Beach Please: Implementing a New England Coastal States Open Beach Access Act

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The New England states should modify their Coastal Zone Management programs to allow each state to implement a New England Open Beach Access Act. Each state with an ocean coastline would follow a uniform program for coastal zone management instead of following their own respective state-specific program. Regional specific zone programs, instead of individual state-run coastal zone programs will become more efficient at streamlining daily operations and maintaining a consistent regional coastal program over time. Currently, the federal Coastal Zone Management Act (CZMA) allows individual states to manage their coastal programs. The discord occurs when a bordering state defines boundaries, recreational uses, or rights in such a way that the sister state does not. Congress should amend the federal CZMA to allow for states wishing to join a regional specific Open Beach Access program the ability to do so without impairing their status in the Coastal Management Program or their allocation of federal funds. By implementing a New England Coastal States Open Beach Access Act, a consistent and uniform coastal program will lead to a more effective coastal management program, and to more public beach access in New England.

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I. INTRODUCTION

The New England coastal states should adopt a uniform Open Beach Access Coordination Act to safeguard the rights of their current and future citizens in terms of shore access, use, and enjoyment. Improving definitions of access points and boundaries, coupled with state coordination, will ensure consistency in the law for public shoreline access and ease the tensions between private property owners and the general public seeking access to the shoreline.

The coastline of New England is a mistress cloaked in beauty and tension. Though thousands of visitors are attracted to one of its many shores year-round, underneath the serene, picturesque beauty lies a roiling current of disputes and issues that have plagued coastal states for hundreds of years.[1] The New England coast is made up of ocean shores across Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut. Landowners residing along the coast have squared off against supporters of public shore rights over access to the shoreline for decades.[2]

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[1] *See* Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENV'T L.J. 51, 52 (2011) (discussing the issues facing coastal landowners such as the hardship of contracting with insurance providers to obtain insurance coverage in the event of a hurricane, coastal flooding, or other climatic events like rising sea levels and climate change. Also discussing the continued population growth in coastal areas over the last century and options to mitigate the impact of this population growth in these coastal areas, such as establishing a limit in developing the lands and the need for establishing rolling easements. For example, consider the modification to beachfront properties, which include property owners erecting a seawall which leads to passive beach erosion. Constructing seawalls has caused hazards to the longevity of the beaches. Thus, it is important for the public to understand climate change while it is occurring and implement a systematic approach to limit the impact to the coastal areas).

[2] S.B. 417, 2023 Gen. Assemb., Jan. Sess. (R.I. 2023) ("Notwithstanding any provision of the general laws to the contrary, the public's rights and privileges of the shore may be exercised, where shore exists, on wet sand or dry sand or rocky beach, up to ten feet (10') landward of the recognizable high tide line; provided, however, that the public's rights and privileges of the shore shall not be afforded where no passable shore exists, nor on land above the vegetation line, or on lawns, rocky

The issues giving rise to these tensions are similar in many beach access disputes. On the one side, private homeowners with beachfront property support public access to beaches via public beaches and not through privately-owned land. Private homeowners with beachfront access contend their titles establish their right of ownership in the beachfront property including the right to exclude the public access to beaches through their privately-owned land, as well as staking claim in the beach property itself. The opposing view is that the public should have access to all beaches regardless of whether the property is under private ownership because the public trust doctrine affords the public these rights. However, the common question remains: how to offer public access to the beach land held in public trust, while at the same time, limiting potential injury—namely intrusion—to the private property owners?[3] The law needs to find a consistent balance between the public's right to access the beach land held in public trust with landowners' sovereignty and their rights to exclude. Further, how can the law assure that the public knows and understands its rights to access the beach land held in public trust.[4] The answer is to implement a uniform Beach Access Act, which would be particularly beneficial in New England.

The draw of the natural beauty of the New England coastline has led to extensive development of shoreline property, an increase in population, and a thriving tourism industry.[5] Along with this desire to venture into the sprawling coastlines come many environmental hazards.[6] The presence of an increased population traveling to the coast and developing infrastructure within coastal

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cliffs, sea walls, or other legally constructed shoreline infrastructure. Further, no entitlement is hereby created for the public to use amenities privately owned by other persons or entities, including, but not limited to: cabanas, decks, and beach chairs."); R.I. SEA GRANT, *Understanding Rhode Island's New Shoreline Access Law* (Sep. 25, 2023), https://seagrant.gso.uri.edu/understanding-rhode-islands-new-shoreline-access-law/#:~:text=New%20Rhode%20Island%20legislation%20clarifies,feet%20above%20the%20seaweed%20line. *See, e.g.*, State v. Ibbison, 448 A.2d 729 (R.I. 1982) (Rhode Island Supreme Court held that the landward boundary of the shore was located at the mean high-water mark and dismissed the criminal trespass charge); Hickey v. Pathways Ass'n, Inc. 472 Mass. 735 (2015) (Massachusetts Supreme Court held inland property owners had an implied easement in a narrow private beach access way along beachfront property owners' lots, referred to as: "The Way," leading to Cape Cod Bay); Crow Point Cmty. Club v. Martel, 88 Mass. App. Ct. 1103, No. 14-P-1309 (2015) (A decade-long series of cases involving appeals to the Massachusetts Land Court's decisions regarding beach access rights via a private walk, referred to as: "Melville Walk," leading to Hingham Beach).

[3] *See* Kane v. Stimson, 2016 Mass. LCR LEXIS 125 (Private property owners in these cases claim an intrusion of their property rights by the public); *Ibbison*, 448 A.2d at 729 (Property owners have sought criminal trespass charges for intrusion of property rights by the public).

[4] *See* S.B. 417, *supra* note 2, at lines 12–32.

[5] Peloso, *supra* note 1. *See generally* T. D. Seymour Bassett, *Documenting Recreation and Tourism in New England*, 50 AM. ARCHIVIST 550 (1987).

[6] *See* Doug Struck & Pews Ocean Commission, *A Sea Change*, THE PEW CHARITABLE TRUSTS (Nov. 14, 2013), https://www.pewtrusts.org/en/research-and-analysis/articles/2013/11/14/a-sea-change. (Noting 10 years after the Pews Commission 2003 report, hazards facing coastal areas still remain. Some environmental hazards include rampant development in coastal areas, wetlands loss, over-fishing, and habitat loss all of which have been worsened by population growth in coastal areas).

areas has presented risks such as beach erosion and declining native species that affect the natural environment.[7]

In 2003 the Pew Oceans Commission released a report which predicted that between 1998 and 2015 the United States faced a 20% increase in population along coastal counties.[8] The Commission predicted the coastal area population would surge from 139 million to 165 million residents.[9] The actual increase in population from 1970 to 2010 was 40%.[10] The oceans are environmental resources for the citizens of United States as well as a source of economic wealth for the country.[11] The federal government and US citizens should be equally responsible for protecting coastal areas. The government has been a faithful steward, enacting coastal management oversight over state-managed coastal programs.[12] Ultimately, it should be the responsibility of citizens to exercise care and apply caution when dealing with coastal areas.

In this paper, I assess the current CZMA and several key differences among the New England states' coastal management programs. I agree with Congress regarding the need for coastal protections and acknowledge that at the time Congress enacted federal legislation, the territory was new and unfamiliar. The discord and the operational issues that have arisen because each state acts as its individual manager of the program highlight the need to implement uniform

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[7] *See id.* (Noting, more than half of Americans live in a coastal county. Since 1970, there has been a 40% increase in population residing along the coast. The ever-growing coastal population impacts the natural environment daily and impacts the future of the environment). *See also* Jay Tanski, *Long Island's Dynamic South Shore: A Primer on the Forces and Trends Shaping Our Coast*, New York Sea Grant 19 (2007), http://edc.uri.edu/nrs/classes/nrs555/assets/readings_2011/LIDynamicSouthShore.pdf (discussing the "Impacts of Human Responses to Shore Erosion," including hard and soft human responses ranging from erecting seawalls to rearranging sand on the beach and the difficulty in predicting the long-term effects of such responses).

[8] *See* Pew Oceans Commission, *America's Living Oceans: Charting a Course for Sea Change*, THE PEW CHARITABLE TRUSTS (May 2003), https://www.pewtrusts.org/-/media/assets/2003/06/02/full_report.pdf (predicting a 20% increase in coastal population growth between 1998 and 2015).

[9] *See id.* (estimating more than half of all Americans lived in coastal counties and by 2015 nearly 25 million more people would relocate to these counties. In 2010, 123 million people resided along the shoreline of the United States. National Oceanic Atmospheric Administration ("NOAA") estimates that the population living in these coastal areas in the United States will increase by over 10 million people into the 2020s); *Coastal Population*, NOAA, https://ecowatch.noaa.gov/thematic/coastal-population#:~:text=In%20the%20U.S.%20coastal%20counties,8%2B%25%20into%20the%202020s (last visited February 13, 2023).

[10] *Id*.

[11] *See* Nathaniel Trumbull & Syma A. Ebbin, *Navigating Towards Tomorrow in the Urban Sea: The Challenges and Opportunities of Marine Spatial Planning in Long Island Sound*, 8 SEA GRANT L. & POL'Y J. 18, 31 (2017) (estimating the value of Connecticut's maritime economy to be worth almost $7 billion dollars and contributes to approximately 40,000 jobs).

[12] *See The Future of Ocean Governance: Building our National Ocean Policy: Hearing Before the Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard of the Committee on Commerce, Science, and Transportation of the United States Senate,* 111th Cong. (2009) (prepared statement of Laura Davis, Associate Deputy Secretary, Dep't of the Interior), https://www.govinfo.gov/content/pkg/CHRG-111shrg56409/html/CHRG-111shrg56409.htm.

policies to promote the public trust doctrine.

In Part II, I explain the historical foundation for the public trust doctrine and the context for implementing the doctrine into American law. Additionally, Part II examines the Coastal Zone Management Act of 1972 and assesses the current discourse regarding the Act.

Part III explains the ownership scheme in coastal properties and the likely disputes in coastal properties, specifically between the public and private property owners. Part III also suggests a better approach at managing coastal zones in New England by implementing an Open Beach Access Act. The section concludes that adopting a uniform Open Beach Access Coordination Act would safeguard the rights of the current and future citizens of these coastal New England states. It would also ensure consistency in the law for public shoreline access and ease the tensions between private property owners and the general public seeking access to the shore.

Part IV seeks to clarify the duties of the state as trustee of the beaches held in public trust and offers a better way to implement the federal Coastal Zone Management Act (CZMA) in New England by adopting an Open Beach Access Act.

Finally, Part V offers my conclusion in support of streamlining and updating the National Coastal Zone Management Program (NCZMP) and implementing a New England Open Beach Access Act.

II. HISTORICAL BACKGROUND OF THE PUBLIC TRUST DOCTRINE

The current public trust doctrine provides states with the power to regulate their respective coastal lands, manage their coastal zone programs, and preserve coastal lands for future generations. Under the public trust doctrine, this power is designed to be used simultaneously with the state's police power.[13] The public trust doctrine was first articulated in ancient Roman law.[14] Traditional rights protected under the doctrine included the public's right to fishing, commerce, and

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[13] *See* Pollard v. Hagan, 44 U.S. 212, 223 (1845) (Noting the relationship between the public trust doctrine and the equal footing doctrine. The Court nullified a federal grant of Alabama intertidal land made prior to Alabama becoming a state because the Court reasoned Congress lacked the authority to grant to a private person land under the navigable waters in Alabama. Such a grant deprived the state of its sovereign authority over these lands); *See also* Shively v. Bowlby, 152 U.S. 1, 49 (1894) (The equal footing doctrine established the power of each state over its public trust lands). Further note, in the federal Coastal Zone Management Act, Congress's 1972 declaration states, "the key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone." 16 U.S.C. § 1451(i).

