Southeastern Environmental Law Journal

Volume 15 | Issue 1 Article 6

Fall 2006

Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources

Marc R. Piorier

MODIFIED PRIVATE PROPERTY: NEW JERSEY'S PUBLIC TRUST DOCTRINE, PRIVATE DEVELOPMENT AND EXCLUSION, AND SHARED PUBLIC USES OF NATURAL RESOURCES

MARC R. POIRIER*

This Symposium, on managing public and private interests in coastal marshes and marsh islands, developed out of an ongoing controversy in South Carolina about the extent to which bridges across publicly owned submerged and tidally flowed lands to private islands should be permitted,

* Professor of Law, Seton Hall University School of Law. The author thanks Brett Frischmann and Frank Pasquale for reading and commenting on a draft of this article. The author is also thankful for the comments received from participants at The University of South Carolina School of Law's September 2006 symposium on "Bridging the Divide: Public and Private Interest in Coastal Marshes and Marsh Islands," (Sept. 7-8, 2006) and the presentation is available at http://www.law.sc.edu/elj/2006symposium/ (last visited Feb. 4, 2007).

where those bridges will surely facilitate private development.[1] In this spirit, this article first examines some recent (and not quite so recent) cases applying New Jersey's public trust doctrine so as to limit or condition private development of the shore.[2] It then explores broader themes and justifications addressing the ways New Jersey and other states use the public trust doctrine to manage water and land at the water's edge, resources which have multiple and conflicting uses.[3] Some of these uses are limited, allocated or degraded by privatizing the resource and establishing an otherwise absolute right to exclude.[4] In a brief concluding section, the article asserts the public trust doctrine's continued usefulness, despite the fulsome development of environmental and land use regulation since the re-emergence of the public trust doctrine circa 1970.[5]

I. THREE USES OF THE PUBLIC TRUST DOCTRINE IN NEW JERSEY

A. Denial of Permits to Use Submerged Lands and Deflection of Related Regulatory Takings Claims

Most of New Jersey's modern public trust doctrine case law involves a right of access to the shore or to the ocean.[6] It is based on classic cases about

---

[1] For a discussion of the specific controversy, see Nancy Vinson, Dir. Water Quality and State Legislative Programs, Coastal Conservation League, Henry McMaster, S.C. Attorney General, Ellison Smith, Attorney, Smith Bundy Bybee & Barnett, Carolyn Risinger Boltin, Deputy Comm'r, Ocean and Coastal Res. Mgmt. S.C. Dep't of Health & Envtl. Control, Presentations at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interests in Coastal Marshes and Marsh Islands (Sept. 8, 2006), *available at* http://www.law.sc.edu/elj/2006symposium/ (last visited Feb. 4, 2007). *See also* S.C. Coastal Conservation League v. Dep't of Health & Envtl. Control, 610 S.E.2d 482 (S.C. 2005) (invalidating regulations that established procedures and criteria for granting permits to build bridges across publicly owned marshes to "small" privately owned islands as void for vagueness).

[2] *See infra* Part I.

[3] *See infra* Part II.

[4] *Id.*

[5] *See infra* Part III.

[6] *See, e.g.*, Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005) (holding that a private beach club owner must allow public to cross private beach and to use it on reasonable terms and fees); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 366 (N.J. 1984) ("The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand."); Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978) (holding that under the public trust doctrine, a municipality cannot limit non-residents' horizontal use of the municipality's dry sand beach to a fifty-foot wide strip); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) (holding that under the public trust doctrine, a municipality could not charge non-residents a

private and public property rights in submerged lands and related oyster fisheries or shad fisheries.[7] However, given the focus of this Symposium, I will first discuss *Karam v. State of New Jersey Department of Environmental Protection*.[8] This case is close enough on the facts to be of some immediate applicability to the South Carolina controversy because it

---

higher fee for use of its municipal beach than residents). For discussion of the most recent development on beach access in New Jersey, see *infra* Part I.C.

Very few of New Jersey's public trust cases involve other types of natural resource management. The public trust doctrine was invoked for the principle that the state may protect submerged lands subject to the public trust doctrine against thermal pollution, both by injunction and by seeking damages. State v. Jersey Cent. Power & Light Co., 308 A.2d 671 (N.J. Sup. Ct. Law Div. 1973). And it has been invoked to bolster the state's authority to manage those who manage potable water. Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 539 A.2d 760, 765 (N.J. Sup. Ct. Law Div. 1987), *mod. & aff'd*, 557 A.2d 299 (N.J. 1989) (involving challenges to actions of the Passaic Valley Water Commission concerning fund distribution and allocation of ownership among participating municipalities, and stating the public trust doctrine applies to control of drinking water reserves). "Ultimate ownership rests in the people and this precious natural resource is held by the state in trust for the public benefit." *Id. Cf.* K.S.B. Technical Sales v. North Jersey Dist. Water Supply, 381 A.2d 774, 780 (N.J. 1977) ("Ultimate ownership rests in the people and this precious natural resource is held by the state in trust for the public benefit." *Id.* (citation omitted). This same statement was made in support of a holding that supplying water was a governmental and not proprietary function, and therefore that a state "Buy American" law was not preempted by the General Agreement on Tariffs and Trade. *Id.*).

[7] Arnold v. Mundy, 6 N.J.L. 1, 9 (N.J. 1821) (affirming a common right of fishing as against a claim of private ownership of a submerged oyster bed in New Jersey's Raritan Bay, pursuant to a grant; this result is based on a holding that under the public trust doctrine the sovereign owned submerged lands for purposes of "navigating, fishing, fowling, [and] sustenance," that the right was common to all citizens, and the sovereign's ownership was vested "not for his own use, but for the use of the citizen" so the sovereign could not by alienating the land eliminate the common fishery). *See* Martin v. Waddell's Lessee, 41 U.S. 367 (1842) (applying New Jersey law when addressing a dispute over the oyster fishery in Raritan Bay by reference to the British sovereign's ownership of submerged lands and the right of fishery for use of the public pursuant to the public trust doctrine, which defeated a claim of private ownership of 100 acres of mud flats that had been seeded with oysters). *See generally* BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY (Univ. of Ariz. Press 1998). For further discussion of the history of New Jersey's public trust doctrine, see Leonard R. Jaffee, *The Public Trust Doctrine is Alive and Kicking in New Jersey Tidalwaters:* Neptune City v. Avon-by-the-Sea *– A Case of Happy Atavism*, 14 NAT. RES. J. 309 (1974); Leonard R. Jaffee, Note, *State Citizen Rights Respecting Great-Water Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971).

[8] 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999). The New Jersey Supreme Court's affirmance is textual but it is brief, and the case is best approached through the Appellate Division's opinion.

involves a New Jersey state agency's denial of a request for a permit to build a dock on tide-flowed lands.[9]

In *Karam* the petitioners owned upland property and a separate riparian grant to adjoining tide-flowed land.[10] The state conveyed both the upland and riparian ownership to the Karams' predecessors in interest in 1924.[11] As the prior owners subdivided, they always sold off upland with a corresponding slice of tide-flowed land.[12] The riparian grant could only be used to build a dock or a recreational pier.[13] It also required continued common ownership with the adjoining upland.[14] Moreover, before construction of a dock or pier, the state required an additional permit.[15] Over the years, the state's focus on coastal management shifted from commerce and development in the direction of environmental concerns.[16] By the time the Karams bought their land in 1993, and then applied for their permit to construct a dock, the tide lands in question had been designated a special restricted area because they supported a population of shellfish uncontaminated by pollution.[17] That is why the state denied the permit.[18] In short, the Karams were denied permission to build a dock that would have enhanced the use, enjoyment, and economic value of their land so the state could protect another, also water-dependent, resource of benefit to others.[19]

The Karams sued, claiming their property had been taken by the permit denial.[20] The court's analysis proceeded in two steps. First, it inquired whether the riparian grant, which technically had been purchased separately, was a separate interest, all of whose use had been lost due to the state's shellfish protection policy and consequent permit denial.[21] The case thus presented an instance of the "denominator" problem, where the categorization of the property interest may determine the magnitude of the loss, and therefore determine whether a regulatory taking has occurred.[22] If

---

[9] *Id.* at 1223.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 1224.
[13] *Id.* at 1223.
[14] *Karam*, 705 A.2d at 1223.
[15] *Id.*
[16] *Id.* at 1224.
[17] *Id.* (the Department of Environmental Protection designated the Manasquan River a "special restricted area" in 1987).
[18] *Id.*
[19] *Id.*
[20] *Karam*, 705 A.2d at 1227-28.
[21] *Id.* at 1226.
[22] *Id.* at 1227-28.

the property taken were understood to be the riparian grant alone, the permit denial might constitute a total taking.[23] If the upland and riparian parcels were considered together, the effect of the regulation would be to destroy only one strand in the bundle of the plaintiffs' property rights.[24] The court found that the upland and riparian grants had been originally purchased, owned, and subdivided together, that the petitioners had purchased them together, and that they should be considered part of the same contiguous parcel.[25] Since the property owners retained the upland parcel, and it retained value despite the permit denial, the proper takings analysis was the ad hoc balancing test from *Penn Central Transportation Co. v. City of New York*.[26]

The second part of the *Karam* opinion focuses on the current owners' reasonable investment-backed expectations, one of the three *Penn Central* factors.[27] Here the public trust doctrine surfaces; the court found the property subject to the riparian grant belonged to the state, and while states have the inherent authority to convey such lands to private persons, "the sovereign never waives its right to regulate the use of public trust property."[28] Therefore, the original 1924 riparian grant "did not create an absolute and perpetual right to construct a dock, free from all legislative and regulatory intervention."[29] The Waterfront Development Act,[30] already in

---

[23] *Id.*

[24] *Id.* Presumably, had the court found the riparian right to be a separate property interest and its economic value to have been altogether destroyed by the permit denial, the court would have applied the loss of all economic value analysis established in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). *Karam*, 705 A.2d at 1225-26. The court discusses *Lucas* in this context as part of its background exposition of the law of regulatory takings. *Id.* The court contrasted environmental regulations that merely diminish the value of property and do not effect a taking, discussing the leading state case of *Gardner v. New Jersey Pinelands Commission*, 593 A.2d 251 (N.J. 1991) (upholding a state statute regulating the use of more than a million acres of land in order to protect the sensitive and environmentally important Pinelands region).

[25] *Karam*, 705 A.2d at 1228.

[26] 438 U.S. 104, 124 (1978) These factors include the economic impact on the property owner, the extent of the regulation's interference with distinct investment-backed expectations (later cases added that those expectations must be reasonable ones, see generally *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001)), and the character of the government action. *Penn Central*, 438 U.S. at 124.

[27] *Karam*, 705 A.2d at 1228-29; *see id.* at 1226 (citing *Penn Cent.*, 438 U.S. at 124).

[28] *Id.*

[29] *Id.* at 1229.

[30] Waterfront and Harbor Facilities Act of 1914, N.J. STAT. ANN. § 12:5-1 to -11 (2006).

place in 1924, required an additional permit.[31] To be sure, over the decades, "[t]he focus of the regulatory scheme adopted under the Act shifted from development to preservation," but "the state plainly had 'reserve powers' to alter or change the law, even after making the covenant" with the predecessor purchasers.[32] Basically, "the State's emerging policy with respect to shellfish protection fell within its police powers under the public trust doctrine."[33] The court stated:

> The crucial fact is that since the early 1970's the regulatory jurisdiction of the DEP has substantially expanded and the substantive criteria necessary for granting a development permit has significantly stiffened. The decision to shift public policy from commerce to environmental protection and wildlife preservation was not made by a faceless bureaucrat somewhere within the administrative labyrinth of a nameless office building in Trenton. Instead, it was articulated by our Legislature in carefully crafted enactments and heralded by the Governor with great fanfare. Plaintiffs must be held to have had constructive notice of these developments.[34]

Thus, the court provides several related reasons why the state could change its tidelands management policy and deny the permit for the dock. First, submerged lands are imbued with a public trust that cannot be alienated; even when the property is alienated, a paramount public right remains.[35] Second, the court refers (without further elaboration I might add) to the "reserved powers" doctrine, which holds that states may not contract away centrally important police powers.[36] The state invoked its general police power to protect natural resources.[37] Also, the regulations authorizing

---

[31] *Karam*, 705 A.2d at 1223 ("Because the Waterfront Development Act was in place at the time the riparian grant was issued, a development permit was required as a condition for improving the tide-flowed property.").
[32] *Id.* at 1229.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.* (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (finding the government may not abdicate control of public trust property), and Contributors to Pa. Hosp. v. Philadelphia, 245 U.S. 20 (1917) (deciding the government may not contract away its power of eminent domain)). *See* Stone v. Mississippi, 101 U.S. 814 (1879) (holding that a state may not contract away police power); *see also* Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849 (2001) (suggesting that the public trust doctrine is grounded in the "reserved powers" doctrine).
[37] *Karam*, 705 A.2d at 1229.

the permit denial were in place when the current owners bought the property.[38]

The bottom line is that the Karams did not have sufficient reasonable expectations to be entitled to compensation. The Karams' need to develop their private property was subservient to another, emerging environmental consideration, which fit within the public trust doctrine's broad parameters. The private property owners' interest in stable expectations, and in realizing the full economic potential of their property, was properly qualified and limited by a paramount state interest in managing certain natural resources, a public interest whose contours could change over time to the detriment of the private property owner.

The public trust aspect of *Karam* was reiterated and perhaps further developed in *East Cape May Associates v. State of New Jersey, Department of Environmental Protection*.[39] This case involved a convoluted dispute over permits that a developer needed in order to build 366 housing units.[40] A necessary permit to fill wetlands was denied.[41] In one section of the opinion, the court addressed the petitioners' claim that the permit denial abrogated 1903 and 1907 contracts with the state that, on their face, allowed the predecessor in title to fill the wetlands.[42] Citing *Karam*, the court found that despite the old contracts, there was no reasonable investment-backed expectation in filling the wetlands because of the state's continuing public trust obligation in land covered by tide waters.[43] The court went beyond *Karam* in one regard; in *Karam* the state's Waterfront Development Act,[44] enacted in 1914, might have provided a long-existing basis for the qualification of the original private property owners' expectations concerning a right to build a dock, and a warning to private owners.[45] Here,

---

[38] *Id.* ("We stress that the prohibition against the erection of docks along the Manasquan River was a matter of public record long before plaintiffs purchased the property. The prohibition was expressly set forth in a published regulation. Specifically, N.J. STAT. ANN..§ 7:12-2.1(A)(5) and N.J. STAT. ANN. § 7:12- 3.2(a) denominate the area in which plaintiffs' property is situated as a 'special restricted area.' N.J. STAT. ANN. § 7:7E-3.2(D) proscribes the construction of a dock in waters so classified.").

