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WALKING THE BEACH TO THE CORE OF SOVEREIGNTY: THE HISTORIC BASIS FOR THE PUBLIC TRUST DOCTRINE APPLIED IN *GLASS V. GOECKEL*

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In 2004, a split panel of the Michigan Court of Appeals announced its conclusion that Michigan littoral owners of property owned to the water's very edge and could exclude members of the public from walking on the beach. In that instant almost 3300 miles of the Great Lakes foreshore became, in theory and in law, closed to public use. The case became the leading flash point of controversy between the vast public and ardent private property rights groups. A little more than one year later, the Michigan Supreme Court reversed that ruling as errant on public trust grounds and returned the legal rule to what had been the long accustomed practice—that the public enjoyed rights to traverse the Great Lakes coast of Michigan below the ordinary high-water mark. This Article offers extensive historical support for the public trust positions taken by the Michigan Supreme Court drawn from the Romans, the Medieval period in which modern concepts of sovereignty derived, and the English and American uses of the doctrine up through the end of the nineteenth century. These sources demonstrate that the public rights of use of the foreshore of this nation's great waters, including the Great Lakes, derive from the very essence of sovereignty as it is embedded in the American system of government. Accordingly, the public trust doctrine as received and expounded in this country is properly conceived of as an inherent limitation on the sovereign that no branch of government at either the state or federal level is free to ignore.

The Great Lakes are special; they are inland seas that hold one-fifth of the world's fresh surface water. The lakes are public resources that provide all citizens of the region with beauty and navigational and recreational opportunities of great value and importance. My Great Lakes experience compares with that of many. I grew up in Chicago a few hundred yards from Lake Michigan and spent a week or two during many summers along the lake's eastern shore in both Indiana and Michigan. Later, as the cycle of my life turned, I took my own children to spend part of their summer on several of those same beaches. We enjoyed the miles of lakefront, sometimes hiking along the beach, looking for the best waves or

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dunes or sand castle sites, other times walking back from where the wind and waves had pushed us, greeting the people fishing, shell collecting, or simply walking the beach. Looking shoreward from the water, there was always beach that everyone used, then the vegetation line, and above that there were dunes or gullies leading to the higher ground upon which were found private homes or resorts.

Almost without warning, a simple back lot-front lot easement dispute mutated into a threat to the public right to walk these shores—a right as old and venerable as the legal system itself. When Richard Goeckel and his wife Kathleen purchased lakefront property on Lake Huron in Alcona County, Michigan, the property was burdened by an express easement in favor of Joan Glass.[1] Goeckel[2] resisted Glass' use of the easement to the point where Glass sued to enforce its terms.[3] Goeckel initially asserted a counterclaim sounding in trespass, claiming use by Glass that exceeded the permissible extent of the easement. Goeckel later amended that pleading to add a separate counterclaim alleging that Glass had no right to do what she and millions of other users of Great Lakes beaches in Michigan had always done: walk laterally near the water's edge.[4] Goeckel asserted this counterclaim even though in deposition he admitted that he had no objection to Glass' practice and that he and others also regularly walked the beaches in front of the lands of the upland riparians. He went so far as to admit in his deposition that his view comported with the near-universal understanding of the relative rights to the beach at the water's edge: the right lay with the public.

> Q. Do strangers walk along the beach in front of your property on a regular basis?
>
> A. Yes.

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1. Joan Glass had held and used this easement continuously since 1967; the Goeckels bought the property over which the easement lies in 1997. Glass v. Goeckel, 683 N.W.2d. 719, 721 (Mich. Ct. App. 2004).

2. For the sake of simplicity, the term Goeckel is used rather than the plural even though the suit was filed in both names. *Glass*, 683 N.W.2d. at 721. Richard Goeckel was more active in the litigated events of the case. Pictures of the *Glass v. Goeckel* parties may be found at http://detnews.com/2005/metro/0503/10/C07-112832.htm and http://www.record-eagle.com/2005/feb/27beach.htm.

3. Glass v. Goeckel, 703 N.W.2d 58, 63 (Mich. 2005). *See also* Letter from Pamela Burt, Attorney for Glass, to Author (Oct. 26, 2006) (on file with University of Michigan Journal of Law Reform).

4. First Amended Counter Complaint at 21a, Glass v. Goeckel, No. 01-10713-CH(K) (Mich. Cir. Ct. Sept. 12, 2001).

Q. Travel over your property and other beach-front properties?

A. They're not traveling over my property. They're traveling next to the water's edge, which is the State of Michigan's property.

. . . .

Q. Do you walk yourself along the beach near the water line traveling across other people's property?

A. Yes, I do.

Q. That is the custom, as you understand it, for people to walk the beach freely along near the water?

A. Yes.

. . . .

Q. Okay. You indicated that you have no problem with strangers or anyone walking along the beach near the water's edge?

A. That's correct.

Q. And would that include walking on dry sand next to the water's edge? And by next to it I mean within a foot of the water's edge or two.

A. I have no problem with anybody doing that.

Q. So when people walk by on the beach in front of your home they don't walk in the water, their feet aren't wet?

A. That's fairly—that's pretty general. Some people walk in the water, some people walk on the sand. Depends if they got shoes on or they're barefoot.[5]

This colloquy gave no hint of the devastating abnegation of established public rights that, for slightly more than a year's time, emerged from this case. Indeed, Goeckel's words were a virtual admission that the counterclaim sounding in trespass along the water's edge was without legal merit and was not consonant with longstanding universal understandings acknowledged by both the public and upland riparians, including Goeckel himself.[6]

5. Deposition of Richard A. Goeckel at 17–19, 35, Glass v. Goeckel, No. 01-10713-CH(K) (Mich. Cir. Ct. Sept. 12, 2001).

6. The *Glass* case did not make a record on existing practice in regard to what areas of the foreshore have been historically used by the public and the nature of these uses. Reports in the press, however, leave no doubt that the public was accustomed to using the dry

In the circuit court, after hearing argument on cross motions for summary judgment,[7] the trial judge brokered an agreement of the express easement issues and, together with making an explicit ruling in favor of Glass rejecting the lateral trespass claim and recognizing the public right to walk along the beach, entered a judgment in favor of Glass.[8] The case should have ended there.

Goeckel did not adhere to the agreed settlement on the express easement issue. He subsequently was held in contempt and enjoined from further interference with the easement, and Glass was awarded attorney's fees.[9] According to Pam Burt, counsel for Glass, the award of fees apparently incensed Goeckel, and was the most likely reason for the appeal. The appeal initially centered on the fee award, and seemed to add a challenge to the beach walking ruling favoring the public as an afterthought.[10] The fee award was dismissed on the ground that, as a post-judgment matter, it lay outside of the appellate jurisdiction of the court of appeals.[11] A full seventeen months after Goeckel's appeal was filed, and ten months after amici ordinarily are permitted to file by court rules,[12] a radical

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sand areas of the beach up to what was the apparent high-water mark for walking and other pursuits. *See, e.g.*, John Flesher, *Sandy Footsteps Lead to Court: Case Could Decide Who Can Walk on Beach*, TRAVERSE CITY RECORD EAGLE, Feb. 27, 2005, http://www.record-eagle.com/2005/feb/27beach.htm; Keith Schneider, *Michigan Supreme Court Asked to Draw Line in the Sand: Arguments Heard to Allow or Ban Public from Great Lakes Beaches*, GREAT LAKES BULLETIN NEWS SERVICE, Mar. 19, 2005, http://www.mlui.org/landwater/fullarticle.asp?fileid=16829. When the Court of Appeals decision was first announced, it was described as "unexpected" in that it undercut longstanding practice. *See* Jess Piskor, *Court's Unexpected Order: Keep Off the Beach!, Great Lakes Bulletin News Service*, July 4, 2004, *available at* http://www.mlui.org/landwater/fullarticle.asp?fileid=16718. The majority in *Glass*, in its discussion of using the public trust to protect "traditional" public rights, stated that: "[w]alking the lakeshore below the ordinary high water mark is just such an activity, because 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." Glass v. Goeckel, 703 N.W. 2d. 58, 74.

7. First Amended Complaint at 23a, Glass v. Goeckel, No. 01-10713-CH(K) (Mich. Cir. Ct. Sept. 12, 2001). After the amended answer of Goeckel added the counterclaim relating to beach walking, Plaintiff Glass added a count for a declaration of her right, and that of the public, to walk along the water's edge below the ordinary high-water mark.

8. Glass v. Goeckel, No. 01-10713-CH(K) (Mich. Cir. Ct. June 25, 2002) (order establishing easement rights); Glass v. Goeckel, No. 01-10713-CH(K) (Mich. Cir. Ct. Apr. 3, 2002) (trial court opinion).

9. Letter from Pamela Burt, *supra* note 3.

10. *Id.*

11. Glass v. Goeckel, No. 01-10713-CH(K) (Mich. Ct. App. Oct. 22, 2002) (order regarding contempt of court and amending order establishing easement rights).

12. Michigan Court Rule 7.212(H) governs the filing of an amicus brief with the Court of Appeals, and states, in relevant part: "An amicus curiae brief may be filed only on motion granted by the Court of Appeals. The motion must be filed within 21 days after the appellee's brief is filed."

private property rights organization that had chosen for itself the public-spirited sounding name Save Our Shoreline (SOS), received special leave of court to file an amicus brief in the case on behalf of Goeckel.[13] The SOS brief seized on dicta in a 1930 Michigan Supreme Court Great Lakes reliction case, *Hilt v. Weber*,[14] that had incautiously taken language from a Wisconsin inland lakes case stating that the public has no right of passage over dry land between the low- and high-water mark because exclusive use is in the riparian[15] owner, although the title is in the state.[16]

The stage was set for a judicial overreaching of almost unimaginable magnitude. The impact of the Michigan Court of Appeals action dwarfs the infamous conduct of the Illinois Legislature in the landmark public trust case of *Illinois Central Railroad Co. v. Illinois*.[17] In *Illinois Central*, granting the port area fronting Chicago to private control was held to be illegal, an alienation of sovereignty that undercut the ability of subsequent legislatures to govern in the public interest.[18] In *Glass*, the court of appeals, in a stunning decision, privatized the entire Michigan Great Lakes foreshore area by

13. The initial claim of appeal from the circuit court was filed by the Goeckels on 6/15/2002; Ms. Glass' first Appellee's brief was timely filed on 12/26/2002; Ms. Glass timely filed an amended Appellee's brief on 01/23/2003 in response to an amended Appellant's brief filed by the Goeckels on 01/16/2003 in response to a 1/10/2003 court order. *See* Docket, Glass v. Goeckel, 683 N.W.2d 719 (Mich. Ct. App. 2004) (No. 242641). SOS' first attempt to file an amicus brief was denied as untimely on 12/03/2003; SOS then filed a motion to extend time to file a motion to file an amicus brief on 12/08/2003, and this motion was granted (and SOS's amicus brief accepted) on 12/18/2003. *See id.*

14. Hilt v. Weber, 233 N.W. 159 (Mich. 1930).

15. Parcels adjoining lakes and other standing bodies of water are properly called "littoral" and tracts along flowing water are called "riparian." *See* BLACK'S LAW DICTIONARY 1327 (6th ed. 1990). In common usage and in relevant legal content, littoral parcels are often described as riparian, because of that term's more general content associating it with adjacency to the water. *Id.* The *Glass* court properly uses the term "littoral" in describing parcels that are next to the Great Lakes, see JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 28 (4th ed. 2006), but many of the precedents do not use that same terminology and instead refer to lakeside parcels as riparian. This Article will use the term riparian to describe littoral parcels unless the use of the term littoral is necessitated by the context, such as describing the *Glass* opinions.

16. *Hilt*, 233 N.W. at 168 (citing Doemel v. Jantz, 193 N.W. 393 (Wis. 1923) (involving Lake Winnebago, a meandered inland lake)).

17. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). An interesting attempt to recast the action of the Illinois legislature in a more flattering light recently appeared. *See* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004). As discussed more fully below, even if the action of the Illinois legislature was not the perfidious giveaway that many have thought it to be, the principle of the case is unaltered—the sovereign cannot act in ways that are incompatible with its solemn trust obligations to the people whom it serves and for whom it must exercise its fiduciary duty to preserve trust assets. *See infra* notes 162–174.

