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# IMPROVING PUBLIC ACCESS TO COASTAL BEACHES: THE EFFECT OF STATUTORY MANAGEMENT AND THE PUBLIC TRUST DOCTRINE

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The tremendous population growth that our nation's coastal areas have experienced is a well documented phenomenon.<sup>1</sup> The next decade promises to bring more people to the coasts with no decline in sight.<sup>2</sup> The increase in population results in escalating competition to own land on or near the coast. As the number of people who own and desire to own coastal land increases, the available access areas for the public necessarily decreases. The end result is that a greater number of public beach-goers are forced to use an ever decreasing number of public access ways.

This tension has led to several court battles and state legislative efforts to maintain access to public coastlines. This Note focuses on the varying ways the states have attacked the problem and how private property owners have responded.

The public trust doctrine is nearly universally accepted in the United States.<sup>3</sup> The doctrine states that shorelands, bottomlands, tidelands, tidewaters, navigable freshwater, and the plant and animal life living in these waters are owned by the public but held in trust by the state for the benefit of the public.<sup>4</sup> In nearly all states, the public trust doctrine provides the public with the right to pass and repass over these lands, which is known as lateral access.<sup>5</sup> Lateral access and state control are generally limited to the area of

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<sup>1</sup> Alice G. Carmichael, Note, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. REV. 159, 160 n.2 (1985) (stating that travelers' expenditures in coastal community of Dare County, N.C. increased 2778% between 1970 and 1982 and 1025.5% in Carteret County in the same period).

<sup>2</sup> James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, n. 2 (1995) (stating that 65% of the United States population lives within 50 miles of the coast and by the year 2000, 75% will live in coastal areas).

<sup>3</sup> DAVID C. SLADE, *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* xvi (1990).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 162 (citing several instances of where this lateral access right has been recognized). See, e.g., *Adams v. Pease*, 2 Conn. 481, 483 (1818); *Cobb v. Davenport*, 32 N.J.L. 369, 378 (1867); *Tucci v. Salzhauer*, 336 N.Y.S. 2d 721 (1972), *aff'd*, 307 N.E.2d 256 (N.Y. 1973).

the beach that is below the ordinary high-water mark.<sup>6</sup> Some states have begun to increase the area included in the public trust in order to aid in the public's enjoyment of what has been made available to them.<sup>7</sup> The New Jersey judiciary extended the public's right to sunbathe and enjoy recreational activities to the privately owned dry sand beach.<sup>8</sup> A state court stated that "[r]easonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed."<sup>9</sup>

The other type of access that courts have traditionally discussed is the perpendicular access across land. The nearly unanimous rule is that the public trust doctrine does not grant the public any right or privilege of perpendicular access by crossing over private land.<sup>10</sup> As ownership of coastal land becomes increasingly private, lack of perpendicular access has created the unusual situation of having beaches open to the public but with no way to reach them. This prompted a New Jersey judge to comment: "[T]o say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public

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<sup>6</sup> The beach has been traditionally divided into three separate areas. The area from the sea to the ordinary high water mark is known as the foreshore or tideland, from the ordinary high water mark to the vegetation or debris line is known as the dry sand area, and landward from the vegetation line is known as the upland and is generally considered wholly private. SLADE, *supra* note 3, at xxxix-xl. The ordinary high water mark is "generally computed as a mean or average high-tide, and not as the extreme height of the water." *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 177 S.E.2d 513, 516 (N.C. 1970).

<sup>7</sup> See e.g., N.C. GEN. STAT. § 146-6(f) (1994) (implicitly recognizing a public trust easement between the mean high tide line and the vegetation line); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (recognizing the right of the public to enjoy the dry sand area as a recreational area that comes with the use of the wet sand or foreshore area).

<sup>8</sup> *Tona-Rama*, 294 So. 2d at 78.

<sup>9</sup> *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984). In this case the court held "where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner." *Id.* See also TEX. NAT. RES. CODE ANN. § 61.011 (West 1996) (mandating that in Texas all parts of the beach between the line of low mean tide and the vegetation line are subject to the public's trust rights).

<sup>10</sup> E.g., *Mackall v. White*, 85 A.D.2d 696 (N.Y. App. Div. 1981) (holding that the general public does not have a right of access over privately owned upland to the foreshore); *Kemp v. Putnam*, 288 P.2d 837 (Wash. 1955) (stating that the public right to fish a stream does not give the right to trespass in reaching the stream). But see *Trout and Salmon Club v. Mather*, 35 A. 323 (Vt. 1896) (giving citizens of that state the right to cross over private land to reach great ponds).

trust doctrine.”<sup>11</sup> Trying to develop an adequate answer to this problem has confronted the states for decades.

There are two main ways the states may attack the perpendicular access problem: through statutory remedies or through common law remedies. Included in the use of statutory remedies is the use by some states of their state constitutions to help ensure the public’s access. The California Constitution states:

[N]o individual, partnership or corporation . . . shall be permitted to exclude the right of way to such water whenever it is required for any public purpose . . . and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.<sup>12</sup>

This Note argues that the state legislatures and hence the courts should liberally construe the laws in favor of public access to the water.<sup>13</sup> Utilizing the states’ constitutions in this manner can be helpful, but California is one of only a few states who have done so.<sup>14</sup> The primary statutory treatment of coastal access is through the federally mandated Coastal Zone Management Act of 1972 (“CZMA” or “Act”).<sup>15</sup> This Act was designed to help the states deal with the incredible development that the coastal areas were experiencing at the time of enactment. This will be discussed in more detail below.<sup>16</sup>

The states have also used various common law remedies to try to solve the problem of perpendicular access. Equal protection,<sup>17</sup> dedication,<sup>18</sup>

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<sup>11</sup> *Matthews*, 471 A.2d at 364.

