ON THE LEGAL LIFE-HISTORY OF BEACHES

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Climate change is, among other things, making it more and more difficult to get to the beach. Recent studies show that rising sea levels have been shrinking America's beaches through erosion and inundation. This trend is unlikely to slow down anytime soon, and some scientists predict that we will see feet of additional sea-level rise within our lifetimes. While beaches are shrinking, reducing the availability of recreational opportunities for locals and tourists alike, the number of people who want to visit the beach has grown dramatically. The growth in demand is due to a variety of factors, including the very low cost of going to the beach, its prominent place in American culture, and—of course—the fact that the combination of oceans, waves, and sand makes for an irreplaceable outdoor experience.

In his classic paper, Toward a Theory of Property Rights, the economist Harold Demsetz hypothesized that, as the availability of a resource declines or as demand increases, people will have a greater incentive to convert the resource from a commons into pieces of private property. Demsetz's hypothesis has proven correct with respect to beaches: many landowners have responded to the era of less beach and more visitors by expending resources on beach privatization. The attempted privatization of America's beaches does not evince a coordinated attempt to establish a market. Instead, what landowners and their lawyers have done is to convince the courts to recast the beach, which for centuries had been a blurry mix of public and private rights, as a fundamentally private holding that might occasionally be burdened with the odd public right-of-way.

Beach privatization exacerbates the effects of unequal wealth by converting a place of outstanding, low-cost recreational opportunities into a string of exclusive backyards that enhance the value of already-expensive beachfront homes. In addition to the fact that landowners have convinced

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courts of law to facilitate wrong-way wealth transfers, they have also made a substantial dent into the social justice supplied by low-cost, high-quality recreation.

This Article explains how the current privatization movement is contrary to almost a millennium's worth of common law meant to ensure that beaches would continue to supply the ecosystem service of "connectivity"—a low-cost connection between land and sea—not just to the wealthy, but to the working person and the wanderer as well. After explicating the conflict between privatization and tradition, the Article goes on to provide a number of theories that history-conscious courts can use to strike a blow for equality and to restore a healthy balance between public and private rights.

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I. INTRODUCTION

As John Locke might have said, all the beaches once were America: land that colonizers had not yet converted to European-style property.[1] But in the seventeenth century, the Europeans began to distribute parcels carved from enormous hunks of "discovered," conquered, or purchased land.[2] By the beginning of the twentieth century, various foreign, colonial, and American governments had transferred hundreds of millions of acres into private hands.[3] Sometimes, that real estate included sandy ocean beaches.

Each government grant, or "patent,"[4] of a beachfront lot split ownership of the beach in two: the grantee received title to the part of the beach landward of "the high-water line," but the law required that the government retain ownership of all land seaward.[5]

1. "Thus in the beginning all the world was America," that is, "things of nature . . . given in common." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 143, 145 (Thomas I. Cook ed., 1947). Property regimes existed among Native Americans in North America before and after the arrival of the Europeans. For some examples, see Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 351–53 (1967).

2. As Justice John Marshall wrote in *Johnson v. M'Intosh*, "the different nations of Europe . . . asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil." 21 U.S. 543, 574 (1823).

3. Depending on the time period and location of the transfer, the government grantor could be a foreign sovereign (*e.g.*, by Spain in California between 1785 and 1821), a colonial government (*e.g.*, in Massachusetts between roughly 1620 and 1776), a U.S. territorial government (*e.g.*, in the Mississippi Territory between 1798 and 1817), the federal government (*e.g.*, in Oregon in 1850), or a state (*e.g.*, in South Carolina after 1776). *See* Karen B. Clay, *Property Rights and Institutions: Congress and the California Land Act of 1851*, 59 J. ECON. HIST. 122, 122 (1999); EDWARD T. PRICE, DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC 29–48 (1995); ROBERT V. HAYNES, THE MISSISSIPPI TERRITORY AND THE SOUTHWEST FRONTIER, 1795-1817 57–61 (2010); Shively v. Bowlby, 152 U.S. 1, 2 (1894); Lowcountry Open Land Tr. v. South Carolina, 552 S.E.2d 778, 782–83 (S.C. Ct. App. 2001).

4. The term "land patent" refers to "[a] conveyance to an individual of that which is the absolute property of the government and to which, but for the conveyance, the individual would have no right or title." *Land Patent*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969). I use the term in this Article to refer to a document used to transfer land from a government to a private party; such documents are sometimes also referred to as government deeds or sovereign grants.

5. Up until the early twentieth century, common-law systems in Britain and the United States used the term "high-water line" to refer to the line on the beach separating public and private land. As explained below, the purpose of using this line as the boundary was to maintain sovereign ownership of areas that were effectively part of the sea; the law deemed public ownership of the sea to be necessary to ensure a functioning transportation network.

During the colonial era, a few states began to use the "low-water line" as the boundary in order to encourage the construction of commercial port facilities. Mark Cheung, *Rethinking the History of the Seventeenth-Century Colonial Ordinance: A Reinterpretation of an Ancient Statute*, 42 ME. L. REV. 115, 115–17 (1990). The Supreme Court's decision in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935), prompted most high-water-line states to adopt the mean high-tide line as their definition of high-water line. The mean high-tide line is located by estimating the intersection of the mean high-tide plane (the average elevation of high tides in the area over an 18.6 year period) and the beach. *See* Josh Eagle, *Taking the Oceanfront Lot*, 91 IND. L.J. 851, 873–74 (2016).

The focus of this Article is on jurisdictions that were governed by English or American common law at the time that the government issued the patent. For patents issued by the Spanish or Mexican governments, for example, including some beachfront land in California and Texas, many of the general arguments made in this Article are relevant. The difference would be in the application of Spanish or Mexican law to the terms of the initial transfer. *See, e.g.*, Summa Corp. v. Cal. *ex rel.* State Lands Comm'n, 466 U.S. 198, 200 (1984); Coburn v. San Mateo

The resulting dual ownership of the beach is complicated. The complications are due in large part to the property-law awkwardness of locating private land directly adjacent to public land. The State, in that scenario, is both neighbor and sovereign. What this means is that the private landowner's rights will necessarily be less than what she would be entitled to if she lived next to another private landowner. The State, for example, has the power to enact land-use laws that could prescribe any use of the private beachfront lot that might diminish the value of the State's property.[6] An ordinary neighbor would obviously not have that kind of power.[7]

It is one thing to say that the beachfront landowner's rights are something less than "ordinary" property rights; it is another to give them specific, intelligible contours. Answering the question of conceptual boundaries—designing private rights that are fair to beachfront landowners while at the same time maintaining necessary sovereign autonomy—has long been a chimerical goal for lawmakers.[8]

The balance-of-rights problem is but one source of tension between the landowner and the State. There is also a practical-boundary problem. Dividing one piece of land into two pieces of land requires the establishment of a boundary line separating them, marking the physical extent of each newly minted lot. Between two lots of ordinary land, boundaries are fixed lines, marked by stationary

County, 75 F. 520, 526 (N.D. Cal. 1896); J. J. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 LAND & WATER L. REV. 467, 473 (1973). As Professor Clarence Wharton explained:

> Though we became then, and have since been, a Common Law country, we retain much of the Civil Law. Twenty-seven million acres of our lands were granted by Spain and Mexico and every title and every transaction with reference thereto, prior to 1840, must to this day and throughout the ages to come be measured by the laws of the fallen sovereign. All . . . deeds . . . affecting these lands up to 1840 must be construed according to the Civil Law.

Clarence Wharton, *Early Judicial History of Texas*, 12 TEX. L. REV. 311, 324 (1934).

6. In order to prove public nuisance and enjoin the private landowner, a state must prove either that the landowner is significantly interfering with a public right or that her actions are "proscribed by a statute, ordinance or administrative regulation." RESTATEMENT (SECOND) OF TORTS § 821B(2)(b) (AM. L. INST. 1979).

7. Private neighbors' land use is regulated by the law of private nuisance, which is generally context-dependent (relativistic), but also provides that some uses are permitted regardless of the context. When the State is the neighbor, the question is whether a particular use of the beachfront lot interferes with public use of state-owned land under the law of public nuisance. Public nuisance law is not context-dependent, and it guarantees no minimum use. In other words, if every use of a particular piece of private property would result in a public nuisance, then there is no lawful use of that land. Tighter restrictions on ownership of private land—especially expensive beachfront land—are an inevitable source of friction.

As Professor Joseph L. Sax put it:

> The private competition among property owners is generally characterized by two factors: the competition to which one must submit is both localized and reciprocal . . . [but] the reciprocal element which seems to invest the competition among private users with an element of fairness, or at least of sportsmanship, is absent when one of the parties is the government.

Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 66 (1964).

8. One example of the law's effort to solve this problem is what are known as "riparian" and "littoral" rights. These rights are held by private, waterfront landowners, and serve as a check on the power of the neighboring sovereign owner. *See* Eagle, *supra* note 5, at 879–83.

items like boulders or GPS coordinates.[9] But sand is unstable, the ocean is powerful, and beaches experience continuous physical change.[10]

Common-law judges thought it was critically important to keep the oceans public, so they developed the concept of a moving boundary between public and private property.[11] The location of the boundary was determined not by joining fixed points together, but by reference to physical features of the beach: whether the area in question was usually dry (and thus private) or usually wet (and thus public).[12] As the word "usually" suggests, location of the public-private boundary is an act of estimation.[13] And because beaches experience continuous physical change, and because the law adjusts the boundary in response to change, it is impossible to know where the (estimated) boundary might be next week or next year.[14] Two parties' inability to know the precise extent of their relative rights to a single piece of land logically will lead to conflict where each party assigns high value to a different use of the property.[15]

9. *See generally* WALTER G. ROBILLARD, LANE J. BOUMAN & ROBERT C. SHELTON, CLARK ON SURVEYING AND BOUNDARIES (7th ed. 2013).

10. Beaches are coastal landforms composed of very small, rounded pieces of rock or shell. That the pieces are rounded is one of the keys to beach geology: the water-smoothed shape renders individual grains of beach sand unable to attach to one another. The freedom of the sand, in combination with gravity, water, and ocean energy in the form of tides, currents, wind, and storms, results in the formation of beaches: loosely packed formations that generally maintain shallow-sloping profiles.

> The most important characteristic of a beach is its dynamic nature; beaches are restless, ever-shifting groups of particles which respond with great sensitivity to small changes in the natural forces that are quite imperceptible to man. . . . A beach is a deposit of material which is in transit either along shore or off-and-on shore.

Willard N. Bascom, *Characteristics of Natural Beaches*, 1 COASTAL ENG'G PROC. 163, 163, 165 (1953).

11. *See* H. GALLIENNE LEMMON, PUBLIC RIGHTS IN THE SEASHORE 15 (1934).

12. It is safe to say that the courts, which created the common law of beachfront property, wrote rules as if it was not important to be able to clearly distinguish public from private parts of the beach. One scholar explained the location of the boundary—the high-water line—as the most landward extent of "that intermediate part most frequently washed and laid bare by the waves, a part that can most truly be said to be neither *terra firma*, dry land, nor *fundis maris*, sea bed." *Id.* at 11.

13. In its aforementioned decision in *Borax Consolidated, Ltd. v. City of Los Angeles*, the Supreme Court believed it was eliminating the uncertainty connected with locating beach boundaries by adopting the mean high-tide line as the definition of high-water line; the Court contended that the use of a scientific measurement (the average height of high tides over an 18.6 year period) would provide "requisite *certainty* in *fixing* the boundary of valuable tidelands." 296 U.S. 10, 27 (1935) (emphasis added). Locating the mean high-tide line on a particular beach involves finding the points on a beach where the elevation above sea level is equal to the average height of high tides. While this sounds precise, the truth is that elevations on beaches can change hour-to-hour and that measuring the average height of high tides is an exercise in estimation. *See* Josh Eagle, *Are Beach Boundaries Enforceable? Real-Time Locational Uncertainty and the Right to Exclude*, 93 WASH. L. REV. 1181, 1187–94 (2018).

14. *See* Eagle, *supra* note 13, at 1194–99.

15. As the boundary becomes more and more uncertain, the coowned beach begins to resemble a cotenancy, a commons, or perhaps an anticommons, in which neither owner can act without the cooperation of the other. Sometimes, anticommons can be undesirable (*e.g.*, when the situation prevents welfare-enhancing improvement of the property); from the perspective of the public owners of the lower beach, the counterdevelopment forces generated by anticommons status are beneficial insofar as they limit private development of the upper beach. On the costs and benefits of these various coownership scenarios, see Lee Anne Fennell, *Commons, Anticommons, Semicommons*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35 (Kenneth Ayotte & Henry E. Smith eds., 2011); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition*

In addition to the neighborly power differential and the uncertainty of entitlements, there is one other major source of tension that arises from splitting ownership of the beach in two. Strung together, beachfront tracts can form a property-based barrier between the people (save beachfront landowners) and the sea. This private ribbon of land, and its potential disruption of land-sea connectivity, is socially stressful because the sea, with its many ecosystem products and services,[16] is publicly owned and open to public use.[17] Since the beginning of human culture, people have used the oceans as places to gather food and other natural resources; as spiritual icons representing strength, mystery, bounty, danger, and persistence; and, perhaps most important in the Anglo-American tradition, as inter- and intranational highways for transporting goods and people in commerce.[18]

The privatization of the beachfront, with the resultant blockage of connectivity, is particularly likely to cause social (and legal) stress because beaches are what I call "natural ports": they are the only places along the oceanfront where a person can enter and exit the sea without first investing in a dock, pier, or similar structure. Thus, the net value of beaches as access points, and the cost of losing access, is higher than it would be for marshes or rocky shores.

Dating back to the medieval period, the tension created by privatizing beachfront land unsurprisingly has manifested in litigation.[19] Early English cases featured quarrels over both physical and conceptual boundaries.[20] The Abbott of Peterborough's case (1367), for example, was about line location: the dispute between the Abbott and the King concerned ownership of land that had slowly changed from usually wet to usually dry.[21] On the other hand, an unnamed 1468 decision focused not on underlying title, but on the contours of the parties'

from Marx to Markets, 111 HARV. L. REV. 621, 622 (1998). *See generally* Yun-chien Chang, *Tenancy in "Anticommons"? A Theoretical and Empirical Analysis of Co-Ownership*, 4 J. LEGAL ANALYSIS 515 (2012).

16. "An ecosystem service is defined as 'the flow of value to human societies as a result of the state and quantity of natural capital.'" Anne-Gaelle Ausseil, John Richardson Dymond, Miko U. F. Kirschbaum, Robbie M. Andrew & Roger L. Parfitt, *Assessment of Multiple Ecosystem Services in New Zealand at the Catchment Scale*, 43 ENV'T MODELLING & SOFTWARE 37, 37 (2013) (quoting PAVAN SUKHDEV ET AL., THE ECONOMICS OF ECOSYSTEMS AND BIODIVERSITY: MAINSTREAMING THE ECONOMICS OF NATURE: A SYNTHESIS OF THE APPROACH, CONCLUSIONS AND RECOMMENDATIONS OF TEEB 7 (2010)).

17. Oceans are, and always have been, intensively public in the eyes of the law. The legal root of public oceans, sometimes called "mare liberum" or freedom of the seas, is in an eponymous tract penned in the seventeenth century by Hugo Grotius. HUGO GROTIUS, MARE LIBERUM 1609-2009 IX (Robert Feenstra ed., 2009). Grotius was a prodigious legal scholar who also spent time, as a twenty-four-year-old, serving as the attorney general of Holland. *Hugo Grotius*, STAN. ENCYCLOPEDIA OF PHIL., https://plato.stanford.edu/entries/grotius/ (Jan. 8, 2021) [https://perma.cc/SW89-HFXF]. For a definition of "ecosystem service," see Ausseil et al., *supra* note 16, at 37.

18. *See generally* JOHN R. GILLIS, THE HUMAN SHORE: SEACOASTS IN HISTORY 158 (2012).

19. *See, e.g.*, 41 Edw. 3 (1367). For a full description of this case, consult Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENV'T. L.J. 305, 316–20 (2010) (The entire opinion is attached to the Sax article as an appendix.).

20. *See* Sax, *supra* note 19, at 311–20.

21. *See id.* at 316–20.

relative property rights.[22] In that case, a fisherman sought not a declaration of public title, but of a public right to build a net-drying rack on the otherwise private, upper part of the beach.[23]

In modern times, beach cases have become more and more common as the supply of beaches has dwindled and demand has exploded.[24] Some of these cases are, like the Abbott's case, about line location.[25] In one of the modern classics, *In re Application of Ashford*,[26] private landowners argued that the line should be located by reference to the elevation of the average high tide in the area; the State of Hawaii convinced the state supreme court that the line should be located higher on the beach, at the vegetation line (where freshwater-dependent plants become nonviable).[27] The bulk of modern cases, though, are about conceptual boundaries, more similar to the English net-drying case.[28] In *Matthews v. Bay Head Improvement Ass'n*,[29] for example, the question was whether the public had a right to use the otherwise-private, upper beach for the limited purposes of rest and relaxation.[30]

22. *Legal History: The Year Books*, B.U. SCH. OF L., https://www.bu.edu/phpbin/lawyearbooks/display.php?id=20025 (last visited Sept. 23, 2022) [https://perma.cc/7ADA-7XY9] (referencing 8 Edw. 4 (Mich.) (1468)).

23. The allegation in this case was not that the fisherman had unlawfully trespassed but that he had committed "trespass by digging." In order to secure his fish-drying rack, the fisherman had driven stakes into holes he dug into the sand. Although the report does not indicate the court's holding, the justices' discussion indicates that they likely ruled in favor of the landowner on the ground that his ownership rights included the right to prevent others from digging on his property. *See id.* The distinction between putting a temporary structure on the beach and digging a foundation for a more permanent structure exemplifies the possibility of fine and localized property-right contours; it also illustrates a general principle that beachfront landowners can have the right to prevent substantial interference with use of the upper beach, especially when the interference is by a private party and also commercial in nature. *See, e.g.*, Blundell v. Catterall, 5 B. & Ald. 268 (1821) (holding that private entrepreneurs could not locate unsightly Victorian era "bathing machines" on the beach); Mulry v. Norton, 3 N.E. 581 (N.Y. 1885) (relating to the maintenance of bathing houses for rental and the use of the beach by hotel guests).