18. *Illinois Central*, 146 U.S. 387.

denying any public rights or usufructs in land that was not inundated by the water of the Great Lakes at the moment of use.[19] Given that the prior usage had uniformly allowed the public use of the foreshore area to the high-water mark, that decision worked an immediate transfer of rights[20] from the public to the private riparian owners that affected the 3288 linear miles of Michigan's Great Lakes shoreline.[21]

The Michigan Supreme Court granted leave to appeal[22] and in a five-two decision reversed the Court of Appeals.[23] The five member majority opinion, authored by Justice Corrigan, held for Glass and in favor of the asserted public rights that attached under the public trust doctrine without regard to where legal title lay:[24]

> [W]hen the state (or entities that predated our state's admission to the Union) conveyed littoral property to private parties, that property remained subject to the public trust. In this case, the property now owned by defendants was originally conveyed *subject to specific public trust rights in Lake Huron and its shores up to the ordinary high water mark.* The ordinary high water mark lies, as described by Wisconsin, another Great Lakes state, 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."[25]

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19. Glass v. Goekel, 683 N.W.2d 719 (2004).

20. This Article will try to maintain a distinction between rights and usufructs on the one hand, and title or ownership on the other. Pragmatically, the rights and usufructs are most vital because, in all of the relevant regards, the important public interests are satisfied by use of the foreshore regardless of title and ownership. Title and ownership may be relevant in matters that are not of broad public concern, such as mineral deposits. *See infra* note 216.

21. *See* State of Michigan, Shorelines of the Great Lakes, http://www.michigan.gov/som/0,1607,7-192-29938_30245-15959–,00.html (last visited Feb. 26, 2007).

22. Glass v. Goeckel, 688 N.W.2d 91 (Mich. 2004).

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

24. The majority assumed the case under decision was one "where a private landowner ostensibly holds title to the water's edge." *Id.* at 61.

25. *Id.* at 62 (citing State v. Trudeau, 408 N.W.2d 337 (Wis. 1987)) (internal quotation marks omitted).

The two dissenters[26] would have allowed the public access to walk or use the foreshore in furtherance of other public trust purposes only in the water, or on the wet sand. Justice Young stated, "I believe it is only in this area of wet shoreline that the public may walk."[27] Justice Markman summarized his view as follows: "the littoral property owner's title extends to unsubmerged land and the public's legal rights under the public trust doctrine extend to the submerged lands, including the wet sands."[28]

Although the court majority staved off a grave threat to established public rights, the *Glass* case did not put the matter fully to rest. On a host of fronts, private property rights groups are claiming that government has overstepped the line and taken or debased their rights.[29] Justice Markman's dissent was particularly acerbic, accusing the majority of a litany of errors in the application of both doctrine and precedent.[30] Its fervor and veneer of logical consistency, although built on a totally flawed premise, will allow it to be replayed by litigants in other fora. Indeed, SOS is not the only group seeking privatization of the foreshore of the Great Lakes. In the neighboring state of Ohio, private riparian owners are seeking, through judicial[31] and legislative[32] means, to appropriate public property rights into exclusionary private ownership, and to extinguish public usufructs along the shore of Lake Erie. Of

26. The dissenters were Justices Young and Markman. All members of the court agreed that the case was not controlled by the Michigan Great Lakes Submerged Lands Act, MICH. COMP. LAWS. §§ 324.32501–324.32516 (2006), upon which the trial court had relied in fixing the high-water mark. *See Glass*, 703 N.W.2d at 62–63, 66, 79–81 (Young, J., concurring in part, dissenting in part), 95, 97 (Markman, J., concurring in part, dissenting in part). Accordingly, the opinions here referred to as dissenting, are opinions that concur in part.

27. *Id.* at 79 (Young, J., dissenting).

28. *Id.* at 107 (Markman, J., dissenting) (internal citation omitted).

29. *See infra* text accompanying note 31; *see also* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (finding a taking when federal water deliveries withheld to protect endangered species).

30. *Id.* at 81–82.

31. *See* First Amended Complaint, Ohio *ex rel.* Merrill v. Ohio, No. 04 CV 00 1080 (Ohio Ct. Common Pleas, Lake County Ohio 2004), *available at* http://ohiolakefrontgroup.com/documents/FirstAmendedComplaint.pdf; Motion for More Definite Statement, Ohio *ex rel.* Merrill v. Ohio, No. 04 CV 00 1080 (Ohio Ct. Common Pleas, Lake County Ohio 2004), *available at* http://www.ohiolakefrontgroup.com/documents/AGMotion.pdf; *see also* Ohio Lakefront Group website, http://www.ohiolakefrontgroup.com (providing general information about this lawsuit).

32. H.B. 218, 125th Gen. Assem., Reg. Sess. (Ohio 2003–04), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=125_HB_218; *see also* Testimony of the Ohio Lakefront Group, *available at* http://www.ohiolakefrontgroup.com/testimony.html; Stephanie Showalter, Ohio H.B. 218—An Update (on file with the University of Michigan Journal of Law Reform) (providing additional information about the Ohio legislation).

importance to the Ohio groups, Justice Markman's opinion suggested that the public trust, because it is a property law concept, is entirely a matter of state law, leaving each state free to choose for itself the extent of protection to be given.[33] In the end, however, the ongoing private property rights effort in Ohio seeks wholesale abdication of governmental control and responsibility for the vital foreshore area of the Great Lakes.[34] That result, like the one sought by Goeckel, SOS and others in the *Glass* case, is so radical and inimical to the public—whom government serves—that government itself is debarred from acting in that manner. It is along that path that walking the beach leads to the core of sovereignty.[35]

* * * * *

This Article will explore why the public trust doctrine, as applied in *Glass v. Goeckel*, is so clearly established as a core element in the American concept of state sovereignty. The application of these core principles in *Glass* is not only correct, but is consonant with the decisional law in other Great Lakes States.[36]

This Article focuses its analysis on the "great waters" of the United States. This is a term of art chosen for this particular purpose—to describe at a minimum the oceans, including the Gulf of Mexico, the bays, the Great Lakes, and the other great inland waterways of this nation. This terminology facilitates this Article's most pressing purpose: to defend against the contemporary attacks on the public property interests and public rights of use in the Great Lakes foreshore. Accordingly, within that subset comprising the "great waters," most of the analytical effort will be directed to the Great Lakes, as the law applied to them is an extension of the law of the nation's sea coasts. As the *Glass* case, the strident dissent

33. *Glass*, 703 N.W.2d at 93–94. Markman's assertion is incorrect, as there is a considerable minimum of public trust protection that is obligatory on the states. *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989); *see also infra* notes 226–230.

34. The Ohio Lakefront Group provides an illustration of their position on its website, showing areas below the ordinary high-water mark as being, "Your Deeded Private Property" and "Land the ODNR [Ohio Department of Natural Resources] has taken from you." See Ohio Lakefront Group, http://www.ohiolakefrontgroup.com/steal_your_land.html (last visited May 4, 2007).

35. A similarly mundane occurrence almost two centuries ago prompted a similarly global view of the law involved. In that instance, Justice Rossell of the New Jersey Supreme Court observed that a dispute over "the taking of a few bushels [of] oysters" posed a case "affecting the rights of all our citizens, and embracing, in their investigation, the laws of nations and of England, the relative rights of sovereign and subjects, as well as the municipal regulations of our own country." Arnold v. Mundy, 6 N.J.L. 1, 79 (1821).

36. *See infra* text accompanying notes 174–205.

of Justice Markman, and the Ohio efforts all demonstrate, public rights in the Great Lakes region are, and remain, under attack. The legal defense mounted in this Article will offer additional support for the position of the *Glass* majority and show that the privatization of the Great Lakes foreshore is, in addition to being bad policy, quite literally beyond the authority of the state.

The subjects examined and the conclusions reached in this Article are neither wholly new nor are they without respectable precedent. Rather, they are an emanation of the well established public trust doctrine. Its power to constrain governmental activity has been a prominent part of American jurisprudence since Justice Field's 1892 majority opinion in *Illinois Central Railroad v. Illinois*.[37] Even so, the nature of the public trust, particularly its obligatory aspects in a federal system and its application to all branches of the government, is less well understood. Additionally, this Article will explore one of the more difficult aspects of the Michigan Supreme Court's *Glass* decision: the migration of the public trust doctrine to the non-tidal great waters of the United States from its Roman and English origins, where the doctrine and its legal antecedents were originally developed in relation to tidal waters. Using the lens of history and the relationship of public trust law to the law of accretion, reliction, erosion, and submergence, this Article will further support the *Glass* majority's conclusion that public rights do not end at the literal, moment-to-moment line that is the water's edge. The rights that have been secured for the public extend to the highest point reached by the water on a predictable basis.

I. TAKING THE LONG VIEW: PRECURSORS OF THE AMERICAN LAW OF THE FORESHORE AND RIPARIAN BOUNDARIES

Almost as long as there have been nations that embraced notions of both nationhood and private property ownership, there has been a potential need to adjust the public and private interests at the water's edge. As an historical matter, many aspects of the relationship were physically determined—the great waters were resistant to efforts of individuals in pre-industrial and early post-industrial societies to exert any meaningful control over them.[38]

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

38. When such societies found it necessary to "manage" water for the benefit of society by using great rivers for irrigation, the historic result was a "hydraulic society" that featured centralized governmental control of the entire society to produce the labor and managerial

That alone precluded establishing key hallmarks of private property: the ability to exercise ongoing control and the right to exclude others. Those physical limitations combined with an independent normative belief that the great waters themselves should be public. That belief, beyond being pragmatic, was also utilitarian, centered on the recognition that there was a true societal common benefit in allowing the great waters to be treated as a commons to support navigation, fishery, and bathing by as much of the populous as could conveniently carry on those uses.[39] The resultant legal regime recognized paramount public interests in the great waters themselves and in the foreshore adjacent to them.[40] On the fast lands above the reach of the great waters, private riparians could, in contrast, build permanent structures and fences that would not be washed away and could realistically exercise dominion and exclude others from those areas.[41] The potential for conflict between the public and its uses of the great waters and the upland riparians and their desire to utilize the adjacent areas between their upland parcels and the water was centered on the foreshore area. This required legal rules of mediation applicable to the foreshore alone.

A. The Roman law of Foreshore Property Rights and Usufructs

Roman law has roots as old as the seventh century B.C., but as a developed and coherent legal system susceptible to modern study, the third through sixth centuries A.D. are the usual focal point, characterized first by the Institutes of Gaius and later by those of Justinian and the Digests commenting on those codes.[42] The comprehensive codification undertaken by the Emperor Justinian in the sixth century A.D. usually marks the starting place for the discussion of the law affecting the great waters.[43] Justinian's Institutes delineated private and public rights at the foreshore and estab-

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conditions that would allow the construction of waterworks capable of manipulating the water. *See generally* KARL A. WITTFOGEL, ORIENTAL DESPOTISM (Yale Univ. Press 1957).

39. *See generally* Carol Rose, *The Comedy Of The Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

40. *See infra* notes 44–50.

41. *See infra* notes 51–53.

42. *See* ALAN WATSON, ROMAN LAW AND COMPARATIVE LAW 3 (1991). The work of Justinian went far beyond the codification represented by the Institutes and included the Digests which recorded the ideas of the period's commentators. *Id.* at 84–85.

43. *Id.* Emperor Justinian's codification of the law in the sixth century A.D. gave later lawyers a relatively short but comprehensive account of a highly developed legal system that made an easy model to copy.

lished rules of boundary adjustment within that zone, particularly the rules governing accretion and erosion.[44]

In the area of property law, Roman law employed classification to great advantage.[45] Classifications were developed based on generic characteristics and, once things were properly sorted by class, a particular legal rule would be applied to that class of things.[46] Property law, under the Romans, was a particularly good example of classificatory jurisprudence and "Roman jurists were accustomed to classify property in several ways, according to various differences in its nature and relations."[47]

In relation to the great waters, the Institutes of Justinian put the matter rather plainly. The relevant paragraphs are set forth in full:

> (1) By natural law the following things belong to all men, namely: air, running water, the sea, and for this reason the shores of the sea. No one, therefore, is prohibited from approaching the seashore if he avoids damaging houses, monuments, and other structures, because they are not, like the sea, subject to the Law of Nations.
>
> (2) All rivers and ports are also public, and therefore the right of fishing in a harbor or in streams is common to all.
>
> (3) The shore of the sea extends to the point attained by the highest tide in winter.
>
> (4) The public use of the banks of rivers is also subject to the Law of Nations, just as the use of the river itself is; and hence anyone has a right to secure a vessel to them, to fasten ropes to trees growing there, or to deposit any cargo thereon, just as he has to navigate the river itself; but the ownership of the same is in those whose lands are adjacent, and therefore the trees growing there belong to them.
>
> (5) The public use of the sea-shore is also subject to the Law of Nations in like manner as that of the sea itself, and

44. *See infra* notes 50–62.