[14] William L. Lahey, *Waterfront Development and the Public Trust Doctrine*, 70 MASS. L. REV. 55, 56-60 (1985) (Noting the history of the public trust doctrine); *See also*, Phillips Petroleum Co. v. Miss., 484 U.S. 469, 477–78 (1988) (citing *Shively v. Bowlby,* noting the Court's common law interpretation of the public trust doctrine as binding legal principle).

navigation.[15] In modern American law, the public trust doctrine provides that the state, as sovereign, holds title to certain lands, waters, and living resources in trust for the benefit of all the people.[16] Many states have responded to the changing public needs and desires for beach access by expanding the list of uses which are protected under the public trust doctrine.[17]

This paper will examine the plight of the property owners with respect to their deeded rights, the reactions by the New England states' governments in protecting such rights, and the issues faced by the public who frequent the shores.

A. Common Law Right to Beach Access

At common law, the public trust doctrine applied to lands over which the tide ebbed and flowed.[18] Under the public trust doctrine the public has the right to enjoy the lands and waters for fishing, fowling, recreation, and commerce.[19] American jurisprudence traditionally applied the public trust doctrine in the following categories: (1) guaranteeing the public's right to access and use the shoreline; (2) determining the public's right to use the water; and, (3) limiting the state's ability to convey submerged lands.[20] Scholars today contend that the doctrine is under-utilized and should be interpreted broadly so as to protect the environment while avoiding costly litigation that could require the state to pay compensation.[21]

Public access to beachfront property has been on the rise for decades because of an increase in tourism and development of coastal lands.[22] Additionally, many coastal destinations that were once too far away have become accessible by

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[15] Fornias, *infra* note 62, at 36 ("[T]he public's rights at that time were limited to fishing, navigation and commerce."); William L. Lahey & Cara M. Cheyette, *The Public Trust Doctrine in New England: An Underused Judicial Tool*, NAT. RES. & ENV'T, Fall 2002, at 93, https://www.jstor.org/stable/40924254?seq=1.

[16] DAVID C. SLADE ET AL., COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 1 (David C. Slade, ed., 1997) (discussing the historical significance of the public trust and the modern American public trust doctrine).

[17] *See generally*, MICHAEL C. BLUMM, THE PUBLIC TRUST DOCTRINE IN 45 STATES (2014), https://www.rilegislature.gov/commissions/shac/commdocs/Public%20Trust%20Document%20in%2045%20States%20March%202014%20Michael%20C%20Blumm.pdf.

[18] *See* Ill. Cent. R.R. Co. v. Ill., 146 U.S. 387, 435 (1892).

[19] SLADE ET AL., *supra* note 16, at 169-75 (noting the rights enjoyed by the public).

[20] Patricia E. Salkin, *Applying the Public Trust Doctrine in New York: A Management Tool for Protecting Public Resources Today and for Future Generations*, 2 ALB. L. ENV'T. OUTLOOK 5, 6 (1996) (discussing the categories in which the public trust doctrine has been applied).

[21] *See* Salkin, *supra* note 20 at 5-7 (discussing Belsky's argument that "the public trust doctrine is one of the background principles of property law that could be used to justify restrictions" and, further, suggesting that the "public trust doctrine may be read more broadly to protect all types of government actions.").

[22] *See* Doug Struck & Pews Ocean Commission, *supra* note 6; *See also* Melissa K. Scanlan, *Shifting Standards: A Meta Data for Public Access and Private Property along the Coast*, 65 S.C. L. REV. 295 (2013) (discussing an increased demand for beach access).

airplane, train, car, or ferry ride.[23] By the mid-twentieth century, the tourism boom and population swell generated a growing discord between private property owners who resided along the shoreline and the public who increasingly sought access to the coveted coastal lands.[24]

New England is equipped to handle these travelers because of the ease of access between the New England states and the many options for transportation.[25] Tourists travel by cruise line into scenic ports, by aircraft into multiple airports, by train into nestled rail stations, and by car over scenic highways. The tourism business in New England has expanded over the last half century due to the ease of movement created by these various modes of transportation.[26] A natural result of New England's tourism boom was an increased population seeking to invoke their right to access the shores.[27]

Nationally, shore access is a topic of contention in many states, and in many cases leading to litigation.[28] All coastal states and the public in general must act as trustees under the public trust doctrine to ensure the lands and resources comprising American shores are protected for future generations to enjoy, because the resources are scarce and harbor great value for current and future citizens.[29] In revisiting the under-utilized doctrine, Congress, the stewards of the doctrine, should reassess the scope, form, and plan currently in place, because the future of

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[23] *See generally* The Stratton Commission Report issued in 1969 titled, "Our Nation and The Sea-A Plan for National Action". REPORT OF THE COMM'N ON MARINE SCIENCE, ENGINEERING, AND RESOURCES (Jan. 1969) (noting the increase in coastal area traffic and the impact of coastal development because of the population growth).

[24] Daniel R. Mandelker & Thea A. Sherry, *The National Coastal Zone Management Act of 1972*, 7 URB. L. ANN. 119-121 (1974) (discussing the "Stratton Commission" or the concerns Congress had in the 1960's over the increase of coastal area development).

[25] The New England states are a close-knit grouping of states sharing common shorelines. *New England*, WIKI VOYAGE, https://en.wikivoyage.org/w/index.php?title=New_England&oldid=4786707 (last visited February 13, 2024).

[26] *See, e.g.*, Randy Fiveash, *Tourism Tracker, Key Results of the State's Tourism Marketing Initiatives,* CONN. TOURISM BUS. PARTNERS (April 2018), https://portal.ct.gov/-/media/DECD/Tourism/Tourism_Marketing_Metrics/tourismtracker_Apr2018.pdf (last visited February 13, 2023) (indicating that approximately 14.7 billion dollars were spent by travelers in Connecticut in 2017).

[27] REPORT OF THE COMM'N ON MARINE SCIENCE, ENGINEERING, AND RESOURCES (Jan. 1969) The Stratton Commission detailed the increase in coastal area traffic and the impact of coastal development because of the traffic.

[28] *See* Leabo v. Leninski, 182 Conn. 611, 618 (1981) (noting opening a beach for public use substantially hindered the easement holder's rights of use as well as his entitlement to quiet enjoyment of the beach); Rowland Family Trust v. Pelletier, 673 A.2d 1081, 1086 (R.I. 1996) (the court recognized an easement for inland owner access to the shore over beachfront property owner's land); Martha's Vineyard Land Bank Comm'n v. Taylor, 93 Mass. App. Ct. 1116, 2018 WL 3077223, 4 (Defendant Taylor could not demonstrate that their continued use of a path leading to the beach was notorious, open or adverse and, therefore, a prescriptive easement could not be established).

[29] *See* Trumbull & Ebbin, *supra* note 11, at 36 (estimating the almost immeasurable value of the oceans).

the nation depends on the resources of the coasts.[30] Addressing the coastal issues broadly, as a region, instead of just within individual state borders, would benefit the entire region and would better protect the shore for future generations. This is particularly important in the small New England states because of the shared coastal shorelines.

The New England Coastal States should adopt a uniform Open Beach Access Act to safeguard the rights of their current and future citizens in the use and enjoyment of shared shore access because consistent regulation of the program between states with common borders will likely facilitate ease of understanding, uniform compliance, and better implementation.[31] To achieve a uniform Open Beach Access Act, the New England states should agree on common policy, procedures, caretakers, and implementation because each state currently has different approaches to their coastal management programs.[32] Using the federal CZMA as a guide, a New England region Open Beach Access Act will create a uniform policy in the region. This uniform policy should include: (1) defined coastlines, (2) defined terms-such as high-water mark and low water mark, (3) permitting for land development, (4) similar signage indicating beach access routes along main roads and interstates, and (5) consistent implementation of a single, region-wide, Open Beach Access Act across New England.

Coastal communities, parks, and beaches in New England have been financially impacted by increases in development and tourism.[33] The proximity of the New England states and the ease of travel between them naturally supports the influx of new visitors. Of course, businesses along the coastline actively market to these tourists because of the potential accession to wealth they provide.[34] In response to the introduction of such avid travelers, many coastal property owners have instituted public prevention measures on their coastal properties.[35] For example,

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[30] The Coastal Zone Mgmt. Act of 1972, 16 U.S.C. §§1451-64 (1988) herein referred to as the "CZMA" is a federally funded coastal management program under which coastal states may voluntarily participate in the federal coastal management plan to receive grant money authorized by this statute. *See also* Mandelker & Sherry, *supra* note 24 (discussing the Coastal Zone Management Act including regulation of the act by Congress, and state-based review of the program).

[31] WOODS HOLE GRP., LIVING SHORELINES IN NEW ENGLAND: STATE OF THE PRACTICE 7 (2017), https://www.conservationgateway.org/ConservationPractices/Marine/crr/Documents/Final_StateofthePractice_7.2017.pdf.

[32] *Id.* at 8.

[33] *See* REPORT OF THE COMM'N ON MARINE SCIENCE, ENGINEERING, AND RESOURCES (Jan. 1969) The Stratton Commission noted in the 1960's the emergence of considering the impact developing the land has on the environment, specifically coastal areas; Trumbull & Ebbin, *supra* note 11, at 48 (estimating the value of Connecticut's maritime economy to be worth almost $7 billion dollars).

[34] *See* Trumbull & Ebbin, *supra* note 11, at 48 (estimating the value of Connecticut's maritime economy to be worth almost $7 billion dollars and contributes to approximately 40,000 jobs).

[35] Alex Nunes, '*They Want Us Out of Here': How Private Interests Blocked the Public from One R.I. Barrier Beach*, THE PUBLIC'S RADIO, (June 9, 2021), https://thepublicsradio.org/article/-they-want-us-out-of-here-how-private-interests-took-control-of-ri-s-most-exclusive-barrier-beach; *see*

"no trespassing" and "private property" signs are often found near the most picturesque parts of the coastline.[36] The quaint New England States are not the only locales facing these issues;[37] many other coastal states are riddled with similar dilemmas.[38] Even the West Coast has seen its share of private property owners erecting signs and placards to stave off the influx in tourist traffic.[39]

1. The Origins of the Public Trust Doctrine

To understand the significance of the American Public Trust Doctrine, it is helpful to reflect on the beginning concepts which formed its foundation. The Public Trust Doctrine can be traced back to a notion in Roman law that property rights in the shorelines, rivers, and seas—water rights, including navigation, fowling, and fishing—should be preserved for the "benefit of the public."[40]

Some of the earliest expressions of the public trust doctrine can be found in the Magna Carta and the Roman Institutes of Justinian.[41] The early concept was simple: no single individual could own the beach because the beach was open to use by the public.[42] These values were represented in ancient Roman law known as the Institutes of Justinian.[43]

Scanlan, *supra* note 22 (citing a Michigan homeowners association posting signs near the beaches in an effort to ward off any unwanted guests).

[36] *Id.*

[37] *See* Erika Kranz, *Sand for the People- The Continuing Controversy over Public Access to Florida's Beaches*, 83 FLA. B.J. 11 (2009) (discussing coastal states such as, Florida and California, facing similar dilemmas in balancing rights between private beachfront owners and the wandering public).

[38] *See e.g.*, Surfrider Found. v. Martins Beach 1, LLC, 14 Cal. App. 5th 238, 247 (2017) (the complaint alleged that the property owner closed the gate to Martins Beach Road, erected a sign stating, "BEACH CLOSED KEEP OUT," and hired security guards to deny public access to the beach); Howard v. Glenn Haven Shores Ass'n 2016 WL 3639899 (Mich. Ct. App. July 7, 2016) (noting plaintiff, Howard, placed "keep off " signs near the planted beach grass which was abutting the beach and shore).

