The Public Trust Doctrine

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THE PUBLIC TRUST DOCTRINE

INTRODUCTION

In 1972 the Wisconsin Supreme Court decided *Just v. Marinette County.* The decision sustained the constitutionality of an ordinance zoning certain lands in close proximity to navigable waters. The ordinance was sustained on the basis of an innovative distinction between a valid police power regulation and an invalid taking without just compensation. The purpose of this article is to examine the taking versus regulating test introduced by the court. Initially, it will examine *Just,* then Wisconsin's strong public trust doctrine, which may have been the most significant reason for the innovation, and finally, the important cases subsequent to *Just* which indicate whether the court is applying the test expansively or narrowly.

A major source of damage to property is flooding. It is estimated that by 1980 the average annual economic loss in the United States caused by flooding will approach 760 million dollars. The magnitude of the problem has caused both state and federal governments to attempt to diminish the damage through insurance programs and building regulations. These efforts have been directed mainly at the human encroachments on the flood plain, the primary cause of flooding.

1. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
2. Marcus and Abrams, *Flood Insurance and Flood-Plain Zoning as Compatible Components: A Multi-Alternative Approach to Flood Damage Reduction,* 7 NR. RES. LAW. 581 (1974) [hereinafter cited as *Flood Insurance*]. In terms of what this figure means to the individual homeowner, the Southeastern Wisconsin Regional Planning Commission conducted a study of homes situated in different flood recurrence levels of the floodplain. The results of the study indicated that:

   The average annual cost of floodplain occupancy, which is defined as the sum of the expected long-term damages expressed on a uniform annual basis, may also be high and, therefore, a burden to the homeowner. [The] average annual flood damages for a $35,000 house without a basement range from a low of $180 if the house is located on the edge of the 50-year floodplain, to a high of $2,160 for a house located on the edge of the 5-year floodplain.

4. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power,*
Flooding is the response of a river's hydrological regime to a variety of meteorological stimuli, primarily rain. A flood, occurs when the capacity of a river channel is exceeded. The purpose of the flood plain is to prevent excess waters from reaching the channel until downstream levels subside sufficiently. The soil characteristics of the flood plain have a direct effect on its ability to retard and hold these excess waters. The three primary characteristics of soil are its saturation ability, its natural impermeability, and human encroachments. The importance of the human encroachment factor is demonstrated by a recent study conducted at the University of Michigan, where the cumulative effect of encroachments throughout a hypothetical watershed was to increase the number of floods by thirty per cent. Since the meteorological elements of floods are often difficult or impossible to control, the human encroachment factor is the variable that must be regulated. This is the object of the shoreland-flood plain zoning regulations of Wisconsin.

In 1965, Wisconsin passed its Water Quality Act. The purpose of the Act was to protect navigable waters. In order to achieve this, the legislation authorized municipal shoreland zoning regulations relating to the beds of navigable waters and lands abutting or lying close to them. In addition, the legisla-
ture enacted a statute that empowered it to pass flood plain zoning ordinances if a county, city, or village did not adopt a reasonable and effective one of its own. Thus, Wisconsin has attempted to regulate the human encroachment factor in the flood plain through zoning ordinances. Although similar regulations in other states have been declared by their courts to be unconstitutional takings of property, the Wisconsin court upheld the constitutionality of these regulations in Just v. Marinette County.

**JUST V. MARINETTE COUNTY**

**EXPANSION OF THE PUBLIC TRUST DOCTRINE TO SHORELANDS**

In 1968, the Justs filled a portion of their property adjacent to a navigable lake in violation of Marinette County's...
shoreland-flood plain zoning ordinance. They sought a declaratory judgment that the ordinance was an unconstitutional taking of their property. The Wisconsin Supreme Court declared the ordinance constitutional. The decision is significant for three reasons. First, it introduced a new element into the definition of the police power. Second, it gave great weight to the "essential, natural character" of the land. Third, it altered the traditional diminution-of-value test.

