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The Public Trust Doctrine: The Development of New York's Doctrine and How It Can Improve

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THE PUBLIC TRUST DOCTRINE: THE DEVELOPMENT OF NEW YORK'S DOCTRINE AND HOW IT CAN IMPROVE

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I. HISTORY OF THE PUBLIC TRUST DOCTRINE

The modern public trust doctrine is over a thousand of years in the making and can be traced back to the Roman *Institutes of Justinian*.[1] The doctrine initially intended to preserve citizens' access and use of the air, running water, sea and the seashore—all were considered to be too valuable to the public to be held as private property.[2] Book II, Title I of the *Institutes of Justinian* emphasized the public's need to use these waterways for commerce and transporting cargo.[3] Moreover, the Institutes accentuated the importance of preserving the seashore for the public to allow commuters to stop along their voyage and fasten cables to trees as a resting place for their cargo.[4] This general theory was recognized in England and prohibited the King from alienating certain lands that were generally used for egress and ingress for fishing, trading and other uses by his subjects.[5] Only Parliament could enlarge or diminish these public rights.[6]

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[1] Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989).

[2] JUSTINIAN, *INSTITUTES*, Book II ¶¶ 1, 5 (J.B. Motle trans. 1911), at 19, http://amesfoundation.law.harvard.edu/digital/CJCiv/JInst.pdf.

[3] *Id.* ¶ 4

[4] *Id.*

[5] Joseph L. Sax, *The Public Trust Doctrine in National Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 478 (1970).

[6] *Id.*

The public trust doctrine was first recognized as United States' common law in the 1892 landmark United States Supreme Court decision in *Illinois Central R.R. v. Illinois*.[7] In that case, the Court invalidated an Illinois law that granted the Illinois Central Railroad Company title to submerged lands in the Chicago Harbor.[8] More recently, federal courts have begun demonstrating reluctance to further develop the doctrine,[9] leaving its application to the states. In the wake of the handful of cases that adjudicated the federal common law doctrine, we are left with a federal doctrine that protects navigable-in-fact waters and the surrounding beds up to the high-water mark, holding them in trust for the public's use for navigation, fishing or commerce.[10]

Although the federal government began developing a federal doctrine in the late 1800s, this area is not preempted—each state has the power to adopt and develop its own public trust doctrine,[11] ultimately causing substantial differences in its application among the states. This is further exacerbated by the limited federal precedent on this topic. For example, the courts and legislature in Montana have applied the doctrine to protect any surface of water that can be used for recreational purposes.[12] Other states have extended the doctrine beyond just commerce, navigation, and fishing to include open space, wildlife habitats, areas used for scientific purposes, hunting, bathing,

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[7] Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

[8] *Id.* at 433-34.

[9] Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?*, 19 PUB. LAND & RESOURCES L. REV. 51, 53 (1998); Dist. of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1078 (D.C. Cir. 1984) ("declin[ing] to consider . . . whether the public trust doctrine provides a basis for Air Florida's liability."); Sierra Club v. Andrus, 487 F. Supp 443, 449 (D.D.C. 1980) (holding that Congress's implementation of 16 U.S.C. § 1 eliminated trust duties as they relate to "National Park System management").

[10] *See generally Ill. Cent. R.R.*, 146 U.S. at 387; United States v. Montello, 87 U.S. 430 (1874). *See infra* note 71 and accompanying text for a definition of navigable-in-fact waters.

[11] *See, e.g.*, Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 87-88 (2007); Robin K. Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 56 (2010).

[12] Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984) (holding that, "under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes").

and swimming.[13] Some states have even broadened the doctrine to protect wildlife,[14] parks[15] and the dry sand area of beaches.[16] However, just because these spaces are protected by the doctrine does not mean the government is properly exercising its fiduciary duty to keep them open to the public—this is an issue that many face in Nassau County, New York.[17]

Another difference in the doctrines can be spotted when comparing the original thirteen states to those admitted later because the former relied substantially on English common law[18] while the latter relied substantially on the Equal Footing Doctrine.[19] The Equal Footing Doctrine was created in an attempt to give those later admitted states the same rights as the original thirteen;[20] however, the original thirteen were much less likely to be subject to federal conveyances and reservations than the later admitted states[21] because many of them were originally federal territories.[22] This resulted in, for example, several Indian tribes owning lands under the Arkansas River in Oklahoma,[23]

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[13] *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (holding that the public trust doctrine also includes the "right to fish, hunt, bathe, swim, to use for boating and general recreational purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes" and that the doctrine must also preserve lands to be used for "scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area"); Orion Corp. v. State, 747 P.2d 1062, 1073 (Wash. 1987), *cert. denied*, 108 S. Ct. 1996 (1988) (holding that the public trust doctrine does not only include navigation and fishing, but also extends to "boating, swimming, water skiing, and other related recreational purposes"); Menzer v. Vill. of Elkhart Lake, 186 N.W.2d 290, 296 (Wis. 1971) (holding that the Wisconsin doctrine also preserves "all public uses of water").

[14] Wade v. Kramer, 459 N.E.2d 1025 (Ill. App. Ct. 1984).

[15] Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114 (Mass. 1966); Sierra Club v. Dep't of Interior, 398 F. Supp. 284 (N.D. Cal. 1975).

[16] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

[17] Paul LaRocco, *Taxpayers Bought This Land. But Much of it is Hidden*, NEWSDAY (July 19, 2018, 6:00 AM), https://projects.newsday.com/investigations/nassau-hidden-preserves-open-spaces/#cobrand-include. Nassau County owns hundreds of acres of land which is supposed to be open for public use; however, it is inaccessible, fenced off or overgrown in shrubs. *Id.*

[18] Craig, *A Comparative Guide to the Western States' Public Trust Doctrines*, *supra* note 11, at 56.

[19] Weber v. Bd. of Harbor Comm'rs, 85 U.S. 57, 65-66 (1873).

[20] *Id.*

[21] Craig, *A Comparative Guide to the Western States' Public Trust Doctrines*, *supra* note 11, at 66.

[22] Craig, *A Comparative Guide to the Western States' Public Trust Doctrines*, *supra* note 11, at 66.

[23] Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-32 (1970); United States v. Cherokee Nation of Okla., 480 U.S. 700, 701 (1987).

and the United States retaining title to the Coeur d'Alene Lake and Idaho's St. Joe River in trust for the Coeur d'Alene Tribe.[24]

While each state has its own doctrine that may be very extensive and vary greatly from its neighbors, this Note will focus on New York's public trust doctrine and will briefly discuss features that belong to doctrines of several other states. Section II will provide a brief introduction to the doctrine and how it is generally applied. Section III will explore the federal public trust doctrine, and section IV will indicate the issues that may arise as a result of the federal government's approach. Section V will compare the rights reserved for New Yorkers to access water held in trust to the rights reserved for the citizens of other states. Section VI will analyze the ability of New York to dispose of trust property, as well as the history of judicial review of such alienation. Section VII will survey how certain states address pollution and wildlife destruction suits under the public trust doctrine and discuss why these claims should not automatically arise under the public trust doctrine. Section VIII will explore how the public trust doctrine could cause more harm than good, and section IX will discuss how New York's doctrine is not overly burdensome as some may believe. Ultimately, this Note will conclude that New York's doctrine is moderately more expansive than the federal doctrine and does not unreasonably burden the rights of real estate developers and riparian landowners. While New York's current doctrine is not an effective model for other states, it could be with a few minor adjustments to further benefit the public.

II. INTRODUCTION TO THE PUBLIC TRUST DOCTRINE

Each state has its own public trust doctrine that may vary drastically in breadth compared to its neighbors; however, one idea that remains the same across the country is that the doctrine's main purpose is to protect certain property so people may use and enjoy it. Professor Alexandra Klass of the University of Minnesota Law School described the public trust doctrine as embodying the idea that certain resources, such as tidal and navigable waters and land underneath them, are owned by the state with a permanent restriction against alienation.[25] Professor Klass further explained that "[t]o some, the

[24] Idaho v. United States, 533 U.S. 262, 272 (2001).

[25] Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006).

doctrine is a vehicle for public access to water, beaches, or fishing in a world otherwise dominated by private ownership."[26] This theory was reflected in the New Jersey Supreme Court's decision that granted the public the right to cross over the dry sand area of a beach that was owned by a private entity.[27] Others believe that the doctrine is a "check on government attempts to give away or sell [certain] . . . resources for short-term economic gain."[28] This argument is noted in a 1989 Vermont Supreme Court decision, which prohibited the sale of 1.1 miles of land along the City of Burlington's waterfront because that land was subject to the public trust doctrine and, therefore, could not be sold.[29] Last, the doctrine may be used as "a back-door mechanism for judicial taking of private property without just compensation through a clever argument that the property was never 'private' in the first place,"[30] and, thus, was never privately owned. Although the Takings Clause of the Fifth Amendment of the United States Constitution protects the people from the government's taking one's property for public use without just compensation, the public trust doctrine is an exception.[31] For example, when an event, such as rising sea levels, causes the private property owner's land to be increasingly submerged, it is effectively taken by the government to be held in trust.[32] This is because states only allow private ownership of lands up to a certain point, usually determined by a mean water mark.[33] When the water levels rise, so do the water marks, ultimately causing the landowner's property ownership to diminish.[34] While the government may not have actively attempted to take the newly submerged land, the

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[26] *Id.* at 699.

[27] Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 113 (N.J. 2005) (holding that the beach association is not permitted to limit the public's access to the water, nor the use of the upland sand for intermittent recreational purposes that are connected to the use of the ocean).

[28] Klass, *supra* note 25, at 699.

[29] State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1129 (Vt. 1989).

[30] Klass, *supra* note 25, at 699.

[31] McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003) (holding that rising water levels create new and additional tidelands which then constitute *res* in a public trust; accordingly, private ownership is diminished in the new tidelands for the benefit of the public).

