LEADING A JUDGE TO WATER: IN SEARCH OF A MORE FULLY FORMED WASHINGTON PUBLIC TRUST DOCTRINE

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Abstract: Under the public trust doctrine, a state must hold certain types of natural resources, most particularly navigable waters and shorelands, in trust for the benefit of the public. For that reason, courts closely scrutinize state actions impacting these public trust resources. In *Caminiti v. Boyle*,[1] the Washington State Supreme Court developed a test that addresses situations where the State transfers control of public trust resources to private parties. But no firm rule guides Washington courts where a state action impacts the public trust without an alienation. This Comment examines the review Washington courts have applied in such situations, and concludes that while certain core principles are extractable—especially the principle that Washington courts' role under the public trust doctrine does not end with enforcing the non-alienation rule established in *Caminiti*—Washington public trust law in this area remains vague. This Comment argues that reference to Wisconsin's well-developed doctrine would clarify and improve Washington's public trust doctrine, and proposes an analytical framework inspired by that created in Wisconsin's courts.

INTRODUCTION

In spite of (or perhaps because of) the froth that the public trust doctrine has generated among academics,[2] the Washington judiciary has imposed it cautiously.[3] Washington courts recognize that the doctrine

1. 107 Wash. 2d 662, 732 P.2d 989 (1987).

2. *See* 1 DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 4:9 (2009) ("[L]aw review articles on the public trust doctrine are legion."); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 3 (2007) (noting that the doctrine has been the subject of a "raging flood" of academic commentary). In his treatise on environmental law, Professor William Rodgers maintains a continually expanding footnote compiling notable public trust doctrine articles—the footnote now spans several pages and contains dozens of articles. 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.20, at 155 n.1 (1986 & Supp. 2009).

3. *See* 23 TIMOTHY BUTLER & MATTHEW KING, WASHINGTON PRACTICE: ENVIRONMENTAL LAW AND PRACTICE § 8.92, at 356 (2d ed. 2007) ("Washington courts have not gone as far as some other states in defining the scope and reach of the public trust doctrine."). Indeed, courts in Washington have unfailingly upheld legislation against public trust challenges. *See, e.g.*, Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 169 P.3d 14 (2007) (four dissenters and Justice Chambers—thus a majority of justices—concluding that public trust doctrine imposed no restraint on ability of local governments to issue moratoria on shoreline building); Samson v. City of Bainbridge Island, 149 Wash. App. 33, 202 P.3d 334 (2009) (holding that city's amendment to its shoreline master program prohibiting private dock construction within undeveloped harbor did not violate public trust doctrine); *infra* Parts II.B, III.

casts them as enforcers of a public trust in certain unique public resources in which the public has an "overriding interest"[4]—navigable waters and shorelands being the prototypical and historical examples[5]—but how best to discharge this duty remains in some respects unsettled. A landmark public trust case, *Caminiti v. Boyle*,[6] established that the State may not give up control of public trust lands unless it does so in such a way that the public interest in those lands—the *jus publicum*—is not substantially impaired.[7] *Caminiti* did not, however, speak to situations where the trust is compromised while remaining under state control or even as a direct result of the State's actions.

This raises a question: What limits does Washington's public trust doctrine impose on the State's conduct when that conduct does not transfer control of public trust land to private parties, but still impacts the *jus publicum*? How, for example, should courts review state action when the State wishes to reclaim public mudflats in order to build a power plant? Or to fill a wetland in order to build a highway? This Comment examines how courts review such government action under the public trust doctrine, and suggests a path towards a more complete framework. In the interest of brevity, situations where state action impacts the *jus publicum* without transferring control to a private party will generally be referred to as "non-alienation cases."

Washington courts appear to recognize that their role as protectors of the public trust involves more than an application of the principles established in *Caminiti v. Boyle*. When evaluating non-alienation cases, courts in Washington usually do more than simply confirm that an alienation has not taken place.[8] A careful reading of Washington courts' treatment of non-alienation cases suggests certain principles that apply in such situations, but the cases are limited both in number and in depth.

Wisconsin's courts, on the other hand, have developed a five-factor analysis with which they evaluate non-alienation cases.[9] The important public trust principles that sound faintly in Washington's non-alienation

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4. *Samson*, 149 Wash. App. at 58 n.8, 202 P.3d at 347 n.8; *see also* Orion Corp. v. State, 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987) (noting that public trust doctrine requires that the State maintain dominion over Washington's public property held in trust for the people).

5. *See* Rettkowski v. Dept. of Ecology, 122 Wash. 2d 219, 232, 858 P.2d 232, 239 (1993) ("The public trust doctrine evolved out of the public necessity for access to navigable waters and shorelands.").

6. 107 Wash. 2d 662, 732 P.2d 989 (1987).

7. *Id.* at 670, 732 P.2d at 994–95.

8. *See infra* Part III.

9. *See* State v. Pub. Serv. Comm'n, 81 N.W.2d 71, 73–74 (Wis. 1957); *infra* Part IV.

jurisprudence are clearly enunciated in Wisconsin's. This Comment argues that Washington's courts should look to Wisconsin public trust law to distill their treatment of non-alienation cases into a coherent framework. Wisconsin's approach addresses the special considerations required in non-alienation cases and reflects the principles articulated in Washington's still-developing doctrine.

Part I of this Comment introduces the public trust doctrine. Part II examines the doctrine's development in Washington up to the seminal *Caminiti v. Boyle* decision, and closely considers *Caminiti*. Part III analyzes non-alienation cases since *Caminiti*. Part IV introduces Wisconsin's well-developed public trust doctrine jurisprudence and covers Wisconsin courts' response to the non-alienation case problem. Finally, Part V argues that in such situations, Washington judges should employ a factor analysis similar to that created by their colleagues in Wisconsin.

I. MURKY WATERS; FERTILE GROUND

Often vague and always diverse, public trust doctrine philosophies have developed throughout the United States into a host of different textures and levels of refinement. Washington courts therefore have plentiful, though not always crystal clear, examples to draw from when they evaluate Washington's own public trust doctrine. This Part introduces the public trust doctrine, outlines its basic principles, and briefly addresses academic and judicial attitudes towards the doctrine.[10] Additionally, with the aim of giving the reader a sense of how refinements to Washington's public trust law would fit into the larger national picture, this Part provides snapshots of several areas of public trust law that have developed differently from state to state.

10. A full review of public trust law in the United States is beyond the scope of this Comment. This introduction, however, provides important foundation. More comprehensive treatments are available. *See, e.g.*, RODGERS, *supra* note 2, § 2:20, at 155–68; SELMI & MANASTER, *supra* note 2, §§ 4:9–:20. Histories of the doctrine can be found in Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–91 (1970), and Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425 (1989).

A. "It is a doctrine with both a radical potential and indifferent prospects"[11]

Whether or not "black letter" law can be said to exist in a doctrine as malleable[12] as the public trust doctrine is debatable, but some basic principles have been around long enough to grow barnacles. The doctrine is old enough to be considered classical,[13] has a long history in the United States,[14] and relates closely to the general rule that title to lands beneath a state's internal tidal and navigable waters rests in that state.[15] At the doctrine's core are the ideas that the public has a powerful interest in lands beneath navigable and tidal waters,[16] and that the state holds such lands in trust for the people.[17] Recognizing this, courts have split ownership interests in public trust lands into two parts: private property interests (the *jus privatum*) and public interests (the *jus publicum*).[18]

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11. RODGERS, *supra* note 2, § 2:20, at 155.

12. *See id.* (terming the doctrine "resoundingly vague").

13. Scholarship on the public trust doctrine nearly always notes the doctrine's roots in the codes of the Roman emperor Justinian. *See, e.g.*, Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632 (1986) ("The public trust doctrine is based on an amorphous notion that has been with us since the days of Justinian—the notion that the public possesses inviolable rights in certain natural resources."); Sax, *supra* note 10, at 475 & n.15; Ewa M. Davidson, Comment, *Enjoys Long Walks on the Beach: Washington's Public Trust Doctrine and the Right of Pedestrian Passage Over Private Tidelands*, 81 WASH. L. REV. 813, 830–32 (2006). There has been criticism of the accuracy of that line of descent. *See* Huffman, *supra* note 2, at 12–19. Nonetheless, it has been commonly accepted by modern courts as a starting point when considering the doctrine. *See* Davidson, *supra*, at 830 ("The judiciaries of ten states, including Washington, recognize the Institutes [of Justinian] as an ancient codification of the public trust doctrine." (footnote omitted)).

14. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 284–86 (1997) (citing early public trust cases and commentary).

15. *See* Phillips Petrol. Co. v. Mississippi, 484 U.S. 469 (1988) (looking to public trust cases to address extent of state title to lands washed by non-navigable tidewaters). In the original thirteen states, state ownership of submerged lands was acquired from England through revolution. Shively v. Bowlby, 152 U.S. 1, 48–49 (1894). States later admitted to the Union acquired identical rights to submerged lands under the equal-footing doctrine. *Phillips Petrol.*, 484 U.S. at 474 (quoting *Shively*, 152 U.S. at 57).

16. *Coeur d'Alene Tribe*, 521 U.S. at 285 (noting "the principle in American law recognizing the weighty public interests in submerged lands"); Caminiti v. Boyle, 107 Wash. 2d 662, 668–69, 732 P.2d 989, 994 (1987).

17. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

18. *Coeur d'Alene Tribe*, 521 U.S. at 284 (quoting *Shively*, 152 U.S. at 13); *see also* MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM (n.d.), *reprinted in* STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 389–90 (3d ed. 1888) ("[T]he *jus privatum*, that is acquired by the subject either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or the arms of the sea are affected for public use."). Lord Hale's treatise, written in the late seventeenth century, was a starting point for the

The *jus publicum* has historically included public rights to use navigable waters for navigation, commerce, and fishing[19]—the so-called "traditional triad" of public trust rights.[20] While a state may freely convey the *jus privatum* to private parties, such transfers are subject to an implied reservation of the *jus publicum*.[21] The public trust doctrine thus preserves continuing public rights in public trust resources even in the face of apparent alienation by the State.[22]

The seminal decision involving an alienation of public trust lands is the U.S. Supreme Court's 1892 *Illinois Central Railroad v. Illinois*.[23] Commentators and courts have generally agreed that *Illinois Central* represents the prototypical situation that the public trust doctrine exists to prevent, where "a small, well-organized private interest procure[s] legislation that g[ives] it monopoly privileges in order to extract wealth from the diffuse and unrepresented public."[24] The case originated from the Illinois legislature's decision to deed to a railroad more than 1000 acres of the Chicago harbor—a property as large as "all the merchandise docks along the Thames at London."[25] When a later legislature moved to

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earliest American public trust scholars. Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 826–27 n.121 (2004). It was likewise relied upon in the first American public trust doctrine cases. *See, e.g.*, Arnold v. Mundy, 6 N.J.L. 1, 74–76 (N.J. 1821).

19. *See Ill. Cent.*, 146 U.S. at 452.

20. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983).

21. *Ill. Cent.*, 146 U.S. at 458; *see also Arnold*, 6 N.J.L. at 72 (stating that the sovereign cannot "intrude upon the common property . . . , the enjoyment of it is a natural right which cannot be infringed or taken away").

22. *See, e.g.*, *Arnold*, 6 N.J.L. 1 (recognizing public right to gather oysters on New Jersey beaches even where pre-independence land grant had purported to convey oyster bed to private individual).

23. 146 U.S. 387 (1892). For a thorough history of *Illinois Central* and an assessment of its "lodestar" position in United States public trust doctrine law, see Kearney & Merrill, *supra* note 18, at 853–87. State courts, including Washington's, see *infra* notes 96–100 and accompanying text, have almost unfailingly used *Illinois Central* as the foundation for fleshing out their own public trust doctrines. *See, e.g.*, CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1118 (Alaska 1988) ("*Illinois Central* remains the leading case regarding public rights in tide and submerged lands conveyed by the state."); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088 (Idaho 1983) ("*Illinois Central* . . . is the seminal case on the scope of the public trust doctrine and remains the primary authority today."); Shepard's Point Land Co. v. Atlantic Hotel, 44 S.E. 39, 41–42 (N.C. 1903); *see also* West Indian Co. v. Virgin Islands, 844 F.2d 1007, 1018 (3d Cir. 1988) (citing *Illinois Central* as a generally understood common law rule of the United States).

24. Kearney & Merrill, *supra* note 18, at 805; *see also, e.g.*, Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 425 (1987) (noting that though there are difficulties in judging the adequacy of consideration, the city had probably been "ripped off" by the railroad).

25. *Ill. Cent.*, 146 U.S. at 454.

undo the transfer, the railroad cried foul, and a suit resulted in which both parties asserted title.[26]

The litigation worked its way to the Supreme Court, which rejected the railroad's claim on the grounds that the State's public trust responsibilities prevented it from transferring the land in the first place.[27] Justice Stephen Field, writing for the Court, declared that:

> [S]uch property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental, and cannot be alienated, except . . . when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.[28]

The State's transfer of the lands under the harbor of Chicago—a property "of immense value to the people of the State of Illinois"—was therefore necessarily revocable.[29] Anything else would be "a gross perversion of the trust."[30]

The public trust doctrine, however, has never been limited to the bedrock tenets of *Illinois Central*. Rather, as a creature of the common law, the doctrine is capable of expansion to meet the public need.[31] Courts usually do not hesitate to entertain public trust claims even when no transfer of public land has occurred.[32] Even in early cases, courts recognized that the public rights encompassed by the *jus publicum* may extend beyond the traditional triad[33] and that the *jus publicum*'s scope

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26. *Id.* at 439.

27. *Id.* at 453 ("A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.").

28. *Id.* at 455–56.

29. *Id.* at 454.

30. *Id.* at 455.

31. *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

32. *See, e.g.*, Save Ourselves, Inc. v. La. Envtl. Control Comm'n, 452 So. 2d 1152 (La. 1984) (applying public trust doctrine to agency's approval of hazardous waste facility); United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n, 247 N.W.2d 457, 461, 463 (N.D. 1976) (holding that public trust doctrine is not restricted to conveyances of real property and applying doctrine to water allocation decision); *see also* State *ex rel*. Rohrer v. Credle, 369 S.E.2d 825, 827 (N.C. 1988) ("Under the public trust doctrine, each state could *regulate* or dispose of its tidal lands, provided that it could be done 'without substantial impairment of the interest of the public in the waters.'" (emphasis added)).

33. *See, e.g.*, Home for Aged Women v. Commonwealth, 89 N.E. 124, 129 (Mass. 1909) ("[I]t would be too strict a doctrine to hold that the trust for the public . . . is for navigation alone. It is

may reach beyond tidal and navigable waters.[34] The Vermont Supreme Court put it elegantly:

> [T]he public trust doctrine retains an undiminished vitality. The doctrine is not fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit. The very purposes of the trust have evolved in tandem with the changing public perception of the values and uses of waterways.[35]

Accordingly, the doctrine manifests itself diversely throughout the nation, conforming to the changing public needs and judicial traditions of different states.[36]

The public trust doctrine stands distinct from the various regulatory regimes[37] that protect the public interest in waters and underlying lands in that the judiciary, rather than the legislature, largely created and developed it.[38] This judicial scrutiny of legislative policy judgments[39]—an arena in which great deference is normally granted[40]—has fascinated academics, giving rise to both ringing praise[41] and spirited criticism.[42]

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wider in its scope, and it includes all necessary and proper uses, in the interest of the public."); *see also infra* notes 57–63 and accompanying text.

34. *See, e.g.*, Bohn v. Albertson, 238 P.2d 128 (Cal. Ct. App. 1951) (extending public trust to lands flooded by the San Joaquin River); *In re* Water Use Permit Applications, 9 P.3d 409 (Haw. 2000) (extending public trust to groundwater).

35. State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1130 (Vt. 1989) (internal quotation marks and citations omitted).

36. *See* Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007) (reviewing the public trust doctrine in eastern states, and noting the "richness and complexity of [the various states'] public trust philosophies"); *infra* Part I.B.

37. *See, e.g.*, Water Resources Act of 1971, WASH. REV. CODE §§ 90.54.005–.920 (2008) (mandating that allocation of water between competing uses be based on securing maximum net benefits for the people of the state); Shoreline Management Act of 1971, WASH. REV. CODE §§ 90.58.010–.920 (2008) (requiring that uses and developments proposed for Washington's shorelines be consistent with statutory shoreline management policies and local shoreline management plans).

38. Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 524–25 (1992).

39. Weden v. San Juan County, 135 Wash. 2d 678, 698, 958 P.2d 273, 283 (1998) ("[C]ourts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny . . . .").

40. State v. Heiskell, 129 Wash. 2d 113, 122, 916 P.2d 366, 370 (1996) ("Ultimately, it is not this Court's function to question the wisdom of a[] [legislative] enactment, unless a constitutional impediment is present. We will not inquire into the policies underlying a clear legislative enactment.").

41. *See, e.g.*, Johnson, *supra* note 38, at 594, 596 (calling the doctrine "a powerful tool to protect the public interest in tidelands and shorelands" that "provides important protection for coastal

Professor Joseph Sax's call to use the doctrine as a tool for protection of natural resources[43] has been particularly influential,[44] and over the last forty years a few state courts have taken the doctrine in a decidedly "environmentalist" direction.[45] More commonly, however, the environmental aspect of the doctrine has met with tepid judicial response, and by and large no great revolution has occurred to match Professor Sax's vision.[46]

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resources from harmful private development"); Sax, *supra* note 10, at 509, 560 (arguing that the doctrine is a "medium for democratization" that protects a "disorganized and diffuse majority" from the "self-interested and powerful minorities" that "often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests").

42. William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 404 (1997) ("[T]he [public trust] doctrine has been criticized as a backward-looking, antidemocratic vestige whose time, if it ever existed, has passed."); *see, e.g.*, James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 533 (1989) ("By misconceiving the doctrine [as consisting of more than a simple easement], our modern courts have confused the concepts of public rights, police power, and constitutional rights. As a consequence, the courts have threatened basic values of constitutional democracy and individual liberty."); Lazarus, *supra* note 13, at 658 ("[T]he public trust doctrine . . . is now, at best, superfluous and, at worst, distracting and theoretically inconsistent with new notions of property and sovereignty . . . .").

43. Sax, *supra* note 10, at 474 ("Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." (footnote omitted)); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 188 (1980) ("The central ideal of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title.").

44. *See* Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10,114, 10,125 (2008) (noting the increasing use of the public trust doctrine since the 1970s and Professor Sax's status as the "catalyst" for this revival); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 352 (1998) (crediting Professor Sax with "usher[ing] in" the modern revival of the public trust concept).

45. Both the California and Hawaii supreme courts have handed down prominent public trust doctrine decisions in which they cited Professor Sax's work and held that the doctrine demands affirmative state action to preserve the environment. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983) (expressly applying the public trust doctrine to limit stream diversions that were harming the environment); *In re* Water Use Permit Applications, 9 P.3d 409, 455 (Haw. 2000) (holding that public trust doctrine requires the State to consider cumulative impact of water use allocations on the trust, and to implement reasonable mitigation measures, including the use of alternative sources).

46. *See* J.B. Ruhl, *Ecosystem Services and the Common Law of "The Fragile Land System,"* NAT. RESOURCES & ENV'T, Fall 2005, at 5–6, *available at* http://www.law.fsu.edu/faculty/profiles/ruhl/2005-FragileLandSystem20NREFall.pdf (noting that the public trust doctrine has not been widely embraced by state courts as a vehicle for judicial intervention in natural resource management policy); James L. Wescoat, Jr., *Submerged Landscapes: The Public Trust in Urban Environmental Design, from Chicago to Karachi and Back Again*, 10 VT. J. ENVTL. L. 435, 461

In sum, whatever the controversies surrounding its content, scope, and theoretical underpinnings, the public trust doctrine is a firmly established part of the common law.[47] The doctrine generally protects water-based activities on water resources, but is capable of being extended farther. It invites active use by environment-focused lawyers, but, being often "buried in the deeper recesses of the complaint,"[48] the doctrine has been more readily embraced by academics than courts. It certainly exists throughout the United States, but its contours—even within a particular jurisdiction—are often hard to define.