[39] East Cape May Assoc. v. N.J. Dep't of Envtl. Prot., 777 A.2d 1015 (N.J. Super. Ct. App. Div. 2001).

[40] *Id.* at 1019.

[41] *Id.*

[42] *Id.* at 1033-35.

[43] *Id.* at 1034 (citing *Karam*, 705 A.2d 1221).

[44] Waterfront and Harbor Facilities Act of 1914, N.J. STAT. ANN. § 12:5-1 to -11.

[45] *Karam*, 705 A.2d at 1229.

the allegedly protective contracts were entered into earlier than any permit statute.[46] All the same, the court found:

> tidally flowed land has always been subject to the public trust doctrine. That doctrine provides that the sovereign never waives its right to regulate the use of public trust property, such as land covered by tide water. So, as in *Karam*, the 1903 and 1907 grants were made with the understanding that the state had the right to continued regulation of the land.[47]

As in *Karam*, the public trust doctrine allowed regulation, many decades later, that could change course and thus disappoint the private property owner.[48] Although in a different context, this seems to be the same kind of application of the public trust doctrine as a background principle limiting private property rights that the South Carolina Supreme Court recently applied in *McQueen v. South Carolina Coastal Council*.[49]

---

[46] *East Cape May Assoc.*, 777 A.2d at 1034.

[47] *Id.* (citation omitted).

[48] *Karam*, 705 A.2d 1221.

[49] McQueen v. S.C. Coastal Council, 580 S.E.2d 116 (S.C. 2003) (no regulatory taking where the state denied permits to backfill and install bulkheads on lots that had reverted to tidelands or marshlands, because of the public trust doctrine's limitation on private property rights in such lands); *accord*, Esplanade Properties, Inc. v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (applying Washington state law); Coastal Petroleum v. Chiles, 701 So.2d 619 (Fla. App. 1997) (applying Florida state law). The "background principles" exception to regulatory takings was formulated in these words in *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029, and has become a significant type of defense to regulatory takings claims. *See* Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 329 (2005). For a specific discussion of the public trust doctrine as a background principle of property law limiting regulatory takings claims, see Blumm & Richie, *supra*, at 341-344; *see also* Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 36-59 (1995) (exploring the contours of the public trust doctrine and examining the applicability of public trust and custom to defeat regulatory takings claims); Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996); Paul Sarahan, *Wetlands Protections Post-*Lucas*: Implications of the Public Trust Doctrine on Takings Analysis*, 13 VA. ENVTL. L.J. 537 (1994). The possibility that public trust limitations on private property would insulate regulation against a takings claims of course antedates the *Lucas* formulation of the issue as a "background principles" inquiry. *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 584-587 (1989).

A difference that might be of significance to those attentive to the fine points of regulatory takings doctrine is that *McQueen*, 580 S.E.2d 116, analyzes the public trust doctrine as part of the "background principles of nuisance and property law" exception

B. Development Exactions Related to Public Access, Based on the Public Trust Doctrine

Another kind of challenge – one to a state development exaction scheme that burdened developers with construction, maintenance and public access obligations – occurred in *National Association of Home Builders of the United States v. State of New Jersey, Department of Environmental Protection*.[50] This case, too, may be directly applicable to the conflict in South Carolina.

Plaintiffs National Association of Home Builders and New Jersey Association of Home Builders challenged a state rule that applied to developments along a 17.4 mile length of Hudson River waterfront known as the Hudson River Waterfront Area.[51] The rule required those who sought Waterfront Development permits (a requirement under state law) to construct and maintain a thirty-foot wide walkway along their entire waterfront, built to specified standards; to convey a conservation easement for the walkway to the New Jersey Department of Environmental Protection (NJDEP); and to allow perpendicular public access to the walkway.[52]

---

described in *Lucas* in the context of a categorical taking. In contrast, *Karam* uses it as an important consideration affecting reasonable expectations under a *Penn Central* ad hoc analysis, in the context of a partial taking. *Karam*, 705 A.2d 1221. *Accord*, Palazzolo v. State, No. 88-0297, 2005 R.I. Super. LEXIS 108 (R.I. Super. July 5, 2005*), on remand from* Palazzolo v. Rhode Island, 533 U.S. 606 (2001), *remanding* 785 A.2d 561 (R.I. 2001), (finding no regulatory taking from denial of permit to fill wetlands, based in part on reduced economic expectations due to public trust status of the wetlands involved); R.W. Docks & Slips v. State, 628 N.W. 781 (Wis. 2001) (upholding denial of dredge permit against a regulatory takings claim based on a *Penn Central* analysis, finding that at stake was only a riparian right of reasonable use as qualified by the public trust doctrine); Orion Corp. v. Washington, 747 P.2d 1062 (Wash. 1987) (applying a reasonable expectations test in light of Washington's public trust doctrine before *Lucas*). For an excellent current examination of the interplay of the public trust doctrine and regulatory and physical takings doctrine, discussing both categorical analysis and *Penn Central* balancing, see Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421 (2005). *But cf.* David Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust Expectations and the (Mis)Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 372-379 (2002) (criticizing the use of an expanded public trust doctrine to impose new definitions of property retroactively so as to avoid regulatory takings claims).

[50] 64 F.Supp. 2d 354 (D.N.J. 1999).

[51] Hudson River Waterfront Area Rule, N.J. ADMIN. CODE. § 7:7E-3.48 (2004) (enacted pursuant to New Jersey's Waterfront Development Act of 1914, N.J. STAT. ANN. § 12:5-1 to -11).

[52] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 356. For more information on the history and status of this ongoing and incomplete project, see Alexander Lane, *Along the Hudson, a Path of Construction*, STAR-LEDGER (Newark), Apr. 16, 2006, § 1 at 21. (writing that

Developers were required to perform these requirements without state compensation.[53] The rule was alleged to be unconstitutional as a taking.[54]

Federal District Court Judge Garrett E. Brown, Jr., applying New Jersey law, approached the controversy by characterizing the three categories of property at stake.[55] Each of the categories implicated the public trust doctrine and permitted, or might permit, the state to impose the challenged conditions.[56] The largest portion of the land at issue (88.7%) had originally been submerged and was subsequently artificially filled in.[57] Because the land was formerly submerged, it was held subject to a public right of access to use and enjoy the property.[58] Thus, even after it was alienated to private owners,[59] the public could not be excluded.[60] The court applied a standard public trust doctrine principle that submerged lands, even when alienated, continue to be affected by a public right, a *ius publicum,* to serve the public trust purposes.[61] This portion of the land would not support any takings challenge to the Walkway exaction, as public access was a preexisting burden on the private ownership.

The court also upheld the required conservation easements, stating that they "merely memorialize[d] the State's role in protecting the public's right

---

planners first conceived the idea some forty years ago and gave it the force of law about twenty years ago and it is roughly half-finished).

[53] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 356.

[54] *Id.*

[55] *Id.* at 357-58.

[56] *Id.*

[57] *Id.* at 357.

[58] *Id.*

[59] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 357-58.

[60] *Id.* at 358. The court stated but did not explore at any length this feature of submerged and formerly submerged lands. *Id.* Other opinions, of New Jersey state courts and other courts, have done so. *See, e.g.*, Shively v. Bowlby, 152 U.S. 1 (1894) (submerged lands remain impressed with a public trust obligation); *Ill. Cent. R.R. Co.*, 146 U.S. at 453 (the control of the state for purposes of the public trust can never be lost); Marks v. Whitney, 491 P.2d 374 (Cal. 1971) (alienated submerged lands remain subject to a public trust *ius publicum*); Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979) (land filled in from Boston Harbor remained subject to a public trust obligation); *Borough of Neptune City*, 294 A.2d at 54 (suggesting that despite earlier New Jersey cases, submerged lands that had been alienated were still "impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein."); State v. Cent. Vt. Ry. Co., 571 A.2d 1128 (Vt. 1989) (formerly submerged lands along the shore of Lake Champlain held subject to public trust obligations).

[61] For a concise account of the *ius publicum* and *ius privatum* distinction, *see* DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 6-9 (Coastal States Org. 2d ed. 1997).

to use and enjoy the property under the public trust doctrine."[62] There was no merit in the plaintiffs' claim that the conservation easement requirement demonstrated that the state's impositions went beyond the parameters of the public trust doctrine.[63] I note that South Carolina's current marsh island regulations also may require conservation easements in cases where private bridges are allowed.[64] Here is another example of this technique, linked to exercise of the public trust doctrine.

What about the remaining 11.3% of the property, which had never been underwater but was subject to one or more of the walkway conditions?[65] A small portion of it had walkway on it, or would have walkway on it, and the rest was necessary for perpendicular access to the walkway.[66] Although this land was not filled land, the court held that there was still, potentially, a right of public access here, and that if the public had a right of access, then the developers could not complain of the Walkway program.[67] The right of access was derived from a holding in *Matthews v. Bay Head Improvement Association*[68] and can be applied in accordance with a reasonableness test set forth in *Matthews*.[69]

Matthews is a beach access case, and builds on the prior leading modern New Jersey beach access or public trust cases,[70] *Borough of Neptune City v. Borough of Avon-by-the-Sea*[71] and *Van Ness v. Borough of Deal*.[72] The actual holding in *Matthews* was limited to requiring public access on equal terms to the dry sand beach owned by a quasi-public body.[73] This limitation

---

[62] *Nat'l Assoc. of Home Builders*, 64 F. Supp. 2d at n.1.
[63] *Id.*
[64] S.C. CODE ANN. REGS. 30-12(N)(4) (2006).
[65] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 358.
[66] *Id.* at 358-59.
[67] *Id.* at 359.
[68] Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).
[69] *Nat'l Assoc. of Home Builders,* 64 F.Supp. 2d at 359 (relying on *Matthews*, 471 A.2d 355).
[70] *Matthews*, 471 A.2d 355.
[71] Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972) (under the public trust doctrine, shore municipality operating a public beach could not charge higher beach fees to residents of a neighboring municipality than to its own residents).
[72] Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978) (under the public trust doctrine, a shore municipality could not limit non-residents' use of municipality's dry sand beach to a fifty foot wide strip).
[73] *Matthews*, 471 A.2d at 358. The Bay Head Improvement Association (Association) was founded in 1910 and incorporated as a nonprofit corporation in 1932. *Id.* at 359. It "service[d] the needs of all residents of the Borough [of Bay Head] for swimming and bathing in the public trust property." *Id.* at 366. It owned the extensions of seven of nine public streets across the beach to the mean high tide line, as well as a fee interest in six upland properties and also leased 42 additional tracts of upland sand area. *Id.* The Association excluded the

kept it more or less in line with the holdings in *Neptune City* and *Van Ness*, both of which opened up a general public access to municipally owned dry sand beaches.[74] But in *Matthews* the court also addressed the burdens placed on owners of private beachfront property by the public trust doctrine, and deriving from the mere fact of owning private property adjacent to lands as to which the public had a primary right of access.[75] *Matthews* states that "private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand."[76] In fixing the contours of the right reasonably to use the dry sand beach, the court articulated four factors to be weighed and considered: "location of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner."[77]

Perhaps due to its limiting holding that the beach at issue here was owned by a "quasi-public" entity, *Matthews* did not further elaborate on how to apply these factors.[78] Reasonable access to Bay Head's beaches was achieved by requiring the association that managed Bay Head's beaches to open up membership to all instead of restricting it to Bay Head residents, and by requiring daily as well as seasonal beach passes to be offered for sale to nonresidents.[79]

The court in *National Home Builders* enumerated the four factors from *Matthews*, effectively affirming that the developers' private property rights

---

residents of the neighboring Borough of Point Pleasant from using the beaches it owned or managed by limiting membership in the Association to residents of Bay Head. *Id.* at 359-60. This exclusion began at the time of the formal inception of the Association in 1932, and was justified at the time of trial by assertions of a lack of parking and concern to avoid overcrowding the beach. *Id.* at 360. After extensive examination of the interrelationship of the Association and the municipality, the court concluded "the quasi-public nature of the Association is apparent." *Id.* at 367-68.

[74] *Borough of Neptune City*, 294 A.2d at 50; *Van Ness*, 393 A.2d 571.

[75] *Matthews*, 471 A.2d at 364.

[76] *Id.* at 366.

[77] *Id.* at 365.

[78] *Id.*

[79] *Id.* at 368–369. The court rejected the New Jersey Public Advocate's claim that all privately-owned beachfront property within the Borough must be opened to the public, on the basis that changing the Association's membership rules might well reasonably satisfy the public's need for access and use at the time of the case. *Id.* at 369. If private parties withdrew their leased land from the Association and then sought to restrict public access, the court said, further adjudication of the public's public trust claims under a reasonableness standard might be necessary. *Id.*

of exclusion must yield to the public right of reasonable shore access in New Jersey, and that the standard walkway exactions fulfilled this function.[80] The court held, however, that the record was not clear as to how *Matthews* should be applied here to achieve reasonable public access; therefore, summary judgment for the state was precluded.[81] Rather than go forward with an actual application of *Matthews*, the plaintiffs settled.[82] Thus, an actual application of the *Matthews* access requirement across private land was forestalled; it would have to await the *Raleigh Avenue* case, decided in 2005.[83]

In terms of regulatory takings doctrine, the court in *National Association of Home Builders* also held that the reasonableness determination under *Matthews v. Bay Head* was not the kind of "individualized determination" of an exaction that required heightened scrutiny under *Dolan v. City of Tigard*.[84] Because of New Jersey's public trust doctrine, the generally applicable walkway requirements were simply a different animal than exactions or dedications under *Dolan*.[85] Perhaps this application of the *Matthews* reasonable access test can also be understood as an implementation of a background principle limiting property, as per *Lucas v. South Carolina Coastal Council*.[86] This principle stands in contrast to cases such as the Massachusetts Supreme Judicial Court's ruling on public passage along the shore, which held that a longstanding public easement (somewhat analogous to New Jersey's public trust doctrine) was limited to commerce, navigation and fowling, and therefore did not extend to a right of passage along the shore.[87] A state bill proposing to create a right of passage would require compensation to private property owners for the loss of their right to exclude others.[88]

---

[80] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 359.
[81] *Id.* at 360.
[82] *Id.*
[83] *See infra* Part I.C.; *Raleigh Ave. Beach Ass'n*, 879 A.2d 112.
[84] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 359-60 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (requiring a rough proportionality between the effects of development pursuant to a permit and exactions imposed as conditions of the permit)).
[85] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 359 ("*Matthews* . . . simply does not stand for the proposition that 'individualized determinations,' as are contemplated by [*Dolan*] for dedications or exactions of private land, are a part of the reasonableness test." (citations omitted)).
[86] 505 U.S. 1003 (1992). *See generally* Blumm & Ritchie, *supra* note 49.
[87] Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974).
[88] *Id.* (tracing the limited public right to use the shore to the Massachusetts Bay Colony's Colonial Ordinance of 1641-47); *see also* Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (limiting the public easement in privately owned inter-tidal lands to fishing, fowling and

C. Private Property Owners' Right to Exclude from Beaches is Limited in Favor of Public Rights of Use and Access, Pursuant to the Public Trust Doctrine

In New Jersey, land seaward of the mean high tide line (the wet sand beach) is typically owned by the state, and the public has free use of it.[89] While traditional uses long understood to be protected by the public trust doctrine include commerce, fishing and fowling, the New Jersey Supreme Court has held modern recreational uses such as swimming, boating and sunbathing are also protected.[90] Two types of physical access problems can arise here. The public has a right to use the ocean and the wet sand beach, but it may not be able to get to them easily from the land. Thus, public access controversies often involve access to a wet sand beach across the adjacent dry sand beach from roads and parking areas, and across whatever dunes, bulkheads or other structures may be in between. This article will call this vertical access or perpendicular access. In addition, the public's ability fully to enjoy the wet sand beach may depend its on being able to use at least some portion of the dry sand beach for recreation, and to walk along

---

navigation, but not general recreation; applying the common law of Massachusetts, and based on an interpretation of the Massachusetts Colonial Ordinance of 1641-47).

