

LIMITING THE EXPANSION OF THE PUBLIC TRUST DOCTRINE IN NEW JERSEY: A WAY TO PROTECT AND PRESERVE THE RIGHTS OF PRIVATE OWNERSHIP

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Oceanfront property presents unique conflicts between public and private notions of property law. The public trust doctrine is a common law doctrine that seeks to balance the rights of both the private owner and the public.¹ The doctrine seeks to protect the public, which has historical rights in the wet sand area, and the private landowner who claims an exclusive ownership interest in the dry sand area.² Even so, conflicts often arise between the upland owner and the public, forcing courts to adjudicate these disputes. On one hand, a private owner has exclusive rights to the particular parcel in question. On the other hand, the parcel in question is located in a geographic location that has substantial value to the public at large. This type of adjudication involves a delicate balance between private property ideals and the rights of the public at large.³ Because of New Jersey's unique geography, beach conflict cases often

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¹ Michael A. Walker, Note, *CERCLA's Natural Resource Damage Provisions: A Loophole for Private Landowners?*, 9 ADMIN. L.J. AM. U. 425, 444 (1995). For a discussion of the origins of the public trust doctrine, see discussion *infra* Part I.

² Walker, *supra* note 1, at 444. The wet sand area is the land between the mean high and low tide lines, while the dry sand area consists of the property landward of the mean high tide line. *Id.*

³ See James S. Burling, *Private Property Rights and the Environment after Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 1-4 (2002).

The battle over property rights in America has rekindled an age-old debate: whether our legal system is based upon the assumption that man uses and has dominion over property for his own benefit, limited only by the proviso that no harm is done to the public, or whether property can be put to private beneficial use only with the consent of the sovereign, and that "private" property is held subject to an inchoate trust for larger societal interests.

Id. at 2.

arise and a substantial amount of case law in the field has developed,⁴ making New Jersey a pioneer in this area.⁵

Beachfront property law in New Jersey can be broken down into three contexts. The first context involves the application of the public trust doctrine to beaches that are municipally-owned and maintained.⁶ Traditional problems in this area often involve beach fees and the permissibility of resident or member classifications.⁷ The New Jersey Supreme Court has not permitted such classifications, and the court has held that the doctrine demands that the upland dry sand beaches of municipalities be open equally to all for a wide variety of recreational purposes.⁸ The second context involves “quasi-municipal” beaches,⁹ which refers to beaches that hold themselves out as providers of recreational services, such as private beach clubs and associations.¹⁰ In the landmark case, *Matthews v. Bay Head Improvement Ass’n*,¹¹ the court subjected such quasi-public beaches to the same rules as municipal beaches, thus

⁴ *Van Ness v. Borough of Deal*, 393 A.2d 571, 573 (N.J. 1978). In *Van Ness*, the court stated:

The Public Trust Doctrine has always been recognized in New Jersey. It is deeply engrained in our common law, due, no doubt, to New Jersey’s unique location on the Atlantic Ocean, Delaware and New York Bays with numerous rivers and tributaries emptying into these bodies, resulting in extensive shorelines and considerable tidal waters and tidal lands in the State.

Id. (citation omitted).

⁵ Sean T. Morris, Note, *Taking Stock in the Public Trust Doctrine: Can States Provide for Beach Access Without Running Afoul of the Regulatory Takings Jurisprudence?*, 52 CATH. U. L. REV. 1015, 1020–21 (2003); Gilbert L. Finnel, Jr., *Public Access to Coastal Public Property Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 641 (1989) (“New Jersey’s Supreme Court is a leader in applying the public trust doctrine to protect the public’s rights to use dry sand beaches.”).

⁶ For examples of how New Jersey views the role of municipal beaches and the rule that municipal beaches must be held open to all equally regardless of resident or member status, see *Van Ness*, 393 A.2d at 574, and *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972).

⁷ See *Van Ness*, 393 A.2d at 573–74; *Neptune City*, 294 A.2d at 48–49.

⁸ See *Van Ness*, 393 A.2d at 574; *Neptune City*, 294 A.2d at 55.

⁹ See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 368 (N.J. 1984). In *Matthews*, the court deemed the defendant, Bay Head Improvement Association, to be “quasi-municipal” because its “activities paralleled those of a municipality in the operation of the beachfront.” *Id.*

¹⁰ *Id.* The New Jersey Supreme Court considered the totality of the circumstances to determine that the particular beach in question was “quasi-municipal.” *Id.* The court explained: “[w]hen viewed in its totality—[the Association’s] purposes, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront—the quasi-public nature of the Association is apparent.” *Id.*

¹¹ 471 A.2d 355 (N.J. 1984).

holding that access cannot be restricted.¹² Further, the court held that such beaches must allow public use of the upland dry sand areas as well as the traditional wet sand area.¹³ The third context is that of the private beachfront homeowner.¹⁴ The holding in *Matthews*, although limited to the quasi-public nature of the beach in the controversy, did determine that “private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.”¹⁵

New Jersey has tackled these inherent conflicts between owners and the public within the framework of the three contexts laid out above.¹⁶ New Jersey courts have granted substantial rights to the public at the expense of the private owner in both the first and second contexts.¹⁷ Although there is no precedent with respect to the third context, the natural progression seems to be towards granting the public more rights in private beaches.¹⁸ Yet, it is unclear how the courts will decide cases involving homeowners’ associations on the beachfront or an individual homeowner’s exclusive possession of the beach adjacent to its home.¹⁹

On July 26, 2005, the New Jersey Supreme Court decided the most recent case in the line of beach controversies, *Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.*²⁰ The central issue in *Raleigh* concerned conflicts between the owner of a private beach club and the public over beach access and use.²¹ The New Jersey Supreme Court, following *Matthews*, held that access could not be restricted to

¹² *See id.* at 368.

¹³ *Id.* at 364, 368.

¹⁴ With respect to this third context, *Matthews* is still the leading case on point in that it demonstrates the court’s willingness to extend the public rights under the public trust doctrine to private upland dry sand beaches. *See id.* at 369–70.

¹⁵ *Id.* at 369.

¹⁶ *See generally Matthews*, 471 A.2d at 363; *Van Ness v. Borough of Deal*, 393 A.2d 571, 573 (N.J. 1978); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 48–49 (N.J. 1972).

¹⁷ *See Matthews*, 471 A.2d at 364, 368; *Van Ness*, 393 A.2d at 574; *Neptune City*, 294 A.2d at 55.

¹⁸ *Matthews*, 471 A.2d at 369–70.

¹⁹ In *Matthews*, the court refrained from deciding this issue. It did expressly limit its holding to the quasi-municipal nature of the beach, but conceded that “considerable uncertainty will continue to surround the question of the public’s right to cross private land and to use a portion of the dry sand” *Id.* at 370.

²⁰ *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005).

²¹ *Id.* at 113.

members of the beach club only.²² The court mandated that Atlantis Beach Club (“Atlantis”), a private owner, must permit the public to vertically access the wet sand *and* allow the public to enjoy the entire upland dry sand area.²³ Furthermore, the court found that Atlantis may only charge a reasonable fee for access and use.²⁴ The court’s willingness to follow and expand the holding in *Matthews* demonstrates the court’s disregard for the rights and privileges of private ownership.

Since the New Jersey Supreme Court’s landmark decision in *Matthews*, the rights of private owners of beachfront property are in a state of concern, if not jeopardy.²⁵ New Jersey has often expanded the doctrine to fit the changing needs of the public.²⁶ Although courts have the ability to make changes to a particular field of law, in the case of the public trust doctrine, such changes can be unfair and arbitrary because they affect the rights of landowners who are constitutionally protected from uncompensated seizure of property.²⁷ Were the legislature or the executive, rather than a court, to mandate a private owner to open private property to the general public, commentator Barton Thompson has suggested that “the United States Supreme Court would almost certainly hold that the state had taken the owners’ property in violation of the Constitution.”²⁸

²² *Id.* (holding that “the public trust doctrine requires the Atlantis property to be open to the general public at a reasonable fee for services provided by the owner and approved by the Department of Environmental Protection”).

²³ *See id.* at 124.

²⁴ *Id.* at 125 (affirming the Appellate Division’s determination that the Department of Environmental Protection’s authority “includes jurisdiction to review fees proposed by Atlantis for use of its beach” and that such fees shall be limited to “an amount ‘required to operate and maintain the facility’ as a guide, and that fees will not be approved if they operate to ‘limit access by placing an unreasonable economic burden on the public’” (quoting *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club*, 851 A.2d 19, 33 (N.J. Super. Ct. App. Div. 2004), *aff’d*, 879 A.2d 112 (N.J. 2005))).

²⁵ *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1451–52 (1990) (discussing the recent trend of restricting private property rights in order to expand those of the public and/or the government).

²⁶ *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984); *Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

²⁷ U.S. CONST. amend. V (“Nor shall any person . . . be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.”). *See Nat’l Ass’n of Home Builders v. N.J. Dep’t of Env’tl. Protection*, 64 F. Supp. 2d 354, 356 (D.N.J. 1999) (plaintiffs alleging a regulatory taking where a building regulation required owners to build and maintain a walkway along the waterfront).

²⁸ Thompson, *supra* note 25, at 1450. *National Ass’n of Home Builders*, although applying the public trust doctrine to an allegation of a taking, is not relevant because it involves a claim of a regulatory taking. *See Nat’l Ass’n of Home Builders*, 64 F. Supp.

This Comment argues that courts should avoid expanding the doctrine to accomplish what legislative and administrative bodies would be constitutionally prohibited from doing. This Comment proposes that courts not use the doctrine to bypass the requirements of the Fifth Amendment of the Constitution, which requires compensation after a taking of private property by the government.²⁹ Because of the nation's strong commitment to private ownership,³⁰ the public trust doctrine should not be used as a tool to grant further rights to the public at the expense of the private landowner.³¹ A slow and steady expansion of this doctrine not only violates constitutional rights, but also leads to the eradication of private oceanfront property and leaves landowners uncompensated, disenfranchised, and without notice of the actual geographic scope of their property.³² Courts should not permit "the state [to] evade the due process and takings limits on the police power by extending the reach of the public trust doctrine."³³

This Comment will argue for appropriate limitations on the public trust doctrine. It will begin by presenting the historical and general background of its development. Part I provides a policy discussion of the doctrine's original underlying purposes and goals. Further, Part I advocates limiting the expansion of the doctrine to those objectives. Part II provides a chronological view of New Jersey's expansion of the doctrine as a way of enlarging the public's rights to the foreshore and dry sand area. Part III discusses the inherent conflicts involved in owning beachfront property. Specifically, it addresses the conflicts between fundamental notions of private property and the rights of the public concerning access to and use of

2d at 356. This Comment is concerned with state court interpretations of the public trust doctrine, not its application to the analysis of a regulatory taking.

²⁹ U.S. CONST. amend. V.

³⁰ See Burling, *supra* note 3, at 1–4. Burling states: "Indeed our Constitution was but the latest manifestation of the long-standing natural law understanding that an individual's property should not be taken without compensation." *Id.* at 4.