24. Although an admittedly crude proxy, a Lexis search for cases ("use w/10 beach and sand") found 353 opinions issued between 1824 and 1976, as compared with 973 between 1977 and 2022. Recent cases include: Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010); Tomasi v. Twp. of Long Beach, 796 F. App'x 766 (3d Cir. 2020); Chmielewski v. City of St. Pete Beach, 890 F.3d 942 (11th Cir. 2018); Altamaha Riverkeeper v. U.S. Army Corps of Eng'rs, No. CV 418-251, 2020 U.S. Dist. LEXIS 180987 (S.D. Ga. Sept. 30, 2020); P.R. Land & Fruit, S.E. v. Municipio De Culebra, Civil No. 09-2280 (ADC), 2019 U.S. Dist. LEXIS 181053 (D. P.R. Oct. 17, 2019); Self v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria, 274 Cal. Rptr. 3d 255 (Cal. Ct. App. 2021); Public Risk Mgmt. of Fla. v. Munich Reinsurance Am., No. 8:18-cv-1449-T-35AEP, 2021 U.S. Dist. LEXIS 12364 (M.D. Fla. Jan. 21, 2021); MKOS Props., LLC v. Johnson, No. 1215, 2020 Md. App. LEXIS 1135 (Md. Ct. Spec. App. Nov. 23, 2020); New Jersey *ex rel.* Dep't of Env't Prot. v. 1 Howe St. Bay Head, LLC, 232 A.3d 441 (N.J. Super. Ct. App. Div. 2020); Ellis v. Town of E. Hampton, 2020 NYLJ LEXIS 1897 (N.Y. Sup. Ct. Dec. 21, 2020); Town of Nags Head v. Richardson, 817 S.E.2d 874 (N.C. Ct. App. 2018), *aff'd*, 828 S.E.2d 154 (N.C. 2019); Surfrider Found. v. Martins Beach 1, LLC, 221 Cal. Rptr. 3d 382 (Cal. Ct. App. 2017); Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. Ct. App. 2015).

25. *See, e.g.*, *In re* Application of Ashford, 440 P.2d 76 (Haw. 1968).

26. *Id.* at 77.

27. *Id.*

28. *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984).

29. *Id.*

30. *Id.* at 365.

In three earlier articles, I argued that courts nearly always frame inquiries into practical and conceptual beach-boundary disputes too narrowly.[31] Courts generally ignore a broad swath of property-law precedent that applies to all waterfront land, including beaches.[32] In addition, the cases almost never grapple with the complex ownership implications of each beach's geomorphological past.[33]

This Article takes a positive approach, outlining the analytic path courts ought to take in determining the extent of public and private rights in a disputed beach. A properly scoped assessment requires an inquiry into the legal life-history of the beach in question and entails answering the following questions in order. [34]

Based on the geological history of the beach, how far seaward does the private lot currently extend? It is possible that, in addition to the usually wet parts of the beach that the State has always owned, it has at some point in time also gained ownership to some usually dry parts of the beach.[35] These acquisitions are a product of the common-law rules governing relocation of the boundary after storms, currents, winds, or tides change the elevation of the beach.[36] If, for example, a storm rapidly added sand to a beach such that new land came into existence landward of the high-water line, that land would belong to the State.[37]

What access rights, if any, did the public hold in the beachfront tract when it was still sovereign property, that is, prior to the date of its patent?[38] Under the common law, sovereign ownership could take several different legal forms.[39] As a general matter, the State could own land in the form of an ordinary landowner.[40] Like a private landowner, the State would hold the standard Blackstonian rights to exclude and include, to use and enjoy, and to alienate (gift, trade, or sell) the property.[41] But for certain kinds of land, the law tailored sovereign property rights to protect important public interests. These were the kinds of interests that

31. Eagle, *supra* note 13, at 1207–08; *see also, e.g.*, Josh Eagle, *Who Owned the* Lucas *Lots? What "No Property" Looks Like on the Beach*, 53 REAL PROP., TR. & EST. L.J. 89 (2018); Eagle, *supra* note 5.

32. *See* Eagle, *supra* note 5, at 896.

33. *See* Eagle, *supra* note 13, at 1201; Eagle, *supra* note 31, at 98.

34. Biologists define "life-history" as "[t]ogether, the age-, size-, or stage-specific patterns of development, growth, maturation, reproduction, survival, and lifespan." Daniel Fabian & Thomas Flatt, *Life History Evolution*, 3 NATURE EDUC. KNOWLEDGE 24, 24 (2012).

35. As described below, states gain title to upper beach areas when they are formed by rapid events or artificial forces. *See infra* Subsection IV.A.1.

36. *See infra* Subsection IV.A.1.

37. *See infra* Subsection IV.A.1.

38. *See infra* Section III.A.

39. *See infra* Section III.A.

40. *See infra* Section III.A.

41. Blackstone wrote:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature . . . but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134 (1765).

transcended the importance of any one sovereign's autonomy: for example, the public's interest in a functional and affordable transport network. A king or legislature in debt might find it appealing to sell off roads, rivers, or the ocean. The common law put measures in place, including the public trust doctrine, that were meant to make alienation of those properties difficult and, in some cases, impossible.[42] These measures gave the people rights in sovereign-owned property that were distinct from those of the sovereign herself. An exception to the general principle of sovereignty, the people could use of these special rights in order to prevent the king, queen, or State from interfering with public use.[43]

If the public held rights in the beachfront tract when it was under sovereign ownership, did the patent eliminate those rights? If public rights existed prior to the patent, there are three possibilities: the patent did not affect those rights at all, the patent eliminated those rights altogether, or the patent modified—expanded or reduced—them. Determining which of these outcomes occurred is a matter necessitating judicial interpretation of the patent, asking, "what did the sovereign clearly intend to transfer?"[44] The common law has long included rules of construction for all patents as well as special, more stringent, rules for interpreting patents that might affect public rights in rivers and oceans.[45]

If public rights survived the patent, has legislation or a court decision attempted to subsequently eliminate them? Suppose that a court finds, following a quiet-title action, that the beachfront landowner owns the beach in fee and free from any public encumbrances. The issue would be whether that judicial decision was effective in terminating any previously extant public rights. The rules of construction described above were intended to ensure, among other things, that the sovereign (the Crown in England or a state legislature in America) did not lose property with which it did not intend to part.[46] In other words, the common law conceived of disposal of sovereign property as something that was clearly beyond the power of the courts, an intrusion on the power of either the Crown or the legislative branch.[47] With regard to special kinds of state-owned property, like submerged and tidal lands, legislatures have always had disposal power, but—as noted above—rules such as those found in the public trust doctrine narrowly circumscribe that power.[48]

42. *See infra* Subsection III.A.1. The public trust doctrine is a set of rules regulating sovereign use of certain real property, namely submerged and tidal lands. *See generally* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

43. *See Ill. Cent. R.R. Co.*, 146 U.S. at 433 (explaining that the Attorney General of Illinois, "in the name of its people," sued to disgorge submerged land that a possibly corrupt state legislature had attempted to convey to the railroad). For an explanation of the allegations of corruption, see JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO 8–41 (2021).

44. *See infra* Subsection III.B.1.

45. *See infra* Subsection III.B.1.

46. *See infra* Subsection III.B.1.

47. Put differently, the public trust doctrine gives courts the power to ratchet down, but not up, the amount of land or land rights transferred in a patent. Every rule within the public trust doctrine can be viewed as an attempt to ensure that each square foot of land, or micron of right, within a purported sovereign transfer could be traced to a clear and express manifestation of sovereign intent. *See* Sax, *supra* note 19, at 311–13.

48. *See infra* Section III.B.

If public rights did not exist after the patent, were they later established by public use (adverse or otherwise), State exercise of eminent domain power, or formal agreement between the landowner and the State? Decisions in most modern beach cases presume that no public rights existed after the patent, that is, that the beachfront lot was originally cast as a piece of property using the same mold used for an ordinary piece of property (*e.g.*, a landlocked parcel surrounded by other private holdings).[49] It is possible that this is what the sovereign intended in the patent, but it is not something that courts should presume. If, while adhering to the rules of construction described above, a court still found that a patent eliminated public rights, it is possible that some subsequent action or set of actions reestablished those rights.[50] In many states, for example, the law recognizes the possibility that prolonged and adverse public use of a private beachfront tract might result in the creation of an implied public prescriptive easement.[51]

Part II of this Article introduces modern beach access disputes and includes a taxonomy of cases. The purposes of this Part are to give a sense of the kinds of cases for which the application of a legal life-history approach would be useful. In addition, the cases selected as examples illustrate the ways in which the courts have struggled to apply general rules of property law to the special case of beaches.

Part III focuses on public, private, and sovereign rights in a piece of beachfront land before and just after the government has issued the patent. The key questions, as noted above, are whether public-access rights existed prior to the patent and, if so, whether the patent eliminated them.[52] Answering these questions is crucial to resolving beach disputes because it sets the fundamental parameters of the competing property interests, public and private. This Part is meant to aid courts and lawyers working through the process of understanding the initial mix of rights.

Part IV lays out a framework for assessing the impact of a variety of post-patent events on the initial rights mix. As described in Part II, courts (or, really,

49. *See* Geoffrey Samuel, *On the Beach: What Can Beaches Reveal About Legal Reasoning and Categorization?*, 12 J. COMP. L. 187, 196 (2017). As Professor Adam Mossoff writes:

> [A] "property right" is a broad concept that encompasses a variety of different types of legal rights that secure exclusive use in a valued asset or resource, such as a fee simple and land, a right to spectrum, a right in oil, a riparian right, a right to corporate stock, a right of way, and a right to an invention, among many others. Each of these species of rights within the broader category has further specific doctrines that apply in the myriad circumstances in which these rights are utilized by the right holders or violated by third parties, such as the unauthorized diversion of water from a farmer's stream. When comparing different types of rights or doctrines subsumed within a broader right, a proper comparison of the fundamental policy presumptions that unite these rights or doctrines within the broader category can be illuminating. *However, mistaken conceptual comparisons merely obfuscate and ultimately frustrate this same analysis.*

Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687, 1697 (2013) (emphasis added) (citations omitted). The mistake in beach access cases is to analogize beachfront property, with all of its special legal and physical properties, to ordinary, land-locked real estate. Based on Professor Mossoff's descriptions elsewhere in the paper, the uncertain boundaries of beachfront land seem more similar to those that conceptually circumscribe patents than lose that surround ordinary parcels of land. *See, e.g.*, *id.* at 1694–95.

50. *See infra* Part IV.

51. *See infra* Part II.

52. It is also possible that the patent created public rights where none previously existed. *See infra* Section III.B.

the attorneys who frame the cases for the courts) ordinarily put most of the attention in beach litigation on events of the relatively recent past. This Part explains the various ways in which postpatent actions—natural forces, the behavior of the landowner and the public, and government decisions—might alter the property rights in beachfront land.

Part V briefly concludes.

II. A TAXONOMY OF MODERN BEACH CONFLICT

A. Drivers of Beach Conflict

The special geological, geographical, and legal features of beaches, as noted above, lead to inevitable tension between public and private property rights.[53] This tension blossoms into conflict at times when and in places where a beachfront owner and the public respectively assign high value to different and incompatible uses of the beach.[54] In modern cases, the public typically seeks to use beachfront land for recreation and, more precisely, for connectivity with the ocean's water and waves.[55] Conflicts arise when landowners face crowding—and the associated visual, aural, and psychological impacts—that exceeds their expectations.[56]

It is no accident that the frequency of beach conflict has increased over the past fifty years.[57] During that time, public demand for beach recreation opportunities has increased, the supply of recreation opportunities has decreased, and beachfront property has become more and more expensive.[58] While the first two factors have led to greater congestion, the third has raised landowners' expectations of exclusivity.[59]

Demand for beach recreation is nothing new; for millennia, people have used beaches to relax, to collect shells, and to play.[60] In the United States, demand began to grow in earnest around 1900 when, for the first time, beach recreation opportunities became an industrial commodity—a product that could be actively marketed and sold for direct enjoyment (by hotels, railroads, and beach-

53. *See supra* Part I.

54. Madeline Reed, *Seawalls and the Public Trust: Navigating the Tension Between Private Property and Public Beach Use in the Face of Shoreline Erosion*, 20 FORDHAM ENV'T L. REV. 305, 305–06 (2017).

55. *See, e.g.*, Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 127 (Tex. App. 1986); Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 358 (N.J. 1984).

56. Thaddeus Mast, Eric Staats & Melissa Nelson Gabriel, *Who Owns Florida's Beaches? Private Landowner Rights Can Clash with Public Beach Access*, NEWS-PRESS, https://www.news-press.com/story/news/2017/11/19/who-owns-floridas-beaches-private-landowner-rights-can-clash-public-beach-access/878660001/ (Nov. 19, 2017, 10:00 AM) [https://perma.cc/2QNE-U438].

57. *See supra* text accompanying note 24.

58. Matthew Spiegel & Susie Allen, *Study: Rising Seas Aren't Causing Coastal Property Values to Decline*, YALE INSIGHTS (Apr. 20, 2021), https://insights.som.yale.edu/insights/study-rising-seas-arent-causing-coastal-property-values-to-decline [https://perma.cc/652B-DPN7].

59. *See What is Waterfront Worth?*, ZILLOW RSCH. (Sept. 11, 2014), https://www.zillow.com/research/what-is-waterfront-worth-7540/ [https://perma.cc/F8JX-K38Q].

60. *See infra* Subsection IV.A.3.

town businesses)—and for indirect use as a marker of "coolness" (by Hollywood producers and entrepreneurs hawking surf-and-skate-themed clothing and shoes).[61]

In Los Angeles County, the birthplace of beaches as big-business and cultural icon, the number of people who visited county beaches grew from almost none in 1900 to more than 50 million annually today.[62] To put this last number in perspective, in 2017 there were about 30 million visits to the five most-visited National Parks—Great Smoky Mountain, Grand Canyon, Yosemite, Rocky Mountain, and Yellowstone—combined.[63]

The supply of beach recreation opportunities in the United States has declined over the past century due to increased privatization of the coast and to rising sea levels.[64] Privatization especially reduces access when beachfront land is developed; it is the financial investment in homes and hotels that spurs the landowner's craving for exclusivity.[65] The most extreme examples of how development can reduce supply are beachfront gated communities, which create greater distance between public roads and the ocean and bring private police into the mix.[66]

Climate change and sea-level rise also reduce beach recreation opportunities by shrinking the acreage of beach available for recreational use: higher water levels inundate the lowest-lying parts of a beach, and they are also tied to higher erosion rates.[67] A global study of erosion rates published in 2018 in *Nature*

61. James R. Houston gives a sense of the magnitude of the knock-on value of beach recreation opportunities:

> Beaches make a large contribution to America's economy. The California Department of Boating and Waterways and Coastal Conservancy (2002) estimated tourists made 659 million day visits to California beaches in 2001 and spent $61 billion. This is 750 million day visits and $93 billion in 2016 dollars when the increase in California's population from 2001-2016 is included along with inflation (Statistica 2016; U.S. Department of Labor 2017d). Multiplying the contribution that California beach visitors make to the national economy ($93 billion) by the ratio of visitors to national beaches (2.3 billion) and to California beaches (750 million) yields an estimate that visitors to all U.S. beaches made $285 billion in direct spending in 2017. This is 28.8% of total tourism direct spending of $990 billion (U.S. Travel Association, 2017c).

James R. Houston, *The Economic Value of America's Beaches—A 2018 Update*, 86 SHORE & BEACH 3, 6 (2018). By the way, the *Urban Dictionary* defines "coolness" as "[o]ne's attractiveness in society as determined by their amount of win." *Coolness*, URB. DICTIONARY (Feb. 21, 2010), https://www.urbandictionary.com/define.php?term=Coolness [https://perma.cc/K3XP-BAHY].

62. Prior to 1900, beachfront land in Los Angeles was used for "cattle and sheep grazing on large rancho tracts" and industrial-scale salt works. Ronald A. Davidson, *Before "Surfurbia": The Development of South Bay Beach Cities Through the 1930s*, 66 Y.B. ASS'N PAC. COAST GEOGRAPHERS 80, 83 (2004); *see Los Angeles County Beach History*, CNTY. OF LOS ANGELES 1, https://file.lacounty.gov/SDSInter/dbh/docs/149602_BeachHistory100708.pdf (last visited Sept. 23, 2022) [https://perma.cc/N5L3-W64Y].

63. *See Annual Visitation Report by Years: 2011 to 2021*, NAT'L PARK SERV., https://irma.nps.gov/STATS/SSRSReports/National%20Reports/Annual%20Visitation%20By%20Park%20(1979%20-%20Last%20Calendar%20Year) (last visited Sept. 23, 2022) [https://perma.cc/G2BB-KEZ3].

64. Chi-Ok Oh, Anthony W. Dixon, James W. Mjelde & Jason Draper, *Valuing Visitors' Economic Benefits of Public Beach Access Points*, 51 OCEAN & COASTAL MGMT. 847, 847 (2008).

65. *See* Achim Schlüter, Maarten Bavinck, Maria Hadjimichael, Stefan Partelow, Alicia Said & Irmak Ertör, *Broadening the Perspective on Ocean Privatizations: An Interdisciplinary Social Science Enquiry*, 25 ECOLOGY & SOC'Y, no. 3, 2020, at 1, 8.

66. *See* Mast et al., *supra* note 56.

67. *See* Arjen Luijendijk, Gerben Hagenaars, Roshanka Ranasinghe, Fedor Baart, Gennadii Donchyts & Stefan Aarninkhof, *The State of the World's Beaches*, SCI. REPS., Apr. 27, 2018, at 1.

Scientific Reports indicates that erosion hotspots coincide with some of the most popular beach destinations in the United States, including Southern California, Texas's Gulf coast, and most of Florida.[68]

The greater crowding produced by increased demand and smaller beaches leads to conflict when crowds interfere with landowners' expectations.[69] On average, a waterfront home is twice as expensive as a landlocked residence.[70] Beachfront homes are the most expensive waterfront homes; led by Laguna Beach, Malibu, and Hermosa Beach, California, the top-ten most-expensive places to buy a waterfront home are all saltwater locations.[71] The beachfront premium reflects a robust affinity for visual and physical access to the oceans.[72] When a buyer pays extra for access, public use that diminishes the perceived quality of that access (*e.g.*, spoiling the view or denting the sense of exclusivity), feels like a loss to the landowner; depending on the imputed cost of that losing feeling, the beachfront owner may be motivated to sue.[73]

B. Cataloguing Cases by Type of Public Rights at Issue

Modern litigation generally concerns two kinds of public rights. In a *whole-beach* case, the fight is over the public's right to use the upper part of the beach.[74] When the state-owned part of the beach is under water (at high tide in most states), one has to use the upper, usually dry part of the beach to get to the water. Moreover, the upper beach is also an accessory to use of the state-owned lower beach; to the person who wants to enter the ocean in order to recreate (surf, swim, or hop waves), the value of being able to enter the ocean is substantially dependent on being able to rest from time to time on the sand.[75] In the second type of

68. *See id.*

69. *See* Mast et al., *supra* note 56.