[89] *Matthews*, 471 A.2d at 358.

[90] *Id.* at 363-64 (recognizing the extension of activities protected under the public trust doctrine to include "bathing, swimming and other shore activities" and describing a public "right to sunbathe and generally enjoy recreational activities") (citing *Borough of Neptune City*, 294 A.2d at 54 ("We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities.")). The public trust doctrine has always been recognized in New Jersey. *Arnold*, 6 N.J.L. at 3 (tidal waters are among the types of natural resources that are common property, to be managed by the state for the benefit of the public; citizens may not be absolutely divested of their common right).

A few other states have recognized that the traditional uses of the shore benefit from the access provided by the public trust doctrine, yet refuse to extend the public trust doctrine to modern recreational uses of the shore. *E.g.*, *Opinion of the Justices*, 313 N.E.2d 561 (there is no public right of passage below the mean high tide line under Massachusetts law; a bill establishing one would effect a taking); *Bell*, 557 A.2d at 173-76 (privately owned inter-tidal land was subject to a public easement for fishing, fowling and navigation, both commercial and recreational, but not for a broader recreational uses of the beach). *See also* Glass v. Goeckel, 703 N.W.2d 58 (Mich. 2005) (the public trust doctrine assures a right to walk along the foreshore of the Great Lakes below the ordinary mean high water line). The Connecticut Supreme Court reframed the shore access issue in terms of a First Amendment right of access to public parks, thus avoiding a holding on the public trust doctrine that might apply to public as well as public shore property. Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001) (relying on a First Amendment analysis to assure public access to a municipal park on Long Island Sound), *aff'g on other grounds* Leydon v. Town of Greenwich, 750 A.2d 1122 (Conn. App. Ct. 2000) (relying on a public trust analysis to assure public access to the park).

the beach landward of the mean high tide line. This article will call the right to use a portion of the dry sand beach for recreational purposes connected to the wet sand beach and the ocean, and to pass along the shore above the mean high tide line, horizontal access.[91]

In addition to these physical public access issues, exclusion or discrimination in access is sometimes accomplished through the use of beach access fees.[92] Where a municipality or private owner charges beach fees (as has been authorized by New Jersey law since the 1950s),[93] the fees may be used to discourage public access, either by creating a different fee schedule for residents and non-residents, or by manipulating the availability of more economical season passes.[94] Discrimination in the sale and pricing of beach fees is also controlled by the public trust doctrine.[95]

Prior to 2005, the New Jersey cases applied these basic principles to various issues arising from the exclusion of the public from municipal beaches[96] and, in *Matthews v. Bay Head Improvement Ass'n*, to a privately owned but "quasi-public" beach.[97] *Matthews* stated that the public was entitled to reasonable access even if that access involved crossing private property, but did not actually apply the principle to private (as opposed to "quasi-public") property.[98] As we saw above, the *National Association of Home Builders* case threatened to apply the *Matthews* access principle to privately owned property that had never been tide lands directly subject to the state's control and persistent *ius publicum*; this threat resulted in a settlement of the case's takings claim.[99]

The *Matthews* dictum was, finally, applied to private property in 2005 by the New Jersey Supreme Court in *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*.[100] This case involved a successful attempt by town residents to secure public access to a privately owned, 480-foot wide strip of Atlantic Ocean dry sand beach in Lower Township, Cape May County, New Jersey.[101] Atlantis Beach Club (Atlantis) owned the beach and was operating

---

[91] *See Raleigh Ave. Beach Ass'n*, 879 A.2d at 117 (summarizing trial court holding using these terms).
[92] *See Borough of Neptune City*, 294 A.2d at 55.
[93] *Id.* at 50.
[94] *Id.* at 55.
[95] *See, e.g., id.*
[96] *Id.*
[97] *Matthews*, 471 A.2d 355.
[98] *Id.* at 364.
[99] *See supra* Part I.B.
[100] 879 A.2d 112.
[101] *Id.* at 113.

it as a private club.[102] Just west of the property, a pathway ran west to east along the unpaved section of Raleigh Avenue up to the private beach, crossed a bulkhead on the private property, and continued on a boardwalk through the dunes to the dry sand beach.[103]

Until 1996, public access to the ocean and wet sand beach was freely available along this path.[104] In 1996, however, Atlantis posted a sign at a gate at the Raleigh Avenue access point, stating that free public access ended there, but that membership in the club was available.[105] By the time the controversy came to a head a few years later, this membership consisted of an opportunity to buy either a set of beach passes good for one season (for $700), or to buy an interest in the property consisting of an access easement (for $10,000, later raised to $15,000).[106] Atlantis provided security personnel and lifeguards during the summer season.[107]

In 2002, a resident of the nearby Raleigh Avenue neighborhood received a summons for trespassing while he was leaving the wet sand area, crossing the Atlantis property, to get to Raleigh Avenue "in order to take the most direct route to his home."[108] The next nearest free public access point was half a mile (nine blocks) to the north.[109] Atlantis sought an order against this individual, other unnamed individuals, the municipality, and the state, seeking to enjoin individuals from trespassing and to obtain a court declaration that "Atlantis [was] not required to provide the public with access to or use of any portion of its property or the adjacent ocean."[110] The Raleigh Avenue Beach Association, consisting of Raleigh Avenue residents who live near the beach, filed a complaint against Atlantis, Seapointe Village (Seapointe) (a large hotel and condominium complex directly to the north), the local police department, and the state. The residents' action was based on the public trust doctrine.[111] It "sought free public access through the Atlantis property to the beach, and to a sufficient amount of dry sand

---

[102] *Id.* at 113-14. The property, bulkheaded at its western boundary, runs east about 342 feet, through dunes and dry sand beach, to the mean high tide line and the wet sand beach beyond it. *Id.*
[103] *Id.*
[104] *Id.* at 115 n.2.
[105] *Id.* at 115.
[106] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 115, 117.
[107] *Id.* at 115–16. Owners of these access easements apparently had to bear a proportionate share of the club's annual operating costs, shared with the annual members. *Id.*
[108] *Id.* at 116.
[109] *Id.* at 115.
[110] *Id.* at 116.
[111] *Id.*

above the mean high water line to permit the public to enjoy the beach and beach-related activities."[112] The actions of Atlantis and the residents were consolidated.[113]

As to horizontal access, the trial court held that the public was entitled to use a three-foot wide strip of dry sand beach next to the wet sand beach, and running the entire length of Atlantis' property.[114] The public was also entitled to a limited vertical (perpendicular) access; a path that the court defined, starting at the bulkhead and then moving along the northern boundary of the property across the dunes and the dry sand, but not at Raleigh Avenue.[115] Atlantis was no longer able to inhibit the free use of the horizontal ocean access;[116] and insofar as Atlantis provided lifeguards, equipment, or other facilities, it could charge the public who used the beach in front of its property a commercially reasonable fee, to be approved by the state Department of Environmental Protection (DEP).[117]

An Appellate Division panel reaffirmed the basic holding's reliance on *Matthews v. Bay Head*, but it adjusted the details in significant ways.[118] It held that perpendicular access would be required at the Raleigh Avenue entrance to the beach; the trial court's limitation of perpendicular access to a route along the northern border was "a longer, significantly less direct route . . . ."[119] The Raleigh Avenue route was justified as well, for other reasons.[120] The appellate court also held that the public was entitled to "complete horizontal access" and use of the dry sand beach.[121] The court explicitly rejected Atlantis' claim that the club was entitled "to use its land to generate profit by providing an exclusive place for its paying clientele."[122]

---

[112] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 116.
[113] *Id.*
[114] *Id.* at 117.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 851 A.2d 19, 28-29 (N.J. Super. Ct. App. Div. 2004), *modified*, 879 A.2d 112 (N.J. 2005).
[119] *Raleigh Ave. Beach Ass'n*, 851 A.2d at 29.
[120] *Id.* The additional factors included a history of public access across Atlantis' property, the large number of nearby residential units, and the lack of perpendicular access to the south. *Id.* Also, the court noted that Atlantis did not provide cabanas, changing facilities or other amenities for its members, so that allowing the public to cut across its beach was perhaps less intrusive (during most of the summer, the property to the south, owned by the United States Coast Guard, was closed to the public in order to protect an endangered species, the piping plover). *Id.*; *see also Raleigh Ave. Beach Ass'n*, 879 A.2d at 117.
[121] *Raleigh Ave. Beach Ass'n*, 851 A.2d at 36 (supplemental order granting motion for clarification).
[122] *Id.* at 30.

The court stated bluntly, "[e]xclusivity is not a valid reason for limiting use or access."[123] It also noted that the public's intermittent use of the upland sand would not interfere with Atlantis' providing services to its members.[124]

The Appellate Division clarified, based upon Atlantis' statements at oral argument, that Atlantis could charge a fee to members of the public who remain on and use the dry sand beach as members, but would not charge a fee for those who receive the benefit of its lifeguard services while using the ocean but who did not remain upon its property.[125] The court held that the beach fees could be higher than those appropriate for a municipality or non-profit organization, though they would still be limited and regulated.[126] Concerning the structure of beach fees, Atlantis would be required to offer daily, weekly, monthly and seasonal fees. Providing only for a seasonal fee of $700 for up to eight household members, as it had done, would "discriminate[] against individuals and small families by forcing them to pay an amount bearing no rational relationship to the cost associated with individual use of the property. . . . Simply stated, it is exclusionary."[127]

The New Jersey Supreme Court, after summarizing key precedents on the public trust doctrine, faced squarely the issue it had avoided in *Matthews v. Bay Head Improvement Ass'n*: the judicial imposition of public access requirements on a private beach.[128] As discussed above,[129] *Matthews* articulates four factors that should apply in determining what access to and

---

[123] *Id.*
[124] *Raleigh Ave. Beach Ass'n*, 851 A.2d at 30.
[125] *Id.*
[126] *Id.* at 33 (citing Slocum v. Borough of Belmar, 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989) (reviewing thirty categories of expenses related to beach use and maintenance and prescribing allocations as between general accounts and a special segregated beach account)).
[127] *Raleigh Ave. Beach Ass'n*, 851 A.2d at 33. The state DEP was authorized to regulate fees charged by Atlantis under the state's Coastal Area Facility Review Act (CAFRA), N.J. STAT. ANN. § 13:19-1 to -21 (2006), as the boardwalk over the dunes and onto the beach was deemed a structure requiring a CAFRA permit and the regulation of fees could be understood to be a condition of the permit. *Id.* The DEP's authority to impose conditions on CAFRA permits generally was affirmed in *In Re Egg Harbor Associates*, 464 A.2d 1115 (N.J. 1983) (finding DEP had authority to impose a requirement of inclusion of low and moderate income housing as a condition of a CAFRA permit; it was related to general public welfare, if not directly to environmental, concerns).
[128] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 119-20 (citing *Matthews*, 471 A.2d 355).
[129] *See supra* Part I.B.

use of the foreshore was reasonable.[130] In *Raleigh Avenue*, the court assessed and applied them.[131]

The "location of the dry sand area in relation to the foreshore" factor was quite straightforward.[132] The court noted that one could easily reach the property from the Raleigh Avenue extension and path.[133] As for the "extent and availability of publicly-owned upland sand area" factor, the court noted that there is no publicly owned beach in Lower Township.[134] The Seapointe condominium made its upland beach area "available to the public for a 'reasonable' fee," pursuant to a condition of a state-issued permit.[135] (Elsewhere in the opinion it had noted that the only other two public access points from the west to the ocean in Lower Township were over Seapointe's beach property, which was at least nine blocks to the north.)[136] To the north, there was a public beach in the next town.[137] To the south, the Coast Guard beach was closed to the public for most of the summer in order to protect the endangered piping plover.[138] As to the "nature and extent of public demand," the local residential area was not large (three by nine blocks), but the court also discerned an enormous public interest generally in use of the New Jersey shore, and found that parking was generally adequate (presumably to support outsiders as well as walk-ins using the beach).[139] As for "usage of the upland sand by the owner," the land had been closed to non-members since 1996, and Atlantis had charged unregulated beach fees between 1996 and 2004.[140] The beach had been used by the public for many years prior to 1996.[141] La Vida, the condominium complex directly to the west of Atlantis, had accepted public use of the beach as a condition of a Coastal Area Facility Review Act (CAFRA) permit, a condition that might apply to Atlantis as well.[142]

---

[130] *Matthews*, 471 A.2d at 365 (discussing four factors to determine the amount of private dry sand that must be open to the public).
[131] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 121-22.
[132] *Id.* at 121.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 122.
[136] *Id.* at 115.
[137] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 122.
[138] *Id.* at 121-122.
[139] *Id.* at 122.
[140] *Id.*
[141] *Id.* at 122-24.
[142] *Id.* at 123. The court conceded that the permit language was unclear, that the relationship between La Vida and Atlantis was not clear, and that an access right pursuant to the CAFRA permit had not been argued by any party. *Id.* at 123. In light of this, it would not rely on the

The court devoted a paragraph to responding to Atlantis' assertion that it was entitled as a property owner to exclude whomever it wanted and to charge whatever the market would bear for the value created by that exclusivity:

> The Beach Club nonetheless asserts that it will lose one of the "sticks" in its bundle of property rights if it cannot charge whatever the market will bear, and, in setting fees for membership, decide who can come onto its property and use its beach and other services (lifeguards, trash removal, organized activities, etc.). But exclusivity of use, in the context here, has long been subject to the strictures of the public trust doctrine.[143]

The court also cited a leading New Jersey precedent requiring desegregation of public recreational facilities that, as public accommodations, must provide access to the general public.[144]

The court provided some further discussion of the Appellate Division's holdings on governmental supervision of beach fees.[145] It agreed the DEP had jurisdiction, both because the boardwalk was a structure requiring a CAFRA permit and supervision of fees could be a condition of that permit and also because the DEP had general authority to promote the public's health, safety and welfare.[146] It stressed that fees should not limit access by placing an unreasonable burden on the public.[147]

A dissent by Justice Wallace, joined by Justice Rivera-Soto, applied the *Matthews* factors differently.[148] It would not have allowed the public the right to use all of Atlantis' upland property.[149] Justice Wallace was persuaded by the proximity of Seapointe, which allowed public use of its

---

permit for the public use issue. *Id. See id.* at 128 (Wallace, J., dissenting) (agreeing that the La Vida CAFRA permit should not be considered).

