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# THE “PUBLIC ACCESS DOCTRINE”: OUR CONSTITUTIONAL RIGHT TO SUN, SURF, AND SAND

*Robert George\**

## I. INTRODUCTION

Before Brenden Leydon came along, the Town of Greenwich, Connecticut had an ordinance that banned out-of-towners from its beach.<sup>1</sup> Leydon, however, wanted to jog down the Greenwich Point Beach and, believing he had a right to do so, filed a lawsuit against the Town.<sup>2</sup> His right to jog on the beach, he first argued, was rooted in the public trust doctrine,<sup>3</sup> an ancient law developed by a Roman Emperor<sup>4</sup> who may have believed, as Leydon did, that something special about the seashore made it a place that everyone should be able to access. Leydon next argued, under a more modern and familiar doctrine, that his right to free speech and expression was violated when he was prevented from accessing the beach and “exchanging ideas and information with other park users.”<sup>5</sup> He lost. The trial court noted that while the public trust doctrine is well known,

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1. *Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001) n.5 [hereinafter *Leydon II*]; Greenwich, Conn. Special Acts of 1919, § 7-30 (providing in relevant part “[i]n accordance with No. 124 of the Special Acts of 1919, as amended, and recognizing that public parks . . . have been acquired . . . for the use of inhabitants of the Town . . . only inhabitants of the Town may enter, remain upon or use [the town’s] parks . . .”).

2. *Leydon v. Town of Greenwich*, 750 A.2d 1122, 1124 (Conn. 2000) [hereinafter *Leydon I*].

3. *Id.*

4. COASTAL STATES ORGANIZATION, INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES (David C. Slade et al. eds., 2d ed. 1997).

5. *Leydon II*, 777 A.2d at 560-61 n.10. The complaint alleged that the “‘plaintiff’s attempt to enter upon the [p]ark was for purposes of expressing himself by exchanging ideas and information with other park users on topics of social and political importance.’”

there was no authority to apply it to this case.<sup>6</sup> He appealed and won on the grounds that the public trust doctrine did apply, and that the town ordinance violated it.<sup>7</sup> The appellate court noted that “[f]or almost two centuries, our Supreme Court has discussed the concept that land held by a municipality as a public park or public beach is held for the use of the general public and not solely for use by the residents of the municipality.”<sup>8</sup> The Town appealed, and the Connecticut Supreme Court reached yet another outcome, one that differed from both of the lower courts. It found that Leydon had a right to the beach not on the basis of a doctrine handed down from the Roman Empire, but as a right of expression.<sup>9</sup>

It is not surprising that faced with a question regarding who has rights to access the beach, three different courts came to three different conclusions. The nation’s beaches are more crowded than ever.<sup>10</sup> Each year, the nation’s beaches host approximately two billion visits, more than twice the number of visits to the combined “properties of the National Park Service (286 million) Bureau of Land Management (106 million) and all state parks and recreation areas (767 million).”<sup>11</sup> The handling of the *Leydon* decision reflects three approaches for dealing with the tension between the rights of beachfront property owners, whether private or municipal, and the increasing public demand for the beach. This Comment will examine the approach of two states still adhering to a narrow interpretation of the ancient public trust doctrine that limits public access. It will then explore the possibility of a new public access doctrine based on authorities inherent in both the public trust doctrine and freedom of expression.

The two doctrines are distinct and have developed from separate bodies of law with different historical underpinnings. But both of them are based on the notion of obligations incumbent upon the government by virtue of its ownership or, in the case of the public trust doctrine, stewardship, of certain types of property.

Part II of this Comment will examine the public trust doctrine, focusing on its application in states that have interpreted it broadly. Part III will examine the doctrine as it exists in Maine and Massachusetts, where courts

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6. *Leydon I*, 750 A.2d at 1125.

7. *Id.* at 1124.

8. *Id.* at 1126.

9. *Leydon II*, 777 A.2d at 555-56.

10. JAMES HOUSTON, U.S. ARMY ENGINEER RESEARCH AND DEVELOPMENT CENTER, THE ECONOMIC VALUE OF BEACHES – A 2002 UPDATE, *available at* [http://www.netlobby.com/pdf/value\\_of\\_beaches2.pdf](http://www.netlobby.com/pdf/value_of_beaches2.pdf).

11. *Id.*

have so far refused to use it as a tool for opening up the beaches for the general public. Part IV will examine the public forum doctrine, the notion that there are places such as “streets and parks” that, by their very nature as public fora, must remain open to those who wish to exercise their freedom of speech and expression.<sup>12</sup> Part V will further compare the fundamental values underlying both doctrines. Part VI will examine the *Leydon* decision in detail, focusing on the use of the public forum doctrine as a means of gaining access to the beach. Finally, Part VII will propose a new “public access doctrine,” a concept that merges the state ownership interests granted through public trust with the constitutional protection afforded public fora, to achieve a potent new argument in favor of opening up the nation’s beaches.

It is important to acknowledge the difficulties of achieving a pure synthesis of the two doctrines. Most significantly, the public forum doctrine typically deals with property owned by the government;<sup>13</sup> the public trust doctrine deals with property that the government holds in trust for the public welfare, even though actual title to the land may lie in private hands.<sup>14</sup> Also, the public forum doctrine deals with free speech and expression. The public trust doctrine, on the other hand, grants access for the purposes of fishing, navigation, and, in most states, recreation. Finally, the public trust doctrine is derived from state common law,<sup>15</sup> while the public forum doctrine is rooted in constitutional precedent dealing with limits the government can impose on free speech.<sup>16</sup>

Despite these differences, the Connecticut decision highlighted the fundamental interests that are inherent in both doctrines, and that are at stake any time a fence is erected between the beach and people who want to use it.

## II. THE PUBLIC TRUST DOCTRINE

*But look! here come more crowds, pacing straight for the water,  
and seemingly bound for a dive. Strange! Nothing will content*

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12. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

13. KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW*, 1188 (Robert C. Clark et al. eds., Foundation Press, 14th ed. 2001).

14. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at 1.

15. *Id.*

16. SULLIVAN & GUNTHER, *supra* note 13, at 1188.

*them but the extremest limit of the land. . . . No. They must get just as nigh the water as they possibly can without falling in.*

—Herman Melville, *Moby Dick*<sup>17</sup>

The public trust doctrine, a common law doctrine, grants each state a legal interest in its shorelines to hold in trust for the general public.<sup>18</sup> The doctrine's ancient roots began around 530 A.D. when codified by Roman Emperor Justinian.<sup>19</sup> Specifically, the body of Roman civil law codified by the emperor in the "Institutes of Justinian," dictates that:

By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations.<sup>20</sup>

The original code acknowledged that the seashore was "subject to the same law as the sea itself, and the ground or sand beneath it," and could not be considered private property.<sup>21</sup>

The doctrine was subsequently adopted and strengthened by English common law, which imposed on the government "an affirmative duty to administer, protect, manage and conserve fish and wildlife."<sup>22</sup>

The doctrine was imported into the Americas, where it has been interpreted as splitting the title of property along the seashore.<sup>23</sup>

Because of their special and public nature, the title to public trust lands is not a singular title in the manner of most other real estate titles. Rather, public trust land is vested with two titles, one dominant and the other subservient. . . . The dominant title is the *jus publicum*, simply described as the bundle of trust rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes. The

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17. HERMAN MELVILLE, *MOBY DICK* 17 (The Franklin Library 1979) (1851), *quoted in* COASTAL STATES ORGANIZATION, INC., *supra* note 4, at xii.

