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THE NEXT WAVE IN PUBLIC BEACH ACCESS: REMOVAL OF STATES AS TRUSTEES OF PUBLIC TRUST PROPERTIES

JAMES M. KEHOE*

The Great Shawnee Chief Tecumseh asked rhetorically, "Sell the Earth? Why not sell the air, the clouds, the great sea?"¹

INTRODUCTION

America's coastal areas have experienced a tremendous increase in development since the 1960s.² As a byproduct of this exponential growth, the public now has less access to the ocean in many coastal areas.³ Disparities in socioeconomic status play a major role in access to the nation's resources, especially in access to beaches. When oceanfront landowners, through continued development, can exclude the public from gaining access to the coastline, the ocean itself becomes private property.

Two diametrically opposed views underlie the different concerns regarding management of oceanfront property. Proponents of greater beach access argue that the general public should have rights of access to and along every beach in the country without regard to whether the beachfront property is privately or publicly owned. Beachfront home-

* I would like to dedicate this Note to my family and especially to the memory of Michael Brian Kehoe.

1. See J. Hughes, *American Indian Ecology* 63 (1983).

2. See Coastal Zone Act Reauthorization Amendments of 1990, Pub. L. No. 101-508(a)(2), § 6202, 104 Stat. 1388-299, 1388-299 (1990) ("Almost one-half of our total population now lives in coastal areas. By 2010, the coastal population will have grown from 80,000,000 in 1960 to 127,000,000 people, an increase of approximately 60 percent, and population density in coastal counties will be among the highest in the Nation."); *Public Access to the Shore: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 1st Sess. 3 (1987) [hereinafter *Public Access Hearings*] (statement of Hon. Claudine Schneider, United States Representative from Rhode Island) (stating that 65% of the United States population lives within 50 miles of the coast and by the year 2000, 75% will live in coastal areas); Alice G. Carmichael, Note, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. Rev. 159, 160 n.2 (1985) (stating that travelers' expenditures in the coastal community of Dare County, N.C., increased 2778% between 1970 and 1982); Paul Morison, Note, *Staring Down the Barrel of Nollan: Can the Coastal Commission Dodge the Bullet?*, 9 Whittier L. Rev. 579, 584 (1987) (noting that 85% of California's population lives within 30 miles of the shore); Michelle A. Ruberto & Kathleen A. Ryan, Note, *The Public Trust Doctrine and Legislative Regulation in Rhode Island: A Legal Framework Providing Greater Access to Coastal Resources in the Ocean State*, 24 Suffolk U. L. Rev. 353, 353-54 & n.1 (1990) (noting that 65% of Rhode Island's population now lives within five miles of the coastline and that private landowners control over 90% of Narragansett Bay's 350 mile shoreline).

3. *Public Access Hearings*, *supra* note 2, at 3 (statement of Hon. Claudine Schneider, United States Representative from Rhode Island).

owners, in contrast, believe that the public only should be allowed access to public beaches. Such a view allows these homeowners to retain expectancy interests of security of title to their property. A major problem in the beach access area is that these opposing ideologies comprise more than mere views; they embrace competing expectancy interests.⁴

Both arguments, however, have serious shortcomings. Enforcement of the position that the public should have access to all beaches from every point along the coast may violate the United States Constitution, which protects persons from deprivations of private property without due process of law.⁵ Certain government-authorized deprivations or uses of private property without providing compensation are known as takings.⁶

Public access to all oceanfront property irrespective of the landowners' rights would cause an extreme diminution in property values of privately owned oceanfront land. These decreases in property values may be substantial enough to effect a taking. Further, it is not necessary for vindication of public interests in these properties to realize access to *all* beaches from *every* vantage point. While private properties may block some access routes to the coastline, other routes may still be accessible at nearby locations. On the other hand, the position that the public should only be able to use public beaches overly restricts public use of the ocean. In many areas, public beaches are few

4. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 847 (1987) (Brennan, J., dissenting).

5. U.S. Const. amend. V. The Fifth Amendment's Takings Clause was never technically incorporated into the Fourteenth Amendment. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 10.2, at 335 (4th ed. 1991). The Supreme Court, however, determined that the Fourteenth Amendment provides the same protections for citizens against deprivations by the states. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

6. The definition of what constitutes a taking is as confused as the law regarding the public trust doctrine. According to the Supreme Court in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992), a taking exists when, by appropriation or over-regulation, "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." There are several other ways to define a taking. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1981) ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."); *United States v. Causby*, 328 U.S. 256, 266 (1946) (finding that airplane flights over landowner's property effected a taking because "they [were] so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land"). When a taking exists, the property owner must be compensated for her loss. No compensation is owed, however, if the state can show that the nature of the estate is such that the proscribed use was not initially part of the "owner's" title. *Lucas*, 112 S. Ct. at 2899; see D. Benjamin Barros, Note, *Defining "Property" in the Just Compensation Clause*, 63 *Fordham L. Rev.* 1853, 1864-65 (1995); *infra* part II.B and note 169.

and far between⁷ and reasonable public access is not provided, especially to those that lack transportation.

The increased privatization of, and diminished access to, coastal properties has generated a great deal of litigation over the past twenty years.⁸ This increased litigation has led to legislative action by many states and the federal government. A few states, using different approaches, have responded favorably to a public desire to gain access to the ocean. For example, Hawaiian legislation "guarantees" access to the state's coastline by providing for the acquisition of land to create public access routes.⁹ Texas has accomplished greater beach access through the Texas Open Beaches Act,¹⁰ which encourages courts to find public easements by imposing prima facie presumptions of prescriptive public rights in beach properties.¹¹ New Jersey has increased beach access judicially through the seminal case of *Matthews v. Bay Head Improvement Ass'n*.¹² In *Matthews*, the New Jersey Supreme

7. A major problem in the United States in terms of beach access is the rapidly increasing population and the tendency toward higher population density at the coastline. See *supra* note 2; *infra* notes 261-62 and accompanying text.

8. See *Nollan*, 483 U.S. at 825; *Grupe v. California Coastal Comm'n*, 212 Cal. Rptr. 578 (Ct. App. 1985); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972).

9. Hawaiian law states:

The legislature finds that miles of shorelines, waters, and inland recreational areas . . . are inaccessible to the public due to the absence of public rights-of-way . . . [and] that the population of the islands is increasing while the presently accessible beach, shoreline, and inland recreational areas remain fixed; and that the absence of public access to Hawaii's shorelines and inland recreational areas constitutes an infringement upon the fundamental right of free movement in public space and access to and use of coastal and inland recreational areas. The purpose of this chapter is to guarantee the right of public access to the sea, shorelines, and inland recreational areas, and transit along the shorelines, and to provide for the acquisition of land for the purchase and maintenance of public rights-of-way and public transit corridors.

Haw. Rev. Stat. § 115-1 (1985).

10. Tex. Nat. Res. Code Ann. §§ 61.001-.026 (Vernon 1978 & Supp. 1995). Because of the Texas Open Beaches Act, approximately 77% of the Gulf shores are available for public use. *Public Access Hearings*, *supra* note 2, at 14 (statement of Garry Mauro, Commissioner of the General Land Office, State of Texas).

11. Tex. Nat. Res. Code Ann. § 61.020 (Vernon 1978 & Supp. 1995). The Texas approach to increased access is illustrated by the case of *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App. 1979). In *Moody*, a landowner built a motel on land alleged to be public property by way of prescriptive easement. *Id.* at 374. The court stated:

The public's use of the beach for many years was so open, visible and notorious that the appellants must have recognized the people's right to the beach. For many years in excess of the 10 year statutory period, the general public used the beach as their own: hunting, fishing, swimming, boating, sunning, and effecting many more uses.

Id. at 377-78. The amount of public access to the Texas coastline supports the proposition that the prescriptive easement approach works well in a supportive jurisdiction.

12. 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

Court determined that the public must have "reasonable access to the foreshore¹³ as well as a suitable area for recreation on the dry sand."¹⁴

In contrast, other states, including Delaware, Maine, Massachusetts, New Hampshire, and Virginia, have adopted very strict guidelines concerning the concept of public ownership of coastal properties, rejecting expansive public rights in the coastline.¹⁵ Generally, the mean high tide line is the line of demarcation between private and state ownership.¹⁶ Delaware, Maine, Massachusetts, New Hampshire, and Virginia have historically used the low water mark as the line of demarcation, a line more favorable to private landowners.¹⁷

The federal government has also enacted legislation to address the problem of diminishing beach access. The Coastal Zone Management Act of 1972 ("CZMA")¹⁸ provides funding for states to develop coastal management programs, including strategies to acquire access routes to the ocean. Due to its lack of both substantive guidance and innovation, however, the CZMA has not ameliorated the problems associated with diminishing beach access.¹⁹

It is well settled that each state holds certain properties in trust for the public and that these obligations may not be discharged.²⁰ This concept of the state as trustee of property for the benefit of the public

13. The foreshore is the wet sand area between the mean low tide line and the mean high tide line. Lord Hale, *De Jure Maris* (1787), reprinted in Stuart A. Moore, *A History of the Foreshore* 370, 378 (3d ed. 1888).

14. *Matthews*, 471 A.2d at 366. The test for reasonableness is "whether those means [such as proximity and availability of public beaches and streets to the wet sands] are reasonably satisfactory so that the public's right to use the beachfront can be satisfied." *Id.* at 365.

15. See William Goldfarb, *Water Law* 121 (2d ed. 1988). For example, of Maine's 3800 total coastal miles, only approximately 20 miles are publicly owned. *Public Access Hearings*, *supra* note 2, at 17-18 (statement of James E. Tierney, Attorney General of the State of Maine).

Of Massachusetts' 1500 miles of coastline, only about 300 miles are available for public use. *Id.* at 9 (statement of Stephen Bliven, Assistant Director of the Coastal Zone Management Program for Massachusetts). Further, only about 50% of those 300 miles are easily accessible; the other 50% are either islands or inaccessible without four wheel drive vehicles. *Id.* These data are even more incredible considering that 75% of the Massachusetts population lives within a half hour of the shore. *Id.*

16. See Goldfarb, *supra* note 15, at 121. The public trust traditionally encompassed up to the mean high tide line, so the *Matthews* court extended it to encompass an area for recreation. Unfortunately, New Jersey municipalities are presently utilizing many forms of subterfuge to eliminate beach access that has been endorsed by the state courts. See Joseph F. Sullivan, *Dispute on Access to Beach in New Jersey Goes to Court*, N.Y. Times, April 4, 1989, at B2; see also Jack H. Archer et al., *The Public Trust Doctrine and the Management of America's Coasts* 107-08 (1994) (noting that New Jersey municipalities have attempted to limit access to beaches by "subtle means," including "restricting access to public toilets").

17. See Goldfarb, *supra* note 15, at 121.

18. 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993).

19. See *infra* notes 249-63 and accompanying text.

20. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); see also *infra* notes 80-86 and accompanying text (discussing *Illinois Central*).

is known as the public trust doctrine. The public trust is an ancient doctrine providing for public rights in certain properties, including the ocean.²¹ In essence, the public trust doctrine assumes that the state owns legal title to certain properties, while the use of the properties is reserved to the public. Unfortunately, while states agree that the ocean and coastline, at least to the mean low tide line,²² are held for the public benefit, the states do not allow for reasonable access to these properties, thereby rendering the designation of these properties as part of the public trust meaningless.

This Note argues that the public trust doctrine is the best solution to the problem of diminishing public access to the ocean. Part I reviews the legal foundations of the public trust doctrine in both Roman and English law. Part II focuses on the public trust as an American legal concept and analyzes the myriad legal contexts into which the doctrine has been classified, including modern trust principles. Part III addresses the consequences of classifying the public trust as a principle of modern trust law and, most importantly, examines the possibility of removal of states as trustees of public trust properties. Part IV examines federal legislation and proposes that a federal statute be passed setting minimum standards for state compliance with public trust access rights to the nation's beaches. This Note concludes that the public trust doctrine is the best way to deal effectively with the problem of diminishing public beach access, allowing for the removal of states as trustees of trust properties under certain circumstances. States will act more prudently with respect to public trust properties if federal legislation of the type proposed in this Note is effectuated.

I. ORIGINS OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine has Roman and English common law antecedents.²³ The development of the doctrine, both statutorily and judicially, provides insights into how the doctrine may be construed today.

21. See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). Many states have adopted the public trust doctrine and/or public rights in waters in their state constitutions. See Alaska Const. art. VIII, § 14; Cal. Const. art. X, § 4 (amended 1974); Fla. Const. art. X, § 11; Haw. Const. art. XI, § 1; Idaho Const. art. XV, § 1; Mont. Const. art. IX, § 3; N.C. Const. art. XIV, § 5; Pa. Const. art. I, § 27 (amended 1971); R.I. Const. art. I, § 17; Va. Const. art. XI, § 3; Wis. Const. art. IX, § 1.

