

## THE PUBLIC TRUST DOCTRINE AND BEACH ACCESS: COMPARING NEW JERSEY TO NEARBY STATES

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### I. INTRODUCTION

The public trust doctrine, which has its roots in Roman law and English common law, establishes that tidal waters and certain other navigable waterways, along with the tidal lands underlying those waters, are held in trust by the states for the benefit, use, and enjoyment of the public.<sup>1</sup> Specifically, the public trust doctrine as employed by most of the seven states<sup>2</sup> surveyed in this Comment provides—with some exceptions—that the state owns all lands seaward of the mean high tide line in trust for the public, including the “foreshore,” which is defined as the area of beach sand situated between the mean high and low tide lines.<sup>3</sup> Along with its decree of public ownership, the doctrine has historically protected the public’s right to navigate by boat and to fish upon public trust lands.<sup>4</sup> Each state’s public trust doctrine differs as to the degree of rights afforded to the public; there is a federal public trust doctrine, but it is considered “a default minimum standard,” and states “almost always expand” upon it.<sup>5</sup> As such, this Comment is concerned exclusively with

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<sup>1</sup> See *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 119 (N.J. 2005) (explaining the historical development of the public trust doctrine).

<sup>2</sup> New Jersey, Maryland, Delaware, New York, Connecticut, Rhode Island, and Massachusetts.

<sup>3</sup> See *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 359–60 (Mass. 1979) (explaining that the English common law established public ownership seaward from the mean high tide line, but that Massachusetts deviated from this standard by using the mean low tide line for public ownership instead). For a detailed discussion of the differences between the states’ individual public trust doctrines, see *infra* Parts II, III & IV.

<sup>4</sup> See *Sheftel v. Lebel*, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998).

<sup>5</sup> Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 4–5 (2007).

the public trust doctrines of the seven individual states surveyed herein, each of which originated prior to the federal doctrine.<sup>6</sup>

In particular, the Supreme Court of New Jersey has advanced a dynamic and highly functional version of the public trust doctrine, which guarantees that members of the public have both reasonable “vertical” access—meaning access through upland areas—to the publicly owned foreshore and reasonable “horizontal” access—meaning access along the waterfront, parallel to the foreshore—to the dry sand above the foreshore of Atlantic Ocean-facing beaches.<sup>7</sup> The New Jersey doctrine applies not only to publicly and quasi-publicly owned upland areas, but also to some locations where the sand above the foreshore is privately owned.<sup>8</sup> New Jersey courts apply several factors in order to determine the extent of the public’s right to cross and/or use portions of privately owned, oceanfront beaches, balancing private rights and public trust rights in the process.<sup>9</sup> In addition, the New Jersey version of the doctrine explicitly protects the public’s right to take part in recreational activities on public trust lands, including swimming in the ocean and resting on the shore, recognizing that fishing and navigation are no longer the only uses that the doctrine contemplates on such lands.<sup>10</sup>

New Jersey is unusual, however, among coastal states in the Mid-Atlantic and Northeast in terms of the degree of access it affords to its beaches under the public trust doctrine. In Maryland, though the state owns tidal lands up to the mean high tide line, the public has no right to access or cross privately owned upland sand areas in order to reach the public foreshore.<sup>11</sup> In Delaware, the state only owns tidal lands up to the mean low tide line, and the Superior Court of Delaware has specifically rejected an invitation to adopt the New Jersey version of the doctrine, deeming it to be too expansive and inconsistent with Delaware’s existing doctrine.<sup>12</sup> New York courts have seen scant litigation on the matter and have not established any public rights beyond public ownership seaward of the mean high tide line.<sup>13</sup>

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<sup>6</sup> See *infra* Parts II & III.

<sup>7</sup> See *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124 (N.J. 2005).

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 121–22.

<sup>10</sup> See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54–55 (N.J. 1972).

<sup>11</sup> See *Clickner v. Magothy River Ass’n*, 35 A.3d 464, 473–74 (Md. 2012).

<sup>12</sup> See *Groves v. Sec’y of Dep’t of Natural Res. & Envtl. Control*, No. 92A-10-003, 1994 WL 89804, at \*5 (Del. Super. Ct. Feb. 8, 1994).

<sup>13</sup> See *Arnold’s Inn, Inc. v. Morgan*, 310 N.Y.S.2d 541, 547 (N.Y. Sup. Ct. 1970),

Connecticut's high court has explicitly rejected the claim that the public has any right to cross upland beach areas to reach the foreshore, which is publicly owned.<sup>14</sup> Rhode Island has a similar doctrine, under which the public owns the foreshore below the mean high tide line but has no right to access dry sand areas above that line.<sup>15</sup> Finally, in Massachusetts, private landowners own land down to the mean low tide line.<sup>16</sup> While Massachusetts' public trust doctrine allows for public usage up to the mean high tide line—covering the entire foreshore—for fishing, foaling, and navigation, it does not provide for “perpendicular” access, which is the same as “vertical” access in New Jersey, across upland areas to the foreshore.<sup>17</sup>

As a result, the public trust doctrine is severely limited in other coastal states in the vicinity of New Jersey. In these states, the public trust doctrine only guarantees public access to a small—and sometimes completely submerged, such as during a normal high tide—strip of the beach and does not include any right of vertical public access from upland areas.<sup>18</sup> The purpose of the public trust doctrine—public ownership of tidal lands—strongly suggests that the New Jersey model is preferable to those of nearby coastal states. Unlike the public trust doctrines of the other states surveyed in this Comment, the New Jersey doctrine allows for meaningful, substantial public access to the shore.<sup>19</sup>

Part II of this Comment provides significant detail as to both the historical development and the modern state of the public trust doctrine in New Jersey as it pertains to beach access, outlining the types and degrees of access permitted under the current doctrine. Part III of this Comment then provides significant detail as to the historical development and modern conditions of the various versions of the public trust doctrine espoused by the other six states surveyed herein. Part IV of this Comment presents an argument in favor of the more robust New Jersey version of the public trust doctrine, as compared to the versions utilized by the other six states. This part considers examples from case law to determine how public trust rights function, in practice, in New Jersey and in the other six states. Finally, Part V

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*modified*, 317 N.Y.S.2d 989 (N.Y. App. Div. 1970).

<sup>14</sup> See *Leydon v. Town of Greenwich*, 777 A.2d 552, 564 n.17 (Conn. 2001).

<sup>15</sup> See *Cavanaugh v. Town of Narragansett*, No. WC 91-0496, 1997 WL 1098081, at \*7 (R.I. Super. Ct. Oct. 10, 1997).

<sup>16</sup> See *Sheftel v. Lebel*, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998).

<sup>17</sup> See *id.*

<sup>18</sup> See *supra* discussion Part I.

<sup>19</sup> See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363–64, (N.J. 1984) (noting that public ownership of the foreshore “would be meaningless” without a means of guaranteeing public access to said foreshore).

concludes by reiterating that the New Jersey version of the public trust doctrine best fulfills the purposes of the doctrine among the seven states surveyed.

## II. THE PUBLIC TRUST DOCTRINE AND BEACH ACCESS IN NEW JERSEY

The public trust doctrine has a strong foundation in New Jersey, extending back to the colonial era. The doctrine has its earliest origins in Roman jurisprudence, which kept access to the shoreline open to all persons.<sup>20</sup> This principle carried into English common law, finding a direct expression in the Magna Carta.<sup>21</sup> The modern New Jersey public trust doctrine is derived directly from the English common law doctrine, which established that the sovereign owned the lands covered by tidal waters for the common use of the people.<sup>22</sup> The existence of the public trust doctrine has never been in doubt in New Jersey.<sup>23</sup> In fact, the first case to explicitly mention the doctrine was the 1821 case of *Arnold v. Mundy*.<sup>24</sup> In that case, the court found that the sea and the fish therein, among other natural resources, constituted common property that the English sovereign had previously held and that the state government subsequently held for the people of New Jersey after the Revolution.<sup>25</sup> The court also noted that the state could not convey tidal lands to private holders because doing so would divest the people of their common right to that land.<sup>26</sup>

New Jersey's modern public trust doctrine features three seminal decisions by the state's high court—*Borough of Neptune City v. Borough of Avon-by-the-Sea*,<sup>27</sup> *Matthews v. Bay Head Improvement Ass'n*,<sup>28</sup> and *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*<sup>29</sup>—each of which has subsequently added to and fortified the rights and protections afforded to the public under the doctrine. The first is *Neptune City*, a 1972 decision in which the Supreme Court of New Jersey sought to clarify the public trust doctrine after noting that the doctrine, though

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<sup>20</sup> *Id.* at 360.

<sup>21</sup> *Id.* at 360–61 (explaining that the Magna Carta “rectified . . . prior improper conduct” by William the Conqueror of appropriating common property).

<sup>22</sup> See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 51 (N.J. 1972).

<sup>23</sup> *Id.* at 52.

<sup>24</sup> *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 294 A.2d 47 (N.J. 1972).

<sup>28</sup> 471 A.2d 355 (N.J. 1984).

<sup>29</sup> 879 A.2d 112 (N.J. 2005).

clearly a part of New Jersey law, was not well-defined.<sup>30</sup> The court had to determine whether Avon-by-the-Sea, a coastal municipality, could charge higher beach access fees to non-residents than to residents.<sup>31</sup> The court noted that Avon had once held its beach “free to all comers,” along with the rest of the New Jersey shoreline, but that the rise of automobile usage had led to a substantial increase in the number of beach-goers, resulting in crowded beaches and the implementation of beach access fees by Avon and other municipalities.<sup>32</sup> After briefly discussing the historical basis of the public trust doctrine and noting that the scope of New Jersey’s public trust doctrine was poorly-defined, the court proceeded to stress both the vast importance of the shoreline to the state and the tremendous increase in the recreational use of the shore resulting from improvements in transportation and increases in population.<sup>33</sup> The court reiterated New Jersey precedent, noting that the state owns all tidal lands up to the mean high tide line and clarifying that there was no issue of access to the foreshore in this case, as Avon publically owned the upland sand area above the foreshore.<sup>34</sup> Thus, the only issue was whether Avon could discriminate between residents and non-residents in charging access fees.<sup>35</sup>

In a significant step, the *Neptune City* court resolved the dispute of differentiated beach access fees by expanding the rights guaranteed to the public under the public trust doctrine in two key ways: first, by determining that the public has full access rights under the doctrine to publicly owned upland dry sand areas in addition to the publicly owned foreshore and, second, by finding that the doctrine protects modern recreational beach uses. Specifically, the court found that the public trust doctrine, as a principle of common law, is flexible and “should not be considered fixed or static.”<sup>36</sup> As such, the court held that, when a beach—including “the upland sand area” of the beach above the foreshore, to use the court’s own term—is publicly owned,

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<sup>30</sup> *Neptune City*, 294 A.2d at 53 (“It is safe to say, however, that the scope and limitations of the doctrine in this state have never been defined with any great degree of precision.”).