70. *What is Waterfront Worth?*, *supra* note 59.

71. *See id.* Prices do not seem to have been affected by reports of sea-level rise. *See* Justin Murfin & Matthew Spiegel, *Is the Risk of Sea Level Rise Capitalized in Residential Real Estate?*, 33 REV. FIN. STUD. 1217, 1251 (2020).

72. *See* Stephen J. Conroy & Jennifer L. Milosch, *An Estimation of the Coastal Premium for Residential Housing Prices in San Diego County*, 42 J. REAL EST. FIN. & ECON. 211, 223 (2011); Stuart E. Hamilton & Ashton Morgan, *Integrating Lidar, GIS and Hedonic Price Modeling to Measure Amenity Values in Urban Beach Residential Property Markets*, 34 COMPUTS., ENV'T & URB. SYS. 133, 133 (2010); Christopher Major & Kenneth M. Lusht, *Beach Proximity and the Distribution of Property Values in Shore Communities*, 72 APPRAISAL J. 333, 333 (2004); Jeffrey J. Pompe & James R. Rinehart, *Beach Quality and the Enhancement of Recreational Property Values*, 27 J. LEISURE RSCH. 143, 143 (1995).

73. The costs are imputed because landowners likely place different values (or costs) on the presence of people on the beach. Some landowners may, for example, seek solitude, while others may enjoy a lively scene.

74. *See, e.g.*, Crystal Dunes Owners Ass'n v. City of Destin, 476 F. App'x 180, 182 (11th Cir. 2012). Whole beach cases are sometimes also called "lateral access" cases because whole beach rights make it easier for the public to walk laterally along the ocean. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 829 (1987).

75. As the Supreme Court of New Jersey wrote in *Matthews v. Bay Head Improvement Ass'n*:

> Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. . . . The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean.

471 A.2d 355, 365 (N.J. 1984) (citations omitted).

access case, the *road-to-ocean* case, the issue is whether the public holds a right-of-way allowing people to cross beachfront property to get to the ocean from a nearby public road.[76]

In both types of cases, it would be possible for the state to use its eminent domain power to acquire easements over privately owned beachfront land. The federal and state constitutions provide that states can "take" private land for public use, so long as they pay the owner just compensation.[77] Even under the most stringent definition of public use found within Takings Clause jurisprudence,[78] both forms of access would qualify; thus, the only issue would be the fair market value of the easement.[79]

The real question then, in either a whole-beach or a road-to-ocean case, is whether the public is entitled to the easement it wants *without having to buy it*.[80] Another way to put this is: does the public already hold an easement or easement-like interest due to one or more events in the legal life-history of the beach at issue? If so, then there would be no reason to buy one.

1. Whole-Beach Cases

In determining whether the public has a right to use the upper beach, modern courts have employed two different analytical frameworks, each of which is based on established principles of property law. The first framework focuses on the public-use history of the beach at issue in order to determine whether an easement exists due to prescription, implied dedication, or customary law.[81] The second framework connects the question of public rights to the State's ownership of the usually wet part of the beach and, specifically, to the public trust doctrine, which spells out the rules that govern State ownership.[82]

a. Public Rights Based on Historical Public Use

Courts can use the fact of historical public use in two distinct ways. In applying the theory of *prescriptive rights*, courts examine whether historical public use has created public rights; the question is whether evidence of prior, adverse

76. *See, e.g.*, Pappas v. State Coastal Conservancy, 288 Cal. Rptr. 3d 602, 606 (Cal. Ct. App. 2021); Surfrider Found. v. Martins Beach 1, LLC, 221 Cal. Rptr. 3d 382, 388–89 (Cal. Ct. App. 2017). Road-to-beach cases are sometimes referred to as "perpendicular access" cases. *See* Nat'l Ass'n of Home Builders v. N.J. Dep't of Env't Prot., 64 F. Supp. 2d 354, 359 (D.N.J. 1999).

77. U.S. CONST. amend. V; *see, e.g.*, S.C. CONST. art. I, § 13; N.Y. CONST. art. I, § 7. *See generally* Steven G. Calabresi, Sarah E. Agudo & Katherine L. Dore, *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685 (2015).

78. For an example of a stringent definition, see Justice Thomas's dissent in *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (Thomas, J., dissenting).

79. *See generally* Wanling Su, *What Is Just Compensation?*, 105 VA. L. REV. 1483, 1483 (2019).

80. There is a separate question of whether landowners might be entitled to charge beachgoers a reasonable fee to cover expenses related to use of the beach, such as lifeguarding, trash collection, etc. *See infra* note 169 and accompanying text.

81. *See infra* notes 83–86 and accompanying text.

82. *See infra* notes 139–41 and accompanying text.

public use satisfies the elements of an implied public prescriptive easement.[83] On the other hand, in applying theories of *implied dedication* or *customary use*, the question is whether historical public use should be considered as evidence of another act.[84] In *implied dedication*, the act would be a landowner's informal donation of an easement to the State.[85] In a *customary-use framework*, the act would be an agreement between the landowner and members of the public that was consummated during the ancient period known in the law of custom as time "immemorial."[86]

i. Prescription and Dedication

The court's opinion in the Texas case of *Moody v. White*[87] provides a good illustration of how prescriptive rights and implied dedication can operate to create implied public easements that allow public access to otherwise-private areas of the upper beach. At trial in *Moody*, the Attorney General of Texas had argued the existence of a public easement over a stretch of upper beach.[88] The Moodys, who held title to the beachfront lot, built part of their motel just seaward of the vegetation line, that is, on the upper beach.[89] The attorney general's office presented evidence to the jury

> consist[ing] of testimony from many people from all walks of life who were familiar with the region: geologists and oceanographers who had studied the island for many years, long-time residents who had watched the people of Texas use the beach for over forty years, commercial fishermen who had relied on the beach and the Gulf as their source of income, law enforcement officials who patrolled the beach area, ferryboat operators who had guided the boats which carried the public to and from the island, public officials who had made policy that controlled the beaches. All of these witnesses presented their recollections of the use of the beach. In particular, they talked about the use of the beach in the area now claimed by the appellants as their property.[90]

83. *See* 4 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 34.10[4][e] (LexisNexis Matthew Bender 2021) ("American jurisdictions generally allow for the public to acquire an easement by prescription."). "To establish [an easement by prescription], the plaintiff must prove 'by a balance of probabilities twenty years' adverse, continuous, uninterrupted use of the land . . . [claimed] in such a manner as to give notice to the record owner that an adverse claim was being made to it.'" Mastin v. Prescott, 444 A.2d 556, 558 (N.H. 1982) (quoting Arnold v. Williams, 430 A.2d 155, 156 (1981)), *cited in* Op. of the Justs. (Public Use of Coastal Beaches), 649 A.2d 604, 610 (N.H. 1994).

84. *See* Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 127–29 (Tex. App. 1986).

85. In order to prove a public easement by implied dedication, the public (or the State on its behalf) must establish that:

> (1) the landowner induced the belief that he intended to dedicate the area in question to public use; (2) the landowner was competent to do so, i.e., had fee simple title; (3) the public relied on the acts of the landowner and will be served by the dedication; and, (4) there was an offer and acceptance of the dedication.

Id. at 128.

86. *See infra* note 121 and accompanying text.

87. 593 S.W.2d 372 (Tex. Civ. App. 1979).

88. *Id.* at 374.

89. *Id.*

90. *Id.*

The *Moody* court found these facts sufficient to support an easement based on either prescription or dedication.[91] As the court explained, a person seeking to gain an easement by prescription in Texas must prove the elements of adverse possession, that is, that her use of that land was "open, notorious, hostile, adverse, uninterrupted, exclusive, and continuous for a period of more than 10 years."[92] The theory of dedication is the direct opposite of prescription: the claim is that an owner of the beachfront lot not only approved of public use, but affirmatively wished to create a permanent public right in the beach.[93] The elements of dedication, as laid out in *Moody*, are:

> The person who makes the dedication must have the ability to do so, i.e., the landowner must have fee simple title before he can dedicate his property. Secondly, there must be a public purpose served by the dedication. Third, the person must make either an express or implied offer. And fourth, there must be an acceptance of that offer.[94]

While it might seem odd that the same facts were held to support two opposite claims (both adverse and permissive use), the functional overlap in the two claims is a product of the unique physical features of beaches. Ordinarily, for example, a landowner wishing to prevent a prescriptive easement claim from ripening would be able to erect a gate or a fence in order to interrupt adverse use.[95] (Recall that continuous use is an element of a prescriptive easement.) State and local laws, however, generally prohibit the use of gates and fences (as well as freestanding signs) on the upper beach; not only might such structures prove dangerous in heavy winds, but they are aesthetically inconsistent with beach views.[96] The owner of the beachfront lot cannot take any visually obvious steps

91. *Id.* at 379.

92. *Id.* at 377. Courts usually do not require a plaintiff seeking an easement by prescription to prove exclusive use. In the context of adverse possession, the element of exclusivity is included to support the necessary finding that the adverse possessor has treated the land as her own (and thus exercised her right to exclude, when appropriate). In the context of an easement, courts have obviated this element on the ground that easements can be fully functional as property interests even when used by both the owner and the claimant. *See generally id.*

93. *Id.* at 378.

94. *Id.*

95. *See* WOLF, *supra* note 83, § 34.10[3][b] and the cases cited therein.

96. Moreover, the closer one installs fences or structures to the ocean, the more likely such installations are to end up, due to erosion, on trust property (as the property line would move landward with erosion). Structures on trust property are public nuisances:

> An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance; and an unauthorized encroachment upon the soil itself is known in law as a purpresture. Purpresture is also a particular kind of nuisance. The word is derived from the French word *pourpris*, which signifies an inclosure: "That is," says Coke, "when one encroacheth and makes that serviceable to himself which belongs to many. And because it is properly, when there is an inclosure made of any part of the king's demesne, or of a highway, or a common street, or public water, or such like things."

People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1155 (Cal. 1884) (quoting 2 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 244 (1642)). For examples of state statutes preventing the installation of structures on the "active beach" (between the ocean and the dunes), see MARK RANDALL & HENDRIK DEBOER, CONN. OFF. OF LEGIS. RSCH., COASTLINE CONSTRUCTION RESTRICTIONS, 2012-R-0046, (Feb. 2, 2012), https://www.cga.ct.gov/2012/rpt/2012-R-0046.htm [https://perma.cc/67TM-DT6E].

to prevent public use; the absence of action could be interpreted as an offer of public use (one of the four elements of dedication).[97]

Findings of prescription and dedication both reflect a conclusion that preventing the public from using the upper beach had no or little value to the landowner (or her predecessor-in-interest) at some point in the recent past. The inquiry into value, which is also an inquiry into fairness, is given life by the elements of prescription and dedication. In a prescription case, the questions asked by the elements are: Did the landowner have the opportunity to recognize that the public was using her land? Did she have time to respond to the problem? Did she care enough to take steps to try stop the use?[98]

Similarly, in a dedication case, the elements are meant to establish that recognition of the easement is fair to the landowner.[99] In a dedication, the story is that the landowner *wants* to part with the easement, either because it costs her nothing to do that or because the benefits of dedicating exceed the costs.[100] The landowner might see the presence of people at the beach as something that adds to, rather than detracts from, its aesthetic qualities;[101] or, the landowner might want the ability to access the beach in other places and, thus, dedicate in hope of reciprocity.[102]

ii. Customary Law

In prescription and dedication claims, the facts of historical public use are used to support a finding that a public easement has sprung into existence at some point in the remembered past.[103] In a claim of easement-by-custom, on the other hand, these same facts are used to prove that the easement has existed since a time predating memory and records.[104] The idea is that the public use would not have been tolerated by past generations of beachfront owners and society at large if the now-long-forgotten agreement had not been reached.[105]

97. As the Supreme Court of Florida said:

> The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public.

City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974).

98. These questions are simply different ways of asking: was the public use open and notorious (obvious and visible), long-term (for the statutory period), and continuous (not interrupted)?

99. *Cf., e.g.*, Moody v. White, 593 S.W.2d 372, 378–79 (Tex. Civ. App. 1979).

100. *See, e.g.*, *id.* at 378 ("Dedication by implication presumes an intent on the part of the landowner to give his property to the public.").

101. It is not hard to imagine that many beachfront owners enjoy social interaction with beachgoers (including their neighbors) as well as the sights of recreation: surfing, playing, volleyball, etc.

102. Without access to the dry sand in front of other beachfront properties, the beachfront landowner would not be able to leave her patch of dry sand at high tide!

103. *See, e.g.*, *Moody*, 593 S.W.2d at 374–78.

104. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 677 (Or. 1969) ("[T]he first requirement of a custom, to be recognized as law, is that it must be ancient.").

105. *See generally id.*

The best-known application of custom to beaches can be found in the Oregon Supreme Court's 1969 decision in the case of *State ex rel. Thornton v. Hay*.[106] In that case, the Hays, like the Moodys, were the owners of a beachfront lot which was home to a "tourist facility."[107] In order to expand their business space, the Hays sought to build a fence around the area defined by extending the parcel's shore-perpendicular lot lines to the surveyed mean high-tide line.[108]

The Attorney General of Oregon, Robert Y. Thornton, argued at trial that the facts of historical public use of the beach in question were sufficient to satisfy the elements of a public prescriptive easement.[109] In the alternative, he argued that the State had the authority to use zoning laws to prevent the construction of improvements in the area between the vegetation line and the Pacific Ocean.[110]

The trial court found in favor of the State on the prescription claim, but on appeal the Oregon Supreme Court opted to rest the establishment of the public easement on the doctrine of customary use, or custom.[111] The court listed the elements of easement as they appeared in Blackstone's *Commentaries*:

> Paraphrasing Blackstone, the first requirement of a custom, to be recognized as law, is that it must be ancient. It must have been used so long "that the memory of man runneth not to the contrary."
>
> ***
>
> The second requirement is that the right be exercised without interruption. A customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right.
>
> ***
>
> Blackstone's third requirement, that the customary use be peaceable and free from dispute, is satisfied by the evidence which related to the second requirement.
>
> The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community. There is evidence in the record that when inappropriate uses have been detected, municipal police officers have intervened to preserve order.
>
> The fifth requirement, certainty, is satisfied by the visible boundaries of the dry-sand area and by the character of the land, which limits the use thereof to recreational uses connected with the foreshore.

106. *See generally id.*

107. *Id.* at 672.

108. *Id.* at 671.

109. *Id.*

110. *Id.* at 672. The Oregon statute provided, "[u]nless a permit therefor is granted . . . , no person shall make an improvement on any property that is within the ocean shore." OR. REV. STAT. § 390.640(1) (1967). The statute defines "ocean shore" as "the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, whichever is farther inland." OR. REV. STAT. § 390.605(2) (1999).

111. *Thornton*, 462 P.2d at 672, 676–78.

> The sixth requirement is that a custom must be obligatory; that is, in the case at bar, not left to the option of each landowner whether or not he will recognize the public's right to go upon the dry-sand area for recreational purposes.
>
> ***
>
> Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law.[112]

From the court's perspective, the State's proof had satisfied each of these six elements.[113] The court viewed custom as a superior tool for establishing public easements because it was more efficient: "[s]trictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region."[114]

The court went on to address the argument, presumably made by the landowners, that the use of customary law in the United States was improper.[115] The basis for this argument, according to the court, "is that because of the relative brevity of our political history it is inappropriate to rely upon an English doctrine that requires greater antiquity than a newly-settled land can muster."[116] The court's view was that the relative youth of the United States

> does not . . . militate against the validity of a custom when the custom does in fact exist. If antiquity were the sole test of validity of a custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry-sand area as public land.[117]

As scholars, most notably the late Professor David J. Bederman, have pointed out, the Oregon court was not correct in asserting that its use of custom was similar to the English version of the doctrine.[118] The court likely sought to connect its ruling to English legal tradition in order to avoid the perception that it was creating a new and radical basis for decision.[119] A complete reading of the English version, however, reveals that the use of the doctrine of custom in the United States was not at all related to its use in England.

112. *Id.* at 677.

113. *Id.*

114. *Id.* at 676.

115. The court also addressed and rejected the argument that Oregon courts ought not to use custom due to the lack of precedent for it in Oregon law. *Id.* at 677.

116. *Id.*

117. *Id.* at 677–78.

118. Professor Bederman described the court's use of custom as imbued with "an extraordinary streak of judicial activism." David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1417 (1996). Bederman further stated the following:

> What has escaped much scholarly attention about the Thornton decision was not only that it represented a fundamental departure from earlier models of statutory and common law methods of applying custom, but also how it radically transformed the doctrine of localized community practices into a surrogate for the common law of property itself.

Id. at 1421.

119. *Thornton*, 462 P.2d at 677. This would be why the court was careful not to deviate from Blackstone: "[t]he custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites." *Id.*

English courts developed the theory of custom in the thirteenth century to deal with the fact that many land-use agreements had come into existence during an earlier period that had no written records,[120] a period that Blackstone famously called "immemorial."[121] In English common law, the specific date on which time immemorial ended was July 6, 1189, the date of the investiture of King Richard I.[122] To determine whether an immemorial-era agreement (what Blackstone called "original institution and authority") existed, English courts asked whether post-1189 behavior conformed to the terms of the alleged pre-1189 agreement.[123]

Put differently, in order for a custom to arise, it must be true that the affected land was owned by a private party during a period for which no records exist.[124] This condition does not exist in the United States where records exist regarding the initial transfer of land to a private party (the patent) and memorializing every transaction since that time.[125]

Some state courts have taken a different route than Oregon's, creating an admittedly novel form of custom, one suited both to America's relatively short history and to the unique features of beachfront property.[126] In what might be called American customary use, courts sidestep the aforementioned, problematic proof issues related to adversity and implied dedication by implying easements from the simple fact of exceptionally long public use.[127]

120. In the third book of Blackstone's *Commentaries*, for example, he refers to "an agreement (proved by immemorial custom)." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1766). Such agreements would have been products of negotiations between a lord and the community of peasants that farmed the manor. Whether peasants had greater or lesser leverage in those negotiations depended upon, among other things, the supply of peasant labor. Land use patterns in medieval villages "relate to both the historical complexity of class formation and the strength of peasant communities *vis-à-vis* the powers of lordship." Tom Saunders, *Class, Space and 'Feudal' Identities in Early Medieval England*, *in* SOCIAL IDENTITY IN EARLY MEDIEVAL BRITAIN: STUDIES IN THE EARLY HISTORY OF BRITAIN 223 (William O. Frazer & Andrew Tyrell eds., 2000); *see* Kathleen Troup, *Book Reviews: Great Britain and Ireland*, 50 ECON. HIST. REV. 833, 833 (1997) (reviewing CARENZA LEWIS, PATRICK MITCHELL-FOX & CHRISTOPHER DYER, VILLAGE, HAMLET AND FIELD: CHANGING MEDIEVAL SETTLEMENTS IN CENTRAL ENGLAND (1997)) ("[T]he degree of dominance by a lord over his or her peasants could determine the ways in which that lord influenced settlement and farming patterns."). *See generally* Susan Kilby, *Mapping Peasant Discontent: Trespassing on Manorial Land in Fourteenth-Century Walsham-le-Willows*, 36 LANDSCAPE HIST. 69 (2015); David Routt, *The Late Medieval Countryside: England's Rural Economy and Society, 1275–1500*, 11 HIST. COMPASS 474 (2013).