45. "The Roman jurists' delight in classification is well demonstrated in property law." WATSON, *supra* note 42, at 44.

46. *See, e.g.*, SEYMOUR F. HARRIS, THE ELEMENTS OF ROMAN LAW SUMMARIZED 19–27 (photo. reprint 1994) (2d ed., rev. 1889) (abstracting Roman law into tabular form based on classifications).

47. JAMES HADLEY, INTRODUCTION TO ROMAN LAW 155 (photo. reprint 1996) (1873).

> therefore any person has as good a right to build a house there in which he can take refuge, as he has to dry his nets or to draw them out of the sea. The ownership of the shores, must, however, be considered as belonging to no one, but to be subject to the same law as the sea itself and the earth or sand underneath it.[48]

Reviewing Roman law classifications helps provide a fuller understanding of the passage from the Institutes of Justinian. "Things" (including what has since become property) were divided into things pious ("*res divini juris*") and things secular ("*res humani juris*"), with the latter category further subdivided into *res privatae* and *res publicae*.[49] Although some things in the broad class of *res publicae*, such as the public funds in the public treasury could be the subject of ordinary business relations:

> [O]ther things again could not be dealt in, because they were *communia omnium*, the common property of all men, not subject to the special control of individuals or communities. So the air, the running river, the sea and with it the sea-shore, as far in as the sea reaches at high tide—over these things nobody can exert an exclusive power.[50]

That same writer observed that Roman law did allow some private usufructs to be created in relation to the *comminia omnium*. Given the technologies and the practices of the period, these were small uses that increased the private benefit derived from the water resource, but invariably did so without prejudice to the ongoing use of the resource by the larger public. He describes two examples, taking water out of a stream to fill a private pond, and enclosing areas waterward of the high tide line.[51] In the former case, the usufruct is to the quantum of water appropriated;[52] in the latter case the use is exclusive so long as the enclosure is maintained, but is lost when the water sweeps away the enclosure.[53]

The rule allowing the enclosure or exclusive use of parts of the foreshore of the great waters is also quite limited. Alan Watson, a

48. J. INST. 2.1.1–.5 (Samuel P. Scott trans., 1932).

49. HADLEY, *supra* note 47, at 155–56.

50. *Id.* at 157.

51. *Id.*

52. *Id.* at 157–58. The idea of appropriation as the basis for establishing rights to use water is at the heart of the dominant water law in the more arid portions of the United States and has a long history in many post-Roman settings.

53. *Id.*; *see infra* notes 54–59.

Roman law scholar, espouses a view of privatization of the foreshore that calls attention to the hegemony of the public interest over the private interest in the *res publicae*.

> Things under human law were either public (*res publicae*) or private (*res privatae*). *Res publicae* were things belonging to the state, such as roads, navigable rivers, and harbors. Riverbanks were owned privately but their use was public; anyone could tie up his boat to trees that grew there. Another classification described some things as common to all (*res communes*): the air, running water, and the sea; and these too could not be owned. According to one early classical jurist, the seashore up to the high-water mark of the winter tides was public; according to a later one and to Justinian, the seashore was common to all. No one could build on it as a matter of right, but permission might be granted by the magistrates to erect a shelter, which, however, would give no property rights in the soil.[54]

During this period, the right to enclose areas of the foreshore for exclusive use as allowed by Institutes 2.1.5 did not, realistically, amount to much. The "private" uses allowed were for the building of huts, the drying of nets, and so forth.[55] These "privatizations" actually increased the public use of the foreshore. These were uses that increased the private value and, hence, total public value, of the resource by increasing the ability of all members of the society to obtain greater benefits from the sea and the foreshore. Equally telling, in the event that privatizations proved a threat to public use of the waters and the foreshore, Roman law subordinated them to the public uses. In her book-length monograph on the public trust, Helen Althaus makes this point quite strongly, relying on the cross translation of section 2.1.5 of Justinian's *Institutes* and the analysis of W. A. Hunter:

> The use by the public of the shores is part of the *Jus Gentium* just as is the use of the sea itself. And therefore *it is free to anyone to place a hut there to which to betake himself, or to dry nets there, or to haul them up from the sea. But of those shores it is understood*

54. WATSON, *supra* note 42, at 44.
55. *See infra* notes 56–59.

> *that no man is owner*; for they come under the same rules of law as the sea itself and the underlying earth or sand.[56]

> Hunter expanded on the common use of the shores for fishing, with reference to parallel provisions of the Digests.[57] For example, he noted a famous rescript (advisory opinion) issued to the fishermen of Formaie and Capena who had sought a ruling about use of the foreshore. In setting out their private rights of use of the foreshore, the commentator Antonius Pius stated that the right to build huts or to place pilings gave rights for only so long as the sea allowed it, for "*when it fell into ruins, the soil reverted to its former state as a res communis,* which any other person might build upon."[58] Even more important for public rights and their primacy, the Digests stated that "*anyone could forbid the erection of a pier or other construction that would interfere with his use of the sea or beach.*"[59]

Clearly, in establishing a universal right to enjoin structures that interfere with the use of the sea or beach, a principle emerged from the Roman law commentators and the subsequent Roman law scholars that no privatization diminishing public use was allowed.[60] The principle had the effect of maximizing the sum of public benefits flowing from the resource. The law allowed non-injurious private uses that assisted those individuals making the private use, but importantly, the persons entitled to make those private uses included the general public, not merely the adjacent riparians.[61] Conflicting overuse of the great waters was unlikely given existing technologies. Like the special status of riparians in later centuries that allowed them to wharf out to deeper water,[62]

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56. HELEN F. ALTHAUS, PUBLIC TRUST RIGHTS 4 (1978) (citing J. INST. 2.1.5; W. HUNTER, ROMAN LAW 310 (J. Cross trans., 4th ed. 1903)) (emphasis added [by Althaus]).

57. The Digests were the commentaries on the law by the legal scholars of that age. WATSON, *supra* note 42, at 24–25, 84–85.

58. ALTHAUS, *supra* note 56, at 4 (citing DIG. 1.8.6.pr. & 1.8.10) (emphasis added [by Althaus]).

59. *Id.* (citing DIG. 43.8.3.1 & 43.8.4) (emphasis added [by Althaus]).

60. *See supra* notes 48–59 and accompanying text.

61. This is an important distinction because it underscores the fact that the "privatization" allowed actually was in the service of broad use of the foreshore and was not in any way meant to increase the exclusive control of the upland riparians at the expense of the public.

62. Riparians, unlike the public at large, still enjoy the right to wharf out so long as they do not interfere with the paramount rights of the public in the use of the great waters. *See, e.g.*, Obrecht v. Nat'l Gypsum Co., 105 N.W.2d 143, 149–51 (Mich. 1960). Conversely, although the public trust doctrine permits the state government to wharf out in order to provide water access to the public, the state may not wharf out in a way that compromises privately owned fast lands above the high-water mark. *See, e.g.*, Peterman v. Dep't of Natural

Roman law privatization of the foreshore had the effect of maximizing total social benefits. Nevertheless, a limit on private use came into play when the private use interfered with paramount public rights. This same idea was largely preserved in English jurisprudence. Although diluted somewhat by English royal practice, English law allowed private ownership or usufructs that did not burden the larger public interest.[63] This was received as law in the United States,[64] and has not changed materially since Roman times.

The thrust of Roman law, when applied to the great bodies of water, established the boundary of riparian tracts at the high-water mark.[65] Exclusive usufructuary interests that might be seen as akin to "temporary title" in the foreshore below high water could be obtained by physical occupation by riparians or members of the general public alike.[66] Even so, recognition of such private interests did not diminish the public usufruct in the foreshore area for purposes related to the paramount public rights of navigation, fishery, and bathing. That is a consistent theme in the Roman law that, as will be shown, was reinvigorated when the English law of the foreshore was brought to the United States.[67]

B. Enduring Boundaries of the Foreshore of the Great Waters

While the Roman law, as reflected in Justiniain's Institutes, established the primacy of public usufructs of the great waters, it is important to remember the Roman law also placed a high value on private property. One of the signal contributions of Roman law was its formalization of concepts that remain fundamental in modern property law. In that regard, Roman law recognized occupation as

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Res., 521 N.W.2d 499, 510 (Mich. 1994). In *Glass*, Justice Corrigan relied on *Peterman* as having previously and definitively established the ordinary high-water mark as the "landward boundary of the public trust." Glass v. Goeckel, 703 N.W.2d 58, 69 (Mich. 2005).

63. The Roman law roots and its anti-privatization branches of law declined in England during the Dark Ages and the Saxon period, particularly with regard to exclusive fisheries in important areas of tidal rivers. ALTHAUS, *supra* note 56, at 23 (citing William Drayton, Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 764 (1970)). The reemergence of public rights born of the Roman law tradition began to take hold again around the time of Magna Carta in 1215. *See infra* note 101; *see also* ALTHAUS, *supra* note 56, at 23–24; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763–74 (1970).

64. *See infra* notes 167–174.

65. *See supra* note 47.

66. *See supra* notes 54–59.

67. *See infra* notes 113–174.

a means of acquiring property, and once acquired as property, owners enjoyed the right to exclude others.[68] Strong public rights in the great waters and strong private property rights in riparian tracts that were subject to *dominium* posed a potential conflict in relation to use of the foreshore. It seems inevitable that riparians seeking to maximize the benefit of their riparian location would try to extend their exclusive rights all the way to the very shore and beyond.

As already seen, the Roman law resisted that waterward riparian advance in two ways—(1) drawing the line marking the *res communes*[69] at the point of high water and (2) allowing the public to seek interdiction of private uses that interfered with public uses. Simultaneously, however, Roman law strongly protected the private property advantage of riparian proximity to the water by introducing the doctrine of accretion.[70]

The Romans were well aware that natural forces had the power to permanently change the physical demarcation point between land and water, and so prescribed a rule to govern the legal consequences of those changes. The rule they adopted was solicitous of the riparian's interests recognized by the *jus privatum*, but did not harm the public interests. The Institutes of Justinian, section 2.1.20 describes accretion:

> (20) Moreover, whatever a river adds to your land by alluvial soil belongs to you under the Law of Nations, for this deposit is an indiscernible increase; and that which is added in this manner is held to have been added so gradually that you cannot ascertain how much is added at any moment of time.[71]

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68. Amir A. Kakan, *Evolution of American Law, From Its Roman Origin to the Present*, 48 ORANGE COUNTY L. 31, 46 (Feb. 2006). *See generally* Woodman v. Pitman, 10 A. 321, 322 (Me. 1887) (awarding better right to ice upon a river based on occupancy; citing Roman law as well as Blackstone and Kent for the proposition); WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW (1938).

69. The law governing land adjoining rivers was different as to title, but not as to effect. Consider the commentary of the Roman digester Gaius, found in the Legal Doctrines of Daily Application and Utility, Book II. "[P]ublic use of the banks of rivers is subject to the Law of Nations . . . [t]herefore, everyone is free to conduct a boat to the bank; to attach ropes to trees growing there; to dry nets, and draw them up from the sea; and to deposit any cargo thereon . . . . [O]wnership of the banks, however, is vested in those to whose land they are contiguous . . . ." DIG. 1.1.8.5 (Gaius, Legal Doctrines of Daily Application and Utility 2) (Samuel P. Scott trans., 1932).

70. *See* J. INST. 2.1.20 (Samuel P. Scott trans., 1932).

