"IN MY DEFENSE, I HAVE NONE:"[1] TAYLOR SWIFT, INDIAN LAW, AND A RE-EXAMINATION OF CUSTOM'S INAPPLICABILITY IN THE UNITED STATES

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Traditions matter. They connect people with their past and provide a sense of identity and community in the present. When they disappear, the opposite occurs; individuals are left isolated and detached. The common law doctrine of custom was crafted to protect community customs and traditions, yet for centuries, American courts have repeatedly declared this doctrine inapplicable and irrelevant. This Article demonstrates that the inapplicability of customary law in the United States has been greatly exaggerated. More specifically, this Article shows it was a deliberate fabrication created to justify both the seizure of native lands and the commencement of the American Revolution. Acknowledging this shameful history, which includes the centuries-long erasure of native nations and the modern-day denial of tribal rights, demands the reexamination of the doctrine of custom, and its alleged inapplicability.

This Article explores how and why custom was declared dead in America while also advocating for its revival. Custom defines who we are, and the doctrine of custom provides an essential framework for protecting the cultural practices that shape our collective identity. Safeguarding our customs—from what we eat, to where we play—is vitally important. Unfortunately, current methods of protection are limited and largely ineffective. Reviving customary law offers a potential solution that will benefit all Americans while also addressing the particular injustice of declaring native customs, and by extension, native people, irrelevant.

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1. Taylor Swift, *The 1, on* Folklore (CD, Republic Recs. Jul. 24, 2020).

* I would like to thank my colleagues Josh Eagle, Emily Suski, Ned Snow, Davihd Sella Villa and Etienne Toussiant for their help and advice with this article.

Last summer, while vacationing in Connecticut with my teenage daughters, I found myself making a pilgrimage to Westerly, Rhode Island, the location of Taylor Swift's palatial summer home known as "Holiday House."[2] The house, made famous in Swift's song *The Last Great American Dynasty*, is located on a steep cliff, overlooking Long Island sound. The front of the property is hidden behind a tall wrought-iron gate; on the sides it is surrounded by massive twenty-foot-high plantings; and the back abuts a steep cliff. The cliff is then secured against erosion by a long seawall extending from the property's back fence, over the dry sand beach, and down to the ocean.

On the day we visited, my daughters stood on the lowest part of the seawall and took pictures with Swift's home in the background. They were not alone. As my children uploaded their selfies to Instagram, at least half a dozen other "Swifties"[3] were doing the same thing. Many were also taking these photos higher up the seawall, blatantly ignoring the numerous "private property" and "no trespassing" signs posted against the rocks.

2. At the insistence of my teenage daughters, I would like to note that nothing in this Article should be read as a criticism of Taylor Swift.
3. A commonly used term for Taylor Swift fans.

Taylor Swift is one of the most famous women in the world and it is unsurprising that she takes her security seriously. Nevertheless, whether she has a right to declare the beach behind her house private property is a different question. I was contemplating this issue when I struck up a conversation with a woman also observing the picture-taking teens. We began talking about Taylor Swift, Holiday House, and the "no trespassing" signs. Then, as the conversation progressed, the woman informed me that initially, Swift had sought to bar the public not just from the seawall (which she had constructed), but also from the surrounding beach. According to my companion, these efforts were ultimately thwarted by a recent legislative decision confirming the public's right to the shore. She then noted that this beach access right was grounded in a constitutional provision enacted to protect the customary rights of Rhode Island's indigenous people.

As an Indian Law scholar, I was intrigued. Was it possible that Taylor Swift had been thwarted by Indian law? This Article began as an attempt to answer that question. It then quickly transformed into an examination of the common law doctrine of custom, its supposed inapplicability in the United States, and the reasons why the doctrine should be revived. Part I explores the Taylor Swift beach dispute and the origins of Rhode Island's constitutional protection of public beach access. Part II examines the doctrine of custom more generally as well as the long-standing judicial explanation for its inapplicability in the United States. Part III demonstrates the link between America's rejection of the doctrine of custom and its embrace and perpetuation of the "vanishing Indian" myth and, specifically, how the deliberate denial of coastal Native Americans' continued existence required this rejection. Part IV argues that, given the falsity of the historic justification for rejecting the doctrine of custom, the doctrine can and should be revived. Finally, Part V demonstrates how reviving custom would remedy this long-standing injustice, while also providing concrete legal benefits to modern day native nations as well as the American public more generally.

I. Rhode Island Public Beach Access

A. The Taylor Swift Dispute

Taylor Swift's mansion, Holiday House, was famous long before Swift moved in. From 1947–1982 it was the home of Rebekah Harkness, wife of William Hale Harkness—the last heir to the Standard Oil fortune.[4] In 2013

4. As Swift notes in her song, Harkness was known for her eccentricities and her legendary parties. For example, "Flew in all her Bitch Pack friends from the city. Filled the pool with champagne and swam with the big names." Taylor Swift, *Last Great American Dynasty*, *on* Folklore, at 02:14 (Republic Recs. 2020). *See also* Elise Taylor, *The Outrageous Life of Rebekah Harkness, Taylor Swift's High-Society Muse*, Vogue (July 29, 2020), https://perma.cc/ST5L-DRS4 (noting "Holiday House, was the site of some raucous Gatsby-esque parties:

Swift bought Holiday House for $17.75 million, making it the most expensive home in Rhode Island.[5] Then, after buying the property, she quickly set about securing it. In addition to the tall metal fence and twenty-foot-high shrubbery encasing the property, Swift's home is also protected by a panoply of security guards who, shortly after Swift purchased the home, began blocking the public from using the surrounding beach. Swift's actions angered many of her new neighbors.[6] In 2019, Rhode Islander Scott Keeley claimed Swift's attempts to prevent beach access were unconstitutional and refused to comply with her guards' demands that he leave the beach. He was then arrested for trespass and became one of the leading proponents of a new shoreline access law.[7]

Keeley and other shore access advocates claimed that Swift's actions violated Article 1, Section 17 of the Rhode Island constitution, which states:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore.[8]

They also sought a legislative declaration that "privileges of the shore" encompassed significant portions of the dry sand beach, including much of the area policed by Swift's security team.[9]

Blue Blood recalls that Harkness once filled her pool with Dom Perignon (which, oddly, was not the only liberty she took with libations: it's also said she put scotch in her fish tank).").

5. *See* Wheeler Cowperwaithe, *Watch Hill Mansion Is Most Expensive House Sold in RI This Year. Here's What It Sold For*, Providence J. (Nov. 2, 2022), https://perma.cc/T5PG-Z379 (noting Taylor Swift's home remained the most expensive home sale nearly ten years after her initial purchase).
6. Many of Swift's new neighbors were furious with her and her security team for blocking access to a public beach adjacent to her home. As one such neighbor complained, "Now that summer has come and people are getting ready to use the beach, people are really grumbling about having Taylor in town, . . . Her property line is at the path to the public beach, and she always has guards patrolling the area . . . It's making it such a hassle." Radar Staff, *Taylor Swift's Rhode Island Neighbors 'Angry' About Her Snobby Behavior; Security Accused of 'Harassing' Beachgoers*, Radar Online (May 31, 2013), https://perma.cc/TNS5-F77Z.
7. *See* Brian Amaral, *Seaweed Collector's Arrest in Rhode Island Revives Age-Old Debate on Beach Access: Massachusetts Laws Date to Mayflower Days*, Providence J., (June 12, 2019), https://perma.cc/C48G-2EU3 (describing the 2019 arrest of Keeley). Under the new law, it is now the property owners who could face arrest. *See* Susannah Sudborough, *R.I. Beachfront Property Owner Arrested After Shoreline Dispute*, Boston.com (Aug. 22, 2023), https://perma.cc/FZ9W-ZJ2H (describing the arrest of the property owner under the new beach access law after the man harassed a beachgoer using the beach near his property).
8. R.I. Const. art. 1, § 17.
9. After the law passed, Mike Keely was again confronted by Swift's security as he tried to set up his beach chair along the high tide line. "'I can't set up past the private property sign?' Keeley responded [to the security officers]. 'Really?' The security guard replied: 'No.'" Keeley then contacted the authorities who informed the guard that Keeley had the right to be there. "'[Property owners] can't stop [beachgoers] from passing through or even setting up,' the officer said. 'He is 10 feet [from the high tide line], he is not over those 10 feet.' . . . [Keeley]

In the summer of 2023, the Rhode Island legislature passed S.B. 417,[10] which defines the public's constitutional right to the "privileges of the shore" as including beach access. Further, it clarified that the public beach included the area up to ten feet above the high tide line.[11] This was a significant expansion of the public's rights to the shore and the law was immediately challenged.[12] The case is under appeal,[13] but if the law is upheld, Rhode Islanders will have one of the most robust beach access rights in the country due, at least partially, to a recognition of the legal significance of native customs and traditions.[14]

B. The Legislative History of S0417

The Rhode Island shore holds deep significance for many native communities. It is no accident that countless roads and villages surrounding the state's beaches have Indigenous names. In fact, one of Rhode Island's most popular coastal towns, Narragansett, is literally named for the Narragansett tribe.[15] Many beloved state traditions, such as Polar bear plunges and clambakes,[16]

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told 12 News he feels 'vindicated,' even though the interaction was initially frustrating." Sarah Doiron & Anita Baffoni, *Security Guard Tries to Keep Man Behind RI Shoreline Access Bill of Charlestown Beach*, WPRI.com (July 12, 2023), https://perma.cc/X56Y-J293.

10. The law makes an exception for legally constructed sea walls, so Swift's seawall can remain, and she can likely continue to prevent the public from climbing it. However, the beach next to her house must remain open to the public. #S.B. 0417, 118th Gen. Assemb. § 2 (R.I. 2023).
11. *Id.* This line, sometimes referred to as the "wrack line," is the line of seaweed, small shells, and other debris left on the beach from the high tide. The law guarantees beach access rights up to the wrack line rather than the more typical high tide line and, thus, if the law is upheld, Rhode Islanders will have one of the most expansive beach access rights in the country. *See, e.g.*, Ralph W. Flick, *Beachfront Property Ownership and Public Use*, 50 Real Est. L.J. 490, 493 (2021) ("In most coastal states, the property line on the coastal boundary of private real estate is the mean high water line while a minority of states on the Atlantic coast use the mean low tide line."). *See also* Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 673 (2011) (noting that Hawaii and Oregon have the most robust rules, protecting beach access up to the vegetation line).
12. *See Infra* Part I.C (discussing the previous boundary and how it increased under this legislation).
13. Bill Seymour, *SK Resident Files Lawsuit Over Shoreline Access Provisions*, The Independent (Aug. 21, 2025), https://perma.cc/VS9G-GP53 ("The 2023 Rhode Island shoreline access law, while currently in effect, is facing a challenge by some shoreline property owners in South Kingstown and Westerly. . . . In July 2024, a judge sided with the property owners, ruling the law unconstitutional and requiring the state to compensate them. This ruling is being appealed, and the law remains in effect pending the outcome of that appeal").
14. *See supra* note 11.
15. *See A History of Narragansett*, Town of Narragansett Rhode Island, https://perma.cc/TM7Z-RUUQ.
16. This practice of cooking originated with Rhode Island's coastal Indian tribes, who then taught the settlers how to steam the clams under a covering of seaweed. *See* Ruth Talbot Plimpton, Mary Dyer: Biography of a Rebel Quaker 92 (2009).

also owe their origins to Rhode Island's indigenous people.[17] However, this connection is more than historical. The shore remains a vital part of many of the ceremonies and traditions practiced by Rhode Island's indigenous communities yet, because few of these communities possess coastal property, they are entirely reliant on public beach access to maintain their traditions.[18]

Even before the passage of S0417, tribal leaders, such as Narragansett citizen Randy Noka, had been advocating for greater beach access. According to Noka, because Rhode Island's beaches encompass the ancestral lands of the Narragansett, beach access for tribal citizens "should be open totally. You should be able to walk from here to Florida, from here to Maine."[19] Randy's wife, Bella Noka, echoes these sentiments and notes the long-standing importance of the shore to the Narragansett:

> Having access to the ocean has always healed us. It's a place where you go for that. It's medicine. It's our native, traditional medicine . . . . This is who we are. This is our way. It's natural to go to a place that does our healing . . . . I don't know anyone who pays to get into a place that they worship. This is our way. This is the indigenous and aboriginal way of our people. Who is to violate that way?[20]

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17. Frank Carini, *No Trespassing: Coastal Land Taken from Indigenous People Walled Off with Signs, Fences and Chains*, ecoRI.org (May 17, 2021), https://perma.cc/LA2L-Y7TG.