18. *Id.* at 1.

19. *Id.*

20. JUSTINIAN INST. 2.1.1 (Thomas Collett Sandars trans., 7th Am. ed. 1876).

21. *Id.* at 2.1.5.

22. David C. Slade, *The Public Trust Doctrine: A Gift from a Roman Emperor*, COASTLINES, Fall 1997, at 21-22 (Vol. 7, No. 4), *available at* [www.epa.gov/owow/estuaries/coastlines/97fall.pdf](http://www.epa.gov/owow/estuaries/coastlines/97fall.pdf) (last visited Apr. 21, 2006).

23. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at 6.

subservient title is the *jus privatum* or the private proprietary rights in the use and possession of trust lands.<sup>24</sup>

The modern doctrine in the United States goes beyond the mere grant of a trust to the various states; it imbues them with an obligation. For example, in voiding a deal in which the Illinois legislature deeded to the Illinois Central Railroad the entire waterfront area of Chicago, the Court found that the State was banned from conveying public trust land in a way that would effectively destroy the public’s right to it.<sup>25</sup> Moreover, in a more modern case, *Phillips Petroleum Co. v. Mississippi*, the Court defined the land covered under the public trust as any waterway influenced by the ocean’s tides, regardless of whether it is navigable.<sup>26</sup> In *Phillips Petroleum*, an oil company was barred from staking claim to the land beneath eleven streams that flowed into the Gulf of Mexico because the State, “upon entering the Union, [was] given ownership over all lands beneath waters subject to the tide’s influence.”<sup>27</sup>

As such, the doctrine has a wide geographic reach. It includes “navigable” waters and the lands beneath them, encompassing 191,000 square miles of navigable water within states’ boundaries, or approximately the combined size of Maryland, Virginia, North Carolina, South Carolina, and Georgia.<sup>28</sup>

It is left to the individual states to lay out the limits of the access rights granted under the doctrine. In New Jersey, for instance, the courts have defined the right to access broadly, granting to the public the right to access the beach for the purposes of sunbathing and swimming.<sup>29</sup> This right of access extends not only to the intertidal zone, but also to the sandy beach above it.<sup>30</sup> Furthermore, the right of access may include public streets and upland sand areas as a means of entry to the beach.<sup>31</sup> The New Jersey Supreme Court found that it does not matter whether the public trust

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24. *Id.*

25. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 460 (1892). The Court held that “[t]here can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.”

26. 484 U.S. 469, 476 (1988).

27. *Id.* at 484.

28. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at 2. Although the public trust doctrine reaches some waters that are not in fact navigable, the phrase “navigable waters” has been retained in the law to denote all waters covered under the doctrine. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. at 480-81.

29. *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 358 (N.J. 1984) (citing *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47 (N.J. 1972)).

30. *Id.* at 363.

31. *Id.* at 365.

doctrine is being used to provide access to a private or a municipal beach, noting that due to “the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary.”<sup>32</sup> In doing so, New Jersey recognizes that the public trust doctrine, while historically a device to allow access in order to protect commerce and navigation, has always hinged on something more: “a deeply inherent right of the citizenry.”<sup>33</sup> The New Jersey Supreme Court also recognizes that the doctrine needs to change with the times, stating:

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine . . . should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.<sup>34</sup>

California, like New Jersey, has defined the doctrine broadly. In California, the doctrine:

provid[es] the public the right to use California’s water resources for: navigation, fisheries, commerce, environmental preservation and recreation; as ecological units for scientific study; as open space; as environments which provide food and habitats for birds and marine life; and as environments which favorably affect the scenery and climate of the area.<sup>35</sup>

It is generally recognized, as in New Jersey and California, that the doctrine can be modified over time to meet the evolving public need and usage of the public trust lands.<sup>36</sup> The Circuit Court of Appeals for the District of Columbia noted that:

More recently, courts and commentators have found in the doctrine a dynamic common-law principle flexible enough to meet diverse modern needs. The doctrine has been expanded to protect additional water-related uses such as swimming and similar recreation,

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32. *Id.*

33. *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d at 53.

34. *Id.* at 309.

35. CALIFORNIA STATE LANDS COMMISSION, CALIFORNIA’S RIVERS, A PUBLIC TRUST REPORT – EXECUTIVE SUMMARY vi (1993).

36. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at 172 n.32.

aesthetic enjoyment of rivers and lakes, and preservation of the flora and fauna indigenous to public trust lands. It has evolved from a primarily negative restraint on states’ ability to alienate trust lands into a source of positive state duties.<sup>37</sup>

### III. MAINE AND MASSACHUSETTS: A NARROW VIEW OF THE PUBLIC TRUST DOCTRINE

Not only does the public trust doctrine differ from state to state, it has varied in its influence throughout history. After a period of relative dormancy, the doctrine was revived in 1988 by *Phillips Petroleum*.<sup>38</sup> After that ruling, twenty-nine coastal states formed the Coastal States Organization to research the doctrine’s historical roots and modern application.<sup>39</sup>

The trend towards interpreting the doctrine broadly has reached most states, with two major exceptions—Maine and Massachusetts.<sup>40</sup> These two holdouts adhere to a much narrower interpretation of the doctrine that excludes the right to use beaches for recreational purposes, such as sunbathing and walking.<sup>41</sup> Both Massachusetts and Maine, which was part of Massachusetts when the courts formulated what is now a shared interpretation of the public trust doctrine, trace this interpretation of the doctrine to the Massachusetts Colonial Ordinance of 1641-1647.<sup>42</sup> Massachusetts codified the doctrine in 1648 in *The Book of General Lawes and Libertyes Concerning the Inhabitants of Massachusetts*.<sup>43</sup> The doctrine was heavily influenced by the geography of the shoreline of Massachusetts, which then included the Province of Maine. This coastline includes long, slowly sloping beaches that defy easy access by ships.<sup>44</sup> To encourage private development of piers long enough to reach out into deep water, the courts adopted a version of the doctrine more favorable to private property

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37. *District of Columbia v. Air Florida Inc.*, 750 F.2d 1077, 1083 (D.C. Cir. 1984).

38. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at xiii.

39. *Id.*

40. *See Slade*, *supra* note 22.