121. The word "immemorial," usually attached to the word "usage," appears twenty-five times in the *Commentaries*. *See generally* BLACKSTONE, *supra* note 120.

122. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 31 (1765).

123. 1 BLACKSTONE, *supra* note 41, at 64 ("I therefore style these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power and the force of laws, by long and immemorial usage and by their universal reception throughout the kingdom.").

124. *See supra* notes 85–86 and accompanying text.

125. There may be some exceptions to this. For example, in South Carolina, many records were destroyed during the Civil War. Bryan F. McKown & Michael E. Stauffer, *Destroyed County Records in South Carolina, 1785–1872*, 97 S.C. HIST. MAG. 149, 154–55 (1996).

126. *See, e.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974).

127. *See id.*

The Supreme Court of Florida's 1974 decision in the case of *City of Daytona Beach v. Tona-Rama, Inc.*[128] illustrates application of the American customary use doctrine. In its opinion, the court first notes the fact that the use of doctrines like prescription and dedication do not necessarily fit beaches, which are "of no use for farming, grazing, timber production, or residency" and thus "require separate consideration from other lands with respect to the elements and consequences of title."[129] The court cites to a treatise for the proposition that "there can be no usage in this country of an immemorial character,"[130] but goes on to state that: "[i]f the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner."[131]

In order to make its expansion of custom less painful for beachfront landowners, the majority is careful to describe the result produced by the successful application of American custom as something less than an easement: "[it] does not create any interest in the land itself."[132] The court does not give the public's right a name, but instead describes some of its features: the owner cannot interfere with public use, but can make use of the area consistent with that use; the government can regulate the public's use of the area; and the owner cannot unilaterally revoke the public's right of use, but the public can abandon it (presumably by ceasing to take advantage of it for some period of time).[133]

Perhaps most illuminating, the court analogizes the landowner's rights in the beach to "rights of a part-owner of a land-locked nonnavigable lake."[134] Under Florida law, the owner of land along the shore of such a lake has a right to use the entire surface of the lake.[135] She shares this right with the other owners and, as in a cotenancy, cannot exercise it in a way that unreasonably interferes with the ability of other shoreland owners to similarly use the entire surface.[136] In the beach context, the landowner would be a cotenant with the beneficial owners of the lower beach, that is the public.

In North Carolina, both courts and the legislature have recognized that American customary use applies to its beaches. In *Nies v. Town of Emerald Isle*,[137] the North Carolina Court of Appeals explained:

> We acknowledge both the long-standing customary right of access of the public to the dry sand beaches of North Carolina as well as current legislation mandating such. *See* N.C. Gen. Stat. § 77-20. It is unclear from prior North Carolina appellate opinions whether the common law doctrine of

128. *Id.*

129. *Id.* at 77.

130. *Id.* at 78 (citing 3 HERBERT THORN DIKE TIFFANY, THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND § 935 (3d ed. 1920)).

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.* (citing Duval v. Thomas, 114 So. 2d 791 (Fla. 1959)).

135. *See Duval*, 114 So. 2d at 794–95 ("[T]he body of water should be available to all owners for use that would not unreasonably interfere with rights of the other proprietors.").

136. *Id.*

137. 780 S.E.2d 187 (N.C. Ct. App. 2015).

> custom is recognized as an independent doctrine in North Carolina, or whether long-standing "custom" has been used to help determine where and how the public trust doctrine might apply in certain circumstances. . . . In any event, we take notice that public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness. Native-born North Carolinians do not generally question whether the public has the right to move freely between the wet sand and dry sand portions of our ocean beaches.[138]

iii. Public Rights Based on the Public Trust Doctrine

A second type of theory used by courts to establish a public right to use the upper beach is best described as an easement appurtenant to trust property.[139] Unlike prescription, dedication, and custom, the trust-appurtenant easement does not require any proof of historical public use.[140] Rather, courts imply an upper beach easement based on something akin to necessity: the public requires some use of the upper beach in order to be able to enjoy the lower, state-owned beach.[141]

New Jersey is the state whose courts are best known for using a trust-appurtenant-easement theory. In its 1982 decision in *Matthews v. Bay Head Improvement Ass'n*,[142] the Supreme Court of New Jersey addressed the plaintiffs claim that members of the public were entitled to use parts of the upper beach that the defendant held as owner or lessee. The association asserted a right to exclude the public from the upper beach and a right to include only those individuals who held memberships in the association.[143]

The New Jersey court declined to employ theories of prescription, dedication, or custom on the ground that such "judicial responses" to the "modern social problem" of recreational-opportunity shortages were "archaic."[144] Instead, the court argued that: (1) the State held legal title to the lower beach and the lands beneath the sea; (2) the State's title to the lower beach and submerged lands was subject to the restrictions contained within the public trust doctrine; (3) the public trust doctrine gave the citizens of New Jersey beneficial ownership of those lands; (4) this beneficial ownership included the right to use trust lands and the waters above them for traditional (commerce, navigation, and fishing) as well as modern (recreation) purposes; (5) and, that the public's right to use trust lands and waters could not be meaningfully exercised without a limited easement over the upper beach.[145] In the court's words: "where use of dry sand is essential or

138. *Id.* at 196.
139. *See* Eagle, *supra* note 13, at 1209–10.
140. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984).
141. *See, e.g.*, *id.*
142. *Id.* at 355.
143. *Id.* at 359–60.
144. *Id.* at 365.
145. *See id.* at 360–67.

reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner."[146] While the public (or the State) did not have to prove facts substantiating historical use of a beach or beaches, it did have to prove that access to a particular stretch of upper beach was necessary due to shortages of publicly owned upper sand in the area.[147] It also had to show that the easement created could be shaped in a way that prevented unreasonable impositions on the relevant beachfront landowners.[148]

From a landowner's perspective, the New Jersey approach could be viewed as a radical change in established law. The argument would be that the classic version of the public trust doctrine applies only to submerged and tidal lands: the State's obligations consist of ensuring the public's ability to use trust areas for the classic trust purposes of navigation, commerce, and fishing, and these obligations do not include any responsibility for protecting modern recreational access to the sea; and, therefore, that the trust-appurtenant easement represents a sudden, modern, landward expansion of public property rights at the expense of beachfront owners' property rights.

The legal principles behind the trust-appurtenant approach, however, are eminently sound. As discussed in greater detail in Section III.A, the State's obligations to maintain public access to trust areas can become meaningless if the law limits the geographic scope of the State's obligations to the physical bounds of the trust lands it owns in fee.[149] Moreover, there are two flaws in describing the issue as one of "modern recreational access." History (and common sense) make it clear that the public has used beaches for recreation since people first discovered them.[150] More important, modern recreation is not so much recreation as it is commerce. Beach recreation opportunities have become the driving force behind large amounts of economic activity and are easily seen as the modern expression of longstanding commercial use of beaches.[151]

2. Road-to-Ocean Cases

Although it involves only pedestrian transit (and not resting), a road-to-ocean easement is potentially more difficult and controversial than a whole-beach easement, especially in heavily developed areas. In many places, the only way to walk from the road to the beach is through the gap between two houses. Depending on the width of the gap, members of the public might be walking

146. *Id.* at 365.

147. *Id.* at 369–70.

148. *See id.*

149. *See* discussion *infra* Section III.A.

150. *See* discussion *infra* Section IV.A.

151. *See, e.g.*, *Beachcombing for Sea Glass Is Business for Some, Passionate Hobby for Most*, SEATTLE TIMES, https://www.seattletimes.com/pacific-nw-magazine/beachcombing-for-sea-glass-is-business-for-some-passionate-hobby-for-most/ (May 3, 2009, 3:50 PM) [https://perma.cc/2MFF-M9Q8]; Chris Fleisher, *Betting on Beach Tourism*, AM. ECON. ASS'N (June 26, 2019), https://www.aeaweb.org/research/mexico-tourism-economic-development-service-manufacturing [https://perma.cc/WV6C-PKYT].

within ten feet or fewer of beachfront homes or hotels. The aesthetic impacts of public use so close to home are more significant than those generated by use of the more distant upper beach.

The impacts of a road-to-ocean easement are also qualitatively different. Where the upper beach is private, the beachfront homeowner gazing at the sea will see people walking along the beach or sitting in chairs; the public can do that lawfully (except in low-tide-line states or at high tide in high-tide-line states) because the State owns the lower beach. In some spots, where the upper beach is quite narrow, the difference in visual impact of a person walking on the upper or lower beach is negligible. Road-to-ocean access, though, frames people in a picture that previously had no one in it.

It is for these reasons that courts in only one state—New Jersey—treat road-to-beach claims differently from run-of-the-mill public easement claims.[152] While courts in many states have shown a willingness to bend the elements of dedication and prescription for whole-beach access, with some going so far as to develop the concept of American customary law, they have for the most part been reluctant to exhibit the same degree of flexibility in assessing road-to-beach claims.[153]

In its 1970 decision in *Gion v. City of Santa Cruz*,[154] the California Supreme Court did make an attempt to add flexibility to traditional doctrines in service of public access, only to be rebuffed by the state legislature. The court's opinion had addressed two cases that it had consolidated for appeal: the *Gion* case, which dealt with the public's right to park on privately owned beachfront property, and a case called *Dietz v. King*, which was a road-to-ocean case.[155] The court found that public had acquired a road-to-ocean easement by virtue of 100 years of public use, applying rules similar to those found in the doctrine of American custom employed by the Supreme Court of Florida in *City of Daytona Beach v. Tona-Rama, Inc.*[156] Specifically, the court in *Gion* wrote that:

> If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of "adversity" to support a decision of implied dedication. Litigants, therefore, seeking to show that land has been dedicated to the public need only produce evidence that persons have used the land as they would have used public land. If the land involved is a beach or shoreline area, they should show that the land was used as if it were a public recreation area. If a road is involved, the litigants must show that it was used as if it were a public road.[157]

The court did not require either the public, or the State to prove that its use was adverse to the owner; instead, the court put the burden on the landowner to prove

152. *See* LOCKE, *supra* note 1, at 145.

153. *See, e.g.*, Gion v. City of Santa Cruz, 465 P.2d 50 (Cal. 1970); Dietz v. King, 465 P.2d 50 (Cal. 1970) (two cases in one decision).

154. *Gion*, 465 P.2d at 50.

155. *Dietz*, 465 P.2d at 54.

156. 294 So. 2d 73 (Fla. 1974). For a discussion of this case, see *supra* note 97 and accompanying text.

157. *Gion*, 465 P.2d at 56.

that she (or her predecessor-in-interest during the relevant time period) had granted the public permission to use the property.[158]

Along those lines, the California legislature passed Section 1009 of the California Civil Code in 1971.[159] Section 1009 provides that public use of private beachfront land subsequent to March 4, 1972, cannot be used as evidence in support of a claim for an easement by implied dedication.[160] In Section 1009(a), the legislature explained its rationale:

> It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use . . . . Owners of private real property are confronted with the threat of loss of rights in their property if they allow or continue to allow members of the public to use, enjoy or pass over their property for recreational purposes. . . . The stability and marketability of record titles is clouded by such public use, thereby compelling the owner to exclude the public from his property.[161]

And what about New Jersey? In its 2004 decision in *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.*,[162] the state's supreme court used the trust-appurtenant theory to mandate that Atlantis, a beachfront landowner, allow the public walking access from the terminus of East Raleigh Avenue to what is known as Diamond Beach.[163] As East Raleigh Avenue ends at the landward extent of the Atlantis property, the court's order allowed members of the public to walk, from road to beach, across the entire Atlantis parcel.[164]

It is clear, in reading this case, that the Supreme Court of New Jersey understood the potential impacts of road-to-ocean access on beachfront property owners and carefully worded its opinion to minimize those impacts to the maximum extent practicable. First, the court limited the use of the trust-appurtenant

158. *See id.* at 57 ("For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use.").

159. CAL. CIV. CODE § 1009 (Deering 2022); *see* Scher v. Burke, 395 P.3d 680, 682 (Cal. 2017).

160. The public can acquire a road-to-ocean easement for public use meeting these elements prior to that date when "the public has used the land 'for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone.'" Tiburon/Belvedere Residents United to Support Trails v. Martha Co., 279 Cal. Rptr. 3d 489, 493 (Cal. Ct. App. 2020) (citing *Gion*, 465 P.2d at 56). Section 1009(f)(1) requires that, when the land is within 1,000 yards of the ocean, the landowner post a sign reading: "Right to pass by permission and subject to control of owner: Section 1008, Civil Code." CAL. CIV. CODE § 1009(f)(1) (Deering 2022).

161. CIV. § 1009(a)(1)–(3).

162. 851 A.2d 19 (N.J. Super. Ct. App. Div. 2004).

163. *See id.* at 22.

164. Atlantis was aptly named:

> The subject property, Block 730.02, Lots 1.02 and 1.03 . . . is located in Lower Township in what is known as Diamond Beach. . . . Running eastward from a bulkhead that forms its westerly boundary, Lot 1.02 occupies approximately three acres comprised of dunes, a dry sand beach, and ocean floor. Lot 1.03, which shares the same north and south boundaries, is located to the east of Lot 1.02 and is completely under water at high tide. Both lots were formerly part of a larger tract of land encompassing an area of approximately 7767 acres of which 2450 acres are currently located in the ocean.

Id.

theory in road-to-ocean cases to beaches with no other convenient access points.[165] As the court described the situation:

> The Diamond Beach area comprises the only beach property fronting on the Atlantic Ocean located in Lower Township [and] . . . [a]ccess to the beach [without the ability to cross the Atlantis property] . . . entails an eight-block walk from Raleigh Avenue, a distance of approximately one-half mile.[166]

In addition to limiting the trust-appurtenant theory to hard-to-reach locations, the court also permitted the landowner to charge members of the public a reasonable fee for crossing its property.[167] This fee would be based on the amount Atlantis spent on services provided, including life guards, maintenance of the walkway, and trash collection.[168] The fee-for-service approach to road-to-ocean access echoes the thousand-year-old common-law arrangement for other private-public facilities—such as ports and inns—located within the network of commerce.[169]

In sum, courts tackling claims for both road-to-ocean and whole-beach easements have had to tinker with laws that apply to ordinary land in order to account for a unique combination of factors: beaches are land that is indefinitely open and unenclosable; land that is forever changing in form and extent; land that has been heavily used by the public in the past; land that is not usually harmed by public use; and, land that forms a connection with the quintessentially public ocean.

III. THE BIRTH OF THE BEACHFRONT LOT

As noted in the Introduction, from the time of the European discovery of America through the early twentieth century, foreign, colonial, and American

165. *Id.* at 28 (quoting Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984)) ("The determination of what is reasonable is dependent upon the 'particular circumstances [which] must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved.'").

166. *Id.* at 23–24.

167. *Id.* at 28–29, 32–33.

168. *Id.* at 33–34.

169. In England, the Crown had the exclusive right to grant port rights, or a "franchise," to a waterfront landowner, who was then entitled to collect reasonable fees for use of her land as a port; once she had agreed to become a franchisee, the landowner was required to allow the public to use her land (for a reasonable fee):

> But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandise in any part of the haven.

See 1 BLACKSTONE, *supra* note 41, at 197. Similarly, innkeepers were (and are) required to accept peaceful travellers upon payment of a reasonable fee:

> U[nder] the common law of England, an innkeeper is bound to receive and lodge in his inn all travellers, and to entertain them at reasonable preces without any special or previous contract, unless he has some reasonable ground for refusal. This rule is not based upon any statutory provision but on custom, and has been given expression in a number of decisions of the English courts. The same rule requires an innkeeper not to oust his guest, once admitted, without reasonable ground. An innkeeper who violates this duty commits a crime and can be punished. He is also liable in damages to the traveller aggrieved.

Paul Hartmann, *Racial and Religious Discrimination by Innkeepers in U.S.A.*, 12 MOD. L. REV. 449, 449 (1949).

(federal and state) governments transferred out hundreds of millions of acres, including millions of acres of beachfront property.[170]

The legal life-history of every beach in the United States begins before those transfers out, when the beach was still sovereign property.[171] The laws in place during the prepatent period of sovereign ownership included restrictions on the sovereign's rights to use and enjoy its property.[172] In particular, the law included a variety of limits on sovereign use of real property that formed (or had the potential to form) a byway in the network of commerce.[173] These limitations effectively created public rights in sovereign property, treating the sovereign and the public as, respectively, legal and beneficial owners of the same land.[174]

A. PrePatent Public Rights

When the sovereign owns land, it ordinarily has the same three basic property rights as a private owner would: the State is entitled to fair use and enjoyment of the land; it can sell it or give it away; and, it can prevent the public from entering (or allow select members to enter).[175] English common-law courts early on began to treat some kinds of land differently; specifically, courts limited some or all of the sovereign's rights to use and enjoy, alienate, or exclude others with respect to certain types of property.[176]

170. *See* discussion *supra* Part I.

171. *See* discussion *infra* Section III.A.

172. *See* discussion *infra* Section III.A.

173. *See* discussion *infra* Section III.A.

174. *See* discussion *infra* Section III.A.