[143] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 124.

[144] *Id.* (citing Clover Hill Swimming Club v. Goldsboro, 219 A.2d 161 (N.J. 1966)). I have no indication that race was a factor in the policies of the Atlantis Beach Club here. I have argued elsewhere that New Jersey's development of the public trust doctrine to assure unrestricted access to beaches did in fact include a public concern about racially-motivated exclusion that is not acknowledged in the cases themselves. Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996) [hereinafter *Environmental Justice and the Beach Access Movements*].

[145] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 124-25.

[146] *Id.*

[147] *Id.* at 125.

[148] *Id.* at 125-129.

[149] *Id.*

private upland beach for a reasonable fee.[150] Therefore, in his view, the *Matthews* factors justified both perpendicular and some horizontal access, but not a full right of use.[151] At the same time, Justice Wallace disagreed with the trial court's provision for the public use of only a three-foot wide strip of dry sand beach.[152] He would have allowed use of a ten-foot-wide strip, allowing a family to traverse the Atlantis property safely to Seapointe, as well as providing the public with a limited ability to use part of the dry sand beach.[153]

II. MODIFIED PRIVATE PROPERTY

If my account of New Jersey's modern public trust seems less than complete, it is because I have stripped out the numerous cases that address the use of municipal beaches. These include not only the familiar cases about the general public's right of access to municipally owned beaches,[154] but also other cases about the scope of permissible regulation of beach use once the underlying public access obligation was established.[155] I have also

---

[150] *Id.* at 128.

[151] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 127-29 (Wallace, J., dissenting).

[152] *Id.* at 129.

[153] *Id.* (Wallace, J., dissenting).

[154] *See, e.g.*, Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978) (finding that a municipality could not limit non-residents' use of municipality's dry sand beach to a fifty-foot wide strip); Hyland v. Borough of Allenhurst, 393 A.2d 579 (N.J. 1978) (holding that if municipal restrooms are made available at all, they must be made available to residents and non-residents alike); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972) (holding a municipality may not charge higher beach use fees to non-residents); Hyland v. Township of Long Beach, 389 A.2d 494 (N.J. Super. Ct. App. Div. 1978) (holding that reasonable pre-season discount for purchase of beach pass is not a violation of the right of access to beach lands pursuant to the public trust doctrine); Hyland v. Borough of Allenhurst, 372 A.2d 1133 (N.J. Super. Ct. App. Div. 1977), *modified by*, 393 A.2d 579 (N.J. 1978) (holding that charging different rates for beach passes to residents and non-residents where beach club facilities were already paid for by residents in their local taxes is allowed; the municipality could limit daily passes to residents, while making seasonal and half seasonal passes available to non-residents, in light of limited parking and facilities); Slocum v. Borough of Belmar, 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989) (holding that examining how beach fees discriminated against non-residents); Sea Isle City v. Caterina, 303 A.2d 351 (N.J. Super. Ct. Law Div. 1973) (upholding pre-season discount on seasonal badges, but overturning weekly badge that commenced at noon on Saturday, thus forcing weekenders to buy two badges).

[155] *See, e.g.*, Capano v. Stone Harbor, 530 F.Supp. 1254 (D.N.J. 1982) (holding the public trust doctrine requires ban on swimming at unsafe beach to be applied uniformly; exception allowing nuns to use beach in front of their convent was invalid, or else must be extended to all beach users); Lusardi v. Curtis Point Property Owners Ass'n, 430 A.2d 881 (N.J. 1981) (finding that municipality could zone vacant beachfront land as single family residential, but it could not prevent group owners of a still-vacant lot from using it for the group's

omitted discussion of *Arnold v. Mundy*[156] and other cases from the nineteenth century concerning the inalienability vel non of submerged lands, despite their foundational relevance in establishing an American version of the public trust doctrine.[157]

---

recreation); Secure Heritage, Inc. v. Cape May, 825 A.2d 534 (N.J. Super. Ct. App. Div. 2003) (holding that the ban on sale of seasonal beach tags to commercial lodging establishments did not violate the public trust doctrine, but was invalid as arbitrary because it violated equal protection); State v. Vogt, 775 A.2d 551 (N.J. Super. Ct. App. Div. 2001) (public trust doctrine does not entitle topless use of beach in violation of state law and local ordinance); State v. Oliver, 727 A.2d 491 (N.J. Super. Ct. App. Div. 1999) (upholding conviction under municipal ordinance for continuing to use beach despite tropical storm; legitimate state police power to protect public health and safety allows it to close beaches otherwise open under the public trust doctrine); Sea Watch, Inc. v. Borough of Manasquan, 425 A.2d 1098 (N.J Super. Ct. Law Div. 1980) (invalidating ordinance that prohibited walking down a public boardwalk without a beach pass because the boardwalk was a public way and the ordinance was unnecessary to enforce the beach pass); State v. Mizrah, 373 A.2d 433 (N.J. Super. Ct. App. Div. 1977) (finding where municipality charged a beach fee, a person sunbathing on the foreshore was not exempted from payment of the fee, as his use extended beyond the traditional right to pass and repass).

[156] Arnold v. Mundy, 6 N.J.L. 1 (N.J. 1821).

[157] These cases are problematic. *See generally* MCCAY, *supra* note 7, at 95-122. McCay points out that in the latter part of the nineteenth century the New Jersey courts seemed much more willing to allow alienation of submerged lands to the detriment of common rights. *Id.* *Wooley v. Campbell*, 37 N.J.L. 163 (N.J. 1874), for example, distinguished two conceptions of alienation, one based on the state as parliamentary proprietor, pursuant to which submerged lands could be freely alienated, and the other based on the state as sovereign and trustee, who could not alienate freely. *Wooley* relied on *Stevens v. Paterson & Newark Railroad Co.*, 34 N.J.L. 532 (N.J. 1870), which held the legislature as proprietor could alienate submerged lands to the railroad, to the detriment of other riparian owners. This trend seems to be in tension with the classic Supreme Court statement in *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (holding the state cannot abdicate its trust over property in which the whole people of the state are interested). *But cf.* Appleby v. City of New York, 271 U.S. 364 (1926) (discussing how, where city conveyed lots below tidewater for navigational purposes, the public trust was extinguished, the private owner acquired a fee interest, and city could not use the property for mooring).

The later nineteenth-century cases appear to reflect an unresolved conflict between different concepts and practices of the alienability of submerged and tide-flowed lands. McCay argues that *Wooley*, *Stevens* and other New Jersey cases "were part of a much larger trend towards state disposition of public lands." MCCAY, *supra* note 7, at 108. *Appleby*, for example, addresses the effect of an alienation that occurred before 1879, when a New York state constitutional amendment put a stop to it. *Appleby*, 271 U.S. at 366-67. The situation was apparently similar in California. City of Berkeley v. Superior Court, 606 P.2d 362, 365-66 (Cal. 1980) (discussing sales of tideland by the state in the latter half of the nineteenth century, and holding that the public trust limitations on ownership were not thereby extinguished). A recent reexamination of *Illinois Central*, 146 U.S. 387, concluded that the case was at least as much about a political fight among several different contenders for ownership as it was about any particular theory of common rights in the lake bed. Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What*

These omissions allow us to focus on how New Jersey applies the public trust doctrine to private property. Private property owners see themselves as injured by permit denials or conditions or independently imposed access requirements that preclude development (*East Cape May*),[158] limit use (*Karam*),[159] or impinge on an exclusivity that the private owner would like to market (*National Association of Home Builders*,[160] *Raleigh Avenue*).[161] Rights to use and exclude are typically understood as fundamental attributes of private property, and yet the public trust doctrine is invoked to justify modifying or limiting them.[162] Moreover, although the public trust doctrine is depicted as a preexisting limitation (sometimes in tandem with police powers exercised out of concern for the public welfare in environmental matters),[163] the specifics of the limitation or modification are developed later. Because of the public trust doctrine, private property in the shore, in land that is tidally flowed, or in formerly submerged land, can be thus understood to be different; limited ex ante, although the exact extent of the limitation only develops as time goes on, with the private owner and the state engaging in a dialogue about permissible uses through a permitting process or litigation.

A. Reasonably Modified Private Property Rights

How is this uncertainty in private property rights managed and justified? A key concept in the modern New Jersey public trust doctrine is "reasonableness" in the accommodation of resources between private and public interests.[164] "The precise extent of public access in a specific area remains subject to a fact-sensitive analysis, based on the *Matthews*

Really Happened in Illinois Central, 71 U. CHI. L. REV. 799 (2004). Whatever historical and socio-legal insights further study may offer, and despite the importance of *Illinois Central* in particular as a lodestar for the modern public trust doctrine, as a group these are in fact thoroughly ambiguous cases. "*Illinois Central* could be used in courts as authority for an inalienable public trust, on the one hand, or as authority for a state's right to alienate both *jus privatum* and *jus publicum* for private purposes, on the other." MCCAY, *supra* note 7, at 109-110.

[158] East Cape May Assoc. v. N. J. Dep't of Envtl. Prot., 777 A.2d 1015 (N.J. Super. Ct. App. Div. 2001).

[159] Karam v. Dep't of Envtl. Prot., 705 A.2d 1221 (N.J. Super. Ct. App. Div. 2001).

[160] Nat'l Assoc. of Home Builders v. Dep't of Envtl. Prot., 64 F.Supp. 2d 354 (1999).

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

[162] *See Arnold*, 6 N.J.L. 1.

[163] *See Oliver*, 727 A.2d 491.

[164] The *Matthews* opinion uses "reasonable" or "reasonably" fifteen times. *Matthews*, 471 A.2d 355. The *Raleigh Ave.* majority opinion uses these terms twelve times. *Raleigh Ave. Beach Ass'n*, 879 A.2d 112.

factors."[165] *Matthews* articulated factors for determining what constitutes reasonable access across privately owned property next to the ocean and wet sand beach, under a given set of circumstances.[166] In *Matthews* itself, reasonableness was satisfied by opening a quasi-public beach to the general public.[167] The federal court in *National Association of Home Builders*[168] planned to determine reasonableness under the *Matthews* factors with a similar fact-specific inquiry.[169] *Raleigh Avenue* established reasonableness of imposition on the private right to exclude after an examination of the *Matthews* factors, though the various courts disagreed on the details, and the majority and dissent at the Supreme Court level also disagreed.[170] These are all ad hoc, fact specific inquiries; in each of these cases the ultimate guarantor of reasonableness is the court's examination of local conditions affecting the need for public access.[171]

A notion of reasonableness also inheres in the attention paid to the level and structure of beach access fees in numerous cases.[172] Regulation of beach fees involves a similar attempt to manage fairly the private or municipal interest in recovering the costs imposed by opening beaches to the general public, and at the same time to protect the public against the exclusionary effects of improperly designed beach fees.[173] Here the reviewer is in the first instance the DEP, though courts have stepped in to clarify which fee structures impermissibly discriminate in violation of the public trust.[174] And again, each situation is different and thus requires an ad hoc, fact-specific inquiry.

I should also note that reasonable public access does not mean municipal or private beaches are prohibited from managing overcrowding. A number of cases are quite clear that this type of congestion is contrary to the right of public access and use, and that restrictions may be maintained to

---

[165] Brian Weeks, *Public Rights of Access to and Use of the Shores of Tidal Waterways in New Jersey*, 237 N.J. LAW. 12, 15 (2005).
[166] *Matthews*, 471 A.2d at 365-266.
[167] *Id.* at 364.
[168] *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 358.
[169] *Id.*
[170] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 113.
[171] *Id.* at 115. *See also Matthews*, 471 A.2d 355; *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d 354.
[172] Weeks, *supra* note 165, at 15-16.
[173] *See Raleigh Ave. Beach Ass'n*, 879 A.2d at 118-120.
[174] *Id.*

limit overall use so long as they do not discriminate among users based on residence.[175]

What about the denial or conditioning of a permit? Does some idea of reasonableness also underlie these cases? Yes, if one raises a regulatory takings challenge and applies the *Penn Central* ad hoc test, with its all-important prong of reasonable investment-backed expectations.[176] *Karam* put this spin on the public trust doctrine's effect.[177] However, *East Cape May Associates* and the *National Association of Home Builders* analysis as to the filled lands apply instead an "antecedent inquiry" into the extent of the private property owners' rights[178] (note that *Karam*[179] can be read in that way too, given its not altogether clear language). Such applications make it harder to identify a direct reasonableness requirement. Presumably, a refusal to issue a permit, or the imposition of conditions that are too distant from the core justifications of the public trust doctrine, might trigger a judicial questioning about the real purpose of the denial or exaction.[180] In one subset of permit condition cases, individualized determinations, heightened judicial scrutiny, as expressed in *Nollan*[181] and *Dolan*,[182] is available to rein in governmental action.[183] In another subset of government regulatory actions – permit conditions imposed in general programs where *Nollan* and *Dolan* do not apply – the government actions occur in the context of regulatory programs that have ascertained categories of circumstances in which

---

[175] This point militates against invoking the public trust doctrine (or at least New Jersey's version of it) to force a right of access to restricted fishing areas such as marine protected areas. In my view, the public trust doctrine permits management of resources, and does not impose a requirement of open access that may lead to destruction of the resource. Whether some states' constitutional public trust provisions go further, to assure a right of access that is contrary to the best interests of managing a congested resource, is beyond the scope of this article.

