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## WHERE THE SEA MEETS LAND

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*Each wave that we danced on at morning ebbs from us,  
And leaves us, at eve, on the bleak shore alone.*

– Thomas Moore<sup>2</sup>

### INTRODUCTION

Those who have been to Siesta Key, Florida, in the last couple of years have noticed the growing number of hotels and timeshares along the beach.<sup>3</sup> Some of these hotels start early in the morning putting up rows of chairs along the sandy part of their private beach in order to keep the public off of it.<sup>4</sup> The part of the beach these hotels claim as private is all of the soft, sandy part of the beach, essentially leaving a small, rock-hard portion where the tide has just receded from the night before, for members of the community and public to use.<sup>5</sup> This has started a war among public beach goers and private landowners in Sarasota County because, although portions of Siesta Key beach are privately owned, the public also customarily enjoys these parts of the beach.<sup>6</sup>

My husband and his family have been visiting Siesta Key beach for almost thirty years; he first took me there when we started dating, eager to share his favorite childhood pastime.<sup>7</sup> I had never been to Siesta Key, but

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2. THOMAS MOORE, *I Saw From the Beach*, in THOMAS MOORE'S COMPLETE POETICAL WORKS 196 (1895).

3. *See Backtracking on Beach Access*, HERALD-TRIBUNE (Oct. 29, 2009, 1:00 AM), <http://www.heraldtribune.com/article/20091029/OPINION/910291046> (recognizing the growing tension in Sarasota County between private land owners, like hotels, and public right to access the beach).

4. Rachel Brown Hackney, *'Private' Beach Rights Dispute Rises Again on Siesta Key*, SARASOTANEWSLEADER.COM, (July 5, 2012), <http://sarasotanewsleader.com/private-beach-rights-dispute-arises-again-on-siesta-key/>.

5. *See id.*

6. *See id.*

7. *See generally The Best Beach in America*, DR.BEACH, <http://www.drbeach.org/top10beaches.htm> (last visited Oct. 6, 2014). Siesta Key Beach ranked

had heard countless members of his family describe the smooth white sand and the clear blue water, filled with stingray, dolphins, fish, and kaleidoscope shells.<sup>8</sup> I can honestly say I have never witnessed a more beautiful view of the setting sun than from the shoreline at Siesta Key; because as that large ginger ball dips into the dark blue water at the earth's end, the sand on Siesta Key's shore seems even more whitened against the settling dusk.<sup>9</sup> It is the sand we come for.<sup>10</sup> Indeed, what makes Siesta Key Beach so unique is its sand.<sup>11</sup> It is white as snow, smooth, and as soft as flour.<sup>12</sup> Further, unlike the sand at other beaches in Florida (especially on the east coast), it stays cool all day long.<sup>13</sup>

Unfortunately, within the last several years, a well-known hotel chain was built along Siesta Key Beach.<sup>14</sup> Before this hotel was built, other hotels along the beach shared the beach with everyone, including the public.<sup>15</sup> However, this hotel started putting up chairs for its guests across the beach, as close to the water as possible, intending to block the public.<sup>16</sup> Consequently, when a member of the public tried to put down a chair nearby—whether it was in front of the hotel's row of chairs or in the midst of them—security personnel from the hotel would tell them to move.<sup>17</sup> Most people simply moved, however reluctantly, mumbling that they did not think anyone had the right to own the beach.<sup>18</sup> Still, one hotel's action triggered a ripple effect, spurring the other hotels along the beach—that had previously left space for the public along the shoreline—to also start

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number one in the list of top ten best beaches in America. *Id.*

8. *See generally id.* (describing the atmosphere at Siesta Key Beach).

9. *See generally* David McRee, *Battle of the Beach Sands*, VISITFLORIDA.COM, <http://www.visitflorida.com/en-us/articles/2008/june/919-battle-of-the-beach-sands.html> (last visited Oct. 6, 2014) (explaining the sand at Siesta Key Beach is made up of fine, soft quartz which makes it among the whitest in the state).

10. *See generally id.* (explaining the sand is so clean it “squeaks” or “chirps” when you step on it, which can be very entertaining for both children and adults alike).

11. *Siesta Beach*, BEST BEACHES, <http://www.bestbeaches.org/best-beaches/siesta-key-beaches/siesta-beach/> (last visited Oct. 6, 2014) (“The world’s finest, whitest sand.”).

12. *See id.*

13. *See* McRee, *supra* note 9 (distinguishing between the beach sand at Siesta Key, which is composed almost entirely of quartz crystals and stays cool all day long, and the beach sand along the southeastern Florida coast and the Keys, which is mostly composed of coral and mollusk shell).

14. *See generally* Hackney, *supra* note 4.

15. *See generally id.* (explaining how the owner of a hotel on Siesta Key Beach does not allow its guests to put chairs within 150 feet of water to allow for public use).

16. *See generally id.* (citing beach-goers who complain about hotel's beach chairs along the water line at Siesta Key beach as deterrent to their access).

17. *See generally id.* (citing police reports of incidents where hotel on Siesta Key beach ran people off their land).

18. *See generally id.* (citing people leaving the beach despite thinking they could be there).

pushing the public off the beach, because now too many people were concentrated on a single part of the beach.<sup>19</sup>

One morning, during one of our vacations to Siesta Key, my husband and I were two of the people this hotel told to get off its beach.<sup>20</sup> We got to the beach before the hotel set up its chairs, set up an umbrella and two of our own chairs along the shoreline, where the rock-hard portion of sand meets the soft sand part of the beach, and in front of the large hotel.<sup>21</sup> Sure enough, hotel security approached us and told us to move.<sup>22</sup> The thought of not being able to dig my toes into the soft white sand of the beach, while I read my book and enjoy the ocean view, upset me, so I start to wonder: can this hotel really *own* the beach and also *exclude* the public from enjoying it?<sup>23</sup>

This question is not as easily answered as I had imagined because to my surprise, ownership, boundary lines, and the use of the beach are still widely debated.<sup>24</sup> In Florida, the area of wet sand below the mean high water line belongs to the public.<sup>25</sup> This area of the beach has been held by the state in trust for the people since Florida became a state in 1845.<sup>26</sup> In practice, the public trust doctrine usually permits the public to walk across the sandy part of the beach to get to the water, but once at the shoreline they have nowhere to go, but *in* the water.<sup>27</sup> However, the purpose of the public trust doctrine is not only to protect the public right to access the beach, but also the public right to use and enjoy the beach.<sup>28</sup> Yet, in order for the public to fully enjoy and use the beach, they must necessarily use the dry sand, as the dry sand portion of the beach is intimately linked to recreation and other ordinary beach activities.<sup>29</sup> Thus, use of the dry sand upward of the mean high water line, presents a complicated situation for

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19. *See id.*

20. *See* Hackney, *supra* note 4 (providing examples of the same hotel telling people to get off its beach).

21. *See generally id.* (detailing a similar scenario to that which we faced as public use guests).