18. The Narragansetts are the State's only federally recognized tribe and the only indigenous Rhode Islanders in possession of a federal reservation. Indian Tribal Entities Within the Contiguous 48 States Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021). However, they received no coastal property under the 1978 Rhode Island Indian Claims Settlement Act, which gave them their reservation in return for extinguishing the tribe's claim for land sales made in violation of the Trade and Intercourse Act. Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–16 (1978); Indian Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790). The Trade and Intercourse Act prohibited tribal land sales to the public by any purchaser other than the federal government. Under the Settlement Act, the Narragansett tribe received approximately 1,800 to 2,000 acres of land in Charlestown, none of which has beach access. Rhode Island Land Claims Settlement Act, 25 U.S.C. §§ 1701–16; *see also* Margaret Nesi, *The LandBack Movement: A Fight to Return Stolen Land Back Into Indigenous Hands*, Brown Undergraduate L. Rev. (Nov. 17, 2022), https://perma.cc/S7JH-V54K (describing the tribe's fight to regain access to the coast); Carini, *supra* note 17; Meredith Haas, *People of the Small Point | Fighting for Access for All People*, Sea Grant Rhode Island (Feb. 8, 2023), https://perma.cc/94UN-GGWQ (noting they have no coastal access).

19. Carini, *supra* note 17.

20. Alex Nunes, *'They're Doing Something Right': Narragansett Town Council to Consider Free Beach Access for Narragansett Tribal Members*, The Public's Radio (May 15, 2022), https://perma.cc/GXQ9-AAL2. Some tribal members are hoping the state might return the tribe a slice of this coastal land and a part of its heritage. Bella Noka proposed the state give the tribe a strip of land to the right of the Charleston Beachway: "It would be a place tribal members could go without being harassed by a curious, sometimes rude, public. Coastal real estate they could call their own and could share with respectful visitors." Carini, *supra* note 17.

Quenikom Pau Muckquashim, another Narragansett citizen, shares these views noting, "Access to this land is extremely important to our people . . . . It's a big part of our traditional way of life."[21]

When deciding the beach access issue, the Rhode Island legislature heard testimony from tribal citizens like Bella Noka, and this testimony appears to have influenced its decision-making.[22] In explaining its choice to protect public beach access, the Legislature referenced the long-standing tradition of beach access. It noted that such rights are "guaranteed in the State Constitution . . . [and] the 1663 Rhode Island Charter from King Charles II."[23] It also highlighted "the use and enjoyment of the shore by Native Americans for thousands of years prior to that."[24]

C. History of Rhode Islanders' Rights to the Shore

Rhode Island's shore access controversy is about more than the beach. It is a recognition of the importance of community customs and the need to protect them. Notably, this is a concern that dates to the founding of the colony. The public's right of shore access was part of the Rhode Island's founding charter. It states:

> [O]ur express will and pleasure is, and we do, by these presents, for us, our heirs and successors, ordain and appoint, that these presents shall not, in any manner, hinder any of our loving subjects, whatsoever, from using and exercising the trade of fishing upon the coast of New England, in America; but that they, and every or any of them, shall have full and free power and liberty *to continue and use the trade of fishing upon the said coast*, in any of the seas thereunto adjoining, or any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish; and to build and set upon the waste land belonging to the said Colony and Plantations, such wharves, stages and

21. Carini, *supra* note 17.

22. Before the law was passed, Rhode Island formed a Commission on Shoreline Access to study public rights along the shore. *See* Press Release, State House, State of Rhode Island General Assembly, Shoreline Access Study Commission Appointed (Aug. 11, 2021), https://perma.cc/7NYZ-SJTR (describing the commission's legislative mandate). At a public meeting in 2021, Narragansett Indian Bella Noka, who is also a tribal elder, told commission members she goes to the shore to worship and has been interrupted and questioned while in ceremony. She recalled one instance when she was burning sweetgrass after her mother died. "Someone walked by me and said, 'That smells like marijuana.' I was told that the cops were going to be called on me," she said. Alex Nunes, *At Public Hearing, Speakers Say Rhode Island Has a Ways to go on Shoreline Access*, The Public's Radio (Nov. 18, 2021), https://perma.cc/6T5A-SH5P. The commission's results and recommendations were then reported back to the Legislature. *See generally* Special Legislative Commission To Study And Provide Recommendations On The Issues Relating To Lateral Access Along The Rhode Island Shoreline, Final Report (2022), https://perma.cc/QBC7-4VZY.

23. S.B. 0417, Gen. Assemb., Jan. Sess. § 1(2) (R.I. 2023) (as passed by Senate on June 8, 2023).

24. *Id.*

> workhouses as shall be necessary for the salting, drying and keeping of their fish, to be taken or gotten upon that coast.[25]

The 1663 Charter was primarily concerned with protecting the public's right to fish, but it also contained a guarantee of public shore access.[26] The charter uses the phrase "to continue and use," which indicates it was protecting already established practices. As Professor Sean Lyness notes, "the fact that the public's rights were codified at all—and, at that, just a few decades after the colony's founding—is telling as to their significance."[27]

The importance attached to public beach access continued throughout the nineteenth century, and when the state constitution was enacted in 1843, it included a provision specifically guaranteeing public shore access. The provision, as originally written, stated:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state. But no new right is intended to be granted, nor any existing right impaired, by this declaration.[28]

The 1843 constitution guaranteed Rhode Islanders "the privileges of the shore." Nevertheless, it wasn't until 1941, in *Jackvony v. Powel*, that the courts directly addressed the meaning of this provision.

Jackvony involved a lawsuit to prevent the City of Newport "from erecting or causing to be erected a fence or other barrier on such portion of the shore between the high-and-low-water lines as lies to the south of the property known as Easton's Beach."[29] In deciding the case, the court noted "the constitution does not define what, at the time of the adoption of the [1843] constitution, were 'the privileges of the shore' to which the people of the state had been theretofore entitled."[30] Still, the court wrote, "it seems clear to us that there must have been

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25. Charter of Rhode Island and Providence plantations (1663), reprinted in 2 R.I. Records, 1664–1677, at 16 (John Russell Bartlett ed., Providence, A. Crawford Greene and Brother 1857).
26. *See generally* Josh Eagle, *Beaches as Ports* (2025) (on file with author) (describing the history of public beach access).
27. Sean Lyness, *A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine*, 26 Roger Williams U. L. Rev. 671, 675 (2021).
28. R.I. Const. art. I, § 17. The drafters of the constitution were very clear to state that the text alters no right yet it was arguably expanded by this provision. *See* Lyness, *supra* note 27, at 676 (suggesting that by including the "key (and amorphous) phrase, 'privileges of the shore,'" "the text does more than lock in the status quo—it broadens the scope of the right"). *See* Dennis Nixon, *The Legal and Regulatory Environment of Fisheries Licensing in Rhode Island*, 49 R.I. Bar J. 11, 13 (2001) (noting the provision was "subsequently amended to further define the term 'privileges of the shore,' but the key phrase 'rights of fishery . . . under the charter and usages of the state' remains unchanged").
29. Jackvony v. Powel, 21 A.2d 554, 554 (R.I. 1941).
30. *Id.* at 556. It further noted that the state legislature had not opined on what the constitutional language was intended to encompass, writing:

> > But we have not found, nor has there been called to our attention, any instance in which the general assembly, before the adoption of the constitution, legislated

some such 'privileges,' which were then recognized as belonging to the people and which the framers and adopters of the constitution intended to change into 'rights,' beyond the power of the general assembly to destroy."[31]

To decipher what "privileges" the constitutional framers intended, the court turned to common law understandings of the phrase and noted that:

> [a]mong the common-law rights of the public in the shore . . . are rights of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and also, as necessary for the enjoyment of any of these rights, and perhaps as a separate and independent right, that of passing along the *shore*.[32]

The court then described this passage right as encompassing the area between the "high-water mark and low-water mark."[33]

Jackvony recognized a right of passage but failed to precisely define it.[34] Forty years later, in *State v. Ibbison*,[35] the Rhode Island Supreme Court decided greater specificity was needed. The court noted that the *Jackvony* court had used the term "high water mark" or wrack line and "mean high tide line" interchangeably.[36] To end this confusion, the *Ibbison* court held that the shore passage right only extended to the mean high tide line, which is lower than the wrack line and is often submerged.[37] This change meant that there would frequently be no public right of passage along the shore.[38]

> with regard to the privileges of the people of this state in its shores bordering on tidewaters and lying between the lines of mean high tide and mean low tide, privileges which have been commonly believed to include the above-mentioned privileges of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and of passage along the shore.

Id. at 557.

31. *Id.* at 556.
32. *Id.* (emphasis added). Because there were no cases interpreting this provision, the court looked to dicta to determine what the term encompassed. *Id.* The court also suggested that the right could be subject to "reasonable regulation by acts of the general assembly in the interests of the people of the state." *Id.* at 558.
33. *Jackvony*, 21 A.2d at 558.
34. *Id.* at 557 (citing three cases from the nineteenth century and one from the early twentieth).
35. State v. Ibbison, 448 A.2d 728 (R.I. 1982). In *Ibbison*, six defendants were convicted of criminal trespass for traveling along a beach, between the high-water mark and the mean high-water line, during a beach clean-up operation. *Id.* at 729. A littoral owner believed that "his land extended down to the mean high-water line—i.e., under water" and "informed the beach cleaners that they were trespassing." Lyness, *supra* note 27, at 680–81; *see also Ibbison*, 448 A.2d at 729–30. When the defendants disagreed, he had them arrested. *Id.* For further discussion of the *Ibbison* case, *see* Lyness, *supra* note 27, at 680–84.
36. *Ibbison*, 448 A.2d at 730.
37. *Id.* at 732.
38. *Id.* ("In fixing the landward boundary of the shore at the mean-high-tide line, we are mindful that there is a disadvantage in that this point is not readily identifiable by the casual observer. We doubt, however, that any boundary could be set that would be readily apparent to an observer when we consider the varied topography of our shoreline. The mean-high-tide line represents the point that can be determined scientifically with the greatest certainty.

