

ROCK-KOSHKONONG LAKE DISTRICT AND THE SURPRISING NARROWING OF WISCONSIN’S PUBLIC TRUST DOCTRINE

By Christian Eickelberg

In 2013, in Rock-Koshkonong v. Wisconsin Department of Natural Resources, the Wisconsin Supreme Court ruled in a 4-to-3 decision that the Department of Natural Resources could not consider damage to non-navigable wetlands above the ordinary high water mark under Wisconsin’s public trust doctrine when making a water level determination for Lake Koshkonong. According to the majority, the Department of Natural Resources could consider damage to adjacent wetlands only under statutory authority because Wisconsin’s constitutionally based public trust doctrine was confined to navigable waters below the ordinary high water mark.

This paper maintains that the Rock-Koshkonong majority made a number of analytical missteps in reaching its decision. The court failed to provide sufficient justification for confining the scope of Wisconsin’s public trust doctrine to navigable waters, mischaracterizing its precedents and silently narrowing the celebrated case of Just v. Marinette County, which interpreted Wisconsin’s public trust doctrine to include wetlands adjacent to and affecting navigable waters. The paper concludes that the court’s narrowing of the scope of Wisconsin’s public trust doctrine disregarded the history and purpose of the doctrine and unnecessarily curtailed public rights in favor of private property rights in the process.

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INTRODUCTION

More than forty years ago, the Wisconsin Supreme Court decided what has become a celebrated case, *Just v. Marinette County*.¹ In sweeping language, the court held that the state of Wisconsin did not initiate a taking when it enacted a regulation requiring a landowner to apply for a permit to fill privately-owned wetlands.² Wetlands, the court asserted, were “part of the balance of nature,” essential to sustaining Wisconsin’s lakes, rivers, and streams.³ The public trust duty of Wisconsin, as codified in the state’s constitution, required the state to promote navigation and to reduce pollution on navigable waters.⁴ Because of the essential nature of lands near navigable bodies of water, Wisconsin could regulate these wetlands even if privately-owned.⁵ The court claimed that the state of Wisconsin had an affirmative duty to protect and preserve these public trust lands in their natural state.⁶

The *Just* court’s reasoning, that the state does not unconstitutionally take property when it restricts a landowner from altering the natural condition of wetlands adjacent to navigable waters, has stood as the law in

1. *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

2. *Id.* at 768.

3. *Id.*

4. As discussed *infra* notes 25–41 and accompanying text, Wisconsin’s public trust doctrine is constitutionally based.

5. See Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 668 (2012) (noting that the Wisconsin Supreme Court in *Just* held that the state could assert the public trust doctrine to bar the filling of privately-owned wetlands to keep those wetlands in their natural condition).

6. *Just*, 201 N.W.2d at 768.

Wisconsin.⁷ The decision is notable for its recognition of the state's duty to preserve public trust lands because of their ecological value⁸ in addition to the traditional rights that the public has in trust lands, such as access to water, fishing, and bathing.⁹ Commentators frequently cite the decision as an example of Wisconsin's robust history of protecting public trust resources.¹⁰

Despite Wisconsin's rich history of preserving wetlands, the Wisconsin Supreme Court recently decided a case that narrowly interprets *Just* and has the potential to disrupt what appeared to be settled precedent. In *Rock-Koshkonong Lake District v. State Department of Natural Resources*, the lake District and other property owners (the District) challenged the Wisconsin Department of Natural Resources' (DNR) decision to not raise the water level of Lake Koshkonong.¹¹ The DNR based its decision on evidence that raising the water level would have a negative environmental effect on wetlands adjacent to and affecting Lake Koshkonong.¹² The DNR asserted that it was constitutionally required to consider the damage to the wetlands near Lake Koshkonong because these wetlands were subject to Wisconsin's public trust doctrine (PTD).

The District appealed the DNR's decision and, after a contested hearing, an Administrative Law Judge (ALJ) upheld the DNR's denial of the District's petition.¹³ The ALJ was not convinced by the District's argument that economic damage resulting from a lower water level outweighed the potential environmental harm that would result from a

7. See, e.g., *Zealy v. City of Waukesha*, 548 N.W.2d 528, 534 (Wis. 1996) (citing *Just* with approval in holding that a conservancy District preventing certain uses of land in order to prevent destruction of wetlands was a proper exercise of the state's police power, and if the issue had been before it, a proper exercise of the state's public trust power as well).

8. See, e.g., *Just*, 201 N.W.2d at 771 (“[t]he shoreland zoning ordinance preserves nature, the environment, and natural resources as they were created and to which the people have a present right” and “preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.”).

9. As discussed *infra* notes 25–41 and accompanying text, traditionally, the PTD conferred only certain types of rights to the public, such as access to water, fishing, bathing, or recreation. See also *Munninghoff v. Wisconsin Conservation Comm'n*, 38 N.W.2d 712, 715 (Wis. 1949) (“In general, the rights of the public to incidents of navigation are boating, bathing, fishing, hunting, and recreation.”) (citation omitted).

10. See, e.g., Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 *ECOLOGY L.Q.* 135, 138, 161 (2000) (noting Wisconsin's 150-year history of PTD use to protect natural resources, and that the *Just* decision further added to the trust's scope); Tracy K. Kuczynski, *Wisconsin's Shoreland Management Program: An Assessment with Implications for Effective Natural Resources Management and Protection*, 1999 *WIS. L. REV.* 273, 283 (1999) (calling *Just* a “landmark” decision).

11. *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800, 805 (Wis. 2013).

12. *Id.* at 809.

13. *Id.* at 810.

higher water level.¹⁴ The ALJ also agreed with the DNR that the wetlands were subject to Wisconsin's PTD.¹⁵

The District appealed to the courts, and the circuit court and court of appeals affirmed the decision on appeal. However, a divided Supreme Court of Wisconsin reversed, deciding that non-navigable wetlands above the ordinary high water mark (OHWM) were not within the scope of Wisconsin's PTD.¹⁶ Consequently, the court remanded the case, instructing the DNR to equally consider all property rights potentially affected by the water level and to refrain from giving the wetlands near the lake a constitutional preference over other property uses.¹⁷

This paper analyzes the *Rock-Koshkonong* decision and its potential repercussions for the PTD and wetlands regulation in Wisconsin. Under *Just*, the DNR had a duty to promote navigation in navigable waters as well as to protect and preserve those waters for fishing, recreation, and scenic beauty.¹⁸ This duty extended to lands adjacent or near navigable bodies of water, which included wetlands.¹⁹ But according to the *Rock-Koshkonong* court, lands that are not navigable or that are above the OHWM are excluded from this rule.²⁰ If the PTD does not apply to these lands, the state police power still may subject them to regulation.²¹ Nevertheless, the distinction is important because the state has a complete defense to private landowners' takings claims when the state enacts regulations on public trust land pursuant to its trust authority.²² Further, the state, as trustee of the public trust, has an affirmative duty to maintain public trust lands for the public, which it can do through regulation.²³ In contrast, under the police power, the state can potentially be liable for taking private property when

14. See *id.* at 813.

15. *Id.* at 804.

16. *Id.* at 820–21.

17. *Id.* at 825.

18. See *Just*, 201 N.W.2d at 768 (“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.”) (citing *Muench v. Pub. Serv. Comm'n*, 53 N.W.3d 514 (Wis. 1952)).

19. *Just*, 201 N.W.2d at 769 (“Lands adjacent to or near navigable waters exist in a special relationship to the state. They have been held to special taxation and are subject to the state public trust powers.”).

20. *Rock-Koshkonong*, 833 N.W.2d at 820–21.

21. *Id.* at 822 (citing *Just*, 201 N.W.2d at 765).

22. See DAVID C. SLADE, *THE PUBLIC TRUST DOCTRINE IN MOTION: EVOLUTION OF THE DOCTRINE* 47-49 (PDTIM LLC, 2008) (noting that when a state “acts under its public trust authority it is managing its own trust assets, and thus is sheltered from ‘takings’ claims because a state cannot unconstitutionally ‘take’ what it already owns in trust.”).

23. See *Ctr. for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1365–66 (2008) (noting that the PTD imposes a duty on the state to preserve public trust lands).

regulating non-trust land, and the state could rescind current wetlands regulation because it has no affirmative duty to preserve non-trust land.²⁴

This paper maintains that Wisconsin's ability to maintain wetlands adjacent to navigable waters has been significantly curtailed by the *Rock-Koshkonong* decision. Section I of this paper briefly surveys the development of the PTD and wetlands regulation in Wisconsin. Section II discusses the facts and reasoning of *Just*. Section III addresses the *Rock-Koshkonong* decision.

