

# A New Must of the Public Trust: Modifying Wisconsin's Public Trust Doctrine to Accommodate Modern Development While Still Serving the Doctrine's Essential Goals

Evann D.S. Derus

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# A NEW MUST OF THE PUBLIC TRUST: MODIFYING WISCONSIN'S PUBLIC TRUST DOCTRINE TO ACCOMMODATE MODERN DEVELOPMENT WHILE STILL SERVING THE DOCTRINE'S ESSENTIAL GOALS

*“It is not the law, as we view it, that the state, represented by its Legislature, must forever be quiescent in the administration of the trust doctrine, to the extent of leaving the shores of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin.”<sup>1</sup>*

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## I. INTRODUCTION

Perhaps no rights are held more closely and engrained more deeply in American society than the “bundle of sticks” afforded to property owners. Finding its roots in Aesop’s fables,<sup>2</sup> the well-known bundle of sticks metaphor describes the grouping of rights held by property owners that constitutes ownership.<sup>3</sup> Each stick represents a property right and varies in length and width, suggesting some rights are stronger

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1. *City of Milwaukee v. State*, 193 Wis. 423, 451–52, 214 N.W. 820, 830 (1927) (emphasis added).

2. Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 368 n.132, 368–69 (1998).

3. *See* *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 581 (1937) (“[O]wnership itself, as we had occasion to point out the other day, is only a bundle of rights and privileges invested with a single name.”).

than others. Like rights, sticks can be added and removed from the bundle. Further, each stick has a defined end, just as all rights have limits and restrictions.<sup>4</sup>

The public trust doctrine, with ancient roots in Roman law and inherited by the United States from English common law,<sup>5</sup> is one such limit to the bundle of sticks. While jurisdictions define the doctrine differently,<sup>6</sup> generally the public trust doctrine highlights the importance of navigable waterways to society by vesting ownership of waters and the land beneath them in the public.<sup>7</sup> The water and land are held in trust by states, allowing the public to use the water and land for certain purposes.<sup>8</sup>

While the doctrine's purpose of preserving limited natural resources for the public's enjoyment is well-intended, the public trust doctrine ultimately provides uncertainty for both the public and property owners. The public may not understand what recreational activities are protected by the doctrine. For example, can citizens enjoy long walks along the shore of any body of water? Similarly, is fishing permissible for the public on any lake within the United States? At the same time, property owners may wonder where their property ends and the public's begins.

Further complicating this inherently uncertain doctrine is the fact that each state has the power to delineate the specifics of its own public trust doctrines.<sup>9</sup> Originally a common law doctrine, components of the public trust are now explicit and implicit in state statutes and constitutions.<sup>10</sup> For example, Pennsylvania's constitution explicitly

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4. See Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 886–87 (2013) (describing the bundle of sticks as a malleable concept shaped by courts).

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

6. See Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322, 323 (2006) (“The complexity of the public trust doctrine is astounding. . . . [F]airly substantial differences exist in the interpretation of the doctrine between jurisdictions. . . .”); *infra* notes 10–15 (discussing different state approaches to the doctrine).

7. Henquinet & Dobson, *supra* note 6, at 328 (summarizing court holding that states hold lands under the navigable waters in trust for the public's rights to use the waters).

8. *Id.* at 330.

9. Phillips Petrol. Co. v. Mississippi, 484 U.S. 469, 475 (1988); Anne-Louise Mittal, Comment, *A Breach of Trust: Rock-Koshkonong Lake District v. State Department of Natural Resources and Wisconsin's Public Trust Doctrine*, 98 MARQ. L. REV. 1467, 1483 (2015).

10. See, e.g., HAW. CONST. art. XI, § 1; N.C. CONST. art. XIV, § 5; N.Y. CONST. art.

explains the state's natural resources belong to Pennsylvanian citizens, but are held in trust by the state:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.<sup>11</sup>

Other state constitutions infer the existence of a public trust doctrine, without delineating the doctrine's specifics.<sup>12</sup> Many states, both with and without detailed constitutional provisions, further codify the doctrine in state statutes, sometimes describing what citizens seeking doctrine enforcement can do.<sup>13</sup> For example, Connecticut's environmental statute states, "[A]ny person . . . may maintain an action . . . for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . ."<sup>14</sup> Whether the state's doctrine is delineated primarily by constitution, statute, or case law bears little significance on resolving the uncertainty and complications cloaking each state's law.<sup>15</sup>

While the Supreme Court solidified the doctrine's validity in the United States in the 1892 decision *Illinois Central Railroad Company v. Illinois*,<sup>16</sup> the doctrine is far from settled in terms of what rights it

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XIV, § 2; CONN. GEN. STAT. § 22a-16 (2013); IDAHO CODE § 58-1203 (2014); VT. STAT. ANN. tit. 29, § 401 (2014).

11. PA. CONST. art. I, § 27.

12. See, e.g., ALASKA CONST. art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."); MONT. CONST. art. IX, § 3 ("[W]aters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."); N.C. CONST. art. XIV, § 5 ("It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry . . .").

13. CONN. GEN. STAT. § 22a-16 (2013); IDAHO CODE § 58-1203 (2014); MASS. GEN. LAWS ch. 91, § 2 (2015); MINN. STAT. § 116B.01 (2015); VT. STAT. ANN. tit. 29, § 401 (2014).

14. CONN. GEN. STAT. § 22a-16 (2013).

15. See generally N.C. CONST. art. XIV, § 5; CONN. GEN. STAT. § 22a-16 (2013); Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). See also Brian Weidy, *What Is the Wisconsin Public Trust Doctrine?*, CONFLUENCE (Jan. 16, 2015) (stating that "nearly all cases invoking the public trust doctrine in Wisconsin led to either an expansion or an affirmation of the section of the constitution" and asking whether this doctrine is "[a]n exception to the law or a misinterpretation").

16. 146 U.S. 387 (1892). This case is sometimes called the "lodestar" of the American Public Trust Doctrine. Kilbert, *supra* note 5, at 5.

protects.<sup>17</sup> Recently, environmental groups have employed the doctrine and its flexibility to advance litigation, arguably, outside the four corners of what the doctrine was intended to protect. For example, in *Alec L. v. Jackson*, citizens and environmental organizations brought action in the United States District Court for the District of Columbia against Environmental Protection Agency administrator Lisa Jackson and others claiming these individuals failed to protect the atmosphere, which the plaintiffs argued was a “[p]ublic [t]rust asset.”<sup>18</sup> While the court noted other courts have recently applied the public trust doctrine to facts not originally envisioned,<sup>19</sup> the court also acknowledged a doctrine expansion to cover atmospheric resources would be “a significant departure from the doctrine as it has been traditionally applied.”<sup>20</sup> Ultimately, the court found against the plaintiffs, though not on the case’s merits.<sup>21</sup> Instead, the court reasoned the public trust is a state law matter and should not be decided by federal courts.<sup>22</sup>

Public trust litigation halted development in Milwaukee, Wisconsin, when a nonprofit “watchdog” group opposed a proposed apartment high-rise located on Lake Michigan’s shore on public trust grounds.<sup>23</sup> Despite a county-owned building, the Downtown Transit Center, already being located on the proposed development site, Preserve Our Parks argued the parcel was subject to the public trust doctrine and thus could not be transferred to a private party for development.<sup>24</sup>

This Comment first will discuss the development of the public trust doctrine and the objectives the doctrine originally advanced.<sup>25</sup> Next, the Comment will discuss Wisconsin’s public trust law and how the law is

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17. See Henquinet & Dobson, *supra* note 6, at 323.

18. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 12 (D.D.C. 2012), *aff’d sub nom. Alec L. ex rel. Looz v. McCarthy*, 561 F. App’x 7 (D.C. Cir. 2014).

19. *Jackson*, 863 F. Supp. 2d at 13 (citing cases that applied the doctrine to water-related uses like swimming and the aesthetic enjoyment of the waters); see, e.g., *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077 (D.C. Cir. 1984) (noting that the doctrine has been used to protect natural resources that relate to navigable waterways).

20. *Jackson*, 863 F. Supp. 2d at 13.

21. *Id.* at 17.

22. *Id.*

23. *The Couture and the Public Trust Doctrine: Preserve Our Parks’ Position*, PRESERVE OUR PARKS [hereinafter PRESERVE OUR PARKS], <http://www.preserveourparks.org/sites/default/files/uploads/documents/The%20Couture%20and%20the%20Public%20Trust%20Doctrine.pdf> [https://perma.cc/PQ34-7E2V] (last visited Oct. 14, 2015).