Other states have recognized the public trust doctrine and/or public rights to waters statutorily. See Ala. Code § 33-7-1 (1991); N.H. Rev. Stat. Ann. § 271:20 (1987 & Supp. 1994); N.Y. Pub. Lands Law § 75 (McKinney 1993); N.D. Cent. Code Ann. § 61-01-01 (1985 & Supp. 1993); Or. Rev. Stat. Ann. § 390.610 (1987); S.D. Codified Laws § 43-17-1 to -2 (1983 & Supp. 1994).

22. See *supra* notes 15-17 and accompanying text.

23. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 633-36 (1986).

A. Roman Law

The earliest known expression of the public trust doctrine was advanced in the works of Justinian, a primary source of Roman law, codified approximately 1500 years ago.²⁴ The Romans, in creating their laws, borrowed heavily from the Greeks,²⁵ who were very dependent on the resources of the sea.²⁶ According to Justinian, natural law²⁷ provided for communal rights in basic natural resources, including the sea and the seashores.²⁸ Roman law declared:

No one therefore is forbidden access to the seashore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of the nations. . . . But [the seashores] cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.²⁹

These "laws of nature," established by "divine providence," were to remain "fixed and immutable."³⁰

Roman law established different classifications of property interests, two of which are important for the purposes of this Note. First, the *res nullius* were common properties without owners, subject to the

24. J. Inst. 2.1.1. The Romans codified statutory and jurisprudential law in the *Corpus Juris Civilis*, promulgated by the Emperor Justinian. The *Corpus Juris Civilis* contained four main parts: Institutes, Digest, Code, and Novels. For the purposes of this Note, only the Institutes and Digest are relevant. For a further detailed discussion concerning the *Corpus Juris Civilis*, see U.S. Fish and Wildlife Service, Public Trust Rights 1-9 (1978).

While the public trust concept has been in existence since Roman times, public rights with regard to water resources existed well before the birth of Christ. See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 *Env'tl. L.* 425, 429-30 (1989).

Some researchers, however, believe that the modern public trust doctrine is solely an American legal invention. See Richard C. Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 *U. Ill. L. Rev.* 407, 411 (1986) (arguing that the public trust doctrine "is largely an American creation"); Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 *Fla. St. U. L. Rev.* 511, 589-91 (1975) (arguing that the public trust doctrine did not exist under the English common law).

25. Wolfgang Kunkel, *An Introduction to Roman Legal & Constitutional History* 24, 99 (2d ed. 1973).

26. William Drayton, Jr., Note, *The Public Trust in Tidal Areas: A Sometime Submerged Legal Doctrine*, 79 *Yale L.J.* 762, 763 (1970).

27. Natural law is "the law of nature or of God." 52A *C.J.S. Law* § 1 (1968). The term was "intended to denote a system of rules and principles for the guidance of human conduct which . . . might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his *nature*, meaning by that word his whole mental, moral, and physical constitution." *Black's Law Dictionary* 1026 (6th ed. 1990).

28. J. Inst. 2.1.1-1.6.

29. *Id.* at 2.1.1.

30. *Id.* at 1.2.11.

use and benefit of the public.³¹ The actual property of the seashore was considered *res nullius*³² and was, therefore, subject to public use. Regarding the use and benefit, however, the seashores were considered *res communes*, or common properties.³³ The *res communes* were properties belonging to the state or to private individuals, but subject to perpetual use by the public.³⁴ While the seashores were not subject to state ownership,³⁵ they were under state supervision or jurisdiction to ensure free public use.³⁶ Roman law provided remedies for private infringement of the public's rights of free use of the coastline, including damages and injunctions.³⁷ Thus, the properties were held by the government in trust for the public use. This theme of government holding property for the public use underlies the modern public trust doctrine.

B. English Law

Public rights to the coastline and the ocean differed dramatically before and after the adoption of the Magna Charta. The Magna Charta was adopted in 1215 for the primary purpose of making the King of England subject to the law.³⁸ English law regarding the public trust doctrine can be readily bifurcated: pre-Magna Charta and post-Magna Charta.

1. Pre-Magna Charta

English common law³⁹ required that almost all land have an owner,⁴⁰ otherwise incidents from the owner could not be collected by

31. Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters* 17 (1826). *But see* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 250 (1992) (noting that some researchers believe that "the Justinian idea of communal rights to shorelines was aspirational rather than descriptive").

32. Angell, *supra* note 31, at 16-17. The notion of *res nullius* is at odds with the English common law, which required that all property have an owner. *Id.* at 17. Under English common law, if lands were incapable of ownership by an individual, it was considered as owned by the Crown. *Id.*

33. *Id.*

34. Dig. 1.8.6.pr. (Marcianus, Institutes 3); 1.8.10 (Pomponius (extracts from Plautius 6)).

35. Dig. 41.1.14.pr. (Neratius, Parchments, Book V).

36. Dig. 43.8.3.pr. (Celsus, Digest, Book XXXIX); 39.2.24.pr. (Ulpianus, On the Edict, Book LXXXI). For the practical purposes of the public, there was no difference between the *res communes* and the *res nullius* because they were both subject to common use.

37. William A. Hunter, *Roman Law* 165 (1876).

38. Lloyd E. Moore, *The Jury: Tool of Kings, Palladium of Liberty* 48 (2d ed. 1988).

39. English common law came largely from the Romans. Angell, *supra* note 31, at 15. This English reliance on Roman ideas brought the concept of the public trust to England. *See* Lazarus, *supra* note 23, at 635.

40. Lord Hale, Sir Matthew Hale's First Treatise (1786), in Stuart A. Moore, *A History of the Foreshore* ch. 14, at 357-61 (3d ed. 1888); *see also* Jan S. Stevens, *The*

the King, thereby reducing revenue to the Crown. To provide for public use of certain properties, most importantly for fishing and navigation, land was owned by the King, but held for the common use of all.⁴¹

In the years preceding the charter, during the Middle Ages, public rights in the seashore evaporated.⁴² This decline in public rights was the result of the Crown's jurisdictional and sovereignty claims to tidal areas being mistaken for private ownership.⁴³ Due to this confusion, the King claimed the private right to the coastline and its vast resources.⁴⁴ Once claimed as privately owned in fee,⁴⁵ the King believed them to be freely alienable and conveyed the lands to private owners.⁴⁶ Thus, local feudal lords took control of ocean resources.⁴⁷

Although in violation of English common law, the King and local lords continued to convey these properties, and the Roman ideas of common ownership dwindled in English law.⁴⁸ By the time the Magna Charta was issued in 1215, almost the entire English oceanfront was owned by private individuals.⁴⁹

During this period, the economy depended heavily on the ocean, and without the availability of the ocean and its resources, the country's socioeconomic situation faltered.⁵⁰ Societal upheaval and unrest prompted the Magna Charta, which, in conjunction with judicial inter-

Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right, 14 U.C. Davis L. Rev. 195, 201 (1980) (suggesting that the English and American legal scholars who classified the public trust as a true trust did so because of this need to find an owner of the legal title to common properties).

41. Angell, *supra* note 31, at 17.

42. Ruberto, *supra* note 2, at 363-64.

43. See Stuart A. Moore, A History of the Foreshore 1-168 (3d ed. 1888); Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. Rev. 185, 198 (1974); Drayton, *supra* note 26, at 764-65.

44. Moore, *supra* note 43, at 182 (discussing Digges' *Queen's Prerogative and Interest in Land left or gained from the Sea and Arms thereof, with Answers to Every Objection*, in Moore, *supra* note 43, at 185-211); Drayton, *supra* note 26, at 765.

45. The term "fee" refers to a fee simple absolute, which is "an estate limited absolutely to a person and his or her heirs and assigns forever without limitation or condition." Black's Law Dictionary 615 (6th ed. 1990). The holder of a fee simple absolute has an "unconditional power of disposition." *Id.*

46. Drayton, *supra* note 26, at 765.

47. See *id.*

48. *Id.*

49. Moore, *supra* note 43, at 24, 28, 639-40.

50. See Ruberto, *supra* note 2, at 365 ("Citizens in the stifled commercial society protested the king's infringement on personal property rights and demanded navigation rights."); see also Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. Davis L. Rev. 185, 189-90 (1980) (stating that peasants revolted because of the decrease in availability of resources); Leonard R. Jaffee, Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 Rutgers L. Rev. 571, 582 (1971) (noting that citizens demanded increased water rights as England became "a commercial entity").

pretation of the charter, effectively restored the public's interest in the ocean.⁵¹

2. Magna Charta

The Magna Charta marked the revival of the Roman concept of communal ownership in coastal properties.⁵² At the time the Magna Charta was ratified, the navigation of rivers by English citizens had become a very difficult task due to the proliferation of weirs⁵³ owned by the King.⁵⁴ These weirs became such a nuisance by obstructing navigational passage and public fishing that a provision of the Magna Charta ordered the King to remove all of them.⁵⁵

The main purpose of the Magna Charta was to restrict the King's power by pronouncing that the sovereign was subject to the citizens. It did not, however, "expressly recognize public rights in coastal resources."⁵⁶ Thus, although the Magna Charta is considered a defining moment in public rights to the coastline, the judges who interpreted the document are the true champions of public water rights.⁵⁷ As it

51. Drayton, *supra* note 26, at 765.

52. *Id.* at 765-66.

53. Weirs are fishing structures permanently affixed to the bottom of the body of water.

54. Drayton, *supra* note 26, at 766.

55. Magna Charta, ch. 33 (1215).

56. Ruberto, *supra* note 2, at 365.

57. The common law went to extreme lengths in providing public rights in tidal properties, far beyond those enunciated in the Magna Charta. *See* Drayton, *supra* note 26, at 765-68. After noting that the Magna Charta began a trend toward protecting the public interest, Drayton states:

The steps taken in [the time of the Magna Charta], however, were insignificant when compared with those which have since been attributed to it. Every grain of public interest protection to be found in the Magna Charta was subsequently seized upon and developed to illogical and unhistorical lengths by a legal system struggling to adapt the law of the foreshore to new and more demanding economic and political conditions. In the process of developing ("interpreting") the terms of the contract made at Runnymede, the courts, while never abandoning the original Roman conception of a general common ownership in all the people, began to speak in terms of particular guaranteed rights. The resulting doctrinal ambiguity continues to this day, although the emphasis on particular public rights or easements has become dominant.

Id. at 765-66. *But see* *Arnold v. Mundy*, 6 N.J.L. 1 (1821). In *Arnold*, Chief Justice Kirkpatrick declared of the Magna Charta:

I am of opinion, that this great principle of the common law was, in ancient times, in England gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves these common rights; that the KINGS themselves, also, in some instances during the same period, granted them out to their courtiers and favourites; and that these seizures and these royal favours are the ground of all the several fisheries in England, now claimed either by prescription or by grant; that the great charter, as it is commonly called, which was nothing but a restoration of common right, though it did not annul, but confirmed, what had been thus tortiously done, yet restored again the principles of the common law, in this

developed, the common law tremendously expanded the public rights recognized in the Magna Charta, and the King's legal rights with respect to fishery and navigation became limited to those he exercised as protector of the public good. The King no longer had the right to grant oceanfront properties to feudal lords irrespective of public rights in the use of such properties. The King's role shifted from pirate of public rights to protector of public rights.⁵⁸

Joseph Angell, a prominent legal scholar of the early 1800s, wrote that the "property of the sea and tide waters" were held by the Crown.⁵⁹ But the waters were public and free for navigational and fishing purposes "indiscriminately and without interruption."⁶⁰ Angell further noted that the shore was "of common right public. . . . The maxim [was] . . . [that] the king ha[d] the property, but the people ha[d] the necessary use."⁶¹ Approximately one half century after the ratification of the Magna Charta, the English legal scholar Henry de Bracton wrote:

By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore, provided he keeps away from houses and buildings [built there], for by the *jus gentium* shores are not common to all in the sense that the sea is, but buildings built there, whether in the sea or on the shore, belong by the *jus gentium* to those who build them. Thus in this case, the soil cedes to the building, though elsewhere the contrary is true, the building cedes to the soil.⁶²

as well as in many other respects; and since that time no king of England has had the power of granting away these common rights, and thereby despoiling the subject of the enjoyment of them.

Id. at 77. *Arnold* was subsequently overruled by *Gough v. Bell*, 22 N.J.L. 441, 457-58 (1850), *aff'd*, 23 N.J.L. 624 (1852). The New Jersey Supreme Court, however, has recently reinstated the decision of *Arnold* in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 51-55 (N.J. 1972).