[39] *Surfrider*, 14 Cal. App. 5th at 247 (2017); Grupe v. Cal. Coastal Comm'n, 166 Cal. App. 3d 148, 155 (1985) (noting signs proclaiming "private beach" were posted along the boundaries of the public beach and private beach areas).

[40] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-77 (1970) (discussing the origin and purpose of the public trust doctrine and that public ownership of water was ambiguous in Roman law. The Romans did not specify whom exactly owned the waters or lands near the water. The central theme in Roman law was the idea that water was reserved for the benefit of the public).

[41] Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 429 (1989) (discussing the origin of the doctrine and public interest in water from before the birth of Christ).

[42] *See* Salkin, *supra* note 20, at 5 (discussing the historical context of the public trust doctrine originating during the Roman Empire. The Justinian Institute "declared three things common to all mankind: 1) the air, 2) running water, and 3) the sea").

[43] James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1917-21 (1995) (discussing the origins of the public trust doctrine); *See also* CAESAR FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN (J.B.

The public trust doctrine is rooted, not only in ancient Roman law,[44] but also in the cultures of countries around the world who found the water as a great resource for their people.[45] Water interests were established in many countries including Spain and France, as well as many African and Asian nations.[46] Further, the Justinian Institute borrowed from the Greek understanding of a public's rights to water use based on the public's subsistence on resources harvested from those waters.[47]

Meanwhile, on the American continent, Native Americans established a concerted belief in a communal ownership of water, air, and land rights.[48] Asking rhetorically, Native American Shawnee Chief Tecumseh inquired: "Sell a country? Why not sell the land, the air, the clouds, the great sea? Did not the Great Spirit make them all for the use of his children?"[49] Native Americans generally did not accept the idea that the land, sea, or air were capable of private ownership.[50]

In England, the king was the sovereign property owner of all land and shoreline under his control.[51] Among the many powers of the king came one of the most important: the power to convey coastal property to loyal subjects.[52] As a result of these conveyances, English private citizens became owners of coastal property.[53]

Upon settling the early American colonies, the early colonists were granted lands from the king.[54] As early colonists began relocating along the coastal areas, it was the responsibility of the government to protect the public's right to fishing

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Moyle trans., H. Sauertieg & D. Widger, 5th ed. 1913) (providing an English translation of the Institutes of Justinian).

44 *See* Kehoe, *supra* note 43.

45 Wilkinson, *supra* note 41, at 428-31 (discussing the public trust idea in countries around the world).

46 *Id.* (noting countries such as Spain and China each had concepts of public trust in its respective country).

47 *See* Kehoe, *supra* note 43, at 1918 (discussing the influence of Greek law and the society's reliance on the resources of the sea).

48 *The Different Views of Land*, SMITHSONIAN, https://americanindian.si.edu/nk360/manhattan/different-views-land/different-views-land.cshtml (last visited Feb. 12, 2024); *see* W. BRANDON, THE AMERICAN HERITAGE BOOK OF INDIANS (1961) (providing an extensive history of the Native American culture and further explaining the Native American concepts of open lands for the benefit of all mankind).

49 The Gilder Lehrman Inst. of Am. Hist, *Speech Excerpts* (2012) https://www.gilderlehrman.org/sites/default/files/inline-pdfs/Speech%20Excerpts.pdf.

50 *See* Brandon, *supra* note 48.

51 Patrick Deveney, *Title, Jus Publicum, and The Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 36-52 (1976) (explaining that there was no concept of a public trust doctrine at early common law).

52 Lahey, *supra* note 14, at 56.

53 *Id*. (explaining the historical foundation of private ownership rights in coastal land).

54 *Id.* (explaining the early conveyances made by the King to the colonists were because the colonists were his loyal subjects).

and navigation.[55] Scholars of the public trust doctrine align the early colonists' concept of public trust with that of the king.[56] Early colonists viewed the king as owner and protector of his coastal lands for the benefit of English subjects.[57] These colonists developed their own laws[58] based off many concepts in English common law, such as public uses of the sea.[59] However, as the public trust doctrine evolved into early American law,[60] it was often met with litigation.[61] Unlike in any other country, in the United States, the public trust doctrine was and is paramount to preserving the public's right to access the shore.[62] The significance of the Public Trust Doctrine is that it preserves the public's right to shoreline access, regardless of who is the actual owner of the land.[63]

2. Public Access to the Shore Through the Public Trust Doctrine

The public trust doctrine as applied in current US law prescribes that certain property is held in trust by the sovereign for the benefit of the public.[64] The doctrine also establishes the public right to use and enjoy resources held in public trust.[65] Many have argued that the public trust doctrine sets the stage for controversy among Americans because the United States was built on notions of private ownership of property, whereas the public trust doctrine operates contrary to private property rights, allowing instead for resources to be placed in trust for the benefit of the public and thereby constraining private exclusionary rights.[66]

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[55] *Id.* (explaining protecting the colonists' right to fish and navigate the waters in America based on the need to work and to subsist off the land).

[56] *Id.* (discussing the evolution of the public trust doctrine and the colonist's views of private ownership rights in land).

[57] *Id.*; Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context*, 29 NAT. RES. J. 585, 586 (1989).

[58] *See* R.I. CONST. ART. I, § 17 (RI wrote the public rights and privileges of the shore into its Constitution in 1843: "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state. But no new right is intended to be granted, nor any existing right impaired, by this declaration").

[59] Lahey, *supra* note 14 (Early colonist concept of public trust in America involved the right to fish and navigate the waters).

[60] Edward J. Fornias, *Public Trust Doctrine in Delaware - The Problem of Beach Access*, 17 DEL. LAW. 35 (1999) (discussing American law developed based on the English Common Law concept of the public trust).

[61] *See, e.g.,* Martin v. Waddell's Lessee, 41 U.S. 367 (1842).

[62] *See* Fornias, *supra* note 60, at 36.

[63] *Id.*; *Public Trust Doctrine*, NAT. WORKING WATERFRONT NETWORK, https://nationalworkingwaterfronts.com/law-and-policy/public-trust-doctrine/ (last visited Feb. 12, 2024).

[64] *See* Ved P. Nanda Jr. & William R. Ris, *The Public Trust Doctrine: A Viable Approach to International Environmental Protection*, 5 ECOLOGY L.Q. 291 (1976) (describing the evolution of the doctrine and adaption into United States law).

[65] *Id.*

[66] *See* Fornias, *supra* note 60, at 37; *See* Michael C. Blumm, *The Public Trust Doctrine and*

Proponents of both sides agree that the doctrine either secures natural resources in trust under inalienable public ownership or stands to infringe on the rights of private property owners.[67]

The public possesses established interests in water because of the invaluable resources the water contains.[68] The public has come to expect access to the shore as a right nearly akin to access to air flow and sunshine. The concept of providing the public with uninterrupted shore access was adapted into American law from the ancient public trust doctrine.[69] Proscribed under the public trust doctrine, the United States cannot convey its interest in tidal lands in such a way as to impair the right of the public to use the waters.[70]

B. Coastal Zone Management Act of 1972

Congress recognized the need for a systematic approach to address beach access issues and coastal resource preservation decades ago. It sought to address this need by implementing the federal Coastal Zone Management Act of 1972 (CZMA).[71] The Act utilizes a cooperative federalist model that provides guidance and financial assistance to states to address issues affecting shorelines, including beach access.[72] This means the program requires partnership between the federal government and states who volunteer to participate in the program, which is administered by the National Oceanic and Atmospheric Administration ("NOAA").[73][74] By enacting the CZMA, Congress recognized the need to manage

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Private Property: The Accommodation Principle, 27 PACE ENV'T L. REV. 649 (2010).

67 Wilkinson, *supra* note 41; Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, UTAH L. REV. 1437 (2013) (noting the public trust doctrine "seeks to prevent impairment of trust resources").

68 *See, e.g.,* Jay Tanski, *Long Island's Dynamic South Shore: A Primer on the Forces and Trends Shaping Our Coast*, NEW YORK SEA GRANT 19 (2007), http://edc.uri.edu/nrs/classes/nrs555/assets/readings_2011/LIDynamicSouthShore.pdf (discussing Connecticut's economic resource in the water bordering the state, the Long Island Sound); Trumbull & Ebbin, *supra* note 11 (estimating the value of Connecticut's maritime economy to be worth almost $7 billion dollars).

69 *See infra* Part II (discussing the origins of the public trust doctrine).

70 *See, e.g.*, Blumm, supra note 66, at 658-59; Ariz. Ctr. for Law in Pub. Int. v. Hassell, 837 P.2d 158, 167 (Ariz. Ct. App. 1991) (see n.13 for a listing of thirty-eight states which recognize it holds land under navigable water in trust for the benefit of the public).

71 The Coastal Zone Mgmt. Act of 1972, 16 U.S.C. §§1451-64 (1988) herein referred to as the "CZMA" is a federally funded coastal management program under which coastal states may voluntarily participate in the federal coastal management plan to receive grant money authorized by this statute.

72 16 U.S.C. §§ 1451-64.

73 Alaska voluntarily left the CZMA in 2011 and is the only shoreline state which does not participate in the program. For a detailed listing of states participating in the CZMA, *see* NOAA, OFF. FOR COASTAL MGMT., COASTAL ZONE MGMT. PROGRAMS, https://coast.noaa.gov/czm/mystate/.

74 Sarah Chasis, *The Coastal Zone Management Act: A Protective Mandate*, 25 NAT. RES. J. 21 (1985) (discussing that the CZMA is administered and reviewed for compliance by NOAA because Section 316 of the Act applied a "mechanism" of review for bringing federal programs into conformity with the policies of the Act).

coastal property development and preserve nearly 95,000 miles of irreplaceable shoreline.[75] Through the CZMA, NOAA established the National Coastal Zone Management Program (NCZMP), which is currently utilized by thirty-five states, territories, and commonwealths.[76] The CZMA is a flexible tool enabling each state to plan and manage all aspects of the coastlines—including recreational use—by granting federal money when states comply with the policies of the Act.[77]

Approximately 180 million people visit US beaches each year.[78] Recreational uses of the coastline generate significant economic benefit for coastal states, and the CZMA recognizes this when developing strategies for access routes to the shore.[79] Access routes to the shoreline benefit the public because the coastline is a source of recreation and employment.[80] Those access routes also benefit the state because they stimulate the economy.[81] Crucial considerations, like balancing the demand between coastal use and preservation when creating shoreline access routes, are significant factors in the strategic development of each state's coastal management program.[82] While, at the same time, states strive to preserve important coastline resources and balance the demand between coastline use and preservation.[83]

1. Coastal Management Acts in the New England States

Currently, there are a variety of coastal management acts regulating coastal resources in the New England states. For example, Connecticut has implemented

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[75] Mandelker & Sherry, *supra* note 24 (discussing the CZMA, including regulation of the act, and state-based review of the program).

[76] *Id.*; *See* COASTAL ZONE MGMT. PROGRAM, *supra* note 73.

[77] Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration,* 40 DEPAUL L. REV. 981 (1991) (providing requirements for each state to meet and follow to receive federal grant money).

[78] Am. Shore & Beach Pres. Ass'n, *New Study Shows Beaches are a Key Driver of US Economy* (2008), http://sandsaver.com/downloads/beacheconomy.pdf (noting that 180 million Americans make more than 2 billion annual visits to the ocean, gulf, and inlet beaches).

[79] *See* THE STRATTON COMM'N REP., REPORT OF THE COMM'N ON MARINE SCIENCE, ENGINEERING, AND RESOURCES (Jan. 1969) (The 1969 Stratton Commission Report outlined the findings that the public sought beaches for recreation and the coastal areas provided resources and employment for the state citizens).

[80] *Id.* (The 1969 Stratton Commission Report outlined the findings that the public sought beaches for recreation and the coastal areas provided resources and employment for the state citizens).