24. *Id.*

25. See *infra* Part II.

most protective compared to other states bordering Lake Michigan.<sup>26</sup> Subsequently, the Comment will detail the conflict between developers of the new Couture development and the environmental group Preserve Our Parks.<sup>27</sup> This discussion will illustrate recent litigation involving the public trust doctrine that conflicts with the spirit of the rule. Finally, the Comment will propose a factor test for the public trust doctrine that would allow developments like The Couture to move forward without cumbersome delay, while also maintaining the essential, original protective features of the doctrine.<sup>28</sup>

## II. THE THRUST OF THE PUBLIC TRUST DOCTRINE: THE DOCTRINE'S DEVELOPMENT AND CORE PRINCIPLES

Given the public trust doctrine's continued relevance in modern American society, it is somewhat surprising to discover the doctrine has ancient roots. The doctrine finds its roots in Roman law, which stated rivers, seas, and shores "[b]y the law of nature . . . [were] common to mankind."<sup>29</sup> While Roman waterways could not be owned,<sup>30</sup> the Romans still carefully balanced private property rights against public interest, requiring private property owners give up certain rights to benefit larger society.<sup>31</sup> In addition to protecting navigable waterways, Roman law protected shores up to "the highest point reached by the water on a predictable basis."<sup>32</sup> Romans experienced both economic and larger societal benefits from the public trust doctrine.<sup>33</sup>

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26. See *infra* Part III.

27. See *infra* Part IV.

28. See *infra* Part V.

29. Kelsey Breck, Note, *Closing the Regulatory Gap in Michigan's Public Trust Doctrine: Saving Michigan Millions with Statutory Reform*, 46 U. MICH. J.L. REFORM 267, 271 (2012) (alterations in original) (quoting Kilbert, *supra* note 5, at 4).

30. Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 920 (2007).

31. Breck, *supra* note 29, at 271.

32. *Id.* One can see how this definition of the protected land's boundary line could have caused confusion during Roman times had this era seen development like the modern era. Most certainly Roman developers would have fought over where the highest water mark on a predictable basis was located.

33. *Id.*; see also Jean-Paul Rodrigue, *Historical Geography of Transportation: The Emergence of Mechanized Systems*, HOFSTRA U. DEP'T OF GLOBAL STUD. & GEOGRAPHY (2013), <https://people.hofstra.edu/GEOTRANS/eng/ch2en/conc2en/ch2c1en.html> [<https://perma.cc/K5KX-SCPL>] ("The Roman Empire grew around an intricate network of coastal shipping . . .").

The English inherited the common law doctrine from the Romans, with modifications.<sup>34</sup> The English doctrine did not apply to all navigable waterways, rather only those navigable waterways subject to the ebb and flow of the tide.<sup>35</sup> Further, unlike Roman law, English common law assigned a legal titleholder to every piece of property able to be occupied and therefore owned.<sup>36</sup> The public received dominant title to the lands, preserving the public's right to use the lands.<sup>37</sup> While under both Roman and English common law, some public uses of waters were preserved by the public trust doctrine, "it has never been clear whether the public had an enforceable right to prevent infringement of those interests," meaning the public may have had no legal recourse against an uncooperative government.<sup>38</sup> This uncertainty during the doctrine's early stages produced confusion as the American public trust doctrine developed.<sup>39</sup>

The colonists carried England's public trust doctrine to the colonies, originally applying the doctrine just as applied in England.<sup>40</sup> As newly minted Americans headed west and settled, the doctrine did not apply to interior lands because the waters were unaffected by the tide.<sup>41</sup> In reaction to litigation, American courts replaced the English tidal rule, holding waters *navigable-in-fact* passed to states gaining statehood.<sup>42</sup> Navigable waters were defined as those "used or capable of being used in its ordinary condition as a highway for commerce through which

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34. Not all of the differences between the Roman and English public trust doctrines will be discussed in this Comment, as the content of the modifications is not relevant. Noting changes in the doctrine occurred at every step of the way—from Roman law to English law, and then again from English law to American law—is relevant to illustrate the public trust doctrine has always been a fluid doctrine. This Comment's proposed modifications to the doctrine would be far from unprecedented as the doctrine's fundamentals have changed before.

35. Frey & Mutz, *supra* note 30, at 920. The requirement that the waterways be subject to the ebb and flow of the tide has been eliminated in American jurisprudence. American courts reasoned this requirement had little effect on the doctrine's application in England because almost all of the waterways in England were influenced by the tide. *See, e.g., Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 477–79 (1988).

36. Frey & Mutz, *supra* note 30, at 920–21.

37. *Id.* at 921.

38. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–76 (1970).

39. *Id.*

40. Frey & Mutz, *supra* note 30, at 921.

41. *Id.* at 921–22.

42. *Id.* at 922.

trade and travel could take place.”<sup>43</sup> This definition underscores one of the original goals of the doctrine—to ensure waterways remain accessible to all for purposes of trade.<sup>44</sup> When a state entered the Union, any waterway meeting this navigable-in-fact requirement (and its bed) passed to the new state.<sup>45</sup>

If doubt existed that the 60,000 square miles of the Great Lakes<sup>46</sup> are subject to the public trust doctrine, it dissipated with the Supreme Court’s ruling in the seminal case *Illinois Central Railroad Company v. Illinois*.<sup>47</sup> *Illinois Central* applies particularly well to this Comment as the case involved development planned for Lake Michigan waters adjacent to Chicago.<sup>48</sup> During a time of massive city, business, and commercial growth, the United States began construction of breakwaters and other harbor protections and created an improvement plan for Chicago’s harbor.<sup>49</sup> Eventually, the Illinois State Legislature granted to Illinois Central Railroad, rather than Chicago, nearly 1,000 acres of land<sup>50</sup> for the railroad to develop the harbor.<sup>51</sup> Pursuant to a legislative act, the legislature granted “all the right and title of the State in and to the submerged lands, constituting the bed of Lake Michigan . . . ‘in fee to the railroad company, its successors and assigns.’”<sup>52</sup> The Court’s majority opinion identified the grant to Chicago’s purpose as allowing the city “to enlarge its harbor and to grant to it the title and interest of the State to certain lands adjacent to the shore of Lake Michigan . . . and place the harbor under its control, giving it all the necessary powers for its wise management.”<sup>53</sup>

The Court made several significant interpretations of the public trust doctrine in the opinion. The Court determined the public trust doctrine applied to Lake Michigan and, therefore, “the State [held] the title to the lands under the navigable waters of Lake Michigan, within its limits,

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43. *Id.*

44. See Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 U. MICH. J.L. REFORM 861, 889 (2007); *supra* p. 448.

45. Frey & Mutz, *supra* note 30, at 922.

46. *Id.* at 923.

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

48. See *id.* at 433–34.

49. *Id.* at 437–38.

50. *Id.* at 448, 454.

51. *Id.* at 448–49.

52. *Id.* at 450.

53. *Id.* at 451.

in the same manner that the State holds title to soils under tide water.”<sup>54</sup> The land was held in trust for the people so they “may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”<sup>55</sup> However, the Court also explained that, in the people’s interest in navigation and commerce, the state may grant some land for the “erection of wharves, docks and piers” though may not grant general control over the lands.<sup>56</sup>

In analyzing the *Illinois Central* opinion, legal scholars have surmised the public trust doctrine was not intended to eliminate all lakefront development.<sup>57</sup> Justice Field, writing for the Court, favored small grants of land for wharves and docks.<sup>58</sup> Justice Field’s actual fear was the complete transfer of Chicago’s harbor to a private corporation.<sup>59</sup> Rather than curtail lakefront development, Justice Field sought to maintain the lakefront’s accessibility for commercial vessels at reasonable prices.<sup>60</sup> “Thus, the public trust doctrine, as invoked in the *Illinois Central* litigation, was scarcely an anti-development doctrine.”<sup>61</sup> Some commentators argue *Illinois Central* itself endorsed a public use exception to the public trust doctrine, allowing the government to convey property to private owners anytime the public’s interest was served.<sup>62</sup>

This discussion of the doctrine’s historical development makes two points. First, and perhaps most importantly, the public trust doctrine is not a stagnant legal concept. As evidenced by the distinctions between

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54. *Id.* at 452. The court also said that “the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.” *Id.* at 437.

55. *Id.* at 452.

56. *Id.* at 452–53.

57. 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, 924 (2004); *see also Ill. Cent. R.R. Co.*, 146 U.S. at 452 (explaining permissible types of development).

58. Kearney & Merrill, *supra* note 57, at 924; *see also Ill. Cent. R.R. Co.*, 146 U.S. at 452 (explaining that grants that do not substantially impair the public interest are permissible).

59. Kearney & Merrill, *supra* note 57, at 924.

60. *Id.* at 924–25.

61. *Id.* at 925.

62. *See* Michael Seth Benn, Comment, *Towards Environmental Entrepreneurship: Restoring the Public Trust Doctrine in New York*, 155 U. PA. L. REV. 203, 209 (2006).