58. As Joseph Angell noted:

[I]t cannot be construed that the king has any other legal tenure in the rights of fishery and navigation than belong to him in the character of *protector* of public and common rights. And hence it is that the king has no authority either to grant the exclusive liberty of fishing in any arm of the sea, or to do anything which will obstruct its navigation. The king, it is true, may grant the soil of any arm of the sea . . . but the right of the grantee so derived is always subservient to the public rights before mentioned.

Angell, *supra* note 31, at 33-34 (citation omitted); *see also* John M. Gould, *A Treatise on the Law of Waters* 42 (2d ed. 1891) ("[Tidal properties are] burdened with a trust or charge in favor of the public.").

59. Angell, *supra* note 31, at 19.

60. *Id.* Angell went on to note that the "indiscriminate" public right was subject to an exception for "royal fish" (whales and sturgeon), which the King owned because of his "guardianship of the seas, and of his protection thereof against pirates." *Id.*

61. *Id.* at 20 (citation omitted); *see also* Gould, *supra* note 58, at 42 ("The king has the property, but the people have likewise the use necessary.").

62. 2 Henry de Bracton, *On the Laws and Customs of England* 39-40 (Samuel E. Thorne trans., 1968) (footnotes omitted). Bracton's obvious reliance on Justinian's

Judging from Angell's and Bracton's accounts, the judiciary's expansive construction of the Magna Charta brought English common law full circle by the early 1800s. In fact, Bracton's explication indicates that the Crown's interest in these properties after the Magna Charta was significantly similar to Justinian's concepts.

The Crown's interest in these properties was two-fold. First, the Crown had the *jus publicum*, the right of control and jurisdiction for the public benefit.⁶³ Second, the Crown had the *jus privatum*, the right of private property.⁶⁴ The *jus privatum* was subject to the *jus publicum* and could not be used by the Crown in a manner antithetical to the rights of the public.⁶⁵ Furthermore, while the land determined to be *jus publicum* could be conveyed to private owners, it could never be discharged of public rights.⁶⁶

With this doctrinal development came pressure from individuals interested in public rights to broaden the reach of the public trust, ideally to where it encompassed even more than it did at Roman law.⁶⁷ These proponents advocated adoption of the easement approach, which limited private owners' rights by reserving easement rights in the public.⁶⁸ The advocates of this approach believed it to be the way that Roman law provided for public use of these properties. This translation of Roman law was skewed, however, because the Romans did not believe in private ownership of public trust lands; rather, they believed in communal rights.⁶⁹ But, as one researcher declared:

This theoretical difference [between the adoption of the easement approach and the actual Roman ideas of communal ownership] . . . has prevented neither coexistence nor confusion of identity. The

Digest is readily apparent. Compare text accompanying note 61 with text accompanying note 29. Bracton's declaration uses almost the exact language of Justinian's Digest.

At least one researcher, however, disagrees with Bracton's assertion:

Bracton must have been well aware that throughout the kingdom the foreshore in the point of property was in very numerous places vested in the lords of manors, although subject to the *jus publicum*. It has . . . been clearly decided that many of the passages which Bracton took from the Civil Law are inconsistent with, and form no part of, the English Common Law.

Moore, *supra* note 43, at 33.

63. Gould, *supra* note 58, at 35-36 (citing Lord Hale, *De Jure Maris*, ch. 6 (1787)).

64. *Id.* at 36-37.

65. *Id.*

66. *Id.*

67. See Drayton, *supra* note 26, at 769.

68. *Id.* An easement is "[a] right of use over the property of another." Black's Law Dictionary 509 (6th ed. 1990). There were several practical reasons for the English to follow the easement theory. One major advantage was that the Crown could alleviate unnecessary expense in maintaining these properties, while still allowing for public use. Paradoxically, this theory allowed for a return to the Roman idea of communal ownership. When easement rights became sufficiently enlarged, the concept of private ownership in public trust lands would be all but decimated. Drayton, *supra* note 26, at 769-71.

69. See *supra* text accompanying notes 27-36.

Courts have never forsaken the theory of ancestral Roman law, and the Roman approach recently has been gaining ground in practice. . . . [T]he broader principles of the Roman model can only lend support to a claimed easement under the public trust theory.⁷⁰

Despite this confusion, the public trust doctrine was fully revived in English common law. Therefore, the English essentially adopted the idea of the public trust doctrine from the Romans. The King held the title to the property, but the public had rights to the use of the property.

II. THE PUBLIC TRUST DOCTRINE AS AN AMERICAN LEGAL PRINCIPLE

With the adoption of the English common law by the American colonies, the public trust doctrine was embedded in American law.⁷¹ Throughout its history, the public trust doctrine has been ignored, attacked, and, finally, vindicated.

A. Background

British settlers brought the concept of the public trust to America when they claimed ownership by the right of discovery.⁷² Upon British settlement of the colonies, public trust rights were transferred to the colonies by royal charters.⁷³ As early as 1810, American courts recognized the concept of the public trust doctrine.⁷⁴ The Supreme Court first enunciated the doctrine in *Martin v. Waddell*.⁷⁵ The *Martin* Court determined that after the American Revolution, the people became sovereign, thereby inheriting all rights in navigable waters and connected soils previously held by the Crown.⁷⁶ These rights, of course, did not include those surrendered by the Constitution to the

70. Drayton, *supra* note 26, at 769.

71. See Archer, *supra* note 16, at 6.

72. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894). The Supreme Court held that when acquiring a new territory, the United States took title and dominion of the tidal waters and land below the high water mark for the public benefit and in trust for the future states to be created from the territory. The Court also stated that the newly admitted states possessed the same rights in trust properties as the original states. *Id.* at 26.

73. Catherine R. Hall, *Dockominiums: In Conflict with the Public Trust Doctrine*, 24 Suffolk L. Rev. 331, 336 (1990). "[F]ee to these lands passed to the state [from the Crown], which held them in trust for the inhabitants of [the state]." *Id.* at 339.

74. See *Carson v. Blazer*, 2 Binn. 474, 494 (Pa. 1810). The Pennsylvania court in *Carson* declared that "the right to fisheries in the said river is vested in the state, and open to all." *Id.* The case of *Arnold v. Mundy*, 6 N.J.L. 1 (1821), however, is generally regarded as the first case in the United States in which a court discusses the public trust concept. The *Arnold* court stated that "where the tide ebbs and flows . . . are common to all the people." *Id.* at 12.

75. 41 U.S. (16 Pet.) 367 (1842).

76. *Id.* at 410.

federal government.⁷⁷ The properties that were transferred to the states included the properties that were impressed with the public trust. Because the Crown held legal title to these properties subject to the public's use,⁷⁸ when the states took control of these properties, they also took subject to the public use rights.⁷⁹

In the landmark public trust case, *Illinois Central Railroad v. Illinois*,⁸⁰ the United States Supreme Court stated that public trust "lands were held by the State, as they were by the King, *in trust* for the public uses."⁸¹ In *Illinois Central*, Illinois had granted a large part of Chicago's waterfront on Lake Michigan, a navigable lake, to private owners.⁸² The Illinois Attorney General filed suit on behalf of the citizens of Illinois against the private owners and the City of Chicago to obtain a judicial decision as to the rightful ownership of the property.⁸³ The Supreme Court, in no uncertain terms, declared that the public trust doctrine imposes affirmative obligations upon states as trustees:

77. *Id.* The rights that the states surrendered to the federal government in the Constitution are embodied in Article I, § 10. These rights include the right to coin money, the right to pass *ex post facto* laws, and the right to keep troops without congressional consent. U.S. Const. art. I, § 10.

78. See *supra* text accompanying notes 59-66.

79. As the law and common sense both dictate, a trustee or any other transferor cannot convey greater title than she possesses. *Williams v. Thrasher*, 62 F.2d 944, 946 (5th Cir.), *cert. denied*, 289 U.S. 748 (1933); *McNeil v. Tenth Nat'l Bank*, 46 N.Y. 325, 329 (1871); 90 C.J.S. *Trusts* § 306 (1955); cf. *Hessen v. Iowa Auto. Mut. Ins. Co.*, 190 N.W. 150, 152 (Iowa 1922) (stating that one cannot transfer greater interest in chattel than one possesses).

Of course, the process described in the text only accounts for the original 13 states. With respect to the western lands that the United States subsequently acquired, the United States was the owner when the western states came into being. But the Supreme Court has reasoned that, on the basis of the "equal footing doctrine," new states take property of the United States in the same way as the original states. See *Shively v. Bowlby*, 152 U.S. 1, 26 (1894) ("The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands below the high water mark, within their respective jurisdictions."). The subsequent states succeeded to the same rights based on the theory that the properties acquired by the United States from the original 13 colonies or from foreign nations were held in trust for the new states so that they might be admitted on equal footing with the original states. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845). As to lands in territorial status, the Federal government exercised sovereignty. *Shively*, 152 U.S. at 48-50. Thus, western states also took title subject to duties owed to the public through the public trust.

80. 146 U.S. 387 (1892).

81. *Id.* at 457 (quoting *Stockton v. Baltimore & N.Y. R.R.*, 32 F. 9, 19 (C.C.D.N.J. 1887)). *Illinois Central* has been followed and cited extensively in modern case law. See *Utah Div. of State Lands v. United States*, 482 U.S. 193, 203 (1987); *Lake Mich. Fed'n v. United States Army Corps of Eng'rs*, 742 F. Supp. 441, 444 (N.D. Ill. 1990). Thus, these rights exist today in much the same way as they did in England after the Magna Charta.

82. 146 U.S. at 438.

83. *Id.* at 433.

A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The State can no more abdicate its trust over property in which the whole people are interested*, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace.*⁸⁴

Thus, *Illinois Central* left no doubt that the public trust doctrine is valid under federal law and is binding on each of the states. The Court emphatically declared that a state may not abandon its public trust obligations by attempting to convey trust properties.⁸⁵ The Court concluded that, because of the state's duty imposed by the public trust, the attempted alienation was revocable by an interested party.⁸⁶

B. *The Takings Doctrine and Public Trust Decisions*

There was very little development of the public trust doctrine in America until the late twentieth century. Since the 1970s, the public trust doctrine frequently has been employed to vindicate public rights in private lands.⁸⁷ These public interests must be construed narrowly to avoid constitutional violations of private property, such as takings.⁸⁸ Takings originally referred only to physical appropriation by government of private property.⁸⁹ In modern times, however, takings are found in many circumstances where there is no physical appropriation.⁹⁰ A taking may be found when governmental action (federal or state) results in significant impairment of the use and enjoyment of the property.⁹¹ Therefore, an overly comprehensive regulation, even though it does not require physical acquisition of the property, may

84. *Id.* at 453 (emphasis added).

85. *Id.* at 453.

86. *Id.* at 453-55.

87. Prior to the 1970s, the public trust doctrine was conspicuously overlooked. See Sullivan, *supra* note 16, at B2.

The increased use of the doctrine since the 1970s is in large part due to Professor Joseph L. Sax and his seminal article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970). Utilizing his ideas, the public found a new way to voice concerns regarding dwindling access to natural resources. Professor Sax, a Professor of Law at Boalt Hall School of Law, University of California at Berkeley, is widely regarded as the foremost legal scholar on the public trust.

88. See *supra* notes 5-6 and accompanying text.

89. Nowak & Rotunda, *supra* note 5, § 11.12(a), at 427.

90. *Id.*

91. *Id.* at 427, 441.

effect a taking.⁹² Paradoxically, in some situations, an extensive regulation may be found not to be a taking because it does not require a physical appropriation.⁹³ Evidence of a physical acquisition, therefore, causes the judiciary to favor a takings finding; there is almost always a declaration of a taking when a governmental action allows physical acquisition of property or permits people, other than the owner of the property, to occupy the property permanently.⁹⁴

Government can only take and use private property for the public benefit if it is justified by emergency or if the government pays just compensation.⁹⁵ Of course, the government does not have the right to take private property for any reason merely by paying compensation; the government must show that the action is for the purpose of benefiting the health, safety, and welfare of the public.⁹⁶

Thus, while a state's removal of the privilege of a landowner to exclude others from her property may effect a taking,⁹⁷ this is not always the case.⁹⁸ Courts will consider the degree to which the action advances legitimate public concerns. Other relevant inquiries include the amount of diminution in property value of the land and the extent to which the action interferes with the owner's reasonable expectancy interests with regard to the use of the property.⁹⁹ This Note urges the federal government to enact legislation that would provide for more access routes to the ocean.¹⁰⁰ Avoiding the takings doctrine is an inexpensive way to provide for increased rights of access to beaches, because when there is a taking, compensation must be paid. Although it is an inexpensive way to provide access, it is not the only way. Therefore, while a judicial finding of a taking may occur when a right of access is recognized across private property, it is not fatal to the proposals in this Note.¹⁰¹ Nevertheless, an attempt will be made to demonstrate methods to avoid the takings problem altogether, because of the economic benefits of doing so.