In reaching its decision, the *Ibbison* court largely ignored Rhode Island case law. It simply declared the mean high tide line the fairer point to define the limits of the public's shore access because it could be determined with the most scientific accuracy.[39] Unsurprisingly, the *Ibbison* decision was deeply unpopular[40] and, within a year, the Rhode Island General Assembly convened a Constitutional Convention to propose a constitutional amendment guaranteeing public beach access and effectively overturning *Ibbison*.[41]

The amended provision read:

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, *including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore*; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.[42]

A ballot question with the proposed amendment was approved by Rhode Island voters on November 4, 1986, by a vote of 183,021 (67.5%) to 88,046 (32.5%).[43] This was the highest plurality of any of the fourteen constitutional

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Clearly, a line determined over a period of years using modern scientific techniques is more precise than a mark made by the changing tides driven by the varying forces of nature.").

39. The mean high-water line is the arithmetic average of the high-water heights measured over an 18.6 year metonic cycle. *Id.* at 730. For further discussion of the impact of *Ibbison* in the wider context of Rhode Island's public trust doctrine, *see* John M. Boehnert, *Greater Providence Chamber of Commerce v. State: Balancing Private Property Rights in Filled Tidal Lands Under the Rhode Island Public Trust Doctrine*, 21 Wm. & Mary Env't L. & Pol'y Rev. 637, 675–78, 696 (1997).

40. Antonia Noori Farzan, *How Much of RI's Shoreline is the Public Entitled To? Commission Seeks Clarity*, Providence J. (Dec. 9, 2021), https://perma.cc/T28N-58Y8 (noting that "[t]he Ibbison decision was extremely unpopular.").

41. The Assembly passed a resolution "creating a Bi-partisan Preparatory Committee to assemble information for a Constitutional Convention," which began on January 6, 1986. Elliot Andrews et al., Rhode Island Constitutional Convention History 3 (2014), perma.cc/6SMR-FLZJ.

42. R.I. Const. art. I, § 17 (emphasis added).

43. This was "a level of acceptance higher than any of the [other] substantive ballot questions." Patrick T. Conley & Robert G. Flanders, Jr., The Rhode Island State Constitution: A Reference Guide 111 (2011).

amendments on the ballot and demonstrated the public's overwhelming support for the measure.[44]

After the amendment was enacted, the amendment's drafters published detailed commentary explaining the reasoning behind the textual changes.[45] This commentary explains, "[t]he committee was concerned with the absence of [a] constitutional definition of the 'privileges of the shore' to which Rhode Islanders are entitled."[46] Further, it notes, "[t]he case of [Jackvony] . . . was central to the deliberations of the committee," and, in particular, the *Jackvony* court's specific recognition of "a public right of passage along the shore . . . ."[47] Finally, the commentary states that "[t]he committee strongly affirmed that the [Jackvony] case accurately reflected those shore privileges which have been in place in Rhode Island historically" and that the "resolution reflected that sentiment."[48] In short, the constitutional amendment was enacted to effectively overrule Ibbison and reinstate Jackvony's guarantee of meaningful shore access.[49]

Unfortunately, the committee did not define the term "shore."[50] As a result, uncertainty regarding the public's shore access rights continued.[51] In 2022, a government study[52] demonstrated that the public did not know where their

44. Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk U. L. Rev. 313, 325–26 (1990).

45. *See* Lyness, *supra* note 27, at 686 (noting that "after the convention had concluded, the convention delegates provide a fascinating and clear insight into their reasoning for each constitutional change").

46. Annotated Constitution of the State of Rhode Island and Providence Plantations 9 (1988) [hereinafter Annotated Constitution].

47. *Id.*

48. *Id.* at 8–10.

49. As Professor Lyness notes, "[b]y expressly adding the right of 'passage along the shore,' and, by implication, knowing that passage along the shore was often impossible under the Ibbison rule, the framers of the constitutional amendment codified Jackvony and all but explicitly overruled Ibbison." Lyness, *supra* note 27, at 687.

50. Annotated Constitution, *supra* note 46, at 10 ("The committee also considered clarifying the definition of the term 'shore' as used in the Constitution. After long deliberation, the committee left the definition of the term 'shore' for judicial determination.").

51. As Dennis Nixon explains, "Popular sentiment sought to move the landward boundary shoreward, such as to the 'vegetation line,' 'extreme high water mark,' 'dry sands,' or 'one rod landward of mean high water.'" However, ultimately, the delegates "decided not to increase the geographic scope of the shore because of the likelihood that a court would find such an action a taking without just compensation." Nixon, *supra* note 44, at 326.

52. Sean Lyness, *A Primer on Rhode Island's Shoreline Access Rights*, 72 R.I. Bar J. 7, 10 (2023) ("A House Study Commission on Lateral Shoreline Access convened in 2022 to examine the issue, hearing from scientists, shoreline advocates, and private property owners. The evidence was overwhelming: the public did not know where their rights in the shoreline began or ended, and the mean-high tide line endorsed by *Ibbison* was impossible to discern without scientific equipment, not to mention underwater more than half of the time.").

rights to the shore began or ended and that determining whether someone had intentionally trespassed onto private beach property was almost impossible.[53]

S0417 was the Rhode Island legislature's attempt to resolve this uncertainty while still guaranteeing the public's shore access.[54] It does so by setting the public beach at 10 feet landward from the visible high tide line, or "wrack line."[55] This change increased certainty, but it also angered many beach front property owners. These owners then challenged the law as an unconstitutional taking and, in July 2024, the superior court of Rhode Island agreed.[56]

According to Judge Taft-Carter, the Rhode Island General Assembly had "appropriated a public right of access onto private property when it designated up to 10' landward of the recognizable high tide line as the access point for the public's rights and privileges," and this "confiscated the Plaintiffs' property resulting in an unconstitutional taking."[57] Taft-Carter's ruling is currently under

53. In the forty years since public access was set at the mean high tide line, there have been no successful prosecutions of trespassers. *See Understanding Rhode Island's New Shoreline Access Law*, SeaGrant (Sept. 25, 2023), https://perma.cc/FN92-HSNN. ("[T]here have been no successful prosecutions of trespassers. And that's for a very simple reason. In order to have a successful prosecution of someone who is alleged to have trespassed, there needs to be a showing that they had criminal intent. And criminal intent means knowing that what you're doing is against the law, and doing it anyway. So in this situation, if no one knows where the high tide line is, it's very hard for prosecutors to prove criminal intent"). *See also* Ryan Blessing, *Finding Middle Ground: Beach Tour Breaks Down Ocean State's Shore Line Access Law*, Westerly Sun, (Sep. 24, 2023), https://perma.cc/9R8Y-YCBC (noting the ease of locating the public beach under the new law).

54. S.B. 417, 118th Gen. Assemb. § 1 (R.I 2023) (noting "since 1982, there has also been a greater awareness by the public, judiciary and lawmakers of the scientific findings that established the difficulties in using the MHW line as the indicator of public rights to the shore"). Under the law, Swift's seawall remains permissible. As noted by State Senator Mark McKenney (D-Dist. 30, Warwick), the senate sponsor of the bill, "with respect to seawalls, lawns, infrastructure that is legally erected, there's no entitlement to go and access that." Blessing, *supra* note 53.

55. *See* Blessing, *supra* note 53 (explaining that "where there are multiple wrack lines, the one closest to the water will be the one from which the 10 feet is measured. 'You can go 10 feet landward of that line . . . . But not past the vegetation line, the idea being you're not going onto anyone's property, their lawn."). *See also Understanding Rhode Island's New Shoreline Access Law*, *supra* note 53.

56. The law was challenged by the Rhode Island Association of Coastal Taxpayers who claimed the law "opens their residential life to the constant presence of strangers, destroying privacy and raising safety concerns." Frank Carini, *Get off My Beach!*, ecoRI News (July 11, 2023), https://perma.cc/5RL8-9RDG; Nancy Lavin, *R.I. Superior Court Judge Sides with Property Owners in Shoreline Access Law Dispute*, R.I. Current (July 15, 2024), https://perma.cc/E3BX-DBZ4.

57. Roth v. State of Rhode Island, C.A. No. WC-2023-0440, 12 (R.I. Super. Ct., 2024); *See also* Stilts, L.L.C., v. State of Rhode Island, No. WC-2023-0481, 6 (R.I. Super. Ct., 2024) (also holding the statute an unconstitutional taking and raising, yet not addressing, the custom argument).

appeal.[58] However, regardless of the ultimate outcome, this fight demonstrates not just the long-standing disagreements over public shore access but also, the importance of community customs and traditions, and the desire to protect them.[59]

II. Traditional Usages and Customs of the Shore

One of the most striking aspects of Rhode Island's shore access right is that it specifically protects the customary practice of gathering seaweed.[60] At first glance, constitutional protection for seemingly seaweed collection seems inexplicable. However, Rhode Island's history demonstrates the vegetation's deep and enduring importance.

A. The Custom of Gathering Seaweed

Long before colonization, Native Americans consumed seaweed as a nutritious and readily available dietary staple, and they continued these practices even as their land bases and shore access was diminished. As historian Daniel Mandell notes, throughout the nineteenth century, the native communities of Southern New England remained "heavily dependent on the natural resources on and near their reserves."[61] In fact, for many of these communities, the availability of traditional food sources is what enabled them to resist western relocation.[62] In 1820, when the Narragansett were asked if they wished to move

58. Roth, C.A. No. WC-2023-0440, *cert. granted*.

59. *See generally* Matthew D. Slepkow, Note, *Shoring Up the Limits of Rhode Island's Public Trust Doctrine: Greater Providence Chamber of Commerce v. State of Rhode Island Makes It Simple as One, Two, Fee*, 1 Roger Williams U. L. Rev. 183, 190–91 (1996) (describing Rhode Island's unique relationship with the shore).

60. *See* Lyness, *supra* note 27, at 696 (According to Sean Lyness, in interpreting the word "shore," "'the gathering of seaweed' is most helpful, as the constant waves often place a seaweed 'line' along the beach. Although there is some disagreement as to where, exactly, the seaweed line corresponds with tidal data, logically the seaweed line is at least as far inland as the tide will go. Guaranteeing the public the right to gather this seaweed suggests that the 'shore' must be closer to the high-water mark.").

