



2006

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Recommended Citation

Kristin A. Scaduto, *The Erosion of Private Property Rights after Raleigh Avenue Beach Association v. Atlantis Beach Club*, 51 Vill. L. Rev. 459 (2006).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol51/iss2/6>

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2006]

THE EROSION OF PRIVATE PROPERTY RIGHTS AFTER RALEIGH
AVENUE BEACH ASSOCIATION V. ATLANTIS BEACH CLUB

I. INTRODUCTION

Each year millions of Americans visit our nation's treasured coastline seeking a little fun in the sun.¹ For many Americans, our nation's beaches offer a brief vacation from the realities of daily life—a place to relax with friends, enjoy a leisurely stroll in the sand or play amidst the rolling waves.² For others, however, our nation's beaches are a place to call home.³ In fact, approximately seventy percent of America's coastline is privately owned.⁴ At the intersection of private domain and public demand, however, lies the controversy as to what limitations, if any, should be placed on public access and private property ownership rights in our coastal lands.⁵ Thus, unbeknownst to the thousands of American families who took to the beaches this summer, a battle was raging between private

1. See, e.g., *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112, 122 (N.J. 2005) (stating New Jersey beach tourism is sixteen billion dollar industry); see also Pamela Pogue & Virginia Lee, *Providing Public Access to the Shore: The Role of Coastal Zone Management Programs*, 27 COASTAL MGMT. 219, 220 (1999) (noting 110 million people lived in coastal regions in 1998).

2. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369 (N.J. 1984) (reporting that beaches "are a unique resource" and that public demand is rising).

3. See Sean T. Morris, Note, *Taking Stock in the Public Trust Doctrine: Can States Provide for Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?*, 52 CATH. U. L. REV. 1015, 1015 (2003) (describing seventy percent of U.S. coastline as privately owned); Pogue & Lee, *supra* note 1, at 221-22 (providing geographical breakdown of residents per coastal mile and offering predicted growth rates); Jennifer A. Sullivan, Comment, *Laying Out an "Unwelcome Mat" to Public Beach Access*, 18 J. LAND USE & ENVTL. L. 331, 332 (2003) (remarking "[t]o some the beach is a playground; while to others the beach is a backyard"); see also Michael Booth, *Public's Access to Private Beach Is Upheld, Subject to Reasonable Fees*, N.J.L.J., Aug. 1, 2005 (noting twenty-six percent of New Jersey's 127 mile coastline is privately owned).

4. See Morris, *supra* note 3, at 1015 (remarking on private coastal ownership).

5. See, e.g., Deborah Mongeau, *Public Beach Access: An Annotated Bibliography*, 95 L. LIBR. J. 515, 515-16 (2003) (explaining both sides of controversial public access debate). At this point it would be helpful to introduce some coastal terminology that I will use throughout this Note. "Beach" refers to the stretch of land reaching from the edge of the sea to the beginning of the vegetation; this term includes both wet and dry sand. See ANDREW MORANG & LARRY PARSON, COASTAL TERMINOLOGY AND GEOLOGICAL ENVIRONMENTS IV-1-6 (2002), http://chl.erd.c.usace.army.mil/%5CMedia/1/9/2/%5CCEM_Part-IV_Chap-1.pdf (defining coastal terms). "Tidelands" are the areas of the beach "covered and uncovered by the daily rise and fall of the tide." *Id.* at IV-1-7. "Foreshore" and "wet sand beach" indicate the area between the highest reaches of the water at high-tide to the lowest reaches of the water at low-tide. *Id.* at IV-1-6 to IV-1-7. "Dry sand beach" designates the area of the beach landward of the high-tide line. *Id.* at IV-1-6.

property owners whose land abuts the coastline and public advocates who continually seek more access to this valuable resource.⁶

Currently, there is vast disparity both in the way coastal states address this issue and in the scope of coastal rights that are awarded to the public.⁷ As exemplified by New Jersey's jurisprudence, the public trust doctrine is one methodology used by states to expand public access rights in our nation's beaches.⁸ The public trust doctrine dictates that because states hold their tidal lands in trust for their people, the public is entitled to use these trust lands for certain enumerated purposes.⁹ Unfortunately, while advancing the interests of the public at large, the public trust doctrine has the ability to undermine the private property rights of oceanfront landowners.¹⁰ A recent New Jersey Supreme Court public trust decision, *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*,¹¹ had the effect of not only jeopardizing the stability of the land titles involved, but also had the effect of forcing some private oceanfront landowners to bear the brunt of the costs associated with providing access to the public.¹² The Framers of our Constitution would be disheartened to know that the judiciary, without legislative or executive support, was retroactively redefining property rights at the expense of its citizens.¹³

6. See Mongeau, *supra* note 5, at 515-16 (discussing debate).

7. See, e.g., *id.* at 515-18 (introducing variations in approach to beach dilemma); see also Frank Langella, Note, *Public Access to New York and New Jersey Beaches: Has Either State Adequately Fulfilled Its Responsibilities as Trustee Under the Public Trust Doctrine?*, 44 N.Y.L. SCH. L. REV. 179, 187-88 (2000) (recognizing states use public trust doctrine, prescription, dedication, customary use and eminent domain).

8. See generally *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112 (N.J. 2005); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369 (N.J. 1984); *Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978); *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47 (N.J. 1972).

9. See, e.g., Sullivan, *supra* note 3, at 335 (explaining public trust doctrine).

10. See Robert Polis & Leslie MacRae, *Back to the Beach: Will It Ever Be Safe to Buy Dry Sand Again?*, 13 PENN ST. ENVTL. L. REV. 147, 171 (2005) ("A person owning beachfront property in New Jersey has a dark cloud on his title.").

11. 879 A.2d 112 (N.J. 2005).

12. See Polis & MacRae, *supra* note 10, at 171 ("The state must remove the cloud from littoral and riparian properties and concentrate on buying property that it wants it[s] citizens to enjoy."); Stephanie Reckord, Comment, *Limiting the Expansion of the Public Trust Doctrine in New Jersey: A Way to Protect and Preserve the Rights of Private Ownerships*, 36 SETON HALL L. REV. 249, 251 (2005) ("New Jersey courts have granted substantial rights to the public at the expense of the private owner."); see also Tresa Baldas, *It's Public Versus Private in Battle for Beach Access*, RECORDER (S.F.), Sept. 1, 2005, (offering quote of Michigan-based lawyer who defended private property owners on Lake Huron from public trust expansion). "These people made purchases on beachfront property when the law said you have to to the water's edge, and now they don't. And I don't know how you can call that anything other than a reduction in property rights, which in my view is a taking without compensation." *Id.*

13. See Reckord, *supra* note 12, at 249-51 (equating New Jersey's approach to "takings" by judiciary).

This Note reviews the dichotomy of public access and private property rights, highlighting New Jersey's expansive approach in awarding public access. Part II summarizes the beloved private property rights at stake when the public seeks access rights in private beaches.¹⁴ While exploring the battle over the nation's beaches, Part III discusses different methodologies utilized to secure public access with a particular emphasis on the public trust doctrine.¹⁵ Subsequently, Part IV underscores the injustice of using the public trust doctrine expansively by exploring the implications of *Raleigh Ave. Beach Ass'n*.¹⁶ Part V then concludes by offering reform suggestions aimed at better balancing the private and public interests involved in coastal disputes.¹⁷

II. PROPERTY RIGHTS IN AMERICA

The recent backlash¹⁸ to the United States Supreme Court's eminent domain decision in *Kelo v. City of New London*¹⁹ is indicative of America's deep-rooted reverence for individual property rights.²⁰ Since the days of our Founding Fathers, Americans have relished in the knowledge that their hard earned property would be free from governmental intrusion.²¹ Inherent in this belief is the notion that individual rights are not to be

14. For a discussion of property rights, see *infra* notes 18-29 and accompanying text.

15. For a discussion of methodologies in place to address the coastal access dilemma, see *infra* notes 51-57 and accompanying text.

16. While Atlantis Beach Club, the adversely affected property owner in *Raleigh Ave. Beach Ass'n*, was considering an appeal to the U.S. Supreme Court on the basis of a takings claim, no petition has yet been filed. Colleen Diskin, *N.J. Eases Access to Private Beaches*, N.J. REC., July 27, 2005, at News. For a discussion of this case and its use of the public trust doctrine, see *infra* notes 100-213 and accompanying text.

17. For suggested reform, see *infra* notes 216-24 and accompanying text.

18. Since the June 23, 2005 ruling by the United States Supreme Court in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), legislators on local, state and national levels have responded to the public outcry regarding the ability of the government to use eminent domain for economic development purposes. In many states across the country, legislation aimed at preventing *Kelo*-like outcomes is either currently in place or is in the process of being drafted. See Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F01 (surveying state restrictions currently in place and reform movements underway); see also Editorial, *Not So Fast on Eminent Domain*, CHI. TRIB., July 18, 2005, at 14 (highlighting bipartisan support in House of Representatives for preventing eminent domain application in economic redevelopment cases).

19. 125 S. Ct. 2655 (2005) (validating state law permitting economic development).

20. See James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 34 (2002) (emphasizing fundamental role property rights play in American jurisprudence).

21. See *id.* (emphasizing Americans' desire to protect individual property rights). "Indeed, our Constitution was . . . [a] manifestation of the long-standing natural law . . . that an individual's property should not be taken without compensation. . . . [P]roperty is an *individual* right derived from the labor of individuals. It is inherently possessed by the people, and not born of government largesse." *Id.*

infringed upon by the needs of the public at large.²² Our Founding Fathers acted with this beloved liberty in mind when drafting the Fifth Amendment, which provided that private property could not be taken from its owners without just compensation.²³

While our Founding Fathers made it clear that private property rights were to be vigilantly safeguarded, they were less clear as to the definition of “property rights.”²⁴ Conceptually, property rights have been analogized to a “bundle of sticks.”²⁵ In discussing public beach access, the most important “stick” is the right to exclude.²⁶ In fact, the right to exclude is revered as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”²⁷ Additionally, while title stability

22. See Burling, *supra* note 20, at 2 (stressing “individual rights are sacrosanct over the needs of the group”); see also Gary M. Pecquet, *Private Property and Government Under the Constitution*, 45 FREEMAN: IDEAS ON LIBERTY 1 (1995), available at <http://www.fee.org/publications/the-freeman/article.asp?aid=2607> (pointing out “private property refers to the rights of owners to use their possessions which are enforceable against all nonowners—even the government”).

23. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation”); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897) (holding Fourteenth Amendment makes Fifth Amendment applicable to states); see also Pecquet, *supra* note 22 (commenting Fifth Amendment sought to “prevent the government from forcing a few property owners to bear the burdens of legislative measures intended to benefit the general public”).

24. See Burling, *supra* note 20, at 32 (implying natural inquiry is “what rights a property owner has in the first place”). When considering property rights, it is important to consider state law, as state law, not federal law, defines the scope of protected property rights. See *id.* (remarking that “state law will generally determine whether something is a protected property right”); Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL. L.J. 1, 56 (1998) (“[A]cknowledging that the Constitution does leave the development of property law to the States . . .”).

25. *United States v. Craft*, 535 U.S. 274, 274 (2002) (providing “common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property”); Burling, *supra* note 20, at 32 (“Traditionally, property rights included an array of rights such as the right to sell, give away, hold, and protect a particular thing.”).

26. See, e.g., Scott, *supra* note 24, at 6 n.10 (highlighting importance of right to exclude in beach access cases). Professor Scott observes that, when writing for the Court in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), Chief Justice Rehnquist “identified the right to exclude others as of singular importance in the law of private property.” *Id.* In the *Dolan* decision, the Chief Justice proffered compelling support for this inference. See *id.* (discussing right to exclude). Chief Justice Rehnquist remarked: “Public access would deprive petitioner of the right to exclude others, ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

27. See *Dolan*, 512 U.S. at 384 (forcing landowner to grant public access over her property as condition of building permit would deny landowner of right to exclude others); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831 (1987) (finding no preexisting right existed, where building permit allowed public to cross over landowner’s property to reach ocean, because of owner’s inherent right to exclude others); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433

and return of an owner's investment backed expectations are not constitutionally protected "sticks" per se, they are equally venerated property values that courts often seek to protect.²⁸ Now, armed with this basic understanding of "property rights," we can turn to our discussion of how private property rights are being compromised for the sake of public beach access.²⁹

III. THE BATTLE OVER BEACH ACCESS

A. *America's Beaches: Playgrounds and Battlefields*

Our nation's seashore is a valuable natural resource, indisputably treasured by all walks of life.³⁰ Each day, hordes of Americans head to the

(1982) (citing right to exclude others in holding law requiring property owners to permit cable television wires on their premises was Fifth Amendment taking); *Kaiser*, 444 U.S. at 176 (finding taking where navigational servitude requiring public access to pond detracted from owner's right to exclude); see also Scott, *supra* note 24, at 6 (suggesting right to exclude others "is grounded in a need for individuality, solitude, privacy or control").

28. See *Bell v. Town of Wells*, 557 A.2d 168, 171 (Me. 1989) (offering representative look at how states seek to protect title stability). The Fifth Amendment recognizes, however, that there may be some situations that call for an alteration in property rights, but notes that these situations call for proper compensation to the landowner. See U.S. CONST. amend. V (calling for just compensation). This would suggest that there should be stringent limitations on the degree to which land title definitions can be modified once a property owner has taken title. See Sidney St. F. Thaxter, *Will Bell v. Town of Wells Be Eroded with Time?*, 57 ME. L. REV. 117, 140 (2005) (suggesting "desire for public access to Maine coast does not justify changing Maine property law and depriving owners of their longstanding, well-established legal rights"); see also Burling, *supra* note 20, at 27-30 (providing overview of notice as it relates to Takings Clause and public trust doctrine); Scott, *supra* note 24, at 45 (discussing Delaware's jurisprudence "that seems to support an [sic] historic view of long standing policies of property law that favor stability in title").

The U.S. Supreme Court advanced a three factor test, which included "distinct investment-backed expectations" as a factor for courts to consider when evaluating physical invasion takings claims. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (advancing three factor test). Since 1978, courts have considered an owner's investment expectations when hearing takings cases. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633-36 (2001) (discussing investment-backed expectations); J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. ENVTL. L. & POL'Y 247, 268 (2004) (stating "right to make some economically viable use of private property or obtain compensation is established in several United States Supreme Court decisions" and "interference with a property owner's 'investment-backed expectations' and significant diminution of property value may also trigger compensation"); Burling, *supra* note 20, at 32 (professing right to sell one's property is intrinsic to bundle of property rights).

29. See Scott, *supra* note 24, at 58 (highlighting lost property rights). In his article, Professor Scott notes that many "had thought they had protected ownership interests in coastal property. Most were surprised to learn that, at least in some circumstances, they did not own as much as they had believed." *Id.*

30. See, e.g., Langella, *supra* note 7, at 189 (explaining that "[c]oastal beaches are a unique and extremely valuable resource").

beach to find solace, relaxation or recreation.³¹ To be closer to this undeniably alluring resource, a record number of Americans are moving their homes closer to the coast.³² This dramatic shift in coastal area population density has led to the overdevelopment of our nation's shore.³³ As a result of this overdevelopment, public beach access continues to decrease while public demand continues to increase.³⁴ Specifically, the public demands two forms of access: lateral and perpendicular.³⁵ Lateral access, which has already been successfully addressed by most states,³⁶ pertains to the public's desire to walk along private beaches.³⁷ Conversely, perpendicular access, which is not allowed in most states,³⁸ seeks to ensure access to the

31. See David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1376 (1996) (remarking "Americans love the coast").

32. See Morris, *supra* note 3, at 1015 (acknowledging over fifty percent of nation's population live within fifty miles of coast); see also Bederman, *supra* note 31, at 1376 (commenting to "live at the shore is manifestly desirable").