<sup>12</sup> CAL. CONST. art. X, § 4 (1879).

<sup>13</sup> *See id.*

<sup>14</sup> *See also* N.C. CONST. art. XIV, § 5.

<sup>15</sup> 16 U.S.C. § 1451 (1972).

<sup>16</sup> *See infra* part I.

<sup>17</sup> The equal protection doctrine was used to combat discriminatory beach fees against out-of-towners. *Neptune City v. Avon-By-the Sea*, 294 A.2d 47 (N.J. 1972).

<sup>18</sup> *See Gion v. City of Santa Cruz*, 465 P.2d 50, 56-58 (Cal. 1970) (holding that the litigant must show that persons using property believed the public had the right to use and that the owner acquiesced to the public use).

easements,<sup>19</sup> and custom<sup>20</sup> have all been invoked by the states as solutions. The problem with these approaches is one must meet many requirements which are usually determined through judicial proceedings. This lack of certainty undermines their effectiveness as a means to solve the beach access problem. The other common law solution involves the public trust doctrine.

Part I of this Note will focus on the two main approaches utilized by the states to deal with the problem of public beach access: the public trust doctrine and statutory management (the CZMA). Part II will discuss how both methods approach the constitutional problem of takings. Part III will isolate three states, North Carolina, California, and Texas, to examine how they have chosen to attack the problem. Finally, Part IV will analyze the various state approaches, and will suggest the "best" way to handle the continuously increasing demand of the public on our nation's fragile beach environments.

## I. PUBLIC TRUST DOCTRINE V. STATUTORY MANAGEMENT

The public trust doctrine does not take the same form in every jurisdiction. Each state is given authority and responsibility for applying the doctrine within its borders according to its own views of justice and policy.<sup>21</sup> Therefore, there are a number of variations of the doctrine. They are all, however, based upon a few central principles.

The public trust doctrine is a property right invested in the state, not a police power.<sup>22</sup> Theoretically this allows a state to manage the trust lands as a property owner and does not require the exercise of a state's police powers or the power of eminent domain.<sup>23</sup>

There are two titles vested in public trust lands. The dominant title is the *jus publicum*.<sup>24</sup> It is the right to use and enjoy trust property for

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<sup>19</sup> Easements require that the use must be with knowledge of landowner, under claim of right, open, hostile, continuous and uninterrupted, and for a statutory or prescriptive period of time.

<sup>20</sup> Custom requires a very long period of time to develop. It must be used so long "that the memory of man runneth not to the contrary." Oregon *ex rel.* Thornton v. Hay, 462 P.2d 671, 677 (Or. 1969) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*152, to find a custom in the public's right to use the dry sand area of Oregon's beaches).

<sup>21</sup> Shively v. Bowlby, 152 U.S. 1 (1893).

<sup>22</sup> SLADE, *supra* note 3, at 9.

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

<sup>24</sup> *Id.* at 7.

commerce, navigation, fishing, bathing, and other public purposes.<sup>25</sup> This title is based on the state's obligation to hold the land in trust for its citizens.<sup>26</sup>

The lesser title is the *jus privatum*.<sup>27</sup> This title deals with the private proprietary rights in the use and possession of trust lands.<sup>28</sup> It gives the state the right to develop and sell the property.<sup>29</sup> A state may convey the lesser title to private ownership, but the property will still be subject to the dominant *jus publicum* interest.<sup>30</sup>

This underlying property interest has many benefits over the traditional police power that states usually exert. Police power is not specifically aimed at addressing the specific problems of coastal areas.<sup>31</sup> The public trust doctrine by its very definition is narrowly tailored to meet the unique exigencies of the coastline.<sup>32</sup> Additionally, police power traditionally has been used to restrict harmful activities and has not been used successfully to create and support protective environmental programs.<sup>33</sup> A state's police power is also more likely to violate the Takings Clause of the Constitution.<sup>34</sup> When the state's rights are grounded in property rights, it will be less likely to be guilty of violating the Takings Clause so long as it has acted within its rights and obligations as a trustee over the trust land.<sup>35</sup>

Another benefit of the public trust doctrine is that the basic doctrine has a clear purpose and beneficiary. The doctrine is there for the benefit of the public. Its purpose is to ensure the public's ability to fully enjoy the waters and lands held in trust.<sup>36</sup> Finally, the trust doctrine is flexible enough that it can handle nearly all the problems of the coast without having to continuously create expensive legislative solutions. It makes sense to open the trust doctrine to include access to the lands and waters held in trust. As

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

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.* at 224.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 225.

<sup>34</sup> *Id.* The Fifth Amendment to the U.S. Constitution provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

<sup>35</sup> SLADE, *supra* note 3, at 225.

<sup>36</sup> *Id.* at 224.

noted above, if the trust is to have any practical meaning, the public must possess the right to reach these areas.<sup>37</sup>

A drawback to the effectiveness of the doctrine is that there is no uniform doctrine. Each state has its own version and interpretation. Some states have construed the doctrine expansively, like North Carolina, while others such as Maine have a narrow construction of what the doctrine allows.<sup>38</sup> This provides for a confusing and inconsistent application of the doctrine that in turn makes for an inefficient rulemaking system.