[81] *Id.*; *Economic Impact of Beaches*, BEACHAPEDIA, https://beachapedia.org/Economic_Impact_of_Beaches (Dec. 18, 2015, 9:14 AM).

[82] Each shoreline state maintains a coastal management program. The federal program has regulations and requirements under which each state must comply to receive federal funding. Each individual state participating in the program monitor various factors when operating their coastal management program. *See* Coastal Zone Mgmt. Act, 14 U.S.C. §§ 1451-64.

[83] *See generally, Coastal Zone Mgmt.*, NOAA, http://oceanservice.noaa.gov/tools/czm (CZMA overview).

the CZMA through its own legislation, the Coastal Management Act.[84] In Rhode Island, coastal regulations are found in the Coastal Resources Management Program, known as either the CRMP or the "Red Book."[85] In Massachusetts, the management plan is called the Commonwealth of Massachusetts Coastal Zone Management Program Plan.[86] In New Hampshire, they have the New Hampshire Coastal Program.[87] Finally, Maine utilizes its Maine Coastal Plan.[88] Each plan effectively outlines the policies and procedures in place to protect and preserve coastal areas.[89] Each state's plan differs in terms of specific regulations and implementation of boundary lines, causing ambiguities in the law when comparing management programs across the states.[90]

In Massachusetts there are approximately 1,500 miles of shoreline.[91] However, only roughly 25% of that shoreline is accessible by the public.[92] In Maine, there are approximately 3,500 miles of shoreline,[93] but only roughly 12% of that shoreline is accessible by the public.[94] In New England, two states (Maine and

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[84] *See* Coastal Mgmt. Act, C.G.S.A. §§ 22a-90—111.

[85] *See* 650 R.I. Admin. Code 20-00-1.1 (discussing the public trust in Rhode Island under which the public is allowed access to the foreshore below the mean high tide line. However, the public has no right to access dry sand areas above the mean high tide line. This means private waterfront owners ultimately own land down to the mean high tide line).

[86] *See* MASS. OFF. OF COASTAL ZONE MGMT., PUBLIC RIGHTS ALONG THE SHORELINE (2005), https://www.mass.gov/info-details/public-rights-along-the-shoreline (discussing the public trust in Massachusetts, under which the public is allowed access to the shorelands, including the foreshore, up to the mean high tide mark. Usage includes fishing, foaling and navigation. It does not provide perpendicular access, sometimes referred to as vertical access, to the upland beach areas to reach into the foreshore. The private landowners own land down to the mean low tide line).

[87] *See* N.H. DEP'T OF ENV'T SERVICES, COASTAL WATERS, https://www.des.nh.gov/water/coastal-waters.

[88] *See* STATE OF MAINE DEP'T OF MARINE RESOURCES, ABOUT THE MAINE COASTAL PROGRAM, https://www.maine.gov/dmr/programs/maine-coastal-program/about-the-maine-coastal-program.

[89] *See supra* notes 84–88 and supporting text.

[90] *See supra* notes 84–88.

[91] John S. Driscoll et al., *Massachusetts*, BRITANNICA (Feb. 12, 2024), https://www.britannica.com/place/Massachusetts; Chris Burell, *Barriers at the Beach: State law and town rules keep most of Mass. shoreline off-limits,* GBH (August 7, 2023), https://www.wgbh.org/news/local/2022-05-23/barriers-at-the-beach-state-law-and-town-rules-keep-most-of-mass-shoreline-off-limits.

[92] *State of the Beach/State Reports/MA/Beach Access*, BEACHAPEDIA, (July 5, 2017, 9:23 AM) https://beachapedia.org/State_of_the_Beach/State_Reports/MA/Beach_Access; Chris Burell, *Barriers at the Beach: State law and town rules keep most of Mass. shoreline off-limits,* GBH (August 7, 2023), https://www.wgbh.org/news/local/2022-05-23/barriers-at-the-beach-state-law-and-town-rules-keep-most-of-mass-shoreline-off-limits.

[93] *Facts About* Maine, MAINE.gov, https://www.maine.gov/legis/general/facts/facts.htm (last visited Feb. 12, 2024); *see Shoreline Mileage of the United* States, NOAA, https://coast.noaa.gov/data/docs/states/shorelines.pdf (last visited Feb. 13, 2024).

[94] MAINE SEA GRANT COLLEGE PROGRAM ET AL., PUBLIC SHORELINE ACCESS IN MAINE: A CITIZEN'S GUIDE TO OCEAN AND COASTAL LAW 1 (3rd ed. 2016), https://seagrant.umaine.edu/wp-content/uploads/sites/467/2019/03/2016-public-shoreline-access-in-maine-standard.pdf; Marine Law

Massachusetts) do not own the intertidal zone:[95] These states follow the Colonial Ordinance of 1647, defining private property lines as extending to the mean low water line, commonly referred to as the low tide line.[96]

Other states define waterfront ownership rights in terms of the mean high-water line, or high tide line, with land seaward of the line generally held in trust by the state.[97] In fact, Rhode Island goes further, extending the land held in public trust to include anything ten feet inward from the mean high-water mark.[98] The confusion caused by these discrepancies is compounded by the proximity of the small New England states.[99] Given their proximity, wealthy landowners may well hold beachfront properties in multiple New England states.[100] Sister states like Rhode Island and Connecticut possess different laws regarding whether beachfront property can be privately owned.[101]

2. Reconciling Property Boundaries in Private Ownership

Property owners whose lands abut shoreline generally possess rights referred

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Institute, University of Maine School of Law, Maine Sea Grant College Program, University of Maine Cooperative Extension, *Public Shoreline Access in Maine: A Citizen's Guide to Ocean and Coastal Law*, (September, 2004), https://www.mainehealthybeaches.org/documents/pubacc04.pdf.

[95] Lahey, *supra* note 14 (discussing the states mentioned above extend private rights to the low water mark).

[96] Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623 (1998) (discussing the Book of the General Laws and Liberties, commonly referred to as the Colonial Ordinance. In 1641, the Colonial Ordinance included the following provision: Every inhabitant who is a householder shall have free fishing and fowling in any great ponds, bays, coves and rivers so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town, or the general court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others' property without their leave).

[97] *See generally* PUBLIC RIGHTS ALONG THE SHORELINE, *supra* note 86; PUBLIC SHORELINE ACCESS IN MAINE, *supra* note 94; *Understanding Rhode Island New Shoreline Access Law*, *supra* note 2.

[98] *Understanding Rhode Island New Shoreline Access Law*, *supra* note 2 (Public now has the right to "laterally access the shore up to 10 feet landward of the visible high tide line – the line that is recognized by seaweed, shells, or other debris left by the tide." "In the over 40 years since the Ibbison case, 'there have been no successful prosecutions of trespassers. And that's for a very simple reason. To have a successful prosecution of someone who is alleged to have trespassed, there needs to be a showing that they had criminal intent. And criminal intent means knowing that what you're doing is against the law and doing it anyway. So, in this situation, if no one knows where the high tide line is, it's very hard for prosecutors to prove criminal intent.'").

[99] *New England Size Comparison*, MapFight.xyz, https://mapfight.xyz/map/new.england/.

[100] *See generally* Paul Zielbauer, *The Driveway? In Another State; A Blunder in 1642 Creates Headaches Today for Homeowners who Straddle the Border*, NEW YORK TIMES (Jan. 26, 2001), https://www.nytimes.com/2001/01/26/nyregion/driveway-another-state-blunder-1642-creates-headaches-today-for-homeowners-who.html.

[101] *See supra* note 99; CONN. DEP'T OF ENERGY AND ENV'T PROTECTION, *Living on the Shore*, *Who Owns the Shore: The Public Trust* (March 6, 2020), https://portal.ct.gov/DEEP/Coastal-Resources/Living-on-the-Shore-Brochure/Who-Owns-The-ShoreThe-Public-Trust.

to as littoral (or riparian) rights.[102] Such rights may include ownership of the lands under the water.[103] Many property owners with littoral rights also possess ancillary rights to access the shore and foreshore and limited rights to exclude.[104] In a majority of coastal states in the CZMA,[105] the boundary between the public trust land and any privately-owned littoral land is the mean high tide or mean high water line.[106] As this paper details, the boundaries between public land and private land differs among the New England states.

The Colonial Ordinance of 1647 provided colonists title to lands at the extreme low water mark.[107] Then, as a result of updates to the Ordinance of 1647, private owners were given title extending to the flat lands, including salt marshes, because those salt marshes housed resources such as fowl, shellfish, and hay.[108] In some of the New England states, the Colonial Ordinance has been credited with providing the framework for laws governing public access to the shoreline.[109]

In the second half of the 1600's, Massachusetts exercised a great deal of control in settling Maine.[110] In 1692, the Massachusetts Bay Colony merged with present-day Maine and the Plymouth Colony.[111] The Colonial Ordinance became governing law for these three areas at that time.[112]

In the nineteenth century, as the United States was expanding, the public trust

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[102] 1 HENRY PHILLIP FARNHAM, THE LAW OF WATERS AND WATER RIGHTS § 63 (1904) (explaining the private interest rights in water and further discussing littoral and riparian rights).

[103] *Id.* (explaining ownership rights to submerged lands).

[104] Stop the Beach Renourishment, Inc. v. Fla Dep't of Env'l Prot., 560 U.S. 702 (2010) (discussing littoral rights).

[105] The coastal states included in the program encompass almost all coastal states except for Alaska. Alaska voluntarily left the CZMA in 2011 and is the only shoreline state which does not participate in the program. *See* COASTAL ZONE MGMT. PROGRAMS, *supra* note 73.

[106] Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High-Water Line in Coastal Boundary Mapping*, N.C. L. REV. 185, 198, 200-02 (1974) (defining the public trust boundary lines. The mean high tide line is generally calculated as the average all of the high-water points over a period of 18.6 years. In the United States, the period of years analyzed is spread over the preceding nineteen years.).

[107] *See* Sparhawk v. Bullard, 42 Mass. 95, 95 (1840) (stating the seaward boundary line of littoral property is the extreme low water mark); *see also*, Fernandez, *supra* note 96 (discussing the Ordinance "safeguarded the common law rights of fishery and navigation").

[108] *See* Herbert E. Locke, *Right of Access to the Great Ponds by the Colonial Ordinance*, 12 ME. L. REV. 148 (1919) (providing an extensive background on The Colonial Ordinance of 1647).

[109] *See id.* at 150-56 (providing an extensive background on The Colonial Ordinance of 1647 and a discussion of the New England states where the ordinance survives. The Ordinance is "firmly established" in Massachusetts, New Hampshire, and Maine).

[110] *See id.* at 152 (discussing Massachusetts aided in settling Maine in the late 1600's and by "custom and adoption" the Ordinance is embodied into Maine common law).

[111] Lewis Soule, *The New Hampshire Town Meeting*, 17 N.H. B.J. 210, 210-11 (1975) (explaining the merger of the Massachusetts Bay Colony, including present-day Maine, and the Plymouth Bay Colony in 1692).