175. *See* Arnold v. Mundy, 6 N.J.L. 1, 72 (N. J. 1821). In England, the law divided property owned by the Crown into personal holdings, which the sovereign was free to use as an ordinary owner would, and Crown holdings, in which the living sovereign held what was effectively a life estate; she could reap profits from the use of Crown holdings, but she could not alienate them or destroy them. In other words, she owed a duty to the next sovereign. The Crown also retained an interest in property that it transferred out; specifically, the sovereign was entitled to collect rent (in money or services) or taxes from those private parties who held "of the Crown." As described in detail below, the Crown also held legal title to certain types of lands (*e.g.*, submerged lands and lands used for roads) in which the public (as represented by Parliament) held a beneficial interest. In the United States, the State itself is the sovereign and thus the distinction between the sovereign and the people does not exist. The State has an obligation to represent the interests of the people with respect to every piece of real property it owns. But the courts—playing a role that is essentially a substitute for the role Parliament played in the English system—have placed even greater limits on the legislature's ability to dispose of and use certain kinds of lands (*e.g.*, submerged lands and roads). *See generally id.*

176. As Chief Justice Kirkpatrick of the Supreme Court of New Jersey wrote in 1821:

> Nothing can be more clear, therefore, than, that part of the property of a nation which has not been divided among the individuals, and which Vattel calls *public property*, is divided into two kinds, one destined for the use of the nation in its aggregate national capacity, being a source of the public revenue, to defray the public expense, called the *domain of the crown*, and the other destined for the common use and immediate enjoyment of every individual citizen, according to his necessity, being the immediate gift of nature to all men, and, therefore, called the *common property*. The title of both these, for the greater order, and, perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the king's forests and fall and carry away the trees, though it is the public property; it is placed in the hands of the king for a different purpose, it is the domain of the crown, a source of revenue; so neither can the king intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or

Beaches are closely linked to two special kinds of sovereign property: submerged lands (including the lower beach) and land that has been used by the public as a road, highway, or channel of commerce.[177] In the case of both submerged lands and highways, the common law—drawing from principles expressed in the Magna Carta—limited all three property rights.[178] There was one central policy consideration underlying these limitations: the importance of maintaining of an open, reasonably priced transportation network.[179] By providing equal access to commercial opportunities, an open network is critical to fair competition and individual autonomy.[180]

1. Submerged Lands

Prior to the issuance of a beachfront patent, the sovereign held legal title to sometimes-submerged lands (the lower beach) and always-submerged lands

taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be.

Id. at 72–73.

177. *See* discussion *infra* Section III.A. *See generally* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

178. *See infra* notes 192–98 and accompanying text.

179. As Professor Richard Epstein has explained:

> [A]ny system of divided private ownership, based on first possession, tends to create the very bargaining and holdout problems that the institution of private property is designed to overcome. Each segment of the river is worth very little for transportation unless all segments could be subjected to uniform ownership. The risk is that the owner of one segment will hold out against all the others, so that bargaining breakdown will prevent any use of the river at all for navigation. It is precisely to overcome such difficulties that one of the most unproblematic uses of the eminent domain power has always been the condemnation of private lands for public highways, open to all. The formation of the highway removes, or at least controls, the risk of holdout which might otherwise dominate voluntary negotiations to lay out and construct roads.
>
> If we need highways, then why is the land for public highways not owned by the public at large in the original position? The answer is quite simply this: while in the original position we know that there is some need for public highways, we do not know *where* they are best located . . . . There is, however, no reason to wait for government action to dedicate navigable rivers to commerce. The location of the common highway is determined by nature. There is no need to begin with private ownership, and then to allow the property to be taken for public use upon payment of just compensation to private owners. So long as there is good reason to think that navigation along the river will be socially beneficial—an easy call—then the original recognition of navigation servitude prevents the blockade of the river by any single riparian or interloper.

Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 415–16 (1987) (citations omitted).

180. Clifford Winston, of the Brookings Institution, writes:

> An efficient and extensive transportation system greatly enriches the standard of living . . . by reducing the cost of nearly everything in the economy; expanding individuals' access to and choices of employers and employers' choices of workers; enabling firms and urban residents to benefit from the spatial concentration of economic activities, referred to as agglomeration economies; reducing trade costs and allowing firms to realize efficiency gains from specialization, comparative advantage, and increasing returns; and limiting firms' ability to obtain market power by locating in geographically isolated markets with no competition. By increasing frictions, however, an inefficient transportation system, just like poorly functioning financial institutions, can cause all sorts of economic activity to collapse.
>
> Transportation is also important because it can be thought of as a merit good—that is, societies generally believe that citizens are entitled to accessible transportation to experience a decent quality of life no matter where they live . . . .

Clifford Winston, *On the Performance of the U.S. Transportation System: Caution Ahead*, 51 J. ECON. LIT. 773, 773 (2013) (citation omitted).

(land beneath the ocean).[181] The public, however, was the beneficial owner of those lands.[182] How did this arrangement come to be?

As signed by King John on June 15, 1215, Chapter 33 of the Magna Carta directed that all fishing weirs be removed "from Thames and Medway, and throughout all England, except upon the sea shore."[183] The weirs of the thirteenth century were wooden structures, resembling underwater fences, that fishermen deployed to catch fish as they swam up- or downstream in rivers.[184] One end of the weir would always be located on the bank of the river, while the other end could be in the middle of the river or, if the fisherman wanted to catch all of the fish, on the opposite bank.[185]

Over the next millennium, English and American courts developed this single sentence in the Magna Carta into what is now known as "the public trust doctrine."[186] From well before it got its name in the early twentieth century, the public trust doctrine has incorporated a single goal: to prevent excessive private control of waterways that are useful for navigation.[187]

The purposes of preventing private blockages were, as noted above, twofold. First, an open transportation network distributes trade opportunities (and fishing opportunities) fairly.[188] Participants in an equitable market economy should be able to compete based on the price and quality of their goods and services; private control of the channels of commerce would allow channel owners to pick winners and losers in the market, as well as to capture the bulk of profits generated by trade.[189] Separately, but related, an open network promotes individual autonomy by enlarging the scope of available markets, giving people more

181. *See Colonial Patents and Open Beaches*, 2 HOFSTRA L. REV. 301, 305, 309 (1974).

182. *See id.* at 303.

183. Chapter 33 of the Magna Carta provided that:

> O[mnes] kydelli de cetero deponantur penitus de Tamisia, et de Medewaye, et per totam Angliam, nisi per costeram mars. All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore.

WILLIAM SHARPE MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 343 (2d ed. 1914). The editors of that translation note that:

> The object of this provision is not open to doubt; it was intended to remove from rivers all obstacles likely to interfere with navigation. Its full importance can only be understood when the deplorable state of the roads is kept in view. The water-ways were the great avenues of commerce; when these were blocked, townsmen and traders suffered loss, while those who depended on them for necessaries, comforts, and luxuries, shared in the general inconvenience.

Id.

184. *See* Thomas Pickles, *The Social History of a Medieval Fish Weir, c. 600–2020*, 46 SOC. HIST. 349, 355 (2021).

185. *Id. See generally* JOHN MCDONNELL, INLAND FISHERIES OF MEDIEVAL YORKSHIRE 1066–1300 (1980).

186. *See* Note, *The Public Trust Doctrine in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 779 (1970) [hereinafter *A Sometime Submerged Traditional Doctrine*].

187. *Id.* at 762. Although the doctrine is ancient, the term "public trust doctrine" first appeared in an American court decision in 1936. *See* Ne-Bo-Shone Ass'n v. Hogarth, 81 F.2d 70, 73 (6th Cir. 1936).

188. *See A Sometime Submerged Traditional Doctrine*, *supra* note 186, at 779.

189. *See* Winston, *supra* note 180 and accompanying text. This is also why, when we allow private ownership of network segments, such as toll roads or railroads, the government regulates the rates those owners can charge as well as the conditions under which owners can prevent members of the public from using the segment. *See generally* John Paul Stevens, *The Regulation of Railroads*, 19 SECTION OF ANTITRUST L. 355 (1961).

choices about how (and where) they can make a living.[190] If a liberal, free-market-driven society is the objective, as it has long been in the Anglo-American tradition, then an open transportation network is fundamental to the success of the enterprise.[191]

When, in the Magna Carta, King John agreed to restrictions limiting his use of Crown property, he may have known that an open transportation network would be valuable in shaping a stable and prosperous society.[192] He almost certainly thought that he would be able to reap substantial revenues from the private commerce conducted through the network, through the imposition of customs duties.[193] He would have been right. In the centuries following the signing of the Magna Carta, revenue from customs on imports and exports became the principal source of income to the Crown. "By the early fifteenth century, indirect taxes (i.e., taxes on trade) composed about 75 percent of the English Crown's net revenue from all sources. . . ."[194]

The public trust doctrine is one of several sets of rules English and American courts developed to operationalize the policy of free movement of goods and people in commerce.[195] The central functional rule in the public trust doctrine—what has been called the "duty not to dispose"—is a direct limitation on the sovereign's right to alienate trust lands.[196] As its name suggests, the duty not to dispose prevented the sovereign from selling or gifting trust lands to private parties unless that transfer would benefit the public.[197] The best example of a beneficial disposal is when the sovereign grants submerged land to a private party for use in the construction of a wharf for loading and unloading ships.[198] Wharves enhance the transportation network by providing connections between the wet

190. *See* Winston, *supra* note 180 and accompanying text.

191. *See* Winston, *supra* note 180 and accompanying text.

192. Jane Frecknall Hughes & Lynn Oates, *King John's Tax Innovations—Extortion, Resistance, and the Establishment of the Principle of Taxation by Consent*, 34 ACCT. HISTORIANS J. 75, 93 (2007).

193. *Id.*

194. Rosemary L. Hopcroft, *Maintaining the Balance of Power: Taxation and Democracy in England and France, 1340–1688*, 42 SOCIO. PERSPS. 69, 70 (1999).

195. *See* Epstein, *supra* note 179, at 415–16.

196. JOSH EAGLE & SHI-LING HSU, OCEAN AND COASTAL RESOURCES LAW 525–56 (3d ed. 2020). As the Supreme Court stated in *Illinois Central Railroad Co. v. Illinois*:

> That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale.

146 U.S. 387, 452 (1892).

197. *Illinois Cent. R.R. Co.*, 146 U.S. at 452.

> The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants.

Id.

198. *Id.*

highway system of rivers and oceans and the terrestrial system of roads and highways.[199]

While the duty not to dispose is most easily seen as a limit on the right to alienate, it (along with other rules in the public trust doctrine) also limits the other two fundamental property rights. The sovereign does not have an unlimited right to exclude; after all, the entire purpose of the doctrine is to maintain an open network that members of the public can use for transportation.[200] In other words, the public trust doctrine mandates that the government not adopt rules that unreasonably block public access to the transportation network.[201] Along the same lines, the doctrine puts limits on the sovereign's right to use and enjoy its property; it is barred from using the property in any way that would interfere with public use for transit.[202] For example, it could not build a weir across a navigable river.[203]

What does all of this tell us about public rights in the beachfront lot while it was still in sovereign ownership? In the prepatent world, the public had the right to navigate waters overlying trust lands, including both submerged and sometimes-submerged areas.[204] The public trust doctrine prohibited the government from blocking public use of those areas for navigation, commerce, and fishing.[205]

But modern public-beach-access cases involve areas landward of sometimes-submerged areas such as the upper beach and land between the upper beach and the nearest public road.[206] Were there any restrictions on sovereign property rights with respect to those areas?

A narrow reading of the public trust doctrine would result in answering this question in the negative: the trust guaranteed public access to waters above submerged and sometimes-submerged areas, period.[207] But imagine that the sovereign wished to grant to a favored subject, Citizen X, the exclusive right to land her boats on a particular beach. In the absence of the public trust doctrine, the sovereign could grant Citizen X private ownership of the submerged and sometimes-submerged lands adjacent to the upper beach. This would allow the grantee to prevent others from bringing their vessels to the beach. What if, after being advised that this transfer might be voided by Parliament or a court, the sovereign opts for a different path to the same result? Instead, it will grant Citizen X the exclusive right to use land between the nearest public road and the beach. This

199. *See* Cheung, *supra* note 5, at 143–44.

200. Eagle, *supra* note 5, at 876.

201. *See id.* at 872–79.

202. *Id.* at 878.

203. *Id.* at 875.

204. *Id.* at 873 n.128.

205. *Id.* at 875.

206. *See, e.g.*, Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1108 (Fla. 2008); Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 123–24 (N.J. 2005).

207. For a description of the doctrine in these terms, see James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 3 ENV'T L. 527, 527, 533 (1989) ("[T]he public trust doctrine should be analyzed as a simple easement . . . .").

move would prevent others from pulling their boats onto the dry sand for loading and unloading; more significantly, it would prevent others from reaching the water from the road. In other words, a grant of exclusive right to use sovereign beachfront land to Citizen X interrupts the transportation network in exactly the same way that a grant of submerged lands would.

Given the equivalence of the two approaches to privatizing the network, it is possible to argue that the public had a right to cross land between roads and beaches while that land remained in sovereign hands. If that is the case, then those rights would still exist unless some subsequent event erased them.[208]

2. "Once a Highway, Always a Highway"

In the alternative, it is possible that the public held prepatent rights to use land between road and beach under a different doctrine. The common law developed a rule that, once a sovereign dedicated land to use as a public road or pathway, it could not reassign that land to a different use without going through a process in which the public agreed to that reassignment.[209] This rule, known by the Dylan-esque maxim "once a highway, always a highway," has existed since at least the twelfth century and is meant to protect roads and pathways that people have relied upon for use in transportation and commerce.[210] "Throughout the

208. In *Illinois Central Railroad*:

> [T]he Court articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970) (emphasis omitted); *see* EAGLE & HSU, *supra* note 196, at 490.

209. 16 HALSBURY'S LAWS OF ENGLAND BEING A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND 262 (Viscount Hailsham et al. eds., 2d ed. 1935) [hereinafter 16 HALSBURY'S LAWS]; Alan Dowling, *"Once a Highway, Always a Highway*,*"* 45 N. IR. LEGAL Q. 403, 403 (1994) (citing Dawes v. Hawkins, [1860] 8 CB (NS) 848).

210. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND, COMMONLY CALLED GLANVILL 114 [IX, 11] (G.D.G. Hall ed. & trans., 1983). Some roads, namely the so-called King's Roads, received heightened protection from private appearance in the form of royal jurisdiction. Ranulf de Glanville wrote in about 1189, "[a] Purpresture, or more properly speaking a Porpresture, is when any thing is unjustly encroached upon; against the King; as in the Royal Demesnes, or in obstructing public ways, or in turning public waters from their right course. . . ." JOHN BEAMES, A TRANSLATION OF GLANVILLE, TO WHICH ARE ADDED NOTES 239 (1900). "A minor fistfight might turn out to be serious if it involved a royal servant or happened on the king's highway." S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 32 (2003); *see also* Sir Frederick Pollock, *The King's Peace in the Middle Ages*, 13 HARV. L. REV. 177, 177 (1899) ("In the twelfth century the list [of crimes within the King's jurisdiction] is considerably increased, and may be said to include . . . highway robbery. . . .").

> By the Norman period, there had come into being a popular standard of width for the roads of especial importance which were regarded as falling under the king's own protection—they should be so wide that two waggons could pass upon them, and two oxherds could just make their goads touch across them, and sixteen armed knights ride side by side along them. Any encroachment on these roads was forbidden under the heavy penalty of one hundred shillings.

F. M. Stenton, *The Road System of Medieval England*, 7 ECON. HIST. REV. 1, 3 (1936).

After the Norman period, "the king's peace was gradually extended over all the greater roads of England." *Id.* at 3–4. An American version of the King's Highway doctrine is the Commerce Clause, Article I, Section 8 of the United States Constitution. The Commerce Clause gives Congress the power to regulate interstate commerce,

English cases there is manifested a reluctance to permit the discontinuance of highways and an earnest determination to maintain them."[211]

As an Arizona appellate court explained in 2014: "at common law the crown could not grant dispensation or license to obstruct the highway. . . . Nor could local councils on their own authority legally grant permission to private citizens to obstruct the highway."[212]

In addition to protecting roads from a sovereign's change of heart, the "always a highway" doctrine also protected existing roads from private interference.[213] Under the common law, private rights-of-way could be terminated through adverse use over time (say, where a landowner blocked a third-party right-of-way running across her property), or through abandonment (long periods of nonuse by the third party).[214] Public rights-of-way, on the other hand, were deemed to survive regardless of adverse use or the absence of use.[215] This is why the maxim includes the word "always."

If there were evidence in the historical record that, while the beachfront land remained in sovereign hands, a highway connected a road to the beach, then it is quite possible that this right-of-way has never been extinguished. As the Earl of Halsbury wrote in his 1911 treatise, *The Laws of England*, "[t]he public cannot release rights once acquired by them, no authority can bind them in purporting to release such rights, and there is no extinctive presumption or prescription arising from non-exercise therof."[216] Various states in America have adopted laws, crafted statutorily or judicially, that provide procedures by which state governments can "vacate streets and highways."[217]

Courts have been generous in defining the term "highway" to include footpaths,[218] bridges,[219] and even rivers. An 1844 decision of the Mississippi Supreme Court put it this way: "[a] highway is a thoroughfare, common to all,

including the channels of interstate commerce such as highways and navigable waterways. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

211. BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF ROADS AND STREETS 659 n.2 (Indianapolis: The Bowen-Merrill Co., 1890).

212. Mack v. Dellas, 326 P.3d 331, 334 (Ariz. Ct. App. 2014).

213. Such interference would be a purpresture. *See* Dowling, *supra* note 209, at 403.

214. BRADLEY MARTIN THOMPSON, SYNOPSIS OF LECTURES ON FIXTURES AND EASEMENTS FOR THE JUNIOR CLASS—LAW DEPARTMENT 72–73 (Ann Arbor: Courier Book & Job Printing House, 1892).

215. 16 HALSBURY'S LAWS, *supra* note 209, at 262.

216. *Id.*

217. THOMPSON, *supra* note 214, at 77. Whether such laws should apply to roads established prior to their enactment is an open question.

218. ROBERT HUNTER, PRESERVATION OF OPEN SPACES, AND OF FOOTPATHS, AND OTHER RIGHTS OF WAY 253 (London, Eyre & Spottiswoode, 1896).

219. *See* ELLIOTT & ELLIOTT, *supra* note 211, at 34.

> While it is true that the term "highway" does not always or necessarily include bridges, yet, when the question for solution involves the application of general rules common to all ways open for passage to the public, not as matter of sufferance or favor, but as of right, bridges must be included within its sweep, and this is true of the phase of the subject here under immediate discussion. The general rule is that "once a highway, always a highway," and within the term "highway" as used in this general rule bridges open to the public as of right on the payment of toll, are included.