B. United States Courts Take Diverse Approaches to the Jus Publicum

The boundary of the public trust has often been linked to the wash of the tide,[49] but depending on which court's decision applies, the landward limit of the *jus publicum* may be the low water mark,[50] the high water mark,[51] the vegetation line,[52] or even the reach of the waves in winter.[53] Other jurisdictions have expanded the trust beyond the sea to all surface waters,[54] to groundwater,[55] and to non-water resources.[56] Suffice it to say the public trust doctrine's scope and application can vary dramatically

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(2009) ("While it is an exaggeration to say that law review articles on the public trust doctrine are almost as numerous as the number of decisions that cite *Illinois Central*, the number of public trust cases has not been as large as hoped or feared by various commentators.").

47. Caminiti v. Boyle, 107 Wash. 2d 662, 669, 732 P.2d 989, 994 (1987). The notion that federal law imposes a minimum or "floor" public trust doctrine on the states has been advanced by several commentators. *See, e.g.*, Craig, *supra* note 36, at 4–5 (characterizing the public trust doctrine articulated by the United States Supreme Court in *Illinois Central* as the "default minimum standard for the states"); Wilkinson, *supra* note 10, at 459 (arguing that the public trust doctrine stems from the U.S. Constitution's Commerce Clause and becomes binding on new states at statehood).

48. RODGERS, *supra* note 2, § 2.20, at 155.

49. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 57 (1894) ("At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation."); *see also* City of Berkeley v. Superior Court, 606 P.2d 362, 364–66 (Cal. 1980) (recounting history of public rights in California tidelands).

50. Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1099–100 (Mass. 1981) (". . . or 100 rods from mean high water, if lesser.").

51. Opinion of the Justices, 649 A.2d 604, 607–08 (N.H. 1994).

52. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 358 & n.1 (N.J. 1984) (". . . or where there is no vegetation[,] to a seawall, road, parking lot or boardwalk.").

53. *In re* Sanborn, 562 P.2d 771, 773–74, 776 (Haw. 1977).

54. Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984) (holding that Montana's public trust doctrine extends to "any surface waters that are capable of recreational use").

55. *See, e.g.*, *In re* Water Use Permit Applications, 9 P.3d 409, 445–47 (Haw. 2000) ("[T]he public trust doctrine applies to all water resources without exception or distinction.").

56. *See, e.g.*, Parsons v. Walker, 328 N.E.2d 920, 926–27 (Ill. App. Ct. 1975) (extending public trust protections to public park).

from state to state. The following is a representative tour designed to give a sense of courts' differing treatments of the public trust doctrine throughout the United States.

It is common for states' public trust doctrines to differ in the range of public activities protected. For instance, Mississippi has an expansive list of purposes to which public trust lands may be put, including navigation, transportation, commerce, fishing, bathing, swimming, other recreational activities, development of mineral resources, environmental protection, enhancement of marine life, sea agriculture, and "no doubt others."[57] Alaska, on the other hand, has maintained a narrow scope, limiting its doctrine to the three traditional uses of navigation, commerce, and fishing.[58] Scientific study is a public trust use in California,[59] as is hunting in Wisconsin.[60] New Jersey's courts protect the right to travel over private lands to access public trust areas,[61] but Arkansas' courts do not.[62] The Supreme Court of Iowa has situated itself between these two extremes, holding that the public's right to access trust lands is protected only to the extent that the State can prove at least some ownership interest in the land that would provide access.[63]

The extent to which a state has an affirmative duty to preserve public trust lands and waters also varies widely. Hawaii's public trust doctrine is directly based on language in its constitution[64] and imposes powerful, substantive checks on the State's regulation of water use.[65] In contrast, the North Carolina Supreme Court has held that the public trust doctrine provides only a presumption that where the legislature conveys public trust land, it does not do so "in a manner that would impair public trust

57. Cinque Bambini P'ship v. State, 491 So. 2d 508, 512 (Miss. 1986), *aff'd* 484 U.S. 469 (1988).

58. *See* City of Saint Paul v. State, 137 P.3d 261, 263 n.8 (Alaska 2006).

59. Santa Teresa Citizen Action Group v. City of San Jose, 7 Cal. Rptr. 3d 868, 884 (Cal. Ct. App. 2003).

60. R.W. Docks & Slips v. State, 628 N.W.2d 781, 787–88 (Wis. 2001).

61. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) ("[W]here use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.").

62. State v. McIlroy, 595 S.W.2d 659, 665 (Ark. 1980) ("It is not disputed that riparian landowners on a navigable stream have a right to prohibit the public from crossing their property to reach such a stream.").

63. *See* Larman v. State, 552 N.W.2d 158, 161 (Iowa 1996).

64. *See* HAW. CONST. art. XI, § 7 ("The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.").

65. *In re* Water Use Permit Applications, 9 P.3d 409, 504–05 (Haw. 2000) (holding that the public trust imposes a fiduciary duty on the State to "actively and affirmatively protect, control and regulate" water resources).

rights."[66] In that state, the legislature can overcome this presumption—and consequently extinguish all public rights in the property—by clearly indicating that it wishes to convey a parcel without reservation of any public trust rights.[67]

More specifically pertinent to this Comment are the standards under which courts review legislative action under the public trust doctrine. In Idaho, courts take a "close look" at a State action to determine whether it complies with the public trust doctrine.[68] In Alaska, grants of exclusive rights to harvest natural resources are subject to "close scrutiny."[69] Maine's courts review legislative restraints on public trust rights for a rational basis,[70] but look for a "particularly demanding standard of reasonableness" when they assess that rationality.[71] Courts are sometimes remarkably unclear as to the level of scrutiny they apply.[72] Washington's standard of review is discussed below in Parts II and III.

As this section has shown, the national setting in which Washington courts must determine the ambit of the Washington public trust doctrine is decidedly piebald. It is not without good reason that the doctrine has been described as "not easily researchable" with "few experts" and "not many more who claim to be experts."[73] This variety also shows, however, that when Washington courts are called upon to develop, refine, or clarify the public trust doctrine, they are the beneficiaries of a rich field of different approaches and philosophies.

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66. Gwathmey v. State, 464 S.E.2d 674, 684 (N.C. 1995) (holding that because there is no constitutional basis for the public trust doctrine in North Carolina, the doctrine only serves as a rule of statutory construction, and will not invalidate express legislative acts).

67. *See id.* In Washington, however, it appears that even express legislation cannot abrogate the trust, and that the legislature can never relinquish the trust by a transfer of property. *See* Orion Corp. v. State, 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987).

68. Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1092 (Idaho 1983).

69. Owsichek v. State, 763 P.2d 488, 494 (Alaska 1988) (referring specifically to natural resources listed in the Alaska Constitution's common use clause).

70. *See* State v. Haskell, 955 A.2d 737, 740 (Me. 2008).

71. Opinion of the Justices, 437 A.2d 597, 607 (Me. 1981).

72. *See* Brian E. Gray, *The Uncertain Future of Water Rights in California: Reflections on the Governor's Commission Report*, 36 MCGEORGE L. REV. 43, 60–61 & n.114 (2005) (asserting that in *National Audubon Society*, the California Supreme Court identified no less than five different standards of review, including "a feasibility criterion, a public interest test, a rough form of cost-benefit analysis, a balancing approach, and a purely 'considerational' requirement analogous to a [National Environmental Policy Act] or [California Environmental Quality Act] analysis of reasonable alternatives").

73. RODGERS, *supra* note 2, § 2.20, at 155–56.

II. WASHINGTON'S EARLY CASES CULMINATED IN A TEST THAT ADDRESSES TRUST ALIENATIONS

As in other states, the public trust doctrine has existed in Washington common law since statehood, though it has evolved considerably from its late nineteenth-century beginnings.[74] Early cases, decided when Washington was a resource-rich frontier state, concerned themselves mainly with the efficient development of Washington's natural resources.[75] Later cases expanded the doctrine,[76] and it currently includes at a minimum public rights to navigate, engage in commercial activity, fish, boat, swim, and water ski,[77] as well as an interest in clamming on public[78] (but not on private)[79] land.

The standard by which Washington courts review legislative action under the public trust doctrine has likewise evolved. Before 1987's *Caminiti v. Boyle*, the extent of this review was largely uncertain. *Caminiti* ushered in Washington's modern public trust era by developing a test that enables courts to respond to alleged alienations of public trust lands. This Part traces the development of the public trust doctrine in Washington up to and including *Caminiti*, focusing on the manner and degree to which courts review legislative action.

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74. *See* Caminiti v. Boyle, 107 Wash. 2d 662, 669, 732 P.2d 989, 994 (1987). For an account of the public trust doctrine's role and history in Washington by a leading Washington public trust law scholar, and a still-valuable discussion of the doctrine's potential future in this state, see Professor Ralph Johnson's 1992 article, *supra* note 38. A compilation of Professor Johnson's published work (including his many articles and symposia on public trust law) is available online through the University of Washington's Marian Gould Gallagher Law Library. Cheryl Nyberg, Ralph Johnson: 1923–1999 (2001), http://lib.law.washington.edu/ref/raljohnson.html.

75. *See* State v. Sturtevant, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913) ("The state has invited investment in [public trust] lands upon the theory that, in private ownership, all land lying back of the inner harbor line or the line of ordinary navigability would be reclaimed and put to useful purposes.").

76. Orion Corp. v. State, 109 Wash. 2d 621, 640–41, 747 P.2d 1062, 1073 (1987) ("Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.").

77. *Caminiti*, 107 Wash. 2d at 669, 732 P.2d at 994 (quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969)). According to the *Caminiti* Court, *jus publicum* activities also include "other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Id.*

78. Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 124 Wash. App. 441, 451, 101 P.3d 891, 896 (2004).