In an attempt to remedy the grave inconsistencies in the states' methods of dealing with the increasing coastal crises, Congress passed the Coastal Zone Management Act in 1972. One of the purposes behind the Act was to "preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations."<sup>39</sup> The Act promotes this goal by providing funds and guidelines by which the states should develop their own programs for management of land and water in the "coastal zones."<sup>40</sup> The states' programs must meet the requirements of the CZMA and then be approved by the Secretary of Commerce before the funds are released to the states.<sup>41</sup>

A second policy objective of the CZMA is "to encourage and assist the states" in assuming responsibility for management of the coastal zone.<sup>42</sup> The Act lists nine items for which the state programs should provide at a

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<sup>37</sup> Maine, on the other hand, has reached a far different conclusion. The Maine Supreme Court held that the public trust rights were limited to the traditional rights of fowling, fishing, and navigation. The court did not extend the rights to include recreational activities. *Bell v. Town of Wells*, 557 A.2d 168, 171-73 (Me. 1989).

<sup>38</sup> North Carolina has adopted and expanded the trust principles in its constitution. It establishes a policy of protection of state lands and waters for the benefit of its citizens and recognizes that the state's wetlands, estuaries, and beaches are part of its common heritage. N.C. CONST. art. XIV, § 5. For a description of Maine's construction, see *supra* note 37.

<sup>39</sup> 16 U.S.C. § 1452(1) (Supp. 1996).

<sup>40</sup> "Coastal zone" is defined as "the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches." *Id.* § 1453(1).

<sup>41</sup> LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE, 2-6 (Environmental Law Series No. 5, 1995). Twenty-four states have submitted an approved plan: Washington, Oregon, California, Massachusetts, Wisconsin, Rhode Island, Michigan, North Carolina, Hawaii, Maine, Maryland, New Jersey, Alaska, Delaware, Alabama, South Carolina, Louisiana, Mississippi, Connecticut, Pennsylvania, Florida, New Hampshire, New York, and Virginia. *Id.* at 2-5 n.4.

<sup>42</sup> 16 U.S.C. § 1452(2).

minimum.<sup>43</sup> One of the nine is "public access to the coasts for recreation purposes."<sup>44</sup> This item demonstrates the importance of access to the lawmakers of our country and its citizens.

Unlike the public trust doctrine, the state's power with respect to the CZMA is based on police power. Congress has attempted to eliminate some of the problems traditionally associated with management based on police power. By outlining the nine minimum issues, Congress tried to narrowly tailor the statutory controls. The CZMA is based on the issuance of permits to potential developers. Through this technique the Act should help states become more efficient managers of resources.

By providing overriding policy objectives and some minimum guidelines, the CZMA provides for a more predictable nationwide policy than the public trust doctrine. The CZMA is far from ideal, however, as the CZMA still leaves a substantial number of provisions open to interpretation by the individual states. For example, one can look at how the coastal zones of each state are defined. North Carolina's plan includes all twenty coastal counties.<sup>45</sup> By contrast, California's coastal zone generally extends inland only 1000 yards from the mean high tide line.<sup>46</sup> Finally, Georgia's zone is defined by its "dynamic dune field."<sup>47</sup>

In dealing with the problem of beach access, states have adopted a variety of laws. Public access restrictions are used to preserve both visual and physical access to beaches.<sup>48</sup> These restrictions can be more constricting on landowners than the mere limits on growth and development.<sup>49</sup> Because restrictions create such a heavy impact on landowners, combined with the fact that most ocean-side landowners can afford to litigate extensively, it is not surprising that the public access debate has sparked fierce and protracted legal battles over the Takings Clause of the Constitution.

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* § 1452(2)(E).

<sup>45</sup> N.C. GEN. STAT. § 113A-103(2) (1995).

<sup>46</sup> CAL. PUB. RES. CODE § 30,103 (West 1986). In special areas of concern, the zone extends inland to the first major ridgeline or five miles, whichever is less, not including the San Francisco Bay. *Id.*

<sup>47</sup> GA. CODE ANN. § 12-5-232 (1992). "Dune field" is defined as extending from the ordinary high water mark to the landward boundary of the first 20-foot tree or existing structure as of July 1, 1979. *Id.*

<sup>48</sup> MALONE, *supra* note 41, at 3-4.

<sup>49</sup> *Id.*



## II. TAKINGS

As states attempt to expand public access across private lands to the trust lands that lay beyond, they will inevitably run into takings challenges. These challenges are based upon the Fifth and Fourteenth Amendments. The Fifth Amendment, as described above, is applied to the states through application of the Fourteenth Amendment.<sup>50</sup> Originally these amendments were applied to physical takings of private property by government entities.<sup>51</sup> Beginning in the early 1900s, courts began to hold that severe restrictions on the use of private land by government agencies constituted takings.<sup>52</sup> The rationale behind the decisions was that the restrictions had the effect of rendering the property useless to the private owner or at least greatly reducing its value.