22. *See generally id.*

23. *See generally id.*

24. *See Backtracking on Beach access, supra* note 3; *see also* Hackney, *supra* note 4.

25. FLA. CONST. art. X, § 11.

26. *See* Broward v. Mabry, 58 Fla. 398, 408–09 (Fla. 1909) (explaining the history of the public trust doctrine in Florida).

27. FLA. CONST. art. X, § 11. *See generally* FLA. STAT. § 253.02 (2014) (detailing the powers and duties of the Board of Trustees within the parameters of Florida's public trust doctrine).

28. *See* FLA. CONST. art. X, § 11; FLA. STAT. § 253.02; *see also* White v. Hughes, 190 So. 446, 448–49 (Fla. 1939) (explaining that the public has a right to use and enjoy the beach).

29. S. Brent Spain, *Florida Beach Access: Nothing but Wet Sand?*, 15 J. LAND USE & ENVTL. L. 167, 170 (1999).

communities, such as Siesta Key in Sarasota County, Florida, where more and more private property owners are seeking to exclude the public from the dry sand portion of the beach.<sup>30</sup>

Under the public trust doctrine, as it was first intended, use and enjoyment of the beach essentially required some use of the dry sandy portion of the beach, area that lies above the mean high water mark.<sup>31</sup> The state's public trust doctrine, which was established to protect the interests of its trustees (i.e. the public), does not adequately protect the interests of its trustees because it fails to adequately preserve the public's pre-existing right to a reasonable area of dry sand beach above the high tide line.<sup>32</sup> Instead, when beachgoers in Florida attempt to assert their right to the dry sand area of a beach, they are either faced with "No Trespassing" signs, or are, like my husband and I, forced to leave by private landowners, the police, or private security guards.<sup>33</sup> Although the current public trust doctrine in Florida may succeed in establishing the public's right to access the beach—usually seen through an easement over private property to reach the water—in practice it does not sufficiently protect this right where the public does not have use and enjoyment of the dry sand portion of the beach.<sup>34</sup>

Part I.A of this comment discusses the history and evolution of the public trust doctrine, which dates back to Roman and Old English common law.<sup>35</sup> It asserts the public has a pre-existing right to the dry sand portion of the beach, a right that has been wrongfully limited in Florida by its current public trust doctrine.<sup>36</sup> Part I.C examines the uniqueness of beach property, and explains how the traditional notions of private property cannot succeed in overcoming the public's pre-existing right to the beach.<sup>37</sup>

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30. *Backtracking on Beach access*, *supra* note 3.

31. *See* Spain, *supra* note 29, at 168–71.

32. *See generally* Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 478 (2001). "The people have a right to . . . natural, scenic, historic, and aesthetic values of the environment." *Id.*

33. Erika Kranz, *Sand for the People: the Continuing Controversy over Public Access to Florida's Beaches*, 83 FLA. B.J. 10, 11 (2009).

34. *See* FLA. CONST. art. X, § 11; FLA. STAT. § 253.02 (2014) (outlining the current public trust doctrine in Florida).

35. *See* Monica K. Reimer, *The Public Trust Doctrine: Historic Protection for Florida's Navigable Rivers and Lakes*, 75 FLA. B.J. 10 (2001), available at <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/8D98D298C0060C0785256B110050FFB7>.

36. *See generally id.* (discussing the evolution of Florida's public trust doctrine as originating in ancient Rome).

37. *See* Ryan, *supra* note 32, at 479 (explaining that the public trust doctrine supports the notion that the nature of certain property is so common as to effectively resist private ownership).

The fact remains that over time the public right to use and enjoy the beach in Florida has been dwindling away, almost to extinction, as it is increasingly limited by development and privatization of Florida beaches.<sup>38</sup> Finally, Part II argues that Florida should follow New Jersey's lead and resolve this problem by amending its current legislation to include a reasonable area of dry sand area above the high water mark for the use and enjoyment of the public.<sup>39</sup>

## I. THE PUBLIC TRUST DOCTRINE

### A. HISTORY OF THE PUBLIC TRUST DOCTRINE

American law, including the public trust doctrine, finds its roots in both English and Roman common law.<sup>40</sup> The Roman Emperor Justinian first recognized the idea of a public trust in the seaside when he included the provision, “by the law of nature these things are common to all mankind; the air, running water, the sea and consequently the shores of the sea,” in his realm's written law.<sup>41</sup> Thus, the public trust doctrine, at its very core, finds its origins in natural law.<sup>42</sup> Further, in England, because the King—who held legal title to the sea and shore—exercised ownership over all sovereign land, a quarrel between the King and the people over land was usually settled in favor of the King.<sup>43</sup> Nevertheless, even the King's ownership over such property, including the shore, was subject to certain “regresses and egresses” of the people, whose rights had been “variously

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38. See Hackney, *supra* note 5.

39. See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309 (N.J. 1972) (stating that the public had rights in the dry sand beach immediately landward of the high water).

40. See *Shively v. Bowlby*, 152 U.S. 1, 14 (1894) (noting that the origin of the public trust doctrine can be traced to English common law).

41. Steve Strunsky, *A Walk Along the Water Is Not a Simple Matter*, N.Y. TIMES (Jan. 13, 2002), <http://www.nytimes.com/2002/01/13/nyregion/a-walk-along-the-water-is-not-a-simple-matter.html> (explaining the public trust doctrine dates back to 530 A.D. when the Institute of Justinian, a body of Roman civil law, was established); see George P. Smith, II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 310 (2006), available at <http://lawdigitalcommons.bc.edu/ealr/vol33/iss2/3> (explaining scholars believe that this rule of law infiltrated the common law system in medieval Europe).

42. See Smith, II & Sweeney, *supra* note 41, at 308–09 (examining the history of the public trust doctrine as it relates to natural law); see also Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 748 (2012) (discussing the origin of the public trust doctrine in the United States and abroad).

43. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 476 (1970).

modified, promoted, or restrained by the common law, and by numerous acts of parliament . . . .”<sup>44</sup> There is no doubt that use of the shore, historically, has been a common right of the public;<sup>45</sup> the King may have had technical ownership over the sandy shore, but the people retained use of that shore.<sup>46</sup> English common law then formed the foundation of our legal system when it was used to govern the first Colonies of America.<sup>47</sup> Today, under American law, title to land from the federal government runs only up to the high water mark, with land waterward held by the states in trust for the people.<sup>48</sup> However, what is missing from the modern public trust doctrine is the preservation the public’s natural right to *use* the

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44. *Id.*; see Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989) (explaining the notion that the English common law system favored a balancing of both a private property owner’s interest and the community interest).

45. See HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND, 39–40 (Samuel E. Thorne trans., 1968) (“By natural law these are common to all: running water, air, the sea, and the *shores of the sea, as though accessories of the sea.*”) (emphasis added). While Bracton recognized the common ownership of both the sea and the shore, he also acknowledged that the shores were not common in the same sense as the ocean was because the buildings built there belonged to the person who built them. *Id.* at 40.