71. *Id.*

Awarding accretions to the riparian proprietor[72] had the effect of allowing a dynamic adjustment to the realities of the shore. Only the boundaries moved in an effort to leave undisturbed the status quo ante when it came to riparian locational advantage and public uses. This form of adjustment of boundaries without disturbing the relative rights of the private riparians and the public has continued unbroken from the Romans to the present.[73]

C. Sovereignty and the Foreshore in England at the Time of the American Revolution

The Roman law concepts described above found their way into Anglo-American law and jurisprudence with little alteration as to their effect, but with considerably richer political, theoretical, and doctrinal overlays. In Roman times, the Institutes of Justinian left little room for doubt about the subjects of greatest immediate interest—the rights to the great waters and the foreshore.[74] Roman law was less explicit in stating the rationale for the common ownership of the foreshore. But the rules granting primacy to the public at large were consistent with the belief that such resources were incapable of private ownership in the usual Roman law sense—being able to exercise dominion over the thing.[75] As previously described, below the high tide line the law allowed limited exclusive private use that might be washed away by the sea itself or might be removed at the suit of any member of the public whose use of the foreshore was impaired by the structure.[76] Men may have taken individual advantage of the great waters for fishing, navigation, or bathing, but these uses did not require an exclusivity that was impossible to obtain. Conveniently, but with little explanation in the Digest, the rules adopted by the Institutes of Justinian maximized the public benefit from the great waters by classifying them as

72. *See* HADLEY, *supra* note 47 at 166 ("Once more, if new land was formed by alluvial action, by soil carried down a stream and deposited on its banks or at its mouth, this new land became the property of him whose land it joined.").

73. The text here is primarily descriptive. The reasons for the accretion doctrine and the related doctrines of reliction, erosion and submergence are more fully explored in post-Roman law settings. *See infra* notes 207–218.

74. *See supra* text accompanying note 48.

75. *See supra* notes 54–59.

76. *See supra* notes 50–59.

belonging to the *res communes*, while allowing complementary private uses to be maintained.[77]

Coming out of the Middle Ages, however, a second and more theoretical tradition was added to the predecessors of Anglo-American law that reinforced the Roman law *res communes*-based public use and control of the foreshore area.[78] The emerging nation states began to explicate a concept of sovereignty that considered not only the pragmatic needs of the emperor for governing, but also responsibilities of the sovereign, as an ongoing entity, to the people subject to the sovereign's rule:

> During the thirteenth century Roman and canon lawyers developed the idea that there were certain rights and functions which a kingdom had to exercise if it was to exist and flourish. Simultaneously they stressed the concept of the king not as *dominus* in the absolute legal sense of the word, but rather as guardian, *curator*, of the office and responsibilities entrusted to him. Since the king was but a temporary official in a position of trust, he might not alienate the essential functions of his office to the prejudice of the state.[79]

This concept may not sound immediately familiar, but it is a bulwark of contemporary American jurisprudence. It is recognized in the operation of the public trust doctrine and also in other doctrines that limit or forbid acts of the sovereign that impair the ability of the sovereign to govern on a continuing basis.[80]

Looking more specifically at the Middle Ages in England, in the thirteenth century, the monarchy was yet to be well established as a center of authority over all of the barons.[81] Power, loyalty, and tribute may well have had as much to do with the king's ultimate ability to govern as did the law, but the law of inalienability was already in place and cited by the Crown, particularly when it was

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77. *See supra* notes 54–59.

78. There is also a third interesting line of reasoning from the English Middle Ages that places the foreshore in the Crown's ownership. It is the concept that those lands were "waste lands" belonging to the Crown because of either their periodic inundation or aspect as barren, unproductive beach sand that was incapable of cultivation. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 11 (1892).

79. PETER N. RIESENBERG, INALIENABILITY OF SOVEREIGNTY IN MEDIEVAL POLITICAL THOUGHT 3 (1956).

80. *See, e.g.*, Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529 (1992); Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633 (1996).

81. *See generally* J.C. HOLT, MAGNA CARTA & MEDIEVAL GOVERNMENT (1985).

convenient to do so in the effort to regain lands and other rights for the Crown.[82] Procedures and doctrines that are familiar today are direct descendants of protections in use in that period. *Quo warranto*, for example, was used in one thirteenth century case by Edward I to attack *his own* prior action as beyond his own authority.[83] Importantly for present purposes, that case involved the claim that the authority was lacking because the lands were inalienable from the Crown.[84] Another inalienability doctrine, the rule that prescription does not operate against the sovereign,[85] finds expression in the best-known legal commentary of this period.[86] In Peter Riesenberg's words, in this period, "there was a protracted effort by the monarchy to recover alienated lands and what it considered the rights of the Crown; also an effort to retain unimpaired its rightful freedom to govern."[87] Whether born of convenience, pragmatism, or principle, the inalienability of sovereignty became a structural part of Anglo-American jurisprudence in this period and has remained a part since.

There is also a canonical link to the inalienability doctrines that adds a complementary dimension of importance to Anglo-American law.[88] This existed when the United States was formed and it continues in place today. That element is the view that the sovereign is a trustee.[89] This is a point of special relevance and probity in understanding the contours of the modern public trust doctrine as it applies to cases like *Glass* and affects governance of the great waters more generally. In the canonical view, the wealth of nature was provided by the deity for the benefit of the people.[90] This concept was folded into those of emerging sovereignty and the attributes of the office of king by building a metaphor between

82. RIESENBERG, *supra* note 79, at 100.

83. *See id.* at 102 n.47.

84. *Id.*

85. *Id.* at 102–03 n.49; *see also* 94 C.J.S. *Waters* § 329 (2006) ("[N]o such right can be acquired against a state . . . . ").

86. These were Brotton and Fleta. *See* RIESENBERG, *supra* note 79 at 102–03.

87. *Id.* at 103. Riesenberg notes that the Crown was not always successful in recovering the alienated lands when it invoked these doctrines but argues that was not "all-important." *Id.* What was important was establishing a principle that affected English constitutional development and aligned the crown to the realm rather than to the person of the sitting king.

88. *Id.* at 100.

89. See *infra* notes 111–173.

90. FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 26–27 (S.B. Chrimes trans., 1939).

natural resources and the King's role as God's vicar on earth.[91] Resources were entrusted to the King as steward, to benefit the people and the nation. One of the early iterations of this concept in the Anglo-American tradition appears in the work of Henry of Bracton, the most famous legal commentator of that period.[92]

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.[93] Although the context is a bit different, Bracton's rendition of the matters addressed by those sections of the *Justinian's* Institutes governing the foreshore follows, in part, the phrasing of the Roman law standard. It makes a significant departure, however:

> By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore, provided he keeps away from houses and buildings [built there], for by the *jus gentium* shores are not common to all in the sense that the sea is, but buildings built there, whether in the sea or on the shore, belong by the *jus gentium* to those who build them. Thus in this case the soil cedes to the building, though elsewhere the contrary is true, the building cedes to the soil.[94]

As the first sentence shows, in the time of Bracton, the Roman law classification of the great waters and their shores as public was intact. Plainly, however, Bracton's interpretation of English law, as he understood it in the mid-thirteenth century, tolerated the erection of private structures in the foreshore, possibly beyond what Roman law would have allowed.[95] The balance was a bit different for technological and political reasons. Politically, Bracton's world had seen a number of centuries in which the more decentralized

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91. *See, e.g.*, Guy I. Seidman, *The Origins Of Accountability: Everything I Know About The Sovereign's Immunity, I Learned From King Henry III*, 49 ST. LOUIS U. L.J. 393, 411–12 (2005).

92. *See* 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 305 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (1569), *available at* http://hlsl.law.harvard.edu/bracton/Unframed/English/v2/305.htm.

93. *See supra* note 50.

94. 2 BRACTON, *supra* note 92, at 39–40.

95. *See, e.g.*, HUNTER, *supra* note 56, at 310. (explaining that Roman Digests allowed anyone to move for an interdict if the structures interfered with the public use of the sea or the beach).

baronies and the Saxons had been tolerant of more exclusionary practices, especially in regard to fisheries.[96] Even by Bracton's time, however, and even taking into account grants of exclusive fisheries and the erection of fish weirs, Medieval forms of privatization of the *res communes* did not have the effect of barring concurrent public use—the commons was still large and bountiful in relation to the scale of private efforts to occupy and possess it.[97] The Roman public trust was still intact.

The English law on this subject did not stay where Bracton found it. On balance, the law moved back toward the Roman law pronouncements that allowed less privatization. Two interconnected points stand out. First, in working out the proper compromise between public and private, the law became less rigid by developing doctrines that allowed and supported a degree of privatization in the foreshore area as long as the public rights were not too greatly diminished.[98] The law had changed from rigid prohibition to more of an effects-based schema. Second, the law began to embrace more explicitly a trust concept as an incident of sovereign ownership and obligation.[99] The law began to impose trust-based limitations as a servitude upon the ownership of those who might become transferees or "permittees"[100] of the sovereign in relation to foreshore areas.

The law of the foreshore described by Bracton, to the extent that it appeared to sanction privatization, did not remain the law of England. Magna Carta of 1215 is one of the early turning points in

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96. *See* Leonard R. Jaffee, Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571, 579–80 (1971).

97. There is a paucity of direct data on this point. However, data on over-fishing and environmental degradation and their impact on fish stocks are available, tracing trends at least 200 years old. *See, e.g.*, PAUL HOLM, OCEANS PAST: HISTORY MEETS MARINE SCIENCE (2005), http://www.cmrh.dk/HMAP/OceansPastIntro_Holm.pdf. The comparatively robust state of fish stocks as an historic matter as little as 150 years ago would seem to imply that they were not stressed a millennium before that.

98. *See infra* notes 101–111.

99. *Id.*

100. 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 ("Concerning animals ferae naturae, the king employed his sovereign and proprietary powers to diminish his subjects' right to take wildlife by creating an elaborate land-classification system, including royal forests, and by limiting hunting to royal grantees."). The crown often granted revocable exclusive licenses called "liberties" to lords and sub-lords. Frequently these were for fast land areas, such as forests for hunting, but some were for exclusive fisheries (liberties of piscary). *See* Charles E. Clark, *Licenses in Real Property Law*, 21 COLUM. L. REV. 757, 761 (1921); *see also* Alan Harding, *Medieval Law and the Foundations of the State*, 212–13 (2002); Royal E.T. Riggs, *The Alienability of the State's Title to the Foreshore*, 12 COLUM. L. REV. 395, 404 (1912).

the effort to resurrect public trust uses, particularly in regard to fisheries. Magna Carta expressly limited the practice of allowing private parties to erect and maintain "kydells" (a kind of fish wheel or fish weir) in some of the most important public waters, including by name the rivers Thames and Medway and referring to other inland waters "throughout all England."[101] Gradually, this public pressure emerged as a counterweight to privatization of the shore area. Public rights began to find their way into royal charters and caselaw.[102] By the time of the publication of Sir Matthew Hale's *De Jure Maris*[103] five hundred years after Bracton, a distinctively new balance was in place, and this balance was highly protective of public usufructs. Crown ownership extended only to average high tide rather than the extreme high tide of the Roman law.[104] Private grants for fish weirs, piers, and docks below even that point had at times been recognized.[105] Vitally, piers and docks played an important economic role in the life of England, an island nation heavily engaged in trade, and were too important to be routinely subject to abatement. Yet, at the same time private claims were being eroded and cut back by a now-accepted "Digges" presumption against such grants[106] and public usufructs were in the process of being reinvigorated by asserting that transfers below high-water mark were impressed with a trust. For example, an important 1795 case involving Portsmouth harbor stated, "It is clear that the right to the soil, between high and low water-mark, is prima facie in the crown. Then the onus of proving an adverse title is thrown upon the defendants [in an abatement action brought by the Crown]."[107]

Several commentators point out that the Digges' theory had little support when it was propounded, and that Hale's apparent acceptance of that theory was not well grounded in the holdings of

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101. Magna Carta, 1215, c. 33. Interestingly, Helen Althaus argues that this passage in Magna Carta should be read to apply a public rights navigability doctrine to all waters, not merely tidal waters. ALTHAUS, *supra* note 56, at 29. Such an extension of public rights undermines those, such as Justice Markman, who criticize the application of English public trust doctrines to non-tidal waters. *See* Glass v. Goeckel, 703 N.W.2d 58, 92–93 (Mich. 2005) (Markman, J., dissenting).

102. *See generally* ALTHAUS, *supra* note 56, at 23–38; Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, *supra* note 63, at 764–66.

103. Matthew Hale, *De Jure Maris*, *in* A HISTORY OF THE FORESHORE 370 (Stuart A. Moore ed., 3d ed. 1993) (1888).

104. *See* Attorney Gen. v. Chambers, 43 Eng. Rep. 486, 490 (1854) (relying on Hale's treatise placing the demarcation line in English law at the medium high tide line).

