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Enjoys Long Walks on the Beach: Washington's Public Trust Doctrine and the Right of Pedestrian Passage over Private Tidelands

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ENJOYS LONG WALKS ON THE BEACH: WASHINGTON'S PUBLIC TRUST DOCTRINE AND THE RIGHT OF PEDESTRIAN PASSAGE OVER PRIVATE TIDELANDS

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Abstract: Under Washington's public trust doctrine, the state retains a *jus publicum* interest in tidelands, regardless of ownership. This interest obligates the state to protect the public rights encompassed within the *jus publicum*: navigation, fishing, boating, swimming, water skiing, and corollary recreational activities. The state satisfies this duty so long as its actions do not circumscribe public access to those resources, including tidelands, traditionally protected by the public trust doctrine. The title to any tidelands property sold into private ownership is similarly burdened; a private tidelands owner may not utilize property in a way that would compromise the state's *jus publicum* interest and public rights protected thereby. This Comment argues that Washington's public trust doctrine encompasses a public right of pedestrian passage over unsubmerged private tidelands, at least where necessary to realize those *jus publicum* rights previously recognized by the judiciary. Judicial acknowledgment of such a right is a logical extension of the Washington State Supreme Court's holding in *Caminiti v. Boyle* that private construction on state tidelands does not impair the *jus publicum* where the private property owner permits public pedestrian passage as necessary to effectuate public trust rights. Furthermore, recognition of a right of public access to private tidelands harmonizes Washington's public trust doctrine with that of other states that also recognize the Institutes of Justinian as an ancient source of public trust principles. Finally, the state legislature's repeated identification of a dearth of public recreational access to tidelands also supports this premise, as the scope of Washington's public trust doctrine is shaped by the needs of the state's citizens.

Two Washington residents decide to go fishing, one on foot and the other by boat.[1] The first individual accesses state-owned tidelands within a state park, but then continues walking beyond the state park boundary until he reaches a promising location on unsubmerged, privately-owned tidelands from which to cast his line. The second individual launches his boat from the state park and then tries his luck while floating over the same private tidelands on which the first fisherman stands just a few feet away. The owner of the tidelands, incensed by the presence of these strangers on his property, calls the police. Both individuals inform the arriving officer that the public trust doctrine protects the public right of fishing from both tidelands and tidewaters, regardless of the tidelands' private ownership. Yet, under the holding of a recent unpublished

1. Hypothetical created by the author.

decision from the Washington State Court of Appeals,[2] the officer would allow the second individual to continue fishing from his boat but arrest the first individual traveling on foot for trespass.

The majority of tidelands within Washington State are privately owned. Washington entered the Union with ownership of all tidelands within its borders up to and including the line of ordinary high tide, with the exception of those areas previously reserved by the federal government.[3] The Washington Constitution, while establishing state ownership of the state's 2337 miles of tidelands,[4] provides no guidance as to their management. Intent on encouraging development, the state transferred sixty-one percent of its tidelands into private ownership between 1890 and 1979.[5] A recent study estimates that approximately seventy-three percent of the Puget Sound coastline is currently in private ownership.[6] Yet approximately two-thirds of Washington's population lives in the counties bordering Puget Sound, with some eighty-five percent of this subpopulation residing within ten miles of the Puget Sound shoreline.[7]

In 1987, the Supreme Court of Washington—perhaps responding to the extensive transfer of tidelands into private ownership during the previous century—declared in *Caminiti v. Boyle*[8] "that the [public trust] doctrine has always existed in the State of Washington."[9] Regardless of actual ownership, Washington retains sovereignty and dominion over all

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2. City of Bainbridge Island v. Brennan, No. 31816-4-II, 2005 Wash. App. LEXIS 1744, at *63 (Wash. Ct. App. July 20, 2005), *review denied*, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006). See *infra* notes 115–121 and accompanying text for an explanation of the error underlying this holding.

3. WASH. CONST. art. XVII, §§ 1–2; *see also infra* notes 53–60 and accompanying text.

4. WASH. CONST. art. XVII, § 1; *see* WASH. STATE DEP'T OF ECOLOGY, PUBL'N NO. 00-06-029, MANAGING WASHINGTON'S COAST: WASHINGTON STATE'S COASTAL ZONE MANAGEMENT PROGRAM 21 (2001), *available at* http://www.ecy.wa.gov/pubs/0006029.pdf.

5. Kenan R. Conte, The Disposition of Tidelands and Shorelands, Washington State Policy 1889–1982, at 55–56 (Dec. 7, 1982) (unpublished M.P.A. thesis, The Evergreen State College) (on file with The Evergreen State College); *see also* JAMES W. SCOTT, WASH. STATE DEP'T OF ECOLOGY, AN EVALUATION OF PUBLIC ACCESS TO WASHINGTON'S SHORELINES SINCE PASSAGE OF THE SHORELINE MANAGEMENT ACT OF 1971, at 10 (1983) (estimating that forty-five percent of the saltwater shoreline remains in public ownership).

6. THE TRUST FOR PUBLIC LAND, PUGET SOUND SHORELINE STRATEGY: A CONSERVATION VISION FOR PUGET SOUND 14 (2005), http://www.tpl.org/content_documents/puget_sound_shoreline_screen.pdf.

7. *Id.* at 10.

8. 107 Wash. 2d 662, 732 P.2d 989 (1987).

9. *Id.* at 670, 732 P.2d at 994.

tidelands within its borders.[10] This public property interest, known as the *jus publicum*, requires the state to protect public access to resources and activities encompassed by the public trust doctrine.[11] Specifically, the state must protect "the right 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'"[12] The state's *jus publicum* interest in effect limits the property rights conveyed with the title to any Washington tidelands, preventing private owners from substantially impairing protected public rights in any way.[13]

This Comment argues that the public trust doctrine in Washington encompasses public access to private tidelands, at least where pedestrian passage is necessary to effectuate currently protected *jus publicum* rights. The Supreme Court of Washington's opinion in *Caminiti* strongly suggests that where private ownership obstructs public access to resources protected by the public trust doctrine, the *jus publicum* is impermissibly impaired if the owner does not in some way allow pedestrian passage across the impeding property.[14] Judicial protection of public access to private tidelands is also consistent with the scope of the doctrine in states that, like Washington, recognize the Institutes of Justinian as a source of public trust principles.[15] Furthermore, the courts have recognized that application of the Washington public trust doctrine must be responsive to the needs of its citizens.[16] The Washington Legislature, the arbiter of public need, has enacted legislation to correct a perceived deficiency in recreational access to tidelands.[17]

Part I of this Comment establishes that the public trust doctrine protects all tidelands within Washington State and examines the responsibilities this doctrine imposes upon both the state and private

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10. *Id.* at 669, 732 P.2d at 994.

11. *Id.* at 668–70, 732 P.2d at 994.

12. *Id.* at 669, 732 P.2d at 994 (quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969)).

13. Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072–73 (1987) (observing that "[t]he public trust doctrine resembles 'a covenant running with the land . . . for the benefit of the public'" (quoting Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986))).

14. *See infra* Parts I.A.3, IV.A.

15. *See infra* Part II.

16. *Orion*, 109 Wash. 2d at 640–41, 747 P.2d at 1073.

17. See *infra* Part III for a discussion of the significance of the Shoreline Management Act (SMA), the Seashore Conservation Act (SCA), and the Aquatic Lands Act (ALA).

tidelands owners. Part II discusses the relationship between judicial recognition of public access to private tidelands and judicial recognition of the Institutes of Justinian as an ancient codification of public trust principles. Part III examines the role of the Washington Legislature in determining the scope of the public trust doctrine. Finally, Part IV argues that the public trust doctrine in Washington encompasses a public right to pedestrian passage over private tidelands, at least where such access is required to effectuate uses already judicially recognized as protected by the public trust.

I. THE PUBLIC TRUST DOCTRINE PROTECTS WASHINGTON'S TIDELANDS

Although vested with ownership of most tidelands within its borders upon entry into the Union, Washington has since sold the majority of this valuable property into private ownership.[18] Under the public trust doctrine, the title to any tidelands consists of two separable interests—the *jus privatum* and the *jus publicum*. Although Washington may sell the *jus privatum* interest in the title into private ownership, the state retains a *jus publicum* interest in any such property, regardless of the identity of the titleholder.[19] Federal case law—later adopted explicitly by the Washington State Supreme Court[20]—suggests that a state may not cede all control of the *jus publicum*.[21] Furthermore, under its own case law, the *jus publicum* interest obligates Washington State to protect the public rights encompassed within the public trust doctrine: "the right 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'"[22] The state satisfies this duty so long as it either: (1) promotes the overall public interest in the *jus publicum*; or (2) does not substantially circumscribe public access to resources, including

18. *See* Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 552–53 (1992) (citing Conte, *supra* note 5, at 55–56).

19. Caminiti v. Boyle, 107 Wash. 2d 662, 668–70, 732 P.2d 989, 993–94 (1987).

20. *See id.* at 670, 732 P.2d at 994–95; *see also infra* notes 62–66 and accompanying text.

21. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (holding that the Illinois Legislature lacked authority to grant the Illinois Central Railroad title in the lands underlying most of the Chicago waterfront on Lake Michigan).