79. State v. Longshore, 141 Wash. 2d 414, 428, 5 P.3d 1256, 1263 (2000).

A. Dicta in Washington State's Early Public Trust Doctrine Cases Are Inconsistent Regarding the Extent to Which the Doctrine Limits State Action

An examination of Washington's early public trust doctrine jurisprudence reveals no consistent approach with respect to the doctrine's limits on state action. The first case to deal with public trust concerns in Washington was *Eisenbach v. Hatfield*,[80] in which a landowner sued to stop construction of structures on privately owned tidal land seaward of his property.[81] The Washington State Supreme Court held that the landowner could not, as a riparian owner, stop state action in the navigable waters adjoining his estate.[82] Though it ruled against the landowner, the *Eisenbach* Court noted the distinction between the *jus privatum*, which might be conveyed to individuals, and the "public right of navigation and fishing," which could not.[83]

Eisenbach was not alone among early Washington decisions in recognizing the concept of the *jus publicum*. The state supreme court noted in *State v. Sturtevant*[84] that the State held the right of navigation "in trust for the whole people" of Washington.[85] Later, in *Hill v. Newell*,[86] the Court quoted language from a then-leading California public trust doctrine case that went even further, to the effect that any state interest in public trust land was "subservient" to public rights in the *jus publicum*, and that the State was incapable of disposing of public trust lands in a manner prejudicial to those rights.[87] Other early courts expressed similar sentiments, with varying degrees of forcefulness.[88]

Occasional suggestions that the judiciary has no role in enforcing what form the state trusteeship should take, however, offset this early

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80. 2 Wash. 236, 26 P. 539 (1891).

81. *Id.* at 237, 26 P. at 539.

82. *Id.* at 253, 26 P. at 543–44.

83. *Id*. at 240–41, 26 P. at 539–40.

84. 76 Wash. 158, 135 P. 1035 (1913).

85. *Id.* at 165, 135 P. at 1037.

86. 86 Wash. 227, 149 P. 951 (1915).

87. *Id.* at 231, 149 P. at 952 (quoting People v. Cal. Fish Co., 138 P. 79, 82 (1913), and noting that that court's language was "in effect the holding of this court").

88. *See, e.g.*, City of New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 499, 64 P. 735, 737 (1901) (noting paramount public right in use of navigable waters that sovereign could neither destroy nor abridge), *quoted with approval in* Madson v. Spokane Valley Land & Water Co., 40 Wash. 414, 419, 82 P. 718, 720 (1905); *cf.* Hulet v. Wishkah Boom Co., 54 Wash. 510, 517, 103 P. 814, 816 (1909) (noting public right to navigate, and holding that that right could not be "unnecessarily interfer[ed]" with by a private party).

language. The *Eisenbach* Court indicated that it could not "deny the power of the state to deal with its own property as it may deem best for the public good."[89] Further, well into the twentieth century, Washington courts accepted without objection state policies that would result in the destruction of public trust lands.[90] Certainly no early court invoked the public trust doctrine in order to restrict state action with regard to the *jus publicum*.

In sum, early public trust cases in Washington contain interesting dicta, but fail to yield a consistent theory about the extent to which state action is reviewable under the public trust doctrine. Unambiguous recognition of public trust constraints on state action would not emerge until the Supreme Court of Washington accepted Benella Caminiti's petition for review in 1987.

B. Caminiti v. Boyle*: The Beginning of Washington's Modern Public Trust Doctrine*

In *Caminiti v. Boyle*, the Washington State Supreme Court explicitly considered a challenge to state action under the public trust doctrine for the first time.[91] *Caminiti* involved a challenge to a state statute that allowed owners of waterfront property to build recreational docks without payment to the State.[92] The petitioners argued that the statute effectively relinquished state control over public trust resources, and that those resources would be gobbled up by uncontrolled proliferation of private docks.[93] While the petitioners lost on the merits, they succeeded in persuading the Court to affirmatively recognize a Washington public trust doctrine,[94] and since then Justice James Andersen's opinion for the

89. Eisenbach v. Hatfield, 2 Wash. 236, 253, 26 P. 539, 544 (1891), *quoted in* Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 90, 102 P. 1041, 1044 (1909). The *Eisenbach* Court also noted that the states succeeded to the British Parliament's "absolute control" over public trust rights. *Id.* at 240–41, 26 P. at 539–40; *see also* Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 131–32, 94 P. 922, 923 (1908) ("[T]he state has full power to dispose of [tide lands], subject to no restrictions save those imposed upon the Legislature by the Constitution of the state and the Constitution of the United States."); *cf.* Dawson v. McMillan, 34 Wash. 269, 275, 75 P. 807, 809 (1904) ("It is no doubt true that the sovereign authority may control and regulate the use of navigable waters . . . .").

90. *See, e.g.*, Harris v. Hylebos Indus., Inc., 81 Wash. 2d 770, 786, 505 P.2d 457, 466 (1973) ("The legislative intent regarding the use of tidelands in harbors of cities is manifestly that . . . the filling and reclaiming of the tidelands which have been sold to private parties shall be encouraged.").

91. Johnson, *supra* note 38, at 535.

92. 107 Wash. 2d 662, 663, 732 P.2d 989, 991 (1987).

93. *See id.* at 671, 732 P.2d at 995.

94. *Id.* at 669–70, 732 P.2d at 994.

eight-justice majority has been the foundation for Washington's doctrine.

After reaffirming its earlier holdings that the State of Washington has the power to transfer the *jus privatum* in tidelands and shorelands,[95] the Court turned to the *jus publicum* and set about formulating Washington's legal standard for public trust alienation claims. In doing so, the Court relied heavily on language from the United States Supreme Court's *Illinois Central* decision, which also involved a state giving up control of public trust resources.[96] The *Caminiti* Court adopted the principles from *Illinois Central*: The State can no more give away the *jus publicum* interest in public trust land than it can give away its police powers, and regardless of who holds title to public trust land, sovereignty and dominion over such land always remain with the State.[97]

Further, the Washington State Supreme Court looked to *Illinois Central* to formulate a test that would identify state violations of the public trust doctrine. From Justice Field's wall of nineteenth-century prose, Justice Andersen plucked the following articulation of the United States Supreme Court's holding:[98]

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.[99]

Working from this passage, the *Caminiti* Court declared that when a violation of the doctrine is alleged, Washington courts must inquire:

> (1) [W]hether the State, by the questioned legislation, has given up its right of control over the jus publicum and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it.[100]

Applying the first prong of the new test, the *Caminiti* Court noted that by enacting the law allowing private dock construction, the Legislature

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95. *Id.* at 666–67, 732 P.2d at 993.

96. *Id.* at 669–70, 732 P.2d at 994–95; *see supra* notes 23–30 and accompanying text.

97. *Caminiti*, 107 Wash. 2d at 669, 732 P.2d at 994 (citing Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892)).

98. As have many other courts. *See, e.g.*, People v. Cal. Fish Co., 138 P. 79, 82 (Cal. 1913); State v. Head, 498 S.E.2d 389, 392 (S.C. Ct. App. 1997); Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 59 (Tex. App. 1993).

99. *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994 (quoting *Ill. Cent.*, 146 U.S. at 453).

100. *Id.* at 670, 732 P.2d at 994–95.

had not conveyed title to any public trust lands and had given up "relatively little" control over the public trust.[101] Further, the Court explained that the State retained ultimate control because it could revoke landowners' ability to build docks at any time.[102]

Because some control had been alienated, however, the Court went on to apply the test's second prong. At least to a limited degree, reasoned the Court, allowing construction of private docks promoted public interest in the *jus publicum*.[103] Such activity was, after all, consistent with a public good articulated in the Shoreline Management Act: "recognizing and protecting private property rights consistent with the public interest."[104] Additionally, the Court saw no reason to draw a distinction between encouraging use of public waters from public docks and encouraging the same from private docks.[105] Finally, the Court observed that there was no impairment of the *jus publicum* because recreational docks were not permitted to block access to public beaches.[106] In sum, the Court held that though the dock statute relinquished some state control over public trust land, the statute mildly promoted, or at least did not impair, public interest in the *jus publicum*.

Caminiti is a fixture in Washington public trust law and its test allows courts to respond to alienations of the *jus publicum*.[107] But Washington's

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101. *Id.* at 672, 732 P.2d at 995.

102. *Id.* at 673, 732 P.2d at 996.

103. *Id.* However, a recent court of appeals decision held that while dock building is permissible under the public trust doctrine, the doctrine confers no positive right to do so. *See* Samson v. City of Bainbridge Island, 149 Wash. App. 33, 59, 202 P.3d 334, 347 (2009) ("Samson misconstrues the public trust doctrine by implying that the doctrine enshrines a right to construct individual, private docks, just because a private property owner *could* use that dock for navigation purposes.").

104. *Caminiti*, 107 Wash. 2d at 673, 732 P.2d at 996 (quoting WASH. REV. CODE § 90.58.020).

105. *Id.* at 674, 732 P.2d at 996.

106. *Id.*

107. *See* Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 696, 169 P.3d 14, 22 (2007) (citing *Caminiti*); State v. Longshore, 141 Wash. 2d 414, 427, 5 P.3d 1256, 1262 (2000) (citing *Caminiti*); Weden v. San Juan County, 135 Wash. 2d 678, 699, 958 P.2d 273, 283 (1998) (applying test); Orion Corp. v. State, 109 Wash. 2d 621, 638–39, 747 P.2d 1062, 1072 (1987) (citing *Caminiti*); *Samson*, 149 Wash. App. at 58–60, 202 P.3d at 347–48 (citing *Caminiti*); Citizens for Responsible Wildlife Mgmt. v. State, 124 Wash. App. 566, 569–72, 103 P.3d 203, 205–06 (2004) (applying test); Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 124 Wash. App. 441, 451–52, 101 P.3d 891, 896–97 (2004) (applying test).