Roman, English, and American doctrines, “the public trust doctrine has evolved through the ages to fit current circumstances and beliefs.”<sup>63</sup> These changes have occurred “in different ways and at different paces” based upon the needs, circumstances, and beliefs of particular jurisdictions.<sup>64</sup> Second, the public trust doctrine is not merely an environmental preservationist doctrine. In fact, during the time of *Illinois Central*, the public trust doctrine often “encourage[d] and direct[ed] economic growth.”<sup>65</sup> It was not unusual for courts to find the public trust doctrine best served through the private development of protected lands and waterways, even if this development did interfere somewhat with the doctrine’s traditional notions.<sup>66</sup>

### III. WISCONSIN’S PUBLIC TRUST DOCTRINE

Wisconsin’s public trust doctrine has roots in the state’s constitution.<sup>67</sup> Article 9, Section 1 of the Wisconsin Constitution states:

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, *shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States*, without any tax, impost or duty therefor.<sup>68</sup>

While the Wisconsin Constitution explicitly announces the doctrine, courts have “developed a number of core public trust standards” that give meaning to the constitutional provision.<sup>69</sup> Additionally, because “[t]he primary authority to administer [the] trust for the protection of the public’s rights rests with the legislature, which has the power of

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63. Henquinet & Dobson, *supra* note 6, at 323.

64. *Id.* at 323–24.

65. Benn, *supra* note 62, at 209 (quoting MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY 1789–1920*, at 11 (1987)).

66. *Id.*

67. *Hilton ex rel. Pages Homeowners’ Ass’n v. Dep’t of Nat. Res.*, 2006 WI 84, ¶ 18, 293 Wis. 2d 1, 717 N.W.2d 166.

68. WIS. CONST. art. 9, § 1 (emphasis added).

69. James Olson, *All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine*, 15 VT. J. ENVTL. L. 135, 163 (2014).

regulation to effectuate the purposes of the trust,”<sup>70</sup> the legislature has the ability to and has expanded the doctrine’s meaning.<sup>71</sup>

Wisconsin’s doctrine requires waters be “navigable-in-fact” and does not limit this definition to only waters useful commercially.<sup>72</sup> Navigability is not at issue in this Comment as Lake Michigan under any definition is navigable, so it suffices to note that Wisconsin’s navigability requirement encompasses many types of waterways.<sup>73</sup> Land up to the high-water mark is protected by the public trust doctrine.<sup>74</sup> The ordinary high-water mark is “the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.”<sup>75</sup>

The navigable waterways and their beds are held by the state in trust for the public.<sup>76</sup> Initially, as discussed in the previous section, the public trust doctrine’s primary purpose was to protect navigable waterways for commercial navigation.<sup>77</sup> While the doctrine still protects for the purpose of open navigation, Wisconsin’s public trust can be used for other reasons.<sup>78</sup> In light of case law, the public trust doctrine may be used to prevent pollution, promote recreation, and protect scenic beauty.<sup>79</sup> Although the doctrine generally protects the waters and the

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70. *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492, 498 (1983).

71. The Wisconsin legislature has passed laws that clarify, and in some cases add to, the state’s public trust doctrine. *See, e.g.*, WIS. STAT. § 30.12(1) (2013–2014) (“[N]o person may do any of the following: (a) Deposit any material or place any structure upon the bed of any navigable water . . . .”); *id.* § 30.13(1) (“A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark . . . if all of the following conditions are met . . . .”).

72. Frey & Mutz, *supra* note 30, at 943.

73. *See* Gabe Johnson-Karp, Comment, *That the Waters Shall Be Forever Free: Navigating Wisconsin’s Obligations Under the Public Trust Doctrine and the Great Lakes Compact*, 94 MARQ. L. REV. 415, 420 (2010) (“Wisconsin courts have interpreted the doctrine to include almost all waters of the state . . . .”). Since 1989, Wisconsin lakes are considered navigable if they are navigable-in-fact, generally meaning a boat can float in the waterway. Frey & Mutz, *supra* note 30, at 943.

74. Frey & Mutz, *supra* note 30, at 943.

75. *Id.* at 943–44 (quoting *Diana Shooting Club v. Husting*, 156 Wis. 261, 272, 145 N.W. 816, 820 (1914)).

76. *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492, 497 (1983).

77. *Id.*

78. Johnson-Karp, *supra* note 73, at 425.

79. *Id.*; *see also* *Muench v. Pub. Serv. Comm’n*, 261 Wis. 492, 513–14, 53 N.W.2d 514, 523 (1952) (holding that the doctrine protects public recreation); *R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 19, 244 Wis. 2d 497, 628 N.W.2d 781 (holding that doctrine protects public recreation and scenic beauty); *Wis.’s Envtl. Decade, Inc. v. Dep’t of Nat. Res.*, 85 Wis. 2d 518,

land beneath them for various purposes, the Wisconsin Supreme Court has held that “limited encroachments upon the beds” is allowed where intrusion serves the public interest.<sup>80</sup>

The Wisconsin Supreme Court made clear the protective scope of the doctrine, emphasizing in *Diana Shooting Club v. Husting* that the “wisdom of the policy . . . cannot be questioned.”<sup>81</sup> The court went on to say the doctrine “should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.”<sup>82</sup> Significantly, the court asserted the waters should be free for commerce, travel, and recreation.<sup>83</sup>

Despite the commonality between the Great Lakes and their shoreline—undeveloped Lake Michigan shoreline looks largely the same in Wisconsin as it does in Michigan, Illinois, or Indiana—there are a number of differences between how each of these states treats Lake Michigan in terms of the public trust doctrine.<sup>84</sup> Of all states bordering a Great Lake, Wisconsin’s public trust doctrine is most protective<sup>85</sup> and has “consistently been at the forefront” of the doctrine’s expansion.<sup>86</sup> First, Wisconsin’s doctrine applies to many public uses of waterways, protecting the public’s right to not only navigate Lake Michigan but also to fish, hunt, and recreate on the lake.<sup>87</sup> Second, the doctrine protects natural resources and the environment.<sup>88</sup> Finally, the doctrine allows for the protection of the scenic beauty of the lands and water held in trust.<sup>89</sup> While the doctrine prohibits the state from giving or selling substantial

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533, 271 N.W.2d 69, 76 (1978) (holding that the doctrine can be used to prevent pollution).

80. *Bleck*, 114 Wis. 2d at 465; *Hixon v. Pub. Serv. Comm’n*, 32 Wis. 2d 608, 618, 146 N.W.2d 577, 582 (1966).

81. *Diana Shooting Club v. Husting*, 156 Wis. 261, 271, 145 N.W. 816, 820 (1914).

82. *Id.*

83. *Id.*

84. See Frey & Mutz, *supra* note 30, at 924. Many states define navigability differently. For example, Illinois does not use the “floatable” definition of navigability that Wisconsin uses. *Id.* at 926. Further, Illinois landowners own their shore land to the water’s edge, granting more land than under Wisconsin’s definition. *Id.*

85. *Id.* at 942.

86. Mittal, *supra* note 9, at 1483–84.

87. *Muench v. Pub. Serv. Comm’n*, 261 Wis. 492, 514, 53 N.W.2d 514, 524 (1952); Frey & Mutz, *supra* note 30, at 942–43.

88. Frey & Mutz, *supra* note 30, at 942; see, e.g., *Just v. Marinette Cty.*, 56 Wis. 2d 7, 16–17, 201 N.W.2d 761, 768 (1972).

89. *Muench*, 261 Wis. at 514; Frey & Mutz, *supra* note 30, at 942–43.

land or lakebed to private parties, minor alterations in the shoreline of a waterway may be acceptable.<sup>90</sup>

Wisconsin's public trust doctrine is "best characterized as not only expansive but also elastic, capable of being stretched to address changing social norms and emergent public concerns."<sup>91</sup> Wisconsin's public trust doctrine applied to structures or landfill in waterways indicates this flexibility. In *Hixon v. Public Service Commission*, the Wisconsin Supreme Court stated the legislature must weigh all relevant policy factors when making determinations regarding fill or structures on the land of navigable waters.<sup>92</sup> Specifically, the court stated the legislature must consider the goals of "preserv[ing] the natural beauty" of the waterways, "obtain[ing] the fullest public use" of the waters, and providing convenience to riparian owners.<sup>93</sup> Navigation is a consideration when deciding to what extent the fill or structure will enhance the water's public use.<sup>94</sup>

The public trust doctrine also imposes on the state a "duty to eradicate the present pollution and to prevent further pollution in its navigable waters."<sup>95</sup> The doctrine does, however, prevent the state from making "any substantial grant of a lake bed for a purely private purpose."<sup>96</sup> Further, even for a public purpose, the state may not change the entire lake or alter it in a way that destroys the character of the waterway.<sup>97</sup> The doctrine, however, does not require that the waterways and shoreline remain unchanged.<sup>98</sup>

Wisconsin's public trust doctrine illustrates the power states have to customize their own doctrines. The doctrine's primary principles remain—the navigable waterways and the land beneath them belong to the public and are held in trust by the state. However, Wisconsin's law is fairly customized, protecting more than under English or Roman common law and more than many states currently do.

