STATE CONSTITUTIONAL LAW—PUBLIC TRUST DOCTRINE—THE WISCONSIN SUPREME COURT REMOVES ITSELF FROM THE FOREFRONT OF ENVIRONMENTAL JURISPRUDENCE. *ROCK-KOSHKONONG LAKE DISTRICT v. STATE DEPARTMENT OF NATURAL RESOURCES*, 833 N.W.2D 800 (WIS. 2013).

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I. INTRODUCTION

In *Rock-Koshkonong Lake District v. State Department of Natural Resources*,[1] the Wisconsin Supreme Court reviewed a decision by the Wisconsin Department of Natural Resources ("DNR") that denied a petition to raise the water levels of a dammed lake. As part of the basis for its decision, the DNR cited the potential impact on adjacent wetland areas, relying in part on the public trust doctrine, rooted in article IX, section 1 of the Wisconsin Constitution.[2] The DNR argued the state had the power to protect non-navigable wetlands adjacent to navigable waters.[3] In a 4-3 decision,[4] the Wisconsin Supreme Court in *Rock-Koshkonong* disagreed, holding that the constitutional basis for the public trust doctrine does not extend beyond the ordinary high water mark of navigable waterways.[5] Though the DNR did not have a constitutional

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1. 833 N.W.2d 800 (Wis. 2013).

2. WIS. CONST. art. IX, § 1. Article IX, section 1 of the Wisconsin Constitution forms the basis for the public trust doctrine's application to waterways within the state. For the exact text of article IX, see *infra* Section III.

3. *Rock-Koshkonong*, 833 N.W.2d at 816.

4. The Wisconsin Supreme Court is made up of seven justices. *Supreme Court*, WISC. COURT SYS., http://wicourts.gov/courts/supreme/index.htm (last visited Mar. 12, 2014). Three justices dissented from the majority opinion. *Rock-Koshkonong*, 833 N.W.2d at 835.

5. *Rock-Koshkonong*, 833 N.W.2d at 804.

public trust basis to regulate non-navigable water, the majority found that it could nevertheless do so through the state's police power.[6] This Comment will argue that in reaching its decision, the majority in *Rock-Koshkonong* departed from precedent in narrowing the public trust doctrine, confused the issue of ownership with regulation, and engaged in a strained analysis of the relation between the public trust doctrine and state police power.

II. STATEMENT OF THE CASE

The dispute in this case arose from a 2003 petition from the Rock-Koshkonong Lake District ("District") to raise the DNR-designated water level of Lake Koshkonong.[7] Pursuant to Wisconsin state law, the DNR has the authority to regulate water levels in all navigable waterways in the state.[8] In response to the District's petition, the DNR performed a series of environmental tests lasting two years and issued a proposed order denying the District's petition in April 2005.[9] After the District filed for a contested case, the dispute went before the Department of Administration, Division of Hearings and Appeals.[10] As part of its argument, the DNR presented expert testimony on the detrimental effects that raising the lake's water level would have on adjacent wetlands.[11] The Administrative Law Judge's ("ALJ") decision made a number of factual findings, including findings on water quality, the ordinary high water mark ("ordinary high water mark"), wildlife, agricultural drainage, public access, and navigability.[12] In terms of wetland considerations, the ALJ found that raising the water level would

6. *Id.*

7. *Id.* at 803–04. The Rock River-Koshkonong Association, Inc. and Lake Koshkonong Recreational Association, Inc. both joined the District's petition. *Id.* For simplicity's sake, the three entities will be referred to as "the District."

8. WIS. STAT. ANN. § 31.02(1) (West 2008) ("The department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters . . . .").

9. *Rock-Koshkonong*, 833 N.W.2d at 808.

10. *Id.*

11. *Id.* at 808–09.

12. *Id.* at 811–12. In total, the ALJ made 120 findings of fact. *Id.* at 810.

be detrimental to the wetland area in terms of shoreline erosion,[13] water quality,[14] and wildlife.[15]

The District then appealed the ALJ's decision to the Rock County Circuit Court, contending that the DNR and ALJ erroneously interpreted "public rights in navigable waters" and the DNR's duty to "protect . . . property" found in the statute.[16] Specifically, the District contended that the DNR had improperly expanded the public trust doctrine by protecting non-navigable wetlands.[17] The circuit court affirmed the prior decision, as did the Wisconsin Court of Appeals.[18] The court of appeals found that the DNR's consideration of the impact on adjacent wetlands was reasonable and consistent with "the very resources [the DNR] has been assigned to protect."[19] The District petitioned for review from the Wisconsin Supreme Court, which granted review in February 2013.[20]

The Wisconsin Supreme Court identified four main issues for consideration.[21] In examining the extent of the public trust doctrine, the

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13. Specifically, the ALJ decision noted, "[t]he reduced frequency of low water conditions during the summer and the increase in the average summer water levels . . . account for the loss of wetlands over the past 70 years." Review of the Water Level Decision for Lake Koshkonong and the Indianford Dam, No. 3-SC-2003-28-3100LR ¶ 41 (Wis. Div. of Hearings & Appeals Dec. 1, 2006).