46. See JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 17, 33 (1826) (explaining the common law policy that the sea is to be used by the public even though the King retains legal ownership). Lands that were under ownership of the King were lands that were not capable of ownership by any one individual; hence the king owned the shore. *Id.* However, even though the King could grant soil to a grantee of these lands, the right of the grantee was always subservient to the right of the public. *Id.* at 33–34.

47. See *Broward v. Mabry*, 58 Fla. 398, 407 (Fla. 1909) (explaining the crown’s capacity to hold title to navigable waters and shoreline). Under the common law of England, which also existed in the English Colonies of America, the sovereign held land, including the shore, in trust for the people who had the “rights of navigation, commerce, fishing, bathing, and other easements” recognized by law. *Id.*

48. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894); see *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 342 (Fla. 1986); Monica K. Reimer, *The Public Trust Doctrine: Historic Protection for Florida’s Navigable Rivers and Lakes*, 75 FLA. B.J. 10 (2001), available at <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/8D98D298C0060C0785256B110050FFB7>; see also Sax, *supra* note 43, at 476 (“It has . . . been a general rule that land titles from the federal government run down only to the high water mark, with title seaward of that point remaining in the state . . . .”). Lands beneath navigable water bodies are referred to as “sovereignty lands” because title to the lands passed “as an incident of sovereignty.” *Coastal*, 492 So. 2d at 342. In the new state, trust over these lands came to be through the operation of law, without the need for a deed, inventory, patent, or survey by the government. Reimer, *supra*. It is not a legal description in a deed that establishes ownership, but rather the nature of the water itself. *Id.* Instead of record title, the navigable character of the body of water establishes the requisite notice. *Id.* “The boundary of navigable freshwater lakes and rivers is the ordinary high water line. The public has the right to make all lawful uses of sovereign lands up to this boundary line, including use of the shore or space between ordinary high and ordinary low water marks.” *Id.*

nation's dry sandy seashore.<sup>49</sup>

After the United States gained Florida from Spain in 1821, and upon its acceptance into the Union in 1845, Florida became subject to the same rights and responsibilities regarding navigable waters and submerged lands as the original thirteen states.<sup>50</sup> Included with its governance of public trust lands, was the duty of the State of Florida to ensure the beach and its shore continued to be free for public use.<sup>51</sup> Although the public trust doctrine began at English common law,<sup>52</sup> it was eventually integrated into the Florida Constitution and further codified by Florida Statute.<sup>53</sup> The pertinent portion of the Florida Constitution explains, “[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people.”<sup>54</sup> Thus, the purpose of the land held in trust by the State of Florida is to protect and further the public's interest in a unique natural resource.<sup>55</sup>

In Florida, the boundary line between privately owned beach and state owned land is the mean high water line, which is determined by the average range of high tide over the previous nineteen years as referenced in the Florida Constitution as the “ordinary boundary line.”<sup>56</sup> The term, “ordinary boundary line,” used to separate private property from state owned land (subject to public trust), also derives from English common law, initially instituted by Sir Matthew Hale in his 1787 writing, *De Jure Maris*.<sup>57</sup> However, much confusion has mounted over what Hale's

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49. See generally Spain, *supra* note 29, at 169 (explaining the current public trust doctrine in Florida does not include any dry sand area of the beach).

50. See *Mabry*, 58 Fla. 398 at 408–09.

51. Kranz, *supra* note 33, at 13.

52. Donna R. Christie, *Of Beaches, Boundaries and Sobs*, 25 J. LAND USE & ENVTL. L. 19, 46 (2009) (asserting Florida's public trust doctrine derived from English common law); see also *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 342–43 (Fla. 1986) (explaining title to land under navigable waters transferred “as incident to sovereignty,” without the need for deed or survey because such ownership is based on the navigable nature of the water itself, which makes notice of public ownership); *Mabry*, 58 Fla. 398 at 407.

53. See FLA. CONST. art. X, § 11; FLA. STAT. § 253.02 (2014).

54. FLA. CONST. art. X, § 11.

55. See FLA. CONST. art. X, § 11 (“Private use of portions of such lands may be authorized by law, *but only when not contrary to the public interest.*”) (emphasis added); *Thiesen v. Gulf, F. & A. Ry. Co.*, 78 So. 491 (Fla. 1917) (explaining state rights are intended to be exercised for the benefit of the public as whole, and may regulated those rights for the good of the people); see also 56 FLA. JUR. 2d *Water* §§ 162–65 (describing the public's right to use navigable waters in the state).

56. See FLA. STAT. §§ 177.27 (14)–(15), 177.28(1) (2014); *Miller v. Bay-To-Gulf, Inc.*, 193 So. 425, 427–28 (Fla. 1940).

57. See Christie, *supra* note 52, at 30.

“ordinary high tide” boundary actually means, as states and courts have struggled to interpret it over the years.<sup>58</sup> The persisting perplexity of boundary lines on the shore derives from the nature of beach land itself, which unlike traditional inland property, is subject to shifting tidal fluctuations.<sup>59</sup> Tidal instabilities make determining a fixed boundary line on a daily basis difficult, which further aggravates the tension between private owners of beachfront property and beach-goers who seek to use this natural resource.<sup>60</sup> Consequently, because such a boundary exists on sand, which is evanescent in nature, it is at its core enigmatic.<sup>61</sup>

## B. THE SCOPE OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a matter of state law,<sup>62</sup> therefore states have the power to not only define the boundary line, but also to expand the scope of the public’s interest to access and use the beach shore beyond uses traditionally recognized.<sup>63</sup> The Florida legislature has recognized the importance of the public’s access to its beaches by defining the purpose behind the state’s plan, as to “[e]nsure the public’s right to reasonable

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58. *See id.* (“Hale designated lands covered by the ‘ordinary high tide,’ [also] identified as neap tides, as the boundary.”).

59. *See id.* at 33.

60. *See In re Ashford*, 440 P. 2d 76, 77 (Haw. 1968); *see also County of Hawaii v. Sotomura*, 517 P. 2d. 57, 62 (Haw. 1973) (“[T]he presumption is that the upper reaches of the wash of waves over the course of a year lies along the line marking the edge of vegetation growth.”); *Harkins v. Del Pozzi*, 310 P. 2d 532, 534 (Wash. 1957) (finding the vegetation line to be the mean high tide line). *But see Hughes v. State*, 410 P. 2d 20, 26–29 (Wash. 1966), *rev’d on other grounds*, 389 U.S. 290 (1967) (“[Ordinary high tide] is indefinite at best and an oversimplification of a phenomenon inherently complex and variable.”). *See generally* Christie, *supra* note 52, at 30–31. Because the boundary line on beaches is subject to change daily, some states have resorted to visual indicators, like the edge of vegetation, so that day-to-day beach users have some idea as to where the line stands as a matter of law. Christie, *supra*.