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90. *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 118, 81 N.W.2d 71, 74 (1957); Frey & Mutz, *supra* note 30, at 944.

91. Mittal, *supra* note 9, at 1484.

92. *Hixon v. Pub. Serv. Comm'n*, 32 Wis. 2d 608, 620, 146 N.W.2d 577, 583 (1966); Olson, *supra* note 69, at 163.

93. *Hixon*, 32 Wis. 2d at 620.

94. *See id.*

95. *Just v. Marinette Cty.*, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 768 (1972).

96. *State v. Pub. Serv. Comm'n*, 275 Wis. 112, 118, 81 N.W.2d 71, 74 (1957).

97. *Id.*

98. *See City of Milwaukee v. State*, 193 Wis. 423, 451–52, 214 N.W. 820, 830 (1927).

## IV. THE COUTURE CONTROVERSY

In early summer 2012, Milwaukee-based developer Rick Barrett announced a proposed forty-four-story project to be built where the Downtown Transit Center is located and initially consisting of 180 hotel rooms and 179 apartments.<sup>99</sup> Barrett's primarily residential project—along with other developments such as an eighteen-story office tower located at 833 Michigan Avenue<sup>100</sup> (833), Northwestern Mutual's rebuilt headquarters at 800 East Wisconsin Avenue,<sup>101</sup> and a thirty-three-story residential, retail, and parking tower located at the corner of Mason and Van Buren Streets, also developed by Northwestern Mutual<sup>102</sup>—will not only change the skyline's look<sup>103</sup> but also have a great impact on how professionals navigate downtown.<sup>104</sup>

The developer of 833, Mark Irgens, praised The Couture for what a

99. Sean Ryan, *Penthouse View: Couture, 833 East Developers Envision Complementary Projects*, BUS. J., Aug. 3, 2012, at 1, 30, <http://www.bizjournals.com/milwaukee/print-edition/2012/08/03/penthouse-view-couture-833-east.html> [<https://perma.cc/PF7S-KANC?type=image>].

100. *Overview*, 833EAST.COM, <http://www.833east.com/overview> [<https://perma.cc/FY6M-6AMM>] (last visited Oct. 15, 2015).

101. *Northwestern Mutual Tower and Commons*, URBANMILWAUKEE.COM, <http://urbanmilwaukee.com/building/northwestern-mutual-new-building> [<https://perma.cc/2P7P-TUXZ>] (last visited Oct. 15, 2015). Collectively, with the new Milwaukee Bucks arena, these projects have been coined the "Downtown Milwaukee Renaissance." Mark Kass, *The 'Renaissance' Is Coming to Downtown Milwaukee*, MILWAUKEE BUS. J., June 5, 2015, at 3, <http://www.bizjournals.com/milwaukee/print-edition/2015/06/05/the-renaissance-is-coming-to-downtown-milwaukee.html> [<https://perma.cc/T76Z-4VEQ?type=image>].

102. *Northwestern Mutual to Build 33-Story Residential, Retail and Parking Tower; Increase Investment in Downtown Milwaukee*, NW. MUTUAL, <https://www.northwesternmutual.com/news-room/122933> [<https://perma.cc/5NTT-CZ67>] (last visited Nov. 8, 2015).

103. At 507 feet tall, The Couture would become one of the tallest buildings in Wisconsin. *Tallest Buildings in Milwaukee*, EMPORIS.COM, <http://www.emporis.com/statistics/tallest-buildings/city/101324/milwaukee-wi-usa> [<https://perma.cc/JU3D-QCUY>] (last visited Nov. 21, 2015).

104. Ryan, *supra* note 99. Plans exist for a skywalk to connect The Couture, 833, and the U.S. Bank tower. *Id.* at 30. Stewart Wangard, another local real estate developer, stated the skywalk feature of these buildings is exceedingly important. Sean Ryan, *Connections and Coastal Views Contemplated on New Lakefront Site*, MILWAUKEE BUS. J.: REAL EST. (Mar. 15, 2013, 5:00 AM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2013/03/connections-and-coastal-views.html?page=2](http://www.bizjournals.com/milwaukee/blog/real_estate/2013/03/connections-and-coastal-views.html?page=2) [<https://perma.cc/6JS2-TXUB?type=image>]. While Wangard values lake views, the developer said the important part of this project is the building will integrate people with the rest of Milwaukee. *Id.* Wangard acknowledged that people will pass others in the skywalk and in the new restaurants and that these are the interactions that lead to "real business networking." *Id.* Wangard said, "Commerce does not function in isolation . . . . Those interactions occur every day in Milwaukee. It's only going to occur when you are running into other people." *Id.*

residential development of its size would do for Milwaukee's downtown, asserting The Couture would add to the "vibrancy of downtown . . . and ultimately attract more potential commercial office tenants by having these uses and amenities."<sup>105</sup> Michael Cudahy, a renowned Milwaukee philanthropist and entrepreneur with a special interest in Milwaukee's lakefront and its development,<sup>106</sup> praised The Couture and 833 stating, "I'm delighted that [the Lakefront] is materializing almost the way I hoped it would."<sup>107</sup>

Unfortunately, the story of Milwaukee's lakefront development did not progress smoothly. From the moment Barrett announced The Couture, park advocates questioned whether the development's location on filled lakebed would prohibit private development.<sup>108</sup> Preserve Our Parks, a Milwaukee nonprofit "watchdog" group, opposed the development. Preserve Our Parks and its surveyor contended that two-thirds<sup>109</sup> of the Transit Center site was once Lake Michigan.<sup>110</sup> Assuming this parcel was once Lake Michigan, the public trust doctrine would govern the property, giving the public ownership of the land and the state title to the land for the public's benefit, which would prevent

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105. Ryan, *supra* note 99, at 30.

106. See Jeff Sherman, *Milwaukee Talks: Michael Cudahy*, ONMILWAUKEE.COM (Aug. 28, 2002), <http://staff.onmilwaukee.com/buzz/articles/cudahy.html> [<https://perma.cc/69A6-PRPT>] (quoting Cudahy, "I think Milwaukeeans for way too long said, 'oh yeah, the lake, uh huh.' They really didn't pay attention to the tremendous asset that we have here. This is part of the biggest natural fresh water area in the world, and it's right here in Milwaukee!") Cudahy also expressed hope that business leaders would step forward to "take a lead in moving this city forward."). Cudahy has taken the lead, with involvement in the Pier Wisconsin project and investment in the lakefront restaurant Harbor House. *Harbor House to Bring Fine Dining to Lakefront*, ONMILWAUKEE.COM (Apr. 20, 2010), <http://onmilwaukee.com/dining/articles/harborhousepreview.html> [<https://perma.cc/6TBP-JNMA>] (stating Cudahy teamed up with Bartolotta to develop the restaurant).

107. Ryan, *supra* note 99, at 30. The vision for the new lakefront would include major changes to the area's infrastructure. *Id.* Michigan Street would be rebuilt in this area and Clybourn Street made into a boulevard. *Id.* Major work to the expressway ramps was also planned. *Id.* By July 2012, the city had already approved \$180,000 to go towards engineering work on the local infrastructure. *Id.* More recently, Mayor Tom Barrett and Governor Scott Walker announced an agreement where the state would spend \$16 million on moving two ramps of the Lake Interchange to create space for new development. *The Big Milwaukee Business Stories of 2013: Amazon, Northwestern Mutual Led 2013 List*, BUS. J., Dec. 27, 2013, at 10, 11, <http://www.bizjournals.com/milwaukee/print-edition/2013/12/27/the-big-milwaukee-business-stories-of.html?page=7> [<https://perma.cc/LZ4N-KQCA?type=image>]. In exchange, the city committed \$18 million to local road improvements. *Id.*

108. Ryan, *supra* note 99, at 30.

109. PRESERVE OUR PARKS, *supra* note 23, at 3 n.3.

110. *Id.* at 2.

private development on this property. Preserve Our Parks relied on a survey it commissioned, showing that the Downtown Transit Center site was located on filled lakebed.<sup>111</sup> Preserve Our Parks claimed to not be anti-development and asserted it would have liked to see The Couture built, just in a different location.<sup>112</sup>

Not all found Preserve Our Parks' argument compelling, particularly because the Downtown Transit Center building sat on the property. Preserve Our Parks submitted its findings supporting its argument to the Wisconsin Department of Natural Resources (DNR), which concluded the site was not subject to the public trust doctrine.<sup>113</sup> In late September 2012, the DNR ruled the Transit Center property is not protected by Wisconsin's public trust doctrine.<sup>114</sup> The DNR reasoned Preserve Our Parks' maps, upon which its argument relied, pre-dates the creation of Wisconsin as a state.<sup>115</sup> Because the public trust doctrine applied to states at the time they became states, the map did not support Preserve Our Parks' claim that the property is subject to the doctrine.<sup>116</sup> Additionally, the DNR contended the maps do not "definitively show the old lake shoreline and do not establish it as being in the vicinity of the transit center site."<sup>117</sup> Further, the map advanced by Preserve Our Parks did not meet modern surveying standards, according to the DNR.<sup>118</sup>

While some Milwaukeeans rejoiced over the DNR's conclusion,<sup>119</sup> the fight over The Couture project was far from over. In February 2013,

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111. *Id.*

112. *Id.* at 3.