[32] *Id.*

[33] Sax, *supra* note 5, at 476.

[34] Conversely, New Jersey has held that when the dry land area is increased in size as a result of a beach replenishment program, the riparian landowner is not afforded any ownership interest in such property. City of Long Branch v. Jui Yung Liu, 4 A.3d 542, 560 (N.J. 2010). Accordingly, a riparian landowner's property ownership is subject to reduction, without the possibility of it increasing. *Id.*

public trust doctrine may cause a passive acquisition of the land by the government[35] without the need to commence a condemnation proceeding pursuant to the Takings Clause which states: "nor shall private property be taken for public use, without just compensation."[36] Ultimately, the government may take land from a private landowner and not pay any compensation if the taking is performed pursuant to the public trust doctrine.

Similar to Professor Klass's idea that the public trust doctrine acts as a check on the government from alienating certain resources, late Professor Joseph Sax, a highly renowned public trust doctrine scholar and author of *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*,[37] noted that the public trust doctrine imposed three major restrictions on the government.[38] First, when property is subject to a trust, it must not only be used for a public purpose, but also be readily available to the general public.[39] Therefore, the resource must be open and accessible to the public and any significant restriction on its use would likely be considered an unlawful breach of the government's duty pursuant to the doctrine.[40] Second, "the property may not be sold, even for a fair cash equivalent"[41] or for a worthy cause without legislative approval. For instance, the New York Court of Appeals decided in 1873 that, without legislative approval, protected land could not be used even for a worthy cause such as a courthouse or school.[42] Last, "the property must be maintained for particular types of uses."[43] To further explain this last point, Professor Sax indicated that the property or "resource must be

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[35] Not only is trust *res* protected against alienation by the doctrine, once a municipality takes title to property to be held in its governmental capacity, it cannot be acquired by another even through adverse possession. N.Y.C. v. Sarnelli Bros., Inc., 720 N.Y.S.2d 555, 556 (App. Div. 2001).

[36] U.S. CONST. amend. V.

[37] Sax, *supra* note 5.

[38] Sax, *supra* note 5, at 477.

[39] Sax, *supra* note 5, at 477.

[40] *See, e.g.*, Lake George S.B. Co. v. Blais, 281 N.E.2d 147, 148 (N.Y. 1972) (holding that "[i]t has long been the rule that a municipality, without specific legislative sanction, may not permit property acquired or held by it for public use to be wholly or partly diverted to a possession or use exclusively private."). *See also* State v. Vogt, 775 A.2d 551, 561 (N.J. Super. Ct. App. Div. 2001) (holding that while the resource must be open to the public, the government may impose reasonable restrictions on use of the resource such as enacting legislation that criminalizes being nude on a beach).

[41] Sax, *supra* note 5, at 477.

[42] Williams v. Gallatin, 128 N.E. 121, 122 (N.Y. 1920).

[43] Sax, *supra* note 5, at 477.

held available for certain traditional uses, such as navigation, recreation, or fishery . . . [or] must be in some sense related to the natural uses peculiar to that resource."[44]

These restrictions on alienation have protected property for more uses than were initially intended by the *Institutes of Justinian*, such as the New Jersey Supreme Court's declaration that the doctrine must not adhere to "ancient prerogatives of navigation and fishing, but [must] extend as well to recreational uses, including bathing, swimming and other shore activities."[45] The New Jersey court further held that the doctrine should not be "fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."[46] For example, Mississippi has expanded its doctrine to protect commerce, bathing, swimming and other recreational activities, development of mineral resources, environmental protection and preservation, the enhancement of aquatic, avian and marine life, sea agriculture and more.[47] However, not all states share this view. For instance, two scholars addressed the absence of an effective Nevada doctrine, writing that Nevada simply lacks "sufficient public trust statutes to have effected any state-law expansions of the doctrine."[48] Another scholar went as far to write, "Nevada remains the only western state that has not addressed the public trust doctrine."[49] These claims became outdated recently when the Nevada Supreme Court acknowledged the state's narrow doctrine in a 2011 decision.[50]

Regardless of whether a state has a broad doctrine or one that was very modestly developed, a plaintiff or petitioner asserting a claim arising under the public trust doctrine must have standing to sue, otherwise the case will be dismissed.[51] In an effort to clarify an earlier decision,[52] in 1992 the United States Supreme Court created a three-

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[44] Sax, *supra* note 5, at 477.

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

[46] *Id.*

[47] Cinque Bambini P'ship v. State, 491 So. 2d 508, 512 (Miss. 1986).

[48] Craig, *A Comparative Guide to the Western States' Public Trust Doctrines*, *supra* note 11, at 70.

[49] John P. Sande, IV, *A River Runs to It: Can the Public Trust Doctrine Save Walker Lake?*, 44 SANTA CLARA L. REV. 831, 833 n.15 (2004).

[50] Lawrence v. Clark Cty., 254 P.3d 606, 606-12 (Nev. 2011) (holding that the public trust doctrine "requires the state to serve as trustee for public resources").

[51] Allen v. Wright, 468 U.S. 737, 751 (1984).

[52] *See generally id.*

prong test to determine standing.[53] The initial burden of proof is on the plaintiff, who must prove satisfaction of each element to pursue a public trust doctrine claim.[54] First, the plaintiff must prove that he suffered an "injury in fact"; the claimed damages are not conjectural or hypothetical.[55] Next, the plaintiff must prove that there is a nexus between the injury and the defendant's conduct he is seeking to enjoin.[56] This second element requires proof that the injury was not actually the result of an independent third party.[57] Last, the plaintiff must prove that a favorable court order is likely—not merely speculative—to remedy the claimed injury.[58]

III. DEVELOPMENT OF THE FEDERAL PUBLIC TRUST DOCTRINE

Originally, the public trust doctrine only limited private ownership of lands beneath tidal waters.[59] The first federal expansion of the doctrine can be traced back to an 1842 United States Supreme Court decision which held that the people also have the right to access and use navigable waters as well as the soil under them.[60] These areas are also protected and cannot be alienated.[61] Just a few years later, the Court recognized the Equal Footing Doctrine, which granted newly admitted states ownership of all tidal and navigable water within their borders, along with the soil beneath the water, to be held in trust for the benefit of the people.[62] However, in utilizing the Equal Footing Doctrine, the United States retained ownership to any waters and lands beneath them that were not then navigable or tidal.[63] Accordingly, the states were only granted title to navigable-in-fact waters and the lands

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[53] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding that plaintiffs, several wildlife organizations, lacked standing as they did not suffer a harm or injury that was not also suffered by all of the citizens).

[54] *See generally id.*

[55] *Id.* at 560-61.

[56] *Id.*

[57] *Id.*

[58] *Lujan*, 504 U.S. at 560-61. *See infra* note 155 and accompanying text for a discussion of standing.

[59] Richard Ausness, *Water Rights, the Public Trust Doctrine, and the Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 408 (1986).

[60] Martin v. Lessee of Waddell, 41 U.S. 367, 432-33 (1842).

[61] *Id*. (holding that after the revolution, the states received the king's responsibility of holding certain property in trust, and therefore, any alienation of previously protected property would be a breach of the public trust doctrine).

[62] Pollard v. Hagan, 44 U.S. 212, 228-29 (1845).

[63] PPL Montana, L.L.C. v. Montana, 565 U.S. 576, 591 (2012).

beneath them when they were navigable-in-fact at the time of statehood.[64] Moreover, such analysis is to be performed on a segment-by-segment basis,[65] which has resulted in state ownership of portions of riverbeds and United States ownership of other portions of the same riverbeds.[66]

The next major development in the federal public trust doctrine was the decision of the United States Supreme Court in *Illinois Central R.R. v. Illinois*.[67] In that case, the Illinois legislature conveyed over 1,000 acres of submerged lands beneath Lake Michigan to the Illinois Central Railroad Company.[68] Ultimately, the Court invalidated the transfer and held that the conveyance directly conflicted with the public trust doctrine which protected the submerged lands and therefore substantially restricted the public's ability to use the area for navigation, commerce and fishing.[69] Navigable waters may only be alienated when doing so improves the public's interest or would not impose a detriment to the public's interest "in the lands and waters remaining."[70]

Under federal law, a body of water is navigable-in-fact when: (1) "[v]essels of any kind . . . can float upon the water;" (2) "are, or may become, the mode by which a vast commerce can be conducted . . . in order to give it the character of a navigable stream;" or (3) is "generally and commonly useful to some purpose of trade or agriculture."[71] Nevertheless, if the water is not navigable-in-fact, but is tidal, it is still protected under the public trust doctrine.[72] As a result of *Illinois Central R.R.*, the federal public trust doctrine also preserves the people's right to use navigable waters for navigation, commerce and fishing. This is an expansion of the traditional navigable-in-law concept that merely protects any "[w]aterways that are affected by

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64 United States v. Utah, 283 U.S. 64, 75 (1931).

65 *PPL Montana*, 565 U.S. at 593.

66 *United States v. Utah*, 283 U.S. at 79.

67 146 U.S. 387 (1892).

68 *Id.* at 433-34.

69 *See generally id*.

70 *Id*. at 452.

71 United States v. Montello, 87 U.S. 430, 441-42 (1874).

72 Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476-81 (1988) (affirming precedent that indicates state ownership of all tidal water—bodies of water that are affected by the "ebb and flow of the tide").

tides,"[73] and therefore, waters can receive public trust protection even if they are not affected by the tide.