41. *Id.*

42. *Bell v. Town of Wells*, 510 A.2d 509, 512-13 (Me. 1986) [hereinafter Bell I]; *see also Bell v. Town of Wells*, 557 A.2d 168, 175 (Me. 1989) [hereinafter Bell III] (noting that “[t]he Maine common law rules defining property interests in intertidal land come from the same Colonial Ordinance source as the Massachusetts common law rules on that subject, and the Maine case development on the subject has in no significant respect departed from that in Massachusetts.”).

43. *Bell I*, 510 A.2d at 512.

44. *Slade*, *supra* note 22.



rights, granting only a public easement to the intertidal zone<sup>45</sup> and limiting the access to the purposes of “fishing, fowling, and navigation.”<sup>46</sup>

Maine and Massachusetts also have interpreted the doctrine as giving the state something less than *jus publicum*, the “bundle of trust rights of the public to fully use and enjoy trust lands,” normally taken under the public trust doctrine.<sup>47</sup> Accordingly, it leaves for the private property owners something more than the traditional *jus privatum* title to “private proprietary rights in the use and possession of trust lands.”<sup>48</sup> The private right is dominant, while the public right to access is a mere easement for the limited purposes of navigation, fishing, and fowling.<sup>49</sup>

Despite the economic nature of access granted, the Colonial Ordinance recognized the fundamental nature of the right it was dealing with, designating this right as one of only three Liberty Common rights.<sup>50</sup> The other two rights were the right to leave the colony and, more significantly, the right to free speech.<sup>51</sup>

Thus under the Colonial Ordinance the public right to use the intertidal zone was seen in terms of an individual freedom. As Chief Justice Shaw wrote, the “great purpose” of the enactment was “to declare a great principle of public right, to abolish the forest laws, the same laws and the laws designed to secure several and exclusive fisheries and to make them all free.” The Colonial Ordinance did not designate who “owned” or “held” the right to use the intertidal zone, just as we would not attempt to designate who “owns” freedom of speech.<sup>52</sup>

Nonetheless, when the issue was recently revisited in Maine, the Supreme Judicial Court, sitting as the Law Court, found that the public trust doctrine, as defined by the Colonial Ordinance, did not include a right to access for the purposes of recreation.<sup>53</sup> Beachfront owners brought the case after the legislature sought to broaden the scope of the doctrine by passing the Public Trust in Intertidal Land Act of 1986 (“the Act”).<sup>54</sup> The legislature “declared that ‘the intertidal lands of the State are impressed with a public

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45. Bell I, 510 A.2d at 515 n.13.

46. Slade, *supra* note 22.

47. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at 6.

48. *Id.*

49. Bell III, 557 A.2d at 173.

50. Bell I, 510 A.2d at 516.

51. *Id.*

52. *Id.* (citing *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 68 (1851)).

53. Bell III, 557 A.2d at 173.

54. 12 M.R.S.A. §§ 571–573 (2005).

trust,’ . . . and that those rights of the public include a ‘right to use intertidal land for recreation.’”<sup>55</sup> The Act stated that “[t]hese recreational uses are among the most important to the Maine people today who use intertidal land for relaxation from the pressures of modern society and for the enjoyment of nature’s beauty.”<sup>56</sup> In *Bell*, landowners on Moody Beach in the Town of Wells sued the town to enjoin it from extending the public trust doctrine to include the right of walkers and sunbathers to use the beach in front of their homes.<sup>57</sup> The Law Court struck down the Act on the ground that granting a right to recreation on privately owned beaches is unconstitutional under the Takings Clause of the Maine Constitution.<sup>58</sup> The Law Court noted that “constitutional prohibitions on the taking of private property without compensation must be considered.”<sup>59</sup>

The Massachusetts rule on general recreation is even narrower than the Maine rule, which extends access at least to those who are engaging in recreational fishing.<sup>60</sup> Drawing on the English common law that excludes bathing as a justification for beach access, Massachusetts courts have held that the public trust doctrine does not extend to recreation of any sort.<sup>61</sup> The Massachusetts Supreme Court confirmed this finding in an opinion advising the Massachusetts House of Representatives that a proposed law extending the scope of the public trust doctrine to include “public on-foot free right-of-passage” would allow for unconstitutional takings of private property.<sup>62</sup>

Because the Colonial Ordinance granted an easement for only three specific purposes, any attempt by the respective legislatures in Maine and Massachusetts to expand the doctrine to include recreation in order to keep pace with modern demands has invoked the Takings Clause of their respective constitutions.<sup>63</sup> Both legislatures have tried to expand the doctrine, but both have failed in the face of the Takings Clause, which “was designed to operate and it does operate to prevent the acquisition of any title to land *or to an easement in it* or to a permanent appropriation of it, from an owner for public use, without the actual payment or tender of a just compensation for it.”<sup>64</sup>

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55. *Bell* III, 557 A.2d at 176 (citations omitted).

56. 12 M.R.S.A. §§ 571–573 (Supp. 1988).

57. *Bell* III, 557 A.2d at 168.

58. *Id.* See also 12 M.R.S.A. §§ 571–573 (Supp. 1988); Me Const. art. III.

59. *Bell* III, 557 A.2d at 169.

60. *Butler v. Attorney General*, 80 N.E. 688 (Mass. 1907).

61. See *id.* at 689.

62. *Opinion of the Justices*, 313 N.E. 2d 561, 571 (Mass. 1974).

63. *Bell* III, 557 A.2d 168, 176 (Me. 1989).

64. *Id.* at 177 (citing *Cushman v. Smith*, 34 Me. 247, 265 (1852)).

Courts in Massachusetts and Maine have also unwisely clung to a public trust doctrine rooted in a defunct value system that provides no adequate justification in modern times. As Maine courts have acknowledged, “[t]he Puritans did not believe in exposing themselves to the sun. Neither the Puritans nor anyone else in 17th Century Massachusetts, Maine or England believed in regular bathing as we know it today.”<sup>65</sup> Fundamental rights, however, are fundamental precisely because they are not relative to the era in which they exist. The court’s reasoning implies that had the Puritans been regular sunbathers with a penchant for cleanliness, then the right to access the beaches might be interpreted differently today.

Yet the courts are not unsympathetic to the need for providing access to shorefront property for recreation. Some have suggested that the proper solution “is for the State or municipalities to purchase the needed property rights or obtain them by eminent domain through the payment of just compensation, not to take them without compensation through legislative or judicial decree redefining the scope of private property rights.”<sup>66</sup> But there has also been a call to overturn *Bell III*, which was decided by a narrow 4-3 margin. In one recent case, Justice Saufley, noting that Maine’s 3,480 miles of coastline is the longest on the eastern seaboard, echoed the *Bell III* dissent, which called for broadening the public trust doctrine.<sup>67</sup> In *Bell III*, Justice Wathen wrote in dissent that “[t]he rights of the public are, at a minimum, broad enough to include such recreational activities as bathing, sunbathing and walking.”<sup>68</sup> Affirming that view, Justice Saufley noted that the majority view in *Bell III* was an:

unduly narrow judicial construction of the time-honored public trust doctrine [that] . . . restricted the public’s right to peaceful enjoyment of one of this state’s major resources, the intertidal zones. Pursuant to our holding in *Bell [III]*, a citizen of the state may walk along a beach carrying a fishing rod or a gun, but may not walk along the same beach empty-handed or carrying a surfboard. This interpretation is clearly flawed.<sup>69</sup>

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65. *Bell v. Town of Wells*, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sept. 14, 1987) (Brodrick, J.), 1987 Me. Super. LEXIS 256, 10 (Me. Super. Ct. 1987) [hereinafter *Bell II*].