Traditionally, a constructive taking of property has been found when a zoning ordinance rendered land practically or substantially useless for all reasonable purposes, or shouldered the individual owner with a loss disproportionate to the societal benefit. In Just, the court approached the problem differently. If a zoning ordinance could be classified as preventing a public harm, then, regardless of the individual property owner's loss, the individual would not be entitled to compensation. The harm caused by uncontrolled development of shorelands is obvious. Filling of wetlands, in particular, has a tremendous impact on the carrying capacity of a flood plain. By allowing fill above an accepted level, the frequency and intensity of floods are increased. If the Justs and other property owners similarly situated are allowed to place fill whenever and wherever they so desire, all the individuals located in that same flood plain will be directly and adversely affected. However, in the majority of zoning situations it will not be so easy to determine the harm or to distinguish it from a benefit which the public derives from the operation of the regulation. Zoning classifications are rarely designed to prevent loss of life and property. Rather, they deal with planning decisions as to whether a particular zone would provide a benefit, i.e., would best promote the health, safety, and general welfare by allowing industrial, residential, or recreational use. Just fails to clearly distinguish the two, establish any criteria characteristic of harm, or indicate its applicability to non-shoreland-flood plain zoning ordinances. The court does, however, place great reliance on the public trust doctrine and herein may lie the key to the decision.

14. See Plater, supra note 4, at 204-206.
The court looked to the public trust doctrine as the legislature's authority for passing a shoreland-flood plain regulation:

The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. . . . To further this duty, the legislature may delegate authority to local units for the government, which the state did by requiring counties to pass shoreland zoning ordinances. (citations omitted).16

In so doing, it introduced a new dimension to the trust doctrine. Prior to this decision, the court had treated only navigable waters and submerged beds of navigable waters as subject to the public trust. Now, however, the court recognized the interrelationship between shorelands and navigable waters:

What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing and scenic beauty.16

The language indicates that perhaps the court intended to apply the harm-benefit analysis only to public trust lands. There are problems, however, with taking a narrow view of the court's decision. This is so because of the court's use of the concept of the essential natural character of the land.

When the Justs filled a portion of their lake frontage, they were acting consistently with the popular conception of private property borrowed from English common law, that is, that they were free to do what they pleased with their property.17 Zoning ordinances are a recognized limitation of this concept. The introduction of the harm-benefit analysis to zoning legislation might potentially increase the scope of the police power. This is evident from the fact that the court in Just found a strong relationship between the essential natural character of the land and harm. The court said:

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use

15. 56 Wis. 2d at 18, 201 N.W.2d at 768-69.
16. Id. at 16-17, 201 N.W.2d at 768.
it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.18

A constructive taking does not occur when a change of the essential natural character of land, harmful to the public, is prevented by the police power. This is so because the prevention of harm is the province of the police power and reasonable uses, i.e., natural uses, of the property are permitted. When the land involved is other than shorelands and flood plains, an attempt to determine its essential natural character demonstrates the possible scope of this innovative concept.

What is the essential natural character of farm land just outside metropolises? Is it agricultural, or recreational, or residential? Is farming more consistent with its essential natural character than a subdivision? The court provided little more interpretive assistance with this concept than it did with the harm-benefit distinction, but it may have indicated its intent to limit the distinction to public trust lands when it said:

[N]othing this court has said or held in prior cases indicates that destroying the natural character of a swamp or a wetland so as to make that location available for human habitation is a reasonable use of that land when the new use, although of a more economical value to the owner, causes a harm to the general public.19

By so distinguishing this case on its facts, the court may have expressed its intent to limit its decision to them. If this be the case, then the decision will not affect the lands outside metropolises unless they are public trust lands. This conclusion would be clearly proper were it not for the court’s subsequent response to the contention that the Justs’ property was severely depreciated in value by the ordinance.

The Justs relied on cases decided outside of Wisconsin to support their attack on the constitutionality of the Marinette County ordinance.20 These decisions declared flood plain ordi-

18. 56 Wis. 2d at 17, 201 N.W.2d at 768.
19. Id. at 18, 201 N.W.2d at 768.
20. See cases cited in note 12 supra.
nances to be unconstitutional takings. In criticizing them, the Wisconsin court said:

It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public.21

Applying this reasoning to the Justs, the court added:

While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.22

Assuming that the purpose of a zoning ordinance was to prevent harm, a challenge to its constitutionality based on a diminution-of-value theory would be severely weakened by the elimination of its speculative value from consideration. The farm land on the edge of a metropolis would have roughly the same value before and after being zoned agricultural, whereas the potential subdivision or apartment complex would be diminished in value substantially by such zoning. Just could be argued for the proposition that the apartment complex value should not be considered, because the key factor in the court’s conclusion was that the change in the land could have been permitted only at the expense of harm to the public. It was on this basis that the court distinguished Pennsylvania Coal Company v. Mahon23 and the observation of Justice Holmes that a strong public desire to improve its condition is not justification for accomplishing that end without paying for it. Such warning was inapplicable to shoreland-flood plain zoning because its purpose was not to “create or improve the public condition, but only [to] preserve nature from the despoilage and harm resulting from the unrestricted activities of humans.”24