<sup>31</sup> *Id.* at 48–49.

<sup>32</sup> *Id.* at 49. Beach access fees help municipalities pay for beach maintenance and operating expenses (such as lifeguards’ wages). *See id.* Municipalities were explicitly granted the authority to charge beach access fees in two New Jersey statutes, enacted in 1950 and 1955. *Id.* at 50. Avon amended its own ordinance in 1970 to charge higher beach access fees to non-residents than to residents, leading to this litigation. *Id.* at 50–51.

<sup>33</sup> *Id.* at 53.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 53–54.

<sup>36</sup> *Neptune City*, 294 A.2d at 54.

“a modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference.”<sup>37</sup> As to what activities the public has a right to conduct on publicly owned beaches—including upland dry sand areas—the court held that the public trust doctrine protects more than just the public’s right to “the ancient prerogatives of navigation and fishing.”<sup>38</sup> Instead, the court found that a modern, dynamic public trust doctrine must also protect modern recreational uses, which include “bathing, swimming and other shore activities,” in order to be effective.<sup>39</sup> According to the court, as a result of such an expanded public trust doctrine, towns cannot be permitted to discriminate against non-residents in charging beach access fees.<sup>40</sup> Towns can charge fees, but they must charge residents and non-residents the same amount, as to do otherwise would violate the public’s access rights under the doctrine.<sup>41</sup>

The second seminal case of New Jersey’s modern public trust doctrine is *Matthews v. Bay Head Improvement Ass’n*, the first major case in the state to deal with public access to quasi-publicly owned and privately owned upland sand areas above the mean high tide line.<sup>42</sup> *Matthews* involved the beaches of Bay Head, which contained seventy-six beachfront properties at the time of the litigation.<sup>43</sup> The Bay Head Improvement Association (the “Improvement Association”), an agency that controlled beach access in the town and limited such access to Improvement Association members, directly owned six of those properties.<sup>44</sup> Private landowners owned the remaining seventy properties; however, most of the landowners leased their dry sand areas to the Improvement Association, such that it had full reign to regulate access to those properties as well.<sup>45</sup> As of the date of the *Matthews* decision, there had never been any attempt by the Improvement Association or by anyone else to stop any person,

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<sup>37</sup> *Id.* at 54.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* The court noted that other states have similarly expanded the scope of the public trust doctrine beyond its original purposes to cover recreational uses, including Massachusetts, Wisconsin, Oregon, California, and New York. *Id.* at 55.

<sup>40</sup> *Id.* at 55.

<sup>41</sup> *Id.* (“We are convinced it has to follow that, while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents.”).

<sup>42</sup> *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 358 (N.J. 1984).

<sup>43</sup> *Id.* at 359–60.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* The Improvement Association employed beach police to ensure that only members could access the beach. *Id.* at 359.

Improvement Association member or not, from accessing the area below the mean high tide line—the publicly owned foreshore.<sup>46</sup> Specifically at issue was whether the non-Improvement Association public had the right to also access the dry sand area of the beach upland of the foreshore, for vertical access through it as a direct route to the foreshore and/or for horizontal access along it as a more expansive right to remain on the upland sand area.<sup>47</sup>

The court first found that, in order to accommodate the expanded rights of public access to dry sand areas and recreational uses that had been established in the *Neptune City* decision twelve years earlier, public access to “municipally-owned dry sand areas,” in addition to access to the foreshore, is of vital importance.<sup>48</sup> The court also noted, however, that neither *Neptune City* nor any subsequent case had addressed the question of access to and across dry sand areas above the foreshore of *privately* owned beaches.<sup>49</sup> In a significant step, the court determined that the public’s right to use the foreshore “would be meaningless” if the public had no way to access said foreshore.<sup>50</sup> In perhaps an even more significant step, the court proceeded to find that the public must be granted at least some access to the dry sand areas above the foreshore, not only for purposes of accessing the foreshore, but also because the foreshore and the sea itself cannot be reasonably enjoyed without at least some ability to rest upon the dry sand.<sup>51</sup>

After recognizing the practical necessities of public access to dry sand areas above the foreshore, the court determined that public

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<sup>46</sup> *Id.* at 359–60. Access to the Bay Head foreshore could have been gained by non-Improvement Association members by entering Bay Head along the foreshore from the Borough of Mantoloking to the south or from the Borough of Point Pleasant to the north. *Id.* at 360.

<sup>47</sup> *Id.* at 358. The court described the Improvement Association as a “quasi-public body,” and conducted its analysis under the public trust doctrine based on the distinction between land controlled by such a body and land controlled directly by a municipality, like the land at issue in *Neptune City*. *Id.*

<sup>48</sup> *Matthews*, 471 A.2d at 362–63.

<sup>49</sup> *Id.* at 363–64. In particular, the *Matthews* court noted that such access can be divided into two types: (1) the public’s right to cross dry sand areas to reach the foreshore (vertical access), and (2) the public’s right to remain upon dry sand areas for sunbathing and recreational activities (horizontal access). *Id.*

<sup>50</sup> *Id.* at 364. That said, the court recognized that the public certainly does not have an unlimited right to cross privately owned lands in order to reach the foreshore. *See id.* Instead, “[t]he public interest is satisfied so long as there is *reasonable* access to the sea.” *Id.* (emphasis added).

<sup>51</sup> *Id.* at 365. The court noted that, without any ability to access the dry sand area above the foreshore, it may be impossible for a person to rest on the shore after swimming in the ocean. *Id.*

rights to dry sand areas under the public trust doctrine should not be limited to municipally owned beaches of the type at issue in *Neptune City*.<sup>52</sup> Instead, “where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public’s use of the upland dry sand area subject to an accommodation of the interests of the owner.”<sup>53</sup> In so holding, the court cited “the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine,” leading it to conclude that the public must have a right to both access and use “privately-owned dry sand areas as reasonably necessary.”<sup>54</sup>

The court identified four factors for determining the exact nature and extent of the public’s rights to any individual piece of privately owned dry sand area, noting that specific factual circumstances will determine how much, if any, access is required; public access to such areas under *Matthews* is, therefore, determined on a case-by-case basis.<sup>55</sup> Specifically, the four *Matthews* factors are: “[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner.”<sup>56</sup> In applying its reasoning—and the factors it developed—to the facts of this case, the *Matthews* court ultimately found that, by excluding the public from the dry sand beaches of Bay Head above the foreshore, the Improvement Association frustrated the public’s rights under the doctrine.<sup>57</sup> Thus, the court determined that the public trust doctrine required Improvement Association membership to be open not just to residents of Bay Head, but also to the public at large—guaranteeing that members of the public could elect to gain both vertical and horizontal access to the dry sand areas of Bay Head’s beaches by securing membership in the Improvement Association.<sup>58</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Matthews*, 471 A.2d at 365.

<sup>55</sup> *See id.* at 365–66.

<sup>56</sup> *Id.* at 365.

<sup>57</sup> *Id.* at 368. Specifically, the court found that Bay Head contained no public beaches. *Id.* It also noted that if every municipality on the shore chose to implement such a policy, the public would not be able to exercise its right to use and enjoy the foreshore at all. *Id.* For a more detailed, factor-by-factor analysis of the court’s application of the *Matthews* factors to a privately owned beach in the more recent *Raleigh Avenue* case, see *infra* discussion Part II.

<sup>58</sup> *Id.* at 368–69. The court recognized that Improvement Association membership confers rights that go beyond the scope of the public trust doctrine, but held that opening up membership to the public is still required in order to effectuate the doctrine (full membership may go beyond the rights of the doctrine, but no



The third and final major New Jersey decision on the public trust doctrine and beach access—in which the Supreme Court of New Jersey applied the principles of *Neptune City* and *Matthews* directly to a piece of privately owned land, in a statement of law that now defines the modern New Jersey doctrine—is the 2005 decision of *Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.*<sup>59</sup> In *Raleigh Avenue*, the court directly applied the *Matthews* factors to a privately owned beachfront property and found that the public trust doctrine required public access to its upland sand areas via both vertical access—from a street on dry land, across a dune and dry sand, to the foreshore—and horizontal access—along the length of the beach and parallel to the ocean, inland from the foreshore.<sup>60</sup>

Atlantis Beach Club, Inc. (“Atlantis”) owned a beachfront lot, including an area of sand dunes and a large upland sand area landward of the mean high tide line, in Lower Township, New Jersey.<sup>61</sup> Specifically, Atlantis was located in a section of Lower Township known as Diamond Beach, a small area that contained the only Atlantic Ocean-facing beach in the town and had, at the time of the case, only a few places from which the public could access the beach.<sup>62</sup> Atlantis opened its private beach club in 1996, after which it began charging non-member residents of Diamond Beach substantial fees for the right to limited access to its beach.<sup>63</sup> On June 22, 2002, Tony Labroschiano, a Raleigh Avenue resident and a member of the Raleigh Avenue Beach Association (“the Beach Association”), was issued a trespassing summons when he attempted to walk from the wet sand area of the beach to the east of the mean high tide line—the foreshore—through the dry sand area owned by Atlantis in order to reach his Raleigh Avenue home.<sup>64</sup> Subsequently, the Beach Association filed a complaint against Atlantis, among other defendants, claiming that Atlantis’ beach access policy violated the public trust doctrine.<sup>65</sup>

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membership falls short of the doctrine’s guaranteed rights). *Id.*

<sup>59</sup> *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005).

<sup>60</sup> *See id.* at 124.

<sup>61</sup> *Id.* at 113–14. Atlantis operated its property “as a private club.” *Id.* at 113.