In the last decade, the takings doctrine has experienced a shift in the court system. The Supreme Court, by a slim majority, has seemingly made it increasingly difficult for the states to improve access to the trust lands. This trend is exemplified by three cases: *Nollan v. California Coastal Commission*,<sup>53</sup> *Lucas v. South Carolina Coastal Council*,<sup>54</sup> and *Dolan v. City of Tigard*.<sup>55</sup>

In *Nollan*, the Supreme Court reversed a California State Court of Appeals decision which held that the imposition of an easement upon the granting of a permit did not violate the Takings Clause of the Fifth Amendment.<sup>56</sup> *Nollan* wanted to tear down his bungalow and replace it with a larger house on his beachfront lot.<sup>57</sup> The California Coastal Commission conditioned his permit on *Nollan's* granting the public an easement to go

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<sup>50</sup> The Fourteenth Amendment provides in part: "No State shall make or enforce any law which shall abridge the privileges . . . of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

<sup>51</sup> SLADE, *supra* note 3, at 285.

<sup>52</sup> *Id.* See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The court stated that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

<sup>53</sup> 483 U.S. 825 (1987).

<sup>54</sup> 112 S. Ct. 2886 (1992).

<sup>55</sup> 114 S. Ct. 2309 (1994).

<sup>56</sup> 483 U.S. 825 (1987).

<sup>57</sup> *Id.* at 828.

across his beach, which was located in between two public beaches.<sup>58</sup> Nollan appealed the decision to the County Superior Court which ordered that the condition be struck.<sup>59</sup> That decision was then reversed by the California State Court of Appeals which in turn was overturned by the United States Supreme Court.<sup>60</sup>

The Court held that a land use regulation does not effect a taking if it "substantially advances legitimate state interests and does not deny an owner economically viable use of his land."<sup>61</sup> Writing for the majority, Chief Justice Rehnquist held that the state must prove the easement is reasonably related to the harmful effects that the development would have on public access rights.<sup>62</sup> The Court did not find the necessary nexus between the harm claimed by the commission—blocking visual access—and the purpose of the easement—the providing of lateral access across the beach.<sup>63</sup>

Justice Brennan, in a vigorous dissent, argued that the majority was imposing an unreasonably demanding standard.<sup>64</sup> He thought that the true standard according to the Court's precedents should ask whether the easement "could reasonably be chosen to mitigate the burden produced by a diminution of visual access."<sup>65</sup> Brennan also downplayed any effect that the majority decision may have on future cases. "[T]he Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development."<sup>66</sup> In the future, the Commission would only have to make it clear that the provision for access directly corresponds to the burden created by the new development.<sup>67</sup> Another limiting factor on the impact of the case is if the majority had applied the public trust doctrine to this case there is evidence that there could not have been a taking because the portion of the

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<sup>58</sup> *Id.* The Commission was seeking a lateral access across Nollan's dry sand beach which was surrounded on one side by the mean high tide and on the other by Nollan's seawall.

<sup>59</sup> *Id.* at 825.

<sup>60</sup> 223 Cal. Rptr. 28 (1986).

<sup>61</sup> *Nollan*, 483 U.S. at 834 (alterations omitted) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>62</sup> *Id.* at 838.

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

<sup>64</sup> Justice Brennan felt that historically the test to be used when dealing with a state's police power is a "rationally related" test. *Id.* at 841-44. Nevertheless, he thought that even an exacting standard was met here. *Id.*

<sup>65</sup> *Id.* at 850.

<sup>66</sup> *Id.* at 862.

<sup>67</sup> *Id.* at 863.

beach at issue likely still belongs to the public.<sup>68</sup>

Six years later in *Lucas v. South Carolina Coastal Council*, the Supreme Court further narrowed the nuisance exception to the Takings Clause.<sup>69</sup> In 1986, Lucas purchased two beachfront lots on the Isle of Palms.<sup>70</sup> Two years later South Carolina passed the Beach Management Act which prohibited occupiable construction seaward of a determined erosion line.<sup>71</sup> This prohibited Lucas from building residential houses on the two lots as he had planned.<sup>72</sup> Thus, Lucas argued that the Act deprived him of all viable economic use of his land.

The South Carolina Coastal Commission ("SCCC") countered by saying that the nuisance exception insulates from a takings challenge even those regulations which deprive a land owner of all reasonable use of property. The Supreme Court of South Carolina agreed with the SCCC, stating that when a regulation respecting the use of property is "designed 'to prevent serious public harm,' no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."<sup>73</sup>

The Supreme Court, in *Lucas*, once again outlined its understanding of what constitutes a violation of the Takings Clause.<sup>74</sup> It held that there is a taking when "land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'"<sup>75</sup> The Court then went on to state that the noxious or harmful use of property always was the progenitor of the aforementioned takings test.<sup>76</sup>

Justice Scalia stated the nuisance exception for the majority:

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<sup>68</sup> *Id.* at 862. The senior land agent's report to the Commission states that "presently, most, if not all of Faria Beach [the beach at issue] waterward of existing seawalls lies below the Mean High Tide Level, and would fall in public domain or sovereign category of ownership." *Id.* at 862 n.11 (emphasis omitted) (alterations omitted).

<sup>69</sup> *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). Any regulation that deprives an owner of all economic beneficial use is a taking unless the use is prohibited under state common law of property or nuisance.

<sup>70</sup> *Id.* at 1006.

<sup>71</sup> *Id.* at 1007.

<sup>72</sup> *Id.* Lucas had purchased the two lots for \$975,000 in 1986. The passage of the Beachfront Management Act only allowed Lucas to build "wooden walkways no larger in width than six feet and small wooden decks no larger than one hundred forty-four square feet." *Id.* at n.2.