³¹ James L. Huffman, *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow: Introduction and Overview: A Fish out of Water: The Public Trust Doctrine in Constitutional Democracy*, 19 ENVTL. L. 527, 559 (1989) ("By expanding the scope of public trust rights, the state will expand its ability to regulate beyond the constraints of the Constitution. The state can thus evade the due process and takings limits on the police power by extending the reach of the public trust doctrine.").

³² *Id.* Professor Huffman describes such taking of rights from one group and granting them to another as too "easy and unprincipled." *Id.* at 567.

³³ *Id.* at 559. The Due Process Clause and the Takings Clause of the Fifth Amendment are applicable to the States by means of the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

the wet and dry sand areas. Part IV discusses the United States Supreme Court's analysis of the takings doctrine and links the constitutional protections of the Fifth Amendment to the recent judicial expansions of the public trust doctrine. To do so, a synopsis of the takings doctrine, eminent domain, and property jurisprudence will be necessary.

Last, Part V advocates a limited public trust doctrine specifically designed for New Jersey.³⁴ This Comment proposes that courts should not expand the doctrine as an end run around the takings doctrine. Private property requires courts to maintain clear and distinct boundary lines and to respect the fundamental rights of landowners as well as those of the public.³⁵

I. BACKGROUND

The public trust doctrine is a common law creature with ancient roots.³⁶ Historically, the doctrine protected the land where the tide ebbed and flowed.³⁷ The doctrine provides that the land adjacent to the water's edge is held in trust for the people by the state.³⁸ In theory, then, regarding oceanfront property, the land subject to the "ebb and flow" of the tide is beneficially owned by the people.³⁹ The land subject to the doctrine is often referred to as the "wet sand."⁴⁰ The public's right as trust beneficiary is "subject to reasonable limitations, to use public trust lands and associated navigable (or public trust) waters for a wide variety of commercial and recreational purposes."⁴¹

³⁴ Morris, *supra* note 5, at 1020–21 ("New Jersey courts have been both pioneers and leaders in their application of the Public Trust Doctrine, being among the first to both discuss the concept and to expand its usage.").

³⁵ Burling, *supra* note 3, at 1–4; Huffman, *supra* note 31, at 567. According to Professor Huffman, "[b]y confusing the property rights character of the public trust doctrine with concepts of trust law, constitutional rights, judicial review, and governmental power, the courts and commentators have opened the door to dramatic expansion of governmental power with resultant intrusions upon individual rights." *Id.*

³⁶ Walker, *supra* note 1, at 444.

³⁷ *Id.* The ebb and flow of the tide is often referred to as navigable waters. *Id.* Courts have interpreted the area to be the sand between the high and low tide lines. *See, e.g.,* Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10, 26 (1929).

³⁸ DONNA R. CHRISTIE & RICHARD G. HILDRETH, COASTAL AND OCEAN MANAGEMENT LAW 8 (2d ed. 1999).

³⁹ JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 2 (2d ed. 2002).

⁴⁰ *Id.* Title to the land below the mean high-tide line that comprises the wet sand is held by the state. *Id.*

⁴¹ *Id.*

The doctrine has its roots in Roman law, which considered certain objects to be subject to common ownership.⁴² Specifically, the air, water, and sea were viewed as common property.⁴³ According to Roman law, “[t]he use of these resources was available to all, so long as the conduct of one individual did not infringe upon the use of resources by others.”⁴⁴ The English followed this principle but changed the idea of common ownership to that of state ownership.⁴⁵

Under English common law, the king as the sovereign controlled the lands “subject to the ebb and flow of the tides, often referred to as land under navigable waters,” in trust for the public.⁴⁶ Therefore, “the Crown could not appropriate the resources for its own use or convey them to others.”⁴⁷ Technically, title, referred to as *jus privatum*, was in the king as sovereign, but dominion over the lands, referred to as *jus publicum*, was vested in the Crown as a trust for the benefit of the public.⁴⁸ Under this scheme, the public acquired two principal rights: fishing and navigation.⁴⁹

Today, land above the mean high tide line to the line of vegetation, called the “dry sand,” is subject to private ownership.⁵⁰ The land below the mean high tide line, called the “wet sand,” however, is held in trust by the state for the public.⁵¹ For this reason, the lands that comprise the wet sand are often called the “public trust lands” or the “sovereignty lands.”⁵² As beneficiary of this trust, the public has rights subject to “reasonable limitations” to use the public trust lands for a number of purposes that vary from state to state.⁵³

⁴² Walker, *supra* note 1, at 444.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ CHRISTIE & HILDRETH, *supra* note 38, at 8.

⁴⁷ Walker, *supra* note 1, at 444.

⁴⁸ CHRISTIE & HILDRETH, *supra* note 38, at 19; Charles F. Wilkinson, *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today, and Tomorrow: Introduction and Overview: The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 430–31 (1989).

⁴⁹ Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623, 628 (1998) (“Of these two public uses, navigation has historically been considered the superior right.”).

⁵⁰ KALO ET AL., *supra* note 39, at 1. This is the general rule, but there are some states that use the low tide line as the mark of private ownership. Mark Cheung, *Dockminiums: An Expansion of Riparian Rights That Violates the Public Trust Doctrine*, 16 B.C. ENVTL. AFF. L. REV. 821, 835 (1989). Those states that use the low tide line still subject the land between the low and high tide lines to the trust doctrine. *Id.*

⁵¹ KALO ET AL., *supra* note 39, at 2.

⁵² *Id.*

⁵³ *Id.*

Lateral or horizontal access is considered a public right under the public trust doctrine,⁵⁴ following from the traditional purpose of the doctrine. The doctrine was designed so that the public could, for fishing and navigational purposes, make use of the wet sand area.⁵⁵ Therefore, the public right to horizontal access cannot be restricted as long as the horizontal access is in the wet sand area.⁵⁶ However, there are some traditional ways in which the public can gain vertical or perpendicular access through private property.⁵⁷ The public may achieve such access through prescription,⁵⁸ implied dedication,⁵⁹ or customary use.⁶⁰

In addition, private ownership interests may also exist in the public trust lands.⁶¹ These interests consist of common law rights and privileges to use the waters and wet sand areas and are classified as either littoral or riparian rights.⁶² Littoral rights are those rights of

⁵⁴ CHRISTIE & HILDRETH, *supra* note 38, at 42.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ KALO ET AL., *supra* note 39, at 91. In order to succeed through prescription, the public's use must be open and notorious, continuous and uninterrupted, and adverse for the prescribed amount of time by statute. *Id.* Achieving access through prescription is often difficult because it is near impossible for such a large group as the public to meet all of the elements of prescription. CHRISTIE & HILDRETH, *supra* note 38, at 43. Christie and Hildreth state: "Establishing adverse use can be the greatest obstacle to overcome in acquiring a public prescriptive easement [because] [p]ermissive use can never ripen into an easement." *Id.* at 44.

⁵⁹ KALO ET AL., *supra* note 39, at 92. In order to gain access through implied dedication, the public must show through acts and circumstances "that the landowner intended to donate an easement to the public and that such an offer was impliedly accepted." CHRISTIE & HILDRETH, *supra* note 38, at 45. Difficulty arises if implied dedication is used to secure access and use of private dry sand because the owner of the particular parcel must have stopped using the property for the requisite time period; concurrent use will not satisfy dedication and would thus be considered a revocable license. Luise Welby, Comment, *Public Access to Private Beaches: A Private Necessity*, 6 U.C.L.A. J. ENVTL. L. & POL'Y 69, 80-81 (1986).

⁶⁰ See KALO ET AL., *supra* note 39, at 93. Commentaries have "defined the requirements of custom to be public use that is ancient, exercised without interruption, reasonably, obligatory, and not repugnant to other custom law." CHRISTIE & HILDRETH, *supra* note 38, at 47. Customary rights "evolved from the belief that a usage that lasted for centuries must have been founded on a legal right conferred in the distant past, and, therefore, should be recognized and enforced even though never formally recorded." Welby, *supra* note 59, at 82. The difficulty with using custom law to gain access and use of private lands is that the geographic area claimed must be specific and reasonable. *Id.* at 84. Thus, gaining a significant portion of beach for the public would require vast and costly litigation on a parcel-by-parcel basis. *Id.*

⁶¹ KALO ET AL., *supra* note 39, at 2.

⁶² *Id.*

owners associated with saltwater bodies and freshwater lakes.⁶³ Riparian rights refer to the rights of owners in rivers and other freshwater bodies.⁶⁴ The state maintains title to coastal waters.⁶⁵

Upon the colonization of America, title to American tidal waters passed from the king to the respective colonies.⁶⁶ After the American Revolution, title over lands under tidal waters vested in the states.⁶⁷ Before the acquisition of new territories, the tidal lands were held in trust by the United States government until the time of new state creation.⁶⁸ At the time of state creation, title to tidal lands within the new state's boundaries was passed to the newly created state.⁶⁹

The United States officially adopted the public trust doctrine as part of the common law, but granted title to the states allowing each to administer its own version of the trust.⁷⁰ In *Illinois Central Railroad Co. v. Illinois*,⁷¹ the Supreme Court acknowledged the public's rights inherent in the trust doctrine when it upheld the revocation of a land grant by a state noting that a state "can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers"⁷² Therefore, by the late Nineteenth Century, the United States recognized the duty of the states to protect the lands subject to the trust.⁷³ The Court also emphasized that all navigable waterways are subject to the public trust doctrine under federal law.⁷⁴ Therefore, although the states have title and

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Walker, *supra* note 1, at 445.

⁶⁷ CHRISTIE & HILDRETH, *supra* note 38, at 9.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 19.

⁷¹ 146 U.S. 387 (1892).

⁷² *Id.* at 453. The Court's acceptance of the doctrine under federal law solidified the position that the lands subject to the public trust doctrine could not be transferred free of the public's claim. The Court explained that "[t]he trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." *Id.* at 455-56.

⁷³ *See id.*

⁷⁴ *Id.* at 453-54.

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 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, and subject always to the

power, the public trust doctrine is created under federal law, making it mandatory for the states to maintain some version of the doctrine.⁷⁵ This is significant in light of the recent expansions of the doctrine, because once the geographic area covered by the trust is increased, it is permanently subject to the trust.

In *Shively v. Bowlby*,⁷⁶ the Supreme Court explained that tidal lands are distinguishable from those landward of the high tide line because of their equal importance to all for purposes of commerce, navigation and fishery.⁷⁷ The Court stated: "Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of tidal lands are vested in the sovereign for the benefit of the whole people."⁷⁸ In other words, the rights of private individuals are subordinated to the rights of the public to enjoy the area for commerce, navigation, and fishing. Furthermore, while the states have discretion in determining proper uses of the trust lands, *Shively* reiterated that states are limited to that which "can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce."⁷⁹

II. NEW JERSEY'S RELATIONSHIP WITH THE PUBLIC TRUST DOCTRINE

Proponents of increasing beach access and expanding the geographic area of the public trust lands often urge state courts to utilize the public trust doctrine to meet their goals.⁸⁰ Because of the failings of other attempts to secure increased public access and rights, public advocates are now recommending the use of the public trust

paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

Id. at 435.