IV. INADEQUACY OF THE FEDERAL PUBLIC TRUST DOCTRINE

While the federal doctrine provides the states with a good foundation to expand upon, it is currently inadequate because it is based largely on ancient prerogatives and only modestly accounts for changing times.[74] Unlike most states that have legislation and case law to further their doctrines, the Arizona legislature has made several attempts to limit the public trust doctrine, thus, often defaulting to federal law. Although Arizona enacted many laws in 1995 that appeared to extend its doctrine in regard to water rights,[75] the legislature expressly stated that it "does not intend to create an implication that the public trust doctrine applies to water rights in this state."[76] Moreover, the state legislature even attempted to alienate the state's ownership of all watercourses within the state, except for a few rivers, by quitclaim deed, and also to permit the issuance of a quitclaim deed for lands in or near the beds of the Gila, Salt and Verde Rivers for a small fee of only twenty-five dollars.[77] In a 1991 decision, the Arizona Court of Appeals held that these legislative attempts to destroy a significant part of the state's public trust doctrine were deemed an unlawful breach of the doctrine and the state's constitution.[78] Subsequently, Governor Hull signed Senate Bill 1126 into law on May 4, 1998, which again restricted the public trust doctrine.[79] This legislation[80] officially created a new navigability test that was more lenient than the federal approach and permitted an increased amount of alienation of areas that were otherwise inalienable pursuant to federal law.[81] In February of 2001, the Arizona Court of Appeals determined that the statute was unconstitutional and a violation of the

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[73] Steven C. Russo, *OGC 9: Enforcement Guidance: Public Rights of Navigation and Fishing*, N.Y. ST. DEP'T OF ENVTL. CONSERVATION (Dec. 7, 2011), https://www.dec.ny.gov/regulations/74771.html.

[74] See *supra* Section III.

[75] ARIZ. REV. STAT. § 45-101-343 (LexisNexis 2018).

[76] 1995 Ariz. Sess. Laws ch. 9, § 25(B), p.36.

[77] Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 162 (Ariz. Ct. App. 1991).

[78] *Id.* at 174.

[79] Defenders of Wildlife v. Hull, 18 P.3d 722, 727 (Ariz. Ct. App. 2001).

[80] ARIZ. REV. STAT. § 37-1129 (LexisNexis 1998).

[81] *Defenders of Wildlife*, 18 P.3d at 727.

public trust.[82] While the state legislature made these repeated attempts to dismantle its public trust doctrine, the judicial branch worked to remedy this problem, announcing in an Arizona Supreme Court decision that the "public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people."[83] Furthermore, the court indicated that it is "for the courts to decide whether the public trust doctrine is applicable to the facts."[84]

Similar to Arizona, Colorado has done very little to expand its doctrine. For example, in 1976, in *People v. Emmert*,[85] three individuals were floating on rafts on the Colorado River.[86] Eventually, the river passed through a privately owned ranch that the individuals did not have permission to enter.[87] The three individuals did not leave their rafts at any time, nor did they encroach upon the shoreline,[88] but, nevertheless, they were arrested and eventually charged with third-degree criminal trespass.[89] The defendants were found guilty because they stipulated that they floated on a section of the river that could be privately owned because it was non-navigable and "not historically used for commercial or trade purposes of any kind."[90] Similarly, New York protects its riparian landowners as it only expanded its doctrine to protect waterways that "have practical usefulness to the public as a highway for transportation,"[91] which would have similarly resulted in criminal convictions for the defendants. However, a broader application of the doctrine, as demonstrated in New Hampshire, protects any "river or stream [that] is capable in its natural state of some useful service to the public because of its existence."[92] Arguably, the very same defendants in *Emmert* would not have faced trespass charges had they been in New Hampshire because the river served, in its natural state, usefulness for recreational transportation, which could be considered a useful service.

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82 *Id.* at 739.

83 San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999).

84 *Id.*

85 597 P.2d 1025 (Colo. 1979).

86 *Id.* at 1026.

87 *Id.*

88 *Id.*

89 *Id.* at 1030.

90 *Emmert*, 597 P.2d at 1026.

91 N.Y. NAV. LAW § 2(5) (McKinney 2018).

92 St. Regis Paper Co. v. N.H. Water Res. Bd., 26 A.2d 832, 838 (N.H. 1942).

While no state should be required to expand its doctrine to protect all rivers and streams for use by the public for any beneficial purpose, states should make meaningful expansions to ensure the public can fully enjoy their natural amenities. When a state refuses to make any important expansions of its public trust doctrine, it must rely substantially on the federal doctrine. Not only does this criminalize an act as innocuous as floating down a river that is non-navigable, it can also completely bar access to water that is navigable. To date, the federal doctrine has not expanded to provide the public with any right to cross any dry sand areas to reach a navigable waterway. Accordingly, the federal doctrine could permit private ownership of land surrounding a body of navigable water and deny the public any rights to cross over any of the riparian owners' property. This effectively precludes the public from accessing the body of water that it otherwise has a right to access. An effective remedy to this issue would be to follow New Jersey's *Matthews* factors.[93]

V. RIGHT TO ACCESS WATER HELD IN TRUST

One of the many differences that exist among the states' doctrines is the right to access water held in trust. For example, some states criminalize crossing over the dry sand area of a private landowner to access trust waters or foreshores[94] while other states encourage it.[95]

A. New York

Although New York is home to a substantial number of beautiful beaches and waterfront homes, there has been limited litigation regarding the application of the public trust doctrine to beach access. Accordingly, the boundary between the private landowner's rights and the public's rights is unclear.[96] Nevertheless, the extremely modest case law in this area suggests that the private property owner has the sole right to all real estate that is landward of the high water

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[93] *See* discussion of the *Matthews* factors *infra* Section V.F.

[94] Cavanaugh v. Town of Narragansett, No. WC91-0496, 1997 R.I. Super. LEXIS 21, at *28 (Oct. 10, 1997).

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

[96] Robin K. Craig, *A Comparative Guide to the Eastern Public Trust Doctrines*, *supra* note 11, at 87-88.

mark, none of which the public may lawfully use, while the public only has the right to access the lands seaward of the mean high water mark.[97] This approach could result in criminal charges against individuals who cross privately owned dry sand beaches to reach the foreshore.[98] Accordingly, New York prefers the rights of riparian landowners over those of the public, thus permitting the landowner to enjoy his real estate without the burden of beachgoers.

B. Washington

Washington's doctrine provides the public with arguably the least water access as its appellate court refused to give the public any right to cross over any privately owned property and only affords its citizens the right to use the foreshore when it is covered by water.[99] When the tide is out, the people in Washington do not have any right to use the foreshore.[100] Accordingly, the court has not only barred the people from crossing over a private owner's land to reach the water under any circumstance, but it has also limited the time during which the public may use the foreshore.

C. Rhode Island

Rhode Island's doctrine indicates that the government holds the foreshore below the mean high tide line in trust for the public to use; however, the public has no right to access dry sand areas above that line.[101] This rule developed after James Cavanaugh, who failed to pay the beach admission fee, attempted to cross the dry sand area of a Rhode Island beach to reach the shoreline.[102] The Town of Narragansett responded with criminal charges for failing to pay the

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[97] Arnold's Inn, Inc. v. Morgan, 310 N.Y.S.2d 541, 547 (Sup. Ct. 1970). *High Water Mark*, DICTIONARY.COM, https://www.dictionary.com/browse/high-water-mark?s=t (last visited Oct. 3, 2018) (defining high water mark as "the highest level reached by a body of water" during high tide).

[98] This approach is similar to Rhode Island's doctrine in that crossing over privately owned dry sand beach to reach the foreshore could result in criminal charges. *Cavanaugh*, 1997 R.I. Super. LEXIS, at *28.

[99] City of Bainbridge Island v. Brennan, No. 31816-4-II, 2005 Wash. App. LEXIS 1744, at *4 (July 20, 2005).

[100] *Id.*

[101] *Cavanaugh*, 1997 R.I. Super. LEXIS, at *28.

[102] *Id.* at *5.

beach admission fee.[103] The court held that the public has no right to cross the dry sand area to reach the foreshore[104] and ultimately found Cavanaugh guilty of a misdemeanor.[105] This decision illustrates that if a body of water is entirely surrounded by privately owned property, the public has no right to cross it to reach the water, rendering it accessible only by the landowners.

D. Massachusetts

In a 1979 decision, the Massachusetts Supreme Court held that a private landowner owns all real estate landward of the mean low tide mark; however, the public retains an easement over the foreshore for the sole purposes of navigation, fishing and fowling.[106] Almost twenty years later, the Appellate Court further indicated that the public has "no right to cross, without permission, the dry land of another for the purpose of gaining access to the water or the flats in order to exercise public trust rights; doing so constitutes a trespass."[107] Accordingly, Massachusetts appears to take a very pro-landowner position because it extends private ownership down to the mean low tide mark—an extension made by only a few states—and permits public access to the foreshore for only very limited activities.[108] While this approach limits the public's use of certain bodies of water, especially those completely surrounded by private land ownership, it respects the rights of the landowners and effectively prevents an unwanted easement across their land.

E. Maryland

Maryland similarly has a pro-landowner position. In *Department of Natural Resources v. Mayor of Ocean City*,[109] a real estate developer sought to construct a condominium on the dry sand area of an oceanfront lot.[110] In an effort to halt the development, the

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[103] *Id.*

[104] *Id.* at *28.

[105] *Id.* at *5.

[106] Bos. Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 365 (Mass. 1979).

[107] Sheftel v. Lebel, 689 N.E.2d 500, 505 (Mass. App. Ct. 1998).

[108] *See infra* notes 240-52 and accompanying text for a discussion of the public's right to access property in relation to a watermark.

[109] 332 A.2d 630 (Md. 1975).