<sup>73</sup> *Id.* at 1010 (quoting *Lucas v. South Carolina Coastal Commission*, 404 S.E.2d 895, 899 (S.C. 1991)).

<sup>74</sup> *Id.* at 1016.

<sup>75</sup> *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>76</sup> *Id.* at 1023-24.

"[R]egulations that prohibit all economically beneficial use of land: [a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."<sup>77</sup> Essentially, this narrowed the construction of the nuisance exception to include only violations of the state's common law of property or nuisance.<sup>78</sup> If the regulation goes beyond what has been traditionally held to be justifiable under common law, then the state must pay compensation.<sup>79</sup> Only if the state can show a prior prohibitory common law principle, can it claim that "the Beachfront Management Act is taking nothing."<sup>80</sup>

*Lucas* is an important decision, but its effect is also limited. It offered no guidance as to what happens when there is only a partial taking. What happens when the regulation only affects part of the value of the land?<sup>81</sup>

Two years later in *Dolan v. City of Tigard*, the Supreme Court further defined the test it had laid out in *Nollan*.<sup>82</sup> In *Dolan*, the Supreme Court reversed a state court which upheld the City of Tigard's decision to force the petitioner to dedicate a portion of her property for use as a greenway and a fifteen foot pedestrian/bicycle pathway.<sup>83</sup>

The Court first applied the *Nollan* nexus test.<sup>84</sup> The Court then took the test one step further by also deciding the "required degree of connection between the exactions and the projected impact of the proposed development."<sup>85</sup> Here the extended step was necessary because the Court found a nexus between the public purpose and the required dedication.<sup>86</sup> The Court required the city to show "rough proportionality" between the

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<sup>77</sup> *Id.* at 1029.

<sup>78</sup> MALONE, *supra* note 41, at 3-12.

<sup>79</sup> *Lucas*, 505 U.S. at 1030.

<sup>80</sup> *Id.* at 1032.

<sup>81</sup> MALONE, *supra* note 41, at 3-12.

<sup>82</sup> *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

<sup>83</sup> *Id.* at 2314. Dolan owned a store and wished to expand by building a new store on her property. The City Planning Commission granted her permit request subject to the condition of the dedication of the greenway and bike path. The dedication encompassed roughly 10% of the entire property. *Id.* at 2313-14.

<sup>84</sup> See *supra* text accompanying notes 61, 62.

<sup>85</sup> *Dolan*, 114 S. Ct. at 2317. The Court held that the extra step was necessary here and not in *Nollan*, because in *Nollan* the connection did not even meet the easiest standard. *Id.*

<sup>86</sup> *Id.* at 2317-18.

condition and the harm posed by the development.<sup>87</sup> It did not require a "precise mathematical calculation" to see if the city had met its burden, but it must make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."<sup>88</sup>

The Court, after applying its analysis, held that the city did not meet this burden.<sup>89</sup> The city never said why a public greenway is better than a private greenway nor did it quantify its finding that the extra bike path was necessary.<sup>90</sup> The city had to do more than merely assert that the dedication was necessary. There must be some independent proof of that necessity.<sup>91</sup>

The *Dolan* decision makes the burden on states tougher than the traditional "rationally related" test, which was previously used for the application of a state's police power.<sup>92</sup> The states' burden now requires that they meet a proportionality test and prove that the condition is related in nature and extent to the impact.<sup>93</sup> These three cases show that the Supreme Court is adopting a pro-private property rights stance. This position could potentially be an overwhelmingly expensive result for the coastal states. Most coastal states and towns simply cannot afford to compensate for every piece of land that they need for public access.<sup>94</sup>

While the three cases appear to increasingly restrict the states' police powers, they remain silent on the use of the states' property rights through the public trust doctrine. The states would appear to stand on more solid ground by claiming that the land is theirs in the first place. States could assert that private landowners merely hold the *jus privatum* to the land and not the *jus publicum*.<sup>95</sup> This approach in turn would give the states the underlying right to manage these properties without resorting to their police powers or

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<sup>87</sup> *Id.* at 2319. "We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment." *Id.*

<sup>88</sup> *Id.* at 2319-20.

<sup>89</sup> *Id.* at 2321.

<sup>90</sup> *Id.* at 2320-21.

<sup>91</sup> *Id.* at 2321-22.

<sup>92</sup> *Id.* at 2319.

<sup>93</sup> *Id.* at 2319-20.

<sup>94</sup> SLADE, *supra* note 3, at 9. Whenever the state is forced to purchase land for public access to the beach, it is usually dealing with the most expensive land in the country, waterfront property. *Id.* Correspondingly, it must deal with the people who have the most resources with which to fight the state's attempts.

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

eminent domain.<sup>96</sup> While appealing, this approach is laden with some inherent difficulties. Normally, the owner of the *jus privatum* pays taxes on the land and perceives that the land is his to the exclusion of everyone else.<sup>97</sup> Additionally, the boundary descriptions are usually silent as to the nature of the *jus publicum* interest retained by the state.<sup>98</sup> This further adds to the expectation of a waterfront property owner. Anything that adds to this expectation or perception of the private landowner increases the amount of resistance that will be exerted by the landowner.<sup>99</sup> That resistance naturally will be increased by any attempt to expand the public trust doctrine to include perpendicular access to our nation's beaches.