22. *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)).

tidelands, protected under the *jus publicum*.[23] Similarly, the public trust doctrine also burdens the title to tidelands transferred into private ownership.[24] A private tidelands owner thus may not undertake any property usage that would substantially compromise the state's *jus publicum* interest and public rights protected thereby.[25]

A. *Judicial Interpretation of the Public Trust Doctrine Prohibits the State of Washington from Ceding Control of Its* Jus Publicum *Interest in Tidelands*

Each state holds in trust for the benefit of its people an interest in any property protected by the public trust doctrine.[26] Although federal case law may prohibit a state from entirely ceding control of this trust,[27] each state determines the scope of public rights protected thereby.[28] Under Washington's public trust doctrine, the state may not cede its *jus publicum* interest in any individual parcel unless doing so either promotes or does not substantially impair the public rights protected thereby:[29] navigation, fishing, boating, swimming, water skiing, "and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."[30] Washington case law

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23. *See* Weden v. San Juan County, 135 Wash. 2d 678, 698–99, 958 P.2d 273, 283 (1998); *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994-95; 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).

24. *See* Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072–73 (1987) (quoting Reed, *supra* note 13, at 118).

25. *See Orion*, 109 Wash. 2d at 640, 747 P.2d at 1073 (holding under the public trust doctrine that a developer never possessed the right to fill and dredge navigable tidelands); *see also* Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 986–87 (9th Cir. 2002) (holding under Washington law that denial of a developer's application to construct homes over Puget Sound tidelands did not constitute a regulatory taking because such construction was inconsistent with public trust principles); *Wilbour*, 77 Wash. 2d at 316, 462 P.2d at 239 (ordering the owners of littoral property to remove fills that prevented annual submergence of their shoreline and thus impeded their neighbors' access to the adjoining lake).

26. *Ill. Cent.*, 146 U.S. at 435.

27. *Id.* at 452–53.

28. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) (noting that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit"); Shively v. Bowlby, 152 U.S. 1, 26 (1894) ("[E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy . . . . Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.").

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

30. *Id.* at 669, 732 P.2d at 994 (quoting *Wilbour*, 77 Wash. 2d at 316, 462 P.2d at 239).

further establishes that so long as state regulation either promotes or does not circumscribe public access to protected resources, the state has not ceded control over the *jus publicum*.[31]

1. *Federal Case Law Suggests that No State May Cede All Control over its Tidelands, but that Individual Parcels May Sometimes Be Transferred into Private Ownership*

The United States inherited the public trust doctrine from English common law,[32] whereby the Crown retained an interest in the nation's ports, seas, and navigable rivers for the benefit of the people.[33] Early U.S. Supreme Court decisions developing American public trust doctrine explicitly referred to Lord Hale's treatises on the foreshore and adopted his concepts of the *jus privatum* and *jus publicum*.[34] Discussing the Crown's "right of propriety or ownership in the sea and soil thereof,"[35] Lord Hale explained:

> But though the king is the owner of this great wast, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof . . . .[36]

Although tidelands belonged prima facie to the Crown, they could also belong to a subject, as where transferred by the king through charter or grant.[37] But even upon such transfer of title,

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31. *See* Weden v. San Juan County, 135 Wash. 2d 678, 699, 958 P.2d 273, 283–84 (1998) (holding that San Juan County did not cede control of the public trust by banning use of motorized personal watercraft because the regulated waters remained accessible to all individuals); *Caminiti*, 107 Wash. 2d at 674, 732 P.2d at 996 (holding that a statutory provision eliminating fees for construction and maintenance of private docks on state tidelands did not interfere with public access to affected tidelands because a regulation required that the public "be able to get around, under or over" the docks); 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) (holding that the state did not cede control of the public trust by regulating commercial geoduck harvesting because such regulation promoted regeneration of this resource).

32. *See Shively*, 152 U.S. at 14.

33. *See id.* at 11–13.

34. *See, e.g., id.* at 11, 12; Martin v. Waddell, 41 U.S. 367, 412, 16 Pet. 234, 264 (1842).

35. Sir Matthew Hale, *De Jure Maris*, *in* A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 376 (Stuart A. Moore ed., 3d ed., 1888).

36. *Id.* at 377.

37. *Id.* at 379, 384.

> the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or damnified.[38]

The U.S. Supreme Court summarized the public trust doctrine under English common law in *Shively v. Bowlby*:[39] (1) "the title, *jus privatum*, in [tidelands] . . . belongs to the King as the sovereign"; and (2) "the dominion thereof, *jus publicum*, is vested in him as the representative of the nation and for the public benefit."[40]

American public trust doctrine at its most basic level constitutes "a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[41] Yet each state is otherwise free to individually determine the lands and rights protected under the *jus publicum*.[42] Although the reach of the public trust doctrine must therefore be determined independently for each state, early federal case law reveals several overarching principles.[43]

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38. *Id.* at 404–05.

39. 152 U.S. 1 (1894).

40. *Id.* at 11.

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

42. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988) (noting that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit"); *Shively*, 152 U.S. at 26 ("[E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy . . . . Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.").

43. Commentators disagree as to whether *Illinois Central*, 146 U.S. 387, establishes a federal basis for the public trust doctrine. *See, e.g.*, 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, 803 (2004) (questioning whether the holding of *Illinois Central* rests on federal or state law); 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 U.C.L.A. L. Rev. 385, 396 n.39 (1997) (discussing the uncertainty). In fact, the U.S. Supreme Court itself later noted with respect to its decision in *Illinois Central* that "the conclusion reached was necessarily a statement of Illinois law." *Appleby v. City of New York*, 271 U.S. 364, 395 (1926). Although this is true in that each state independently determines the scope of the public trust doctrine, the words of the U.S. Supreme Court in *Illinois Central* nonetheless indicate that certain public trust principles transcend state borders:

> It is the *settled law of this country* that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective

Most significantly, *Illinois Central Railroad Co. v. Illinois*[44] suggests that no state may entirely cede control of the *jus publicum*. In this seminal public trust decision, the U.S. Supreme Court held that the Illinois Legislature lacked authority to grant to the railroad both "ownership and control" of the submerged lands underlying most of the Chicago waterfront on Lake Michigan.[45] Although the terms of the sale prohibited the railroad from impairing the public right of navigation, the transfer nonetheless deprived the state of any meaningful control over development of this important harbor.[46] The Court declared that

> [t]he State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.[47]

In so holding, the Court enunciated the general rule that with respect to the lands beneath navigable waters, "control of the State for the purposes of the [public] trust can never be lost."[48] It further found exceptions to this general rule for only two property categories: (1) "such parcels as are used in promoting the interests of the public therein," and (2) "such parcels as . . . can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[49] Thus, the *Illinois Central* opinion suggests that no state may transfer into private ownership individual tidelands parcels unless

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States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . . .

146 U.S. at 435 (emphasis added). *See also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970) ("The Court's decision [in *Illinois Central*] makes sense only because the Court determined that the *states* have special regulatory obligations over shorelands . . . ." (emphasis added)). Ultimately, however, whether *Illinois Central* establishes federal underpinnings for the public trust doctrine is here moot because the Washington State Supreme Court has explicitly adopted the *Illinois Central* standard. Caminiti v. Boyle, 107 Wash. 2d 662, 670, 732 P.2d 989, 994–95 (1987); *see also infra* notes 62–66 and accompanying text.

44. 146 U.S. 387 (1892).

45. *See id.* at 460.

46. *Id.* at 450–51.

47. *Id.* at 453.

48. *Id.* In discussing the public trust obligations of the states, the Court referred specifically to "lands under the navigable waters of an entire harbor or bay, or of a sea or lake." *Id.* at 452–53.

49. *Id.* at 453.

such transfer either promotes the public interest in that same property or does not substantially impair public interest in remaining public trust lands.[50] Subsequent to its decision in *Illinois Central*, the Court held that New York lost its authority to regulate navigation over two Hudson River lots sold under condition that the private owner construct bulkheads, wharves, and streets upon request.[51] Similarly, the Court affirmed Oregon's ability to sell tidelands into private ownership under conditions that encouraged expensive improvements necessary to prevent ongoing shore erosion and harbor shoaling.[52]

2. *Washington State Retains the* Jus Publicum *Interest in All Tidelands Property Transferred into Private Ownership*

Upon its admission into statehood in 1889, the equal footing doctrine vested Washington with title to its tidelands.[53] Each state receives title to the tidelands within its borders upon entry into the Union.[54] For states formed from the original thirteen colonies, such title can be traced to royal charters;[55] the equal footing doctrine ensures that states subsequently admitted into the Union similarly receive title to the tidelands within their borders.[56] The U.S. Supreme Court reaffirmed in its most recent public trust case that "all lands under waters subject to the ebb and flow of the tide"—regardless of actual navigability—became property of each respective State upon its entry into the Union.[57]

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50. *Id.*

51. Appleby v. City of New York, 271 U.S. 364, 368, 396–99 (1926).

52. Shively v. Bowlby, 152 U.S. 1, 52–57 (1894). Oregon today recognizes, on the basis of both custom and usage, a public right to use not only tidelands, much of which are owned by the State of Oregon, but also any dry sand area—that portion of the beach between the tidelands and the visible line of vegetation. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 672–73, 675–77 (Or. 1969).

53. Act of Feb. 22, 1889, ch. 180, § 8, 25 Stat. 676, 678–79 (providing that upon compliance with all requirements therein, Washington "shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States"); *see also* Pollard's Lessee v. Hagan, 44 U.S. 212, 230, 3 How. 238, 259 (1845).

54. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988); *see also* Brace & Hergert Mill Co. v. State, 49 Wash. 326, 332, 95 P. 278, 281 (1908) ("This is founded on the principle that the shores and beds of all bodies of water, whether navigable or unnavigable, belong to the state on which they are situate . . . .").

55. *Shively*, 152 U.S. at 48–49 (quoting Martin v. Waddell, 41 U.S. 367, 409–11, 16 Pet. 234, 262–64 (1842)).