[176] Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 110 (1978).

[177] *Karam*, 705 A.2d at 1228-29.

[178] *East Cape May Assoc.*, 777 A.2d 1015; *Nat'l Assoc. of Home Builders*, 64 F.Supp. 2d at 358.

[179] *Karam*, 705 A.2d 1228-29.

[180] *Id.* at 1221.

[181] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (holding an "essential nexus" is required between public access condition imposed on beachfront construction permit and impacts of the construction allowed by the permit).

[182] Dolan v. City of Tigard, 512 U.S. 374 (1994) (noting that in addition to "essential nexus," "rough proportionality" is required between dedication and access conditions imposed as a result of a permit necessary for expansion of commercial real estate and the effects of that expansion).

[183] *See East Cape May*, 777 A.2d at 1024.

limiting private property interests is deemed appropriate.[184] Thus, permit denials might occur in individual or categorical modes, with only the former requiring heightened scrutiny. In any event, in all administrative actions, other mechanisms of review of administrative actions are available to police their reasonableness. And most of the time the public trust doctrine is not separately invoked, although it may be raised in response to regulatory takings challenges. *Karam* is an example of the blending of regulatory reasonableness and the public trust doctrine in the background.[185]

I think it important to note that New Jersey often accomplishes beach access through permit conditions – as in the condition on Seapointe's state-issued CAFRA permit in *Raleigh Avenue*[186] – or through conditions requiring public access in the context of U.S. Army Corps of Engineers projects for beach replenishment along the New Jersey shore.[187] Both administrative practices supplement and displace the public trust doctrine's access requirement, and arguably go further as they do not require examination of the *Matthews* reasonableness factors.[188] Again, perhaps takings doctrine provides a check on unreasonable permit conditions found in the "essential nexus" and "rough proportionality" requirements of *Nollan*[189] and *Dolan*.[190]

B. Economic Rationales: The Puzzle of Parsing Open Access versus Exclusion

Why fudge instead of making an effort to establish a clearer-cut, one-way-or-the-other policy of public ownership or of alienation of public trust resources?[191] It may have something to do with the nature of water –

---

[184] *See generally, e.g.*, Krupp v. Breckenridge Sanitation District, 19 P.3d 687, 695-99 (Colo. 2001) (discussing the narrow application of *Nollan* and *Dolan*).
[185] *Karam*, 705 A.2d 1221.
[186] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 119-120.
[187] *See also* City of Long Branch v. Liu, 833 A.2d 106, 107-10 (N.J. Super. Ct. Law Div., 2003) (holding that the newly created dry sand beach seaward of the prior mean high tide line belonged to New Jersey for the benefit of the public).
[188] On the other hand, I should note here a very recently filed case that invokes the public trust doctrine and seeks to impose broader public access restrictions than those imposed in 1993 permit conditions related to beach replenishment. It relies in particular on *Raleigh Ave.* Tom Feeney & Rick Hepp, *State Lawsuit Seeks Unrestricted Access to Sea Bright Sand*, STAR-LEDGER (Newark), Sept. 23, 2006, at 1.
[189] *Nollan*, 483 U.S. 825.
[190] *Dolan*, 512 U.S. 374.
[191] *See, e.g.*, Callies & Breemer, *supra* note 49, at 372-379 (criticizing doctrines like custom and public trust as insufficiently precise to put property owners on notice of the limits to private property use and exclusion that may be imposed on them). *But see, e.g.*, Timothy J.

actually, of water and of land closely connected to water. The uses of water and the land under and next to it are many, varied and complicated. Some of these uses are undoubtedly best encouraged by partition into private property, so that private owners invest to maximize their benefits and minimize the costs of use.[192] Some uses of water do not require the internalization of externalities that privatizing resources supposedly accomplishes, though they may require collective management of navigation or fishing sooner or later to avoid congestion.[193] Some kinds of uses result, perhaps inevitably, in spillover effects as to other uses. This is partly because of the fugitive nature of water and water pollution, as well as of fish and other water-dwelling creatures.[194] Impacts on scenic amenities will be inherently shared, not excludable. Different uses are congestible in different ways; one owner's highly desired oil transshipping facility may have down sides acceptable to her, but affect nearby owners' and other stakeholders' homes and fishing in ways that make them unhappy.[195] It may be especially important to maintain open access for fundamental modes of transportation, in part because of the adverse impacts of monopolistic control on various kinds of downstream production.[196] In an earlier era, when those who lived at the shore depended on its bounty for sustenance, fishing and fowling had a dramatic and fundamental importance.[197] And I have focused here on New Jersey, where the public trust in submerged and shore lands is limited to those lands flowed by the tide, *i.e.*, salt water.[198] There will undoubtedly be additional complications introduced when the navigable resource is also potable fresh water.

In discussing submerged lands, a resource generally considered subject to the public trust doctrine, Kearney and Merrill employ the characterization

---

Dowling, *On History, Takings Jurisprudence, and* Palazzolo*: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 91-92 (2002) (claiming a reasonable extension of the public trust doctrine provides basis for barring takings claims); Kleinsasser, *supra* note 49, at 454 (discussing how regulation incrementally expanding the public trust doctrine will not create takings liability).

[192] *Arnold*, 6 N.J.L. at 10.

[193] *See, e.g.*, Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 2 (1991) [hereinafter *Rethinking Environmental Controls*] (discussing the environment as a commons, with greater use leading to congestion).

[194] *Id.* at 2-3.

[195] *See, e.g.*, Dep't of Envtl. Prot. v. Exxon Corp., 376 A.2d 1339, 1342-1345 (N.J. Super. Ct. Ch. Div. 1977).

[196] *See, e.g.*, Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 937 (2005) [hereinafter *Economic Theory*].

[197] *See, e.g.*, *Arnold*, 6 N.J.L. at 1.

[198] *Id.* at 9.

"vexed resource" because of the extraordinarily high degree of legal uncertainty affecting it.[199] They explain why: "[a] resource such as submerged lands under navigable waters requires a blend of open access and exclusion rights."[200] They point out that we want open access to navigation, and yet at the same time we want private ownership to encourage the development of docks, wharves, and other facilities that make public access possible.[201] But what is the right amount of privatization? Too much or too little is problematic.[202] Kearney and Merrill write that Justice Field's opinion in *Illinois Central*[203] attempted to negotiate this uncertainty by suggesting a distinction between small alienations that were permissible and large grants that were not.[204] But "he offered no principle that would guide courts in the future," perhaps because he could not.[205] They suggest this kind of resource may call for tailored arrangements, a case-by-case approach perhaps superintended by an administrative agency.[206]

Kearney and Merrill have in fact oversimplified, undoubtedly deliberately, by focusing on only two uses of water and submerged lands, one that tends toward open access, and one that tends towards propertization.[207] What about fish? Oysters? The view of the lake? The uses of water, submerged lands, and land at the water's edge are considerably more varied than their example, and therefore even more puzzling and complex. Consider also a point not mentioned earlier, that the uses and relative value of those various uses may change over time, through diverging social circumstances, increased knowledge, or changed preferences.

Among property theory's various accounts of the relationship of natural resource use to the possible forms of property, one version discerns an inevitable and desirable tendency to create private property.[208] As use

---

[199] Kearney & Merrill, *supra* note 157, at 928.
[200] *Id.* at 929. *See* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 417 (1987) ("Navigable rivers are . . . a mixed asset, some of whose attributes should remain private and others should be public.").
[201] Kearney & Merrill, *supra* note 157, at 881.
[202] *Id.* at 929.
[203] *Ill. Cent. R.R. Co.*, 146 U.S. at 434.
[204] Kearney & Merrill, *supra* note 157, at 929.
[205] *Id.*
[206] *Id.* at 930.
[207] *Id.* at 928-30.
[208] *See, e.g.*, Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS & PROC.) 347 (1967). *See generally Rethinking*

increases and congestion becomes more problematic, private property is supposed to be the best way to manage resource use, for it internalizes both costs and benefits, and also makes market trades possible.[209] Not so fast, say others. Some resources are managed perfectly well with other strategies of common access and informal control, or of regulation.[210] Private property itself may not in fact always maximize social welfare.[211] Of late, many property theorists have noted that, both as a historical matter and theoretical matter, mixed regimes of property and governance sometimes work best.[212] In fact, "[m]ost real-world property regimes governing environmental goods have been admixtures of individual private ownership, non-public common ownership, and state/public ownership."[213] These theories of mixed approaches are not fully worked through and ready for general application, and they may indeed turn out to be so situation-specific that they do not offer helpful general prescriptions.[214] With one exception, I will not look

---

Environmental Controls, *supra* note 193 (summarizing the arguments in an eminently accessible form).

[209] *See, e.g.*, *Rethinking Environmental Controls*, *supra* note 193, at 6-8.

[210] *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (James E. Alt & Douglas C. North eds., Cambridge Univ. Press 1990); THE QUESTION OF THE COMMONS (Bonnie J. McCay & James M. Acheson eds., Univ. of Ariz. Press 1987); Carol M. Rose, *Energy and Efficiency in the Realignment of Common Law Water Rights*, 19 J. LEGAL STUD. 261 (1990), [hereinafter *Energy and Efficiency*], *reprinted in* CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 163 (Westview Press 1994) [hereinafter PROPERTY AND PERSUASION]; Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986), [hereinafter *Comedy of the Commons*], *reprinted in* PROPERTY AND PERSUASION, *supra*, at 103.

[211] *See, e.g.*, Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

[212] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002); Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQ. IN L. 79 (2001); Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181 (2003); Saul Levmore, *Two Stories about the Evolution of Property Rights*, 31 J. LEGAL STUD. 421 (2002); Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. 331 (2002); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005); Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002); Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000) [hereinafter *Semicommon Property Rights*]; Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005).

[213] Daniel H. Cole, *Clearing the Air: Four Propositions about Property Rights and Environmental Protection*, 10 DUKE ENVTL. L. & POL'Y F. 103, 109 (1999).

[214] It's complicated. As Dan Cole explains,

> [T]he choice in environmental protection and resource conservation is not *whether* to adopt a property based approach but *which* property-based approach or

into them further here. But given the nature of the resource, you can be sure that the public trust doctrine will soon enough be subject to more than one analysis under these mixed regime theories of property.

I do, however, want to say a word about Brett Frischmann's theory of infrastructure commons.[215] It is an appealing theory for one scrutinizing the public trust doctrine, focusing as it does on open access as an alternative to a property right of exclusion, and arguing that open access ought to be the governing principle of management for a wide variety of infrastructure resources.[216] In Frischmann's view, for some types of resources, open access will generate large but not immediately foreseeable positive externalities, including the downstream production of public goods and non-market goods, and of innovation and experimentation with new and ultimately valuable uses.[217] Private ownership (for which a right to exclude is conceptually fundamental, if not always absolutely essential) and the market mechanism upon which private ownership relies for allocation of resource uses are, in Frischmann's view, flawed with regard to certain types of resources.[218] The market mechanism "has an inherent bias for outputs that generate observable and appropriable returns."[219] It fails to account for downstream uses of some resources that, if kept as open access, in one way or another may themselves allow subsequent uses as public goods or non-market goods,

---

> approaches to adopt. To what extent should the state assert public rights (res publicae) as opposed to vesting limiting or unlimited private property rights in individual users (res individuales) or groups of users (res communes)? The answer to this question requires a comparative institutional analysis of alternative property rights regimes, including their relative costs of production, exclusion, and administration.

Id. at 108 (emphases in original, footnote omitted).

[215] *Economic Theory*, *supra* note 196; Brett M. Frischmann, *Infrastructure Commons*, 2005 MICH. ST. L. REV. 121 [hereinafter *Infrastructure Commons*]. *See also* Lawrence Lessig, *Re-Marking the Progress in Frischmann*, 89 MINN. L. REV. 1031 (2005) (summarizing and commenting on Frischmann's theory of infrastructure in the context of the Internet).

[216] Although Frischmann sometimes writes that these resources are traditionally managed as a commons, he also states, more precisely, that they are managed in such a way as to be "openly accessible to members of a community who wish to use them." *Infrastructure Commons*, *supra* note 215, at 123. *See Economic Theory*, *supra* note 196, at 933 ("This Article uses 'open access' and 'commons' interchangeably to refer to the situation in which a resource is openly accessible to all users regardless of the users' identity or intended use of the resource."). This does not necessarily mean that access is free or unregulated; but that the resource is "openly accessible to all within a community regardless of who you are and how you are using the resource." *Infrastructure Commons*, *supra* note 215, at 123.

[217] *Economic Theory*, *supra* note 196, at 937.

[218] *Id.* at 919.

[219] *Id.*

uses whose cumulative value may be predictable only in general but not specific as to either use or user.[220]

Frischmann's argument is most persuasive to me as applied to two of his three examples, information and the Internet. He argues that open access to information and to the Internet permits a variety of downstream resources that themselves may be very valuable, but in ways that are unpredictable both as to value and as to which individuals will develop these uses.[221] Since information and the Internet are not congested in any significant way by allowing open access, and since allowing privatization and exclusion shuts down future valuable uses that are certain to occur, but uncertain in ways that preclude, ex ante, bargaining for access, open access is necessary to manage these resources efficiently.[222]

Frischmann's third example of an infrastructure commons is that of environmental amenities; specifically he turns to the example of a lake.[223] To me, the fit of his general theory is not quite as exact and persuasive here. There are to be sure desirable uses that are encouraged by privatization and the right to exclude. At the same time, the environment in general, and a lake in particular, also provide a wide variety of services, some of them ecosystem services, which it makes sense to classify as infrastructure.[224] Some of these ongoing uses are nonrival or partially nonrival.[225] And there is some uncertainty as to future users and as to the value of various future uses to them.[226] However, this uncertainty is not as dramatic and persuasive as in the case of information or the Internet. Put another way, the consequences of exclusion, privatization, and perhaps consumption or

---

[220] Much of Frischmann's argument, as I understand it, turns on the observation that for certain types of resources, we may expect open access to result in large future positive externalities that may not be identifiable (an information issue) and, even if identifiable, may not be appropriable. *See id.* at 975-78.

[221] *Id.* at 1016.

[222] *Id.* at 1022.