Although the language employed by the court in Just does not make clear the extent of the decision’s applicability, it

21. 56 Wis. 2d at 22, 201 N.W.2d at 770.
22. Id. at 23, 201 N.W.2d at 771.
23. 260 U.S. 393 (1922).
24. 56 Wis. 2d at 24, 201 N.W.2d at 771.
strongly suggests that the public trust doctrine was one of the major, if not primary, reasons why the Marinette County ordinance was found to be constitutional. To understand why the trust doctrine was so central to the court’s decision, it is necessary to examine its development in Wisconsin, its area of applicability, and its historical importance.

**The Public Trust Doctrine**

The public trust doctrine in Wisconsin has its origin in the Northwest Ordinance of 1787. The document grew out of Virginia’s grant of the Northwest Territory to the United States in 1784. The cession was made upon two conditions; first, that the new states carved from this territory be admitted to the Union with all of the rights and privileges of the old; second, that all of the navigable waters therein be forever free public highways. This second condition was drafted into the Northwest Ordinance in the following language:

> 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 imposed or duties therefor.

In 1848, the Territorial Convention adopted this provision as Section 1, Article IX, of the Wisconsin Constitution. Determining the waters to which this trust applied, and the duties it imposed on the state as trustee, has occupied the court from the early days of statehood to the present.

The Ordinance stated that navigable waters were to be forever free. The first problem was to determine what constituted navigable waters. The definition of navigability has proved flexible enough to accommodate the changing needs of the public. It has expanded its parameters from oceans and tidal waters to encompass ponds and streams of only inches in depth. It has altered its focus from commerce to recreation. In short, the public trust has been applied to an ever growing number

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25. Ordinance of 1787, Art. IV (July 13, 1787).
of waters in Wisconsin and become an important legislative concern.

The origin of the term navigable waters is in the English common law. There, water was navigable if it was affected by the ebb and flow of the tide. Such a definition was adequate for England and much of the East Coast of the United States, but wholly inappropriate for Wisconsin. Wisconsin, bereft of tidal waters, bounded in part by Lake Michigan and Lake Superior and the Mississippi River, and blessed with more than 8,000 rivers and streams, clearly had to redefine navigability. In *Diedrich v. Northwestern Union Ry.*, navigable waters were determined to be those that were "navigable in fact." In so defining the term, the court effectively broke away from the restrictive common law definition, and embarked upon a task of deciding which waters were navigable in fact. Two major influences helped shape Wisconsin's conception of navigable in fact. First, in the early years of the developing public trust doctrine, the United States experienced tremendous industrial growth. One of the numerous reasons why such growth was possible was the network of rivers that criss-crossed the country. Navigability in this period quite naturally was viewed in terms of its relationship to commerce. Wisconsin was no exception, and its principal industry being lumber, the first test of navigable in fact was the "saw-log test." Any watercourse capable of floating logs at sometime during the year was navigable in fact. Second, Wisconsin showed an increasing concern for development of its resources in connection with hunting, fishing, swimming, and boating. Recreation, therefore, became a major consideration in regard to navigability. Thus, the next major change in the definition of navigable in fact was to include those waters which were navigable by boats of the shallowest draft. At present, navigable in fact means navigable in

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31. 42 Wis. 248 (1877).
32. *See Cohn v. Wausau Boom Co.*, 47 Wis. 314, 324, 2 N.W. 546, 548 (1879) where the court said:
   Whether and how far navigable for other purposes, the capacity of floating logs to market appears to be the *chief navigable value* of the Wisconsin river... (Emphasis added).
33. *Whisler v. Wilkinson*, 22 Wis. 546 (1868); *Olson v. Merrill*, 42 Wis. 203 (1877).
fact for any purpose whatsoever.\footnote{Wis. Stat. § 30.10 (1973).}

Along with deciding which waters were subject to the trust, the court had also to decide what it meant for these waters to be "forever free." The first problem that had to be dealt with in this area was that of the ownership of the beds of navigable waters. Perhaps the clearest statement of the ownership of the beds of these waters is that contained in \textit{Illinois Steel Co. v. Bilot}.\footnote{109 Wis. 418, 84 N.W. 855, 85 N.W. 402 (1901).} The court in that case said:

\begin{quote}
The United States never had title, in the northwest territory out of which this state was carved to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by people of this commonwealth. Whatever concession this state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors.\footnote{Id. at 426, 84 N.W. at 856-57.}
\end{quote}