Id. It is interesting to note here the reference to a payment of a (presumably reasonable) toll; this is similar to the approach taken by New Jersey courts when recognizing whole-beach or road-to-ocean public easements.

whether it be on land or water, and the law with respect to public highways, and to freshwater rivers, is the same, as regards the right of soil."[220] Or as it was stated in *Mr. Serjeant Stephen's New Commentaries on the Laws of England*:[221]

> The term "highway" is not restricted to any particular kind of way, and it often includes those roads or ways, *e.g.*, church paths, which are common to the inhabitants of some particular parish or district only; and a road may be a public road or highway, although it may not be a thoroughfare.[222]

The justification for the generous application of "always a highway" appears to be, like the public trust doctrine, deeply rooted in the benefits of free transit, which—depending on the century—has occurred, and still occurs, over roads, paths, and waterways.

The history of beaches and their role as natural ports useful in commerce could be used to support application of "always a highway" to beaches themselves. Beaches were the original ports, providing connectivity between marine and terrestrial transportation networks. Ports, and the commercial activity they facilitate, have been the bedrock of the English and American economies for more than a millennium. (If that sounds like an exaggeration, consider the fact that the etymology of the word "important" reveals that it was derived from the words "port" and "import"![223])

As historian Ian Friel puts it, "[p]orts, whether they consist of an open beach or a complex dock system, are the key points at which maritime and terrestrial society meet."[224] Or, as Matthew Hale wrote in the seventeenth century, "[t]his kingdom is an island, and the ports of the kingdom are the gates, *ostia regni*, as well in reference to the exercise of trade, as in referrence [sic] to the safety and security of it against foreign enemies."[225]

In the later medieval period, between 1100 and 1300 A.D., as England gradually became less rural and more town-centered, towns grew because they provided infrastructure for the establishment of markets where trade could occur.[226]

220. Morgan v. Reading, 11 Miss. (3 S. & M.) 366, 406 (1844).

221. *See generally* HENRY JOHN STEPHEN, MR. SERJEANT STEPHEN'S NEW COMMENTARIES ON THE LAWS OF ENGLAND (Edward Jenks ed., 14th ed. 1903).

222. *Id.* at 52 (citation omitted). As the court said in *Hickman v. Maisey*:

> The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage.

[1900] 1 QB 752, 758; *see also* Gina Clayton, *Reclaiming Public Ground: The Right to Peaceful Assembly*, 63 MOD. L. REV. 252, 254 (2000) (exploring the issue of the scope of the public's right to use roads in the United Kingdom).

223. *Important*, THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (1986).

224. Ian Friel, *How Much Did the Sea Matter in Medieval England (c. 1200—c. 1500)?*, *in* ROLES OF THE SEA IN MEDIEVAL ENGLAND 169 (Richard Gorski ed., 2012).

225. Matthew Hale, *A Treatise, in Three Parts. Pars Prima. De Jure Maris Et Brachiorum Ejusdem. Pars Secunda. De Portibus Maris. Pars Tertia. Concerning the Customs of Goods Imported and Exported*, *in* A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS ch. III, at 50 (Dublin, Francis Hargrve ed., 1787).

226. Richard Britnell, *The Economy of British Towns 600–1300*, *in* THE CAMBRIDGE URBAN HISTORY OF BRITAIN: VOLUME 1 600–1540, at 111 (D. M. Palliser ed., 2008).

Early market towns ("*wics*") were located on trade routes; "[a] general feature of the siting of [wics] was their relationship to communications – to roads and, even more, to water: nearly all large towns . . . were situated on an estuary or navigable river."[227] The presence of a beach was a key ingredient; "[t]he principal topographical characteristic of *wics* is their elongated beach location with landing stages extending out into the water."[228] And these natural ports were closely connected to the road system; in the twelfth and thirteenth centuries, "[English Channel] ports inevitably increased the importance of the roads which led directly to them . . . ."[229]

America, in the beginning, was a colonial outpost; as such, the ports were probably even more central than they had been in the Old World:

> Situated across the smaller ocean from the leading nations of Europe, [America's] large and commodious harbors, formed, in many cases, by estuaries and river mouths, stand like so many "open doors" inviting the products, men, and ideas of other nations from beyond her "subject sea" to her eastern and southern shores, to which, through the numerous water gaps and the natural highways of commerce the products of the country have been cheaply and rapidly sent for exchange and further transportation. The natural highways of commerce, the lake chains and rivers, have always been lines of travel . . . .[230]

As Edward Price wrote in *Dividing the Land: Early American Beginnings of Our Private Property Mosaic*: "[t]he first settlements in all the Southern colonies were necessarily in the coastal lowlands where the ships from Europe could unload passengers and supplies. The premium land continued to be the tidewater shores of bays and rivers with access for personal movement and marketing."[231]

The founding of Philadelphia, led by William Penn, illustrates the role of beaches before and during the era of disposal. Penn's vision was of "a colony built around a river capital which would serve as the seat of government and the hub of commercial activity."[232] While his initial goal was to locate Philadelphia adjacent to a segment of river deep enough along its banks to allow direct loading

227. D. M. Palliser, T. R. Slater & E. Patricia Dennison, *The Topography of Towns 600–1300*, *in* THE CAMBRIDGE URBAN HISTORY OF BRITAIN, *supra* note 226, at 156. The quality of roads during the Middle Ages was low; thus, "whenever possible the heaviest goods were sent by water rather than by road." Stenton, *supra* note 210, at 19.

228. Pallister et al., *supra* note 227, at 159. The central role of beaches in trade was common throughout Europe. For example,

> [t]he essential elements of [medieval Spanish] seaports can be summarized as follows: sandy beaches to facilitate loading, unloading, and related activities; promontories offering protection from the wind and conferring defensive advantages in wartime; river mouths and smaller watercourses providing a water supply and serving as a means of communication with the interior; and proximities to sea lanes.

Jesús Angel Solórzano Telechea, *Medieval Seaports of the Atlantic Coast of Spain*, 21 INT'L J. MAR. HIST. 81, 84 (2009).

229. Stenton, *supra* note 210, at 4.

230. Bessie A. Brown, *Geographic Development of Seaports in the United States*, 4 J. GEOGRAPHY 337, 338 (1905).

231. PRICE, *supra* note 3, at 117.

232. Gary B. Nash, *City Planning and Political Tension in the Seventeenth Century: The Case of Philadelphia*, 112 PROC. AM. PHIL. SOC'Y 54, 54 (1968).

and unloading of large ships, the reality was that the only available waterfront land had steep banks, marshes, or beaches.[233] When Penn began the process of distributing land to his investors, it was the beachfront land on a cove called Dock Creek that was most precious.[234] "Along the cove's eastern shore . . . was a good sandy beach where small boats could be drawn up without difficulty."[235] Because of its beaches, Dock Creek was the focal point of economic activity (and land disputes) from 1682, when Penn arrived, until the end of the seventeenth century.[236]

Beaches remain commercially important today, but for more modern enterprises: beach-driven tourism and the private real estate market.[237] Although modern uses are different from the ancient ones, connectivity remains the key: it is the access that beaches provide to the sea that makes them valuable both to beachfront landowners and the public.[238]

B. The Effect of the Patent on Public Rights

There are two possibilities in the moment just before issuance of the patent. First, it is possible that the sovereign held a limited right to exclude in the prepatent period due to either the adjacency of the beach to the ocean or the existence of a thoroughfare covered by "always a highway."[239] Second, it is possible that the sovereign held a complete right to exclude the public from its beachfront land.[240]

Where the sovereign held a limited, prepatent right to exclude, the question would be whether the patent extinguished that right. For reasons discussed below, extinction of prepatent public rights via a patent is highly unlikely to have occurred.[241] Where the sovereign held a full, prepatent right to exclude, the question would be whether the patent transferred to the grantee a full right to exclude or, instead, conveyed the property subject to public rights of whole-beach and road-to-ocean passage.

1. Did the Patent Extinguish Established Public Rights?

If the sovereign held an incomplete right to exclude, could it transfer a complete right to exclude? The simplest way to assess this question is through application of one of the most basic principles of property law: a party cannot convey

233. *Id.* at 56, 61.
234. *Id.* at 60.
235. *Id.* at 57.
236. *Id.* at 62–71.
237. *See supra* Section II.A.
238. *See supra* Section II.A.
239. *See infra* Subsection III.B.1.
240. *See infra* Subsection III.B.2.
241. *See infra* Subsection III.B.1.

that which she does not own.[242] As the Supreme Court of Tennessee put it in 1850:

> If a party include in a deed by which he conveys part of his own property to another, other property which does not belong to him, the deed will be good so far as the bargainor had title, and as to the property included in it to which he had no title, it will be a mere nullity.[243]

It is possible that the patent could have extinguished preexisting public rights if, and only if, the document—or the legislation authorizing it—contained language clearly meant to do that. As the Alaska Supreme Court has written: "[b]efore any tideland grant may be found to be free of the public trust . . . , the legislature's intent to so convey it must be clearly expressed or necessarily implied in the legislation authorizing the transfer."[244]

Similarly, the Supreme Court of South Carolina has held that "[i]n the absence of specific language, either in the deed or on the plat, showing that it was intended to [convey trust property], [the property] remains in the State in trust for the benefit of the public."[245]

These judicial statements reflect age-old rules of construction especially crafted by courts to protect trust property. The common law includes both *general rules* of construction for interpreting patents and *special rules* of construction for interpreting patents of waterfront property. These rules are very different from those governing interpretation of ordinary deeds.

For example, common-law rules dictate that, in the context of a *private-to-private* deed, rights not explicitly reserved by the grantor are deemed to have been included in the grant, that is, transferred away.[246] In other words, if the grantor wants to retain an easement allowing her to drive across the land she is selling (after she sells it), she must ordinarily spell that out in the deed she hands

242. "A tired yet valid maxim of the property law is that one cannot sell what one does not own." Brophy v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co., 855 F. Supp. 213, 216 (S.D. Ohio 1994).

243. Richards v. Ewing, 30 Tenn. (11 Hum.) 327, 330 (1850).

244. CWC Fisheries v. Bunker, 755 P.2d 1115, 1119 (Alaska 1988).

> And it would require very plain language in these letters patent to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away. But we see nothing in the charter to require this conclusion.

Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 414 (1842).

245. State v. Hardee, 193 S.E.2d 497, 501 (S.C. 1972).

246. WOLF, *supra* note 83, § 81A.05[3][b][ii] ("[A] deed conveys the entire estate or interest which the grantor owns unless the deed clearly states otherwise."). As a general matter,

> [c]anons of construction are merely statements of judicial preference for the resolution of a particular problem. They are based on common human experience and are designed to achieve what the court believes to be the "normal" result for the problem under consideration. Thus, their purpose is not to ascertain the intent of the parties to the transaction. Rather, it is to resolve a dispute when it is otherwise impossible to ascertain the parties' intent.

Id. § 81A.05[3][a].

over to the buyer.[247] If any part of the deed is ambiguous, a rule of construction dictates that the language in question be interpreted in favor of the grantee.[248]

But English and then American courts developed different rules for interpreting patents. These rules were meant to ensure that patents transferred only those public property rights that the government intended to transfer. In contrast to the rule applicable to private-to-private deeds, the rule of construction for land patents provides that any ambiguous language in the patent be resolved in favor of the *grantor*, that is, the government; pursuant to this rule, if it is unclear whether the government conveyed property rights, then it did not.[249]

As a policy matter, generally applicable rules requiring narrow construction of patents were inspired by concerns about agency; they were meant to protect the public from the actions of incompetent, negligent, rogue, or corrupt government officials.[250] The rules also reflected the law's deferential attitude toward sovereign power: courts were not sovereigns and thus were not free, through the act of liberally interpreting a patent, to give away sovereign property; only the sovereign (in the United States, a legislature) could do that.[251]

247. Some courts will allow an implied reservation if there is strict necessity for the easement. *See* Van Sandt v. Royster, 83 P.2d 698 (Kan. 1938); Howley v. Chafee, 93 A. 120 (Vt. 1915).

248. WOLF, *supra* note 83, § 81A.05[3][b][i]. The rationale for this rule is that the grantor, as the author of the deed, has control over and is responsible for its language. *Id.*

249. "[Patents] are peculiarly subject to the rule, applicable generally, that all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction." Massachusetts v. New York, 271 U.S. 65, 89 (1926) (citing Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 544–48 (1837)). In *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 408–09 (1842), the Supreme Court explained the scope of the inquiry in this way:

> The right of the king to make this grant, with all of its prerogatives and powers of government, cannot at this day be questioned. But in order to enable us to determine the nature and extent of the interest which it conveyed to the duke, it is proper to inquire into the character of the right claimed by the British crown in the country discovered by its subjects, on this continent; and the principles upon which it was parcelled out and granted.

Id. at 408–09. Eighty years later, in *Massachusetts v. New York*, Justice Stone wrote that:

> [I]n our view the meaning of the grant itself determines the principal question which we have to decide. In ascertaining that meaning, not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted "with a view to public convenience, and the avoidance of controversy," and "the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals." The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight.

271 U.S. at 86–87 (quoting Handly's Lessee v. Anthony, 18 U.S. (5 Wheat.) 374, 383–84 (1820) (Marshall, C.J.) and citing *Martin*, 41 U.S. (16 Pet.) at 410).

250. As the Supreme Court wrote in *Burke v. Southern Pacific Railroad Co.*:

> [I]f the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral-land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the Government, will lie to annul the patent and regain the title . . . .

234 U.S. 669, 692–93 (1914).

251. *Massachusetts*, 271 U.S. at 89 ("The dominion over navigable waters, and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held in private ownership."). As a general matter, for example, private parties cannot obtain title to public property through adverse possession. *See* 3 TIFFANY, *supra* note 130, § 1170.

In addition to rules of construction generally applicable to patents, the common law developed even-more-specialized rules for interpreting patents that conveyed waterfront land.[252] These rules can be considered part of the public trust doctrine.[253] In England, the law prohibited the Crown from interfering with those public rights without the express consent of Parliament.[254] English, and then American, courts enforced this rule by creating a presumption that, unless otherwise specified, patents of waterfront land did not include any property rights the future exercise of which would interfere with the public's ability to use adjacent waters for trade, travel, or sustenance.[255]

In reality, for real property transferred out during the "era of disposal," the granting documents would rarely if ever be specific enough to meet the high burden of proof. A typical U.S. government patent was a single page and consisted mainly of boilerplate. Included in the boilerplate was the "habendum clause":[256] a description of the property rights being transferred by the government through the patent. In patents issued pursuant to the Lands Act of 1820, for example, the habendum clause read:

> [T]he United States of America . . . do give and grant, unto the [grantee] and his heirs, the said tract, above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of

252. In *Shively v. Bowlby*, the Supreme Court spelled out the rule:

> It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention.

152 U.S. 1, 13 (1894).

253. *See Martin*, 41 U.S. (16 Pet.) at 411:

> The dominion and property in navigable waters, and in the lands under them, being held by the king as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit. In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly -- and it will not be presumed that he intended to part from any portion of the public domain, unless clear and especial words are used to denote it.

Id. at 406.

254. *See* Sax, *supra* note 208, at 475–78. Professor Sax cites a nineteenth century English treatise, R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM 106 (2d ed. 1875), in this passage:

> [I]t is important to realize that the inability of the Sovereign to alienate Crown lands was not a restriction upon government generally, but only upon the King:
>
> > The ownership of the shore, as between the public and the King, has been settled in favor of the King; but, as before observed, this ownership is, and had been immemorially, liable to certain general rights of egress and regress, for fishing, trading, and other uses claimed and used by his subjects. *These rights are variously modified, promoted, or restrained by the common law, and by numerous acts of parliament, relating to the fisheries, the revenues and the public safety* . . . .

Sax, *supra* note 208, at 476 ("Thus, whatever restraints the law might have imposed upon the King, it was nonetheless within the authority of Parliament, exercising what we would call the police power, to enlarge or diminish the public rights for some legitimate public purpose.").

255. *Martin*, 41 U.S. (16 Pet.) at 414.

256. A "habendum clause" is defined as "[t]hat part of a deed, usually following the premises, which sets forth the estate to be held and enjoyed by the grantee." *Habendum clause*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).

> whatsoever nature, thereunto belonging, unto the said [grantee] and to [his/her] heirs and assigns forever.[257]

The use of boilerplate to transfer out what are now some of the most valuable properties in America is an artifact of the haste and scale of efforts to move land into private ownership between the 1600s and the early 1900s.[258] These efforts were much more like liquidation sales than negotiated real estate transactions.[259] The context in which most beachfront patents were issued should weigh heavily against a finding that the government intended to cut off high-value public rights. It is difficult to reconcile the common law's insistence on retention of trust rights with elimination of those rights through haphazard disposal practices.

257. Act Making Further Provision for Sale of Public Land, 03 Stat. 566 (Apr. 24, 1820). The words "heirs and assigns forever" indicate an intent to transfer a fee simple interest in the property. "Fee simple" refers to the temporal duration of the interest being conveyed and not to the completeness of that interest. According to an early English law dictionary, fee simple "is where a Man hath Lands or Tenements, to hold to him and his Heir forever." GILES JACOB, A NEW LAW-DICTIONARY 293 (1729). While "fee simple" describes the duration of grantee rights, it does not bear on the contours of those rights. *Id.* ("Tho' *Fee-Simple* is the most ample Estate of Inheritance, it is subject to many Incumbrances; as Judgments, Statutes, Mortgages, Fines, Jointures, Dower, Etc.").

258. Although it is hard to comprehend today, governments gave away or sold vast amounts of land between 1700 and 1900. In California, for example, the Spanish and Mexican governments granted out almost 13 million acres, or about 15% of all land in the state, within the sixty-year period beginning in 1785. Clay, *supra* note 3, at 123. Pursuant to the largest federal program, established by the Homestead Act of 1862, the federal government issued about 15,000 patents per year between 1862 and 1900. The sum-total of land transferred under that Act was about 270 million acres, or about 10% of all land in the United States. There seems to be a consensus among historians that fraud and corruption in the issuance of patents was ubiquitous. In 1783, Congress created the first federal land settlement process, charging Governors of the Northwest Territory with responsibility for investigating and confirming private land claims. According to Karen Clay, "[f]orcing [Governors] to handle more than 4,000 claims without the benefit of well-defined guidelines led to substantial irregularities. The magnitude of the problem is suggested by Congress' creation of a board to investigate claims confirmed by [the Governors]." *Id.* at 137 (The Northwest Territory consisted of the land that now makes up five states: Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of a sixth, Minnesota.). In the largest land-patenting program in our history, the Homestead Act of 1862, researchers continue to debate the extent of the fraud. Estimates of the proportion of fraudulent claims range from 8% to 40%. RICHARD EDWARDS, JACOB K. FRIEFELD & REBECCA S. WINGO, HOMESTEADING THE PLAINS: TOWARD A NEW HISTORY 65–90 (2017); *see* John Messing, *Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903–1910*, 35 PAC. HIST. REV. 35, 35 (1966).