66. *Bell III*, 557 A.2d at 180.

67. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 51, 760 A.2d 232, 248-49 (Saufley, J., concurring) (citing *Bell III*, 557 A.2d at 187-89 (Wathen, J., dissenting)).

68. *Bell III*, 557 A.2d at 189.

69. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 51, 760 A.2d at 248-49 (footnote omitted).

Finally, it is worth noting that both states acknowledge that the public trust doctrine can be expanded. The Maine Law Court has found this to be the case where common law rights “ha[ve] been so largely accepted and acted on by the community as law that it would be fraught with mischief to set [them] aside.”<sup>70</sup> The Superior Court of Maine also noted “the Colonial Ordinance was not exclusive. It did not . . . preclude the development of new common law property rights.”<sup>71</sup> The precedent in Massachusetts for changing the doctrine to meet modern needs goes back more than a century. One court noted that the doctrine must change with time and that the doctrine itself was broad enough to include all new uses as they arise.<sup>72</sup> A later court affirmed, noting the doctrine “includes all necessary and proper uses, in the interest of the public.”<sup>73</sup>

The decision in both states to deny access depends heavily on historical precedent that is no longer relevant. It defies modern usage patterns of sunbathing and other recreational uses that are “largely accepted and acted on by the community.”<sup>74</sup> As such, the doctrine in both states may be vulnerable to a renewed attack, one reinforced with constitutional armor.

#### IV. THE PUBLIC FORUM DOCTRINE

The Supreme Court has noted that:

[t]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.<sup>75</sup>

But the Court has imposed a stringent test on any governmental restriction on expression in a public forum. Those restrictions must be time, place, and manner restrictions that are narrowly tailored to meet a compelling state interest.<sup>76</sup> The Court has frowned upon restrictions that go beyond

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70. *Barrows v. McDermott*, 73 Me. 441, 448-49 (1882); *see also* *Bell II*, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sept. 14, 1987) (Brodrick, J.), 1987 Me. Super. LEXIS 256 at 13.

71. *Id.* at 23.

72. *See* *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. 158, 167 (1863).

73. *Home for Aged Women v. Commonwealth*, 89 N.E. 124, 129 (Mass. 1909).

74. *Bell II*, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sep. 14, 1987) (Brodrick, J.), 1987 Me. Super. LEXIS 256 at 13 (citing *Barrows v. McDermott*, 73 Me. at 448-49).

75. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

76. *See* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

this, consistently striking down restrictions that impose a total ban on a particular medium of expression.<sup>77</sup>

The notion that there are certain places that by force of habit and custom have become public fora where people have a constitutional right to express themselves first appeared in the dictum of a pre-World War II Supreme Court case.<sup>78</sup> Justice Roberts said:

[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all; . . . but it must not, in the guise of regulation, be abridged or denied.<sup>79</sup>

The doctrine developed and strengthened over the years until it became so entrenched that Justice Kennedy noted in dicta that “[a]t the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places.”<sup>80</sup> The doctrine, however, is flexible and has been applied differently by courts over the years.<sup>81</sup>

Unlike the fixed boundaries that define the reach of the public trust doctrine, the boundaries of the public forum doctrine defy geographical demarcation. In general, the Court separates government owned property into three categories for the purposes of determining how much the

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77. See *Saia v. New York*, 334 U.S. 558 (1948) (striking down a ban on blow horns because it left too much discretion in the hands of the police chief); *Schneider v. State*, 308 U.S. 147 (1939) (invalidating a ban on leaflets on the grounds that the state interest in preventing littering was insubstantial compared to the right of expression in a public forum); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (invalidating a total ban on the distribution of leaflets by ringing people’s doorbells).

78. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514 (1939).

79. *Id.* at 515-16.

80. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 696 (1992).

81. David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 159 (1992) (arguing that after a period in which the Warren and Burger Courts used the doctrine as a means of protecting free speech, the Rehnquist Court reversed course and now interprets it in a way to restrict speech).

government may restrict speech: 1) the traditional public forum, 2) the designated public forum, and 3) the nonpublic forum.<sup>82</sup>

In a nonpublic forum, the government has wide ranging powers to restrict speech.<sup>83</sup> In *Perry Education Association v. Perry Local Educators’ Association*, the seminal case for the application of the modern public forum doctrine, the Court determined that a school mail system, including teachers’ mailboxes, was a nonpublic forum, and as such, the school could allow access to the teachers’ union while restricting access to a competing union.<sup>84</sup> The government, however, can transform a nonpublic forum, such as the teachers’ mailboxes, into a designated public forum by opening it up “for use by the public as a place for expressive activity.”<sup>85</sup> A designated public forum enjoys the same free speech protection as a traditional one. In both, only “reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”<sup>86</sup>

The place at issue here, public beaches, most closely resembles the third *Perry* category: the traditional public forum. Places such as these are “quintessential” public fora, defined as such because the public has traditionally perceived and used it in that way.<sup>87</sup> On the surface, *Perry* seems to be a relatively straightforward application of the public forum doctrine, but in practice courts and scholars continue to struggle both to determine what a public forum is, and how it impacts free expression.<sup>88</sup> As Justice John Paul Stevens said, “[m]y experience on the bench has convinced me that these categories must be used with caution and viewed with skepticism. Too often, they neither account for the facts at issue nor illuminate the interests at stake.”<sup>89</sup>

Accordingly, there is no set test for determining what is a traditional public forum. Rather, the Court looks at a variety of factors to determine whether society has, through continuing practice, resolved that a place is a public forum.<sup>90</sup>

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82. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 694.

83. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (finding regulations in non-public fora permissible “as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view”).

84. *Id.*

85. *Id.*, at 45.

86. *Id.*, at 46.

87. *Id.*, at 45 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

88. Justice John Paul Stevens, *Freedom of Speech*, 102 YALE L.J. 1293, 1302 (1993).

89. *Id.*

90. *Int’l. Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 681 (1992).