61. *See* Christie, *supra* note 52, at 26. Florida’s 825 miles of sandy shore continues to wither away due to beach erosion and accelerated sea level rise, causing legal boundary lines to be washed out to sea. *Id.* Further, even regular wind and tide conditions cause the physical makeup of the beach to constantly change, because “beaches are ever-changing, restless armies of sand particle, always on the move.” *Id.* at 30.

62. *Macnamara v. Kissimmee River Valley Sportsman’s Ass’n*, 648 So. 2d 155, 159 (Fla. Dist. Ct. App. 1994) (holding that neither Federal decisions nor formulations for locating the boundary which have been adopted by different states have any bearing on Florida’s legal ordinary high water boundary).

63. Christie, *supra* note 52, at 23; *see also* Smith II & Sweeney, *supra* note 41, at 325 (“[T]he scope of the public trust doctrine will be determined by the states. Like other doctrines, the public trust was created with ‘a set of minimum [constitutional] standards that can be expanded, but not contracted, by the states.’”) (citing Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 464 (1989)).

access to beaches.”<sup>64</sup> The problem is that according to Florida’s current legislation, the public’s right to “reasonable access” does not automatically mean people have the right to lounge or build sand castles on the dry sandy part of the beach, especially when next to privately owned land; rather, “reasonable access” seems to indicate a presumption that certain easements are required over sandy beach for the public merely to get to the water.<sup>65</sup>

The Florida Supreme Court has acknowledged the public’s right to such recreational use of sovereign lands and waters “as within the scope of the public trust’s common law protections,”<sup>66</sup> expressly relying on the traditional notion of the doctrine as intended under English and Roman law, when it opined:

There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the life-giving touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same. This primeval quality appeals to us. ‘Changeless save to the wild waves play, time writes no wrinkles on thine azure brow; such as creation’s dawn beheld, thou rollest now.’ The attraction of the ocean for mankind is as enduring as its own changelessness. The people of Florida—a State blessed with probably the finest bathing beaches in the world—are no exception to the rule. Skill in the art of swimming is common amongst us. We love the oceans which surround our State. We, and our visitors too, enjoy bathing in their refreshing waters. The constant enjoyment of this privilege of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has.<sup>67</sup>

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64. FLA. STAT. § 187.201 (8)(b)(2) (2014); *see also* Spain, *supra* note 29, at 169 (explaining Florida legislative policy establishes legislative acknowledgement of the importance of public beach access in Florida).

65. *See* FLA. STAT. § 187.201(8)(b)(2); *see also* FLA. STAT. § 161.55(5) (setting forth the public’s right, but not explicitly including any right to dry sand).

66. Christie, *supra* note 52, at 23–24.

67. *White v. Hughes*, 190 So. 446, 448–49 (Fla. 1939) (emphasis added). While *White* dealt

In *White v. Hughes*, the court clearly recognized the viability of the public's right to recreation incident to bathing in the water of the ocean, which included reclining on the soft sand.<sup>68</sup> Further, in holding that an injured beach-goer could recover for his injuries after being hit by an automobile driving at the waters edge, the court in *White* also explained the public's right of access to the water was "superior," even though it was not exclusive to that of the motorist.<sup>69</sup> Therefore, taken as a whole, the court's ruling stands as a catalyst for ascertaining the public's pre-existing right to use the beach beyond mere bathing and navigation in the water.<sup>70</sup>

Moreover, the Florida Supreme Court, in *City of Daytona Beach v. Tona-Rama, Inc.*, later pronounced that the right of the public to the "full use of the beaches should be protected."<sup>71</sup> The court further explained, "[t]he 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."<sup>72</sup> Thus, because the nature of the beach as property is not conducive to other more traditional uses associated with *land*, it is the public that puts the beach to its *best* use, for recreational space, as well as for a "haven" incident to its historically recognized use of the ocean for fishing and bathing.<sup>73</sup>

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with a dispute between a beach-goer who was injured after being hit by an automobile driving on the beach, in dicta, I believe it can stand as a platform for expanding the public's lawful uses of the beach beyond mere bathing and navigation in the water. *Id.* at 453.

68. *Id.* at 153. "[B]athers have the 'right of way' to the use of the beach, not only for access to and from the water, but for reclining on the beach near the water's edge for rest and recreation between their dips in the surf, and motorists should at all times exercise a high degree of care to avoid injuring bathers and pedestrians who are using the beach for legitimate bathing and recreation purposes." *Id.* (emphasis added).

69. *See id.* at 454 ("In other words, [the public] should not take advantage of their superior but not exclusive right to the use and enjoyment of the ocean beach."); *see also* Sallas v. State, 124 So. 27, 28 (Fla. 1929) ("The fact that Atlantic and Jacksonville Beaches have been made public highways by legislative enactment in no way modifies or restricts the use and right of the pedestrian public in the use of them for lawful purposes . . . that right [is] equal to, if not superior to, that of the motorist.").

70. *White*, 190 So. at 453.

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

72. *Id.*

73. *See id.* *See generally* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 806 (2009) (explaining his social obligation theory as way to justify the expansion of the public trust to facilitate social interactions and health and noting that "recreation is an important aspect of health, which is a vital dimension of the capability of life . . ."); John Makdisi, Professor of Law, St. Thomas University, Lecture at St. Thomas Law, Property I Class (Fall, 2013). Property rights are defined according to a person's relation to a thing. Makdisi, *supra*. Additionally, one policy interest in law, generally, is to put a thing in the hands of the highest valuing user, which is tied to the principle of externalities. *Id.*

Indeed, the nature of beach property itself supports the public's pre-existing right to use the dry sandy portion of beach.<sup>74</sup> Beach property is not subject to ownership as easily as inland property is because it cannot be possessed or seized in the same way as other real property can.<sup>75</sup> First, beaches are made up of grains of sand, and this sand constantly moves, making seizing it nearly impossible.<sup>76</sup> Because of the inherently mutable nature of the dry sand, which gathers to form 'a beach,' this sand is more like natural gas, oil, or even water—dare I say, a wild animal—than traditional property.<sup>77</sup> In fact, the beach is most commonly referred to, and recognized by scholars and courts as a unique, irreplaceable natural resource.<sup>78</sup> Therefore, unlike inland property, a beach is less susceptible to being privately owned because it cannot be 'seized' in the conventional sense.<sup>79</sup>

Second, although the dry sand of a beach is unremittingly subject to various uses, for use to justify ownership of land, it must be appropriately linked to the kind of land being used.<sup>80</sup> To help evaluate what type of use for a particular tract of land is appropriate, it is helpful to look at two

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Property law internalizes the principle of externalities by recognizing land belongs in the hands of whoever values the land more. *Id.* Moreover, such value should only increase when the use of land also encourages fair social interactions and promotes good health, whether it is physical or moral. *Id.*

74. See Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand on*, 11 OCEAN & COASTAL L.J. 47, 49 (2006) (exploring the moral justifications for granting private ownership of sandy beach, but concluding none actually justify the current system of privatizing most beaches). "The lack of strong moral [justifications] for private dry sand beaches can be used to justify different public policies that could expand public access to the beaches." *Id.*

75. See *id.* at 53. As one property theorist suggests, there is a difference between possessing a physical deed to a piece of land and declaring ownership, and possessing the physical space over which one claims ownership. *Id.* at 52–53. When it comes to private ownership of beach property then, the relevant question may be: when did ownership or possession of the beach first occur? See *id.* at 52. This question represents the problem with private ownership of beach property because it would seem to be literally and conceptually impossible to seize something as mutable as the sand near the shoreline of the ocean. *Id.* at 53. Moreover, understanding this important distinction distinguishes the sandy region of the shore from inland property. See *id.* at 52.