105. Althaus, *supra* note 56 at 23–24.

106. *See generally* ALTHAUS, *supra* note 56, at 30–33.

107. Attorney Gen. v. Richards, 145 Eng. Rep. 980, 983 (1795).

cases and was not as broad as has been argued.[108] Even if these critiques of Digges are apt in pointing out its lack of support in English law of his time, the critiques are immaterial in assessing the role that the Digges' presumption plays in American law as propounded by American courts. It was Hale's treatise and the other English sources of legal authority *as understood by the American courts*[109] *and commentators*[110] that formed the basis for establishing American law on the subject.[111] As a result, their enunciations of broad public ownership of the foreshore, supported both by a presumption against grants of those lands and an imposition of trust on the holders of those lands, was the undisputed starting place for American jurisprudence.[112] Interestingly, as recounted below, in the comparatively pragmatic political and social environment of the emerging American nation, the public protections emerged even more strongly, ensuring that the great waters would be a source of great common benefit to the populous.

II. THE UNITED STATES HISTORY OF THE LAW OF THE FORESHORE AND RIPARIAN BOUNDARIES

To fully understand the current United States law of the great waters and the foreshore area, it is important to trace the reception and adaptation of English law during the eighteenth and nineteenth centuries. This period saw overwhelming changes in the United States: the opening and settlement of the West, industrialization, a manifold growth in the population and the economy, and the establishment of a well-defined federal system. This period also placed a great deal of faith in laissez-faire economics, undergirded

108. *See, e.g.*, Patrick Deveney, *Title,* Jus Publicum, *and the Public Trust: An Historical Analysis,* 1 SEA GRANT L.J. 13 (1976); Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law,* 3 FLA. ST. U. L. REV. 511 (1975); *see also* Pollard v. Hagan, 44 U.S. (3 How.) 212, 231–32 (1845) (Catron, J., dissenting).

109. *See, e.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

110. *See, e.g.*, JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS, AND IN THE SOIL AND SHORES THEREOF 38–39, 50–51 (1826).

111. The possible fact that the Digges' presumption was not well-supported by the English law when it was propounded does not vitiate the ideas that it embodied in relation to limits on sovereign authority. Particularly in another jurisdiction, in this case the United States, the policy of the position could be credited and adopted even if the historical precedential support in England was not substantial. Thus, the American courts were free to take away from Hale the notion of trust ownership and public rights, and a stewardship concept that attached to sovereign ownership of those key resources.

112. *See infra* text accompanying notes 117–147.

by a strong conception of private property rights.[113] While it has roots in the inherited English law, the public trust doctrine and its companion boundary-adjusting doctrines (e.g. accretion) comprise a uniquely American approach to rights of use in the foreshore. It is plain that in the United States: (1) public rights in the foreshore and public use of the foreshore are present and are protected to a very large measure against alienation into exclusive private use; (2) those rights encompass the whole body of rights available under the English public trust doctrine: navigation, fishing, bathing, and the use of the foreshore to effectuate those uses, including passage along the shore; and (3) the public rights attach to waters and shores along major navigable waterways, not just waters affected by tidal flows.[114] States, although often denominated "masters of their property law," are not wholly unfettered when they attempt to modify the content of those public rights.[115] Finally, boundary adjusting doctrines such as accretion and reliction, while preserving riparian locational advantage, do not alter the basic relationship of public and private rights.[116]

A. Receiving English Common Law and Establishing Public Rights Doctrines in America

It was not a foregone conclusion that the evolved public trust norms of English common law, e.g., presumed sovereign ownership and public use of public trust resources of the sea and foreshore, would emigrate and survive in the new world that confronted the colonists. The colonizers were risk takers and part of the risk-reward bargain frequently included the express grant of foreshore areas or the implied authority to privatize them as a means of encouraging activities that served the Crown's interest in having the colonies develop.[117] The success of the American Revolution and the transfer of sovereignty from the Crown to the new states created a decision point for the incipient American govern-

113. *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell et al. eds., Oxford Univ. Press 1976) (1776). Laissez-faire is described by Encyclopedia Brittanica Concise as "[w]idely accepted in the 19th century . . . . " Britannica Concise, Laissez-Faire, http://concise.britannica.com/ebc/article-9369632/laissez-faire (last visited Feb. 27, 2007).

114. *See infra* notes 117–174.

115. *See infra* notes 107–128.

116. *See infra* notes 177–188.

117. The Avalon Project, His Royal Highness's Grant to the Lords Proprietors, Sir George Carteret, 29th July, 1674, http://www.yale.edu/lawweb/avalon/states/nj04.htm.

ments. It required them to choose between a legal posture that was receptive to the past privatizations and upon which there was some continuing reliance, and a legal posture that repudiated or limited those colonial grants.[118] Although the latter course was likely to upset usages that had been in place for substantial periods of time in reliance on royal and colonial grants, the politics of the issue were rather one-sided. The new sovereigns' self-interest lay in restoring to the state and the public the resources previously claimed and alienated by the Crown.[119] Additionally, the holders of the royal grants, in many cases, had been loyalists allied with or sympathetic to the British during the Revolutionary War.[120] It was a popular policy to undermine their economic base and redistribute the wealth born of their royal privilege and favor.[121]

The American resolution of this issue was first articulated in *Arnold v. Mundy*, when the New Jersey Supreme Court ruled that prerevolutionary private grants for oystering were invalid.[122] In *Martin v. Waddell*,[123] the United States Supreme Court deliberated on facts bearing a close resemblance to those in *Arnold*.[124] The two cases presented the same issue of exclusive oystering, on the same waters—Raritan Bay—again with a plaintiff claiming an exclusive right of use derived directly from the same royal grant.[125] That grant was a 1664 royal grant from King Charles II to his brother James, Duke of York, transferring a very considerable part of the east coast of the United States.[126] The most significant difference in the two cases was that the federal trial court in *Martin* approved and entered judgment on a jury verdict that had, unlike the New Jersey Supreme Court in *Arnold*, held in favor of exclusive rights of

118. *See, e.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

119. *See, e.g., id.* (denying the plaintiff's exclusive right to take oysters in the public rivers and bays pursuant to a grant by the King of Great Britain, arguing that right to fishery cannot be privatized under English common law); *see also, e.g.*, Russell v. The Jersey Co., 56 U.S. 426 (1853); Holyoke Co. v. Lyman, 82 U.S. 500 (1872).

120. *See generally* STEPHEN LYON MERSHON, ENGLISH CROWN GRANTS: THE FOUNDATION OF COLONIAL LAND TITLES UNDER ENGLISH COMMON LAW 163 (1918).

121. The popularity of the policy in an economically stratified and bottom-weighted society is an important reason for the inclusion of the "Takings" clause in the Bill of Rights. *See* Jennifer Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990).

122. Arnold v. Mundy, 6 N.J.L. 1 (1821).

123. *Id.*

124. *Compare* Martin *v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) (discussing exclusive royal grant for oystering in Raritan Bay), *with* Arnold v. Mundy, 6 N.J.L. 1 (1821) (discussing exclusive royal grant for oystering in Raritan Bay).

125. *Martin*, 41 U.S. (16 Pet.) 367; *Arnold*, 6 N.J.L. 1.

126. *Martin*, 41 U.S. (16 Pet.) at 407.

the eventual holder of the relevant portion of the area described in the royal patent and against uses permitted by an 1824 New Jersey statute.[127]

The United States Supreme Court disagreed with the federal trial court and embraced the *Arnold* result and important parts of its reasoning.[128] Because *Martin* involved competing grants of oystering rights, the Court noted a sharp distinction between a grant like that of King Charles to James and a grant of a small parcel.[129] The Court stated that the grant from King Charles was an instrument of so broad a scope that it was intended for founding a "political community" and must be viewed in that light.[130] That light was harsh and demanding. It was premised on the position of Hale in *De Jure Maris*, which was hostile to exclusive grants of fishing rights and doubted whether, in a post-Magna Carta world, the King could even make a grant of the magnitude of the one upon which the claims in *Martin* were founded.[131] That position echoed a vital passage of Chief Justice Kirkpatrick's opinion for the New Jersey Supreme Court in *Arnold v. Mundy*, where the New Jersey Court had said:

> [B]y all these [the law of nature, the civil law, and the common law], the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fowling, sustenance, and all other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is

127. *Id.* at 407–08, 417–18.

128. *Id.* at 417–18. The Court does not rely on *Arnold* as precedent, but reaches the same result and parallels some of its key arguments. *See infra* notes 131–136.

129. *Martin* described the Charter from the English monarch as follows: "It was an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed." *Martin*, 41 U.S. (16 Pet.) at 412. The competing title was for only one hundred acres and was predicated upon an 1822 New Jersey statute. *Id.* at 408.

130. *Martin*, 41 U.S. (16 Pet.) at 411–12.

131. *Id.* at 412. Hale was also relied upon for the interpretation of the grant as reserving the usual prerogatives of the Crown, even in the absence of any words of such reservation. *Id.* at 416.

> vested in him not for his own use, but for the use of the citizen, that is, for his direct and immediate enjoyment.[132]

A pivotal element in the reasoning of Justice Kirkpatrick was his view of Magna Carta as restoring the common rights of the public at large that had been established by the Roman, civil law, and common law traditions.[133] He characterized Magna Carta as no more than, "a restoration of common right" that "restored again the principles of the common law" after which "no king of England has had the power of granting away these common rights . . . ."[134]

In *Martin v. Waddell*, the United States Supreme Court followed suit.[135] For grants of that nature, the Court established the view of Sir Matthew Hale, incorporating the equivalent of the "Digges presumption," as part of American property law, protecting all public trust resources for the public's use and benefit:

> The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly—and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it.[136]
>
> . . . .
>
> Unequivocal words of grant that made no mention of extinguishing trust rights, were insufficient to free the lands from the trust.[137]

A few years after that, in 1845, the Supreme Court addressed a related question of trust-based limitations on tidelands grants—this

132. Arnold v. Mundy, 6 N.J.L. 1, 76–77 (1821).
133. *Id.*
134. *Id.*
135. *Martin*, 41 U.S. (16 Pet.) at 411.
136. *Id.*
137. *See id.* at 369–74 (containing the language of the grant).

one having a complicated overlay of federalism. In *Pollard v. Hagan*, the area under consideration involved lands in Alabama.[138] According to the fact finding in the case, the area involved was fast land that previously had lain under the waters of Mobile River in a tidal area.[139] The plaintiffs in a quiet title action claimed under a post-statehood grant from the United States; the defendants claimed as state law riparians owners of the upland parcel asserting that the land that had emerged was theirs due to the operation of the accretion doctrine.[140]

The case was complicated because of the many possibilities regarding the source of title for the parcel.[141] The Court accepted the fact-finding showing that the parcel was submerged at Alabama's statehood, and found that it was inalienable by the United States, which had held title as a trustee for the later created states, such as Alabama.[142] The majority concluded by describing the uniquely American position on these matters, spelling out that the states, both original and new, became the successor "municipal sovereigns" to the English crown or other sovereigns who made grants to the United States.[143] A key precept in the opinion was the clear enunciation of the equal footing doctrine that placed the later formed states on an equal plane with the original states. The court put it plainly when it stated, "The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states."[144]

The *Pollard* opinion granted an apparent hegemony to the states over tidelands, a key public trust resource.[145] The majority simultaneously reminded the states of the uniquely American public trust ownership by the states to ensure the benefits of common use, stating, "[b]ut her rights of sovereignty and jurisdiction are not

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

139. *See id.* at 219–20.

140. *Id.*

141. The complexities included efforts to link the parcel's title to the deed of cession by the State of Georgia of its western claims in 1802, to the Louisiana Purchase, to the Treaty with Spain of 1819, to the Property Clause found in Article IV of the United States Constitution, and to the common law of England. *See id.* at 221–29. These concerns were relevant because of their potential to affect the rights of Alabama which was, by express words, admitted to the Union on an "equal footing" with the original states. *Id.* at 222.

142. *See id.* at 221.

143. *Id.* at 228–30. The term "municipal sovereignty" is used throughout Justice McKinley's opinion, and is aimed at explaining the limits of federal power under the Property Clause and is not a limitation on the enumerated powers of the United States. *See id.* (discussing commerce power regulation).

144. *Id.* at 230.