In practice this has come to mean that, although a riparian owner takes title up to the shore of a navigable lake, the state takes title to the lake's bed.\footnote{Pewaukee v. Savoy, 103 Wis. 271, 79 N.W. 436 (1899).} In the case of a riparian owner situated alongside a river or stream, the riparian takes title to the bed of such river or stream up to its center or thread.\footnote{Walker v. Shephardson, 4 Wis. 486 (1855).} The riparian's title to the bed of a navigable stream, however, does not frustrate the state's trust powers because the riparian's title is by favor of the state and subject to all of the public rights intended to be preserved by the trust.\footnote{Franzini v. Layland, 120 Wis. 72, 97 N.W. 499 (1903).} The duties imposed by this trust are at the heart of the doctrine.

As the concept of navigability has expanded, so has the purview of the trust doctrine. The two are inextricably intertwined. The trust is the tool given to the state to insure the freedom of navigable waters. The powers and duties that repose in the state as trustee are those necessary to keep navigable waters forever free for the public. The legislature is charged with the task of managing the trust, and an analysis of its confrontations with the court sheds light on the boundaries of
its powers. Initially, it should be noted that the trust has never been considered to be a passive trust. On the contrary, it has been looked upon as imposing affirmative duties on the state. As the court said in *City of Milwaukee v. State*:\(^41\)

The equitable title to these submerged lands vests in the public at large, while the legal title vests in the state, restricted only by the trust, and the trust, being both active and administrative, requires the law-making body to act in all cases where action is necessary, not only to preserve the trust but to promote it.\(^42\)

The legislature has taken this obligation to heart, in some instances, far beyond the bounds contemplated by the court. Expansive use of such legislative license is illustrated in *Priewe v. Wisconsin State Land & Improvement Co.*\(^43\) In 1891, the legislature authorized the draining of Muskego and Wind Lakes, and granted title to the uncovered bed of those lakes to a non-riparian, private individual. The stated purpose of the legislation was to preserve the public health and well-being of the communities adjacent to the lakes. A riparian owner of property fronting on Muskego Lake sued for damages and a permanent injunction against the draining of the lakes. The trial court sustained the demurrer to the complaint for failure to state facts sufficient to constitute a cause of action. The supreme court reversed. The basis of the supreme court’s decision was that the state could properly exercise its trust powers in the aid of commerce or any other legitimate public purpose, but it could not arbitrarily take away or destroy the rights of a riparian owner without due process of law for a merely private purpose or for the sole purpose of benefitting another riparian. Upon analyzing the facts, the court concluded that despite the legislatively stated public purpose of the law, it was manifestly intended to secure a speculative advantage and gain for a private party. Such a grant was beyond the scope of the power invested in the legislature by the trust because:

The right which the state holds in these lands is in virtue of its sovereignty, and in trust for the public purposes of navigation and fishing. The state has no proprietary interest in

\(^{41}\) 193 Wis. 423, 214 N.W. 820 (1927).

\(^{42}\) 193 Wis. at 449, 214 N.W. at 830.

\(^{43}\) 93 Wis. 534, 67 N.W. 918 (1896).
them, and cannot abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrepealable one; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.\textsuperscript{44}

The trust, according to \textit{Priewe}, did not include the power of alienation, for if it did, then the legislature could convey all its right, title and interest in every one of the thousands of lakes in Wisconsin to private parties, a thought that the court found highly objectionable. \textit{Priewe}, then, established the basic proposition that the trust imposed a duty on the state that could not be abdicated. The navigable waters of Wisconsin were to be forever free, not free until the legislature gave them away. It also established the judiciary as the watchdog of the trust. In spite of a legislature's stated public purpose, the court looked beyond that to the conveyance and concluded that the manifest purpose of the grant was to secure a gain for private parties. In so doing, the court put the legislature on notice that, in matters affecting the trust, it would go beyond form to substance and insure that that body fulfilled its duties in administering the trust.