33. See Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 649 (1989) (declaring cumulative effect of coastal development, not development of individual waterfront properties, leads to lack of public beach access); James M. Kehoe, Note, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1913 (1995) ("America's coastal areas have experienced a tremendous increase in development since the 1960s. As a byproduct of this exponential growth, the public now has less access to the ocean in many coastal areas."); see also DONNA R. CHRISTIE & RICHARD G. HILDRETH, COASTAL AND OCEAN MANAGEMENT LAW IN A NUTSHELL 42 (2d. ed. 1999) ("As commercial, industrial, residential, and recreational uses of the coasts increase, a wall of development on the ocean's edge obstructs the view of the sea and access to the publicly-owned beach and waters seaward of the mean high-tide line.").

34. See Langella, *supra* note 7, at 189 ("Unfortunately, the fixed supply of coastline and an ever increasing population have created a situation in which many Americans are finding diminishing opportunities to access the beachfront. The tension is only increased by the continued privatization of available waterfront property."); see also Morris, *supra* note 3, at 1015 (stating approximately seventy percent of U.S. shoreline is privately owned).

35. See Sullivan, *supra* note 3, at 333 (discussing "two important beach access issues: horizontal access and vertical access").

36. See Morris, *supra* note 3, at 1033 (announcing most states recognize legitimate public right to "tread over and upon these lands").

37. See Sullivan, *supra* note 3, at 333 (horizontal access "encompasses the public's right to walk along the beach below, or parallel to, the mean high-tide line"). A major reason for conformity across the nation in providing horizontal access is the public trust doctrine. See Daniel Summerlin, Note, *Improving Public Access to Coastal Beaches: The Effect of Statutory Management and the Public Trust Doctrine*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 425, 425-36 (1996) ("In nearly all states, the public trust doctrine provides the public with the right to pass and repass over these lands, which is known as lateral access.").

38. See Morris, *supra* note 3, at 1033 (concluding "[w]hile nearly all states recognize the public's right to horizontal access, California and New Jersey are among the few that have sought to enforce vertical access"). In fact, the "nearly unanimous rule is that the public trust doctrine does not grant the public any right or privilege of vertical access." *Id.* at 1034 (internal quotations omitted). *But see* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984) ("Exercise of the public's right to swim and bathe below the mean high water mark may depend

beach from the street.³⁹

While coastal development assuredly created a public access dilemma, it also created a bundle of private property rights.⁴⁰ Purchasers of ocean-front property, like purchasers of all American property, take title to their land with a defined set of property rights.⁴¹ As such, coastal owners take with the reasonable expectation that they will be able to exclude others from utilizing their private property.⁴²

As one would imagine, the fierce advocacy from both private and public factions sets the stage for “a titanic struggle between opposing forces.”⁴³ From New Jersey to California, the beach-going public and private coastal landowners are at odds.⁴⁴ In one corner of the ring, the pub-

upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless.”)

39. See Morris, *supra* note 3, 1033 (defining perpendicular access as “public’s right to access the shoreline by crossing over the private land of another”); Sullivan, *supra* note 3, at 333 (explaining perpendicular access “deals with getting to the beach; in other words, the access from the road to the public segment of the beach”).

40. For a discussion of private property rights, see *supra* notes 18-29 and accompanying text.

41. See, e.g., United States v. Craft, 535 U.S. 274, 278 (2002) (describing “property as a ‘bundle of sticks’”); Burling, *supra* note 20, at 32 (asserting property rights include “an array of rights”).

42. See Baldas, *supra* note 12 (noting that “[o]ne of the key property rights that someone has is the right to exclusion”). Baldas also offered the remarks of the attorney who represented Atlantis Beach Club in the *Raleigh* case:

If I own my house and someone wants to sit on my front lawn, I can call the police and have them removed. They’ve got no right to sit on my lawn. But here my client’s [sic] own a piece of [waterfront] property that if someone wants to go and sit on it, they can sit on it. That’s a major property right that they have lost.

Id. (quoting Atlantis attorney Chad Sherwood); see also Kehoe, *supra* note 33, at 1914 (explaining homeowners have “expectancy interests of security of title to their property”). Nonetheless, because states have historically held the foreshore in trust for their people, private property interests in coastal lands are usually bound by the tide line. See Langella, *supra* note 7, at 184 (discussing limits of trust land). The traditional boundary line between “private and public land is the mean high-tide line.” Sullivan, *supra* note 3, at 333. Sullivan also states:

[T]he mean high-tide line is a fictional line that is measured by averaging ‘all high-tides over an 18.6 year cycle’ . . . in some areas where the tide does not fluctuate, the mean high-tide line is evidenced best as the line between the dry sand and the wet sand.

Id. at 333-34; see also Steve Strunsky, *A Walk Along the Water Is Not a Simple Matter*, N.Y. TIMES, Jan. 13, 2002, at N1 (“Advocates for both private property and public access agree that the point where property owners have the right to exclude the public is mean high tide, or high water mark. Essentially, this is the spot farthest inland reached by the water at high tide.”).

43. Langella, *supra* note 7, at 180, 189; see Sullivan, *supra* note 3, at 332 (enumerating conflicting rights of general public and private landowners).

44. See Langella, *supra* note 7, at 180-81 (observing increasing majority of Americans moving within fifty miles of coastal areas, leading to increased litigation over beach access across America); see also Morris, *supra* note 3, at 1017 (describing nationwide extent of court struggles); Jane Costello, *Beach Access: Where Do You*

lic seeks unobstructed access to and use of the entire shoreline,⁴⁵ believing that its right to use the shore is ancient and thus predates any private waterfront property interests.⁴⁶ In the other corner, however, private property owners seek to restrict the public from encroaching on their privately-held beaches, preferring instead to limit public use to publicly-owned beaches.⁴⁷ Private owners assert that depriving them of their right to exclude the public would violate their constitutionally protected right against uncompensated takings.⁴⁸ Unfortunately, balancing these “two diametrically opposed views” has proven to be rather challenging.⁴⁹

B. Solving the Coastal Access Dilemma

States have addressed public coastal rights in a number of different ways.⁵⁰ Common law methods such as prescriptive easements,⁵¹ dedica-

Draw the Line in the Sand?, N.Y. TIMES, Jan. 21, 2005, at F4 (discussing Ponte Vedra Beach, Florida); Editorial, *Beach Walkers Shouldn't Trample Property Rights; Court Should Uphold Statute That Says Private Property Extends to Water's Edge*, DETROIT NEWS, Mar. 13, 2005, at A16 (opposing unrestricted public access to privately-owned Great Lakes beaches); Brian Feagans, *Serious Threat; Suit Aims for Private Beaches*, MORNING STAR (Wilmington, N.C.), July 7, 1998, at 1A (discussing North Carolina); Martha Groves, *Drawing Lines in the Sand in Battle over Broad Beach*, L.A. TIMES, Aug. 14, 2005, at B1 (discussing Malibu, California); Ann M. Henson, *Florida Town at Center of Debate over Public Access*, BOSTON GLOBE, July 2, 2004, at A7 (discussing Destin, Florida); Nicoletta Kotsianans, *On LBI, Court Ruling Threatens Beachfront Way of Life/State Supreme Court's Decision Gives the Public Greater Access to Once-Private Beaches*, PRESS OF ATLANTIC CITY (N.J.), Aug. 3, 2005, at A1 (discussing Long Beach Island, New Jersey).

45. See Langella, *supra* note 7, at 189 (citing public's position that they possess “a general right of access to and use of every beach in the country without regard to whether the beachfront property is privately or publicly owned”).

46. See Finnell, *supra* note 33, at 664 (acknowledging states hold fee simple title to their public trust lands and takings claims are irrelevant because such land cannot be private); Kehoe, *supra* note 33, at 1928 (asserting pre-existing public trust claims prevent owners of private land from claiming rights to exclude public). *But see* Gail Diane Cox, *Coast to Coast to Court*, NAT'L L.J., Aug. 20, 2001, at A1 (citing injustice where property owners were “sold property with the promise of an exclusive slice of the Atlantic or the Pacific, only to find themselves trumped by the public trust doctrine”).

47. See Langella, *supra* note 7, at 189 (stating private landowners think “general public access to beachfront should be limited only to public beaches”).

48. See Summerlin, *supra* note 37, at 431 (remarking beach access “has sparked fierce and protracted legal battles over the Takings Clause of the Constitution”).

49. See Kehoe, *supra* note 33, at 1913-14 (noting difficulties of reconciling opposing perspectives); *see also* Langella, *supra* note 7, at 189 (referring to competing standpoints); Sullivan, *supra* note 3, at 332 (enumerating conflicting rights of private landowners and public).

50. For a discussion of specific methods employed, see *infra* notes 51-64 and accompanying text.

51. Prescriptive easements concede to people, who would otherwise not have ownership rights in a particular parcel of land, the right to use that land. *See, e.g.*, CHRISTIE & HILDRETH, *supra* note 33, at 43 (discussing prescription). Prescriptive easements can be acquired in beachfront land where the public, in addition to

tion⁵² and custom⁵³ are often used to address public entitlement claims.⁵⁴

satisfying the statutory requirements, has made continual use of the beach for a specifically defined period. *See id.* at 43-44 (describing manner in which prescription occurs). Most states recognize this application of prescriptive easements and, in fact, some courts specifically prefer this method over the public trust doctrine. *See Langella, supra* note 7, at 187 ("Most states recognize that continual use of a beach by the public constitutes a prescriptive easement."); *Morris, supra* note 3, at 1034 n.145 (exemplifying use of prescriptive easements in Texas); *see also* *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 232, 248 (Fla. 1974) (applying prescription to conflict over waterfront property); *Eaton v. Town of Wells*, 760 A.2d 232, 248 (Me. 2000) (finding prescriptive easement in beach and holding where prescriptive easements exist, court need not consider expansion of public trust); *Moody v. White*, 593 S.W.2d 372, 377-78 (Tex. App. 1979) (providing presumption in favor of prescriptive easement); *Kehoe, supra* note 33, at 1936 ("The Texas Open Beaches Act encourages the judiciary to find public easements across coastal properties by imposition of a presumption in favor of prescriptive public rights.").

52. Dedication considers the owner's intent, either express or implied, to dedicate a portion of his property to public use. *See, e.g., Finnell, supra* note 33, at 633-37 (providing comprehensive commentary on express and implied dedication). Many states approve of dedication as a means of securing increased public access rights. *See id.* (reviewing dedication jurisprudence). In his article, Professor Finnell illustrates coastal dedication jurisprudence. *See id.* (citing *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970); *City of Palmetto v. Katsch*, 98 So. 352 (Fla. 1923); *Dep't of Natural Res. v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975); *Gewirtz v. City of Long Beach*, 69 Misc. 2d 763 (N.Y. 1972); *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923 (Tex. App. 1964)).

Professor Finnell indicates that some states have even chosen to condition a landowner's building permit approval upon his or her dedication of a private beach or access route. *See id.* at 629 ("[Governments] can also require dedication of accessways, without compensation, as a condition to subdivision or other coastal development permission."); *see also Grupe v. Cal. Coastal Comm'n*, 166 Cal. App. 3d 148 (Cal. Ct. App. 1985) (finding constitutional development exaction that required private landowner to dedicate lateral access easement to public as condition for permit approval of his proposed single family waterfront home). In *Grupe*, the California Appellate Court found authority in California's Constitution and in California's Public Resources Code section 30212. *Id.* at 160-61 (finding authority for dedication exaction). Shortly after the *Grupe* decision, the United States Supreme Court faced a similar issue in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834, 837-42 (1987) (holding that easement dedication was unconstitutional because stated purpose of advancing visual access to coast was not substantially furthered by requirement of dedication that served to provide lateral access along coast). Professor Finnell suggests that, despite the ruling in *Nollan*, dedications might still be a valid way to improve public access to the coast. *See Finnell, supra* note 33, at 629 (discussing feasibility of dedication requirements). Professor Finnell finds authority for his position in the fact that *Nollan* does not ban access dedications outright, rather it requires the exaction to "substantially advance[] legitimate state interests." *Nollan*, 483 U.S. at 834. Professor Finnell suggests:

[States] can also require dedication of accessways, without compensation, as a condition to subdivision or other coastal development permission. Required dedications, though, require careful consideration of the taking issue, particularly in light of the Supreme Court's 1987 decision in *Nollan v. California Coastal Commission*.

The Court in *Nollan* held that the California Coastal Commission's requirement that the Nollans dedicate a lateral accessway prior to getting a coastal development permit constituted a taking. The opinion, if narrowly interpreted, ought not deter coastal governments and agencies

Each of these methods offers a common law property-based exception to an owner's right to exclude others.⁵⁵ Moreover, each method can be utilized to secure both lateral and perpendicular access to and use of the beach.⁵⁶

In addition to common law techniques, legislative enactments, eminent domain and constitutional attacks have all served to satisfy the public's need for greater public beach access and use.⁵⁷ While the Federal Coastal Zone Management Act of 1972⁵⁸ has failed to provide an effective

from promoting public access to public property through reasonable permit conditions, required dedications, and fees in lieu thereof.

Finnell, *supra* note 33, at 629. Even after the Court's ruling in *Nollan*, California law still permits the imposition of easement dedications for both horizontal and vertical access as a condition of "new" development. See CAL. PUB. RES. CODE § 30212 (2005). This California law provides that:

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Id.

53. Custom generally operates to prevent private landowners from excluding the public from lands that they have "customarily used in an uninterrupted fashion from ancient times." Langella, *supra* note 7, at 188; see also Sullivan, *supra* note 3, at 336 ("The doctrine of custom is based on seven requirements—the customary use must be ancient, exercised without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and consistent with other customs or other law."). Custom, also utilized by a number of states, has the ability to guarantee public rights in large portions of the coast. See CHRISTIE & HILDRETH, *supra* note 33, at 47-48 (indicating customary use can claim entire coastlines and listing states that permit custom claims); see also *Tona-Rama*, 294 So. 2d at 77-78 (applying customary usage to grant public rights where prescriptive easement requirements were not met); *In re Ashford*, 440 P.2d 76, 78 (Haw. 1968) (applying ancient Hawaiian custom which held "location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves"); *State ex. rel. Thornton v. Hay*, 462 P.2d 671, 677-78 (Or. 1969) (opening Oregon coastal beaches to public on basis of custom); *Moody*, 593 S.W.2d at 379 (recognizing validity of custom as basis for granting public access to beaches, but rejecting it in instant case).

54. See, e.g., Langella, *supra* note 7, at 187-88 (listing methods various states have employed to secure public access to private beaches).