<sup>62</sup> *Id.* at 115. Atlantis was located at the end of Raleigh Avenue, which was one of only three public beach access points in Diamond Beach. *Id.* The closest free beach access point to Raleigh Avenue was Dune Drive, nine blocks (approximately one half mile) from Raleigh Avenue. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 116. Raleigh Avenue residents made up the Raleigh Avenue Beach Association. *Id.*

<sup>65</sup> *Raleigh Ave.*, 879 A.2d at 116.

The trial court below considered issues of both horizontal and vertical access to Atlantis' dry sand area under the public trust doctrine and found that: (1) as to horizontal access, the public was only entitled to use the area below the mean high tide line and a three-foot-wide strip of dry sand immediately landward of that line; and (2) as to vertical access, the public was only entitled to use a narrow pathway along the northern edge of the Atlantis property to reach the foreshore from Raleigh Avenue.<sup>66</sup> The Appellate Division below issued an opinion recognizing greater public trust rights than the trial court had found, determining that Atlantis could not interfere with the public's right to either vertical or horizontal access to the dry sand area under the public trust doctrine.<sup>67</sup> At oral argument before the Supreme Court of New Jersey, Atlantis conceded vertical access to the foreshore to the Beach Association along a narrow boardwalk extending from Raleigh Avenue to the ocean, but maintained its position that horizontal access should be limited to a three-foot-wide strip of dry sand immediately above the foreshore.<sup>68</sup>

Significantly, the Supreme Court of New Jersey reiterated the message of the *Matthews* court that the public trust doctrine would be without meaning or force if access to public trust lands, i.e., the foreshore, were unavailable.<sup>69</sup> In acknowledging this fact, the court found a modern parallel to the Roman origins of the public trust doctrine.<sup>70</sup> Under the ancient doctrine, people were able to haul their fishing nets ashore and dry them on the sand, an activity that would have required the use of much more than just the usually wet—and sometimes completely submerged—foreshore.<sup>71</sup> The court then

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<sup>66</sup> *Id.* at 117. Both the Beach Association and the State, which had been named as a defendant, appealed the trial court's determination. *Id.*

<sup>67</sup> *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 22, 33 (N.J. Super. Ct. App. Div. 2004), *aff'd*, 879 A.2d 112 (N.J. 2005). In particular, the Appellate Division found that the public trust doctrine included a right of the public to use and to remain upon the dry sand area above the foreshore. *Id.* at 22. It also found that Atlantis could charge fees to members of the public for use of the dry sand area if they remained in that area for extended periods of time, provided that Atlantis supplied certain services (trash pickup on the beach, lifeguards, showers, etc.) and that such fees were approved by the state Department of Environmental Protection. *Id.* Atlantis subsequently petitioned to the Supreme Court of New Jersey for review. *Raleigh Ave.*, 879 A.2d at 118.

<sup>68</sup> *Raleigh Ave.*, 879 A.2d at 119. Atlantis essentially argued for the solution reached by the trial court. *Id.*

<sup>69</sup> *Id.* at 120.

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* (“[U]se of the dry sand has long been a correlate to use of the ocean and is a component part of the rights associated with the public trust doctrine.”). The link made by the court to the Roman roots of the public trust doctrine is of great

turned to the *Matthews* factors and applied them directly to determine the nature and extent of public trust rights, if any, to the dry sand area owned by Atlantis.

As to the first *Matthews* factor, “[l]ocation of the dry sand area in relation to the foreshore,” the court noted that the three-foot strip of dry sand immediately landward of the foreshore, to which Atlantis wished to restrict the public’s horizontal access, was about 339 feet seaward from the dune line in front of Raleigh Avenue.<sup>72</sup> As to the second factor, “[e]xtent and availability of publicly-owned upland sand area,” the court noted that there was no publicly owned beach in Lower Township; an adjacent municipality did have public beaches, but the only option in Lower Township was to pay for access to privately owned beaches.<sup>73</sup> As to the third factor, “[n]ature and extent of the public demand,” the court found that, while the Diamond Beach section of Lower Township was small and had limited parking, the overall demand for beach use in New Jersey was tremendous in general.<sup>74</sup> Finally, as to the fourth factor, “[u]sage of the upland sand land by the owner,” the court found that, prior to 1996, the Atlantis beach property had been open to the public, and that a development immediately inland of Atlantis—which had preceded the construction of Atlantis—had been required to cede public access to a portion of the same beach in order to obtain a development permit.<sup>75</sup> Specifically, the earlier development had to allow public access to a 220-foot-wide portion of its beach in order to obtain a development permit under the Coastal Area Facility Review Act of 1973 (CAFRA).<sup>76</sup>

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significance, as none of the other states surveyed in this Comment have been willing to draw such a connection. The message sent by the *Raleigh Avenue* court was that just as the prevailing public foreshore activity during Roman times (fishing) required public usage of the dry sand area, so, too, do modern trust-protected activities. Thus, even if state ownership only extends as high as the mean high tide line, fulfillment of the public trust doctrine requires public access to more of the beach than just a narrow strip of land.

<sup>72</sup> *Id.* at 121. The horizontal length of the Atlantis tract (along the length of the ocean) was about 480 feet. *Id.*

<sup>73</sup> *Id.* at 121–22. Specifically, the court noted that Wildwood Crest, the municipality immediately to the north of Lower Township, had public beaches, and that a private beachfront development adjacent to Atlantis within Lower Township allowed public access at a DEP-approved fee (a fee similar to those charged at the public beaches of nearby towns, and substantially less than that charged by Atlantis). *Id.* at 122. Directly to the south of Atlantis was a piece of Coast Guard-owned beach property, which was closed to the public for most of the summer season. *Id.*

<sup>74</sup> *Raleigh Ave.*, 879 A.2d at 122.

<sup>75</sup> *Id.* at 122–23.

<sup>76</sup> *Id.* The earlier-built development (immediately inland, or west, of Atlantis) had owned the Atlantis beach before selling it to the developer who built Atlantis. *Id.*

In spite of this history of public access to what eventually became the Atlantis-owned beach, however, Atlantis closed off its beach to non-members in 1996.<sup>77</sup>

Based upon this application of the *Matthews* factors, the court held that Atlantis must make its upland sand area above the foreshore available to the public under the public trust doctrine.<sup>78</sup> In so holding, the court specifically highlighted the long history of public access to this tract of beach prior to 1996, the CAFRA permit granted to the pre-Atlantis development that previously owned this stretch of beach, the high public demand for beaches, the lack of publicly owned beaches in Lower Township, and the fact that Atlantis had been using the upland sand area as part of its business enterprise.<sup>79</sup> The court generally adopted the position on beach access fees that the Appellate Division had proposed below—that Atlantis could charge the Department of Environmental Protection (DEP)-approved fees to the public in order to cover its costs of providing beach services.<sup>80</sup>

The three decisions discussed above—*Neptune City*, *Matthews*, and *Raleigh Avenue*—form the core of New Jersey’s modern public trust doctrine jurisprudence as it relates to the question of beach access. These three New Jersey Supreme Court decisions have ensured that the public’s rights under the doctrine will be enforced. The first, *Neptune City*, extended the public’s rights under the doctrine to include a right to use the upland dry sand areas of publicly owned beaches, announced a right to conduct modern recreational uses beyond the traditional protected uses of navigation and fishing, and established that municipalities cannot discriminate between residents and nonresidents in charging beach access fees.<sup>81</sup> The second,

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<sup>77</sup> *Id.* at 122.

<sup>78</sup> *Id.* at 124. The *Raleigh Avenue* court’s reliance on and extensive discussion of the *Matthews* factors cemented their importance in determining public trust access rights to privately owned beachfront properties in New Jersey. As a result, *Raleigh Avenue* demonstrates that New Jersey courts are serious about enforcing a functional, living version of the public trust doctrine, ensuring that it guarantees actual public access in practice as opposed to simply in theory.

<sup>79</sup> *Id.* Two of the seven Justices of the court dissented, arguing that: (1) the existing public vertical access to the foreshore (via the narrow easement across Atlantis-owned dry sand defined by the trial court) and the available access to an adjacent privately owned beach (which allowed public access at DEP-approved fees) were sufficient to satisfy the needs of the public; and (2) while a three-foot-wide area of public upland sand access on Atlantis’ property would be insufficient for horizontal access, the proper balance would be to allow public access on a ten-foot-wide area—not on the entire upland sand area. *Id.* at 128–29 (Wallace, J., dissenting).

<sup>80</sup> *Raleigh Ave.*, 879 A.2d at 124–25.

<sup>81</sup> See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54–55 (N.J. 1972).

*Matthews*, built upon the doctrine further by requiring a quasi-publicly owned association to provide reasonable public access to both the foreshore and to some of its upland sand areas in order to accommodate the expanded dry sand rights and recreational use rights announced in *Neptune City*.<sup>82</sup> *Matthews* also established a set of factors for the consideration of public trust rights on other quasi-publicly owned and privately owned beachfront lands.<sup>83</sup> The third, *Raleigh Avenue*, applied the *Matthews* factors directly to a privately owned parcel; the court concluded that the public trust doctrine required public access both across and within the privately owned dry sand area of that parcel.<sup>84</sup> These three decisions have solidified public trust rights in New Jersey, even in privately owned shoreline areas. As the next section of this Comment will demonstrate, however, nearby states do not guarantee the same high level of public trust rights protection as New Jersey.

### III. THE PUBLIC TRUST DOCTRINE AND BEACH ACCESS IN NEARBY STATES

This section explores the public trust doctrine as it pertains to beach access in six other states geographically close to New Jersey: Maryland, Delaware, New York, Connecticut, Rhode Island, and Massachusetts. While the doctrines of these states vary—considerably, in some instances—all of them fall far short of the high level of public beach access rights provided by the New Jersey doctrine.

#### A. Maryland

The existence of the public trust doctrine has been established in Maryland for centuries and, under the doctrine, state ownership of tidal lands reaches the mean high tide line.<sup>85</sup> Two cases define Maryland's modern public trust doctrine as it pertains to beach access. The first is *Department of Natural Resources v. Mayor of Ocean City*, which the state's high court, the Maryland Court of Appeals, decided in 1975.<sup>86</sup> At issue was essentially the same question, albeit in a different form, that the Supreme Court of New Jersey answered in *Raleigh Avenue* decades later—what, if any, rights the public had under the public trust doctrine to access the dry sand area of a privately owned beach above

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<sup>82</sup> See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 358, 365–66 (N.J. 1984).

<sup>83</sup> See *id.* at 366.

<sup>84</sup> See *Raleigh Ave.*, 879 A.2d at 124.