The rule is applied generally, rather than particularly. The inquiry is not into whether a particular park, sidewalk, or other property is a place where public expression occurs, but whether the property can be defined generally as a park, sidewalk, or other sort of property where public expression traditionally takes place.<sup>91</sup> In other words, while traditional public fora are designated for the purpose of protecting expression, the test for whether a particular place is a public forum is not necessarily whether it has actually been a place where expression occurs, but whether if, by tradition, it is the sort of place people go to express themselves and exchange ideas. If it is a street, park, or sidewalk, it makes no difference whether it is residential or public, whether it has been a location of public debate since the founding of the nation, or whether it has been used exclusively for the people to drive to their homes at night.<sup>92</sup>

It is also not necessary for the government to hold title to the property for it to be deemed a traditional public forum.<sup>93</sup> “[O]ur decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a cliché, but recognition that ‘wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.’”<sup>94</sup> In particular, a place is more likely to be a public forum if: the government has “abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the [property];”<sup>95</sup> it has traditionally been open to the public;<sup>96</sup> and it is the sort of place, like a street, park, or sidewalk that has from “time out of mind” been held in the public trust

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91. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (“No *particularized inquiry* into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.” (emphasis added); *United States v. Grace*, 461 U.S. 171, 177 (1982) (noting “public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks are considered, *without more*, to be public for[a]” (emphasis added; internal quotation marks omitted)); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (noting that quintessential public fora “include those places which by long tradition or by government fiat have been devoted to assembly and debate, such as parks, streets, and sidewalks.” (internal quotations omitted)).

92. *Frisby v. Schultz*, 487 U.S. at 480.

93. *Id.*; *See also Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 792 (1996) (citing *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985) (Kennedy, J., concurring)).

94. *Frisby v. Schultz*, 487 U.S. at 480-81 (internal quotations omitted).

95. *Flower v. United States*, 407 U.S. 197, 198 (1972); *See also Greer v. Spock*, 242 U.S. 828, 837 (1976) (noting that while *Flower* does not stand for the proposition that the government creates a public forum merely by opening up property to the public, it does support the proposition that if the government abandons its claim to restrict expression, the property become a public forum).

96. *United States v. Grace*, 461 U.S. at 177 (noting that “whether the property has been ‘generally open to the public,’” while not dispositive, is a factor to consider).

and used for expressive activity.<sup>97</sup> As such, the Court has acknowledged that it is not so inflexible as to limit its application to streets, parks, and sidewalks. As one justice observed, a “failure to recognize the possibility that new types of government property may be appropriate for[a] for speech will lead to a serious curtailment of our expressive activity.”<sup>98</sup>

#### V. THE FUNDAMENTAL RIGHTS UNDERLYING BOTH DOCTRINES

There are three theories underlying the protection of free speech, two which deal directly with speech itself and its value in preserving democratic ideals. John Stuart Mill first expressed one theory, that unrestricted speech is the path towards truth. He wrote:

[a]nd though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?<sup>99</sup>

A second related theory lies in the assertion that free speech is required for the smooth functioning of a democratic society. As articulated by Alexander Meiklejohn, all sorts of speech deserve constitutional protection because they enable voters to “acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>100</sup>

But most intriguing in the context of the public trust doctrine is the theory that free speech is valuable just because expression itself is a means of self-realization.<sup>101</sup>

Unlike the truth and self-government theories, which view speech as instrumental to desired social consequences, autonomy theories emphasize the intrinsic worth of speech to individual speakers and listeners. Justice Brandeis echoed this theme too . . .

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97. *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) (finding that airport terminals are not public fora in part because of “the lateness with which the modern air terminal has made its appearance[.]”).

98. *Id.* at 698 (Kennedy, J., concurring).

99. JOHN MILTON, *AREOPAGITICA – A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644)*, reprinted in *RENASCENCE EDITIONS* (University of Oregon 1997), available at <http://darkwing.uoregon.edu/~rbear/areopagitica.html>.

100. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

101. SULLIVAN & GUNTHER, *supra* note 13, at 962.



suggesting ‘that [t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties; [they] valued liberty both as an end and as a means.’ An emphasis on individual self-realization readily extends First Amendment protection beyond the political realm to art, literature and even entertainment and advertising.<sup>102</sup>

The parameters of speech defy codification. Rather, freedom of expression is something to be understood and arrived at through “an elaborate mosaic of specific judicial decisions.”<sup>103</sup> The Court has found that “constitutionally protected forms of communication include parades, dances, artistic expression, picketing, wearing arm bands, burning flags and crosses, commercial advertising, charitable solicitation, rock music, some libelous false statements, and perhaps even sleeping in a public park.”<sup>104</sup>

Likewise, the public trust doctrine is grounded on the notion that humans, by virtue of their being human and nothing more, have a fundamental right to self-realization, which, in this context, would include access to the sea. While the doctrine has been used to provide access for commercial purposes such as shipping, fishing, and navigation, it has also drawn its authority from the connection so many people feel for the sea, and the right of people simply to follow the feeling that draws them to it.<sup>105</sup> “Beaches, resorts, marinas, harbors and the general lure of the waters bring people to the coasts in droves to fish, surf, bathe, sunbathe, sail, build, stroll and live their time-honored ‘pursuit of happiness.’”<sup>106</sup>

#### VI. LEYDON V. TOWN OF GREENWICH

Connecticut employs a broad interpretation of the public trust doctrine. It encompasses all land from the high tide mark seaward, to the low tide mark and all navigable waters.<sup>107</sup> It includes a wide range of activities including “fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge, and of passing and repassing . . .”<sup>108</sup> The state also enforces the public forum doctrine consistent with Supreme Court holdings,

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102. *Id.*

103. Stevens, *supra* note 88, at 1300.

104. *Id.* at 1298 (footnotes omitted).

105. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at xii.

106. *Id.* at xii (emphasis added).

107. CONNECTICUT DEP’T OF ENVTL. PROTECTION, OFFICE OF LONG ISLAND SOUND PROGRAMS, FACT SHEET, THE PUBLIC TRUST (2004), <http://www.dep.state.ct.us/olisp/publications/publictrust.htm>.

108. *Town of Orange v. Resnick*, 109 A. 864, 865 (Conn. 1920).

applying the strict scrutiny test to any government infringement of protected speech.<sup>109</sup> Under strict scrutiny, the government must have a compelling reason to restrict access, and any such restriction must be narrowly tailored to achieve that interest.<sup>110</sup> The restriction should not hinder speech any more than is absolutely necessary.<sup>111</sup>

In *Leydon I*, the Connecticut appellate court issued a seemingly straightforward decision overturning the lower court’s ruling that the Town of Greenwich could legally prohibit “out-of-towners” from the town beach.<sup>112</sup> Greenwich Point Park is a 147-acre town owned park that includes a stretch of beach on Long Island Sound.<sup>113</sup> The Town restricted access to residents and fined out-of-towners twenty-five dollars if they violated the ordinance.<sup>114</sup>

An out-of-town jogger argued that the state held the beach in trust for all residents, thus prohibiting the town from discriminating against state residents who were not also town residents.<sup>115</sup> He also asserted the ordinance violated his rights to free speech under the state and federal constitutions.<sup>116</sup> The Town maintained that the public trust doctrine in Connecticut only applies to the intertidal zone, not the dry sand the jogger wanted to run along.<sup>117</sup> The appellate court, however, agreed with the jogger and overturned the lower court, holding that “land held by a municipality as a public park or public beach is held for the use of the general public and not solely for use by the residents of the municipality.”<sup>118</sup>

The Connecticut Supreme Court affirmed the appellate court but based its decision on the public forum doctrine, instead of relying on the public trust doctrine.<sup>119</sup> First, it found that that the jogger’s desire to assemble and talk with other beach-goers constituted the sort of expressive and associative activities that fall within the embrace of First Amendment

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109. *Leydon II*, 777 A.2d 552, 571 (Conn. 2001).