55. See Mark R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and N.J.: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719, 729-30 (1996) (calling methods "[p]roperty based exceptions to an owner's ability to exclude others").

56. See Morris, *supra* note 3, at 1034-35 (discussing approaches that have been used to provide both types of access).

57. See CHRISTIE & HILDRETH, *supra* note 33, at 49-52 (reviewing approaches to beach access problem).

58. 16 U.S.C. §§ 1451-1464 (2005); see Kehoe, *supra* note 33, at 1916 (explaining how Coastal Zone Management Act (CZMA) "provides funding for states to develop coastal management programs, including strategies to acquire access routes to the ocean").

remedy for the lack of public access,⁵⁹ various state-enacted legislation has proven to be more effective.⁶⁰ When legislation is effectively drafted to address coastal problems, states will not have to resort to creative methods, such as public trust expansion, to appease the public.⁶¹ Additionally, state and local governments can utilize their eminent domain powers to take private beaches for use by the public.⁶² Applying eminent domain powers to such a situation, that is, where the public demand for a natural resource is high but the supply of that resource is low, is presumably what our Founding Fathers had in mind when they incorporated “*public use*” terminology into the Fifth Amendment.⁶³ And, while constitutional attacks on First Amendment grounds certainly are not the standard in the fight for public rights in private beachfront land, the Connecticut Supreme Court accepted this argument in holding that the general public was entitled to

59. See Kehoe, *supra* note 33, at 1916 (“Due to its lack of both substantive guidance and innovation, however, the CZMA has not ameliorated the problems associated with diminishing beach access.”).

60. Legislation can serve many purposes: to preserve public beaches, to protect existing access points, to prohibit development where it would interfere with existing public accessways, to provide for coastal land acquisition and to condition land development upon the dedication or creation of additional public access points. See CHRISTIE & HILDRETH, *supra* note 33, at 51 (stating “many states have statutes designed to protect existing public access and to mitigate the impacts of shoreline activities on existing accessways”). While legislation has been enacted in many coastal states, it has produced few notable successes. See, e.g., California Coastal Act, CAL. PUB. RES. CODE §§ 30,000-30,012 (West 2005) (conditioning coastal development permits on dedication of easement to public); HAW. REV. STAT. § 115-1 (2004) (providing for state acquisition of coastal land to guarantee coastal access routes); Texas Open Beaches Act, TEX. NAT. RES. CODE ANN. §§ 61.011-61.026 (Vernon 2005) (encouraging public access to beaches by imposing presumption on courts that prescriptive easements exist); see also Breemer, *supra* note 28, at 296-300 (discussing how California Coastal Commission serves to preclude private property rights); Kehoe, *supra* note 33, at 1915 (discussing Texas’s Open Beach Act and Hawaii’s legislation); Summerlin, *supra* note 37, at 442 (exemplifying Texas’s use of legislation to address public rights in beaches).

61. In states where comprehensive and effective legislation provides for public beach access, courts have not been forced to expand the public trust doctrine to address the issue of coastal access. See Summerlin, *supra* note 37, at 439, 442-43 (commenting that legislation in North Carolina precludes need to expand public trust doctrine and legislation in Texas has been successful at advancing beach access rights without judicially expanding public trust).

62. See Finnell, *supra* note 33, at 629 (“Governments can acquire public accessways through negotiated purchase or eminent domain.”); see also Bell v. Town of Wells, 557 A.2d 168, 170 (Me. 1989) (illustrating instance where municipality acquired private beach for public use in holding that expansion of public trust doctrine would effectuate taking).

63. See Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984) (interpreting “public use” broadly). But see DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 286 (4th ed. 2004) (commenting “early state court decisions required actual use by the public in order to satisfy the constitutional requirement”).

use a municipal beach that had previously been open only to municipality residents.⁶⁴

C. *The Public Trust Doctrine*

1. *Background and Scope*

The public trust doctrine⁶⁵ is the most controversial⁶⁶ approach used to address the beach access dilemma.⁶⁷ The doctrine stands for the notion that the nation's natural resources should be accessible to the public at large.⁶⁸ Rooted in Roman law and English common law,⁶⁹ the public

64. See *Leydon v. Town of Greenwich*, 777 A.2d 552, 575 (Conn. 2001) (holding constitutional protection for expression required beaches be open to public); see also Sullivan, *supra* note 3, at 336 (discussing Connecticut case).

65. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 358 (N.J. 1984) ("The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people.").

66. See Scott, *supra* note 24, at 4 (declaring critics believe public trust doctrine to be "destructive of the basic fabric of the property law"). See generally Sarah C. Smith, Note, *A Public Trust Argument for Public Access to Private Conservation Land*, 52 DUKE L.J. 629 (2002) (reviewing various state applications of public trust, both broad and narrow).

67. See, e.g., CHRISTIE & HILDRETH, *supra* note 33, at 49 (discussing history and application of public trust doctrine); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 527 (1989) ("The traditional public trust doctrine is property law. It defines an easement that members of the public hold in common.").

68. See Smith, *supra* note 66, at 638 (commenting that "because natural resources belong to the public as a whole, private owners may not deprive the public of access"); see also Scott, *supra* note 24, at 3 ("The public trust doctrine has been heralded by environmental activists as a valuable weapon in the fight to preserve the earth's resources in a natural state and to make their enjoyment more readily accessible to the populus at large.").

69. See Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-79 (1970) (providing historical background of public trust). For a comprehensive history of the public trust doctrine, see Kehoe, *supra* note 33, at 1917-37 (discussing origins of doctrine through Roman, English and American law); Smith, *supra* note 66, at 638-47 (cataloguing development and breadth of doctrine). But see Scott, *supra* note 24, at 33 (criticizing scholarly and legal reliance upon ancient public trust doctrine to expand public rights onto dry sand). Professor Scott critically notes: "Unacknowledged in many references, however, is the immediately adjacent and qualifying language in the document that continues, 'except upon the seashore.'" *Id.*

In terms of its application in the United States, the doctrine was first recognized by a New Jersey court in 1821. See *Arnold v. Mundy*, 6 N.J.L. 1, 53 (N.J. 1821) (adopting public trust doctrine). Later, in 1894, the U.S. Supreme Court addressed the public trust doctrine in the seminal case of *Shively v. Bowlby*, 152 U.S. 1 (1894). In *Shively*, the Court held that title to the land under tidal waters is vested in the state and was to be held in trust for the benefit of all people. See *id.* at 16 (holding states own title to land under tidal waters). In 1988, the Court again addressed the doctrine in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). In *Phillips*, the Court noted that "the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id.* at 475. According to one scholar, "[p]resumably, follow-

trust doctrine traditionally bestows upon the public the right to utilize navigable *waterways* for *commercial* purposes, such as fishing and navigation.⁷⁰ In recent times, however, the doctrine's scope has been expanded to include *non-occupational*, recreational activities that occur on the *dry sands* of the shore, such as walking and sunbathing.⁷¹

The scope of the public trust doctrine varies greatly from state to state.⁷² Despite its incongruities, one thing seems certain—the public trust doctrine generally provides for limited lateral access along the shore's public trust land.⁷³ Nonetheless, depending on how the doctrine

ing *Phillips*, states are free to diminish their public trust doctrine, or they may expand the scope of the public trust authority 'as they see fit.'" Tricia A. Sherick, Comment, *A Comparison of the Coastal Zone Management Policies of the Atlantic and Pacific Coastal Regions Versus Programs Implemented in Selected Great Lakes States: The Case for Greater Application of the Public Trust Doctrine in Great Lakes States Coastal Management Policy*, 28 U. TOL. L. REV. 459, 470 (1997).

70. See Burling, *supra* note 20, at 37 ("Public trust rights traditionally have included the right to access navigable waterways for fishing and navigation."); Scott, *supra* note 24, at 20 ("The purposes that support the delimitation of this unusual species of property have historically been identified as serving the fundamental public needs of vocational navigation, fishing and commerce."); Smith, *supra* note 66, at 638 ("Traditionally, the public trust protected beaches and navigable waterways so that commerce could proceed unimpeded."); see also Van Ness v. Borough of Deal, 393 A.2d 571, 573 (N.J. 1978) (stating "original purpose of [the doctrine] was to preserve for all the public natural water resources for navigation and fishing").

71. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369 (N.J. 1984) ("Rather, we perceive the public trust doctrine not to be 'fixed or static,' but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit." (citing *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, at 54 (N.J. 1972))); see Burling, *supra* note 20, at 37 ("Modern commentators argue that the public trust also includes recreational and ecological values."); Scott, *supra* note 24, at 20 ("In more contemporary environs the reasons for subjecting property to the doctrine include sunbathing, beachcombing, walking, aesthetic enjoyment, recreation, and a myriad of other forms of pure avocational activity."); see also Smith, *supra* note 66, at 638 ("In the last fifty years, however, both the scope and the purpose of the public trust doctrine have changed.").

72. See Langella, *supra* note 7, at 185 ("There is little uniformity to the Public Trust Doctrine. Each state has its own version and interpretation based on its views of justice and policy. Some states have interpreted and applied the Doctrine expansively while others have done so narrowly."); see also Scott, *supra* note 24, at 23 ("The actual contemporary definition of the public trust varies from state to state and the only certain observation that might be made about the doctrine is that there is no single or uniform, explanation or application."). Trying to make sense of the vagueness of the public trust doctrine, Professor Scott notes:

The most certain and faithful statement one can make is that in most states, on most occasions, the public will possess some interest in the intertidal zone It may be in the form of ownership, or it may be an easement or servitude. Also, private owners may, in most jurisdictions, have some reasonable expectation that most traditional notions of property will remain applicable to their ownership of beach property.

Id. at 48.

73. For a discussion of horizontal access, see *supra* notes 37-38 and accompanying text. While the public trust doctrine has not been very helpful in securing

is interpreted in its respective jurisdiction, it can have a significantly divergent impact on the ongoing public access debate.⁷⁴

The doctrine, applied narrowly, can have the effect of limiting the trust's permissible activities to those permitted under traditional common law (i.e., fishing and navigation).⁷⁵ Furthermore, a narrowly defined trust can minimize publicly entrusted areas by defining boundaries in terms of the low, rather than the high, tide line.⁷⁶ States that adhere to the more traditional public trust model are regarded as proponents of

vertical access to our nation's beaches, most states, via the public trust doctrine, recognize the public's right to horizontally pass along private portions of the shoreline. See Langella, *supra* note 7, at 184 (stating horizontal, but not vertical, access is permitted); see also Summerlin, *supra* note 37, at 426 (concluding nearly unanimous rule is that public trust doctrine does not provide vertical access over private land).

Nonetheless, when considering the horizontal access, we must be aware that it is generally limited in area below a state-determined boundary line. See Langella, *supra* note 7, at 184 (discussing limitations of public trust). While there are multiple ways to define this territory, courts most commonly define the trust lands in terms of the mean high-tide line. See, e.g., *Glass v. Goekel*, 703 N.W.2d 1, 28-30 (Mich. 2005) (limiting public's right in lake-side beach to area bounded by high water mark); see Scott, *supra* note 24, at 16-18 (mentioning alternate methods like "low water mark, the ordinary low watermark, the winter tide, the neap tide, the highest tide, [or] the vegetation line"). "The mean high-tide line is a fictional line that is measured by averaging 'all high-tides over an 18.6 year cycle.'" Sullivan, *supra* note 3, at 333. The mean high-tide line is best conceptualized as the dividing line between the wet sand, the sand over which the tide ebbs and flows, and the dry sand. See *id.* But see John A. Humbach & Jane A. Gale, *Tidal Title and the Boundaries of the Bay: The Case of the Submerged "High Water" Mark*, 4 FORDHAM URB. L.J. 91, 102-04 (1975) (remarking upon vagueness of tide line boundaries). The authors state:

In sum, the "high water" line, as a real estate boundary, is not a line at all but a linguistic formulation. And as such, it is scarcely more definite than the concept, "the edge of the sea," which it is supposed to define. About the only contribution that the "high water line" formulation makes to our understanding of the boundary location is to tell us that the division between upland and sea lies toward the landward, not the seaward, of the area of tidal wash.

Id. at 103-04. In keeping my discussion as simple as possible, I will refer to the boundary in terms of the "mean high-tide line." Keep in mind, however, that this boundary could change by jurisdiction.

74. See Scott, *supra* note 24, at 16-19 (analyzing divergent boundary lines drawn by various states).

75. See Summerlin, *supra* note 37, at 430 nn.37-38 (commenting that public trust doctrine varies in scope by location and using Maine to illustrate narrow application of doctrine).

76. See, e.g., *Groves v. Sec'y of the Dep't of Nat. Res. and Env't Control*, No. 92A-10-003, 1994 WL 89804, at *5 (Del. Super. Ct. Feb. 8, 1994) (asserting "long-standing rule of law in Delaware that a private riparian landowner holds title to the low water mark"); *Wellfleet v. Glaze*, 525 N.E.2d 1298, 1301 (Mass. 1988) (holding "there is no general right in the public to pass over the land or to use it for bathing purposes"); see also *Kehoe*, *supra* note 33, at 1916 (remarking "Delaware, Maine, Massachusetts, New Hampshire, and Virginia have historically used the low water mark as the line of demarcation"); Smith, *supra* note 66, at 643 (listing cases that limit public trust application to traditional level).

private property rights.⁷⁷ When a court resists public trust expansion, it typically cites at least one of three concerns: the inappropriateness of legislating from the bench,⁷⁸ Fifth Amendment takings implica-

77. See Kehoe, *supra* note 33, at 1916 (discussing policies favorable to landowners). Delaware's public trust jurisprudence exemplifies the pro-private landowner view. See *State ex rel. Buckson v. Pa. R.R. Co.*, 267 A.2d 455, 458-59 (De. 1969) (discussing desire to preserve property rights). The Delaware Supreme Court noted:

This Court is not now free to disturb the time-honored rule of property here under attack Rules of property, established by decisional law and long acquiesced in, may not be overthrown by the courts except for compelling reasons of public policy or imperative demands of justice. Courts must avoid unsettling judge-made rules affecting the devolution of property, in the absence of a strong requisite public policy. . . . We find no public policy or demand of justice requiring this Court to abandon the recognized rule of property here under scrutiny. Indeed, if we consider the confusion and chaotic effect upon land titles which would follow an abrupt abandonment of the prevailing rule, it may be said that public policy and the demands of justice compel preservation of the existing rule. If there is to be a change, it must be accomplished by the General Assembly with due regard for the law of eminent domain.

Id. Later, in *Groves v. Secretary of the Department of Natural Resources and Environment Control*, the Delaware Supreme Court summarized its public trust jurisprudence. See *Groves*, 1994 WL 89804, at *5 (recapitulating Delaware jurisprudence on public trust). "Although the private landowner owns the foreshore, the public does have certain limited rights superior to those of the private owners. These rights are what constitute the public trust doctrine. They are the right to navigate and fish over the foreshore . . ." *Id.* at *6. In the same decision, the court also noted that:

There does not and never has existed, as a part of this doctrine in Delaware, a right of the public superior to the landowner to access to the foreshore for walking and/or recreational activities. The private rights of ownership may not be taken absent just compensation as mandated by the United States and Delaware constitutions. If the Court or Legislature recognizes this right of the public superior to the landowner to access to the foreshore for walking and/or recreational activities, then the State will have to compensate the affected landowners for a takings.