⁷⁵ *Ill. Cent. R.R. Co.*, 146 U.S. at 435. The Supreme Court "left it to the individual states to determine the development and implementation of the Public Trust Doctrine." Morris, *supra* note 5, at 1019. In other words, "the states are federally prohibited from abrogating the public trust entirely." Wilkinson, *supra* note 48, at 464.

⁷⁶ 152 U.S. 1 (1894).

⁷⁷ *See id.* at 17.

⁷⁸ *Id.* at 57.

⁷⁹ *Id.* at 47.

⁸⁰ Thompson, *supra* note 25, at 1535-37; Morris, *supra* note 5, at 1039-40.

doctrine, and they often cite *Matthews* as the leading case on point.⁸¹ *Matthews*, however, was not the first New Jersey case to entertain the doctrine's expansion.⁸² New Jersey's expansion has been an ongoing and cumulative process.⁸³

A. Borough of Neptune City v. Borough of Avon-by-the-Sea

*Borough of Neptune City v. Borough of Avon-by-the-Sea*⁸⁴ presented the issue of whether a municipality could charge non-residents a higher fee than residents to access its beaches.⁸⁵ The New Jersey Supreme Court held that a municipality may not restrict access based on individuals' residency.⁸⁶ To reach this conclusion, the court utilized the public trust doctrine to expand the rights associated with public trust lands beyond the traditional rights of fishing and navigation.⁸⁷ Although the court conceded that the "original purpose of the doctrine was to preserve for the use of all the public natural water resources for navigation and commerce,"⁸⁸ it considered the doctrine to be flexible and not limited to its original purposes.⁸⁹

In holding that a municipality may not discriminate on the basis of residency, the court used the doctrine to mandate that access must be provided for all equally.⁹⁰ The New Jersey Supreme Court held that:

at least where the upland sand area is owned by a municipality—a political subdivision and creature of the state—and dedicated to public beach purposes, a modern court must take the view that the public trust doctrine dictates that the beach and the ocean

⁸¹ James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1935–37 (1995); Morris, *supra* note 5, at 1039–40.

While the theories of eminent domain, custom and implied dedication are all of some assistance in acquiring public easements across and upon private shore property, none of them will be effective as a long-term solution. Only the public trust doctrine has the potential to provide a long-range solution to the public access problem.

Welby, *supra* note 59, at 102.

⁸² See discussion *infra* Parts II.A and II.B.

⁸³ Morris, *supra* note 5, at 1021–22.

⁸⁴ 294 A.2d 47 (N.J. 1972).

⁸⁵ *Id.* at 48.

⁸⁶ *Id.* at 55.

⁸⁷ *Id.* at 51, 54.

⁸⁸ *Id.* at 52.

⁸⁹ *Id.* at 54.

⁹⁰ *Neptune City*, 294 A.2d at 55.

waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.⁹¹

To reach its decision, the New Jersey Supreme Court interpreted the public trust doctrine broadly.⁹² It explained that “public rights in tidal lands 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.”⁹³ Never before had New Jersey provided for such wide latitude. The New Jersey Supreme Court changed the public trust doctrine so that it could “be molded and extended to meet changing conditions and needs of the public it was created to benefit.”⁹⁴ Thus, the *Neptune City* court’s expansion of the doctrine was two-fold: it increased the public’s inherent rights to include recreation and it enhanced the public’s right of access to include the upland dry sand of municipal beaches.

In his dissent, Justice Francis predicted the continued expansion of the doctrine.⁹⁵ The justice explained that the public has considerable rights in the land seaward of the mean high tide line, but questioned the majority’s expansion of the public’s rights in trust lands and in municipal upland dry sand beaches.⁹⁶ Further, Justice Francis argued that the majority’s holding necessarily meant that the public would be able to make use of all private dry sand areas, not just those on municipal beaches.⁹⁷ Justice Francis posed the corollary question: “[O]f what utility [are the recreational rights] if access from the upland does not exist or is refused by the upland owner?”⁹⁸ Disagreeing with the expansion of rights and the determination that all municipal dry sand beaches must be open to all equally, Justice Francis espoused the opinion that the public does not have rights on privately-owned dry sand beaches.⁹⁹

B. *Van Ness v. Borough of Deal*

*Van Ness v. Borough of Deal*¹⁰⁰ reinforced the decision in *Neptune City*, as *Van Ness* only concerned the application of the public trust

⁹¹ *Id.* at 54.

⁹² *See id.* at 51.

⁹³ *Id.* at 54.

⁹⁴ *Id.*

⁹⁵ *Neptune City*, 294 A.2d at 56 (Francis, J., dissenting).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 56–57. According to Justice Francis, “a private owner could legally fence in his entire beach area upland of the mean high water mark” *Id.* at 57.

¹⁰⁰ 393 A.2d 571 (N.J. 1978).

doctrine to municipal dry sand beaches.¹⁰¹ The particular conflict involved whether a municipally-owned beach, Deal Casino, could limit a part of the beach for Deal residents who were members of the casino.¹⁰² The casino did not restrict the public's access to the waterfront or its use of the beach adjacent to the high water mark.¹⁰³ However, a portion of the upland dry sand beach was reserved for members of the casino and their guests.¹⁰⁴ The Public Advocate argued that the dry sand of the casino must be open to the public in its entirety.¹⁰⁵ Deal, on the other hand, argued that, because the public could enjoy the rights associated with the wet sand area and because the particular beach was never dedicated to the public, it could continue to limit access to an area of the dry sand to its members.¹⁰⁶ The trial court agreed with the Public Advocate,¹⁰⁷ while the Appellate Division sided with the municipality.¹⁰⁸

The New Jersey Supreme Court reversed, relying on its holding in *Neptune City*.¹⁰⁹ Again, the court announced that municipally-owned dry sand beaches must be open to all members of the public equally.¹¹⁰ Significantly, *Van Ness* "abandoned the limitation found in [*Neptune City*] that the upland must be dedicated to public beach purposes in order for the doctrine to apply."¹¹¹ Instead, the New Jersey Supreme Court reasoned that because the casino dedicated the beach for recreational purposes in general, the rule of *Neptune City*

¹⁰¹ *Id.* at 573.

¹⁰² *Id.* at 572.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 572-73.

¹⁰⁶ *Van Ness*, 393 A.2d at 572.

¹⁰⁷ *Van Ness v. Borough of Deal*, 352 A.2d 599, 608-09 (N.J. Super. Ct. Ch. Div. 1975), *rev'd*, 367 A.2d 1191 (N.J. Super. Ct. App. Div. 1976), *rev'd*, 393 A.2d 571 (N.J. 1978). The Chancery Division held: "Deal is discriminating illegally against nonresidents . . ." *Id.* at 609. Interestingly, the court did not base its decision on the public trust doctrine, but on municipal power and equal protection theories. *See id.*

¹⁰⁸ *Van Ness v. Borough of Deal*, 367 A.2d 1191, 1197-98 (N.J. Super. Ct. App. Div. 1976), *rev'g*, 352 A.2d 599 (N.J. Super. Ct. Ch. Div. 1975), *rev'd*, 393 A.2d 571 (N.J. 1978). The Appellate Division held that Deal Casino had satisfied the requirements of the public trust doctrine because it had set aside "a reasonable portion of the beach" for public use. *Id.*

¹⁰⁹ *Van Ness*, 393 A.2d at 573-74.

¹¹⁰ *Id.*

¹¹¹ Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 *FORDHAM ENVTL. LAW J.* 1, 42 (1998).

applied.¹¹² The case also made clear that the entire beach, both the wet and dry sand areas, had to be available to all citizens regardless of their status as residents or members.¹¹³ The New Jersey Supreme Court, however, did expressly limit its holding by noting that “[w]e are not called upon to deal with beaches on which permanent improvements may have been built, or beaches as to which a claim of private ownership is asserted.”¹¹⁴

Justice Mountain dissented from the majority’s holding, specifically on the grounds that the doctrine had not been clearly defined.¹¹⁵ Therefore, the justice argued that the courts should refrain from applying the doctrine to all municipally-owned dry sand beaches.¹¹⁶ More importantly, Justice Mountain expressed concerns that such an application constituted a compensable taking.¹¹⁷ Further, the justice dismissed the fact that a municipality held the property in question.¹¹⁸ According to Justice Mountain, the court effectuated a taking despite its lack of eminent domain powers.¹¹⁹ The justice summarized his view in the closing comments:

[N]o more land or water should be found to come within the ambit of the public trust until such time as the scope and contours of this doctrine are made clear. It is especially necessary to decide what role, if any, the Legislature is entitled or required to play. There should also be an initial determination as to whether the inclusion of municipally owned dry beach land within the public trust—making it available to indiscriminate

¹¹² *Van Ness*, 393 A.2d at 573–74. The court explained:

The fact that Deal has never dedicated the Casino beach to the use of the general public is immaterial. The beach is dedicated to recreational uses including bathing, swimming, surf fishing and other shore activities. If the area, which is under municipal ownership and dedication, is subject to the Public Trust Doctrine, and we hold that it is, all have the right to use and enjoy it.

Id.

¹¹³ *Id.* at 573 (“[I]n New Jersey, a proper application of the Public Trust Doctrine requires that the municipally owned upland sand area adjacent to the tidal waters must be open to all on equal terms and without preference.” (citation omitted)).

¹¹⁴ *Id.*

¹¹⁵ *Van Ness*, 393 A.2d at 575 (Mountain, J., dissenting).

¹¹⁶ *Id.* The justice explained: “[I]t seems to me improvident to rule now that great stretches of our most valuable beach properties shall be subject to this amorphous and ill-defined doctrine.” *Id.* at 576.

¹¹⁷ *Id.* at 577.

¹¹⁸ *Id.* at 578 (“It is the accepted law of New Jersey that municipal property, at least if not held in a governmental capacity, when taken by the State, must be paid for.”).

¹¹⁹ *Id.*

usage—is or is not a compensable taking and whether the judiciary should purport to exercise the taking power.¹²⁰

Although the court expressly limited the holding in *Van Ness* to municipal beaches, the state of the public trust doctrine was still ambiguous.¹²¹ *Van Ness* reiterated that the public trust doctrine is dynamic.¹²² This left open the question as to whether the court would “mold” the doctrine in the future to require access to and use of non-municipal beaches should the day come when the “public needs” demand it.¹²³ The answer came a few years later when the New Jersey Supreme Court revisited the public trust doctrine and made sweeping changes to its application.¹²⁴

C. *Matthews v. Bay Head Improvement Ass’n*

The holdings in *Neptune City* and *Van Ness* opened the door for later modifications to the doctrine.¹²⁵ Irrespective of the rights inherent in trust lands, the public’s rights are limited to the geographic area covered by the public trust doctrine.¹²⁶ *Matthews*, however, has threatened the balance by allowing the courts to also expand the geographic breadth of the doctrine to include privately-owned dry sand.¹²⁷ *Matthews’* expansion of the public trust doctrine

¹²⁰ *Van Ness*, 393 A.2d at 579 (Mountain, J., dissenting) (footnote omitted).