<sup>85</sup> Craig, *supra* note 5, at 64.

<sup>86</sup> *Dep't of Natural Res. v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975).

the publicly owned foreshore.<sup>87</sup> Specifically, a developer sought to build a condominium on the dry sand area of an oceanfront lot; the case involved a challenge against the developer's application on the grounds that the condominium would exclude the public from the dry sand area.<sup>88</sup> The Maryland Court of Appeals noted that "there can be little doubt" as to the public's right to use the foreshore and traced this right in Maryland back to the pre-Revolutionary era.<sup>89</sup> The court quickly qualified this right, however, explaining that the public trust doctrine only protects the public's right to access and use the foreshore, and that any claim of right to access or use the dry sand area upland of the foreshore "must find support elsewhere"—outside of the public trust doctrine.<sup>90</sup> Thus, the court established that the public has no right under the doctrine to access or use privately owned dry sand areas above the foreshore.<sup>91</sup> The court brushed away arguments by the petitioners, who claimed that they had public trust rights to use the dry sand area, as to the history and purpose of the public trust doctrine, holding instead that such considerations could not override the private landowner's rights to the dry sand area.<sup>92</sup>

The second important Maryland decision to address the public trust doctrine in the context of beach access rights is *Clickner v. Magothy River Ass'n*, a 2012 case also decided by the Maryland Court of Appeals.<sup>93</sup> The case developed after a couple, the Clickners, purchased Dobbins Island, a small island in the tidal Magothy River with an extensive history of public use.<sup>94</sup> After purchasing Dobbins Island, the

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<sup>87</sup> See *id.* at 632. The court noted that this was an issue of first impression in Maryland. *Id.* A significant portion of this case turned on whether the public had acquired an implied easement to the dry sand area of the specific piece of private property in question. See *id.* This issue was separate from the public trust issue and will not be discussed in this Comment.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 633.

<sup>90</sup> *Id.* at 634.

<sup>91</sup> *Id.* (explaining that a grant of the dry sand area to a private owner leads to the result that the "rights of fishing, boating, hunting, bathing, taking shellfish and seaweed and of passing and repassing have been *pro tanto* extinguished by the prior grant" to the private owner).

<sup>92</sup> *Ocean City*, 332 A.2d at 637. Specifically, in a manner that seemed to foreshadow similar arguments made (and accepted by the Supreme Court of New Jersey) decades later in *Raleigh Avenue*, the petitioners argued "that fish cannot be salted or dried, or cabins or huts constructed, or twigs and branches gathered on the foreshore, which is subject to continuous tidal action, therefore placing some of it under water a considerable portion of each day." See *id.* The Maryland court was not convinced, holding instead that private ownership rights shall prevail. *Id.*

<sup>93</sup> *Clickner v. Magothy River Ass'n*, 35 A.3d 464 (Md. 2012).

<sup>94</sup> See *id.* at 467–68. The Magothy River is an extension of Chesapeake Bay. The court's opinion provides detail as to the storied history of Dobbins Island, which had

Clickners placed “No Trespassing” signs around the island and erected a fence along its perimeter, just above the mean high tide line.<sup>95</sup> The Magothy River Association and six individuals (collectively “the River Association”) subsequently brought suit against the Clickners, “seeking to establish a public right to use” part of the island.<sup>96</sup>

The court recognized, and neither party disputed, that the public trust doctrine provided that the State of Maryland owned the tidal lands of Dobbins Island up to the mean high tide line “for the benefit of its citizens.”<sup>97</sup> As such, that line marked the delineation between public ownership below the mean high tide line and the Clickners’ private ownership above that line.<sup>98</sup> The court then found that the right asserted by the River Association to use the dry sand area on Dobbins Island above the mean high tide line—behind the Clickners’ new fence—could not be grounded in the public trust doctrine because the doctrine does not cover lands above the foreshore.<sup>99</sup> Quoting *Ocean City*, the court determined that the River Association could only use the dry sand area on Dobbins Island if it could show that it had either an implied or express easement allowing it to do so; the public trust doctrine was of no avail.<sup>100</sup>

Thus, *Ocean City* and *Clickner* both flatly deny the existence of public trust rights above the mean high tide line and strictly limit permissible public trust beach access to the foreshore.<sup>101</sup> As such, Maryland’s public trust doctrine offers far less beach access than New Jersey’s doctrine; Maryland’s doctrine, unlike New Jersey’s, offers no vertical or horizontal access to public trust lands. That said, some of the states discussed in this Comment, especially Delaware, have an even more limited public trust doctrine than Maryland.

#### B. Delaware

An early expression of Delaware’s public trust doctrine, from 1851, noted the existence of the doctrine in Delaware and announced that private landowners owned to the low tide line, but maintained that the public does have a right to conduct fishing and navigation on the

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been privately owned since prior to the Revolution but had nevertheless been subject to frequent visitation by the public during the ensuing centuries. *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 466.

<sup>97</sup> *Id.* at 473.

<sup>98</sup> *Id.*

<sup>99</sup> *Clickner*, 35 A.3d at 473–74.

<sup>100</sup> *Id.* at 474.

<sup>101</sup> *See infra* discussion Part III.A.

foreshore.<sup>102</sup> The public trust doctrine has not generated much litigation in Delaware during recent times, and the only modern case pertinent to this discussion is an unpublished trial court decision from 1994, *Groves v. Secretary of the Department of Natural Resources & Environmental Control*.<sup>103</sup> Because *Groves* is the only Delaware case on the public trust doctrine relevant to the question of public beach access, only *Groves* will be discussed in this Comment.

In *Groves*, a private landowner holding waterfront property on Rehoboth Bay wanted to place rip-rap along the foreshore of her property to prevent erosion.<sup>104</sup> In order to gain permission to do so, she sought, and was eventually granted, a permit from the state Secretary of the Department of Natural Resources and Environmental Control (DNREC).<sup>105</sup> The rip-rap was subsequently constructed; it “covered an area between the mean high tide, or water, line and the mean low tide, or water, line,” such that “[t]he only time any beach was exposed was at low tide and then, only a minimal amount was exposed.”<sup>106</sup> *Groves*, a neighboring property owner, appealed the DNREC’s granting of the permit on public trust grounds, along with other, unrelated grounds, when the construction of the rip-rap began.<sup>107</sup> Specifically, *Groves* argued that the public trust doctrine required public access to the foreshore, which the rip-rap now blocked, for purposes of walking, sunbathing, and recreation.<sup>108</sup> *Groves* cited *Matthews*, from the Supreme Court of New Jersey, as persuasive authority.<sup>109</sup>

The court quickly distinguished *Matthews*, noting that the New Jersey decision does not bind the Delaware courts.<sup>110</sup> In particular, the court noted that New Jersey law differs considerably from Delaware law in the realm of the public trust because the State of New Jersey owns the foreshore, whereas the State of Delaware only owns up to the mean low tide line; the foreshore is, as a result, owned by private landowners in Delaware.<sup>111</sup> While the public does have certain rights to use the

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<sup>102</sup> Bickel v. Polk, 5 Del. (5 Harr.) 325, 325 (Del. Super. Ct. 1851).

<sup>103</sup> *Groves v. Sec’y of Dep’t of Natural Res. & Envtl. Control*, No. 92A-10-003, 1994 WL 89804 (Del. Super. Ct. Feb. 8, 1994).

<sup>104</sup> *Id.* at \*1.

<sup>105</sup> *Id.* at \*1–2.

<sup>106</sup> *Id.* at \*2.

<sup>107</sup> *Id.* at \*2, 5.

<sup>108</sup> *Id.* at \*5.

<sup>109</sup> *Groves*, 1994 WL 89804, at \*5.

<sup>110</sup> *Id.* at \*5.

<sup>111</sup> *Id.* (“[T]he New Jersey law on this issue is of no value at all.”). The court’s explicit decision not to follow *Matthews* and the New Jersey doctrine is hardly



foreshore in Delaware that are superior to private landowners' rights—those of fishing and of navigation by boat, the rights that the court stated “constitute the public trust doctrine”—the doctrine has never given “a right of the public superior to the landowner to access to the foreshore for walking and/or recreational activities.”<sup>112</sup> Indeed, the court went so far as to determine that, if it or the state legislature were to find in the public trust doctrine such a right to walk and/or recreate along the foreshore, Delaware would have to compensate private waterfront landowners for a taking.<sup>113</sup>

Though *Groves* is an unpublished opinion by a Delaware trial court, rather than by the Delaware Supreme Court, there have been no contrary statements of law in Delaware in the twenty years since its decision. As a result, *Groves* appears to be an accurate statement of the modern public trust doctrine in Delaware. The decision establishes the extent of the public trust doctrine in Delaware: the State only owns from the mean low tide line seaward, and the public's right to use the foreshore is limited to navigation by boat and fishing.<sup>114</sup> The *Groves* court specifically declined to follow *Matthews*, or to even recognize a public trust right to walk along the foreshore or to conduct recreational activities there.<sup>115</sup> Delaware may thus have the most limited public trust doctrine of the seven states surveyed in this Comment.

### C. *New York*

The public trust doctrine of New York was, in similar fashion to the doctrines of the other states surveyed herein, derived directly from the English common law.<sup>116</sup> As in Delaware, New York has scant litigation on the public trust doctrine and, as a result, has scant litigation on the doctrine as it relates to beach access; in fact, few modern cases address the issue even tangentially. In that respect, both New York and Delaware stand in stark contrast to the attention and importance given to the public trust doctrine in the beach access context in New Jersey. In spite of the general lack of precedent, however, New York clearly has a more expansive public trust doctrine than Delaware. *Arnold's Inn, Inc. v. Morgan*, a lower court case decided

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surprising, considering the large differences (as noted by the court) between Delaware and New Jersey public trust law.

<sup>112</sup> *Id.* at \*6.

<sup>113</sup> *Id.*

<sup>114</sup> See *infra* discussion Part III.B.