56. *See Pollard's Lessee*, 44 U.S. at 230, 3 How. at 259.

57. *Phillips*, 484 U.S. at 476.

In addition, the Washington Constitution independently provides the state with title to tidelands as well as to the land beneath all navigable waters:

> The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes . . . .[58]

Thus, with the exception of such lands previously reserved by the federal government,[59] Washington entered the Union with ownership of all tidelands up to the line of ordinary high tide.[60]

The Supreme Court of Washington, following extensive review of the state's case law, declared in 1987 in *Caminiti* that "the [public trust] doctrine has always existed in the State of Washington"[61] and explicitly adopted the test enunciated by the U.S. Supreme Court in *Illinois Central*.[62] Washington's title to tidelands and shorelands consists of both *jus privatum* and *jus publicum* interests; the public trust doctrine dictates that the state may transfer into private ownership only its interest in the *jus privatum*.[63] Thus, "sovereignty and dominion over this state's tidelands and shorelands, as distinguished from *title*, always remains [sic] in the State, and the State holds such dominion in trust for the public."[64] Following *Illinois Central*,[65] Washington courts look to the

58. WASH. CONST. art. XVII, § 1.

59. *Id.* § 2.

60. *See* Harkins v. Del Pozzi, 50 Wash. 2d 237, 240, 310 P.2d 532, 535 (1957); Brace & Hergert Mill Co. v. State, 49 Wash. 326, 331, 95 P. 278, 280 (1908) (collecting cases). The Supreme Court of Washington has since defined the line of ordinary high tide as "the average of all high tides during the tidal cycle." Hughes v. State, 67 Wash. 2d 799, 810, 410 P.2d 20, 26 (1966), *rev'd on other grounds*, 389 U.S. 290 (1967).

61. Caminiti v. Boyle, 107 Wash. 2d 663, 670, 732 P.2d 989, 994 (1987). In accordance with federal case law, the court has also explicitly stated that "[it] look[s] *solely* to Washington law to determine whether the public trust doctrine provides the general public with [a] right," thus insulating its public trust decisions from those of sister courts in other states. State v. Longshore, 141 Wash. 2d 414, 428, 5 P.3d 1256, 1263 (2000) (emphasis in original); *see also supra* note 42 and accompanying text (describing federal case law). Yet this pronouncement has not prevented the court, when deciding the scope of the public trust doctrine in Washington, from considering the scope of this doctrine in other states. *See* Orion Corp. v. State, 109 Wash. 2d 621, 641 n.10, 747 P.2d 1062, 1073 n.10 (1987); Wilbour v. Gallagher, 77 Wash. 2d 306, 316 n.12, 462 P.2d 232, 239 n.12 (1969).

62. *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994–95; *see supra* text accompanying notes 48–50.

63. *Id.* at 668–69, 732 P.2d at 993–94.

64. *Id.* at 669, 732 P.2d at 994 (emphasis in original).

following two factors in determining whether a legislative act violates the public trust doctrine: "(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."[66]

Beyond the minimum established in *Illinois Central*, states may further define the characteristics of their own public trust doctrine;[67] Washington explicitly protects not only the public's interest in waters subject to tidal influence, but also to the lands beneath such waters. In *Caminiti*, the Supreme Court of Washington analyzed the public's "overriding interest in navigable waterways *and lands under them*."[68] It has since referred to "public ownership interests in certain uses of navigable waters *and underlying lands*,"[69] and to "a public property interest, the jus publicum, in *tidelands* and the waters flowing over them, despite the sale of these lands into private ownership."[70]

3. *Regulation of Public Trust Resources Does Not Cede the State's Control Over the* Jus Publicum *if It Either Promotes or Does Not Circumscribe Public Access to the Regulated Resources*

The State of Washington does not cede control over the *jus publicum* when it promotes public access to tidelands. The Washington State Supreme Court held in *Caminiti* that a provision of the Aquatic Lands Act[71] eliminating fees for the installation and maintenance of private recreational docks on state tidelands did not violate the public trust doctrine.[72] Enactment of this provision[73] changed state practice by allowing owners of private residential property abutting state-owned

65. *See supra* text accompanying notes 48–49.

66. *Caminiti*, 107 Wash. 2d at 670, 732 P.2d at 994–95.

67. *See supra* notes 41–43 and accompanying text.

68. *Caminiti*, 107 Wash. 2d at 668, 732 P.2d at 994 (emphasis added).

69. Weden v. San Juan County, 135 Wash. 2d 678, 698, 958 P.2d 273, 283 (1998) (emphasis added) (quoting Johnson, *supra* note 18, at 524).

70. *Id.* (emphasis added).

71. The provision challenged in *Caminiti* was codified at the time of suit at WASH. REV. CODE § 79.90.105 (1983). The current version of this provision—amended to specify the abutting property owner's rights in the event that the state desires to lease or sell the adjoining tidelands—was recodified at WASH. REV. CODE § 79.105.430(1) (2006). The Aquatic Lands Act (ALA) is now found at WASH. REV. CODE chs. 79.105–140 (2006).

72. *Caminiti*, 107 Wash. 2d at 675, 732 P.2d at 997.

73. 1983 Wash. 2d Ex. Sess. Laws 2159–60 (codified at WASH. REV. CODE § 79.105.430).

tidelands to build private recreational docks on the adjacent state tidelands without paying compensation to the state.[74] The provision does not convey title to any of the state-owned tidelands into private ownership, but merely confers a revocable license to construct and maintain a private dock.[75] Use of any private docks so constructed is limited to recreational purposes, and is further subject to both state and local regulation.[76] In holding that this statute does not violate but rather advances some of the interests of the public trust doctrine—"albeit to a limited degree"—the court observed that the docks would improve recreational access to tidal waters by these property owners and their guests.[77] Private investment in such docks would thus contribute, at least to some extent, to increasing usage of tidal waters.[78]

The state also does not cede control over the *jus publicum* where it acts to protect tidelands through restriction of particular uses, at least so long as public access to tidelands is not impaired. To the contrary, Washington courts generally find that such regulations increase, rather than decrease, state control of the *jus publicum*. Thus, San Juan County did not cede control of public trust waters by enacting an ordinance banning use of motorized personal watercraft.[79] There, the court stressed that the regulated waters remained accessible to all individuals.[80] Similarly, state regulation of commercial geoduck harvesting protects the public interest by ensuring continuation of geoduck resources.[81] And while no judicial determination has yet squarely addressed whether the Washington public trust doctrine encompasses wildlife, state regulation of hunting and trapping practices increases state control over this potential public trust resource.[82]

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74. *Caminiti*, 107 Wash. 2d at 664–65, 732 P.2d at 991–92.

75. *Id.* at 672–73, 732 P.2d at 995–96.

76. *Id.*

77. *See id.* at 673–74, 732 P.2d at 996.

78. *See id.*

79. Weden v. San Juan County, 135 Wash. 2d 678, 699, 958 P.2d 273, 283 (1998).

80. *Id.* at 699, 958 P.2d at 283–84 ("Although the Ordinance prohibits a particular form of recreation, the waters are open to access by the *entire* public, including owners of [personal watercraft] who utilize some other method of recreation.").

81. 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) ("The public trust doctrine . . . protects the public right to recreation, commerce, and commercial fishing, all of which are bolstered by the state's system of facilitating sustainable geoduck harvesting and natural regeneration of the resource.").

82. Citizens for Responsible Wildlife Mgmt. v. State, 124 Wash. App. 566, 575, 103 P.3d 203, 207–08 (2004).

B. *The Public Trust Doctrine Burdens the Title to Tidelands Transferred into Private Ownership*

The Supreme Court of Washington has compared the *jus publicum* to "a covenant running with the land . . . for the benefit of the public."[83] This limitation on the rights conveyed with titles of Washington tidelands bars their private owners from undertaking activities that compromise the *jus publicum*. In fact, even prior to officially recognizing the public trust doctrine, the court had indicated that the property rights accompanying land covered by navigable water were circumscribed.[84] In *Wilbour v. Gallagher*,[85] the court required littoral property owners to remove fills that prevented submergence of their shoreline and thus impeded their neighbors' access to the adjoining lake.[86] The property at issue bordered Lake Chelan, whose level is raised and lowered annually to allow generation of hydroelectric power.[87] Neighbors had long used the waters that, at peak levels, covered the defendants' property for such recreational activities as fishing, boating, and swimming.[88] Attempting to prevent the annual submergence of their property that allowed such use, the defendants erected fills to a height five feet above the maximum lake level.[89] Comparing the situation to that of a naturally fluctuating lake, the court held that "the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands."[90] The court thus ordered the fills removed because they obstructed public navigation.[91]

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83. Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072–73 (1987) (quoting Reed, *supra* note 13, at 118).

84. Wilbour v. Gallagher, 77 Wash. 2d 306, 315, 462 P.2d 232, 238 (1969) ("As the level [of the water] rises, . . . the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights."). Although *Wilbour* predates judicial recognition of the public trust doctrine in Washington, the scope of activities declared protected by the *jus publicum* in *Caminiti* is in fact taken from *Wilbour*. *See* Caminiti v. Boyle, 107 Wash. 2d 662, 669, 732 P.2d 989, 994 (1987).

85. 77 Wash. 2d 306, 462 P.2d 232 (1969).

86. *Id.* at 316, 462 P.2d at 239.

87. For information about the Lake Chelan hydroelectric project, see http://www.chelanpud.org/lake-chelan-hydro-project.html (last visited Oct. 10, 2006). For information about Lake Chelan levels, see http://www.chelanpud.org/lake-chelan-lake-levels.html (last visited Oct. 10, 2006).