113. *Id.* at 2.

114. Sean Ryan, *DNR Rules Public Trust Doctrine Does Not Protect Downtown Transit Center*, MILWAUKEE BUS. J.: REAL EST. (Sept. 28, 2012, 2:36 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2012/09/dnr-rules-public-trust-doctrine-does.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2012/09/dnr-rules-public-trust-doctrine-does.html) [<https://perma.cc/RMM6-MKKL?type=image>].

115. *Id.*

116. *See supra* p. 452.

117. Ryan, *supra* note 114.

118. Sean Ryan, *Downtown Transit Center Debate Runs Deep*, MILWAUKEE BUS. J.: REAL EST. (June 4, 2013, 4:20 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2013/06/downtown-transit-center-debate-runs-deep.html?page=2](http://www.bizjournals.com/milwaukee/blog/real_estate/2013/06/downtown-transit-center-debate-runs-deep.html?page=2) [<https://perma.cc/8R38-EN2T?type=image>]. A modern survey could be done, though the DNR does not typically take on this kind of work. *Id.* Further, the dirt on the Transit Center property could be analyzed to see if the site was indeed filled. *Id.*

119. Milwaukee County Executive Chris Abele, who is heavily involved in the negotiations between the city and Barrett for the property, expressed excitement over the DNR's decision. Abele said, "Now that the issue has been thoroughly researched, we can continue to move forward with the exciting Couture project which will change the skyline of

the Milwaukee County Board approved spending \$100,000 to go to court, asking a judge to rule in the city's favor regarding the public trust controversy.<sup>120</sup> Though even with a legal fight on the horizon, some remained optimistic that The Couture would be completed by fall 2015 or spring 2016.<sup>121</sup> While the complete progression of this neighborhood would occur over several years, "the end result could be a truly urban neighborhood, with residents, retail, museums and lots of jobs concentrated around the Lake Michigan shoreline."<sup>122</sup>

Armed with attorneys, the city and Preserve Our Parks' fight over the Transit Center land became even more technical. Not only was the lake's former location an issue but additionally a Wisconsin law passed in 1915 surfaced.<sup>123</sup> This law codified a line originally drawn in a deal between Milwaukee city officials and the Chicago & Northwestern Railroad Company.<sup>124</sup> The deal declared anything east of the line reserved for public uses.<sup>125</sup> Preserve Our Parks contended this law did not state land west of the line was unprotected, merely that land east of the line was protected.<sup>126</sup> The conflict seemed destined for court, with Preserve Our Parks pledging to contest any sale unless the development was limited to the one-third of the property the group believed does not implicate the public trust doctrine.<sup>127</sup>

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Milwaukee and create 4,400 jobs and millions of dollars in tax base." Ryan, *supra* note 114. As this Comment will go on to address, Abele's prediction could not have been further from the truth, as over two years later The Couture's public trust issue finally settled. *Infra* pp. 465-66.

120. See Sean Ryan, *Milwaukee County Approves Downtown Transit Center Lawsuit*, MILWAUKEE BUS. J.: REAL EST. (Feb. 7, 2013, 2:48 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2013/02/milwaukee-county-approves-downtown.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2013/02/milwaukee-county-approves-downtown.html) [<https://perma.cc/W3ZP-CT4L?type=image>].

121. See Sean Ryan, *Road to Fruition: Lakefront Changes Create Multitude of Opportunities, Challenges to Differ from Park East*, BUS. J., Mar. 15, 2013, at 1, 32, <http://www.bizjournals.com/milwaukee/print-edition/2013/03/15/road-to-fruition-lakefront-changes.html?page=2> [<https://perma.cc/9Z4A-ZCQG?type=image>] (discussing projected expectations for the project at the time the article was written).

122. *Id.*

123. See Ryan, *supra* note 118 (discussing a legal question regarding 1915 law passed by the legislature that drew a line down Milwaukee's lakefront but did not include the transit center as a protected area).

124. Sean Ryan, *Credit or Blame for Transit Center Decision Rests with 1915 Wisconsin Legislature*, MILWAUKEE BUS. J.: REAL EST. (Sept. 28, 2012, 3:42 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2012/09/credit-or-blame-for-transit-center.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2012/09/credit-or-blame-for-transit-center.html) [<https://perma.cc/2L82-GLEV?type=image>].

125. *Id.*

126. See *id.*; see also PRESERVE OUR PARKS, *supra* note 23.

127. Sean Ryan, *Preserve Our Parks Vows Court Challenge of Downtown Transit Center*

In early 2014, the Wisconsin Legislature and Governor Walker stepped in, passing 2013 Wisconsin Act 140.<sup>128</sup> This law established the Milwaukee shoreline as extending

from approximately the line of East Lafayette Place extended easterly on the north to the present north harbor entrance wall of the Milwaukee River on the south as specified in an agreement between the Chicago and Northwestern Railway Company and the city of Milwaukee recorded with the office of the register of deeds of Milwaukee County.<sup>129</sup>

The law stated any limitations placed on the land described in the act no longer applied and that the action had the power of a court's final judgment.<sup>130</sup> Because the Transit Center property was west of the boundary line established in this law, many thought this act would end, or at least begin to end, the controversy surrounding this property.<sup>131</sup>

A redesign of The Couture, released in September 2014, increased the building's public space and added a stop for Milwaukee's yet to be installed streetcar.<sup>132</sup> The revised plan included two retail spaces on the second floor of the building, with the lower levels devoted to a streetcar and bus depot.<sup>133</sup> Additionally, the revised plan included a public park atop the building's base.<sup>134</sup> While Mayor Barrett stated the updated

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*Sale*, MILWAUKEE BUS. J.: REAL EST. (Oct. 28, 2013, 12:21 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2013/10/preserve-our-parks-vows-court.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2013/10/preserve-our-parks-vows-court.html) [<https://perma.cc/WZ7K-HF9E?type=image>].

128. Act of Mar. 17, 2014, 2013 Wis. Act 140, 2013 Wis. Sess. Laws 946.

129. *Id.*

130. *Id.*

131. Sean Ryan, *Walker Signs Bill to Help Couture Development: Slideshow*, MILWAUKEE BUS. J.: REAL EST. (Mar. 17, 2014, 5:33 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2014/03/walker-signs-bill-to-help-couture-development.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2014/03/walker-signs-bill-to-help-couture-development.html) [<https://perma.cc/2C89-N5UD?type=image>] (“The new law is intended to clear up legal uncertainties over the sale raised by Preserve Our Parks . . .”). Developer Barrett was cautiously optimistic stating, “I know there’s still threats of litigation from out there, but I think this helps us get to where we need to be . . . . Today is the first day we can start talking about it.” *Id.*

132. *Time to Approve Transit Center Sale*, Editorial, MILWAUKEE BUS. J., Sept. 12, 2014, at 29, <http://www.bizjournals.com/milwaukee/print-edition/2014/09/12/time-to-approve-transit-center-sale.html> [<https://perma.cc/9L9H-A6JS?type=image>].