145. *Id.*

governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions."[146] As discussed more fully later, whatever English courts may have deemed appropriate for the Crown to do in relation to public trust properties in England, the law in the United States would be the law of its own making, and that law severely limited government's power to alienate trust properties, and by implication, the power to extinguish uses at the heart of the public trust.[147]

B. Adapting English Public Rights to the American Topography

In the early years of nationhood, American courts received the English law of the foreshore and riparian boundaries, modified its public rights content, and immediately began to adapt it instrumentally to meet the country's needs.[148] Conditions in the United States, both physical and economic, were different from those in England. The newly formed nation, in the main, lacked the accumulated wealth needed for capital formation and had little by way of industrial infrastructure. Instead, it had a wealth of natural resources. England, in contrast, was a relatively small island nation where conditions tended to be the opposite. Partly because of their respective circumstances, both nations were dependent on trade, and in that era, the bulk of trade moved most easily by water. Accordingly, navigation was a paramount concern on a practical level and the laws of both nations employed doctrines that reflected the importance of navigation along the waterways that would bear it.[149] In the United States, this fact led to wholesale acceptance of public rights in the great waters and unique refinements of received English doctrine to ensure that the public benefits were available even on waters that would not have been the subject of public rights in England.

In England, the great waters to which public rights doctrines attached—the presumption of Crown ownership and the public trust—were waters affected by the tides.[150] In England, waters

146. *Id.* at 229.

147. *See infra* notes 148–174.

148. *See, e.g.*, Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248 (1973); *cf.* SAX ET AL., *supra* note 15, at 37–47 (describing the instrumentalist development of the law of riparian rights in the early years of nationhood).

149. *See* SAX ET AL., *supra* note 15, at 522–24.

150. *Id.*

subject to tidal influence corresponded well to the waters that had value for navigation and trade.[151] The same was not true in the United States. Roads into the American interior were few and poor, but unlike England, the United States had many major rivers that were navigable well above the tidal influence.[152] Likewise, after the Treaty of 1783 with Great Britain and the Louisiana Purchase in 1803, the United States owned vast unsettled areas drained by great non-tidal rivers and, of course, the Great Lakes.[153] Recognizing the necessity of shaping the law to take advantage of the network of interior great waters, United States courts developed doctrines of navigability that did not depend on tidal influence and attached the English public rights promoting doctrines of public ownership and the public trust to the larger class of waters that extended beyond the reach of tidal influence.[154] The rationale for rejecting the English view was simple—it did not suit America, and American courts believed that had English topographical conditions been similar to those in the United States, the English common law rule would itself have been different:

> This [English] common law right [limiting public rights to tidal waters], if even it was properly applicable to the Susquehanna and Delaware, and other large waters, was not deemed proper for this country, nor was it adopted, up to the period of our revolution; because the several acts of assembly before that time, declaring these rivers to be highways, and regulating the fisheries in them, are incompatible with the [English] common law right; and *since* the revolution, no part of the common law has been adopted except that which was proper for our country.[155]

The somewhat more subtle question was whether the only rights that advanced beyond the ebb and flow of the tide were navigational in nature, or whether the full panoply of public trust rights—navigation, fishing, and bathing, along with foreshore access and use—followed the expanded navigability doctrines of the

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151. *See generally* William Drayton, Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970).

152. *See infra* notes 155–157.

153. *See* Treaty for the Cession of Louisiana, U.S.–Fr., Apr. 30, 1803, 8 Stat. 200 (ceding Louisiana).

154. This is familiar material to students of water law, particularly in regard to the use of navigability doctrines to ensure public usufructs. *See, e.g.*, SAX ET AL., *supra* note 15, at 521–33.

155. Carson v. Blazer, 2 Binn. 474, 476 (Pa. 1810).

emerging American nation. Of course, the great waters of the United States are all navigationally valuable and many cases expanding public rights beyond the English tidal reach relied on navigability as the focus of their pragmatic rationale.[156] For example, some states, such as Maine, established a public right of navigation in non-tidal rivers.[157] Other states, even in the context of rivers, went beyond navigation. For example, Pennsylvania held an exclusive private fishery violative of public rights on a major non-tidal river.[158] As a general matter, on inland navigable waters *other than the Great Lakes*, the English common law, as accepted by many American states, granted limited use of the shore to the public, usually the right to tie up to trees and other objects—a use plainly associated with the navigational use of the waters.[159]

For present purposes, however, the most important developments were those affecting the Great Lakes, which were recognized by the Supreme Court as "inland seas" as to which title of the states and grants to any private riparians were all subject to the public trust.[160] For the Great Lakes, the United States Supreme Court explained that the same logic that had extended admiralty jurisdiction in the United States to inland non-tidal waters also

156. *Id.* The opinion explains that the English principle was not well-suited to America's inland waters that were navigable well above the reach of tidal influence. The court notes that the Susquehanna, for example, "is a mile wide, and runs several hundred miles through a rich country, and . . . is navigable, and is actually navigated by large boats." *Id.* The court then stated its view that had a river with those qualities been found in England, it would have prompted the English to adopt a different rule of navigability and public use. *Id.* The court pointed out that in England, the only rivers in which the tide does not ebb and flow "are small." *Id.*

157. *See* Brown v. Chadbourne, 31 Me. 9, 21–23 (1849).

158. *See Carson*, 2 Binn. at 476–77 (rejecting an exclusive fishery on the Susquehanna River).

159. *See, e.g.*, Morgan v. Reading, 11 Miss. (3 S. & M.) 366, 372–78 (1844) (citing, and translating from Latin, English authorities from Bracton onward). In some jurisdictions this use was limited to times of emergency. *See, e.g., id.* Rules of bed title also vary slightly, but, in general, on rivers and lakes that were actually used for navigation at the time of admission of the state to the union, the state owns the beds. *See, e.g.*, Utah v. United States, 403 U.S. 9 (1971). Other ancillary uses of the fast land in aid of navigation were at times allowed. *See, e.g., Brown*, 31 Me. at 24–25 (removal of riparian's dam to allow log floating permitted). For all other waters the riparian owns to the thread of the stream, even if under state law the public or co-riparians have a right of use of the water itself. *See generally* SAX ET AL., *supra* note 15, at 521–33.

160. The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 453 (1851).

extended the public trust use of the sea and its shores to the Great Lakes.[161]

The holding in *Illinois Central*, declaring the applicability of the full public trust doctrine to the Great Lakes, rests on a number of lines of authority.[162] Primary, of course, is the argument of Justice Field that the public trust attaches to waters, viewed as important to navigation and full public use.[163] Like earlier American judges,[164] he felt the English rule applying the trust to tidal waters was adopted because that class of waters in England was coextensive with the waters valuable for navigation and other public use.[165] Hence, tidal influence was not a basis for limitation of the trust in this country. Rather, to Justice Field, the English position's logic supported an extension of the trust to other waters that shared the suitability to provide the public benefits to which the English public trust doctrine applied.[166] Second, by 1892, the Supreme Court had many times elaborated what the equal footing doctrine meant. In cases like *Martin v. Waddell*, the thrust of public trust as it both benefited and burdened the later-formed states had become very clear—the foreshore was trust property in the hands of the United States, so the national government was not competent to impair the trust and all states succeeded to the interest of the previous foreign sovereign.[167] Part of the holding in *Illinois Central* clearly announced the burden on states: the foreshore was trust property, not only while it was in the hands of the federal government in the pre-statehood period, but also when it was in the hands of the states after statehood.[168] This was always true, but had not been an issue in any previous case. That explains why the Court cites no grants of riparian tracts of comparable magnitude in its description of the 1863 grant to Illinois Central.[169] That also may explain why the Court went to some length in its description of the parcel granted to Illinois Central and its importance to Chicago and the

161. *Id.* at 453–54; *see also* Hardin v. Jordan, 140 U.S. 371 (1891). The language in *Hardin* is especially telling on this point, describing the Great Lakes as "inland seas" subject to the same rules as the ocean front. *See id.* at 382.

162. Arguments that support full application of the public trust to the Great Lakes have moorings in the Northwest Ordinance and the Commerce Clause. *See generally* Wilkinson, *supra* note 33.

163. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435–37 (1892).

164. *See supra* 122–147.

165. *Ill. Cent. R.R. Co.*, 146 U.S. at 435–37.

166. *See supra*, notes 161–165.

167. *See, e.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); *see also* Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

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

169. *Id.* at 452–56.

region, thereby conveying the Court's sense of the enormity of the grant and its public consequence.[170] In that regard, *Illinois Central* was a case of first impression because no state previously had attempted to alienate a significant amount of public trust property free of the trust. Vitally, while there were statements to the effect that the states could determine which grants of trust lands to private individuals served the common benefit of the people,[171] after Illinois Central, it was clear that the state was itself a trustee and was limited in making choices that would release parcels from the trust. The state was not free to act in disregard of the common benefit. Just two years later in *Shively v. Bowlby*,[172] a case the modern Court has deemed "the seminal case in American public trust jurisprudence,"[173] the Court summarized the principles governing lands between high and low water in major navigable waters as follows:

> Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. *Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right.* Therefore the title and the control of them are vested in the sovereign *for the benefit of the whole people.*[174]

C. Public Trust Law in the Courts of the Great Lakes States

The highest courts of a number of Great Lakes states have announced ringing endorsements of the public trust as it applies to the Great Lakes.[175] What is equally clear, though not always achieved by the same doctrinal path, is that the area to which the public's trust-based rights attached includes the foreshore, to high water. The only material doctrinal variation goes to title to the lands, and to the precise way in which high water is described by

170. *Id.* at 454–55.
171. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 46–47 (1894).
172. *Shively*, 152 U.S. at 1.
173. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473 (1988).
174. *Shively* 152 U.S. at 57 (emphasis added).
175. See *infra* notes 176–205.

the courts.[176] These variations do not affect core public usufructs. What also comes through is solicitude for the riparian advantage of proximity, but not at the expense of the public's rights.

The 1916 Ohio Supreme Court decision in *State v. Cleveland & Pittsburg R.R. Co.*[177] is, perhaps, the best example of meshing public trust protection with respect for the private interests of riparian (littoral) proprietors. In that case, the federal government had constructed a harbor on Lake Erie in Cleveland by putting in a breakwater and dredging to ensure water of a navigable depth to a harbor line at some distance landward inside the breakwater.[178] The harbor line, however, was still a considerable distance, roughly 900 feet, from the high-water mark in many parts of the harbor.[179] The legal conflict arose when the littoral owners, including among them the Cleveland & Pittsburgh Railroad, claimed a common law right to wharf out to the navigable water.[180] Because of the great distance from their upland to the harbor line, they facilitated their efforts at wharfing out by filling in some portion of the shallow water closest to the shore.[181] The State of Ohio claimed title to the shallows between the harbor line and the upland shore as absolute owner to the high-water mark under the received English common law.[182] In addition, it claimed that its ownership was superior to the claimed riparian right to wharf out to navigable water under the common law of England from which the state's property law derived.[183]

The Ohio Supreme Court began by explaining that American courts' reception of English common law "does not compel us to incorporate into our system of jurisprudence principles which are inapplicable to our circumstances and which are inconsistent with our notions of what a just consideration of those circumstances demands."[184] Using that understanding of the received law, and with an instrumental explanation of the necessity of wharfing out

176. Minnesota, for example, grants title to the low-water mark. *See infra* notes 205–208. Defining the ordinary high-water mark was a matter that is frequently addressed in the cases. *See, e.g.*, Glass v. Goeckel, 473 Mich. 667, 685–94 (2005).

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

178. *Id.* at 679. The harbor line would mark the point at which, on the lakeward side, the water would be deep enough for navigation. On the landward side of the harbor line, the water would, in many places, be too shallow to support navigation.

179. *Id.*

180. *Id.*

181. *Id.* at 677–79.

182. *Id.* at 679.