<sup>115</sup> *Id.*

<sup>116</sup> See *Trustees of Brookhaven v. Smith*, 80 N.E. 665 (N.Y. 1907).

in 1970, is the most recent statement of law on the matter.<sup>117</sup>

At issue in *Arnold's Inn* was an area of fill that the defendant, a private landowner, had placed atop the foreshore adjacent to his property in order to elevate that area above the mean high tide line.<sup>118</sup> The plaintiff, a nearby restaurant owner, argued that the fill constituted a trespass on public lands by the defendant.<sup>119</sup> In deciding the case, the court referred to its public trust doctrine via the Roman—and, later, English—concepts of the *jus publicum* and *jus privatum*.<sup>120</sup> The court defined the *jus publicum* as “the right shared by all to navigate upon the waters covering the foreshore at high tide and, at low tide, to have access across the foreshore to the waters for fishing, bathing or any other lawful purpose,” and the *jus privatum* as “the right of the owner to the foreshore.”<sup>121</sup> The court noted that a landowner is permitted to fill in the foreshore and, thus, to extinguish the *jus publicum* as to the filled-in piece of foreshore, but nevertheless held that the defendant’s fill constituted a trespass against the Town of North Hempstead (“the Town”), in which the property was located, because “title to the land beyond the high-water line of Manhasset Bay is vested in the . . . Town.”<sup>122</sup> Thus, regardless of whether the defendant could theoretically fill in the foreshore, he was not permitted to do so without first receiving a grant from the Town, or, otherwise, without satisfying the elements of adverse possession or of prescriptive easement.<sup>123</sup> There had been no grant of the foreshore by the Town to the defendant, and the court found that the defendant had not satisfied the elements of adverse possession or prescription, so it

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<sup>117</sup> *Arnold's Inn, Inc. v. Morgan*, 310 N.Y.S.2d 541 (N.Y. Sup. Ct. 1970), *modified*, 317 N.Y.S.2d 989 (N.Y. App. Div. 1970).

<sup>118</sup> *Id.* at 546.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 547.

<sup>121</sup> *Id.* The *jus publicum/jus privatum* framework is the public trust doctrine in different terms—it has the same impact, regardless of what it is called. After the Magna Carta came into force in England, tidal lands below the high tide line were divided into two categories: (1) the *jus privatum*, representing the king’s ownership interest in the land; and (2) the *jus publicum*, representing that the king held the land as a sovereign for the people. The *jus publicum* was thus held in public trust. *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 358 (Mass. 1979). After the rise of Parliament, the *jus publicum* was understood to be in the control of the Parliament, while the *jus privatum* remained with the king. *Id.* Because neither had a full property interest in the land, neither could convey said land, and so it remained open to the public. *Id.*

<sup>122</sup> *Id.* at 547–49.

<sup>123</sup> *Arnold's Inn*, 310 N.Y.S.2d at 548–49. The court noted that the foreshore is indeed alienable, such that the town could convey it to a private landowner or lose it by prescription. *Id.* at 548.

ordered the defendant to remove the fill placed beyond the original mean high-water line.<sup>124</sup>

*Arnold's Inn* makes clear that public trust ownership—the *jus publicum*, to use the court's terminology—extends to the mean high tide line in New York.<sup>125</sup> This case also establishes that fishing and navigation are not the only protected public uses of the foreshore under the doctrine, because the court also mentions “bathing” and “any other lawful purpose” as being protected.<sup>126</sup> Additionally, although the court did not find a violation of the public trust doctrine by the defendant's placement of fill, it did find that said fill was a trespass against title held by the Town in the foreshore.<sup>127</sup> Thus, while *Arnold's Inn* certainly does not approach the scope of the New Jersey public trust doctrine, it does establish that the state owns the entire foreshore and, more significantly, that the public has a right to access it—for purposes beyond just fishing and navigation—when sand is exposed there at low tide.

#### D. Connecticut

Connecticut directly inherited the public trust doctrine from the English common law after the Revolution, and state ownership has always extended to the mean high tide line under its version of the doctrine.<sup>128</sup> Case law on the doctrine is scarce, but a 2001 decision, *Leydon v. Town of Greenwich*, contains language that directly addresses the public trust doctrine as it relates to beach access.<sup>129</sup> In *Leydon*, at issue was whether the Town of Greenwich (“Greenwich”) could restrict access to a shorefront town park to only its residents and their guests.<sup>130</sup> Ultimately, the Supreme Court of Connecticut found Greenwich's restriction of access to be unconstitutional under both the federal and state constitutions, for reasons wholly unrelated to the public trust doctrine.<sup>131</sup> The appellate court below, however, had specifically

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 547.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 547–49.

<sup>128</sup> See *Chapman v. Kimball*, 9 Conn. 38, 40 (Conn. 1831).

<sup>129</sup> *Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001).

<sup>130</sup> *Id.* at 557–58. The park, Greenwich Point, included a beach on Long Island Sound. *Id.* at 559. The court noted that access to the park was only possible via a “piece of land known as Tod's Driftway (driftway), which [was] owned by . . . a private association of landowners . . . . The town [held] an easement over a private road on the driftway that provide[d] the only means by which a person seeking to enter Greenwich Point by land [could] do so.” *Id.*

<sup>131</sup> *Id.* at 557.

discussed the public trust doctrine in deciding against *Greenwich*,<sup>132</sup> so the Supreme Court of Connecticut decided to address the doctrine for purposes of clarification.<sup>133</sup>

The Connecticut Supreme Court first noted that the appellate court below had, in fact, conflated the public trust doctrine with another area of law, but nevertheless addressed the doctrine in some detail in a footnote.<sup>134</sup> Specifically, the court explained that the Connecticut version of the public trust doctrine includes a public right to access the foreshore “from the mean high tide line to the water,” but also noted that “it does not also give a member of the public the right to gain access to that portion of the beach by crossing the beach landward of the mean high tide line.”<sup>135</sup> Thus, the court determined that the public trust doctrine was of no avail to the plaintiff because the doctrine would give the plaintiff no right to reach the foreshore of Greenwich Point from upland areas; additionally, even if the plaintiff could somehow legally reach the foreshore, his access would only include the foreshore itself.<sup>136</sup>

As such, *Leydon* clearly and concretely states that the public trust doctrine in Connecticut does not include any right to vertical access to the foreshore from upland areas, nor does it include any horizontal right to access upland sand areas above the foreshore.<sup>137</sup> *Leydon* places Connecticut’s version of the doctrine in the middle of the states surveyed: more expansive than the version employed by Delaware, because the State of Connecticut has full public ownership of the foreshore up to the mean high tide line, but far more limited than that of New Jersey, which includes the rights of vertical and horizontal access through and to upland sand areas that the *Leydon* court denied. The Connecticut doctrine appears to be more or less identical to the Maryland doctrine.<sup>138</sup>

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<sup>132</sup> *Leydon v. Town of Greenwich*, 750 A.2d 1122, 1126–27 (Conn. App. Ct. 2000), *aff’d in part, rev’d in part*, 777 A.2d 552 (Conn. 2001).

<sup>133</sup> *Leydon*, 777 A.2d at 564 n.17 (Conn. 2001).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> See *supra* discussion Part III.D.

<sup>138</sup> See *supra* discussion Part III.A. As discussed above, Maryland, like Connecticut, fully owns the foreshore in trust, but has explicitly denied any public trust right to vertical and/or horizontal access to said foreshore.

*E. Rhode Island*

The Rhode Island public trust doctrine, which derives from the common law, extends state ownership up to the mean high tide line.<sup>139</sup> The doctrine is also codified in both Rhode Island's state constitution<sup>140</sup> and in a statute.<sup>141</sup> In addition to the constitutional and statutory provisions outlining the public trust doctrine, there is extensive Rhode Island case law—in contrast to some of the other states surveyed in this Comment—on the doctrine. This Comment discusses the three most salient examples of this case law below.

The first important case that can be considered part of Rhode Island's modern public trust doctrine in the beach access realm is *Jackvony v. Powel*, which the Rhode Island Supreme Court decided in 1941.<sup>142</sup> In that case, a commission of the City of Newport sought to construct a six-foot-high wire fence across the beach on the border of Newport and another town, extending from the mean high tide line down to the mean low tide line, in order “[t]o keep nonresidents from using the beach for nothing and thus protect Newport taxpayers.”<sup>143</sup> The court struck down the proposed fence as unconstitutional under the Rhode Island Constitution, noting that such fences would frustrate the public's rights to “fishing, bathing, boating, getting seaweed or sand, or for exercise or any other purpose.”<sup>144</sup>

Over forty years later, the Supreme Court of Rhode Island decided *State v. Ibbison*, an equally important case in the state's public trust doctrine history.<sup>145</sup> In *Ibbison*, the defendants were conducting a “beach-clean-up” operation along a Rhode Island beach when a private beachfront landowner, accompanied by a police officer, stopped

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<sup>139</sup> See *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895).

<sup>140</sup> One section of the Rhode Island Constitution points to “the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore.” R.I. CONST. art. I, § 16. The following section specifies these privileges as including “fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore.” R.I. CONST. art. I, § 17.

<sup>141</sup> A Rhode Island statute implicitly mentions the public trust doctrine; it points directly to the constitutional provisions quoted *supra* note 140, and specifies that the State of Rhode Island “has historically maintained title in fee simple to all soil within its boundaries that lies below the high water mark.” R.I. GEN. LAWS § 46-5-1.2 (West 2014).

<sup>142</sup> *Jackvony v. Powel*, 21 A.2d 554 (R.I. 1941).

<sup>143</sup> *Id.* at 554–55 (quotation marks omitted).

<sup>144</sup> *Id.* at 558. The constitutional provision that the court held to be offended was article I, section 17, which is essentially a constitutional codification of the public trust doctrine. See *supra* note 140.

<sup>145</sup> *State v. Ibbison*, 448 A.2d 728 (R.I. 1982).

them.<sup>146</sup> The defendants were subsequently convicted of criminal trespass.<sup>147</sup> At the time of their arrests, the defendants were located landward of the mean high tide line, but seaward of the high water mark, defined by the defendants at the trial court as “a visible line on the shore indicated by the reach of an average high tide and further indicated by drifts and seaweed along the shore.”<sup>148</sup> The direct issue before the court was how to calculate the boundary line of public trust ownership to determine whether a trespass occurred.<sup>149</sup>

After reviewing Rhode Island precedent and the common law public trust doctrine, the Rhode Island Supreme Court determined that the state constitution’s guarantees of public rights extend to the mean high tide line—not to the high water mark, which is above the mean high tide line during periods of higher-than-normal tides (as was the case when the defendants were on the beach).<sup>150</sup> The court found that setting the demarcation line dividing public and private ownership at the mean high tide line, instead of the high water mark, struck the best balance between the interests of the public and the beachfront landowners.<sup>151</sup> Setting the line above the mean high tide line at the high water mark, according to the court, would deprive private landowners of their rights, and setting the demarcation line below the mean high tide line would deprive the public of its rights.<sup>152</sup> Nevertheless, the court, noting the confusion of previous Rhode Island decisions in determining the exact line of the extent of public ownership, affirmed the lower court’s dismissal of the trespassing charges against the defendants.<sup>153</sup> Additionally, the court held that municipalities pursuing such trespassing charges against members of the public in the future must be able to prove that the would-be trespassers knew that they were located above—and had intentionally

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<sup>146</sup> *Id.* at 729.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* It is worth noting that, at the time of the defendant’s arrest, the mean high tide line was under water. *Id.* at 729–30.