133. Sean Ryan, *Couture Plans Revised to Add Streetcar and Bus Stop, Rooftop Park*, MILWAUKEE BUS. J.: REAL EST. (Sept. 3, 2014, 10:02 AM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2014/09/couture-plans-revised-to-add-streetcar-and-bus.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2014/09/couture-plans-revised-to-add-streetcar-and-bus.html) [<https://perma.cc/9MQF-GLGR?type=image>]. Note also that the plan now includes no hotel rooms and instead 302 apartments. *Id.*

134. *Id.*

plan “[made] the public’s interest a priority with its open spaces, its pedestrian access, and the transportation connections,”<sup>135</sup> Preserve Our Parks was not impressed with these additions. Preserve Our Parks President John Lunz said, while “[i]t looks like some nice amenities [where] thrown in . . . the underlying issue is public ownership versus private ownership of the lake bed” and is “something that needs to be settled by the courts.”<sup>136</sup>

Ultimately, in an effort to obtain the certainty needed to find a title company willing to insure the sale,<sup>137</sup> Milwaukee County petitioned the Wisconsin Supreme Court for legal approval to sell the Transit Center property.<sup>138</sup> The lawsuit asked the Wisconsin Supreme Court to uphold 2013 Wisconsin Act 140, which Preserve Our Parks contended was unconstitutional.<sup>139</sup> The supreme court ultimately agreed with the nonprofit,<sup>140</sup> which urged the court to reject the county’s petition for jurisdictional reasons.<sup>141</sup> In response, Milwaukee County, alongside the

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135. *Id.*

136. Sean Ryan, *Michael Cudahy Calls Opposition to Couture Lakefront Plans ‘Ludicrous’*, MILWAUKEE BUS. J.: REAL EST. (Sept. 4, 2014, 11:42 AM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2014/09/michael-cudahy-calls-opposition-to-couture.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2014/09/michael-cudahy-calls-opposition-to-couture.html) [<https://perma.cc/YE55-74DQ?type=image>]. In regards to Preserve Our Parks, Michael Cudahy said, “When all parties, including all of the surrounding owners of real estate all say, ‘Hurray, let’s do it,’ it seems kind of ludicrous to imagine someone would try to stop it because of a part of the constitution that is dated back to 1880.” *Id.*

137. This is a necessary step before any sale of property can take place.

138. Sean Ryan, *Milwaukee County Takes Couture Land Sale Dispute to Supreme Court with Legal Filing*, MILWAUKEE BUS. J.: REAL EST. (Dec. 23, 2014, 9:18 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2014/12/county-takes-couture-land-sale-dispute-to-supreme.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2014/12/county-takes-couture-land-sale-dispute-to-supreme.html) [<https://perma.cc/9LXF-AV7U?type=image>]. The lawsuit was filed by an attorney at von Briesen & Roper SC and is associated with a \$100,000 increase in the city’s contract with that firm. *Id.*

139. *Id.* By taking this action directly to the supreme court, the county had hoped to avoid a lengthy legal battle, believing the nonprofit would appeal any lower court decision. *Id.*

140. Sean Ryan, *Update: Wisconsin Supreme Court Refuses to Hear Couture Dispute Over Transit Center Sale*, MILWAUKEE BUS. J.: REAL EST. (Feb. 11, 2015, 11:25 AM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2015/02/wisconsin-supreme-court-refuses-to-hear-couture.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2015/02/wisconsin-supreme-court-refuses-to-hear-couture.html) [<https://perma.cc/3SR2-EE82?type=image>]; Dan Behm, *State High Court Won’t Weigh in on Couture Boundary Dispute*, MILWAUKEE J. SENTINEL (Feb. 11, 2015), <http://www.jsonline.com/news/milwaukee/state-high-court-wont-weigh-in-on-couture-boundary-dispute-b99443179z1-291534721.html> [<https://perma.cc/DH3B-SF6Z>].

141. *Milwaukee Cty. v. Pres. Our Parks, Inc.*, 2015 WI 24, 862 N.W.2d 604, 605, No. 2014AP2957-OA (Wis. Feb. 10, 2015) (unpublished table decision) (denying certification requested in original action); Don Behm, *Parks Group Asks State Supreme Court to Halt Sale of County Transit Center*, MILWAUKEE J. SENTINEL (Jan. 25, 2015), <http://www.jsonline.com/news/milwaukee/parks-group-asks-state-supreme-court-to-halt-sale-of-county-transit-center-b99431586z1-289689181.html> [<https://perma.cc/8CRC-VKAW>].

City of Milwaukee, filed suit in circuit court, seeking to have the validity of 2013 Wisconsin Act 140 affirmed.<sup>142</sup>

In late June 2015, three years after Rick Barrett initially proposed The Couture, Milwaukee County Circuit Court Judge Christopher Foley gave the development a legal green light, ruling the boundary established by the state law was valid.<sup>143</sup> Judge Foley acknowledged the boundary delineated in the state law does not reflect the location of the shoreline when Wisconsin became a state.<sup>144</sup> The judge believed this was not the principal issue because the legislature has the power to decide what land is protected by the public trust doctrine, so long as the land meets certain criteria.<sup>145</sup> In deciding whether Preserve Our Parks would “overcome the presumption that the Legislature acted reasonably when it approved the 2014 law,” Judge Foley reasoned, “The Legislature thought that allowing the Couture development to occur on filled lake bed would have little effect on water interests, and bring significant public benefits.”<sup>146</sup> Judge Foley emphasized, because the property had not been a lake for over 100 years, the sale and subsequent development would have no impact on navigation.<sup>147</sup> Additionally, Judge Foley reasoned the development would not limit public access and interest in the lake, “noting the Couture’s public spaces provide access to the lake.”<sup>148</sup> Finally, Judge Foley said, through economic development, the sale of Transit Center property would serve a public

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142. Don Behm, *County Files Suit Against Parks Group in Couture Dispute*, MILWAUKEE JOURNAL SENTINEL (Feb. 24, 2015), <http://www.jsonline.com/news/milwaukee/county-files-suit-against-parks-group-in-couture-dispute-b99451116z1-293908821.html> [https://perma.cc/7JQJ-DQWP]; Sean Ryan, *Couture Lawsuit Filed Against Preserve Our Parks in Circuit Court*, MILWAUKEE BUS. J.: REAL EST. (Feb. 24, 2015, 2:30 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2015/02/couture-lawsuit-filed-against-preserve-our-parks.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2015/02/couture-lawsuit-filed-against-preserve-our-parks.html) [https://perma.cc/L7F4-K4YM?type=image].

143. Sean Ryan, *Court’s Decision Allows Transit Center Sale for Couture Development*, MILWAUKEE BUS. J.: REAL EST. (June 26, 2015, 11:39 AM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2015/06/courts-decision-allows-transit-center-sale-for.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2015/06/courts-decision-allows-transit-center-sale-for.html) [https://perma.cc/A4TR-BGJJ?type=image].

144. Don Behm & Tom Daykin, *Judge Clears Way for County Land Sale for Couture High-Rise*, MILWAUKEE J. SENTINEL (June 26, 2015), <http://www.jsonline.com/news/milwaukee/judge-clears-way-for-county-land-transfer-for-couture-high-rise-b99527381z1-310088541.html> [https://perma.cc/4U2E-KHD4].

145. *See id.*; *see also* Ryan, *supra* note 143. Judge Foley also commented on the difficulty of determining where the historic shoreline was. Ryan, *supra* note 143.

146. Behm & Daykin, *supra* note 144.

147. Ryan, *supra* note 143.

148. *Id.*

purpose.<sup>149</sup>

Despite speculation that Preserve Our Parks would continue to oppose The Couture development,<sup>150</sup> the group did not appeal Judge Foley's decision.<sup>151</sup> As local city leaders rejoiced, Preserve Our Parks president affirmed the group's commitment to protecting the lakefront, stating the group would "continue to oppose any private development of public park lands or any further privatization of Milwaukee's public lakefront."<sup>152</sup> As is, Judge Foley's decision "clear[ed] the path for development of roughly 2.5 acres" immediately south of the Transit Center.<sup>153</sup> While for the time being the debate over the Transit Center property and similarly situated parcels is settled, with discussion of additional development in this area, Preserve Our Parks or other groups could continue to slow development by raising public trust concerns.<sup>154</sup> Additionally, with other undeveloped property on Lake Michigan's shores located elsewhere, the public trust doctrine could prevent development that would be otherwise good for Wisconsin.

#### V. NEW FACTOR TEST PROPOSED

Certainly, much has changed since the Roman era, yet the main principle of the public trust doctrine—that the waters and lands underneath belong to the people—has remained consistent.<sup>155</sup> Wisconsin's doctrine, articulated in the state's constitution, maintains this basic principle.<sup>156</sup> Another basic principle, articulated in *Illinois Central*, is the state, which holds the water and lands in trust for the people, may not convey general control over the waters to a private party.<sup>157</sup> However in contemporary times, when local and state governments are stretched both financially and in terms of staffing, it might make sense in some cases to convey trust property to private

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149. *Id.*

150. *Id.*

151. Sean Ryan, *Preserve Our Parks Will Not Appeal Lawsuit, Clearing Way for Couture on Milwaukee's Lakefront*, MILWAUKEE BUS. J.: REAL EST. (Aug. 19, 2015, 8:03 AM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2015/08/preserve-our-parks-will-not-appeal-lawsuit.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2015/08/preserve-our-parks-will-not-appeal-lawsuit.html) [<https://perma.cc/3KUN-WFGC?type=image>].

152. *Id.*

153. *Id.*

154. *See id.* (summarizing the county's statement about moving forward and Preserve Our Parks' statement that they will continue opposing development).

155. *See* Kilbert, *supra* note 5, at 5–6.

156. *See supra* Part III.

157. *See supra* Part II.

parties better suited to protect the land and waters for the public. With this idea in mind, this Comment proposes that even if property unequivocally falls within the public trust doctrine, this categorization should not definitively prevent even a large conveyance to a private party. Instead, the court should weigh five factors to determine whether the public trust doctrine should be enforced: (1) the size of the parcel to be sold relative to the size of the waterway as a whole; (2) the conveyance's effect on commerce and navigation; (3) the conveyance's effect on the environment and water's ecosystem; (4) the conveyance's effect on scenic beauty; and (5) the conveyance's effect on public recreation.

