing Weber v. Bd. of Harbor Comm'rs, 85 U.S. (18 Wall.) 57 (1873); *Pollard*, 44 U.S. (3 How.) 212).

103. *Id.* (citing *Weber*, 85 U.S. (18 Wall.) 57; *Pollard*, 44 U.S. (3 How.) 212). The public trust and equal footing doctrines are legally distinct. *See* PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1234–35 (2012). On the one hand, "[t]he 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." Kilbert, *supra* note 10, at 19; *see also PPL Mont., LLC*, 132 S. Ct. at 1227–28 (quoting United States v. Oregon, 295 U.S. 1, 14 (1934)). The public trust doctrine, on the other hand, is the body of law that describes how these waters and lands must be managed in trust for the public. Kilbert, *supra* note 10, at 17.

104. *Shively*, 152 U.S. at 57–58. Additional U.S. Supreme Court cases similarly explained these settled principles regarding state ownership of tidelands in particular. Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 15–16 (1935) (citations omitted); Weber v. Bd. of Harbor Comm'rs, 85 U.S. (18 Wall.) 57, 65–66 (1873) (citing Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867); *Pollard*, 44 U.S. (3 How.) 212); *Goodtitle*, 50 U.S. at 477–78; *Pollard*, 44 U.S. (3 How.) at 230; *Martin*, 41 U.S. (16 Pet.) at 410.

doctrine.[105] In reaching its holding, the Court clarified that all navigable waters and the lands underneath 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.[106] 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 the 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.[107]

Two years later, in *Shively v. Bowlby*, the United States Supreme Court 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 . . . ."[108] This demarcation line is consistent with English common law, under which the King's trust holdings went up to the high-water mark on the shore.[109] 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.[110]

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105. *Ill. Cent. R.R. Co.*, 146 U.S. at 460 (holding an attempted conveyance of a lakebed inoperative).

106. *Id.* at 434–35.

107. *Id.* at 434.

108. *Shively*, 152 U.S. at 57–58; *see also* Hardin v. Jordan, 140 U.S. 371, 381 (1891) (stating that governmental rights extend up to the high-water mark). However, the Court also explained that riparian and littoral private property rights are governed by state law. *Shively*, 152 U.S. at 57–58. 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. Chi., Milwaukee, St. Paul & Pac. R.R., 312 U.S. 592, 596–97 (1941) (citations omitted) (holding that the navigation servitude extends up to the ordinary high-water mark on a navigable stream).

109. Kilbert, *supra* note 10, at 22 (citing *Shively*, 152 U.S. at 26, 51, 57–58).

110. *Shively*, 152 U.S. at 57–58; *see also Hardin*, 140 U.S. at 381 (stating that governmental rights extend up to the high-water mark); Kilbert, *supra* note 10, at 22 (citing *Shively*, 152 U.S. at 26, 51, 57–58) (stating that common law provided the government property rights up to the high-water mark). For oceans, the high-water mark may be called the *mean high tide line*, which is defined as "the average height of all the high waters" over the lunar cycle of 18.6 years that governs the tides. Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 26–27 (1935) (quoting MARMUR, TIDAL DATUM PLANES 76, SPECIAL PUBLICATION NO. 135, U.S. COAST AND GEODETIC SURVEY (1927)) (internal quotation marks omitted). This line can change significantly over the years. *See id.* For inland lakes, water levels fluctuate based on forces that lack the regularity of lunar tides, such as precipitation and barometric pressure:

> 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 permanently receded from that point and may yet again exert its influence up to that point.

Glass v. Goeckel, 703 N.W.2d 58, 71 (Mich. 2005). 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

Since *Shively v. Bowlby* and *Illinois Central*, the United States Supreme Court has been relatively silent on the equal footing doctrine. However, the Court more recently reaffirmed in *Phillips Petroleum Co. v. Mississippi*[111] in 1988 and *PPL Montana, LLC*[112] in 2012 that, under the equal footing doctrine, the federal government transferred ownership to the states over all lands subject to tidal influence, regardless of navigability,[113] as well as all lands under rivers that were navigable in fact at the time of statehood.[114] These decisions underscore the quality distinguishing the equal footing doctrine from the public trust doctrine.[115] 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*.[116] 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.[117] In contrast, the public trust doctrine,

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with the shore. Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914) (citing Town of Lawrence v. Am. Writing Paper Co., 128 N.W. 440, 442 (Wis. 1910)). 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." *Id.* (citing *Town of Lawrence*, 128 N.W. at 442); *see also Glass*, 703 N.W.2d at 72–73 (quoting *Diana Shooting Club*, 145 N.W. at 820) (adopting Wisconsin's definition of ordinary high-water mark); State v. Trudeau, 408 N.W.2d 337, 342 (Wis. 1987) (citing *Town of Lawrence*, 128 N.W. at 442).

111. 484 U.S. 469 (1988).

112. 132 S. Ct. 1215 (2012).

113. *See PPL Mont., LLC*, 132 S. Ct. at 1227 (citing Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)); *Phillips Petroleum Co.*, 484 U.S. at 476 (citing McCready v. Virginia, 94 U.S. 391, 395–97 (1876)). In *Phillips Petroleum Co.*, private property owners claimed title to lands underlying non-navigable waters influenced by the tide, which they traced back to a pre-statehood Spanish land grant. 484 U.S. at 472. The State of Mississippi claimed title to the same land based on the original grant of land underlying tidal waters when Mississippi entered the Union on equal footing with the other states. *Id.* The private property owners argued that they had record title for these lands and had paid taxes on them for more than a century. *Id.* at 481–82. The Court stated that it honors "reasonable expectations in property interests," but found these expectations were not reasonable given that Mississippi courts have consistently held that the state has title to all public trust lands, including all the land under the tidewater. *Id.* at 482 (citing Rouse v. Saucier's Heirs, 146 So. 291, 291–92 (Miss. 1933)).

114. *PPL Mont., LLC*, 132 S. Ct. at 1227–28. 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." The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

115. *See PPL Mont., LLC*, 132 S. Ct. at 1227–28; *Phillips Petroleum, Co.*, 484 U.S. at 476 (citing *McCready*, 94 U.S. at 395–97).

116. *PPL Mont., LLC*, 132 S. Ct. at 1227 (citing *Martin*, 41 U.S. at 410).

117. *See* Kilbert, *supra* note 10, at 19–24 (citations omitted). This is also called the *mean high tide*. *See* Kilbert, *supra* note 10, at 23 (citing Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 26–27 (1935)).

as well as property law more generally, is defined by state law.[118] 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.[119]

States have the power to expand the resources and rights protected by the public trust doctrine.[120] However, state power to contract and relinquish ownership of property the federal government transferred at statehood is limited,[121] and courts diverge on the nature and extent of that limitation.[122] Therein lies the root of why some states allow the public to access the public/private beach zone for walking and general recreation, while other states protect the exclusive use of this zone by private property owners.

IV. SOVEREIGNTY META-THEORY, PROPERTY, AND PUBLIC RIGHTS

With regard to the question of locating the line where the coastal private fee title ends, states are divided.[123] Most states fall into the mean or ordinary high-water mark group[124]—consistent with the original federal grant of property to the states[125]—while a minority fall into the mean or ordinary low-water mark group.[126] In this Article, these states will be referred to as "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

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118. *See PPL Mont., LLC*, 132 S. Ct. at 1235; Elizabeth B. Wydra, *Constitutional Problems with Judicial Takings Doctrine and the Supreme Court's Decision in* Stop the Beach Renourishment, 29 UCLA J. ENVTL. L. & POL'Y 109, 120 (2011).

119. *See* ARCHER ET AL., *supra* note 9, at 15–16 & n.1.

120. *PPL Mont., LLC*, 132 S. Ct. at 1235 ("Under 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.").

121. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (stating that state control over tidewaters is subject to limitations that Congress may impose).

122. *See* ARCHER ET AL., *supra* note 9, at 58.

123. West v. Slick, 326 S.E.2d 601, 617 (N.C. 1985).

124. *See, e.g.*, Bloom v. Water Res. Comm'n, 254 A.2d 884, 887 (Conn. 1969) ("The state, as the representative of the public, is the owner of the soil between high-and [sic] low-water mark upon navigable water where the tide ebbs and flows."); Van Ruymbeke v. Patapsco Indus. Park, 276 A.2d 61, 64 (Md. 1971) (stating that private landowners bordering tidal waters own to the mean high-water mark); Opinion of the Justices, 649 A.2d 604, 608 (N.H. 1994) (noting New Hampshire has rejected the "Massachusetts law that adopted the low-water mark as the boundary between public and private ownership" (citing Concord Mfg. Co. v. Robertson, 25 A. 718, 730–31 (N.H. 1890))); *West*, 326 S.E.2d at 617 ("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.").

125. *See* Kilbert, *supra* note 10, at 19.

126. *See, e.g.*, McGarvey v. Whittredge, 28 A.3d 620, 626 (Me. 2011) (naming Maine, Massachusetts, and Virginia as states that extend private property rights to the low-water mark and explaining how ownership to the low-water mark originated in the colonial grant of property from England, which diverged from the seventeenth century English common law of private ownership ending at the high-tide line).

mark, while the state holds the property below that mark into the sea or lake.[127] *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.[128]

Yet, even in the low-water states, the existence of private property to the low-water boundary alone does not determine the shared/exclusive nature of the property between the high- and low-water marks or the scope of public rights in that public/private beach zone.[129] 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.[130] Thus, while all states have relatively clear rules regarding the dividing line between state and private *title* on the shore,[131] the particular legal theory undergirding their courts' decisions is far more important in determining the contours of public and private *rights*.[132]

A fundamental difference between 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.[133] The meta-theory driving a court's decision to use a lineal title or an easement approach focuses on whether the public trust doctrine is considered an attribute of state sovereignty.[134] 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.[135] 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.[136]

Secondly, after determining whether the lineal title or the easement approach applies to the public/private beach property, the court will define the scope of public rights on the property.[137] Whether a court views public rights as fixed or evolving influences the nature and category of rights protected in the public/private beach zone.

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127. *See West*, 326 S.E.2d at 617.

128. *See id.*

129. *See, e.g.*, 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).

130. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 378–79 & n.5 (Cal. 1971) (citations omitted) (defining tidelands as the land extending up to the mean high tide and explaining that California holds the tidelands in trust, but still recognizing private patents to some tidelands to the low tide).

131. *See supra* notes 124, 126 and accompanying text.

132. *See* ARCHER ET AL., *supra* note 9, at 6.

133. *See infra* Part IV.A.

134. *See infra* Part IV.A.

135. *See infra* Part IV.A.

136. *See* Rose, *supra* note 26, at 728.

137. *See* Kilbert, *supra* note 10, at 58.

A. Sovereignty Theory and Implications for the Choice of 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 courts are 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.[138] 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.[139]

Given the strong protections for exclusive use of private property in the United States, Professor Carol Rose highlighted this anomalous approach to public trust property, stating that "[m]ost property is not impressed with a 'public trust' allowing access; why should the beaches be?"[140] Drawing on the definitional–historical approach to understanding property taken by the Supreme Court in *Phillips Petroleum* and *Lucas v. South Carolina Coastal Council*,[141] 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.[142] In takings terms—as will be discussed below—this forms the foundation of background principles necessary to understanding property rights.[143] Some courts have concluded that states cannot

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138. *See* Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914) (declaring it "beyond the power of the state to alienate [the river bed] freed from such [public trust] rights" (citing People v. N.Y. & Staten Island Ferry Co., 68 N.Y. 71, 76 (1877); Priewe v. Wis. State Land & Improvement Co., 79 N.W. 780, 782 (Wis. 1899); 1 HENRY PHILIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 36a, at 173 (1904))).

139. *Diana Shooting Club*, 145 N.W. at 819 (citing *N.Y. & Staten Island Ferry Co.*, 68 N.Y. at 76; *Priewe*, 79 N.W. at 782; FARNHAM, *supra* note 138, at 173); *see also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 434 (1892) (asserting that the use of lands covered by tidal waters cannot impair the public interest in the property and is subject to Congressional control); Pollard v. Hagan, 44 U.S. (3 How.) 212, 215–16 (1845) (declaring that rivers may not be sold, and the "right to them passes with a transfer of sovereignty" (citing Martin v. Waddell, 41 U.S. (16 Pet.) 367, 413 (1842))). Additionally, based on the public trust doctrine and the gift clause of the Arizona constitution, the Arizona courts have rejected two legislative attempts to avoid state title to streambeds by defining these water bodies as non-navigable. *See* Defenders of Wildlife v. Hull, 18 P.3d 722, 728–39 (Ariz. Ct. App. 2001) (citations omitted); Ariz. Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 166–73 (Ariz. Ct. App. 1991) (citations omitted). Professor Abrams is a leading scholar who advances the concept of the public trust doctrine as a limitation on sovereignty. *See* Abrams, *supra* note 26, at 903–04 (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 448).

140. Rose, *supra* note 26, at 716.

141. 505 U.S. 1003 (1992).

142. *Id.* at 1027; Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988) (citing McCready v. Virginia, 94 U.S. 391, 395–97 (1877)). Academics have explored this definitional–historical approach in contrast to an approach focused on terms of deeds and expectations. *See* Joseph L. Sax, *Rights That "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 944 (1993) (citing *Lucas*, 505 U.S. at 1028–29).

143. *See* ARCHER ET AL., *supra* note 9, at 73–74.

take what they already own and never had the power to diminish.[144] Consistent with this concept, Professor Rose described public trusts as being "in the nature of an inalienable easement, assuring public access."[145]

In support of this unique approach to public trust property, Professor Abrams provided rich and layered historical precedent for an easement approach based on a sovereignty theory.[146] He demonstrated that, although quite different from the protections afforded other property in the United States, the existence of overlapping public and private rights is grounded in many centuries of precedent in English common law.[147]

English law drew heavily on an even earlier legal framework that existed under Roman law.[148] 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 only publicly owned, but they were considered in the class of things incapable of private ownership.[149]

England continued to use a similar property construction, but it substituted the King as the steward of resources for the Roman concept of the laws of nature.[150] However, unlike Roman natural law, vesting title in the Crown did not mean that the foreshore area was incapable of private ownership; rather, it meant that private title was severed from and needed to coexist along with public rights.[151] The English common law concepts of *jus privatum* and *jus publicum* encapsulate the inalienable public easement with overlapping public and private rights.[152] *Jus privatum* is the legal title to the land that the Crown may transfer to a private owner.[153] *Jus publicum*, however, is the sovereign's duty to hold property in trust for the public benefit.[154] Out of these English common law descriptions, a sovereignty theory developed that led to the conclusion that the King could not convey the public trust easement or *jus publicum*[155]: "Although

144. *See id.* at 78–80 (citations omitted).

145. Rose, *supra* note 26, at 728.

146. Abrams, *supra* note 26, at 869–89 (citations omitted).

147. *See id.* at 877–93 (citations omitted).

148. *See id.* at 877–83 (citations omitted).

149. *Id.* at 880.

150. *Id.* at 877–81 (citations omitted).

151. *See id.* at 881 (citing Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 679 (2005)).

152. *See* Glass v. Goeckel, 703 N.W.2d 58, 103 (Mich. 2005) (citing Lorman v. Benson, 8 Mich. 18, 28 (1860)).

153. ARCHER ET AL., *supra* note 9, at 6–7 (citing Hale, *supra* note 46, at 89).

154. *Id.* at 7 (citing Hale, *supra* note 46, at 89).

155. *See* Shively v. Bowlby, 152 U.S. 1, 13 (1894) (citations omitted).

the [K]ing could convey the lands below the high-water mark, any conveyance to a private individual was subject to the *jus publicum*. . . . The *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.'"[156]

Under English common law, the dividing line for private title was not the same as the line for public rights.[157] Put another way, the holder of the *jus privatum* (title) in the public/private beach zone could not "impede the public's customary use of public trust land . . . ."[158]

During the early development of the public trust doctrine in the United States, this sovereignty theory permeated some of the landmark Supreme Court cases.[159] For instance, in *Pollard v. Hagan*,[160] the Supreme Court described the "right to the shore between high and low water-mark" as "an attribute of sovereignty."[161] The Court declared that "[r]ivers 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]."[162]

Similarly, in *Illinois Central*, the Court explained that ownership of the navigable waters and lakebeds is a "subject of public concern to the whole people of the State."[163] The Court also reasoned that "[t]he sovereign power, itself, therefore, cannot . . . make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right."[164] 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 the ordinary high- and low-water marks, those lands are still burdened with a public

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156. Opinion of the Justices, 649 A.2d 604, 607–08 (N.H. 1994) (citing *Shively*, 152 U.S. at 11, 13). According to Kilbert:

> Both private, *jus privatum*, and public, *jus publicum*, interests were recognized in the lands underlying navigable waters. While legal title to the lands under navigable waters (*jus privatum*) could be transferred by the crown to a private party, the crown would continue to hold the public's interest in using the lands (*jus publicum*) in trust for the people.