Section IV examines the effects of *Rock-Koshkonong* and argues that the court's analysis was defective in at least three ways: 1) the court erred in not deferring to the DNR's interpretation of the statute at issue because it was not clearly contrary to the law; 2) once the court engaged the merits of the case, it narrowed *Just* and the PTD in Wisconsin without stating that it was doing so by claiming that *Just* was only about the police power and not the PTD; and 3) the court overlooked both the history and the spirit of the PTD by narrowing the doctrine's scope to navigability, which discounted the effect that wetlands have on navigable waters.²⁵ Ultimately, in its rush to criticize the deferential standard of review for agency determinations and the perceived damage that the constitutional status of wetlands caused to private property rights, the Wisconsin Supreme Court did not carefully analyze or remain consistent with its own precedents. This paper concludes that the *Rock-Koshkonong* opinion did a disservice to Wisconsin's protection of public trust resources.

I. THE PUBLIC TRUST DOCTRINE IN WISCONSIN AND THE IMPORTANCE OF ADJACENT WETLANDS

The *Just* and *Rock-Koshkonong* decisions both involved Wisconsin's PTD and the regulatory scheme that Wisconsin had developed to maintain the trust. This section provides a brief overview of the PTD in Wisconsin and is followed by a review of the state's wetlands regulation.

24. See SLADE, *supra* note 21, at 48–49 (“[w]hen a state acts under its police powers, it is regulating private property, and thus opens itself to ‘takings’ claims.”).

25. As discussed *infra* note 177 and accompanying text, EPA, for example, has recently released a study demonstrating the interconnectedness of wetlands to larger bodies of water such as lakes, rivers, and streams.

A. Overview of the Wisconsin Public Trust Doctrine

The PTD originated in Roman law,²⁶ evolved in medieval England,²⁷ and has been discussed by United States (U.S.) courts since at least the early nineteenth century.²⁸ At bottom, the PTD places the government as trustee of select natural resources and ensures that the government will manage those resources for the benefit of the public.²⁹ The PTD is like other types of property-trusts, in which a trustee manages the trust and its assets for the benefit of another party—in the case of the PTD, the state acts as trustee and manages the trust assets³⁰ for the public, as beneficiary.³¹ The PTD is an anti-monopolistic doctrine in that it favors diffuse public rights over particular private ownership.³²

Wisconsin derived its PTD from the Northwest Ordinance of 1787, which proclaimed that “navigable waters leading into the Mississippi and St. Lawrence, and 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.”³³ In 1848, Wisconsin recognized its dominion over navigable waters in the state by incorporating the same language from the ordinance into its constitution.³⁴ This trust was

26. The Institutes of Justinian are often cited as the origination of the recognition of public rights in natural resources. J. Inst., 2.1.1–2.1.6 at 55 (P. Birks & G. McLeod trans. 1987) (“The things which are naturally everybody’s are: air, flowing water, the sea, and the sea-shore.”).

27. The Magna Carta also features public trust elements. Magna Carta, 1225, chapter 23, available at <http://www.constitution.org/eng/magnacar.htm> (stating that the king cannot force the people to build bridges over rivers, demonstrating that the king does not hold complete fee in waterways).

28. One of the earliest cases relying on the public trust is *Arnold v. Mundy*, 6 N.J.L. 1, 1821 N.J. LEXIS 2 (1821), where the Supreme Court of New Jersey decided that a riparian landowner could not prevent the public from harvesting oysters that he had planted on the bed of a navigable river. The court stated that the public had a right to navigation in that river and thus the riparian owner could not prevent public access. In reaching its decision, the court consulted older public trust authorities such as Justinian and various sources from England. Twenty years after *Arnold*, the Supreme Court in *Martin v. Waddell’s Lessee*, 41 U.S. 367 (1842) followed much of the New Jersey Supreme Court’s reasoning.

29. Michael C. Blumm & Mary Christina Wood, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 3 (2013).

30. Public trust assets typically take the form of navigable waters, the beds underneath those waters, and the public property interests in the trust assets. David C. Slade, *Putting the Public Trust to Work* 3, NOAA SHORELINE (1997), available at <http://www.shoreline.noaa.gov/docs/8d5885.pdf>.

31. *Id.* at 3.

32. See, e.g., *Geer v. State of Connecticut*, 161 U.S. 519, 529 (1896) *overruled on other grounds by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (“ . . . this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.”).

33. Confederation Congress, Ordinance of 1787: The Northwest Territorial Government (July 13, 1787).

34. The Wisconsin Constitution provides that the state:

subsequently codified in statutes, which delegated trust management duties largely to the Wisconsin DNR.³⁵ The statutory and constitutional provisions provide the basis for Wisconsin's administrative and judicial enforcement of the PTD.

Under the PTD, the state holds title to the beds of lakes, ponds, and rivers of navigable waters.³⁶ The scope of the trust originally existed to protect commercial navigation,³⁷ but Wisconsin courts long ago expanded the trust to protect the public's rights for recreational purposes such as "boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty."³⁸ The Wisconsin Supreme Court first recognized the PTD's presence in the Wisconsin Constitution in 1924, asserting that "by the organic law" of the Northwest Ordinance,³⁹ the court was compelled to not diminish or abrogate the trust.⁴⁰ The Wisconsin courts' role in interpreting and expanding the trust has been the subject of commentators for years; indeed, as Professor Sax stated over forty years ago, the "Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state."⁴¹ For most of Wisconsin's history, the trend of the PTD in Wisconsin has been "to extend and protect the rights of the public" to navigable waters.⁴²

"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 therefore."

WIS. CONST. art. IX, § 1.

35. See WIS. STAT. ANN. § 23.11 (West 2009) (the DNR "shall have and take the general care, protection and supervision of all . . . lands owned by the state or in which it has any interests.").

36. *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 787 (Wis. 2001).

37. Although Wisconsin used to employ the "saw log" test to determine navigability, the test has been replaced by the standard of "navigable in fact for any purpose, which means that a body of water is navigable if it is capable of floating a boat, skiff, or canoe. See *Whisler v. Wilkinson*, 22 Wis. 572, 574 (1868) (discussing Wisconsin's old "saw log" test, which meant that a body of water was navigable if a log could float down it); *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 519 (Wis. 1952) (discussing Wisconsin's current test for navigation).

38. *R.W. Docks & Slips*, 628 N.W.2d at 788.

39. See *supra* notes 33–34 and accompanying text (explaining that the PTD language from the Northwest Ordinance was incorporated into Wisconsin's constitution).

40. *In re Crawford Cnty. Levee & Drainage Dist. No. 1*, 196 N.W. 874, 876 (Wis. 1924).

41. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970).

42. *Lake Beulah Mgmt. Dist. v. Dep't of Natural Res.*, 799 N.W.2d 73, 83–84 (Wis. 2011) (citing *Muench v. Pub. Serv. Comm'n*, 53 N.W.2d 514, 516–21 (Wis. 1952)).

B. Ecological Importance of Wetlands

For much of U.S. history, the public considered wetlands nuisances that served as impediments to productive land use.⁴³ In land-grant programs like the Swamp Lands Act of 1850, the federal government actively encouraged draining or filling of wetlands.⁴⁴ Moreover, unlike other types of aquatic environments, wetlands are capable of being privately owned, and often serve as appealing sites for development.⁴⁵ Between 1780 and 1980, studies estimate that over 50 % of wetlands in the U.S. were filled, drained, or flooded.⁴⁶ In the latter part of the twentieth century, however, environmentalists and scientists began to appreciate that wetlands constituted a productive and invaluable public resource.⁴⁷ Studies have shown that wetlands improve water quality and groundwater recharge, provide flood protection, and are centers of immense biodiversity.⁴⁸ It is with this emerging awareness about the importance of wetlands that Wisconsin Supreme Court decided the *Just* case.

II. JUST V. MARINETTE COUNTY

In 1967, pursuant to shoreland regulations promulgated by the Wisconsin legislature, Marinette County implemented a shoreline-zoning ordinance.⁴⁹ The ordinance's purpose was to "protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands."⁵⁰ To achieve this purpose, the ordinance sought to restrict development of areas near

43. Thomas E. Dahl, *Wetlands Losses in the United States 1780's to 1980's*, NAT'L WETLANDS INVENTORY 1, 2 (1990), available at <http://www.fws.gov/wetlands/Documents/Wetlands-Losses-in-the-United-States-1780s-to-1980s.pdf>.

44. *Id.*

45. Michael C. Blumm and D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 697 (1989).

46. *See* Dahl, *supra* note 43, at 1.

47. *See id.* at 2.

48. United States Department of Agriculture, National Resources Conservation Service, *Restoring America's Wetlands: A Private Lands Conservation Success Story 2*, available at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/16/stelprdb1045079.pdf.

49. *Just v. Marinette Cnty.*, 201 N.W.2d 761, 764. The Marinette county shoreland zoning ordinance followed a model ordinance published by the DNR and was designed to meet standards and criteria for shoreland regulation required by the legislature under Wisconsin Statute section 144.26, which stated that the "purpose of the regulation program is . . . to aid in the fulfillment of the state's role as a trustee of its navigable waters and to promote public health, safety, convenience and general welfare." *Just*, 201 N.W.2d at 764-65 (internal citations omitted).