¹²¹ See Scott, *supra* note 111, at 43.

¹²² *Van Ness*, 393 A.2d at 573.

¹²³ See Scott, *supra* note 111, at 43.

¹²⁴ See *id.* at 43–44. Professor Scott states: “In its decision the court disclaimed any reliance on the traditional acquisitive theories of dedication or prescription. Instead, it chose to ground itself squarely on a newly defined public trust doctrine.” *Id.* at 44.

¹²⁵ Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 778 (1996) (“*Neptune City v. Avon’s* articulation of the public trust doctrine became the linchpin of subsequent beach access cases in New Jersey.”).

¹²⁶ Sarah C. Smith, Note, *A Public Trust Argument for Public Access to Private Conservation Land*, 52 DUKE L. J. 629, 648–49 (2002). Smith writes: “The public trust argument is, of course, limited to public trust land. Land that is not part of the public trust will not be protected from a takings argument” *Id.* at 648.

¹²⁷ See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984). The court in *Matthews* wrote:

We see no reason why rights under the public trust doctrine to use of the upland dry sand area should be limited to municipally-owned property. . . . Today, recognizing the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary.

Id.

in New Jersey provided ammunition to proponents for greater public access to the beaches.¹²⁸

*Matthews v. Bay Head Improvement Ass'n*¹²⁹ presented a case involving a quasi-municipal beach, Bay Head Improvement Association (the "Association"), that limited use of its beaches to members only.¹³⁰ The Association was a nonprofit corporation owning and leasing beachfront property.¹³¹ Its membership was limited to residents of Bay Head who paid a yearly fee, and non-members were only permitted to use the beach after hours and in the off-season.¹³² The plaintiffs claimed that the Association denied the public access and use of the beach.¹³³

Because the holdings in *Neptune City* and *Van Ness* were limited to municipally-owned and controlled beaches,¹³⁴ the Supreme Court of New Jersey evaluated the public trust doctrine's application to privately-owned dry sand beaches.¹³⁵ In announcing that the public may have a right to use the dry sand of private beaches, the court reasoned that "without some means of access the public right to use the foreshore would be meaningless."¹³⁶ The court limited its decision to beaches that the court deemed "quasi-municipal."¹³⁷ The court based this determination on the fact that "[t]he Association's activities paralleled those of a municipality in its operation of the beachfront."¹³⁸ In making this determination, the New Jersey Supreme Court considered factors such as size, services rendered, and maintenance functions.¹³⁹ The majority reasoned: "When viewed in its totality—its purposes, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront—the quasi-public nature of the Association is

¹²⁸ See *Morris*, *supra* note 5, at 1022–23; *Scott*, *supra* note 111, at 44.

¹²⁹ 471 A.2d 355 (N.J. 1984).

¹³⁰ *Id.* at 359.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 358. The original parties to the suit included the neighboring town of Point Pleasant as a plaintiff and the town of Bay Head as a defendant. However, the claim against Bay Head was dismissed because it did not own the beach. Eventually, Point Pleasant stopped pursuing its claims. *Id.*

¹³⁴ *Matthews*, 471 A.2d at 363.

¹³⁵ *Id.* at 363–64.

¹³⁶ *Id.* at 364. The court articulated that "[r]easonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed." *Id.* at 365.

¹³⁷ *Id.* at 365–66.

¹³⁸ *Id.* at 368.

¹³⁹ *Matthews*, 471 A.2d at 368.

apparent.”¹⁴⁰ The court in *Matthews* did not limit its holding to access issues.¹⁴¹ Instead, it granted the public an additional public trust right, the right to use the dry sand of private beaches in certain circumstances.¹⁴² While the court greatly expanded the public’s trust rights, it did warn that the right to access and use private dry sand is not a right to unrestricted access. The court further noted that the public interest is protected where there is some reasonable access to the water.¹⁴³ The opinion in *Matthews*, however, is quite significant for several reasons. First, it accomplishes this right of access through its interpretation of the public trust doctrine, not by any other property principles, such as dedication or easement.¹⁴⁴ Quoting *Neptune City*, New Jersey’s highest court again reiterated the dynamic nature of the doctrine.¹⁴⁵ Second, the opinion directly avoided applying the doctrine to purely private beaches.¹⁴⁶ Instead, the holding is limited to quasi-municipal beaches like those involved in the case.¹⁴⁷ Nevertheless, the court did decide that “private land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming.”¹⁴⁸ In sum, the New Jersey Supreme Court limited its holding to quasi-municipal beaches, but added a disclaimer that circumstances may warrant application to private beaches in the future.¹⁴⁹

D. Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.

On July 26, 2005, the New Jersey Supreme Court decided the most recent beach access and use dispute.¹⁵⁰ The court picked up on the expansion of the public interest in private beachfront property where *Matthews* left off. In *Raleigh Avenue Beach Ass’n v. Atlantis Beach*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 365 (“The bather’s right in the upland sands is not limited to passage.”).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Matthews*, 471 A.2d at 365 (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972)).

¹⁴⁶ *Id.* at 369. The court declined to rule on the Public Advocate’s claim that all private beaches should be open to the public. *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005) [hereinafter *Raleigh II*].

Club, Inc.,¹⁵¹ the court held that the public cannot be restricted from access and use of Atlantis Beach Club (“Atlantis”), a private beach, even though the court never expressly found that Atlantis was “quasi-municipal.”¹⁵²

Atlantis is located in the Diamond Beach neighborhood of Lower Township, and its western boundary is along an unpaved section of Raleigh Avenue.¹⁵³ The beach belonging to Seapointe Village (“Seapointe”), north of Atlantis, is open to the public.¹⁵⁴ Because of limited access to the beachfront, members of Raleigh Avenue Beach Association (“Association”), comprised of residents living on Raleigh Avenue in the Diamond Beach section, are forced to walk one-half mile to reach the nearest free access point.¹⁵⁵ In 1996, Atlantis went private, charging fees to its members to access and use the beach.¹⁵⁶ Problems arose between Atlantis and the Association when a member of the Association was charged with trespassing while crossing Atlantis’ beach, the most direct route to his home.¹⁵⁷ Subsequently, Atlantis “filed an Order to Show Cause and Verified Complaint against [the trespasser], other unnamed persons, Lower Township, and the State of New Jersey” to permanently enjoin the public from trespassing upon its property.¹⁵⁸ Atlantis also sought a declaration that it was not required to permit the public to access or use its beach.¹⁵⁹ In response, the Association filed a complaint against Atlantis seeking free access and use of a reasonable amount of dry sand, claiming that Atlantis’ beach is subject to the public trust

¹⁵¹ 879 A.2d 112 (N.J. 2005).

¹⁵² *Id.* at 120–21, 124. While the court recognized that *Matthews*’ narrow holding was limited to its unique facts (i.e. the public nature of the Bay Head Improvement Association and its close relationship to the municipality), the court nevertheless disregarded the first determination made in *Matthews*: that the Association was quasi-public, and therefore, the holdings of *Neptune City* and *Van Ness* applied to it. *See infra* notes 137–40 and accompanying text.

¹⁵³ *Raleigh II*, 879 A.2d at 113–15.

¹⁵⁴ *Id.* at 114. The New Jersey Department of Environmental Protection required Seapointe’s beach to be open to the public as a condition of its 1987 permit issued pursuant to the Coastal Area Facility Review Act, N.J. STAT. ANN. § 13:19-1 to -21 (West 2004). *Raleigh II*, 879 A.2d at 114.

¹⁵⁵ *Id.* at 115. The court noted that “[a]ccess is blocked by condominium buildings located at the terminus of the other streets in the area.” *Id.*

¹⁵⁶ *Id.* at 115–16. Before Atlantis established the private club, the beach was free and open to the public. *Id.* at 115. The fees in 2002 were \$700 per family per season for eight beach tags. *Id.*

¹⁵⁷ *Raleigh II*, 879 A.2d at 116.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

doctrine.¹⁶⁰ In addition, the Department of Environmental Protection (“DEP”) “sought a ruling on the question whether the beach along the Atlantic Ocean in the Diamond Beach area is subject to the public trust doctrine such that an individual can walk along the ocean shore on the Atlantis property without fear of prosecution for trespassing”¹⁶¹

In reversing the trial court¹⁶² and holding that Atlantis’ beachfront is subject to the public trust doctrine, the Appellate Division placed much emphasis on the fact that the Township did not provide similar services to the public.¹⁶³ The court thus held that Atlantis, a private owner, must permit the public to vertically as well as horizontally access its property and to make reasonable use of its dry sand beach as necessary to accommodate the public’s recreational rights in the foreshore.¹⁶⁴ In addition, the court held that Atlantis could only charge a “commercially reasonable fee” to those members of the public who remained on the beach for longer periods of time.¹⁶⁵ The Appellate Division found that the fees Atlantis charged for access and use of its beach “discriminated against individuals and small families by forcing them to pay an amount bearing no rational relationship to the cost associated with individual use of the property.”¹⁶⁶

Relying heavily on *Matthews*, the New Jersey Supreme Court affirmed the Appellate Division.¹⁶⁷ Purporting to apply the *Matthews* factors, the court held that the public trust doctrine applied to

¹⁶⁰ *Id.* Around this time, “the DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment . . . to Atlantis for conducting CAFRA-regulated activities on its property without obtaining required permits.” *Id.*

¹⁶¹ *Id.* at 117.

¹⁶² *Raleigh II*, 879 A.2d at 117. The trial court held that Atlantis must permit access to the ocean and allow the public use of a three-foot wide strip of its dry sand. *Id.* Further, the court held that the DEP’s authority does not extend to the regulation of the use of Atlantis’ dry sand. *Id.*

¹⁶³ *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 22 (N.J. Sup. Ct. App. Div. 2004), *aff’d*, 879 A.2d 112 (N.J. 2005) [hereinafter *Raleigh I*].

¹⁶⁴ *Id.* at 30. The court further stated: “We are satisfied that Atlantis’s attempts to limit access to, and use of, its upland sand are hostile to the public trust doctrine and not sustainable on appeal.” *Id.*

¹⁶⁵ *Id.* at 22. The Appellate Division stated: “All members of the public who use the waterfront are entitled to use Atlantis’s adjacent upland sand for extended periods and must be afforded a fair opportunity to pay a reasonable single-person fee.” *Id.* at 33.

¹⁶⁶ *Id.*

¹⁶⁷ *Raleigh II*, 879 A.2d at 113.