61. Daniel Mandell, Tribe, Race, and History: Native Americans in Southern New England, 1780-1880, 14–15 (2010).

62. The success of some native communities in resisting removal is demonstrated in the dozens of tribes that continue to reside on the east coast. Currently there are thirty-four federally recognized tribes between Florida and Maine. Eastern Region, U.S. Dep't of the Interior Indian Aff., https://perma.cc/KJ59-3RD3. There are also over sixty state-recognized tribes and many more seeking recognition. State Recognized Tribes, 500 Nations (Jan. 1, 2017), https://perma.cc/Q5YR-V3X9. For examples of tribes seeking state recognition *see, e.g.*, Kyle Ingram, *Tuscarora Nation Pursues Push for State Recognition in NC after Decades of Exclusion*, Raleigh News & Observer (May 21, 2024), https://perma.cc/ANU4-7YYH; Emma Davis, *Wabanaki Leaders Say Proposed State Recognition Process Could Hinder Sovereignty Fight*, Me. Morning Star (Mar. 13, 2025), https://perma.cc/PEW7-FRJ5; Bill Donahue,

west of the Mississippi river, they declined, stating, "we have land enough, and wood enough, and living on the salt water, and having boats of our own, have plenty of fish &c&c."[63] Seaweed was certainly part of this "&c&c."[64]

Less than fifty years later, in 1867, seaweed was recognized as so important to the Herring Pond Wampanoag tribe of Cape Cod that the Massachusetts legislature passed a statute granting the tribe specific "protection for its kelp and seaweed," and "allowing the tribe's treasurer to claim and sell [it] on behalf of the community."[65]

During the colonial period, seaweed also became a vital resource for the newly arrived colonists. It was an important source of food, but it was also used for insulation, livestock feed, to protect crops from extreme weather and as a form of fertilizer.[66] Such uses then continued through the eighteenth and nineteenth centuries. Many historic accounts of coastal New England include descriptions of residents going down to the beach after storms to gather seaweed.[67]

Blood Feuds: The Fight Over Who Gets to be Native American, City Life (July 13, 2025), https://perma.cc/Y9YQ-QUUH (describing the Seaconke Wampanoag's fight for state recognition in Rhode Island). *See generally* Jane Dinwoodie, Beyond Removal, Indian States and Sovereignties in the American South, 1812–1860 (May 2017) (Ph.D thesis, University of Oxford) (describing how thousands of indigenous Southerners, as much as 20%, effectively remained in their homelands despite the 1830 Indian Removal Act).

63. By the mid-nineteenth century, only a few of the twenty-seven Narragansett families were recorded as "follow[ing] farming exclusively." Mandell, *supra* note 61, at 15.

64. *See, e.g.*, Mara Hagen-Path, *Shells of History, Lessons from the Narragansett Tribe*, Motif (Oct. 3, 2023), https://perma.cc/XS48-XHW7 (describing a modern Narragansett clam bake using seaweed). *See also Quahog – A Brief History of Our Clam*, Little Egg Chamber of Commerce (Mar. 31, 2022), https://perma.cc/S5H4-U6X5 (describing how seaweed was used in traditional Narragansett cooking to steam clams); Christopher Scott Martin & David Norton Stone, Rhode Island Clam Shacks 52 (2017) (describing clams as being cooked "in the oldfashioned [sic] Narragansett Indian style, with Seaweed").

65. Mandell, *supra* note 61, at 132; *see also* 1867 Mass. Acts ch. 96 (An Act Concerning the Taking of Kelp and Seaweed Upon Lands of the Herring Pond Plantation).

66. Ocean Special Management Plan (draft report July 23, 2010), https://perma.cc/WJB8-MVP2 [hereinafter Draft SAMP Report] (citing Samuel Livermore, A History of Block Island from Its Discovery, in 1514 to the Present Time, 1876, at 33 (1877)) ("[Rhode] Island farmers (many of them also fishermen) . . . mixed seaweed with fish offal and soil to create compost . . . [that] maintained the soil's fertility despite centuries of intensive [farming]."); Robert Thompson, *Beach Access, Trespass, and the Social Enactment of Property*, 17 Roger Williams U.L. Rev. 351, 364–65 (2012) (defending the use of the wrack line given Rhode Island's history of farmers collecting "seaweed to manure their fields"); *see also* Charles Hillinger, *Indian History Leaves Prints in Rhode Island Names*, L.A. Times (May 4, 1986), https://perma.cc/J7BN-6SWV (describing the historic uses of seaweed in Rhode Island); Suzan Bellincampi, *Sea Harvest*, Vineyard Gazette (Mar. 10, 2021), https://perma.cc/67AT-EGDN (describing how colonists used seaweed for "for agriculture, insulation of homes (called banking the foundation), covering boats for the winter, stuffing mattresses, and for animal fodder").

67. The best time to collect seaweed is after storms and the best place to collect it is well up on the beach where the storm surge and waves deposited it. *See generally* Joyce Russell, New

As Professor Robert Thompson writes, "the farmers of Rhode Island would rush in their wagons down to the beach after storms to collect the ocean's valuable natural fertilizer before the other farmers carted it away."[68] By the nineteenth century, seaweed was so important to New Englanders that many communities created a fall holiday so that farmers could gather seaweed.[69]

During the industrial era, seaweed's importance furthered increased. Soda formed from burning seaweed was used in European glass and soap production.[70] It was also an ingredient in the production of saltpeter which was used to manufacture gunpower and explosives during the Napoleonic wars.[71] In addition, seaweed was a crucial ingredient in the production of iodine, a byproduct of saltpeter, and used to treat a range of medical disorders.[72]

Seaweed became extremely valuable,[73] but as it grew in value, increasing numbers of property owners claimed the exclusive right to its collection. Disputes over seaweed collection on private property began to arise. Property

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Vegetable Garden Techniques 102 (2019) (describing the "wonders of seaweed" and the best ways to harvest it "after a storm").

68. Robert Thompson, *Local Government and the Closing of the Coast: Parking Bans and the Beach as a Traditional Public Forum*, 25 Fordham Env't L. Rev. 458, 491–92 (2014). In Cape Cod, Henry David Thoreau recounts a similar experience. Thoreau writes of going down to the beach to witness the wreckage of a ship that sank in a storm during the night and that after viewing the wreckage, encountering "an old man and his son collecting, with their team, the sea-weed which that fatal storm had cast up." Henry David Thoreau, Cape Cod 8 (Boston: Ticknor and Fields 1866); *see also* Chapman v. Kimball, 9 Day 38, 40–42 (Conn. 1831) (demonstrating that 200 years ago, the gathering of seaweed for fertilizer was also commonplace in Connecticut and considered a protected public use of the tidelands). Even today, farmers and gardeners continue to collect seaweed as fertilizer. *See* Hannah Stephenson, *Seaweed Could be the Secret Weapon to Help Your Garden Bloom. Here's why*, The Independent (Mar. 17, 2025), https://perma.cc/9XNQ-8CGA.

69. Mitchell W. Feeney, Comment, *Regulating Seaweed Harvesting in Maine: The Public and Private Interests in an Emerging Marine Resource Industry*, 7 Ocean & Coastal L.J. 329, 335 (2002). Today, this practice continues with festivals like New England Kelp Harvest Week and Seaweed Saturday. *See New England Kelp Harvest Week,* U. Conn. Coll. Agri., Health & Natural Resources (Apr. 18, 2023), https://perma.cc/BG8E-2QXV; *see also Seaweed Saturday*, Portland Press Herald (Apr. 24, 2024), https://perma.cc/DTR8-FHZM.

70. *See From the Vault: Seaweed Intrigue*, Herreshoff Marine Museum (Dec. 17, 2020), https://perma.cc/NT6Z-J847.

71. *Id.*

72. In the nineteenth century, gathering seaweed was so common that it may have been the excuse used by two spies to redirect suspicion away from themselves. According to the December 14, 1889, issue of *The Bristol Phoenix*, "On Friday evening of last week two men, named Ball and Willis, were arrested charged with taking seaweed from" the Herreshoff Marine Company's shore in Bristol, Rhode Island. *Id.* The men claimed to have been collecting seaweed but, according to an article from the Herreshoff Marine Museum, "seaweed collecting" was likely a cover story to hide their attempt to spy on the Cushing Torpedo boat that Herreshoff was manufacturing for the U.S. Navy, and which was poised to launch January 23, 1890. *Id.*

73. In 1875, early Rhode Island historian S.T. Livermore noted that on Block Island, the "[i]slanders had gathered over 6,000 cords of seaweed valued at $10,000." *See* Draft SAMP Report, *supra* note 66, at 33.

owners claimed trespass while the seaweed collectors attempted to rely on long-standing customary rights. For the most part, the seaweed collectors lost, sometimes violently, yet seaweed gathering continued and was eventually protected through constitutional amendment.

1. Seaweed Cases

One of the earliest seaweed disputes is contained in the papers of Thomas G. Hazard, a descendant of one of the founders of Newport, Rhode Island. These papers include "several depositions and other documents from a lengthy lawsuit brought by Anthony Wilbor, in which several of Hazard's sons allegedly beat Wilbor for attempting to take seaweed from their beach" in 1799.[74]

A less violent example is the 1846 case *Kenyon v. Nichols* in which the defendant was accused of trespassing on the plaintiff's land after he entered to gather and remove seaweed. The defendant claimed a customary right, one held by all Rhode Island inhabitants, to take seaweed from private property for the purpose of cultivation, but the court rejected this argument and ruled that such a right could not be established by custom.[75]

Similarly, in the 1901 case *Carr v. Carpenter*,[76] the defendant was sued for trespass after he entered onto the beach adjoining plaintiff's property to gather seaweed. As in *Kenyon*, the defendant argued that "by general custom he and all the inhabitants of the State had the right to take sea-weed from the shore."[77] Once again, the court rejected this argument and reiterated that such a right could not be established by custom. According to the court, "the right to take sea-weed and drift-stuff, and the right to take sand and stones from the beach, have always been recognized and upheld by our courts as rights attached to the ownership of the upland bordering on the sea."[78, 79]

Despite such rulings, seaweed collection continued and was eventually recognized as a constitutional right.[80] Still, as cases like *Kenyon* and *Carr* demonstrate, when seaweed gathering was not included among the

74. *Thomas G. Hazard Family Papers,* R.I. Hist. Soc'y, https://perma.cc/V4ZV-3B5B.

75. Kenyon v. Nichols, 1 R.I. 106, 111 (1848). For other nineteenth century cases finding the landowner's rights to the resources of the shore, *see e.g.,* Bailey v. Sisson, 1 R.I. 233 (1849); Hall v. Lawrence, 2 R.I. 218 (1852); Watson v. Knowles, 13 R.I. 639 (1882); Town of Middletown v. Newport Hosp., 16 R.I. 320 (1888); Allen v. Allen, 19 R.I. 115 (1895).

76. Carr v. Carpenter, 22 R.I. 528, 528 (R.I. 1901).

77. *Id.* at 553.

78. *Id.* at 530. For further discussion of the *Carr* case, *see* Jose L. Fernandez, *Public Trust, Riparian Rights, and Aquaculture: A Storm Brewing in the Ocean State*, 20 Wm. & Mary Env't L. & Pol'y Rev. 293, 309–11 (1996). *See also* Nudd v. Hobbs, 17 N.H. 524, 527 (1845) (rejecting a similar customary claim).

79. *Carr*, 22 R.I. at 535; *see supra* Part I.C.