88. *Wilbour*, 77 Wash. 2d at 312, 462 P.2d at 236.

89. *Id.* at 309, 462 P.2d at 234–35.

90. *Id.* at 315–16, 462 P.2d at 238. The court went on to state that the property owners were nonetheless "entitled to keep trespassers off their land" during the months the lake was lowered. *Id.*

The Washington State Supreme Court has since explicitly affirmed that the property rights of private tidelands owners are limited by the public trust doctrine. In *Orion Corp. v. State*,[92] the court held that a developer never possessed the right to dredge and fill navigable tidelands in Padilla Bay.[93] Orion Corporation, the purchaser of 5600 acres of tidelands in this Puget Sound estuary, sued the state for inverse condemnation after regulations enacted pursuant to the Shoreline Management Act[94] allegedly prevented both its planned construction of a Venetian-style development and reclamation of the land for farming.[95] The court held that Orion's purchase of the Padilla Bay tidelands was subject to the public trust.[96] As a consequence, Orion could not use its property in any way that would "substantially impair" public trust rights.[97] The regulations thus did not effect a taking so long as they only denied uses barred by the public trust doctrine.[98] In particular, the court held that dredging and filling of privately owned tidelands was inconsistent with public trust principles because navigation, fishing, and associated public trust rights would be substantially impaired.[99]

Conversely, private construction on state tidelands does not impair the *jus publicum* where the private property owner permits public pedestrian

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Note that if the public trust doctrine in fact encompasses a public right to walk across unsubmerged private tidelands and shorelands, then an individual indulging in such activity would not in fact be trespassing. Furthermore, the Supreme Court of Washington recently reserved as open the question of "whether and under what circumstances the public has a right to enter upon or cross over private tidelands on foot," indicating that its decision in *Wilbour* does not provide an answer to this question. State v. Longshore, 141 Wash. 2d 414, 429 n.9, 5 P.3d 1256, 1263 n.9 (2000).

91. *Wilbour*, 77 Wash. 2d at 318, 462 P.2d at 237.

92. 109 Wash. 2d 621, 747 P.2d 1062 (1987).

93. *Id.* at 641, 747 P.2d at 1073.

94. WASH. REV. CODE ch. 90.58 (2006).

95. *Orion*, 109 Wash. 2d at 626–30, 747 P.2d at 1065–67.

96. *Id.* at 659, 747 P.2d at 1082–83.

97. *Id.* at 641, 747 P.2d at 1073.

98. *See id.* at 660, 747 P.2d at 1083.

99. *Id.* at 641, 747 P.2d at 1073; *accord* Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 986–87 (9th Cir. 2002) (holding under Washington law that denial of a developer's application to construct homes over Puget Sound tidelands below Magnolia bluff did not constitute a regulatory taking because such construction was inconsistent with public trust principles).

Note that Seattle reclaimed the extensive tideflats of Elliott Bay through such filling during the late nineteenth and early twentieth centuries. *See generally* Seattle Central Waterfront Tour, Part 1: Overview, http://www.historylink.org/essays/output.cfm?file_id=7072 (last visited Sept. 19, 2006). Art. XV, sec. 3 of the Washington Constitution specifically reserves to municipal corporations the right to extend streets over the tidelands in navigable city harbors and bays.

passage necessary for the purpose of effectuating public trust rights.[100] Specifically, the Supreme Court of Washington held in *Caminiti* that a provision of the Aquatic Lands Act eliminating fees for construction and maintenance of private docks on state tidelands did not violate the public trust doctrine.[101] In finding that the *jus publicum* was not substantially impaired, the court specifically cited to a state administrative regulation[102] requiring that the owners of such docks provide public pedestrian access over, under, or around these structures.[103] The court's opinion thus suggests that private docks on state tidelands do not run afoul of the public trust doctrine where they do not impair public access to state tidelands.[104]

The scope of permissible public activity on private tidelands is not, however, limitless. Specifically, the Washington State Supreme Court has held one activity—the taking of shellfish from private tidelands—to be outside the scope of the *jus publicum*.[105] In *State v. Longshore*,[106] the defendant removed naturally occurring clams from privately owned tidelands.[107] On appeal from a conviction for second-degree theft, the defendant asserted that such clams constitute a public trust resource and thus could not be privately owned.[108] The court rejected this argument, holding that the unauthorized taking of naturally occurring clams from private tideland property constitutes theft.[109]

The Supreme Court of Washington has yet to squarely address the existence of a public right of passage over unsubmerged private tidelands.[110] That the *jus publicum* in Washington does not encompass

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100. *See* Caminiti v. Boyle, 107 Wash. 2d 662, 667, 732 P.2d 989, 996 (1987).

101. *Id.* at 675, 732 P.2d at 997; *see supra* text accompanying notes 72–78.

102. WASH. ADMIN. CODE 332-30-144(4)(d) (2005) provides: "Owners of docks located on state-owned tidelands or shorelands must provide a safe, convenient, and clearly available means of pedestrian access over, around, or under the dock at all tide levels."

103. *Caminiti*, 107 Wash. 2d at 674, 732 P.2d at 996 ("[T]he public must be able to get around, under or *over* [the private docks]." (emphasis added)).

104. *See id.*

105. State v. Longshore, 141 Wash. 2d 414, 429, 5 P.3d 1256, 1263 (2000).

106. 141 Wash. 2d 414, 5 P.3d 1256 (2000).

107. *Id.* at 417–18, 5 P.3d at 1258.

108. *Id.* at 419–20, 427, 5 P.3d at 1259, 1262.

109. *Id.* at 429, 5 P.3d at 1263.

110. Note that recognition and enforcement under the public trust doctrine of a public right of access to private tidelands would not constitute a taking under either state or federal law. The right to exclude others is admittedly a "fundamental attribute of property ownership." Guimont v. Clarke, 121 Wash. 2d 586, 602, 854 P.2d 1, 10 (1993). But where a property right is denied, the state can

the right to take shellfish from private tidelands, however, has no bearing on this issue. Although the court held in *Longshore* that an unauthorized taking of naturally occurring clams from private property constitutes theft,[111] it explicitly noted that its decision did not reach the question of public access to private tidelands.[112] Furthermore, the court's decision rested in large part on the state legislature's specific exemption of shellfish from the definition of wildlife in RCW 77.08.010(16).[113] Washington case law in fact strongly suggests that both wild and seeded shellfish, at least if slow-moving, constitute either real or personal property.[114] The Washington public trust doctrine, while burdening tidelands with the right of public access for fishing, navigation, and recreational activities, has never sanctioned a taking of tangible private property.

Although the Supreme Court of Washington has yet to squarely address the issue, Division II of the Washington State Court of Appeals

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nonetheless rebut the presumption of a taking under the Washington Constitution by demonstrating that the property owner never possessed the right under state law to engage in the desired activity. *Id.* Succinctly stated, "a 'property right must exist before it can be taken.'" Orion Corp. v. State, 109 Wash. 2d 621, 641–42, 747 P.2d 1062, 1073 (1987) (quoting Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 456 (1974)); *see also* Granite Beach Holdings, L.L.C. v. State *ex rel.* Dep't of Natural Res., 103 Wash. App. 186, 205, 11 P.3d 847, 858 (2000) ("There can be no inverse condemnation if no property right exists."). Similarly, the U.S. Supreme Court held that confiscatory regulations do not constitute a taking under the U.S. Constitution where the limitation effected already "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992); *see also* Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, at *6–7 (R.I. Super. Ct. July 5, 2005) (holding under *Lucas* that the public trust doctrine constitutes a background principle of state law limiting plaintiff's takings claim).

The public trust doctrine burdens the title to any privately owned tidelands in Washington, and thus bars such a property owner from engaging in any property use that substantially impairs public rights within the scope of the *jus publicum*. *See supra* text accompanying notes 84–99. Accordingly, courts have twice held under Washington law that the title possessed by a private tidelands owner simply does not encompass the right to dredge and fill the property, and that regulations prohibiting such a right thus do not effect a taking. *See supra* note 99 and accompanying text. Similarly, if the public trust doctrine encompasses a public right of access to private tidelands, then the title possessed by a private tidelands owner never included the right to exclude individuals from such property; a right of exclusion would substantially impair the *jus publicum*.

111. *Longshore*, 141 Wash. 2d at 429, 5 P.3d at 1263.

112. *Id.* at 429 n.9, 5 P.3d at 1263 n.9 ("[W]e need not determine whether and under what circumstances the public has a right to enter upon or cross over private tidelands on foot.").

113. *See id.* at 425–26, 5 P.3d at 1261–62.