[223] *Id.* at 981-90; *Infrastructure Commons*, *supra* note 215, at 131-33.

[224] *Economic Theory*, *supra* note 196, at 981-82, 990. Frischmann has a specific three-part definition of infrastructure: "(1) [t]he resource is (or may be) consumed nonrivalrously, (2) [s]ocial demand for the resource is driven primarily by downstream producers that require the resource as an input, and (3) [t]he range of goods and services produced downstream varies across the spectrum of private goods, public goods and/or nonmarket goods." *Infrastructure Commons*, *supra* note 215, at 125. *See Economic Theory*, *supra* note 196, at 956 (substantially similar statement).

[225] *Economic Theory*, *supra* note 196, at 982.

[226] *Cf. Comedy of the Commons*, *supra* note 210, at 761-76 (arguing that a requirement of indefiniteness of the number and identity of users is explicit in traditional roadway open access cases and implicit in traditional waterway open access cases).

congestion are considerably more predictable for a lake than for the Internet.[227] Thus, I am unsure whether Frischmann's analysis actually applies in quite the same way to environmental infrastructure, generally speaking, as he asserts. Perhaps the problem may simply be that the most efficient amount of privatization is difficult to determine and can vary over time, as Kearney and Merrill argue with regard to Lake Michigan in the vicinity of Chicago;[228] perhaps we do not need to add in the Frischmann twist of future nonrival uses of an uncertain magnitude and distribution.

It also occurs to me that Frischmann's theory might parse quite differently for different resources and uses included within the broad category of "environmental." For example, most traditional applications of the public trust doctrine – commerce, navigation, fishing, fowling and, to use a forgotten term from *Arnold v. Mundy*, "sustenance"[229] – are arguably more important in terms of large positive downstream effects than purely recreational uses. Frischmann, for example, identifies transportation as a traditional type of infrastructure.[230] That should certainly include transportation by water.[231] The possibility that recreational uses do not result in quite the same arguments in favor of open access to protect uncertain but important downstream uses might explain why we have variation among the states as to extending the public trust doctrine to recreational uses, even while there seems to be agreement on maintaining its central core as to navigation and commerce.[232]

Here Carol Rose's focus on sociability as a justification for "inherently public property" (in addition to a justification based on economic benefits,

---

[227] The largest source of uncertainty that I see for an environmental resource such as a lake is actually uncertain future negatives. Over time, science may disclose unexpected adverse consequences from traditional uses that ought to affect our calculus on how to manage the resource. This has happened repeatedly in the last forty years in environmental and natural resource concerns, with everything from pesticides, to filling wetlands, to global warming. Frischmann is focused on uncertain future positives, but perhaps in the environmental context his theory should be adapted to include uncertain future negatives. *See generally Economic Theory*, *supra* note 196. Perhaps this shift can be understood as incorporation of an expression of some version of a precautionary principle applied to infrastructure. Further exploration of this idea is beyond the scope of the article.

[228] Kearney & Merrill, *supra* note 157, at 928 (describing the legal uncertainty surrounding management of submerged lands under navigable waters).

[229] *Arnold*, 6 N.J.L. at 77.

[230] *Economic Theory*, *supra* note 196, at 981.

[231] Carol Rose also points out that service to commerce was a central feature of traditional doctrines involving "inherently public property." *Comedy of the Commons*, *supra* note 210, at 774.

[232] *See also id.* at 753-58 (discussing 19th and early 20th century controversies over whether recreational uses were included within the public trust doctrine).

or on sociability as merely an additional type of economic benefits) can provide some insight, and also an assist to Frischmann.[233] I can only sketch out the argument in its briefest form in this context. Rose opens her examination of inherently public property by asking how to justify the expansion of public rights of access to recreational uses of the beach.[234] After an extensive historical and theoretical examination of traditional rights of access under three traditional doctrines involving public ownership, she returns to this question, again pointing out that "the role of recreation is a striking example of historic change in public property doctrine."[235] Rose then argues that we want to encourage wide public use of recreational resources, as they provide a civilizing, socializing force that benefits us all.[236] Rose thus extends an argument historically made about city parks to public beaches.[237] Public places open to all have an important benefit, though one intangible and difficult to quantify – they civilize us.[238]

Perhaps Rose's sociability justification for open access to recreational public trust resources could be translated into the economic terms in which Frischmann's analysis proceeds. The benefits arguably are large and uncertain. Moreover, as I develop further briefly below, if exclusion is understood to have the purpose or effect of identity-based discrimination, allowing discriminatory exclusion may cause large and uncertain downstream negative externalities, as opposed to the large, uncertain positives Rose describes.[239] In any event, Frischmann's theory of infrastructure commons is an intriguing general claim about an economic justification for providing rights of access to resources, one that bears watching as it develops.

C. Policy Rationales: Dilemmas of Distribution, Democratization, and Discrimination

It is important not to be so carried away by the approach of achieving efficiency in managing natural resources that one overlooks issues of distribution and dislocation in resource allocation decisions. These issues also manifest in the application of the public trust doctrine. South Carolina's

---

[233] *Id.* at 713-14.
[234] *Id.*
[235] *Id.* at 779.
[236] *Id.* at 779-81.
[237] *Id.*
[238] *Cf.* Georges Seurat, *A Sunday Afternoon on the Island of La Grande Jatte* (1884-1886) (painting depicting Parisian society at play on a sunny Sunday afternoon in a park by the water).
[239] *See infra* Part II.C.

decision, whatever it is, on the permitting of bridges built on publicly owned submerged lands, has distributional and developmental consequences; I identify four here.

First, the change in character of the shore if private development is unrestricted would significantly shift value from those who enjoy the shore in its present state to those who benefit from the resulting development even at the cost of some environmental and recreational degradation.[240] What is proposed is a kind of limited enclosure of natural resources that are currently public and shared. This is certainly a redistribution of use, despite whatever mitigation measures can be imposed to dampen the impact of development on some of the shared public ecosystem services.

Depending on how redistributive it is, enclosure is, at least to a certain degree, an undemocratic process.[241] In discussing the tensions in the nineteenth century between common rights of fishing and shellfishing and the alienation of submerged lands in New Jersey – sometimes justified in modern terms on the basis of threat of a "tragedy of the commons,"[242] – Bonnie McCay describes a counterposed "tragedy of the commoners," a loss of access to other fisherman that impacts their lives and livelihoods.

> [M]ost of those who said "no" to privatization were relatively poor people who depended on common property rights of access to marine resources to make a living. These "commoners" stole, cheated, fought, and organized collective raids and legal defense to protect their common rights from what they saw as threats to them. Privatization of shellfish resources, like enclosure of the open fields and meadows of agrarian societies, was a "tragedy of the commoners."[243]

---

[240] *See* Nancy Vinson, Dir. Water Quality and State Legislative Programs, Coastal Conservation League, Presentation at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interest in Coastal Marshes and Marsh Islands (Sept. 8, 2006), *available at* http://www.law.sc.edu/elj/2006symposium/ (last visited Feb. 4, 2007); Nancy Vinson, *Evolution of Regulations for Bridges to Marsh Islands in South Carolina*, 15 SOUTHEASTERN ENVTL. L.J. 19 (2006).

[241] *See*, *e.g.*, Blumm, *supra* note 49 (the public access theme of the public trust doctrine promotes democratization by preventing monopolization).

[242] The locus classicus is Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968). For a helpful recent discussion of barriers to solving problems of management of the commons, see Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVTL. L. 241 (2000).

[243] MCCAY, *supra* note 7, at 195.

Second, another intangible but important function of some applications of the public trust doctrine is to address discrimination. It is clear that the New Jersey beach access cases are motivated by a concern about discrimination in access to shore resources.[244] The literal term "discrimination" appears frequently.[245] One has to understand that the New Jersey shore, like much of New Jersey, includes towns that are fairly characterized as having residents of widely divergent wealth, ethnic origin, race and religion.[246] Sometimes, as at the shore, these towns are in close proximity.[247] In addition, many shore towns have a love-hate relationship with those who come down from the New York and Philadelphia areas for a day, a weekend, or a week, but are not part of the resident community.[248] New Jersey's beach access policy under the public trust doctrine is expressed as being simply about residents of one town versus outsiders.[249] Whether it also addresses an unarticulated concern for race and class discrimination is a question, the details of which are beyond the scope of this article, though I have previously argued that it does.[250] Discrimination of any stripe, race, ethnic or class, has costs to those who suffer it, and to ignore such discrimination has implications for the kind of society in which we live. I have no indication as to whether the South Carolina marsh island controversy has any immediate implications for discrimination,[251] but the state is entitled to consider, and should consider, these aspects of managing the use and development of its coast.

Indeed, the notion that public access requirements pursuant to the public trust doctrine can remedy identity-based discrimination suggests a useful elaboration of Carol Rose's argument justifying a right of public access on the basis of sociability.[252] As discussed above, Rose argues that shared

---

[244] *See, e.g., Raleigh Ave. Beach Ass'n*, 879 A.2d 112; *Van Ness*, 393 A.2d 571; *Borough of Neptune City*, 294 A.2d 47.

[245] *See, e.g., Raleigh Ave. Beach Ass'n*, 879 A.2d at 124; *Van Ness*, 393 A.2d at 575, *Borough of Neptune City*, 294 A.2d at 50.

[246] *See generally Environmental Justice and the Beach Access Movements*, *supra* note 144, at 772-799 (discussing the history of the beach access movement in New Jersey).

[247] *See, e.g., Borough of Neptune City*, 294 A.2d 47.

[248] *See Environmental Justice and the Beach Access Movements*, *supra* note 144, at 785.

[249] *See id.* at 803.

[250] *Id.* (comparing the beach access movement in the 1970s in New York and Connecticut, which was overtly based on a civil rights model, with the beach access movement in the 1970s in New Jersey, which was overtly based on a property and public trust access model, even though proponents of access were well aware of and sympathetic to underlying issues of racial discrimination).

[251] *See* Faith R. Rivers, *Preserving Heirs' Property Along the Gullah Coast,* 15 SOUTHEASTERN ENVTL. L.J. 147 (2006).

[252] *See supra* Part II.B.

public recreation has a socializing function, and that the more people involved in socializing, the better.[253] Rose approaches the issue as one of either private ownership, with consequent exclusion of the public generally, or public-trust based public access for all.[254] That is sometimes an accurate description of particular beach or shore access controversies. In New Jersey, we have, for example, the *National Association of Home Builders*[255] and *Raleigh Avenue*[256] cases. Most of New Jersey's beach access cases, however, are not private versus public conflicts, but public (town residents) versus public (everyone else) controversies.[257] The exclusion is explicitly based on residency, which, as is often the case with local residency, may well correlate with income, ethnicity, race or religion.[258] There is an identity-defining element to these kinds of exclusions. (Nor is this unprecedented. Rose's historical examination of common law customary rights of access to particular locations for community rituals points out that the right extended only to members of that particular community.)[259] Thus, insisting on the general public's right of beach access in New Jersey is not just about promoting sociability generally, but about undermining a divisive and discriminatory sociability; one that uses beach access to define us and them, haves and have-nots.[260] New Jersey's public trust doctrine allocates beach recreation space towards one kind of community and citizenship instead of another.

---

[253] *Comedy of the Commons*, *supra* note 210, at 779-81. Rose in particular discusses the views of Frederick Law Olmsted and others on the socializing and democratizing values of parks. *Id.* at 779.

[254] *Id.*

[255] *Nat'l Ass'n of Home Builders*, 64 F. Supp. 2d 354.

[256] *Raleigh Ave. Beach Ass'n*, 879 A.2d 112.

[257] For a catalog of many of these cases, see *supra* note 6.

[258] I have suggested elsewhere that this type of exclusion is similar in some ways to exclusionary zoning. *Environmental Justice and the Beach Access Movements*, *supra* note 144, at 743-44; *see id.* at 755-57 (describing explicit linkages between beach access and exclusionary zoning in the context of the leading New York case, *Gewirtz v. Long Beach*, 330 N.Y.S.2d 495 (Sup. Ct. Special Term 1972), *aff'd without opinion*, 358 N.Y.S.2d 957 (N.Y. App. Div. 1974)).

[259] *Comedy of the Commons*, *supra* note 210, at 769.

[260] As I have pointed out elsewhere, the leading New Jersey beach access case was in fact litigated in part on a federal Equal Protection claim, which was discussed in the opinion below but not in the state supreme court's opinion. *Environmental Justice and the Beach Access Movements*, *supra* note 144, at 776-78 (discussing Borough of Neptune City v. Borough of Avon-by-the-Sea, 274 A.2d 860 (N.J. Super. Ct. Law Div. 1971), *rev'd*, 294 A.2d 47 (N.J. 1972)). And a dispute about beach fees in Long Branch in the mid-1970s was explicitly challenged by the local poor community of color on the basis of its effective exclusion based on race and class. *Id.* at 810.

We can identify two further potentially useful consequences that follow from this argument. First, Rose expresses concern about the difficulty of proving the assumptions underlying her sociability thesis, even though they have a long pedigree in Western thought.[261] In contrast, the notion that in some recreational contexts access involves definition of community, and that discriminatory exclusion and stigma are significant issues, will seem intuitively obvious to the contemporary reader, especially one who is familiar with the history of segregation as applied to recreational facilities.

Also, an argument about denial of access as allocating social space in the context of exclusion and stigmatizing discrimination suggests that Frischmann's economic justification for infrastructure commons might be bolstered in certain resource contexts by considering the welfare costs to society of excluding users where that exclusion is the result of and causes stigma.[262] This might be a useful approach to develop even if those costs cannot be quantified, and perhaps, in light of Frischmann's general arguments about downstream uncertainty of overall social welfare,[263] *especially* if they cannot be quantified. Developing this argument further is beyond the scope of this article.