80. *Supra* Part I.C.

constitutionally protected privileges of the shore, this important custom received no legal protection.[81] Nevertheless, this lack of protection for customary practices was not limited to seaweed. For centuries, most U.S. courts have held that the law of custom is inapplicable in America.[82]

B. The Common Law Doctrine of Custom

The doctrine of custom is an ancient part of the common law which holds that, because a long-standing customary usage, one dating back to time immemorial, must have at one point been given to the people by a legal authority, it is now entitled to formal recognition.[83]

This "immemorial" or antiquity requirement as defined by jurist William Blackstone means that the customary use has been in existence for so long that "the memory of man runneth not to the contrary."[84] Specifically, he defined such a custom as running from the coronation of King Richard I on September 3, 1189, to the present.[85] Only after this first criterion was satisfied were the other Blackstonian requirements, that the usage had to be reasonable, certain, continuous, acquiesced in, peaceably enjoyed, and consistent with other customs and laws, considered.[86]

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81. A number of other New England courts also ignored customary claims by labeling them profits which were never subject to customary law in England or in the United States. *See, e.g.*, Waters v. Lilley, 21 Mass. 145, 148 (1826) (suggesting customary easements were recognizable under Massachusetts law but holding that any right to fish was a non-customary profit à prendre rather than an easement); Perley v. Langley, 7 N.H. 233, 236–37 (1834) (finding the claimed customary right to carry away sand was a profit rather than an easement); Littlefield v. Maxwell, 31 Me. 134, 139 (1850) (Maine defendant alleged a customary right to store wood on a private landowner's property situated on the dry-sand beach between the high-tide mark and the vegetation line).
82. *See infra* Part II.C.
83. Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 Wm. & Mary L. Rev. 835, 877 n.180 (1982) ("The law of custom developed in feudal England long before a formal legal system provided legal recognition to certain usages exercised by the people. The basic premise of the doctrine of customary rights was that, because the usage must at one time have been conferred upon the people by a legal authority, it now merited formal recognition. To warrant legal recognition, the usage had to be reasonable, certain, continuous, acquiesced in, peaceably enjoyed, consistent with other customs and laws, and of immemorial duration.").
84. 1 William Blackstone, Commentaries *67; Butler, *supra* note 83 ("the requirement that the custom be immemorial was interpreted as meaning that the custom commenced with the reign of Richard I (1189)").
85. 1 Blackstone, *supra* note 84, at *67. "'[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.'" David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1383 (1996).
86. John H. Balfour Browne, The Law of Usages and Customs 5 (1875); 1 Blackstone, *supra* note 85, at *77–78.

The United States was founded centuries after 1189, and American courts used this fact to hold that the immemoriality requirement could not be satisfied.[87] As Professor Bederman writes, time became "a sort of legal canard as to the irrelevance of custom in America."[88]

C. Custom's Inapplicability in America

In considering the law of custom, courts and commentators repeatedly declared the impossibility of proving "immemoriality" of an American custom.[89] For example, in the earliest custom case, the 1825 decision *Ackerman v. Shelp*,[90] the New Jersey court refused to recognize the claimed customary right of an easement to reach a riverbank, stating, "'[t]ime of memory' hath been long ago ascertained by law to commence from the beginning of the reign of Richard the first, and any custom may be destroyed by evidence of its non-existence in any part of the long period from that time to the present."[91] Consequently, the court held, "This is sufficient to destroy all common law customs in New Jersey, for

87. *See, e.g.*, Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*, 46 Baylor L. Rev. 1093, 1102 (1994) (noting "states often rejected custom on the basis that no custom could be 'immemorial' in a country as young as the United States"). *See also* Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 Temp. L. Rev. 199, 209–10 (2006) (noting "it was difficult, from merely a practical standpoint, to prove the existence of custom in the United States" and explaining "the impossibility of proving 'immemoriality' of an American custom").

88. Bederman, *supra* note 85, at 1401; Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. Haw. L. Rev. 99, 104–05 (1998).

89. *See, e.g.*, John D. Lawson, The Law of Usages and Customs 28 (1881) (noting that customary rights cannot exist in the United States since settlement since it would lack the "the essential ingredient of a good custom—it is not immemorial"). *See also* Sarah Harding, *Perpetual Property*, 61 Fla. L. Rev. 285, 307 (2009) (noting that "customary rights were spurned in American law because of the factual requirement that the custom be traced back to time 'immemorial'"); Margit Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 Wm. & Mary L. Rev. 669, 680 n.43 (1983) ("Literally, immemorial usage can never be found in the United States (excluding usages by American Indians) [therefore] . . . most American courts . . . have refused to recognize customary rights); S. Brent Spain, *Florida Beach Access: Nothing but Wet Sand?*, 15 J. Land Use & Env't L. 167, 176 n.60 (1999) ("The primary argument used for the rejection of the doctrine of custom in early American law was that no custom in the United States has lasted long enough to satisfy the time immemorial requirement."); Amelia Ulmer, Note, *Ancient and Reasonable: The Customary Use Doctrine and Its Applicability to Private Beaches in Florida*, 36 J. Land Use & Env't L. 145, 153 (2020) ("The doctrine was largely disfavored by the courts in its early American applications due to the relative newness of the country, and thus the inability of judges to imagine an American version of time immemorial.").

90. 8 N.J.L. 125 (1825). *See also* Alyson C. Flournoy et al., *Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy*, 25 Ocean & Coastal L.J. 1, 17–18 (2020) (noting the dates and locations of the earliest American custom cases).

91. *Ackerman*, 8 N.J.L. at 130 (citing 2 Blackstone, Commentaries *31).

the country was not discovered by civilized inhabitants, and civil rights could not consequently have been in use, till more than three hundred years after the beginning of the reign of Richard the first."[92] The court also noted it was not alone in reaching this conclusion, pointing out that there was not "a single instance" of a court finding that the doctrine of custom "had been received here with the common law."[93]

In the 1836 Virginia case *Harris v. Carson*,[94] the Court of Appeals of Virginia rejected custom on a similar basis, explaining that,

> For, a custom, to be valid, [it] must be as old as the common law; it must be immemorial . . . . Our ancestors brought with them the common law or general customs of *England*, but none of the particular [or local] customs. The common law became the law of our whole state, and gave the rule to every part of it . . . . Any practice or usage, however general, introduced into this country since its settlement, and in opposition to the common law, can have no force on the ground of custom; because it lacks the essential ingredient of a good custom—it is not immemorial.[95]

The Supreme Court of Virginia then reiterated this holding in the 1860 Virginia case *Delaplane v. Crenshaw*,[96] in which it concluded:

> [t]hat a custom to displace the common law must be immemorial, and that the time of memory runs back to the reign of Richard Cœur de Lion, are maxims of such ancient, universal and familiar acceptation in the English law, that it is now quite too late to controvert their correctness.[97]

In the 1891 case *Ocean Beach Ass'n v. Brinley*,[98] the New Jersey court also rejected the doctrine of custom as inapplicable in the United States, stating:

> The first requisite of a good custom is that it shall have been used so long that the memory of man runneth not to the contrary. . . . Customs similar to those of gavelkind and borough-English, cannot exist here, for they cannot have the antiquity necessary to their validity. To be recognized by the courts, they must have existed immemorially, that is, before the beginning of the reign of Richard the First. This country was not discovered until more than three hundred years after the commencement of that sovereign's reign, and consequently no custom can have existed here for the period required to make it legal.[99]

The judicial declaration that custom could not exist in the United States because the antiquity requirement could never be satisfied was then repeatedly

92. *Id.*
93. *Id.*
94. 34 Va. (7 Leigh) 632 (1836).
95. *Id.* at 638–39 (rejecting plaintiff's argument that custom dated from time immemorial and holding that while American jurisprudence incorporated English common law, it did not bring with it the English doctrine of customs); *accord* Ocean Beach Ass'n v. Brinley, 34 N.J. Eq. 438, 448 (Ch. 1881) (citing 1 Blackstone, *supra* note 84, at *76).
96. 56 Va. (15 Gratt.) 457 (1860).
97. *Id.* at 471.
98. 34 N.J. Eq. 438, 438 (Ch. 1881).
99. *Id.* at 448.

reaffirmed throughout the twentieth century. In the 1905 Connecticut case *Graham v. Walker*,[100] the court held, "we are of opinion that such rules of the English common law as gave [easements by local custom] sanction were unadapted to the conditions of political society existing here, and have never been in force in Connecticut."[101] In the 1935 New York case *Gillies v. Orienta Beach Club*,[102] the court refused to accept customary usage as a means of claiming an easement in a private beach for bathing and boating, holding:

> A careful reading of the English authorities convinces one that the custom had its origin in the fact that from time immemorial the use had been permitted; that because of the length of time the use had existed any records of statutes creating the right had been destroyed; a presumption that the use had been duly authorized was therefore, created. The necessity for such a fiction does not exist in this State. England is of the Old World, our State is of the New.[103]

In 1979, in *State ex rel. Haman v. Fox*,[104] the Idaho Supreme Court refused to apply the law of custom, finding that although it might theoretically exist, the circumstances of this case did not meet the "time immemorial" requirement.[105] In the 1989 case Bell v. Town of Wells,[106] the Maine Supreme Court also refused to apply the doctrine, noting, "[v]ery few American states recognize the English doctrine of public easements by local custom."[107] Then, in 2014, in *Almeder v. Town of Kennebunkport*,[108] the Maine Supreme Court clarified its earlier holding, declaring the law of custom "a dead doctrine in the United States."[109]

D. Modern Uses of Custom

Despite American courts' centuries-long rejection of custom, there are two notable exceptions. The first is the 1969 Oregon Supreme Court case *Thornton v. Hay* and the second is the 1989 Hawai'i case *Public Access Shore (PASH)*. What is striking about these two cases is that both find the purportedly "impossible" immemorial requirement can be satisfied by indigenous customs.

100. 61 A. 98, 99 (Conn. 1905).
101. *Id.* at 99.
102. 289 N.Y.S. 733, 739–40 (Sup. Ct. 1935), aff'd, 288 N.Y.S. 136 (App. Div. 1936).
103. *Id.* at 739–40.
104. 594 P.2d 1093, 1101 (Idaho 1979).
105. *Id.*
106. Bell v. Town, 557 A.2d 168, 179 (Me. 1989).
107. *Id.* (noting custom didn't apply because the public usage must have occurred "so long as the memory of man runneth not to the contrary").
108. 106 A.3d 1099, 1113 (Me. 2014).
109. *Id.*

1. Thornton v. Hay

In 1969, the Oregon Supreme Court decided State ex rel. *Thornton v. Hay*[110] and recognized a customary right of shore access based in part on indigenous usages. The case involved a lawsuit brought by the state of Oregon to prevent owners of a beachfront motel from blocking access to the dry sand portion of their property.[111] The trial court granted an injunction based on the finding of a prescriptive easement, but the Oregon Supreme Court affirmed the injunction based on the doctrine of custom, writing, "[t]he most cogent basis for the decision in this case is the English doctrine of custom."[112] In explaining its decision, the court looked to Blackstone's commentaries on the doctrine of custom and wrote that, adopting his seven criteria for establishing a custom, the custom of the people of Oregon to use the dry sand area of the beach for public recreation "meets every one of Blackstone's requisites."[113]

With regard to the antiquity prong, the court recognized it could not simply rely on the customary uses of the relatively recent Anglo-American settlers. However, the court found no reason it could not look to the ancient customs of the state's indigenous inhabitants. The court wrote:

> On the score of the brevity of our political history, it is true that the Anglo-American legal system on this continent is relatively new. Its newness has made it possible for government to provide for many of our institutions by written law rather than by customary law. This truism does not, however, 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.[114]

The *Thornton* court considered native and non-native custom complementary and capable of combination. It noted:

> The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam-digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires,

110. 462 P.2d 671 (Or. 1969).
111. *Id*. at 672–73.
112. *Id.* at 676.
113. *Id*. at 677. Oregon courts first acknowledged the doctrine of custom in 1907 in Hume v. Rogue River Packing Co., 51 Ore. 237 (1907). *Hume* rejected the plaintiff's claim but acknowledged that customary rights existed under Oregon law, stating, "Custom is said to be applicable to cases where the inhabitants of a particular locality have acquired an easement by long enjoyment, without being capable of taking collectively under deed." *Id.* at 250, 261.
114. *Thornton*, 462 P.2d at 677–78.