Without more, the \textit{Priewe} case would indicate that the legislature could alienate trust lands if the purpose were truly public. \textit{In Re Crawford County Levee and Drainage District}\textsuperscript{45} held to the contrary. Assuming that the legislative purpose was public, if carrying it out entailed a substantial destruction of public rights in navigable waters, it is prohibited. Crawford County had instituted proceedings to establish a drainage district. The proposal called for the establishment of a district of 15,000 acres, 3,000 of which were water. The drainage scheme would have left about 13,000 acres, 1,775 of which would have been water. The purpose of the scheme was to claim the submerged land for agricultural use. The state agency with jurisdiction of the matter found that the proposed work was necessary, promoted the public health and welfare, and would not materially impair the navigability of the waters entered upon or use of the waters. The trial court confirmed the agency's determination and directed it to proceed with the work. The supreme court reversed with orders to dismiss the proceedings.

\textsuperscript{44} 93 Wis. at 550-51, 67 N.W. at 922.
\textsuperscript{45} 182 Wis. 404, 196 N.W. 874 (1924).
Upon close analysis of the trust doctrine, it concluded that no matter what its stated purpose, any scheme that would destroy navigable waters of the state must be abandoned. The trust gave no discretion in the matter. This lack of discretion prohibited the legislature or the court from balancing the public detriment against its gain. The only question that had to be decided was whether or not there was a substantial destruction of the public’s rights in navigable waters. Such was the case here where 1,225 acres of water that had been used by the public for trapping, hunting, and fishing would be completely destroyed by the drainage scheme, and the navigability of the remaining 1,775 acres would be materially impaired.

Such a hard-line approach was probably unnecessary. The trust doctrine need not have been construed so narrowly in order to retain vitality. The active management of the trust would necessarily demand some difficult decisions altering the trust property. Such alterations might be very much to the public benefit. Crawford County indicated that no matter what the benefit, the court could not engage in any balancing process where navigability was in question. Yet, such a process would seem to be a logical way to manage the trust which exists for the benefit of the public, not as a means of preserving wilderness areas.

Crawford County was the last case in what might be termed the initial period of development of the trust doctrine. During this period, the legislature showed a tendency to abuse its trust. In response to this abuse, the court interpreted the trust doctrine narrowly and more as a restriction on legislative power than as a vehicle for the exercise of that power. In so doing, it also established itself as the watchdog of the trust and indicated that it took its role seriously. However, three years after this uncompromising stance the court was presented with an opportunity to retreat. Faced with a legislative cession of trust lands to the City of Milwaukee which included an authorization to convey them to a private riparian land owner, and a valid public purpose of the first magnitude supporting it, the court in City of Milwaukee v. State put some flexibility back into the trust doctrine.

Milwaukee was entering into a transitional state in its commercial history. It had served as a major port for many prod-

46. 193 Wis. 423, 214 N.W. 820 (1927).
ucts both in-state and out-of-state. However, the size of the commercial vessels plying the Great Lakes was increasing, and the possibility of the construction of a great seaway bringing vessels of ocean-going size to the city was approaching reality. In anticipation of such changes and for the purpose of maintaining its competitive position, Milwaukee put together a harbor improvement plan. The plan called for the filling and dredging of submerged land constituting a portion of the bed of Lake Michigan. The Illinois Steel Company owned land crucial to the scheme. In 1909, the legislature authorized the cession of a needed portion of the bed of Lake Michigan to the city. The city continued developing its plan but upon concluding that condemnation would be prohibitively expensive, the legislature amended the grant. The amendment denominated the ceded lands as unnecessary for the purposes of navigation or other public uses, authorized the city to convey the land to the Illinois Steel Company, and stated that the action was not injurious to the public interest. The action was brought to test the legality of the legislation. Under the trust doctrine as interpreted by Priewe and Crawford County, the cession should have been invalidated. First, it constituted a destruction of navigable waters in that the filled area would no longer be navigable. Also, no matter how the purpose of the cession was defined, it would not stand up to judicial scrutiny. If it were for a private purpose, it would fall under the condemnation of Priewe. If it were for a public purpose, it would fall under the condemnation of Crawford County. Finally, a balancing of the public injury against the public benefit was prohibited by Crawford County. The court, however, overcame these obstacles and sustained the conveyance.