Atlantis and that Atlantis must open its beach to all members of the public.¹⁶⁸

Unlike the court in *Matthews*, however, the court did not focus on the quasi-public factor.¹⁶⁹ The court acknowledged the quasi-public nature of the Improvement Association in *Matthews*, but never addressed the issue of whether Atlantis was in fact quasi-public.¹⁷⁰ Rather, the court proceeded to apply the *Matthews* factors to determine the “appropriate level of accommodation” of the interests of the owner.¹⁷¹ In doing so, the court looked at the “[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner”¹⁷² By only applying the factors, the court did an injustice to the holding in *Matthews*. The court in *Matthews* first determined that the beach at issue so mirrored the activities and roles of a municipality that the holdings of *Neptune City* and *Van Ness* applied to it.¹⁷³ Once it is determined that the beach is quasi-public, the next prong of the test is to determine the amount of dry sand that will satisfy the public’s rights while, at the same time, accommodating the interests of the owner.¹⁷⁴ It is also important to note that although the court in *Matthews* held that private land is not immune from public access and use, the court added that the public’s right is not one of “unrestricted access” and its rights are satisfied where there is reasonable access to the water.¹⁷⁵

Dissenting in *Raleigh*, Justice Wallace pointed out that the *Matthews* court held that the upland dry sand had to be open to all

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 120–21.

¹⁷⁰ *Id.* at 121. The court in *Raleigh II*, discussing the quasi-public nature of the Improvement Association in *Matthews*, stated:

The Improvement Association was closely connected with the municipality, which provided at various points in time, office space, liability insurance, and funding, among other things. That symbiotic relationship, as well as the public nature of the activities conducted by the Improvement Association, led the Court to conclude that the Improvement Association was in reality a “quasi-public body”

Id. at 120–21 (citing *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 366–68 (N.J. 1984)).

¹⁷¹ *Id.* at 121 (citing *Matthews*, 471 A.2d at 365–66).

¹⁷² *Raleigh II*, 879 A.2d 121–23 (quoting *Matthews*, 471 A.2d at 365).

¹⁷³ See *Matthews*, 471 A.2d at 368.

¹⁷⁴ *Id.* at 365–66.

¹⁷⁵ *Id.* at 364.

because it was quasi-public in nature.¹⁷⁶ In *Raleigh*, the court never found Atlantis to be quasi-public; therefore, the primary focus should have been on accommodating the interests of the owner, as *Matthews* made clear. The court, however, held that Atlantis beach has to be open to all in its entirety, begging the question: does this accommodate the owner's interest?¹⁷⁷

While *Matthews* did warn that circumstances may warrant finding such rights in purely private beaches, it refrained from deciding the issue and expressly stated:

We realize that considerable uncertainty will continue to surround the question of the public's right to cross private land and to use a portion of the dry sand as discussed above. Where the parties are unable to agree as to the application of the principles enunciated herein, the claim of the private owner shall be honored until the contrary is established.¹⁷⁸

The court in *Raleigh*, however, focused primarily on the unavailability of public beaches in the Township,¹⁷⁹ public demand,¹⁸⁰ the "La Vida CAFRA permit condition,"¹⁸¹ and "the type of use by the current

¹⁷⁶ *Id.* at 367–68; *Raleigh II*, 879 A.2d at 127 (Wallace, J., dissenting) ("Thus, in *Matthews*, the entirety of the beach was privately-owned, but by a quasi-public organization."). Justice Wallace filed a dissent, in which Justice Rivera-Soto joined. *See id.* at 125.

¹⁷⁷ The court in *Matthews* explained that [w]hile the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded *reasonable* access to the foreshore as well as a *suitable area* for recreation on the dry sand.

Matthews, 471 A.2d at 365–66 (emphasis added). The court never held that the public would be entitled to use and access of all of a private landowner's upland dry sand without first finding that the beach in question was quasi-public or quasi-municipal in nature.

¹⁷⁸ *Id.* at 370.

¹⁷⁹ *Raleigh II*, 879 A.2d at 121–22. While it is true that there are no publicly-owned beaches in Lower Township, there are public beaches in Wildwood Crest, north of Lower Township. *See id.* More importantly, Seapointe is a public beach that provides lifeguards, public restrooms, showers, and parking. *See id.* at 114. Seapointe is located north of La Vida, which is immediately west of Atlantis. *Id.*

¹⁸⁰ *Id.* at 122. The court emphasized public demand, but in its discussion the majority points only to the residents who live in walking distance of Atlantis. *See id.* The court also mentions the general "enormous public interest in the New Jersey shore" *Raleigh II*, 879 A.2d at 122.

¹⁸¹ *See id.* at 122–23. The majority, in analyzing the "usage of the upland sand land by the owner" factor, explained that Atlantis beach was open to the public prior to 1996. *Id.* at 122. In 1986, La Vida Condominium's CAFRA building permit was conditioned on the homeowner's association being responsible for public access to the beach. *Id.* According to the Court, the fact that the permit describes a portion of dry sand beach leads to the conclusion that the dry sand area was meant for public

owner as a business enterprise.”¹⁸² Without finding that the particular beach in issue was quasi-public or quasi-municipal, the court ordered a private owner to provide services and open its property to the public free of charge.¹⁸³

Further, the court held that the DEP will determine a reasonable fee that Atlantis can charge to those members of the public who choose to remain on its dry sand for a longer period of time.¹⁸⁴ The court noted: “We expect that the DEP will use N.J.A.C. 7:7E-8.11(b)4, which limits fees at publicly-owned beaches to an amount ‘required to operate and maintain the facility’ as a guide, and that fees will not be approved if they operate to ‘limit access by placing an unreasonable . . . burden on the public.’”¹⁸⁵ Administration of this type of order is not likely to be a simple task. It is unclear what an unreasonable burden is and how long a person must remain on the dry sand before a fee can be charged. Because the public may make use of the dry sand area to rest and relax between swimming, it will be difficult to determine what is reasonable access and what constitutes a sufficient area of dry sand.¹⁸⁶ In addition, even though Atlantis may charge a fee to those who remain on its beach, the court

use. *See id.* at 123. The court noted, however, that it would not “consider the permit dispositive on the issue of public use” because neither party made it. *Id.* Yet, the majority “highlighted” the CAFRA permit condition as evidence of “longstanding public access to and use of the beach” at the end of the opinion. *Raleigh II*, 879 A.2d at 124.

¹⁸² *Id.*

¹⁸³ *See id.*; *Raleigh I*, 851 A.2d at 30. Atlantis did not object to providing lifeguard services free of charge to those members of the public who used the ocean, but did not remain on its dry sand. *Raleigh I*, 851 A.2d at 30. Atlantis did, however, object to the DEP’s jurisdiction over the determination of fees for those who remained on its beach for longer periods of time. *See id.* at 30–31. The Appellate Division held that the DEP did have jurisdiction and that it could review fees charged by Atlantis to those who used its beach. *See id.* at 31–32. The New Jersey Supreme Court affirmed the Appellate Division’s judgment regarding fees. *See Raleigh II*, 879 A.2d at 124–25.

¹⁸⁴ *Raleigh II*, 879 A.2d at 125.

¹⁸⁵ *Id.* (quoting *Raleigh I*, 851 A.2d at 33). The court acknowledged “that Atlantis, as a private entity, should be allowed to include expenses actually incurred for reasonable management services (in addition to reimbursement for other costs) in the fee calculation.” *Id.* Further, the court noted that Atlantis has the “independent and inherent right . . . to provide cabanas for rent . . . or to engage in other similar business enterprises for profit, e.g., beach chair rentals, food concessions, etc.” *Id.*

¹⁸⁶ *See Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984) (“Precisely what privately-owned upland sand area will be available and required to satisfy the public’s rights under the public trust doctrine will depend on the circumstances.”). The court in *Matthews* did not lay out a precise formula. Instead, the court noted the rule in broad terms: “private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.” *Id.* at 366.

is effectively disallowing a private entity the right to profit by only permitting Atlantis to charge a “reasonable fee.”¹⁸⁷

Justice Wallace found that the majority incorrectly held that the application of the factors weighed in favor of the plaintiff.¹⁸⁸ Specifically, the dissent pointed out that the second factor, “the extent and availability of publicly-owned upland sand area,” favored a judgment for Atlantis because Seapointe, a neighboring beach, is open to the public.¹⁸⁹ The dissent also found that the final factor, “usage of the upland sand by the owner,” weighed in favor of the defendant because Atlantis had been operating as a private beach for the last nine years.¹⁹⁰

The dissent, in applying the test and rules of *Matthews*, found that the public’s rights would be satisfied by “granting access to the ocean and an easement across the private sand area owned by the Atlantis Beach Club to access the beach at Seapointe” and “expand[ing] the horizontal access across defendant’s property to a ten-foot-wide strip above the high water mark.”¹⁹¹ Justice Wallace explained that ten feet of dry sand would be enough space for the public to enjoy the ocean and the beach while, at the same time, accommodating the rights of the private owner.¹⁹² The dissent’s approach to resolving this issue is true to the holding in *Matthews*, which emphasized the need to accommodate the interest of the private owner.¹⁹³ The majority’s conclusion that no accommodation of the owner’s interest is necessary leads to the question: Is this a compensable taking? Justice Mountain, in his dissenting opinion in *Van Ness*, expressed such concerns:

Suddenly the magic wand labeled “public trust” is gently waved and, lo and behold, what had been a beach reserved solely for residents of the Borough has been transformed into a beach open to the general public. It matters not at all in what terms this bit of

¹⁸⁷ See *Raleigh I*, 851 A.2d at 33. Indeed, the appellate court stated: “The notion that lands are to be held in public trust, protected and regulated for the common use and benefit, is incompatible with the concept of profit.” *Id.*

¹⁸⁸ *Raleigh II*, 879 A.2d at 127–28 (Wallace, J., dissenting). The dissent wrote: “In balancing the above factors, it is obvious that the greater weight favors access to the ocean and the use of the water below the mean high water mark.” *Id.* at 128.

¹⁸⁹ *Id.* Justice Wallace explained that Seapointe’s open beach “strikes a proper balance between the public trust doctrine, which requires reasonable access and use of the ocean and beaches, and a private owner’s right to use its property as it deems fit.” *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 125–26.

¹⁹² *Raleigh II*, 879 A.2d at 129 (Wallace, J., dissenting).

¹⁹³ *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365–66 (N.J. 1984).

judicial legerdemain is couched. The fact remains that one right in the bundle of rights we call ownership has been destroyed—the right to exclude others. There has been a compensable taking, accomplished by judicial act. But the judiciary may not exercise the power of eminent domain!¹⁹⁴

III. AREAS OF CONFLICT

Because the public has rights to the land subject to the public trust doctrine, private landowners are in a unique position. As littoral owners, they also have interests in the wet sand area.¹⁹⁵ The primary reason for owning beachfront property is its proximity to the ocean. Therefore, it is no surprise that the wet sand area presents conflicts between these two groups. These conflicts primarily exist in regards to how the public may access the foreshore, the rights associated with the wet sand area, and, now, the areas the public is permitted to use.¹⁹⁶

Historically, “the foreshore of the entire coast is said to be held in trust for the public for the explicit purposes of navigation and fishing.”¹⁹⁷ In more recent times, states, such as New Jersey, have expanded the category of uses permitted in the foreshore, while other states have not.¹⁹⁸ In states with a more liberal doctrine, the public’s rights were eventually “extended to those incidental privileges that were necessary for the public enjoyment of a right.”¹⁹⁹ Some states agree that recreational uses are among those that the doctrine permits, while other states maintain that the historical purposes of navigation and fishing are exhaustive.²⁰⁰ The Supreme Court of New Jersey rationalized increasing the geographic scope by linking the amount of space needed by the public to the recreational rights covered under the trust doctrine.²⁰¹ In doing so, the New Jersey Supreme Court inferred that a right to swim or sunbathe is useless without the right to relax and utilize some part of the dry sand, demonstrating that the types of uses permitted directly

¹⁹⁴ Van Ness v. Borough of Deal, 393 A.2d 571, 578 (Mountain, J., dissenting).