Interestingly, however, the *Caminiti* test has never been affirmatively used to restrain state action. Courts have only given teeth to *Caminiti*'s broad statements about the inalienable public interest in public trust lands against private parties, doing so to block takings claims. *See* Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (applying Washington law); *Orion*, 109 Wash. 2d 621, 747 P.2d 1062. In *Orion*, a developer had purchased tidelands intending to dredge and fill them. 109 Wash. 2d. at 626, 747 P.2d at 1065. The State later designated the lands as "shorelines of statewide significance" and refused to allow the developer to proceed. *Id.* at 627–29, 747 P.2d at

public trust doctrine has not remained dormant since *Caminiti*. As the next Part will show, while later courts have looked mainly to the *Caminiti* test for guidance, they have also gone beyond *Caminiti* and explored principles for deciding non-alienation public trust cases.

III. NON-ALIENATION PUBLIC TRUST DECISIONS APPLY REVIEW BEYOND THE *CAMINITI* TEST

The first prong of the *Caminiti* test asks whether the State has given up its right of control over the *jus publicum*;[108] the test is constructed such that courts should apply the second prong only if they answer "yes" to the first.[109] In non-alienation cases—where, by definition, the State has not given up *jus publicum* control—a strict application of the test will therefore always end at the first prong.

It is not clear, however, what this means. Of the three reported decisions in which courts considered non-alienation cases, only one dismissed a public trust claim based on a negative answer to the *Caminiti* test's first prong.[110] The other two, including one by the Washington State Supreme Court, went beyond the test's strict parameters.[111] The following will explore those three non-alienation cases.

A. Weden v. San Juan County*: The Washington State Supreme Court Provides Scrutiny Beyond the* Caminiti *Test in a Non-Alienation Case*

In 1998's *Weden v. San Juan County*,[112] the Supreme Court of Washington tackled a non-alienation public trust case. *Weden* involved a public trust doctrine challenge to a San Juan County ordinance prohibiting use of motorized personal watercraft.[113] The challengers, a

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1066–67. The developer brought a takings claim, but the Court sided with the State, concluding that the developer never had a right to fill the land, having purchased it subject to the paramount public interest in the *jus publicum*. *Id*. at 640–42, 747 P.2d at 1072–73.

108. *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994.

109. *Id.* at 670, 732 P.2d at 994–95.

110. *Citizens*, 124 Wash. App. at 575, 103 P.3d at 207–08.

111. *Weden*, 135 Wash. 2d at 699–700, 958 P.2d at 283–84; *Wash*. *State Geoduck*, 124 Wash. App. at 452, 101 P.3d at 897.

112. 135 Wash. 2d 678, 958 P.2d 273 (1998).

113. *Id.* at 684, 958 P.2d at 276. Personal motorized watercraft are commonly and generically known as "jet skis." Personal Watercraft Coal. v. Bd. of Supervisors, 122 Cal. Rptr. 2d 425, 430 (Cal. Ct. App. 2002).

trade association and a group of individuals and businesses, asserted that the ban violated their public trust right to navigate.[114] They directed the Court's attention to an article by the late University of Washington Professor Ralph Johnson for the proposition that the doctrine was "like a constitutional principle."[115]

Justice Charles Johnson, writing for the majority, drew heavily from Professor Johnson's article, declaring that "courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, as if they were measuring that legislation against constitutional protections."[116] Justice Johnson's grounding for "heightened scrutiny" in the "universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands" also came from Professor Johnson's article.[117]

Turning to the facts, the Court seemed to agree with the respondents that use of motorized personal watercraft is an activity encompassed by the *jus publicum*, but nevertheless held that the San Juan County ordinance did not violate the public trust doctrine.[118] Because the

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114. Brief of Respondents at 51–53, *Weden*, 135 Wash. 2d 678, 958 P.2d 273 (No. 64776-3) ("[T]he Ordinance substantially impairs the public interest of *all* members of the public to use and access the navigable waters, which the public trust doctrine encourages and protects . . . .").

115. *Id.* at 52 (quoting Johnson, *supra* note 38, at 527 n.9). Professor Johnson, in turn, drew this conclusion from *Caminiti*. *See* Johnson, *supra* note 38, at 527 n.9 (citing *Caminiti* for the proposition that "the doctrine, like a constitutional principle, constrains the power of the legislature").

116. *Weden*, 135 Wash. 2d at 698, 958 P.2d at 283 (internal quotation marks omitted) (quoting Johnson, *supra* note 38, at 526–27).

117. *Id.* (quoting Johnson, *supra* note 38, at 525). The theoretical justification for courts' power to override legislative decisions under the public trust doctrine is hotly debated. *See supra* notes 41–42. Washington courts have occasionally observed that the public trust doctrine is "partially encapsulated" in article XVII, section 1 of the Washington State Constitution, which reserves State ownership of "the beds and shores of all navigable waters in the state." Rettkowski v. Dep't of Ecology, 122 Wash. 2d 219, 232, 858 P.2d 232, 239 (1993); *see also* Wash. State Geoduck Harvest Ass'n v. Wash. State Dept. of Natural Res., 124 Wash. App. 441, 451, 101 P.3d 891, 896 (2004) (describing public trust doctrine as "essentially" a constitutional protection). And there is at least some support for the argument that the duties imposed by the public trust doctrine spring directly from the Washington State Constitution. *See* Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 695, 169 P.3d 14, 21 (2007) (implying that the "duty imposed by the public trust doctrine" is a product of courts' interpretation of article XVII, section 1). The interconnectedness of article XVII, section 1 and the public trust doctrine is particularly apparent in the frequency with which courts undertake intertwining discussions of the two sources of law. *See, e.g.*, *id.* at 694–96, 713–14, 169 P.3d 14, 21–22, 30–31 (both lead opinion and dissent discussing article XVII, section 1 and the public trust doctrine together); *Weden*, 135 Wash. 2d at 717, 958 P.2d at 292 (Sanders, J., dissenting).

118. *Weden*, 135 Wash. 2d at 699, 958 P.2d at 283 (emphasizing that the *jus publicum* includes "*other related recreational purposes* generally regarded as corollary to the right of navigation and the use of public waters").

ordinance represented a regulation of the *jus publicum* rather than an alienation, the Court's application of the *Caminiti* test unsurprisingly came up negative—a regulation does not "give up" control.[119]

Scrutiny, however, did not end there. The Court appeared to weigh the ordinance's negative consequences on the *jus publicum* against the positive. On the one hand, the ban prohibited a recreational use protected by the public trust doctrine, but on the other, it left the county's waters otherwise open to access by the entire public.[120] Furthermore, the County had made findings that use of motorized personal watercraft was "inconsistent with the protection and preservation of the wildlife which inhabit the waters and refuges of the County."[121] The Court concluded that it would stretch the public trust doctrine too far to protect an activity that "actually harms and damages" the *jus publicum*.[122]

In sum, *Weden* endorses scrutiny beyond the *Caminiti* test in non-alienation cases. It also provides some guidance as to factors not identified in *Caminiti* that Washington courts should look to when they carry out that review: (1) whether the public trust resource remains open to the entire public, and (2) whether the State's action preserves the *jus publicum*.

B. Non-Alienation Decisions After Weden *Have Applied Still Different Kinds of Scrutiny*

Two decisions after *Weden*, both by Division II of the Washington Court of Appeals, have addressed non-alienation cases: *Washington State Geoduck Harvest Ass'n v. Washington State Department of Natural Resources*,[123] and *Citizens for Responsible Wildlife Management v. State*.[124] Like *Weden*, both decisions announced use of a heightened scrutiny standard.[125] But while the court in *Washington State Geoduck* followed *Weden* in progressing beyond the first prong of *Caminiti*, the court in *Citizens* did not.

In *Washington State Geoduck*, a group of commercial geoduck harvesters argued that the Department of Natural Resources violated the

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119. *Id.*

120. *Id.* at 699, 958 P.2d at 283–84.

121. *Id.* at 687, 958 P.2d at 277.

122. *Id.* at 700, 958 P.2d at 284.

123. 124 Wash. App. 441, 101 P.3d 891 (2004).

124. 124 Wash. App. 566, 103 P.3d 203 (2004).

125. *Id.* at 570–71, 103 P.3d at 205; *Wash. State Geoduck*, 124 Wash. App. at 451, 101 P.3d at 896.

public trust doctrine by auctioning exclusive geoduck[126] harvesting rights on public land to the highest bidder.[127] Not so, said the court. The court explained that while Washington's public trust doctrine includes a public interest in geoducks living in state-owned lands,[128] the auction practices at issue did not violate the public trust doctrine.[129] The court's analysis centered on the *Caminiti* test. Focusing on the test's first prong, the court discussed how the State retained control over this aspect of the public trust by maintaining a variety of safeguards.[130] As in *Weden*, however, the court proceeded beyond the first prong and emphasized the public good promoted by the public trust regulation at issue.

Where the *Weden* Court looked to factors not specifically endorsed in *Caminiti*, the *Washington State Geoduck* court applied the *Caminiti* test's second prong. The court concluded that far from substantially impairing the public trust, the Department of Natural Resources' regulation of commercial geoduck harvesting promoted sustainable use and natural regeneration of the resource.[131] Such results bolstered values that the public trust doctrine traditionally protects: "recreation, commerce, and commercial fishing."[132]

In *Citizens for Responsible Wildlife Management*, several citizens groups invoked the public trust doctrine to challenge two laws enacted through the initiative process that prohibited various hunting and trapping practices.[133] In Washington, no court had addressed whether hunting is a public trust activity, or whether terrestrial wildlife is a public trust resource.[134] The court concluded that it did not have to

126. "The Pacific geoduck clam (*Panopea abrupta*) is the largest intertidal clam in the world, weighing up to ten pounds, and reaching life spans of up to 163 years." Wilber v. State, 187 P.3d 460, 461 n.1 (Alaska 2008). Geoducks can command high market prices. Alaska Trademark Shellfish, LLC v. State, 91 P.3d 953, 954 (Alaska 2004).

127. *Wash*. *State Geoduck*, 124 Wash. App. at 448, 101 P.3d at 895.

128. *Id.* at 451, 101 P.3d at 896.

129. *Id.* at 452, 101 P.3d at 897.