[112] *See* Locke, *supra* note 108, at 150 (providing an extensive background on The Colonial Ordinance of 1647. Massachusetts, Maine, Rhode Island, and Connecticut followed the Colonial Ordinance, Vermont did not embody the Ordinance into its common law).

doctrine came to the forefront of discussions surrounding public rights to water access.[113] Several landmark cases trace the beginnings of the public trust doctrine in the United States.[114] Decided in 1842, *Martin v. Waddell's Lessee* highlights the fledgling public trust doctrine.[115] The Supreme Court ruled that the plaintiff did not acquire an exclusive right of fishery through his land grant.[116] Instead, the Court reasoned that property in the tidal waters were held in trust.[117] Just a few years later in 1845, the Court ruled in *Pollard v. Hagan* that title to submerged tidelands in Mobile Bay were vested in the state of Alabama as of 1819, when Alabama was admitted to the Union.[118] In 1893, the Court decided in *Shively v. Bowlby* that the federal government held in trust the beds of tidal waters in unincorporated territories, for the benefit of future state citizens.[119] Consequently, the federal government could not alienate the lands so as to impair the trust.[120]

The foundational case which established the public trust doctrine in the United States was *Illinois Central Railroad v. Illinois*.[121] Decided by the Supreme Court in 1892, *Illinois Central Railroad* held that conveying trust lands to a private party was beyond the power of the state legislature.[122] The Court then outlined instances which may arise when the state, through its control, may dispose of such lands.[123] The underlying concept of the public trust doctrine as it pertains to beach access is that the state's power over navigable waters is not conferred by federal law. Instead, it exists by virtue of the state's sovereign status, which gives it dominion over navigable waters within its borders for common use or for the public's

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[113] *See generally* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central,* 71 U. Chi. L. Rev. 799 (2004) (discussing the public trust doctrine in the early 19th century).

[114] *See, e.g.* Martin v. Waddell's Lessee, 41 U.S. 367 (1842); Pollard v. Hagan, 44 U.S. 212 (1845).

[115] Martin v. Waddell's Lessee, 41 U.S. 367, 411 (1842) (finding that the state was in control of their respective waterways and the public trust doctrine preempted the landowner from establishing control over oysters in tidal waterways).

[116] *Id.* at 418.

[117] *Id.* at 411.

[118] Pollard v. Hagan*,* 44 U.S. 212, 229 (1845) (finding title to submerged tidelands in Mobile Bay were owned by Alabama. Because the thirteen original states owned the submerged lands under its waters, likewise, the states incorporated into the Union subsequently owned their respective submerged lands).

[119] Shively v. Bowlby, 152 U.S. 1, 45 (1894).

[120] *Id.* at 18.

[121] Ill. Cent. R. Co. v. Ill., 146 U.S. 387, 436 (1892).

[122] *Id.* at 454-55.

[123] *See id.* at 452-53 (The abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.).

benefit.[124]

In 2018, the Supreme Court declined to hear a case involving an attempt to prohibit the public from accessing a public beach by parking in a private parking lot and passing through privately-owned land in California.[125] *Surfrider Foundation v. Martins Beach 1, LLC.,* illustrates the tensions between private owners of coastal land and the public's desire to access the coast.[126]

III. DISPUTES IN COASTAL PROPERTY

Coastal management studies have analyzed the legal conflicts that arise regarding beach access.[127] At the core of these disputes are the conflicting interests of owners of private beachfront property and the public's desire to access the oceans.[128] The public's growing interest in accessing the beach for recreational purposes and enjoyment of the coast's splendor often leads to tense litigation between the private owners and the public.[129]

Massachusetts first enacted laws providing public access landings in seaside towns in 1908.[130] Coastal access was less of an issue prior to 1908 because coastal visitors primarily vacationed at beachfront inns.[131] Those staying inland and choosing to access the beach through private property were so few in number that such incursions rarely offended private property owners.[132]

This has changed since the twentieth century and the evolution of the tourism industry, creating an uptick in coastal traffic.[133] During this time, many states

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124 Martin v. Waddell's Lessee, 41 U.S. 367, 410-11 (1842).

125 Surfrider Found. v. Martins Beach 1, LLC, 14 Cal. App. 5th 238, 247 (2017), *cert. denied*, 139 S. Ct. 54 (2018), (noting the property owner closed the gate to the beach, hired security guards to deny public access to the beach, and posted a "BEACH CLOSED KEEP OUT," on the gate).

126 *See Id.*

127 *See* Michael Betty, Public Access to Beaches in the United States (Apr. 24, 1974) (Master of Arts in Marine Affairs Thesis, University of Rhode Island) (on file with DigitalCommons@URI, Theses and Major Papers, Paper 18), https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1018&context=ma_etds (discussing the various legal issues surrounding beach access disputes).

128 Michael P. McGonagle & Stephen K. Swallow, *Open Space and Public Access: A Contingent Choice Application to Coastal Preservation*, 81 LAND ECON. 477, 477, 487-92 (2005) (noting that costal residents tend to disfavor high public access and conflict between conservation practices for public access versus ecological quality).

129 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987) (involving a beachfront property owner being required to obtain a permit from the Coastal Commission prior to developing on their beachfront property. Part of the permitting process required the owner to grant an easement across their property for the public to access the beach).

130 1908 Mass. Laws, ch. 606 §§1, 4, 714, 714-15 (1908) (current version at MA ST 88 § 14), https://archive.org/details/actsresolvespass1908mass/page/714/mode/2up.

131 Cheryl Lassiter, *The Early Beach Hotels*, SEACOASTONLINE (June 22, 2017), https://www.seacoastonline.com/story/news/local/hampton-union/2017/06/22/the-early-beach-hotels/20451676007/.

132 *Id.*

133 *See, e.g.,* Holly Pretsky & Louisa Hufstader, *Summer Traffic Triggers Talk of Tipping Point*,

began passing legislation which allocated coastal acreage for public beaches.[134] Many towns in the 1950's even purchased land along the coast to be set aside for public beaches.[135] The practice of municipalities purchasing coastal land for use as public beaches and parks continues to this day.[136]

A. Ownership Scheme of Coastal Lands

The Public Trust Doctrine entitles the public to reasonable and beneficial use of land held in public trust, which include the wet sand of beaches.[137] Today, public trust coastal lands are owned by either the federal, state, or local governments.[138] At the federal level, ownership of coastal land was first designated in 1961 when President John F. Kennedy created the Cape Cod National Seashore.[139] The Cape Cod National Seashore (CCNS) is comprised of 43,607 acres of coastal lands in Massachusetts.[140] The CCNS was designated as a protected coastal area under the care of the National Parks Service.[141] This was significant because it was the first time the federal government acknowledged a

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VINEYARD GAZETTE (Aug. 1, 2019, 1:48 PM), https://vineyardgazette.com/news/2019/08/01/summer-traffic-triggers-talk-tipping-point-marthas-vineyard; *See generally,* Marc L. Miller, *The Rise of Coastal and Marine Tourism*, 20 OCEAN & COASTAL MGMT 181 (2003) https://doi.org/10.1016/0964-5691(93)90066-8.

134 Mark Harlow Robinson, Beach Ownership and Public Access in Massachusetts (1983) (Master of Arts in Marine Affairs Thesis, University of Rhode Island) (on file with DigitalCommons@URI, Theses and Major Papers, Paper 151), https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1154&context=ma_etds.; N.C. Gen. Stat. §§ 113A-134.1 to -134.3 (1981); 1981 N.C. Sess. Laws ch. 925.

135 Robinson, *supra* note 136.; Elsa Devienne, *Urban Renewal by the Sea: Reinventing the Beach for the Suburban Age in Postwar Los Angeles*, 45 J. OF URB. HIST. 99, 106 (2019), https://doi.org/10.1177/0096144217753379.

136 Chris Burrell, *Maine's Solution to Beach Barriers? Buying Land for Public Use,* https://www.wgbh.org/news/local/2022-11-16/maines-solution-to-beach-barriers-buying-land-for-public-use (last updated Aug. 7, 2023); Exec. Off. of Env't Affairs, Mass. Coastal Zone Mgmt. Off., PRESERVING HISTORIC RIGHTS OF WAY TO THE SEA: A PRACTICAL HANDBOOK FOR RECLAIMING PUBLIC ACCESS IN MASS., 2d ed., (June 1999), at 23, https://www.mass.gov/doc/preserving-historic-rights-of-way-to-the-sea-a-practical-handbook-for-reclaiming-public-access/download.

137 Thomas Ankersen, *Who Owns the Beach? It Depends on State Law and Tide Lines*, U.S. NEWS & WORLD REPORT (July 19, 2021), https://www.usnews.com/news/best-states/articles/2021-07-19/who-owns-the-beach-it-depends-on-state-law-and-tide-lines.

138 *See infra* notes 139–142 and *supra* notes 134–36 and accompanying text; David Owens, *Land Acquisition and Coastal Resource Management: A Pragmatic Perspective*, 24 Wm. & Mary L. Rev. 625, 634-35 (1983), https://scholarship.law.wm.edu/wmlr/vol24/iss4/5.

139 Cape Cod National Seashore Act, Pub. L. No. 87-126, 75 Stat. 284 (1961); *Bill Signing- S. 857 Public Law 87-126, Cape Cod National Seashore Act, 11:47 AM,* JOHN F. KENNEDY PRESIDENTIAL LIBRARY & MUSEUM, https://www.jfklibrary.org/asset-viewer/archives/jfkwhp-1961-08-07-a#?image_identifier=JFKWHP-AR6733-B (last updated Oct. 28, 2023, 9:32:06AM EDT).

140 Nat'l Park Serv. Land Res. Div., NATIONAL PARK SERVICE ACREAGE REPORTS, (Dec. 31, 2023); Michael Carlowicz, *Cape Cod National Seashore*, NASA (Aug. 23, 2016), https://earthobservatory.nasa.gov/images/89171/cape-cod-national-seashore.

141 Cape Cod National Seashore Act, *supra* note 139; *Cape Cod National Seashore Massachusetts*, NAT'L PARK SERV., https://www.nps.gov/caco/index.htm (last visited Mar. 27, 2024).

need to protect the invaluable beachfront for future generations.[142]

B. Identifying the Dispute in Coastal Lands

While many coastal towns in the United States have tried to protect land for public beach access, conflicts have arisen where public access routes to beaches require use of privately owned land.[143] Much of this tension surrounding the public trust doctrine involves the dry sand area of the beach. Because the wet sand beach falling seaward is usually governed by the public trust doctrine, disputes often arise where ownership of land above the wet sand area is in question.[144] The calculation to determine the high-water line is the average height of all waters over a period of 18.6 years.[145] The public trust doctrine holds the wet sand area in trust for public activities such as fishing, fowling, navigation, and recreation. Inconsistencies surrounding ownership of this dry sand area have led to extensive litigation in many states.[146]

Laws providing the public with liberal beach access to the dry sand area are found in New Jersey, Texas, and Oregon. Meanwhile, many New England states prioritize private ownership of the dry sand areas over the public's right of access. Most notably in 1984, New Jersey advanced the use of an expanded public trust doctrine in *Matthews v. Bay Head Improvement Association*.[147] The court in *Matthews* allowed reasonably necessary use of the beach to the public, including sunbathing, swimming, and general recreation.[148] Expanding further on the concept of public access rights, both California and Texas have statutorily expanded those rights to include dry sand beaches through the use of implied dedication.[149] In 1970, the California court in *Gion v. City of Santa Cruz* held that the public had the right under the doctrine of implied dedication to cross the property of a private owner to gain access to an adjoining beach.[150] Rhode Island's shoreline access bill (signed into law on June 26, 2023) clarifies the public's right to laterally access the shore up to 10 feet landward of the visible high tide line—the line that is recognized by seaweed, shells, or other debris left by the tide.[151]

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142 Cape Cod National Seashore Act, *supra* note 139, at 291.

143 Ankersen, *supra* note 137.

144 *See* Public Rights Along the Shoreline *supra* note 86; Living on the Shore, *supra* note 101.

145 *See* Maloney & Ausness, *supra* note 106.

146 *See e.g.*, State v. Ibbison, 448 A.2d 728 (R.I. 1982) (Rhode Island Supreme Court held that the landward boundary of the shore was located at the mean high-water mark and dismissed the criminal trespass charge); Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970) (widespread use of private land led to an implied dedication of the property for the benefit of the public).

147 Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 321-22 (1984).

148 *Id.* at 323-24.

149 *See* Seaway Co. v. Att'y Gen., 375 S.W.2d. 923, 935 (Tex. Civ. App. 1964) (finding an implied dedication of the dry sand areas by the appellant's predecessors).