<sup>149</sup> *Id.* at 730.

<sup>150</sup> *See id.* at 732.

<sup>151</sup> *Ibbison*, 448 A.2d at 732.

<sup>152</sup> *Id.* (“Setting the boundary at the point where spring tides reach would unfairly take from littoral owners land that is dry for most of the month. Similarly, setting [it] . . . at the [ ] mean low tide [line] would so restrict the size of the shore as to render it practically nonexistent.”).

<sup>153</sup> *Id.* at 733 (“In view of the lack of clarity in early decisions of this court regarding whether the landward boundary of the shoreline was to be computed as a mean or as an absolute high-water mark, we shall affirm the dismissals of the charges . . . but for different reasons.”).

crossed—the mean high tide line.<sup>154</sup>

A third—and perhaps even more relevant, for purposes of this Comment—Rhode Island case dealing with the public trust doctrine and beach access is *Cavanaugh v. Town of Narragansett*, an unpublished 1997 trial court decision that offers a clear statement of current Rhode Island law on the matter.<sup>155</sup> In *Cavanaugh*, the plaintiff was charged with a misdemeanor after he attempted, without paying the beach access fee, to cross the dry sand area of a public beach in order to reach the foreshore below the dry sand area.<sup>156</sup> Abutting the public beach were private properties and structures that completely blocked the public from having any “perpendicular” access to the foreshore—equivalent to what New Jersey courts call “vertical” access, and which will be referred to as “vertical” access subsequently in this Comment—such that only the publicly owned, fee-charging beach afforded the general public any vertical access to said foreshore.<sup>157</sup> The plaintiff sued, arguing that the Town of Narragansett could not deprive the public of vertical access to an otherwise inaccessible area of foreshore by charging fees.<sup>158</sup>

The court interpreted article I, section 17 of the Rhode Island Constitution to determine whether the public trust doctrine required vertical access to the foreshore; it found that “the provision by its own language provides absolutely no indication that a right of [vertical] access across the property of others exists.”<sup>159</sup> According to the court, even if the public trust doctrine did provide for vertical access to the foreshore, the Town of Narragansett would still be able to charge the beach access fees that it did in this case.<sup>160</sup> Additionally, the court found no support for the plaintiff’s argument that the public trust doctrine implicates the dry sand area above the mean high tide line.<sup>161</sup>

Taking *Jackvony*, *Ibbison*, and *Cavanaugh* together, Rhode Island’s public trust doctrine presents a mixture of both expansive and limited rights in the realm of beach access.<sup>162</sup> On one hand, two articles of the

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<sup>154</sup> *Id.*

<sup>155</sup> *Cavanaugh v. Town of Narragansett*, No. WC91-0496, 1997 WL 1098081 (R.I. Super. Ct. Oct. 10, 1997).

<sup>156</sup> *Id.* at \*2.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at \*5. In tracing the history of the common law public trust doctrine and applying that history to article I, section 17, the court found a lack of any right to vertical access. *Id.* at \*9.

<sup>160</sup> *Id.* at \*11.

<sup>161</sup> *Cavanaugh*, 1997 WL 1098081, at \*7.

<sup>162</sup> *See supra* discussion Part III.E.

state constitution and a state statute have codified the public trust doctrine in Rhode Island and provide, in sum, that the doctrine goes beyond fishing and navigation to include a right of “passage along the shore” and other recreational activities that are not protected in some of the other states surveyed in this Comment.<sup>163</sup> *Jackvony* affirms these rights as indeed part of the doctrine and establishes that fences cannot be erected that block off the foreshore and prevent the public from passing along it.<sup>164</sup> On the other hand, *Cavanaugh* illustrates that there is simply no public right to vertical access to the foreshore, setting the Rhode Island doctrine apart from the New Jersey doctrine in that manner.<sup>165</sup> Additionally, *Ibbison* implicitly shows that Rhode Island does not recognize a public trust right to use any of the dry sand area landward of the mean high tide line, because anyone who does so intentionally risks being convicted of trespass.<sup>166</sup> Thus, Rhode Island’s public trust doctrine provides the public with substantial rights in the foreshore itself, but provides no vertical access through or horizontal access to upland dry sand areas.

#### F. Massachusetts

Like the other states surveyed in this Comment, Massachusetts inherited its public trust doctrine directly from the English common law.<sup>167</sup> Unlike most of the other states, however, Massachusetts broke away from the English model when it determined that the seaward extent of private property ownership was the low tide line instead of the high tide line.<sup>168</sup> This change in the law, which pre-dated the Revolution by more than a century, was an accommodation for the building of wharves by private landowners along the shoreline.<sup>169</sup> The Massachusetts courts later placed one important condition on the expanded ownership rights of private landowners to the low tide line: landowners cannot impede the navigation of boats.<sup>170</sup> Massachusetts has rich case law on the public trust doctrine, but two cases, in particular, best outline Massachusetts’ modern doctrine in the context of beach access.

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<sup>163</sup> See *supra* notes 140 & 141.

<sup>164</sup> See *Jackvony v. Powel*, 21 A.2d 554, 558 (R.I. 1941).

<sup>165</sup> See *Cavanaugh*, 1997 WL 1098081, at \*5.

<sup>166</sup> See *State v. Ibbison*, 448 A.2d 728, 733 (R.I. 1982).

<sup>167</sup> *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 358–59 (Mass. 1979).

<sup>168</sup> *Id.* at 359–60.

<sup>169</sup> *Id.* The change to private ownership down to the low tide line can be traced in official capacity as far back as the colonial ordinance of 1647. *Id.* at 360.

<sup>170</sup> *Id.* at 360–61.



The first salient case on the matter, *Opinion of the Justices*, is actually an answer by the Supreme Judicial Court of Massachusetts, the State's highest court, submitted in response to a question posed by the Massachusetts House of Representatives about a proposed bill.<sup>171</sup> The proposed bill sought to codify a public right to "on-foot free right-of-passage" through the area "between the mean high water line and the extreme low water line."<sup>172</sup> The court noted that the public has "limited" rights to use the shore.<sup>173</sup> As an example of the limited nature of these rights, the court cited the contrary right of a waterfront landowner to build on his property to the extent that the public is completely excluded from it, as long as he does not block the navigation of boats.<sup>174</sup> Thus, the court held that there was no authority whatsoever to grant the public "a right to walk on the beach."<sup>175</sup> According to the court, the proposed bill would actually have gone so far as to constitute a public taking under the Massachusetts Constitution, necessitating the payment of compensation to beachfront landowners.<sup>176</sup> The court also explicitly declined to endorse the more expansive version of public trust doctrine rights that the Supreme Court of New Jersey espoused only two years prior in *Neptune City*.<sup>177</sup>

The second important Massachusetts case is *Sheftel v. Lebel*, a 1998 intermediate appellate court decision that squarely addressed the question of vertical access to the foreshore.<sup>178</sup> At issue in *Sheftel* was an easement held by the defendants across the plaintiffs' property to a tidal body of water.<sup>179</sup> The defendants argued that the easement should be extended from its ending point at the mean high tide line down to the mean low water line, and sought to build a pier for their boat out

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<sup>171</sup> *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974).

<sup>172</sup> *Id.* at 563–65.

<sup>173</sup> *Id.* at 566.

<sup>174</sup> *Id.* ("[A] littoral owner may build on his tidal land so as to exclude the public completely as long as he does not unreasonably interfere with navigation.").

<sup>175</sup> *Id.* at 566–67.

<sup>176</sup> *Id.* at 568. For an example of another state court similarly determining that granting such a right would constitute a taking, see *Groves v. Sec'y of Dep't of Natural Res. & Env'tl. Control*, No. 92A-10-003, 1994 WL 89804, at \*6 (Del. Super. Ct. Feb. 8, 1994) (finding that a public right to walk along the shoreline would constitute a taking and result in necessary compensation payments to beachfront landowners).

<sup>177</sup> *Opinion of the Justices*, 313 N.E. 2d at 567 ("Whatever may be the propriety of such an interpretation . . . the grant to private parties effected by the colonial ordinance [of 1647] has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights . . . . The rights of the public though strictly protected have also been strictly confined . . . .") (internal citations omitted).

<sup>178</sup> *Sheftel v. Lebel*, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998).

<sup>179</sup> *Id.* at 501.

to that line, while the plaintiffs argued that the easement should not be extended beyond the mean high tide line.<sup>180</sup> While the other facts of the case are not particularly relevant to this Comment, the court's discussion of the public trust doctrine, analyzed below, is indeed very salient.

At the outset, the court noted that private landowners in Massachusetts own property down to the low tide line, in contrast to the typical common law rule—followed in most other states—granting private ownership only to the high tide line.<sup>181</sup> The court also noted, significantly, that the foreshore has nevertheless always been subject to the public trust doctrine, which establishes that the public holds a reserved easement to use the foreshore for “fishing, fowling, and navigation.”<sup>182</sup> The court subsequently qualified its statement by also determining that the public has no right to “perpendicular” (vertical) access under the public trust doctrine through privately owned upland property to reach the foreshore, noting that anyone who crosses such property to access the foreshore is guilty of trespass.<sup>183</sup> Easements, such as the one that existed in this case, are therefore necessary for any member of the public to have lawful access across another's privately owned upland sand area to the foreshore below.<sup>184</sup>

The *Sheftel* court explained the Massachusetts public trust doctrine in a very precise manner: private landowners own the land to the low water line, the public has an easement to use the foreshore for a few specific purposes, and there is no right to vertical access to the foreshore from upland areas.<sup>185</sup> *Opinion of the Justices* is also chiefly important as an exposition of the public trust doctrine in Massachusetts, as it clearly declares that the doctrine contains no public right to walk along the beach.<sup>186</sup> Taken together, *Opinion of the Justices* and *Sheftel* illustrate that Massachusetts clearly falls on the more

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 503.