14. "An increase in water levels is likely to further degrade overall water quality on Lake Koshkonong . . . ." *Id.* ¶ 42. The ALJ concluded this degradation would occur through additional wetland loss, which would "reduce the system's capacity to slow flood and stormwater, and diminish the capacity to filter nutrients, sediments, and other pollutants, resulting in increased levels of pollutants being carried downstream in surface waters." *Id.* ¶ 57.

15. The wetlands provide natural habitats for amphibians and reptiles (collectively, "herptiles"). *Id.* ¶ 66. "Continued loss [of these habitats] will likely lead to continued incremental loss of herptile populations *on and around* Lake Koshkonong." *Id.* ¶ 67 (emphasis added).

16. *Rock-Koshkonong*, 833 N.W.2d at 813. The District argued two additional points for overturning the decision: improperly considering wetland water quality considerations and excluding certain economic evidence. *Id.* While these arguments are fully discussed in the opinion, they are outside the scope of the constitutional issues focused on in this Comment.

17. *Id.*

18. Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 803 N.W.2d 853, 854–55 (Wis. Ct. App. 2011).

19. *Id.* at 864.

20. *Rock-Koshkonong*, 833 N.W.2d at 813.

21. *Id.* at 804. Only the second issue identified by the court is relevant to the constitutional basis for the public trust doctrine. The other three issues presented are:

> [W]hat level of deference, if any, should be accorded to the DNR's conclusions of law under the circumstances of this case?
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> . . . .

court framed the issue as whether the DNR exceeded its authority under the public trust doctrine by considering the impact on private wetlands that are adjacent to the lake and located above the ordinary high water mark.[22] On this issue, the Wisconsin Supreme Court disagreed with the findings of the court of appeals.[23] The Wisconsin Supreme Court held the DNR did not have constitutional authority to regulate land above the ordinary high water mark to protect or promote navigable waterways.[24] However, it upheld the DNR's consideration of these lands under statutory authority as a valid use of the state's police power.[25] The court then remanded for proceedings consistent with the opinion on other issues.[26]

III. HISTORY OF WISCONSIN'S PUBLIC TRUST DOCTRINE

Recognizing the public nature of navigable waters, the public trust doctrine vests ownership and control of the land under navigable waters in the state.[27] It is a longstanding common law doctrine with roots in ancient Roman law.[28] One of the major concepts underpinning the public trust doctrine was the notion that certain interests, "such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to

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> . . . [D]id the DNR exceed its authority in making a water level determination under Wis. Stat. § 31.02(1) "in the interest of public rights in navigable waters" by considering wetland water quality standards in Wis. Admin. Code § NR 103?
> . . . [D]id the DNR err in making a water level determination under Wis. Stat. § 31.02(1) by excluding evidence and refusing to consider the impacts of water levels on residential property values, business income, and public revenue?

Id.

22. *Id.*

23. *Id.* at 835.

24. *Id.* at 804.

25. *Id.*

26. *Rock-Koshkonong*, 833 N.W.2d at 805.

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

28. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1969); *see also* Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 ECOLOGY L.Q. 123, 125–26 (2012) ("It is not surprising that the public trust doctrine arose out of just such a traditional society when it was recognized under ancient Roman law—the air, running water, the sea, and consequently the shores of the sea were shared as a commons for all to use." (internal quotation marks omitted)).

private owners."[29] Under this doctrine, "a state holds the beds of navigable bodies of water in trust for all of its citizens and has an obligation to protect public rights in navigable waters."[30] The extent and reach of the doctrine varies, as individual states are largely responsible for its implementation.[31]

Wisconsin has enjoyed a reputation as a state with a wealth of "natural beauty and recreational opportunities."[32] Wisconsin is home to more than 15,000 inland lakes, more than 33,000 miles of rivers and streams, and approximately 5.3 million acres of wetlands.[33] Its resources also include the Mississippi River, Lake Michigan, and Lake Superior.[34] Not surprisingly, Wisconsin has, over the years, crafted a well-developed public trust doctrine.[35]

The public trust doctrine in Wisconsin is a longstanding principle that can be traced back to the Northwest Ordinance of 1787.[36] The doctrine is codified in article IX, section 1 of the Wisconsin Constitution,

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29. Sax, s*upra* note 28, at 475.

30. John Quick, Note, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105, 105 (1994) (citing Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 517 (Wis. 1952)).

31. Scanlan, *supra* note 28, at 126.

32. Jodi H. Sinykin, *At a Loss: The State of Wisconsin After Eight Years Without the Public Intervenor's Office*, 88 MARQ. L. REV. 645, 647 (2004).

33. *Id.*

34. *Id.*

35. Quick, *supra* note 30, at 106. For an in-depth examination of the history of the public trust doctrine in Wisconsin, see Patrick O. Dunphy, *The Public Trust Doctrine*, 59 MARQ. L. REV. 787, 794–803 (1976).