[110] *Id.* at 632.

public filed suit claiming that the construction would prevent its access to the dry sand area, constituting a breach of the public trust doctrine.[111] The court quickly decided that the public trust doctrine only protects the foreshore, not any of the dry land above it.[112] More recently, this was upheld in *Clickner v. Magothy River Association Inc*.,[113] in which the court limited the doctrine to protect only the sand up to the mean high tide line.[114] Accordingly, the "public has no right to access or cross privately owned upland sand areas in order to reach the public foreshore."[115]

F. New Jersey

New Jersey has the broadest public trust doctrine in terms of providing the public with access to the foreshore because, in certain circumstances, it permits the public to cross over the dry sand area in order to reach the foreshore—even when the sand is privately owned.[116] In 1984, the New Jersey Supreme Court held that the dry sand area above the mean high water line may be subject to the public trust doctrine, thereby protecting it for the enjoyment by the people.[117] The court reasoned that, in order for the public to fully enjoy the rights preserved by the doctrine, it must also preserve a limited right in the dry areas just above the water line.[118] However, the court indicated that the public's right to the dry sand area was not absolute, but it created four factors to determine whether the public has access rights and, if so, the extent of those rights. Known as the *Matthews* factors, they are used to determine whether property is subject to the doctrine. First, the court examines the dry sand area in relation to the foreshore.[119] Second, it considers the magnitude and availability of publicly owned upland sand area.[120] Third, it contemplates the nature

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111 *Id*.

112 *Id.* at 634.

113 35 A.3d 464 (Md. 2012).

114 *Id.* at 473.

115 Jack Potash, *The Public Trust Doctrine and Beach Access: Comparing New Jersey to Nearby States*, 46 SETON HALL L. REV. 661, 662 (2016).

116 Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984) (holding that the association was a quasi-public entity, thus the public has a right to cross the dry sand area that it owns).

117 *Id.*

118 *Id.* at 365.

119 *Id.*

120 *Id*.

and extent of the public demand for access to the foreshore and use of the beach.[121] Last, it studies the usage of the upland sand by the owner.[122] The court reasoned that in certain circumstances, giving the public the right to use a portion of the dry sand area near the water provided for meaningful use of that water.[123] Without granting this right, a body of water could ultimately be inaccessible to the public except for owners of land abutting the mean high water mark or those who have been granted permission to cross the land. Moreover, this also prevents the public from being arrested for trespass.

In *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, the New Jersey Supreme Court applied the *Matthews* factors in a groundbreaking 2005 decision that rendered privately owned sand area—above the mean high water line—open to the public.[124] Atlantis Beach Club, Inc. owned and operated a beach club in New Jersey, charged its members access fees to use the beach and restricted all nonmembers from gaining entry.[125] The court held that this practice violated the public trust doctrine by restricting the public's right to access the water.[126] It further explained that

> Atlantis cannot limit [the public's] vertical [crossing the dry sand area] or horizontal [use along the shoreline] . . . 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 connected with the ocean and wet sand.[127]

It applied the *Matthews* factors to a private association which expanded the scope of the doctrine. However, the court in *Matthews* envisioned such expansion.[128]

New Jersey's four-factor test is arguably the best approach to address beach access. A strict approach that refuses the public any right to cross the dry land area of a private landowner substantially impacts the public's right to use a body of water. Such an approach does not further the public's interests because, in many instances, it

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121 *Matthews*, 471 A.2d at 365.

122 *Id*.

123 *Id.* at 364.

124 Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 113 (N.J. 2005).

125 *Id.*

126 *Id*.

127 *Id.*

128 *Matthews*, 471 A.2d at 366.

restricts people from using and enjoying public trust areas. However, the public should still be respectful of the private owner's interests and privacy concerns. Using this four-factor test, the courts effectively consider both the public's interests and the private landowners' interests in reaching a decision that does not result in a complete prohibition to access a body of water and also does not subject each landowner to an unwanted easement.[129] The *Matthews* factors, taken together, limit the public's use when it would be overly burdensome to the landowner, while permitting access when doing so would be reasonable. Although New York has not had a case that is directly on point, it should adopt this approach in an appropriate case.

VI. PERMISSION TO ALIENATE AND RIGHT TO JUDICIAL REVIEW

The New York State Legislature retains the sole power and discretion to alienate, or otherwise change, the use of protected areas. There is but one instance in which legislative approval is not necessary for alienation and that is when a grant is pursuant to an urban renewal plan,[130] which will be discussed in detail in section IX of this Note. The litigation in New York that has arisen under the public trust doctrine focused on whether the area in question was subject to the doctrine[131] or whether a municipality had a duty to preserve an area,[132] keep it open to the public[133] and retain title to it.[134] None of the case law apparently involves review of a legislative grant. This may indicate that the legislature is given complete deference in its decisions with regard to the public trust doctrine.

Somewhat similar to New York, Illinois follows a title theory whereby the state's title to the resources is impressed by a trust in favor of a particular use.[135] Under this theory, legislative approval must be secured before any alienation.[136] The Illinois Supreme Court ruled that

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[129] *Id.* at 369 (holding that if a body of water is inaccessible due to private riparian land ownership, some of the privately owned land could be subject to unwanted easements).

[130] Vill. Green Realty Corp. v. Glen Cove Cmty. Dev. Agency, 466 N.Y.S.2d 26 (App. Div. 1983).

[131] *See In re* Glick v. Harvey, 36 N.E.3d 640 (N.Y. 2015).

[132] Evans v. Johnstown, 410 N.Y.S.2d 199, 207 (Sup. Ct. 1978).

[133] 10 E. Realty, LLC v. Inc. Vill. of Val. Stream, 793 N.Y.S.2d 122 (App. Div. 2005).

[134] *Vill. Green Realty Corp.*, 466 N.Y.S.2d at 27.

[135] Thomas W. Merrill, *The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications*, 38 HAW. L. REV. 261 (2016).

[136] People *ex rel.* Scott v. Chi. Park Dist., 360 N.E.2d 773, 780 (Ill. 1976).

legislative approval must withstand the most critical examination if the alienation is in favor of a private entity.[137] Similarly, Washington courts use a heightened degree of scrutiny when reviewing any legislation relating to the public trust doctrine.[138] However, these theories should be avoided. In a case arising under the public trust doctrine, the court is not considering a suspect class, a fundamental right, or other highly sensitive and important subjects that would warrant a form of strict or heightened scrutiny, and therefore, is simply unnecessary. Furthermore, the United States Supreme Court has ruled that weighing the advantages and disadvantages of certain issues is the role of the legislative branch, not the judicial branch, because it is sufficiently capable of determining what is in the best interest of the public due to the country's democratic process.[139] Since the legislature is elected directly by the people, limiting its ability to alienate protected areas reduces the public's voice on how those areas should be utilized.

Another interesting approach is found within Alaska's Constitution, providing that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[140] Alaska's Supreme Court has interpreted this to simply create a trust for the people, not a public trust.[141] Alaskan courts define the result of Article VIII of its Constitution as a trust-like relationship in which Alaska is to hold fish, wildlife, water and other natural resources in trust for the benefit of its citizens.[142] Therefore, "instead of recognizing the creation of a public trust in the clause per se, we have noted that the common use clause was intended to engraft in [its] constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."[143] Thus, Alaska's public trust doctrine is not actually that broad since it appears to address protection of natural resources via an alternative route that mirrors a

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137 *Id.*

138 Responsible Wildlife Mgmt. v. State, 103 P.3d 203, 205 (Wash. Ct. App. 2004) (holding that a "statute enacted through the initiative process is presumed constitutional and the party challenging it bears the burden of proving it unconstitutional beyond a reasonable doubt. Nonetheless, courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny, as if measuring the legislation against constitutional protections" (citations omitted)).

139 Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

140 ALASKA CONST. amend. VIII, § 3.

141 Brooks v. Wright, 971 P.2d 1025, 1031 (Alaska 1999).

142 *Id.*

143 *Id.* (internal quotations marks omitted).

traditional doctrine. This approach is analogous to that of Hawaii's by requiring a constitutional amendment to alter the trust while leaving the courts with the substantial power of interpreting the state's constitution.

Although similar to the Alaskan approach, Hawaii is slightly more protective. Hawaii follows a constitutional theory where the constitution "mandates that certain resources be devoted to particular public uses,"[144] effectively requiring a constitutional amendment to otherwise alienate an area. Since the doctrine is almost completely embedded in the state constitution, "ultimate authority to interpret and defend the public trust in Hawai'i rests with the courts."[145] This procedure should also be avoided because, not only does the legislature have little control in alienating a protected area or changing its use, any changes to Hawaii's doctrine requires a constitutional amendment either through a constitutional convention or by the legislature proposing a constitutional amendment to the electorate.[146] While allowing the electorate to decide these issues would be ideal, this process fails to account for the excessive amount of time it would take to make any changes and the fact that the entire state would determine the use of a specific area. This means that an individual, hundreds of miles away from the subject site, who may have never visited it, would have the same voting right as the individual who may be interested in developing it. Accordingly, if a small community sought to develop a few acres of protected land to build a school, courthouse, sporting facility or otherwise, those who do not have easy access to the facilities would likely vote it down simply to preserve protected areas without engaging in a meaningful examination of the matter.

What may surprise many is that New York has the preferable method of alienation and judicial review as compared to these few states; however, it is still not perfect. It allows for the elected legislature to make decisions on behalf of the people, leaving a political remedy should it go astray. This is similar to the approach of the Washington Supreme Court which held that once property is "acquired and devoted to public use [it] is held in trust for the public and cannot be alienated without legislative authority, either express or

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144 Merrill, *supra* note 135, at 261.