110. *Id.*

111. *Id.*

112. *Leydon I*, 750 A.2d 1122 (Conn. 2000).

113. *Id.* at 1124.

114. *Id.* at 1125 n.6.

115. *Id.* at 1125.

116. *Leydon II*, 777 A.2d at 560-61. “The complaint alleges . . . that the [p]laintiff’s attempt to enter upon the [p]ark was for the purposes of expressing himself by exchanging ideas and information with other park users on topics of social and political importance.” *Id.* at n.10.

117. *Leydon I*, 750 A.2d at 1126 n.8.

118. *Id.* at 1126 (citations omitted).

119. *Leydon II*, 777 A.2d at 565 n.20.

protection.<sup>120</sup> Even if the jogger did not intend to express himself, the court found that “there can be no doubt that the plaintiff sought admission to Greenwich Point to exercise his constitutional right to freedom of association, which, alone, is sufficient to implicate the protections of the federal and state constitutions.”<sup>121</sup> It then found that the ordinance was overbroad, that even if it had not yet restricted the plaintiff’s or anyone’s constitutional right to expression, the ordinance was unconstitutional merely because, as written, it had the potential to restrict expression.<sup>122</sup> The ordinance, the court noted, reached “a substantial amount of constitutionally protected conduct” and the mere risk that it would have a “chilling effect on others who fear to engage in the expression that the [ordinance] unconstitutionally prohibits.”<sup>123</sup>

It also determined that the beach itself was a public forum.<sup>124</sup> The court emphasized the park-like characteristics of the beach, such as the parking lot, nature center, and walkways. But it also cited with favor precedent asserting there was nothing to preclude a similar finding about a beach that was not connected to a park.<sup>125</sup> It expressly noted that it did not “mean to suggest that a municipal beach without some or all of the other attributes of Greenwich Point would not constitute a park—and, therefore, a traditional public forum—for first amendment purposes.”<sup>126</sup>

Because it found that Greenwich Point was a public forum, the court applied strict scrutiny to the ordinance. In particular, any attempt by the government to enforce a wholesale exclusion of a particular class of people, such as out-of-towners, is likely to fail under the time, place, and manner test that governs state restrictions on speech in a public forum.<sup>127</sup> This restriction failed because “in any public forum, by definition, all parties have a constitutional right of access.”<sup>128</sup> The court found that the

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120. *Id.* at 562 n.13.

121. *Id.*

122. *See id.* at 566.

123. *Id.* at 556 (quoting *State v. Linares*, 655 A.2d 737 (Conn. 1995)).

124. *Id.* at 568.

125. *Leydon II*, 777 A.2d at 569 n.26 (citing *Naturist Soc’y, Inc. v. Fillyaw*, 958 F.2d 1515, 1522-23 (11th Cir. 1992)). The court noted many similarities between parks and beaches. It found that none of the proposed reasons for distinguishing between the two, such as the vulnerability of scantily-clad sunbathers with their possessions arranged out in the open around them and the shortage of law enforcement officials, justified denying public forum status to a beach. *Id.*

126. *Id.* at 571 n.29.

127. *Id.* at 571 (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 678 (1998)) (finding that public fora have “objective characteristics . . . [that] require the government to accommodate private speakers.”).

128. *Id.* at 573 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37,

“ordinance bars a large class of nonresidents . . . from engaging in a multitude of expressive and associational activities at Greenwich Point.”<sup>129</sup>

In effect, the supreme court found that under the state constitution any activity that is compatible with the customary and normal activity of a place is expressive, and therefore worthy of constitutional protection.<sup>130</sup> Applying this test to activities at Greenwich Point, the court found the range of expressive conduct to be virtually limitless and would include “walking on the beach in a T-shirt that expresses a particular political view or religious conviction, distributing literature or pamphlets in the parking lot, walkway or at a picnic table, participating in a silent vigil anywhere in the park, and soliciting signatures for a petition at the entrance to the park.”<sup>131</sup> The court specifically found that this wide range of activities would be considered expressive activity at the beach “even if that property, in contrast to Greenwich Point, contains no other attractions or activities and, therefore, is used solely as a beach.”<sup>132</sup>

#### VII. A NEW DOCTRINE: THE “PUBLIC ACCESS DOCTRINE”

It was no mistake that the Connecticut courts found access based on both the public trust and public forum doctrines. Despite their differences, both protect fundamental rights and together they suggest a new theory upon which the public can claim access to the beaches: because beaches fall under the public trust doctrine, the state has a property interest sufficient to invoke the public forum doctrine’s protection for places where people traditionally gather to exchange ideas. Because beaches are public fora they are subject to the time, place, and manner test regarding any state restriction on expressive use. Furthermore, recreation is an expressive use, so any restriction on beach access must pass constitutional muster via the time, place, and manner test.

The assumption that beaches are public fora could be challenged on the ground that not all beaches are government property. The proposed public access doctrine relies on a broad view of government property that encompasses more than that which the government holds actual title to. Many beaches are privately owned. In particular, the beaches at issue in

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55 (1983)).

129. *Id.* at 573.

130. *Leydon II*, 777 A.2d at 575. *See also* *Grayned v. City of Rockford*, 408 U.S. 104 (1972). This standard, briefly adopted by the Supreme Court, held that speech would be subject to strict scrutiny as long as it was compatible with the use of the public property.

131. *Leydon II*, 777 A.2d at 575.

132. *Id.* at 575 n.38.