50. *See id.* at 765 n. 2. The ordinance defined shorelands as lands "1,000 feet from a lake, pond, or flowage; 300 feet from a river or stream or to the landward side of the flood plan, whichever distance is greater." WIS. STAT. § 59.971(1).

navigable waters, providing only for certain “permitted” or “conditional” uses of shorelands.⁵¹ Accordingly, the ordinance required an individual whose land fell within the zone to apply for a permit to “fill, drain, or dredge” wetland areas.⁵²

The Justs’ land was located within 1,000 feet of the normal high-water elevation of Lake Noquebay, a navigable body of water, and the U.S. Geographical Survey Map designated the land as swamp or marshland.⁵³ As a result, the Justs’ land fell within the zone covered by the ordinance that required them to apply for a permit to fill, drain, or dredge wetlands.⁵⁴ Ignoring the permit requirement, the Justs hauled sand onto their property and filled more than 500 square feet of wetlands.⁵⁵

The county sought an injunction to restrain the Justs from placing fill without a permit, and also sought a fine for the fill that the Justs had already placed.⁵⁶ In response, the Justs claimed that the conservancy and wetlands filling restriction was unconstitutional because the laws amounted to a constructive taking of their land without compensation.⁵⁷ The trial court upheld the ordinance, concluded the Justs had violated it, and fined them \$100.⁵⁸

The Justs appealed the trial court’s ruling, and the court of appeals affirmed.⁵⁹ The Justs petitioned and the Wisconsin Supreme Court granted certiorari, where the Justs again argued that the permit requirement was unconstitutional. Marinette County and the state of Wisconsin both argued that the zoning ordinance was a permissible exercise of the state’s police power.⁶⁰ The Wisconsin Supreme Court, however, framed the issue in “more meaningful” terms: according to the court, the case represented the “conflict between the public interest in stopping the despoliation of natural resources, which our citizens until recently have taken as inevitable and for

51. *Just*, 201 N.W.2d at 765–66 (explaining that the ordinance required a conditional-use permit for any filling of “any area which is within three hundred feet horizontal distance of a navigable water and which has surface drainage toward the water.”) (quoting Marinette County Shoreland Zoning Ordinance § 5.42(2)(d) (Sept. 19, 1967)).

52. *Id.* The ordinance defined “wetlands” as areas “where ground water is at or near the surface much of the year or where any segment of plant cover is deemed an aquatic according to N. C. Fasset’s ‘Manual of Aquatic Plants.’”

53. *Id.* at 766. Because the U.S. Geological Survey designated the Justs’ land as swamps or marshes and located within 1,000 feet of the normal high-water mark of the lake, their land was included in the conservancy District and classified as “wetlands” under the ordinance.

54. *Id.*

55. *Id.*

56. *Id.* The ordinance imposed a fine of \$10 to \$200 for each violation of the ordinance.

57. *Id.* at 767.

58. *Id.* at 764.

59. *Id.*

60. *Id.* at 767.

granted, and an owner's asserted right to use his property as he wishes."⁶¹ The protection of these public rights, the court acknowledged, may be accomplished through the exercise of the police power, unless the deprivation to the property owner is too great and amounts to a confiscation without compensation.⁶²

The court then noted that lakes and rivers in their natural state are unpolluted, and that Wisconsin's PTD imposed a duty to eradicate existing pollution and prevent future pollution in its navigable waters.⁶³ The court stated, "what makes this case different from other condemnation or police power zoning cases is the interrelationship of the wetlands . . . to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty."⁶⁴ While the people of Wisconsin had for years viewed wetlands as undesirable, the people were coming to a greater appreciation for the essential nature of wetlands to the purity of water in Wisconsin's lakes and streams.⁶⁵

The *Just* court clarified that this was a case in which an owner's use caused harm to the general public, not a case in which the state was depriving an owner from using land for natural and indigenous uses.⁶⁶ Affirming the lower courts, the court ultimately upheld the ordinance for two reasons. First, Wisconsin had previously held that regulations to prevent pollution and to protect waters from degradation were valid police-power enactments.⁶⁷ Second, Wisconsin's active public trust duty required the state to promote navigation and to protect and preserve navigable waters for fishing, recreation, and scenic beauty.⁶⁸ Further, the court made clear that this was not:

[A] case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm in public rights. Lands adjacent to or near navigable waters exist in a special

61. *Id.* at 767.

62. *Id.*

63. *Id.* at 768 ("[t]he state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters.").

64. *Id.*

65. *Id.*

66. *Id.* at 768.

67. *See id.* at 768. ("Wisconsin has long held that laws and regulations to prevent pollution and to protect the waters of this state from degradation are valid police-power enactments.").

68. *Id.* ("[t]he active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but to protect and preserve those waters for fishing, recreation, and scenic beauty.").

relationship to the state. They have been held to special taxation and are subject to the state public trust powers.⁶⁹

Because of this special trust relationship, and the fact that the wetlands were not isolated and were adjacent to the navigable body of water, the Marinette County ordinance was neither confiscatory nor unreasonable.⁷⁰ Moreover, the ordinance did not deprive the Justs of the natural uses of their land, only speculative economic ones.⁷¹ The Justs had a wetland before the ordinance; they still had a wetland after the ordinance; thus, there was no taking. The court declared that the zoning ordinance regulating wetlands within 1,000 feet of Lake Noquebay was constitutional and did not deprive the Justs of any natural use of their land.⁷²

The court's reasoning in upholding the regulation followed from the fact that the state, as trustee of the public trust, was constitutionally required to maintain Wisconsin's navigable waters.⁷³ Because the Justs' wetlands lay within 1,000 feet of Lake Noquebay and activities such as filling wetlands affected the cleanliness of the wetlands, it followed that the cleanliness of Lake Noquebay was affected. Thus, it was not a far step for the court to agree with the DNR that the ordinance's requirement to apply for a permit to fill wetlands adjacent to Lake Noquebay effectuated the public benefit of reduction in pollution in the lake. In effect, the *Just* court ruled that the public's right to reduced levels of pollution in navigable waters outweighed the Justs' right to fill their wetlands.

In the years following the decision, courts and commentators celebrated *Just* for its extension of the public trust to lands adjacent to navigable waters and for the decision's broad language supporting the protection of the environment, tempering unfettered private ownership, and development of land. While some faulted the decision for its broad language and for glossing over specific factual details,⁷⁴ the majority of commentators celebrated the decision.⁷⁵ Wisconsin courts also cited *Just* with approval in

69. *Id.* at 769 (internal citation omitted).

70. *Id.*

71. *Id.* at 771.

72. *Id.* at 771–72. The Justs argued that the ordinance deprived them of the ability to develop their land, but the court held that the issue was whether the ordinance denied them the “natural use” of their land. The court ultimately concluded the ordinance did not deprive the Justs of the natural use of their land.

73. *Id.* at 768.

74. See David P. Bryden, *A Phantom Doctrine: The Origins and Effects of Just v. Marinette County*, 1978 AM. B. FOUND. RES. J. 397, 407–08 (1978) (asserting that the *Just* decision was “fuzzy” about certain details of the case such as the scope of the conservancy zoning District or how often property values have been destroyed by conservancy Districts).

75. See RICHARD E. WARNER, KATHLEEN M. HENDRIX, *CALIFORNIA RIPARIAN SYSTEMS: ECOLOGY, CONSERVATION, AND PRODUCTIVE MANAGEMENT* 271 (University of California Press, 1984)

Wisconsin public trust cases.⁷⁶ It is no understatement to say that *Just* left an indelible mark on the public trust and environmental protection in Wisconsin.

III. ROCK-KOSHKONONG LAKE DISTRICT V. DEPARTMENT OF NATURAL RESOURCES

Lake Koshkonong is the sixth largest inland lake in Wisconsin, featuring 27 miles of shoreline, ten miles of which have been developed for residential and commercial use.⁷⁷ The lake also contains about 12 miles of wetland shoreline.⁷⁸ Water levels on Lake Koshkonong are controlled by the Indianford Dam, which was originally built in 1853, and reconstructed in 1917.⁷⁹ Between 1932 and 2002, water levels on the lake rose due to faulty operation and maintenance of the dam.⁸⁰ Because the dam did not operate correctly, it could not effectively regulate water levels on Lake Koshkonong until 2002 when the dam was rehabilitated.⁸¹ Once the dam was rehabilitated, the DNR implemented a water level order it had issued in 1991 which set the average depth for the lake at five to seven feet.⁸²

In April 2003, the Rock-Koshkonong Lake District (the District) petitioned the DNR to amend the 1991 water level order.⁸³ The District maintained that the DNR's proposed water level was "not consistent with the public interest because lower water levels on [the Lake] led to severe

(calling the *Just* decision "justly celebrated" for upholding public trust rights in the face of a challenge from private property rights); Peter J. Byrne, *Green Property*, 7 CONST. COMMENT. 239, 242 (1990) (commenting that the *Just* decision recognized the enormous environmental cost of private development, and that a landowner has no more right than a member of the public to ruin the environment); Stephen C. Werner, Jr., *To Compensate or Not to Compensate, That Is the Question: Misconstruing the Federal Regulatory Takings Analysis in Zealy v. City of Waukesha*, 3 WIS. ENVTL. L.J. 203, 237 (1996) (calling *Just* a "landmark" decision).