The cheapest way to solve the access problems to the beaches is through the public trust doctrine. Through use of the doctrine the states do not have to compensate private landowners. Further support for this method was given by the Supreme Court in 1988 when it stated that there are no constitutional limitations on the states' enforcement of pre-existing public trust rights.<sup>100</sup> The Court noted that "the States have interests in lands beneath tidal waters which have nothing to do with navigation,"<sup>101</sup> such as "bathing, swimming, recreation, fishing, and mineral development."<sup>102</sup> That decision would seem to give state governments sufficient power over public trust lands. This seemingly simple solution, however, is still confronted by the aforementioned problems. What this approach saves by not having to compensate landowners or develop extensive legislation, it loses in having to fight extensive legal battles against the wealthy individuals and corporations who own the beachfront land.

Finding a solution is a problem which the states have begun to face seriously for the first time. The last twenty years have seen a dramatic

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

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

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

<sup>99</sup> *Id.*

<sup>100</sup> *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988). The state of Mississippi issued oil and gas leases on land under streams which were affected by the tide. Phillips, which was the titleholder to the land and paid taxes on it, brought suit to quiet title. *Id.* The Court held that the public trust doctrine applied to waters influenced by the tide and therefore the underlying land could be leased by the state. *Id.* at 484-85. Justice O'Connor, writing a dissenting opinion, noted that "[a]lthough Mississippi collected taxes on the land and made no mention of its claim for over 150 years . . . Mississippi was not estopped from dispossessing petitioners." *Id.* at 494.

<sup>101</sup> *Id.* at 476.

<sup>102</sup> *Id.* at 482.

increase in legislation designed to help create a solution. This Note now turns to three approaches by different states to determine which application is the most efficient in tackling this dilemma.

### III. VARIOUS STATE APPROACHES

#### A. *North Carolina*

North Carolina's answer to the CZMA was to pass the Coastal Area Management Act ("CAMA") in 1974.<sup>103</sup> The North Carolina legislation is an example of what is more commonly found in the western states—a comprehensive management of the coastal zone.<sup>104</sup> CAMA includes the North Carolina Coastal and Estuarine Water Beach Access Program.<sup>105</sup> It provides in part that public interest would be served by increasing access to ocean and estuarine beaches.<sup>106</sup> It also recognizes the need for reasonable public access and necessary parking.<sup>107</sup> The program basically entails the acquisition of easements through public funds.<sup>108</sup> The Coastal Resources Commission ("CRC"), which essentially administers CAMA, adopts programs and decides upon which lands to purchase the easements.<sup>109</sup> The CRC must give priority to "acquisition of lands that due to adverse effects of natural hazards, such as past and potential erosion, flooding, and storm damage, are unsuitable for the placement of permanent structures."<sup>110</sup>

This legislation has some advantages. It avoids takings challenges by purchasing beach access rights directly from the landowners, not by using a state's police powers.<sup>111</sup> This program also precludes litigation to determine what the public rights may have been, and places the burden of paying for the

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<sup>103</sup> N.C. GEN. STAT. §§ 113A-100 to 113A-134.3 (1995). The stated purpose of CAMA is to establish a comprehensive plan for the protection, preservation, and orderly development and management of the coastal area of North Carolina. *Id.*

<sup>104</sup> MALONE, *supra* note 41, at 3-12.

<sup>105</sup> N.C. GEN. STAT. §§ 113A-134.1 to 113A-134.3.

<sup>106</sup> *Id.* § 113A-134.1. The statute further notes "[t]he beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State." *Id.*

<sup>107</sup> *Id.* § 113A-134.3.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Carmichael, *supra* note 1, at 200.

beach access on the public rather than on the landowners.<sup>112</sup> Despite these advantages it is still a very expensive solution to the problem. To help combat these costs North Carolina could turn to the public trust doctrine.

North Carolina adopted the public trust doctrine in 1903.<sup>113</sup> It has subsequently been held to include only traditional uses such as navigation, bathing, and fishing.<sup>114</sup> In an early case, the North Carolina Supreme Court held that the "public has the right to the unobstructed navigation as a public highway, for all purposes of pleasure or profit, of public trust lands."<sup>115</sup> This holding may exhibit a flexibility on behalf of the courts to extend the public trust doctrine.

North Carolina is a high tide state which means that the rights to the foreshore have remained in the state and for the use of the public.<sup>116</sup> The exact issue of the extent of the public trust doctrine has not been raised in the state.<sup>117</sup> This would tend to indicate that legislation in the state of North Carolina has been fairly effective in its application. Apparently there has not been the need to expand the public trust doctrine and directly decide which access rights are reserved for the public.

Regardless of how successful the legislation has been, it remains to be seen whether the taxpayers and the state are willing to continue purchasing the easements with public funds. The ability to spread the cost among taxpayers may have merely postponed the state's need for finding a cheaper solution to the problem.

## B. *California*

California has the most comprehensive coastal legislation in the California Coastal Act.<sup>118</sup> As a result it also has the most comprehensive beach access legislation, which has been supported in the courts.<sup>119</sup> The coastal zone in California extends inland 1000 yards from the mean high tide

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<sup>112</sup> *Id.*

<sup>113</sup> *Shepard's Point Land Co. v. Atlantic Hotel*, 44 S.E. 39 (N.C. 1903).

<sup>114</sup> Carmichael, *supra* note 1, at 178.

<sup>115</sup> *State v. Baum*, 38 S.E. 900, 901 (N.C. 1904).