150 Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970).

151 S.B. 0147A, 2023 Gen. Assemb., Jan. Sess. (R.I. 2024), http://webserver.rilegislature.gov/

Another vehicle for granting public access to private property is through a prescriptive easement. In bringing a claim for a prescriptive easement, the claimant must prove uninterrupted use of the property for the required number of years. Prescriptive easements are often quite hard to prove because the claimant must prove, among other elements, that the use was adverse to the owner.[152] An express or an implied dedication by a property owner may allow access to the dry sand area for the public.[153] A dedication is a gratuitous transfer from a private landowner to a public entity. Although these dedications are recognized by the court, they are revocable, impeding the effectiveness of the dedication as a long-term grant of use to the public.[154] In *Dolan v. City of Tigard*, the Supreme Court held that an exaction forcing a private landowner to dedicate a public access easement must be proportional to the size of the development project for which a private landowner is seeking a permit.[155]

For many years, states have permitted large-scale developments under certain conditions which benefit the public.[156] In approving the developments, the states employed mandatory dedication of components constructed by the developer to benefit the public, such as streets, sidewalks, and sewers.[157] *Nollan* set a notable

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BillText/BillText23/SenateText23/S0417A.pdf (noting that in 1986, RI amended its constitution to clarify that the "rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore…shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property."). Coastal scientists from the University of Rhode Island described the confusion surrounding determining the mean high-water mark for the public. *Id.* at 3, lines 10–32. The new law thoroughly defines the mean high-water mark, stating:

> Notwithstanding any provision of the general laws to the contrary, the public's rights and privileges of the shore may be exercised, where shore exists, on wet sand or dry sand or rocky beach, up to ten feet (10') landward of the recognizable high tide line; provided, however, that the public's rights and privileges of the shore shall not be afforded where no passable shore exists, nor on land above the vegetation line, or on lawns, rocky cliffs, sea walls, or other legally constructed shoreline infrastructure. Further, no entitlement is hereby created for the public to use amenities privately owned by other persons or entities, including, but not limited to: cabanas, decks, and beach chairs.

46 R.I. Gen. Laws § 23-26(c).

152 *See, e.g.,* Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 118 (1943) (holding public use of the beach was "not antagonistic to the ownership of the property").

153 *See, e.g., id.* at 113.

154 S. Brent Spain, *Florida Beach Access: Nothing but Wet Sand?*, 15 FLA. STATE UNIV. J. OF LAND USE & ENV'T L. 167, 171 (1999).

155 Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (involving a store expansion in Oregon. The Court held that there must be "rough proportionality" between the city's public interest and the proposed infringement on the property owner's rights).

156 *See generally* REID EWING, ET AL., BEST DEVELOPMENT PRACTICES: DOING THE RIGHT THING AND MAKING MONEY AT THE SAME TIME 2 (2019).

157 *See e.g.*, LAUREL, MD., UNIFIED LAND DEVELOPMENT CODE, ch. 20, art. II, §§ 20-29.8 (2024), https://library.municode.com/md/laurel/codes/unified_land_development_code?nodeId=CH20LADESU_ARTIISU (reservation of land for public purpose).

precedent regarding this practice.[158] There, the California Coastal Commission agreed to issue a permit for expanding a private beachfront house on the condition that the property owner grant a lateral public access route across the beachfront.[159] The Supreme Court held this mandatory dedication was an unconstitutional taking.[160] This precedent is significant because these conditions of approval for a permit grant, known as exactions, are common. The Court in *Nollan* held that such exactions must have an essential nexus between a legitimate state interest and the actual conditions of the permit being issued, and when there is no essential nexus, then the exaction amounts to an unconstitutional taking.[161]

A source of conflict with the public trust doctrine is that each state is responsible for defining terms and boundaries within its respective state.[162] The Supreme Court of Arizona in *Hassell*, noted that "generations of trustees hav[ing] slept on public rights does not foreclose their successors from awakening."[163] States have held that even when the property in trust is not in use by the public, the land and resources are still held in trust by the state for the benefit of the public.[164] For example, Ohio expressed this principle in *Schnittker*: "[T]he state as trustee for the public property cannot, by acquiescence, abandon the trust property or enable diversion of it to private ends different from the object for which the trust was created."[165] In *Phillips Petroleum v. Mississippi*, landowners brought an action to quiet title in lands under the tide-influenced water.[166] There, the Supreme Court held that tidelands which fall under public ownership include all shore lands subject to tidal action and not just those of navigable water bodies.[167] In *Bell v. Town of Wells*, the Maine Supreme Court held that public use of the state's tidelands is restricted to fishing, fowling, and navigation rights

158 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (holding that a government agency may require an easement as a condition for a permit if that exaction substantially advanced the government interest that was affected by granting the permit).

159 *Id.* at 838.

160 *Id.* at 839.

161 *Id.* at 837.

162 Brigit Rollins, *The Public Trust Domain: Basics of the Public Trust Doctrine*, NAT'L AGRIC. LAW CTR. (Apr. 6, 2021) https://nationalaglawcenter.org/the-public-domain-basics-of-the-public-trust-doctrine/.

163 Ariz. Ctr. For Law in Pub. Int. v. Hassell, 837 P.2d 158, 171 (Ariz. Ct. App. 1991).

164 Schnittker v. Ohio Dep't. of Nat. Res., No. 00AP-976, 2001 Ohio App. LEXIS 1828, at *13-14 (Ct. App. Apr. 24, 2001) ("Mere non-use of the trust property by the public cannot authorize the appropriation of it by private persons to private uses and thus thwart the purpose of the trust").

165 *Id.* (Schnittker purchased waterfront property on Kelley's Island, Lake Erie, on which include a large pier on the lake. The pier was built prior to Schnittker's purchase in the early 1900's. The state enacted the Fleming Act which required leases for piers, no previous owner had ever applied for such lease on this pier. The Ohio Dept. of Natural Resources sought to enforce the Act and require Schnittker to obtain a lease, he objected, and the Supreme Court in Ohio held the lease was required.)

166 Phillips Petroleum Co. v. Miss., 484 U.S. 469, 469 (1988).

167 *Id.* at 470.

granted under the Colonial Ordinance of 1647.[168]

The public trust doctrine of each state is subject to constraints.[169] In *Sandusky*, the Sandusky Marina contracted with the Ohio Department of Natural Resources ("ODNR") to obtain a 50-year lease for 19.3 acres of submerged lands in Lake Erie to place a marina.[170] The contract included the cost of rent: $2500 for the first five years, after which rent could be adjusted according to "any variations in property values".[171] The rental rate increased to $33,654 because the ODNR enacted new rental rates based on a square foot calculation. The Court held "[T]he state may not exercise its (trust) power to the extent that it acts to unilaterally abrogate contracts into which it entered."[172] In *Waterfront Development Corp. v. Commonwealth*, the court held that the use of filled former tidelands remained in the public trust of the state and can only be used for public purposes such as access to the present waterfront.[173] On the other hand, Rhode Island seeks to balance the opposing interests by giving the public rights to lands ten feet landward from the mean high-water mark, but subject to certain limitations.[174] This law allows what amounts to the incidental use of private land adjacent to the land held in public trust.

IV. CLARIFICATION OF THE PRINCIPLE

This section will address how applications of the public trust doctrine in American jurisprudence vary from state to state. Although this doctrine applies widely,[175] the individual states' responsibilities as trustees are carried out by measures unique to each. These differences become even clearer in New England where the variations are most pronounced. Long ago, these states accepted the duties and obligations as trustees of the protected land defined within the trust.

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168 Bell v. Town of Wells, 557 A.2d 168, 169 (Me. 1989).

169 Ariz. Ctr. for Law in Pub. Int. v. Hassell, 837 P.2d 158, 166-67 (Ariz. Ct. App. 1991) (see n.13 for a listing of thirty-eight states which have concluded that the state holds lands under navigable waters in trust for the benefit of the public).

170 Sandusky Marina Ltd. P'ship. v. Ohio Dep't of Nat. Res., 710 N.E.2d 302, 303-04 (Ohio App. 6 Dist. 1998).

171 *Id.* at 306.

172 *Id.* (the court reasoned "while the doctrine charges the state with the responsibility and authority to maintain offshore submerged lands for the benefit of the public, the doctrine does not give the state unbridled power to do anything it pleases").

173 Boston Waterfront Dev. Corp. v. Commonwealth, 374 N.E.2d 598, 606 (Mass. App. Ct. 1978).

174 46 R.I. Gen. Laws § 23-26(c) ("The public's rights and privileges of the shore shall not be afforded where no passable shore exists, nor on land above the vegetation line, or on lawns, rocky cliffs, sea walls, or other legally constructed shoreline infrastructure. Further, no entitlement is hereby created for the public to use amenities privately owned by other persons or entities, including, but not limited to: cabanas, decks, and beach chairs.").

175 Ariz. Ctr. for Law in Pub. Int. v. Hassell, 837 P.2d 158, 167 (Ariz. Ct. App. 1991) (see n.13 for a listing of thirty-eight states which have concluded that the state holds lands under navigable waters in trust for the benefit of the public).

Today, the role of the trustee is often challenged by a public seeking to enforce the protection of these public trust lands.

A. Obligations of the Trustee

There have been instances where the members of the public express a lack of confidence in the state's ability to act as trustee for public benefit.[176] The scope of the duties and obligations of the trustee under the public trust doctrine has been litigated by state citizens seeking enforcement of said duties.[177]

In *Kelly*, Oceanside Partners sought to develop a large-scale multi-use development along 1.9 miles of shoreline and were granted a permit to build on a 1540-acre piece of property in Hawaii.[178] The state and county had imposed development restrictions on the permit.[179] Kona, the location of the development, experienced heavy rainfall in 2000 because of severe storms, and Oceanside failed to enact the runoff water management measures outlined in the permit.[180] Thus, the surrounding waters were degraded.[181] A cultural heritage organization commenced an action against the county and state under the public trust doctrine because the county and state were joint trustees of the resources, having had an "affirmative duty" to enforce such runoff provisions as specified in the permit.[182] The court held that the state must "ensure that the prescribed measures are actually being implemented" and that "the duties imposed upon the state are the duties of a trustee and not simply the duties of a good business manager."[183]

1. Regulatory Takings and Just Compensation

Fifth Amendment issues concerning due process and government takings are relevant to our understanding of the way the public trust doctrine applies to private land-owners of coastal land.[184] The Fifth Amendment contains the Due Process

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176 Slocum v. Borough of Belmar, 569 A.2d 312, 316-17 (N.J. Super. Ct. Law Div. 1989) (holding that Belmar violated its duty of loyalty under the state's public trust law by charging and using beach admission fees to pay for municipal expenses).

177 *Id.* at 316.

178 Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 989 (Haw. 2006).

179 *Id.* at 990.

180 *Id.* at 991.

181 *Id.*

182 *See Id.* at 991-92.

183 *Id.* at 1011 ("[W]e are not convinced by DOH's argument that its duties under the public trust doctrine are undertaken in its absolute discretion . . .. As a guardian of the water quality in this state, DOH then 'must not relegate itself to the role of a mere umpire… but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision making process.'" (quoting *In re* Water Use Permit Applications, 9 P.3d 409, 455, (Haw. 2000))).