Id. (internal citations omitted). Professor Scott comments on Delaware's use of the public trust doctrine:

The Public Trust Doctrine has found a respected place within Delaware jurisprudence . . . strik[ing] a cogent legal balance between private and public rights in property that accepts a more traditional view of Anglo-American property law. The continuity in the synthesis of the [court's] decisions seems to support an [sic] historic view of long standing policies of property law that favor stability in title.

Scott, *supra* note 24, at 45.

78. See *Bell v. Town of Wells*, 557 A.2d 168, 176 (Me. 1989) (discussing role of courts in interpreting legislation). The *Bell* court condemned judicial activism:

To declare a general recreational easement, the court would be engaging in legislating, and it would do so without the benefit of having had the political processes define the nature and extent of the public need. It would also do so completely free of the practical constraints imposed on the legislative branch of government by the necessity of its raising the money to pay for any easement taken from private landowners. . . . The judicial branch is bound, just as much as the legislative branch, by the constitutional prohibition against the taking of private property for public use without compensation.

tions⁷⁹ and the deprivation of due process.⁸⁰ Similarly, the doctrine's critics claim that it is incompatible with "the basic values of a constitutional democracy."⁸¹

Id.

79. *See id.* at 169 ("[T]he courts and the legislature cannot simply alter these long-established property rights to accommodate new recreational needs; constitutional prohibitions on the taking of private property without compensation must be considered."); *see also* Huffman, *supra* note 67, at 572 (suggesting compensation is required because property rights are altered when trust is expanded); Scott, *supra* note 24, at 50 ("The United States Supreme Court has observed that the just compensation clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960))); Kehoe, *supra* note 33, at 1914 (suggesting public trust expansion would "cause an extreme diminution in property values of privately owned oceanfront land" which would result in taking). Professor Huffman further discusses the constitutional implications:

[A] constitutional democracy is a limited democracy, and it is the courts' role to be vigilant in imposing those limits. Among those limits is the [F]ifth [A]mendment's protection of property rights, a protection of little value if the courts are free to convert clearly defined easements into vast public rights.

Huffman, *supra* note 67, at 534. *But see* Kehoe, *supra* note 33, at 1928 ("There are several ways to get around the takings problem with reference to the public trust."). For a further discussion of the private property rights jeopardized by the public trust doctrine, *see infra* notes 158-213 and accompanying text.

80. Because judicial decisions have retroactive repercussions, a continually expanding public trust doctrine can remove a property owner's opportunity to have his day in court. *See* Reckord, *supra* note 12, at 273 (commenting expansion "negatively impacts all oceanfront landowners despite the fact that none were ever before the court" and noting this "effectuates a denial of due process to all owners who are affected by such judicial activism"); *see also* Scott, *supra* note 24, at 58-70 (discussing retroactivity of public trust decisions).

Professor Huffman has also espoused strong beliefs on the matter, commenting that public rights should be protected and secured through the democratic political process. *See* Huffman, *supra* note 67, at 549 ("[O]nly when democratic processes fail is there any possible justification for judicial intervention to protect public rights."). He implies that when the public fails to achieve their purpose, they have, in fact, failed themselves because the political process is a representative one. *See id.* at 556 (finding society responsible for self-regulation through political process). He does not believe that people should "look to the courts to grant them what they have been denied in the democratic process." *Id.* at 555-56. Thus, because the public elected these officials who are responsible for the land development and zoning rulings, which have allowed privatized beaches to exist, the people have failed themselves by electing officials who failed to carry out their objectives. *See id.* (inferring that because proper role for legislatures in *representative* democracies is to serve its "constituents' interests," as long as elected representatives reflect majority vote, representatives are acting with majority's interests in mind). Professor Huffman also expresses concern with judicial expansion of the doctrine remarking that, when changes are effectuated through the courts, they are not subjected to "the majority constraining provisions of the Constitution." *Id.* at 571.

81. Huffman, *supra* note 67, at 527. Professor Huffman comments that "much of modern public trust law infringes upon vested private property rights and is therefore violative of the federal constitution." *Id.* at 528; *see* Scott, *supra* note 24, at 56 (repeating Justice Scalia's opinion in *Stevens v. City of Cannon*

At the other end of the spectrum, however, there are states, including New Jersey, that adhere to a more broadly-defined doctrine.⁸² These public-friendly states commonly expand the doctrine's reach by increasing the activities permitted under it and by pushing entrusted coastal boundaries further landward.⁸³ Courts seeking to advance public entitlement suggest that the public trust is a background principle of state law⁸⁴ and, as such, public rights in the beach trump private ownership rights.⁸⁵ Subsequent consideration of *Raleigh*, which advances the most ambitious use of the public trust doctrine to date, will illustrate the problems with such an approach.⁸⁶

Beach, 510 U.S. 1207, 1211 (1994), that states may not deny "the rights protected under the Constitution 'by invoking nonexistent rules of substantive law'").

82. See, e.g., *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124 (N.J. 2005) (broadening doctrine to permit public to utilize entire dry sand area of private beach); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369 (N.J. 1984) (expanding public trust doctrine to include right to cross over private property); see also Finnell, *supra* note 33, at 677 (arguing public trust doctrine should be used more frequently to grant public access to coastal property); Smith, *supra* note 66, at 643-44 (remarking that, recently, states "have significantly broadened the trust"); Sullivan, *supra* note 3, at 437 (providing beach access via public trust doctrine is cheapest solution to problem). But see Huffman, *supra* note 67, at 532 (commenting "the advocates of the modern public trust doctrine seek to achieve purposes not contemplated by the traditional doctrine").

83. See, e.g., *Glass v. Goeckel*, 703 N.W.3d 1, at 704 (Mich. 2005) (defining public's rights in public trust lands to area below high water mark); *City of Bainbridge Island v. Brennan*, No. 31816-4-II, 2005 WL 1705767, at *18 (Wash. App. July 20, 2005) (expanding public trust "to include incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes") (citations and internal quotations omitted); see also Smith, *supra* note 66, at 644 (listing public trust decisions which expanded public rights to recreational activities).

84. See Huffman, *supra* note 67, at 548 ("By linking the public trust doctrine to constitutional claims of right, the courts may believe that they can circumvent the constitutional protections of private property. The courts would argue that because these public rights are protected under the public trust doctrine, they predate any private claims of right."); Morris, *supra* note 3, at 1030 (commenting states can avoid takings claims by proving that, because of background principle, property did not belong to private owner in first place). But see Burling, *supra* note 20, at 28 (pointing out beachfront property owners were not on notice "the public would forevermore enjoy the benefits of [their] property . . . without payment"); Scott, *supra* note 24, at 56 (citing Justice Scalia's opinion in *Stevens*, 510 U.S. at 1211-12, which emphasized that constitutional property protections "would be a nullity if anything that a State court chooses to denominate 'background law'—regardless of whether it really is such—could eliminate property rights").

85. For a discussion of prescriptive easements and public rights of beach access, see *supra* note 51.

86. See Diskin, *supra* note 16 (commenting *Raleigh* is first test "of how far past the water line the doctrine could be applied on a private beach"). For discussion of the implications of an expansive public trust doctrine, see *infra* notes 158-213 and accompanying text.

2. *New Jersey: Riding the Public Trust Wave*

Since being the first state to apply public trust principles in 1821,⁸⁷ New Jersey has remained the doctrine's most fastidious supporter.⁸⁸ With each successive public trust decision, New Jersey's judiciary continues to redefine and expand the scope of the doctrine in achieving public beach rights.⁸⁹

New Jersey was the first state to take an expansive view as to which activities were permissible under the public trust doctrine—moving from allowing only traditional activities, such as fishing and boating, to permitting a broad range of recreational activities, like swimming and sunbathing.⁹⁰ In doing so, rather than proffering a fixed list of acceptable activities as its sister states do, New Jersey has opened the door to continuous adaptation by conceptualizing the public trust as a “flexible concept that changes with the changing needs of the population.”⁹¹ This “flexible” conception has also opened the door to an expanded definition of

87. See *Arnold v. Mundy*, 6 N.J.L. 1, 53 (N.J. 1821) (applying public trust doctrine to make “the air, the running water, the sea, the fish, and the wild beasts” common property of people); see also *Morris*, *supra* note 3, at 1021 n.37 (“New Jersey . . . is generally regarded as the first state to have judicially recognized the scope and applicability of the Public Trust Doctrine.”) (internal quotation and citation omitted).

88. See *Morris*, *supra* note 3, at 1020-21 (“New Jersey courts have been both pioneers and leaders in their application of the Public Trust Doctrine, being among the first to both discuss the concept and to expand its usage.”).

89. See *Poirier*, *supra* note 55, at 772-98 (analyzing New Jersey's beach access movement); *Polis & MacRae*, *supra* note 10, at 150-70 (discussing New Jersey public trust jurisprudence and reviewing *Raleigh* decision); *Scott*, *supra* note 24, at 36-46 (“New Jersey has employed quite an expansive interpretation of the Public Trust Doctrine in its contemporary decisions.”); *Langella*, *supra* note 7, at 199-209 (summarizing New Jersey's approach to public trust doctrine); *Morris*, *supra* note 3, at 1020-23 (discussing public trust in New Jersey).

90. See *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54-55 (N.J. 1972) (“We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.”); *Summerlin*, *supra* note 37, at 426 (“The New Jersey judiciary extended the public's right to sunbathe and enjoy recreational activities to the privately owned dry sand beach.”); see also *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (“Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed.”).

91. *Smith*, *supra* note 66, at 644 (asserting that “[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit” (citing *Borough of Neptune City*, 294 A.2d at 54-55)). Critics of this interpretation suggest that it is destructive of property rights. See *Burling*, *supra* note 20, at 38-39 (implying flexible doctrine “strips clarity, certainty, and predictability from the very core of the public trust doctrine.”); *Polis & MacRae*, *supra* note 10, at 154 (“With this declaration, the court washed away the property rights of beach-front owners. The logic of the doctrine . . . could extend landward indefinitely.”).

public trust lands and the forms of beach ownership it can encumber.⁹² Early on, the public's entitlement to trust lands was limited to the foreshore (the area bounded by the mean high-tide line)⁹³ but the latest court decision makes it apparent that the public is entitled to lateral access and use of the entire dry sand area.⁹⁴ As to the beaches encumbered by the public trust, the doctrine's scope has escalated from traditionally encompassing only municipal beaches,⁹⁵ to later including quasi-municipal beaches⁹⁶ and now to seemingly all private beaches.⁹⁷ Amazingly enough, New Jersey courts have even utilized the public trust doctrine to provide for perpendicular access to the beach—a feat few other states have been willing to undertake.⁹⁸ Considering the expansive scope that New Jersey

92. See, e.g., Paul Mulshine, *Down the Sands of Time, the Beaches Have Been Open*, STAR-LEDGER (Newark, N.J.), July 31, 2005, at P1 (quoting New Jersey Assemblyman who questioned whether decision applies to “purely private” beaches where no badges are sold).

93. See *Van Ness v. Borough of Deal*, 393 A.2d 571, 575 (N.J. 1978) (Mountain, J., dissenting) (“Thus, presently the trust comprehends the rights of sea-bathing and foreshore and tidelands recreation” (citing Leonard R. Jaffee, *The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwater: Neptune City v. Avon-By-The-Sea—A Case of Happy Atavism?*, 14 NAT. RESOURCES J. 309, 334-35 (1974)). See generally Reckord, *supra* note 12, at 254 (reviewing trust's traditional application to “water's edge”).

94. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124 (N.J. 2005) (opening property owner's entire dry sand beach to public); see also Scott, *supra* note 24, at 41 (discussing holding in *Borough of Neptune City*). Professor Scott commented that:

[T]he decision has been interpreted as implying that even . . . the dry sand area, may be impressed with the burden of an inchoate, expanded and positive right to public access through the public trust doctrine, and in the judgment of a court an execution of this interest is proper whenever the public develops and expresses a desire to use it.

Id.

95. See *Van Ness*, 393 A.2d at 574 (N.J. 1978) (applying trust to municipally owned beach).

96. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369 (N.J. 1984) (expanding public trust to quasi-municipal beach); see also Polis & MacRae, *supra* note 10, at 160 (explaining quasi-municipal entities are dedicated to public service).

97. See *Raleigh*, 879 A.2d at 124 (extending public's rights to private for-profit beach); Polis & MacRae, *supra* note 10, at 158 (suggesting rights should only be awarded to public in municipal beaches); see also Lewis Goldshore & Marsha Wolf, *On the Beach; State Supreme Court Will Hear Beach Access Case Involving Privately Owned Oceanfront Property*, N.J.L.J., Dec. 20, 2004 (noting that *Raleigh* presented “an important factual distinction between [previous New Jersey] cases and Atlantis Beach Club”). “The earlier rulings concerned municipally owned beaches and a beach under the control of a quasi-public entity. Here, the Supreme Court . . . address[ed] what has traditionally been considered to be private property.” *Id.*

98. See *Matthews*, 471 A.2d at 364 (“Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach.”). *But cf.* *Sheftel v. Lebel*, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998) (“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

has awarded the public trust doctrine, it is understandable why New Jersey courts are often criticized as offending constitutionally protected private property rights.⁹⁹ The criticism becomes even more apparent after analyzing New Jersey's most recent expansion of the doctrine in *Raleigh*.

IV. NEW JERSEY EXPANDS THE PUBLIC TRUST IN *RALEIGH AVENUE BEACH ASSOCIATION V. ATLANTIS BEACH CLUB*

A. *Background and Holding*

Since 1996, Atlantis operated a private beach club on its waterfront property.¹⁰⁰ Prior to that time, the beach had been open to the public for a period of at least ten years.¹⁰¹ In exchange for rather high seasonal membership fees, Atlantis provided its members with a private life-guarded beach, limited recreational activities, minimal concessions and optional cabana rentals.¹⁰² In order to maintain the private nature of its

public trust rights; doing so constitutes a trespass."); *Cavanaugh v. Town of Narragansett*, No. WC 91-0496, 1997 R.I. Super. LEXIS 21, *25-30 (R.I. Super. Ct. Oct. 10, 1997) (noting that Rhode Island does not recognize vertical access over public trust lands). See also Summerlin, *supra* note 37, at 426 (concluding "nearly unanimous" rule is public trust doctrine does not provide vertical access over private land).

99. See Scott, *supra* note 24, at 44 ("New Jersey has generally taken a politically active and acquisitive approach to the public trust doctrine . . .").