114. *See id.* at 426, 5 P.3d at 1262; *see also* Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 131, 94 P. 922, 923 (1908) ("[Clams,] therefore, in a very material sense, belong with the land. When taken they must be wrenched from their beds, made well down in the soil itself.").

explicitly refused to recognize a public right of passage over unsubmerged private tidelands in a 2005 unpublished opinion.[115] The court based its decision on the Supreme Court of Washington's takings analysis in *Orion*.[116] Specifically, the Washington State Supreme Court held in *Orion* that a state regulatory scheme that prohibited a developer's plan to dredge and fill Padilla Bay tidelands did not effect an inverse condemnation.[117] In so holding, the court observed that "[the developer's] right to dispose of its property and *to exclude others* . . . remain[ed] unaffected" under the offending regulations.[118] Division II interpreted this reference to an unaffected right of exclusion as "suggest[ing] that [the Washington State] Supreme Court did not contemplate pedestrian passage over tidelands."[119] But in so reasoning, the appellate court mistakenly construed the *Orion* court's statement regarding the developer's right to exclude others. Specifically, the appellate court interpreted that statement by comparing the developer's property to property not burdened by the public trust, on which the right to exclude would admittedly be near absolute.[120] This interpretation,

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115. City of Bainbridge Island v. Brennan, No. 31816-4-II, 2005 Wash. App. LEXIS 1744 (Wash. Ct. App. July 20, 2005), *review denied*, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006). The City of Bainbridge Island filed suit in 1999 against several waterfront property owners, in part to quiet title to the Puget Sound tidelands fronting the western end of N.E. Fletcher Landing Road. *Id.* at *9–10; Petition for Review of Cross-Appellants Larson at 3, City of Bainbridge Island v. Brennan, No. 31816-4-II, (Wash. Ct. App. Sept. 26, 2005), *review denied*, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006) [hereinafter Petition] (on file with author). The city sought removal of a fence and locked gate erected across the road by abutting private tideland owners. *See Brennan*, 2005 Wash. App. LEXIS 1744, at *9; Petition at 3. The waterfront property owned by the Larsons, among those named as defendants, included tidelands accessible only via a steep trail. *See Brennan*, 2005 Wash. App. LEXIS 1744, at *10; Petition at 3–4. Despite the Larsons' ownership interest both in the tidelands abutting their property and in the road end tidelands at Fletcher Landing, however, the remaining defendants refused them access through the locked gate. *See Brennan*, 2005 Wash. App. LEXIS 1744, at *10; Petition at 4. The Larsons chose to side with the city and filed a cross-claim asserting under the public trust doctrine a public right of passage not only over the road end but also adjacent tidelands. *Brennan*, 2005 Wash. App. LEXIS 1744, at *11, *56–57. The trial court dismissed without comment the Larsons' public trust claim on a summary judgment motion made by the remaining defendants. *Id.* at *11.

116. *Brennan*, 2005 Wash. App. LEXIS 1744, at *61–63; *see supra* notes 92–99 and accompanying text.

117. Orion Corp. v. State, 109 Wash. 2d 621, 641–42, 747 P.2d 1062, 1073 (1987). The court nonetheless remanded the case to the trial court to determine if Orion could have made a "reasonably profitable use of its land consistent with the public trust." *Id.* at 660, 747 P.2d at 1083.

118. *Id.* at 665, 747 P.2d at 1085 (emphasis added).

119. *Brennan*, 2005 Wash. App. LEXIS 1744, at *63.

120. For a general discussion of the right to exclude others from private property, see JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 2.2.1 (2d ed. 2005).

however, ignores the *Orion* court's earlier holding that the developer purchased its estuarine property subject to the public trust.[121]

In sum, Washington's public trust doctrine bars both the state and private tidelands owners from substantially circumscribing public rights protected by the state's *jus publicum* interest. Federal law may prevent any state from ceding all of its *jus publicum* interest. Washington's public trust doctrine further prevents this state from ceding its *jus publicum* interest in any individual parcel unless such action either promotes or does not substantially impair public rights protected therein.

II. STATES RECOGNIZING JUSTINIAN *JUS PUBLICUM* PRINCIPLES ALLOW AT LEAST LIMITED PUBLIC ACCESS TO PRIVATELY OWNED TIDELANDS

The Institutes of Justinian, an ancient Roman text, ensured public access to all tidelands by declaring that tidelands simply could not be subject to ownership.[122] The judiciaries of ten states,[123] including Washington, recognize the Institutes as an ancient codification of the public trust doctrine. Of the three judiciaries in these ten states that have addressed the issue of public passage over privately owned tidelands, all have affirmed the existence of such a right, at least where necessary to effectuate more widely recognized public trust activities.[124]

A. The Institutes of Justinian Assert Common Ownership of Tidelands

Numerous scholars trace the roots of the public trust doctrine to ancient Roman legal principles.[125] The Institutes of Justinian, a textbook

121. *Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073; *see supra* Part I.C.

122. J. INST. 2.1.1 *in* THOMAS COOPER, THE INSTITUTES OF JUSTINIAN 67 (3d ed. J.S. Voorhies 1852).

123. California, Hawaii, Iowa, Maryland, Massachusetts, Michigan, New Jersey, Rhode Island, Vermont, and Washington. *See* Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 718 (Cal. 1983); *In re* Water Use Permit Applications, 9 P.3d 409, 445 (Haw. 2000); State v. Sorensen, 436 N.W.2d 358, 361 (Iowa 1989); Dep't of Natural Res. v. Mayor & Council of Ocean City, 332 A.2d 630, 637 & n.8 (Md. Ct. App. 1975); Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979); Glass v. Goeckel, 703 N.W.2d 58, 63–64 (Mich. 2005); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360 (N.J. 1984); Champlin's Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1166 (R.I. 2003); State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1130 (Vt. 1989); Caminiti v. Boyle, 107 Wash. 2d 662, 668–69 & n.12, 732 P.2d 989, 994 & n.12 (1987).

124. *See* Barry v. Grela, 361 N.E.2d 1251, 1252 (Mass. 1977); *Glass*, 703 N.W.2d at 74; Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 121 (N.J. 2005).

125. *See* Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79

of Roman law written some 1500 years ago, asserts that certain natural resources cannot pass into private ownership:

> Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore, whilst he abstains from damaging farms, monuments, edifices, etc. which are not in common as the sea is.[126]

By declaring that no individual could hold title to the seashore, Roman law thus explicitly assured public access not only to the sea but also to the underlying tidelands:

> The use of the sea-shore, as well as of the sea, is also public by the law of nations; and therefore any person may erect a cottage upon it, to which he may resort to dry his nets, and hawl them from the water; for the shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.[127]

This expansive understanding of the public's right to use the seashore stands in marked contrast to the scope of the *jus publicum* in any state today. Yet judicial recognition of the Institutes of Justinian as an ancient codification of the public trust doctrine correlates with an understanding of the *jus publicum* that encompasses a right of public access to private tidelands.

B. States That Recognize the Institutes of Justinian at a Minimum Allow Public Access to Private Tidelands for Effectuation of Public Trust Rights

In *Caminiti*, the Supreme Court of Washington explicitly recognized not only the existence of the public trust doctrine but also the ancient codification of this legal principle in the Institutes of Justinian.[128] Several states in addition to Washington recognize the origins of the public trust doctrine in the Institutes of Justinian.[129] Three of these

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YALE L.J. 762, 763–64 (1970); Sax, *supra* note 43, at 475 & n.15 (collecting sources).

126. J. INST. 2.1.1 *in* COOPER, *supra* note 122, at 67.

127. J. INST. 2.1.5 *in* COOPER, *supra* note 122, at 68.

128. *Caminiti*, 107 Wash. 2d at 668–69 & n.12, 732 P.2d at 994 & n.12 ("The principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian . . . ." (citing to J. INST.)); *see also* Rettkowski v. Dep't of Ecology, 122 Wash. 2d 219, 239, 858 P.2d 232, 243 (1993) (Guy J., dissenting).

129. The case law of three additional states—Montana, New Hampshire, and New York—refers

states—Massachusetts,[130] Michigan,[131] and New Jersey[132]—have directly addressed the issue of public access to private tidelands and at a minimum affirm such access for the purpose of effectuating traditional public trust rights.[133]

Although otherwise narrow in its scope, the *jus publicum* in Massachusetts encompasses a public right to walk across private tidelands in order to effectuate traditional public trust rights. The Massachusetts judiciary has generally interpreted the public trust doctrine strictly in response to colonial legislation.[134] Specifically, the Colonial Ordinance of 1641–1647[135] granted title of tidelands to all

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generally to Roman law, but fails to cite specifically to the work of Emperor Justinian. *See* Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 167 (Mont. 1984); Opinion of the Justices, 649 A.2d 604, 607 (N.H. 1994); Landmark West! v. City of New York, 802 N.Y.S.2d 340, 349 (2005).

130. *See* Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 358 (Mass. 1979) ("At Roman law, all citizens held and had access to the seashore as a resource in common; in the words of Justinian . . . ." (quoting J. INST. 2.1.1–2.1.6)).

131. *See* Glass v. Goeckel, 703 N.W.2d 58, 63–64 (Mich. 2005) ("This obligation traces back to the Roman Emperor Justinian, whose *Institutes* provided . . . ." (quoting J. INST. 2.1.1)).

132. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360 (N.J. 1984) ("The genesis of this principle is found in Roman jurisprudence, which held . . . ." (quoting J. INST. 2.1.1)).

133. One state—California—has also created through constitutional amendment a right of public access to private tidelands "whenever it its required for any public purpose." CAL. CONST. art. X, § 4; *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 847–48 (1987) (observing with respect to article X, section 4 of the California Constitution that "the State [of California] has sought to protect *public* expectations of access from disruption by private land use"); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 522–23 (1980) (recounting the history leading to adoption of article X, section 4 of the California Constitution). Because this protection is not judicially created, it will not be addressed here further. The remaining states—Hawaii, Iowa, Maryland, Rhode Island, and Vermont—have not directly addressed the question of public access to private tidelands under the public trust doctrine, and thus will also not be addressed further.