Maine were private and not public property.<sup>133</sup> The public forum doctrine, however, supports a broad view of government property. As initially articulated, it was to apply not to government-owned property, but to streets and parks “[w]herever the title . . . may rest.”<sup>134</sup> While public forum issues arise most often in the context of government-owned property, the Supreme Court has readily extended it to non-government property, noting that:

[t]he history of this Court’s First Amendment jurisprudence . . . is one of continual development, as the Constitution’s general command that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press,’ has been applied to new circumstances requiring different adaptations of prior principles and precedents.<sup>135</sup>

Rather than focus on ownership, the Court has instead focused on the use of a particular place for expression.<sup>136</sup> The test is not whether a particular beach has been used for expression, but whether beaches in general are places of expression.<sup>137</sup> If this test is met, the Court has specifically found that government ownership is unnecessary.<sup>138</sup>

Even without legal ownership, state governments have a strong property interest in beaches through the public trust doctrine. In most states, the *jus publicum* title vests ownership of the beaches in the sovereign state, but rights to the use of the land is to be held in a public trust.<sup>139</sup> If the beach is privately owned, that title is subservient to the state’s *jus publicum* title. The owner can never own any part of the property interest included in the *jus publicum* title, which excludes the right of the land owner to restrict access to the public for navigation, fishing, fowling, and whatever other uses are encompassed in a particular state’s public trust doctrine.<sup>140</sup> “Thus, even though the upland owner ‘owns’ the beach or submerged lands, that ownership is still subject to several paramount rights of the public to use those trust lands for public trust purposes.”<sup>141</sup> In short, states have a strong property interest that justifies

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133. Bell II, YORSC-CV-84-125 (Me. Super. Ct., Yor. Cty., Sep. 14, 1987) (Brodrick, J.), 1987 Me. Super. LEXIS 256 at 1.

134. Hague v. Comm. for Indus. Org., 307 U.S. at 515.

135. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 740 (1996).

136. Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 681 (1992).

137. See Frisby v. Schultz, 487 U.S. 474, 481 (1988).

138. *Id.* at 474.

139. COASTAL STATES ORGANIZATION, INC., *supra* note 4, at 6.

140. *Id.* at 7.

141. *Id.*

and even compels the consideration of their beaches as traditional public fora where free speech should be protected under the public forum doctrine.

It is important to note that in Maine and Massachusetts, the *jus publicum* title is not superior to the *jus privatum*, but instead is considered little more than an easement.<sup>142</sup> This, however, is not a serious obstacle for considering their beaches as public fora. First, while the public trust doctrine is considered only an easement in these two states, that easement differs from other easements in that it can never be sold or abrogated. As the Supreme Court clearly stated in *Illinois Central Railroad v. Illinois*, a state’s obligation to preserve access under the public trust doctrine is inalienable.<sup>143</sup> So while in many ways the *jus publicum* title may be considered something less than fee simple ownership (particularly in Maine and Massachusetts) the *jus publicum* is also something more: namely it cannot be sold.<sup>144</sup>

The Supreme Court has further noted in dicta that the public forum doctrine can apply even to property that the government does not have title to.<sup>145</sup> “Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands.”<sup>146</sup> Beaches, as well, are often held privately, but whatever the jurisdiction, precedent and common sense dictate that this fact does not create a serious impediment to at least their consideration as public fora.

Another obstacle to whether the public forum doctrine should apply to beaches is the argument that beaches are not places where people come to exchange ideas. As the Supreme Court has noted:

the extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.<sup>147</sup>

The *Leydon II* court correctly noted that the inquiry is not whether a particular beach has been used as a public forum, but whether beaches are

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142. Bell III, 557 A.2d 168, 173 (Me. 1986).

143. 146 U.S. 387, 460 (1892).

144. *Id.*

145. Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 792 (1996).

146. *Id.* (citing 10A E. MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 30.32 (3d ed. 1990)).

147. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

places that, by tradition, have been used for expressive activities.<sup>148</sup> It approved of Justice Kennedy's comment that "[t]he liberties protected by [the public forum] doctrine derive from the Assembly, as well as the Speech and Press Clauses of the First Amendment, and are essential to a functioning democracy. . . . [P]ublic places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action."<sup>149</sup> The status of beaches in general as public fora has been considered in several states with different results, but the weight of authority seems to favor including both beaches and parks within the doctrine.<sup>150</sup> Just as it is not necessary for every sidewalk to be a place of expression or protest, it is also unnecessary for every beach to be filled with political placards in order for the doctrine to apply. Rather, the unifying requirement of all public fora appears to be that they are places where people naturally gather to express their views.

There is a well-established body of law which suggests that courts treat beaches as traditional public fora because they are places where expression is valued. The *Leydon II* court found that the town had infringed on the jogger's First Amendment right to go to the beach to discuss "topics of social and political importance."<sup>151</sup> It was the jogger's desire to talk about his own case that gave rise to a First Amendment claim.<sup>152</sup>

But even without a specific finding that a plaintiff sought entrance to the beach in order to discuss politics, there remains a strong argument that any restriction challenging a government limitation on beach access is

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148. *Leydon II*, 777 A.2d 552, 567 n.23 (Conn. 2001).

149. *Id.* at 568 (quoting *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. at 696).

150. *Id.* at 569-70 n.27 (citing *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d at 1522 (finding a Florida state beach was a public forum); *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000) (reversing a district court's finding that the Canaveral National Seashore in Florida was not a public forum); *Smith v. Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (conclusively establishing that the Fort Lauderdale Beach is a public forum); *Paulsen v. Lehman*, 839 F.Supp. 147, 161 (E.D.N.Y. 1993) (finding that Jones Beach in New York is a public forum); *Gerritsen v. Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993) (preserving the entire area of the El Pueblo Park in Los Angeles as a public forum); *Kaplan v. Burlington*, 891 F.2d 1024, 1025, 1029 (2d Cir. 1989); *McCreary v. Stone*, 739 F.2d 716, 719, 722 (2d Cir. 1984) (finding a small Scarsdale, New York space to be a public forum); *Flamer v. White Plains*, 841 F.Supp. 1365, 1368, 1374 (S.D.N.Y. 1993)).

151. *Leydon II* at 562 n.13.

152. *Id.* The court noted that the jogger wanted to go to the beach to give a newspaper interview about his case to the *New York Times*, and that "there can be no doubt that the plaintiff sought admission to Greenwich Point to exercise his constitutional right to freedom of association, which, alone is sufficient to implicate the protections of the federal and state constitutions." *Id.*

overbroad.<sup>153</sup> Under this analysis, a plaintiff would have had a right to challenge the beach access restriction as an unconstitutional prior restriction on speech even though his own rights may not have been violated.<sup>154</sup> But whether it is framed as an issue of actual infringement of expression or potential infringement of expression, the *Leydon II* court correctly applied the classic strict scrutiny test. Under this test, “[t]he government can exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”<sup>155</sup> As such, only reasonable time, place, and manner restrictions on expression are permitted.<sup>156</sup> Finding that the town’s total ban on out-of-town residents failed this test, the *Leydon II* court opened the beach to everyone.<sup>157</sup>

Under the public access doctrine posited here, the courts in Maine and Massachusetts, or in any state for that matter, may find that the state’s public trust of the beaches raises a government interest sufficient to implicate the public forum doctrine. The doctrine would then apply because beaches are places of public expression, either directly, indirectly, or by nature of their long history as places of gathering and assembly. And as public fora, the restrictions to access places such as Moody Beach in Wells, Maine would be considered unconstitutional infringements on the right to speech and assembly.