92. *Id.* at 429.

93. *Id.*

94. *Id.* at 431; *see also* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (finding a taking where state law required landlord to permit a cable television company to install a cable box and wiring to her building). *But see* *Yee v. City of Escondido*, 112 S. Ct. 1522, 1534 (1992) (holding that no taking occurred where state law gave tenants the right to occupy their mobile home lots indefinitely at a fixed price).

95. *Nowak & Rotunda*, *supra* note 5, § 11.12(b), at 435-36.

96. *Id.* § 11.13, at 445.

97. *Id.* § 11.12(b), at 437.

98. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 79, 82-85 (1980) (upholding state court decision that no taking existed where the state court prohibited private shopping center owners from excluding individuals exercising their rights of nondisruptive speech by petitioning at the shopping center).

99. *Nowak & Rotunda*, *supra* note 5, § 11.12(b), at 437.

100. *See infra* part IV.

101. *See infra* text accompanying note 297.

There are several ways to get around the takings problem with reference to the public trust. First, establishing a pre-existing public trust right to property effectively precludes a private owner from claiming that the land was "taken" and thus that the owner is entitled to compensation. When there are pre-existing public rights in the property, the "owner" of the land cannot reasonably expect to have the power to exclude the public. The public has a pre-existing right in connection with public trust properties because the states, upon taking title to the properties from the Crown, took only the estate that the Crown had to give.¹⁰² Recall that the Crown's ownership was subject to the public's use; therefore, the state's ownership is also subject to the public's use.

In *Phillips Petroleum Co. v. Mississippi*,¹⁰³ the Supreme Court acknowledged that there are no constitutional limitations on the states' enforcement of pre-existing public trust rights.¹⁰⁴ In *Phillips*, the state of Mississippi issued oil and gas leases on land underlying bayous and streams that were affected by the tide.¹⁰⁵ Petitioners, the record titleholders of the land underlying these waters,¹⁰⁶ brought suit to quiet title after Mississippi issued the leases.¹⁰⁷ The Supreme Court held that the public trust doctrine applied to waters influenced by the tide, whether navigable or non-navigable,¹⁰⁸ and that the property was rightfully leased by the state.¹⁰⁹

Justice O'Connor noted that "[a]lthough Mississippi collected taxes on the land and made no mention of its claim for over 150 years, the Mississippi Supreme Court held that Mississippi was not estopped from dispossessing petitioners."¹¹⁰ Therefore, even though petitioners were record titleholders, presumably bona fide purchasers for value, and paid taxes on the property, they could not divest the state of ownership because, under Mississippi law, ownership of public trust property cannot be claimed by a private entity through adverse possession or any other equitable doctrine.¹¹¹ Thus, states are afforded wide dis-

102. See *supra* notes 76-79 and accompanying text.

103. 484 U.S. 469 (1988).

104. *Id.* at 483. Thus, if the conclusion is reached that the states took title to the properties subject to public trust rights, there is no takings issue to be resolved. See *supra* notes 6, 76-79, and accompanying text; see also *infra* note 134.

105. 484 U.S. at 472.

106. *Id.*

107. *Id.*

108. *Id.* at 472, 484-85.

109. *Id.* at 484-85.

110. *Id.* at 494 (O'Connor, J., dissenting).

111. *Id.* at 484 (O'Connor, J., dissenting). Many states provide that public trust properties may not be lost through adverse possession. See, e.g., Miss. Const. art. IV, § 104 (stating that the state's public trust properties may not be taken by adverse possession); N.C. Gen. Stat. § 1-45.1 (Supp. 1994) (same); see also *Lacy v. Montgomery*, 124 A.2d 492, 497 (Pa. Super. 1956) (same).

cretion with respect to at least the traditional uses¹¹² of the properties held in the public trust, but they are prohibited from descending below some undefined minimum federal standard.

Second, there is a well established exception to the takings doctrine where the exaction "secure[s] an average reciprocity of advantage."¹¹³ The "reciprocity of advantage" test is normally viewed from the perspective of a benefit that the person incurring the exaction receives from the exaction itself.¹¹⁴ The test, however, seems to be read more broadly with respect to cases involving large areas of land, such as zoning.

For example, in *Penn Central Transportation Co. v. New York City*,¹¹⁵ the Supreme Court held that the New York City Landmarks Preservation Commission's refusal of a landowner's construction plans did not effect a taking. The Court reasoned that, similar to the legislation proposed in this Note, the law at issue was not "discriminatory" or a "land use decision which arbitrarily single[d] out a particular parcel for different, less favorable treatment than the neighboring ones."¹¹⁶ The Court found that no taking occurred despite the fact that "zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels."¹¹⁷ The Court further noted that although the landmark law did not "impose identical or similar restrictions on all structures located in [the] community"¹¹⁸ and that landowners suffer disproportionately, the law did not effect a taking.¹¹⁹ The landowners' argument that they were "solely burdened and unbenefitted" was rejected¹²⁰ because the law applied to many structures in New York City and the law "improv[ed] the quality of life in the city as a whole."¹²¹

112. The traditional uses under the public trust were fishing and navigation, but these uses have been expanded considerably in some states. See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (extending the public trust uses to "recreational uses, including bathing, swimming and other shore activities"); *infra* note 171.

113. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

114. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2328 (1994) (Stevens, J., dissenting) (arguing that petitioner received a benefit from the exaction); *Hodel v. Irving*, 481 U.S. 704, 715 (1987) (applying the "reciprocity of advantage" test to the persons incurring the exaction); *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (same).

115. 438 U.S. 104, 138 (1978).

116. *Id.* at 132; see also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2924 (1992) (Stevens, J., dissenting) (noting that courts have often distinguished cases involving regulations targeting one or two parcels and regulations that are part of comprehensive state policies).

117. *Id.*

118. *Id.* at 133.

119. *Id.*

120. *Id.* at 134-35.

121. *Id.* at 134.

Even Justice Rehnquist, in dissent, acknowledged that zoning cannot be a taking, because “[w]hile zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefitted by another.”¹²²

The *Penn Central* reasoning transcends zoning issues and is readily applicable to the beach access arena. As one commentator asserted: “Each person burdened by a harm-prevention regulation is also reciprocally benefitted because similarly situated neighbors are also burdened.”¹²³ This statement suggests the interrelation between the reciprocity exception and the nuisance exception¹²⁴ to the Takings Clause. While the beach access issue probably does not implicate the nuisance exception, Justice Rehnquist noted that even if the prohibited use is noninjurious, there is no taking “if the prohibition applies over a broad cross section of land and thereby ‘secure[s] an average reciprocity of advantage.’”¹²⁵

Thus, applying the reasoning from *Penn Central*, the federal legislation proposed in this Note is not a taking. Although landowners along the coastline will be burdened by reasonable access exactions, they also will benefit as beneficiaries of the public trust because they too will gain by the increased number of access routes to the coast.¹²⁶ Therefore, the legislation proposed does not implicate the takings doctrine because exactions will occur “over a broad section of land”—

122. 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

123. Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. Rev. 627, 679 (1989). As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

124. The nuisance exception states:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). A New Jersey court hinted that, in allowing for greater public rights on dry sand beaches, they were abating a nuisance. See *infra* note 180.

125. *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

126. See Finnell, *supra* note 115, at 679; see also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2924 (1992) (Stevens, J., dissenting) (distinguishing the act at issue by claiming that it “does not target particular landowners, but rather regulates the use of the coastline of the entire state”). The legislation proposed in this Note will be even more closely analogous to zoning laws than that in *Lucas* because it will be part of a national policy of increased beach access.

namely, the entire American coastline—and will “improve the quality of life” in the whole country.

In *Nollan v. California Coastal Commission*,¹²⁷ the Supreme Court held, in a five to four decision,¹²⁸ that constitutional property protections outweighed public interests in certain oceanfront property.¹²⁹ In *Nollan*, the California Coastal Commission¹³⁰ attempted to attach easement rights to development permits for oceanfront property.¹³¹ The Commission was trying to grant a public right to traverse a lateral pathway¹³² on a private beach to achieve greater public access to the ocean between two public beaches.¹³³

The Court found no pre-existing legal right in the public to the property. Thus, the majority determined that the Commission’s action amounted to a compensable taking.¹³⁴ The Court held that this type of forced easement must reasonably be related to the harmful effects that the development would have in terms of public access rights.¹³⁵ The Court reasoned that if the state wanted to grant this property to the public, the state would have to compensate the owner.¹³⁶ In reaching its holding, the majority ignored not only state precedent that acquisition of public easements across private beaches

127. 483 U.S. 825 (1987).

128. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices White, Powell, and O’Connor joined. Justices Brennan, Marshall, Stevens, and Blackmun dissented.

129. See 483 U.S. at 841-42.

130. The California Coastal Zone Conservation Act of 1972 created the California Coastal Zone Conservation Commission. Cal. Pub. Res. Code §§ 27000-27650 (repealed 1977). The California Coastal Act of 1976 replaced the 1972 Act. Cal. Pub. Res. Code §§ 30000-30950 (West 1986 & Supp. 1993). The new act changed the name of the agency to the California Coastal Commission. *Id.* § 30105. The Commission obtained over 52 miles of vertical and lateral coastline access in its first 14 years. California Coastal Comm’n & California State Coastal Conservancy, Coastal Access Program Seventh Annual Report 14 (1987).

131. *Nollan*, 483 U.S. at 828.

132. Lateral access is access along the coastline. The correlative is vertical access, which is access to the coastline.

133. *Nollan*, 483 U.S. at 828.

134. *Id.* at 841-42. Had the Court held that such a right existed, there would not have been a taking. See *supra* notes 101-12 and accompanying text (discussing pre-existing public rights and takings); see also *Nollan*, 483 U.S. at 847-48 (Brennan, J., dissenting) (arguing existence of pre-existing public right to refute majority holding of a taking); *infra* note 169 (discussing takings).

Interestingly, no state court public trust decision has ever been struck down as a violation of the Takings Clause. Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 *Envtl. L.* 573, 597 n.108 (1989). James Huffman submits that this is a mere truism, for if a certain property is considered public trust property, by definition the public rights predate any private rights in the property. James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 *Envtl. L.* 527, 569 (1989).

135. *Nollan*, 483 U.S. at 834-37.

136. *Id.* at 842.

is a valid exercise of a state's public trust obligations,¹³⁷ but also the tradition of the public trust as adapted from the Roman and English common law.¹³⁸ Moreover, for all of the Court's discussion of valuable property rights,¹³⁹ the Court failed to recognize that the Nollans did not even *assert* any adverse economic impact.

Justice Brennan, in his vigorous dissent, noted that the majority based its decision on the failure of the Commission to demonstrate a sufficient nexus between access provisions and the burdens on access that new development would yield.¹⁴⁰ He stated that the majority based its requirement for the "precise fit" regarding this nexus on the false assumption that private landowners have reasonable expectations in their property rights upon which the public seeks to intrude.¹⁴¹ He then argued that "[t]he public's expectation of access considerably antedates any private development on the coast"¹⁴² and that "[i]t is therefore private landowners who threaten the disruption of settled public expectations."¹⁴³ Thus, Justice Brennan attempted to demonstrate a pre-existing right in the public, thereby eliminating any possibility of a taking.¹⁴⁴ Justice Brennan was referring to the California Constitution and its declaration that "[n]o individual . . . shall be permitted to exclude the right of way to such water whenever it is required for any public purpose."¹⁴⁵ He further announced that he "only hope[s] that [the] decision is an aberration, and that a broader vision ultimately prevails."¹⁴⁶

137. See *Nollan v. California Coastal Comm'n*, 223 Cal. Rptr. 28, 30 (Ct. App. 1986); *Remmenga v. California Coastal Comm'n*, 209 Cal. Rptr. 628, 631 (Ct. App.), *appeal dismissed*, 474 U.S. 915 (1985); *Grupe v. California Coastal Comm'n*, 212 Cal. Rptr. 578, 587-90 (Ct. App. 1985). In *Grupe*, the court upheld the state's right to condition a development permit on landowner's assent to allow a public access easement along his property. The court stated that the landowners home "is one more brick in the wall separating the People of California from the state's tidelands." *Id.* at 589.

138. See *supra* parts I, II.A.

139. *Nollan*, 483 U.S. at 831-32.

140. *Id.* at 862-63 (Brennan, J., dissenting).

141. *Id.* at 847 (Brennan, J., dissenting).

142. *Id.* (Brennan, J., dissenting).