36. The majority opinion in *Rock-Koshkonong* begins its analysis with a brief overview of the historical basis for article IX, section 1 of the Wisconsin Constitution. Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800, 817–18 (Wis. 2013). Specifically, it quotes the following passage from *Muench v. Public Service Commission*:

> After the Revolutionary War, the original thirteen states were impoverished and were confronted with the problem of paying the debts created by the war. States without western lands demanded that Virginia and other states claiming such lands to the west should cede the same to the Confederation to be sold to pay such debts. In 1783 the Virginia legislature authorized the ceding of the Northwest Territory to the Confederation, and the actual deed of conveyance was executed March 1, 1784. This cession was made upon two conditions: (1) The new states to be admitted as members of the Federal Union were to have the same rights to sovereignty as the original states; and (2) The navigable waters flowing into the Mississippi and the St. Lawrence rivers, and the carrying places between them, were to be forever free public highways. These conditions were incorporated into the Northwest Ordinance of 1787, which set up the machinery for the government of the Northwest Territory.
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> 53 N.W.2d 514, 516 (Wis. 1952).

which borrowed the language from the Northwest Ordinance.[37] It reads as follows:

> 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.[38]

As trustee, Wisconsin holds title to navigable waters in trust for the citizens of the state, provided the water is "navigable in fact for any purpose."[39] This title (i.e., ownership of the land underneath the water) extends up to the line of ordinary high water mark of the navigable body of water.[40] To effectively promote the state's affirmative obligations as trustee of navigable waters, the legislature delegated substantial authority to the DNR over water management.[41]

Courts in Wisconsin have long held that the public trust doctrine is "organic law" that should be interpreted broadly in order to protect the intended benefits of navigable waters.[42] The public trust is an active duty

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37. Jason J. Czarnezki, *Environmentalism and the Wisconsin Constitution*, 90 MARQ. L. REV. 465, 468 (2007).

38. WIS. CONST. art. IX, § 1.

39. *Muench*, 53 N.W.2d at 519. The initial tests of navigability, discussed *infra* note 86, involved whether a waterway could float logs to market in at least part of the year. The definition has been broadened over the years to extend to waterway navigability for any purpose (both recreational and commercial) and includes both natural and artificial waterways. *See* State v. Bleck, 338 N.W.2d 492, 495 (Wis. 1983); *see also* Czarnezki, *supra* note 37, at 468–69.

40. State v. Trudeau, 408 N.W.2d 337, 341 (Wis. 1987) (citing Ill. Steel Co. v. Bilot, 84 N.W. 855, 856 (Wis. 1901)).

41. Section 31.02(1) states: "The department, in the interest of public rights in navigable waters or to promote safety and protect life, health and property may regulate and control the level and flow of water in all navigable waters . . . ." WIS. STAT. ANN. § 31.02(1) (West 2008); *see also* Wis.'s Envtl. Decade, Inc. v. Dep't of Natural Res., 271 N.W.2d 69, 73 (Wis. 1978) (discussing the delegation of public trust duties to the DNR through Wisconsin Statutes chapters 29–31 and 33).

42. In discussing the public trust doctrine's development in Wisconsin, the Wisconsin Supreme Court stated in *Diana Shooting Club* that:

> The wisdom of the policy which, in the organic laws of our state, steadfastly and carefully preserved to the people the full and free use of public waters cannot be questioned. Nor should it be limited or curtailed by narrow constructions. It should

that requires the state to not only promote navigation, but to protect and preserve those waters.[43] Under this broad mandate, Wisconsin courts have cited the public trust doctrine in upholding regulations of groundwater wells and shoreline zoning ordinances.[44] While these cases suggest that the public trust has been extended beyond the navigable waters themselves, the basis for public trust power has always been firmly rooted in the protection and promotion of the state's navigable waterways.

IV. THE COURT'S REASONING

A. The Majority Opinion

The four justice majority opinion,[45] written by Justice Prosser, viewed the main issue to be how far the constitutional public trust doctrine jurisdiction extends. In its review of precedent and the history of article IX, the majority states that in Wisconsin, the basis for the state's public trust authority is on the existence of navigable water.[46] Specifically, its power and jurisdiction are premised upon state ownership of the land underneath navigable waterways.[47]

The opinion then focuses its analysis on the state's ownership of land under the navigable water. The court explains that the public trust doctrine vests different levels of ownership depending on the body of water and its navigability.[48] The doctrine vests complete ownership over lake beds, but gives qualified titles to riparian owners along navigable streams.[49] The reason for the distinction is that streams can change course or become non-navigable over time, rendering state ownership of

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> *be interpreted in the broad and beneficent spirit* that gave rise to it in order that the people may fully enjoy the intended benefits. Navigable waters are public waters, and as such they should enure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation. *Only by so construing the provisions of our organic laws can the people reap the full benefit of the grant secured to them therein*.
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> Diana Shooting Club v. Husting, 145 N.W. 816, 821 (Wis. 1914) (emphasis added).

43. Just v. Marinette Cnty., 201 N.W.2d 761, 768 (Wis. 1972).

44. *See* Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res., 799 N.W.2d 73, 77–78 (Wis. 2011) (groundwater wells); *Just*, 201 N.W.2d at 768–69 (shoreline ordinances).

45. *See supra* note 4.

46. Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800, 817–18 (Wis. 2013).

47. *Id.* at 818–19.

48. *Id.* at 819.