> and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.[115]

The court concluded the decision with a call for the doctrine's revitalization, writing, "[b]ecause so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society."[116]

2. PASH

The second case involving judicial recognition of custom is the 1995 Hawai'i Supreme Court decision *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* ("*PASH*").[117] *PASH* differs from *Thornton* in that it involved the Hawaiian right of custom (which specifically includes native customs), yet it provides an equally compelling argument for reviving the doctrine of custom more generally.

Hawai'i has a unique history regarding customary rights. In 1892, Hawai'i adopted the English common law and declared it would apply to all cases "except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by *Hawaiian national usage*. . . ."[118] This provision has been understood to give recognition to any custom that arose before 1892 and to preempt the common law in cases of conflict between native custom and other common law rules.[119]

In *PASH*, the court affirmed that land ownership in Hawai'i is subject to a native Hawaiian right to "gather" natural resources in accordance with native custom and that this may limit or prevent other utilization rights.[120] The *PASH*

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115. *Id.* at 673. The court's description of America as a combination of different customs and cultures is also present in its discussion of the certainty prong. The court notes that certainty was historically satisfied by limiting the reach of customary rights and that this limited reach made sense in thirteenth century England, a "small island nation . . . [where] most inhabitants lived and died without traveling more than a day's walk from their birthplace." *Id.* at 678 n.6. In contrast, America has a "vast geography" and "it does not follow that a custom . . . cannot have regional application and be enjoyed by a larger public than the inhabitants of a single village." *Id.* Given this different national make-up, in America, "[a]n established custom . . . can be proven with reference to a larger region." *Id.* at 676.

116. *Id.* at 678.

117. 903 P.2d 1246 (Haw. 1995).

118. *Id.* at 437.

119. Branca v. Makuakane, 13 Haw. 499, 505 (1901) (explaining the question in Hawaii (unlike the rest of the United States) "was not whether the court should decline to follow [an English common law] rule, but whether it should adopt a rule").

120. The *PASH* court held that any person with native Hawaiian blood has the right to gather natural resources on private undeveloped property, whether or not it is owned in fee by others, and defined the term "'native Hawaiian' as any descendant of not less than one half part of the blood of the races inhabiting the Hawaiian islands previous to 1778." *PASH*, 903 P.2d at 1270 n.40 (citing Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34,

court held that effectuating such customary rights was more important than enforcing "the western concept of exclusivity."[121] The court explained:

> [W]e refuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications. Such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i, which can also be successfully incorporated in the context of our current culture.[122]

The court also emphasized the importance of respecting traditional Hawaiian customs and held that native gathering rights must be recognized even if this resulted in a limitation on the property owner's use of his land.[123] According to the court, anything else "would reflect an unjustifiable lack of respect for [native] gathering."[124]

3. Criticism

PASH and *Thornton* relied on native custom to circumvent the long-standing view that customary rights cannot be recognized in the United States. Unsurprisingly, these cases have been subjected to considerable criticism.

a. Thornton Criticisms

Critics of *Thornton* largely accept the court's assertion that native custom can satisfy the antiquity prong.[125] However, rather than seeing this as a reason to reconsider the doctrine's applicability, such critics simply shift their attacks to one of the other Blackstonian requirements.[126] For example, in their discussion of *Thornton*, Professor David Callies and David Breemer relegate the court's

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§ 201(a)(7), 42 Stat. 108, 108 (1921) (codified as amended at 48 U.S.C. note prec. § 491 (1988) and Haw. Const. art. XII, § 1)).

121. *PASH*, 903 P.2d at 1268.

122. *Id.* at 1271.

123. *Id.*

124. *Id.*; *see also* James Burling, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 U. Haw. L. Rev. 497, 516 (2002) (noting the *PASH* court "'refuse[d] the temptation to place undue emphasis on non-Hawaiian principles of land ownership").

125. In discussing *Thornton*, Professor Bederman argued that use of native custom alone could not satisfy the antiquity prong because antiquity was a fact for a jury to determine and that by recognizing ancient custom based on native practices rather than presenting the issue to a jury, the court had converted "a presumption (to be pled and proven as a fact) into a finding subject to judicial notice." This is a criticism of the court's procedure rather than substance. Bederman, *supra* note 85, at 1422.

126. *See, e.g.*, David Callies, *Custom and Public Trust: Background Principles of State Property Law?*, SE18 A.L.I-A.B.A. 699, 725 (1999) (making similar criticisms of *Thornton* based on the Blackstonian criteria of reasonableness and certainty, and, with respect to antiquity and the court's reliance on native custom, merely writing that "[i]t did not matter [to the court] that the custom, . . . was neither 'immemorial' nor limited to a town or village").

treatment of antiquity to a footnote, in which they dismissively accept the court's solution to the previously insurmountable problem, writing, "[i]n the United States, some of the criteria—such as immemoriality as Blackstone would define it—must be, and have been, modified to fit a country whose common-law experience makes the application of certain criteria difficult."[127] They then focus their attacks on the "reasonableness" and "certainty" prongs and conclude that Thornton failed to satisfy these requirements.[128]

Other *Thornton* critics fail to even make a passing reference to antiquity. For instance, in his discussion of *Thornton*, Professor Gregory M. Duhl ignores the antiquity prong[129] while chastising the court for failing to satisfy the prongs of reasonableness and certainty.[130] Similarly, in his scathing dissent from the Court's denial of certiorari in Stevens v. City of Cannon Beach[131] (a subsequent case confirming that a customary beach access applied to the entire coast of Oregon), Justice Scalia claimed the *Thornton* court had misapplied the doctrine of custom but Scalia's criticism focused solely on the prongs of reasonableness and certainty.[132]

b. PASH Criticisms

Critics of *PASH* also tend to attack the decision for failing to meet the Blackstonian requirements for custom (despite the common law's modified applicability in Hawai'i). As in *Thornton*, these scholars focus on the reasonableness and certainty prongs while generally accepting that native custom

127. David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 370 n.156 (2002). This statement appears to be the authors' recognition that the long-standing argument that customary practices did not exist in America prior to colonization is no longer a tenable argument in twenty-first century America.

128. *Id.* at 371 ("In particular, by failing to consider the impact of the customary beach use on private property and by eagerly extending customary beach rights to all Oregonians on all parts of the coast, the court applied standards of reasonableness and certainty that cannot be attributed to Blackstone, though that is exactly what the court did. Indeed, since reasonableness is not a matter of present use but of original legal fairness, the court's statement that 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' is beside the point and irrelevant.")

129. Duhl, *supra* note 87, at 206–07 (discussing antiquity as a historic requirement but not mentioning it in the discussion of *Thornton*).

130. According to Duhl, the *Thornton* decision "ignored English precedent that required certainty of both a custom's locale and the persons who benefited from the customary right." *Id.* at 217.

131. 114 S. Ct. 1332 (1994).

132. Like other *Thornton* critics, Justice Scalia accused the court of misunderstanding the Blackstonian criteria. *Id.* at 1335 (1994). (Scalia, J., dissenting) ("It is by no means clear that the facts-either as to the entire Oregon coast, or as to the small segment at issue here-meet the requirements for the English doctrine of custom.").

can satisfy the antiquity requirement.[133] For example, Professor David Callies criticized the decision but not on antiquity grounds, writing that Hawai'i "blithely ignores at least one [Blackstonian] criterion in its opinion and ignores others—particularly certainty and reasonableness, and arguably continuity."[134] Professor James Burling echoes this omission, calling the *PASH* decision "remarkable" but focused his critique on the certainty prong, not antiquity.[135] Professor Paul Sullivan goes even further, agreeing with Callies that *PASH* ignores continuity,[136] yet conceding that the portion of the opinion, "which fixes the 'time out of mind' date for Hawaiian custom as 1892, is perhaps reasonable."[137]

Thornton and *PASH* demonstrated that native custom can satisfy the antiquity prong, yet post-*Thornton*, few courts have considered the relevance of native custom. Moreover, the handful of cases recognizing customary rights separate from native traditions have proven susceptible to antiquity challenges and a determination that a custom fails the time immemorial requirement.

4. Post-Thornton Challenges

Thornton was controversial and immediately challenged. However, while some of these objections were sustained, none of these challenges directly addressed the *Thornton* court's basis for reviving custom, namely, the recognition of native customs. The first challenge to *Thornton* was *McDonald*

133. Professor Bederman is willing to accept that Hawai'i's unique traditions could justify deviation from all of the Blackstonian criteria. Bederman, *supra* note 85, at 1434 ("[T]he activism of Hawaiian judges in embracing custom seems more defensible than that of their Oregonian colleagues: after all, the native Hawaiian people *did* have a highly articulated system of customary property rights. It is surely an important juridical objective, indeed a Hawaiian constitutional command, to protect and promote those rights.").

134. Burling, *supra* note 124, at 517 (quoting David L. Callies, *Custom and Public Trust: Background Principles of State Property Law*, 30 Env't L. Rep. 10,003, 10,016 (2000)).

135. *Id.* at 515, 517 (describing the aberration as a departure from English cases and stating that "[i]f the state courts are to persist in inventing pseudo-ancient and pseudo-Blackstonian customs and devising Saxian notions of the public trust, the United States Supreme Court may feel compelled to rise to the challenge and explain, again, that under the federal constitution states may not rewrite the law of property, however artful the rewriting may be").

136. Sullivan, *supra* note 88, at 147–48 ("[T]he *PASH* court specifically disavowed . . . a possible limitation based on discontinuation of a practice[.]"); *see also* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law*, 30 Env't L. Rep. 10,003, 10,016 (2000) ("[*PASH*] also plays fast and loose with the Blackstonian injunction, supported by Coke centuries before, that it is impossible to derive a right to take something from land—[known] as a profit a pendre—from custom.").