100. *Raleigh*, 879 A.2d at 116. Atlantis's property was located along the Atlantic Ocean in the Diamond Beach section of Lower Township, Cape May County, New Jersey. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 23 (N.J. Super. Ct. App. Div. 2004) (describing location of property at issue). The Diamond Beach neighborhood consists of a small area (about a mile in length) bounded by approximately three blocks running north/south and six blocks running east/west. *Id.* at 22 (describing beach and surrounding areas). Immediately to the north of the Diamond Beach area is Wildwood Crest and immediately to the south of the Diamond Beach area is the U.S. Coast Guard Reservation. *Id.* At the northern-most portion of Diamond Beach is Seapointe Village, a private resort community whose beaches are open to the public. See *Raleigh*, 879 A.2d at 114 (explaining factual background of *Raleigh* cases). The area in dispute in this case lies at the southern portion of the Diamond Beach neighborhood. Running east/west, Raleigh Avenue provides one of only three possible entry points to Diamond Beach, as other existing access points are blocked by condominium buildings. See *Raleigh*, 851 A.2d at 24 (describing access to Diamond Beach from Raleigh Avenue). Atlantis owns the riparian title to a beach lot that consists wholly of dune vegetation, sand and sea; it boasts no permanent physical constructions other than a timber pathway which provides for access between Raleigh Avenue and the beach. See *Raleigh*, 879 A.2d at 123 (describing Atlantis's ownership interest). Immediately to the west of Atlantis's property are two condominium developments: La Vida and La Quinta del Mar. *Id.* at 114 (detailing area surrounding Atlantis and Diamond Beach). While the title history remains slightly unclear, it appears that the lots owned by La Vida and Atlantis were, at one time, under common ownership. See *Raleigh*, 851 A.2d at 23 n.3 (delineating factual events giving rise to litigation in *Raleigh*).

101. See *Raleigh*, 879 A.2d at 122 (acknowledging Diamond Beach's history of allowing public entrance).

102. *Raleigh*, 851 A.2d at 25 (detailing benefits that Atlantis provided to fee-paying members). Atlantis offered two pricing options: members could purchase

beach, Atlantis posted no trespassing signs at the gate to a walkway previously used by the public to reach the beach from Raleigh Avenue.¹⁰³ Denied their familiar accessway, the residents living along Raleigh Avenue were forced to walk a greater distance to reach the next beach access point.¹⁰⁴ While this increased walking distance spanned no more than one-half mile, some local residents were tempted to trespass on Atlantis's property in order to gain a more direct route home.¹⁰⁵

This suit was instituted after one such incident¹⁰⁶ and consequently resulted in Atlantis seeking a declaration that it was not required to provide free public access over its property.¹⁰⁷ In response, individuals residing along Raleigh Avenue filed their own complaint, collectively as the Raleigh Avenue Beach Association ("Association"),¹⁰⁸ against Atlantis asserting: (1) it was in violation of the public trust doctrine;¹⁰⁹ and (2) the

package of eight seasonal badges for \$700 or a lifetime easement for \$10,000. *See Raleigh*, 879 A.2d at 115 (explaining pricing of membership in Atlantis). While the fees seem high, Atlantis asserts that it charged what the market could bear. *Id.* at 124.

103. *See Raleigh*, 879 A.2d at 115 (noting Atlantis took active measures to prevent public from entering beach). A timber pathway provided access from the terminus of Raleigh Avenue, over the bulkhead which lay along Atlantis's western border, across the dunes, ending at the dry sand beach. *See id.* at 114 (discussing details of access to beach). The pathway is significant for two reasons. One reason, the pathway's relationship to a possibly binding permit on the property requiring unrestricted public access, will be addressed in much greater detail as we proceed. *See infra* notes 127-28, 150 and accompanying text. The second reason, because the pathway qualified as a development, it subjected the Atlantis property to governmental regulation, thus giving the court ultimate support in determining that Atlantis's fees could be regulated by the state. *See id.* at 125 (agreeing that "boardwalk pathway over the dunes to the Atlantis beach qualifies as a development, thereby triggering the DEP's [Department of Environmental Protection] CAFRA [Coastal Area Facility Review Act] jurisdiction over related use of the beach and ocean").

104. *See Raleigh*, 851 A.2d at 24 ("Access to the beach via Dune Drive entails an eight-block walk from Raleigh Avenue, a distance of approximately one-half mile.").

105. *See, e.g., Raleigh*, 879 A.2d at 116 (describing Atlantis's attempt to enjoin individuals from trespassing across its private beach for purposes of exiting to Raleigh Avenue). One particular resident tried to walk across Atlantis's property to get from the wet sand to the street saying he wanted to take the "most direct route back to his home." *Id.*

106. *See id.* (describing suit brought by Atlantis against trespasser who attempted to cross over Atlantis's private property in order to reach Raleigh Avenue).

107. *See id.* (stating Atlantis sought to enjoin trespassers and determine whether public was allowed to use its beach).

108. *See id.* (describing local residents' response to Atlantis suit); *Raleigh*, 851 A.2d at 26 (same).

109. *See Raleigh*, 879 A.2d at 116 (advancing residents' claim that Atlantis violated public trust doctrine); *Raleigh*, 851 A.2d at 26 (same).

public was entitled to free “access through the Atlantis property to the beach,” and a “sufficient amount of dry sand.”¹¹⁰

By the time the case reached the New Jersey Supreme Court,¹¹¹ Atlantis had conceded perpendicular access by means of the pre-existing walkway, but maintained its assertion that the public could not use its dry sand beach beyond the mean high-tide line.¹¹² Therefore, the court was called upon to determine how much dry sand would be “sufficient” to satisfy the Association’s claim under the public trust doctrine.¹¹³ Amazingly, the court did more than grant a “sufficient amount of dry sand” to the public.¹¹⁴ It held that the *entirety* of Atlantis’s beach must be opened to the

110. See *Raleigh*, 879 A.2d at 116 (detailing residents’ claim of action); *Raleigh*, 851 A.2d at 26 (same).

111. See *Raleigh*, 879 A.2d at 117-18 (discussing trial and appellate courts’ holdings). The opinion stated:

[T]he [trial] court held that the public was entitled to a right of horizontal access to the ocean by means of “a three-foot wide strip of dry sand” The trial court also held that the public was entitled to limited vertical access to the ocean, consisting of a path from the bulkhead through the dunes on the property.

Id. at 117.

The court continued:

[T]he Appellate Division . . . [held that] “Atlantis cannot limit vertical or horizontal public access to its dry sand beach area nor interfere with the public’s right to free use of the dry sand for intermittent recreational purposes” Atlantis could charge a fee to members of the public who remain on and use its beach for an extended period of time, as long as Atlantis cleans the beach, picks up trash regularly, and provides shower facilities.

Id. at 117-18 (citations omitted); see also *id.* at 125-26 (Wallace, J., dissenting) (agreeing with trial court). Justice Wallace averred:

I would reverse and reinstate the judgment of the trial court However, because a three-foot-wide strip would not easily allow for an adult and child to walk within that limited area, I would expand the horizontal access across defendant’s property to a ten-foot-wide strip above the high water mark.

Id.

112. See *id.* at 119 (majority opinion) (claiming that public “may only walk along the three feet of dry sand that lie landward of the mean high water line . . . and may not use the dry sand beach beyond”). It is likely that Atlantis conceded vertical access because of a building permit, requiring public access over its walkway, which was potentially binding on its property. For a discussion of the permit and its implications, see *infra* notes 126-28 and accompanying text.

113. See *Raleigh*, 851 A.2d at 26 (determining measures necessary to satisfy Association’s claim).

114. See *Raleigh*, 879 A.2d at 124 (holding that “the Atlantis sands must be available for use by the general public under the public trust doctrine”).

public¹¹⁵ and that it could no longer derive a profit from charging beach access fees.¹¹⁶

In justifying its decision, the court pointed to New Jersey's history of interpreting the public trust as a flexible doctrine, one capable of being continually adapted to meet changes in circumstances.¹¹⁷ The court placed particular emphasis on its landmark holding in *Matthews v. Bay Head Improvement Ass'n*,¹¹⁸ the first American ruling to apply the public trust doctrine to privately owned beaches.¹¹⁹ In doing so, the *Raleigh* court turned to the *Matthews* totality of the circumstances test.¹²⁰ The test,

115. See *id.* at 113 (holding "the public trust doctrine requires the Atlantis property to be open to the general public"); see also Polis & MacRae, *supra* note 10, at 150 (remarking "Atlantis Beach Club had to open its property to the entire public"); Baldas, *supra* note 12 ("In the [*Raleigh*] case, New Jersey's high court ruled that the public must have access to the entire beach.") (emphasis added); Robert Hanley, *As Battle for Beach Access Rages in N.J., Private Club Digs Its Heels into Sand*, N.Y. TIMES, July 4, 2004, at § 1, p. 25 (summarizing that "the public was entitled to use all the dry sand at Atlantis").

116. *Raleigh*, 879 A.2d at 113 (holding that Atlantis could only charge "reasonable fee" for services provided by owner). The court ordered the Department of Environmental Protection (DEP) to regulate the fees charged by Atlantis, asserting that public trust lands, which are "protected and regulated for the common use and benefit, [are] incompatible with the concept of profit." See *Raleigh*, 851 A.2d at 33 (setting out requirements that assure fees are limited to that which is necessary to operate the facility). When discussing the DEP's authority to regulate these fees, the court noted: "We hold that the broad scope of the DEP's authority includes jurisdiction to review fees proposed by Atlantis for use of its beach. We expect that . . . fees will not be approved if they operate to '[l]imit access by placing an unreasonable economic burden on the public.'" See *Raleigh*, 879 A.2d at 125 (indicating profit should not be made from fees). Despite depriving Atlantis of its right to profit from charging access to its property, the court does provide for Atlantis to recoup any administrative or operating expenses associated with providing such access and to derive profit from non-access related activities, such as concessions and chair rentals. See *id.* at 113 (noting that Atlantis could still charge reasonable fee to cover operational costs).

117. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (stating "public trust doctrine is not to be 'fixed or static,' but [rather is] to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit'" (quoting *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 47 (N.J. 1972))). For a discussion of New Jersey's role as the public trust pioneer, see *supra* notes 90-99 and accompanying text.

118. 471 A.2d at 369.

119. See Polis & MacRae, *supra* note 10, at 166 (indicating no court had ever used public trust doctrine to burden private property); see also *Raleigh*, 879 A.2d at 119-24 (drawing upon *Matthews*'s rationale). The following illustrates some points advanced in *Matthews* that are relevant to *Raleigh*'s application of the public trust to dry sand beaches. The *Matthews* court held: "[P]rivate land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming." *Matthews*, 471 A.2d at 369. The court also asserted that a "bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed." *Id.* at 365 (recognizing public interest in beachfront as well as ocean).

120. See *Raleigh*, 879 A.2d at 121 (applying *Matthews* test).

as originally conceived, sought to balance the competing interests of private landowners and the public¹²¹ by considering: the “[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner.”¹²²

Despite arriving at the same conclusion for part of this test, the majority and dissent took substantially different positions as to the remaining factors.¹²³ As to the “extent and availability of publicly-owned upland sand area,” the majority, in ruling in favor of the neighborhood Association, placed extreme emphasis on there being no publicly owned beach in Lower Township.¹²⁴ Attempting to rebut that reasoning, the dissent appropriately noted that the close proximity of other open-to-the-public beaches mandated the preservation of Atlantis’s private property rights.¹²⁵

121. See *Matthews*, 471 A.2d at 365 (establishing balancing test). *Matthews* established the framework for application of the public trust doctrine to privately-owned upland sand beaches. See *id.* (expanding public trust doctrine to encompass sand beaches). The *Matthews* approach begins with the general principle that public use of upland sands is “subject to an accommodation of the interests of the owner,” and proceeds by setting forth criteria for a case-by-case consideration in respect to the appropriate level of accommodation. See *id.* (same).

122. See *id.* (proffering four factor test).

123. See *Raleigh*, 879 A.2d at 121 (awarding two of four *Matthews* factors to Association because public could easily reach sand from Atlantis’s walkway and highlighting clear public demand for beach). The dissent agreed with the majority as to those two factors. See *id.* at 127-28 (Wallace, J., dissenting) (arguing that second and fourth factors of test weigh in favor of defendant). For a discussion of the court’s application of the “location of the dry sand area in relation to the foreshore” factor, see *infra* note 170 and accompanying text. For a discussion as to the points of contention, see *infra* notes 124-29.

124. See *Raleigh*, 879 A.2d. at 121-22 (relying on there being “no publicly-owned beach area in Lower Township”). When considering the lack of publicly owned beaches in Lower Township, it is important to realize that often states and local municipalities pass on opportunities to acquire beachfront land because of the amount of upkeep and liability involved. See, e.g., Mulshine, *supra* note 92 (“Nor did the state make any effort to acquire a formerly private beach . . . when it was up for sale a few years ago. That beach went to private developers.”); see also Strunsky, *supra* note 42 (remarking that property owners frequently complain that “the state has been unwilling to put its money where its mouth is”). “While the state is eager to force owners to provide the public with access to their waterfront property, it has been reluctant to publicly finance waterfront access projects.” *Id.* Providing insight into the town’s rationale for not wanting to undertake a beach operation, one New Jersey Assemblyman commented: “Let the state run it. Let the federal government run it. They’ll find it’s not so easy. Take the problem of hiring lifeguards . . . cleanup costs, the police and first-aid problems and the liability issues stemming from administering what the lawyers term an ‘attractive nuisance.’” *Id.*

125. See *Raleigh*, 879 A.2d at 128 (Wallace, J., dissenting) (emphasizing that, because nearby beaches are available to public, they are still able “to enjoy the beach without interfering with the rights of a private beach owner”). The dissent argued:

[B]ecause there is an adjacent beach to defendant’s private property that is available to the public, I find no need to apply the public trust doctrine beyond access to the ocean and access to a reasonable area across defen-

As to the other point of contention, the “usage of the upland sand land by the owner,” the majority relied upon the fact that the beach had been open to the public for at least ten years¹²⁶ and upon the existence of a building permit, which seemingly obligated Atlantis to provide public access.¹²⁷ The dissent, however, aptly noted that the majority’s reliance on the permit was faulty because neither party had advanced that argument.¹²⁸ Instead, the dissent focused its review on Atlantis’s legitimate use of its property for a commercial enterprise.¹²⁹

defendant’s property to the adjacent Seapointe. In my view, that strikes a proper balance between the public trust doctrine, which requires reasonable access and use of the ocean and beaches, and a private owner’s right to use its private property as it deems fit. The record here amply supports the conclusion that access to the water and to Seapointe over defendant’s privately-owned beachfront will reasonably satisfy the public need at this time. I see no justification to exceed that minor intrusion.

Id. at 128-29. Nonetheless, while the dissent seeks to preserve Atlantis’s property rights, it does argue that the public should be afforded additional horizontal space (ten feet in total) for which to walk along the shore because “a three-foot-wide strip would not easily allow for an adult and child to walk within that limited area.” *Id.* at 126.