Kilbert, *supra* note 10, at 4.

157. *See* ARCHER ET AL., *supra* note 9, at 6–7.

158. *Id.* at 7; *see also* Marks v. Whitney, 491 P.2d 374, 379 (Cal.1971) (quoting People v. Cal. Fish Co., 138 P. 79, 87 (Cal. 1913)) (preserving the public interest in the tideland and stating that the private property owner of tidelands cannot divest the public of its right to use the land for navigation).

159. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) (noting that the sovereignty theory of land covered by tidewaters has been established and frequently discussed by the Supreme Court); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) (discussing sovereignty in relation to the passing of tideland property).

160. 44 U.S. (3 How.) 212.

161. *Id.* at 215–16.

162. *Id.* at 216 (citing Martin v. Waddell, 41 U.S. (16 Pet.) 367, 413 (1842)).

163. *Ill. Cent. R.R. Co.*, 146 U.S. at 455.

164. *Id.* at 456 (quoting Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821)) (internal quotation marks omitted).

trust easement.[165] A state's power to redefine property does not include the power to extinguish the public trust easement on public trust property it grants to private owners.[166]

English common law informed the holding in *Illinois Central*.[167] The Court recognized that, while the King could grant the soil under tidal waters to a private party under English common law, the grant was "subject to the paramount right of public use of navigable waters, *which he could neither destroy nor abridge*."[168] The Court quoted Lord Hale to underscore the idea that "[t]he *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."[169]

While the *Illinois Central* Court ultimately held that a grant of Lake Michigan's lakebed beneath most of the Chicago Harbor to a private entity would be void or subject to revocation,[170] it also described the situations in which such a grant of title to a private party would be consistent with the public trust doctrine.[171] 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 it does maintain public rights if the property's title is conveyed into private ownership. The Supreme Court limited the situations in which a state may make valid grants of trust property to when 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."[172]

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

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165. *See id.* States may alienate trust lands below the ordinary high-water mark, but such grants cannot interfere with the superior rights of public use and navigation. *See* Shively v. Bowlby, 152 U.S. 1, 57–58 (1894) (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 because 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. *See id.* at 6 n.1 (citing 1874 OR. LAWS 76; 1872 OR. LAWS 129).

166. *See, e.g.*, Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914) (declaring it "beyond the power of the state to alienate [the river bed] freed from such [public trust] rights . . . ." (citing People v. N.Y. & Staten Island Ferry Co., 68 N.Y. 71, 73–74 (1877); Priewe v. Wis. State Land & Improvement Co., 79 N.W. 780, 782 (Wis. 1899); FARNHAM, *supra* note 138, at 172)).

167. *See Ill. Cent. R.R. Co.*, 146 U.S. at 436 (discussing English common law and its relevancy to the case at hand).

168. *Id.* at 458 (emphasis added) (quoting *N.Y. & Staten Island Ferry Co.*, 68 N.Y. at 76).

169. *Id.* at 458 (quoting Hale, *supra* note 46, at 22) (internal quotation marks omitted).

170. *Id.* at 460.

171. *See id.* at 452–53. The U.S. Supreme Court described the trust as essentially prohibiting a state from abdicating its general control over lands under navigable waters. *See id.*

172. *Id.* at 423.

period, but also when it was in the hands of the states after statehood."[173] 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."[174] In other words, although a state may convey title under limited circumstances, it cannot legislatively remove the public trust easement from the public/private beach zone;[175] such an action is either void or voidable according to *Illinois Central*.[176]

Similarly, state courts that view the public trust doctrine as inherent in state sovereignty divide property into public and private property—or *jus publicum* and *jus privatum* estates—in effect, differentiating lines for title purposes from rights to use.[177] 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.[178]

For instance, the California Supreme Court's decision in *Marks v. Whitney*[179] typifies a sovereignty theory and easement construct.[180] In that case, the court rejected an attempt by a landowner to fill tidelands, based on an understanding that the beach property was a divided estate on which the private title was burdened by public rights that "restrained private development . . . ."[181] *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.[182] Accounting for the sale of tidelands to private owners, the court asserted that the "only practicable theory" was to recognize that the sale of these lands did not divest the public of their rights.[183] In this way, an easement approach accommodates multiple interests

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173. Abrams, *supra* note 26, at 892 (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 436–37). The *foreshore* is "[t]hat part of the land adjacent to the sea which is alternately covered and left dry by the ordinary flow of the tides; *i. e.*, [sic] by the medium line between the greatest and least range of tide, (spring tides and neap tides)." BLACK'S LAW DICTIONARY 511 (2d ed. 1910). This Article refers to the foreshore as the public/private beach zone.

174. Abrams, *supra* note 26, at 861.

175. *See id.*

176. *See Ill. Cent. R.R. Co.*, 146 U.S. at 453.

177. *See* Marks v. Whitney, 491 P.2d 374, 379 (Cal. 1971) (quoting People v. Cal. Fish Co., 138 P. 79, 87 (Cal. 1913)).

178. *See id.* (quoting *Cal. Fish Co.*, 138 P. at 87).

179. 491 P.2d at 374.

180. *See id.* at 378 n.1, 379 n.5 (citing Borax Consol., Ltd. v. Los Angeles, 296 U.S. 15–16 (1935)).

181. Blumm, *supra* note 26, at 658–59 (citing *Marks*, 491 P.2d at 381).

182. *Marks*, 491 P.2d at 378–79, 379 n.5, 381 (citations omitted).

183. *Id.* at 379 (quoting *Cal. Fish Co.*, 138 P. at 87). Despite the California Supreme Court's recognition of *jus publicum* on privately held tidelands, its opinion left the door open for the state to remove the public trust easement. *See id.* at 380 (quoting City of Long Beach v. Mansell, 476 P.2d 423, 437 (Cal. 1970)). 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 were "no longer useful for trust purposes" and "not subject to the constitutional prohibition forbidding

and harmonizes otherwise discordant laws.[184] 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 use 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.[185]

Another example of a state court employing the sovereignty theory comes from Wisconsin.[186] When Wisconsin entered the Union on equal footing with the original states and obtained title to all navigable waters, as well as the lands beneath them, it incorporated the language of the Northwest Ordinance into the state constitution as follows[187]: "[T]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the state, as to the citizens of the United States, without any tax, impost, or duty therefor."[188]

Following *Illinois Central* and *Shively*,[189] 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.[190] The court also articulated this doctrine as a limitation on state 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."[191]

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alienation . . . ." *Id.* (quoting *Mansell*, 476 P.2d at 437). The court described such a decision as a "political question" for the legislature. *Id.* at 381.

184. *See id.* at 379 (quoting *Cal. Fish Co.*, 138 P. at 87).

185. *Id.* (quoting *Cal. Fish Co.*, 138 P. at 87) (internal quotation marks omitted).

186. *See, e.g.*, Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901) (applying the sovereignty theory).

187. *See* Lundberg v. Univ. of Notre Dame, 282 N.W. 70, 73 (Wis. 1938).

188. WIS. CONST. art. IX, § 1 (2002).

189. Shively v. Bowlby, 152 U.S. 1 (1894); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

190. *See Bilot*, 84 N.W. at 856–57.

191. Doemel v. Jantz, 193 N.W. 393, 395 (Wis. 1923) (citations omitted) (discussing the holding in *Bilot*, 84 N.W. at 855, in support of the argument that the United States never had title of the lakebeds, except for the purpose of holding them in trust for the public). Similarly, the Michigan Supreme Court recognized that "[t]he state, as sovereign, cannot relinquish this duty to preserve public rights in the Great Lakes and their natural resources." Glass v. Goeckel, 703 N.W.2d 58, 65 (Mich. 2005). 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) (citing Eldridge v. Trezevant, 160 U.S. 452, 466–67 (1896); *Shively*, 152 U.S. 1, 34; South Carolina v. Georgia, 93 U.S. 4, 10 (1876)).

The Wisconsin Supreme Court's seminal public trust case, *Diana Shooting Club v. Husting*,[192] illustrates how a sovereignty theory allows courts to reconcile the concept of maintaining the public trust doctrine with a state's power to define property rights.[193] In *Diana Shooting Club,* 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.[194] According to the court, "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."[195]

With regard to public trust rights, the court stated that "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."[196] 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.[197] This easement prevented the state from conveying the typical ownership right to exclude, along with the private title to the riverbed.[198] Ultimately, the court rejected the trespassing claim before it and held that the public maintained a public trust right to hunt on the riverbed up to the ordinary high-water mark—despite the private ownership of the riverbed.[199]

Moreover, the coexistence of public and private rights on the same property accommodates the various rights at issue in contemporary beach access controversies.[200] A court can recognize overlapping rights in this area: the

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192. 145 N.W. 816 (Wis. 1914).

193. *See id.* at 819.

194. *Id.*

195. *Id.*

196. *Id.* (citing People v. N.Y. & Staten Island Ferry Co., 68 N.Y. 71, 76 (1877); Priewe v. Wis. State Land & Improvement Co., 79 N.W. 780, 782 (Wis. 1899); FARNHAM, *supra* note 138, at 173). 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. *See id.* (citing *N.Y. & Staten Island Ferry Co.*, 68 N.Y. at 76; *Priewe*, 79 N.W. at 782; FARNHAM, *supra* note 138, at 173); JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836–1915, at 22 (1984). The federal government granted to Wisconsin 10,200,000 acres, which is about 29% of the whole area of Wisconsin. HURST, *supra* at 10. The State of Wisconsin was to hold these public lands in a trust capacity to be used for purposes delineated by Congress, such as establishing schools, reclaiming swamplands, or building 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; rather, the sale required Congress to take legal action to assert a violation, which it never did. *Id.* at 628 n.7.

197. *See Diana Shooting Club*, 145 N.W. at 819.

198. *See id.*

199. *See id.* at 820.

200. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (holding that "the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary").

private landowner's *jus privatum* may include rights such as possession and alienation, while the public's *jus publicum* still burdens the beachfront estate and allows for public access.[201] In reviewing the beach access cases that follow, a primary difference emerges between courts that limit the public trust doctrine to lands the state owns and courts that recognize that the *jus publicum/privatum* distinction provides an inalienable public trust easement.[202]

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.[203] For instance, a state may redefine the original grant of trust property and draw the private title line at the low-water mark, rather than the ordinary high-water mark.[204] Nonetheless, a public trust easement continues to protect public rights to the high-water mark.[205] 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.[206] Under an easement approach, private property holders have more limited rights to exclude the public from exercising public trust uses on the property.[207]

In contrast to the sovereignty theory that leads to an easement approach,[208] a competing theory is that the state has ultimate control to define (i.e., shrink) the scope of trust property, subject only to the Federal Government's constitutional right to control commerce and navigation.[209] Support for that theory is found in the fact that some states have conveyed trust property to private owners effectively free of public rights.[210]

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201. *See* Blumm, *supra* note 26, at 658–59 (citing Marks v. Whitney, 491 P.2d 374, 380, 381 (Cal. 1971)).

202. *Compare* McGarvey v. Whittredge, 28 A.3d 620, 628 (Me. 2011) (recognizing an inalienable public trust easement), *with* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988) (opining that states hold title to all lands under waters subject to the ebb and flow of the tide).

203. *See Matthews*, 471 A.2d at 365.

204. *See, e.g.*, *McGarvey*, 28 A.3d at 626 (noting that Maine, Massachusetts, and Virginia are all low-water mark states).

205. *See* Blumm, *supra* note 26, at 659 (citing Glass v. Goeckel, 703 N.W.2d 58, 65 (Mich. 2005)).

206. *See McGarvey*, 28 A.2d at 627.

207. *See* Blumm, *supra* note 26, at 665.

208. *See supra* notes 163–66 and accompanying text.

209. *See generally* Genevieve Pisarski, *Testing the Limits of the Federal Navigational Servitude*, 2 OCEAN & COASTAL L.J. 313, 313–14 (1997) (citations omitted) (discussing how the United States has authority, through the Commerce Clause, over control and improvement of navigation—including the ability to use land within the boundaries of navigable waters for purposes related to navigation and commerce—regardless of ownership and without compensation).

210. State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 948 (Ohio 2011) (quoting Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 275 (Mass. 1961); State *ex rel.* Squire v. City of Cleveland, 82 N.E.2d 709, 725 (Ohio 1948)).

The Supreme Court has never directly addressed this issue, but it has muddied the waters in dicta.[211] Although the holding in *Phillips Petroleum* arguably focused on an expansion of public trust property, the Court acknowledged, in defense of its holding, that some states have reduced trust property.[212] In *Phillips Petroleum*, the Court endorsed Mississippi's assertion of public trust ownership of non-navigable tidal waters and the lands beneath them, despite the terms of the title and the expectations Phillips developed by holding title and paying taxes over the course of a century.[213] 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,[214] 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."[215]

The Court went on to state 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."[216] The Supreme Court's discussion in *Phillips Petroleum* indicates that states *may*, but not necessarily *must*, retain a public trust easement on those trust lands.[217]

Professor Kenneth Kilbert offered a finer point on the debate.[218] He described the original federal grant as only the "starting point" for the demarcation line between public and private, suggesting that states are able to change the boundaries of private title to extend below the high-water mark within certain limited circumstances.[219] He argued—consistently with *Shively* and *Phillips Petroleum*—that 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.[220] He asserted—consistently with *Illinois Central*—that a state can only contract the

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211. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 483 (1988) (stating in dicta that some states have "relinquished a public trust claim to tidelands").

212. *Id.*

213. *See* Sax, *supra* note 142, at 949–50 (citing *Phillips Petroleum*, 484 U.S. at 472, 481–82, 484; *id.* at 492 (O'Connor, J., dissenting)).

214. *Phillips Petroleum*, 484 U.S. at 482–83.

215. *Id.* at 483.

216. *Id.* at 483–84.

217. *See id.* at 483.

218. *See* Kilbert, *supra* note 10.

219. *See id.* at 58.

220. *Id.* at 33 (citing *Phillips Petroleum*, 484 U.S. 469 (1988); Shively v. Bowlby, 152 U.S. 1 (1894); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d ed. 1997)). *Shively* 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." *Shively*, 152 U.S. at 52 (citations omitted). However, the *Shively* decision did not involve the issue of whether a state can extinguish the public trust easement when it conveys trust lands into private ownership.

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) "where an important public interest is promoted."[221]

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.[222] Under a lineal title approach, the dividing line for title purposes is exactly the same as the dividing line for public rights.[223] Courts adopting this approach view the public trust doctrine as rooted in ownership and divide coastal property into public and private fee simples.[224] Thus, under the lineal title approach, no public rights exist on the private property side of the line.[225]

Courts that follow a lineal title approach draw a bright line between private and public property—both for title and for use rights.[226] However, this approach is a double-edged sword that can also limit private rights.[227] For instance, the New Jersey Supreme Court followed a lineal title approach in *Arnold v. Mundy*, denying private rights to harvest oysters.[228] 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.[229]

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

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221. Kilbert, *supra* note 10, at 33 (citing SLADE ET AL., *supra* note 220).

222. *See* Blumm, *supra* note 26, at 657. This Article builds on terms advanced by Professors Blumm and Rose, distinguishing 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. *Id.* at 655–59 (citations omitted).

223. *See id.* at 657.

224. *See id.*

225. *See id.*

226. *See id.*

227. Professor Blumm described the New Jersey Supreme Court's approach in *Arnold v. Mundy* as typifying a lineal approach, as 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." *See* Blumm, *supra* note 26, at 655–56 (quoting Martin v. Waddell, 41 U.S. (16 Pet.) 367, 418 (1842)) (citing Arnold v. Mundy, 6 N.J.L. 1, 50 (N.J. 1821)).

228. *See Arnold*, 6 N.J.L. at 76–78.

229. Blumm, *supra* note 26, at 657.

public trust doctrine in the public/private beach zone.[230] While a minority of courts applies what this Author calls a "fixed" theory of public trust rights,[231] a majority of courts applies an "evolving" theory.[232] Under a fixed theory, courts freeze public rights as those recognized in seventeenth century England and at the founding of the United States: the triumvirate of commerce, navigation, and fishing.[233] In contrast, under an evolving theory, courts reject the notion that public trust rights are strictly enumerated and define these rights to reflect society's values, needs, and current uses of trust property.[234]

The decision by the Maine Supreme Court in *Bell v. Town of Wells* (*Bell II*)[235] exemplifies a fixed theory of common law public rights.[236] In that case, 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.[237] The court saw these public rights as "long-established property rights" in the form of an easement on private fees that the state could not simply alter to accommodate new public needs.[238] To do so, according to the court in *Bell II*, may run afoul of "constitutional prohibitions on the taking of private property without compensation."[239] 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 would be "no more burdensome" on the private landowner.[240]

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."[241] Proponents of the theory critique the evolving public rights theory on the grounds that such an open-ended interpretation of public uses would make private property rights on

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230. *See* Kilbert, *supra* note 10, at 58.