145 Kauai Springs, Inc. v. Planning Comm'n of Kaua'i, 324 P.3d 951, 975 (Haw. 2014).

146 *Revision and Amendment of Hawaii State Constitution*, ST. HAW. OFF. ELECTIONS, http://elections.hawaii.gov/resources/revision-and-amendment-of-the-hawaii-state-constitution/ (last visited Oct. 3, 2018).

implied."[147] However, New York courts should have more power to decide on the merits of a proposed alienation of parkland, which is the subject of a substantial amount of litigation in the state arising under the doctrine. When a suit is filed that invokes public trust doctrine protection of parkland, the New York courts first review the classification of the area.[148] When a party claims that an area has been expressly or impliedly classified as parkland or dedicated to public use, the courts should have appropriate authority to determine whether the area is appropriately subject to the doctrine. However, when an area is expressly classified as parkland, the courts seem to lack any power of judicial review or, more likely, provide complete deference to the municipality that classified the area.[149] While it is important to give substantial deference to the municipal agencies that handle express classification, we must be wary of areas that may have been misclassified or not sufficiently used by the public. The very definition of a "park is, in its strict sense, a piece of ground inclosed [sic] for purposes of pleasure, exercise, amusement or ornament."[150] A park "need not and should not be a mere field or open space."[151] When an area is impliedly or expressly classified as parkland, the court should take a more active role in determining whether that classification is accurate by considering whether the public uses the area, the extent to which the public utilizes the area, and the purposes for which the public uses the area. This will prevent misclassification of an area that should not be labeled as a park.

Moreover, the courts should also retain discretion to review the grant by the legislature with a rational basis type of test, whereby the court exercises a relatively lenient review of the grant. This review should consider whether the grant would significantly adversely impact local residents from having access to that type of amenity (i.e., whether the citizens would have reasonable access to a park if the legislature alienates one) and whether the grant would have any detrimental impacts on the surrounding areas to constitute a partial taking, such as significantly decreased property values, or cause a burdensome nuisance. This type of review will allow the courts and

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147 City of Bainbridge Island v. Brennan, 2005 Wash. App. LEXIS 1744, at *45 (July 20, 2005).

148 *In re* Avella v. N.Y.C., 80 N.E.3d 982, 983 (N.Y. 2017).

149 *See generally id.*

150 Perrin v. N.Y. Cent. R.R., 36 N.Y. 120, 124 (1867).

151 Williams v. Gallatin, 128 N.E. 121, 122 (N.Y. 1920).

the legislature to share a fair separation of powers while giving the legislature substantial deference to ensure adhering to the voice of the people.

VII. THE PUBLIC TRUST DOCTRINE AS APPLIED TO POLLUTION AND WILDLIFE

Global warming is a substantial and growing problem in the twenty-first century[152] and has caused an extensive list of lawsuits that have invoked public trust doctrine protection; however, many states refuse to allow a pollution claim pursuant to their doctrines.[153] Many of these lawsuits have resulted in unfavorable decisions for the plaintiffs because many states refuse to acknowledge that pollution comes within the scope of the doctrine.[154] Moreover, in many instances, it is impossible to pinpoint the polluter, which ultimately causes standing issues.[155]

One state that refused to include pollution as an item that can be controlled under the doctrine is New Mexico. The New Mexico Court of Appeals refused to extend the public trust doctrine to include the regulation of greenhouse gases in the atmosphere on the grounds that such regulation should be addressed by the legislature, and any claims should arise under the state's Air Quality Control Act.[156] Furthermore, the court held that any decision on the issue without consideration of the Act would be a clear violation of the separation of powers principles.[157] Similarly, Alaska's Supreme Court dismissed a plaintiff's claim that the state breached its fiduciary duty to preserve the atmosphere, thus, causing adverse effects on the water, shorelines, wildlife and fish, and held that the other governmental branches should handle such regulation.[158]

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[152] Aaron M. McCright & Riley E. Dunlap, *Challenging Global Warming as a Social Problem: An Analysis of the Conservative Movement's Counter-Claims*, 47 SOC. PROBS. 499 (2000).

[153] *See* Sanders-Reed v. Martinez, 350 P.3d 1221 (N.M. Ct. App. 2015); Kanuk v. State, 335 P.3d 1088, 1103 (Alaska 2014); Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016); Comer v. Murphy Oil USA, Inc., 839 F. Supp. 2d 849 (S.D. Miss. 2012); Comer v. Murphy Oil USA, Inc., 718 F.3d 460 (5th Cir. 2013).

[154] *See* Native Vill. of Kivalina v. Exxon Mobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).

[155] *Id.*

[156] *Sanders-Reed*, 350 P.3d at 1227.

[157] *Id.*

[158] *Kanuk*, 335 P.3d at 1103.

Even more recently, a group of young United States citizens filed suit against the federal government claiming it breached its fiduciary duty pursuant to the public trust doctrine.[159] In *Juliana v. United States*, the plaintiffs alleged that the federal government's decisions regarding regulating carbon dioxide emissions, permitting fossil fuel extraction, giving tax breaks and directly subsidizing the fossil fuel industry, funding natural gas pipelines, regulating the import and export of fossil fuels, and authorizing new marine coal terminal projects all had an adverse effect on climate change.[160] The plaintiffs argued that these items, taken together, should constitute a breach of the fiduciary duties under the public trust doctrine.[161] Although the court refused to decide whether the atmosphere is protected under the doctrine,[162] it found that the plaintiffs' claim that the government's actions have caused them to suffer the negative consequences of ocean acidification and rising ocean temperatures—assets that are typically protected under the doctrine—were sufficient to allow the case to proceed. Because a number of the plaintiffs' injuries related to the effects of ocean acidification and rising ocean temperatures, the plaintiffs adequately alleged harm to public trust assets.[163]

Similarly, Pennsylvania has a doctrine that vests the people with a right to "clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment [that are] . . . common property of all the people, including generations yet to come" and that "the Commonwealth shall conserve and maintain them for the benefit of all the people."[164] The state's Supreme Court declared that this constitutional provision "installs the common law public trust doctrine *as a constitutional right to environmental protection*," which is "susceptible to enforcement by an action in equity."[165] Accordingly, it is possible that a plaintiff may be successful in filing a pollution claim arising under the doctrine in Pennsylvania.

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159 Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

160 *Id.* at 1255.

161 *Id.* at 1234.

162 *Id.* at 1255.

163 *Id.* at 1256.

164 PA. CONST. art. I, § 27; *see also* Payne v. Kassab, 312 A.2d 86, 93 (Pa. Commw. Ct. 1973) (relying on both the public trust doctrine and the Pennsylvania Constitution to require maintenance of "clean air . . . and [] the preservation of the natural, scenic, historic and esthetic values of the environment").

165 Commonwealth v. Nat'l Gettysburg Battlefield Tower, 311 A.2d 588, 596 (Pa. 1973) (emphasis in original).

Slightly similar to Pennsylvania's, Alaska's public trust doctrine indicates that the "[s]tate holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, 'and that *government owes a fiduciary duty* to manage such resources for the common good of the public as beneficiary.'"[166] However, while Alaska's Supreme Court held in *Baxley v. State*[167] that the state owes the public a fiduciary duty in managing the resources, the court held in *Brady v. State*[168]—just five months later—that the state need not be proactive in protecting trust property.[169] In the latter case, the court found that the state was not liable for waste when beetles were severely destroying forests, which placed a significant limit on the state's fiduciary duty in managing the trust *res*.[170] Thus, the court apparently indicated that the government could allow passive degradation while imposing a duty to protect against active damage. Even utilizing this theory would be beneficial to New York since it has not yet developed an approach to polluted water.[171]

While the New York doctrine goes to great lengths to protect parks, it seems to take a backseat when considering pollution.[172] For example, a New York court ruled that, although sewage was intentionally being dumped into the Cayadutta Creek, the state did not have a duty to prevent such acts.[173] The court reasoned that even if the creek was navigable and subject to the public trust doctrine, there was no indication that the pollution interfered with the public's right to fish or access the waterway for navigation.[174] While it is understood that a broadening "of the public trust doctrine for no other reason than to protect the environment simply ignores the economic precedent

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166 Baxley v. State, 958 P.2d 422, 434 (Alaska 1998) (emphasis added) (citation omitted).

167 *Id.*

168 Brady v. State, 965 P.2d 1 (Alaska 1998).

169 *See, e.g.*, *id.*

170 *Id.* at 17.

171 Evans v. Johnstown, 410 N.Y.S.2d 199, 207 (Sup. Ct. 1978) (holding that we must disallow any action that interferes "with the public's right to fish or with the public's right of access for navigation"). However, the pollution ultimately resulted in the D.E.C.'s indicating that recreational use and aquatic life had been adversely impacted. *Mohawk/Cayadutta Creek Watershed*, N.Y. DEP'T ENVTL. CONSERVATION (Aug. 14, 2002) https://www.dec.ny.gov/docs/water_pdf/wimohawkcayadutta.pdf.

172 *See infra* Section VIII.

173 *Evans*, 410 N.Y.S.2d at 207.

174 *Id.* Similarly, legislative approval was required for the construction of a bridge that would interfere with navigation. Macrum v. Hawkins, 184 N.E. 817 (N.Y. 1933).

established by the original doctrine itself,"[175] the public does not want to engage in recreational activities in polluted water. The court, nevertheless, ruled that the state's public trust doctrine did not apply[176] and dismissed the plaintiffs' relevant cause of action. New York State should have utilized California's theory, developed just two years later, that placed an affirmative duty upon the state to "take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[177] When the future life of a body of water was placed in jeopardy due to a diversion of several small streams that sustained the water level, the California Supreme Court permitted the invocation of the State's public trust doctrine to end such practice.[178] The New York Court of Appeals should have acknowledged that pollution could be detrimental to the longevity of Cayadutta Creek, and, therefore, should have been a direct violation of the doctrine. It is unfortunate that the 1964 New York Times article that addressed the pollution of Cayadutta Creek was not discussed in the litigation.[179] The article specifically noted that the public no longer swam in the creek, and many could no longer stand to be near it due to the stench of contamination.[180] Courts should disregard the *Evans v. Johnson*[181] decision and set new precedent that preserves the *res* placed under that state's doctrine. The simple fact that the Department of Environmental Conservation published a fact sheet that provides that the Cayadutta Creek has suffered a decrease in aquatic life and recreational use should render the *Evans* decision null and void.[182]

If a case similar to *Evans v. Johnson* confronted the courts of another jurisdiction, such as Louisiana, it is very likely the result would have been different. In Louisiana, "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and

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[175] George P. Smith, II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within A Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307 (2006).