The opinion of the Court of Appeals of Maryland in *Department of Natural Resources v. Mayor & Council of Ocean City* arguably suggests, contrary to the thesis proposed here, that private property rights are not circumscribed by the public trust doctrine. *See* 332 A.2d 630, 634 (Md. Ct. App. 1975). While recognizing the traditional public trust rights of navigation and fishing, the court observed that "[t]he notion that the rights of the owner of the littoral must be exercised in subordination to the paramount rights of the public is no longer applicable, since rights of fishing, boating, hunting, bathing, taking shellfish and seaweed and of passing and repassing have been *pro tanto* extinguished by the prior grant." *Id.* (citing Town of Orange v. Resnick, 109 A. 864 (Conn. 1920)). This statement is mere dicta, however, because the issue actually considered by the court concerned the right of a property owner to build *landward* of the high water mark. *See id.* at 632.

134. *See* Opinion of the Justices, 313 N.E.2d 561, 565–66 (Mass. 1974).

135. Colonial Ordinance of 1641–1647, *in* THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF THE MASSACHUSETS 35 (Thomas G. Barnes ed. 1975) [hereinafter *Colonial Ordinance*]. The ordinance is viewed as "embodying the local law as to the jus privatum . . . and the jus publicum." Butler v. Attorney Gen., 80 N.E. 688, 689 (Mass. 1907).

private coastal owners,[136] subject only to the enumerated public rights of fishing, fowling, and navigation.[137] Although the Supreme Judicial Court of Massachusetts decided that "the right of passage over dry land at periods of low tide cannot be reasonably included as one of the traditional rights of navigation,"[138] it has nevertheless recognized a right to walk across otherwise private tidelands in order to fish from a public jetty.[139] The public trust doctrine in Massachusetts thus appears to encompass public access to private tidelands where necessary to effect enumerated public trust rights, but not for the purpose of allowing general recreation.

Similarly, the Supreme Court of Michigan recently held that the public possesses a right of pedestrian passage over all shorelands of the Great Lakes, regardless of ownership.[140] While the boundary of a private landowner's fee title extends to the low water mark of the Great Lakes, the *jus publicum* extends to the high water mark and thus overlaps with the *jus privatum* between these two boundaries.[141] Michigan had previously recognized protection under the public trust doctrine for the traditional rights of "fishing, hunting, and navigation for commerce or pleasure."[142] But the court acknowledged that it could only protect these traditional rights if it also protected the activities inherent to their exercise.[143] Pedestrian passage constitutes such an activity because the waters of the Great Lakes cannot otherwise be accessed for fishing,

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136. *See* Colonial Ordinance, *supra* note 135, at 35 ("[I]t is declared that in all creeks, coves and other places, about and upon salt water where the Sea ebs and flows, the Proprietor of the land adjoyning shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebs farther."); *see also* Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 359–60 (Mass. 1979); *Opinion*, 313 N.E.2d at 565–66.

137. *See* Colonial Ordinance, *supra* note 135, at 35 ("Everie Inhabitant who is an hous-holder shall have free fishing and fowling, in any great Ponds, Bayes, Coves and Rivers so far as the Sea ebs and flows, within the precincts of the town where they dwell, unles the Free-men of the same town or the General Court have otherwise appropriated them."); *see also Boston Waterfront*, 393 N.E.2d at 359–60; *Opinion*, 313 N.E.2d at 565–66.

138. *Opinion*, 313 N.E.2d at 566.

139. Barry v. Grela, 361 N.E.2d 1251, 1251–52 (Mass. 1977).

140. Glass v. Goeckel, 703 N.W.2d 58, 74 (Mich. 2005) ("[T]he public must have a right of passage over land below the ordinary high water mark."). The U.S. Supreme Court held long ago that the lands beneath the navigable waters of the Great Lakes, although not overtly subject to tidal influence, are encompassed within the public trust doctrine. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436–37 (1892).

141. *Glass*, 703 N.W.2d at 69–70.

142. *Id.* at 74.

143. *Id.*

hunting, and boating; effectuation of these traditional public trust rights thus requires a right of public pedestrian passage over the lakeshore.[144]

The Supreme Court of New Jersey also recently affirmed the importance of public access to private tidelands.[145] The court had already suggested more than thirty years earlier that the title to tidelands conveyed by the state into private ownership might be burdened with a public right of access to ocean waters.[146] In holding that a private club could not restrict public use of the dry sand area[147] within its oceanfront lots, the court in *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*[148] returned in part to this question.[149] The court held that "the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary."[150] This limitation on private property rights was required to afford the public not only "a suitable area for recreation on the dry sand" but also "reasonable access to the foreshore."[151] Under the court's ruling, therefore, public access to private tidelands tracks public access to private dry sand areas.[152]

As in Massachusetts and Michigan, the Supreme Court of New Jersey's holding in *Raleigh* appears to be motivated by desire to protect *jus publicum* rights. The Supreme Court of New Jersey has repeatedly stressed the flexibility of the public trust doctrine in responding to public

144. *Id.*

145. *See* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 121 (N.J. 2005).

146. *See* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972).

147. The dry sand area is that part of the beach between the high water mark and either the vegetation line or a man-made boundary such as a seawall or boardwalk, and thus lies adjacent to but landward of the tidelands. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 358 n.1 (N.J. 1984).

148. 879 A.2d 112 (N.J. 2005).

149. *See id.* at 120–21.

150. *Id.* at 121. Necessity is determined on the basis of four specific criteria: (1) location of the dry sand area with respect to the tidelands, (2) availability and size of publicly-owned dry sand areas, (3) nature and scope of public demand for beach access, and (4) the private owner's usage of the dry sand area. *Id.* at 121–22 (citing *Matthews*, 471 A.2d at 365).

151. *Id.* at 121; *see also Matthews*, 471 A.2d at 366. Note that New Jersey refers to its tidelands as the foreshore. *See* Spiegle v. Borough of Beach Haven, 218 A.2d 129, 133 (N.J. 1966) ("Foreshore: The part of the shore, lying between the crest of the seaward berm and the ordinary low water mark, that is ordinarily traversed by the uprush and backrush of the waves.").

152. The existence of a right of reasonable public access to tidelands appears to have been conceded during oral argument, perhaps explaining why this issue was not directly addressed by the court. *Raleigh*, 879 A.2d at 127 (Wallace, Jr., J., dissenting) (noting that the "defendant concedes . . . that the public has the right to use its property 'at and below the mean high water line'").

need.[153] Even prior to *Raleigh*, it thus had "no difficulty" finding that the activities encompassed by the *jus publicum* "are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other *shore activities*."[154] In defining the public trust doctrine so expansively, of particular concern to the court was that activities such as bathing and swimming could not be enjoyed without periods of rest on the shore.[155]

In sum, the Washington judiciary recognizes the Institutes of Justinian as an ancient codification of public trust principles. A survey of state case law reveals that such affirmative judicial appreciation of the public trust doctrine's historical roots correlates with judicial recognition of a public right of pedestrian passage over privately owned tidelands. This public right of access may, however, apply only where necessary to effectuate activities protected by the *jus publicum*.

III. THE WASHINGTON LEGISLATURE RECOGNIZES A PUBLIC NEED FOR RECREATIONAL TIDELANDS ACCESS

The scope of Washington's public trust doctrine is shaped by the needs of its citizens.[156] The police power of the state vests the Washington Legislature with authority to identify and enact legislation to protect public welfare and safety interests.[157] Because recreational opportunities constitute a concern of the public welfare,[158] the public trust doctrine should respond to the legislature's identification of a need for public recreational access to tidelands.[159]

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153. *See* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine . . . should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."); *Raleigh*, 879 A.2d at 121 ("recognizing . . . the dynamic nature of the public trust doctrine" (quoting *Matthews*, 471 A.2d at 365)).

154. *Neptune City*, 294 A.2d at 54 (emphasis added).

155. *Matthews*, 471 A.2d at 365 ("The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean."); *see also Raleigh*, 879 A.2d at 120. Note that the *Raleigh* court even made the specific analogy between such recreational use and the reference in the Institutes of Justinian to fisherman drying their nets on the seashore. *Id.*

156. Orion Corp. v. State, 109 Wash. 2d 621, 640–41, 747 P.2d 1062, 1073 (1987).

157. City of Seattle v. Ford, 144 Wash. 107, 110–11, 257 P. 243, 244 (1927) (quoting Lawton v. Steele, 152 U.S. 133, 136 (1894)).

158. Markham Adver. Co. v. State, 73 Wash. 2d 405, 424, 439 P.2d 248, 260 (1968).

159. *See generally* WASH. REV. CODE ch. 90.58 (2006); *id.* §§ 79A.05.600–695; *id.* chs. 79.105–140.

A. *The Scope of the Washington Public Trust Doctrine Is Elastic and Defined by Public Need*

The scope of the public trust doctrine in Washington is elastic and ultimately determined by the needs of the people.[160] In *Orion*, the Supreme Court of Washington declared that "[t]he trust's relationship to navigable waters and shorelands resulted not from a limitation, but rather from a recognition of where the public need lay."[161] Even upon first announcing the existence of the public trust doctrine in Washington, the court explicitly refused to limit protected public rights to the narrow confines of navigation and fishing.[162] To the contrary, the court stated that the *jus publicum* interest encompasses "the right 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'"[163]

The Supreme Court of Washington has in recent years repeatedly affirmed the wide swath of public rights protected by the public trust doctrine, attesting to the latter's continued breadth.[164] To this day, the court has held only one activity—the taking of shellfish from private tidelands—to be outside the scope of the *jus publicum*,[165] and has hinted that the public trust doctrine may even extend to environmental protection.[166] But the court has otherwise failed to explicitly elaborate on what activities might constitute "other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."[167] And in particular, it has yet to delineate protected land-based activities.

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160. *Orion*, 109 Wash. 2d at 640–41, 747 P.2d at 1073.