183. *See id.*

184. *Id.* at 681 (quoting Brookhaven v. Smith, 80 N.E. 665, 667 (N.Y. 1907) (internal quotation marks omitted)).

to conducting commerce, the court found that in the United States, most states had concluded that the littoral owner has the right to wharf out to navigable waters, "provided he does not interfere with the public rights of navigation or fishery . . . ."[185] Additionally, the court explained "the state holds the title to the subaqueous land of navigable waters as the trustee for the protection of the public rights therein."[186]

The court turned the case into a win-win-win proposition for the state, the riparian, and the federal government and a resounding victory for the public trust doctrine. First, the court acknowledged the state's regulatory authority over "navigation and fishing between [the harbor] line and the shore" as long as the state regulation did not conflict with federal law in violation of the Supremacy clause.[187] Second, finding no state regulation was in place, the court next vindicated the riparian right of the littoral owner to "wharf out to the line of navigability," which was in this case the harbor line fixed by the federal government.[188] The court explained that this right to reach navigable water maximized the private benefit of the littoral location.[189] The court, however, made clear that the private usufruct was subordinate to the public right in the land between the fast land and the navigable water:

> *Whatever [the littoral owner] does in that behalf is done with knowledge on his part that the title to the subaqueous soil is held by the state as trustee for the public, and that nothing can be done by him that will destroy or weaken the rights of the beneficiaries of the trust estate.* His right must yield to the paramount right of the state as such trustee to enact regulatory legislation. It must be remembered that his right, pending appropriate legislation, is one that can be exercised only in aid of navigation and commerce, and for no other purpose. What he does is therefore in furtherance of the object of the trust, and is permitted solely on that account.[190]

185. *Cleveland & Pittsburgh R.R.*, 113 N.E. at 681. The case did not put in issue the question of the exact line between state ownership and upland ownership (whether it was high water or some other place) because the area under dispute was all subaqueous land to which all agreed title was in the state. *Id.* at 681–82.

186. *Id.* at 681.

187. *Id.* at 682.

188. *Id.* This right of the landowner, however, could not interfere with navigation. *See id.*

189. *Id.* at 680–82.

190. *Id.* (emphasis added).

Finally, the Ohio Supreme Court made it absolutely clear that the state, by its inaction, could not change the power relationship that allowed it to subordinate the interest of the private littoral owner to the public good. The court stated, "[t]he state as trustee for the public cannot, by acquiescence, abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created."[191]

Other courts have been called upon to consider where the line exists between property subject to the trust and property that is free of the trust. As the following examples show, the states do vary on title, but do not vary on the fact that the public's trust rights attach up to high water, however described.[192] An early Illinois case, *Seaman v. Smith*,[193] first noted that on oceans and bays the rule was that the upland owner held title only to the ordinary high-water mark.[194] The case then described the equivalent point of demarcation as it pertained to a parcel bounded by a non-tidal body, Lake Michigan, as being "that place where its outer edge is usually found."[195] A more recent Illinois case traced the Illinois rule for Lake Michigan back to Lord Hale and the *Shively* case, stating that, "below ordinary high-water mark ... this title (*jus privatum*),

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191. *Id.* The passage continues using trust law precepts even more explicitly, stating:

> If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had. An individual may abandon his private property, but a public trustee cannot abandon public property. Mere nonuser of the trust property by the public cannot authorize the appropriation of it by private persons to private uses, and thus thwart the purposes of the trust.

Id.

192. Three Great Lakes states will not be discussed in the text. New York recognizes state trust ownership to the ordinary high-water mark. *See, e.g.*, People *ex rel* Burnham v. Jones, 20 N.E. 577 (N.Y. 1889). *But see* Stewart v. Turney, 142 N.E. 437 (N.Y. 1923) (finding that riparian on an inland lake owns to low water; later relied upon by a lower court to apply to Lake Ontario in *Ransom v. Shaeffer*, 274 N.Y.S 570, 573 (Sup. Ct. 1934)). Indiana, which has only 45 miles of Great Lakes shore, has no case on point but has adhered to the public trust in a case involving the Ohio River. *See* Sherlock v. Bainbridge, 41 Ind. 352 (1872). Pennsylvania, which has only 51 miles of Great Lakes shoreline, has held in favor of the public trust to the high-water mark on navigable rivers even when the riparian title ran to low water. *See* Freeland v. Pa. R.R. Co., 47 A. 745 (Pa. 1901). A lower court has applied that decision to the Lake Erie shore. *See* Sprague v. Nelson, 6 Pa. D. & C. 493, 496 (1924); *see also supra* note 155 (describing public trust in Pennsylvania's navigable rivers).

193. Seaman v. Smith, 24 Ill. 521 (1860).

194. *Id.* at 524–25.

195. *Id.* at 525, *quoted with approval in* People *ex rel.* Attorney Gen. v. Kirk, 45 N.E. 830, 833 (Ill. 1896).

whether in the sovereign or in the subject, is held subject to the public right (*jus publicum*) of navigation and fishing."[196]

Wisconsin is similar in its reception of the public trust into its law. The leading case explained the title of the United States in the years before statehood as "in trust for public purposes."[197] Going beyond that, the court described the effect on the trust of transfer by the United States to the state by stating that "its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth."[198] The court further noted that the state could make concessions in favor of riparian proprietors, but only concessions that could be made "without violating the essentials of the trust . . . ."[199]

Michigan is no exception to the general rule that the state owns the beds of the Great Lakes to the high-water mark. It, too, has recognized state trust ownership to the high tide line since the dawn of the twentieth century.[200] In *People v. Silberwood*, the Michigan Supreme Court observed that the rule of *Illinois Central* on the scope and command of the public trust "is without flaw and ought to stand as the law of this state."[201] Five years later, in *Lake St. Clair*, a case that pitted the state against riparians in a contest over a strip of low-lying land that had been extensively developed by the littoral owners, the state prevailed and the court firmly established the high-water mark as the boundary of state ownership and authority: "On the admission of Michigan, all of said submerged land covered by this lake, to high water mark, passed to the state in its sovereign

196. Cobb v. Lincoln Park Comm'rs, 67 N.E. 5, 6 (Ill. 1903).

197. Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901), *quoted with approval in* Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 517 (Wis. 1952); State v. Land Concepts, Ltd., 501 N.W.2d 817, 819 (Wis. Ct. App. 1993).

198. *Ill. Steel*, 84 N.W. at 856–57.

199. *Id.* at 857. The most recent case in this line is R. W. Docks & Slips v. State, 628 N.W.2d 781 (Wis. 2001). The court stated that the public trust right up to the high-water mark "is established by judicial authority so long acquiesced in as to become a rule of property." *Id.* at 788 (citing Franzini v. Layland, 97 N.W. 499 (Wis. 1903) (internal quotation marks omitted)).

200. *See, e.g.*, State v. Lake St. Clair Fishing & Shooting Club, 87 N.W. 117 (Mich. 1901). The *Glass* majority itself does not rely on arguments that demarcate title, instead noting that the *jus publicum* runs to the ordinary high-water mark. Glass v. Goeckel, 703 N.W.2d 58, 69–71 (Mich. 2005).

201. People v. Silberwood, 67 N.W. 1087, 1089 (Mich. 1896).

right,—not as private proprietor, and subject to sale, but in trust for the public . . . ."[202]

Minnesota is the one state that has expressly granted littoral title to the low-water mark on the Great Lakes (i.e., on Lake Superior, the only Great Lake it touches). Noting that the choice is a matter of state-by-state prerogative and that Minnesota extended riparian titles to the low-water mark, the court in *State v. Korrer* stated, "[w]hile the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark."[203] The title to the foreshore, the area between high and low water is described as "limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose."[204] The state retains an on-going servitude that allows the state to override "without compensation" uses of the riparian "that would interfere with its present or prospective public use . . . ."[205] Thus, even while Minnesota allows title to pass to the littoral owners abutting Lake Superior all the way to the low-water mark, this title is nonetheless burdened by a paramount servitude that applies the public trust to the area below ordinary high water.

The Minnesota example is quite helpful in relation to judicial opinions that find, in one phrasing or another, that each state is free to formulate its own public trust law. Minnesota, by granting private title to the foreshore subject to a paramount public usufruct, established a unique property law/public trust law for its foreshore without abandoning the core principles of the public trust doctrine. Plainly, from a public trust perspective, it is not a denial of the trust for the upland owner to own down to low water as long as the trust remains intact to high water. Formulating localized public trust law is not the same as being able to disregard the trust altogether.

D. Riparian Boundary Law in the United States

The earlier foray into the law of riparian boundaries demonstrates that legal systems in the Western tradition, including those from which American jurisprudence is derived, have employed

202. *Lake St. Clair*, 87 N.W. at 125. The passage continued by ruling that adverse possession claims against the state do not operate in regard to lands below the ordinary high-water mark. *Id.*

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

204. *Id.*

205. *Id.*

adaptive doctrines to account for the natural variability of the shoreline for, quite literally, eons.[206] Accretion, reliction, erosion, and submergence operate in tandem to maintain the riparian character of riparian parcels by allowing alteration of the waterward parcel boundary in response to gradual permanent physical changes in the shoreline. There is little, if anything, about the four doctrines that is controversial at a policy level. These doctrines marry the physical realities of natural forces operating at the edge of water bodies to the almost tautological principle that riparian parcels are, and ought to remain, parcels that touch the water. Correlatively, that water, wherever it is located, ought to be treated as water in regard to the uses to be made. This arrangement preserves the distinctive nature of riparian parcels that derives from proximity to the water, such as the right to wharf out to establish ingress and egress to deeper water.[207] The doctrines also work to ensure that no intervening fast lands can become the exclusive property of a competing owner.[208] This arrangement, likewise, means that the uses of the water for navigation, fishing, and bathing, are permitted on all areas of the water, whether reduced in size, or expanded in size. The "boundary line" adjustment also means that the instrumental use of the foreshore by the public to effectuate the key public trust uses of the water are unimpaired and continue in the area above low water and below high water.

On the great waterways, such as the Great Lakes with which this Article is most concerned, the underlying ownership of subaqueous beds is firmly established in several states.[209] Likewise, as demonstrated in the preceding section, public ownership or a dominant servitude effectuate public usufructs in the foreshore area above low water up to the ordinary high-water mark. With the relative rights and areas to which they attach well-formulated, the need to adjust boundaries is self-evident and vitally important. Simply imagine what would occur if the law did not allow the

206. See *supra* notes 70–73.

207. The incidents of riparianism comprise a far longer list, but the focus here is on parcels that are riparian to great waters, where many of the typical riparian privileges that attach to smaller bodies of water are not only available to riparians, but to the general public as well and, therefore, do not need to be supported by ownership of riparian land.

208. This was the problem that the Michigan Supreme Court rectified in Hilt v. Weber. Hilt v. Weber, 233 N.W. 159, 167–68 (Mich. 1930). That case, however, included as dicta a careless statement taken from an inland lakes case describing ownership of the riparian as running to the water's edge. See supra text accompanying notes 14–16.

209. *See supra* text accompanying notes 117–147.

boundaries that define the respective rights of the states and the upland owners to be modified as gradual changes took place.

Consider first the case in which the land grows, whether by the gradual deposition of additional materials—accretion[210]—or by a gradual recession of the water—reliction.[211] If the law of boundaries is fixed, the land that is added or that emerges as the water recedes is land that was under the water before. If the boundary does not change, that land was owned by the state while it was covered with water and, because the boundary would not move without the modifying doctrine, remains in state ownership now that it is fast land. Moreover, since the result of the physical accretion or reliction has transformed that area into fast land (i.e., above the ordinary high-water mark), that ownership by the state is ownership of the areas to which the public trust no longer attaches. If the land is not trust property, the land can be used by the state for its own purposes or alienated into full private ownership. Stated slightly differently, absent boundary adjustment, the state would now be the riparian and the former riparian would have lost all the benefits of the parcel's riparian status. The moveable boundary[212] supported by the doctrines of accretion and reliction maintains the status quo ante of relative rights. Although the point of demarcation is in a different physical location on the map, all of the legal relationships—private upland fee ownership, public bed ownership, riparian privileges and usufructs that differ from those of the general public, and public servitudes and usufructs—remain the same.

Conversely, in cases in which the land shrinks, whether by the gradual removal of materials—erosion[213]—or by a gradual increase

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210. Accretion is defined as: "1. The gradual accumulation of land by natural forces, esp. as alluvium is added to land situated on the bank of a river or on the seashore." BLACK'S LAW DICTIONARY 22 (8th ed. 2004).

211. Reliction is defined as: "1. A process by which a river or stream shifts its location, causing the recession of water from its bank .... 2. The alteration of a boundary line because of the gradual removal of land by a river or stream." BLACK'S LAW DICTIONARY 1317 (8th ed. 2004). A previous edition of Black's Law Dictionary provides a better definition: "An increase of the land by the permanent withdrawal or retrocession of the sea or a river. Process of gradual exposure of land by permanent recession of body of water." BLACK'S LAW DICTIONARY 1161 (5th ed. 1979).