231. *See* Donahue, *supra* note 37, at 599.

232. *See id.* at 599–600 (citations omitted).

233. *See, e.g.*, Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 173–74 (Me. 1989) (citations omitted) (explaining that the Colonial Ordinance of 1641-47 of the Massachusetts Bay Colony fixed public rights in the seventeenth century by reserving "out of the fee title granted to the upland owner a public easement only for fishing, fowling, and navigation").

234. *See, e.g.*, Opinion of the Justices, 649 A.2d 604, 609 (N.H. 1994) ("Rights of navigation and fishery 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 . . . ." (quoting Concord Mfg. Co. v. Robertson, 25 A. 718, 721 (N.H. 1890))) (internal quotation marks omitted).

235. 557 A.2d 168 (Me. 1989).

236. *Id.* at 169.

237. *Id.*

238. *Id.*

239. *Id.* (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 expanded the common law easement).

240. *Id.* at 175.

241. *See id.* at 169.

beaches ephemeral and uncertain.[242] For instance, the court in *Bell II* was concerned that, if it recognized a new general recreation easement allowing the public not only to walk, but also to sunbathe, picnic, play sports, or swim, private beaches would become indistinguishable from public beaches specifically acquired by the government for those general purposes.[243] As this Article explains further in Part 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.[244]

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.[245] While some courts apply a fixed theory of public rights to deny the public the right to walk on beaches,[246] others—such as courts in Michigan and North Carolina—include beach walking in the fixed historic rights of "passage and repassag[e]."[247]

In contrast, courts that apply an evolving theory of public rights recognize protections for beach walking,[248] access for scuba diving,[249] or protections for general recreation in the public/private beach zone[250]—and even beyond that zone, into the privately held uplands.[251] In situations in which a private property owner takes title to the low-water mark, courts apply an evolving theory of

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242. *Id.* at 174, 175 (citing Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974)) (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").

243. *See id.* at 176.

244. *See infra* Part V.

245. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005) ("[W]alking along the lake shore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation . . . .").

246. *See Bell II*, 557 A.2d at 176–79 (citations omitted) (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, hinging on the fixed theory of public rights); Opinion of the Justices, 313 N.E.2d at 566 (applying a fixed theory of public rights to determine that the new right of passage on foot constituted an unconstitutional taking).

247. *See, e.g.*, *Glass*, 703 N.W.2d at 62, 74 (citing Arnold v. Mundy, 6 N.J.L. 1, 12 (N.J. 1821)) (holding that beach walking is inherent in the exercise of traditional public trust rights); West v. Slick, 326 S.E.2d 601, 617, 618 (N.C. 1985) ("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 respondent's property is well established beyond need of citation.").

248. N.J. Sports & Exposition Auth. v. McCrane, 292 A.2d 545, 579 (N.J. 1972).

249. McGarvey v. Whittredge, 28 A.3d 620, 624 (Me. 2011).

250. Cinque Bambini P'ship v. State, 491 So. 2d 508, 512 (Miss. 1986) (citing Treuting v. Bridge & Park Comm'n of Biloxi, 199 So. 2d 627, 632–33 (Miss. 1967)).

251. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365–66 (N.J. 1984) (evaluating factors to determine that passage across private beaches and use of private beaches is incidental and necessary to the enjoyment of public recreational rights in tidelands); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54–55 (N.J. 1972) ("[W]here the upland sand area is owned by a municipality . . . the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms . . . .").

public rights to protect public rights in the public/private beach zone for multiple uses, ranging from access for scuba diving to ecological protection.[252]

For example, *Marks v. Whitney* exemplifies an evolving theory of common law public rights. In that case, the court determined whether the respondent could fill and develop tidelands to which he had title when such actions would cut off his neighbor's access to the ocean.[253] The California Supreme Court described public rights as "sufficiently flexible to encompass changing public needs" and held that the court was "not burdened with an outmoded classification" of rights.[254] The court included as protected public trust rights—based on "a growing public recognition" of its importance—"the preservation of those [tide]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."[255] Thus, the 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 the tidelands to which he held title.[256] The court reasoned that Marks' *jus privatum* was subject to public rights to protect the area as an open natural space.[257] Similarly, as explained further in Part V, courts in New Jersey, New Hampshire, Maine, Minnesota, and Wisconsin have explicitly adopted an evolving theory of public trust rights.[258]

V. BEACH ACCESS CASES

A majority of states maintains the division of title between private owners and the state at the mean or ordinary high-water mark—consistent with the nature of the property the federal government transferred to the states when they entered the Union.[259] In these high-water states, beach walking is usually allowed in the public/private beach zone.[260] Even in high-water states, however,

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252. *See* Marks v. Whitney, 491 P.2d 374, 380–81 (Cal. 1971) (denying tideland development and recognizing ecological protections that would limit public access to land to which the owner had title in a high-water state, and recognizing ecological protection as a public trust use); *McGarvey*, 28 A.3d at 636 (allowing access for scuba diving in a low-water state).

253. *See Marks*, 491 P.2d. at 377, 380–81 (citing Colberg, Inc. v. State, 342 P.2d 3, 12 (Cal. 1967)).

254. *Id.* at 380 (citing *Colberg*, 342 P.2d at 12).

255. *Id.* at 380. The court similarly noted that it was not necessary for it to "define precisely all the public uses which encumber tidelands." *Id.*

256. *See id.* at 380, 381 (citing *Colberg*, 342 P.2d at 12).

257. *Id.* at 381.

258. *See infra* Part V.

259. Frey & Mutz, *supra* note 25, at 910 n.20; Stephanie Showalter, *No Right to Walk Between High Water Mark and Water's Edge*, 3:2 SANDBAR, July 2004, at 1, 6–7, *available at* http://nsglc.olemiss.edu/SandBar/archives/vol3/2/index.html.

260. *See, e.g.*, West v. Slick, 326 S.E.2d 601, 618 (N.C. 1985) (finding that "passage by the public by foot, vehicle and boat must be free and substantially unobstructed over the entire width of the foreshore"). North Carolina is an example of a state in which the right of public access to

boundary issues arise when individual deeds purport to grant title to land within or below the public/private beach zone.[261] In those cases, the court's theory of coastal property rights influences how the court interprets the deeds. Recall that the California Supreme Court applied a sovereignty theory in *Marks v. Whitney*, concluding that an easement existed in the public/private beach zone—thus

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beaches for walking, as well as all forms of recreation, has long been recognized and protected. *See* N.C. GEN. STAT. § 1-45.1 (2011) (declaring that "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 (N.C. Ct. App. 2005) (citing Friends of Hatteras Island Nat'l Historic Mar. Forest Land Trust for Pres., Inc. v. Coastal Res. Comm'n of N.C., 452 S.E.2d 337, 348 (N.C. Ct. App. 1995)). The dividing line of ownership is the mean high-tide line on the North Carolina coast. N.C. GEN. STAT. § 77-20 (2011); *West*, 326 S.E.2d at 617–18 (quoting Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 177 S.E.2d 513, 516 (N.C. 1970)). In *West v. Slick*, the North Carolina Supreme Court referred to this demarcation line as reflecting a "long established rule that littoral rights do not include ownership of the foreshore." *West*, 326 S.E.2d at 617. *West* did not directly address beach walking, but revolved around a dispute regarding property owners' ability to establish a neighborhood public road, or public road by prescription or dedication, across neighboring land. *Id.* at 602 (citing N.C. GEN. STAT. § 136-67 (2011)). 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. *See id.* For instance, although the beach below the mean high-tide line is public property, a littoral owner has the right to place a pier in this area. *Id.* These littoral rights are like a private easement on public land. *Id.* at 618. 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.* at 617 (quoting *Carolina Beach Fishing Pier*, 177 S.E.2d at 516). 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.* (quoting *Carolina Beach Fishing Pier*, 177 S.E.2d at 516). Without explanation or references, the court simply declared that "[t]he long standing right of the public to pass over and along the strip of land lying between the high-water mark and the low-water mark adjacent to respondents' property is well established beyond need of citation." *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. Kalo, *supra* note 23, at 1501, 1503–04 (citing 15A N.C. ADMIN. CODE 07H.0309(d)(1) (2002), *available at* http://www.nccoastalmanagement.net/Rules/Text/t15a_07h.pdf). After *West*, North Carolina codified the "customary free use and enjoyment of the ocean beaches" enjoyed by the people of the State of North Carolina "from time immemorial." N.C. GEN. STAT. § 77-20(d)–(e); *West*, 326 S.E.2d at 601. When faced with a constitutional challenge to this provision, the North Carolina Court of Appeals did not reach the merits: the litigants voluntarily dismissed the claim based on the state's position that the provision did not create a public easement over the dry sand area of the beach. *Fabrikant*, 621 S.E.2d at 24, 31. However, Professor Joseph Kalo asserted that, in North Carolina, the public has a common law customary right to use dry sand oceanfront beaches, regardless of title. Kalo, *supra* note 23, at 1432 n.13.

261. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 379 n.5 (Cal. 1971) (citing Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 15–16 (1935); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892); City of Long Beach v. Mansell, 476 P.2d 423, 437 (Cal. 1970); City of Oakland v. Oakland Water-Front Co., 50 P. 277, 295 (Cal. 1897)) (discussing the nature of California's public trust lands where tidelands were "patented as tidelands to [the plaintiff's] predecessor in title").

reconciling a patent to the land down to the low-tide line in a state in which tidal property is held by the state up to the high-tide line.[262] 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.[263]

Beach access in the United States varies not only between states,[264] but also within the same state.[265] As noted, the property and common law theories applied by a court, as well as the extent to which a court relies on English common law, influence the outcome for public beach access.[266] This is most readily observed when comparing decisions from states that share common legal foundations. Parts V.A and V.B demonstrate this point by analyzing cases from the former Massachusetts Bay Colony and from the former Northwest Territory around the Great Lakes.

A. The 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 upon a shared legal foundation: the Massachusetts Bay Colony's Colonial Ordinance of 1641-47.[267] Under the Colonial Ordinance, private property ownership extended from the uplands to the low-tide mark.[268] The Ordinance modified

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262. *Marks*, 491 P.2d at 379 (quoting People v. Cal. Fish Co., 138 P. 79, 87 (Cal. 1913)) (defining tidelands as the land extending up to the mean high-tide line and explaining that California holds the tidelands in trust, but still recognizing private patents to some tidelands to the low-tide line).

263. *See id.* at 381 (citing Newcomb v. City of Newport Beach, 60 P.2d 825, 829 (Cal. 1936); Atwood v. Hammond, 48 P.2d 20, 24 (Cal. 1935)).

264. *Compare* Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974) ("[I]t was held that the public rights in the seashore do not include a right to use otherwise private beaches for public bathing." (citing Butler v. Att'y Gen., 80 N.E. 688, 689 (Mass. 1907))), *with* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 358 (N.J. 1984) (noting that the "[t]he public's right to use tidal lands and water encompasses navigation, fishing, and recreational uses . . ." in low-water New Jersey (citing Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972))).

265. *Compare Matthews*, 471 A.2d at 359 (stating that beach access was limited to municipal residents by quasi-municipal organization), *with Borough of Neptune City*, 294 A.2d at 49–50 (citing Borough of Neptune City v. Borough of Avon-by-the-Sea, 274 A.2d 860, 861 (N.J. Super. Ct. Law Div. 1971)) (stating that municipal beach access was available only to nonresidents who pay fees).

266. *Compare* Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 181 (Me. 1989) (noting that state law determines public rights in intertidal land as "derive[d] from the prevailing interpretation of the English common law" to arrive at fixed view), *with* McGarvey v. Whittredge, 28 A.3d 620, 628, 636 (Me. 2011) (citing Shively v. Bowlby, 152 U.S. 1, 11 (1894)) (noting that, while state public trust doctrine derives from English common law, characterization of scuba diving as "navigation" under common law is not dispositive of the outcome).

267. *See Michaelson*, 173 N.E.2d at 275; *McGarvey*, 28 A.3d at 628–29.

268. *See Michaelson*, 173 N.E.2d at 275.

seventeenth century English common law in the intertidal area[269]—or public/private beach zone—"to encourage commercial wharf development at private expense."[270] 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.[271]

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. However, the supreme courts in Maine and Massachusetts have followed different legal theories, producing divergent results.[272] In *McGarvey v. Whittredge*, the Maine Supreme Court took a sovereignty approach and found a public trust easement, coupled with an evolving common law public rights theory,[273] and recognized public access for scuba diving.[274] However, the Maine Supreme Court and Massachusetts Supreme Court previously applied the lineal title approach and fixed common law public rights theory—in the Maine case of *Bell v. Town of Wells* (*Bell II*)[275] and in the Massachusetts cases of *Michaelson v. Silver Beach Imp. Ass'n, Inc.*[276] and *Opinion of the Justices*[277]—and denied public access for recreation as well as for simply beach walking.[278]

In 2011, the Maine Supreme Court addressed the question of whether the public has the right to walk across the public/private beach zone to reach the ocean for scuba diving in *McGarvey v. Whittredge*.[279] The court traced the legal development of private ownership and public rights in this zone back to its origins in English common law and the easement approach that overlaps *jus privatum* and *jus publicum*.[280] After recounting the transfer of property under the equal footing doctrine, the court explained that Maine modified its common law to allow private ownership to the low-water mark; however, similar to English common law, this property is "subject to the public trust rights reserved to the State."[281] The court sought a legal interpretation that balanced what it

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269. The *intertidal area* is the zone between ordinary high and low tides.

270. *McGarvey*, 28 A.3d at 626. Interestingly, the New Hampshire Supreme Court rejected the "Massachusetts law that adopted the low-water mark as the boundary between public and private ownership." Opinion of the Justices, 649 A.2d 604, 608 (N.H. 1994) (citing Concord Mfg. Co. v. Robertson, 25 A. 718, 729 (N.H. 1890)).

271. *McGarvey*, 28 A.3d at 629–30 (citing ME. CONST. art. X, §§ 3, 5).

272. *See, e.g.*, *id.* at 634–36 (taking a strong easement approach and applying a common law public rights theory); Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974) (taking a title approach and applying a fixed common law public rights theory).

273. 28 A.3d 620 (Me. 2011).

274. *See id.* at 634, 636.

275. 557 A.2d 168 (Me. 1989).

276. 173 N.E.2d 273 (Mass. 1961).

277. 313 N.E.2d 561 (Mass. 1974).

278. *See Bell II*, 557 A.2d at 169, 175; Opinion of the Justices, 313 N.E.2d at 567; *Michaelson*, 192 N.E.2d at 275, 278, 280.

279. *McGarvey*, 28 A.3d at 623.

280. *See id.* at 628 (citing Shivley v. Bowlby, 152 U.S. 1, 11–13 (1894)).

281. *See id.*

called the "solidly established" rights of private property owners in the intertidal zone with the public's "uninterrupted right to make appropriate use of those lands."[282] 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.[283]

This interpretation of the Colonial Ordinance presumes the continued existence of a public trust easement unless explicitly altered.[284] Similar to the United States Supreme Court in *Illinois Central*, the Maine Supreme Court cited to Sir Matthew Hale's Treatise from 1787 in *McGarvey* to describe in greater detail the *jus privatum* and *jus publicum* distinction between private title and public use rights.[285]

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 which public uses of this zone were protected within the *jus publicum*.[286] 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.[287] However, unlike the Maine Supreme Court decision in *Bell II*—highlighted above as exemplifying a fixed theory of common law public rights[288]—the *McGarvey* court underscored the need for the common law to be flexible to maintain its relevance to contemporary life.[289] In so doing, the court stated that its "interpretation of the public trust rights has recognized that some intertidal activities have come into favor and eventually fallen out of

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282. *See id.* at 630.

283. *Id.* at 631.

284. *See id.*

285. *See id.* ("For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of an [sic] highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or damnified." (quoting Hale, *supra* note 46, at 35)); *see also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1892) ("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." (quoting Hale, *supra* note 46, at 22)).

286. *See McGarvey*, 28 A.3d at 636.

287. *Id.* at 629 (citing JOHN J. WHITTLESEY, LAW OF SEASHORE, TIDEWATERS AND GREAT PONDS IN MASSACHUSETTS AND MAINE xxxvi–xxxvii (1932)).

288. *See supra* Part IV.B.