49. *Id.*

stream beds problematic and impractical.[50] The question of ownership is critical to the majority because the public trust doctrine "implicates state ownership or virtual state ownership—by virtue of its trust responsibility—of *land* under navigable water."[51]

With this theory of ownership in mind, the majority concludes that there is no constitutional basis for the DNR's use of the public trust doctrine as jurisdiction over non-navigable lands. The public trust doctrine grants jurisdiction between the ordinary high water marks of navigable rivers and lakes, but not land above it. The court acknowledged the state's duty required it "not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty,"[52] but rejected the contention that the public trust doctrine powers granted by the constitution extended beyond the ordinary high water mark.[53] Extending the trust to cover wetlands above the ordinary high water mark, the majority reasoned, would create substantial uncertainty in terms of ownership of private lands and would present no logical stopping point for the state's constitutional basis for jurisdiction over private lands.[54] Thus, the DNR was incorrect to rely upon the public trust doctrine in regulating wetlands above the ordinary high water marks of Lake Koshkonong.[55] In doing so, the majority established a bright-line test for the use of the public trust doctrine: any land above the ordinary high water mark of a navigable water is not subject to the constitutional public trust duty.[56]

In making this conclusion, the majority drew a distinction between "[a]pplying the state's police power to land above or beyond the [ordinary high water mark] . . . to protect the public interest *in navigable waters*" and "asserting public trust jurisdiction over non-navigable land and water."[57] While there was no constitutional basis for the DNR to protect

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50. *Id.* at 820. The majority discusses the issue of qualified title versus ownership in trust to highlight the fact that in Wisconsin, the public trust doctrine does not vest complete ownership of land under all navigable waterways. In the case of streams and rivers, if the waterway were to become non-navigable, the private riparian owners would regain title to the lands.

51. *Id.*

52. *Rock-Koshkonong*, 833 N.W.2d at 821 (quoting Wis.'s Envtl. Decade, Inc. v. Dep't of Natural Res., 271 N.W.2d 69, 72 (Wis. 1978)).

53. *Id.* (emphasis omitted) (quoting *Wis.'s Envtl. Decade*, 271 N.W.2d at 72). The majority reasons that giving the state constitutional trust power to regulate scenic beauty beyond its public trust jurisdiction (beyond the ordinary high water marks) could give the state authority to regulate all lands that could be seen from navigable waterways.

54. *Id.*

55. *Id.* at 835.

56. *See id.* at 820–21.

57. *Id.* at 821.

non-navigable wetlands, the court examined whether section 31.02(1) of the Wisconsin Statutes allowed the DNR to do so pursuant to the state's general police power.[58] The key phrase, according to the majority, was that the DNR could regulate water levels "in the interest of public rights in navigable waters *or* to promote safety and protect life, health and property."[59] Because the two phrases in the statute are separated by "or," the statute must have been predicated on two distinct grounds; the former being the public trust duty and the latter being the general police power.[60] The phrase "to promote safety and protect . . . property" was a legislatively authorized use of the police power to protect the wetlands above the ordinary high water mark.[61] The distinction between the constitutional public trust power and the general state police power was important to the majority because police power "is subject to constitutional and statutory protections afforded to property, may be modified from time to time by the legislature, and requires some balancing of competing interests in enforcement."[62]

In support of their interpretation of the statute, the majority examined its prior decision in *Just v. Marinette County*,[63] a "textbook example" of the state's use of the police power to protect navigable waterways through shoreland zoning ordinances.[64] The majority found it

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58. *Rock-Koshkonong*, 833 N.W.2d at 822.

59. WIS. STAT. ANN. § 31.02(1) (West 2008) (emphasis added). The majority noted that promoting safety and protecting property are both subjects within the police power of the state. *Rock-Koshkonong*, 833 N.W.2d at 824 (quoting Wis. Power & Light Co. v. Pub. Servs. Comm'n, 92 N.W.2d 241 (Wis. 1958)).

60. *Rock-Koshkonong*, 833 N.W.2d at 824.

61. *Id.* at 822. According to the majority, the DNR could not rely on the public trust doctrine in protecting adjacent wetlands, as they were above the ordinary high water mark. It could do so, however, under the broad power granted to them in the statute by the phrase "or to promote safety and protect life, health and property." This phrase is an explicit authorization to act pursuant to the police power. The opinion goes on to say:

> If the statute read only that the department "in the interest of public rights in navigable waters," may regulate and control the level and flow of water in all navigable waters, the statute would be seen as a direct enforcement mechanism for the public trust in navigable waters. But the statute does more. It contains a disjunctive element giving the department authority to regulate and control the flow of water in all navigable waters "to promote safety and protect life, health and property."

Id. at 824 (quoting § 31.02(1)).

62. *Id.*

63. 201 N.W.2d 761 (Wis. 1972).