76. See Patrick O. Dunphy, *The Public Trust Doctrine*, 59 MARQ. L. REV. 787, 807–08 (1976) (arguing that, even though *Just* has not been applied beyond public trust situations, *Just* was still an important decision for its recognition of the interrelationship of the land and water and for extending the trust to Wisconsin shorelands); See also *M & I Marshall & Ilsley Bank v. Town of Somers*, 414 N.W.2d 824, 830 (1987) (noting that *Just* discussed Wisconsin's public trust duties, but also that *Just* was not limited to only public trust cases); *Zealy*, 548 N.W.2d at 534 (agreeing with *Just*).

77. *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800, 805 (Wis. 2013).

78. *Id.* at 806.

79. *Id.*

80. *Id.* at 806–07; See also Appellate Brief of Respondent at 7, *Rock-Koshkonong Lake Dist. v. State Dep't of Natural Res.*, 833 N.W.2d 800 (2013) (No. 08-AP-1523), 2012 WL 1570525 at *19 (discussing the background of the Indianford Dam).

81. *Id.* at 806.

82. *Id.* at 805.

83. *Id.* at 807 n. 11. (noting that Rock County established the District to "undertake a program of . . . protection and rehabilitation for Lake Koshkonong.").

restrictions on recreational boating” and would force landowners to pay to extend their piers.⁸⁴ In response, the DNR conducted an environmental assessment of the District’s proposed water level; based on this assessment, the DNR denied the District’s petition.⁸⁵ The District requested a hearing on the DNR’s denial of the petition, and the DNR granted the request and initiated a hearing before an ALJ.⁸⁶

At a contested hearing, the DNR submitted evidence demonstrating the adverse effects of increased water levels on adjacent wetlands and water quality of Lake Koshkonong.⁸⁷ In addition to erosion, loss of wildlife and fish habitat, and reduced recreational activities for hunters and fishermen, the DNR also claimed that losing the wetlands around the lake would exacerbate the continued loss of other, more removed wetlands.⁸⁸ The District countered with evidence showing that the low water levels negatively affected navigation, water quality, and fish and wildlife habitat.⁸⁹ The District also provided extensive evidence on the predicted economic effect from lower lake water levels, including lower property values and reduced commercial activity related to the lake.⁹⁰

Affirming the DNR’s order rejecting the District’s petition and upholding the DNR’s water level proposal, the ALJ issued 120 findings of fact.⁹¹ Factors considered by the ALJ included the lake’s historical water levels, the wetlands near the lake, water quality of the lake, riparian access, and navigability of the lake.⁹² The ALJ determined that the evidence regarding damage to the environment and water quality of the lake itself were valid reasons to reject the proposal to raise water levels and outweighed enhancements to navigation and access.⁹³ Noting that the DNR had objected to admitted evidence relating to the effect of water levels on real estate values, business income, and public income, the ALJ also struck

84. *Rock-Koshkonong*, 833 N.W.2d at 807–08 (internal quotations omitted).

85. *Id.* at 808.

86. *Id.* at 808 n. 13 (identifying parties that included the District’s petition to include Rock River-Koshkonong Association and the Lake Koshkonong Recreation Association).

87. *Id.* at 808–09.

88. *See id.* (explaining that the DNR also provided evidence demonstrating that the high water level from before the dam’s rehabilitation in 2002 damaged numerous wetlands around Lake Koshkonong because the wetlands had been flooded).

89. *Id.* at 809.

90. *Id.* at 809–10 (including predictions that reduced water levels from the pre-2002 level would cause a “decline of \$9 million in gross sales” supporting “an estimated 150 total jobs” for the water-tourism industry on the lake, and a belief that a “real” or “perceived” drop in water level would lead to a softening of demand for lake property and, in consequence, a reduction in property value around the lake).

91. *Id.* at 810.

92. *Id.* at 810–12.

93. *Id.* at 812.

the economic testimony as mere “secondary or indirect economic impact” that did not bear on the statutory standard.⁹⁴ The ALJ acknowledged that the DNR was required by statute to balance conflicting interests when making a water level determination, and that the DNR had done so in the situation.⁹⁵ The ALJ concluded that “the DNR’s decision . . . is necessary to protect the public rights in navigable waters and reasonably balances and accommodates public and private rights, the promotion of safety, and the protection of life, health, and property.”⁹⁶ The DNR adopted the ALJ’s decision as its own, as prescribed by Wisconsin statute.⁹⁷

The District appealed the decision, and both the circuit court and court of appeals affirmed the ALJ’s ruling.⁹⁸ The District appealed to the Wisconsin Supreme Court, alleging that the DNR had exceeded its scope of authority under Wisconsin statutes by focusing on wetlands above the OHWM. According to the District, the DNR misinterpreted its statutory directive to “protect . . . property”⁹⁹ and improperly objected to relevant evidence of economic damage.¹⁰⁰

A. The Majority Decision

The Wisconsin Supreme Court granted certiorari, and Justice David Prosser wrote for a bare four-member majority of the court. As a threshold matter, the court stated it would set aside or modify the agency action only

94. *Id.* (considering riparian access—and not certain secondary economic impacts—as “comprehend[ed] at least one component of these asserted secondary impacts”).

95. *Id.*

96. *Id.* at 813.

97. *Id.* (noting that the DNR adopted the ALJ’s decision per Wis. Stat. § 227.46(3)(a) (2003–04) and Wis. Admin. Code § NR 2.155(1) (2004)).

98. *Id.* Addressing the District’s contention that the DNR improperly considered wetlands, the court of appeals articulated why it believed that *Just* disposed of the District’s appeal. The court stated:

[the *Just*] court’s discussion of lands adjacent to or near navigable waters did not distinguish between those lying below the ordinary high water mark, and those lying above this mark. While it is the existence of navigable water that triggers the DNR’s jurisdiction under Wis. Stat. § 31.02(1) and the [PTD] . . . *Just* establishes that the DNR is not restricted to consideration of impacts below the [OHWM] when evaluating public rights in navigable waters.

Rock-Koshkonong Lake Dist. v. Dep’t of Natural Res., 803 N.W.2d 853, 863 (Wis. Ct. App. 2009) review granted, 810 N.W.2d 221 (Wis. 2012) and rev’d, 833 N.W.2d 800 (2013) (citing *State v. Trudeau*, 408 N.W.2d 337 (Wis. 1987) for the assertion that the DNR’s jurisdiction is triggered when a navigable body of water is at issue).

99. See WIS. STAT. § 31.02(1) (2014) (“The [DNR], 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. . . .”) (emphasis added).

100. *Rock-Koshkonong*, 833 N.W.2d at 814.

if the agency had “erroneously interpreted a provision of law.”¹⁰¹ Next, the court determined the level of deference to give to the DNR’s interpretation, deciding that the DNR’s decision was entitled to no deference because the DNR’s decision was an erroneous interpretation of law that went beyond the scope of the Wisconsin Constitution and decisions of the Wisconsin Supreme Court.¹⁰² Further, the DNR had improperly disregarded evidence regarding economic damage to property, which also worked against the court giving deference to the agency.¹⁰³

The court then addressed the District’s argument that the DNR improperly applied the PTD to the wetlands at issue.¹⁰⁴ The court framed the issue as one of overreach by the DNR—according to the majority, the DNR’s application of the PTD to wetlands was an attempt to extend public trust jurisdiction beyond navigable waters.¹⁰⁵ The court asserted that the Wisconsin public trust applied only to navigable waters below the OHWM because the state’s title under the PTD only included the beds of navigable waters,¹⁰⁶ and that the PTD had always been confined to a limited geographic area.¹⁰⁷ According to the court, the DNR’s position sought to extend the DNR’s public trust jurisdiction beyond navigable waters to non-navigable waters and land.¹⁰⁸ This extension to non-navigable land would eliminate the navigability element of the PTD, which is one of the prerequisites for the DNR’s constitutional basis for regulating and controlling water and land.¹⁰⁹ The DNR’s application of the PTD to non-navigable wetlands would abolish the narrow rationale for the PTD and

101. *Id.* (citing Wis. Stat. § 227.57(5) for the statutory standard of review when determining agency interpretations of law).

102. *Id.* at 814–15 (citing *Racine Harley-Davidson, Inc. v. Wis. Div. of Hearings & Appeals*, 717 N.W.2d 184, 190 (Wis. 2006)) (noting that the DNR had given new interpretation to Wis. Const. Art. IX, §1, the article of Wisconsin’s constitution incorporating the PTD).

103. *Id.* at 816 (citation omitted).

104. *Id.* (explaining the District’s contention that DNR “exceeded its authority when it considered impacts on private wetlands adjacent to Lake Koshkonong” that were above the OHWM).

105. *Id.* at 818.