<sup>182</sup> *Id.* at 505.

<sup>183</sup> *Id.* (“The public has, however, no right of perpendicular access across private upland property, i.e., no right to cross, without permission, the dry land of another for the purpose of gaining access to the water or the flats in order to exercise public trust rights; doing so constitutes a trespass.”).

<sup>184</sup> See *Sheftel*, 689 N.E.2d at 505. The court noted that the easement's purpose was to allow access to the foreshore and that no extension of that easement to the low water line was necessary for the defendants because the public trust doctrine protects the public's right of boating on the foreshore. *Id.* Therefore, an easement extending as far as the mean high tide line sufficed to give the defendants access to the water for boating. *Id.*

<sup>185</sup> See *id.* at 503–05.

<sup>186</sup> See *Opinion of the Justices*, 313 N.E.2d 561, 567 (Mass. 1974).

limited end of the spectrum in terms of the scope of rights it grants under its public trust doctrine. In particular, Delaware is the only other state in which private ownership extends to the mean low tide line, and there is no right to vertical access to the foreshore or horizontal access to the dry sand area above the foreshore in Massachusetts. Thus, public trust rights in Massachusetts are limited to a reserved public easement to conduct the traditional trust-protected activities of fishing, fowling, and navigation in the privately owned foreshore, and do not include any guarantee of vertical access.

#### IV. OF THE STATES SURVEYED, NEW JERSEY BEST IMPLEMENTS THE PUBLIC TRUST DOCTRINE

New Jersey has the most expansive version of the public trust doctrine of the states surveyed in this Comment with regard to beach access. Its recognition of public trust rights of both vertical access (across upland sand areas to the publicly owned foreshore) and horizontal access (parallel to the ocean along the length of the beach and encompassing dry sand areas above the foreshore) guarantees that the public trust doctrine is far more than a legal theory; it allows for real access to, and true enjoyment of, public trust lands.<sup>187</sup> In contrast, the doctrines of the other six states contain no rights of vertical access through, or horizontal access to, dry sand areas; thus, public trust rights in these states often exist in theory only and may be of little use in practice.<sup>188</sup>

First, without the key right of vertical access that New Jersey courts have found, the public trust doctrine is largely without force, because without vertical access, members of the public may have no means whatsoever by which to physically reach public trust lands.<sup>189</sup> As will be reiterated below, none of the other six states provide for any degree of vertical access within their respective versions of the public trust doctrine; thus, access to the foreshore may be impossible in portions of these states.

In Maryland, though the applicable case law does not explicitly refer to vertical access, the two cases reviewed in this Comment clearly

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<sup>187</sup> See, e.g., *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121, 124 (N.J. 2005).

<sup>188</sup> See, e.g., *Dep't of Natural Res. v. Mayor of Ocean City*, 332 A.2d 630, 634 (Md. 1975). This is but one example of the numerous statements of law rendered by courts outside of New Jersey, discussed in this Comment, denying the public of vertical access rights to the foreshore through upland areas.

<sup>189</sup> See, e.g., *Sheftel*, 689 N.E.2d at 505 (noting that, in Massachusetts, an easement is required for the public to cross privately owned upland sand areas in order to reach the public trust-protected foreshore).

establish that the public has no right to such access.<sup>190</sup> The *Ocean City* court plainly held that the public trust doctrine only confers a right to use the foreshore itself; in fact, it specifically denied that the doctrine lends any support to the notion that the public has a right to cross upland areas in order to reach the foreshore.<sup>191</sup> The *Clickner* court affirmed this narrow doctrine when it held that the public cannot access privately owned dry sand areas without an easement.<sup>192</sup> The collective force of *Ocean City* and *Clickner* establishes that the public trust doctrine in Maryland only protects the public's limited right in the foreshore itself, without any corresponding protection of the public's ability to physically reach the foreshore. As a result, the public may not have any way to actually access the otherwise publicly owned Maryland foreshore in spite of its purportedly guaranteed right to said foreshore.

Delaware, too, has implicitly rejected any notion of vertical access to public trust lands. In *Groves*, a Delaware trial court refused to follow New Jersey's *Matthews* decision.<sup>193</sup> While the *Groves* opinion did not directly address vertical access, its rejection of *Matthews* and its finding of very limited public rights, encompassing only fishing and navigation in Delaware's privately owned foreshore, indicate that the idea of vertical access in Delaware is rather far-fetched.<sup>194</sup> In fact, Delaware's public trust doctrine is so limited that even if Delaware recognized a public right of vertical access to the foreshore, it would not constitute a significant public right because the *Groves* court held that the doctrine includes no right in the public to even walk along or conduct recreational activities within the foreshore, apart from the limited allowance of fishing and boating.<sup>195</sup>

New York courts have affirmed public ownership of the foreshore, as the court established in *Arnold's Inn*.<sup>196</sup> That said, no case in New York has addressed the question of whether a right of vertical access actually exists. Without any statement of case law or statutory authority establishing such a right, there is no indication that the public would be able to cross privately owned upland areas to reach the foreshore in New York without committing trespass, because vertical access is the

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<sup>190</sup> See *supra* discussion Part III.A.

<sup>191</sup> See *Ocean City*, 332 A.2d at 634.

<sup>192</sup> See *Clickner v. Magothy River Ass'n*, 35 A.3d 464, 473–74 (Md. 2012).

<sup>193</sup> See *Groves v. Sec'y of Dep't of Natural Res. & Envtl. Control*, No. 92A-10-003, 1994 WL 89804, at \*5 (Del. Super. Ct. Feb. 8, 1994).

<sup>194</sup> See *id.* at \*5–6.

<sup>195</sup> See *id.* at \*6.

<sup>196</sup> See *Arnold's Inn, Inc. v. Morgan*, 310 N.Y.S.2d 541, 547 (N.Y. Sup. Ct. 1970), *modified*, 317 N.Y.S.2d 989 (N.Y. App. Div. 1970).

rare exception, rather than the rule, among the states surveyed.

Connecticut has provided a statement of law clear enough to prevent any misinterpretation on the question of whether a right to vertical access to the foreshore exists in the state—there is no such right.<sup>197</sup> The *Leydon* court clearly established two principles in its brief discussion of the public trust doctrine: (1) the public has a right to access the foreshore, but (2) the public has no right to reach said foreshore by crossing upland areas.<sup>198</sup> As a result, Connecticut's doctrine is typical of the surveyed states: it has a publicly owned foreshore, which the public theoretically has the right to access, but the public has no right to vertically access that foreshore, leading to the potential scenario—as would have been the case in *Leydon* had the court not struck down the Town of Greenwich's restriction on access for constitutional reasons—of a publicly owned foreshore that is physically impossible for the public to actually access, except, perhaps, by boat.<sup>199</sup> As such, *Leydon* is highly illustrative of the shortcomings of a public trust doctrine without a right to vertical access.

Rhode Island, too, has explicitly denied that its public trust doctrine—which is enshrined in its constitution and in statute—includes a right to vertical access, as explained by the court in *Cavanaugh*.<sup>200</sup> *Cavanaugh*, like *Leydon*, dealt with vertical access to the foreshore through publicly owned property; in *Cavanaugh*, however, access was not restricted to a particular group, but was instead regulated by a beach access fee.<sup>201</sup> The court noted, as the New Jersey courts have, that a municipality can charge a beach access fee without interfering with public trust rights.<sup>202</sup> The *Cavanaugh* court also denied the existence of a right to vertical access to the foreshore, as noted above.<sup>203</sup> Significantly, the public beach in *Cavanaugh* was surrounded

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<sup>197</sup> See *Leydon v. Town of Greenwich*, 777 A.2d 552, 564 n.17 (Conn. 2001).

<sup>198</sup> See *id.*

<sup>199</sup> See *id.* at 564 n.17, 565–66. The court noted that the public trust doctrine was of no avail to the plaintiff, who had no right to access the publicly owned foreshore of a *publicly owned park* under the public trust doctrine. See *id.* at 559, 564 n.17. Thus, if not for the unrelated federal and state constitutional violations by the Town of Greenwich, upon which grounds the court invalidated the Greenwich ordinance, the plaintiff would have had no actual means by which to access this particular piece of the foreshore. See *id.* at 565–75.

<sup>200</sup> See *Cavanaugh v. Town of Narragansett*, No. WC91-0496, 1997 WL 1098081, at \*5 (R.I. Super. Oct. 10, 1997). The court interpreted the Rhode Island Constitution narrowly, refusing to find a right to vertical access where one was not explicitly stated. See *id.* Although *Cavanaugh* was not a decision of the state's highest court, there has been no contrary statement of law in Rhode Island since its decision in 1997.

<sup>201</sup> See *id.* at \*2.

<sup>202</sup> See *id.* at \*11.

<sup>203</sup> See *id.* at \*5.

by privately owned parcels and beach structures that rendered the foreshore entirely inaccessible to the public, save for the public beach in question.<sup>204</sup> It would not take a very different set of facts to render the foreshore entirely inaccessible; had that public beach instead been private, the Rhode Island doctrine still would not allow for any vertical access to the foreshore, such that the foreshore would be entirely inaccessible to the public that owns it.

Finally, Massachusetts' public trust doctrine includes a similarly specific denial of a right to vertical access, leading to the same undesirable result of a foreshore that is potentially inaccessible to the public that is intended to have a right to use it under the doctrine. The *Sheftel* court explicitly stated that there is no right to vertical access across upland areas to reach the foreshore; attempting to cross a privately owned upland area to reach the foreshore constitutes a trespass, unless the person seeking to cross the upland area has an easement to do so, as the plaintiff in *Sheftel* indeed did.<sup>205</sup> As in the other states surveyed herein apart from New Jersey, Massachusetts' public trust doctrine contains no means by which the public can actually access the foreshore in which the doctrine establishes that it has specific rights.