137. Sullivan, *supra* note 88, at 146, 159 ("They may likewise not be 'traditional,' either because in a modern incarnation they would be severed from their . . . feudal context or because they have not been widely practiced (or practiced at all) for generations . . . . Finally, they may not be 'rights,' at least in the sense that they have a basis in state law . . . . Thus, what *PASH* proposes is revolutionary, and it is *new*." (emphasis in original)).

v. Halvorson,[138] which held that the Oregon public had no right to recreational use of the dry sand portions of private land on an ocean cove because there was no testimony showing customary use by the ancient inhabitants of that *particular* narrow beach on the bank of the cove.[139] *McDonald* accepted native usage as a basis for customary rights but sought to limit the scope of *Thornton*. *McDonald* was subsequently overturned in Stevens v. City of Cannon Beach,[140] which held that customary beach access applied to entire coast of Oregon and did not need to be assessed on a case-by-case basis.[141]

City of Cannon Beach confirmed customs' widespread applicability in Oregon; yet other custom cases, namely those that did not rely on native usages, did not survive similar challenges. After *Thornton*, both Florida and Texas recognized the doctrine of custom, yet the Florida decision was limited while the Texas case was ultimately overruled.

a. Florida

In 1974, the Supreme Court of Florida decided City of Daytona Beach v. Tona-Rama, Inc.[142] The *Tona-Rama* court acknowledged the difficulty in finding customary usages because "there can be no usage in this country of an immemorial character."[143] However, it noted that two states, Oregon and Hawaii, had recently rejected this history and "used the 'customary rights doctrine' to afford the rights in beach property."[144] The court then held 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."[145] Under such conditions, the court held:

> The general public may continue to use the dry sandy area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use *this particular area of the beach* as they have without dispute and without interruption for many years.[146]

Tona-Rama applied the doctrine of custom, but it did not rely on native usage. Thus, the court was forced to find that, at least for beaches, a shorter

138. 780 P.2d 714 (Or. 1989).
139. *Id.* at 724.
140. 317 Ore. 131 (1993).
141. *Id.* at 143. The Supreme Court then declined to hear the case on appeal although Justice Scalia wrote a scathing dissent. *See* Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1333–34 (1994) (Scalia, J., dissenting).
142. 294 So.2d 73 (Fla. 1974).
143. *Id.* at 78 (quoting 3 Herbert Thorndike Tiffany, The Law of Real Property and Other Interests in Land, § 935, 623–24 (3d ed. 1939).
144. *Id.*
145. *Id.* The court found that the public's long-standing, customary recreational uses of the beach outweigh the interests of private parties. *See id.*
146. *Id.* (emphasis added).

period of customary use could satisfy the "ancient" requirement.[147] Notably, the dissent was uneasy with the majority's shortening of the antiquity prong, but suggested this problem could have been cured by reliance on native usages.[148] The dissent noted, "at the time Columbus discovered America, twenty-five thousand Indians lived in Florida," and added that "[o]ne does not have to be a Chamber of Commerce publicity director to assume that these earliest of Floridians enjoyed the beautiful sandy beaches at Daytona."[149]

The *Tona-Rama* court ignored the dissent's suggestion and held that antiquity could be met with mere "decades" of use. This determination left the decision vulnerable to challenges[150] which became apparent in 2007, when Florida's fifth district court of appeal decided *Trepanier v. County of Volusia*.[151] *Trepanier* limited *Tona-Rama*, holding that customary use did not apply statewide and must be assessed on a case-by-case basis.[152] Unlike the Oregon court in *Cannon Beach*, the *Trepanier* court held that in order to establish a customary right, the local government must show "that the general area of the beach where [the private] property is located has customarily been put to such use."[153]

A decade after *Trepanier*, the Florida legislature limited *Tona-Roma* further, when it passed House Bill 631, codified as section 163.035, stating that:

> [A] governmental entity may not adopt or keep in effect an ordinance or rule . . . based upon customary use of any portion of a beach above the mean high-water line . . . unless such ordinance or rule is based on a judicial declaration affirming recreational customary use on such beach.[154]

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147. The court held that beaches are not like other forms of property, and this did not need to fully comply with the Blackstonian antiquity requirement. *Id.* at 77. Professor Josh Eagle has called this non-antiquity-based doctrine "American customary use." Josh Eagle, *On the Legal Life-History of Beaches*, U. Ill. L. Rev. 225, 245–46 (2023).

148. *Tona-Rama*, 294 So.2d at 79 (Boyd, J., dissenting).

149. As the dissent noted, "Historians estimate that the North American continent has been inhabited by man for at least ten thousand years" and these inhabitants

> were followed by countless Europeans, and, for many decades, the City of Daytona Beach has exercised dominion over the beaches, as if the beaches were owned and controlled by the City government . . . . Surely, when the present owner purchased the land in question, it was common knowledge that the public had, for centuries, used both the wet and dry sand near the ocean for recreational purposes.

Id.

150. *Id.* (noting "the land has been treated by the public [a]nd local government for many decades as publicly owned land. The public has used it for swimming, hiking, auto driving, and related purposes for a period much longer than twenty years, without interruption.").

151. 965 So.2d 276 (Fla. Dist. Ct. App. 2007).

152. *Id.* ("[W]e do not believe that the supreme court intended to announce a right by custom for public use of the entire sandy beach area of the entire State of Florida.").

153. *Id.* at 290–91 ("[W]e read Tona–Rama to require proof that the general area of the beach where Appellants' property is located has customarily been put to such use and that the extent of such customary use on private property is consistent with the public's claim of right.").

154. Fla. Stat. Ann. § 163.035.

The statute also clarified that the requirement for customary use in Florida is that the "identified recreational uses have been ancient, reasonable, without interruption, and free from dispute."[155]

Tona-Rama held that the "ancient" requirement could be satisfied by decades rather than centuries, but this interpretation is receiving increasing push back.[156] For example, shortly after § 163.035 was enacted, Walton County sought a judicial determination that the public use of its beaches was ancient, reasonable, without interruption, and free from dispute, and thus, the public had a customary right to use the dry-sand beaches for recreation.[157] Dozens of private homeowners immediately objected. They, in turn, asked the court to hold that customary use was inapplicable because recreational use of Walton County's beaches has not continued since time immemorial, i.e., 1189.[158]

In response, Walton County cited *Tona-Rama* for the proposition that ancient could be satisfied by three or four decades of use.[159] Nevertheless,

155. Section 163.035 of the Florida statute effectively invalidated Walton County's customary use ordinance because it was not based on a judicial declaration, as now required by the statute. *See id.* (prohibiting a governmental entity from adopting or keeping in effect an ordinance based on customary use without first obtaining the requisite judicial declaration); Ulmer, *supra* note 89, at 162. The statute allows customary use ordinances adopted during the time the town's ordinance came into effect to stand but, if challenged, requires the jurisdiction to establish that the doctrine applies over the relevant beach area via an affirmative defense. Fla. Stat. Ann. § 163.035.

156. *See, e.g.*, Amicus Curiae Brief of Pamela Greacen and Arthur L. Buser, Jr. in Support of Appellants at 15, Dirty Duck 16004 LLC v. Town of Redington Beach, 376 So. 3d 774 (Fla. Dist. Ct. App. 2023) (No. 2D23-0251), 2023 WL 7040211 (criticizing *Tona–Rama*'s discussion of customary use for "replac[ing] the common law definition of 'ancient' (which would pre-date the existence of the U.S.) with an undefined, arbitrary, and much shorter duration"); *see also* Amended Reply/Cross-Answer Brief of Appellant/Cross-Appellee at 25, Northshore Holdings, LLC v. Walton Cnty., 360 So. 3d 786 (Fla. Dist. Ct. App. 2022) (No. 1D22-0895), 2022 WL 18277405 ("In this very litigation, it has been suggested that 'ancient' could mean two decades or nearly two millennia, depending on the dictionary accessed.").

157. Ulmer, *supra* note 89, at 162.

158. *See id.* at 164 ("The argument against the use of beaches in Florida being considered 'ancient' is that the types of activities that take place on beaches now (surfing, sunbathing, swimming, etc.) were not practiced by the British in the year 1189 (especially not in Florida), and, therefore, the use of Florida's beaches for recreation is not ancient."); Alyson Flournoy, Thomas T. Ankersen & Sasha Alvarenga, *Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy*, 25 Ocean & Coastal L.J. 1, 40 (2020).

159. Amended Brief and Cross-Initial Brief Filed by Appellee/Cross-Appellant Walton Cnty., Fla. at 67–68, Northshore Holdings, LLC v. Walton Cnty., 360 So. 3d 786 (Fla. Dist. Ct. App. 2022) (No. 1D22-0895), 2022 WL 12645838 ("For instance, Black's Law Dictionary defines the term 'ancient'—which the Appellants claim is 'vague'—as '[h]aving existed for a long time without interruption, usu. at least 20 to 30 years.'" *See Ancient*, Black's Law Dictionary 100 (9th ed. 2009). Merriam-Webster's Dictionary of Law similarly defines the term 'ancient' as 'having had an uninterrupted existence of 20 to 30 or more years.'"). *Ancient* (Legal Definition), Merriam-Webster, https://perma.cc/QP8T-W7EG.

recognizing the weakness of this argument, the county also submitted evidence of ancient use including archaeological remains from pre-European Native American settlements.[160] Ultimately, Walton County lost.[161] However, the court's decision was based on the town's failure to show continuous use after 1978 and not a lack of antiquity.[162] The *Walton* court appears to have accepted that evidence of native usage satisfied the immemoriality prong.[163]

The 2024 case *Buending v. Town of Redington Beach*[164] presented a similar attack on Florida's doctrine of custom. The case focused on the meaning of ancient but unlike Walton, the town did not cite to native usage. In *Buending*, the private property owners argued that ancient usage required use dating back to 1189. The town argued such an interpretation was unreasonable since "neither Florida nor the United States of America existed on September 3rd, 1189."[165] The court agreed. It noted "the phrase 'ancient use' is 'an awkward concept in a new world society" and held that the 70 years of customary beach use was sufficient to satisfy the antiquity prong.[166]

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160. During the 2018 customary use hearing, Dr. James J. Miller presented a summary of his findings resulting from his research of the historical basis for customary use. *Minutes of Customary Use Hearing before the Bd. of Cnty. Comm'rs, Walton Cnty., Fla.* (Nov. 3, 2018), https://perma.cc/66X3-TM6N. He cited Native American pottery and tools to support the claim of a generational use of the beaches. Dr. Miller's presentation covered the different beach uses and activities beginning with 3000 B.C. through the 1980s. *See also* Tom McLaughlin, *Walton County to Use 'Ancient' Evidence to Prove Its Case for Customary Use*, Nw. Fla. Daily News (Oct. 16, 2020), https://perma.cc/W8UW-BEDV ("Evidence will include archaeological remains from pre-European native American settlements, plats and maps, photography, newspaper articles and advertisements and the direct testimony of visitors and residents.").

161. *See* Kimber Collins, *Appeals Are Coming in for Walton County Public, Private Beach Rights*, mypanhandle.com (Apr. 18, 2024), https://perma.cc/2HBM-5RH5.

162. Staley Prom, *The Latest on Customary Use at Florida's Beaches*, Surfrider Found. (Apr. 15, 2024), https://perma.cc/SSD5-RX79 (noting Florida's First District Court of Appeal's March 27, 2024, per curiam affirmed the circuit court's decision that Walton County abandoned customary use for the Jasmine Dunes Subdivision in 1978). Moreover, Walton County's antiquity argument was contradictory; as the appellee notes, Walton County "repeatedly argued that ancient is a mere twenty-to-thirty years, which contradicts its assertion that ancient is a synonym for 'since time immemorial.' Ancient either means September 3, 1189, or the Florida Supreme Court concocted a new standard. The County cannot credibly argue both positions." Reply/Cross-Answer Brief of Appellant/Cross-Appellee at 24 n.6, Northshore Holdings, LLC v. Walton Cnty., 360 So. 3d 786, (Fla. Dist. Ct. App. 2022) (No. 1D22-0895), 2022 WL 12644807.