184 U.S. CONST. amend. V.

Clause and the Takings Clause,[185] which states that "[n]o 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."[186]

The Supreme Court case first applying the Fifth Amendment directly to the states by way of the Fourteenth Amendment was *Chicago, B. & Q. Railroad Co. v. Chicago*.[187] Writing the opinion for the Court, Justice Harlan stated that, under the due process of law, states were required to provide just compensation when seizing private property.[188] This was a landmark case because it established that the Bill of Rights did not only apply to the federal government, but could also be applied to the local state government.[189]

In a later case, *Transportation Co. v. Chicago,* the Court further narrowed its holding in *Chicago Railroad* that private property shall not be taken for public use without just compensation.[190] In that case, Chicago's improvement of its highways had obstructed a stream that caused damages to a landowner's property.[191] The Court found that the city was not required to compensate the property owner because of the city's obstruction.[192] In fact, the Court found that there was neither a "physical invasion of the real estate of the private owner, nor a practical ouster of his possession."[193] The Court held that "acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use[,] are universally held not to be a taking."[194] Justice Strong's rationale rests on there being no intrusive entry on the plaintiff's lot, merely a temporary inconvenience.[195]

Prior to 1922, the Court operated under a general rule that regulation of land was not a taking.[196] However, where regulation went too far, it could constitute a taking.[197] The dissent in *Penn Coal Co.* maintained that this was an instance where the general rule should apply, as the government was exercising its police power to protect lives, safety, welfare, and morals.[198] In *Hadacheck v. Sebastian*, the Court applied this general rule, holding that a Los Angeles City ordinance prohibiting the operation of a brick kiln or a brick yard within the city limits was

185 *Id.*
186 *Id.*
187 Chicago, B & Q R.R. Co. v. Chi., 166 U.S. 226 (1897).
188 *Id.* at 241.
189 *Id.* at 233-34.
190 N. Transp. Co. v. City of Chicago, 99 U.S. 635, 641-42 (1878).
191 *Id.* at 636.
192 *Id.* at 642.
193 *Id.*
194 *Id.*
195 *Id.* at 643.
196 Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
197 *Id.*
198 *Id.* at 417.

a legitimate exercise of police power.[199] This ordinance was deemed constitutional even though the plaintiff claimed it rendered his property valueless because the property could only be used as a brickyard.[200] The Court reasoned: "[T]here must be progress, and if in its march private interests are in the way they must yield to the good of the community."[201] Justice McKenna, writing for the court, also noted the ordinance did not amount to a complete denial of the use of Hadacheck's property, and the presence of a brickyard was inconsistent with neighboring uses.[202] Although Mr. Hadacheck could have used the clay on his land, it would have "be[en] prohibitive from a financial standpoint," or in other words, more expensive to do so.[203] This case was one of the first cases involving regulatory takings under zoning law.[204] It recognized the city's police powers and use of zoning ordinances whereby the city may enact regulations to protect the safety of lives, property, welfare, peace, and morals.[205]

2. Protecting Property Interests

Scholars are split regarding whether interests in water should be treated as a property right subject to the takings clause or as a public resource.[206] In prior appropriation[207] jurisdictions, water may either generally be considered due process property or common law property but not regulatory takings property,[208] depending on whether it is state law, common law, or the constitution that protects the rights of people with respect to their property. In determining whether a governmental action amounts to a regulatory taking, the court considers whether the regulation in question goes "too far" in impacting private property rights.[209] If a private property right is found to be affected by the regulation, the next step the

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199 Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (noting an example of a legitimate exercise of police power).

200 *Id.* at 405.

201 *Id.* at 410.

202 *Id.* at 409, 412.

203 *Id.* at 411.

204 See *Id.*

205 *Id.* at 410.

206 *See* Melinda Harm Benson, *The Tulare Case: Water Rights, The Endangered Species Act, and the Fifth Amendment,* 32 ENV'T L. 551, 571 (2002) (discussing interests and protections of water rights); Jan G. Laitos, *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901 (1989) (discussing water as a "property right protected by the takings clause").

207 "Prior appropriation" is a term that describes jurisdictions where the state's laws prioritize rights to water based on who is first to take occupancy of the water and to use it in a reasonable and beneficial manner. These states tend to view water as a scare resource that needs protection.

208 Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 732 (2008).

209 Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (the Court established a list of factors to weigh).

court will employ is a balancing test which considers the effects of the regulation based on several factors, called the *Penn. Central* factors.[210] If the court finds a physical invasion of private property resulting in denial of the property owner of all reasonable economically beneficial use of their property,[211] the court will not employ a balancing test but instead find a taking per se.[212]

In 1922, in *Pennsylvania Coal v. Mahon*, the Court held that the Kohler Act, a Pennsylvania state law which prohibited the mining of coal under a habitation was not a legitimate exercise of police power.[213] Instead, they deemed it to be an unconstitutional taking of property rights without adequate and just compensation.[214] Justice Holmes, writing for the Court, focused on the extent of the "diminution in the value of the property" to determine whether a regulatory act constituted a taking.[215] He conceded that, "while property may be regulated to a certain extent, if regulation goes 'too far' it will be recognized as a taking."[216] This holding has been characterized as a diminution-of-value test.[217]

In 1978, the Court held, in *Penn Central* that a city regulation, the Landmark Law, did not interfere with the city's reasonable investment-backed expectations, and thus the restrictions caused by the regulation did not constitute a taking.[218] Justice Brennan and the Court focused on discerning what constitutes just compensation by introducing what has become known as the *Penn Central* Factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, (3) the character of governmental action.[219] The Court announced its parcel-as-a-whole theory:

> Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a

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210 Penn. Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978) (the Court discussed the *Penn. Central* factors, also called the *Penn. Central* balancing test).

211 Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

212 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("physical occupation of an owner's property authorized by the government was a taking of the property"); *Lucas*, 505 U.S. at 1019 (discussing just compensation must be paid unless the interest in question was already limited by a background principle of law that inheres in the claimant's title).

213 *Mahon*, 260 U.S. at 416.

214 *Id.*

215 *Id.* at 413.

216 *Id.* at 415.

217 *Id.* at 419.

218 Penn. Cent. Transp. Co. v. City of N.Y., 438 U.S. 104, 136 (1978).

219 *Id.* at 124.

whole.[220]

As Justice Rehnquist explained in his dissent in a later case expounding on the parcel-as-a-whole doctrine, "[t]he need to consider the effect of regulation on some identifiable segment of property makes all-important the admittedly difficult task of defining the particular parcel."[221] Thus, the identity of the 'particular parcel' would be determined, in a given case, by applying the parcel-as-a-whole doctrine to the relevant facts.[222] This doctrine is significant because, considering the parcel as a whole instead of the portion of the property affected by the state action, it then is typically less likely that a state action will have deprived a landowner of the practical use of the property.

So, the real question in these regulatory takings cases is defining just compensation.[223] Scholars have offered many thoughts as to what would constitute a "just" compensation.[224] Few have offered any bright-line rule, test, or formula aimed at gathering those answers.[225] Perhaps the answer is as simple as calculating the "just compensation" in regulatory takings claims to be no-compensation, or "zero".[226]

The conclusion in *Penn Central* leads courts to employ a balancing test—the *Penn Central* factors—to aide in deciding whether a regulation has affected a taking.[227] The Court identified three factors for determining future regulatory takings claims: the economic impact of the regulation on the plaintiff, interference with investment-backed expectations, and physical invasions of property by the

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220 *Id.* at 130–31 (internal quotations omitted).

221 Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 514-15 (1987) (Rehnquist, J., dissenting).

222 *See Penn Cent. Transp. Co.*, 483 U.S. at 149 n.13 (Rehnquist, J., dissenting).

223 *See* D.O. Malagrinò, *Among Justice John Paul Stevens's Landmark Legacies: Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 53 CREIGHTON L. REV. 77, 102–08 (2019) (discussing that takings analysis should not concern whether there has been a taking but rather what "just compensation" is required, and that perhaps the *Penn. Central* factors are really the test for just compensation).

224 *See* Glynn S. Lunney, Jr., *Compensation for Takings: How Much is Just?,* 42 CATH. U. L. REV. 721 (1993) (discussing when a government has "gone too far" to affect a taking); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (discussing the role administrative agencies take when considering whether the situation warrants just compensation).

225 *See* Lunney, *supra* note 224; Michelman, *supra* note 224.

226 *See* Salkin, *supra* note 20 (discussing Belsky's position in support of the government broadening its public trust doctrine to "carve out exceptions for regulatory takings claims with no compensation"); Thomas Miceli & Kathleen Segerson, *Private Property, Public Use, and Just Compensation: The Economics of Eminent Domain, Foundations & Trends in Microeconomics*, vol. 3 no. 4 275 (2007) (discussing a no-compensation rule, citing Blume's "corollary conclusion that zero compensation is efficient"); Yun-Chien Chang, *Economic Value of Fair Market Value: What Form of Takings Compensation is Efficient*, 20 SUP. CT. ECON. REV. 35 (2012) (noting that the scholarship on takings compensation splits between zero compensation, lump-sum compensation, and some compensation based on fair market value and economic value).

227 *Penn. Cent. Transp. Co.*, 438 U.S. at 124 (1978).

government.[228] Even though the Court glossed over the fact that different amounts of weight may be given to each factor, the Court did not specify which factor outweighed another.[229] Scholarship notes that *Penn Central* is the primary authority for reconciling regulatory takings cases.[230]

In its 1982 opinion *Loretto v. Teleprompter Manhattan CATV Corp*., the Court held that a "physical occupation of an owner's property authorized by the government was a taking of the property".[231] The case involved a cable company installing a service wire on the landowner's building to furnish cable service to the tenants.[232] A regulation in New York required the landlord to permit a cable television company to install its service wiring upon the landlord's property, effectively destroying the right of the landowner to exclude or control that portion of the property.[233] Justice Marshall discussed in the majority opinion, "that Manhattan Teleprompter's minor but permanent physical occupation of Loretto's property constituted a regulatory taking of property for which just compensation is due under the Fifth and Fourteenth Amendments."[234] Marshall also pointed out that "the right to exclude is one of the most essential sticks in the bundle of rights" belonging to property owners.[235] Thus, the Court therein established the permanent physical occupations test for regulatory takings.[236]

In its 1992 decision, *Lucas v. South Carolina Coastal Council*, the Supreme Court held that "compensation must be paid to sustain" the Beachfront Management Act because it "deprive[d]. . .Owner[s] of all economically productive or beneficial uses of [their] land" by prohibiting development of their property located near coastal lands."[237] In the majority opinion, Justice Scalia reasoned that one way for a state to resist such a takings claim is to show "the proscribed use interests were not part of the owner's title to begin with, so that the severe limitation on property use is not newly legislated or decreed, but inhere[ent] in the title itself."[238] The Court described this theory as "tract as a whole."[239] This focus on the "tract as a whole" theory brings a heavy challenge

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228 *Id.* (in practice, these factors have resulted in easier wins for plaintiffs bringing takings claims for physical occupations, exactions and conditions on development, and permit denials.

229 *See Penn. Cent. Transp. Co.*, 438 U.S. 104.

230 *See* A. Dan Tarlock, *Regulatory Takings*, 60 CHI-KENT L. REV. 23 (1984) (noting that *Penn. Central* has "widely be seen as almost a complete victory for public regulation"); Steven J. Eagle, *The Four- Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601 (2014) (noting that *Penn. Central* is the "polestar" of the Supreme Court's regulatory takings cases).

231 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

232 *Id.* at 421-22.

233 *Id.* at 423-25.

234 *Id.* at 421.

235 *Id.* at 433.

236 *Id.* at 451.

237 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

238 *Id.* at 1027-29.