According to the court, the trust doctrine prohibited the granting of trust lands only for purely private purposes. In support of this conclusion, it cited McLennan v. Prentice. In so doing, the court conveniently ignored the language in McLennan prohibiting any irrepealable grant of trust lands. It then analyzed the development of the principles of navigability and found it to be the primary restriction on the state's

47. Wis. Laws 1909, ch. 358.
49. 85 Wis. 427, 55 N.W. 764 (1893).
50. 93 Wis. 534, 67 N.W. 918 (1896).
absolute title to trust land. This restriction was seen in terms of preserving the state’s inland lakes for purposes of recreation, hunting, fishing, and swimming. On the other hand, the restriction necessarily related to commerce when the Great Lakes were involved. In support of this contention, the court made what today might seem a presumptuous statement:

[When a large body of water like Lake Michigan, one of the chain of the Great Lakes, is considered, we arrive at the inevitable conclusion that this lake and these lakes forming practically one great inland sea, are designed by nature primarily for the exploitation of commerce . . . .] 51

Since Lake Michigan by virtue of its size was designed by nature for commerce, it could be treated differently than inland lakes. The cession of 1,500 feet of its bed for filling was an aid to navigation, not an obstruction, because it promoted commerce. As a consequence, the conveyance to the steel company was not for a purely private purpose, but also for a larger, public purpose. Having determined that the conveyance to the Illinois Steel Company was for a predominantly public purpose, the court attempted to deal with the prohibition against alienation of trust lands set forth in Crawford County. At this point, the court made a major departure from the earlier cases and introduced flexibility into the doctrine.

The public trust was an active trust; it did not instruct the legislature to leave the shores of Lake Michigan in the same condition they had been in prior to settlement of Wisconsin. More properly, the trust commanded that the shores of the lake be changed if it were necessary to promote the public interest in navigation. Priewe and Crawford County were not opposed to this concept for the former was a scheme to destroy the entire navigability of the lake for a purely private purpose, while the latter would have resulted in a considerable area losing its original character. Neither of these elements were involved here. In considering whether the effect on navigability would be material, the court would look to the size and depth of the waters and the purpose for which they were primarily adapted. Despite this distinction, the court recognized that it was making a break with its precedents and in this instance stated:

The cases involving the legal principles on navigation and the rights of riparian owners were recognized and adopted by this court at a time when no member of the court had a vision of the state's future development and progress. Our present-day conditions must therefore meet with a public judicial policy commensurate with the progressive age in which we now live; and if a modification of the early doctrines be deemed necessary, the legislature and the court should not hesitate to adopt an extension of the early principles to meet and harmonize with the spirit of this modern, progressive age.\(^2\)

The concept of the public trust as found in *Milwaukee* is more in harmony with the needs of the public. It allows for a necessary flexibility in promotion and protection of the navigation by establishing what might fairly be termed a balancing process. Such an approach gives the trust doctrine vitality; it permits the active management of the state's navigable waters by the elected representatives of the public. As long as the court remains the watchdog of the trust, protecting it from legislative abuse, the trust doctrine, so conceived, will remain a valuable public servant and aid to protection of public rights in navigable waters. In fact, this flexibility has proved to be of such utility that it has been applied to inland lakes as well as the Great Lakes.

More than a quarter of a century after the decision in *Milwaukee* the court in *State v. Public Service Commission*\(^3\) applied the balancing approach to an inland lake. In so doing, it demonstrated the utility of the balancing process, extended its application, and listed the factors that the court should consider. The City of Madison had received statutory authorization to fill an area of a navigable lake, and to use the area for parks, lagoons, recreational activities, parking areas, and any other municipal purpose. In addition to the fill project, the city had also received authorization to dredge a portion of the lake towards its outlet, and open a new connection between the lake and a lagoon. The plan was presented to the Public Service Commission and was approved. The state brought an action to review the orders of the Commission. The supreme court held that the grant of the lake bed to the city was not in viola-

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52. *Id.* at 453, 214 N.W. at 831.
53. 275 Wis. 112, 81 N.W.2d 71 (1957).
tion of the public trust doctrine. In reaching its conclusion, the court considered five factors. First, public bodies would control the area. Second, the area would be devoted to public purposes and open to the public. Third, the diminution of lake area would be very small when compared with the whole of the lake. Fourth, not one of the public uses of the lake as a lake would be destroyed or greatly impaired. Fifth, the disappointment of the members of the public who would have lost the use of that area would be negligible when compared with the greater convenience of those members of the public who would use the city park. The employment of this approach was justified by citing Milwaukee for the proposition that the trust doctrine did not prevent minor alterations of the natural boundaries between water and land. The five factors served to aid in determining whether or not a proposed alteration was minor.