161. *Id.*; *see also* Rettkowski v. Dep't of Ecology, 122 Wash. 2d 219, 242, 858 P.2d 232, 244 (1993) (Guy, J., dissenting) (observing that "at its most basic level, the scope of the public trust doctrine is defined by the public's needs in those natural resources necessary for social stability").

162. Caminiti v. Boyle, 107 Wash. 2d 662, 669, 732 P.2d 989, 994 (1987).

163. *Id.* (quoting Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969)).

164. *See Orion*, 109 Wash. 2d at 641, 747 P.2d at 1073; Weden v. San Juan County, 135 Wash. 2d 678, 699, 958 P.2d 273, 283 (1998); State v. Longshore, 141 Wash. 2d 414, 427, 5 P.3d 1256, 1262 (2000).

165. *Longshore*, 141 Wash. 2d at 429, 5 P.3d at 1263.

166. *See Weden*, 135 Wash. 2d at 698, 958 P.2d at 283 ("The doctrine protects 'public ownership interests in certain uses of navigable waters and underlying lands, including . . . environmental quality.'" (quoting Johnson, *supra* note 18, at 524)).

167. *Caminiti*, 107 Wash. 2d at 669, 732 P.2d at 994 (citing *Wilbour*, 77 Wash. 2d at 316, 462 P.2d at 239). A corollary is defined as "[a] proposition that follows from a proven proposition with little or no additional proof" or "something that naturally follows." BLACK'S LAW DICTIONARY 363

B. *The Police Power of the State Vests the Washington Legislature with Discretion to Determine Public Need*

In discussing the constitutional reach of the state's police power, the Supreme Court of Washington has repeatedly affirmed the role of the legislature in determining public needs. Police power is the unwritten authority possessed by a state's legislature to enact statutes promoting public welfare and security:[168] "[h]owever difficult it may be to give a precise or satisfactory definition of 'police power,' there is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people."[169] Included amongst the concerns encompassed by the police power is recreation and resource protection.[170] The Washington Legislature is vested with extensive discretion to determine current requirements of the public interest.[171] In the context of the public trust doctrine, the Washington State Supreme Court has specifically opined that "the use of police power by government allows the Legislature to enact laws in the interest of the people."[172]

(8th ed. 2004).

168. City of Seattle v. Ford, 144 Wash. 107, 110–12, 257 P. 243, 244 (1927) (quoting Lawton v. Steele, 152 U.S. 133, 136 (1894)); Markham Adver. Co. v. State, 73 Wash. 2d 405, 421–22, 439 P.2d 248, 258 (1968).

169. *Markham*, 73 Wash. 2d at 421–22, 439 P.2d at 258 (quoting Shea v. Olson, 185 Wash. 143, 153, 53 P.2d 615, 619 (1936)); *see also* McDermott v. State, 197 Wash. 79, 84, 84 P.2d 372, 374 (1938) (noting that the police power authorizes the legislature to enact "regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all *great public needs*, as well as regulations designed to promote the public health, the public morals, or the public safety" (quoting State v. Pitney, 79 Wash. 608, 611, 140 P. 918, 919 (1914) (emphasis added))).

170. *Markham*, 73 Wash. 2d at 424, 439 P.2d at 260 ("The public welfare embraces healthful recreation and the protection of our national resources.").

171. *Ford*, 144 Wash. at 112, 257 P. 243 at 244 ("[A] large discretion is necessarily vested in the legislature to determine . . . what the interests of the public require." (quoting *Lawton*, 152 U.S. at 136)); *see also Weden*, 135 Wash. 2d at 691, 958 P.2d at 280 (quoting same passage); *McDermott*, 197 Wash. at 83, 84 P.2d at 374 ("In the exercise of police power, the legislature is vested with a wide discretion . . . to determine what the public interest requires . . . ."); *Markham*, 73 Wash. 2d at 422, 439 P.2d at 259 ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . ." (quoting Berman v. Parker, 348 U.S. 26, 32 (1954))).

172. *Weden*, 135 Wash. 2d at 691, 958 P.2d at 279. Note that a takings challenge would almost certainly be mounted were the Washington Legislature to enact a law restricting the right of private individuals to exclude the public from privately owned tidelands, thus necessitating that the courts examine whether a right of public access to private tidelands is encompassed by the public trust

C. *The Washington Legislature Recognizes Recreational Access to Tidelands as a Public Need*

The Washington Legislature's understanding of public need with respect to tidelands may be inferred from three statutes: the Shoreline Management Act (SMA),[173] the Seashore Conservation Act (SCA),[174] and the Aquatic Lands Act (ALA).[175] The SCA's Declaration of Principles eloquently summarizes the importance of tidelands access to the public, particularly with respect to recreational opportunities:

> The beaches bounding the Pacific Ocean from the Straits of Juan de Fuca to Cape Disappointment at the mouth of the Columbia River constitute some of the last unspoiled seashore remaining in the United States. They provide the public with almost unlimited opportunities for *recreational activities*, like swimming, surfing and hiking; for outdoor sports, like hunting, fishing, clamming, and boating; for the observation of nature as it existed for hundreds of years before the arrival of white men; and for relaxation away from the pressures and tensions of modern life. In past years, these *recreational activities* have been enjoyed by countless Washington citizens, as well as by tourists from other states and countries. The number of people wishing to participate in such *recreational activities* grows annually.[176]

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doctrine.

173. WASH. REV. CODE ch. 90.58 (2006). The Supreme Court of Washington has itself recognized that "[public] trust principles are reflected in the SMA's underlying policy." Orion Corp. v. State, 109 Wash. 2d 621, 641 n.11, 747 P.2d 1062, 1073 n.11 (1987). *See also* A. Reid Allison III, *The Public Trust Doctrine in Washington*, 10 U. PUGET SOUND L. REV. 633, 661 (1987) (observing that "the SMA explicitly recognizes the interest of the public in its enjoyment of the physical and aesthetic qualities of the natural shorelines of the state").

174. WASH. REV. CODE §§ 79A.05.600–95.

175. *Id.* chs. 79.105–45. More generally, Prof. Ralph Johnson, in his seminal article regarding the public trust doctrine in Washington, analyzed several statutes and in summarizing observed: "Congruence between public trust values and several statutes governing use of the state's natural resources is common. These statutes have become increasingly important resource management tools, and the extent to which they embody or reflect public trust values has increased over time." Johnson, *supra* note 18, at 542–48.

176. WASH. REV. CODE § 79A.05.600 (emphasis added). Furthermore, the Legislature explicitly provides in a later provision that the SCA is to be administered "in harmony with the broad principles set forth in RCW 79A.05.600." *Id.* § 79A.05.615. This approach is consistent with the role given to declarations of policy and statements of purpose by the courts. Specifically, the Washington State Supreme Court has noted that "[d]eclarations of policy in an act, although without operative force in and of themselves, serve as an important guide in determining the intended effect

In addition to noting in the SCA the increasing number of people seeking recreational access to tidelands, the legislature in the SMA expressed concern that a large portion of the state's tidelands and shorelands had been transferred into private ownership.[177] Seeking to preserve public recreational access to tidelands and shorelands, the legislature ordered the state Department of Ecology to give preference to several uses for "shorelines of statewide significance,"[178] including, regardless of ownership, the tidelands of the Pacific coastline and of much of Puget Sound and the Strait of Juan de Fuca.[179] Among these preferred uses the legislature included "[i]ncreas[ing] recreational opportunities for the public in the shoreline."[180] The legislature also emphasized the importance of increasing public access to state-owned tidelands in the ALA,[181] and established the Washington State Seashore Conservation Area under the SCA to provide public recreational access to state-owned tidelands.[182] The Department of Ecology includes opportunity to reach the water's edge—tidelands—in the definition of "public access."[183]

In sum, the public trust doctrine responds to public need. Public need, in turn, is determined by the Washington Legislature. The legislature's identification of a need for increased public recreational access to

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of the operative sections." Hearst Corp. v. Hoppe, 90 Wash. 2d 123, 128, 580 P.2d 246, 249 (1978). *See also* Wash. State Hous. Fin. Comm'n v. O'Brien, 100 Wash. 2d 491, 495–96, 671 P.2d 247, 250 (1983) ("In determining legislative motive, we give great weight to the statutory declaration of purpose."); Moore v. Moore, 20 Wash. App. 909, 913, 583 P.2d 1249, 1252 (1978) ("The statement of purpose in an act is the 'primary insight into the intent of the legislature . . . .'" (quoting Anderson v. O'Brien, 84 Wash. 2d 64, 67, 524 P.2d 390, 393 (1974))).

177. *See* WASH. REV. CODE § 90.58.020 ("The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest . . . .").

178. *Id.*

179. *Id.* § 90.58.030(2)(e).

180. *Id.* § 90.58.020.

181. *Id.* § 79.105.030 (2006) (providing that "[t]he manager of state-owned aquatic lands shall strive to provide a balance of public benefits," which include "[e]ncouraging direct public use and access").

182. *Id.* § 79A.05.605.

183. WASH. ADMIN. CODE 173-26-221(4)(a) (2005), promulgated by the Department of Ecology under the SMA, defines "public access" as follows: "Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations."

tidelands may be inferred from its repeated statutory attempts to address this issue.