126. *See id.* at 123 (majority opinion) (discussing upland sand usage). In doing so, the court places significant weight on the existence of a CAFRA permit, but notes that, because neither party relied upon the permit in their arguments, the court would “not here consider the permit dispositive on the issue of public use. Suffice it to say that the Atlantis beach was used by the public for many years.” *Id.*

127. *See id.* at 125 (rationalizing that, due to permit conditions, Atlantis must open beach to public). The CAFRA permit was issued to La Vida in 1986 as a condition of its condominium development, which sits immediately to the west of the Atlantis property. *See id.* at 114 (describing nature of permit). The permit required La Vida to provide for public access to the beach. *See id.* at 123 (same). The majority specifically highlights this permit in its decision. *See id.* at 124 (rationalizing that permit requires Atlantis to open beach to public). While the language of the 1986 permit was ambiguous, the court inferred that “open access and use was ceded to the public by La Vida.” *Id.* at 123. In inferring such, the court drew upon a similar CAFRA permit issued in 1987 to a neighboring property. *See id.* at 114, 123 (explaining terms of Seapointe’s permit and hypothesizing DEP intended beach to be public). Seapointe’s permit expressly required it to open its beach to the public, whereas La Vida’s permit merely required access without mentioning the public’s right to enjoy the upland sand. *See id.* at 114 (comparing Seapointe’s permit to La Vida’s). Compounding the ambiguity of La Vida’s permit are unclear title lines to the Atlantis and La Vida properties, which makes it difficult to determine whether the permit was binding on Atlantis. *See id.* at 114 n.1 (explaining cause of ambiguity in La Vida’s permit). Despite the majority disclaiming any reliance on the CAFRA permit, it nonetheless discusses the permit in great detail. *See id.* at 122-24 (explaining details and effects of permit).

128. *See id.* at 128 (Wallace, J., dissenting) (criticizing reliance on permit).

129. *See id.* at 128 (“Defendant uses its beach as a private-for-profit beach club. . . . Defendant provides its members with security, beach maintenance, lifeguards, and some recreational activities. The only improvement on the land is the boardwalk. Therefore, I find that this factor weighs in favor of defendant.”).

B. Raleigh's Misplaced Reliance on Matthews

While the *Raleigh* court purported to base its holding on precedent established by the *Matthews* court, it strayed considerably from integral aspects of that landmark decision.¹³⁰ Significantly, because the *Raleigh* court failed to regard large portions of the *Matthews* court's rationale, it incorrectly applied *Matthews*'s four part balancing test, thereby destroying Atlantis's private property rights.¹³¹ Because *Matthews* was decided on narrow grounds, the factual context of the case was crucial to that court's holding.¹³² In finding that the Bay Head Improvement Association could not exclude the public, the court highlighted the non-profit association's quasi-municipal nature.¹³³ Yet, there was no similar quasi-municipal analogy available to the *Raleigh* court as Atlantis's property was being used as a for-profit commercial entity with no pre-existing ties to the municipality.¹³⁴

Additionally, one of the most essential elements in the *Matthews* decision was its desire to provide for a balance between public and private interests.¹³⁵ Arguably, the four factor test contemplated by the court was designed to address this very concern.¹³⁶ Thus, before arriving at its totality of the circumstances test, the *Matthews* court offered some guiding re-

130. See Polis & MacRae, *supra* note 10, at 170 (labeling *Raleigh* as "quantum leap from *Matthews*"); see also Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1451 (1990) ("Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests.").

131. See Polis & MacRae, *supra* note 10, at 166 (expanding public trust doctrine results in "derogation of the existing bundle of property rights as they have existed for centuries in New Jersey"). For purposes of this discussion, I will focus on the upland dry sand area of Atlantis's beach because Atlantis conceded vertical access. See *Raleigh*, 879 A.2d at 119.

132. See *Raleigh*, 879 A.2d at 120 ("The factual context in which *Matthews* was decided was critical to the Court's holding.").

133. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 368 (N.J. 1984) ("The Association's activities paralleled those of a municipality in its operation of the beachfront. . . . When viewed in its totality—its purposes, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront—the quasi-public nature of the Ass'n is apparent."). In reaching this conclusion, the court noted that the town had provided office space for the Association in the borough hall, had waived property taxes for the relevant portions of the beach, had provided liability insurance for the Association, and had maintained the boardwalk. See *id.* (listing factors which contributed to court's determination that beach was quasi-municipal). The *Matthews* court noted that: "Where an organization is quasi-public, its power to exclude must be reasonably and lawfully exercised in furtherance of the public welfare . . ." *Id.* at 366.

134. See *Raleigh*, 879 A.2d at 115 (noting Atlantis was commercial, for-profit entity unlike beach association involved in *Matthews*, which was non-profit entity).

135. See *Matthews*, 471 A.2d at 365 (seeking to balance "public's right and the private interests involved").

136. See *Raleigh*, 879 A.2d at 127 (Wallace, J., dissenting) (commenting four factor test was intended to "strick[e] a fair balance between the rights of the public and the interests of the private owner").

marks.¹³⁷ First, the court warned that the intrusion should be permitted only when the public need is “*essential or reasonably necessary*.”¹³⁸ Second, it called for a deferential consideration of the private property interests at stake.¹³⁹ Finally, the court indicated that the public was not entitled to the same rights at private beaches as it was at municipal beaches.¹⁴⁰ Seemingly, public rights in private lands would be satisfied provided that “*reasonable access to the foreshore*” and a “*suitable area for recreation on the dry sand*” were provided.¹⁴¹

In considering these limitations, the award of Atlantis’s entire dry sand beach to the public was not “*essential or reasonably necessary*.”¹⁴² As the dissent aptly notes, and as the majority dutifully concedes, there were numerous beaches available to the beach-going residents of the Association.¹⁴³ While it may have been more convenient for members of the Association to use the beach at Atlantis rather than the beach nine blocks away, the law has never been based on mere convenience.¹⁴⁴

Second, the *Raleigh* court fails to adequately accommodate the interests of the private landowner.¹⁴⁵ Not only did the court’s holding effec-

137. For a discussion of these remarks, see *infra* notes 138-42.

138. See *Matthews*, 471 A.2d at 365. The *Matthews* court stated that “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*.” *Id.* (emphasis added); see also CHRISTIE & HILDRETH, *supra* note 33, at 49 (illustrating limiting language of *Matthews*).

139. See *Matthews*, 471 A.2d at 365 (asserting public’s use of upland sand should be “subject to an accommodation of the interests of the owner”). Furthering this notion, the court notes that, where the parties are unable to agree as to the doctrine’s application, “the claim of the private owner shall be honored.” *Id.* at 370.

140. See *id.* at 366 (remarking “public’s rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches”).

141. *Id.* at 365-66 (limiting access with words “suitable” and “reasonable”) (emphasis added).

142. *Id.* at 365. In evaluating the reasonableness or necessity of the court’s award to the public, it is helpful to consider the second factor of the test—“the extent and availability of publicly-owned upland sand area.” See *id.* at 365 (claiming “test is whether those [already available] means are reasonably satisfactory so that the public’s right to use the beachfront can be satisfied”).

143. See *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 121-22, 128 (N.J. 2005) (commenting on availability of other beaches).

144. See Huffman, *supra* note 67, at 570 (stating “common law has never before been based on desire alone”). Nine blocks is a seemingly small distance for one to travel to reach the beach. See Mulshine, *supra* note 92 (parking deficiency forces people to walk more than one mile to beach); Carole Paquette, *Fight for Parking at Beaches Grows More Intense*, N.Y. TIMES, July 23, 1995, at 13L1 (walking one mile to beach is common). The majority of people not lucky enough to live by the beach typically must drive many miles to reach it, then, due to the lack of parking at most beaches, must park a considerable distance away, assuredly having a walk longer than 1/2 mile to get to the beach. *Id.* (discussing long distances that must be walked to reach beach).

145. See Polis & MacRae, *supra* note 10, at 150 (calling decision “terrible blow to private property owners along the beach in New Jersey”).

tively strip Atlantis of its right to exclude others, one of the most essential “sticks in its bundle of property rights,”¹⁴⁶ but it also diminished Atlantis’s ownership interests by inhibiting the club’s future profitability and decreasing the resale value of its land.¹⁴⁷ While the dissent correctly deferred to Atlantis’s use of its property for a commercial venture,¹⁴⁸ the majority failed to acknowledge Atlantis’s rightful usage of its property as a business venture.¹⁴⁹ Instead, the majority averted attention from this fact by offering a lengthy discussion of two seemingly irrelevant considerations: a building permit—which did not conclusively bind the Atlantis property—and the previous public use of Atlantis’s beach.¹⁵⁰ By placing mini-

146. See *Raleigh*, 879 A.2d at 124 (highlighting argument that court is infringing upon property rights, especially right to exclude) (internal quotations omitted); see also *Polis & MacRae*, *supra* note 10, at 161-62 (remarking “New Jersey beachfront owners have every right to assume that they have the right to exclude the public from their private dry sand areas” and asserting that court should not be able to take away owner’s right to exclude by retroactively revising its interpretation of ancient doctrine).

147. In order to comprehend the extent of the court’s holding it is important to remember that Atlantis’s entire property consisted solely of sand and dunes with no permanent buildings. *Raleigh*, 879 A.2d at 124 (describing Atlantis property). Thus, the decision leaves Atlantis, a once very lucrative, exclusive beach enterprise, with nothing other than the right to sell concessions and rent beach equipment. See *id.* at 125 (advancing acceptable use of Atlantis property in light court’s holding); *Polis & MacRae*, *supra* note 10, at 154 (reporting dry sand area is “what makes beachfront property so attractive to buyers”); *Hanley*, *supra* note 115 (offering standpoint that “United States [is] ‘premised on being able to make a profit’”); see also *Kehoe*, *supra* note 33, at 1914 (“Public access to all oceanfront property irrespective of the landowners’ rights would cause an extreme diminution in property values of privately owned oceanfront land.”).

148. For a discussion of the dissent’s opinion, see *supra* note 129 and accompanying text.

149. In its lengthy discussion of the usage of upland sand, the majority dedicates less than twenty percent of its attention to Atlantis’s use of the beach as a commercial venture. See *Raleigh*, 879 A.2d at 122-24 (writing less than 300 words in 1400 word discussion of this factor). In one of its few mentions of the Atlantis business, it masks the relevance of this private use by injecting cynical limitations. See, e.g., *id.* at 124 (“The owner, after years of public access and use, and despite a condition in the La Vida permit providing for access and, arguably use, decided in 1996 to engage in a commercial enterprise—a private beach club—that kept the public from the beach.”).

150. See *id.* at 122-24 (discussing permit and public use). Despite purporting to dismiss the CAFRA permit, the court nonetheless highlights its existence in its holding. See *id.* at 124 (spending significant time highlighting CAFRA permit). Immediately after dismissing the permit as not being dispositive, the majority returns to its discussion of the permit. The court noted:

[The permit] argument has not been made by any party . . . we, therefore, will not here consider the permit dispositive on the issue of public use. Suffice it to say that the Atlantis beach was used by the public for many years and that public access and, arguably, public use of 220 feet of ocean beach had been required as a condition of a CAFRA development permit.

Id. at 123. The court’s fallback argument to the permit is the recorded public use of Atlantis’s beach from 1986 to 1996. *Id.* at 122-24 (discussing argument). While this would be relevant if the Association had asserted a prescriptive easement or a

mal importance on the fact that Atlantis was acting as a legitimate commercial enterprise, the court masks the decision's true effect, which effectively forced Atlantis to turn its profitable company into a non-profit public entity.¹⁵¹

Lastly, the *Raleigh* court abandoned the notion that public rights in public beaches should not be indistinguishable from public rights in private beaches.¹⁵² By ordering Atlantis to limit its fees and offer services comparable to those of municipal beaches,¹⁵³ the court effectively turned

dedication claim, prior public use before the establishment of Atlantis's enterprise hardly seems as though its should be given momentous weight in reviewing the factor entitled "usage of the upland sand land by the owner." *Id.* at 122 (placing weight on prior public use argument) (emphasis added). Consideration of the use "by the owner" is not satisfied by discussing the area's "public use." *See, e.g.*, Strunsky, *supra* note 42 (noting that divergent interests of public beach-goers and private property owners is driving beach-access controversy).

One must wonder if the reason for the majority's dependence on the CAFRA permit and past public use is based upon the background principles of dedication. *See supra* note 52 and accompanying text (discussing dedication). In fact, had the Association grounded its claim in the common law theory of dedication, it is likely that the case would have turned out the same way, but without a concurrent expansion of the public trust doctrine. *See, e.g.*, Sullivan, *supra* note 3, at 336 (indicating that previous owners' intent to dedicate would be binding on new owners). While the language of the permit was ambiguous and the chain of title was somewhat vague, it is likely that an intent to dedicate could have been extracted. *See Raleigh*, 879 A.2d at 114 n.1 (noting ambiguity and unclear title); Sullivan, *supra* note 3, at 336 ("[P]revious owners may have been responsible for the dedication and had the requisite intent to dedicate."). Nonetheless, the Association advanced a public trust argument, so the court did not need to address the issue of dedication based upon the 1986 La Vida CAFRA permit. *See Raleigh*, 879 A.2d at 116 (enumerating Association's claims).

151. *See Reckord, supra* note 12, at 251-52 (commenting on Atlantis's new role as public beach).

152. The *Matthews* holding suggested that public rights in private beaches are limited. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (asserting public's use of upland sand should be "subject to an accommodation of the interests of the owner").

153. *See Raleigh*, 879 A.2d at 124 (approving appellate court approach). The New Jersey Superior Court held that public trust lands are "incompatible with the concept of profit." *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 33 (N.J. Super. Ct. App. Div. 2004). In so holding, the court asserted that Atlantis may only charge such fees as to be able to recoup reasonable operating expenses. *See id.* ("recognizing that it should reflect an amount sufficient to cover costs of operation"). Furthermore, these fees must be "reasonable and comparable to other beach tag charges in the region" and any desired increases in access fees must first be approved by a state regulatory agency. *Id.*; *see also* Polis & MacRae, *supra* note 10, at 150 (asserting fees approved for Atlantis were substantially "lower than what many municipalities in New Jersey charge for access to public beaches"). The court also held that in order to charge fees Atlantis must continue to "provide customary lifeguard services comparable to that provided by public entities, regular beach maintenance, included cleaning and trash pickup, and outdoor showers." *Id.* While the court conceded that Atlantis may still engage in for-profit food concessions and chair or cabana rentals, it seems likely that this minor venture was not a driving factor in the profitability of Atlantis's operation. *See id.* (listing permissible profitable activities).

Atlantis into a municipal beach.¹⁵⁴ Additionally, by holding that Atlantis's entire upland beach must be opened to the public, the court did much more than afford the public a "suitable area for recreation"—it provided the public an excessive area.¹⁵⁵ Because the litigants only sought a "suitable area" of dry sand, it was unnecessary for the court to undertake such a bold expansion of the public trust to Atlantis's detriment.¹⁵⁶ Thus, as the foregoing discussion illustrates, the *Raleigh* court greatly advanced the rights of the public without heeding any of the cautions advanced by the *Matthews* court.¹⁵⁷

C. *Preparing for the Storm: The Future of Private Beachfront Ownership in New Jersey*

1. *Raleigh's Far-Reaching Implications*

One of the primary problems with the *Raleigh* decision is deciphering which private landowners are bound by the decision.¹⁵⁸ *Raleigh* made

154. See Polis & MacRae, *supra* note 10, at 171 (commenting *Raleigh* blurs distinction between public and private beaches); see also *Raleigh*, 851 A.2d at 30 ("The services provided privately by Atlantis fill an important void, given the lack of services provided by the Township.")