212. Some cases use the phrase "moveable freehold." *See, e.g.*, Glass v. Goeckel, 683 N.W.2d 719, 726 (Mich. Ct. App. 2004) (quoting Peterman v. State Dep't of Natural Res., 521 N.W.2d 499, 507 (Mich. 1994)).

213. Erosion is defined as: "The wearing away of something by action of the elements; esp., the gradual eating away of soil by the operation of currents or tides." BLACK'S LAW DICTIONARY 582 (8th ed. 2004).

in the level of the water—submergence[214]—the boundary would need to be adjusted in the reverse direction. If that did not occur, the riparian would now be able to claim ownership of a strip of water-covered land as subject to exclusive ownership and could forbid or charge the public for access to that area which is essential to enjoyment of the water as a whole. To prevent this result, under the doctrines of erosion and submergence, the riparian's fee shrinks, the public's beds increase in size, and the relative rights of each near the water's edge, albeit in a different location, remain the same.

Despite the analytical symmetry of the four doctrines, strong incentives to litigate accretion and reliction cases contrast with correspondingly weak incentives to litigate over erosion and submergence. This imbalance results from the fact that accretion and reliction make practical as well as legal differences in the focused private interest of the affected riparian in remaining riparian, while erosion and submergence most often affect only diffused benefits belonging to the general public that, in most cases, are not being threatened with disruption in the real world because the riparian that might be able to claim a trespass is making no effort to exclude the public from the now inundated areas and shores. The passive attitude of the riparians who have "lost" land to erosion or submergence is understandable—the parcel has remained riparian and the area that has eroded away has lost all practical value as a situs for the uses made on fast land. This explains why there appears to be a total dearth of erosion or submersion cases when the adversely affected riparian is arguing only to have the boundary left unchanged in order to better utilize the now-submerged or foreshore areas.[215] Instead, erosion and submergence cases and

214. The term "submergence" does not appear in the law dictionaries, but is used in several cases and is linked to reliction in the same way that erosion is linked to accretion. *See e.g.*, Michelsen v. Leskowicz, 55 N.Y.S.2d 831, 838 (1945) ("[T]he proprietorship of lands may be lost by erosion or submergence, the former consisting of a gradual eating away of the soil by the operation of current or tides, and the other of its disappearance under the water and the formation of a more or less navigable body over it."). There is a linguistic anomaly here, de-reliction (or dereliction) (the relevant meaning, of course) should be the opposite of "reliction." That is not the case, the two are synonyms; Black's Law Dictionary defines "dereliction" as "2. An increase of land caused by the receding of a sea, river, or stream from its usual watermark." BLACK'S LAW DICTIONARY 475 (8th ed. 2004).

215. It appears that in cases where the facts give any hope of it, the riparian attempts to argue for avulsion as the basis for leaving the boundary unchanged rather than making the attack on the "ordinary" operation of the boundary changing effect of erosion and submergence with regard to minerals in the soil. *See, e.g.*, Mun. Liquidators, Inc. v. Tench, 153 So. 2d 728 (Fla. Dist. Ct. App. 1963).

subaqueous boundary cases more generally are contested primarily when the changed boundary would place valuable mineral or oil and gas deposits present in the depths of the soil on the other side of the former boundary.[216] The few courts that have addressed this question in regard to claims of the eroded landowner to retain the minerals that were previously part of the parcel have not separated the surface and subsurface estates[217] and have stressed the importance of retaining the correlative advantages to the respective parties of access to the waterbody.[218]

Returning to the questions germane to public rights in the great waters, this discussion of accretion, reliction, erosion, and submergence has demonstrated quite clearly that those boundary adjustment devices do not intend to alter the division between private and public interests in the great waters or their foreshore. Having looked at both the erosion and submergence cases and the arguments made for upland owners' rights and the courts' grounds for rejection of those claims, it is clear that there is nothing in those cases that undercuts the balance of private and public rights established by the larger law of the foreshore. To the contrary, even commentary critical of the mobile boundary as applied to the mineral estate accepts and favors the mobile boundary concept in relation to surface interests which is the aspect of the doctrine that protects public interests in access and use of the foreshore.

BEYOND *GLASS V. GOECKEL*: CONCLUSIONS AND SUGGESTIONS FOR FURTHER ANSWERS

The Michigan Supreme Court ruling in *Glass v. Goeckel* is a rich decision that is imbued with the great legal tradition recognizing and protecting public rights. The majority opinion self-consciously asserts the public trust to protect public interests in the foreshore

216. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988). *Cf.* Louisiana v. Mississippi, 466 U.S. 96 (1984) (dispute over boundary location on interstate river precipitated by presence of oil and gas deposits beneath channel). For a discussion of accretion and erosion disputes, *see supra* text accompanying notes 210–215.

217. *See, e.g.*, Jackson v. Burlington N. Inc., 667 P.2d 406 (Mont. 1983) (oil deposits under Yellowstone River); Nilsen v. Tenneco Oil Co., 614 P.2d 36 (Okla. 1980) (oil beneath a non-navigable river).

218. *See* Robert L. Kimball, Comment, *Accretion and Severed Mineral Estates*, 53 U. CHI. L. REV. 232, 241–42 (1986). Mr. Kimball lists four lines of argument employed by the courts. *Id.* at 241–51. Although Mr. Kimball is quite critical of applying the movable boundary indiscriminately to the severed mineral estates, Kimball does not object to moveable boundary for the surface estate in accretion and erosion cases. *Id.* at 241.

against radical diminution and loss.[219] The victory for public rights, however, does not signal the end of the challenges. The private property side, possessed of a considerable war chest, unsuccessfully sought both rehearing in the Michigan Supreme Court[220] and certiorari in the United States Supreme Court.[221] In Ohio, efforts to restrict public use of the foreshore in that state persist. Those efforts demonstrate that the public trust issue, even as settled doctrine, is unlikely ever to be free from renewed efforts by self-interested property owners to capture and privatize a greater share of the resource benefits surrounding the great waters of this nation. For that reason, reciting why the *Glass v. Goeckel* majority has propounded a correct view of the law is a way station, but not the endpoint of the larger discussion of public trust.

The most important work that remains is to take *Glass v. Goeckel* to what might be called the *Illinois Central* level, and then two half steps beyond. In *Illinois Central*, of course, the most distinctive aspect of the case lay in the decision that some set of actions by the sovereign in derogation of the public trust were impermissible, illegal, and, therefore, void.[222] In *Glass*, the Michigan Supreme Court needed only to find that the court of appeals' interpretation of the Michigan law was incorrect and reversal followed from that.[223] The case was still what might be called a run-of-the-mill appeal that corrected an error below, without any of the gravitas that was required to define the authority of a sovereign state to limit public trust rights. To a significant extent, this Article has demonstrated that the public trust doctrine of *Glass* has the limitation of sovereignty at its core. The *Illinois Central* aspect of the public trust was in play in *Glass*,[224] but more of the majority opinion in *Glass* was devoted to examining the proper interpretation of the Michigan precedents and showing that the court of appeals had erred in its use of precedent.[225]

The first half step beyond that is to make it even clearer that there is explicit content to the public trust doctrine that is obligatory for the states, and to give that limit some definition. The harder test case is one in which the United States Supreme Court

219. *See, e.g.*, Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005).
220. Glass v. Goeckel, 703 N.W.2d 188 (Mich. 2005).
221. Goeckel v. Glass, 126 S. Ct. 1340 (2006) (mem.).
222. *See* discussion *supra* notes 167–169.
223. *See* discussion *supra* notes 24–25.
224. See Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005).
225. *Id.* at 64–66, 68–76.

would have to independently establish a public trust threshold that could not be altered by the sovereign actions of any state. Although the Court found a definite limit in *Illinois Central*, that case came to the Supreme Court in a posture where the state, like the English Crown had done centuries before, was invoking the limitation on its own power.[226] By the 1873 revocation of the earlier grant to the railroad, Illinois, as sovereign, effectively agreed that the public trust placed a limitation on its sovereignty.[227] When a case is presented in which the state is claiming that it has chosen to allow a major alienation of public trust rights, it will be both different and the same.[228] In deciding a case in which the state denies a trust violation, the Court obviously cannot rely on the state's concurrence that the trust has been violated. Even so, as explicitly stated in *Shively v. Bowlby*:

> "In . . . Illinois Cent. R. Ct. v. Illinois . . . it was recognized as the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, *when that can be done without substantial impairment of the interest*

226. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 448 (1892). The case was precipitated by the act of the 1873 Illinois legislature that attempted to revoke the 1869 grant. *Id.*

227. *See id.* at 452. Mr. Justice Field put the matter this way:

> The question, therefore, to be considered, is whether the legislature was competent to thus deprive the state of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the state.

Id.; *see also id.* at 453–54.

228. No state has yet attempted to abnegate the foreshore public trust in large measure. Idaho, however, has by legislation taken what may amount to a similar denial of trust. In 1995, following two court decisions limiting appropriations as a function of the public trust, the legislature expressly forbade use of the public trust as a limit on appropriation or use of water in that state. *See* IDAHO CODE ANN. §§ 58-1201–1203 (2006). *See also* Michael C. Blumm et al., *Renouncing the Public Trust Doctrine: An Assessment of the Validity of Idaho House Bill 794*, 24 ECOLOGY. L. Q. 461 (1997) (offering a critical assessment of the Idaho legislature's action). The Idaho action is a marked contrast to that taken in California. In California, the issue arose in the famous Mono Lake case. Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709 (Cal. 1983) (en banc). In that case the California Supreme Court said that the trust might be released when a paramount state interest, such as the security of prior appropriation water rights might be in jeopardy, but found no sufficiently authorized or explicit state action doing so. *Id.* at 712. Thereafter, the authorized state entities declined to release those water rights from the trust. *See generally* Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 ECOLOGY L. Q. 541 (1995).

> *of the public in such waters*, and subject to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce."[229]

In this half step, the Court will have to explicate the constitutional authority for its ability to intervene to "correct" the state's view of its authority over its property law. Professor Wilkinson has, correctly in my view, explained why there is federal authority here,[230] but the Court has never had to assert and exercise that power.

The second half step is somewhat easier, but still a bit novel. Virtually all public trust cases have involved legislative, executive, or administrative actions that are challenged in the courts as violative of the public trust. What *Glass v. Goeckel* posed was a judicial interpretation of the state's property law that was asserted to violate the public trust. As noted earlier, the correction of that error eliminated the necessity to delve into the question of whether courts can violate the public trust by their property law pronouncements.[231] However, with respect to judicial takings, Professor Thompson has, correctly in my opinion, explained why courts can take property when they radically redefine property rights.[232] It seems reasonable then that the same logic that supports judicial redefinitions of property rights as potential takings applies to judicial redefinitions as violations of the public trust, but there is neither scholarship nor precedent that addresses the issue. A second source of doubt regarding judicial takings is similar to the federalism concern—there is no law on the subject of judicial violations of the public trust. That may make the Supreme Court hesitant to take such a case. Looking at judicial takings as a parallel, the Court has avoided accepting or deciding cases on that ground.[233]

The Michigan Supreme Court in *Glass v. Goeckel* issued a major public trust decision. It preserves longstanding public use in Michigan. By its precedential value, the decision protects public use throughout the Great Lakes against extirpation by radically

229. Shively v. Bowlby, 152 U.S. 1, 46–47 (1894) (emphasis added) (citing Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435–37, 465, 474).

230. *See* Wilkinson, *supra* note 33, at 454–64.

231. *See* discussion *supra* notes 24–25.

232. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1541–44 (1990).

233. *See, e.g.*, Hughes v. Washington, 389 U.S. 290 (1967) (avoiding judicial takings issue raised by Justice Stewart's concurrence); Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986) (vacating the judicial takings claim and remanding on ripeness grounds).

ill-conceived and erroneous judicial action. In many ways, it should have been an easy case due to the longstanding public uses that were so widely made. It should have been no case at all, and Goeckel himself conceded as much. The fact that it was neither easy nor dead on arrival ought to be a warning that public rights are always in potential jeopardy. The public trust doctrine has an extraordinary pedigree and extraordinary reach, but the full scope of its protection against governmental abandonment of public interests is not yet established law. Perhaps those chapters of its future history will never need to be written. For now, celebrate *Glass v. Goeckel*, but also prepare.