IV. WASHINGTON'S PUBLIC TRUST DOCTRINE INCLUDES PEDESTRIAN PASSAGE OVER PRIVATE TIDELANDS

Although the Supreme Court of Washington recently denied the petition for review of the public trust claim rejected by the Washington State Court of Appeals, Division II, in its unpublished decision in *City of Bainbridge Island v. Brennan*,[184] both legal and historical analyses indicate that the public trust doctrine in Washington encompasses public pedestrian passage over private tidelands, at least where necessary to effectuate currently protected *jus publicum* rights. This outcome is a logical extension of the court's narrow interpretation in *Caminiti* of private property rights burdened by the *jus publicum*.[185] Furthermore, judicial espousal of at least limited public access to private tidelands both harmonizes the public trust doctrine of this state with others that recognize the Institutes of Justinian as a source of public trust rights,[186] and responds to the Washington Legislature's identification of a need for increased public recreational access to tidelands generally.[187]

A. Establishing a Public Right of Pedestrian Passage over Private Tidelands Allows both Private Tidelands Owners and the State to Fulfill Their Public Trust Doctrine Obligations

Where private property ownership obstructs public access to resources protected by the public trust doctrine, *Caminiti* strongly suggests that the *jus publicum* is impermissibly impaired if the private owner does not in some way allow public pedestrian passage across the impeding property.[188] There, the court found that private docks on state tidelands did not circumscribe the *jus publicum* because state administrative regulations required that dock owners allow the public to walk over, under, or around such structures.[189] The court's explicit

184. No. 31816-4-II, 2005 Wash. App. LEXIS 1744 (Wash. Ct. App. July 20, 2005), *review denied*, No. 77713-6, 2006 Wash. LEXIS 448 (Wash. May 31, 2006).

185. *See supra* text accompanying notes 100–104.

186. *See supra* Part II.

187. *See supra* Part III.

188. *See, e.g.*, Caminiti v. Boyle, 107 Wash. 2d 662, 674, 732 P.2d 989, 996 (1987).

189. *Id.*

condonation of activity that would normally constitute a trespass on private property was not motivated by concern for public access to state property per se. Rather, this judicial sanctioning of public passage over private docks situated on state tidelands constitutes a primary basis for the court's conclusion that the statutory provision at issue does not substantially impair the *jus publicum*.[190] The *jus publicum*, in turn, is comprised not of the actual land protected under the public trust doctrine, but of the interest always retained by the state in land protected by the public trust doctrine.[191] This interest—the public trust doctrine rights to which the public is entitled and which the state must always protect—is identical regardless of whether the protected tidelands are in state or in private ownership.[192] Because the *Caminiti* court made its conclusion with respect to the *jus publicum*, rather than mere public access to state tidelands, its holding applies with equal force to all tidelands, regardless of state or private ownership.

The public trust doctrine effectively limits the title to private tidelands insofar as the owner of such property cannot undertake any property usage that substantially impairs the *jus publicum*.[193] A property owner substantially impairs the *jus publicum* wherever public access to private tidelands is barred, whether the private owner dredges and fills the tidelands[194] or, more simply, excludes all entry by members of the public. At least where no other tidelands access is reasonably available and the private tidelands owner excludes the public, conveyance of tidelands property into private ownership also violates the state's obligation not to substantially impair the *jus publicum*.[195] No such impairment occurs, however, so long as the private tidelands owner allows public pedestrian passage where necessary to effectuate public trust rights such as navigation, fishing, and swimming.[196] Thus, neither the state nor private property owners can satisfy their public trust obligations unless the *jus publicum* encompasses a right of pedestrian passage across private tidelands for members of the public attempting to engage in protected activities.

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190. *Id.* ("In any event, nothing in the statute substantially impairs the *jus publicum*.").

191. *See id.* at 668–69, 732 P.2d at 994; *supra* Part I.A.1.

192. *See Caminiti*, 107 Wash. 2d at 669–70, 732 P.2d at 994; *supra* Part I.A.1.

193. *See supra* Part I.B.

194. *See supra* Part I.B.

195. *See supra* Part I.B.2–3.

196. *See Caminiti*, 107 Wash. 2d at 674, 732 P.2d at 996.

B. *Broad Construction of Washington's Public Trust Doctrine Is Consistent with Judicial Recognition of the Institutes of Justinian as a Codification of Public Trust Rights*

The Institutes of Justinian declare that tidelands could be owned by no one, consequently establishing a universal right of tidelands access.[197] Many scholars thus identify this ancient Roman text as one of the earliest codifications of public trust principles.[198] The public trust doctrine as we know it today, however, has evolved tremendously from its communal beginnings. Because of this country's inheritance of property law by way of England,[199] title to all tidelands in the United States resides in the possession of either a state, the federal government, an Indian nation, or a private party. Furthermore, federal jurisprudence declares that, beyond certain minimum requirements, each state is free to individually determine the public rights protected under its *jus publicum* interest in all tidelands within its borders.[200] Ten state judiciaries nonetheless specifically recognize Emperor Justinian's codification of public trust principles and thus choose to continue in his tradition, albeit within the confines imposed by tidelands ownership.[201]

Of the three such judiciaries that have addressed the issue of public passage over privately owned tidelands, all have affirmed the existence of such a right, at least where necessary to effectuate more widely recognized public trust activities.[202] Massachusetts does not protect pedestrian passage over tidelands for its own sake,[203] but protects this activity when in aid of the enumerated public trust right of fishing.[204] Similarly, the public trust doctrine in Michigan encompasses walking along private property on the shoreline of the Great Lakes, as members of the public would not otherwise be able to effectuate their traditionally protected activities of fishing, hunting, and navigation.[205] The New Jersey public trust doctrine guarantees "reasonable access" to coastal

197. *See supra* Part II.A.

198. *See supra* Part II.A.

199. *See supra* Part I.A.1.

200. *See* Shively v. Bowlby, 152 U.S. 1, 26 (1894).

201. *See supra* Part II.B.

202. *See supra* Part II.B.

203. Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974).

204. Barry v. Grela, 361 N.E.2d 1251, 1251–52 (Mass. 1977).

205. Glass v. Goeckel, 703 N.W.2d 58, 74 (Mich. 2005).

beaches for recreational use by allowing pedestrian passage even over private dry sand areas.[206]

The Supreme Court of Washington also looks to the Institutes of Justinian as an ancient codification of public trust principles.[207] Judicial protection of public pedestrian passage over private tidelands would therefore harmonize Washington's public trust doctrine with that of states that adopt a similarly broad view. Such harmonization may only require public recreational access to private tidelands where necessary to effect activities protected by the *jus publicum*.

C. *The Washington Legislature's Identification of a Public Need for Increased Recreational Access to Tidelands Further Validates this Construction of the Public Trust Doctrine*

The Washington State Supreme Court explicitly declared soon after confirming the existence of the public trust doctrine that the doctrine's scope derives not from navigable waters per se but rather from public need.[208] This underpinning in public need in turn caused the court to recognize that the *jus publicum* interest encompasses not only the traditional rights of navigation and fishing, but also recreational activities such as boating, swimming, and water skiing.[209] In fact, the court has thus far found only one activity—the taking of shellfish from private tidelands—to fall outside the scope of the public trust doctrine.[210]

By focusing on public need, the judiciary created an indirect role for the Washington Legislature in defining the scope of the public trust doctrine.[211] The legislature determines public need with respect to welfare and security under its inherent police powers;[212] public welfare includes recreational opportunities.[213] The legislature has expressed concern for public recreational access to tidelands[214] in response to its

206. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 121 (N.J. 2005).

207. *See* Caminiti v. Boyle, 107 Wash. 2d 662, 668–69, 732 P.2d 989, 994 (1987); *see also* Rettkowski v. Dep't of Ecology, 122 Wash. 2d 219, 239, 858 P.2d 232, 243 (Guy J., dissenting).

208. Orion Corp. v. State, 109 Wash. 2d 621, 640–41, 747 P.2d 1062, 1073 (1987).

209. *Caminiti*, 107 Wash. 2d at 669, 732 P.2d at 994 (citing Wilbour v. Gallagher, 77 Wash. 2d 306, 316, 462 P.2d 232, 239 (1969)).

210. State v. Longshore, 141 Wash. 2d 414, 429, 5 P.3d 1256, 1263 (2000).

211. *See supra* Part III.A–B.

212. *See supra* Part III.B.

213. Markham Adver. Co., Inc. v. State, 73 Wash. 2d 405, 424, 439 P.2d 248, 260 (1968).

214. *See supra* Part III.C.

prior conveyance of more than sixty percent of Washington tidelands into private ownership.[215] Furthermore, the legislature has specifically established as a goal "[i]ncreas[ing] recreational opportunities for the public in the shoreline,"[216] including in the latter term both state-owned and privately owned tidelands.[217] The courts should now respond to the legislature's repeated calls and recognize as protected by the *jus publicum* a public right of pedestrian passage across private tidelands, at least where necessary to effectuate recreational activities also protected thereby.

V. CONCLUSION

Although the Supreme Court of Washington has yet to squarely address a right of public pedestrian passage over private tidelands, the Washington public trust doctrine logically encompasses such a right, at least where necessary to effectuate those water-based activities already judicially recognized as protected by the *jus publicum*. Neither the state nor private property owners can otherwise satisfy their obligations under the public trust doctrine. Recognition of a right of public access to private tidelands would also harmonize *jus publicum* rights among those states that recognize the Institutes of Justinian as a source of public trust principles. Furthermore, the public trust doctrine responds to public need, which the Shoreline Management Act, the Seashore Conservation Act, and the Aquatic Lands Act all strongly suggest includes increased public recreational access to tidelands.

215. Conte, *supra* note 5, at 55–56; *see also* SCOTT, *supra* note 5, at 10.

216. WASH. REV. CODE § 90.58.020 (2006).

217. *Id.* § 90.58.030(2)(d).

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