289. *See McGarvey*, 28 A.3d at 624 (quoting Pendexter v. Pendexter, 363 A.2d 743, 749 (Me. 1976) (Dufresne, C.J., concurring)).

use . . . such as the use of the intertidal lands for pre-automobile travel and the use of those lands for driving and resting cattle."[290]

The court recounted that Maine's court decisions recognized a variety of public trust rights bearing 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 engaging in activities for pleasure, business, or sustenance.[291]

Despite these expansions of the traditional scope of public rights, the *McGarvey* court was mindful not to "unreasonably interfere" with riparian rights.[292] The Maine Supreme Court had previously applied a fixed common law theory in *Bell II* and held that intertidal lands did not include a general recreation easement.[293] By contrast, the *McGarvey* court rejected the notion that public trust rights are strictly enumerated rights.[294] To limit public uses forever to those uses that were in favor in the seventeenth century—as the *Bell II* court did—would severely restrict the use of this public/private beach zone to people who walk "with a fishing rod, a gun, or a boat . . . ."[295] Instead, the *McGarvey* court focused on whether crossing the intertidal zone for scuba diving was "among the purposes consistent with the common law of the *jus publicum*, even when such access is for activities that do not strictly fall within the triumvirate of descriptors."[296] The *McGarvey* court reasoned that the *jus publicum* included the public's right of passage and repassage, holding that public rights include the right to walk across the intertidal zone to access the ocean for scuba diving.[297] 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."[298] Comparing the *McGarvey* and *Bell II* decisions of the Maine 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. Similar to the littoral owners in Maine, littoral owners in Massachusetts

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290. *Id.* at 632.

291. *See id.* (citing State v. Lemar, 87 A.2d 886, 888 (Me. 1952) (digging for worms); Barrows v. McDermott, 73 Me. 441, 447–48, (1882) (business or sustenance); Deering v. Proprietors of Long Wharf, 25 Me. 51, 64–65 (1845) (landing a boat)).

292. *See id.*

293. *See id.* at 633 (citing Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 176 (Me. 1989)).

294. *See id.* at 635.

295. *See id.*

296. *Id.* at 634. A concurring opinion of three justices criticized this approach, arguing that crossing the intertidal zone to access the ocean for scuba diving fits within the seventeenth century navigational use of the zone. *See id.* at 642 (Levy, J., concurring).

297. *Id.* at 636 (quoting Hale, *supra* note 46, at 36).

298. *See id.* (quoting Hale, *supra* note 46, at 36).

hold title down to the low-water mark.[299] However, the reasoning and outcome for public beachgoers' rights was markedly different in *Michaelson v. Silver Beach Imp. Ass'n, Inc.*[300] than in Maine's *McGarvey* decision.[301] The coastal property in question in *Michaelson* contained a sea wall at the low-water mark.[302] Applying a lineal title theory, the court determined that the state's property began where private property ended at the seawall and extended into the ocean.[303] The Massachusetts Supreme Court decided *Michaelson* in 1961—eleven years after the State of Massachusetts 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."[304] 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 continuing to use 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.[305]

The *Michaelson* court was silent on English common law and the concept of a *jus publicum* easement burdening the private estate.[306] Instead, the court relied exclusively on state law, likening 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.[307] 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*, placing the newly created property in the state's domain.[308]

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299. *See* Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 275 (Mass. 1961); *McGarvey*, 26 A.3d at 626.

300. 173 N.E.2d 273 (Mass. 1961).

301. *Compare id.* at 275 (applying a fixed common law public right theory and holding littoral owners' rights extended to low-water mark, subject only to public rights of navigation, fishing, and fowling), *with McGarvey*, 28 A.3d at 634–36 (citations omitted) (applying an evolving common law public rights theory—rejecting the notion that public rights are strictly enumerated—and holding that public rights include access for scuba diving).

302. *Michaelson*, 173 N.E.2d at 275.

303. *See id.* (quoting Home for Aged Women v. Commonwealth, 89 N.E. 124, 125 (Mass. 1909)).

304. *See id.* at 274.

305. *See id.* at 280. This decision was based on an interpretation of the Colonial Ordinance of 1641-47, under which "private ownership along the tide waters was extended to the 'low-water mark' . . . subject to the public rights of navigation, fishing, and fowling." *Id.* at 275 (quoting Butler v. Attorney Gen., 80 N.E. 688, 689 (Mass. 1907)).

306. *See id.* at 275–80.

307. *See id.* at 277–78.

308. *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2612 (2010) (affirming 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, not an accretion, and thus the newly created land did not belong to the littoral property owner). Unlike an *accretion*, which is a gradual buildup of land, an *avulsion* is a sudden buildup of land, which does not entitle

Also motivating the decision was the court's view of public rights as fixed in the seventeenth century: according to the court, 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."[309] The state has "no power to build beaches for bathing purposes without compensating the littoral owners . . . ."[310] This is a particularly striking opinion, given that the state added sand to property clearly in the public domain below the low-tide line.[311] 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 seem to indicate a different result.

Similarly, in an advisory opinion, the Massachusetts Supreme Court considered whether a proposed bill creating an "on-foot right-of-passage" in the intertidal zone was permissible.[312] The *Opinion of the Justices*[313] case 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.[314] The court noted that it was "unable to find any authority that the rights of the public include a right to walk on the beach."[315] 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.[316] However, where private property runs to the low-water mark and beach walking is not seen as fitting within seventeenth

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the littoral property owner to a change in the property boundary. *See id.* at 2598 (citing Cnty. of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 66–67 (1874); Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Ass'n, 512 So. 2d 934, 936 (Fla. 1987)). According to the Florida Supreme Court, "if 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.* at 2611. The U.S. Supreme Court—unlike the Massachusetts Supreme Court in *Michaelson*—based its decision entirely on finding that the state action at issue was an avulsion, without regard to whether the public trust rights included beach recreation and bathing. *See id.*; *Michaelson*, 173 N.E.2d at 277–78. Additionally, many beach renourishment projects now involve federal funding and the Army Corps of Engineers, requiring public access easements for all nourished beaches. *See, e.g.*, Chiesa v. D. Lobi Enter., No. C-296-06, 2012 WL 4464382, at *1 (N.J. Super. Ct. App. Div. Sept. 28, 2012) (involving circumstances in which the Army Corp of Engineers required a state to certify prior to construction of a beach replenishment project that it obtained permanent public access easements for all nourished beaches).

309. *See Michaelson*, 173 N.E.2d at 277.

310. *Id.*

311. *See id.* at 274, 277.

312. Opinion of the Justices, 313 N.E. 2d 561, 564–66 (Mass. 1974).

313. 313 N.E. 2d 561 (Mass 1974).

314. *See id.* at 566.

315. *Id.* at 567.

316. *See id.*; *see, e.g.*, Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 50, 53) (N.J. 1972) (discussing public rights in New Jersey, where the property boundary is at the high-water mark).

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.[317]

Thus, although both Maine and Massachusetts draw the private title line at the ordinary low-tide line,[318] 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.[319] However, in Massachusetts, where the court views public rights as fixed in the seventeenth 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.[320]

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

Like the shared historical origins of Maine and Massachusetts in the Massachusetts Bay Colony's Colonial Ordinance of 1641-47,[321] the Great Lakes states of Wisconsin, Michigan, Ohio, and Minnesota have mutual origins in the Northwest Territory.[322] For areas that were part of the Northwest Territory before statehood, the Northwest Ordinance of 1787 is generally considered part

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317. *See id.* at 568. The Supreme Court of Maine similarly held that Maine's Public Trust in Intertidal Land Act, which created a comprehensive recreational easement and recognized public rights beyond the traditional scope of the Colonial Ordinance, was an unconstitutional taking without compensation. *See* Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 179 (Me. 1989). 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. *See id.* at 174. Further, in *Groves v. Secretary, Department of Natural Resources & Environmental Control*, a Delaware court mirrored the Massachusetts Supreme Court's analysis while applying a state law that recognizes private littoral title to the low-water mark. *See* C.A. No. 92A-10-003, 1994 WL 89804, at *5–6 (Del. Super. Ct. Feb. 8, 1994) (citations omitted). The *Groves* court stated that the public trust rights in states in which littoral owners' title stops at the high-water mark were "of no value at all" to decide the case. *See id.* at *5. While private property owners in Delaware need to accommodate the "superior" public rights to navigate and fish in the foreshore, these rights do not include "access to the foreshore for walking and/or recreational activities." *See id.* at *6. Thus, the court opined that, if a court or legislature grants such a public right, "the State will have to compensate the affected landowners for a takings [sic]." *Id.* The court's decision, while recognizing some limited overlapping rights in the foreshore, did not refer to English common law and the rights included in the *jus publicum* in this public/private beach zone. *See id.* at *5–6 (citations omitted). It also ascribed to a fixed theory of the common law—one that recognizes public rights related only to navigation and fishing. *See id.* at *6 (citing Bickel v. Polk, 5 Del. (5 Harr.) 325, 325 (1851); Oceanport Indus., Inc. v. Delaware, Civ. A. No. 12553, 1993 WL 181297, at *4 (Del. Ch. May 18, 1993); State v. Pa. R.R. Co., 237 A.2d 579, 580 (Del. Super. Ct. 1967), *aff'd*, State *ex rel.* Buckson v. Pa. R.R. Co., 267 A.2d 455 (Del. 1969)).

318. McGarvey v. Whittredge, 28 A.3d 620, 626 (Me. 2011).

319. *See id.* at 626, 635, 636.

320. *See* Opinion of the Justices, 313 N.E.2d at 567–68.

321. *See supra* Part V.A.

322. *See* NORTHWEST ORDINANCE OF 1787 § 1, *reprinted in* 1 U.S.C. at LVII (2012).

of the foundation of each state's public trust doctrine: this Ordinance, in essence, required each state to hold all navigable waters, as well as the lands beneath and between them, in trust for the public's shared use and enjoyment.[323] Specifically, the Northwest Ordinance declared navigable waters and "the carrying places" between them as "common highways" that were to be "forever free" for all inhabitants of the territory.[324]

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.[325] Similar to case law in Maine, Wisconsin's decisions are inconsistent with regard to theory, law, and results.[326] Michigan and Minnesota clearly find a public trust easement in the public/private beach zone.[327] And Ohio provides a distinct outlier example of a lineal title approach at work.[328]

Michigan's *Glass v. Goeckel*[329] 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.[330] With 3,288 miles[331] of Great Lakes coastline, Michigan has more coastline than any other state, with the exception of Alaska;[332] accordingly, the decision has had an extensive impact within Michigan's borders, and it provides a modern and historically grounded template for other states wrestling with beach access disputes.

In *Glass v. Goeckel*, the court upheld the public's right to enjoy beach walking in the public/private beach zone along Michigan's vast Great Lakes

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323. *Id.* § 12 art. IV, *reprinted in* 1 U.S.C. at LIX (2012).

324. *Id.*

325. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 62, 73–74 (Mich. 2005) (concluding that all land below ordinary high-water mark is held in trust for the public and applying a fixed common law theory to allow beach walking based on a traditional right of passage); State v. Korrer, 148 N.W. 617, 623 (Minn. 1914) (citations omitted) (holding that, while private property runs to the low-water mark and Minnesota's property law is informed by common law, each state is free to determine property rights suitable to each state's conditions).

326. *See, e.g.*, R.W. Docks & Slips v. Wisconsin, 628 N.W.2d 781, 787, 790 (Wis. 2001) (citing State v. Trudeau, 408 N.W.2d 337, 341 (Wis. 1987)) (declaring that the state has always held title up to the high-water mark, applying the public trust easement theory, and holding that private rights below the ordinary high-water mark are limited and subordinate to public trust rights); Doemel v. Jantz, 193 N.W. 393, 398 (Wis. 1928) (declaring that private property extends to the low water mark, applying a lineal title theory, and holding that beach walking in the normal public/private beach zone, without water present, was a trespass on the private riparian owner's property).

327. *See Glass*, 703 N.W.2d at 73; *Korrer*, 148 N.W. at 623.

328. *See* State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 948 (Ohio 2011).

329. 703 N.W.2d 58 (Mich. 2005).

330. *See id.* at 61.

331. This is the equivalent of 5,294 kilometers.

332. *Great Lakes Facts and Figures*, GREAT LAKES INFORMATION NETWORK, http://www.great-lakes.net/lakes/ref/lakefact.html (last visited Oct. 26, 2013). The total shoreline of the Great Lakes in the United States and Canada—including connecting channels, mainland, and islands—is 10,900 miles, or 17,549 kilometers. *Id.*

coastline.[333] An easement approach based on a sovereignty theory infused this decision; however, rather than relying on an evolving common law theory, the court grounded beach walking rights in the traditional public trust rights of "passage."[334]

The dispute in *Glass v. Goeckel* arose when a lakefront property owner brought a trespass claim against a neighbor for walking along the public/private beach zone.[335] In that case, the private landowner along Lake Huron held "title to the water's edge."[336] 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."[337] The Michigan Supreme Court drew the line between public and private property along the Great Lakes at the ordinary high-water mark, explaining that all land below that mark was held in trust for the public.[338] However, the court acknowledged that some lakeshore property deeds—such as the one before it—described private property boundaries below this mark.[339] Like the deeds involved in the California case of *Marks v. Whitney*,[340] or the Ohio case of *State ex rel. Merrill v. Ohio Dep't of Natural Resources*, deeds in Michigan may set the private property boundary at the low-water mark, or water's edge, which is somewhere below the ordinary high-water mark.[341] However, *unlike* the Ohio Supreme Court, Michigan rejected the lineal title approach that "private title necessarily ends where public rights begin."[342]

Given the existence of these variable terms in deeds, the court needed a legal theory that reconciled private title descriptions that were seemingly at odds with state ownership of navigable waters up to the ordinary high-water mark.[343] The

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333. *Glass*, 703 N.W.2d at 62.

334. *See id.* at 63–64, 73–74.

335. *Id.* at 61.

336. *Id.*

337. *Id.* at 63 n.5.

338. *See id.* at 62. "Michigan's courts have adopted the ordinary high-water mark as the landward boundary of the public trust." *Id.* at 69.

339. *See id.* at 70.

340. 491 P.2d 374 (Cal. 1971).

341. *Marks*, 491 P.2d at 377, 379; *Glass*, 703 N.W.2d at 70; State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 940 (Ohio 2011).

342. *Compare Glass*, 703 N.W.2d at 70 (holding that the "boundary of the public trust need not equate with the boundary of a landowner's littoral title"), *with Merrill*, 955 N.E.2d at 948 (determining that the "natural shoreline" delineates the boundary between public and private property).

343. If the issue of validity of private ownership lakeward of the ordinary high-water mark had been raised in Wisconsin, the court's reasoning may have been different because of Wisconsin's clear prohibition against any conveyance of lakebed for purely private purposes. *See* Priewe v. Wis. State Land & Improvement Co., 67 N.W. 918, 922 (Wis. 1896). Although Wisconsin's legislature has made grants of public trust property, that property may only be used for public purposes, and such grants do not operate to transfer the legal title from the state. City of Madison v. State, 83 N.W.2d 674, 678 (Wis. 1957). Further, the rights vested in grantees of trust property are extremely limited: the state merely gives the grantee the ability to use the property—a privilege that is revocable at any time. *See id.* For instance, the legislature gave the City of Madison permission to

court in *Glass v. Goeckel* applied a sovereignty theory that led to the finding of a public trust easement,[344] while also distinguishing private title from public rights.[345] Similar to the California Supreme Court in *Marks v. Whitney*,[346] 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."[347]

Similar to the Wisconsin Supreme Court in *R.W. Docks & Slips v. Wisconsin*, the Michigan Supreme Court highlighted that, on navigable waters, public rights limit private title—a concept that is "vital" to public trust law.[348] 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 to protect 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.[349] The court declared that "the sovereign must preserve and protect navigable waters for its people."[350]

Thus, the Michigan Supreme Court reconciled potential conflicts between private title and public rights by recognizing an easement that accommodates the coexistence of private title and public rights.[351] Drawing on historic English common law concepts of *jus privatum* and *jus publicum*, the court dissolved the potential dissonance.[352] To the 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

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use trust property to build a civic center on Lake Monona, while continuing to vest ownership and trust responsibilities in the state. *See id.* at 675, 678. Continued use of that trust property, however, does not give Madison title to the property. *See id.* at 678. A lakebed grant in Wisconsin is conceptually like the state granting a private easement on public lands.

344. *See Glass*, 703 N.W.2d at 65, 74, 75.

345. *Id.* at 70.

346. 491 P.2d 374 (1971).

347. *Glass*, 703 N.W.2d at 65 (emphasis added); *see Marks*, 491 P.2d at 382 (citing Yates v. Milwuakee, 77 U.S. (10 Wall.) 497, 504 (1870)). In Wisconsin, the state cannot convey property to the lakebed below the ordinary high-water mark. Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901). Wisconsin did allow private title to river beds—but, like Michigan, Wisconsin only did so while preserving public trust protections. Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914) (citing Willow River Club v. Wade, 76 N.W. 273 (Wis. 1898)).