¹⁹⁵ KALO ET AL., *supra* note 39, at 2.

¹⁹⁶ Welby, *supra* note 59, at 70.

¹⁹⁷ *Id.* at 85.

¹⁹⁸ *Id.* at 87. For example, “Massachusetts’ judicial opinions proclaim that the only justification for taking the use of private land without compensation is the improvement of fishing or navigation—the two areas originally covered by the public trust.” *Id.* at 88.

¹⁹⁹ Fernandez, *supra* note 49, at 628.

²⁰⁰ Welby, *supra* note 59, at 87–88.

²⁰¹ See Matthews v. Bay Head Improvement Ass’n, 471 A.2d 355, 365 (N.J. 1984).

correlate to the amount of land that will be considered subject to the trust.²⁰²

Because of the failures of prescription, dedication, and customary use, the courts have resorted to expanding the public trust doctrine to grant further rights to the public without a need for compensation.²⁰³ Another benefit of using the public trust doctrine that proponents of public beach access cite is that an expansion of the doctrine amounts to changes to all private beachfront owners regardless of the litigants to the instant suit.²⁰⁴ As a result, one judicial determination changes the nature of the rights of all private landowners.²⁰⁵ This expansion is of great concern because it effectuates a denial of due process to all owners who are affected by such judicial activism.

The New Jersey Supreme Court has employed the public trust doctrine to increase the permitted rights and uses and the geographic scope of the doctrine.²⁰⁶ Specifically, in *Matthews*, the New Jersey Supreme Court warned private landowners that “the opportunity to swim [a right recognized in New Jersey] may be entirely dependent upon the public’s ability to reach the foreshore.”²⁰⁷ Although the court did not hold that the public could vertically access private beaches, it did expressly caution that circumstances might warrant such a decision.²⁰⁸ The court’s decision in *Raleigh* found such circumstances to exist when it mandated that a private entity, not expressly found to be quasi-public, open its beach to all and that the state can determine the fee it may charge.²⁰⁹ Such limitless expansion affects the entire coastline of the state and negatively impacts all oceanfront landowners, despite the fact that none were ever before the court.²¹⁰ Expanding the doctrine beyond that for which it was designed may be done out of good intention to enhance public rights, but it also significantly disregards the private property rights that Americans cherish.

²⁰² *Id.*

²⁰³ See Welby, *supra* note 59, at 85–87.

²⁰⁴ See *id.* at 87.

²⁰⁵ See *id.*

²⁰⁶ See *Raleigh II*, 879 A.2d 112 (N.J. 2005); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984); *Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972).

²⁰⁷ Welby, *supra* note 59, at 86.

²⁰⁸ *Matthews*, 471 A.2d at 363–64.

²⁰⁹ *Raleigh II*, 879 A.2d at 124–25.

²¹⁰ See Welby, *supra* note 59, at 87.

While the rights of the public to the wet sand area are guaranteed and protected as a matter of law, the area landward of the high tide line is not.²¹¹ Urged by proponents of increased public rights to beaches,²¹² courts are now willing to entertain expansion of the geographic areas covered by the public trust doctrine.²¹³ Specifically, *Raleigh* demonstrates that the New Jersey Supreme Court is willing to permit public use of and access to privately-owned dry sand beaches.²¹⁴ This willingness threatens the security enjoyed by private landowners and the rights to exclusive use and ownership of private property. Furthermore, the lack of compensation to such owners is unconstitutional.

PART IV. THE SUPREME COURT—THE PUBLIC TRUST AND THE TAKINGS DOCTRINE

A. *The Takings Doctrine*

The Fifth Amendment requires compensation after a government seizure of private property.²¹⁵ Thus, when the government acts to protect the public trust lands in a way that diminishes private interests in the land, “those adversely affected will claim that there is a ‘taking’ of some private property interest for which compensation is required.”²¹⁶ If, however, a court in a decision redefines the boundaries of the trust lands, “a private property interest thought to exist may be defined out of existence” along with the takings claim.²¹⁷ A court, however, should not be permitted in a single case to broadly redefine these boundaries affecting all landowners.

Since its recognition of the public trust doctrine in *Illinois Central*, the Supreme Court has rarely interfered with the states’ authority to administer their own versions of the public trust doctrine.²¹⁸ The lack of interpretations of the doctrine by the Supreme Court has allowed a variety of differing state policies

²¹¹ *Id.* at 75.

²¹² *Id.* (“Beach access advocates argue that this dry sand area is crucial to the full enjoyment of the ocean itself.”).

²¹³ See *Raleigh II*, 879 A.2d 112; *Matthews*, 471 A.2d 355.

²¹⁴ See *Raleigh II*, 879 A.2d 112.

²¹⁵ U.S. CONST. amend. V.

²¹⁶ *KALO ET AL.*, *supra* note 39, at 2.

²¹⁷ *Id.*

²¹⁸ See *Morris*, *supra* note 5, at 1019–20.

concerning the treatment of private waterfront property.²¹⁹ Outside of the public trust doctrine, however, the Supreme Court has not hesitated to act when the primary issue in the case concerns a takings claim.²²⁰

The Fifth Amendment protects individuals from loss of private property as a result of government action.²²¹ Although the Fifth Amendment is applicable to the federal government, the states are also bound by it by means of the Fourteenth Amendment.²²² Physical takings by the government for its use or for use by the public are “per se takings” that demand compensation.²²³ Physical takings occur “when the state physically intrudes (or authorizes third parties to do so) onto private property, thus abrogating the private owner’s right to exclude others.”²²⁴ The right to exclude others coincides with a property owner’s right to exclusive possession.²²⁵

In regulatory takings,²²⁶ “government actions do not encroach upon or occupy the property [but] affect and limit its use to such an extent that a taking occurs.”²²⁷ The Supreme Court has outlined some factors to consider when determining whether or not a particular governmental action is a regulatory taking requiring compensation.²²⁸ If the regulation “denies all economically beneficial or productive use of the land,” the state must compensate the owner.²²⁹ Even if the regulation does not deny all economically beneficial or productive use of land, it may still be a taking.²³⁰ Other factors the Court will take into consideration include: “the regulation’s economic effect on the landowner, the extent to which

²¹⁹ *See id.*

²²⁰ *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825 (1987).

²²¹ U.S. CONST. amend. V.

²²² *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

²²³ *See, e.g.*, Jesse W. Barton, Note, Tulare Lake Basin Water Storage District v. United States: *Why it was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS ENVTL. L. & POL’Y J. 109, 116 (2002).

²²⁴ *Id.* Any physical invasion onto private property is a physical taking regardless of amount of land occupied. *Id.*

²²⁵ *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (“[P]ermanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property.”).

²²⁶ Barton, *supra* note 223, at 117.

²²⁷ *Palazzolo*, 533 U.S. at 617 (citing Penn. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

²²⁸ *See id.*

²²⁹ *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)).

²³⁰ *See id.*

the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”²³¹ Taken together, these factors, once evaluated, will determine whether compensation is necessary.²³²

Two important Supreme Court cases, *Nollan v. California Coastal Commission*²³³ and *Lucas v. South Carolina Coastal Council*,²³⁴ evaluated state regulations of oceanfront property, demonstrating the Court’s position when a taking claim is raised. In each case, the states were attempting to gain additional public beach and/or access through legislation or regulation.²³⁵ However, neither state had compensated the private owners.²³⁶ The Court rejected the states’ attempts to grant further access rights to the public on private beaches under the auspices of its police powers.²³⁷

B. *Nollan v. California Coastal Commission*

In *Nollan v. California Coastal Commission*, the Supreme Court held that “to obtain easements of access across private property the State must proceed through its eminent domain power.”²³⁸ The California Coastal Commission (the “Commission”) had granted a building permit to the landowners, the Nollans, with the express condition that they provide a public easement across their oceanfront property.²³⁹ The Nollans brought suit to invalidate the condition, claiming that it violated the Takings Clause of the Fifth Amendment.²⁴⁰ The Superior Court of Ventura County held in favor of the Nollans, finding no rational justification for the condition.²⁴¹ The California Court of Appeals reversed²⁴² and flatly rejected the constitutional claim since the condition only diminished the overall

²³¹ *Id.* The Court utilizes the test outlined in *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

²³² *Palazzolo*, 533 U.S. at 617.

²³³ 483 U.S. 825 (1987) [hereinafter *Nollan II*].

²³⁴ 505 U.S. 1003 (1992).

²³⁵ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan II*, 483 U.S. 825.

²³⁶ See *Lucas*, 505 U.S. 1003; *Nollan II*, 483 U.S. 825.

²³⁷ See *infra* Parts IV.B, IV.C.

²³⁸ *Nollan II*, 483 U.S. at 832.

²³⁹ *Id.* at 828.

²⁴⁰ *Id.* at 829.

²⁴¹ See *Nollan v. Cal. Coastal Comm’n*, 223 Cal. Rptr. 28, 29 (1986) [hereinafter *Nollan I*].

²⁴² *Id.* at 32.

value of the property to the Nollans and did not “deprive [them] of the reasonable use of [their] property.”²⁴³

The United States Supreme Court disagreed and held that even a slight diminution in value may be enough to constitute a taking.²⁴⁴ Writing for the majority, Justice Scalia elaborated:

In *Loretto* we observed that where governmental action results in “[a] permanent physical occupation” of the property, by the government itself or by others, “our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”²⁴⁵

According to Justice Scalia, the proper focus should be on the nexus between the problem created by the development and the condition in the permit.²⁴⁶ Regulation is not a compensable taking if it “‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’”²⁴⁷

After determining that the state’s interest in protecting the beachfront is a legitimate one, the Court looked at the relationship between that interest and the condition on the Nollans’ building permit.²⁴⁸ The Commission argued that the Nollans’ new house would burden the public by interfering with “visual access” to the beaches.²⁴⁹ In turn, the Commission claimed, this interference would create a “psychological barrier” to the beaches, leading to demands for beach access.²⁵⁰ The Commission argued that those demands could only be satisfied by conditioning building permits on the coastline to those who are willing to provide public easements.²⁵¹ The Court rejected this argument and considered the relationship too attenuated.²⁵² Furthermore, the Court was skeptical about the

²⁴³ *Id.* at 30 (citing *Grupe v. Cal. Coastal Comm’n*, 212 Cal. Rptr. 578, 595–96 (1985)).

²⁴⁴ *Nollan II*, 483 U.S. at 831–32.

²⁴⁵ *Id.* at 832 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982)).

²⁴⁶ *Id.* at 834.

²⁴⁷ *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

²⁴⁸ *Id.* at 838.

²⁴⁹ *Id.*

²⁵⁰ *Nollan II*, 483 U.S. at 838.