64. *Rock-Koshkonong*, 833 N.W.2d at 822. The *Just* decision involved a challenge to shoreland zoning ordinances that prevented the changing of the natural character of land within 1000 feet of navigable lakes. 201 N.W.2d at 761, 767. The decision makes reference to both the police power and public trust doctrine. *See id.* at 768–69.

clear that the *Just* court was relying on the police power rather than the public trust doctrine as the ordinance applied to lands up to 1000 feet from navigable lakes and 300 feet from navigable rivers.[65] These distances are well outside the ordinary high water mark jurisdiction of the public trust doctrine, and "[i]t should be obvious that the state does not have *constitutional public trust jurisdiction* to regulate land a distance of more than three football fields away from a navigable lake or pond."[66] The majority here concluded, as it believed the *Just* court did, that the police power was the only basis to protect wetlands above the ordinary high water mark.[67]

B. The Dissent

The dissenting opinion took issue with the majority's interpretation of past precedent and its narrowing of the public trust doctrine.[68] Justice Crooks argued that the majority incorrectly reinterpreted the *Just* decision as relying on the police power.[69]

The dissent contended that a broad interpretation of the public trust doctrine and its jurisdiction is long settled in Wisconsin.[70] Courts have long held that the public trust not only obligated the state to protect navigable waters, but to promote them.[71] The doctrine should not "be limited or curtailed by narrow constructions" and should be interpreted broadly.[72] Since the ratification of the state constitution, the doctrine has grown over time to include more purposes and to protect the public in its enjoyment of these rights.[73]

The dissent argued that up until this point, it had been nearly a century of settled precedent that the public trust in Wisconsin required not only preservation, but also promotion, of these navigable natural

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65. *Rock-Koshkonong*, 833 N.W.2d at 824; *Just*, 201 N.W.2d at 769.

66. *Rock-Koshkonong*, 833 N.W.2d at 824.

67. *Id.*

68. *Id.* at 835–36 (Crooks, J., dissenting). Additionally, the dissent argued that the majority overreached in ruling on an unnecessary constitutional issue, given that it had no bearing on the outcome of the case. *Id.* at 846. The argument for constitutional avoidance is beyond the scope of this Comment and will not be discussed here.

69. *Id.* at 838.

70. *Id.* at 836 ("To understand the significance and to see the potential implications of the majority's novel interpretation of the *Just* case, it is necessary to appreciate how settled the public trust doctrine has been in Wisconsin until now.").

71. *Id.* at 836–37 (citing City of Milwaukee v. State, 214 N.W. 820 (Wis. 1927)).

72. *Rock-Koshkonong*, 833 N.W.2d at 837 (Crooks, J., dissenting) (emphasis added) (quoting Diana Shooting Club v. Husting 145 N.W. 816, 820 (Wis. 1914)).

73. *Id.* (citing Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 523 (Wis. 1952)).

resources.[74] The trust was to be interpreted broadly.[75] More recently, the dissent pointed to several cases in which the public trust doctrine had been cited to uphold regulations of land above the ordinary high water mark.[76] The public trust was cited directly in upholding regulations of shoreland zoning and inland groundwater wells in *Just v. Marinette County* and *Lake Beulah Management District v. State Department of Natural Resources*.[77] Both *Just* and *Lake Beulah* dealt with the regulation of non-navigable water but were upheld as direct enforcement of the public trust duties placed on the state. Both opinions cited acknowledged the special relationship between the land being regulated and navigable waterways.[78]

Justice Crooks stated that the majority confused the issue of ownership with the issue of regulation.[79] He indicated that the cases cited by the majority to support its position all dealt with conflicts as to whether water was owned by the state or private citizens.[80] In this regard, the dissent agreed that ownership obviously ends at the ordinary high water mark. According to Justice Crooks, the issue here did not involve ownership, but "only whether the DNR has the authority under the public trust doctrine to consider the impact on those adjacent wetlands consistent with its duties under the public trust doctrine."[81]

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74. "[T]he trust . . . requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it." *Id.* at 837 (emphasis omitted) (quoting *City of Milwaukee*, 214 N.W. at 830).

75. "[The trust] should be interpreted in the broad and beneficent spirit that gave rise to it . . . ." *Id.* (quoting *Diana Shooting Club*, 145 N.W. at 820).

76. *Id.* at 837–38.

77. Just v. Marinette Cnty., 201 N.W.2d 761 (Wis. 1972) (shoreland zoning); Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res., 799 N.W.2d 73 (Wis. 2011) (groundwater wells).

78. "Lands adjacent to or near navigable waters exist in a special relationship to the state. . . . [A]nd [they] are subject to the state public trust powers . . . ." *Just*, 201 N.W.2d at 769. "[T]he legislature has delegated the State's public trust duties to the DNR in the context of its regulation of high capacity wells and their potential effect on navigable waters . . . ." *Lake Beulah*, 799 N.W.2d at 84.

79. *Rock-Koshkonong*, 833 N.W.2d at 841 (Crooks, J., dissenting).

80. *Id.* The dissent points to *Diana Shooting Club*, which involved an issue of trespass when a hunter was located between the ordinary high water marks of a navigable river. *Id.* at 841 n.6 (citing *Diana Shooting Club*, 145 N.W. at 820).

81. *Id.* at 841.

V. ANALYSIS AND IMPLICATIONS

A. Soundness of the Court's Analysis

The majority in *Rock-Koshkonong* failed to provide a clear and convincing legal justification for its opinion. First, the majority split from a long line of precedent in narrowing the broad mandate of the public trust doctrine. The public trust doctrine had previously been used to uphold various regulations that go beyond the ordinary high water marks. Second, the majority blurred the issue of ownership with regulation, confusing the real issue presented to it. Finally, the distinction and separation of the public trust doctrine and the police power the majority makes in its interpretation of section 31.02 of the Wisconsin Statutes is misleading.