Of course the prohibition against restrictions on freedom of expression applies only to the government and not to individuals, or, in the case of Moody Beach, private owners of shorefront property. Landowners can restrict whatever expression they want on their own land and even restrict access to whomever they chose.<sup>158</sup> It is government involvement that triggers First Amendment concerns. Such involvement is inherent in the ownership stake that the public trust doctrine gives to the state.

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153. *Id.* at 335.

154. *Id.*

155. *Id.* at 571 (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. at 677).

156. *Id.* at 572.

157. *Id.* at 573.

158. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722-26 (1961). The Supreme Court found that a private restaurant violated the equal protection clause when it refused service to African Americans because the business was sufficiently connected to the state via a lease and other financial arrangements. But it noted without such connections “that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.” *Id.* at 722.



There is also precedent for enforcement of constitutional rights even when the primary actor is a private party.<sup>159</sup> In the famous case of *Shelley v. Kraemer*, a neighborhood association sought government enforcement of a covenant that barred black families from buying homes in their neighborhood. The Supreme Court found

[t]hat the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment.<sup>160</sup>

Regardless of whether the state is acting on its own authority as in *Leydon II* by restricting access to residents, or at the request of landowners seeking to preserve their power to evict alleged trespassers, there is sufficient state action to invoke the protections of the speech and expression.

It would be hard to find a state interest compelling enough to justify even small restrictions on access. After all, a government that is already obligated by the public trust doctrine to allow access to a person walking “along a beach carrying a fishing rod or a gun,”<sup>161</sup> can hardly have a compelling interest in stopping someone without a fishing rod from walking along the beach. Lacking a compelling state interest, there is no government action narrow enough to justify restricting access to the beaches, and the public access doctrine, should a court apply it, would insure the nation’s beaches are available to everyone.

Again and again courts are concerned with free speech as a prerequisite to a functioning democracy. While courts have found that beaches qualify under the public forum doctrine,<sup>162</sup> beaches present a unique opportunity for the courts to consider another rationale for protecting the freedom of expression in a public forum analysis: the need to protect expression as a means of self-fulfillment. Unlike sidewalks or city squares, beaches attract people because of their ability to soothe and calm. They are places where people go for self-reflection and meditation, or just for fun.

Our need for the ocean and the beaches might be quantifiable through studies that count the masses who are drawn each year to the water.<sup>163</sup> Or

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159. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

160. *Id.* at 14.

161. *Eaton v. Town of Wells*, 2000 ME 176, ¶ 51, 760 A.2d 232, 248-49.

162. *See Leydon II*, 777 A.2d 552, 568 (Conn. 2001).

163. Tourism, the largest industry in the United States, depends primarily on the success of coastal states to attract vacationers. Miami alone attracts more tourists than the combined

it might be the marvel of a writer, such as Melville: “But look! Here come more crowds, pacing straight for the water, and seemingly bound for a dive.”<sup>164</sup> Perhaps it will appear as the obvious justification for an ancient law that forbids obstacles in the approach to the seas: “By the law of nature these things are common to all mankind—the air, running water, the sea, and consequently the shores of the sea.”<sup>165</sup> Even the Puritans, who might have blanched at the thought that their spiritual beliefs would someday be used to argue in favor of allowing people to expose their skin to the sun’s rays, understood that recreation was good for the soul. But whether quantified, marveled over, codified, or worshipped, beach access falls within the realm of self-fulfillment, one of the fundamental justifications for the protection of expression.

Courts can find that beaches are public fora not only because they are places where crowds traditionally gather and ideas are traditionally exchanged, but because beaches, by their very nature, are an irreplaceable means of achieving free expression of ideas and self. Under this theory, the purpose of the First Amendment is not merely to protect expression that is useful for democracy, but to protect expression that leads to self-fulfillment. Such forms of expression might include walking on the beach, listening to the surf, or building a sand castle.

One line of cases that addresses restrictions on expressive conduct deals not with the notion of conduct as valuable as a means of self-expression, but with conduct that has a political content, such as symbolic protests through burning a draft card<sup>166</sup> or a flag.<sup>167</sup> In such situations, the courts ask whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”<sup>168</sup> But courts have also been willing to extend protection to expressions whose purpose is to entertain, rather than inform or persuade.<sup>169</sup> In crafting its test for what speech is obscene

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annual draw of Yellowstone, Grand Canyon, and Yosemite National Parks. On average, 180 million people go the coast each year. National Oceanic and Atmospheric Association, *Ocean Facts on Coastal Tourism*, <http://www.yoto98.noaa.gov/facts/tourism.htm> (last visited Apr. 4, 2006).

164. HERMAN MELVILLE, *MOBY DICK* (The Franklin Library 1979) (1851).

165. JUSTINIAN, *supra* note 20, at 2.1.1.

166. *United States v. O’Brien*, 391 U.S. 367, 386 (1968) (reversing an appeals court ruling that struck down a government law prohibiting war protesters from burning their draft cards).

167. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (affirming a lower court ruling that restrictions on flag burning are unconstitutional).

168. *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

169. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (finding “[t]he importance

and therefore beyond the embrace of constitutional protection, the Supreme Court has been careful to ensure protection for expressions that have “artistic value.”<sup>170</sup> It has protected nude dancing as an expression, finding that “[e]ntertainment, as well as political and ideological speech, is protected.”<sup>171</sup> It has protected a production of *Hair*, a rock musical,<sup>172</sup> a drive-in theater that wanted to show nude women,<sup>173</sup> and the right of activists to knock on doors to ask for contributions to their cause.<sup>174</sup> It is clear, as Justice Stevens noted, that the numerous types of expression now within the embrace of the First Amendment extend beyond “matters that were appropriate subjects of debate at a New England town meeting . . . even if the dictionary definition of the word ‘speech’ has not changed since 1791 . . . .”<sup>175</sup>

Under the proposed public access doctrine, it would not be necessary to show that a person seeking access to a beach is doing so in order to express a view to the crowds that gather there. It would be enough merely to want to go to the beach in order to relax. Relaxation and self-fulfillment would be considered types of expression worthy of constitutional protection. Nor would it be necessary, as some might fear, that the doctrine be extended to other places of natural sanctuary, such as mountains or lakes. Unlike the waterfront, there is no ancient doctrine guaranteeing access that has survived not only the passage of centuries, but also translation from one culture to another. Beaches truly are unique, and the public access doctrine by acknowledging this reality will insure their availability for all who desire them. The only extension that such an acknowledgment would require is a small one, one already acknowledged in states such as New Jersey and California. People would have access not only to the intertidal zone, but also to that sliver of sandy beach to which they are entitled in order to exercise their constitutional right to enjoy the sun, the surf, and the sand.

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of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.”)

170. *Miller v. California*, 413 U.S. 15, 24 (1989).

171. *Shad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

172. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975) (reversing a lower court ruling that the city could prevent the production on the grounds that the city’s act constituted prior restraint of expression).

173. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

174. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 633–34 (1980).

175. Stevens, *supra* note 88, at 1298.