76. See *id.* at 53 ("The individual grains of sediment that cumulatively constitute a beach must continue to move or the beach will cease to exist.").

77. See generally *id.* (explaining beaches are both literally and conceptually more difficult to possess than other land).

78. See White, 190 So. at 448–49; Thompson, *supra* note 74, at 59.

79. See Thompson, *supra* note 74, at 53.

80. See *id.* at 54 ("Land can be used appropriately in two senses: first, the land can seem naturally well suited for a use; and second, a use might be valued by the community . . . [as a whole]."); see also *Brumagim v. Bradshaw*, 39 Cal. 24, 50 (Cal. 1870) ("The general principle pervading . . . acts of dominion and ownership which establish *possessio pedis* must correspond . . . with the size of tract, its condition, and appropriate use.").

theories advanced by John Locke and Henry George.<sup>81</sup> Philosopher John Locke defended private ownership of land by reasoning every man has a right in his body, thus man is entitled to the fruits of his own labor.<sup>82</sup> Under Locke's theory, a man may take the "labour of his body" and the "work of his hands" and call it *his* "property."<sup>83</sup> For example, one finds unoccupied land, seizes it, and changes it by improving upon it, through one's own productiveness, which effectively establishes ownership over the thing improved upon.<sup>84</sup> However, what Locke envisioned cannot occur in beach property: it cannot be tilled, planted, or cultivated.<sup>85</sup> What logically follows from reading Locke is that, initially, God gave men land in common, yet that land was never intended to stay in common indefinitely; land is only subject to private ownership inasmuch as the land in question is capable of being improved by the hands of man.<sup>86</sup> Indeed, to be improved upon, the land itself must gain some kind of value.<sup>87</sup> Man does not add value to the beach, if anything, he works to reduce its value, because its value derives from its own innate characteristics, most recognizably, the ocean.<sup>88</sup>

By contrast, Henry George believed all land should be common property because private ownership was perceived as a key factor in increasing the level of poverty.<sup>89</sup> George argued that as land became scarcer, its value increased; yet, even the owner who did nothing to his land could benefit from this added value, consequently scarce land should

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81. See Thompson, *supra* note 74, at 55, 57–58 (citing both theories in discussion on morality and property theory).

82. JOHN LOCKE, *Of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 17, 18 (C.B. Macpherson ed., Univ. of Toronto 1978).

83. *Id.*

84. See generally *id.* at 18–20. "God gave the World to Men in Common; but . . . it cannot be supposed he meant it should always remain common and uncultivated." *Id.* at 20. "As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property." *Id.* at 19.

85. Thompson, *supra* note 74, at 55.

86. See Locke, *supra* note 82, at 19–20; see also Thompson, *supra* note 74, at 56–57 (recognizing ways individual beachfront owners may claim to improve the beach, but explains these owners neither enrich the beach itself, nor add value to the beach because most actions that could be perceived as adding value actually erode and destroy the beach).

87. See Locke, *supra* note 82 **Error! Bookmark not defined.**, at 19–20.

88. See Thompson, *supra* note 74 **Error! Bookmark not defined.**, at 59. See generally HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH (The Modern Library 1839). The beach is the number one tourist destination in the United States, but it is not the sand that draws people, it is the ocean. Thompson, *supra* at 58. The refreshing waves, the breeze, the sound of the waves crashing in the distance, all of these factors add value to the beach. *Id.*

89. GEORGE, *supra* note 88, at 401.

remain common property.<sup>90</sup> While George did agree with Locke that the owner should benefit from the land he improved upon, value that comes from the scarcity of land is hardly the result of improvements by the owner.<sup>91</sup> Similarly, the value a beachfront owner derives from his property is not the result of any improvements he alone makes to the land, but rather value comes from the unique nature of the beach itself, or collective improvements made to the surrounding area by the community as a whole.<sup>92</sup> Accordingly, any value to be claimed from beach property comes almost exclusively from the ocean because that is what draws people to the beach; and that ocean belongs to the public.<sup>93</sup> Further, under George's theory, the scarcity of access to beaches in Florida—due to the growing population along its coastline and privatization<sup>94</sup>—only enhances this value.<sup>95</sup>

### C. PRIVATE VERSES PUBLIC INTERESTS

One of the reasons private landowners of beachfront property seek to bar the public from *their* beach is because they assume part of the bundle of sticks that comes with their “property” includes the power to exclude others.<sup>96</sup> Indeed, many property theorists consider exclusion at the heart of property ownership.<sup>97</sup> This belief makes boundary lines exceedingly important.<sup>98</sup> The problem in Florida then becomes where does one draw a line between a private landowner's recorded interest in their land, and the public's non-recorded interest under the public trust doctrine?<sup>99</sup>

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90. *Id.* at 238–39.

91. See Thompson, *supra* note 74 **Error! Bookmark not defined.**, at 58 (explaining part of the value came the owner's investments, but part also came from the surrounding land being built up by other economically viable activities).

92. See *id.*

93. See *id.*

94. See Spain, *supra* note 29, at 170–71 (explaining the majority of Florida's beaches are privately owned); see also James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1915 (1995).

95. See Thompson, *supra* note 74, at 58–59. See generally GEORGE, *supra* note 88, at 235.

96. See generally Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 919 (2010) (noting that most contemporary commentary on the divide in property theory is framed in terms of the fundamental principle of exclusion). However, the bundle of rights metaphor in property law has never been universally accepted and many theorists argue the focus on the exclusion principle ignores our social values. *Id.* at 918–19.