348. *Glass*, 703 N.W.2d at 65, 68 (asserting that, for navigable waters, a vital distinction exists between private title and the public rights limiting that title); R.W. Docks & Slips v. Wisconsin, 628 N.W.2d 781, 788 (Wis. 2001) (asserting that the rights of riparian owners are subject to the interest of the state and rights of the public in navigable waters (citing State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983))).

349. *See Glass*, 703 N.W.2d at 62, 65. At one point in the decision, the court clearly stated that "the state lacks the power to diminish those [public trust] rights when conveying littoral property to private parties." *Id.* at 62.

350. *Id.* at 63.

351. *See id.* at 69–70.

352. *See id.*

title, the boundary of the public trust need not equate with the boundary of a landowner's littoral title."[353] Private title and public rights "may overlap" as they did under English common law.[354] Thus, the *Glass v. Goeckel* court concluded that "private title of littoral landowners remains subject to the public trust beneath the ordinary high-water mark."[355] 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."[356]

Based on its finding of an inalienable public trust easement, the Michigan Supreme Court rejected the court of appeals' lineal title approach to coastal rights, which—just like Wisconsin's 1923 decision in *Doemel v. Jantz*[357]—granted the private property owner exclusive use of the beach.[358] The Michigan Supreme Court described the grant of 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."[359]

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.[360] Although the court considered littoral rights to be property, the court also noted that 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.[361] 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

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353. *Id.* at 70.

354. *Id.* at 70, 76.

355. *Id.* at73.

356. *Id.* at 70. *See also* Bess v. Cnty. of Humboldt, 5 Cal. Rptr. 2d 399, 401 (Cal. Ct. App. 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); State v. Korrer, 148 N.W. 617, 623 (Minn. 1914) (stating that, even if a riparian owner holds title to the ordinary low-water mark, the owner's title is absolute only to the ordinary high-water mark, and the intervening shore space between high- and low-water mark remains subject to the rights of the public); 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, 585 (Pa. 1958) (subjecting private title held to low-water mark to public rights up to high-water mark); Flisrand v. Madson, 152 N.W. 796, 801 (S.D. 1915) (stating that, even if a riparian owner holds title to the ordinary low-water mark, the owner's title is absolute only to the ordinary high-water mark and the intervening shore space between high- and low-water mark remains subject to the rights of the public).

357. 193 N.W. 393 (Wis. 1923).

358. *Compare Glass*, 703 N.W.2d at 61, 71 (rejecting the court of appeals' lineal title approach), *with Doemel*, 193 N.W. at 398 (granting riparian owners exclusive use of the beach).

359. *Glass*, 703 N.W.2d at 61.

360. *See id.* at 71, 78.

361. *Id.* at 73 n.24 (quoting Hilt v. Weber, 233 N.W. 159, 168 (Mich. 1930)).

alienate: public rights held pursuant to the public trust doctrine."[362] Its rationale is nearly identical to the Wisconsin Supreme Court's reasoning in *R.W. Docks* regarding the limitations of riparian rights that overlap with public rights in the water.[363] Thus, *Glass v. Goeckel* and *R.W. Docks* 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.[364]

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 . . . ."[365] Pursuant to Article IV of the Northwest Ordinance of 1787—the "forever free" provision—the court said it "must protect the Great Lakes as 'common highways.'"[366] Hence, Michigan's "public trust doctrine permits pedestrian use of [the] Great Lakes, up to and including the land below the ordinary high-water mark."[367]

The court described this public trust right as a "common sense assumption," noting agreement among the litigants that walking along the shore falls within traditionally protected public trust rights.[368] A "right of passage over land below the ordinary high-water mark" is necessary to engage in other protected public rights of "fishing, hunting, and navigation for commerce or pleasure."[369] The court noted that other states, such as New Jersey and Connecticut, have also recognized a right of passing and repassing as part of the public use of waters.[370] The court reasoned that "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."[371]

Similar to the Maine Supreme Court's *McGarvey* decision, the *Glass v. Goeckel* decision focused on the traditional rights of passage and repassage contained within the public trust easement.[372] However, while the Maine

362. *Id.* at 78.

363. *See id.*; R.W. Docks & Slips v. Wisconsin, 628 N.W.2d 781, 787 (Wis. 2001).

364. *See Glass*, 703 N.W.2d at 65, 78; *R.W. Docks*, 628 N.W.2d at 790.

365. *Glass*, 703 N.W.2d at 62.

366. *Id.* at 74 (quoting NORTHWEST ORDINANCE OF 1787 § 12 art. IV, *reprinted in* 1 U.S.C. at LIX (2012)).

367. *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, concluding that a "plaintiff does not interfere with defendants' property rights when she walks within the public trust." *Id.* at 75.

368. *Id.* at 73–74.

369. *Id.* at 74.

370. *See id.*

371. *Id.*

372. *See* McGarvey v. Whittredge, 28 A.3d 620, 636 (Me. 2011) (noting Maine's history of private ownership and how public trust rights have always allowed the public to "cross the wet sand

Supreme Court more clearly endorsed an evolving theory of the common law 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 historical and contemporary use of the public/private beach zone.[373] *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.[374] 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.[375] 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."[376]

In a contrasting decision from another former Northwest Territory state, the Ohio Supreme Court applied a lineal title approach and favored exclusive use by private property owners along Lake Erie.[377] That case addressed structures built along the shore that implicated beach walking.[378] 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.[379] Similar to Michigan's *Glass v. Goeckel* private property owner, these lakefront property owners claimed their deeds showed that their boundaries extended farther into the lake than this mark.[380] In 2011, the Ohio Supreme Court determined in *State ex rel. Merrill v. Ohio Dep't of Natural Resources* that the public trust on Lake Erie did not extend to the ordinary high-water mark, but instead stopped at the natural shoreline, which is below the ordinary high-water

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to reach the ocean"); *Glass*, 703 N.W.2d at 74 (noting that, under the public trust doctrine, "the public has always held a right of passage in and along the lakes").

373. *Compare McGarvey*, 28 A.3d at 638–39 (expanding the public trust doctrine to include walking along the beach), *with Glass*, 703 N.W.2d at 62 (noting that, to use the beach for the traditionally protected rights under the public trust doctrine, one necessarily needed to walk along the shore).

374. *Glass*, 703 N.W.2d at 62.

375. *Id.* at 74 n.26. In contrast, New Jersey protects public rights in private uplands based on the public trust doctrine. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984).

376. *Glass*, 703 N.W.2d at 76.

377. *See* State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 950 (Ohio 2011).

378. *See id.* at 941. Although the Ohio Supreme Court decision in *Merrill* did not directly address beach walking, intervenors from the National Wildlife Federation and the Ohio Environmental Council argued about beach walking in the lower courts. *See* State *ex rel.* Merrill v. Ohio Dep't of Natural Res., Nos. 2008-L-007 & 2008-L-008, 2009 WL 2591758, at *11 (Ohio Ct. App. 2009). The Ohio Court of Appeals' opinion in *Merrill* discussed beach walking, *see id.* (providing that the public has a right to walk the shore but only lakeward of the water's edge), while the Ohio Supreme Court ultimately held that the public had no public trust right to use the shore above the natural shoreline. *See Merrill*, 955 N.E.2d at 950.

379. *See Merrill*, 2009 WL 2591758, at *1.

380. *See Glass*, 703 N.W. 2d at 61; *Merrill*, 2009 WL 2591758, at *1.

mark.[381] Thus, the *Merrill* court took a lineal title approach, making no reference to the *jus publicum* easement or English common law.[382]

One may infer from *Merrill* that the Ohio Supreme Court, contrary to the U.S. Supreme Court in *Illinois Central*, the Michigan Supreme Court in *Glass v. Goeckel*, or the Wisconsin Supreme Court in *Diana Shooting Club*, does not view the public trust doctrine as inherent in state sovereignty.[383] The opinion lacks any justification or rationale for its variance from maintaining public ownership of lands that the federal government transferred to Ohio when it entered the Union.[384] Instead, the court simply used a lineal title lens and applied a kind of quid pro quo reasoning 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."[385] The Ohio Supreme Court defined the title boundary as the same boundary for public rights; thus, the decision would likely preclude beach walking above the "natural shoreline."[386]

Minnesota has similarly drawn the private property boundary below the ordinary high-water mark: private property runs to the low-water mark in Minnesota.[387] However, unlike the *Merrill* court's decision in Ohio, the Minnesota Supreme Court recognizes a public trust easement in the public/private beach zone.[388] *State v. Korrer*[389] did not involve beach walking, but rather, it involved the rights of a riparian to mine ore in the public/private beach zone.[390] 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.

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381. *See Merrill*, 955 N.E.2d at 949. The court defined the *natural shoreline* as "the line at which the water usually stands when free from disturbing causes." *Id.* Although this demarcation line is somewhat vague, it is probably somewhere below the ordinary high-water mark. Ohio's approach is idiosyncratic and based on a codification of the boundary line by the Ohio General Assembly at the "natural shoreline." *See id.*

382. *See id.* at 950.

383. *Compare id.* at 949 (recognizing private property rights when the owner's deed included lands held in public trust), *with* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892) (stating that a state has ownership and control of land covered by tidal waters, subject to the interests of the public in the waters), Glass v. Goeckel, 703 N.W.2d 58, 88 (2005) (stating that the state's public-trust title is a function of its sovereignty) (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 452–53), *and* Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914) (providing that, "[a]s 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").

384. *See Merrill*, 955 N.E.2d at 946–50.

385. *See id.* at 948.

386. *See id.* at 948–49.

387. State v. Korrer, 148 N.W. 617, 623 (Minn. 1914).

388. *Compare id.* (recognizing a public trust easement in all the area between the high- and low-water mark), *with Merrill*, 955 N.E.2d at 949 (determining that the public trust stops at the natural shoreline below the high-water mark).

389. 148 N.W. 617.

390. *Id.* at 618.

The Minnesota Supreme Court described Minnesota's property law as informed by English common law,[391] but also clearly declared that each state is free to determine property rights suitable to each state's conditions[392]: "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."[393] The court analyzed English common law to assist in shaping Minnesota's property rules related to lakefront properties.[394] 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."[395]

After concluding that no uniformity existed 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 [the] low-water mark."[396] Nonetheless, the court recognized an easement in the public/private beach zone.[397] Although the riparian enjoys "proprietary privileges" in this zone, the state retains a superior right: "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."[398]

In Minnesota, private title is "limited or qualified by the right of the public to use the same for purpose of navigation or *other public purpose*."[399] The addition of the term "other public purpose" is consistent with an evolving theory of public rights. The Minnesota Supreme 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.[400] For example, in rejecting a commercial navigation test for whether the state held a water body in

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391. *See id.* at 620 (citing Schurmeier v. St. Paul & Pac. R.R. Co., 10 Minn. 82 (1914)).

392. *Id.* at 619 (citing Barney v. Keokuk, 94 U.S. 324, 338 (1876)).

393. *Id.* (citing *Barney*, 94 U.S. at 338). Further, the court reasoned that because the United States 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. *Id.* at 621 (citing Hardin v. Shedd, 190 U.S. 508, 519 (1903); St. Anthony Falls Water-Power Co. v. Bd. of Water Comm'rs, 168 U.S. 349, 359 (1897); *Barney*, 94 U.S. at 338; Franzini v. Layland, 97 N.W. 499, 502 (Wis. 1903)). According to the court, "if the riparian owner acquires it at all, it is by the concession or favor of the state which does own it." *Id.* (citing *Hardin*, 190 U.S. at 519; *Barney*, 94 U.S. at 338; *Franzini*, 97 N.W. at 502).

394. *See id.* at 618–19 (citations omitted).

395. *Id.* at 619.

396. *Id.* at 621.

397. *See id.* at 623.

398. *See id.* (citing State *ex rel.* Anderson v. Dist. Court of Kandiyohi Cnty., 137 N.W. 298, 300 (Minn. 1912); Gniadek v. Nw. Improvement & Boom Co., 75 N.W. 894, 894–95 (Minn. 1898); Carpenter v. Bd. of Comm'rs, 58 N.W. 295, 296 (Minn. 1894); Hanford v. St. Paul & D. R. Co., 44 N.W. 1144, 1145 (Minn. 1890); People *ex rel.* Burnham v. Jones, 20 N.E. 577, 579–80 (N.Y. 1889)).

399. *Id.* (emphasis added).

400. *See id.* at 618 (quoting Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893)).

trust, the court reconfirmed that "[t]o 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."[401]

Although no contemporary court decisions involve beach walking in Wisconsin, controversies over public access continue to emerge outside the courthouse.[402] 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.[403] The legal rights at issue in this and other controversies are confused by a Wisconsin Supreme Court decision issued around a decade after *Diana Shooting Club*, which erroneously drew the private property boundary at the low-water mark of a lake; this decision has not been explicitly overruled.[404] Indeed, *Doemel v. Jantz*[405] still stands as Wisconsin's singular published court decision on the right of the public to walk along lakeshores, and it exemplifies how the application of a lineal title approach and a fixed theory of the common law favors exclusive private use of the shore.[406]

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.[407] 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.[408] The court then identified seemingly conflicting decisions: some in

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401. *Id.* at 618 (quoting *Lamprey*, 53 N.W. at 1143) (internal quotation marks omitted). 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 did in this case. PPL Mont., LLC v. Montana, 132 S. Ct. 1215, 1235 (2012) (explaining that, "[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").

402. *See, e.g.*, McCoy, *supra* note 1 (discussing a controversy involving private property owners' attempt to block the public from accessing a privately owned neighborhood beach).

403. *See* McCoy, *supra* note 1.

404. *See* Doemel v. Jantz, 193 N.W. 393, 398 (Wis. 1923). In Wisconsin, it has long been settled that the state holds title in lakebeds 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." Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901); *see also* State v. Trudeau, 408 N.W.2d 337, 341, 342 (Wis. 1987) (citing *Bilot*, 84 N.W. at 856) (providing that title to the beds of all lakes extends to the ordinary high-water mark and, thus, declaring that those lakebeds cannot be part of private lands). Indeed, by 1901, the Wisconsin Supreme Court had addressed this issue "many times." *See Bilot*, 84 N.W. at 857 (citations omitted).

405. 193 N.W. 393 (Wis. 1923).

406. *See Doemel*, 193 N.W. at 397.

407. *See id.* at 394.

408. *See id.* at 395–96 (citations omitted). In Wisconsin, riparian ownership includes the right to build piers in aid of navigation, to use waters for domestic and agricultural purposes, and to protect upland soil from erosion. *Id.* at 396.

which the state held title to the high-water mark, such as *Illinois Steel v. Bilot*,[409] and others in which the private landowner held title to the low-water mark, such as *Mariner v. Schulte*.[410] 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*[411]—the *Doemel* court viewed the law through a lineal title property lens.[412] When a court applying a lineal title lens is faced with a case holding that the state boundary extends to the high-water mark and another case holding that the private property extends to the low-water mark, one case must be minimized, ignored, or otherwise distinguished. *Doemel* distinguished the *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 up to the high-water mark for the public to assert any protected public trust rights.[413]

Ultimately, the *Doemel* court erroneously concluded that "[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."[414] 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."[415] 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

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409. *See id.* at 397 (citing *Bilot*, 84 N.W. at 856).

410. *See id.* (citing Slauson v. Goodrich Transp. Co., 69 N.W. 990, 991 (Wis. 1897) (holding that private property boundary is the low-water mark); Mariner v. Schulte, 13 Wis. 775, 776 (1861) (holding that proprietors hold title down to the low-water mark)). The *Doemel* court explained that *Diana Shooting Club* stood for the proposition that "the public right to pursue the sport of hunting to the ordinary water high-water mark of a navigable river [exists] while the waters of the river actually extended to such mark." *Id.* at 398. However, this explanation ignores an 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.

Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914). Further, the *Diana Shooting Club* case involved a navigable river in which the private riparian held title to the center; it was not a case involving state title to the lakebed up to the ordinary high-water mark. *See id.* at 818. Additionally, the *Doemel* court misstated the holding in *Mariner v. Schulte*—involving a dispute on a river where private property boundaries ran to the center of the river—because the statement in that case about property boundaries on ponds and lakes was dicta. *See Mariner*, 13 Wis. at 776, 781.

411. *See Diana Shooting Club*, 145 N.W. at 819.

412. *See Doemel*, 193 N.W. at 398.