130. *Id.* (noting that no title was conveyed, that the Department of Natural Resources remained responsible for appraising shellfish bed resources, that resource bidders were required to provide an estimate of the resources they would remove, and that the state had the authority to include in leases terms deemed "necessary to protect the interests of the state").

131. *Id.*

132. *Id.*

133. Citizens for Responsible Wildlife Mgmt. v. State, 124 Wash. App. 566, 568, 103 P.3d 203, 204 (2004). Initiative 655 made it unlawful to hunt black bear using bait, or to hunt black bear, cougar, bobcat, or lynx with dogs. *See* WASH. REV. CODE § 77.15.245 (2008). Initiative 713 made it unlawful to use certain forms of traps to capture mammals for certain purposes. *See id.* §§ 77.15.192–.198.

134. *Citizens*, 124 Wash. App. at 570, 103 P.3d at 205.

decide the issue, because even if hunting was encompassed by the *jus publicum* the citizens groups' public trust challenge still failed.[135] The court undertook a careful and detailed application of the first prong of the *Caminiti* test, examining whether the State had given up control over Washington's terrestrial wildlife.[136] Because the laws in question were state-mandated restrictions on the public's right to use a resource, explained the court, they could not represent the State "giving up" control over Washington's wildlife, but rather amounted to an assumption of greater control.[137] In other words, the *Caminiti* test's first prong blocked the *Citizens* plaintiff's suit because no alienation had occurred. Unlike the *Weden* Court or the *Washington State Geoduck* court, the *Citizens* court did not go farther.

Citizens did, however, produce an ambitious concurrence by Chief Judge Christine Quinn-Brintnall. Judge Quinn-Brintnall was concerned that the scrutiny to which Washington courts hold the legislature under *Caminiti* was insufficient to protect the interests of future generations in the *jus publicum*.[138] In order to remedy this problem, Judge Quinn-Brintnall advocated a considerable overhaul of the *Caminiti* test, arguing that an element of "future interest" should be considered, and that courts should focus their analysis on the second prong, rather than the first, and look to whether a state action would harm the public trust before addressing whether the State had relinquished control.[139] Finally, Judge Quinn-Brintnall argued that no weighing of interests could sufficiently represent the enduring nature of the public trust, and that courts should strike down any law that would result in "unacceptably high" damage to a public trust resource.[140]

In sum, Washington courts can be called on to strike down legislation that involves state choices concerning how the *jus publicum* will be

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135. *Id.*

136. *Id.* at 573–75, 103 P.3d at 206–08.

137. *Id.* at 575, 103 P.3d at 207–08.

138. *Id.* at 576–77, 103 P.3d at 208 (Quinn-Brintnall, C.J., concurring).

139. *Id.* at 577–78, 103 P.3d at 209. The new test that Judge Quinn-Brintnall advocated—as she modified it to apply to a law passed by initiative—is as follows:

> [T]o determine whether an initiative complies with the public trust doctrine, we must determine: (1) whether the people by initiative have given up the State's right/duty to control the *jus publicum* and (2) if so, whether this relinquishment (a) promotes the future interests of the public in the *jus publicum*, or (b) substantially impairs the public's future interest in these resources.

Id. at 577, 103 P.3d at 209.

140. *Id.* at 578, 103 P.3d at 209 ("[W]e do not evaluate the merits of the reasons for the action or the professed needs of those supporting the use or exhaustion of the resources held in the public trust.").

used, rather than the alienation of that land to private parties. It appears to remain an open question, however, what courts should do when they are so called. In *Citizens*, the majority's scrutiny of a non-alienation case ended with the first prong of the *Caminiti* test. But in *Weden*, *Washington State Geoduck*, and Judge Quinn-Brintnall's *Citizens* concurrence, it did not.

A careful reading of *Weden* and *Washington State Geoduck* suggests that review beyond *Caminiti*'s first prong might include asking whether the state action: (1) left the *jus publicum* open to the entire public;[141] (2) had positive effects on the public trust resource at issue;[142] (3) had a positive impact on the *jus publicum* that outweighed the negative impact on those members of the public whose public trust rights it limited;[143] or (4) satisfied the elements of the *Caminiti* test's second prong by either promoting or not substantially impairing the *jus publicum*.[144]

It is not clear from Washington's non-alienation case law, however, which of these concerns, if any, courts are required to address. What *is* clear is that Washington's non-alienation jurisprudence is meager. The few cases detailed in this Part represent the totality of Washington law in this area.

IV. WISCONSIN'S PUBLIC TRUST DOCTRINE PROVIDES STRONG NON-ALIENATION JURISPRUDENCE

Wisconsin's public trust doctrine is well developed,[145] and Wisconsin's courts have specifically considered public trust challenges where state action does not involve alienation of public trust land. In their approach to resolving such cases, Wisconsin courts have attempted to strike a balance between flexibility and enforcement of public trust values. One Wisconsin appellate court reasoned that "no single public interest in the use of navigable waters, though afforded the protection of

141. *See* Weden v. San Juan County, 135 Wash. 2d 678, 699, 958 P.2d 273, 283–84 (1998).

142. *See id.* at 700, 958 P.2d at 284 (implying legislation that prevents activities that "actually harm[] and damage[] the waters and wildlife of this state" would generally be upheld under the public trust doctrine).

143. *See* Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 124 Wash. App. 441, 449, 101 P.3d 891, 895 (2004).

144. *See id.* at 452, 101 P.3d at 897.

145. Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 925 n.116 (2007); *accord* Sax, *supra* note 10, at 509 ("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."); John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105, 106 (1994).

the public trust doctrine, is absolute. Some public uses must yield if other public uses are to exist at all. The uses must be balanced and accommodated on a case by case basis."[146] Recognition of this principle has led Wisconsin courts to develop a rubric for determining when the State may exchange one public purpose for another.

Wisconsin established principles for striking down unprincipled transfers of public trust land to private parties much earlier than Washington.[147] An 1896 case, *Priewe v. Wisconsin State Land & Improvement Co.*,[148] like *Illinois Central*, involved a seemingly corrupt giveaway of public trust land to private interests.[149] In 1891, one James Reynolds obtained a special legislative grant of the lakebeds of two lakes, which he was to drain, ostensibly to protect public health.[150] In fact, Mr. Reynolds had formed a land development corporation and transferred his rights in the lakebeds to the corporation so the beds could be used for development.[151] When a riparian owner challenged the grant, the Wisconsin Supreme Court rejected claims that it was bound by the bald legislative declaration of public purpose, and held that grants of public trust land were void when they were made for "private purposes, and for the sole benefit of private parties."[152]

The Court refined its analysis in *State v. Public Service Commission*[153] to address non-alienation cases. *Public Service Commission* involved a challenge to the legislature's grant of a small portion of Lake Wingra's bed to the City of Madison.[154] The land grant was made in order to develop a lakeside public park, and the City of Madison planned to dredge and fill approximately four acres (one and one-fourth percent) of the lake.[155] The proposal's obvious impacts on the *jus publicum* included, among other things, a reduction of the fish-producing potential of the lake by 1600 to 2000 pounds per year.[156] The

146. State v. Vill. of Lake Delton, 286 N.W.2d 622, 632 (Wis. Ct. App. 1979).

147. As detailed above, the Washington judiciary's first foray into this component of the public trust doctrine occurred in 1987. *See supra* Part II.B.

148. 67 N.W. 918 (Wis. 1896).

149. *See* Sax, *supra* note 10, at 509 ("*Priewe* . . . contains the strong implication of legislative corruption.").

150. *Priewe*, 67 N.W. at 919, 921.

151. *Id.* at 921–22.

152. *Id.* at 922.

153. 81 N.W.2d 71 (Wis. 1957).

154. *Id.* at 72.

155. *Id.*

156. *Id.*

Court relied on a five-factor inquiry to determine whether the lakebed grant was acceptable under the public trust doctrine. Upholding the grant, the Court reasoned that:

> 1. Public bodies will control the use of the area. 2. The area will be devoted to public purposes and open to the public. 3. The diminution of lake area will be very small when compared with the whole of Lake Wingra. 4. No one of the public uses of the lake as a lake will be destroyed or greatly impaired. 5. The disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.[157]

Later Wisconsin courts have relied on the *Public Service Commission* Court's analysis in other non-alienation public trust cases. For example, the same year it decided *Public Service Commission*, the Wisconsin Supreme Court applied the factors to uphold another lakebed grant to the City of Madison, upon which the city planned to build a public theater and civic center.[158] In another case that noted the factors, an appellate court upheld a local ordinance setting aside a portion of the lake for public water ski exhibitions that had been a tourist attraction in the area for some twenty-four years.[159]

Wisconsin courts treat these factors as flexible guidelines rather than an exclusive checklist.[160] And, as Professor Sax noted, if the State were to show "that any or all of its five tests are not useful guidelines, but that public interest problems are more usefully examined by reference to other factors, the court would undoubtedly modify its position."[161]

The *Public Service Commission* factors have also been picked up outside of Wisconsin. In *Paepke v. Public Building Commission*,[162] an Illinois Supreme Court decision, a group of homeowners brought suit to enjoin the use of a portion of a public park as the site for a school.[163] Noting the Wisconsin factors with approval, the Court refused to enjoin

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157. *Id.* at 73–74.

158. City of Madison v. State, 83 N.W.2d 674, 675, 678 (Wis. 1957).

159. State v. Vill. of Lake Delton, 286 N.W.2d 622, 632 (Wis. Ct. App. 1979).

160. *See City of Madison*, 83 N.W.2d at 678 (referring to *Public Service Commission* factors, but also considering whether changed public trust use would improve public's ability to enjoy "scenic beauty" of a resource).

161. Sax, *supra* note 10, at 519.

162. 263 N.E.2d 11 (Ill. 1970).

163. *Id.* at 13.

the change in land use.[164] The Idaho Supreme Court also referenced the Wisconsin factors in developing Idaho's public trust doctrine, and seems to have used them to construct its own standard of review.[165] Professor Sax praised the factors for their relative clarity in the often opaque public trust field.[166]

This is not to say, however, that the Wisconsin approach has escaped criticism entirely. Some commentators have rankled at the absence of an overriding preservation factor,[167] and one observed that "[l]ike many multi-part balancing tests it could do with an accompanying instruction booklet."[168] On the whole, however, the *Public Service Commission* Court's five factors are held in high regard, both by courts and by Professor Sax, the nation's preeminent public trust scholar.