259. The court in *People ex inf. Webb v. California Fish Co.* explained the context of a typical patent process:

> There has never been any provision regarding navigation in any of these statutes, and no inquiry or determination on the subject, or in reference to it, was authorized. No board or officer was given any discretion or authority to ascertain whether any land applied for was or was not required for purposes of navigation, or what effect their reclamation or use for private purposes would have upon navigation and commerce. The surveyor general's approval of the application and survey was necessary. But this requirement applied only to the form of the survey and application and the qualifications of the applicant. It did not empower him to reject the application on the ground that the land was not suitable for cultivation, or that it was needed for navigation, or that its sale to private use would interfere with or destroy the public easement to which such land is dedicated. The applicant determined what land he desired to buy, he caused it to be surveyed if that had not already been done, he made his application and, if he was a person qualified to buy and his proceedings were regular in form, he thereupon became entitled to complete the purchase and could compel the officers of the state to execute the title papers necessary to convey it to him, on payment of the fixed price of one dollar an acre.

138 P. 79, 85 (Cal. 1913).

2. Possible Creation of Rights

If, immediately prior to issuance of the patent, there were no public rights in the subject property, it would have been possible for the government to reserve them by using language to that effect in the patent. But what if there were no such language? Could a silent patent retain any public rights?

As noted, the fire-sale context of the disposal era meant that the government had neither the time nor interest to think about how the patent would affect the public's ability to get to the ocean or use the beach.[260] Moreover, early beachfront patents were issued in a world in which there perhaps remained nearby unpatented land that the public could use to access the sea. In other words, it would not have been until the last patent on a given beach was issued that public access would have been eliminated. Prior to that time, there was no need for a reservation.

Along the same lines as the earlier discussion of Citizen X, it does not seem consistent with the public trust doctrine for the government to privatize a beach simply by transferring out the land adjacent to it.[261] Application of standard public trust rules could result in a court finding that the government had no power to transfer out the last parcel along the beach without a reservation of road-to-ocean access.[262] In other words, the public trust doctrine ought to prevent constructive as well as actual disposals.[263]

The intent and constructive conveyance arguments are consistent not only with general policies of property law, but with the access policies underlying the broader common law of beachfront property. As the Supreme Court of New Jersey once wrote:

> The observation to be made is that the statements in our cases of an unlimited power in the legislature to convey such trust lands to private persons may well be too broad. It may be that some such prior conveyances constituted an improper alienation of trust property or at least that they are impliedly impressed with certain obligations on the grantee to use the conveyed lands only consistently with the public rights therein. For example, the conveyance of tide-flowed lands bordered by an ocean dry sand area in private ownership to the owner thereof may well be subject to the right of the public to use the ocean waters.[264]

260. *Id.*

261. *See* discussion *supra* Section III.A.

262. *See* discussion *supra* Section III.A.

263. As the court said in *People ex inf. Webb*:

> It is not to be assumed that the state, which is bound by the public trust to protect and preserve this public easement and use, should have intentionally abdicated the trust as to all land not within the very limited areas of the reservations, and should have directed the sale of any and every other part of the land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement, which it was its duty to protect, and for the protection and regulation of which it received its title to such lands.

138 P. at 85.

264. Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972).

3. Other Examples of Implied Public Reservations

If the idea of mandatory retention of public rights seems novel, it is not: there are several prominent examples in American law—reserved water rights for public lands and Native Americans, and hunting rights on undeveloped and unenclosed land.

a. Reserved Federal Water Rights

In the mid-nineteenth century, the federal government held hundreds of millions of acres that had been acquired by treaty or purchase.[265] The government's intent at that point was to dispose of (sell or transfer) its land holdings piece by piece to private parties; privatizing the public domain was seen as important to both economic growth and national security.[266] The concept of "reserved lands" began to develop in the decades following the Civil War. During those decades, Congress, which had constitutional authority over the fate of the public lands,[267] frequently reserved lands from disposal, that is, barred those lands from being privatized.[268] Each reservation legislated by Congress was for a specific purpose: some reservations were enacted pursuant to settlements with Native American tribes and others—such as Yosemite National Park (1872)—were established to protect wildlife, important archaeology, and scenic or scientifically important geologic features of the landscape.[269]

While Congress chose to exercise the power to transfer and reserve land, it intentionally chose to leave power over allocation of freshwater resources to the states.[270] In interpreting the effects of one land-disposal statute, the Desert Land Act, on control over water resources, the Supreme Court held that when the "federal government divested itself of land, the deed did not carry with it any 'common law right to the water flowing through or bordering upon the lands conveyed.'"[271]

Around the turn of the century, a problem arose when state water law began to conflict with the use of land that had been reserved by Congress for tribal reservations. In *Winters v. United States*,[272] water diversions by farmers upstream of the Fort Belknap Reservation in Montana threatened tribes' ability to use the lands on the reservation for irrigation and watering livestock, as well as

265. BARTON H. THOMPSON, JR., JOHN D. LESHY, ROBERT H. ABRAMS & SANDRA B. ZELLMER, LEGAL CONTROL OF WATER RESOURCES 1039–40 (6th ed. 2018).

266. *Id.*

267. U.S. CONST. art. IV, § 3.

268. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 280 (1980).

269. *Id.*

270. THOMPSON, JR., ET AL., *supra* note 265, at 1040–41; Winters v. United States, 207 U.S. 564, 577 (1908) ("The power of the government to reserve the waters and exempt from appropriation under the state laws is not denied, and could not be.").

271. THOMPSON, JR. ET AL., *supra* note 265, at 1041 (quoting Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158 (1935)).

272. *Winters*, 207 U.S. at 564.

for domestic (survival) purposes.[273] The United States, as trustee for the reservation lands, filed suit to enjoin the construction of upstream diversions.[274] The Court resolved the case by reading between the lines of the treaty that established Fort Belknap Reservation (and which did not explicitly transfer water rights to the tribes).[275] The Court applied its rules of construction for interpreting tribal treaties; these rules required that "ambiguities occurring will be resolved from the standpoint of the Indians."[276] In the absence of any language regarding water in the treaty, the Court could have read the document in two ways: as not including any water rights for the tribes or as including those water rights that "support the purpose of the agreement."[277]

In the end the Court found that reading the treaty to include those water rights necessary to the purpose of the reservation was the most logical construction, notwithstanding the absence of language.[278] With "the cession of waters, [the reserved lands] would be valueless, and 'civilized communities could not be established thereon.'"[279] As the Court said nearly sixty years later in *Arizona v. California*,[280]

> [i]t is impossible to believe that when [these reservations were created the government was] . . . unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.[281]

b. Hunting on Unenclosed, Undeveloped Private Land

The English hunting laws inherited by the new United States favored large landowners at the expense of the commoners.[282] This was not an accident of the common law. In fact, according to wildlife law scholar Thomas A. Lund, English courts designed hunting rules to ensure "unequal distribution of the right to utilize wildlife."[283]

Needless to say, early American courts and legislatures did not share this policy goal. In his article *Hunting and Posting on Private Land*,[284] Mark R. Sigmon describes how America's eighteenth and nineteenth century lawmakers had to disrupt two English legal principles.[285] First, a good number of English courts,

273. THOMPSON, JR. ET AL., *supra* note 265, at 1044.
274. *Winters*, 207 U.S. at 576.
275. *Id.*
276. *Id.*
277. *Id.* at 576–77.
278. *Id.* at 577.
279. *Id.* at 576.
280. *See generally* 373 U.S. 546 (1963).
281. *Id.* at 598–99; *see* Cappaert v. United States, 426 U.S. 128, 139 (1976) ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water.").
282. *See* THOMAS A. LUND, AMERICAN WILDLIFE LAW 1 (1980).
283. *Id.* at 8.
284. *See* Mark R. Sigmon, *Hunting and Posting on Private Land*, 54 DUKE L.J. 549, 554–55 (2004).
285. *See id.* at 554–58.

although not Blackstone, supported the view that landowners had the right to take wildlife on their land with or without the permission of the Crown.[286] From an American perspective, the opposite result—State control of wildlife take, regardless of where it occurs—was more likely to lead to the equitable distribution of hunting opportunities.[287]

The second legal obstacle created by traditional English rules would seem to have been far more difficult to overcome. Even if the State could make wildlife located on private land available to the public, the public—under English trespass law—could sometimes transit across undeveloped private land but could never hunt there.[288] Some colonial legislatures had adopted laws that permitted fishermen and hunters to cross privately owned, but undeveloped (not currently in use for agriculture), land. These laws did not allow for the take of fish and game on that land; they only permitted transit.[289]

As noted by Sigmon, "[e]arly American lawmakers . . . turned their attention to ensuring that hunters" could hunt on undeveloped private land.[290] They ultimately achieved this goal through various means: "[t]hrough the use of [state] constitutional conventions, court decisions, and legislation . . . ."[291]

In the late 1700s, two states, Pennsylvania and Vermont, adopted constitutional provisions granting the public hunting rights on private land.[292] The Vermont provision stated that "[t]he inhabitants of this State shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not inclosed [sic]. . . ."[293]

In a South Carolina decision dating from 1818, the court held that "[t]he hunting of the wild animals in the forests, and unenclosed lands of this country, is as ancient as its settlement, [and] the right to do so coeval therewith; [and] the owner of the soil, while his lands are unenclosed, can not prohibit the exercise of it to others."[294]

In 1922, the United States Supreme Court, in the case of *McKee v. Gratz*,[295] wrote:

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until

286. The landowner's right could be based on the doctrine of *ratione soli* (an inherent, exclusive right to take) or on the argument that the Crown had earlier granted the landowner, or his predecessor in interest, exclusive hunting rights on the property. *Id.* at 554.

287. *Id.*

288. *Id.* at 555.

289. *Id.*; *see* LUND, *supra* note 282, at 25.

290. Sigmon, *supra* note 284, at 555.

291. *Id.* at 555–56.

292. *See id.* at 556.

293. VT. CONST. of 1777, ch. II, § 39. This provision is still in the Vermont Constitution, located at Section 67. Sigmon, *supra* note 284, at 556 n.45.

294. Sigmon, *supra* note 284, at 557 (quoting M'Conico v. Singleton, 9 S.C.L. (2 Mill) 244, 244 (1818)).

295. 260 U.S. 127 (1922).

> the owner sees fit to prohibit it. A license may be implied from the habits of the country.[296]

The most typical legislative approach to the issue was the adoption of what are known as "posting statutes," laws that allow hunting on undeveloped private land unless the owner has posted signs to the effect of "no trespassing" or "no hunting."[297] Today, the majority of states require posting in some form in order to prevent hunters from "legally trespassing."[298]

IV. POSTPATENT LIFE-HISTORY

As noted in the Introduction, courts ordinarily focus on relatively recent public use in determining whether public whole-beach or road-to-ocean rights exist.[299] It is certainly true that events taking place since the birth of the beachfront lot can create (or eliminate) public rights.[300] These events, however, go beyond facts relating to public use or landowner behavior toward that use.

A. Events Creating Public Rights

1. Increases in Beach Elevation Caused by Rapid or Artificial Forces

As also noted in the Introduction, courts long ago developed rules for locating the boundary between the lower beach and the upper beach, that is, between trust property and the privately owned beachfront lot.[301] The general rule is that the boundary moves when the elevation of the beach changes: when elevation decreases due to erosion, the boundary moves landward; when it increases due to accretion, the boundary moves seaward.[302] In most states, this general rule applies only when the erosion or accretion occurs in a slow and imperceptible manner, that is, gradually over a long period of time.[303]

296. *Id.* at 136.

297. *See generally* Sigmon, *supra* note 284.

298. *Id.* at 558.

299. *See* discussion *supra* Part I.

300. *See* discussion *supra* Part I.

301. *See generally* Katrina M. Wyman & Nicholas R. Williams, *Migrating Boundaries*, 65 FLA. L. REV. 1957, 1960 (2013); Sax, *supra* note 19, at 317.

302. *See* Eagle, *supra* note 13, at 1194–1208.

303. As Blackstone wrote:

> And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terrafirma; or by dereliction, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimis non curat lex: and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the foil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry. So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's, or the subject's property.

2 BLACKSTONE, *supra* note 122, at 261–62 (citations omitted).

There are two kinds of exceptions to the general rule of the migratory boundary. The first exception applies when the increase or decrease in elevation happens rapidly, for example, as the result of a single storm.[304] Rapid beach-change is known in the common law as "avulsion"; confusingly, that term applies to both rapid increases and rapid decreases.[305] (In order to avoid confusion, I use the term "positive avulsion" to refer to rapid increases in elevation and "negative avulsion" to refer to rapid decreases in elevation.) When either positive or negative avulsion occurs, the boundary between the trust and private property does not move; instead, it remains where it was before the avulsion occurred.[306]

The second exception relates to the cause of the loss or gain in elevation. If the change was caused by a human, or "artificial," action, then—as with avulsion—the boundary remains where it was before the artificial change occurred.[307] It is important to note that each state uses its own definition of what constitutes an artificial action.[308] In some states, the only actions that count as "artificial" are those undertaken by the landowner whose property has been affected.[309] For example, if a landowner installed a dock running from her property out into the water, and that dock caused sand to build up, the artificial change rule would prevent her from claiming the newly dry land as her own.[310] But if a *neighbor* installed the dock that caused the sand to build up, courts would deem the accretion to be "natural," and the landowner would own the newly dry land.[311] In other states, the neighbor's actions would count as "artificial."[312] Like the duty not to dispose and the specialized rules of construction for waterfront transfers, the artificial change rules can be considered to be part of the public trust doctrine; they are meant to ensure that private parties cannot convert trust land into private land.

The cases of artificial accretion and positive avulsion are highly relevant to the question of public whole-beach rights. In both scenarios, the boundary between trust and private property remains where it was before the change occurred. What this means is that the newly dry land belongs to the State for the benefit of the public; not only does the public have the right to use the upper beach, it actually owns part of it in fee simple.[313]

304. *See* Eagle, *supra* note 13, at 1194–1208.

305. *Id.* at 1194–95.

306. *Id.* at 1195.

307. *Id.* at 1200–02.

308. *See id.* at 1201.

309. *Id. See* Brundage v. Knox, 117 N.E. 123, 128 (Ill. 1917).

310. *Brundage*, 117 N.E. at 129 ("We think, therefore, by reason and by the great weight of authority, it must be held that the owner of land bordering on Lake Michigan has title to land formed adjacent to his property formed by accretions, even though the formation of such accretions is brought about, in part, by artificial conditions created by third parties.").

311. *Id.*

312. *See* State of Cal. *ex rel.* State Lands Comm'n v. Super. Ct. of Sacramento Cnty., 900 P.2d 648, 666 (Cal. 1995) ("We thus hold, consistent with our prior cases, that accretion is artificial if directly caused by human activities, such as the dredging, wing dams or levees cited in this case, that occurred in the immediate vicinity of the accreted land.").

313. *See* Eagle, *supra* note 13, at 1209–12.

2. Exactions and Transactions

It is possible that the public may have acquired either whole-beach or road-to-ocean rights as the result of a deliberate government acquisition. Such acquisitions can be accomplished in a variety of ways.

First, the State may have used its eminent domain power at some point in the past to acquire easements that allow the public to walk to or along the beach.[314] There is no question that the use of eminent domain for such easements qualifies as a "public use."[315] The two difficult issues relating to the use of eminent domain for whole-beach or road-to-ocean access relate to the pricing and scope of the easement. It will be difficult to establish a fair market value for either a road-to-beach or whole-beach easement due to the fact that there is no actual market—and, thus, no comparables—to use in estimating value.[316] Valuation would be a question of how much the easement—the presence of the public engaged in limited use—would reduce the value of the beachfront property. Estimating the reduction in value caused by limited public use will be difficult to estimate for both types of easement, but it will be particularly difficult for whole-beach easements: people can already use the lower beach because it is state owned; how much more impact is on the landowner from having people slightly closer to her home?[317]

The scope question arises where the government acquired the easement using eminent domain or through an exaction at some point in the distant past. If, for example, the State originally acquired the easement in order to allow recreational fishermen access to the beach, should that easement be read later to allow general recreational access?[318]

3. Back to Prescription, Dedication, and Custom, Briefly

The muddled application of the three doctrines of prescription, dedication, and custom can be explained, perhaps, as an intuitive judicial response to the atavistic function of beaches as connectors between land and sea.[319] In today's

314. *See* WOLF, *supra* note 83, § 79F.01. For a history of eminent domain law, see William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554–55 (1972).

315. The Supreme Court has held that the use of eminent domain for public purposes (*e.g.*, increasing employment) is sufficient to satisfy the "public use" requirement in the Constitution. Kelo v. City of New London, 545 U.S. 469, 485 (2005). Even strict readers of "public use," such as the three dissenting Justices in *Kelo*, would agree that acquiring a right-of-way that the public would physically be able to use meets the Federal Constitutional standard. *See id.* at 521 (Thomas, J., dissenting) ("[T]he government may take property only if it actually uses or gives the public a legal right to use the property.").

316. *See* Oxana Šnajberg, *Valuation of Real Estate with Easement*, 25 PROCEDIA ECON. & FIN. 420, 424 (2015).

317. *See supra* Subsection II.B.1.b. The State may also have acquired an easement via an exaction, as California attempted to do in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

318. *See* WOLF, *supra* note 83, § 34.12.

319. One commentator has also connected atavism with beaches. *See* Leonard R. Jaffee, *The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters:* Neptune City v. Avon-by-the-Sea*—A Case of Happy Atavism?*, 14 NAT. RES. J. 309, 309–10 (1974). More evidence is provided by the widespread nature of laws guaranteeing public access. Rachelle Alterman & Cygal Pellach, *Beach Access, Property Rights, and Social-*

world, popular culture paints beaches as parks next to the sea; attorneys for property owners present them as private backyards to beachfront homes, no different from the fenced-off oases of Bel Air or Scarsdale.[320] But at least some judges understand that using the beach to exit and enter the sea for any number of purposes is something that people have done as long as our species has existed. The specific use to which we have put beaches during recent or ancient times is less important than the fact that we have always used, and benefitted from, the central ecosystem service provided by beaches:[321] the most important ecosystem service produced by beaches is not the provision of recreation,[322] nor the provision of beach recreation opportunities that drive commerce, but the provision of connectivity. If connectivity is the service, then today's beach use is the same beach use that has gone on for millennia.