1. Narrowing the Broad Mandate

In narrowing the public trust doctrine's power and establishing a bright-line test for its jurisdiction, the majority in *Rock-Koshkonong* abruptly departed from a century of precedent. As the dissenting opinion points out, the public trust doctrine vests in the state not only a duty to protect navigable waterways, but also a duty to promote them.[82] As far back as 1927, the Wisconsin Supreme Court has stated:

> The trust reposed in the state is not a passive trust; it is governmental, active, and administrative. Representing the state in its legislative capacity, the Legislature is fully vested with the power of control and regulation. 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 lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.[83]

Because of this affirmative duty placed on the legislature (and the DNR),[84] Wisconsin courts have established a long line of precedent that

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82. *Id.* at 836.

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

84. Though it is primarily the state's duty, in furtherance of its affirmative obligations as trustee, the legislature delegated substantial authority to the DNR over matters of water management. The DNR's duties are comprehensive and its role in protecting the trust is dominant. Lake Beulah Mgmt. Dist. v. State Dep't of Natural Res.,

holds that the public trust doctrine is meant to be construed broadly.[85] As such, the doctrine has steadily expanded to meet the needs of the increasingly modern world. The expansion has grown in both the definitions of navigability[86] and the scope of authority granted to the DNR to protect the trust.[87]

Along these lines, the Wisconsin Supreme Court has long held that the legislature and DNR have broad authority under the public trust doctrine. As the dissent correctly notes, the court has unanimously upheld the public trust doctrine's expansion to non-navigable water that directly impacts navigable waterways in recent years.

The majority's interpretation of the state's public trust jurisdiction is inconsistent with these past decisions. The bright-line test narrows the affirmative duty and is conflicting with the clear mandate from a century of precedent to construe the trust obligations broadly and to promote and protect the waterways. While a bright-line test may have an advantage in being readily ascertainable, it also significantly limits the protections that the state can enforce—or has a *duty* to enforce—under the public trust power.[88]

This bright-line test also ignores contemporary scientific knowledge of ecosystems. The initial findings in the ALJ decision clearly show that the considerations of the wetlands were all rooted in the protection of the navigable waterway. As the court in *Just* noted, "[t]his is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights."[89] Wetlands provide critical

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799 N.W.2d 73, 84 (Wis. 2011) (quoting Wis.'s Envtl. Decade, Inc. v. Dep't of Natural Res., 271 N.W.2d 69, 73 (Wis. 1978)).

85. *E.g.*, *Diana Shooting Club*, 145 N.W. at 820 (stating the public trust 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").

86. Navigability was first tested solely by the waterway's ability to float logs commercially. The requirements were increasingly relaxed until its current definition, which requires only that on a regularly recurring basis the waterway is capable of floating any boat of the shallowest draft used for recreational purposes. The expansion of navigability in these ways affected not only the number of waterways that fell under public trust jurisdiction, but also the different recreational and aesthetic interests that the public had in them. Hunting, swimming, and scenic beauty are all recognized interests in navigable waterways. For a more in-depth examination of the expansion of navigability in Wisconsin public trust doctrine case law, see Quick, *supra* note 30, at 106–09.

87. *See generally*, Scanlan, *supra* note 28, at 131–35.

88. Kilbert, *supra* note 27, at 41–42 (discussing the advantages and disadvantages of a bright-line public trust doctrine test at the ordinary high water mark).

89. Just v. Marinette Cnty., 201 N.W.2d 761, 769 (Wis. 1972).

protections to navigable waters and improve water quality.[90] They also provide habitats and breeding grounds for wildlife that are hunted and enjoyed on navigable waterways.[91] In order to properly protect the navigable waters of the state—as the DNR is constitutionally mandated to do—it must be allowed to consider impacts on the wetlands that bear such a direct impact on the waterway itself.

2. Ownership versus Regulation

The majority opinion seems to confuse the issue of trust ownership with regulations made in discharging public trust duties. The DNR was not claiming ownership of the non-navigable wetlands or attempting to hold them in trust. It was instead using its power to regulate lands above the ordinary high water mark in discharging its public trust doctrine duties.[92] As discussed above, this power has been widely accepted by Wisconsin courts.[93] The DNR was well within its constitutional authority to examine the impact that changes in the adjacent wetlands would have on the navigable waterway because while not owned by the state in trust, "[l]ands adjacent to or near navigable waters exist in a special relationship to the state . . . and are subject to the state public trust powers."[94] Adjacent wetlands, while not owned by the state in trust, fall well within the public trust jurisdiction for regulation because of their special relationship with the navigable waters.

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90. *See* Joint Brief for Clean Wisconsin et al. as Amici Curiae Supporting Respondents at 3–4, Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800 (Wis. 2013) (No. 2008-AP-1523), 2012 WL 2050349, at *3–4.

91. *Id.* at *4.