[176] *Evans*, 410 N.Y.S.2d at 207.

[177] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 728 (Cal. 1983).

[178] *Id.* at 711.

[179] Neil Sheehan, *The Creek at Gloversville—A Picturesque, Meandering Sewer*, N.Y. TIMES, Dec. 28, 1964, https://www.nytimes.com/1964/12/28/the-creek-at-gloversvillea-picturesque-meandering-sewer.html.

[180] *Id.*

[181] *Evans*, 410 N.Y.S.2d at 199.

[182] *Mohawk/Cayadutta Creek Watershed*, *supra* note 171.

replenished insofar as possible and consistent with the health, safety, and welfare of the people."[183] The Louisiana First Circuit indicated that this section of the constitution is the state's public trust doctrine and must be respected.[184] Accordingly, had the Louisiana courts heard *Evans v. Johnson*, they would likely have found a clear violation of the public trust doctrine because the state would have a duty to preserve the creek and its general healthfulness.

While no state has clearly stated that its public trust doctrine applies to pollution in general, many states have extended their doctrines' protection to wildlife.[185] On February 2, 1976, the Steuart Transportation Company (hereinafter "Steuart") inadvertently spilled a large amount of oil in the Chesapeake Bay, killing approximately 30,000 migratory birds.[186] Subsequently, the Commonwealth of Virginia and the United States filed suit for the loss of migratory waterfowl.[187] Although Steuart argued that neither the federal nor state government could sue for the loss of waterfowl it did not own, the court ruled that ownership is irrelevant.[188] The court ultimately found in favor of both plaintiffs, holding that the state and federal government's duty to protect and preserve the public's interest in wildlife resources was sufficient to bring the claim.[189]

California went one step further than Virginia when it statutorily developed a second public trust doctrine. This second doctrine was based on California's Fish and Game Code, which states that "[t]he fish and wildlife resources are held in trust for the people of the state by and through the department."[190] The state legislature found that "[f]ish and wildlife are the property of the people and provide a major contribution to the economy of the state, as well as provide a significant part of the people's food supply; therefore, their conservation is a proper responsibility of the state."[191] This second doctrine becomes evident in a 1981 California Supreme Court decision

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183 LA. CONST. art. IX, § 1.

184 La. Seafood Mgmt. Council v. La. Wildlife & Fisheries Comm'n, 719 So. 2d 119, 124 (La. Ct. App. 1998).

185 *See generally* N.Y. ENVTL. CONSERV. LAW § 15-0103 (McKinney 2018); CAL. FISH & GAME CODE § 711.7(a) (West 2018).

186 *In re* Complaint of Steuart Transp. Co., 495 F. Supp 38, 39 (E.D. Va. 1980).

187 *Id.*

188 *Id.* at 40.

189 *Id*.

190 CAL. FISH & GAME CODE § 711.7(a) (West 2018).

191 *Id.* § 1600.

that ruled that the "shorezone is a fragile and complex resource."[192] The court further explained that "[i]t provides the environment necessary for the survival of numerous types of fish . . . , birds . . . , and many other species of wildlife and plants."[193] Moreover, in a 2008 decision, California's Supreme Court announced that wildlife must be protected.[194]

California's wildlife doctrine was vital in 1980, when California's State Energy Resources Conservation and Development Commission created a field of turbines that generated electricity from the wind.[195] Between 1981 and 2005, the generators "killed tens of thousands of birds, including between 17,000 and 26,000 raptors—more than a thousand Golden Eagles, thousands of hawks, and thousands of other raptors."[196] The Center for Biological Diversity, Inc. filed suit claiming that the state violated its own public trust doctrine because it failed to protect and serve wildlife.[197] Not only did the court find in the plaintiff's favor, but the court also held that it is irrelevant that the public did not own the wildlife.[198] It is extremely important that the court decided that ownership is irrelevant because of the difficulty in determining ownership. Many wild animals, especially birds, migrate from state to state and even from country to country.[199] If the government was forced to prove ownership of the wildlife that is at the center of a public trust doctrine claim, it would often fail. This could result in extremely minimal or even no public trust protection of wildlife. Furthermore, ownership is not necessarily vital in a public trust doctrine claim, as was evident in the New Jersey Supreme Court case, *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, in which the court simply held that the public has a right to access privately owned lands to reach publicly owned property.[200]

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[192] State v. Superior Court of Placer Cty., 625 P.2d 256, 259 (Cal. 1981).

[193] *Id.*

[194] Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot., 187 P.3d 888, 926 (Cal. 2008).

[195] Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 591 (Ct. App. 2008).

[196] *Id.* at 592.

[197] *Id.* at 591.

[198] *Id.* at 598-99.

[199] *Animal Migration*, LIST THINGS, LIST EVERYTHING (Mar. 4, 2011), https://listofeverything.wordpress.com/2011/03/04/list-of-animals-that-migrate-animal-migration-list/.

[200] Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc. 879 A.2d 112, 129 (N.J. 2005).

While some states may wish to extend public trust protection to wildlife, states should not use it to protect against pollution in all circumstances. Pollution in general should not be subject to the public trust doctrine when a specific polluter cannot be identified because it is the legislature's responsibility to institute acceptable levels of pollution. However, when a polluter can be identified, the doctrine should be an appropriate vehicle to seek injunctive relief. It is the role of the federal and state legislatures to determine what an appropriate level of pollution is, and then the judicial branch can interpret and enforce any legislation created to sustain those appropriate levels.[201] For this reason, it would be inappropriate for any court to permit a claim against a government pursuant to the public trust doctrine for failing to keep pollution to a minimal level.[202] However, each state should recognize that pollution—when caused by an identifiable group rather than society itself—should fall within the protection of the public trust doctrine when it affects a protected resource. When society itself is causing pollution, it is the job of the legislature to decide when, and if, the pollution is excessive, and then authorize agencies to implement suitable regulations.[203] All of this country's courts should permit a claim pursuant to the public trust doctrine only if a specific polluter can be identified, and such pollution directly and adversely affects the public's right to use trust property. All other pollution claims should arise under either federal or state legislation.

VIII. THE APPLICATION OF THE PUBLIC TRUST DOCTRINE CAN DO MORE HARM THAN GOOD

It is long established in New York that legislative approval is required when leasing parkland, even for park purposes.[204] However, an interesting turn of events occurred when the New York City Department of Parks and Recreation (hereinafter "DPR") allowed the operation of a restaurant in Union Square Park with certain conditions.[205] The DPR allowed Chef Driven Market, LLC to operate a restaurant in parkland without legislative approval; however, DPR

[201] Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

[202] *See supra* notes 156-58 and accompanying text for a discussion on the Air Quality Control Act.

[203] *See, e.g.*, Chevron, U.S.A., Inc. v. Nat'l Res. Defense Council, Inc., 467 U.S. 837 (1984).

[204] Union Sq. Park Cmty. Coal., Inc. v. N.Y.C. Dep't of Parks & Recreation, 8 N.E.3d 797, 801 (N.Y. 2014).

[205] *Id.* at 802.

"retained significant control over the daily operations of the restaurant, including the months and hours of operation, staffing plan, work schedules and menu prices."[206] Moreover, the restaurant was only seasonal, was not permitted to retain exclusive right to the premise, such as to prohibit the general public from using the seating area, and needed to open its pavilion to the public once per week for community events.[207] Accordingly, the New York Court of Appeals found these restrictions to be tantamount to a revocable license—not a lease—thus, legislative approval was not necessary because the provisions created a restaurant that complied with park purposes.[208] New York municipalities may convey a revocable license to use parkland so long as the use complies with park purposes, is subject to direction, regulation and revocation at the will of the municipality.[209]

Instead of granting a license as New York City did in the Union Square Park case, the New York State legislature approved the construction of Shea Stadium on Queens parkland, known as Willets West, and permitted the parcel's use for stadium purposes.[210] Upon the demolition of Shea Stadium, the land became a parking lot for the new stadium.[211] This new use was still considered stadium purposes, as the parking lot was used in conjunction with the new stadium, Citi Field.[212] Just to the east of Willets West, there is a tract of land known as Willets Point, or more popularly known as the "Valley of Ashes" as coined by F. Scott Fitzgerald.[213] Although the development project would have included schools, retail centers and housing (including low income housing), arguably using the land to its highest and best use, the New York courts still struck the proposal because it included the development of parkland at Willets West. Not only was one simply a parking lot for the use of baseball fans, the second lot was a "blighted and contaminated tract of land," both of which would benefit greatly from the planned development.[214]

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206 *Id*.

207 *Id.*

208 *Id.*

209 *See generally* Miller v. City of New York, 203 N.E. 478 (N.Y. 1964).

210 Avella v. N.Y.C., 80 N.E.3d 982, 984 (N.Y. 2017).

211 *Id.* at 992.

212 *Id.*

213 F. SCOTT FITZGERALD, THE GREAT GATSBY 23 (1925). *In re Avella*, 80 N.E.3d at 992 (DiFiore, C.J., dissenting).

214 *In re Avella*, 80 N.E.3d at 992 (DiFiore, C.J., dissenting).