97. *Id.*

98. Christie, *supra* note 52, at 20–21. Property owners, who own the most expensive property in Florida, often “assume that the bundle of rights purchased” with to their property includes the right to exclude others from the beach. *Id.* However, the public also have “high stakes” in the same property, which the courts have recognized, making boundary lines that much more important to discern. *Id.*

99. See Daniel W. Peyton, *Sovereignty Lands in Florida: It's All About Navigability, Part I*,

The public trust doctrine is an ageless backdrop principle of property law, which has been used as not only a limit to a private property owner's ability to exclude the public from the shore,<sup>100</sup> but also as a limit on private development rights.<sup>101</sup> Although the conflict between private ownership of Florida's beaches and public use is a very real one, private ownership alone does not justify excluding the public from using the dry sand portion of the beach.<sup>102</sup> Certainly, both interests are capable of existing alongside one another.<sup>103</sup> For example, long before a system of private ownership of beaches existed, Native Americans used the shoreline to gather and hunt.<sup>104</sup> American Indians, such as the Calusa Indians of Southwest Florida, used the sandy beaches long before the English Colonies were established.<sup>105</sup> Further, the earliest settlers in America recognized that they could not just take away the right to use the beach from Native Americans; therefore, even during the period when the trust was first established in America the beaches remained open for communal use.<sup>106</sup> Additionally, fishermen who asserted their time-honored right to fish in the sea—a right clearly recognized even under modern public trust doctrines—were also permitted space along the shore to lay their nets.<sup>107</sup> Indeed, the Oregon Supreme

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76 FLA. B.J. 58, 58 (2002) (acknowledging that the question in every ownership case turns on where the line is to be drawn between private and public interests and that the state poses a formidable burden to private ownership).

100. See generally John Makdisi, *Uncaring Justice: Why Jaque v. Steenberg Homes Was Wrongly Decided*, 51 J. OF CATH. LEGAL STUD., 111, 121 (2012) (noting the public trust doctrine has been expanded from fishing to recreation on dry sand areas of privately owned beaches).

101. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (suggesting the public trust doctrine, as a state's law of property, is a background principle of property law which can limit a private landowner's reasonable expectation of development rights). See generally Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 650 (2010) (using the public trust doctrine to moderate private development rights and takings claims).

102. Thompson, *supra* note 74, at 48–49 (discussing private ownership of the beach as primarily concerned with the right to exclude the public).

103. Blumm, *supra* note 101, at 657, 661–62 (explaining that, historically, sovereign lands and private lands existed side by side and the effect of the public trust doctrine is to prescribe a “co-existence of public and private uses”).

104. WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF ENGLAND*, 30–31, 39–40 (Hill and Wang 1983).

105. See generally *Florida of the Indians*, FLORIDAHISTORY.ORG, <http://floridahistory.org/indians.htm> (last visited Nov. 7, 2014) (providing a detailed historical account of Florida's earliest inhabitants, American Indians).

106. Thompson, *supra* note 74, at 51; see also R.I. CONST. art. I, § 17 (showing this right remains in the Rhode Island Constitution today).

107. See STUART A. MOORE & HUBERT STUART MOORE, *THE HISTORY AND LAW OF FISHERIES*, 96 (1903) (explaining the historical foundation of the public trust where fisherman exercising their right to fish in the sea necessarily used the dry sand shore of the beach to lay out nets above the ordinary high water mark).

Court has recognized such historic and communal use of the dry sand area of the beach by noting the first European settlers not only found native inhabitants on its shores “clam digging and [using] the dry sand area for their cooking fires,” but also explaining that such customs continued into Oregon’s statehood.<sup>108</sup> Although no Florida court has pronounced the same principle, it should come as no surprise that Florida, being almost completely surrounded by water, also had aboriginal inhabitants utilizing the seashore long before its statehood.<sup>109</sup> Thus, a private owner’s interests cannot justify encroachment on the public right to use the shore of the beach.<sup>110</sup>

Additionally, private owners who purchase beachfront property are on notice that their land is subject to public use.<sup>111</sup> Because the ocean is owned by the public, a private owner cannot reasonably expect to hoard that giant body of water, and all its shoreline, simply because he has purchased title to the land adjacent to it.<sup>112</sup> In fact, under the current public trust in Florida, the public does have the right to be in the water, so it should come as no surprise to a private owner that the public also has a right to sit along the shore.<sup>113</sup> In sum, while the law does recognize certain rights come with private ownership of land, those rights do not include the right to exclude the public from the shore because the purpose of ownership is to provide a home,<sup>114</sup> for a person to take what he has made

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108. State ex rel. Thornton v. Hay, 462 P.2d 671, 673 (Or. 1969) (explaining the dry sand area of the beach has been enjoyed by the public as “recreational adjunct of the wet-sand” are since the beginning of Oregon’s history).

109. See City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974) (recognizing the shore of Florida beaches “has served” as a “haven for fisherman,” certainly implies a historical reference). See generally *Florida of the Indians*, supra note 105 (providing a detailed historical account of Florida’s earliest inhabitants, the American Indians).

110. See *Backtracking on Beach access*, supra note 3 (explaining that Florida Supreme Court decisions rebut the assumption that private property rights are superior); see also Thompson, supra note 74, at 48. Many people walk on the beach wherever they want to because they do not believe the beach is capable of private ownership. Thompson, supra. This is largely because there is a lack of strong moral values justifying such private ownership of the dry sand beach. *Id.*

111. See Thompson, supra note 74, at 48 (explaining social norms of a community can be more accurate in determining the true practice of property rights than formal law).

112. See generally *id.* at 49 (discussing the moral theories behind property ownership).

113. See generally Smith II & Sweeney, supra note 41, at 309 (urging law makers to take a balancing approach to private and public interests, so as not to effect too much an individual property owner). Taking a natural law approach, this article seeks to balance the lawfulness of possessing property as a private owner against the common good. *Id.*

114. *Id.* at 329–30. Natural Law assures that God gave man the earth for the well-being of all, and the conquering of the earth is for man to make a “fitting home” and to make a “part of the earth his own.” *Id.* (quoting Pope John Paul II, *Centesimus Annus* (May 1, 1991)). However, man should not prevent others from sharing in God’s gift. *Id.* at 330.

with his own hands and possess it.<sup>115</sup> However, the shore of the beach was never intended to be a home for any one person.<sup>116</sup> It is the public, as a whole, that uses the beach, including the shore, as it was intended: for fishing, bathing, and recreation.<sup>117</sup> Thus, until the beach can be cultivated or enclosed—and I assert it is capable of neither—its shores should remain a shared asset, subject to public use.<sup>118</sup>

## II. SOLUTION

### A. CASE LAW EXAMPLES

Although it may be possible to argue the public trust doctrine in Florida is evolving to provide more protection of public rights,<sup>119</sup> the fact is Florida is simply recognizing the historic, inherent public right it had previously neglected to adequately safeguard.<sup>120</sup> Perhaps the reason for the fairly recent unearthing of what many call an ancient doctrine sprouts from the fact that, in the past, there was not a need to conjure the public trust doctrine.<sup>121</sup> A hundred years ago the public did not require the doctrine to protect its right to use and access the beach because its right was not yet being encroached upon; however, today is a different story.<sup>122</sup> Nonetheless, Florida has still not gone far enough in affording the public the protection it deserves regarding its right to access the beach under the public trust doctrine.<sup>123</sup>

New Jersey is one example of a state that has successfully used the public trust doctrine to balance competing public and private interests regarding beach property by recognizing the public's right to sunbathe and enjoy other recreational activities on the dry sandy shore of its beach.<sup>124</sup> In

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115. See Locke, *supra* note 82, at 19–20.