92. The majority's confusion is apparent in its statement "[e]liminating the element of 'navigability' from the public trust doctrine would remove one of the prerequisites for the DNR's *constitutional basis* for regulating and controlling water and land." *Rock-Koshkonong*, 833 N.W.2d at 818. In a footnote to this statement, the majority stated that they had previously rejected theories that extend the public trust doctrine beyond the ordinary high water mark. *Id.* at 818 n.29. The court's discussion here is indicative of their confusion over ownership and regulation. The court selectively quotes *DeGayner & Co. v. State Dep't of Natural Res.*, 236 N.W.2d 217 (Wis. 1975) in support of their reasoning. In *DeGayner*, the Wisconsin Supreme Court rejected a theory proffered by an amicus brief that suggested that a tributary to the Namekagon River should be found navigable as a matter of law because the flow of water from the tributary was important to the Namekagon's water quality and wildlife. 236 N.W.2d at 223. The *DeGayner* court rightly rejected this theory, noting it could be carried to ridiculous extremes, allowing nearly any flowing water to be held navigable (i.e., owned by the state in trust). *Id.* The difference is that the amicus was pushing for *trust ownership* of the tributary due to its relation to the Namekagon River, a much more expansive theory than the one advanced here—regulation pursuant to public trust duty to promote and protect navigable waters.

93. See *supra* Part V.A.1 for discussion of *Lake Beulah* and *Just* cases.

94. *Just*, 201 N.W.2d at 769.

3. Public Trust versus Police Power

The majority's distinction between the public trust and police power authority in section 31.02(1) of the Wisconsin Statutes is misleading and a product of its own narrowing of the public trust.[95] The majority determines from the word "or" that the DNR would rely exclusively on the police power for regulations above the ordinary high water marks and on the public trust doctrine for regulations below them.[96] The argument over the two sources of power is only relevant if adopting the majority's improperly narrow construction of the public trust doctrine. It is clear that in considering the possible effects that raising the water level would have on the wetlands, the DNR was evaluating how those changes would affect the navigable waters themselves.[97] Under the broader interpretation of the public trust doctrine utilized by the courts until now, this fits squarely into the public trust jurisdiction. As such, whether or not they also had authority to do so under an additional, broader source of power is not particularly relevant or necessary to discuss under the broader public trust standard.

Moreover, the majority's implied position that the police power and public trust doctrine are separate and distinct sources of power is misplaced. The cases the majority cites in support do not discuss the police power and public trust as two mutually exclusive sources of power.[98] Additionally, the two doctrines are closely related and are often utilized together in environmental or zoning legislation.[99] The state police power is considerably broader than the public trust doctrine, as the former is rooted in the general welfare while the latter is rooted only in the protection of navigable waters. The fact that state action could be justified under the broad police power does not preclude it from also being justified under the much narrower (and constitutionally based)

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95. In order to square its holding with precedent that upheld regulations above the ordinary high water mark, the majority concluded that these prior decisions must have been relying *solely* on the police power. *See Rock-Koshkonong*, 833 N.W.2d at 823–24.

96. See *supra* note 41, for the exact language of section 31.02 of the Wisconsin Statutes.

97. See *supra* notes 12–14 and accompanying text, for the ALJ factual findings.

98. *See* Wis. Power & Light Co. v. Pub. Serv. Comm'n, 92 N.W.2d 241, 245 ("The commission *acted to protect public rights in the navigable waters* involved, to promote safety, and to protect property, *all of which* involve subjects covered by the police power of the state." (emphasis added)); *Just*, 201 N.W.2d at 768 (stating that while regulations to prevent pollution and protect waterways are valid police power enactments, they also fall under the active public trust duty to protect and preserve those waters).

99. *See generally* Donna J. Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683 (2000).

public trust doctrine. The majority's distinction is not dispositive of the issue and is misleading.

4. Implications

The decision could potentially cause a dramatic shift in Wisconsin's public trust jurisprudence. It may seem that because the DNR was able to extend its regulatory power to the wetlands through the police power, the decision will have little effect. But the majority has narrowed the use of the public trust to land between the ordinary high water marks. As such, any regulation that goes beyond this bright line must be pursuant to a statutorily granted use of the police power. This has two implications.

First, the use of the police power is subject to legislative enactments and modifications. The dissent correctly notes that, notwithstanding DNR authority under the police power to regulate these wetlands, the majority transformed "what was an affirmative duty on the state as trustee into a right to regulate when the legislature chooses to do so, allowing the state to ignore its duty with respect to things that impact navigable waters but are not physically located between the ordinary high water marks."[100] In essence, what the DNR thought was a constitutional duty to act is now suddenly only a regulation that can be changed at any time by the legislature. This change cannot be overstated, as recent scholarship has indicated that the DNR has been hindered by statutory changes, political favoritism, and legislative pressure.[101] The legislature has attempted to change and limit the DNR's jurisdiction through statutory acts.[102] Political favoritism is widely recognized by

100. *Rock-Koshkonong*, 833 N.W.2d at 840 n.3 (Crooks, J., dissenting); *see also* Kilbert, *supra* note 27, at 42. In discussing the use of the police power rather than the public trust doctrine, Kilbert notes, "[p]erhaps even more importantly, the state has no *duty* to regulate private use of the shores pursuant to its police powers, and without the public trust doctrine, the public is left with little recourse where the state fails to protect the shores from private or state actions." Kilbert, *supra* note 27, at 42.