106. *Id.* at 819 (citation omitted); *See State v. McDonald Lumber Co.*, 118 N.W.2d 152, 153 (Wis. 1962) (noting that Wisconsin owns the lakebeds of navigable waters; “[T]he state’s title to the lake bed runs to a line which is called the ‘ordinary high-water mark.’”); *See Wisconsin’s Envtl. Decade, Inc. v. Dep’t of Natural Res.*, 271 N.W.2d 69, 72 (Wis. 1978) (“Title to the navigable waters of the state and to the beds of navigable waters is vested and continues in the state of Wisconsin in trust for the use of the public.”); *See State v. Trudeau*, 408 N.W.2d 337, 342 (stating that “public ownership of the bed applies whether the water is deep or shallow” so long as the bed is below OHWM).

107. *Id.* at 821–22 (“Lake Superior is navigable and if the non-navigable site is a part of the lake, then the land below the OHWM is held in trust for the public.”) (citing *Trudeau*, 408 N.W.2d at 343) (“[T]he OHWM marks the boundary between lake bed titled in the state, which is subject to state regulation in the public interest, and property titled in private owners.”) (citing *Houslet v. Dep’t of Natural Res.*, 329 N.W.2d 219, 223 (Wis. Ct. App. 1982)).

108. *Id.* at 819.

109. *Id.* at 818.

have significant ramifications for private property owners.¹¹⁰ The court clarified that the PTD in Wisconsin gives the public rights in navigable waters, and that it is the state's duty to promote navigation and to preserve those waters for fishing, hunting, recreation, and scenic beauty.¹¹¹ However, the scope of these public rights applied only to navigable waters.¹¹² Thus, the DNR could not cite the PTD as a reason for considering non-navigable wetlands above the OHWM in its water-level determination.¹¹³

The court indicated that the DNR could still protect water resources using its police powers.¹¹⁴ The majority also claimed that *Just v. Marinette County* was a textbook example of the DNR acting under its police powers,¹¹⁵ noting that *Just* emphasized the DNR's police power to enact zoning ordinances and regulations to prevent pollution.¹¹⁶ Further, the court explained that the ordinance in *Just* dealt with lands within 1,000 feet of the normal high-water elevation, and that "it 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."¹¹⁷ The court concluded its analysis by stating that the DNR must consider "all property rights" and not afford non-navigable land or water above the OHWM a constitutional preference over other property uses.¹¹⁸ The court ultimately remanded the case to the circuit court for further proceedings consistent with the opinion.¹¹⁹

110. *Id.* at 819 (failing to elaborate on possible ramifications, likely referring to the fact that PTD lands are insulated from takings claims and noting that the state can invoke the PTD as a shield to private takings claims; moreover, even if a landowner experiences a complete deprivation of the economic use of his land, he is precluded from a taking claim if his land is subject to the PTD because the PTD is a "background principle" of state law). *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (asserting that any limitation on private property so severe so as to effectuate an economic wipeout "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."); *See also McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003) (holding that the landowner's property rights did not include the right to backfill tidelands because of South Carolina's public trust, and rejecting the landowner's takings claim because the public trust doctrine was a background principle of state law).

111. *Id.* at 821 (citation omitted).

112. *Id.* at 821 n. 32 (citation omitted).

113. *Id.* at 821–22.

114. *Id.* at 822.

115. *See id.* (stating that "[t]he *Just* case is a textbook example of using the state's police power to support legislation to protect navigable waters and the public rights therein . . .").

116. *See id.* at 823–24.

117. *Id.* at 824.

118. *Id.* at 825.

119. *Id.* at 835.

B. The Dissent

The *Rock-Koshkonong* majority opinion prompted a vigorous dissent from Justice N. Patrick Crooks, who admonished the majority for undermining the court's precedent, re-characterizing its holdings, and rewriting history.¹²⁰ The dissent took issue with majority's willingness to not defer to the DNR's determination, maintaining that all of the parties in the dispute agreed that the DNR could consider private wetlands as "property" affected by a water level change, and that the wetlands were "property."¹²¹ In Justice Crooks' opinion, the court should have simply affirmed the ALJ's decision.¹²²

According to the dissent, the majority's conclusion stripped "the state, trustee of the [PTD], of the ability to regulate anything" that is not below the OHWM pursuant to the PTD.¹²³ Even though long-settled PTD precedent supported the DNR's consideration of the effect of higher water levels on wetlands adjacent to Lake Koshkonong, the majority disrupted this precedent by reinterpreting *Just* as only a police-power decision. The dissent noted that the majority only cited language from *Just* concerning the police power, ignoring the public trust language in the decision.¹²⁴ Moreover, the dissent alleged that the majority misunderstood the DNR's argument as a claim of state ownership of private wetlands, when actually the DNR's argument was that the PTD required the DNR to consider the effect on wetlands.¹²⁵

120. *Id.* at 846 (Crooks, J., dissenting) (referring most likely to the *Lake Beulah* decision which he authored); See sources cited *infra* notes 161–63).

121. *Id.* at 839 (Crooks, J., dissenting) ("Because that interpretation is dispositive of the issue, I would stop the analysis there.").

122. *Id.* at 839 n.1 (Crooks, J., dissenting).

123. *Id.* at 839 (Crooks, J., dissenting).

124. *Id.* at 840–41 (Crooks, J., dissenting) ("The clear language of *Just* rebuts the majority's conclusion that it was only a police power case. The thrust of the *Just* opinion showed that the court believed it was relying on the [PTD]. The court explicitly held that land above the [OHWM] is subject to the [PTD].").

125. *Id.* at 842 (Crooks, J., dissenting) (stating that the majority misunderstood "the argument of the DNR. The DNR in this case was not asserting that the [PTD] gives the state *ownership* of the private wetlands; rather it argues that the [PTD] allows the DNR to consider the impact on the wetlands when determining water levels.") (emphasis in original). The dissent also took issue with the majority's expansion of the evidence that the DNR must consider in its water level determinations. The dissent argued that the DNR had participated in an exhaustive ten-day hearing and fulfilled its statutory directive to "protect . . . property." It followed that the court should have upheld the DNR's decision to reject certain types of economic damage as being of "secondary or indirect" impact. *Id.* at 846. Under the majority's new interpretation, the limits were unclear for the types of evidence the DNR could exclude in its determinations. *Id.* at 843.

IV. ANALYZING THE ROCK-KOSHKONONG DECISION

The *Rock-Koshkonong* decision reflects a disagreement over the purpose and the scope of the PTD in Wisconsin. The majority ultimately carried the day with its conclusion that non-navigable land above the OHWM is not subject to the PTD. But the majority's analysis contained a number of missteps, particularly in not deferring to the DNR's analysis, in being opaque in its analysis of *Just* and other precedents, and in exhibiting little recognition for the interrelatedness of ecosystems adjacent to navigable waters.

A. *Failing to Defer to the Agency's Determination*

At the outset of its analysis, the *Rock-Koshkonong* majority determined that it could perform a *de novo* review of the legal issues before it without affording any deference to the DNR's interpretation of the Wisconsin Constitution and statutes.¹²⁶ The majority determined that the DNR's consideration of the damage to wetlands in light of the PTD and its rejection of evidence of economic damage to certain property were new interpretations of both the Wisconsin Constitution and Wisconsin statutes.¹²⁷ Despite the majority's claim, the court's lack of deference to the DNR determination was novel and inconsistent with its precedents.

For over 100 years, Wisconsin courts have been called on to determine whether the state has acted in conformity with its "special obligation to maintain the public trust."¹²⁸ When confronted by riparian landowners challenging a DNR action protecting the public trust, Wisconsin courts have deferred to the DNR's policy and scientific judgment.¹²⁹ These types of cases are in contrast to those in which the DNR has decided to not exert its authority, or where public land is being conveyed into private hands because the danger of private interests exerting undue influence on the

126. *Id.* at 815 (footnote omitted).

127. *Id.*

128. *See* *In re Trempealeau Drainage Dist. Merwin v. Houghton*, 131 N.W. 838, 841–42 (Wis. 1911) (recognizing a judicial responsibility to examine legislative authority for its conformity with the state's obligation to maintain the public trust); *See also* Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 *ECOLOGY L.Q.* 135, 146 (2000) (discussing the history of judicial review of the PTD in Wisconsin).

129. Scanlan, *supra* note 128, at 147. *See also*, *Hixon v. Pub. Serv. Comm'n*, 146 N.W.2d 577, 578, 589 (Wis. 1966) (deferring to the agency's findings of fact in protecting the public trust in a navigable river by denying a permit to maintain a riparian landowner's breakwall).

administration of the trust looms large.¹³⁰ In these situations, the court has employed a “hard look” review because the DNR, as trustee, has an obligation to protect the public trust.¹³¹ But Wisconsin courts have been deferential to a trustee’s decision when the state weighs all relevant policy considerations previously outlined by the court.¹³²

In the past, the Wisconsin Supreme Court had declared that the DNR was entitled to great deference when it applied its specialized expertise and technical knowledge in balancing public and private rights in navigable waters. For example, in *Hilton v. Department of Natural Resources*, a homeowners association challenged the DNR’s decision to not allow the association to have more than 11 boat slips on a pier.¹³³ Because the pier was on a navigable body of water, the PTD required the DNR to determine “reasonable use” of the pier while also protecting public access rights.¹³⁴ The DNR considered, among other factors, the environmental effects, natural scenic beauty, history of use, and safety in determining that having more than 11 slips was not a reasonable use.¹³⁵ After a contested hearing and appeal by the association, the circuit court adjusted the number of slips to 17; however, the DNR appealed, and the court of appeals reinstated the 11-slip ruling.¹³⁶ The association again appealed, and the Wisconsin Supreme Court affirmed, deferring to the DNR’s decision and holding that its decision was reasonable, supported by substantial evidence in the record, and consistent with applicable law.¹³⁷

Rock-Koshkonong featured a similar fact pattern of private property interests challenging the DNR’s consideration and protection of public trust

130. Scanlan, *supra* note 128, at 147. Professor Sax identified this principle in his discussion of the U.S. Supreme Court’s skepticism about the Illinois legislature’s conveyance of public trust property; See Sax, *supra* note 40, at 490 (discussing *Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387 (1892)) [hereinafter *Ill. Central*].