116. See discussion, *supra* Part I.B.

117. See Thompson, *supra* note 74, at 48–49.

118. See *id.* at 60.

119. Peyton, *supra* note 99, at 62.

120. See discussion, *supra* Part I.

121. See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351, 352 (1998) (attributing the revival of the old public trust doctrine to Sax's 1970 article, *The Public Trust Doctrine in Natural Resources Law*); see also Strunsky, *supra* note 41 (citing the 1,500 year old public trust doctrine has just recently begun to be used to force private owners to re-open their shores for public use).

122. See Strunsky, *supra* note 41 (explaining the first European to visit the Jersey shore did not need the public trust doctrine in 1524 because private enclaves along the Jersey shore had not been developed yet).

123. See discussion, *supra* Part I.B.

124. See *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (holding the public had rights in the dry sand beach immediately landward of the high

1972, the New Jersey Supreme Court explained the common right to use the sandy portion of the beach above the high water mark is an “ancient principle,” opining that historically, “[n]o one was forbidden access to the sea, and everyone could use the seashore” because the shore was “subject to the same law as the sea itself, and the sand or ground beneath it.”<sup>125</sup> The court further elaborated that in order for the public to fully exercise the rights guaranteed by the public trust doctrine, the public *must* have access to the dry sand area of the shore.<sup>126</sup> Indeed, without reasonable access to dry sand, the public’s right to pass over private land to reach the ocean, as well as the right to sunbathe and swim in the ocean, would be meaningless, essentially eliminating the public trust altogether.<sup>127</sup> California has also used the public trust doctrine to coagulate the public’s right to use the shore, when its Supreme Court declared, “there is a growing public recognition that one of the most important public uses of tidelands . . . as open space . . . .”<sup>128</sup> Thus, these cases offer guidance to Florida in the ways it can utilize the public trust doctrine to protect the public’s interest in maintaining its pre-existing right to use of the shores of Florida beaches.<sup>129</sup>

However, common law alone will not remedy this situation because, unfortunately, it is much easier for a person to move a chair further down the beach, or leave the beach altogether, than to instigate a long, drawn out court process, and potentially expensive litigation.<sup>130</sup> Not to mention, a person who is told to leave a private beach, but refuses to, also faces trespass charges and potential jail time.<sup>131</sup> The average person just does not

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water mark for “recreational uses, including bathing, swimming, and other shore activities.”); *Mathews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 356 (N.J. 1984) (holding the public interest included the right to cross privately owned beach property to gain access to shore and the right to sunbath or enjoy other recreational activities on the dry sand); *Raleigh Ave Beach Ass’n v. Atlantis Beach Club*, 879 A.2d 112, 128–29 (N.J. 2005) (reaffirming the public right to use the dry sand portion of privately owned beaches).

125. *Raleigh Ave Beach Ass’n*, 879 A.2d at 119 (quoting THE INSTITUTES OF JUSTINIAN 159 (Thomas Collett Sandars trans., Callaghan & Company 1876)); see also Moore & Moore, *supra* note 107, at 96 (explaining the historical foundation of the public trust where fisherman exercising their right to fish in the sea necessarily used the dry sand shore of the beach to lay out nets above the ordinary high water mark).

126. *Mathews*, 471 A.2d at 363.

127. See *id.*

128. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). The court’s recognition was in terms of environmental protection for birds and marine life, however, the open space referred to can be equally attributable to space needed for the well-being of the public. *Id.*

129. See, e.g., *id.* 383.

130. See generally Hackney, *supra* note 5 (describing incidents where people were told to get off the beach, and instead of facing arrest, moved).

131. See Thompson, *supra* note 74, at 47 (explaining that in most states if a person ignores a private beach sign he or she could be forcibly removed and charged with trespass); see also Kranz, *supra* note 33, at 11 (noting that a man who was arrested for trespassing after refusing to

have the means to travel that route in order to secure his or her right under the public trust doctrine. Further, it is unlikely the average person possesses the legal knowledge to even realize that his or her right has actually been violated in the first place; and this is exactly why the public's right to the beach is dwindling away.<sup>132</sup> Moreover, as the development of Florida's beaches progresses, the existing encroachment upon the public's right to a reasonable area of dry sand along the shore of the beach will only grow.<sup>133</sup> Consequently, the ancient public trust doctrine will soon be left turning in the tide, sinking in the wet sand, along with the people it was designed to protect.<sup>134</sup>

## B. LEGISLATION

Florida should use the policy behind the public trust doctrine as a guide to amend its current legislation to include a reasonable area of dry sand above the high water mark.<sup>135</sup> Contemporary scholars have called on the public trust doctrine in order to meet the changing needs of the public, as in the case of environmental preservation of natural resources.<sup>136</sup> The justification for using the doctrine now, to protect rights that may not have been contemplated in the past, is that the purpose of the doctrine has always been to serve the greater common good.<sup>137</sup> If the public trust doctrine can be expanded to protect rights that did not exist when the doctrine was first established, it certainly can be used to reaffirm a right that has been wrongly eroded, like the public's right to the dry sand of the shore.<sup>138</sup> Truly, it is the common good that should motivate Florida to amend its legislation to recognize the public's pre-existing right to a reasonable area of dry sand along its coastlines, a right that has long been

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move to a public beach).

132. See Kranz, *supra* note 33, at 11 (citing two examples of people who were told to leave a beach, and all questioned whether they really had to).

133. See *supra* Part II. A.

134. See generally Kranz, *supra* note 33, at 11 (noting that over the past few decades Florida's coastline has been subject to more and more "No Trespassing" signs and other efforts to remove and keep the public away).

135. See *infra* Part II. B. See generally Kranz, *supra* note 33, at 20 (concluding it is the state's constitutional duty to protect Florida's beaches).

136. Smith II & Sweeney, *supra* note 41, at 307 (arguing the ancient public trust doctrine should be expanded to protect natural resources for the community as a whole, but also be limited by its ancient values); see also Sax, *supra* note 43, at 474 (reviving the public trust doctrine to protect natural resources in the 1970's).

137. See Smith II & Sweeney, *supra* note 41, at 308 (looking at the public trust doctrine in the framework of its natural law foundation, where "the air, water, and seashores were common to all.").