²⁵¹ *Id.*

²⁵² *Id.* at 838–39. Justice Scalia wrote:

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new

Commission's underlying motive because "there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."²⁵³

The Court emphatically noted that a "permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."²⁵⁴ Thus, in order to gain vertical access to the ocean, the state must compensate the private landowners or satisfy the nexus test outlined by Justice Scalia: the state must show that a regulation substantially advances a legitimate state interest without denying the owner economically viable use of the land.²⁵⁵ Since the Commission failed to meet this test, regulations like those involved in *Nollan* are not permitted without compensation to the private landowners.²⁵⁶ *Nollan* also addressed basic American principles concerning private property.²⁵⁷ The Court classified the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."²⁵⁸ The Court declared that if a state wants to secure an easement in order to provide beach access to its

house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches . . .

Id. at 838.

²⁵³ *Id.* at 841.

²⁵⁴ *Id.* at 832. The Supreme Court, therefore, expressly refuted the argument made by beach access proponents that the public's presence on private property to get to and from the ocean is minimal and is not an occupation in any permanent sense.

²⁵⁵ *Nollan II*, 483 U.S. at 834. While a state may claim that beach access is a legitimate state interest, it is unclear whether the Supreme Court would find loss of the right to profit to be a denial of economically viable use of land, requiring compensation.

²⁵⁶ *See id.* at 839. Specifically, the Court stated: "We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power . . ." *Id.* In *Nollan*, an easement could have been required without compensation if it was narrowly tailored to addressing the externalities caused by the development. *Nollan* is different than a case like *Raleigh* because regulations, like those in *Nollan*, are clearly subject to the Fourteenth Amendment. With expansions of the public trust, however, the owner has no opportunity to challenge the state court's judgment that resulted in a substantial impairment of the owner's rights unless the Supreme Court is willing to grant certiorari.

²⁵⁷ *See id.* at 841. The Court stated: "California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' . . . but if it wants an easement across the Nollans' property, it must pay for it." *Id.* (citing U.S. CONST. amend. V.).

²⁵⁸ *Id.* at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)).

citizens, it must compensate the private property owner or be substantially advancing a legitimate state interest.²⁵⁹ The Supreme Court's loyalty to traditional property values may be the only roadblock for states that intend to strip landowners of their Fifth Amendment rights. However, the Court has yet to act when state court decisions, not state legislation, are responsible for "taking" private property.²⁶⁰

Nollan is a significant case with respect to the battle for public access and expansion of the public trust zone. First, it demonstrates that the Supreme Court will not allow the states to disguise takings through the use of their police powers.²⁶¹ Second, it expressly categorizes exclusive possession of private property as essential.²⁶²

C. *Lucas v. South Carolina Coastal Council*

Lucas was another victory in the fight to protect waterfront owners because it further solidified the notion that government action that reduces the value of another's property cannot be excused on the ground that it serves to benefit the public.²⁶³ Further, *Lucas* clarified the "harmful or noxious uses" exception to the compensation requirement.²⁶⁴ *Lucas* involved a property owner of two adjacent oceanfront lots.²⁶⁵ The owner, Lucas, purchased the land for \$975,000 in 1986 with the intention of building single-family homes.²⁶⁶ However, in 1988, South Carolina passed the Beachfront Management Act ("Act"), which banned Lucas from building on the lots.²⁶⁷ Lucas alleged that the Act, in effect, constituted a taking without compensation.²⁶⁸ The trial court agreed, holding that the bar on construction rendered the property valueless and required compensation.²⁶⁹ However, the Supreme Court of South Carolina disagreed and reversed, basing its holding on the principle that,

²⁵⁹ *Nollan II*, 483 U.S. at 841–42.

²⁶⁰ In order to secure Supreme Court review, litigants would be prudent to assert a Fourteenth Amendment claim as early as possible. The procedural impediments of preserving the takings claim for appeal are beyond the scope of this Comment, which advocates judicial restraint by state courts to avoid the impropriety of judicial takings altogether.

²⁶¹ *See Nollan II*, 483 U.S. at 841.

²⁶² *Id.* at 831.

²⁶³ *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

²⁶⁴ *See id.* at 1022–23.

²⁶⁵ *Id.* at 1006.

²⁶⁶ *Id.* at 1007.

²⁶⁷ *Id.*

²⁶⁸ *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991).

²⁶⁹ *Id.*

because the legislation aimed to prevent a serious harm by preserving the coastal areas, no compensation is required regardless of the effect on property value.²⁷⁰

The United States Supreme Court reversed and laid out some foundational rules regarding takings.²⁷¹ First, the Court pronounced the general rule that, if a regulation deprives the landowner of all economic use of the property or renders the property valueless, the government must compensate.²⁷² The Court also noted that the state may “resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of [the owner’s] title to begin with.”²⁷³ Writing for the majority, Justice Scalia qualified the noxious use exception upon which the Supreme Court of South Carolina relied.²⁷⁴ The Justice explained that “the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.”²⁷⁵

Rather, the Court will consider numerous factors when determining whether compensation is due.²⁷⁶ Justice Scalia stated that the primary inquiry involves looking into the “nature of the owner’s estate” to determine whether the regulation deprives the owner of a right he had at the time the estate was acquired.²⁷⁷ The second inquiry, according to the majority, involves an analysis similar to that of state nuisance law, whereby a court engages in a balancing

²⁷⁰ *Id.* at 900–01.

²⁷¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–32 (1992).

²⁷² *Id.* at 1027. It is likely that Atlantic Beach Club would have a strong argument that the state court’s decision prevents it from profiting, and, therefore, deprives Atlantic Beach Club of all economic use.

²⁷³ *Id.* This is particularly problematic in the area of the public trust expansions because once the scope of the doctrine is expanded, the rights of the private owner are retroactively altered. In other words, the courts view the owner as never having had such rights. The retroactive application of the doctrine further supports a limited interpretation of the public trust doctrine.

²⁷⁴ *Id.* at 1031.

²⁷⁵ *Id.* at 1026.

²⁷⁶ *Id.* at 1030.

²⁷⁷ *Lucas*, 505 U.S. at 1030. Because of the retroactive nature of the public trust doctrine, the Court should not look to the expanded doctrine to determine the nature of the owner’s estate because that very expansion is the source of the takings claim. Rather, the Court should look to the owner’s estate at the date of acquisition and compare it to the owner’s estate after the state court decision. Otherwise, state courts’ decisions regarding the public trust doctrine would be immune from review.

of the harm posed by the owner's conduct or use of the land and the benefit of restricting the owner's rights to the public.²⁷⁸

With respect to the second inquiry, the state must do more than simply declare the uses the landowner is engaged in or desires to engage in as against the public interest.²⁷⁹ Instead, the state must demonstrate that the uses or desired uses of the owner violate principles of nuisance and property law.²⁸⁰ While the Council in *Lucas* relied on the noxious use exception, the second inquiry is based upon existing background property principles.²⁸¹ The public trust doctrine would likely be considered a background state property principle.²⁸² In a case challenging the expansion of the public trust, however, the focus should be on the preexisting interpretation of the doctrine. This comports with the Supreme Court's instruction that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."²⁸³ Accordingly, a newly defined public trust doctrine cannot be a background property principle.²⁸⁴ Therefore, the analysis should focus either on the public trust doctrine as defined at the date of acquisition or, at least, on the doctrine as defined before the expansion. This is the logical

²⁷⁸ *Id.* at 1030–32. Public nuisance “encompasses a multitude of offenses against the public.” Finnel, *supra* note 5, at 646. “A public nuisance is a condition that interferes with a substantial public right.” Walker, *supra* note 1, at 452. According to the majority in *Lucas*, the second inquiry will entail an:

analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government

Lucas, 505 U.S. at 1030–31 (internal citations omitted).

²⁷⁹ *See id.* at 1031.

²⁸⁰ *Id.* at 1031–32.

²⁸¹ *Id.* at 1030. State law determines background principles of property law. *Id.*

²⁸² For a discussion of the vitality of the public trust doctrine as a background property principle, see Michael A. Blumm and Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341–44 (2005).

²⁸³ *Lucas*, 505 U.S. at 1029 (parentheses in original).

²⁸⁴ In other words, “newly discovering or expanding such principles in order to protect resources now deemed valuable and in the public interest to preserve is inconsistent and irreconcilable with the protection of private rights in land traditionally associated with our system of government in the United States.” David L. Callies and J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis) Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 378 (2002)

interpretation of the application of the test in *Lucas* because the first inquiry focuses on the nature of the owner's estate at the time it was acquired. Thus, the second inquiry should also be limited to the time of acquisition.

Lucas provides that the restriction placed upon the owner must be one that comports with common law property principles.²⁸⁵ While the public trust doctrine is a common law principle,²⁸⁶ an expansion that so distorts the original interpretation would not satisfy the second prong of the test.²⁸⁷ To determine if the use sought to be restricted is one that is based upon a common law prohibition, Justice Scalia proposed looking at whether "a particular use has long been engaged in by similarly situated owners" and whether "other landowners, similarly situated, are permitted to continue the use denied to the claimant."²⁸⁸ Private owners on the beach have long been permitted to restrict access and use of the land above the mean high tide line.²⁸⁹ Only in the cases of municipally-owned or quasi-municipal beaches has the public trust doctrine mandated access and use of the entire dry sand area.²⁹⁰ Likewise, private homeowners on the beachfront may continue to exclude others from the mean high tide line to the line of vegetation.²⁹¹ The public trust doctrine, historically and traditionally, only requires that the public have use of the wet sand area.²⁹² This leads to the conclusion that the state action "goes beyond what the relevant background principles would dictate," and therefore, "compensation must be paid to sustain it."²⁹³

²⁸⁵ *Lucas*, 505 U.S. at 1030-32.

²⁸⁶ See Nat'l Ass'n of Home Builders v. N.J. Dep't of Envtl. Protection, 64 F. Supp. 2d 354 (D.N.J. 1999) (applying the public trust doctrine as a defense to a takings claim and using the holding in *Matthews* as a guide). This Comment does not argue that the public trust doctrine is not a background property principle. Rather, this Comment urges state courts not to reformulate the doctrine beyond its traditional scope. The traditional scope of the doctrine, therefore, is a permissible defense to a takings claim as it is rooted in common law.

²⁸⁷ See Callies and Breemer, *supra* note 284, at 372 (explaining that "the fit between the public trust and the background principles exception fades as the doctrine drifts from its historical moorings").

²⁸⁸ *Lucas*, 505 U.S. at 1031.

²⁸⁹ See Welby, *supra* note 59, at 86.

²⁹⁰ See generally *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984); *Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972).

²⁹¹ See generally *Matthews*, 471 A.2d 355; *Van Ness*, 393 A.2d 571; *Neptune City*, 294 A.2d 47.

²⁹² KALO ET AL., *supra* note 39, at 2.

²⁹³ *Lucas*, 505 U.S. at 1030.