239 *Id*. at 1016 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible

for future plaintiffs claiming a total taking where the owner was left with no economically beneficial use of the property.[240] Thus, in *Lucas*, the Court established the total-taking test for regulatory takings.[241]

In *Kelo v. City of New London*, the Court held that a "state may exercise its eminent domain power to condemn non-blighted property and transfer it to a private corporation for the purpose of creating new jobs, promoting economic development[,] and increasing tax revenues without violating the public use requirement of the Fifth Amendment."[242] In the majority opinion, Justice Stevens stated that the Court's eminent domain doctrine hinges on whether its exercise can reasonably be found to serve a public purpose, such as creating jobs, redeveloping economically depressed areas, or creating tax revenues.[243]

The story of *Kelo* is sad from start to finish, because after the case was settled, many jurisdictions enacted a form of anti-*Kelo* legislation.[244] The City of New London initially negotiated to redevelop the Fort Trumbull area of New London because Pfizer, a pharmaceutical company, expressed interest in opening a home office in New London.[245] Pfizer decided to invest $300 million in a new research facility at a defunct linoleum factory, adjacent to the area of Fort Trumbull the city sought to redevelop.[246] The city, through a partnered development company, purchased the desired land from willing sellers and exercised eminent domain powers to acquire the rest.[247] Some of those who were unwilling to sell their properties initiated suit and took their case to the Supreme Court.[248]

The effects of the *Kelo* case have rocked the city. Litigation eventually cost the city their deal with Pfizer and Pfizer uprooted its headquarters and left the City of

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use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.").

240 *Id.*

241 *Id.* at 1065-66.

242 D.O. Malagrino, *Constitutional Perspectives on Historic Preservation Law: Mediating the Balance Between Private Owners and Their Historic Properties*, 91 Miss. L.J. 389, 408 (2023); Kelo v. City of New London, 545 U.S. 469, 484–85 (2005).

243 *Kelo*, 545 U.S. at 477-84. Notably, the decision in this case generated a significant backlash. *See* Ilya Somin, *Putting Kelo in Perspective*, 48 CONN. L. REV. 1551 (2016).

244 *See* William J. Scheiderich, *Post-Post-Kelo Urban Renewal Legislation*, 30 ST. & LOC. L. NEWS 5 (2007) (discussing many states' enactment of "Anti-Kelo" legislation soon after *Kelo)*.

245 *Kelo*, 545 U.S. at 473–75.

246 *Id.* at 473.

247 *Id.* at. 473-75.

248 *See Kelo*, 545 U.S. 469; *see also* Somin, *supra* note 245 at 1566 (the redevelopment plan was riddled with flaws evident from the commencement of the project which casted doubt on the success of the project).

New London, costing the city approximately $80 million in taxpayer money.[249] Ms. Kelo's home was saved, dismantled, moved to a new location, re-assembled, and is currently home to a local preservationist.[250]

The Supreme Court made little reference to the public trust doctrine in cases involving regulatory takings,[251] until the Court had to establish a third category of takings cases: judicial takings.[252] In *Stop the Beach*, waterfront property owners claimed Florida had effected an unconstitutional taking of property when it began a beach re-nourishment project.[253] The Supreme Court held there was no taking because the state was the owner of the wet sand.[254] In *McQueen v. South Carolina Coastal Council*, the property in question was part of the public trust of the State of South Carolina.[255] The owner claimed a governmental taking entitling him to just compensation because he had lost all economically beneficial use of his property.[256] However, the court held compensation was unnecessary because the property in question was public trust property subject to the control of the state.[257]

B. Implementing an Open Beach Access Act

The New England states should adopt a regional uniform Beach Access Act to provide clarity and consistency in regulating beach access across New England. Each state has a slightly different approach to coastal management, and these approaches continue to evolve to maintain and allow use of the coastal land that is consistent with the needs and desires of the public.[258] These differences are a

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[249] Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. 183, 226 (2007) (both the City of New London and the residents faced difficult times after settling *Kelo*, the city lost the redevelopment deal and the majority of the residents burdened by relocating lost their property); *see also* Somin, *supra* note 245 at 1556 (the Court's decision essentially "placed the definition of the rights protected by the Public Use Clause at the mercy of the very government officials it is supposed to protect us against. [Which was] like appointing a committee of foxes to guard the chicken coop").

[250] Scott Bullock*, Susette Kelo's Little Pink House Finds a New Foundation,* INST. FOR JUST. (June 1, 2008), https://ij.org/ll/susette-kelos-little-pink-house-finds-a-new-foundation/; *See also* THE LITTLE PINK HOUSE (Courtney Moorehead Balaker 2017).

[251] *See, e.g.,* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 846-48 (1987) (Blackmun, J., dissenting).

[252] The doctrine of judicial takings was first announced in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't. Prot.*, 560 U.S. 702 (2010) (holding Florida's beach re-nourishment program of adding 75 feet (of dry sand) to the 6.9-mile shoreline eroded away by recent hurricanes did not constitute a taking of the littoral property owner's rights).

[253] *Id.* at 711-12, 733.

[254] *Id.* at 707-09, 733 (under Florida law, and the doctrine of avulsion, the land that is created by a sudden event belongs to the owner of the seabed. This applies to beach restoration projects).

[255] McQueen v. S.C. Coastal Council*,* 580 S.E.2d 116, 150-51 (2003) (no taking when a landowner was denied a permit to do what he could not otherwise have done because of the public trust doctrine).

[256] *Id*. at 146-47.

[257] *Id.* at 149-51.

[258] Kat So et al*., How to Fix Americans' Diminishing Access to the Coasts*, CTR. FOR AM.

source of conflict because the same federal program is managed inconsistently across state lines.[259] Heightened interest in environmental reform and protection, along with the increased population seeking to utilize the finite coastal resources likely has bolstered interest in adopting best practices for managing and regulating coastal land since the time the public trust doctrine was first introduced. Coastal states have had to revisit their coastal management plans because of the economic value of these coastal lands.[260] Coastal land has become more important to the public as evidenced by the public's focus on preserving the natural environment and concern over changing climate conditions.[261]

Each state in New England uses the public trust principles differently in its coastal zone program.[262] Each state took on the role of manager when it opted to protect its coastal lands and volunteer to enact the CZMA.[263] In Massachusetts, the management authority over coastal land is afforded to the Department of Environmental Protection. Massachusetts has codified its public trust principles in chapter 91 of the Massachusetts General Laws.[264] Massachusetts defines a purpose of chapter 91 as protecting the public interest in tidelands, great ponds, streams, and non-tidal rivers.[265] Connecticut declares a public trust in the "air, water[,] and other natural resources of the State of Connecticut[,] and each person is entitled to the same protection, preservation[,] and enhancement of the same." [266] Rhode Island divides all state waters into six categories which purport to help "maintain a high quality of coastal environment for future generations of Rhode Islanders."[267] Rhode Island incorporates public trust principles but does not utilize

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PROGRESS, (October 4, 2022), https://www.americanprogress.org/article/how-to-fix-americans-diminishing-access-to-the-coasts/.

259 *Id.*

260 *See* Sierra B. Weaver*, Local Management of Natural Resources: Should Local Governments Be Able to Keep Oil Out?*, 26 HARV. ENV'T L. REV. 231, 238 (2002) (state governments have sought to use the CZMA to preserve oceanfront property values).

261 Randy Strobo, *Commodity of the Future? Environmental Ethics and the Value of Water*, 8 J. ANIMAL & ENV'T L. 49, 57, 60 (2017) (discussing the intrinsic value of water); Holly Doremus, *Climate Change and the Evolution of Property Rights*, 1 UC IRVINE L. REV. 1091 (2011) (discussing how property rights, including public coastal access, will need to evolve in response to climate change).

262 *See* Tim Eichenberg & Jack Archer, *The Federal Consistency Doctrine: Coastal Zone Management & New Federalism*, 14 ECOLOGY L.Q. 9, 55-58 (1987) (discussing the authority of coastal states in the program).

263 NOAA Office for Coastal Management, *About the National Coastal Zone Management Program*, NOAA Office for Coastal Management, https://coast.noaa.gov/czm/about/ (last accessed Mar. 20, 2024); *see also* Eichenberg & Archer, *supra* note 266 (discussing the history of the CZMA).

264 Denise J. Dion Goodwin, *Massachusett's Chapter 91: An Effective Model For State Stewardship Of Coastal Lands*, 5 OCEAN & COASTAL L. J. 45, 47-48 (2000).

265 310 MASS. CODE REGS. 9.01(2)(a) (Jan. 5, 2024).

266 CONN. GEN. STAT. § 22a-15 (1971).

267 R.I. Coastal Res. Mgmt. Council, *Coastal Resources Management Program*, § 200 (division of the state by categories), available at https://risos-apa-production-public.s3.amazonaws.com/CRMC/8264.pdf.

much of the doctrine in executing their coastal zone management plan.[268] The state trustee of Maine must manage their "shoreland areas" and water to "promote public health, safety and general welfare" under Maine's Shoreland Zoning Law.[269] New Hampshire's Coastal Program seeks to "balance the preservation of coastal resources with the social and economic needs of current and succeeding/future generations."[270]

The New England states should modify their Coastal Zone Management programs to allow each state to implement a New England Open Beach Access Act.[271] Doing so would allow each state to follow a uniform program for coastal zone management as opposed to following their respective state program. Streamlining the coastal program in the New England region by placing it under the control of one central administrator will allow the program to be operated uniformly. Public beach access points can be updated to include new uniform signage so that travelers following a common interstate highway in New England will be able to identify public beach access points easily.

Regionally specific zone programs, instead of individual, state-run coastal zone programs, would become more efficient at streamlining operations and maintaining their regional coastal program over time. Currently, the CZMA program allows individual states to manage their coastal programs.[272] The conflicts typically arise when a bordering state defines boundaries, recreational uses, or rights in a way the sister state does not. By amending the definitions sections of the CZMA so that regional areas share common definitions, such as mean high tide mark, confusion and litigation would be lessened because common border states could share common definitions.[273] Congress should amend and update the federal CZMA Program to allow states who wish to join a regional specific Open Beach Access program to do so without impairing their status in the NCZMP for allocation of federal funds.

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[268] 46 R.I. GEN. LAWS § 23-1 (2007); Thomas R. Bender, *Legislative Control Over the Coastal Resources Management Council After Separation of Powers: Grasping at Thin Air (,Land, and Water)*, 12 ROGER WILLIAMS U. L. REV. 314, 321 (2007).

[269] ME. STAT. tit. 38, § 435 (1989).

[270] Robert R. Scott et al., *Guide to Federal Consistency Coastal Zone Management Act § 307*, N.H. DEP'T ENV'T SERVS. WATER DIV, WATERSHED MGMT. BUREAU (Feb. 2022), https://www.des.nh.gov/sites/g/files/ehbemt341/files/documents/r-wd-19-28.pdf (New Hampshire's Coastal Program gained federal approval in 1982).

[271] Although hypothetical, The Open Beach Access Act, is certainly warranted because the CZMA is long past-due for amendments and updates.

[272] The Coastal Zone Management Act of 1972, 16 U.S.C. §§1451-64 (1988).

[273] Some have even called for the CZMA to be repealed, *see, for example,* Bruce Kuhse, *The Federal Consistency Requirements of the Coastal Zone Management Act of 1972: It's Time to Repeal this Fundamentally Flawed Legislation*, 6 OCEAN & COASTAL L.J. 1 (2001).

CONCLUSION

Striking the balance regarding the use of coastal water and shoreline between private beachfront property owners and the public is critical to reduce confusion in the law and implement consistency in neighboring state laws. A uniform, regional protection would preserve the public's right to use and enjoy the coastal shores because a consistent act would set forth a cohesive, manageable, and clear plan for public access to the shore. These protections must consider current and future private property owners and ensure their private ownership rights are clear, discernable, and unambiguous, because the rights of private owners of beachfront property must be protected. Private owners of beachfront property must be fully informed of their rights in the land at the outset of the conveyance because it is a material fact that may impact future enjoyment of ownership and it is imperative to consider prior to purchase. Understanding the full ownership rights at the outset of a conveyance can clear underlying questions regarding boundary and land use questions. In conclusion, although states have enacted versions of public trust laws, the need for consistency and flexibility between neighboring New England states in shared shore access must be paramount when implementing region-wide enforcement of property held subject to public trust because of the different approaches each state has taken to manage their coastal waters.