The history of English and American uses of connectivity during the past 1,000 years helps us to understand why judges intuit that connectivity is a part of our history as a species: beaches, and the connectivity they provide, were essential to Britain's food supply, economy, and national security throughout that period.[323] The same was undoubtedly true here, from the time of the earliest colonial settlements.

To get a sense of the importance of connectivity in our culture (and the common law), first consider the fact that our common law of property springs from an island nation: the ratio of land area (in square miles) to coastline (in linear miles) is about 8:1 in Britain, as compared to about 37:1 for the United States;[324] there is no town in England more than seventy miles from the sea;[325]

Distributive Questions: A Cross-National Legal Perspective of Fifteen Countries, 14 SUSTAINABILITY 4237, 4242 (2022).

320. As the former mayor of a Florida beach town put it: "[the beach] has always been private property. How would you like to have someone walk through your back yard?" Linda Trischitta, *Public Money, Private Beach*, S. FLA. SUN SENTINEL (Dec. 30, 2007, 12:00 AM), https://www.sun-sentinel.com/news/fl-xpm-2007-12-31-0712300091-story.html [https://perma.cc/M2RB-6NDL].

321. *See* Ausseil et al., *supra* note 16, at 37.

322. Without connectivity to the adjacent sea, beaches would offer the same amount of enjoyment as the sand dunes of Death Valley National Park. That is not to say that climbing dunes in Death Valley is not rewarding; however, many more people choose to go to the beach.

323. Well before Roman times, before *homo sapiens* had appeared on Earth, *hominins* made good use of beaches. Among the richest archaeological sites in England are the so-called "raised beaches," ancient beaches that are now inland and buried due to geological changes. One such site, the Goodwood-Slindon Raised Beach near Boxgrove, West Sussex, held scores of flint tools fabricated around 500,000 years ago by members of *Homo Heidelbergensis*. PETER MURPHY, THE ENGLISH COAST: A HISTORY AND A PROSPECT 8–9 (2009).

324. Length of U.S. coastline in miles ≈ 95,000; length of UK coastline in miles ≈ 11,000; size of U.S. in square miles ≈ 3.5 million; size of UK in square miles ≈ 94,000. *How Long is the U.S. Shoreline?*, NAT'L OCEAN SERV., https://oceanservice.noaa.gov/facts/shorelength.html#:~:text=NOAA's%20official%20value%20for%20the,U.S.%20shoreline%20is%2095%2C471%20miles (Feb. 26, 2021) [https://perma.cc/H5TQ-2XJU]; *How Long Is Great Britain's Coastline? Well, It Depends…*, BRILLIANT MAPS (Aug. 29, 2016), https://brilliantmaps.com/gb-coastline/ [https://perma.cc/R9L3-YSY6]; *Size of States*, STATE SYMBOLS USA, https://statesymbolsusa.org/symbol-official-item/national-us/uncategorized/states-size (last visited Sept. 18, 2022) [https://perma.cc/5R83-EF63?type=image]; *United Kingdom*, NATIONS ENCYCLOPEDIA, https://www.nationsencyclopedia.com/economies/Europe/United-Kingdom.html [https://perma.cc/QCW4-4VTN].

325. Coton in the Elms is the farthest, at seventy miles from the sea. Brady Haran, *The Farm Furthest from the Sea*, BBC NEWS, http://news.bbc.co.uk/2/hi/uk_news/england/derbyshire/3090539.stm (July 23, 2003, 2:57 PM) [https://perma.cc/4KA3-PDNE].

and, at one point, the English language contained twenty-four different words synonymous with "sea."[326]

In past eras, people used connectivity for survival.[327] The sea, and in particular the near-shore marine environment, includes some of the most biologically productive areas in the world.[328] Thus, it is not surprising many of the oldest uses of beaches are directly related to the collection and use of fish, shellfish, and other sea products.[329]

In the medieval period, beach-based commercial and subsistence fisheries were ubiquitous on the coasts of England and Wales.[330] The low costs of beach-based shellfish harvesting, which required just a rake or shovel, served to make shellfish "an attractive foodstuff for the poor."[331] For commercial fisheries, beaches were especially critical during this time period as a place to dry and to cure fish. Drying or curing was essential to the business of fishing, as it allowed products to be preserved for transport and future sale.[332] The beaches also served as marketplaces where fishermen could sell their catch; in medieval England, "many simply purchased their fish from heaps piled up on the strand [beach]."[333]

326. *See* MURPHY, *supra* note 323, at 117.

327. Hein B. Bjerck, *Settlements and Seafaring: Reflections on the Integration of Boats and Settlements Among Marine Foragers in Early Mesolithic Norway and the Yámana of Tierra del Fuego*, 12 J. ISLAND & COASTAL ARCHAEOLOGY 276, 277 (2017).

328. Daniel M. Sigman & Mathis P. Hain, *The Biological Productivity of the Ocean*, 3 NATURE EDUC. 1, 2 (2012). Coastal areas are more productive than more distant parts of the oceans because

> the seafloor is shallow, and sunlight can sometimes penetrate all the way through the water column to the bottom, thus enabling bottom-dwelling ("benthic") organisms to photosynthesize. Furthermore, sinking organic matter is intercepted by the seabed, where it supports thriving benthic faunal communities, in the process being recycled back to dissolved nutrients that are then immediately available for primary production.

Id.

329. *Id.* at 1–2.

330. *See* Wendy R. Childs & Maryanne Kowaleski, *Fishing and Fisheries in the Middle Ages*, *in* ENGLAND'S SEA FISHERIES: THE COMMERCIAL SEA FISHERIES OF ENGLAND AND WALES SINCE 1300 (David J. Starkey et al. eds., 2000) [hereinafter ENGLAND'S SEA FISHERIES].

331. C.M. Woolgar, *'Take This Penance Now, and Afterwards the Fare Will Improve': Seafood and Late Medieval Diet*, *in* ENGLAND'S SEA FISHERIES, *supra* note 330, at 43. Other evidence of the ubiquity of collection in early England can be found in the economic significance of wreck, which was great enough to give rise to a body of legal doctrine. These rules gave valuable, ship-sourced debris found on the beach to the original owner, or if none appeared, to the monarch: "[t]his [Crown] revenue of wrecks is frequently granted out to lords of manors as a royal franchise." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 292 (W.E. Dean ed., 1847). Rules were also developed to sort ownership of stranded whales:

> Stranded whales were exploited by coastal communities, but from the eleventh century whales and other cetaceans were claimed by the king as "royal fish." The difficulties of enforcing this claim against, on the one hand the holders of coastal lordships, and on the other against local inhabitants, led to recognition by the king of seigneurial claims.

Mark Gardiner, *The Exploitation of Sea-Mammals in Medieval England: Bones and their Social Context*, 154 ARCHAEOLOGICAL J. 173, 173 (2015).

332. *See* Peter E. Doe & June Olley, *Drying and Dried Fish Products*, *in* SEAFOOD: RESOURCES, NUTRITIONAL COMPOSITION, AND PRESERVATION 126 (Zdzislaw E. Sikorski ed., 1990).

333. Wendy R. Childs & Maryanne Kowaleski, *The Internal and International Fish Trades of Medieval England and Wales*, *in* ENGLAND'S SEA FISHERIES, *supra* note 330, at 29. For a picture of what market beaches may have looked like during that time, see Hendrik Cornelisz Vroom's 1623 painting, *The Beach at Scheveningen*, http://www.artnet.com/artists/hendrik-cornelisz-vroom/the-beach-at-scheveningen-fmbhleiq86N8MlONGfqz4A2 (last visited Sept. 22, 2022) [https://perma.cc/NHE8-SFCG], or Simon de Vlieger's 1642 work,

In nineteenth century England, the possibility of collecting marine organisms on the beach drove the creation of an entirely new use of connectivity: for creating natural history educational materials for the people.[334] The early 1800s saw a boom in "sight-hunting": treks to see things like "'the glittering ocean' and the 'wild magnificence' of grand, rocky coastlines."[335] In the middle part of the century, popular natural history books, including Mary and Elizabeth Kirby's *The Sea and Its Wonders*,[336] spurred "amateur scientists armed with manuals on geology and natural history [to swarm] over the coasts of England . . . to discover, collect and record interesting specimens."[337]

Archaeological research from beach areas in the United States indicates that Native Americans and early European settlers also used beaches for collection, curing, and trade of marine products.[338] Collection of shellfish, shells, and sea glass continues to be a popular recreational and commercial activity on beaches around the country.[339]

None of this is meant to suggest that courts should not use prescription, dedication, and custom to grant whole-beach or road-to-ocean access. In fact, the ancient history of connectivity provides an arguable basis for universal custom (somewhat of an oxymoron).[340] The point is that there are other, deeper legal

Fisherfolk and Other Figures on a Beach, http://www.artnet.com/artists/simon-de-vlieger/fisherfolk-and-other-figures-on-a-beach-B9Sgf8bcInl0CdKbd0Tf4A2 (last visited Sept. 23, 2022) [https://perma.cc/H9XN-R2AX]. Drying and curing fish on the beach caused some conflict between beachfront landowners and fishermen who attempted to build permanent structures on the beach. English court reports, for example, reference a 1468 decision involving a fisherman who built a net-drying rack on the beach in Kent. In order to secure his structure, the fisherman drove stakes into holes he dug into the sand. The beachfront owner, believing his title included the sandy land beneath the rack, sued the fisherman for "trespass by digging." Although the report does not indicate the court's holding, the justices' discussion indicates that they likely ruled in favor of the landowner on the ground that his ownership rights included the right to prevent others from digging on his property.

334. *See Beach-Comber*, OXFORD ENGLISH DICTIONARY (3d ed. 2022) ("A person who walks along a beach looking for valuable or interesting items that have washed up on the shore.").

335. JOHN HASSAN, THE SEASIDE, HEALTH, AND THE ENVIRONMENT IN ENGLAND AND WALES SINCE 1800 31 (2003).

336. MARY KIRBY & ELIZABETH KIRBY, THE SEA AND ITS WONDERS (1871); *see* P. G. Moore, *Popularizing Marine Natural History in Eighteenth- and Nineteenth-Century Britain*, 41.1 ARCHIVES NAT. HIST. 45, 55 (2014).

337. HASSAN, *supra* note 335, at 31.

338. *See generally* REBECCA ALLEN, NATIVE AMERICANS AT MISSION SANTA CRUZ, 1791–1834: INTERPRETING THE ARCHAEOLOGICAL RECORD (1998).

339. *See, e.g.*, Ross Anderson, *Beachcombing for Sea Glass Is Business for Some, Passionate Hobby for Most*, SEATTLE TIMES, https://www.seattletimes.com/pacific-nw-magazine/beachcombing-for-sea-glass-is-business-for-some-passionate-hobby-for-most/ (May 3, 2009, 3:50 PM) [https://perma.cc/2MFF-M9Q8]; Gary Kreamer & Stewart Michels, *History of Horseshoe Crab Harvest on Delaware Bay*, *in* BIOLOGY AND CONSERVATION OF HORSESHOE CRABS 299 (John T. Tanacredi et al. eds., 2009) (describing large-scale commercial collection of horseshoe crabs on beaches in New Jersey and Delaware from the 1870s to the present); Jack Nicas, *Metal Detectors Hit the Jackpot*, WALL ST. J. (July 30, 2011), https://www.wsj.com/articles/SB10001424053111904233404576462161651031814 [https://perma.cc/95NA-D7ZL] ("Sales are way up as gold prices soar[.]").

340. Professor Bederman explained that while it was possible to have widespread custom, the Blackstone elements applied in *Thornton* were for the purpose of identify members of the separate category of local custom:

> After considering the leges scriptae, the Acts of Parliament, Blackstone turned his attention to the "unwritten laws of England," including the idea of the common law as an expression of the custom of the entire people of the country. This is the first sense that the notion of "customary law" can be ascribed, but it is not what concerns us here. Instead, Blackstone took pains to differentiate a second form of custom, "particular

bases for the guarantee of connectivity. As Justice Brennan wrote in his dissent in *Nollan v. California Coastal Commission*:

> The [majority's holding] is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public's expectation of access considerably antedates any private development on the coast.[341]

B. Events Eliminating Public Rights

Over time, there have been many, many court decisions and a few statutes that have attempted to foreclose connectivity by appealing to the notion that Justice Brennan rejected, that is, that beachfront patents created purely private lots, identical in their legal contours to ordinary, land-locked tracts.[342] While it would be an uphill battle to attempt to change established rulings and legislation, the idea of unraveling those decisions does not seem farfetched in the context of the basic rule noted earlier (to paraphrase): the State—including the courts—has never had the power to sell that which it does not own.[343] Where decisions are void *ab initio*, overturning them would be less of a shock to the legal system than, for example, overturning precedents.

In an 1892 decision, the Supreme Court considered an attempted transfer of trust property by the Illinois legislature:

> [Lawyers for the grantee present the attempted transfer] as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.[344]

Ultimately, the Court found that it was not:

> We hold, therefore, that any attempted cession of the ownership and control of the state in and over the submerged lands . . . was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof . . . . There can be no

customs, or laws, which affect only the inhabitants of particular districts." "[F]or reasons that have been now long forgotten," Blackstone wrote, "particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large." What follows is a consideration of the Blackstonian conception of the factual proofs and legal requisites for local customs.

Bederman, *supra* note 118, at 1383.

341. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 847 (1987) (Brennan, J., dissenting).

342. *Id.*

343. *See* Brophy v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co., 855 F. Supp. 213, 216 (S.D. Ohio 1994).

344. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 450 (1892).

> irrepealable 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.[345]

In other words, the sovereign's decision to transfer was void and not voidable.

When assessing the validity of attempted legislative efforts to terminate public rights, courts should apply the same rules of construction described in Section III.B, above. The questions would be whether in legislation or the patents issued pursuant to that legislation, the legislature clearly expressed an intention to terminate public rights and whether there is evidence to support a finding that the legislature carefully considered each transfer, and its effects, on the public.

Unlike state legislatures, courts do not have the power to transfer out trust property; only the sovereign can do that.[346] Thus, any court opinion that purports to terminate public rights, or to reject the attempted establishment of public rights, should be closely examined in order to verify that the court did everything it could to retain public whole-beach and road-to-beach access. If, for example, a court read an ambiguous easement to allow certain uses, but not others, then that decision ought to be vacated on the ground that the narrow interpretation of easement scope represented an unauthorized exercise of judicial power. We can think of such decisions as the mirror image of Fifth Amendment judicial takings: a taking of public property without just compensation.[347]

V. CONCLUSION

Beaches are valuable not merely as places, but as places whose unique physical features—a gentle slope and a firm but receptive surface—allow them to provide a valuable ecosystem service: allowing people to profit from connectivity between land and sea. In medieval times, connectivity allowed common access to food and trade; today, it supports billions of dollars of commerce in the form of beach-driven tourism.[348]

Because of the public importance of things like food and commerce, the law has long tried to operationalize the principle that land-sea connectivity ought to be protected from threats of overprivatization.[349] Nowhere can this be seen more than in the legal restrictions, emanating from the common law of the early middle ages, on both royal and private property imbued with connective

345. *Id.* at 460.

346. State v. Hardee, 193 S.E.2d 497, 501 (S.C. 1972).

347. In 2010, the Supreme Court—in a beach case—found that it is possible for state courts to take private property within the meaning of the Fifth Amendment. Stop the Beach Renourishment v. Fla. Dep't of Envt'l Protection, 560 U.S. 702, 733 (2010). Professor Epstein explains:

> The problem of disposing of public property thus raises the mirror image of public use and just compensation questions under the takings clause of the Fifth Amendment: "Nor shall private property be taken for public use, without just compensation." The underlying problems are not any simpler when dealing with property which was originally held by the public in common, for now the guiding principle is in a sense the converse of the original eminent domain clause, to wit: "No public property may be transferred to private use, without just compensation," payable to the public at large.

Epstein, *supra* note 179, at 419.

348. *See supra* Subsection III.A.2.

349. *See supra* Subsection III.A.1.

function.[350] The Crown was not free to privatize navigable waterways and, after dedicating a strip of land as a road, it was not free to undo that decision.[351] Certain private landowners, such as innkeepers, were stripped of their right to exclude travelers from their property.[352] These restrictions on sovereign and private property were meant to protect the integrity and connectivity of the transportation network—it being seen as fundamental to the healthy functioning of commerce and society.[353]

One way to think about the tremendous increase in the value of beachfront property over the past fifty years is as an increase in the incentive that landowners have to invest in litigation meant to quash public rights. Despite the growing demand for public recreational opportunities, there has not been a concomitant increase in the amount of money available to defend public rights.[354] Beachgoers are a classic diffuse group; as such, they face all of the standard obstacles, such as free-riding, that will stand in the way of coming together to fight against beach privatization.[355]

The rate and rationales of victories achieved by beachfront landowners in court and in legislatures is a direct result of the imbalance in incentives and funding between beachgoers and landowners.[356] The primary purpose of this Article is to help correct that imbalance by arming courts and beachgoers with some tools that can be used to support the intuition that public access to beaches is, and has always been, what Justice Scalia called—in a beach case—a "background principle[] of the State's law of property."[357]

350. *See* MURPHY, *supra* note 323, at 8–9 and accompanying text.

351. *See* Epstein, *supra* note 179, at 415–16 and accompanying text.

352. *See supra* note 169 and accompanying text.

353. *See* Cheung, *supra* note 5, at 115–16.

354. *See Beach Access*, SURFRIDER FOUND., https://www.surfrider.org/initiatives/beach-access (last visited Sept. 23, 2022) [https://perma.cc/RL9L-YL85].

355. There are some NGOs that have overcome these obstacles to form pro-public-rights organizations, such as the Surfrider Foundation. *See What We Fight For*, SURFRIDER FOUND., www.surfrider.org (last visited Sept. 23, 2022) [https://perma.cc/WEW5-8BAB]. While such groups will never have resources available to beachfront landowners, they do play a critical role in ensuring that courts and legislatures hear the other side of the story.

356. *See Our Victories*, SURFRIDER FOUND., https://www.surfrider.org/victories/ (last visited Sept. 23, 2022) [https://perma.cc/S5JA-7KZY].

357. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).