131. Elizabeth B. Dawson, *The Public Trust Doctrine in Wisconsin*, in *THE PUBLIC TRUST DOCTRINE IN FORTY-FIVE STATES* 889, 895 (Michael C. Blumm ed., April 9, 2014), available at <http://ssrn.com/abstract=2235329>; See also *Hixon*, 146 N.W.2d at 588 (analyzing the entire agency record to determine its sufficiency).

132. Dawson, *supra* note 126, at 7. Policy considerations vary, See, e.g., *Just*, 201 N.W.2d at 768–69 (the preservation of natural beauty); *Hixon*, 146 N.W.2d at 583 (securing the greatest public use); *Sterlingworth Condo. Ass’n, Inc. v. Dep’t of Natural Res.*, 556 N.W.2d 791, 796 (Wis. Ct. App. 1996) (accommodating the convenience of riparian owners).

133. *Hilton v. Dep’t of Natural Res.*, 717 N.W.2d 166, 169 (Wis. 2006).

134. *Id.* at 172–74 (“Reasonable use” is the common law standard for water rights of riparian owners, determined by “the extent and capacity of the lake, the uses to which it has been put, and the rights that other riparian owners on the [lake] also have.”); *Id.* at 177 (citing *Sterlingworth*, 556 N.W.2d at 797) (internal quotations omitted).

135. *Id.* at 174.

136. *Id.* at 171.

137. *Id.* at 174 (indeed, the *Hilton* court even went so far as to say that “there [was] ample evidence in the record that the ALJ considered the relevant factors in this case and weighed them appropriately in light of the public trust doctrine”).

rights. Based on *Hilton* and other cases in which Wisconsin courts deferred to the DNR's scientific expertise and its interpretation of the public's trust, prior to *Rock-Koshkonong*, the DNR would have enjoyed considerable judicial deference.¹³⁸ But the *Rock-Koshkonong* majority silently broke from its precedents and gave no deference to the DNR's scientific expertise.¹³⁹ The majority worked around its prior case law by characterizing the DNR's consideration of wetlands near Lake Koshkonong as an attempt to extend PTD jurisdiction and create a "new interpretation" of the Wisconsin Constitution.¹⁴⁰ Therefore, the court claimed it owed no deference to the DNR's "novel" interpretation.¹⁴¹ But as discussed in the next section of this paper, the DNR's action was hardly novel or inconsistent with *Just*, a case in which the court had 40 years earlier held that the PTD extended to wetlands adjacent to a navigable body of water.

B. Misinterpreting and Narrowing *Just v. Marinette County*

After the *Rock-Koshkonong* court refused to afford deference to the DNR, the court turned to the issue of whether the wetlands near the lake were within the scope of the PTD. The *Rock-Koshkonong* majority asserted that the statute relied upon by the DNR had been an exercise of Wisconsin's police power, and that the *Just* case concerned the exercise of this power to regulate wetlands.¹⁴² But this interpretation did not square with the once-settled understanding of *Just*.¹⁴³

138. See, e.g., *Sterlingworth*, 556 N.W.2d at 798–99 (upholding DNR's denial of requested number of boat slips because the record demonstrated that the action was reasonable, had a rational basis, and was not the result of an unconsidered, willful, and irrational choice of conduct); *Hixon*, 146 N.W.2d at 588 (stating that the court must have compelling reasons for reversal where DNR's conclusion is based on a highly discretionary determination that rests on its finding as to what is necessary and convenient in the public interest and under the PTD).

139. This paper does not assert that the Wisconsin Supreme Court could not reinterpret, narrow, or overrule its prior decisions, if it wished to do so. The paper does contend, however, that the majority was opaque in its reasoning and could have analyzed its own precedents in a more clear and direct way, so that the public would have a clearer idea what the court decided.

140. *Rock-Koshkonong*, 833 N.W.2d at 815 (stating that Wisconsin courts "are not bound by an agency's decision concerning the scope of its own power") (citing *Wis. Citizens Concerned for Cranes & Doves v. Dep't of Natural Res.*, 677 N.W.2d 612 (Wis. 2004)).

141. *Id.* (footnote omitted).

142. *Id.* at 822.

143. See *supra* notes 49–73 and accompanying text (discussing the factual and legal basis of the *Just* decision).

i. Misunderstanding the *Just* Decision

As evidence that *Just* was a police-power decision, the *Rock-Koshkonong* majority pointed out that *Just* had supposedly been silent on the specific location of the wetlands in relation to the OHWM.¹⁴⁴ Based on this lack of specificity, the majority asserted “[t]here is no constitutional foundation for public trust jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream.”¹⁴⁵ But the language of *Just* rebuts this conclusion. *Just* declared that “[l]ands adjacent to or near navigable waters exist in a special relationship to the state” and are “subject to state public trust powers”¹⁴⁶ Moreover, *Just* distinguished adjacent wetlands from isolated ones—the opinion clearly stated that “[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 in public rights.”¹⁴⁷ The *Just* opinion contemplated any land adjacent to a navigable body of water without narrowing the scope to only lands below the OHWM.¹⁴⁸ But instead of addressing this aspect of *Just*, the *Rock-Koshkonong* majority quoted *Just* only for the proposition that lands adjacent to a body of water can be regulated through Wisconsin’s police power.¹⁴⁹ The majority’s interpretation was inconsistent with *Just*’s explicit statement that lands “adjacent” to navigable bodies of water are subject to Wisconsin’s public trust.¹⁵⁰

The *Rock-Koshkonong* majority also attempted to distinguish the location of the wetlands in *Just* by asserting that the PTD could not possibly have been the justification for the ordinance because it extended to lands “within 1000 feet” of a navigable body of water.¹⁵¹ As the *Rock-*

144. See *supra* notes 49–73 and accompanying text (explaining why the *Just*s’ land fell within the ordinance); *Id.* (failing to specifically state the actual distance of the *Just*s’ land from Lake Noquebay, nor the height of the *Just*’s land). One reason *Just* may have been silent on the height of the wetlands at issue is that wetlands can exist either above or below the OHWM, and the court was not concerned with creating a distinction between the two. WIS. DEP’T OF NATURAL RES., *Waterway and Wetland Permits: Ordinary High Water Mark*, http://dnr.wi.gov/topic/waterways/general_inf_o/ohwm.htm (last revised Oct. 31, 2013).

145. *Rock-Koshkonong*, 833 N.W.2d at 820–21.

146. *Just*, 201 N.W.2d at 761.

147. *Id.*

148. *Id.* at 769.

149. *Rock-Koshkonong*, 833 N.W.2d at 822 (“[T]he DNR has broad statutory authority grounded in the state’s police power to protect wetlands and other water resources Moreover, the agency has explicit statutory authority in this case to consider the impact of water levels of Lake Koshkonong on public and private wetlands adjacent to the lake . . . because it has police power authority to “protect . . . property.”) (citing *Just*, 201 N.W.2d at 765).

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

151. *Rock-Koshkonong*, 833 N.W.2d at 824 (asserting that the Marinette County ordinance’s “dimensions far exceed[ed] the geographic limitations of public trust jurisdiction.”).

Koshkonong dissent pointed out, it is not clear how the majority arrived at this conclusion regarding the dimensions of the PTD because the majority cited no case for this proposition.¹⁵² Instead, the majority seemed to rely only on its own earlier characterization of the PTD as applying only to navigable waters.¹⁵³ But the *Just* decision did not tie its analysis of the PTD to a specific distance from a navigable body of water.¹⁵⁴ Further, the statute in *Just* that authorized Marinette County to enact the shoreland ordinance specifically stated that its purpose was to aid in the fulfillment of the state's role as trustee of its navigable waters.¹⁵⁵ This language calls into question the *Rock-Koshkonong* majority's characterization of *Just* as being a "textbook example" of the state utilizing its police power to enact regulation.¹⁵⁶

Both the *Rock-Koshkonong* majority and *Just* decision agreed that Wisconsin's PTD did not apply to all land or wetlands. Both decisions noted that the PTD's scope was not unlimited.¹⁵⁷ But while the *Rock-Koshkonong* majority asserted that the trust applied only to navigable waters, *Just* stated that only "isolated" or "unrelated" lands were not within this special relationship with the state, and that lands adjacent to bodies of water were within the PTD's scope.¹⁵⁸

The key aspect of *Just* that was missed by the *Rock-Koshkonong* majority was *Just*'s discussion of the relatedness of land adjacent to bodies of water.¹⁵⁹ *Just*'s focus on "relatedness" was effectively an "effects test"; that is, lands adjacent to a body of water that have an effect on that body of water are subject to the state's PTD because of the land's effect on trust

152. *Id.* at 841 (Crooks, J., dissenting) ("In an attempt to circumvent the clear language of the *Just* case, the majority makes a circular argument. The majority imports its conclusion from earlier in the opinion—that the public trust does not extend beyond the ordinary high water mark—and applies it to support its subsequent conclusion.")