143. *Id.* at 848 (Brennan, J., dissenting).

144. See *supra* notes 6, 101-12, 134, and accompanying text (discussing takings and pre-existing public rights).

145. Cal. Const. art. X, § 4 (amended 1976).

146. *Nollan*, 483 U.S. at 864 (Brennan, J., dissenting). At least one commentator agrees with Justice Brennan, stating that if he were to grade the opinions of *Nollan* as a law professor, he "would give Justice Brennan's dissenting opinion an A+ and Justice Scalia, the new man on the Court, a barely passing grade." *Public Access Hearings*, *supra* note 2, at 25 (statement of Dennis W. Nixon, Associate Professor of Marine Affairs, The University of Rhode Island). Nixon continued, asserting that "[Justice Scalia's] reading of the takings law represents a narrow reading of the law that takes us back a hundred years." *Id.*

In 1994, the Supreme Court again expounded on the takings doctrine in *Dolan v. City of Tigard*.¹⁴⁷ In a five to four decision,¹⁴⁸ the Court reversed the state court,¹⁴⁹ which allowed the city of Tigard, Oregon to force a landowner to dedicate a certain portion of her property as a greenway and pedestrian/bicycle path as a condition to the granting of a development permit for her store.¹⁵⁰ The *Dolan* majority added another element to the takings analysis, beyond the *Nollan* nexus¹⁵¹ requirement. *Dolan* required that the city prove a "rough proportionality" between the condition and the particular harm posed by the development.¹⁵² The Court determined that the nexus requirement was met¹⁵³ but the "rough proportionality" requirement was not.¹⁵⁴

The *Dolan* Court stated that the determination of whether the "rough proportionality" standard has been met requires "[n]o precise mathematical calculation" but that the city must establish that the dedication "is related both in nature and extent to the impact of the proposed development."¹⁵⁵ The city, however, merely asserted that the creation of the pathway "could offset some of the traffic demand."¹⁵⁶ Thus, the city failed to meet its burden.¹⁵⁷

Furthermore, the majority distinguished several other cases by stating that they "involved essentially legislative determinations classifying *entire areas of the city*, whereas here the city made an adjudicative decision . . . on an individual parcel."¹⁵⁸ Therefore, the Court noted two distinctions that figured into their finding of a taking in *Dolan*:

147. 114 S. Ct. 2309 (1994).

148. Chief Justice Rehnquist authored the majority opinion, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Stevens' dissent was joined by Justices Blackmun and Ginsberg. Justice Souter dissented separately.

149. *Dolan*, 114 S. Ct. at 2322.

150. *Id.* at 2313-16.

151. See *supra* note 135. But see *supra* notes 140-46 and accompanying text (discussing the dissent, in which Justice Brennan attacked the majority's nexus).

152. *Dolan*, 114 S. Ct. at 2319-20.

153. The city's purposes for the exactions were twofold. First, limiting the development was to prevent flooding from increased stormwater run-off. *Id.* at 2318-19. The Court stated that the nexus requirement was met with respect to flood prevention because decreasing the amount of impervious surface increases flooding. *Id.* at 2318. Second, the pedestrian/bicycle path was to reduce traffic congestion by providing an alternate transportation route. *Id.* The Court reasoned that the nexus requirement was satisfied for this as well, because cycling and walking are "useful alternative means of transportation for workers and shoppers." *Id.*

154. *Id.* at 2321-22.

155. *Id.* at 2319-20. For a discussion of the exact requirements of the "rough proportionality" test, see Christopher J. St. Jeanos, Note, *Dolan v. Tigard and the Rough Proportionality Test: Roughly Speaking, Why Isn't A Nexus Enough?*, 63 *Fordham L. Rev.* 1883, 1895-96 (1995).

156. *Id.* at 2315 (quoting City of Tigard Planning Comm'n Final Order No. 91-09 PC, App. to Pet. for Cert. G24).

157. *Id.* at 2321.

158. *Id.* at 2316 (emphasis added).

adjudicative decisionmaking and conditioning of an individual parcel. The action proposed in this Note is very different from that in *Dolan*. First, this Note proposes mainly legislative as opposed to adjudicative action.¹⁵⁹ Second, the legislation will affect a very broad area of property, even greater than an "entire area[] of the city." In fact, the legislation proposed in this Note would effect the entire coastline of the United States.¹⁶⁰

Moreover, the properties involved in *Dolan* were not public trust properties. The public's interest in the parcel in *Dolan* is hardly comparable to the public interest in the beaches of the United States. The city of Tigard had no pre-existing public right argument in *Dolan*'s property. Such an argument is plausible regarding the beach access issue, and the argument effectively dismantles any takings challenge.¹⁶¹

According to these holdings, a constitutional limit seems to exist on state regulation with respect to trust properties. Under these conditions, the takings doctrine looms as a possible shield for the private landowner in asserting constitutional rights against the general public. Public trust rights, however, should be construed to avoid problems with takings, given that there is a "reciprocity of advantage"¹⁶² and, by definition, these rights are pre-existing public rights. Proper application of the public trust concepts by the judiciary will make more properties available for access to coastal resources by the public.

C. *The Future Application of the Public Trust Doctrine and Public Policy*

On first inspection, the holdings in *Nollan* and *Dolan* seem to be major setbacks for proponents of beach access. As Justice Brennan noted, however, *Nollan*'s precedential value may not be as potent as it seems.¹⁶³ He explained that the Commission could have avoided a judicial finding of a taking by merely declaring a proper purpose in enacting the legislation.¹⁶⁴ The same is true in *Dolan*, where poor pleadings were at least partly responsible for the outcome.¹⁶⁵ Because of the weaknesses of these decisions, including bare majorities in both,¹⁶⁶ the possibility of revised pleadings changing the outcomes of

159. See *infra* part IV.

160. See *infra* part IV.

161. See *supra* notes 101-12 and accompanying text (discussing pre-existing rights and takings).

162. See *supra* notes 113-26 and accompanying text.

163. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 862 (1987).

164. See *id.* at 862-63. Although the majority warned that disguised pleadings will not save the legislation, *id.* at 841, that remains to be seen.

165. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2326 (1994) (Stevens, J., dissenting) (assailing the majority for requiring a definitive showing that the path "will" offset, as opposed to "could" offset, traffic congestion).

166. See *supra* notes 128, 148.

the cases¹⁶⁷ and the *Nollan* majority's disregard for precedent,¹⁶⁸ other states should enact coastal development programs similar to that of the California Coastal Commission to gain ground in the battle for public coastal rights.

There are two main ways that states should proceed in providing increased public beach access. First, states should follow New Jersey's lead in providing that a reasonable portion of the dry sand area is part of the public trust.¹⁶⁹ A similar holding in all coastal states would increase lateral access in the coastal areas significantly. Increasing lateral access alone, however, would be insufficient. States must also provide for increased vertical access to the shoreline. To allow the public the right to traverse pathways *along* the beach is meaningless without the correlative right to get *to* the beach.¹⁷⁰ States should implement programs to increase vertical access, such as conditioning building permits upon the allowance of a public easement.¹⁷¹

Second, states should emulate the legislation of states like Hawaii and Texas.¹⁷² The Hawaiian legislature, recognizing the effect of the increased population on beach access, found that the absence of public access amounted to "an infringement upon the fundamental right of free movement."¹⁷³ Thus, the state legislature provided for the "ac-

167. See *supra* notes 155-56, 164, and accompanying text.

168. See *supra* note 137 and accompanying text.

169. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365-66 (N.J.), cert. denied, 469 U.S. 821 (1984). There is an argument that the court in *Matthews* effected a taking when it appropriated the use of the "dry sand" property not traditionally considered to be trust property to the public. As one scholar has pointed out, however, there seems to be a different view of takings when they occur by legislative enactment rather than by judicial decree. For an insightful discussion of these "judicial takings," see Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).

170. See *Matthews*, 471 A.2d at 365. The *Matthews* court declared:

The bathers' right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the waters' edge. The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to recreational use of the ocean. . . . [W]here use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

Id.; see also Archer, *supra* note 16, at 105. Archer notes:

If the public trust doctrine is to have substance, the general public must have reasonable access to trust lands. If the recreational demands and aesthetic needs of modern society are to be met, it is appropriate for courts, legislatures, and state government agencies to recognize this corollary to the doctrine and move affirmatively to preserve or create such the public right of meaningful access.

Id.

171. See *supra* notes 127-46 and accompanying text.

172. See *supra* notes 9-10 and accompanying text.

173. Haw. Rev. Stat. § 115-1 (1985); see *supra* note 9.

quisition of land for the purchase and maintenance of public rights-of-way and public transit corridors."¹⁷⁴ The Texas Open Beaches Act¹⁷⁵ encourages the judiciary to find public easements across coastal properties by imposition of a presumption in favor of prescriptive public rights.¹⁷⁶ But states must go even further in providing and protecting the public's right of access to the nation's beaches. Specific substantive legislation must be passed that mandates access routes over predetermined mileage intervals.¹⁷⁷

Strong public policy considerations favor legislation to increase public beach access. The more affluent sector of American society tends to dominate ownership of the beachfront property in the United States.¹⁷⁸ When wealthy landowners can exclude others from obtaining access to the beaches, in effect, they own the beach, the foreshore, and the water directly in front of their property. Many feel an almost tangible resentment about the disparate access to the ocean possessed by members of different socioeconomic classes. The concept of the *jus publicum* was largely an effort to combat these sentimental societal upheavals and to discourage monopolization of resources that are rightfully incapable of individual ownership.¹⁷⁹ Legislation of the type espoused in this Note can only provoke a generally positive societal reaction, leading not only to greater cohesiveness among the socioeconomic classes, but also to a sense of community in the individual as well.¹⁸⁰

Reallocation of access to resources will, of course, necessitate "sacrifices" on the part of landowners and "bonuses" for other citizens.¹⁸¹ Advocates of the redistribution of natural resources have examined

174. Haw. Rev. Stat. § 115-1 (1985); see *supra* note 9.

175. Tex. Nat. Res. Code Ann. § 61.020 (Vernon 1978); see *supra* note 10.

176. See *supra* note 10.

177. See *infra* part IV. Part IV discusses federal legislation of the type urged in this Note. States, however, should enact similar and more stringent legislation to protect these important public rights.

178. Because the wealthy tend to dominate oceanfront areas and local politics, the issue has long been thought of as a local land use decision or, at best, a state interest. H.R. Rep. No. 535, 101st Cong., 2d Sess. 24 (1990). Congress, however, has made it clear that it believes beach access is of national interest and "a priority area for improvement." *Id.*

179. See *supra* part I.B. Professor Sax advances that the public trust concept was partly based on the fact that "certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs." Sax, *supra* note 87, at 484.

180. One court, after declaring that the public trust rights provide for certain public uses, including recreation, stated: "'Health, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state.'" *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363 (N.J.) (quoting *N.J. Sports & Exposition Auth. v. McCrane*, 292 A.2d 580, 598 (N.J. Super. Ct. Law Div. 1971), *aff'd*, 292 A.2d 545, *appeal dismissed sub nom. Borough of E. Rutherford v. N.J. Sports & Exposition Auth.*, 409 U.S. 943 (1972), *cert. denied*, 469 U.S. 821 (1984)).

181. Tracy R. Lewis & Philip Neher, *Consistent and Revised Plans for Natural Resource Use*, in *Essays in the Economics of Renewable Resources* 55, 55-56 (Leonard J.

two general economic plans in terms of resource allocation in the United States, though not specifically in terms of coastal access.¹⁸² These plans have interesting consequences when they are examined against the backdrop of the beach access debate.

The first plan requires large capital expenditures and landowner sacrifice early on for the welfare of future citizens.¹⁸³ In terms of the beach access issue, the state and federal governments will have to appropriate funds to provide access routes, and private landowners must sacrifice portions of their properties to effectuate the goal. These landowners, however, receive a "reciprocity of advantage," because they too would realize increased beach access at points along the coastline where similar exactions occurred.¹⁸⁴ This type of plan may be impossible to effect "if currently alive citizens generally do not embrace the intertemporal ethic embodied in it."¹⁸⁵

The second plan seeks distribution that more closely resembles the desires of those alive at the time.¹⁸⁶ If present citizens are not concerned about the benefits to be bestowed on future citizens, they will adopt a plan consistent with their own agendas, focusing on "their own consumption and imperfectly altruistic bequest motives."¹⁸⁷ If this plan is the working model of our society, reallocation of natural resources to provide for "the common good" is, at best, an illusory goal. This plan has been referred to as "reflect[ing] the selfishness and myopia of people, arising from the fact of their mortality, as compared with the even-handed farsightedness of an immortal state."¹⁸⁸ Assuming that this model reflects the vision of the population of people owning coastal properties in America, it would seem that this is the route coastal property owners would prefer. If we consider the broader view of "the public," however, such as the whole populace of a given state, the former plan, requiring a present redistribution of resource access allocation, is the more attractive. As the better model directs, the time to act is now. The legislation proposed in this Note is a manifestation of the first plan and would result in a tremendous increase in beach access and, ultimately, greater societal cohesiveness.