155. In the past, New Jersey has focused its demands for dry sand by seeking to increase the amount of dry sand accessible to the public by a certain number of feet beyond the mean high-tide line. See, e.g., Strunsky, *supra* note 42 (discussing access battle in Point Pleasant Beach, New Jersey where state sought additional ten feet beyond mean high-tide line for public use). The trial court, for example, suggested that the public be entitled to utilize three feet beyond the tide line. See *Raleigh*, 879 A.2d at 125-26 (Wallace, J., dissenting) (citing trial court's holding). The dissent, approving of the trial court's approach, thought that an additional ten feet would be more reasonable in order to allow an entire family to "safely traverse" the beach. See *id.* at 129 (remarking that ten feet is sufficient). Even the State asserted that the public should be entitled to a reasonable amount of dry sand, which it noted would be an "area of at least 10 feet wide above the mean high water line." *Id.* The court's holding was excessive because rather than expanding the public trust land as measured by the mean high-tide line by a reasonable number of feet, the court opened the upland dry sand area to the public—an area which spanned 342 feet. See *id.* at 113, 123 (majority opinion) (holding that entire dry sand area was available for public use).

156. See *Raleigh*, 879 A.2d at 116 (seeking "sufficient amount of dry sand above the mean high water line to permit the public to enjoy the beach and beach related activities").

157. The *Matthews* court explicitly refused to open all private dry sand beaches to the public. See *Matthews*, 471 A.2d at 369 ("The Public Advocate has urged that all the privately-owned beachfront property likewise must be opened to the public. Nothing has been developed on this record to justify that conclusion."); see also Langella, *supra* note 7, at 207 (emphasizing limited nature of *Matthews* holding).

158. See Mulshine, *supra* note 92 (detailing uncertainty of future application); see also Baldas, *supra* note 12 (commenting key issue is "determining at what point along the shoreline does private property end and public access begin"). Baldas also offered the comments of Stuart Lieberman, the attorney who represented the Raleigh Beach Neighborhood Association. *Id.* After the New Jersey Supreme Court's ruling, the attorney was quoted as saying that "[e]very single beach owner who thought they could exclude the public is taking a long, hard look at this deci-

clear that landowners are no longer required to be “quasi-municipal” in order to be subjected to the public trust doctrine.¹⁵⁹ Perhaps the court’s holding could be distinguished so as to only apply to certain classes of private beachfront landowners such as those already engaged in a commercial beach enterprise or neighborhood associations who collectively pool their beach ownership rights thereby controlling larger stretches of beach.¹⁶⁰ The holding, however, will more likely be interpreted broadly and will apply to individual homeowners as well.¹⁶¹ Historically, New Jersey courts have favored expansion when deciding public trust cases.¹⁶² As such, the decision would likely be binding on all private oceanfront landowners,¹⁶³ not to mention property owners of other waterfront property whose land is similarly restricted by the public trust doctrine.¹⁶⁴

sion and is wondering what the future has in store for them in light of the case.”
Id.

159. *Raleigh*, 879 A.2d at 120-21 (mentioning vital facts in *Matthews*, specifically quasi-public nature of beach, but failing to consider whether Atlantis was quasi-public entity); see also Reckord, *supra* note 12, at 268 (“The Court acknowledged the quasi-public nature of the Improvement Association in *Matthews*, but never addressed the issue of whether Atlantis was in fact quasi-public.”).

160. For a discussion of beaches susceptible to the *Raleigh* decision, see *supra* note 95-97 and accompanying text. *But see* Polis & MacRae, *supra* note 10, at 150 (analogizing decision’s effect to “Jaws”). Polis and MacRae note:

The “backyards” of thousands of land owners have been appropriated by the court. There will be those who seek to limit the application of these decisions to the facts of the case. Such a limitation is misguided. If the movie *Jaws* terrified beachgoers when it was released, then a similar terror will result by this decision for landowners everywhere.

Id.

161. See Baldas, *supra* note 12 (commenting that “ruling will set a precedent but a dangerous one”); Diskin, *supra* note 16 (indicating individual homeowners could be affected and remarking “many private beaches . . . may be forced to have their fees set by the state”); Hanley, *supra* note 115 (remarking hopefully that *Raleigh* decision “will provide a powerful legal tool for future court fights against exorbitant charges by beach clubs and private beach owners who try to keep the public from the ocean waters and sand in front of their dunes and homes”); Monica Yant Kinney, *Beachgoers’ Grit Vanquished Greed*, PHILA. INQUIRER, Aug. 11, 2005, at B1 (commenting because of *Raleigh* decision “you, too, can safely sit *anywhere along the Jersey Shore*”) (emphasis added); see also Scott, *supra* note 24, at 44 (surveying New Jersey’s acquisitive application of public trust).

162. See Scott, *supra* note 24, at 38, 44 (highlighting New Jersey’s expansive approach to public trust doctrine).

163. For a review of the retroactivity of judicial decisions regarding the public trust doctrine, see *supra* note 80.

164. While most public trust commentary and judicial application revolves around oceanfront property, the public trust is applicable to lands abutting any navigable waterway. Thus, public trust expansion has the probable effect of also encumbering landowners whose property abuts rivers, streams, lakes and bays. See Polis & MacRae, *supra* note 10, at 170 (criticizing far-reaching implications of *Raleigh* decision). Polis and MacRae state:

The doctrine governs all lands submerged by tidally controlled waters. However, the beaches of the Atlantic Ocean are not the only lands submerged by tidal waters . . . a vast majority of these lands . . . are abutted by private property. If the public is supposed to have unfettered access to

Thus, in order to assure their rights in private beaches and to ascertain the outer limits of those rights, it is likely that, in the wake of this decision, the public will instigate significant lawsuits against these varying classes of private owners.¹⁶⁵

More tragically, private landowners will be forced to bear the extreme economic costs associated with defending such allegations, only to find out that they are fighting a losing battle.¹⁶⁶ Without question, the *Raleigh* decision has minimized any existing safeguard to public trust expansion by facilitating a more lenient application of *Matthews's* totality of the circumstances approach.¹⁶⁷ In fact, by making the test so easy for the public to satisfy, it could even be argued that the *Raleigh* decision effectively abandoned *Matthews's* protections. Seemingly, the public will win regardless of how the private landowner is utilizing their property any time the public can show: it has a strong desire to use the beach,¹⁶⁸ it is inconvenient to access other public beaches¹⁶⁹ and the private dry sand beach abuts the foreshore.¹⁷⁰

public trust lands, what is to stop an individual from traversing the private property of a bay-front or river-front homeowner to go fishing or kayaking? . . . [I]t would appear to be logically inconsistent for the New Jersey courts to rule that the public has unfettered access to one type of public trust lands (the beaches) but yet can be barred from easily accessing another type of public trust lands (tidal rivers and bays).

Id.

165. See Burling, *supra* note 20, at 40 (stating litigation is certain).

166. See Michael A. Culpepper, *The Strategic Alternative: How State Takings Statutes May Resolve the Unanswered Questions of Palazzolo*, 36 U. RICH. L. REV. 509, 525 (2002) (revealing takings litigation is costly).

167. See Polis & MacRae, *supra* note 10, at 171 (calling *Raleigh* decision "act of intimidation following *Matthews*").

168. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 122 (N.J. 2005) ("Local residents . . . have expressed their individual concerns about access and use.").

169. See *id.* at 115-16, 121-22 (complaining of inconveniences involved with other accessible beaches).

170. See *id.* at 127 (Wallace, J., dissenting) (arguing "dry sand area of the Beach Club is directly adjacent to the wet sand and ocean"). This factor relating to the location of the dry sand area in relation to the foreshore seems trivial because wet and dry sand, by definition, are always adjacent. See Morang & Parson, *supra* note 5, at IV-1-6 (advancing interconnected definitions of beach, foreshore, dry sand and wet sand). Curiously, the New Jersey Supreme Court failed to explain how to properly apply this factor in *Matthews*, its 1984 landmark decision. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (including "[l]ocation of the dry sand area in relation to the foreshore" as one factor in four-part test without offering explanation of factor or providing example of how to apply factor). In fact, the *Raleigh* court is the first court to discuss this factor since the court's landmark decision in *Matthews*. See *Raleigh*, 879 A.2d at 121 (finding factor weighed in favor of public's claim without offering adequate explanation of factor); see also *City of Long Branch v. Liu*, 833 A.2d 106, 110 (N.J. Super. Ct. Law Div. 2003) (citing *Matthews* without discussing factor regarding location of dry sand in relation to foreshore); *E. Cape May Assocs. v. Dep't of Env't. Prot.*, 777 A.2d 1015, 1034 (N.J. Super. Ct. App. Div. 2001) (same); *State v. Vogt*, 775 A.2d 551, 560-61 (N.J. Super. Ct. App. Div. 2001) (same); *Stowell v. N.J. Ass'n of Chiefs of*

Even more unjust, the *Raleigh* decision has the effect of forcing private landowners into a business that they had no intention of ever being involved in when they bought their oceanfront lot—certainly not a bargained-for exchange.¹⁷¹ The court in *Raleigh* essentially offered Atlantis two options. The first available option was to willingly open its beach to the public while providing the appropriate beach related services and charging a fee no higher than was necessary to recoup its operational costs.¹⁷² In the alternative, Atlantis could opt out of the beach business by refusing to provide beach services or to charge a fee. The catch to this seemingly more appealing alternative is that the public would still have the right to free access of Atlantis's beach.¹⁷³ While these alternatives provide a win-win situation for the public by giving them unfettered use of the beach at either no fee or a minimal fee, they provide a catch-22 for private landowners.¹⁷⁴

Under the first alternative, the landowners are forced to enter an unfamiliar business replete with added liabilities and no reciprocal benefit.¹⁷⁵ The landowners are permitted to charge a fee, but only one large enough to recover their costs.¹⁷⁶ In setting this fee, the landowners run the risk of incorrectly forecasting demand and thereby improperly setting the fee.¹⁷⁷ Thus, there remains a potential to realize a financial loss under the first option.¹⁷⁸ On the bright side, however, because the landowners have decided to charge a fee for beach access, it is likely that fewer people

Police, 739 A.2d 1011, 1013 (N.J. Super. Ct. App. Div. 1999) (same); *Bubis v. Kassin*, 733 A.2d 1232, 1239 (N.J. Super. Ct. App. Div. 1999) (same); *State v. Oliver*, 727 A.2d 491, 496 (N.J. Super. Ct. App. Div. 1999) (same); *Anfuso v. Seeley*, 579 A.2d 817, 823, 829 (N.J. Super. Ct. App. Div. 1990) (same); *Slocum v. Belmar*, 569 A.2d 312, 316 (N.J. Super. Ct. Law Div. 1989) (same); *Jersey City v. State Dep't of Env'tl. Prot.*, 545 A.2d 774, 782 (N.J. Super. Ct. App. Div. 1988) (same); *Cos-Lin, Inc. v. Spring Lake Bd. of Adjustment*, 534 A.2d 44, 48 (N.J. Super. Ct. App. Div. 1987) (same).

171. See *Polis & MacRae*, *supra* note 10, at 170 (calling *Raleigh* decision "judicial activism at its worst").

172. See *Raleigh*, 879 A.2d at 125 (holding Atlantis only entitled to recoup "expenses actually incurred").

173. See *id.* at 124 (holding upland sands must be available to public).

174. See *Polis & MacRae*, *supra* note 10, at 170 (criticizing *Raleigh's* effect on private landowners).

175. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 33 (N.J. Super. Ct. App. Div. 2004) (stressing profits are incompatible with beach access).

176. See *id.* (limiting fees to only cover expenses).

177. See *Diskin*, *supra* note 16 (commenting Atlantis has yet to recoup operating expenses); see also *Hanley*, *supra* note 115 ("[Atlantis's] president and co-owner, Robert Ciampitti, is incensed at both the ruling and state-imposed fees, saying they do not cover the club's property taxes and other costs of operation, let alone provide a profit.").

178. See *Diskin*, *supra* note 16 (noting Atlantis's expenses); *Mulshine*, *supra* note 92 (providing statements from Senator Connors, who asserts that, financially, beach operations are difficult).

will use this beach than if the landowner opted out of the beach business.¹⁷⁹

Alternatively, the landowner can pursue the second option, choosing not to enter the beach business.¹⁸⁰ In so choosing, the landowners open themselves up to added liability and the possibility that more people will utilize their free beaches—a rare commodity on the Jersey Shore.¹⁸¹ Additionally, the landowners will be unable to recoup any costs associated with the beach over which they no longer retain exclusive control.¹⁸² Under the current decision, property taxes will still be levied on this upland dry sand area and, unless the landowner opts to enter the beach business in order to allocate these expenses to the beach-going public, the landowner will be forced to subsidize this public benefit.¹⁸³ Furthermore, degradation of our natural resources is inevitable under this alternative because the beaches will be subjected to overuse without sufficient maintenance.¹⁸⁴ The Tragedy of the Commons suggests that, when provided with the opportunity to exploit a natural resource, the public will do so by failing to adequately preserve it.¹⁸⁵ In our scenario, the public would fail

179. See generally David R. Henderson, *Demand*, in CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2005), available at <http://www.econlib.org/library/Enc/Demand.html> (“The law of demand states that when the price of a good rises, the amount demanded falls, and when the price falls, the amount demanded rises.”).

180. See *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 118 (N.J. 2005) (presenting option to opt out of beach business).

181. See *id.* (stating beach would remain “open and free”); see also Mulshine, *supra* note 92 (discussing liability).

182. See Diskin, *supra* note 16 (discussing economic consequences of public trust doctrine).

183. See Timothy J. Grendell, *Private vs. Public Land Should be Obvious Distinction*, COLUMBUS DISPATCH (Ohio), Aug. 27, 2005, at 11A (indicating private waterfront homeowners pay taxes on beach).

184. The Tragedy of the Commons refers to the degradation of resources that can occur when they are opened to the public at large. See J. Miles Hanisee, Comment, *An Economic View of Innovation and Property Right Protection in the Expanded Regulatory State*, 21 PEPP. L. REV. 127, 148-49 (1993) (defining theoretical underpinnings). The theory suggests that “[a]s each user seeks to maximize his own gain, the property’s limits are surpassed and waste results. One individual alone may not be the sole cause of the decline in common resources. Rather, numerous parties’ utilization of the resource to the maximum extent possible leads to the deterioration.” *Id.* (citing to “Tragedy of Commons” inventor, Garrett Hardin, in *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968)). See also Amy Henn et al., *Overdevelopment of North Beach: A Psychological Analysis*, <http://www.users.muohio.edu/shermarc/p412/team197.html> (last visited Mar. 14, 2006) (discussing how tragedy of commons has affected beaches in Hawaii). See generally GERALD GARDNER & P.C. STERN, ENVIRONMENTAL PROBLEMS AND HUMAN BEHAVIOR (1995) (discussing tragedy of commons in environmental capacity). But see generally Robert J. Smith, *Resolving the Tragedy of the Commons by Creating Private Property Rights in Wildlife*, 1 CATO J. 439 (1981), available at <http://www.cato.org/pubs/journal/cj1n2/cj1n2-7.pdf> (arguing land privatization can remedy public abuse).