153. See *supra* notes 104–13 and accompanying text (discussing the *Rock-Koshkonong* majority's analysis of the scope of Wisconsin's PTD).

154. *Just*, 201 N.W.2d at 769 (stating only that the case was not about an isolated swamp unrelated to a navigable lake or stream).

155. *Id.* 764–65 (citing Wis. Stat. § 144.26) (the purpose of the state's shoreland regulation program is to "aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare.")

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

157. Compare *Just*, 201 N.W.2d at 769 (clarifying that the case was not about isolated swamps, "the change of which would cause no harm to public rights") with *Rock-Koshkonong*, 833 N.W.2d at 821 (noting that the PTD "has always been confined to a limited geographic area").

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

159. *Id.* Although the *Just* decision did not explicitly label its test as an "effects" test, the basis for the test was evident in the court's reasoning. The *Just* court was concerned with lands adjacent to navigable waters, not isolated lands because the altering of isolated lands "cause no harm to public rights." *Id.* It follows, then, that the altering of adjacent lands does cause harm to public rights. *Id.* Moreover, the ordinance in *Just* was concerned with pollution in lands adjacent to a body of water because of the effect that nearby pollution would have on that navigable body of water.

resources.¹⁶⁰ This seemed to be settled reasoning in Wisconsin because *Just* was not the only decision in Wisconsin to apply an “effects test” to determine the scope of the PTD. For example, in its 2011 *Lake Beulah* decision concerning a permit for an underground well—a type of water-fixture apparently even less connected to navigable waters than wetlands because a well deals with unseen water underground¹⁶¹—the Wisconsin Supreme Court upheld the permit, reasoning that “[w]hen considering actions that affect navigable waters in the state, one must start with the [PTD]. . . .”¹⁶² Significantly, the *Lake Beulah* decision was silent on the exact distance from a navigable body of water in which the trust would apply. The court, agreeing with the DNR and the petitioners that the PTD applied to the well, analyzed only whether the well would affect the nearby navigable body of water.¹⁶³

Under *Just* and cases like *Lake Beulah*, the Wisconsin courts had not delineated a specific distance where the PTD did not apply; the touchstone was whether the area at issue affected navigable bodies of water, a fact DNR intensively determined. Thus, under its precedents the *Rock-Koshkonong* court should have ruled the wetlands near Lake Koshkonong were within the PTD’s scope. Instead, the majority engaged in a strained analysis of these cases and re-characterized its holdings in a way that seemed inconsistent with prior case law.

ii. Narrowing the Scope of the Public Trust Doctrine

The *Rock-Koshkonong* majority declared that the DNR may not give non-navigable land or water above the OHWM a constitutional preference as trust land over other property.¹⁶⁴ Moreover, the majority claimed that the scope of the PTD in Wisconsin had always been limited to navigable waters.¹⁶⁵ But the plain language of previous Wisconsin Supreme Court cases contradicts this assertion—Wisconsin had at least a 40 year history of

160. See Michael C. Blumm and Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 707 (1995) (discussing the “effects test” in *Nat’l Audubon Soc’y v. Superior Court*); See *Nat’l Audubon Soc’y v. Superior Court of Alpine Cnty.*, 658 P.2d 709, 721 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (employing an “effects test” to determine that the PTD in California burdens all activities affecting the state’s trust resources).

161. *Lake Beulah Mgmt. Dist. v. Dep’t of Natural Res.*, 79 N.W.2d 73, 82 (Wis. 2011).

162. *Id.* at 83 (citing *Hilton ex rel. Pages Homeowners’ Ass’n v. Dep’t of Natural Res.*, 717 N.W.2d 166, 173 (Wis. 2006)) (emphasis added).

163. *Id.*

164. *Rock-Koshkonong*, 833 N.W.2d at 825.

165. See *id.* at 820–21 (“There is no constitutional foundation for *public trust* jurisdiction over land, including non-navigable wetlands, that is not below the OHWM of a navigable lake or stream.”).

regulating lands near bodies of water under the PTD.¹⁶⁶ Further, the Wisconsin Supreme Court had recognized *Just* was based on the PTD.¹⁶⁷ It is puzzling why the *Rock-Koshkonong* majority would narrow its precedents, especially without explaining its reasoning.¹⁶⁸

One possible reason for the majority's opacity may lie in a Wisconsin Supreme Court opinion decided a few years before *Rock-Koshkonong*.¹⁶⁹ In *Hilton v. Department of Natural Resources*,¹⁷⁰ Justice Prosser, the author of the majority opinion in *Rock-Koshkonong*, concurred in the result but wrote separately because he believed the case epitomized the growth of agency power, the decline of judicial power, and the "tenuous state of property rights in the 21st Century."¹⁷¹ Justice Prosser argued that the Wisconsin Supreme Court's precedent of deferring to state agency determinations stripped the court of its province and duty to "say what the law is."¹⁷² He asserted that courts must serve as protectors of the people's rights to life, liberty, and property, but both the legislature and the courts had been diluting the role of courts in this goal.¹⁷³ Justice Prosser noted that property

166. See *Just*, 201 N.W.2d at 769 (finding that lands adjacent to navigable bodies of water lie in a special relationship to the state and are subject to the PTD); See also, *M & I Marshall & Ilsley Bank v. Town of Somers*, 414 N.W.2d 824, 830 (Wis. 1987) (stating that in determining whether the taking of an area of shoreland is compensable depends on whether an ordinance prohibits a public harm or provides a public benefit, not the distance of the shoreland from a body of water); *Lake Beulah*, 799 N.W.2d at 83 (holding that an underground well of water was subject to the PTD because it was adjacent to and affected a navigable body of water).

167. See Wisconsin's *Env'tl. Decade Inc.*, 271 N.W.2d at 72 (citing *Just*, 201 N.W.2d at 761) (asserting that the public trust duty "requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty."); *M & I Marshall & Ilsley Bank*, 414 N.W.2d at 830 (noting that the PTD was a factor in the *Just* decision).

168. Under the statute at issue in *Rock-Koshkonong*, the DNR could still consider the wetlands in its decision to "protect . . . property," but this consideration will only be pursuant to the police power, not the constitutional PTD. When the DNR balances the damage to wetlands and the potential economic harm to other property, the DNR cannot afford greater or constitutional weight to the wetlands. Moreover, the DNR could choose to not consider the wetlands near the lake for two reasons: 1) it would have no affirmative duty to regulate, and 2) the statute does not specifically order the DNR to consider wetlands; instead, it only states that the DNR "protect . . . property," leaving the DNR to decide what property means within the confines of the Wisconsin law.

169. Although critics commonly accuse courts for overruling their own precedent because of a change in the make-up of a court, a change in the makeup of the Wisconsin Supreme Court does not explain the *Rock-Koshkonong* decision. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 414 (2010) (Stevens, J., dissenting) (arguing that the only thing that had changed since the Supreme Court's previous rulings was the composition of the Court). The Wisconsin Supreme Court, consisting of the same judges that decided the *Rock-Koshkonong* case, had previously and without dissent deferred to the DNR's extension of the PTD to an underground well. *Lake Beulah*, 799 N.W.2d at 84.

170. See *supra* notes 133–37 for a discussion of the facts and holding of the *Hilton* decision.

171. *Hilton*, 717 N.W.2d at 178–79 (Prosser, J., concurring) (noting that while the case "epitomize[d] the growth of agency power," he reluctantly joined the majority because he believed the court was bound to uphold the decision of the ALJ under the current law).

172. *Id.* at 180 (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

173. *Id.* at 184.

rights become tenuous when subject to “unreviewable and ad hoc decision making.”¹⁷⁴

Justice Prosser’s concurrence endorsed the type of judicial activism where courts overrule their own precedent.¹⁷⁵ Only a few years after *Hilton*, Justice Prosser used *Rock-Koshkonong* as a vehicle to curtail the Wisconsin Supreme Court’s deference to agency decisions, at least where the agency’s decision implicated private property rights.¹⁷⁶ Ironically, the Wisconsin Supreme Court’s history of expanding the scope of the PTD in cases like *Just*, thereby insulating regulation from landowners’ claims of compensation, seems to have caused the justices in the *Rock-Koshkonong* majority to respond by narrowing the scope of the PTD.¹⁷⁷ Perhaps the majority’s activism in narrowing its precedents is a negative environmental development, but the most regrettable aspect of the court’s tapering of the PTD to navigable waters below the OHWM was the majority’s failure to clarify its reasoning.