Mirman & Daniel F. Spulber eds., 1982). The authors rely heavily on Frank Ramsey, *A Mathematical Theory of Saving*, Econ. J., Dec. 28, 1928, at 543-59.

182. See Lewis & Neher, *supra* note 181, at 56.

183. *Id.*

184. See *supra* notes 113-26 and accompanying text.

185. Lewis & Neher, *supra* note 181, at 56.

186. *Id.*

187. *Id.*

188. *Id.*

III. CONSEQUENCES OF THE PUBLIC TRUST DOCTRINE AS A COMMON LAW TRUST PRINCIPLE

Much discussion has been focused on the issue of how to classify the public trust doctrine in American law.¹⁸⁹ Classification is important in determining how the doctrine is applied.¹⁹⁰ Judges and researchers have classified the public trust as part of federal constitutional law,¹⁹¹ state constitutional law,¹⁹² property law,¹⁹³ and as a means of judicial review of administrative action.¹⁹⁴ Several of these classifications have merit, but each also has profound weaknesses.¹⁹⁵ The best way

189. A detailed analysis of these classifications is beyond the scope of this Note. For an interesting, if not accurate, analysis, see Huffman, *supra* note 134, at 534-68. Huffman argues that the public trust is a property concept and should be treated as such. *Id.* at 533-34. Huffman undermines his own analysis, however, by his admission that his concern that the public trust be treated as an aspect of property law "is based largely on the belief that if the doctrine is thus classified, courts will be more likely to be active in the defense of private rights in property." *Id.* at 534. While Huffman's intentions may be considered honorable (from the landowners' perspective), he falls into the logical trap of discovering the conclusions he seeks to reach prior to defining the premises. Interestingly, in the same article, Huffman attacks a proponent of public rights by stating that the colleague "is blinded by his own 'agenda.'" *Id.* at 568.

190. See Huffman, *supra* note 134, at 529.

191. See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 *Env'tl. L.* 425, 464 (1989) (stating that the public trust is best understood as a "federal mandate" embodied in the Constitution).

192. See *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1120 (Alaska 1988) (invalidating state tideland conveyance because it violated the public trust doctrine as embodied in state constitution); *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170-71 (Mont. 1984) (relying on state constitution to assert that public trust allowed the public to use waters that flowed through landowners property); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 461 (N.D. 1976) (finding that plaintiff stated a valid cause of action based on the public trust doctrine embodied in state constitution); see also Blumm, *supra* note 134, at 574, 577-78 (maintaining that the public trust doctrine is often regarded as having a state constitutional basis in the law).

193. See Huffman, *supra* note 134, at 561-65.

194. See W. Rodgers, Jr., *Environmental Law: Air and Water* § 2.20, at 162 (1986); Blumm, *supra* note 134, at 589-95. Blumm discusses the manifestation of the public trust as the "hard look" doctrine, which basically calls for full disclosure in administrative decision making. Treating the doctrine as such would require agencies to reveal explanations for decisions, explanations for following different procedures in similar cases, and would further require the agency to demonstrate that they have considered alternatives. *Id.* at 589-90. Blumm states that this "hard look" results in fairness in process and reasoned decision making, rather than any substantive consequences. *Id.* at 590.

195. For example, if the public trust is viewed as a federal constitutional right, the argument is that these rights predate private ownership rights and are, therefore, legitimized. See *supra* notes 101-12 and accompanying text (discussing pre-existing public rights). Such rights, however, are not explicitly mentioned in the Constitution, so proponents of this view must argue that these rights are implied. The very existence of rights that are not explicitly mentioned in the Constitution is a hotly debated topic. Compare Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1990) (arguing for strict interpretation of the Constitution and finding no rights not explicitly mentioned) and Robert H. Bork, *Original Intent: The Only Legitimate*

to analyze the public trust doctrine is under trust law,¹⁹⁶ as the term "public trust" explicitly, if not intentionally, directs.

A. *Classifying the Public Trust Doctrine*

The public trust has many traits that are similar to modern trusts in America. Thus, the public trust can, and should, be examined in light of modern trust law.¹⁹⁷ "A trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of intention to create it."¹⁹⁸ The principal concept underlying modern trust law is that legal and equitable title to property can be separated.¹⁹⁹

Modern trust law requires the presence of three main elements,²⁰⁰ all of which are present in the public trust. First, a trustee, the individual or group that owns the legal title, is necessary.²⁰¹ In the context of the public trust, the state is the trustee.²⁰² Second, at least one beneficiary,²⁰³ or *cestui que trust*,²⁰⁴ who holds the equitable title is required.²⁰⁵ The beneficiaries of the public trust are the members of the

Basis for Constitutional Decision Making, Judge's J., Summer 1987, at 12, 13 (same with *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804-08, 2810-11 (1992) (discussing rights implicit in the text of the Constitution) and Paul Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Constitutional Scholarship*, 90 Yale L.J. 1063 (1981) (arguing against a strict interpretation of the Constitution).

196. Many courts, including the Supreme Court, have analyzed the doctrine according to modern trust principles. See *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 511 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Morse v. Oregon Div. of State Lands*, 581 P.2d 520 (Or. Ct. App. 1978), *aff'd*, 590 P.2d 709 (Or. 1979).

197. See, e.g., Archer, *supra* note 16, at 31 n.64 ("[N]o conceptual difficulty arises in applying trust principles in the public trust context."). But see Huffman, *supra* note 134, at 534-45. Huffman argues that the public trust is a property concept. See *supra* note 189. Even Huffman, however, a strong opponent of viewing the public trust as part of trust law, concedes that "the doctrine may have had legitimate claim to a corner of the law of trusts at the time of its birth." *Id.* at 533.

198. Restatement (Second) of Trusts § 2 (1959).

199. *Id.* § 2 cmt. f.

200. *Id.* § 2 cmt. h. One or more of these elements may be absent temporarily without destroying the trust. *Id.*

201. *Id.* § 2 cmt. i.

202. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892); *supra* text accompanying notes 80-81.

203. A beneficiary is "[o]ne who benefits from act of another. A party who will benefit from a transfer of property or other arrangement." Black's Law Dictionary 157 (6th ed. 1990).

204. A *cestui que trust* is "[h]e who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. . . . The beneficiary of a trust." Black's Law Dictionary 229 (6th ed. 1990).

205. Restatement (Second) of Trusts § 2 cmt. j (1959).

public.²⁰⁶ Note that both the trustee (or trustees) and the beneficiary (or beneficiaries) "own" the trust property.²⁰⁷ This notion of dual ownership is essential to the trust concept.²⁰⁸ Third, the modern trust requires trust property,²⁰⁹ which, in the public trust context means, at the very least, navigable waterways.²¹⁰

Generally, the settlor²¹¹ creates a trust because she does not have confidence that the beneficiary will use the property wisely, or because the beneficiary is a minor, or otherwise incapacitated and is thus unable to manage the property herself.²¹² The trust purposes are to be identified in the intentions of the settlor.²¹³ In the case of the public trust, the determination as to who is the settlor is controversial.²¹⁴ Commentators may propose that the settlor is God, natural law,²¹⁵ the states themselves,²¹⁶ or the federal government. The reason for determining the settlor is largely to understand the purposes for which the trust was established.²¹⁷

206. *Illinois Central*, 146 U.S. at 452; *supra* text accompanying notes 80-81.

207. Restatement (Second) of Trusts § 2 cmt. f (1959).

208. *Id.* § 2 cmt. f.

209. *Id.* § 2 cmt. k.

210. In England, the public trust doctrine only applied to navigable waterways. *See Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842); *New Whatcom v. Fairhaven Land Co.*, 64 P. 735, 739 (1901); Ruberto, *supra* note 2, at 374-75 & n.116. In America, the definition of trust property is largely controlled by state statutory and/or case law. In 1810, a Pennsylvania court expanded the traditional English public trust doctrine to include waters regardless of navigability. *Carson v. Blazer*, 2 Binn. 474, 477 (Pa. 1810). The Supreme Court held that the public trust doctrine applied to non-navigable waters that were subject to tidal influence. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484-85 (1988); *supra* notes 103-12 and accompanying text. Some states, such as New Jersey, include within the definition of public trust properties a "reasonable" portion of the foreshore and the dry sand area. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

211. The creator of a trust is called the settlor. Restatement (Second) of Trusts § 3.1 (1959). The terminology differs with respect to the creator depending on the type of trust that is created. The term settlor is comprehensive and therefore can be used when the creator makes an *intervivos* trust or makes a testamentary trust (a trust created by will). The term "testator" is used to refer to the creator of a testamentary trust. For our purposes, the term "settlor" will be used.

Note that the three parties mentioned do not have to be different individuals in all cases. For example, the creator and the trustee may be the same person. Trust law, however, does impose some limitations on the parties. For instance, a single person or entity cannot be both sole trustee and sole beneficiary. *Id.* § 115(5). Such a trust would be unenforceable, because a person may not sue himself.

212. *See* George T. Bogert, *Trusts* 7 (6th ed. 1987).

213. Restatement (Second) of Trusts § 4 & cmt. a (1959). Note that a settlor may create a trust by conduct as well as by words. *Id.* § 24.1.

214. This discussion is beyond the scope of this Note and will not be examined in detail.

215. *See supra* text accompanying note 27. For an interesting analysis of the place of natural law in the Constitution, see Russell Kirk, *Natural Law and the Constitution of the United States*, 69 *Notre Dame L. Rev.* 1035 (1994).

216. *See* Archer, *supra* note 16, at 31 n.64.

217. Restatement (Second) of Conflict of Laws § 268 & cmt. a (1969).

There are three main types of trusts.²¹⁸ The determination of which type of trust the public trust falls into, like the identification of the settlor, is done to understand the purpose of the trust so that courts can apply its terms according to the original intent of the trust. Thus, for purposes of this Note, the questions of to whom to attribute the creation of the public trust and to which classification of trust it belongs are of no major importance. The purpose of both determinations is to discern the intentions of the settlor. The purpose of the trust is of utmost importance because, under trust law, a trustee has a fiduciary obligation to the beneficiaries to manage the property in furtherance of the trust purposes.²¹⁹ But no matter who we consider the settlor to be, or how we categorize the trust, the intention of the public trust remains the same—the public's reasonable access and use of public trust properties.

Under modern trust law, when there is a breach of fiduciary duty on the part of a trustee, the trustee can be removed by the courts.²²⁰ Additionally, anyone who stands to benefit from the trust can compel

218. Restatement (Second) of Trusts § 1 cmts. d, e (1959). The first of the three types of trusts is the express trust. The creator of an express trust explicitly details the permitted uses of the trust property. *Id.* § 1 cmt. e. One could argue that, if we assume that the creator of the trust is natural law, then there is (in a sense) an express intention for the public to have use of trust properties. This reasoning is not persuasive and the public trust is probably not properly viewed as an express trust. See Huffman, *supra* note 134, at 536 (noting that an express trust requires a manifestation of intent and arguing that “[n]o such manifestation exists in the public trust doctrine”).

Secondly, there is the constructive trust. A constructive trust is one in which “acquisition or retention of the property is wrongful [or] . . . the [title holder] . . . would be unjustly enriched if . . . permitted to retain the property.” Restatement (Second) of Trusts § 1 cmt. e (1959). Again, assuming the creator to be natural law, the argument could be made that the intention was that the trust property be shared by all members of the public. Thus, if the legal title holder could exclude the public from these properties, she, being a wrongdoer, would be unjustly enriched.

Perhaps the strongest argument for classification, however, is within the third category, the resulting trust. A resulting trust arises where a disposition of property has been made, but the facts and circumstances of the disposition suggest that the creator did not intend for the legal title holder to have the beneficial use of the property also. *Id.* § 404. Thus, the argument is that when public trust properties were transferred into private hands, the intention was that the beneficial interest would be held for the public. See, e.g., Huffman, *supra* note 134, at 537 (“If the public trust doctrine is properly a part of the law of trusts, it necessarily falls within the category of resulting trust.”).