413. *See id.*

414. *See id.*

415. *Id.*

the world, excepting only where those rights conflict with the rights of the public for navigation purposes."[416]

The court then applied a fixed theory of public rights, focusing 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.[417] The court reasoned that because water is necessary for navigation, when water extends to the ordinary high-water mark, public rights accordingly extend to navigation on that water—but when the waters recede, so do public rights.[418] Therefore, the court held that beach walking in the public/private beach zone without water present was a trespass on the private riparian owner's property.[419]

If a beach walking dispute was revisited today in Wisconsin, a different situation would be presented: the *Doemel* 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 it is 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.[420] Moreover, although individual deeds may show property boundaries at the low-water mark or the water's edge of lakes, Wisconsin does not recognize the validity of those deeds,[421] and with regard to navigable rivers, the court has clearly applied a public trust easement to private title.[422]

Indeed, in the present-day decision of *R.W. Docks & Slips v. Wisconsin*,[423] 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

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416. *See id.*

417. *See id.* at 397, 398.

418. *See id.*

419. *See id.*

420. *See* R.W. Docks & Slips v. Wisconsin, 628 N.W.2d 781, 787 (Wis. 2001) (quoting State v. Trudeau, 408 N.W.2d 337, 341 (Wis. 1987)); *Trudeau*, 408 N.W.2d at 343–44 (quoting Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901)); Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 517 (Wis. 1952); Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914); *Bilot*, 84 N.W. at 856; *see also Waterway and Wetland Permits: Ordinary High Water Mark*, WIS. DEP'T OF NATURAL RES., http://dnr.wi.gov/topic/waterways/general_info/ohwm.htm (last visited Oct. 29, 2013) (acknowledging that the Wisconsin Supreme Court has ruled that the state owns title to lakebeds up to the ordinary high-water mark). Even with rivers and streams, in which the private riparian holds title to the center of the stream, that title is not absolute, but qualified, and must give way to public rights when a conflict arises. *See, e.g.*, *Muench*, 53 N.W.2d at 517–18 (quoting Franzini v. Layland, 97 N.W. 499, 502 (Wis. 1903)) (asserting the long-recognized property law that private title must give way to public rights).

421. *See Bilot*, 84 N.W. at 856. In 1901, the Wisconsin Supreme Court explained 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.*

422. *See Diana Shooting Club*, 145 N.W. at 819.

423. 628 N.W.2d 781 (Wis. 2001).

Union."[424] While riparian rights below that mark may coexist and overlap with public rights, they are limited by the public trust doctrine.[425] Although not a beach walking case, this public trust case provided important analysis and insight regarding property rights on state-held lakebed and beaches, as well as 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, was "encumbered by the public trust doctrine and heavily regulated from the get-go."[426] The court reasoned that, "If Docks had no private property right to place boat slips on the lakebed at the marina, it cannot have suffered an unconstitutional taking."[427] While Wisconsin recognizes longstanding 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."[428]

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."[429] 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 Department of Natural Resources' denial of a permit to dredge the lakebed and construct seventy-one boat slips on Lake Superior was not an unconstitutional taking of property.[430] 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 the finding of an easement that recognizes overlapping public and private rights,[431] was similarly echoed by the Supreme Court of Michigan in its 2005 beach walking decision in *Glass v. Goeckel*.[432] The court noted that "the 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."[433]

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424. *Id.* at 787 (quoting *Trudeau*, 408 N.W.2d at 341).

425. *See id.* at 790–91.

426. *See id.* at 790.

427. *Id.* at 787.

428. *Id.* at 788 (citing State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983)).

429. *Id.* at 790 (quoting Delta Fish & Fur Farms, Inc. v. Pierce, 234 N.W. 881, 883 (Wis. 1931)) (internal quotation marks omitted).

430. *See id.* at 788–89, 791.

431. *See* Glass v. Goeckel, 703 N.W.2d 58, 62, 65–66 (Mich. 2005) (quoting Shively v. Bowlby, 152 U.S. 1, 13 (1894)) (distinguishing between private title and public rights, and asserting that it is beyond the power of the state to diminish public rights when it conveys private title).

432. 703 N.W.2d 58 (Mich. 2005).

433. *Id.* at 64.

In sum, the states formed out of the former Massachusetts Bay Colony (Massachusetts and Maine), as well as those 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* decisions, Michigan's *Glass v. Goeckel* decision, and Minnesota's *Korrer* decision all applied a sovereignty theory that supported finding an inalienable public trust easement in the public/private beach zone.[434] This easement accommodates shared uses and public access.[435] 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.[436] Further, in understanding the scope of public trust rights, Maine's *Bell II* decision, Massachusetts' *Michaelson* and *Opinion of the Justices* decisions, and Wisconsin's *Doemel v. Jantz* decision 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.[437]

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 mark states of Maine and Massachusetts, a court that finds an inalienable public trust easement and applies an evolving common law theory will hold in favor of the public's right to cross the intertidal zone to scuba dive,[438] while a court taking a lineal title approach and applying a fixed public rights theory will advise that a proposed statute to secure beach walking rights is an unconstitutional taking.[439] 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 the walking takes place in the water.[440] However, in a Minnesota decision, the court recognized a public trust easement up to the high-

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434. *See* McGarvey v. Whittredge, 28 A.3d 620, 636 (Me. 2011) (quoting Hale, *supra* note 46, at 36); *Glass,* 703 N.W.2d at 65; State v. Korrer, 148 N.W. 617, 621 (Minn. 1914); *R.W. Docks*, 628 N.W.2d at 790; Diana Shooting Club v. Husting, 145 N.W. 816, 819 (Wis. 1914) (citing Hardin v. Jordan, 140 U.S. 371, 383 (1891)).

435. *See Glass*, 703 N.W.2d at 70.

436. *See* State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 950 (Ohio 2011).

437. *See* Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 169 (Me. 1989); Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974) (quoting Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 277 (Mass. 1961)); *Michaelson*, 173 N.E.2d at 277; Doemel v. Jantz, 193 N.W. 393, 395, 397 (Wis. 1923).

438. *See, e.g.*, *McGarvey*, 28 A.3d at 636 (holding that, pursuant to common law, public trust rights are at least broad enough to allow the public to cross intertidal lands and scuba dive).

439. *See, e.g.*, *Bell II*, 557 A.2d at 169, 179 (holding that an act declaring an unlimited right in the public to use intertidal land for recreation was unconstitutional because it amounted to the taking of private property without compensation); Opinion of the Justices, 313 N.E.2d at 568 (holding that a bill allowing physical intrusion onto privately owned shoreline would effectively appropriate the property to a public use, thus constituting an unconstitutional taking).

440. *See Doemel*, 193 N.W. at 395, 397, 398.

water mark, understanding the common law as evolving to protect multiple public purposes beyond commercial navigation.[441]

Accordingly, these cases show that, in low-water mark states—or when faced with deeds that 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.[442] In contrast, when justices see that the line for title purposes is not the same as the line for public rights purposes—and therefore recognize a public trust easement—the decisions accommodate multiple shared uses of the public/private beach zone.[443] If the justices follow a sovereignty theory, they will inevitably find a public trust easement in the public/private beach zone.[444] 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.[445]

Moreover, the application of a fixed theory of common law public rights can strengthen private property rights vis à vis the public. Under this theory, public use rights are limited to those originally recognized at the time the colonies separated from England.[446] 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 allowing beach walking or public recreation are an expansion of these fixed public rights and require compensation to private property owners.[447] However, a fixed

441. *See* State v. Korrer, 148 N.W. 617, 618–21 (Minn. 1914) (citations omitted).

442. *See Michaelson*, 173 N.E.2d at 278, 280; State *ex rel.* Merrill v. Ohio Dep't of Natural Res., 955 N.E.2d 935, 948, 950 (Ohio 2011) (quoting State *ex rel.* Squire v. City of Cleveland, 82 N.E.2d 709, 725–26 (Ohio 1948)); *Doemel*, 193 N.W. at 397, 398.

443. *See, e.g.*, *McGarvey*, 28 A.3d at 625, 636 (declaring that the court would continue to balance private ownership of tidal lands with public use of those same lands and holding that private ownership of such lands has always been subject to the public's right to cross them to reach the ocean); *Korrer*, 148 N.W. at 621–22, 623 (holding that a riparian owner's title extends to the low-water mark but is only absolute to the high-water mark and, thus, his title to the intervening space between the high-water and low-water marks is limited by the right of the public to use the same property for public purposes).

444. *See supra* Part IV.A.

445. *See, e.g.*, *Korrer*, 148 N.W. at 621 (holding that private title extends to the low-water mark but also finding an inalienable public trust easement in the land up to that mark).

446. *See supra* note 233 and accompanying text.

447. *See* Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 179 (holding that Maine's Public Trust in Intertidal Land Act, which created a comprehensive recreational easement, recognized public rights beyond the traditional scope of the Colonial Ordinance and was an unconstitutional taking without compensation); Opinion of the Justices, 313 N.E.2d 561, 567–68 (Mass 1974) (quoting Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 277 (Mass. 1961)) (advising that a proposed beach walking statute would be an unconstitutional taking).

theory does not necessarily exclude beach walking.[448] Michigan's *Glass v. Goeckel* decision also applied a fixed public rights theory to uphold beach walking rights as traditional public rights included in the "right of passage" and as necessary to effectuate other rights of fishing and navigation.[449] Michigan's court held that beach walking has always been recognized within the historic right of passage, as well as the Northwest Territory's "common highways" and "forever free" protections for navigable waterways.[450] 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 allowing beach walking in the public/private beach zone, several high-water mark states have expanded protections for public access and recreation onto beach uplands above the public/private beach zone. This Part highlights examples from New Hampshire, New Jersey, and California to demonstrate the potential Fifth and Fourteenth Amendment constitutional takings limitations on public beach access. The state interest 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 the statutory creation of a comprehensive beach program is a lawful exercise of the state's police power, the scope of the property involved in the program, as well as the methods employed to facilitate public access, impact whether it is an unconstitutional "taking" under the Fifth and Fourteenth Amendments, thus requiring the payment of just compensation.[451]

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."[452] It is highly unlikely that legislation providing public access and recreation on beaches could be shown to deny all economically beneficial or

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448. *See* Glass v. Goeckel, 703 N.W.2d 62, 73–74 (Mich. 2005) (applying a fixed theory, relying on the "traditionally articulated rights protected by the public trust doctrine," yet holding that walking falls within the scope of the public trust).

449. *See id.* at 74.

450. *See id.*

451. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008–09, 1027–28, 1029 (1992) (quoting S.C. CODE ANN. §§ 48-39-280(A)(2), -290(A) (1976 & Supp. 2012)).

452. *Id.* at 1015. Since *Lucas*, the Supreme Court clarified in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* that this rule applies narrowly to "cases in which the property is rendered valueless." John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 945 (2012) (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 329–31 (2002)). If a regulation does not constitute a per se taking, it may nonetheless be a taking under the *Penn Central* multifactor framework. *See Tahoe*, 535 U.S. at 326 & n.23 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633–34, 636 (2001) (O'Connor, J., concurring), *abrogation recognized by* Vasko v. United States, 112 Fed. Cl. 204 (Fed. Cl. 2013)).

productive use of private property. A more likely scenario would be 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.[453] The Supreme Court clarified that an easement allowing the public the right to pass may be considered a permanent physical invasion, despite the variable public usage and regardless of the economic impact.[454]

As with total regulatory takings, one may raise a background principles defense to a permanent physical invasion takings claim.[455] Thus, the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*[456] is relevant.[457] 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."[458] A primary issue that arises in the beach access context is whether the statute is merely codifying an existing public right and corresponding limitation on the private estate.[459] Such a background principles defense could bar a takings claim brought on a permanent physical invasion theory.[460] 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."[461]

This opens up an inquiry into background principles of the state's property laws.[462] As Professor Echeverria observed, the public trust doctrine provides a

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453. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982), *abrogation recognized by* Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y. 1989); Robert Meltz, *Substantive Takings Law: A Primer* 9 (Nov. 18, 2011).

454. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (quoting *Loretto*, 458 U.S. at 432–33 & n.9, 434–35).

455. *See* John R. Sand & Gravel Co. v. United States, 60 Fed. Cl. 230, 235 (2004), *vacated on other grounds*, 457 F.3d 1345 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008).

456. 505 U.S. 1003 (1992).

457. *See John R. Sand*, 60 Fed. Cl. at 235.

458. *Lucas*, 505 U.S. at 1027, 1031–32 (remanding to state court to determine whether a 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).

459. *See id.* at 1027 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

460. *See* Meltz, *supra* note 453, at 38. According to Meltz, "This is unsurprising, given that background principles go to the threshold determination whether the plaintiff had the property right alleged to be taken." *Id.* (citing *Lucas*, 505 U.S. at 1028–29; *John R. Sand*, 60 Fed. Cl. at 235; Kim v. City of New York, 681 N.E.2d 312, 318 (N.Y. 1997)).

461. *See Lucas*, 505 U.S. at 1028–29 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)). The Court in *Lucas* seemed to reject notions of changing times and the need to produce changing property rights. *See* Sax, *supra* note 142, at 945.

462. *See Lucas*, 505 U.S. at 1029.

background principles defense to a takings claim.[463] The public trust doctrine protects public rights to access and use those resources to varying degrees based on state law.[464] Thus, the public trust laws of each state shape a background principles defense to a takings claim related to public beach access.[465] Likewise, the federal equal footing doctrine and a sovereignty theory are relevant to this defense because they inform the threshold question of whether the plaintiff had the property right alleged to be taken.[466]

A consideration related to such a defense is whether background principles evolve over time or whether they are fixed at a certain point.[467] *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."[468]

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."[469] The fact that coastal property is highly regulated and 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 mark states—or even in high-water mark states—in which 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 constitute such a preexisting limitation on the private title.[470] The issue is inextricably tied to the concept that the state's trust responsibilities limit its sovereignty and prevent it from completely divesting trust property.[471] 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.[472] Several key state

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463. *See* Echeverria, *supra* note 452, at 955. In that article, Professor Echeverria argued that a property owner is not entitled to engage in an activity that harms trust resources. *Id.*

464. *See id.* at 959.

465. *See id.* at 967.

466. *See id.*

467. *See Lucas*, 505 U.S. at 1031.

468. *See id.*

469. Meltz, *supra* note 453, at 38 (noting that "RTC's occupation and seizure of failed S&L is not taking, given the absence of 'historically rooted expectations' of compensation in such circumstances" (citing Cal. Hous. Sec., Inc. v. United States, 959 F.2d 955, 958 (Fed. Cir. 1992)).

470. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 78 (Mich. 2005) (concluding 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").

471. *See id.*

472. *See, e.g.*, *Glass*, 703 N.W.2d at 78 (stating that states cannot alienate pubic trust rights); R.W. Docks & Slips v. Dep't of Natural Res., 628 N.W.2d 781, 787 (Wis. 2001) (providing that the state holds title to the beds of lakes, ponds, and rivers in trust to preserve for the public forever the enjoyment of those bodies of water (quoting State v. Trudeau, 408 N.W.2d 337, 341 (Wis. 1987))); Diana Shooting Club v. Husting 145 N.W. 816, 819 (Wis. 1914) (holding that the private title under the navigable river could not include the right to exclude the public from exercising public trust

supreme court decisions have addressed how this public trust easement weakens takings claims in the public/private beach zone: the private coastal estate has always been conditioned, limited, and regulated.[473] The Michigan Supreme Court summed it up: "The state cannot take what it already owns."[474] 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.[475]

This Part begins by focusing on a New Hampshire Supreme Court advisory opinion about a proposed state statute that would impact both the public/private beach zone, as well as the dry uplands above the high-tide line. In *Opinion of the Justices*, the court analyzed each zone differently, which demonstrates the divergent property interests in each zone.[476] Then, this Part 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 rights and public rights on the beaches; it also focuses on the United States Supreme Court's reaction to California's approach in *Nollan v. California Coastal Comm'n*.[477] This discussion illuminates the boundaries of takings claims related to public beach access, as well as recreation on the uplands and in the public/private beach zone.

1. New Hampshire

Unlike the neighboring states of Maine and Massachusetts, New Hampshire draws the private property boundary at the high-tide line.[478] Two years after the Supreme Court decided *Lucas,* the New Hampshire Supreme Court rendered its *Opinion of the Justices* decision, analyzing 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.[479] To this end, the proposed 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.[480]

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rights because "[i]t is beyond the power of the state to alienate [the river bed] freed from such rights" (citing People v. N.Y. & Staten Island Ferry Co., 68 N.Y. 71, 73–74 (1877); Priewe v. Wis. State Land & Improvement Co., 79 N.W. 780, 782 (Wis. 1899); FARNHAM, *supra* note 138, at 172)).

473. *See* cases cited *supra* note 472.

474. *Glass*, 703 N.W.2d at 78.

475. *See id.* at 74, 75, 78.

476. *See* Opinion of the Justices, 649 A.2d 604, 608 (N.H. 1994).

477. 483 U.S. 825 (1987).