C. Disregarding the Purpose of the Public Trust Doctrine

The *Rock-Koshkonong* majority asserted that Wisconsin’s PTD applies only to navigable waters below the OHWM.¹⁷⁸ Under the court’s reasoning, all lands above the OHWM are on equal footing regardless of their location.¹⁷⁹ The majority based this conclusion on its concern that the burden on landowners would be too great to allow Wisconsin to regulate lands adjacent to bodies of water under the constitutional PTD.¹⁸⁰

The majority’s decision was inconsistent with the history and purpose of Wisconsin’s PTD because it overlooked the relationship between wetlands and navigable waters. *Just* declared that the PTD extended to

174. *Id.*

175. Jack L Landau, *The Myth of Judicial Activism—No One Wants to Be a Judicial Activist, Right? Problem Is: No One Agrees What It Is*, 70 OR. ST. BAR BULL., 26, 27 (2010) (identifying three different uses of the term judicial activism: (1) to describe cases in which courts invalidate legislation; (2) to describe cases in which courts fail to follow or overrule their own precedents; and (3) to explain cases in which courts “legislate from the bench”).

176. *See Rock-Koshkonong*, 833 N.W.2d at 816 n. 25 (stating that the court will not give deference to the DNR).

177. *See supra* notes 70–73 and accompanying text for a discussion of the *Just* case and how the Wisconsin Supreme Court included adjacent wetlands in the PTD’s scope.

178. *Rock-Koshkonong*, 833 N.W.2d at 820–21.

179. *See id.* at 825 (claiming that the PTD applies only to navigable waters and asserting that the DNR may “not accord non-navigable land or water above the OHWM a constitutional preference as trust land over other property”).

180. *Id.* at 819 (asserting that the “ramifications for private property owners could be very significant” if the PTD was applied to non-navigable land above the OHWM).

lands that affected navigable waters and streams.¹⁸¹ The *Just* court's application of the PTD to these lands was based on and related to the purpose of the trust, which was to preserve the natural condition of trust resources for the benefit of the public.¹⁸² Concerned with what had been a historic lack of appreciation for the interconnectedness of nature, the *Just* court specifically recognized that navigable waters are affected by their surroundings, and therefore emphasized that land adjacent to navigable waters should receive heightened protection because of its location.¹⁸³ Indeed, this reasoning makes sense in light of present-day science, which has verified the interconnectedness of ecosystems.¹⁸⁴

The *Rock-Koshkonong* majority's conclusion rejected *Just*'s reasoning that lands adjacent to bodies of water should have constitutional preference over other, non-PTD lands. The majority's attempt to equate all land above the OHWM and to claim that the PTD did not extend to lands that affect navigable waters disregarded Wisconsin's constitutional duty to promote and protect trust resources.¹⁸⁵ Further, as Justice Crooks' dissent noted, the majority's concern about the ramifications for private property owners was actually irrelevant to the controversy before it.¹⁸⁶ The majority's reference to potential "ramifications" for property ownership was premised on a concern that if lands adjacent to Lake Koshkonong were trust lands, Wisconsin could regulate activity on those lands without concern for private takings claims.¹⁸⁷ But the issue before the court was whether the DNR could use the PTD to give wetlands affecting navigable waters constitutional preference over other lands, regardless of land

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

182. *Id.* at 767–68.

183. *Id.*

184. See, e.g., Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters* (September 2013 Draft), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf) (concluding that "[w]etlands and open-waters in floodplains of streams and rivers and in riparian areas. . . are integrated with streams and rivers. They strongly influence downstream waters by affecting the flow of water, trapping and reducing non-point source pollution, and exchanging biological species"). [http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/\\$File/WOUS_ERD2_Sep2013.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/0/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf)

185. See *Rock-Koshkonong*, 833 N.W.2d at 842 (Crooks, J., dissenting) (citing *Wisconsin's Env'tl. Decade*, 271 N.W.2d at 72) ("Allowing the trustee to discharge its public trust duties by considering things that affect navigable waters is consistent with our precedent. If it could not, how then would the state discharge its extensive duties 'not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty?'").

186. *Id.* at 841.

187. See SLADE, *supra* note 22 at 49 (emphasizing that the state is sheltered from takings claims when acting pursuant to public trust authority) and *supra* note 107 (discussing the PTD as a bar to private takings claims).

ownership.¹⁸⁸ The majority's focus on the implications of property owners instead of on the interrelatedness of wetland-ecosystems runs counter to Wisconsin's history of trust protection and maintenance for the benefit of the public.¹⁸⁹

CONCLUSION

The *Rock-Koshkonong* case on remand may end with the same result because the DNR could once again decide that the damage to the environment, and wetlands in particular, outweighs the economic damage that might result from a lower water level. Indeed, at least one commentator has asserted that the *Rock-Koshkonong* decision will not change Wisconsin's protection of wetlands because the decision relied on an interpretation of statutory language, and not an interpretation of the Wisconsin Constitution. Under this reading, the *Rock-Koshkonong* majority's discussion of the scope of Wisconsin's PTD was unnecessary dicta to the outcome of the decision.¹⁹⁰ Further, even though the *Rock-Koshkonong* majority might have signaled how it will handle future PTD cases, the majority did not call into question the DNR's authority to protect Wisconsin's wetlands.¹⁹¹

Although the Wisconsin Supreme Court did not question the protection of wetlands in general, the court's reasoning reflected skepticism about regulation of land above the OHWM,¹⁹² and a misplaced concern for the implications that regulation of land adjacent to navigable waters would have on private property ownership.¹⁹³ Further, there is a strong indication

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

189. See *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914) (noting that the trust should be interpreted in the "broad and beneficent spirit that gave rise to it," in concluding that the public had the right to hunt on navigable waters); *Muench*, 53 N.W.2d at 522 (recognizing that citizens of Wisconsin have a right to the enjoyment of fishing, hunting, and scenic beauty, and that these rights therefore were threatened by a proposed dam); *Wisconsin's Envtl. Decade*, 271 N.W.2d at 72-73 (citing *Muench* and *Just* for the proposition that Wisconsin's public trust duty "requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty"); *Zealy*, 548 N.W.2d at 535 (citing *Just* for the proposition that Wisconsin has a "long history of protecting its water resources, its lakes, rivers, and streams, which depend on wetlands for their proper survival").

190. See e.g., Melissa Kwaterski Scanlan, *It's Not Open Season on Wetlands*, MILWAUKEE WIS. J. SENTINEL, July 22, 2013, available at <http://www.jsonline.com/news/opinion/perspectives/its-not-open-season-on-wetlands-b9959581z1-216520241.html>.

191. *Id.*

192. *Rock-Koshkonong*, 803 N.W.2d at 828 (asserting that the PTD did not apply to wetlands near Lake Koshkonong and that the DNR had no statutory duty under the police power to consider the damage to wetlands over private property).

193. See *id.* at 819 (speculating that if wetlands adjacent to Lake Koshkonong were given constitutional preference over other land, the ramifications on private property owners could be significant). The majority expressed concern about the ramifications for private property owners based

that PTD language in the *Rock-Koshkonong* majority opinion was more than dicta because the majority was clear about its intent to confine the scope of the Wisconsin PTD to exclude adjacent wetlands.¹⁹⁴ The most perplexing issue with *Rock-Koshkonong*, however, is the way the majority re-characterized its precedents, particularly the *Just* decision. The fact that the majority attempted to change or reinterpret its precedents is not the problem—indeed, courts can and should be able to correct past mistakes or change previous decisions that are no longer applicable. The problem with the *Rock-Koshkonong* majority decision is the court’s willingness to reinterpret without being forthright about what it was doing. The sort of judicial activism Justice Prosser endorsed in *Hilton* and put into practice in *Rock-Koshkonong* is problematic because it upsets settled expectations without clearly explaining why the court has apparently changed the law. In light of *Just*’s celebrated status as a decision recognizing the effect of human activity on lands adjacent to navigable bodies of water, the *Rock-Koshkonong* decision is troubling. The majority’s narrowing of the scope of Wisconsin’s PTD was inconsistent with the court’s precedents and did a disservice to Wisconsin’s protection of public trust resources.¹⁹⁵

on the fact that the state is insulated from takings claims when regulating PTD land because of its constitutional status in Wisconsin. *Id.* However, property ownership was not a central issue in the *Rock-Koshkonong* case. The central issues in *Rock-Koshkonong* were the level of deference the court should give to the DNR, whether the DNR exceeded its authority in its water level determination by considering the impact on wetlands above the OHWM, and whether the DNR erred in excluding certain economic evidence in its water level determination. *See id.* at 804 (noting the issues presented in the case).

194. *Id.* at 821 (asserting that the PTD in Wisconsin “has always been confined to a limited geographic area”).

195. *See supra* note 41 and accompanying text. Recall that, writing some forty years ago, Professor Sax devoted an entire section in his seminal PTD article on Wisconsin and its “reasonable” interpretation of its PTD doctrine.