There is yet another (third) kind of distributional concern that may or may not involve identity-based discrimination, but that surely involves differential impact on different economic classes. Even without any deliberate measures of exclusion, it is highly likely that in some coastal areas extensive additional development will result in the gradual exclusion of those who previously lived there and used the resource.[264] These people may be poorer, and they may well be disproportionately people of color. This gradual exclusion may occur simply as a result of areas becoming too expensive for prior residents to continue living there, or may involve more active processes of redevelopment. One example that comes to mind is the effect of high-end resort development in Amelia Island, Florida on American Beach, a pre-existing middle class, predominantly African American beach community.[265]

---

[261] *Comedy of the Commons*, *supra* note 210, at 781.
[262] *Economic Theory*, *supra* note 196.
[263] *Id.*
[264] *See generally* Rivers, *supra* note 251.
[265] One can get some idea of the circumstances in American Beach from MARSHA DEAN PHELTS, AN AMERICAN BEACH FOR AFRICAN AMERICANS (Univ. Press of Fla. 1997) and the film SUNSHINE STATE (Sony Pictures Classic 2002). American Beach was recently designated a blighted area and targeted for redevelopment. PHELTS, *supra*. Tiffany Anne Dangler, Note,

Finally, as a fourth policy concern with distributional aspects of the marsh island controversy, it is not at all clear to me that the private construction of bridges to marsh islands involves only private costs in the long run. The public will remain involved, and its fisc may be compromised. On a coast routinely subject to floods and hurricanes, I suspect that any extensive network of new bridges will stimulate new private development and transportation projects,[266] and that the whole complex is likely to be subsidized by public money in the long run. This will almost certainly occur through the provision of publicly-funded disaster relief after a destructive storm. [267] In addition, even if the bridges themselves are, and remain privately funded, the additional traffic they generate and the overall additional development is likely to create pressure for public subsidization of other parts of the transportation infrastructure, and perhaps other kinds of infrastructure as well.[268] Finally, to the extent that federal or state insurance is available,[269] its premiums may or may not actually cover the costs of the insurance provided. I argued, in an article written more than a decade ago, that allowing private land development in desirable but risky locations, such as barrier islands and landslide-prone hillsides, can only lead to ongoing public subsidization of the risky but desirable private land use.[270] The wealthy command a subsidy from all. I see no reason why this general analysis should not apply to the issue of South Carolina's coastal development via marsh island bridges here.

Florida's Take on Takings: An Appeal to Re-Balance the Individual's Rights and the State's Needs, 4 FLA. COASTAL L.J. 207, 227 (2003); *see generally* Rivers, *supra* note 251.

[266] The value of the potential development of these island has driven the increased interest and demand for bridges to islands. *See Vinson*, *supra* note 240.

[267] *See*, *e.g.*, Press Release, Federal Emergency Management Agency, Disaster Aid Ordered for South Carolina Hurricane Recovery (Sept. 21, 1999), *available at* http://www.fema.gov/news/newsrelease.fema?id=8736 (last visited Feb. 4, 2007) (granting state and local governments 75% of the cost to repair public facilities damaged by Hurricane Floyd).

[268] *See generally* Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 303-305 (2003) (discussing the role of the state in increasing the value of coastal properties by providing infrastructure).

[269] *See id.* 295-299 (critiquing the role of the government in subsidizing the cost of living on the coast).

[270] Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243 (1993). This article argued in specific that the South Carolina legislature should have been allowed, without the penalty of takings liability, to prohibit David Lucas' development of beachfront property as a protective measure against an inevitable subsequent public subsidization of his continued use of his property if it were developed. *Id.* at 247-252.

D. Problems of Process and of Judicial Review of Process

Michael Blumm cogently observes that the public trust doctrine is about access to process every bit as much as it is about access to resources.[271] Blumm wrote this analysis just before the emergence of the environmental justice movement into the academic literature in the early 1990s, and I see his argument as essentially a claim that the public trust doctrine can be understood, *inter alia*, as an expression of environmental justice concerns.[272] As I have explained elsewhere, environmental justice advocates typically insist on simultaneous consideration of substantive, distributional and procedural concerns.[273] They realize that where the management of natural resources (whether environmental amenities or disamenities are at stake) is subject to an ongoing process of revision, all stakeholders must be given access to the decision-making processes in order to have a better shot at appropriately nondiscriminatory and distributively fair substantive results.[274]

---

[271] Blumm, *supra* note 49, at 579-80 (emphasizing the public trust doctrine as a method of democratizing the process of natural resource management echoes an argument in Joseph Sax's highly influential article on the public trust doctrine). *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 509 (1970) (the public trust doctrine is a medium of democratization). William Araiza summarizes Sax's argument on the need for judicial intervention as follows: natural resource decisionmaking is too local, and the public trust doctrine forces it to higher levels where aggregate effects can better be ascertained; and it is of too low-visibility. William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 390-91, 397-401 (1997).

[272] Blumm, *supra* note 49.

[273] *See* Marc R. Poirier, *The NAFTA Chapter 11 Expropriation Debate Through the Eyes of a Property Theorist*, 33 ENVTL. L. 851, 890-92 (2003).

[274] *See id.* at 890-92; Araiza, *supra* note 271, at 409, 413, 415. *See also, e.g.,* Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENVTL. L. & LITIG. 37, 88-89 (1998) (communities must be included in environmental decision making in order to redress environmental inequities); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 5 (1998) (current administrative processes omit an important form of public participation and thus fail to achieve environmental equity in results); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681, at 10,688 (2000) (it is not unusual for people of color and from low-income communities to complain of both substantive and procedural aspects of environmental policy decisions); William A. Shutkin, *The Concept of Environmental Justice and a Reconception of Democracy*, 14 VA. ENVTL. L.J. 579 (1995). As helpful as William Araiza's analysis is overall, I think he misses the point in his critique of a process-based approach to the public trust doctrine by focusing on who is representing the interests of the natural resources themselves, rather than on whether all the stakeholders with interests in use of the resources are adequately represented in the decision making processes as they are structured. *See* Araiza, *supra* note 271, at 409, 413, 415.

As for concerns about process and judicial review, Blumm helpfully identifies four types of remedies that stem from the public trust doctrine.

> (1) a public easement guaranteeing access to trust resources; (2) a restrictive servitude insulating public regulation of private activities against constitutional takings claims; (3) a rule of statutory and constitutional construction disfavoring terminations of the trust; and (4) a requirement of reasoned administrative decision-making.[275]

The first two of these are the familiar substantive prongs of the public trust doctrine. The latter two are essentially procedural. In particular, requiring a clear statement that justifies any alienation of public trust resources, explaining how the alienation furthers or at least does not hinder the public interest, both limits government agency and legislative processes, and focuses them. It also provides a clear mechanism for judicial review by facilitating a full record, encouraging a reasoned contemporaneous justification of the action, and providing a substantive standard to be applied.[276]

These procedural aspects of the public trust doctrine can be expected to discipline government decisions on management and alienation of certain resources. In a curious way, they have somewhat the same effect as the "essential nexus" and "rough proportionality" tests of *Nollan*[277] and *Dolan.*[278] They focus additional scrutiny on particular types of conflicts between private property claims and public uses of natural resources. Perhaps this is not coincidental. In a sense, the kinds of exactions *Nollan*

---

[275] Blumm, *supra* note 49, at 578-79.

[276] *See generally* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). An example of this application of the public trust doctrine actually appears in New Jersey case law, in the form of a portion of the concurring and dissenting opinion of Justice Hall in *New Jersey Sports & Exposition Authority v. McCrane*, 292 A.2d 545, 579-80 (1972) (Hall, J., concurring and dissenting), *appeal dismissed sub nom.* Borough of E. Rutherford v. N.J. Sports & Exposition Auth., 409 U.S. 943 (1972). The case involved the transfer of 750 acres of tide lands from the state to a new Sports & Exposition Authority for the purpose of constructing a sports stadium. *Id.* Justice Hall argued that the state had failed to provide a detailed account of how the public's interest, its *jus publicum*, would be preserved, and that in its future determinations the agency would have to specifically address the public trust, applying "the utmost in expert knowledge and objective, good faith consideration." *Id.* This articulation has not been expressly acknowledged in subsequent New Jersey case law. Justice Hall is also the author of the state supreme court's opinion in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, which was argued and decided contemporaneously with the *Sports & Exposition Authority* case. He can be understood to speak with authority on the public trust doctrine in New Jersey.

[277] *Nollan*, 483 U.S. 825.

[278] *Dolan*, 512 U.S. 374.

and *Dolan* address are also about modifying private property in order to provide or protect public uses of shared resources.

One final and curious thought on this point. There is much current furor over the meaning of the "public use" restriction on the power of eminent domain.[279] Nicole Stelle Garnett, among others, has pointed out the symmetry between the issues raised in exaction cases under *Nollan* and *Dolan,* and the claim (one of two rejected in *Kelo*) that "public use" challenges require heightened judicial scrutiny.[280] She proposed extending the heightened scrutiny required in *Nollan* and *Dolan* to "public use" challenges.[281]

The same argument could be made for judicial review of governmental activities under the public trust doctrine, though in reverse. I can do no more than sketch the argument here. Critics of using eminent domain for private economic development identify precisely the same process defect – improper alignment of the public power of eminent domain with particular private interests – that results, albeit through a different mechanism, in improper private acquisitions of public trust property. For example, Richard Epstein some time ago expressed concern that public trust resources that were alienated to private parties might not be compensated for fairly, due to process defects affecting the judgment of the governmental authority which might align them with private interests at the public's expense.[282] One version of the problem with the alienation of Chicago shoreline that eventually resulted in the *Illinois Central Railroad* case is that the state simply could not alienate so large a swath of harbor.[283] But Epstein views

---

[279] The movement to curb eminent domain abuse has gained enormous political visibility from its loss in *Kelo v. City of New London*, 545 U.S. 469 (2005) (refusing to interpret "public use" narrowly in a way that would overrule prior precedents, and refusing to impose a higher standard of review on federal constitutional challenges to eminent domain actions undertaken for economic development). *See generally* EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT (Dwight H. Merriam & Mary Massaron Ross eds., American Bar Association 2006).

[280] Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003). *See also* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513 (2006).

[281] Garnett, *supra* note 280, at 942-45.

[282] Epstein, *supra* note 199, at 421. *See also* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 357-58 (1998) [hereinafter *Idea of the Public Trust*] (discussing Epstein's argument and putting it in the context of Joseph Sax's important work on public trust and other historical examinations of nineteenth century nuisance law and eminent domain doctrine).

[283] *Ill. Cent. R.R. Co.*, 146 U.S. 387.

the problem as being at least as much whether the state received just compensation for the lands it conveyed.[284]

William Araiza, following Richard Epstein, discusses this concern cogently as a "reverse takings" problem.[285] Araiza points out that Joseph Sax's important early article on using the public trust to protect natural resources identified several arguments justifying stringent judicial review on grounds that can be appreciated as regarding improper disposition of public property.[286] These include asking whether public property has been disposed of at less than market value when there is no justification for a subsidy; asking whether grants to private parties allow them to make decisions regarding disposition of public resources, which may subordinate public resources to private interests; and suspicion of attempts to reallocate diffuse public uses to private uses or less diffuse public uses.[287]

Perhaps this is a way of understanding the increased judicial involvement in public trust matters. In public trust cases, as in "public use" cases, then, the concern is an improper use of government authority to transfer property to influential private parties. Notably, however, the polarities are reversed from heightened review in exactions and (potentially, if the argument of Garnett and others prevails) in "public use" challenges to eminent domain actions. In these latter categories of conflict, the presumption is that the government must carefully justify purportedly public-regarding impositions on private property owners' interests and expectations. In contrast, the public trust doctrine is based on a pre-existing public interest in certain natural resources and a caution against impairing it through alienation of those resources. The public interest in these resources is managed by the government, but it is not quite the same as general police power. It is explicitly couched as a property interest, not a police power to modify other, private interests.[288] So the substantive presumption must be

---

[284] Epstein, *supra* note 200, at 423-25 (pointing out the extraordinary difficulty of identifying appropriate compensation with so large and important a parcel as was at issue there).

[285] Araiza, *supra* note 271, at 434-36 nn. 228, 235 (citing, *inter alia,* Epstein, *supra* note 200).

[286] *Id.*

[287] Araiza, *supra* note 271, at 435-36 (discussing Sax, *supra* note 271, at 562-63).

[288] I thus agree that there is a practical, if somewhat rhetorically focused, consequence here, at least to the position of those who insist that all management of resources is best characterized as a choice between property schemes. *See, e.g.*, Cole, *supra* note 213. The improper disposition of public property has a particularly persuasive resonance, and a different and longer history, than challenges based on claims of improper environmental management. Carol Rose makes this point specifically with regard to the public trust doctrine, suggesting that framing the issue as applying a public trust to "inherently public property" creates an expectation of more restraint and different resource management choices that if the proposition were simply that the government was authorized to manage the resource. *Comedy*

reversed. Now it favors a status quo in preserving the *ius publicum,* and requires strict justification for impositions of private property rights on the *ius publicum*.

Increased judicial scrutiny of the proffered justifications of legislative and regulatory actions affecting public trust property may help to curb abuse of governmental power in favor of private interests, while facilitating appropriate use and allocation of both public and private resources. This would not be, as some have worried,[289] a potentially improper exercise of judicial authority, but merely the last step in carrying out the longstanding and traditional function of managing, not just the public interest, but public trust property in submerged lands and in the lands that border them. Certainly, therefore, as to alienation of public trust property – the issue South Carolina currently faces – one might expect both clear explanations of any alienations of public trust resources, including the permitting of exclusive uses of public trust resources, and close judicial review to help to protect the public against inappropriate losses of public property, contrary to the substantive concerns of the public trust doctrine.

III. THE CONTINUED IMPORTANCE OF THE PUBLIC TRUST DOCTRINE TO NATURAL RESOURCES DOCTRINE AND TO PROPERTY THEORY

Just over twenty years ago Richard Lazarus wrote a sensible article questioning the continued usefulness of the public trust doctrine.[290] He pointed out that it had been revived as a doctrinal "patch," pieced together around 1970, just as contemporary environmental law and natural resources

---

of the Commons, *supra* note 210, at 720-21. *See also Idea of the Public Trust*, *supra* note 282, at 358 (the property version of the public trust doctrine serves to restrain legislative giveaways); Lake Mich. Fed'n v. Army Corps of Eng'rs, 742 F.Supp. 441, 446 (1990) ("The very purpose of the public trust doctrine is to police the legislature's disposition of public lands. If courts were to rubber stamp legislative decisions . . . the doctrine would have no teeth.").

[289] *See*, *e.g.*, Araiza, *supra* note 271, at 438-51. Ultimately, Araiza finds comfort in the fact that many state constitutions provide authority to protect environmental and natural resources in the public interest, whether through public trust provisions or other expressions. *Id.* at 438-451. *See also* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996). While such provisions do assure us that judges are pointed in the right direction and are not completely off on a frolic, these provisions are typically general enough that the applications of environmental and public trust principles still have to be implemented by judges working more or less on their own.