These factors should be weighed consistently with the doctrine's primary goal of protecting the waters to allow enjoyable public use.<sup>158</sup> The first factor—the size of the parcel to be sold relative to the size of the waterway as a whole—is the most straightforward component of the test because the factor involves a simple, quantitative comparison. When evaluating the first factor, the smaller the ratio of the parcel to the overall waterway, the more likely the conveyance should be allowed. The more dramatic the ratio, the more the factor weighs towards conveyance. For example, a conveyance that affects 1% of the waterway may favor allowing the conveyance if other factors also support this outcome. However, if a conveyance only affects 0.0001% of a waterway, this conveyance may not need strong support from the other factors to be allowed. This factor is less important when the waterway is large, like in situations dealing with the Great Lakes because a parcel of land is unlikely to be large enough to ever weigh against conveyance. Therefore, when considering a conveyance of a portion of a large waterway, this factor should be given the least weight.

The second factor—the conveyance's effect on commerce and navigation—requires more analysis than the first. The more the sale promotes commerce and navigation, the more this factor weighs in favor of allowing the conveyance. Some developments may only affect commerce incidentally. For instance, a purely residential development may only promote commerce insofar as the residential units themselves are bought and sold. However, a development open to the public with a variety of businesses opens opportunities for commerce. Similarly, a development that incorporates navigation, like a bus depot or airport, would promote both personal and commercial navigation. Conveyances

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158. See *supra* p. 448.

intended for these types of developments should be favored under this factor of the test.

The third factor—the conveyance’s effect on the environment and water’s ecosystem—examines the environmental impacts of the conveyance. If the conveyance addresses environmental protections or will not have adverse environmental effects, this factor weighs towards allowing the conveyance. When evaluating this factor, courts could consider what the future owner plans to do with the property. For instance, if the owner plans to preserve open space after acquiring the property, this preservation would weigh in favor of allowing the sale. Additionally, a conveyance could also potentially improve the environment, which would also favor allowing the land transfer. Perhaps a contaminated waterway could be improved if a portion was transferred to a private party with the resources to orchestrate a cleanup. If the conveyance either has no impact on the environment or improves the environment, the third factor weighs towards allowing the transfer.

As to the fourth factor—the conveyance’s effect on scenic beauty—there are certainly imaginable circumstances where a conveyance would actually improve a property’s scenic beauty. For example, if the government conveyed public trust land to a nonprofit conservation group, the group may have additional funds to better maintain and beautify the property. Similarly, private ownership may enhance the protected property to allow the public to more effectively enjoy public trust lands. For example, the addition of park benches to beaches improves the public’s ability to enjoy the beauty of the protected land and water. If these or similar circumstances are implicated in the sale, the fourth factor weighs towards allowing the conveyance.

Finally, if the conveyance has a positive effect on public recreation, the fifth factor—the conveyance’s effect on public recreation—weighs in favor of the conveyance. There are countless ways a conveyance may have a positive effect on public recreation. For example, a conveyance for the purpose of installing a public pier where the public may dock its boats would promote recreation directly advancing use of the waterway. Additionally, a slim conveyance for the purpose of filling and developing a public park with amenities for the public, like biking or walking trails, would similarly increase the public’s recreational use of trust property. If the conveyance would encourage public recreation more than leaving the property as is would, this factor weighs towards conveyance.

While the addition of these factors departs from public trust doctrine

traditions, the change is not unprecedented. As societies adopted the doctrine during different eras, the doctrine changed. For example, the Roman public trust doctrine originally protected the shores to where the water reached predictably.<sup>159</sup> In contrast, English law protected land to the high-water mark.<sup>160</sup> Now, each state in the United States is free to adopt its own boundary line defining what land is protected.<sup>161</sup> Similarly, Roman law applied to all navigable waterways, while English law only applied to navigable waterways “subject to the ebb and flow of the tide.”<sup>162</sup> United States law did away with the tidal requirement, as almost all English waterways were influenced by the tide, far from reality in America.<sup>163</sup> Presently, while Wisconsin’s doctrine still has a navigability component, the requirement is expansive and does not have the tidal requirement.<sup>164</sup> These examples, merely a brief sampling of the changes the doctrine incurred, illustrate that at no point was the public trust doctrine stagnate. Courts and legislatures always had the power, and exercised that power, to modify the public trust doctrine’s scope to better suit public and private needs.<sup>165</sup>

Further, the addition of these factors is not a drastic departure from Wisconsin’s doctrine. First, the authority to administer the trust falls squarely within the Wisconsin Legislature’s power.<sup>166</sup> Just as doctrine modifications and expansions advanced by the legislature have been accepted before,<sup>167</sup> a legislative act codifying the proposed test is consistent with the legislature’s authority over the doctrine. Second, these factors flow naturally from additional protections Wisconsin’s public trust enforces. With the exception of the first factor considering the size of the conveyance, all of the factors correspond with elements the doctrine already preserves. For example, the second factor, considering the conveyance’s effect on commerce, clearly aligns with the doctrine’s original purpose of preserving waterways for public’s trade

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159. *See supra* p. 451.

160. *See Abrams, supra* note 44, at 882 (recounting a court case that said the land between the high and low waterline belonged to the crown, and also discussing in depth the development of the public trust doctrine historically).

161. *See supra* p. 448 and note 9.

162. *See supra* p. 451–52 and note 35.

163. *See supra* p. 452.

164. *See supra* Part III.

165. *See supra* p. 448, 453–54, 456 and notes 52, 54, 70–71.

166. *See supra* p. 455 and note 70.

167. *See supra* note 71.

use.<sup>168</sup> The fourth factor, examining the conveyance's effect on scenic beauty, aligns exactly with Wisconsin's expansive trust purpose of protecting the trust lands and waters to preserve scenic beauty.<sup>169</sup> Finally, past modifications in Wisconsin's doctrine demonstrates the flexibility the state's doctrine has already embraced.<sup>170</sup>

Additionally, United States Supreme Court precedent supports the idea that sales to private property may be appropriate if certain conditions are met. The seminal case *Illinois Central Railroad Company v. Illinois* provides support for an individualized assessment like the factor test proposed in this Comment. The Court said, "General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters . . . must be read and construed with reference to the special facts of the particular cases."<sup>171</sup> The Court shows preference for a fact-specific inquiry, rather than a broad, blanket rule that favors no development in every situation.<sup>172</sup> A factor test, by instructing courts to look at the facts of each case and identify where those facts fall within the factors, promotes the idea that every public trust case should be viewed individually. The Court also provided that trust property may be conveyed under some circumstances. The Court emphasized that sometimes the public's interest in navigation may be improved by transfer to private individuals, for instance for docks or piers.<sup>173</sup> The Court further concluded that allocation of the land beneath navigable waters, when providing the foundation for structures that aid in commerce and "do not substantially impair the public interest in the lands and waters remaining," is within legislative power under the doctrine.<sup>174</sup> Because the factor test includes a factor regarding commerce, as well as a factor examining the size of the property transferred, the proposed factor test addresses both requirements of *Illinois Central*.

Finally, the Wisconsin Supreme Court has asserted the public trust doctrine does not require the shoreline remain completely unchanged.<sup>175</sup>

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168. See *supra* Part II.

169. See *supra* p. 456 and note 79.

170. See *supra* Part III.

171. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892).

172. *Id.*

173. *Id.*

174. *Id.*

175. See *supra* p. 458 and note 98.

Wisconsin's Supreme Court also made clear the doctrine should be read in a broad way so the public can enjoy the "intended benefits" of the doctrine.<sup>176</sup> Without the proposed test, or a test of similar character, there will be situations where the transfer of public trust land would actually serve the doctrine's goals but where the doctrine prevents the transfer. The Couture project is an example of such a project. The dispute turned on Lake Michigan's location over a century ago. The former edge of the lake was not easily discernable—Preserve Our Parks claimed one location, while The Couture proponents desired the line be affixed in the location articulated in the legislative act passed in 2014. But what if the dispute did not turn on the location of this undetermined line? What if, rather, even if the Transit Center was indisputably located on ground protected by the trust, this fact alone would not prohibit private development? With the proposed factor test, a court could allow The Couture development, even if the project is on reclaimed land subject to the public trust doctrine.