Lucas, like *Nollan*, provides the landowner with further support against unwarranted government seizures. *Lucas* is particularly helpful in that it clarifies the law regarding takings for the benefit of the public or to prevent harmful uses.²⁹⁴ Presently, a state may not simply categorize a use as harmful or claim that the reason for the regulation is to provide the public with a benefit.²⁹⁵ Rather, the state will have to establish its argument in court to escape compensating the owner under the law of property.²⁹⁶ In sum, the state “‘may not transform private property into public property without compensation.’”²⁹⁷

D. Linking the Takings Doctrine to the Expansion of the Public Trust Doctrine

The takings doctrine is of particular importance in the area of the public trust doctrine. First, it provides private landowners with a way to combat overzealous state actions.²⁹⁸ It is especially effective when the government action at issue is legislation.²⁹⁹ Second, the takings doctrine emphasizes the value of private property in our society.³⁰⁰ Because of its importance, the Constitution provides safeguards for individuals whose property is threatened with seizure.³⁰¹ Therefore, the Supreme Court must uphold this constitutional right to be free from seizure of private property without compensation. It is unclear, however, whether the Court is willing to police state judicial actions that result in loss of private property.³⁰² The issue of the Takings Clause as it applies to judicial action has never been directly addressed.³⁰³ Most experts have expressed doubts as to the likelihood of the Court’s subjecting judicial actions to the protections of the Fifth Amendment.³⁰⁴ Opponents to subjecting judicial regulation to Takings Clause

²⁹⁴ See *id.* at 1038–42.

²⁹⁵ *Id.* at 1038–42.

²⁹⁶ *Id.* at 1032.

²⁹⁷ *Id.* at 1031 (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

²⁹⁸ See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); see discussion *supra* Parts IV.B–C.

²⁹⁹ Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L. J. 423, 428 (1995).

³⁰⁰ See U.S. CONST. amend. V; see discussion *supra* Part IV.A.

³⁰¹ See U.S. CONST. amend. V; see discussion *supra* Part IV.A.

³⁰² Grant, *supra* note 299, at 428.

³⁰³ *Id.*

³⁰⁴ Thompson, *supra* note 25, at 1451.

requirements claim it “would constrain societally needed change too much [and] that takings protections are less necessary for such regulation because [they are] typically more principled and nonpolitical than legislative or administrative regulation.”³⁰⁵

The Fifth Amendment may also provide protection to landowners from arbitrary judicial actions.³⁰⁶ In other words, expansion of the public trust doctrine presents the issue of whether such court actions should be reviewed in light of the Takings Clause.³⁰⁷ It presents the question of whether a court, a governmental body just like a legislature, may grant public use and access rights to private property without due compensation.³⁰⁸ The takings doctrine is interpreted as a protection from government action that results in loss of private property.³⁰⁹ As often analogized, property rights are like a bundle of sticks.³¹⁰ If the state directly removes one of the sticks from the bundle or claims it as its own, “it is considered a taking and the state will be forced to pay compensation.”³¹¹ Considered in this light, it is difficult to reconcile a court’s expansion of the scope of the public trust doctrine that results in a change to the owners’ bundle with such an expansion not requiring compensation.³¹² In essence, “by exempting courts from the takings protections, we create an imbalance that invites the state to attempt to accomplish through the judiciary what it cannot accomplish through the other branches of government—thereby unnecessarily skewing the appropriate division of responsibility between the branches.”³¹³

In *Shelley v. Kraemer*,³¹⁴ the Supreme Court held that a state court’s enforcement of a racially restrictive covenant violated the

³⁰⁵ Grant, *supra* note 299, at 428.

³⁰⁶ See Thompson, *supra* note 25, at 1451 (analyzing the issue of exempting judicial determinations from the takings protections).

³⁰⁷ *Id.*

³⁰⁸ *Id.* (“Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion.”).

³⁰⁹ See Barton, *supra* note 223, at 116.

³¹⁰ *Id.* (“Each stick in this bundle represents a right that the owner holds against others. Some of these rights include the right to exclude others from the property, the right to sell the property, the right to transfer the property, the right to possess, and the right to use.”).

³¹¹ *Id.*

³¹² Thompson, *supra* note 25, at 1544.

³¹³ *Id.*

³¹⁴ 334 U.S. 1 (1948).

Fourteenth Amendment.³¹⁵ Specifically, the Court held that state judicial enforcement is state action for the purposes of the Amendment.³¹⁶ The opinion noted that “it has never been suggested that state court action is immunized . . . simply because the act is that of the judicial branch of the state government.”³¹⁷ In the same way, judicial action should be considered state action for the purposes of the Fifth Amendment. State court decisions that effectuate takings of private property should not be immune from the constitutional requirement of compensation. As the *Shelley* Court clarified, the relevant inquiry should be whether the state court action resulted in a constitutional violation.³¹⁸ Just as the Supreme Court interpreted the Fourteenth Amendment, the Court should interpret the Fifth Amendment to “[make] void ‘State action of every kind’ which is inconsistent with the guaranties therein contained, and [should extend] to manifestations of ‘State authority in the shape of laws, customs, or judicial or executive proceedings.’”³¹⁹ Constitutional protections not only prohibit certain executive and legislative actions, they prohibit certain governmental actions in general, including those of the judiciary. Allowing one branch to violate the protections that our forefathers considered essential to free government defeats the purpose of having such protections at all.³²⁰

V. CONCLUSION

All of the New Jersey cases involving interpretation of the public trust doctrine show a steady expansion of public rights to municipal

³¹⁵ *Id.* at 14.

³¹⁶ *Id.* The defendants raised the defense that enforcement of the covenants would violate the Fourteenth Amendment in their amended answer. Brief for Petitioners at 2, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 87), 1947 WL 30427. The United States Supreme Court may review final judgments by a state’s highest court “where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.” U.S.C. § 1257(a) (2000). Federal jurisdiction exists when the case involves “a direct adjudication against the validity of a right or privilege claimed under a law of the United States.” *Shively v. Bowlby*, 152 U.S. 1, 9 (1894). Therefore, litigants intending to appeal a state’s supreme court decision should allege a Fourteenth Amendment claim at the outset of the litigation. At least, the private owner should make such an allegation at the time the first state court expands the public trust doctrine, effectuating a loss of a property right.

³¹⁷ *Shelley*, 334 U.S. at 18.

³¹⁸ *Id.*

³¹⁹ *Id.* at 14 (quoting *The Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883)).

³²⁰ *See Munn v. Illinois*, 94 U.S. 113, 148 (1877) (Field, J., dissenting) (“The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.” (quoting *Wilkeson v. Leland*, 27 U.S. 627, 657 (1829))).

beaches,³²¹ to quasi-municipal beaches, and quite possibly to privately-owned beaches in special circumstances.³²² The New Jersey courts have distorted the traditional protections of the doctrine.³²³ The New Jersey Supreme Court in *Matthews* should have arrived at the same result without expanding the doctrine beyond recognition. Instead, like in *Van Ness*, the court could have based its decision to grant the public access to the Association's beach on the fact that it had already been dedicated to public recreation.³²⁴ Before *Matthews*, private landowners knew their rights and appreciated that they ended at the high water mark. Today, private landowners do not have that same level of understanding. The courts did not consider factors like "stability of title in land, the essential qualities of private ownership including the right to exclude others, constraints upon retrospective alterations of the definitions of land title, and any limits upon the public interest in communal use of property that may be found in the prohibitions of takings."³²⁵ New Jersey today has one of the most expansive public trust doctrines.³²⁶

However, the doctrine has drifted too far from its original purposes. The courts have thus taken a doctrine with "a seemingly respected place in the historical jurisprudence of Britain and the United States" and "employed [it] to assertively readjust notions of the private and public interests in property."³²⁷ While the original doctrine protected both the public and the private landowners, contemporary courts use the doctrine as a way to redistribute property.³²⁸ Proponents of such judicial activism acknowledge the redistributive element in this policy but claim that the "bonuses" to the public outweigh the "sacrifices" of the landowners.³²⁹ Whether this is true depends upon one's particular values. Therefore, allowing the courts to make this determination involves a policy determination that is properly left to the legislatures.³³⁰ The courts

³²¹ See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972).

³²² See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

³²³ The public trust doctrine's main purpose is to protect the wet sand area (seaward of the mean high tide line) because of its importance to all. See *Shively v. Bowlby*, 152 U.S. 1 (1894).

³²⁴ See *Van Ness v. Borough of Deal*, 393 A.2d 571, 573-74 (N.J. 1978).

³²⁵ Scott, *supra* note 111, at 44.

³²⁶ Morris, *supra* note 5, at 1020-21.

³²⁷ Scott, *supra* note 111, at 4.

³²⁸ Kehoe, *supra* note 81, at 1937.

³²⁹ *Id.*

³³⁰ See W. David Sarratt, Note, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1491 (2004) ("In general, legislatures are presumed to act prospectively, saying

should not drastically change property law by implanting their own ideas of policy.³³¹ Rather, if changes are necessary, the political branches should institute such changes because legislative decisions are firmly subject to the built-in restraint of the takings doctrine.³³² The courts' role is to interpret law and apply it to the current case before it,³³³ not to change centuries of law because of public pressure.³³⁴ Any property redistribution should be accomplished through the states' power of eminent domain.³³⁵

Since it is doubtful that the judiciary will subject its own determinations to the protections of the Takings Clause,³³⁶ the courts should not redistribute private property to the public without providing some sort of relief to the affected owner. In other words, courts should not utilize the public trust doctrine to bypass constitutional rights and requirements. The courts should clearly define the geographic scope of the doctrine as well as the rights associated with it, and any changes to the definition should only apply prospectively. A narrow interpretation of the doctrine would eradicate any confusion over notice and provide the private owner with greater protections. Another option that would be fair to private owners is a tax deduction for those owners who involuntarily or voluntarily open their property to the public. This provides some relief to owners who must maintain the property and may be subject to new liabilities.

Limiting the expansion of the public trust doctrine would protect investment expectations³³⁷ and, in turn, provide for stable and predictable real estate investments. More importantly, state courts should be more conservative in their application of the public trust doctrine when expansion would directly affect the rights and privileges of the private owner, specifically where the proposed

what the law shall be, while courts are presumed to decide questions retrospectively, saying what the law is and has been.”).

³³¹ See Thompson, *supra* note 25, at 1544.

³³² See Welby, *supra* note 59, at 91.

³³³ See Sarratt, *supra* note 330, at 1534 (discussing the effects judicial activism has on the balance of power between the branches of government).

³³⁴ See Scott, *supra* note 111, at 44 (“In sum, it might be observed that New Jersey has generally taken a politically active and acquisitive approach to the public trust doctrine, and the courts have responded in support.”).

³³⁵ See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

³³⁶ See generally *id.* (discussing the controversy of exempting judicial determinations from the takings protections).

³³⁷ See Kehoe, *supra* note 81, at 1914 (“Public access to all oceanfront property irrespective of the landowners’ rights would cause an extreme diminution in property values of privately owned oceanfront land.”).

change would be unconstitutional if implemented by the legislature or executive agencies. Lastly, a limited interpretation of the public trust doctrine will maintain clear and distinct boundary lines among the branches of government, thus eradicating any accountability issues associated with such decisions.