185. See Hanisee, *supra* note 184, at 148 (explaining fundamentals of tragedy of commons).

to clean up after themselves, thereby polluting the beaches.¹⁸⁶ Thus, as illustrated above, the decision in *Raleigh* is extremely, and unjustifiably, burdensome on the private landowner.¹⁸⁷

2. *Constitutional Dilemmas Raised by Raleigh*

While denying an oceanfront landowner constitutional due process protections, the *Raleigh* decision also has the ability to effectuate an uncompensated taking of private property.¹⁸⁸ Under modern property law, a landowner takes title to a piece of property with notice of any encumbrances against that property.¹⁸⁹ But, in the case of beachfront ownership, purchasers take title with constructive knowledge that their land below the mean high-tide mark is burdened by the public trust.¹⁹⁰ Thus, in making a purchase decision, the potential owners are aware that their right to exclude others is limited within the public trust land.¹⁹¹ The laws of economics suggest that the price of such property will reflect this encumbrance.¹⁹² Of course, this symbiotic relationship becomes meaningless when the public trust doctrine is subjected to continuous judicial expansion that can, after the fact, broaden the rights of the public in those beachfront properties.¹⁹³

186. See *id.* at 150 (explaining that waste results as public access increases and private entrepreneurs cease to invest efforts in common areas); see also Nina Rizzo, *Tempers Sizzle Over Beach Access*, ASBURY PARK PRESS (N.J.), July 22, 2001, at A1 (discussing health and safety concerns on specific New Jersey beach where private owners have allowed public to use their beach). Rizzo's article notes that "crowds have evolved into a public health and safety concern. There are no lifeguards, bathrooms, changing rooms or trash facilities here. But that isn't stopping people from relieving themselves, disrobing and dumping their garbage on the beach." *Id.*

187. See Polis & MacRae, *supra* note 10, at 171 (indicating *Raleigh* decision would be reversed on appeal to federal court).

188. See Langella, *supra* note 7, at 190 ("If the government sponsored unlimited public access, private property owners would be deprived of their rights without due process of law. Such government sponsored deprivations of private property rights without compensation would constitute a taking.").

189. For a discussion of title economics, see *infra* notes 191-92 and accompanying text.

190. See Polis & MacRae, *supra* note 10, at 169 (discussing property rights inherent in title).

191. See Kotsianans, *supra* note 44 (illustrating owners' concerns).

192. See Robyn L. Meadows, *Warranties of Title, Foreclosure Sales, and the Proposed Revision of U.C.C. § 9-504: Has the Pendulum Swung Too Far?*, 65 FORDHAM L. REV. 2419, 2429 n.52 (1997) (explaining that "buyer will pay less if the buyer knows of any outstanding encumbrance").

193. See Burling, *supra* note 20, at 39 (discussing consequences of judicial expansion of public trust doctrine). Mr. Burling, who argued in front of the Supreme Court on behalf of the landowner in *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001), equates the expansion of the public trust doctrine to an unconstitutional taking. See Burling, *supra* note 20, at 39. Burling argues:

[I]f a property right was initially created without being subject to the modern notions of an expanded public trust, then any later imposition of the newly defined public trust carries with it significant takings implica-

Consider, for example, the effect of *Raleigh* on the property owner's expectations. Atlantis purchased the beach, assuredly at a premium, under the assumption that it could exclude others from its dry sand.¹⁹⁴ During the tenure of its ownership, the court redefined the public trust, holding that Atlantis must open the entirety of its property to the public.¹⁹⁵ As a result, Atlantis is no longer able to exclude *anyone* from *any* portion of its property.¹⁹⁶ Not only does this decision have the effect of redefining Atlantis's property rights, but it also has the effect of depleting any investment expectations that Atlantis presumed in its land.¹⁹⁷

Inherent in our Constitution is the notion that individual property owners should not be forced to bear the burden of meeting public demands.¹⁹⁸ In fact, the Fifth Amendment expressly provides that private property shall not "be taken for public use, without just compensation."¹⁹⁹ As such, one of the most fundamental guarantees associated with individual property interests is that they will not be redefined absent compensation.²⁰⁰ Certainly, where the public trust doctrine is expanded in such a

tions. Once a government sees fit to create a property right, that right cannot later be abrogated or taken away at whim—unless just compensation is paid and there is due process.

Id.; see Polis & MacRae, *supra* note 10, at 169 ("To expand into the dry sand would be to unbundled the set of property rights a landowner receives, and more importantly, expects to be part of the bundle of rights inherent in the title acquired upon purchase.").

194. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124 (N.J. 2005) (discussing exclusivity of use).

195. See *id.* at 124-25 (advancing holding).

196. See *id.* at 125 (opening Atlantis's upland sands to public).

197. See Polis & MacRae, *supra* note 10, at 150 (concluding *Raleigh* is "terrible blow to private owners along the beach in New Jersey"); Diskin, *supra* note 16 (noting Atlantis is considering filing takings claim in U.S. Supreme Court); see also Huffman, *supra* note 67, at 532 ("[A]dvocates of the modern public trust doctrine seek to achieve purposes not contemplated by the traditional doctrine. In the process, they would disappoint reasonable expectations based upon the previously accepted interpretation of the doctrine.").

198. See Breemer, *supra* note 28, at 282 (indicating purpose of takings jurisprudence is to encourage governments to "carefully tailor their land use decisions so that individual property owners do not bear a disproportionate share of the cost of providing public goods").

199. For a discussion of the Fifth Amendment, see *supra* note 23 and accompanying text.

200. See Burling, *supra* note 20, at 39 ("The definition of private property rights depends on 'existing rules and understandings,' and when we actually rely upon such rules and understandings, there is no place for such a transformation of property rights."); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Pa. Coal v. Mahon*, 260 U.S. 393, 414-15 (1922)). Justice Scalia explained pre-*Mahon* takings jurisprudence:

[I]f the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to ex-

way as to “take” property from a private owner so that it may be used by the public at large, the Fifth Amendment is implicated and its teachings are offended.²⁰¹

While the Fifth Amendment has generated a significant library of jurisprudence, when considering the property rights redefined by the public trust doctrine, we must look to the law as it relates to “permanent physical occupations”²⁰² at the “behest of the public.”²⁰³ In *Nollan v. California Coastal Commission*,²⁰⁴ the Supreme Court reviewed its takings jurisprudence and noted that:

[W]here governmental action results in “[a] permanent physical occupation” of the property, by the government itself or others, “our cases uniformly have found a taking . . . without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.” We think a “permanent physical occupation” has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.²⁰⁵

This language has particular implications for the constitutionality of the *Raleigh* decision, which has the effect of not only giving the public a permanent right to pass through Atlantis’s property, but also an unregulated right to remain on that property.²⁰⁶ By expanding the public trust doc-

tend the qualification more and more until at last private property disappeared.”

Id.

201. See Polis & MacRae, *supra* note 10, at 162 (remarking *Raleigh* decision “will undoubtedly reprise interest in a regulatory takings challenge”); see also Burling, *supra* note 20, at 39 (“[I]f a court redefines such existing rules and understandings, then a judicial taking may occur.”). While it is clear that the legislative branch is bound by the Fifth Amendment, it is less clear as to whether the judiciary is similarly bound. See generally Thompson, *supra* note 130 (raising issue of judicial takings). There has been considerable discussion as to whether decisions by the judicial branch can effectuate a taking. See *id.* (reviewing feasibility of judicial takings); see also Reckord, *supra* note 12, at 252 (same). For purposes of this discussion, I will assume that the Fifth Amendment is intended to equally bind all branches of the government, including the judiciary. See Polis & MacRae, *supra* note 10, at 169 (stating that subjecting court to constitution is appropriate); Reckord, *supra* note 12, at 285 (suggesting judicial activity should be subject to strictures of Fifth Amendment).

202. See Scott, *supra* note 24, at 51-53 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

203. See *id.* (identifying type of taking as characterized by Justice Scalia in *Lucas*).

204. 483 U.S. 825 (1987).

205. *Id.* at 831-32 (1987) (internal citations omitted).

206. See *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124 (N.J. 2005) (awarding all upland sands). While it is true that Atlantis may charge for this right, the property remains open to the public regardless of Atlan-

trine in such a destructive way for private landowners, the New Jersey Supreme Court stepped far beyond the constraining provisions of the Constitution.²⁰⁷ Indeed, our Founding Fathers would be shocked to learn that a court, calling upon the public trust doctrine, could effectively take private property for public use without just compensation—yet this is precisely the effect of the court's recent decision in *Raleigh*.²⁰⁸

The future of private property rights is uncertain in the wake of the *Raleigh* decision.²⁰⁹ If other courts follow New Jersey's lead, the constitutional pillars put in place by the Framers will crumble.²¹⁰ If the judiciary is to succumb to the ever-changing and sometimes frivolous demands of the public, cherished American property rights will continue to be swept away with the tide.²¹¹ Moreover, this decision has the potential to impact private property interests in areas other than the beach; broad definitions of "public trust lands" are stretched to include any area in which the public finds value.²¹² Thus, while it is too early to tell how far the *Raleigh* decision will be carried, its potential to erode the constitutionally protected rights of private landowners is troublesome.²¹³

tis's decision whether or not to charge. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 30-33 (N.J. Super. Ct. App. Div. 2004) (reviewing fee structure).

207. See Polis & MacRae, *supra* note 10, at 166 (arguing *Raleigh* decision violates Fifth Amendment by not paying just compensation); see also Huffman, *supra* note 67, at 559 ("By expanding the scope of public trust rights, the state will expand its ability to regulate beyond the constraints of the Constitution. The state can thus evade the due process and takings limits on the police power by extending the reach of the public trust doctrine.").

208. See Burling, *supra* note 20, at 39 (reviewing fundamentality of private property).

209. See Polis & MacRae, *supra* note 10, at 166 (indicating *Raleigh* is physical invasion that destroys vested property rights). Because of the impending disaster, private property owners along the Jersey Shore would be well advised to proactively team up and assert a takings claim, before their properties are similarly burdened. See Reckord, *supra* note 12, at 273 ("Such limitless expansion affects the entire coastline of the state and negatively impacts all oceanfront landowners.").

210. See Polis & MacRae, *supra* note 10, at 166 (explaining that giving New Jersey easement over private dry sand "would violate basic property rights, redefine common law expectations in titles, and defy Supreme Court precedent"); see also Pecquet, *supra* note 22 ("Even the most ingenious constitutional safeguards will wither and die if the public no longer appreciates the importance of liberty and property and if they can be made to believe that the crises of the day invariably requires extra-constitutional remedies.").

211. See Huffman, *supra* note 67, at 572 ("Liberty is nothing if it is to be subjected to such utilitarian calculation, or to the dictatorship of unconstrained majoritarianism.").

212. See Scott, *supra* note 24, at 20 (including in definition of public trust, "public parks or any land that possesses attributes in which the public has a found value").

213. See Polis & MacRae, *supra* note 10, at 170 ("It would appear to be logically inconsistent for the New Jersey courts to rule that the public has unfettered access to one type of public trust lands (the beaches) but yet can be barred from easily accessing another type of public trust lands.").

V. THE NEED FOR REFORM—REALIGNING PRIVATE PROPERTY INTEREST WITH PUBLIC ACCESS RIGHTS

As the foregoing discussion illustrates, there are serious constitutional dilemmas raised when expanded versions of the public trust doctrine are used to address coastal access issues.²¹⁴ While the doctrine certainly provides the public with the increased rights it seeks, it has the effect of being unduly oppressive on the affected private landowners.²¹⁵ The solution to this problem is not to bar the public from gaining increased rights in our nation's beaches, but rather to implement a process capable of achieving an equitable balance between the private and public interests at stake.²¹⁶

There are many potential ways for a state to achieve greater public rights without infringing upon private interests.²¹⁷ States should first seek to utilize common law doctrines such as dedication, prescription and custom. In the past, these tactics have been successful and there is no reason to abandon them in favor of more intrusive means.²¹⁸

Second, states should implement legislation capable of increasing public rights. States with effective legislation in place will not need to resort to more controversial tactics.²¹⁹ Coastal legislation could serve a number of purposes, each with the potential for rectifying the current imbalance that exists in New Jersey. For example, it could preserve existing public beaches, prevent new coastal development or demand governmental acquisition of beachfronts as they become available for sale. Furthermore, it has been suggested that states could condition pending development upon the dedication of beaches to the public.²²⁰ Such development conditions, however, must be applied carefully in light of the court's ruling in *Nollan*.²²¹ Another creative use of legislation would be to

214. See Huffman, *supra* note 67, at 572 (surmising that modern public trust law "is not consistent with the basic premise of constitutional democracy").

215. See *id.* at 528 (asserting public trust law "infringes upon vested private property rights").

216. After all, this is what the *Matthews* court had in mind when holding that "the public's use of the dry sand area [is] subject to an accommodation of the interests of the owner." *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369 (N.J. 1984). Delaware's public trust jurisprudence offers an example of how this balance can be achieved. See Scott, *supra* note 24, at 45-48 (discussing Delaware's public trust law). For a further discussion of Delaware's jurisprudence, see *supra* note 77.

217. See, e.g., Polis & MacRae, *supra* note 10, at 171 (suggesting states should use eminent domain powers to acquire private dry sand).

218. For a discussion of common law methods, see *supra* notes 51-54 and accompanying text.

219. For a discussion of various legislative intents and impacts, see *supra* notes 60-61.

220. For a discussion of dedications as a potential tool for providing beach access, see *supra* note 52.

221. See Finnell, *supra* note 33, at 629 (discussing how conditions need to be applied in light of U.S. Supreme Court decision in *Nollan*).

create tax incentives encouraging beachfront property owners to dedicate an access route or a dry sand beach to the public.²²²

Lastly, if all else fails, states should call upon their eminent domain powers to buy back these treasured lands from private hands.²²³ Despite the current backlash against eminent domain, it is extraordinarily well suited for these situations.²²⁴ In fact, our Founding Fathers would assuredly approve of reclaiming the nation's beaches for use by the public, provided, of course, that just compensation is paid to rectify the loss to private owners.

Private coastal property rights have reached a pivotal moment in their fate.²²⁵ The abuse of the public trust doctrine is a tempting tool for those who wish to expand the public domain at the expense of a time-honored American liberty.²²⁶ Provided the right tools are utilized, all hope is not lost—the future of property rights can be navigated so as to balance both private and public interests in the coast.

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222. See Peter B. Brace, *The Party's Over in Nantucket*, BOSTON GLOBE, July 13, 2003, at H12 (discussing similar approach being used in Nantucket, Massachusetts).

223. States, by using their eminent domain powers to rectify beach access problems, would avoid a takings claim. See Breemer, *supra* note 28, at 300 (explaining use of eminent domain is often objectionable but is “the price of freedom”); Huffman, *supra* note 67, at 572 (same); Scott, *supra* note 24, at 53-54 (“[I]f the public feels it has a need for a resource, it should compose a means by which to set aside assets to purchase it. It should not merely redefine the rules by which the game is played.”).

224. See CALLIES ET AL., *supra* note 63, at 286 (commenting “early state court decisions required actual use by the public in order to satisfy the constitutional requirement”).

225. See Baldas, *supra* note 12 (pointing out that *Raleigh* decision sets dangerous precedent that could lead to future abuse of private property rights).

226. See *id.* (stating “it appears that public beach-goers are winning” beach access fight and commenting that “expansion of the public trust doctrine has altered the doctrine’s original intent”); Hanley, *supra* note 115 (calling *Raleigh* decision “powerful tool” for public activists in future access cases).