#### VI. APPLICATION OF FACTORS TO THE COUTURE PROJECT

Using The Couture as an example illustrates how the factor test would be used. Anytime the doctrine is challenged in court, the court should engage in a two part inquiry: (1) first, determine whether the water or land implicates the public trust doctrine and (2) if the doctrine is implicated, or the circumstances are such that it is ambiguous whether the doctrine is implicated, the court should engage in the factor test proposed in the previous section. The Couture controversy centered on the placement of Lake Michigan's boundary line when Wisconsin became a state, a topic that has attracted much debate.<sup>177</sup> Under the facts of this conflict, the exact location of the lake's former border was hard to determine. While a modern survey could have been done based on an 1835 government survey, that map did not show the high-water mark of the lake, the location of which is needed to determine whether the public trust doctrine is implicated.<sup>178</sup> Because of the difficulty in determining the location of 1800s lakebed, the circumstances are such that it is unclear whether the trust is implicated. Thus, the court must engage in the factor test. After engaging in this test, the court would

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176. *See supra* p. 456–57.

177. *See supra* Part IV.

178. Ryan, *supra* note 118; *see also supra* note 104 (describing some of the other methods that may be used to determine the location of the lake's edge, though these methods would prove to be difficult and potentially inaccurate).

likely allow the conveyance to Rick Barrett and Barrett Visionary Development for the construction of The Couture.

When evaluating the first factor, the court must consider the ratio between the parcel and the body of water associated with the parcel. In this case, the property proposed to be sold is 2.2 acres,<sup>179</sup> only two-thirds of which Preserve Our Parks claims is filled lakebed.<sup>180</sup> Thus, under 1.467 acres, or 0.0023 square miles,<sup>181</sup> are actually in dispute. In contrast, Lake Michigan's surface area is 22,300 square miles.<sup>182</sup> Thus, the ratio of parcel to Lake Michigan is  $1.031 \times 10^{-7}$ . The size of the conveyance to Barrett Visionary Development is exceedingly small, even smaller if you consider that shoreline and any other lakebed fill was not considered in the ratio calculation. Because the size of the parcel is so small relative to the vastness of the lake, this factor supports allowing the parcel sale. This example illustrates that when the body of water is vast, the size of the land must be very large to have an impact, and thus, the first factor should be given less importance than the other factors.

The second factor also supports the property sale, despite the public trust doctrine's application. Combined with other new downtown developments, The Couture will have a positive effect on commerce and navigation in downtown Milwaukee. The most current plan for the project includes two retail spaces and a restaurant, for a total of 54,900 square feet of retail or restaurant space.<sup>183</sup> The developer has advanced several concepts for this retail space, including a boutique grocery store.<sup>184</sup> To improve navigation, the plans include a large public concourse, a BublR bike-sharing station, and a public park.<sup>185</sup> Further, Northwestern Mutual has proposed skywalks that would connect The Couture to Northwestern Mutual's new downtown headquarters.<sup>186</sup> As

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179. Don Behm, *County Asks State High Court to Rule on Land Issue for Couture Project*, MILWAUKEE J. SENTINEL (Dec. 23, 2014), <http://www.jsonline.com/news/milwaukee/county-asks-state-high-court-to-rule-on-land-issue-for-couture-project-b99414637z1-286723481.html> [<https://perma.cc/QPN9-B48U>].

180. *See supra* p. 460.

181. Based on one acre equaling 0.0015625 square miles.

182. *Lake Michigan Facts and Figures*, GREAT LAKES INFO. NETWORK, <http://great-lakes.net/lakes/ref/michfact.html> [<https://perma.cc/B4WJ-YK9Y>] (last visited Oct. 16, 2015).

183. *See* Ryan, *supra* note 133; Sean Ryan, *Couture Still Plans Boutique Grocery Along With New Public Spaces, Streetcar Stop*, MILWAUKEE BUS. J.: REAL EST. (Sept. 7, 2014, 6:00 PM), [http://www.bizjournals.com/milwaukee/blog/real\\_estate/2014/09/couture-still-plans-boutique-grocery-along-with.html](http://www.bizjournals.com/milwaukee/blog/real_estate/2014/09/couture-still-plans-boutique-grocery-along-with.html) [<https://perma.cc/Z9S8-F49X?type=image>].

184. Ryan, *supra* note 183.

185. *Id.*

186. *Id.*

developer Stewart Wangard commented, the movement of people within The Couture and between other downtown buildings is an exceedingly important aspect of the development.<sup>187</sup> The fact that the site currently hosts the Transit Center, which still serves as a bus stop for a variety of routes,<sup>188</sup> may weigh towards not allowing the conveyance. However, the inclusion of a bus and streetcar stop within the lower level of The Couture's plans<sup>189</sup> mitigates concerns regarding the minor impact on navigation associated with the Transit Center's sale. All of these features, especially when compared to the current building which houses meeting rooms and little else, would do much to improve both commerce and navigation within this particular Milwaukee corridor.

Evaluating the third factor, because the property is already filled and has been for over a century, the development would not have a direct impact on the lake's ecosystem. However, increased development could arguably lead to other negative environmental effects associated with development generally. On the other hand, as seen with 833,<sup>190</sup> some newer developments seek LEED<sup>191</sup> or other environmentally focused certifications. If the city has concern over the environmental impacts of the project, the city could add conditions to the sale that would minimize these risks, or the city could add conditions to the permits Barrett will eventually need for construction. Still, this factor may lean slightly against allowing the sale, though not as much as a project with a direct effect on a water's ecosystem or the environment generally.

The fourth factor examines the sale's effect on scenic beauty. The Couture would open up views of the city for those apartment dwellers that choose to live and are able to afford the new development. The developer has already shown willingness to work with downtown neighbors to minimize The Couture's impact on other buildings' views.<sup>192</sup> More importantly, The Couture proposes public park space.

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187. See *supra* note 104.

188. See *Routes and Schedules*, MILWAUKEE CTY. TRANSIT SYS., <http://www.ridemcts.com/routes-schedules> [<https://perma.cc/VRF7-SAP2>] (last visited Oct. 16, 2015).

189. See *supra* p. 462–63 and note 133.

190. See *supra* Part IV.

191. LEED stands for Leadership in Energy & Environmental Design and is a “green building certification that recognizes best-in-class building strategies and practices.” *Overview*, LEED, <http://www.usgbc.org/leed> [<https://perma.cc/HCG6-46EE>] (last visited Oct. 16, 2015). By incorporating certain practices into construction and design, projects can achieve one of four levels of LEED certification. *Id.*

192. See Ryan, *supra* note 99.

With a public park atop the building's base,<sup>193</sup> more citizens will be able to enjoy scenic views of Lake Michigan from an elevated vantage point. This will enhance the scenic beauty of the lake and increase access to these views. Additionally, The Couture itself and its innovative design will enhance the property visually, especially compared to the drab Transit Center. Because the development will make the parcel more attractive and offer the public access to Lake Michigan views, this factor leans towards allowing the sale.

The final factor considers the conveyance's effect on public recreation. Again, when considering this factor, it bears mentioning that the Transit Center has little positive effect on public recreation. The Couture, in contrast, would provide different opportunities for the public to gather, whether at the building's restaurant or green spaces. Additionally, the development will potentially include a bike share dispenser, which would contribute positively to public recreation. Finally, the retail spaces would also increase public recreation. Thus, the fifth factor supports allowing the sale of the parcel.

With four of five factors supporting The Couture, any court would allow this parcel sale despite the potential public trust doctrine protections. The Couture development would advance many of the objectives of Wisconsin's public trust doctrine. The development would increase navigation and commerce in downtown Milwaukee, one of the original goals of the public trust. The development would also contribute to the lake's scenic beauty, public recreation, and affect only a small portion of land compared to the entirety of Lake Michigan. While the environment may be adversely affected by the development, this negative impact is weak.

Had this test been adopted and used in respect to The Couture, 2013 Wisconsin Act 140 would not have been needed. Milwaukee County could have merely sought an exception to the public trust doctrine from the court in 2012, which it would have been approved based on the above-described analysis. In The Couture's case, the test would have avoided an over-three-year delay on commencing the project and hundreds of thousands of dollars in legal fees. Thus, by using the proposed factor test, courts can more closely and effectively achieve the goals of the public trust doctrine without nonsensically vetoing development.

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193. *See supra* p. 462.

## VII. CONCLUSION

Generally the public trust doctrine “balances the need to keep certain lands and waters available for important common uses with the rights of the property owner, state or private, to make use of its property.”<sup>194</sup> As the doctrine currently is applied, projects in Wisconsin that potentially enhance the public’s use of waters and nearby lands may be prohibited from materializing because courts have little flexibility to allow transfer of public trust lands to private parties. By adopting the proposed factor test, the Wisconsin Legislature can allow Wisconsin courts to enable development that advances the goals of the public trust doctrine. Further, the factor test would empower courts to look at the specific facts out of which the litigation stemmed, just as the Supreme Court intended.<sup>195</sup> Thus, while the factor test might seem like a dramatic departure from the traditional public trust doctrine, it actually more accurately reflects the goals of the doctrine than traditional application.

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194. Kilbert, *supra* note 5, at 37.

195. *See supra* p. 470.

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