With the lack of vertical access to public trust lands that exists in the six states other than New Jersey, there is no guarantee that the public will have any way to reach the foreshore on foot without committing trespass. The *Matthews* court said it best: “[w]ithout some means of access[,] the public right to use the foreshore would be meaningless.”<sup>206</sup> Refusing to recognize any right to access the foreshore would—to quote the *Matthews* court again—“seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.”<sup>207</sup> Simply put, if the public cannot actually reach the foreshore, public ownership of it is futile. And the importance of vertical access goes beyond public policy. As the *Matthews* court demonstrated in the quoted material above, the very functionality of the public trust doctrine depends on the presence of at least some degree of vertical access. In lieu of vertical access points, tracts of private beachfront land can render the valuable foreshore entirely inaccessible to the public, so that it serves no purpose to those who purportedly hold it in trust. The significance of the public trust doctrine thus depends on the existence of at least some degree of

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<sup>204</sup> *See id.*

<sup>205</sup> *See Sheftel v. Lebel*, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998).

<sup>206</sup> *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 364 (N.J. 1984).

<sup>207</sup> *Id.*

vertical access to the foreshore. Without such access, the public trust doctrine is without force.

Second, without a right to horizontal access to at least some portion of the upland dry sand area above the foreshore, the usefulness of the public trust doctrine in the other six states is further limited. Questions of horizontal access are closely tied to questions of vertical access, as both implicate the upland dry sand area above the foreshore. Thus, unsurprisingly, states that have denied a right to vertical access have similarly denied a right to horizontal access—albeit implicitly, since New Jersey is the only state to refer to “horizontal access” as a separate concept. For example, the *Ocean City* court rejected the petitioners’ arguments to the effect that at least some usage of the dry sand area is necessary in order to enjoy the foreshore, holding instead that the rights of private landowners who own such dry sand areas trump any claim of right by the public.<sup>208</sup> Similarly, the *Clickner* court found that the public trust doctrine technically does not cover the dry sand area above the mean high tide line and, thus, it found no public right to use it.<sup>209</sup> The *Leydon* court dealt directly with vertical access, but implicated horizontal access as well by finding that public trust access rights only include the foreshore itself.<sup>210</sup> The *Ibbison* court also implicitly denied any right to horizontal access, finding that a person who knowingly and intentionally walks on a privately owned dry sand area above the mean high tide line commits trespass.<sup>211</sup> Indeed, none of the non-New Jersey states have found any form of public right of horizontal access to the dry sand area above the foreshore.

The right to horizontal access is nearly as important as the right to vertical access. Namely, by definition, the foreshore is completely submerged at least once during the average day because seawater reaches beyond the mean high tide line during the higher of the two daily high tides. Additionally, during weather-related episodes of higher-than-normal tides, the foreshore is submerged for extended periods of time. As the *Matthews* court noted, the foreshore and the ocean cannot be reasonably enjoyed “unless some enjoyment of the

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<sup>208</sup> See *Dep’t of Natural Res. v. Mayor of Ocean City*, 332 A.2d 630, 637 (Md. 1975). The court very specifically limited the public’s rights to the foreshore itself, finding that the public trust doctrine only protects that narrow area and does not confer any public right to use dry sand area above the foreshore. *Id.* at 634.

<sup>209</sup> See *Clickner v. Magothy River Ass’n*, 35 A.3d 464, 473–74 (Md. 2012). As in *Ocean City* and *Sheftel*, the court held that the dry sand area could only be used if an easement to use it existed. See *id.* at 474.

<sup>210</sup> See *Leydon v. Town of Greenwich*, 777 A.2d 552, 564 n.17 (Conn. 2001).

<sup>211</sup> See *State v. Ibbison*, 448 A.2d 728, 733 (R.I. 1982).

dry sand area is also allowed.”<sup>212</sup> Without any place for people to rest and relax after swimming in the ocean, for example—and the dry sand area may be the only place where a swimmer can physically rest and relax without being subjected to ocean waves—it may be impossible for the public to use the ocean for swimming.<sup>213</sup> Clearly, while the other six states surveyed apart from New Jersey do not recognize a right to horizontal access, they all protect the public’s right to use the ocean, considering the fact that the public trust doctrine covers all lands seaward of either the mean high or mean low tide line in all of the states surveyed herein. Thus, these six states fail to adequately protect the public trust right to use the ocean by failing to protect any right to use the dry sand area adjacent to the foreshore. Also, as the *Raleigh Avenue* court noted, fishermen could use the dry sand area to haul and dry their fishing nets under the Ancient Roman public trust doctrine, a predecessor of the modern doctrine.<sup>214</sup> Likewise, under the modern public trust doctrine, people using the ocean should be able to use the dry sand area to the extent necessary for modern enjoyment of the ocean.<sup>215</sup> Though the public trust doctrine may technically be limited to public ownership of the foreshore and the waters beyond, it is clear that, as the New Jersey courts have stated, any meaningful use of the foreshore requires at least some use of the adjacent dry sand area.<sup>216</sup>

Third, the New Jersey version of the public trust doctrine does not ignore the rights of private beachfront landowners; instead, it properly balances these interests with those of the public. The *Matthews* court stated in its holding that any public use of an area of upland dry sand is to be “subject to an accommodation of the interests of the owner.”<sup>217</sup> Clearly, the New Jersey doctrine does not extinguish the rights of private landowners. In fact, the very existence of the *Matthews* factors demonstrates that the New Jersey approach closely considers private rights; if public trust rights were not balanced by private landowners’ rights, as they are under the *Matthews* factors, there would be no need to determine the extent of public access rights—or whether there are any such rights at all—on individual tracts of private beachfront land.<sup>218</sup> Depending on the specific application of the *Matthews* factors to a particular tract of privately owned beachfront land, an individual

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<sup>212</sup> *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984).

<sup>213</sup> *See, e.g., id.*

<sup>214</sup> *See Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 120 (N.J. 2005).

<sup>215</sup> *See id.*

<sup>216</sup> *See Matthews*, 471 A.2d at 365.

<sup>217</sup> *See id.*

<sup>218</sup> *See id.* at 365–66; *see discussion supra* Part II.



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landowner may have no obligation to allow the public onto any piece of his or her upland dry sand area. Public access to the foreshore in New Jersey is not all-encompassing, nor does it take up all privately owned lands; the doctrine stops far short of this result. Instead, the New Jersey doctrine provides for “reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.”<sup>219</sup> This standard is far from an indictment of the rights of private beachfront landowners.

Furthermore, even if application of the *Matthews* factors to a specific tract of privately owned beachfront land dictates that the landowner must allow the public to access the dry sand area of the tract, the landowner may, depending on the circumstances, still charge “an appropriate fee structure for use of the beach by the public,” as approved by the state DEP.<sup>220</sup> Thus, the ability of private beachfront landowners to charge fees for public beach access further illustrates that the public’s right to access does not nearly extinguish the private owner’s rights to his or her upland dry sand area.

Finally, the scope of a viable modern public trust doctrine must encompass both modern activities and the significant modern demand for access to the shoreline, neither of which were contemplated by those who fashioned earlier iterations of the doctrine. Modern demands on the seashore, which have increased as a result of societal changes such as improvements in transportation and significant population growth, have brought people to the shore in far greater numbers than in the past.<sup>221</sup> Counteracting this increase in demand is an increase in the proportion of the shore that is privately owned, leading to a strain on those areas of the shore that remain publicly owned.<sup>222</sup> The rights protected by the modern public trust doctrine thus should not be “limited to the ancient prerogatives of navigation and fishing.”<sup>223</sup> Instead, the doctrine should also encompass modern recreational beach uses in order to ensure the flexibility of the doctrine; modern uses that may not have been contemplated by previous generations should be included in the modern doctrine, as the New Jersey courts have recognized.<sup>224</sup>

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<sup>219</sup> *Raleigh Ave.*, 879 A.2d at 121.

<sup>220</sup> *Id.* at 124.

<sup>221</sup> *See Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 53 (N.J. 1972).

<sup>222</sup> *See id.*

<sup>223</sup> *Id.* at 54.

<sup>224</sup> *See id.* at 54–55.

## V. CONCLUSION

The public trust doctrine is an ancient doctrine, with its earliest expression in ancient Rome and continued importance in the common law of England many centuries later.<sup>225</sup> The individual states of the United States, in their adoption of the English common law, assumed that the doctrine was a part of state common law—including the doctrine's stipulation of public ownership in tidal lands—after the Revolution.<sup>226</sup> The modern public trust doctrine establishes public ownership of tidal lands either from the mean high tide line seaward, as in New Jersey, Maryland, New York, Connecticut, and Rhode Island, or from the mean low tide line seaward, as in Delaware and Massachusetts. Additionally, each of the seven states discussed herein offers the public at least some right to use the foreshore—the area of sometimes-dry beach sand between the mean high tide line and the mean low tide line—even in the two states recognizing privately owned foreshores. Clearly, the public trust doctrine in each of these seven states purports to protect at least some degree of the public's right to use the foreshore.

But public trust rights in the foreshore carry little clout, in practice, without guarantees of access. Notably, six of the states surveyed recognize neither a right incident to the public trust doctrine of vertical access from upland areas to the foreshore, nor a right incident to the doctrine of horizontal access above the foreshore to any portion of the dry sand area immediately landward of the mean high tide line. As a result of these deficiencies, the public trust doctrine may be without substance outside of New Jersey, the only state surveyed that guarantees at least some degree of vertical and horizontal access. Though the public may own or have a right to use the foreshore in each of the other six states, such ownership is of little use if access by land remains impossible; in lieu of a right to vertical access, there may be no way for the public to reach the foreshore, save for by boat. Additionally, although the public supposedly has expansive rights to use the foreshore in some of the six states, such rights are of little use if the public is prohibited from using any of the adjacent upland dry sand area while using the foreshore.

Thus, of the seven states surveyed in this Comment, only New Jersey has guaranteed that the public trust doctrine is more than just a

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<sup>225</sup> *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 358–59 (Mass. 1979).

<sup>226</sup> *See, e.g.*, *Chapman v. Kimball*, 9 Conn. 38 (Conn. 1831); *Bickel v. Polk*, 5 Del. (5 Harr.) 325 (Del. Super. Ct. 1851); *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. 1821); *Trustees of Brookhaven v. Smith*, 80 N.E. 665 (N.Y. 1907); *Allen v. Allen*, 32 A. 166 (R.I. 1895).

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legal theory. Public ownership of the foreshore means something in New Jersey; public trust rights give citizens the ability to actually reach and to adequately use the foreshore. Unless changes occur in the doctrines of the other six states, however, public trust rights to the foreshore in those places may be of little or no value.