219. Restatement (Second) of Trusts § 2 cmt. b (1959).

220. *Id.* § 107 cmt. a; see *Riegler v. Riegler*, 553 S.W.2d 37, 41 (Ark. 1977) (upholding decree ordering removal of a trustee who had violated his duty); *Brown v. Brown*, 436 N.E.2d 877, 884-86 (Ind. Ct. App. 1982) (listing appropriate grounds for removal of trustee); *Wolosoff v. CSI Liquidating Trust*, 500 A.2d 1076, 1082 (N.J. Super. Ct. App. Div. 1985) (noting that trustee can be removed within the sound discretion of the court); *Robinson v. Kirbie*, 793 P.2d 315, 318 (Okla. Ct. App. 1990) (stating that trustee may be removed for cause); *Fred Hutchinson Cancer Research Ctr. v. Holman*, 732 P.2d 974, 987 (Wash. 1987) (noting that bad will due to litigation is sufficient cause for removal of trustee); *Waits v. Hamlin*, 776 P.2d 1003, 1007-08 (Wash. Ct. App. 1989) (stating that bad will is appropriate grounds for trustee removal).

removal of the trustee for cause by application to the court with jurisdiction.²²¹ Moreover, under modern trust principles, a beneficiary can call for an accounting of trust assets at reasonable intervals to determine how they are being managed by the trustee.²²² This action can be used as evidence by the beneficiary to prove breach of fiduciary duty. If the breach is serious enough, the accounting could lead a court to remove the trustee and to appoint a new trustee.²²³

B. *The Public Trust as a True Trust*

Once the public trust doctrine is accepted as a true trust, proponents of public beach access have a new weapon in their arsenal with which to attack the increasing privatization of America's coastline.²²⁴ The original purpose of the public trust doctrine, in the most restrictive sense,²²⁵ was to protect fishing, navigation, and commerce.²²⁶ In the American derivation of the ancient Roman idea, however, many courts have extended the doctrine²²⁷ to provide for easements for public access to the foreshore and even the dry sand area.²²⁸ The public trust analyzed as a true trust allows for two different, though substantially overlapping, approaches to increasing public beach access.

First, proponents of public access rights, through the analogy to the modern trust, could call for an accounting of trust properties by the state.²²⁹ This accounting would be a useful tool for the public regarding public trust properties. As beneficiaries, the public could force the

221. Restatement (Second) of Trusts § 107 cmt. i (1959).

222. *Id.* § 173.

223. A new trustee can be appointed by the court with proper jurisdiction. *See id.* § 108(a).

224. Other methods that have been utilized, though with mixed results, are prescription, implied dedication, and custom. For an analysis of these methods, see Carmichael, *supra* note 2, at 159.

225. The term "restrictive sense" refers to the presumption that the creator is the federal government or the state, rather than God or natural law. The assumption is that if we accept that God or natural law is the creator, the rights intended to be public would be more expansive than those intended by the federal or state government.

226. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894).

227. *See Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (noting that public trust easements "include the right to fish, hunt, bathe, swim, [and] use for boating and general recreation purposes the navigable waters of the state"); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) ("The 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."); *Hixon v. Public Serv. Comm'n*, 146 N.W.2d 577, 582 (Wis. 1966) (recognizing that public uses include recreation (citing *State v. Public Serv. Comm'n*, 81 N.W.2d 71, 74 (Wis. 1957))); *see also* Frank E. Maloney et al., *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. Fla. L. Rev. 853, 860-62 (1977) (noting the trend toward increasing allowance of recreational activities along the foreshore under the doctrine).

228. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J.), *cert. denied*, 469 U.S. 821 (1984).

229. *See supra* text accompanying note 222.

trustee to make a full disclosure regarding the condition of the trust properties.²³⁰ Generally, courts have upheld public trust rights to sue governmental and private parties to vindicate public interests in property.²³¹ Information as to the condition of the trust properties could be used as evidence to prove a continuous breach of fiduciary duty on the part of the state.²³² Establishing such a breach could lead to the removal of the state as the trustee.

Second, application of the modern trust concept of fiduciary duty allows for the removal of the state as trustee of public trust properties. It is well settled that all trustees owe a fiduciary duty to the beneficiaries of the trust.²³³ Many states presently breach this fiduciary duty by failing to provide adequate access to public trust properties. Application of modern trust concepts to the public trust allows any member of the public to bring an action against the state for denying her reasonable access to public trust properties.²³⁴ Proponents of increased beach access should target states that have not been responsive to public desire to obtain increased beach access for removal as trustees.

No Supreme Court decisions bar the removal of states as trustees of public trust properties. The question, however, has never been addressed. The public trust is largely misunderstood. Professor Joseph Sax states that, in reviewing reported cases, there exist several misleading comments to the effect that a government may never convey or alienate trust properties to a private owner.²³⁵ Professor Sax refutes these findings:

[T]here is no general prohibition against the disposition of trust properties, even on a large scale. A state may, for example, recognize private ownership in tidelands and submerged lands below the high water mark; indeed, some states have done so and have re-

230. This correlates with Blumm's "hard look" doctrine, *supra* note 194.

231. *See, e.g., Maryland Dep't of Natural Resources v. Amerada Hess Corp.*, 350 F. Supp. 1060, 1066-67 (D. Md. 1972) (upholding state's power to sue oil company based on public trust rights for leak that damaged local harbor); *New Jersey Dep't of Env'tl. Protection v. Jersey Cent. Power & Light Co.*, 308 A.2d 671, 673 (N.J. Super. Ct. Law Div. 1973) (allowing state agency to sue atomic power plant based on public trust rights when the plant released heated water into a canal killing approximately 500,000 fish).

232. *See supra* note 194.

233. Restatement (Second) of Trusts § 2 cmt. b (1959). In important public property rights decisions, the Supreme Court determined that states are impressed with a fiduciary duty with respect to managing trust properties for the benefit of the public. *Shively v. Bowlby*, 152 U.S. 1, 43 (1894); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842); *see also* Waters and Water Rights §§ 30.01(c), 30.02(c) (Robert E. Beck ed., 1991) (discussing the fiduciary obligations of states regarding public trust properties).

234. It has been suggested that the trust obligation can be enforced by any citizen of the United States. *See Mallon v. City of Long Beach*, 282 P.2d 481, 490 (Cal. 1955) (Spence, J., dissenting) (stating that California is the trustee for the public trust properties and that "the beneficiaries of such trust were not alone the people of this state but all the people of the United States. Thus, it has been indicated that the federal government could enforce such trust.")

235. Sax, *supra* note 87, at 485.

ceived judicial approval. . . . [C]ourts have held that since the state has an obligation as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it.²³⁶

Therefore, states may transfer trust properties to individuals as long as the properties are maintained in such a way that the management increases public use or, at least, does not interfere with the public rights in the property.²³⁷ Thus, the notion that the public trust cannot be transferred to another trustee because states cannot transfer trust properties is erroneous. Following Sax's logic, the removal of states as trustees and the insertion of another trustee would transfer the obligations to the new trustee.²³⁸

Upon removal of the state as trustee, the question then becomes: To whom do we entrust the powers of trustee? This question has never been addressed and is difficult to answer. The new trustee would acquire legal title and management of the trust property, as the state previously had.²³⁹

One possible solution is to allow the federal government to supervise and temporarily manage these properties so as to provide for continued reasonable access to the public. The federal government could then convey these equitable interests to municipalities or individuals, subject to the same fiduciary duties as a trustee in any other trust situation.²⁴⁰ These individuals or municipalities would receive federal funds²⁴¹ to purchase easement rights from private landowners at intervals along the coastline.²⁴² The funds received would be in excess of the costs of acquiring these easements. This will provide sufficient financial incentive for the municipality or individual to maintain an interest in increasing beach access.

236. *Id.* at 486-87 (citations omitted).

237. *See Archer, supra* note 16, at 56-60.

238. While the *Illinois Central* decision stated that states cannot abrogate public trust rights, the Court did not address whether the states could forcibly be removed as trustees for violating their fiduciary duties. *See supra* notes 80-86 and accompanying text (discussing *Illinois Central*). Thus, the decision has no bearing on the issue of forcible removal.

239. *See supra* text accompanying notes 201-02.

240. The concept of a private owner was espoused in the 1800s by so-called *laissez-faire* theorists. *See Drayton, supra* note 26, at 769, 772 n.43. This movement, however, called for the trust properties to be turned over to private individuals, free of the trust obligations. *Id.* at 769, 772. Rather than have the trust situation, the lands were to be subject to easement rights in the public. *Id.* at 772 n.43. As one commentator maintained: "Although, given the subsequent advent of democratic government, this early Liberal bias is no longer a necessary block to government trustee ownership, social policy against overcentralization continues to argue for a similar result." *Id.* at 770.

241. *See infra* part IV.

242. It is important to note here that municipalities and individuals with public duties may be able to exercise the power of eminent domain. *See infra* note 247 (providing a definition of eminent domain).

Arguably, giving the property to the federal government to manage would violate the public's rights because the federal government is not as directly accountable to the citizens of each state as are individual state governments. The federal government, however, would only manage the public trust properties temporarily; the properties would then be conveyed to municipalities or individuals. The municipalities would be directly accountable to the public, and individuals, given the proper financial incentives, would also strive to manage the trust properties properly.²⁴³ Another option is that the federal government could convey the property to an office headed by an elected official, who would also be directly accountable to the public.

Of course, states could avoid problems with the public trust doctrine by enacting legislation that sufficiently protects public rights in oceanfront properties. While many states have already implemented programs that attempt to deal effectively with the problem,²⁴⁴ all states need to develop better ways to accomplish the goal of greater beach access. And while the Supreme Court's holdings in *Nollan*²⁴⁵ and *Dolan*²⁴⁶ make it more difficult for states to provide access, it is still possible for states to respond favorably to public desire for beach access.

Another option for states to avoid removal as trustees of trust properties is to administer plans such as attaching easement rights to construction permits. States also may use their eminent domain powers²⁴⁷ to purchase these properties to allow for greater beach access.²⁴⁸ Failure to use police powers is, in some circumstances, a breach of fiduciary duty in areas where there is insufficient beach access. The states are not acting in the best interests of the public regarding public trust properties. They must begin now to provide reasonable access to

243. These municipalities or individuals would be reimbursed for their reasonable expenses pursuant to their duties and would also receive compensation for effectively discharging their obligations as trustees.

244. See *supra* notes 9-14 and accompanying text.

245. See *supra* notes 127-36 and accompanying text. But see *supra* notes 137-46, 163-68, and accompanying text (discussing the weaknesses of the *Nollan* decision).

246. See *supra* notes 147-58 and accompanying text. But see *supra* notes 165-68 and accompanying text (discussing the weaknesses of the *Dolan* decision).

247. Eminent domain is defined as "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character." Black's Law Dictionary 523 (6th ed. 1990).

248. Indeed, the Supreme Court declared that states are free to purchase easement rights. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987). Further, the federal Coastal Zone Management Act even provides states with funds to accomplish augmentation in beach access routes. See 16 U.S.C. § 1455(d)(10)(B) (Supp. V 1993); see also *infra* part IV (discussing the Coastal Zone Management Act). States should also implement their own programs to purchase rights-of-way above and beyond the federal legislation. Hawaiian law, for example, calls for purchase of public rights-of-way at "reasonable intervals." See Haw. Rev. Stat. §§ 115-2, 115-3 (1985); *supra* note 9.

the shore for the public. If they do not, a change in the trustee could well be the solution to the beach access problem in the United States.

IV. FEDERAL GUIDELINES

The only significant federal legislation in the area of public beach access is the Coastal Zone Management Act of 1972 ("CZMA").²⁴⁹ The CZMA makes funds available for states to develop comprehensive coastal management programs, including plans for increased public access to coastal areas.²⁵⁰ When the statute was passed, many proponents of greater beach access rights were elated because it was the first Congressional declaration of a federal interest in what were, prior to the enactment, regarded as "local" land use decisions.²⁵¹

Since its enactment, proponents of the CZMA have been fighting for its survival. The CZMA has been plagued by problems concerning "[i]nadequate and sometimes nonexistent funding, case by case decisionmaking, state/federal conflicts, uncoordinated planning, pressure for development and energy, insufficient research information, splintered federal authority, and restrictive court decisions."²⁵² Additionally, the CZMA has been unable to clear its budget through the Senate Appropriations Committee. For example, in 1987, the management budget was cut from forty to five million dollars.²⁵³

In 1990, Congress amended the CZMA to provide greater incentives for state planning.²⁵⁴ From 1974 to 1985, federal grants pursuant to the CZMA had reached approximately \$187 million.²⁵⁵ The 1990 amendments augmented the appropriations for 1991 through 1995.²⁵⁶ Nevertheless, the amendments have been the subject of attack, be-

249. 16 U.S.C. §§ 1451-1464 (1988 & Supp. V 1993).