<sup>116</sup> *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 177 S.E.2d 513, 516 (N.C. 1970).

<sup>117</sup> Carmichael, *supra* note 1, at 179.

<sup>118</sup> CAL. PUB. RES. CODE §§ 30,000-30,900 (West 1986).

<sup>119</sup> *See, e.g., Lane v. City of Redondo Beach*, 49 Cal. App. 3d 251 (1975). Strong public policy favors public access to the coast. *Id.* at 257.



line.<sup>120</sup> In areas of special concern, the zone extends to the first major ridgeline or five miles, whichever is less, with the exception of the San Francisco Bay.<sup>121</sup>

Like North Carolina, the California Constitution provides for access to its navigable waterways.<sup>122</sup> California's constitution seems to have a broader scope than the North Carolina provision. The California article specifically provides for access whereas the North Carolina article only points to the importance of protecting its land for the public. The emphasis on access can be seen in California court decisions as well.<sup>123</sup>

Also like North Carolina, California has statutorily created a public access program.<sup>124</sup> Much like in the case of their respective constitutions, California has passed a more extensive program than North Carolina. The Coastal Public Beach Access Program was devised as a program that will "maximize public access to and along the coastline."<sup>125</sup> The program grants the Coastal Commission the right to delegate its authority to any public agency which it deems proper to assist it in its goal.<sup>126</sup>

Along with its Coastal Public Access Program, California has a separate article 2 in the Code titled "Public Access."<sup>127</sup> Its six sections deal primarily with new development. One section states that "[d]evelopment shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization . . . ."<sup>128</sup> Another section requires public access be made available "from the nearest public roadway to the shoreline and along the coast . . . in new development projects . . . ."<sup>129</sup>

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<sup>120</sup> CAL. PUB. RES. CODE § 30,103(a).

<sup>121</sup> *Id.*

<sup>122</sup> CAL. CONST. art. 10, § 4. "Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof." *Id.*

<sup>123</sup> See, e.g., *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970). The California Supreme Court stated that there "is also a clearly enunciated public policy in the California Constitution in favor of allowing the public access to shoreline areas." *Id.* at 58. The court goes on to say that no corporation, partnership, or individual "shall . . . exclude the right of way to such water whenever it is required for any public purpose . . . ." *Id.* at 58-59 (citation omitted). Public purpose is later defined to include recreational purposes. *Id.* at 59.

<sup>124</sup> CAL. PUB. RES. CODE §§ 30,530-30,534.

<sup>125</sup> *Id.* § 30,530.

<sup>126</sup> *Id.* § 30,532.

<sup>127</sup> *Id.* §§ 30,210-30,214.

<sup>128</sup> *Id.* § 30,211.

<sup>129</sup> *Id.* § 30,212.

California has extensive legislation dealing with the right of public access. However, because of this abundant regulation, California has been subject to some criticisms. The public agencies have been accused of abusing their discretion in enforcing the powers delegated to them. One commentator wrote that California's abuse of the regulations went "beyond all standards of rationality."<sup>130</sup>

While such criticisms are bound to appear when an area as emotional as this is heavily regulated, California does recognize the delicate balance that it must achieve between private landowners and public rights. One of the opening sections of the California Coastal Act sets its goals as "[m]aximiz[ing] public access to and along the coast . . . consistent with sound resources [sic] conservation principles and the constitutionally protected rights of private property owners."<sup>131</sup> Whether the California Legislature was being sincere or was merely protecting itself is still to be determined in the coming years.

The public trust doctrine was first seen in California in 1913.<sup>132</sup> At that time, the California Supreme Court said that the state had the right to "enter upon and possess the same for the preservation and advancement of the public uses . . . ."<sup>133</sup> Whatever gains the public trust doctrine was making in California seem to have significantly slowed down after the California Coastal Act was passed. With the liberal interpretation clause in the state's constitution and article 2 covering new developments along the coast, there has seemingly been little need to further explore the public trust doctrine.

With the public trust doctrine on unsteady ground, California will continue to rely on its extensive legislation to give the public adequate access to the dry sand beaches and the sea. While it is subject to extensive criticism, as seen above, the California Public Access Program seems to have done an adequate job up to this point.

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<sup>130</sup> Ward Tabor, *The California Coastal Commission and Regulatory Takings*, 17 PAC. L.J. 863, 867 (1986).

<sup>131</sup> CAL. PUB. RES. CODE § 30,001.5(c). A different section also points out that the intent of this legislation (California Coastal Act) is "that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution." *Id.* § 30,214(b).

<sup>132</sup> *People v. California Fish Co.*, 138 P. 79 (Cal. 1913).

<sup>133</sup> *Id.* at 88.

*C. Texas*

Access to the beaches in Texas had not been a problem until 1958, when the Texas Supreme Court for the first time disputed the long held belief that the state owned or controlled all of Texas' coastal beaches.<sup>134</sup> This belief meant that the state controlled the dry as well as the wet sand beach. However, in *Luttes v. State* the Texas Supreme Court ruled that the state only had priority over the wet sand beach.<sup>135</sup> The Texas Legislature responded to the court's challenge by passing the Texas Open Beaches Act the following year.<sup>136</sup>

The Open Beaches Act is not approved by the federal government as meeting CZMA standards. Nevertheless, it too has a subchapter dedicated to public beach access.<sup>137</sup> The first section sets out the goals and policies of the subchapter: "It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico . . . ."<sup>138</sup> This language is broad and over-reaching, for the next section of the statute permits the local government, which is responsible for the regulation of the beaches, to charge fees in order to pay for whatever facilities and services are necessary.<sup>139</sup> But, while some of the language goes too far, the intent is clear: the presumption is in favor of state control. The Act in using its sweeping language has ensured a broad application of the state's powers.