**JUDICIAL LIMITATIONS PLACED ON THE PUBLIC TRUST DOCTRINE SINCE JUST**

It can be said that since 1927, the court has taken a flexible approach to the trust doctrine. The purpose of the trust is to protect the public's rights in navigable waters. Legislation which promotes these rights is not in violation of the trust. The focus of the court's inquiry is therefore directed not to the simple fact of the existence of the grant or a diminution of the amount of navigable water, but whether the public will be served thereby. This gives the legislature more freedom in administering the trust. It is this freedom coupled with the strength and vitality of the trust doctrine that explains, in the author's opinion, the reason for the court's ruling in Just. The legislature's authority to pass a shoreland-flood plain zoning enabling statute was made possible by its recognized power to administer the trust. The applicability of the power to shorelands was the first extension of the doctrine to other than submerged lands. This was allowed because the trust has served to focus the court's attention on the importance of protecting the public's rights in navigable waters and, with the recognition of the interrelationship between shorelands and navigable waters, only by including them in the trust could the public's interest be properly served. Having analyzed Just and the importance, applicability, and history of the public trust doctrine, it remains to be determined by analyzing decisions subsequent to Just whether the court has limited its decision to public trust lands.
One of the first cases following *Just* that indicates the applicability of the harm-benefit analysis employed in that decision is *Kmiec v. Town of Spider Lake*.\(^5\) That case demonstrates the importance, and perhaps difficulty, of applying the rationale of *Just*, in the absence of a clearly defined public harm. Kmiec purchased land in the Town of Spider Lake with the intention of building a permanent residence for himself, and constructing a residential development that would include a golf course and club house. Prior to his purchase, Kmiec had been assured by the town chairman that no ordinance would prohibit his obtaining the necessary permits. Those permits were in fact obtained, large sums of money were expended for equipment, and excavation was begun on fairways. Soon after, Sawyer County and the Town of Spider Lake zoned Kmiec’s property agricultural whereupon he commenced a declaratory judgment action challenging the constitutionality of the ordinances as applied to his property.

The supreme court, relying on the traditional taking versus regulating analysis, held the zoning classification unconstitutional. Citing *Just* for the proposition that a mere depreciation in value is not enough to render an ordinance unconstitutional, the court went on to say that such depreciation would be sufficient when coupled with a restriction that practically or substantially rendered the land useless for all reasonable purposes. Kmiec’s land had not been farmed for eleven years. It would cost $150.00 to $200.00 per acre to put the land back into farming condition. Its market value as farm land was $50,000.00 while its value as developed land would be $119,000.00. Based on these observations, the court agreed with Kmiec’s expert appraiser that the highest and best use of the land was residential-recreational. The court concluded that the agricultural classification was therefore unreasonable.

The same result could have been reached applying the harm-benefit analysis. The court could have analyzed the purpose behind the ordinance to determine whether it was designed to prevent a public harm or secure a public benefit. An employee of a regional planning commission testified that its purpose in recommending the agricultural classification was to use the land as a holding district to control future development

\(^5\) 60 Wis. 2d 640, 211 N.W.2d 471 (1973).
of the district. The court rejected this as an insufficient justification for the classification in light of the fact that there were alternatives that would have accomplished the same objective. The court could just as easily have found that a holding district does not prevent public harm, but only secures a public benefit. If the court found that a holding district did prevent harm, it would then have analyzed the relation between the essential natural character of the land and the proposed uses. If residential-recreational was just as consistent with the land’s essential natural character as agricultural, then the court could have concluded that the ordinance could not exclude the one in favor of the other. Instead of analyzing the relationship between the natural character of the land and its proposed use, the court compared the dollar values of the two uses. Looking at it another way, the court defined “essential natural character” as “essential economic character.” Finally, finding no public harm or uses consistent with the natural character of the land, the speculative value of the property as residential-recreational would have become a proper consideration for the court. Having reached this point, the court could then have indulged in the analysis that it actually did and found that the ordinance was a constructive taking due to the diminution it caused in the value of Kmiec’s property. By ignoring this analysis, and citing Just for a well-established taking concept, the court passed up an opportunity to apply Just to an ordinary zoning situation. In so doing, the court indicated its intent to limit Just to public trust lands. This intent is demonstrated more clearly in two subsequent cases.