138. See *supra* Part II.A.

recognized by the Florida Supreme Court.<sup>139</sup>

Not only has the beach been an important source of recreation for the public, but also it has served as an aesthetic inspiration to countless authors, poets, and politicians.<sup>140</sup> Without adequate access to the shore, the next generation of great minds will be without the inspiration that emanates from the sea, which will undoubtedly influence their works, as it has for those who have come before them.<sup>141</sup> For example, John F. Kennedy, in his Remarks at the Dinner for the America's Cup Crews, described the sea as follows:

I . . . don't know why it is that all of us are so committed to the sea, except I think it is because in addition to the fact that the sea changes . . . and ships change, it is because we all came from the sea. And it is an interesting biological fact that all of us have, in our veins the exact same percentage of salt in our blood that exists in the ocean, and, therefore, we . . . are tied to the ocean. And when we go back to the sea, whether it is to sail or to watch it we are going back from whence we came.<sup>142</sup>

The sea is more than just property, it is a part of all mankind; thus, we all feel inherently linked to it, and whether to sail on it, or to watch it from the shore, the sea is ours in common.<sup>143</sup> Therefore, the inspiration all

139. See *supra* text and accompanying notes 68–72.

140. See discussion *supra* Part II; see also HENRY WADSWORTH LONGFELLOW, *THE SEASIDE AND THE FIRESIDE* 32 (1849); Rachel Carson, *The Sea Around Us*, NATIONAL BOOK FOUNDATION [http://www.nationalbook.org/nbaclassics\\_rcarson.html](http://www.nationalbook.org/nbaclassics_rcarson.html) (last visited Nov. 23, 2014) (“If there is poetry in my book about the sea, it is not because I deliberately put it there, but because no one could write truthfully about the sea and leave out the poetry.”); CATHERINE REEF, *E.E. CUMMINGS A POET’S LIFE* 121 (2006) (“for whatever we lose (like a you or a me) it’s always ourselves we find in the sea.”) (punctuation preserved from original). See generally Ryan, *supra* note 32, at 480 (noting under Sax’s harkening of the public trust, it has been expanded to protect wildlife, parks, and works of fine art). Thus, if the public trust can be used to protect the public’s interest in art and parks, why not to protect the public’s interest in dry sand? Ryan, *supra*.

141. See SIR DAVID BREWSTER, *K.H., MEMOIRS OF THE LIFE, WRITINGS, AND DISCOVERIES OF SIR ISAAC NEWTON* 407 (Edinburg: Thomas Constable, 1855) (“I seem to have been only like a boy playing on the seashore, and diverting myself in now and then finding a smoother pebble or a prettier shell . . . whilst the great ocean of truth lay all undiscovered before me.”); see also *Helen Keller and Doll with Anne Sullivan*, BREWSTER HISTORICAL SOCIETY, <http://www.brewsterhistoricalsociety.org/gallery2013/01-01faces-gallery-Keller.html> (last visited Nov. 23, 2014) (“I could never stay long enough on the shore. The tang of the untainted, fresh and free sea air was like a cool, quieting thought, and the shells and pebbles . . . never lost their fascination for me.”).

142. John F. Kennedy, Remarks at the America’s Cup Dinner Given by the Australian Ambassador (Sept. 14, 1962), available at [http://www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/Americas-Cup-Dinner\\_19620914.aspx](http://www.jfklibrary.org/Research/Research-Aids/JFK-Speeches/Americas-Cup-Dinner_19620914.aspx).

143. See *id.*; see also ELIZABETH I TUDOR & GEROGE BAGSHAW HARRISON, *THE LETTERS OF QUEEN ELIZABETH I* (1981) (“The use of sea and air is common to all, neither can a title to the

mankind seeks to gain through access to the sea, and its shores, should likewise serve as encouragement for Florida to act through legislation to preserve this common right.<sup>144</sup>

### CONCLUSION

Although Florida has already enacted legislation codifying the common law public trust doctrine, that legislation is incomplete because it does not give the public use of a reasonable area of dry sand adjacent to the water's edge.<sup>145</sup> The public has a preexisting right to this dry sand, which over time has slowly been encroached upon, to the point where soon it will be completely extinct if something is not done to protect it.<sup>146</sup> The public trust started in ancient Rome, the English brought the principle with them to the Americas when they established the first colonies, and throughout history people have been traversing the shores of our Nation's beaches.<sup>147</sup> However, modern development and privatization of Florida's beaches continues to threaten the people's access to not only the sea, but also its shores.<sup>148</sup>

Without a clear law protecting this important public right, the people will continue to be pushed off the beach's shores—shores like in Siesta Key Beach—shores the public have been enjoying for generations, shores they actually have a right to enjoy.<sup>149</sup> Further, the Florida Supreme Court has recognized the public's right to use the seaside for recreational activities.<sup>150</sup> However, Florida courts alone cannot effectuate the statewide change that is needed today.<sup>151</sup> Florida courts may provide one avenue of redress, once an individual's right has been violated, yet such a process is not only time consuming, but also vulnerable to uncertain outcomes.<sup>152</sup>

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ocean belong to any people or private persons . . .”).

144. See Ryan, *supra* note 32, at 479 (“resources are of so common a nature that they defy private ownership in the classical liberal sense.”).

145. See *supra* Part I. A.

146. See Ryan, *supra* note 32, at 479. Certain resources are more than just a mere commodity, but hold something sacred in them, which must be valued and protected. *Id.*

147. See discussion, *supra* Part I. A.

148. See Kehoe, *supra* note 94, at 1951 (concluding that increased development along the Nation's shoreline threatens the public's access to the beach and the ocean).

149. See discussion, *supra* Part I. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (Amy Gutmann et al. eds. 1997) (“[T]he main business of government, and therefore the law, [is] legislative.”).

150. *White v. Hughes*, 190 So. 446, 448 (Fla. 1939).

151. See Ryan, *supra* note 32, at 487 (noting judges often lack the administrative expertise to oversee resource management decisions and common law is ineffective in ordering relationships between branches of government).

152. See *id.*

Certainly, the courts are guided by the principles behind the public trust doctrine when making decisions, but those decisions are nonetheless limited to the specific facts before it.<sup>153</sup> Indeed, until the Florida Supreme Court is faced with just the right facts, or circumstances—which would prompt it to hold the public is entitled to a reasonable dry area of sand on *all* Florida’s beaches—any future decisions regarding local beaches by the lower courts will inevitably be limited to that local district.<sup>154</sup>

It is the Florida State legislature that sits in the most advantageous position to ensure the public trust doctrine both adequately preserves the public’s right to a reasonable area of dry sand and accommodates private owners’ interests in beachfront property.<sup>155</sup> Statewide legislation could provide a stable and predictable way for both the public and private beachfront owners to decipher a boundary line, whereby each may exercise their co-existing right to access the beach in harmony.<sup>156</sup> The state, therefore, is in the best position possible to establish binding, uniform law that will prevent the public from being turned away from Florida beaches, where they have a pre-existing right to be, by simply amending the current public trust doctrine to include a reasonable area of dry sand above the high tide line.<sup>157</sup>

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153. *See generally id.* (explaining that the courts are certainly a means of guaranteeing oversight when public trust values are violated).

154. *See generally id.* (noting that just because the public trust doctrine began in common law does not mean it has to remain there).

155. *See Backtracking on Beach access, supra* note 3 (explaining the state legislature should address the lack of available beach access in Florida). *See generally* Ryan, *supra* note 32, at 487 (explaining the public trust is a *trust*, where specific private property rights are designated to the public, then delegated to the state to oversee as *trustee*).

156. *See* Ryan, *supra* note 32, at 488 (explaining property rights in water and land are not absolute and therefore can be regulated and adjusted to benefit the community as a whole).

157. *See supra* Part I. B.