Another example of the sweeping language is in how the law defines public beach. It is defined as "any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to over the area . . . ."<sup>140</sup> The only beaches that seem to be exempt from the legislation are ones which are not accessible by

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<sup>134</sup> Neil E. Pirkle, Note, *Maintaining Public Access to Texas Coastal Beaches: The Past and The Future*, 46 BAYLOR L. REV. 1093 (1994).

<sup>135</sup> *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958).

<sup>136</sup> Pirkle, *supra* note 134, at 1094.

<sup>137</sup> TEX. NAT. RES. CODE ANN. §§ 61.011-61.026 (West 1996).

<sup>138</sup> *Id.* § 61.011(a).

<sup>139</sup> *Id.* § 61.011(b). Granting local governments the right to charge reasonable fees provided that such fees "do not exceed the cost of such public facilities and services, and do not unfairly limit public access to and use of such beaches." *Id.*

<sup>140</sup> *Id.* § 61.001(a).

a public road or ferry.<sup>141</sup> It is not clear what is covered by this exception, but it is assumably a small portion of Texas' beaches. Again, this definition is broader than we have seen in the first two states.

The Open Beaches Act also contains a strict prohibition on any unlawful restraint on the public's right of access to, and use of, a public beach.<sup>142</sup> Any violator is liable for a civil penalty of up to \$1000 per day.<sup>143</sup>

The Texas Supreme Court recognized the public trust doctrine in 1859.<sup>144</sup> The court may have had an early understanding of the doctrine, but it had never explicitly defined the state's trusteeship of public lands.<sup>145</sup> Therefore the position is hard to determine with any accuracy. In one of the few cases involving the public trust doctrine, the court held that the defendant's right to fish in public waters did not include the right to trespass on privately owned land to reach the water.<sup>146</sup>

The lack of cases suggests one of two things. First, that because of Texas' substantial legislation, few parties have relied on the doctrine. Second, it could mean that the public trust doctrine is a highly underutilized tool for the state to increase access to its beaches, possibly without having to charge the fees that it currently does to pay for its program.

#### IV. CONCLUSION

As is evident by the above discussion, all three of the states analyzed have room to explore the public trust doctrine as a means to attack the public beach access problem. This is representative of the entire nation. Extensive legislation appears to be the overwhelming course set by the various states. The question today is whether states can afford to continue on this path. After the recent Supreme Court decisions, *Nollan*, *Lucas*, and *Dolan*, it appears as if the courts will be placing greater restrictions on the states' ability to condition the appropriation of permits upon the granting of public easements across landowners' property. This could hinder the current strategy of the states, most of which base their legislation on the permit

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<sup>141</sup> *Id.* § 61.021(a).

<sup>142</sup> *Id.* § 61.018(a).

<sup>143</sup> *Id.* § 61.018(c).

<sup>144</sup> *City of Galveston v. Menard*, 23 Tex. 349, 392 (1859) (citations omitted).

<sup>145</sup> Michael D. Morrison & M. Keith Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries*, 37 BAYLOR L. REV. 365, 382 (1986).

<sup>146</sup> *Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935).

system.

Many problems face states like California and North Carolina with federally approved coastal programs. Inadequate funding, state/federal conflicts, uncoordinated planning, and pressure for development and energy are all problems for these states.<sup>147</sup> Many states have indicated their inability to manage their coastal plans without federal funding.<sup>148</sup> Between the limiting court decisions and these problems many states will have to look to another option in the future. This need opens the door for states to turn to the public trust doctrine.

States have yet to utilize the public trust doctrine on a widespread basis. Therefore, many of the problems with enforcing the doctrine remain undiscovered. It is a volatile issue, and telling landowners that they do not have total and exclusive title to land which was purchased either at a great price or long ago is not an appealing strategy for any democratically elected official. Nevertheless, the public trust doctrine is a feasible and efficient option which states will have to deal with in the near future.

It will be necessary for states to reach an equilibrium between statutory enforcement and the public trust doctrine. The state with the most successful plan will be the state that allows for flexibility in its approach. North Carolina, for this reason, has situated itself most adequately for this future balance. As evidenced above, the public trust doctrine is virtually untouched in North Carolina. The courts, however, have shown the willingness to expand into this area. Conversely, the legislature has not followed California in expanding its legislation to the point of becoming overreaching. This overreaching is more likely to result in a takings violation, as it did in California under *Nollan*. North Carolina has maintained an adequate coastal program and unlike Texas, has been able to keep federal funding through the CZMA. This is important because North Carolina does not have to charge the fees that many of the Texas coastal communities do.

The coming decades promise to bring even more people to our nation's coastline. This increase will place an enormous strain on many states' existing access problems. North Carolina has the potential to have an efficient system, capable of handling the upcoming strain. With its federally approved coastal program and the ability of its courts to use the public trust doctrine to fill in many of the gaps in the legislation, North Carolina has prepared itself to meet the coming challenges of the twenty-first century.

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<sup>147</sup> MALONE, *supra* note 41, at 2-4.

<sup>148</sup> *Id.* at 2-5.