V. WASHINGTON COURTS SHOULD ADOPT A MULTI-FACTOR ANALYSIS FOR NON-ALIENATION CASES

The public trust doctrine's vague nature and expansive possibilities have led many commentators to argue for creative expansions of the doctrine in areas where they see public need.[169] The doctrine's interesting, and possibly shaky, theoretical foundations have been another fruitful source of debate.[170] This Comment's goals are more modest: to clarify Washington's public trust doctrine, rather than expand or justify it.

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164. *Id.* at 19 ("[W]e believe that standards such as [the *Public Service Commission* factors] might serve as a useful guide for future administrative action.").

165. *See* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1092–93 (Idaho 1983) (quoting State v. Pub. Serv. Comm'n, 81 N.W.2d 71 (Wis. 1957)).

166. *See* Sax, *supra* note 10, at 517 (asserting that the Wisconsin factors are "as close as judicial statement has to a specific enumeration of a set of rules for implementation of the public trust doctrine").

167. *See, e.g.*, Serena M. Williams, *Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?*, 10 S.C. ENVTL. L.J. 23, 42 (2002); Peter Egan, Comment, *Applying Public Trust Tests to Congressional Attempts to Close National Park Areas*, 25 B.C. ENVTL. AFF. L. REV. 717, 739–40 (1998) ("[A]ny trust area could be destroyed incrementally, in small stages.").

168. Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 269 (1992) (referring to the test as applied in *Paepke*). Professor Cohen also noted, however, that from an economic perspective, the test contains "no major substantive error" so long as the last factor is decisive. *Id.*

169. *See* Huffman, *supra* note 2, at 4–5 (collecting examples of authors arguing for expansions of the public trust doctrine in the environmental arena, as well as in less common directions such as regulation of the electromagnetic spectrum and intellectual property).

170. *See id.* at 5–6 (collecting articles).

The public trust doctrine puts judges in an unusual position—it requires them to question legislative policy decisions on substantive grounds.[171] Washington's non-alienation cases show that inconsistent analysis is predictable in such situations unless courts are informed by a well-defined rule.[172] This Part presents a multi-factor analysis, inspired by Wisconsin's non-alienation jurisprudence, that would allow Washington courts to consistently apply meaningful scrutiny in cases that the *Caminiti* test does not reach.

A. Judicial Review of State Action Under Washington's Public Trust Doctrine Is Not Limited to the Caminiti *Test*

The *Caminiti* Court directed Washington courts addressing public trust claims to ask: "(1) whether the State, by the questioned legislation, has given up its right of control over the jus publicum and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the jus publicum, or (b) has not substantially impaired it."[173] By its terms, this test does not provide for further analysis once a court concludes that it faces a non-alienation case. Washington judges actually faced with non-alienation cases, however, have more often than not offered public trust law analysis beyond the non-alienation question.[174]

There are two ways to understand this treatment of the test. The first is to dismiss courts' analysis beyond *Caminiti* as dicta and conclude that the State can never violate the public trust doctrine in non-alienation cases. This seems to have been the view of the majority in *Citizens*, which concluded that the state regulation at issue maintained public trust control, and rejected appellants' public trust claim on that basis.[175] A purely outcome-centered review of Washington's body of non-alienation cases points in the same direction: Despite their apparent analysis

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171. *See* State v. Heiskell, 129 Wash. 2d 113, 122, 916 P.2d 366, 370 (1996) ("Ultimately, it is not this Court's function to question the wisdom of a[] [legislative] enactment, unless a constitutional impediment is present. We will not inquire into the policies underlying a clear legislative enactment."). Though such scrutiny of legislative policy choices is more usual where constitutional protections are involved, the public trust doctrine's constitutional pedigree is debatable in Washington. *See supra* note 117.

172. *Compare, e.g.*, Citizens for Responsible Wildlife Mgmt. v. State, 124 Wash. App. 566, 575, 103 P.3d 203, 207–08 (2004) (majority opinion) (offering no scrutiny beyond first prong of *Caminiti* test) *with id*. at 578, 103 P.3d at 209 (Quinn-Brintnall, C.J. concurring) (arguing that public trust doctrine requires courts to strike down any law that would result in "unacceptably high" damage to natural resources without considering any public good that the law would accomplish).

173. Caminiti v. Boyle, 107 Wash. 2d 662, 670, 732 P.2d 989, 994–95 (1987).

174. *See supra* Part III.

175. *See supra* notes 133–137 and accompanying text.

beyond the *Caminiti* test, Washington courts considering non-alienation claims have uniformly held that the State did not violate the public trust doctrine.[176] A plausible conclusion from this trend is that no matter how negatively a state action affects the *jus publicum*, no public trust violation can occur so long as the State maintains control of the trust lands.

A closer look at *Caminiti* and Washington's non-alienation cases, however, suggests that a different understanding is better: While *Caminiti* sets the rule for alienation cases, the State also has enforceable public trust duties in non-alienation cases, and courts must address those cases with analysis beyond the *Caminiti* test.

The circumstances of *Caminiti* support such an interpretation. The *Caminiti* petitioners' public trust suit was based on their argument that the State had impermissibly given up control of public trust resources.[177] The Court agreed that it was presented with an alienation case, and developed a test that addresses alienation situations.[178] Principles of judicial minimalism suggest that in so doing, the Court was leaving the non-alienation question for later courts to answer.[179]

This understanding is consistent with most Washington courts' analyses of non-alienation cases. Neither the Washington State Supreme Court in *Weden* nor the Division II Court of Appeals in *Washington State Geoduck* let the fact that the State had maintained control over *jus publicum* settle the matter. Instead, each court also considered the positive effects of the State's challenged action.[180] Chief Judge Quinn-Brintnall took a related position in her passionate *Citizens* concurrence, arguing that courts should strike down state actions that "unacceptably" compromise the *jus publicum* regardless of whether the action had alienated the *jus publicum*.[181] The *Citizens* majority stands alone in its

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176. *See* Weden v. San Juan County, 135 Wash. 2d 678, 958 P.2d 273 (1998) (holding that San Juan County ordinance prohibiting use of motorized personal watercraft did not violate public trust doctrine); *Citizens*, 124 Wash. App. 566, 103 P.3d 203 (2004) (holding that law passed by initiative did not violate public trust doctrine by putting restrictions on the hunting and trapping of certain wild animals); Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 124 Wash. App. 441, 101 P.3d 891 (2004) (holding that Department of Natural Resources' auctioning of exclusive rights to harvest geoducks on public land did not violate public trust doctrine).

177. *Caminiti*, 107 Wash.2d at 672, 732 P.2d at 995.

178. *See id.* (holding that by enacting the statute at issue, the Legislature had given up at least some right of control over the *jus publicum*); *supra* Part II.B.

179. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at ix–xi (1999) ("A minimalist court settles the case before it, but it leaves many things undecided.").

180. *See supra* Part III.

181. *See Citizens*, 124 Wash. App. at 575–78, 103 P.3d at 208–09 (Quinn-Brintnall, C.J.,

suggestion that the *Caminiti* test is the only legal tool a Washington public trust plaintiff has.[182]

If an alienation of control under *Caminiti* were the only way in which the public trust doctrine could be violated, the doctrine would allow state action inimical to public trust values to take place without the heightened judicial scrutiny the doctrine demands. A worst-case scenario might involve a legislative boondoggle destroying public trust lands with little or no public benefit. A lake-draining or shoreline-reclamation project that was the pork equivalent of Alaska's "Bridge to Nowhere,"[183] for example, would pass the *Caminiti* test because it would not represent alienation of state control over public trust resources. Nonetheless, it is precisely the type of state action that implicates the principles undergirding the public trust doctrine—the "universally recognized need to protect public access to and use of such unique resources as navigable waters, beds, and adjacent lands."[184]

The *Caminiti* test is a pillar of Washington's public trust jurisprudence. It ensures that the *jus publicum* remains in public hands unless the State can show that a transfer will not harm the public interest. But *Caminiti* does not represent the totality of Washington's public trust doctrine. Heightened public trust scrutiny is required in non-alienation cases as well.[185] Washington's appellate courts, however, have not addressed head-on what heightened scrutiny means in those circumstances. Consequently, when a non-alienating state action

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concurring); *supra* notes 138–140 and accompanying text. Judge Quinn-Brintnall also argued that courts should strike down state action that harmed the *jus publicum* without considering the "merits of the reasons for the action or the professed needs of those supporting the use or exhaustion of the resources held in the public trust." *Id.* at 578, 103 P.3d at 209. Such uncompromising review surpasses the level of review proposed in this Comment, but speaks to a judicial recognition that the public trust doctrine should not end with the *Caminiti* test.

182. The *Citizens* majority's failure to progress beyond the alienation question is probably best explained by appellants' decision to argue at length that regulations of hunting and trapping passed by initiative were abdications of state control over the *jus publicum*. *See* Brief of Appellant at 39–41, *Citizens*, 124 Wash. App. 566, 103 P.3d 203 (No. 73739-8); Appellants' Reply at 4–10, *Citizens*, 124 Wash. App. 566, 103 P.3d 203 (No. 73739-8).

183. *See* Shailagh Murray, *For a Senate Foe of Pork Barrel Spending, Two Bridges Too Far*, WASH. POST, Oct. 21, 2005, at A8, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/.AR2005102001931.html (recounting controversy over $223 million in earmarked federal funding for the "Bridge to Nowhere"—an Alaskan bridge connecting "one small town to a tiny island").

184. Weden v. San Juan County, 135 Wash. 2d 678, 698, 958 P.2d 273, 283 (1998).

185. *See id.* (announcing "heightened degree of judicial scrutiny" standard in non-alienation case); *Citizens*, 124 Wash. App. at 570–71, 103 P.3d at 205 (same); Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 124 Wash. App. 441, 451, 101 P.3d 891, 896 (2004) (same).

implicates public trust lands or rights, trial courts have little concrete guidance.