478. *Compare* Opinion of the Justices, 649 A.2d at 608 (high-tide line private boundary), *with* McGarvey v. Whittredge, 28 A.3d 620, 628 (Me. 2011) (low-water mark private boundary), *and* Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 275 (Mass. 1961) (low-water mark private boundary).

479. *See* Opinion of the Justices, 649 A.2d at 606.

480. *See id.* at 609–10.

With regard to the recreational easement in the public/private beach zone, the justices grounded their analysis in English common law and the easement concept of a divided estate with separate *jus privatum* and *jus publicum*.[481] After the court declared that New Hampshire has always recognized public ownership below the high-water mark,[482] it explained that public ownership overlaps with private littoral owners' rights to use this zone and access the water.[483] While overlapping, the court clarified that private rights may not "unreasonably interfere with the rights of the public."[484]

Further, public rights in New Hampshire are not restricted to traditional navigation and fishing, as they are in neighboring Massachusetts.[485] The New Hampshire Supreme Court embraced an evolving theory of common law public rights, explaining 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 . . . ."[486] The court reasoned that because the phrase "all useful purposes" is broad enough to encompass the right to recreate, the proposed statute would merely codify the existing common law.[487]

In addition to recreation fitting within the contours of a public use right for all useful purposes, the court stated that a recreational right in the public/private beach zone is the same as the previously recognized public rights on the water to "boat, bathe, fish, fowl, skate, and cut ice."[488] 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 tied the recreational use to already recognized uses—albeit ones that are not necessarily part of the traditional triumvirate.[489] The court framed a recreational public use as a preexisting burden on private title, concluding 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

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481. *See id.* at 607–08 (citing Shively v. Bowlby, 152 U.S. 1, 11, 13 (1894)).

482. *Id.* at 608 ("[T]he 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." (quoting Concord Mfg. Co. v. Robertson, 25 A. 718, 730–31 (N.H. 1890) (internal quotation marks omitted))).

483. *See id.* at 609.

484. *See id.*

485. *Compare* Opinion of the Justices, 649 A.2d at 609 (recognizing public rights that extend beyond just navigation and fishing to include "all useful purposes," including recreational uses) (quoting *Concord*, 25 A. at 721), *with* Michaelson v. Silver Beach Improvement Ass'n, 173 N.E.2d 273, 277 (Mass. 1961) (restricting public rights to the "acknowledged public powers in the navigable waters" of navigation and fishing).

486. Opinion of the Justices, 649 A.2d at 609 (quoting *Concord*, 25 A. at 721) (internal quotation marks omitted).

487. *See id.*

488. *See id.* (quoting *Concord*, 25 A. at 721) (citing Hartford v. Town of Gilmanton, 146 A.2d 851, 853 (N.H. 1958)). These public uses, the court added, "include recreational uses." *Id.*

489. *See id.* (quoting *Concord*, 25 A. at 721) (citing *Hartford*, A.2d at 853).

to protect those same rights will not constitute a taking of property without just compensation."[490]

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 providing access to lands above this line is an unconstitutional taking because the public trust easement does not similarly burden uplands.[491] 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.[492] If a prescriptive easement exists, it might well represent a background principle that would defeat a takings claim.

The justices examined the factual difficulties in establishing a statewide prescriptive easement—which required a showing of adverse use on each tract for twenty years—stating that such an assertion was not within the power of the legislature, but rather, was reserved to the judiciary to decide on a case-by-case basis.[493] 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 that this section of the statute would be a taking without just compensation.[494] In reaching this conclusion, the court relied on the Supreme Court's decision in *Nollan v. California Coastal Commission*.[495] 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.[496]

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490. *Id.* Interestingly, this decision came two years after *Lucas* but did not cite that U.S. Supreme Court takings decision.

491. *See id.*

492. *See id.* at 610. According to the court: "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.* (quoting Mastin v. Prescott, 444 A.2d 556, 558 (N.H. 1982)) (internal quotation marks omitted).

493. *See id.* (citing *Mastin*, 444 A.2d at 558; 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.11[6], at 34–128 to 34–128.1 (Michael Allan Wolf ed., 2000)).

494. *See id.* at 611 (citing Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 178 (Me. 1989)).

495. *See id.* (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987)).

496. *See id.* Current New Hampshire law regulating beach access follows the 1994 *Opinion of the Justices*, providing:

> 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(I) (LexisNexis 2008). The purpose of section 483-C:1 in the New Hampshire statutes—which regulates public use of coastal shorelands—is "to recognize and confirm the historical practice and common law right of the public to enjoy the greatest portion of New Hampshire coastal shoreland, in accordance with the public trust doctrine subject to those littoral rights recognized at common law." *Id.* § 483-C:1(I). Additionally, "[a]ny person may use

2. New Jersey

In contrast to New Hampshire, New Jersey recognizes broad public recreational rights on the upland portion of beaches, grounding this recognition in the public trust doctrine.[497] In New Jersey, the state holds tidal lands in trust up to the mean high-tide line.[498] 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.[499]

New Jersey's courts have produced a collection of beach access decisions that arose out of various scenarios whereby the entity controlling the beach opened it to recreational use by only some people and sought to give preference to residents or to entirely exclude nonresidents.[500] In *Borough of Neptune City v. Borough of Avon-by-the-Sea*,[501] 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 non-residents."[502] The New Jersey Supreme Court based its holding on the public trust doctrine, which it described as a "deeply inherent right of the citizenry."[503] In that 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.[504] The municipality charged nonresidents more to access its municipal beach, access to which was necessary to reach the state-held public/private beach zone.[505]

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the public trust coastal shorelands of New Hampshire for all useful and lawful purposes, to include recreational purposes, subject to the provisions of municipal ordinances relative to the 'reasonable use' of public trust shorelands." *Id.* § 483-C:1(III).

497. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972).

498. *Id.* at 56 (Francis, J., dissenting).

499. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984); *Borough of Neptune City*, 294 A.2d at 56 (Francis, J., dissenting). Oregon also recognizes public rights to use upland beach areas, but bases this recognition on custom rather than the public trust doctrine. *See* State *ex rel.* Thornton v. Hay, 462 P.2d 671, 678 (Or. 1969).

500. *See Matthews*, 471 A.2d at 358 (involving a nonprofit association that restricted beach access to members who were residents of Bay Head); Van Ness v. Borough of Deal, 393 A.2d 571, 572, 574 (N.J. 1978) (involving a municipality that dedicated beach for residents only); *Borough of Neptune City*, 294 A.2d at 55 (addressing an ordinance by a municipality that charged higher beach usage fee to nonresidents).

501. 294 A.2d 47 (N.J. 1972).

502. *Id.* at 55. The court stated that "where 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.

503. *See id.* at 53.

504. *See id.* at 49.

505. *See id.* at 50–51.

The court rooted its decision in English common law and accounted for the original federal transfer of property to New Jersey.[506] The case provides an important articulation of the scope of public rights protected by the trust doctrine in New Jersey.[507] Unlike courts that fix public rights as those recognized at the time of statehood or earlier,[508] or courts that describe beach walking as part of the traditional public right of passage,[509] New Jersey explicitly subscribes to a common law theory 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.[510]

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 Ass'n.*[511] In *Matthews*, the New Jersey Supreme Court retraced the origins of public rights to access the sea through ancient Roman law and English common law.[512] The court affirmed *Borough of Neptune City*'s extension of the public trust doctrine to include bathing, swimming, and other shore activities as furthering and consistent with the state's "general welfare."[513] It also quoted approvingly from the Florida Supreme Court as follows:

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506. *See id.* at 51.

507. *See id.* at 53–54.

508. *See, e.g.*, Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 171, 173 (Me. 1989) (concluding that long and firmly established principles of property law, as received into the common law of Massachusetts, established that private property was subject only to the public rights of fishing, fowling, and navigation); Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (declaring that the rights reserved to the public are those preserved by the Colonial Ordinance, which specifies that the public is to retain the rights of fishing, fowling, and navigation).

509. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005) (providing that "walking along the lake shore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation"); West v. Slick, 326 S.E.2d 601, 617, 618 (N.C. 1985) (stating that "[t]he long standing right of the public to pass over and along the strip of land lying between the high-water mark and the low-water mark . . . is well established beyond need of citation").

510. *Borough of Neptune City*, 294 A.2d at 54; *see also* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (concluding that the public trust is not "fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit" (quoting *Borough of Neptune City*, 294 A.2d at 47)) (internal quotation marks omitted).

511. *Matthews*, 471 A.2d at 365–66.

512. *See id.* at 360–63 (citations omitted).

513. *See id.* at 363.

> 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.[514]

The New Jersey Supreme Court understood the import of its prior decision in *Borough of Neptune City* as recognizing that, 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 fore-shore."[515] These areas of the beach are "inseparable."[516] Similarly, *Van Ness v. Borough of Deal*,[517] which was decided only a few years after *Borough of Neptune City*, 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."[518]

In those cases, the New Jersey Supreme Court was not only moved by an evolving theory of public rights on trust property, but also articulated a doctrine that burdens adjacent municipal upland beaches that may be necessary to access and exercise public recreational rights.[519] Then, in *Matthews v. Bay Head Improvement Ass'n*, the court went beyond municipally-owned upland beaches and considered whether the public trust doctrine similarly required either a right of passage across private uplands to access the public/private beach zone or recreational use of the dry upland beach owned by a nonprofit beach club.[520] This beach club owned or leased the dry sand beach uplands and limited membership to municipal residents.[521] The club controlled public access to much of the beach along the Atlantic Ocean in the Borough of Bay Head because it owned the beachfront adjacent to seven of the nine roads in the Borough that ended at the beach.[522]

In reaching its landmark holding that extended 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*,[523] 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."[524] Relying on the *Blundell* dissent, the

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514. *Id.* (quoting White v. Hughes, 190 So. 446, 449 (Fla. 1939)).

515. *See id.*

516. *See id.*

517. 393 A.2d 571 (N.J. 1978).

518. *Matthews*, 471 A.2d at 363 (citing *Van Ness*, 393 A.2d at 573–74).

519. *See supra* notes 502–18 and accompanying text.

520. *See Matthews*, 471 A.2d at 358. The court characterized the beach club as a "quasi-public body." *Id.*

521. *See id.* at 359.

522. *See id.*

523. [1821] 106 Eng. Rep. 1190 (K.B.); 5 B. & Ald. 268.

524. *Matthews*, 471 A.2d at 364 (quoting *Blundell*, 106 Eng. Rep. at 1193, 1194; 5 B. & Ald. at 274–75 (Best, J., dissenting)).

court noted that Justice Best called disruption of this passage a public nuisance.[525] The court also pointed to the dissent's memorable warning that 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 [sic]."[526]

Drawing on this reasoning, the *Matthews* court held that the public trust doctrine requires private beach owners to accommodate the public's right of passage to access the ocean, as well as the public's right to recreate on dry upland beaches.[527] The court reasoned that not only would the public's right to access the ocean be meaningless without access across the upland beach to reach the foreshore,[528] but the "complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge," the absence of which may "eliminate the right to the recreational use of the ocean."[529] Moreover, the court stated that, "where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner."[530]

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."[531] The determination of what privately owned beaches are "required to satisfy the public's rights" depends on a balancing of multiple factors aimed at determining whether the public has "reasonable access" to the foreshore.[532] 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 the usage of the upland beach by the owner.[533] The court's ruling did not open all privately-owned beaches to the public, but it did expose private beaches to a possible right of access or right of

525. *Id.* at 364–65 (quoting *Blundell*, 106 Eng. Rep. at 1197; 5 B. & Ald. at 287 (Best, J., dissenting)).

526. *See id.* at 364 (citing *Blundell*, 106 Eng. Rep. at 1197; 5 B & Ald. at 287 (Best, J., dissenting)) (internal quotation marks omitted). Paradoxically, the majority opinion in *Blundell* was often cited in U.S. courts during that time for the position that "recreation was not a trust purpose that would support public use of waterways or adjacent riparian tidelands." Rose, *supra* note 26, at 757 (citing Nolan v. Rockaway Park Improvement Co., 28 N.Y.S. 102, 103 (N.Y. Gen. Term 1894)).

527. *See Matthews*, 471 A.2d at 364–65 (quoting *Blundell*, 106 Eng. Rep. at 1197; 5 B. & Ald. at 287 (Best, J., dissenting)).

528. *See id.* at 365–66.

529. *Id.*

530. *Id.* at 364.

531. *Id.*

532. *Id.* at 364.

533. *Id.* at 365–66.

use incidental to the bathing and swimming right—depending on the circumstances.[534]

An evolving theory of common law public rights clearly motivated the New Jersey Supreme Court in *Matthews*, just as it had in *Borough of Neptune City*.[535] The court saw the public trust doctrine as malleable enough to retain relevancy to changing social conditions, stating that "[a]rchaic judicial responses are not an answer to a modern social problem."[536] However, the court's heavy emphasis on English common law indicated that the New Jersey Supreme Court, similar to courts in New Hampshire and Michigan,[537] wanted to anchor public rights in more traditional legal bases.[538]

None of these cases, however, directly addressed a takings claim in relation to public trust access to private lands. In *National Ass'n of Home Builders of the United States v. New Jersey Department of Environmental Protection*,[539] the court considered the meaning of the *Matthews* factor test in relation to a takings claim under the U.S. Constitution.[540] The Homebuilders Association brought a takings challenge to a New Jersey rule requiring property owners to construct and maintain a thirty-foot-wide public walkway along the entire waterfront of their property as a condition of obtaining a development permit.[541] 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, and the court applied a different standard based on that distinction.[542]

As to the filled trust lands, the court subscribed to a sovereignty theory.[543] The court held that this land was still burdened by the trust and the private owners did not have the right to exclude the public from this property: the 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."[544] The court denied a takings challenge to the public trust portion of the property.[545] As to the non-trust uplands, upon which the state required perpendicular access to reach the waterway, the court held the applicable analysis was the *Matthews* "reasonably

534. *See id.* at 369.

535. *Id.* at 365 (citing Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972)).

536. *See id.*

537. *See* Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005); Opinion of the Justices, 649 A.2d 604, 609–10 (N.H. 1994) (quoting Concord Mfg. Co. v. Robertson, 25 A. 718, 721 (N.H. 1890) (citing Hartford v. Town of Gilmanton, 146 A.2d 851, 853 (N.H. 1958)).

538. *See Borough of Neptune City*, 294 A.2d at 51.

539. 64 F. Supp. 2d 354 (D.N.J. 1999).

540. *See id.* at 359.

541. *Id.* at 356.

542. *See id.* at 357–59.

543. *See id.* at 357–58.

544. *See id.* at 358.

545. *See id.*

necessary" factors, instead of the Supreme Court's takings test in *Dolan v. City of Tigard*.[546]

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 engage in recreational activities on state-held trust lands in the public/private beach zone;[547] a right to access upland municipal beaches, subject to reasonable regulation;[548] a right of passage;[549] and a right to engage in recreational activities 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 beach zone.[550] 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 also authorize the state to require the landowner to construct and maintain public walkways along the waterfront.[551]

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. This trust for public uses goes well beyond the traditional triumvirate of fishing, navigation, and commerce to include "nature preserves, swimming, boating, and walking."[552] The California constitution guarantees the public's right of access to tidelands, subject to reasonable regulation.[553] Moreover, through the state constitution, 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."[554] Finally, the California constitution directs that 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

546. *See id.* at 360 (citing Dolan v. City of Tigard, 512 U.S. 374 (1994)). The court then held that it lacked the factual record to determine whether the *Matthews* "reasonably necessary" test had been met. *See id.*

547. *See supra* notes 511–12 and accompanying text.

548. *See supra* note 502 and accompanying text.

549. *See supra* notes 528–31 and accompanying text.

550. *See supra* notes 533–35 and accompanying text. A takings issue was not analyzed or decided by any of these New Jersey cases. Although *Matthews* involved a privately owned beach, the owner was a beach club and the remedy was opening the club membership to nonresidents of the municipality. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 369 (N.J. 1984).

551. *See Nat'l Ass'n of Home Builders*, 64 F. Supp. 2d at 357–59.

552. CAL. COASTAL COMM'N, BEACHES AND PARKS FROM SAN FRANCISCO TO MONTEREY 11 (2012), *available at* http://www.coastal.ca.gov/books/12011.intro.pdf (last visited Nov. 7, 2013).

553. CAL. CONST. art. 10, § 4.

554. *Id.*

attainable for the people thereof."[555] 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 "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners."[556]

To this end, the California Coastal Commission operates a coastal access program that includes, as a program priority, creating a California coastal trail to increase public access to the entire California coast.[557] The commission researches and records prescriptive public access easements,[558] obtains easements from private property owners across the dry sand beaches,[559] and produces maps showing the public the location of these access points.[560] Additionally, the legislature enacted a statute expressly providing, with some exceptions, that "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects."[561]

In the dispute that gave rise to the United States Supreme Court decision in *Nollan v. California Coastal Commission*,[562] the state commission argued that it was carrying out its guidelines to further these constitutional and statutory objectives.[563] When reviewing the proposal to rebuild and expand a home along the Pacific Coast, the California 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.[564]

The Supreme Court reviewed this action in *Nollan* and ultimately held that the easement condition constituted a taking of property.[565] 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

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555. *Id.*

556. *See* CAL. PUB. RES. CODE § 30001.5(c) (West 2007).