101. *See generally* Scanlan, *supra* note 28, at 146–86. In section II of her article, Scanlan notes that in recent years the DNR has been considerably affected by the political branches of the state government. Through a number of interviews with the DNR water specialists and other personnel, Scanlan highlights the various changes that have limited the DNR's power and pressured more lenient enforcement mechanisms.

102. *Id.* at 161–63 (discussing the passage of Act 118 as one of several examples). Act 118 reduced the DNR's jurisdiction over grading projects on the banks of navigable waters and allowed for a number of exceptions and generalized permits. *Id.* at 161. Scanlan notes that the Department of Administration Secretary, rather than the DNR, was mostly involved in negotiations leading to the passage of the Act. One interviewee stated that the Department "did not know what the public trust doctrine was and wasn't willing to ask for advice." *Id.* at 162.

DNR water specialists; the vast majority of specialists acknowledge being contacted by a state legislator on behalf of a constituent private riparian.[103] When it was initially created, the DNR was run by a Natural Resources Board and was fairly insulated from politics.[104] But in 1995, an effort to "streamline government" made the secretary of the DNR a governor-appointed and -controlled position and virtually eliminated the Public Intervenor's Office.[105] Needless to say, upper management of the DNR has been much more easily swayed by political pressures since.[106] Against this backdrop, the DNR will be ill-equipped to promote and protect the public trust moving forward without a constitutional mandate to rely on.

Second, as the majority opines, unlike the public trust doctrine, the police power is subject to a balancing of interests test and constitutional takings analysis.[107] Opening up these regulations and DNR decisions to a takings analysis where they previously were insulated could undermine the entire environmental protection scheme. This increased cost could make many environmental regulations infeasible and too costly. The regulations upheld in *Just* and *Lake Beulah* pursuant to the public trust,

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103. *Id.* at 177–79.

104. *Id.* at 180. The former Wisconsin Public Intervenor, in discussing the theory behind appointment by the Natural Resources Board rather than the Governor's administration, stated "natural resources were so important to citizens that they needed to be treated differently. We needed to create a check and balance system that separated DNR decisions from immediate political concerns of the moment." *Id.* The Natural Resource Board was an independent citizen committee composed of citizens appointed to six-year terms. Sinykin, *supra* note 32, at 664.

105. Sinykin, *supra* note 32, at 664. The Public Intervenor's Office was also created in 1967 to protect public rights in natural resources and ensure fair play and due process for environmental concerns. *Id.* at 645. After the 1995 budget "streamlining" the office was cut to one attorney with no secretarial support and was deprived of its authority to sue on behalf of Wisconsin's citizenry. *Id.* at 664.

106. Scanlan, s*upra* note 28, at 179–86. One water specialist interviewed by Scanlan stated that permit applicants know they "should contact the Governor because that will get a response." *Id.* at 179–80. Another interviewee stated, "I have worked through four secretaries and four governors, and things have changed radically since I started. We're no longer doing any training. We're no longer meeting. We are asked to give input after upper management has already made a decision. And political interference is now commonplace." *Id.* at 175.

107. Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res., 833 N.W.2d 800, 824 (Wis. 2013). The general police power has always been subject to takings analysis. The exact relationship between takings and the public trust doctrine, however, is beyond the scope of this Comment. For an in-depth discussion of the public trust doctrine and the Takings Clause, especially after *Lucas v. South Carolina Costal Council*, 505 U.S. 1003 (1992), see Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 681–84 (2011) and Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Costal Council, 45 STAN. L. REV. 1433, 1437–40 (1993).

if reviewed by the majority here, would likely be subject to takings analysis.

While these are serious implications, it is important to note that in upholding the DNR's action under the police power, the constitutional analysis performed by the majority had no real bearing on the outcome of the case. The DNR's protection of the wetlands was permitted, notwithstanding the reinterpretation of the public trust doctrine. Therefore, the constitutional analysis could be technically characterized as dicta which other courts would not be strictly required to follow.[108] It is possible, therefore, that there will be very few implications of the majority opinion in *Rock-Koshkonong*. While this may be true, the Wisconsin Supreme Court has signaled, at least for the time being, that future challenges to DNR actions will be analyzed under the police power if they extend beyond the navigable waters themselves.[109] As such, it is hard to imagine that lower courts would not take notice of the majority's analysis at the risk of being overturned down the line.

VI. CONCLUSION

In *Rock-Koshkonong Lake District v. State Department of Natural Resources*, the Wisconsin Supreme Court limited the public trust doctrine between the ordinary high water marks. In doing so, the court retreated from a century of precedent construing the public trust doctrine broadly. The impact of this decision is unclear, but as a state with more than 15,000 lakes, Wisconsin's citizens should be concerned about the state's dedication to and protection of its natural resources that impact its navigable waterways.

108. Melissa K. Scanlan, Op-Ed., *It's Not Open Season on Wetlands*, J. SENTINEL (July 22, 2013), http://www.jsonline.com/news/opinion/its-not-open-season-on-wetlands-b9959581z1-216520241.html.

109. *See id.*