In fact, the New York judicial application of the doctrine takes such a strong stance on protection of parkland that in 2001, the Court of Appeals issued a decision that ultimately put the preservation of a park and its golf course before the health of New York City residents.[215] The Croton Watershed is one of New York City's three primary sources of drinking water and supplies between ten and thirty percent of the City's requirements.[216] After the United States Environmental Protection Agency demanded that the City filter and disinfect the water derived from the Croton Watershed, the City planned to construct a watershed beneath Van Cortlandt Park.[217] The construction would have taken six years, rendered the use of twenty-eight acres of parkland unusable until the construction was completed, and required the demolition of the golf course and driving range that would have been reconstructed upon completion of the project.[218] Nevertheless, the New York Court of Appeals held that because the construction would have prohibited the public from using twenty-eight acres of land and the golf facilities, the project required legislative approval regardless of the fact that the construction would only be temporary and would ultimately decrease the health risks associated with consuming New York City's drinking water.[219]

Similar to New York's strong preservation of parkland, Illinois follows a strict criticism theory when reviewing legislative alienation. Such an extreme criticism was exercised in *Lake Michigan Federation v. United States Army Corp of Engineers*, a 1990 decision that involved the not-for-profit Loyola University of Chicago (hereinafter "Loyola") after it made attempts to expand its campus.[220] Loyola was adjacent to Lake Michigan and sought legislative and municipal approval to purchase approximately eighteen acres of the lake.[221] Loyola intended to fill the purchased land and build several athletic fields, a track for running, biking and walking, all of which would remain open to the public.[222] Loyola's improvement of the land not only would have benefitted the public's enjoyment of it, but Loyola was a not-for-profit

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215 *See, e.g.*, Friends of Van Cortlandt Park v. N.Y.C., 750 N.E.2d 1050 (N.Y. 2001).

216 *Id.* at 1051.

217 *Id.*

218 *Id.* at 1051-52.

219 *Id.* at 1054-55.

220 Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill 1990).

221 *Id.* at 443.

222 *Id.*

educational facility and had already received the proper governmental approval.[223] Nevertheless, the court found that the grant violated the public trust doctrine.[224] The court reasoned that under the strict criticism approach, any alienation of protected areas for the benefit of a private interest violates the doctrine and "any attempt to relinquish its power over a public resource should be invalidated under the doctrine."[225] Such a strict approach should not be utilized because sometimes, as in this case, alienation of protected trust property is warranted and could provide the public with a substantial benefit.

While Illinois is very protective of trust *res*, the decision in *Lake Michigan Federation v. United States Army Corps of Engineers* was not in the best interests of the public. As Professor Jay Wexler correctly stated, we must pay attention to the "connections between public health and public lands" and parks.[226] Studies have suggested that parks attract people of all backgrounds and the soothing landscape acts as a catalyst towards increasing mingling and sociability, ultimately benefiting public mental health and the feeling of equality.[227] Accordingly, Loyola's proposed development of Lake Michigan would have benefitted the public by creating new areas similar to parkland. Moreover, Professor Wexler's comments support New York's strong protection of parkland; however, New York should consider an alternative to its current classification process. As of now, simply listing property as parkland on the local municipal's assessment roll is conclusive as to its classification. This can cause a piece of property owned by a municipality to be deemed inalienable, even when reclassifying it as alienable would increase its usefulness and enjoyment by the public. For example, a recent Newsday article indicated that at least over the past decade, Nassau County, New York purchased over three hundred acres of land that was intended to be developed into parks.[228] However, those plans fell through and most of the land is overgrown by brush, and some is even fenced off to prevent the public from entering the land.[229] Nevertheless, Nassau

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[223] *Id.* at 455-56.

[224] *Id.*; Merrill, *supra* note 135, at 269.

[225] *Lake Mich. Fed'n*, 742 F. Supp. at 445.

[226] Jay D. Wexler, *Parks as Gyms? Recreational Paradigms and Public Health in the National Parks*, 30 AM. J.L. & MED. 155, 188 (2004).

[227] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 779 (1986).

[228] LaRocco, *supra* note 17.

[229] LaRocco, *supra* note 17.

County is restricted from alienating the land except for urban renewal or if it receives legislative approval. The courts should be more active in determining whether a certain parcel is properly categorized as a park, thus, deciding whether alienation without legislative approval is proper. New York may benefit from following Pennsylvania's approach that permits the alienation of trust *res* when it cannot viably be used for the purposes it was originally dedicated.[230] This would allow a court to rule that parcels, such as those owned by Nassau County, are not properly classified as parkland. The government would then be able to sell these parcels to parties that intend to use the land instead of their being fenced off and not used at all.

IX. NEW YORK'S DOCTRINE IS NOT AS OVERLY BURDENSOME AS MANY MAY BELIEVE

It may come as a surprise to many, especially real estate developers and riparian landowners, that New York's doctrine is less restrictive and burdensome than its counterparts in many states in several ways.[231] First, New York has not expanded the federal navigable-in-fact test to determine whether a particular body of water is held in trust. Accordingly, New York only preserves waterways that are navigable in their natural or unimproved condition, and allows for substantial and permanent commerce.[232] Pursuant to the New York doctrine, "theoretical or potential navigability, or one that is temporary, precarious and unprofitable is not sufficient."[233] The waterway "must have practical usefulness to the public as a highway for transportation."[234] This is only a minor expansion of the federal

[230] *In re* Estate of Ryerss, 987 A.2d 1231, 1236 n.8 (Pa. Commw. Ct. 2009). *See also* Borough of Downingtown v. Friends of Kardon Park, 55 A.3d 163, 169 n.9 (Pa. Commw. Ct. 2012).

[231] Greg Wehner, *Judge Dismises* [sic] *Lawsuit Challenging Picnic Area Beach Driving, Parking In Southampton Village*, 27EAST.COM (Mar. 19, 2018, 4:31 PM), http://www.27east.com/news/article.cfm/General-Interest-Southampton/550818/Judge-Dismises-Lawsuit-Challenging-Picnic-Area-Beach-Driving-Parking-In-Southampton-Village (homeowners complaining of the public's use of the beach). *See infra* note 240.

[232] N.Y. NAV. LAW § 2(5) (McKinney 2018).

[233] *Id.*

[234] *Id.*

requirement derived from *Illinois Central R.R.*, which requires the waterway to support vast commerce.[235]

While New York has only made a modest expansion of its navigability test, minimally encroaching on the rights of riparian landowners, other states take a very different approach. For example, New Hampshire uses a variation of the navigability test that expands its doctrine to protect any "river or stream [that] is capable in its natural state of some useful service to the public because of its existence."[236] The New Hampshire Supreme Court further broadened its doctrine by indicating that the protected waterways are held in trust for public use for any lawful and useful purpose—a drastic increase in public trust protection compared to the traditional use for navigation and fishing.[237] Even more of a drastic expansion of the doctrine occurred when the Kentucky Court of Appeals held that any waterway that can, and does, float logs or rafts shall be protected under the doctrine.[238] Such an expansion increases the number of waterways and waterbeds that are held in trust, increasing the benefit to the public; however, this causes the taking of property from the owners of such lands. While this expansion certainly increases the benefit to the public, it causes a substantial burden upon property owners that have to turn over portions of their land to the state.

Another burden that New Yorkers do not face is criminal penalties for breach of the doctrine. North Dakota codified a law that charges citizens with a misdemeanor if they, in any manner, obstruct the free navigation of any navigable watercourse within this state.[239] While it is important to protect certain territories from alienation or privatization, criminalizing such conduct significantly deters development near public trust protected areas because of fear of inadvertent breach. Moreover, it also may chill the use of the waterways in a way that could be viewed as an obstruction of navigation and, thus, running counter to the purpose of the doctrine.

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[235] United States v. Montello, 87 U.S. 430, 441-42 (1874). *See supra* notes 64-66 and accompanying text for a discussion of how the public trust doctrine can protect a body of water in certain sections that are navigable.

[236] St. Regis Paper Co. v. N.H. Water Res. Bd., 26 A.2d 832, 838 (N.H. 1942).

[237] *Id.*

[238] Floyd Cty. v. Allen, 227 S.W. 994, 995 (Ky. Ct. App. 1921).

[239] N.D. CENT. CODE § 61-01-08 (2017).

While many New York riparian landowners may express discontent[240] with the fact that the public has the right to use land below the high water mark of their backyards when the body of water is held in trust,[241] it may surprise them that this is common across the country. In fact, only a very small handful of states recognize title to the mean low water mark,[242] and some of them only acknowledge limited ownership rights.[243] Moreover, a New York riparian landowner seems to have unfettered discretion to use the foreshore without causing a violation of the doctrine so long as the public can still access its natural state; any alteration of the area could result in trespass charges.[244] The Town of Oyster Bay filed suit against a riparian landowner, Tiffany, after he filled in the foreshore below the high water mark near his home in Oyster Bay, Long Island.[245] The court ultimately held that Tiffany was liable for trespass[246] and responsible for the cost of removing the fill.[247] This issue was addressed more recently in a New York trial court decision in *Arnold's Inn, Inc. v. Morgan*.[248] In that case, the defendant, a private landowner, had placed fill from the high-water line across the foreshore.[249] The court ultimately found that the defendant's action was not a violation of the public trust doctrine because the placement of the fill did not interfere with the plaintiff's or public's right to reasonable, and convenient, access to the water for navigation, fishing or similar purposes.[250] Instead, the court found the defendant liable for trespass.[251] The court essentially ruled that as long as the public still has access to the resource, there is no violation.[252]

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[240] Steven Gaines, *Who Owns the Sand? Beach Squabbles in East Hampton*, DAILY INTELLIGENCER (Mar. 30, 2012), http://nymag.com/daily/intelligencer/2012/03/who-owns-the-sand-beach-squabbles-in-east-hampton.html.

[241] Sage v. N.Y.C., 47 N.E. 1096 (N.Y. 1897).

[242] *See* McDonald v. Whitehurst, 47 F. 757 (E.D. Va. 1891), *aff'd*, 52 F. 633 (4th Cir. 1892); Phillips v. State, 449 A.2d 250 (Del. 1982) (holding that any taking above the low water mark would be a condemnation); Orange v. Resnick, 109 A. 864, 867 (Conn. 1920); Citizens' Elec. Co. v. Susquehanna Boom Co., 113 A. 559, 561 (Pa. 1921).

[243] Mitchell v. St. Paul, 31 N.W.2d 46, 50 (Minn. 1948).

[244] Tiffany v. Oyster Bay, 136 N.E. 224 (N.Y. 1922).