*Omernick v. State*55 involved a statute which established a permit procedure for the diversion of water from lakes and streams.56 Omernick was charged with several counts of violating the statute by unlawfully diverting other than surplus water for agricultural or irrigation purposes from two creeks bordering on his land. The trial court found Omernick guilty on all counts. On appeal, he challenged the statute’s constitutionality. In rejecting his challenge, the court relied heavily on Just. The statute was held not to be a taking of property for two reasons. First, it was a valid exercise of the police power in that it prevented harm to the public. Second, it was not a

55. 64 Wis. 2d 6, 218 N.W.2d 734 (1973).
total ban or prohibition on all uses of the water. In support of
the first proposition, the court said that the statute was de-
dsigned to prevent harm to the public caused by the uncon-
trolled diversion of water from lakes and streams. Quoting from
Just, it said:

[T]he statute “... does not create or improve the public
condition, but only preserves nature from the despoilage and
harm resulting from the unrestricted activities of humans.”

Both the shoreland ordinance and the diversion statute are
characterized as preserving nature from harmful human activi-
ties. Both harms are directly related to the use of the water.
Omernick adds weight to the proposition that the harm-benefit
distinction will be used when the situation involves public trust
lands.

State v. Deetz overruled the common enemy doctrine of
surface waters and adopted the reasonable use rule. Under the
former, surface water was recognized as a common enemy that
each land owner could control in whatever manner he desired,
and any injuries such control worked on adjoining land owners
were not actionable. Under the latter, land owners are privi-
leged to make reasonable use of their land, including harmful
control of surface waters, without suffering liability unless the
harmful interference is unreasonable. Deetz purchased a large
area of land on a bluff overlooking Lake Wisconsin and the
Wisconsin River. After commencing to build a residential de-
velopment on the bluff, huge amounts of sand washed down
onto the lower property and into the lake. Deltas of more than
6,000 and 8,000 square feet formed on the lake bottom, making
formerly navigable portions unnavigable. The state sought in-
junctive relief against the public nuisance and alleged that the
defendant had unlawfully obstructed navigable waters. Faced
with the common enemy doctrine, the state argued that the
doctrine was irrelevant because the public trust per se created
an actionable right. The court rejected this argument holding
that the trust “merely gives the state standing as trustee to
vindicate any rights that are infringed upon by existing law.”

57. 64 Wis. 2d at 21, 218 N.W.2d at 743.
58. 66 Wis. 2d 1, 224 N.W.2d 407 (1974).
59. The state sought relief on the basis of Wis. STAT. § 30.15 (1973).
60. 66 Wis. 2d at 11, 224 N.W.2d at 412.
In reaching this conclusion, the court noted that in *Just*, it had used the doctrine

to defend state action where that doctrine was used as the foundation for the state's legitimate concern in enacting a law for the purpose of preserving and protecting navigable waters and public rights therein from the degradation and deterioration which results from the uncontrolled use and development of shoreline.61

These two cases are important for they indicate where the court is going with the harm-benefit analysis it introduced in *Just*. Both cases deal with public trust situations, *Omernick* with unlawful diversion of waters, and *Deetz* with the obstruction of navigable waters. In *Omernick*, the court employed *Just* as support for sustaining legislation affecting public trust waters. In *Deetz*, *Just* was interpreted as employing the public trust doctrine to sustain the constitutionality of a legislative enactment. Contrasting the use of *Just* in these two cases with the traditional approach taken in *Kniec*, it is apparent that the court has precluded the introduction of the harm-benefit analysis to the typical zoning situation. Rather, the court seems intent on limiting *Just* to public trust situations.

Wisconsin has succeeded where other states have failed. The court has sustained the constitutionality of shoreland-flood plain zoning. In arriving at its result, *Just* employed some very broad language attacking traditional concepts of property. The most important new concept introduced was the harm-benefit distinction between the police power and eminent domain. The strong public trust doctrine in Wisconsin may have been the most significant reason for the court's initiative. The trust has been an important factor in Wisconsin's treatment of its navigable waters since the state's inception. Both the courts and the legislature have been active in their administration of the trust and in the expansion of its scope. Although the subsequent cases indicate that the broad language and innovative concepts of *Just* are not to be applied to the typical zoning situation, the decision is still a very important one. By recognizing the interrelationship of the land and the water and extending the trust to shorelands, the court has added a new dimension to the trust. Assuming that the administration of

61. *Id.* at 12, 224 N.W.2d at 412-13.
the trust will remain as active as its history indicates it will, this extension of the doctrine should prove a significant step forward in the preservation of Wisconsin's water resources.

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