B. What Does Public Trust Scrutiny Look Like Beyond Caminiti*? Wisconsin Suggests an Answer*

Fortunately, Wisconsin's public trust doctrine jurisprudence points the way forward for Washington courts. Compared to Washington's uncertain jurisprudence in this area, Wisconsin courts have been paragons of clarity. And while a few other states have comparably robust public trust traditions,[186] Wisconsin's jurisprudence not only most clearly addresses the non-alienation case problem, it also fits comfortably with Washington's existing jurisprudence.[187]

To reprise, the Wisconsin Supreme Court's factors for evaluating non-alienation cases are:

> (1) Whether public bodies will control the use of the area;
>
> (2) Whether the area will be devoted to public purposes and open to the public;
>
> (3) Whether the diminution of the public trust resource will be very small when compared with the whole of the resource;
>
> (4) Whether any one of the public uses of the resource will be destroyed or greatly impaired;
>
> (5) Whether the new resource use is of greater public benefit than the old.[188]

Building from these five factors would allow Washington courts to more meaningfully analyze legislation that impacts the public trust but does not represent a public trust giveaway. This Section proposes modified Wisconsin factors and argues that the proposed factors fit with Washington courts' treatment of non-alienation cases.

1. Moving From Lake Wingra to Puget Sound: A Proposed Adaptation of Wisconsin's Factors to Washington

In order to adapt the Wisconsin factors to Washington, this Comment proposes two modifications. First, some of the Wisconsin Supreme

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186. *See* Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1089 (Idaho 1983) ("Massachusetts, Wisconsin and California are the three states with the wealth of authority on the subject.").

187. *See infra* Part V.B.2.

188. *See* State v. Pub. Serv. Comm'n, 81 N.W.2d 71, 73–74 (Wis. 1957); *supra* notes 153–157 and accompanying text.

Court's factors are specifically formulated to analyze state actions that diminish lakes. Because the purpose of adopting the Wisconsin factors is to provide Washington courts with a broadly applicable analytical rubric, this narrow language should be dropped. Second, the first Wisconsin factor—involving public control over the public trust—should be dispensed with altogether as already adequately protected by *Caminiti*. This Comment does not presume to offer a replacement for the *Caminiti* test, merely a complement to it. That being the case, there is no reason for the factors to duplicate what Washington courts are already bound to consider.

With those changes made, a Washington court addressing a public trust case would first apply the *Caminiti* test, asking whether an alienation occurred. If it answered in the affirmative, the court would proceed to the second prong of the test, and decide whether the alienation had promoted, or at least not impaired, the public's interest in the *jus publicum*. If, however, the court concluded that no alienation had taken place, it would consider the following:

> (1) Whether the public trust resource will remain available to the entire public;
>
> (2) Whether, and to what extent, the state action will positively or negatively impact the public trust resource;
>
> (3) Whether any one public trust use will be destroyed or greatly impaired;
>
> (4) The overall positive public impact of the state action.

The above factors mirror to an extent the principles articulated in the second prong of the *Caminiti* test, but they are more flexible. Where the second *Caminiti* prong unequivocally forbids alienations that impair the public's interest in the *jus publicum*, the factors allow for a more nuanced approach, appropriate for situations where the State has not given up public trust control. Where the State has not transferred public trust resources to private parties the *jus publicum* is less likely to be compromised, and the State should be allowed more leeway in its decisions.

Wisconsin courts apply their factors in a way that is not unbending or exclusive, and Washington courts should use the proposed factors in the same way. Rather than being treated "as a check-list, resolving the issue in favor of whichever column has the most checks,"[189] the factors should be regarded as tools for determining the fundamental question of whether the State is adequately managing the *jus publicum* "in trust for

189. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

the people."[190] Depending on the type and magnitude of public trust concerns involved, different factors should weigh more or less heavily. Factor three, for example, would weigh much more heavily against a law that eliminated fishing (a widespread, traditional public trust use) in Puget Sound (a large and significant public trust resource) than it would against a law that eliminated water skiing (a less common, though recognized, use) on Lake Union (a smaller resource).

Currently, courts facing non-alienation cases are in the position of deciding between an ad hoc public trust analysis,[191] the second *Caminiti* prong,[192] or a total rejection of further scrutiny.[193] Adopting the proposed factors would eliminate this confusion and provide Washington courts with a structured, flexible, and tested approach to non-alienation cases.

2. The Proposed Factors Fit Well with Washington Jurisprudence and Address Important Public Trust Concerns

Though Washington's non-alienation public trust cases are few in number, a close reading reveals that Washington courts have already considered each of the proposed factors in some form. Furthermore, the factors address venerable public trust principles and will improve courts' scrutiny of legislative action in non-alienation cases, while still allowing for some flexibility in state decisions about the use of public trust resources. The following sections illustrate the factors' groundings in Washington's public trust jurisprudence and the public trust principles they address.

a. "Whether the public trust resource will remain available to the entire public"

This first factor encourages the State to maintain a public trust resource's public nature even if the resource's specific use is modified. The ongoing public character of public trust resources has long been a concern of courts in Washington and elsewhere.[194] In *Weden*, the Court remarked with approval that the San Juan County ordinance at issue left

190. Orion Corp. v. State, 109 Wash. 2d 621, 639, 747 P.2d 1062, 1072 (1987).

191. *See* Weden v. San Juan County, 135 Wash. 2d 678, 699–700, 958 P.2d 273, 283–84 (1998).

192. *See* Wash. State Geoduck Harvest Ass'n v. Wash. State Dep't of Natural Res., 124 Wash. App. 441, 452, 101 P.3d 891, 897 (2004).

193. *See* Citizens for Responsible Wildlife Mgmt. v. State, 124 Wash. App. 566, 575, 103 P.3d 203, 207 (2004).

194. *See supra* notes 21, 86–88 and accompanying text.

the county's waters "open to access by the *entire* public."[195] The *Caminiti* Court also considered this factor, noting that the law it upheld did not allow construction of private docks that inhibited public access to the *jus publicum*.[196]

b. "Whether, and to what extent, the state action will positively or negatively impact the public trust resource"

This factor speaks to the seemingly self-evident principle—unaddressed by a *Caminiti* analysis in non-alienation cases—that the continuing existence of public trust resources is a necessary component of the public's interest in them. The *Washington State Geoduck* court recognized that the State has a duty to preserve public trust resources,[197] and the *Weden* Court suggested that courts will enforce this duty, explaining that "it would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state."[198] This factor will militate in favor of state actions designed to preserve public trust resources, such as the regulations in *Weden*, *Washington State Geoduck* and *Citizens*. Conversely, it should encourage courts to take a skeptical look at any state action that would significantly harm a public trust resource, even if the State retains control.

c. "Whether any one public trust use will be destroyed or greatly impaired"

The third factor recognizes that a core component of the public trust doctrine is the public's right to use public trust resources.[199] This consideration weighed against the State in *Weden*, in that the County had prohibited a particular public use (operation of motorized personal watercraft).[200] It might also have weighed against the State in *Citizens*

195. *Weden*, 135 Wash. 2d at 699, 958 P.2d at 283–84.

196. Caminiti v. Boyle, 107 Wash. 2d 662, 674, 732 P.2d 989, 996 (1987).

197. *Wash. State Geoduck*, 124 Wash. App. at 448–49, 101 P.3d at 895 ("[T]he public trust doctrine . . . obligates the State to balance the protection of the public's right to use resources on public land with the protection of the resources that enable these activities."). The *Washington State Geoduck* court also approvingly noted that the Department of Natural Resources' regulation of geoduck harvesting facilitated natural regeneration of the resource. *Id.* at 452, P.2d at 897.

198. *Weden*, 135 Wash. 2d at 700, 958 P.2d at 284.

199. *See Caminiti*, 107 Wash. 2d at 669, 732 P.2d at 994 (recognizing that the "*jus publicum* interest" can be understood as comprising certain rights of use).

200. *Weden*, 135 Wash. 2d at 699, 958 P.2d at 283.

had the court found that the initiatives at issue went so far as to "greatly impair" Washingtonians' ability to use a public trust resource.

d. "The overall positive public impact of the state action"

The final factor allows courts to consider a state action's public benefit beyond traditional public trust concerns. This factor is undoubtedly the one that gives courts the least concrete guidance. Its inclusion is nonetheless critical in that it allows for the possibility of radical changes to public trust property. Any rule by which courts constrain government action under the public trust must be formulated such that it does not unalterably trap Washington in a particular configuration of policy judgments as to what the public good is.[201] It is the public trust doctrine's flexibility that has allowed it to remain vibrant despite constant societal change.[202] Even in situations where a state's action might eliminate a public trust resource altogether, a showing of sufficient public benefit under the fourth factor might allow a court to rule in favor of the State,[203] though the State would bear a heavy burden.

CONCLUSION

The non-alienation test developed by the Washington State Supreme Court in *Caminiti* is too narrow to fully inform court action in all situations where the public trust is implicated. Washington courts have taken tentative steps in applying the public trust doctrine where the State has not given up control over the *jus publicum*, but they need to be more explicit about what they are doing. Clearer law in this area would help courts, legislators, and agencies more accurately evaluate the constraints the public trust doctrine puts on state action. Wisconsin's well-developed public trust law supplies a formula that both comports with Washington's muddy jurisprudence, and is also "as close as judicial statement has to a specific enumeration of a set of rules for implementation of the public trust doctrine."[204] Washington should follow Wisconsin's lead.

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201. *See supra* note 146 and accompanying text.

202. *See supra* notes 31–36 and accompanying text; *cf.* Orion Corp. v. State, 109 Wash. 2d 621, 640–41, 747 P.2d 1062, 1073 (1987) ("Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.").

203. Though critical of the Wisconsin factors for their vagueness, Professor Cohen suggested that the test is most charitably understood, and most substantively correct, when the final factor is "decisive." *See* Cohen, *supra* note 168, at 269.

204. *See* Sax, *supra* note 10, at 517.