[245] *Id.*

[246] *Id.* at 226.

[247] *Id.*

[248] Arnold's Inn, Inc. v. Morgan, 310 N.Y.S.2d 541 (Sup. Ct. 1970).

[249] *Id.* at 544.

[250] *Id.* at 548.

[251] *Id.* at 550.

[252] *Id.*

Another reason New York's doctrine is not overly burdensome is because legislative approval is not required when making a grant for urban renewal purposes pursuant to the New York General Municipal Law, Article 15, § 502(3).[253] Urban renewal is defined as a plan created by a municipality which includes, but is not limited to, "redevelopment, through clearance, replanning, reconstruction, rehabilitation, and concentrated code enforcement . . . of substandard and insanitary areas of such municipalities, and for recreational and other facilities incidental or appurtenant thereto . . . ."[254] Further, clearance, replanning, reconstruction and rehabilitation are defined as "renewal, redevelopment, conservation, restoration or improvement or any combination thereof as well as relocation activities and the testing and reporting of methods and techniques for the arrest, prevention and elimination of slums and blight."[255] Moreover, the designation of an area as "substandard and insanitary," is an administrative task, not a legislative act that gives municipalities much flexibility in determining which areas may qualify.[256] Accordingly, whenever property is conveyed by an Urban Renewal Agency,[257] for the purpose of improving such real estate, the transfer will likely be upheld even if the resulting product is not open for public use. Nevertheless, there is very limited case law involving public trust doctrine claims and alienation for urban renewal.[258]

The difference Article 15 § 503-a(4) makes in terms of alienating public trust lands is most clear when comparing a grant made by the Incorporated Village of Valley Stream[259] and the Incorporated Village of Lynbrook.[260] A municipal parking lot located within the Village of Valley Stream was held by the Village for public use, and therefore, protected by the public trust doctrine.[261] Accordingly, when Valley Stream officials attempted to lease the

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253 N.Y. GEN. MUN. LAW § 502(3) (McKinney 2018).

254 *Id.*

255 *Id.*

256 Fisher v. Becker, 258 N.E.2d 727, 727 (N.Y.1970).

257 N.Y. GEN. MUN. LAW § 502(3) (Agency is simply an "officer, board, commission, department, or other agency of the municipality" authorized to carry and direct the renewal project.).

258 *See, e.g.*, Grayson v. Town of Huntington, 554 N.Y.S.2d 269, 270-71 (App. Div. 1990); *Fisher*, 258 N.E.2d at 727.

259 10 E. Realty, LLC v. Inc. Vill. of Val. Stream, 793 N.Y.S.2d 122 (App. Div. 2005).

260 *Fisher*, 258 N.E.2d at 727.

261 *10 E. Realty, LLC*, 793 N.Y.S.2d at 123.

space to a private entity for private use without securing legislative approval, the court found this to be a breach of the doctrine and declared the lease invalid.[262] In contrast, the Village of Lynbrook was permitted to convey its municipal parking lot for the construction of privately owned retail and office space because the Village determined the lands were substandard and unsanitary.[263] Therefore, the conveyance was valid as an urban renewal plan.[264]

This municipal law is very important because New York expanded its doctrine to provide extremely broad and strict protection of parkland, yet subjects it to alienation for urban renewal purposes.[265] Real property can become designated for public use or a public park via an "express or implied offer by the owner and, where required, an express or implied acceptance by the public."[266] Any property designated as parkland is held in trust for the benefit of the citizens and any alienation of the property for non-park purposes requires approval by the legislature that must be "'plainly conferred'" in advance of such use.[267] In a 1983 decision, the New York Appellate Division, in *Village Green Realty Corporation v. Glen Cove Community Development Agency*, held that parks may also be alienated pursuant to urban renewal because Article 15 § 503-a(4) does not expressly bar its application to parkland.[268]

In *Village Green Realty Corporation*, a developer acquired parkland from the City of Glen Cove for the purposes of urban renewal; it sought and obtained an opinion from the New York State Comptroller as to the legality of the conveyance.[269] The Comptroller's decision indicated that the City of Glen Cove had the authority to

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[262] *Id.*

[263] *Fisher*, 258 N.E.2d at 727.

[264] *Id.*

[265] Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1054 (N.Y. 2001) (holding that placing a water treatment plant underneath a park will not interfere with using the park for park purposes; however, the construction will deprive the public from using the park for at least five years). Moreover, the requirement that alienated trust *res* be utilized for urban renewal is vital as the project would effectively turn blighted real estate into usable land.

[266] Angiolillo v. Town of Greenburgh, 735 N.Y.S.2d 66, 73 (App. Div. 2001). *See also* Lazore v. Bd. of Trs., 594 N.Y.S.2d 400 (App. Div. 1993).

[267] *Friends of Van Cortland Park*, 750 N.E.2d at 1055 (quoting Ackerman v. Steisel, 104 A.D.2d 940 (1984)). *See also* Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 243 (1871).

[268] Vill. Green Realty Corp. v. Glen Cove Cmty. Dev. Agency, 466 N.Y.S.2d 26 (App. Div. 1983).

[269] *Id.* at 27.

convey the parkland absent legislative approval pursuant to the General Municipal Law § 503-a(4).[270] This law gives municipalities the power to, *inter alia*, "dedicate, sell, convey, lease, grant or otherwise transfer any of its right, title and interest in *any property*, real or personal, to such agency, or grant easements, licenses or privileges therein to such agency" for the purpose of urban renewal.[271] The Comptroller reasoned that municipalities retained the authority to alienate parkland for purposes of urban renewal because the law did not expressly limit its application to parkland and instead permitted alienation of any property.[272] The Comptroller's decision ultimately influenced the New York State Appellate Division.[273] This was the first instance where parkland was alienated pursuant to this municipal law.

It is likely that General Municipal Law § 503-a(4), if utilized properly, could allow the alienation of Willets West for development. Many New Yorkers disagree with the Court of Appeals' decision in *Matter of Avella v. City of New York*;[274] however, their discontent should be directed to the approach taken by New York City and the Queens Development Group, LLC. In *Avella*, the City accepted Queens Development Group, LLC's proposal to develop Willets West, which was expressly classified as parkland, but the state legislature only granted New York City permission to lease it to the New York Mets—it is currently used as a parking lot.[275] The proposal also included development of lands adjacent to Willets West, known as Willets Point, which was not designated as parkland, but is blighted and in desperate need of development.[276] The City did not seek legislative approval, nor did it attempt to utilize Article 15 § 503-a(4). When Senator Avella filed suit, he claimed that legislative approval was not necessary because the area was previously leased to the

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[270] *Id.*

[271] N.Y. GEN. MUN. LAW § 502(3) (McKinney 2018) (emphasis added).

[272] *Vill. Green Realty Corp.*, 466 N.Y.S.2d at 27-28. In contrast, while N.Y. REAL PROP. TAX LAW § 995 indicates that when a municipal corporation which owns real estate "determines that the value thereof is insufficient to justify payment of the tax or special assessment levied thereon, in lieu of payment it may consent to an order directing sale of the property at public auction . . . to satisfy the claim," the Appellate Division has held that this statute is limited only to property not dedicated to public use. *In re* AJM Capital II, LLC v. Inc. Vill. of Muttontown, 14 N.Y.S.3d 476, 477-78 (App. Div. 2015).

[273] *Vill. Green Realty Corp.*, 466 N.Y.S.2d at 27.

[274] *In re* Avella v. N.Y.C., 80 N.E.3d 982 (N.Y. 2017).

[275] *Id.* at 984.

[276] *Id.*

Mets.[277] The court correctly and ultimately ruled that the development on Willets West required legislative approval, barring Queens Development Group, LLC from proceeding with development on that site.[278] This decision does not mean that Willets West and Willets Point cannot be developed; it simply means that the developer can proceed with the project on Willets Point and must secure legislative approval to proceed with construction on Willets West. Moreover, the court stated "that the remediation of Willets Point is a laudable goal," and one that has the support of New York's citizens.[279] Accordingly, it is likely that the development would be approved with ease should it be brought before the legislature as should have been done initially.

Overall, New York's doctrine is not overly burdensome to riparian landowners and developers as many may believe. For example, New York's navigability test requires that a body of water be able to support substantial and permanent commerce to receive protection if it is not tidal. Therefore, bodies of water that are nontidal and not able to support substantial and permanent commerce may be subject to private ownership and the public can be completely barred from using them. However, even if a body of water is subject to the doctrine, unlike in New Jersey, the public has yet to be given any rights to cross over private property to access the water or the land up to the high water mark. Also, while New York has a substantial amount of parkland protected by the doctrine, it can still be alienated for development as long as the plan can fall under the state's general municipal law's urban renewal section. If the project does not fit within the urban renewal requirements, a developer can still seek legislative approval which will likely be granted if the undertaking is one which the public wants because the legislature is the voice of the people. Accordingly, New York's doctrine is actually very pro-riparian landowner and does not unduly burden real estate developers from developing land that is trust *res*.

X. CONCLUSION

While New York's public trust doctrine strongly protects parkland, the courts should begin to exercise judicial discretion over whether the classification and protection of certain parcels of land as

[277] *Id.* at 986.

[278] *Id.* at 991.

[279] *In re Avella*, 80 N.E.3d at 991.

parkland are correct. This will give local governments the ability to alienate property to be used and enjoyed rather than being overgrown and rendered inaccessible to the public such as the hundreds of acres of unused land in Nassau County, New York. New York should also adopt New Jersey's *Matthews* factors to expand the public's limited access to beaches and areas otherwise preserved and held open to the public under the doctrine. Last, the doctrine should not be a mechanism to fight pollution in general; however, it should be utilized to prevent trust property from being contaminated by identifiable polluters when such pollution diminishes the public's enjoyment of that property. If New York made these changes, it would likely have a doctrine that is more effective and beneficial to the public, and could serve as an excellent and workable model for other states.