250. 16 U.S.C. §§ 1455(d)(10)(B), 1461(e) (1988 & Supp. V 1993). The Act sets up a matching grant assistance program with a four to one ratio of federal to state contributions. 16 U.S.C. § 1454(a) (Supp. V 1993). The Act is administered by the Secretary of Commerce, with delegated authority to the Under Secretary for Oceans and Atmosphere at the National Oceanic and Atmospheric Administration. H.R. Rep. No. 535, 101st Cong., 2d Sess. 3 (1990). At present, at least 29 of the 35 eligible states and territories have received federal approval for their coastal management programs. *Id.*

251. Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990's: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. Colo. L. Rev. 711, 711 (1991).

252. *Id.* at 714 (footnote omitted).

253. *Coastal Zone Management: Hearing Before the Nat'l Ocean Policy Study of the Comm. on Commerce, Science, and Transp. of the Senate*, 100th Cong., 1st Sess. 44 (1987).

254. 16 U.S.C. §§ 1451-1464 (Supp. V 1993).

255. Malone, *supra* note 251, at 720.

256. 16 U.S.C. § 1464(a) (Supp. V 1993). The statute segregates the appropriations for the components of the Act differently in the 1990 amendments. The total appropriations under the Act for the 1991 fiscal year are \$54.2 million and rise to \$64.4 million in 1995. H.R. Rep. No. 535, 101st Cong., 2d Sess. 2 (1990).

cause, while purporting to strengthen the CZMA,²⁵⁷ Congress again has refused to include detailed substantive state land use requirements.²⁵⁸

Among the stated goals of the Coastal Zone Management Act is the objective of “[a]ttaining increased opportunities for public access . . . to coastal areas of recreational, historical, aesthetic, ecological, or cultural value.”²⁵⁹ The accomplishment of this goal requires more than a mere declaration of a federal objective and authorization of an appropriation that is subject to massive cuts by the Senate.²⁶⁰ The federal government must provide more incentives to the states for them to respond adequately. The impetus for the states’ cooperation should be in the form of a spending program over and above what the CZMA authorizes. Due to the increasing population in the United States,²⁶¹ and the trend toward higher population density at the coastline,²⁶² more money must be spent on coastal access at present and in the future.²⁶³

As a constitutional matter, the federal government has the power to institute such a spending program pursuant to the Spending Clause of the United States Constitution,²⁶⁴ which states in pertinent part: “Congress shall have Power to . . . provide for the . . . general Welfare of the United States.”²⁶⁵ Congress has the power to condition federal grants upon compliance with federal objectives.²⁶⁶ This federal spending power has been interpreted broadly as extending beyond “the di-

257. According to the House conference report, the purpose was to “improve state management programs.” H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 969 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2674.

258. Malone, *supra* note 251, at 771.

259. 16 U.S.C. § 1456b(a)(3) (Supp. V 1993).

260. See *supra* text accompanying note 253.

261. See Miguel A. Santos, *Managing Planet Earth* 18 (1990). Santos notes that the United States population is growing by approximately two to three million people per year. *Id.* For an industrial country, the United States has one of the fastest growth rates. *Id.* From 1990 until the end of the 20th century, the population has been projected to increase between 32 and 36 million people. *Id.* Santos further states that this escalation in population will increase strain on the distribution of natural resources. *Id.* at 20.

262. See *supra* note 2.

263. It has been suggested that the National Park Service and the United States Fish and Wildlife Service become more active in preserving public coastal areas. *Public Access Hearings*, *supra* note 2, at 6 (statement of Governor Edward D. DiPrete of the State of Rhode Island).

264. U.S. Const. art. I, § 8, cl. 1.

265. *Id.*

266. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); see also *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (declaring that the federal government may “fix the terms on which its money allotments . . . shall be disbursed”); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (stating that the federal government’s power “to impose reasonable conditions on the use of federal funds” is beyond challenge); *Oklahoma v. United States Civil Serv. Comm’n*, 330 U.S. 127, 144 (1947) (“The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans . . . is not unusual.”).

rect grants of legislative power found in the Constitution."²⁶⁷ Therefore, the fact that the objective of greater beach access is not within one of the "enumerated legislative fields"²⁶⁸ is irrelevant. Congress is free to condition federal grants on states' increasing beach access to their citizens.²⁶⁹ Thus, the federal government is free to pursue this stated objective by means of its spending power.

The spending power, however, is limited in scope.²⁷⁰ The language of the Spending Clause requires that the spending program be for "the general welfare."²⁷¹ Indubitably, spending for better public beach access is for the public's welfare.²⁷² On the issue of whether spending is intended to promote public purposes, "courts should defer substantially to the judgment of Congress."²⁷³ Furthermore, the condition for the grant of funds must be clear, affording the states the opportunity to "exercise their choice knowingly, cognizant of the consequences of their participation."²⁷⁴ But due to its lack of substantive guidance and inventiveness, inefficient implementation, and limited financial support, the CZMA clearly is not sufficient to prevent and eliminate the privatization of the American coastline.

This Note proposes comprehensive federal legislation requiring states to increase coastal access and prevent further privatization of the coastline. Although this is one of the stated goals of the CZMA, its effect is diminished because it is stated among several other goals.²⁷⁵ The legislation proposed here has a single goal—to provide the public with greater coastal access in every coastal state. The legislation should assist courts in determining whether there has been a breach of fiduciary duty by the states.²⁷⁶ It should provide clear sub-

267. *United States v. Butler*, 297 U.S. 1, 66 (1936).

268. *Dole*, 483 U.S. at 207.

269. *See Butler*, 297 U.S. at 65.

270. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

271. *Dole*, 483 U.S. at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937) and *United States v. Butler*, 297 U.S. 1, 65 (1936)).

272. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363 (N.J.) ("Extension of the public trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare."), *cert. denied*, 469 U.S. 821 (1984).

273. *Dole*, 483 U.S. at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640, 645 (1937)). The *Dole* Court stated that the degree of deference to which Congress is entitled in this determination "is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 n.2.

274. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

275. 16 U.S.C. § 1452 (1988 & Supp. V 1993).

276. As one researcher interested in the quality of coastal resources and increased beach access has observed:

It is unrealistic to expect that coastal zones will be protected adequately as an interrelated ecosystem without substantive, minimum federal standards When preservation of a critical environmental ecosystem is at stake, there is a need for federal intervention that transcends state and local prerogatives, because the parties affected by the decisionmaking (and thus the forum in which those decisions should be made) are no longer limited to

stantive guidance to states to effectuate the goal. The legislation must, above all, require states to provide at least one access route directly to the ocean every ten miles,²⁷⁷ along all coastlines. Of course, exceptions would be allowed on a case by case basis.²⁷⁸ Further, it should require that states extend the traditional doctrine's application to encompass a portion of the dry sand area along the coastline.²⁷⁹ Such legislation would simplify the judicial determination of whether there has been a breach of fiduciary duty by the state.

This mileage requirement will not be unduly burdensome for the states because methods exist to assist states in obtaining these properties. The proposed federal legislation should describe these methods and encourage state courts to presume that the states have acted properly in acquiring the properties. The first method, and the least costly, is to support judicial findings of pre-existing public rights in coastal properties. In many states, the state constitutions and statutes provide for public rights in the ocean.²⁸⁰ In many cases, these constitutions and statutes predate private ownership. Thus, as Justice Brennan asserted in his dissent in *Nollan*, the public's rights must be enforced judicially because they existed before the private landowners' rights.²⁸¹ When pre-existing rights exist in the public, there can be no legitimate claim of a taking,²⁸² and no compensation is owed.

Furthermore, state legislation could allow the states to acquire coastal properties free of charge. Texas has enacted legislation of this type by adopting a prima facie presumption in favor of public rights, encouraging courts to find prescriptive easements across "private"

those persons living in the immediate vicinity of the resource. In that sense, controlling development that will impair the environmental values of coastal resources is better characterized as 'environmental regulation' to be addressed at the federal level than 'land use' regulation reserved to state and local governments.

Malone, *supra* note 251, at 772.

277. This calculation is based on the idea that the furthest distance anyone would have to travel laterally to a beach access route is five miles. Conceivably, an individual without transportation could walk such a distance.

278. For example, a court could sustain an exception if the terrain is dangerous, such as a steep decline toward the ocean. *See, e.g.*, Haw. Rev. Stat. § 115-3 (1985) (stating that accessways should be at "reasonable intervals taking into consideration the topography and physical characteristics of the land").

279. *See supra* notes 12-14 and accompanying text (discussing the New Jersey Supreme Court's response to diminishing beach access).

280. *See supra* note 21.

281. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 847-48 (1987) (Brennan, J., dissenting).

282. *See supra* notes 6, 169, and accompanying text; *supra* part II.B. The argument of adverse possession by a landowner cannot be sustained, because most states provide that state land and, more specifically, trust lands cannot be lost through adverse possession. *See supra* note 111 and accompanying text.

properties.²⁸³ Thus, the states may acquire these properties without compensating the "owners."

The next facet of the legislation should direct states to use their power of eminent domain.²⁸⁴ This power allows the state to acquire private property for the public benefit by paying just compensation.²⁸⁵ For states in compliance with federal standards under the CZMA, funds are available for this purpose. Although coastal properties are expensive, the longer that states wait to enforce this requirement, the more expensive implementation of the legislation will be, because of continuing appreciation in the properties' value.

If any beneficiary²⁸⁶ could establish that a trustee failed to meet the minimum federal standard under the statute, the court should require that the state either provide an access route or face removal as trustee of the property. Because the removal of states as trustees would require the forfeiture of these federal funds,²⁸⁷ the states would not willingly give up the trustee position. To retain the position, a state would, in effect, be forced to provide what citizens should already have—"reasonable" beach access.

The argument might be made that requiring rights-of-way through private property is a taking of private property for public use and that the land owner must therefore be compensated.²⁸⁸ But states may require reasonable pathways, both lateral and vertical,²⁸⁹ as conditions on coastal building permits without compensating the landowner.²⁹⁰ Of course, the condition must satisfy the *Nollan* "nexus" test²⁹¹ and the *Dolan* "rough proportionality" test,²⁹² which are by no means insurmountable.²⁹³

Further, there is the strong argument that the public trust rights are pre-existing rights.²⁹⁴ If so, there can be no legitimate claim of a taking.²⁹⁵ In addition, the Supreme Court has stated that there are no restrictions regarding state enforcement of pre-existing rights.²⁹⁶

283. Tex. Nat. Res. Code Ann. § 61.020 (Vernon 1978 & Supp. 1995); see *supra* note 10 and accompanying text.

284. See *supra* note 247 (providing a definition of eminent domain).

285. See *supra* notes 247-48 and accompanying text.

286. In this context, the category of beneficiaries probably includes all United States citizens. See *supra* note 234. At the very least, the beneficiaries include all state citizens.

287. If the state is removed as trustee, the new trustee would receive these stipends.

288. See *supra* note 6 and accompanying text and part II.B.

289. See *supra* note 132.

290. See Finnell, *supra* note 123, at 677-78; *Public Access Hearings*, *supra* note 2, at 15 (statement of William Travis, Deputy Director of the San Francisco Bay Conservation and Development Commission, State of California); *supra* part II.B.

291. See *supra* text accompanying notes 135, 140.

292. See *supra* text accompanying notes 152, 155.

293. See *supra* notes 140-46, 163-68, and accompanying text.

294. See *supra* part II.B.

295. See *supra* notes 101-04, 134, and accompanying text.

296. See *supra* text accompanying note 104.

But even if a court determined that it would be a taking to allow for easement rights across private properties, the individual or municipalities, or even the state, as trustee committed to its fiduciary duty, must purchase rights-of-way to allow for reasonable public beach access.²⁹⁷

CONCLUSION

Increased development along the shorelines of the United States threatens the access of the public to one of our nation's most treasured natural resources, the ocean. Disparities in socioeconomic position are leading to significant deviation in terms of access to the nation's common resources.²⁹⁸ The United States must look beyond protection of acknowledged and existing access routes toward the realization of ancient public rights in accessing the ocean.

The public trust doctrine is firmly embedded in Anglo-American jurisprudence, as adapted from ancient Roman ideals. These rights are pre-existing rights and are, therefore, takings-proof. It is time for the legislature and the courts to recognize the doctrine's utility in solving modern problems, especially in terms of beach access in the United States. As the New Jersey Supreme Court declared, "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."²⁹⁹

When states are presented with the option of providing reasonable rights of way, or being removed as trustees of public trust properties and forfeiting federal stipends, states may begin to provide reasonable access. If not, the states should be removed as trustees. Without such a threat or incentive, many states will not act in the best interests of the public regarding public beach access.

297. Recall that municipalities and even individuals, in some circumstances, have the power of eminent domain. See *supra* note 247 (providing a definition of eminent domain).

298. See *supra* part II.C.

299. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