[290] Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

law were emerging in their modern form.[291] While the public trust doctrine had "served to highlight important societal values not then in focus,"[292] Lazarus argued that by 1986 changes in the law made it possible to let go of the public trust doctrine's old-fashioned and unscientific way of approaching the management of natural resources in the public interest,[293] replacing it with a more candid policy-based analysis.[294] Lazarus identified three areas in which the public trust doctrine had been important to the environmental movement from 1970 to 1985. In two of them, environmental standing[295] and the role of nuisance law,[296] his assertions of progress still largely hold up.[297] On the third front, however, changing conceptions of sovereignty and property, [298] Lazarus was overly optimistic. Lazarus assumed in 1986 that federal, state and local governments would continue to develop and implement, in good faith, the framework of environmental and land use statutes put in place in the 1970s as part of an increased

---

[291] *Id.* at 715. Elsewhere in the article, Lazarus wrote that the public trust doctrine was "[t]antamount to an academic call to legal arms on behalf of the natural environment." *Id.* at 633.

[292] *Id.* at 715.

[293] *Id.* at 715-16 ("The doctrine amounts to a romantic step backward toward a bygone era at a time when we face modern problems that demand candid and honest debate on the merits, including consideration of current social values and the latest scientific information.").

[294] *Id.* at 702-10.

[295] *Id.* at 658-60.

[296] *Id.* at 660-64.

[297] The analysis as to environmental standing also bears some updating. The basic Supreme Court case finding that standing may be based on recreational or aesthetic injuries as well as economic injuries still stands. Sierra Club v. Morton, 405 U.S. 727 (1972). Some of the other cases relied on by Lazarus now seem a bit too liberal in and of themselves; standing successes unlikely to be repeated. *E.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978); United States v. Students Challenging Regulatory Action Procedures, 412 U.S. 669 (1973). *Cf.* Simon v. E. Ky. Welfare Right Org., Inc. 426 U.S. 26 (1975) (finding no standing in another context due to problems with causation and redressability). Standing problems have occasionally continued to surface with claims of direct personal interest. *See*, *e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (finding no standing to challenge agency actions alleged to violate the Endangered Species Act). Other environmental standing problems persist. *Compare* Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) (holding voluntary compliance did not defeat standing) *with* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (finding voluntary compliance defeated standing). Furthermore, other developments in administrative law also hamper environmental advocates getting into court with claims of noncompliance with environmental statutes (these may not be remediable by invoking the public trust doctrine, to be sure). *See*, *e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (asserting unavailability of judicial review of inaction in agency stewardship of certain public lands under the Administrative Procedure Act).

[298] Lazarus, *supra* note 290, at 664-90.

understanding of the police power's role.[299] He also assumed, in the face of this assertion of sovereign police power, that strong claims of property rights had eroded and would continue to stay weak.[300] Neither assumption has materialized. Basically, from the comfortable position of hindsight, we can now conclude that Lazarus failed to anticipate the strength and depth of a persistent anti-regulatory, anti-government mood in this country, which is partly, though not entirely, based in hostility to environmental and land use regulation. Furthermore, he failed to anticipate the persistence and strength of the property rights movement.[301]

It is in these areas of property and sovereignty that the public trust doctrine has an ongoing doctrinal usefulness, at least as to those natural resources to which the public trust is understood to apply. Indeed, Lazarus was right in that the public trust doctrine need not normally perform the basic work of regulation, if it ever actually did.[302] In most areas, legislatures and agencies acting under the directives of legislatures have amply filled out the basic environmental aspirations contained, inter alia, in various ambitious expressions of the public trust doctrine, beginning around 1970. That seems to be the case in New Jersey, for example, where permitting and other regulatory requirements provide all the detail, and the state's public

---

[299] *Id.* at 665-68. "With the emergence of this modern police power, the public trust doctrine retains little importance in promoting governmental authority to protect and maintain a healthy and bountiful natural environment." *Id.* at 674.

[300] *Id.* at 668-74. As Lazarus wrote elsewhere in the article, "[t]he thrust of recent developments in environmental and natural resources law has been to replace already eroding traditional notions of private property rights in natural resources with a scheme of government-administered and defined private entitlements to those resources explicitly premised on continuing sovereign regulatory authority." *Id.* at 693. Lazarus asserted, undoubtedly correctly, that old, rigid property rules impaired natural resources management. *Id.* at 694. He also observed that "traditional notions of private property rights in natural resources [are being replaced] with an intricate scheme of government-administered entitlements and permits." *Id.* at 698. Further, that "[t]he public trust doctrine simply has no place in this emerging scheme." *Id.* at 701.

[301] Let us set aside the question to what extent these two trends are one and the same, or are backed politically and financially by the same interests.

[302] *See* Joseph A. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980). Joseph Sax, among others, was explicit about his desire to move the public trust doctrine beyond the boundaries of its historical contours. Barton Thompson, Jr., Robert E. Paradise Professor of Natural Resources, Stanford Law School, Keynote Address at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interest in Coastal and Marsh Islands (Sept. 8, 2006), *available at* http://www.law.sc.edu/elj/2006symposium/ (last visited Feb. 4, 2007).

trust doctrine is typically merged with the regulatory provisions.[303] That seems to be the case in South Carolina as well, where the new regulations offer a resolution for the marsh islands (bridge permits) controversy,[304] at least for the time being.

However, the public trust reemerges as a significant separate font of substantive authority in two important contexts, both of which involve situations where groups seek to challenge the government. First, where pro-environmental organizations believe the government to have been insufficiently protective of natural resources; and second, where private owners and those aligned with them believe that the government has intruded too far on private interests and has effected a regulatory taking.[305]

Let us take the second circumstance first. Basically, in the late 1980s the Supreme Court awarded the property rights movement several victories, leading to what was anticipated by some to be the verge of a property rights revolution, *Lucas v. South Carolina Coastal Council*.[306] That revolution did not emerge from subsequent Supreme Court jurisprudence, due in part to weaknesses and inconsistencies within the conception of property underpinning *Lucas*,[307] and in part to the inability of property rights advocates on the Court to persuade their colleagues.[308] But also, insofar as

---

[303] *See, e.g.*, Hudson River Waterfront Area Rule, N.J. ADMIN. CODE. § 7:7E-3.48 (2004) (enacted pursuant to New Jersey's Waterfront Development Act of 1914, N.J. STAT. ANN. § 12:5-1 to -11 (2006)).

[304] S.C. CODE ANN. REGS. 30-12(N).

[305] The public trust doctrine also emerges as an important substantive doctrine from time to time in cases directly involving traditional ownership disputes, see, *e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (addressing question of state or federal ownership of mineral resources under tidally influenced waters), or in trespass actions that depend on questions of private or public ownership.

[306] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). The other victories I have in mind are *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (requiring compensation as the remedy for a regulatory taking; holding invalidation of the offending statute or ordinance is not enough), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (concluding state commission may not exact a right of public passage across private property as a condition of building permit; an "essential nexus" between permit condition and harm from permitted activity is constitutionally required).

[307] *See* Laura S. Underkuffler, Tahoe's *Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST'L COMMENTARY 727 (2004) (analyzing *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), as articulating the death knell of a theory of property espoused by Justice Scalia and articulated in *Lucas*, 505 U.S. 1003).

[308] *See* Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement within the Supreme Court*, 57 HASTINGS L.J. 759 (2006) (arguing

Lucas required regulatory takings claims to undertake an antecedent inquiry into background principles of nuisance and property law, it established an important new role for the public trust doctrine and other tradition-based defenses against regulatory takings claims.[309] The public trust doctrine became a property-based defense of environmental and land use regulation against a property-based challenge—a configuration that Lazarus did not foresee. Both New Jersey and South Carolina have deployed the public trust doctrine in this way.[310] And given presenter Ellison Smith's discussion of potential regulatory takings challenges to denials of bridge permits,[311] the public trust doctrine remains an important defensive weapon in South Carolina's arsenal in managing the controversy that is the topic of this Symposium.

The public trust doctrine's usefulness as a continuing affirmative mandate is a bit harder to suss out. The public trust doctrine is, indeed, unformed and variable.[312] Nevertheless, as Jim Salzman and J.B. Ruhl point out, it contains a broad affirmation of an obligation to manage and not to dissipate certain natural resources, and thus stands as a counter to what some have perceived as a bias in property law favoring growth rather than preservation.[313] Water law has not been the focus of this Symposium, but I suspect the public trust doctrine invoked in this context is more than a mere empty shell, and has actually influenced how water is allocated and reallocated in some states. The public trust doctrine's availability to those seeking to prod regulators to move in certain directions is also likely to have some effect from time to time, even if not always openly acknowledged. It is

---

Justice Scalia repeatedly failed to persuade colleagues to go along with his theory of property rights, basing analysis on an examination of Justice Blackmun's papers).

[309] *See supra* Part I.A., especially n. 45; Blumm & Richie, *supra* note 49. *See also* Erin Ryan, *Bridging the Divide*: Palazzolo*, the Public Trust, and the Property Owner's Reasonable Expectations: Takings and the South Carolina Marsh Island Bridge Debate*, 15 SOUTHEASTERN ENVTL. L.J. 121 (2006).

[310] *See*, *e.g.*, National Ass'n of Home Builders v. Dep't of Envtl. Prot., 64 F.Supp. 2d 354 (D.N.J. 1999); Karam v. Dep't of Envtl. Prot., 705 A.2d 1221 (N.J. Super. App. Div. 1998), *aff'd*, 723 A.2d 943 (N.J. 1999), *cert. denied*, 528 U.S. 814 (1999); McQueen v. S.C. Coastal Council, 580 S.E.2d 116 (S.C. 2003).

[311] Ellison Smith, Attorney, Smith Bundy Bybee & Barnett, Presentation at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interests in Coastal Marshes and Marsh Islands (Sept. 8, 2006), *available at* http://www.law.sc.edu/elj/2006symposium/ (last visited Feb. 4, 2007).

[312] *See*, *e.g.*, Callies & Breemer, *supra* note 49.

[313] J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 SOUTHEASTERN ENVTL. L.J. 223 (2006). *See generally* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996).

at its strongest where the resources to which it is applied are traditional public trust resources, as is the case here in South Carolina. Where there is a possibility that publicly-owned resources will be alienated to private interests, the public trust doctrine continues to serve to remind legislators and regulators they must carefully justify their actions in terms that reflect their fair consideration of other public interests in those resources.[314]

I would like to argue that there is a third, covert doctrinal application of the public trust doctrine. As discussed above, based on my study of New Jersey beach access doctrine in practice, I believe that the public trust doctrine is used as a substitute for other more explicit antidiscrimination doctrines, which are also in an important sense about access.[315] State and federal statutory and constitutional protections against discrimination are not always easy to apply and prove.[316] Even the strongest of these types of prohibition, against racial discrimination, can be problematic in application. By applying a general requirement of public access, the state can do an end run around these difficulties, at least where the public accommodations at issue are natural resources subject to the public trust doctrine.

In addition to its continuing doctrinal applicability, historical and theoretical studies of the public trust doctrine are also potentially rewarding, not only in their own right,[317] but because, mutatis mutandis, they may help us to better apply public trust principles with discernment in traditional and perhaps novel contexts. Frischmann's general theory of infrastructure

---

[314] *See, e.g.*, *Comedy of the Commons*, *supra* note 210, at 720-21 (framing the question as management of property owned by the public creates an expectation of restraint and justification); *Idea of the Public Trust*, *supra* note 282, at 358 (reasoning the property version of the public trust doctrine serves to restrain legislative giveaways). Lazarus suggests that the development of a "hard look" principle of administrative process and judicial review has superceded this aspect of the public trust doctrine. Lazarus, *supra* note 290, at 684-88 Some authorities question how deep the "hard look" principle has in fact penetrated. *See, e.g.*, RONALD A. CASS ET AL., ADMINISTRATIVE LAW, CASES AND MATERIALS 198-200 (5th ed. 2006) (questioning the extent to which the Supreme Court has embraced the hard look doctrine).

[315] *See Environmental Justice and the Beach Access Movements*, *supra* note 144; discussion *supra* Part II.B.

[316] *See generally Environmental Justice and the Beach Access Movements*, *supra* note 144, at 722, 776-78.

[317] They can take their rightful place along the study of other forms of not-so-private management of resources. *See, e.g.*, OSTROM, *supra* note 210; THE QUESTION OF THE COMMONS, *supra* note 210; *Comedy of the Commons*, *supra* note 210; *Energy and Efficiency*, *supra* note 210; Carol M. Rose, *Romans, Roads, and Romantic Creators: Public Property in the Information Age*, 66 LAW & CONTEMP. PROB. 89 (2003); *Semicommon Property Rights*, *supra* note 212.

commons,[318] suitably modified to take account of the context of public trust resources and practices, might help to refine the public trust doctrine itself, as well as to better justify the assertion of public-trust-like access conditions on very different resources such as information and the Internet. Rose's argument about sociability and returns to scale from general public participation in communal activities[319] might help us not only to understand the value of allowing open access to public parks, but also to refine our debate over the proper deployment of claims to ownership of and exclusion from intangible forms of cultural property and to controversies regarding sacred sites imbued with cultural significance.[320] All this theoretical potential within the fusty old public trust doctrine will not be realized if it is too hastily consigned to the dustbin.

The public trust doctrine often does not provide a clear resolution to resource use conflicts, even where, as in South Carolina, some of the resources at issue fit so squarely within the rubric of traditional public trust resources. The balance and reasonableness it demands[321] must be fleshed out via more detailed regulatory and legislative process. Yet, it provides an important cautionary and practical counterweight to incessant pressures for the privatization and development of natural resources. Whatever its murky origins and quirky, sometimes inconsistent articulations, it forms an important part of the background principles of property and natural resource law that any significant decision on the management of coastal resources must take into account.

---

[318] *Economic Theory*, *supra* note 196; *Infrastructure Commons*, *supra* note 215. *See* discussion *supra* Part II.B.

[319] *Comedy of the Commons*, *supra* note 210. *See* discussion *supra* Parts II.B-C.

[320] *See generally* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003); Carol M. Rose, *Property in All the Wrong Places*, 114 YALE L.J. 1991 (2005) (reviewing BROWN, *supra*, and KAREN R. MERRILL, PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM (2002)); SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (2005).

[321] Barton Thompson, Jr., Robert E. Paradise Professor of Natural Resources, Stanford Law School, Keynote Address at the University of South Carolina School of Law Southeastern Environmental Law Journal Symposium: Bridging the Divide: Public and Private Interest in Coastal and Marsh Islands (Sept. 8, 2006), *available at* http://www.law.sc.edu/elj/2006symposium/ (last visited Feb. 4, 2007).