557. *See Coastal Access Program*, CAL. COASTAL COMM'N, http://www.coastal.ca.gov/access/accndx.html (last visited Nov. 3, 2013).

558. *See Coastal Access Program: Prescriptive Rights Program*, CAL. COASTAL COMM'N, http://www.coastal.ca.gov/access/prc-access.html (last visited Nov. 3, 2013) ("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.").

559. *Id.*

560. *See id.*

561. CAL. PUB. RES. CODE § 30212(a) (West 2007).

562. 483 U.S. 825 (1987).

563. *See id.* at 857–58 (Brennan, J., dissenting).

564. *Id.* at 828 (majority opinion).

565. *See id.* at 838–39.

trust doctrine.[566] Although property law is defined by the state, the opinion largely dismissed California's constitutional guarantees of public access to the ocean.[567]

Instead, the Court focused on the existence of a physical occupation of land.[568] According to the Court, had the commission simply required the Nollans to provide a public easement, extinguishing their right to exclude on the easement path, then "no doubt there would have been a taking."[569] The question the Court wrestled with was whether requiring an easement as a condition for issuing a land use permit was a taking.[570] The Court assumed, without deciding, that it was a legitimate state interest[571] to allow the public to see the beach to "overcome [the] 'psychological barrier' to using the beach created by a developed shorefront, and prevent[] congestion on the public beaches."[572] However, the court stated that there must be a "nexus" between the land use condition and the legitimate public purpose.[573] Given the facts of the case, the Court held that 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 stated purpose of reducing "obstacles to viewing the beach created by the new house," the commission's actions constituted a taking.[574]

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.[575] Since *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."[576]

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566. *See id.* at 827.

567. *See id.* at 832. The majority opinion dismissed California law on this point by stating, "Most 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.*

568. *See id.*

569. *Id.* at 831. Justice Brennan disagreed with this point in his dissent, characterizing such an easement as "a mere restriction" on the property's use. *See id.* at 848 n.3 (Brennan, J., dissenting).

570. *See id.* at 834 (majority opinion).

571. In *Nollan*, the Court emphasized that 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.* (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (internal quotation marks omitted). However, the Court subsequently excised this standard from takings litigation in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 532 (2005). *See also* Meltz, *supra* note 453, at 2 (citing *Lingle*, 544 U.S. 528; *Agins*, 447 U.S. at 260) (discussing the development and demise of the substantive due process test).

572. *See Nollan*, 483 U.S. at 835.

573. *See id.* at 837.

574. *See id.* at 838.

575. *See id.* at 836–37 (recognizing that a land use prohibition, or a land use condition substituted for the prohibition, designed to protect the public's interests is a legitimate exercise of the police power rather than a taking).

576. *See* Peloso & Caldwell, *supra* note 26, at 93 (citing *Nollan*, 483 U.S. at 837).

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.[577] This decision does not go as far as a United States district court did in New Jersey: this court found that there would be no taking if the state action is in accord with the "reasonably necessary" factors established by the *Matthews* public trust doctrine decision.[578]

4. Concluding Observations: Takings and Public Access

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.[579] These cases also articulate an approach to public trust rights that is expansive enough to go beyond beach walking to encompass general beach recreation.[580] While New Hampshire applies an evolving theory of public rights to protect "all useful purposes" on trust lands[581] and New Jersey explicitly rejects an "archaic judicial response,"[582] both state supreme courts are unwilling to completely abandon tradition. Even assuming that courts have the authority to revise background principles of state law—in a manner consistent with *Lucas*[583]—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 that 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 that a statute that codifies such a 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.[584]

Although the New Jersey Supreme Court declared that 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.[585] The New Jersey Supreme Court found such support in a dissenting opinion that does not reflect the

577. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

578. Nat'l Ass'n of Home Builders of the U.S. v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 359, 360 (D.N.J. 1999).

579. *See supra* Part V.C.1–3.

580. *See supra* Part V.C.1–3.

581. *See* Opinion of the Justices, 649 A.2d 604, 609 (N.H. 1994) (quoting Concord Mfg. Co. v. Robertson, 25 A. 718, 721 (N.H. 1890)).

582. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).

583. *See supra* notes 454–68 and accompanying text.

584. *See* Opinion of the Justices, 649 A.2d at 609.

585. *See Matthews*, 471 A.2d at 363–65 (citations omitted).

accepted English common law in the 1800s, but nonetheless provides an argument that, historically, the public has been able to cross private land to reach the sea for bathing.[586] In holding that public trust rights may burden privately owned beaches above the mean high-tide line, the court relied on the public trust doctrine and rejected theories based on prescription, dedication, or custom.[587]

Unlike New Jersey, New Hampshire's Supreme Court advised that private uplands are not burdened with the public trust; thus, opening these lands to the public would take from the private owner the right to exclude others.[588] 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, such a determination had to involve a fact-specific inquiry at each beach, and not be accomplished through statewide legislation.[589]

In its discussion of property rights on the coast in *Nollan*, the Supreme Court applied 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.[590] Any crossing of that line onto private property is either a physical taking, if a direct public easement,[591] or a regulatory taking, if the land use restriction does not have a nexus that is roughly proportionate to a legitimate public purpose.[592] *Lucas* adds another layer of complexity to this analysis, which should arguably be the starting point: determining whether a public trust easement is a preexisting condition burdening private coastal titles.[593] 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.[594] This does not imply that the law must be fixed for all time

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586. *See id.* at 364 (citing Blundell v. Catterall, (1821) 106 Eng. Rep. 1190 (K.B.) 1193, 1194; 5 B. & Ald. 268, 274–75, 278 (Best, J., dissenting)).

587. *See Matthews*, 471 A.2d at 365 (citing Gion v. City of Santa Cruz, 465 P.2d 50, 59 (Cal. 1970); City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 675 (Or. 1969)) (rejecting the need to justify its decision based on prescription, dedication, or custom instead of the public trust doctrine).

588. *See* Opinion of the Justices, 649 A.2d at 611 (quoting Bell v. Town of Wells (*Bell II*), 557 A.2d 168, 178 (Me. 1989)).

589. *See id.* at 610, 611 (quoting 4 POWELL, *supra* 493, at § 34.11[6], 34–128 to 34–128.1).

590. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827, 828 (1987).

591. *See id.* at 831. Justice Brennan disagreed on this point in his dissent, characterizing such an easement as "a mere restriction" on the property's use. *See id.* at 848 n.3 (Brennan, J., dissenting).

592. *See id.* at 837 (providing the nexus test); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (providing the rough proportionality test).

593. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028–29 (1992).

594. The New Jersey decision in *National Association of Home Builders* provides an example of a case where state court-developed public trust factors overrode the *Nollan/Dolan* takings tests, but this is an outlier. *See* Nat'l Ass'n of Home Builders of the U.S. v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 358 (D.N.J. 1999); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts have Applied* Nollan *and* Dolan *and Where They Should Go from*

to constitute a background principle.[595] *Lucas* does not require that background principles must be fixed, but instead, leaves space for the law to evolve with society.[596]

VI. TOWARDS A THEORY THAT ACCOMMODATES 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.[597] 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."[598] However, beachfront property and the rights associated with it cannot be accurately understood in isolation from the longstanding public significance of beaches, the background principles of public trust and property law that inhere in the title,[599] and the natural forces that constantly reshape beaches. This property exists in relation to other parcels, the water, and the members of the public who use coastal areas. As Professor Sax observed about property more 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.[600]

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 alongside the lake and ocean commons, which are clearly held by the public.[601] The public/private beach zone of coastal property is where

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Here, 59 WASH. & LEE L. REV. 373, 381 (2002) (noting that, in the years since *Dolan*, lower courts have consistently applied the essential nexus test to land use exactions similar to those challenged in *Nollan* and *Dolan*).

595. *See Lucas*, 505 U.S. at 1031.

596. *See id.* The *Lucas* Court observed that "changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.*

597. Opinion of the Justices, 649 A.2d 604, 611 (N.H. 1994) (citing Burrows v. City of Keene, 432 A.2d 15, 19 (N.H. 1981)).

598. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987) (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)) (internal quotation marks omitted).

599. *See Lucas*, 505 U.S. at 1026–31.

600. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971).

601. *See supra* notes 11–13 and accompanying text.

these interests overlap and intersect.[602] 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 amenable 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.[603] This protection of the public interest has a positive spillover effect on the protection of private property interests as well.[604] This theory can lend itself to proactive, preventive state action to regulate multiple uses of the beach, rather than a reliance on litigation of nuisance claims after the fact.

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 unrecognized is the impact that these public trust decisions have on other coastal property owners. A lineal title approach has disturbing implications for private coastal landowners.[605] 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.[606] Paradoxically, decisions that favor the private fee

602. *See supra* note 14 and accompanying text.

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

604. *See id.*

605. *See supra* notes 225–28 and accompanying text.

606. *See* Kalo, *supra* note 23, at 1435 (listing littoral rights and not including right of shared use of shore with other littoral owners) (quoting JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 100, at 128–30 (3d ed. 1909)).

owner's right to exclude others from the public/private beach zone grant *fewer* use rights to littoral or riparian owners. 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 the 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.[607]

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.[608] 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.[609] 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.[610] The better view, consistent with hundreds of years of precedent in both American 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.[611]

Additionally, even in high-water states, deeds may be 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.[612] 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

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607. *See* Blumm, *supra* note 26, at 655–56 (discussing how the lineal theory precluded a riparian landowner from protecting oysters he planted in Raritan Bay (citing Arnold v. Mundy, 6 N.J.L. 1, 8, 32 (1821))).

608. This is the approach taken by the Ohio Supreme Court in *State ex rel. Merrill v. Ohio Department of Natural Resources*, 955 N.E.2d 935, 949, 950 (Ohio 2011). 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. Ken Kilbert, *Ohio Supreme Court Draws a Dividing Line on the Scope of the Public Trust Doctrine*, GREAT LAKES LAW (Sept. 16, 2011), http://www.greatlakeslaw.org/blog/2011/09/ohio-supreme-court-draws-a-dividing-line-on-the-scope-of-the-public-trust-doctrine.html.

609. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 65 (Mich. 2005) (holding that beach walking was contained within traditional public trust rights, despite being on private property).

610. *See* Abrams, *supra* note 26, at 898 (discussing how Minnesota allows title to pass to the littoral owners abutting Lake Superior all the way to the low-water mark, but how this title is nonetheless burdened by a paramount servitude that applies the public trust to the area below the ordinary high-water mark).

611. This is the position of the Michigan Supreme Court in *Glass*, 703 N.W.2d at 65, and the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892); it is also the position of legal scholars, including Professor Robert Abrams. *See* Abrams, *supra* note 26, at 898; *see also* Echeverria, *supra* note 452, at 951–52 (viewing the public trust doctrine as a constraint on government authority (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 452–55)).

612. *See Glass*, 703 N.W.2d at 70, 76.

maintain public trust rights in the public/private beach zone without extinguishing private title.[613] 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.[614]

Thus, the coastal estate is best understood as one that involves 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 footing doctrine.[615] A sovereignty theory is also most consistent with U.S. Supreme Court precedent in *Illinois Central* and *Shively*, in which the Court acknowledged state power to alter the state title boundaries after entering the Union, but conditioned that power on the preservation of public rights.[616]

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.[617] 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.[618] 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, but it has also been rejected under the same theory.[619] A fixed theory not only yields inconsistent results, but 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 seventeenth century—is too rigid a theory to ensure the continued

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613. *See id.* at 70.

614. *See id.* at 69–70.

615. *See id.* at 62.

616. *See* Shively v. Bowlby, 152 U.S. 1, 58 (1894); *Ill. Cent. R.R. Co.*, 146 U.S. at 458 (quoting People v. N.Y. & Staten Island Ferry Co., 68 N.Y. 71, 77 (1877)).

617. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365–66 (N.J. 1984) (applying the concept to dry upland beaches to ensure the public has "reasonable access" to public/private beach zone); Arnold v. Mundy, 6 N.J.L. 1, 71 (N.J. 1821) (applying the concept to reject a trespassing claim on oyster bed); Diana Shooting Club v. Husting, 145 N.W. 816, 819, 820 (Wis. 1914) (applying the concept to reject a trespassing claim on navigable rivers up to the ordinary high-water mark).

618. *See* Hannah Jacobs Wiseman, *Notice and Expectation Under Bounded Uncertainty: Defining Evolving Property Rights Boundaries Through Public Trust and Takings*, 21 TUL. ENVTL. L.J. 233, 293 (2008) (arguing that a more structured, yet evolving principle of property rights will create better notice and help solidify owner and user expectations).

619. *Compare Glass*, 703 N.W.2d at 62 (recognizing beach walking as contained within traditional public trust rights), *with* Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974) (rejecting Massachusetts' right of passage on foot law as not part of traditional public trust rights).

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 their very nature.[620] Even before the public trust easement is considered, coastal private lands have ambulatory boundaries that change over time by forces of nature: some of these natural forces are gradually adding or removing land (accretion and erosion), suddenly eliminating large swaths or the entirety of the private parcel by completely submerging it under water (avulsion), or creating a retreat of water that undermines investments in piers left high and dry (reliction).[621] With the climate-influenced rise of sea levels[622] and the lowering of certain lake levels,[623] the ambulatory nature of coastal property boundaries is even more visible in a shorter timeframe.

VII. CONCLUSION

Coastal properties are in flux due to the forces of nature to which they are 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.[624] In addition, they are subject to the state's public trust doctrine.[625] Against this universally understood backdrop of uncertainty in coastal private land ownership, public trust rights are simply one more acknowledgement that coastal property is unusually dynamic, and that the public/private beach zone is unsuitable for 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 the Wisconsin Supreme Court, these coastal properties are

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620. *See* Kalo, *supra* note 23, at 1437–38 (citing GOULD, *supra* note 23, at 310–11).

621. *See id.* (citing GOULD, *supra* note 23, at 310–11).

622. R.S. Nerem et al., *Estimating Mean Sea Level Change from the TOPEX and Jason Altimeter Missions*, 33 MARINE GEODESY 435, 441 (Supp. 2010), *available at* http://www.tandfonline.com/doi/pdf/10.1080/01490419.2010.491031.

623. *Great Lakes Water Level Observations*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: GREAT LAKES ENVIRONMENTAL RESEARCH LABORATORY, http://www.glerl.noaa.gov/data/now/wlevels/dbd/ (last updated Oct. 28, 2013) (showing below average lake levels for Lakes Huron and Michigan).

624. *See* U.S. CONST. art. I, § 8, cl. 3; Pisarski, *supra* note 209, at 313–14 (citations omitted) (discussing how the United States has authority through the Commerce Clause over control and improvement of navigation, including the ability to use land within the boundaries of navigable waters for purposes related to navigation and commerce, regardless of ownership and without compensation).

625. *See, e.g.*, Abrams, *supra* note 26, at 898 (asserting that states, such as Minnesota, are free to formulate their own public trust law, but they may not disregard the public trust altogether).

"encumbered by the public trust doctrine and heavily regulated from the get-go."[626]

Thus, a sovereignty theory of the public trust doctrine and state power ensures an inalienable public trust easement in the public/private beach zone, regardless of the 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 becomes 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.[627] Although not as relevant in the public/private beach zone, the takings prohibition serves to limit the state from encroaching above this zone, unless allowed by background principles of state property and public trust law.[628] 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.

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626. R.W. Docks & Slips v. Wisconsin, 628 N.W. 2d 781, 790 (Wis. 2001).

627. *See* U.S. CONST. amend. V ("private property [shall not] be taken for public use, without just compensation").

628. *See, e.g.*, Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 987 (9th Cir. 2002) (rejecting a takings claim by a private developer when the city denied approval to build on tidelands in the public/private beach zone protected by the public trust doctrine); Nat'l Ass'n of Home Builders of the U.S. v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354, 360 (D.N.J. 1999) (rejecting a takings claim by a homebuilders association when a state agency rule required developers to provide public walkways along the coast based on the public trust doctrine); McQueen v. S.C. Coastal Council, 354 S.C. 142, 146–47, 150, 580 S.E.2d 116, 118, 120 (2003) (rejecting a takings claim by a landowner when the Coastal Council denied approval to build on oceanfront land that had become submerged by erosion because it is protected by the public trust doctrine).

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