163. *See supra* note 148.

164. Buending v. Town of Redington Beach, No. 8:19-CV-1473-VMC-SPF, 2024 WL 3755807, at *11 (M.D. Fla. 2024).

165. Appellant's Reply Brief at *11, Buending v. Town of Redington Beach, 10 F.4th 1125 (11th Cir. 2021) No. 20-11354 (2020 WL 5231731)

166. Buending v. Town of Redington Beach, No. 8:19-CV-1473-VMC-SPF, 2024 WL 3755807, at *33–35 (M.D. Fla. 2024). Professor Josh Eagle has referred to this as "American customary use,"

The Town of Redington prevailed in their custom claim, but the court's truncating of the Blackstonian antiquity requirement leaves such customary use decisions vulnerable to further attacks. Still, for the moment, customary use (at least for beaches) remains a viable defense in Florida. This is not true of other states that applied the doctrine after *Thornton*, but without reliance on native usage. The most notable example is Texas.

b. Texas

In 1984, the Texas court of appeals decided *Matcha v. Mattox*[167] and relied on the doctrine of custom to protect the public's shore access right.[168] The case arose after a hurricane destroyed the plaintiffs' home and the couple sought to rebuild on a location that would interfere with public beach access.[169] The trial court enjoined the construction of the home, and the injunction was then upheld on appeal.[170] In reaching its decision, the *Matcha* court looked to the doctrine of custom, but held that it did not need to be applied rigidly.[171] Instead, the court held that time immemorial was satisfied by public use of Galveston's beaches since the town's 1836 incorporation.[172] The court cited *Thornton* to demonstrate that the doctrine of custom could be flexible but unlike *Thornton*, the court made no reference to native customs.[173]

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which is the idea that custom can be established through comparatively brief time periods suited to America's relatively short history. Eagle, *supra* note 147, at 244.

167. Matcha v. Mattox on Behalf of People, 711 S.W.2d 95, 96 (Tex. App. Ct. 1986), *writ ref'd n.r.e.* (Tex. 1986).

168. *Id.* at 96.

169. The trial court held that the public had acquired an easement to the dry beach through prescription, dedication, and custom. *Id.* at 97.

170. *Id.* at 98.

171. *Id.* The court held that legal custom—"a reflection in law of a long-standing public practice"—supported the trial court's determination that a public easement had "migrate[d]" onto private property. *Id.* at 100. The court reasoned that given the migratory nature of beaches, customary rights of access were not limited to one specific tract. It then stated the seven elements for a customary easement and briefly described the use of the Oregon beach that had justified a customary easement in *Thornton*. *Id.* at 98. The court also cited two previous Texas cases to show the Texas courts had already recognized custom even if they had previously declined to apply it. *See* City of Galveston v. Menard, 23 Tex. 349, 393–94 (1859) (indicating the Texas Supreme Court had recognized custom but had not applied the doctrine because Texas had just earned statehood); Moody v. White, 593 S.W.2d 372, 379 (Tex. Civ. App. 1979) (finding the Texas legislature had effectively recognized custom in the Open Beaches Act, but declining to apply the doctrine).

172. The court did, however, reject the idea that immemorial could be satisfied by mere decades citing City of Galveston v. Menard, 23 Tex. 349, 394 (1859). *Matcha*, 711 S.W.2d. at 99 (recognizing "that rights in the beach area may be acquired by custom" but concluding "that because Galveston had only been settled for twenty years 'no immemorial custom, in relation to rights on the coast, had matured into a common law . . . .'").

173. *Id.* at 98.

In 2012, in *Severance v. Patterson*,[174] the Texas Supreme Court overruled *Matcha* and explicitly criticized the decision for its failure to specifically comply with the Blackstonian requirements. The court noted that "[t]he *Matcha* court's upholding, based on proof at trial, of long-standing 'custom' in public use of Galveston's beaches would still fall short of establishing that a custom existed."[175] According to the *Severance* court, "time immemorial" required practices going back to King Richard I. Thus, since *Matcha* cited no authority for diverging from this requirement, the decision was overruled.[176]

III. Rejecting Custom

The *Thornton* court's call for a revitalization of the law of custom never materialized.[177] Most attempts to revive the doctrine were met with fierce

174. 370 S.W.3d 705, 730 (Tex. 2012).

175. *Id.* at 729.

176. *Id.* at 731 ("[I]t appears the State and the dissents also contend that Galveston's West Beach property owners lost the right to exclude the public from their private property after Texas became a state through some type of custom, notwithstanding the position's implicit acknowledgment that they have failed to establish such a right 'since time immemorial.'"). The *Severance* court also declared that customs "a few decades old, are not authority going back to 'time immemorial'. . . ." *Id.* at 730 (citing Pirkle, *supra* note 87, at 1108 ("English courts required custom to be immemorial, in other words, dating back to before King Richard I [King of England from 1189–1199] . . . .")). *See also* Pirkle, *supra* note 87, at 1104–06 (criticizing the *Matcha* decision).

177. A few other states may or may not recognize custom. For example, the North Carolina Court of Appeals acknowledged 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. Nies v. Town of Emerald Isle, 780 S.E.2d 187, 196 (N.C. Ct. App. 2015); see N.C. Gen. Stat. § 77-20:

> The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State.

However, according to the North Carolina Court of Appeals, "It is unclear from prior North Carolina appellate opinions whether the common law doctrine of 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." *Nies*, 780 S.E.2d at 196–97. *But see* Timothy M. Mulvaney & Brian Weeks, *"Waterlocked": Public Access to New Jersey's Coastline*, 34 Ecology L.Q. 579, 607 n.122 (2007) (noting the state's position is that the North Carolina "public has always enjoyed the right to use the full width and breadth of the state's ocean beaches seaward of the dune line, under the common law theory of customary use since time immemorial"). *See also* State *ex rel.* Haman v. Fox, 594 P.2d 1093, 1101 (Idaho 1979) (finding that the doctrine of custom might be recognized in Idaho but that six of the seven requisite elements had not been met and specifically, that a usage in effect from at least 1912 did not constitute "use from time immemorial").

opposition, and the few initial victories were largely reversed.[178] The decisions relying on native custom were a conspicuous exception to this trend, yet few scholars embraced native custom as a means of revitalizing the doctrine.[179] Instead, most acknowledged that native usages could satisfy the antiquity prong but continued to reject the doctrine's applicability on other grounds. In doing so, such critics ignored the significance of excluding indigenous customary usages from customs cases and the fact that this exclusion was part of a larger effort to erase native people and justify the occupation of their lands. U.S. law's unwillingness to rely on native customs was not a quirk of history. It was a deliberate decision to eliminate custom in return for more important land and legal benefits.

A. Custom's Alleged Inapplicability

For centuries, American courts held that custom's time immemorial requirement could not be satisfied in America. They treated the time immemorial requirement as dispositive despite the fact that the antiquity requirement was not nearly the hurdle American customary law decisions implied. Notably, English courts did not adhere strictly to Blackstone's 1189 date. In fact, as time passed and it became increasingly difficult to demonstrate that a custom dated from 1189, the criterion of immemoriality was reduced to a presumption which, once established, shifted the burden to the party attacking the custom and requiring them to show by evidence that it was not immemorial.

This changing requirement is apparent in several nineteenth century cases, including the 1837 case *Bastard v. Smith*.[180] *Smith* was an action for trespass, for breaking and entering certain closes and trenching through a lawn in order to divert water to a tin mine. The defendant's defense was that custom allowed the trespass.[181] In addressing the claim that the custom could not be proved to be immemorial, Judge Tindal made the following explanation to the jury:

> [A]s to the proof of the custom, you cannot, indeed, reasonably expect to have it proved before you, that such a custom did in fact exist before time of legal memory, that is, before the first year of the reign of Richard I; for if you did, it would in effect destroy the validity of almost all customs: but you are to require proof, as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom; and then you should inquire whether any

178. *See supra* broken (discussing the numerous criticisms of the *Thornton* and *PASH* decisions).

179. *But see, e.g.*, Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321, 347 (2005) (suggesting "[t]he doctrine of custom, especially as related to indigenous gathering rights and recreational beach access, provides another useful threshold takings defense").

180. 2 M. & Rob. 129 (1837).

181. *Id.* at 129.

> document, or memorial, of more ancient times, is produced, tending to disprove the existence of the custom at that early period to which the law looks back.[182]

American courts were aware of such decisions. In *Delaplane v. Crenshaw*,[183] a Virginia case rejecting the law of custom due to a lack of antiquity, the court acknowledged that English courts were not strictly adhering to the 1189 date. The *Delaplane* judge noted, "I am aware that cases are to be found in which regular usage short of the prescribed period has been held to be sufficient evidence of the custom alleged, and where uncontradicted or unexplained, deemed sufficient to authorize a jury to find the existence of an immemorial custom."[184] Yet, after acknowledging such cases, the court found they "do not contradict the general rule."[185]

The reason courts like *Delaplane* could be so dismissive of such cases is that, even though British courts were willing to relax the antiquity definition from 1189 to something more recent, the usage still needed to be relatively long-standing. The problem for early nineteenth-century American courts was that the oldest colonial settlement was barely 200 years old, and most were much more recent. This made demonstrating long-standing custom difficult even under a relaxed standard. More specifically, it made demonstrating long-standing Euro-American customs difficult. In nineteenth-century America, there were plenty of ancient customs still being practiced, but they were the customs of the native inhabitants.

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182. *Id*. at 136; *see* Callies, *supra* note 126, at 708. Similar exceptions have also been made regarding the requirement of continuity. *See* Wyld v. Silver [1962] 3 All ER 309, 313 (holding plaintiffs were entitled to hold an annual fair on a plot of land acquired by defendant because although "no fair or wake has been held there within living memory . . . . I know of no way in which the inhabitants of a parish can lose a right of this kind once they have acquired it except by Act of Parliament. Mere disuse will not do."); *see also* Scales v. Key (1840) 113 Eng. Rep. 625, 627–28; 11 Ad. & E. 817, 821–27 (holding a custom found to exist in 1689 was still applicable even though it had not been exercised for 150 years); Callies, *supra* note 126, at 709–10.

183. Delaplane v. Crenshaw, 15 Gratt. 457 (Va. 1860).

184. *Id*. at 472.

185. *Id.* Interestingly, in *Johnson v. M'Intosh,* Chief Justice Marshall expressed the opinion that strict adherence to a different prong, continuity, was not required to demonstrate a continuous practice. Specifically, in response to the possibility that the relevant Virginia colonial statute barring private purchases had lapsed, Marshall wrote that he considered the later reenactment of a similar provision "as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government." Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 585 (1823). As Eric Kades notes, "Marshall seemed to say that the longstanding customary *legislative* practice of barring private purchases of Indian title was so strong that it overrode the 'mere technicality' of a lapsed or repealed statute." Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065, 1099 (2000).

B. The Loss of Customary Rights was Significant

Before explaining custom's role in the larger policy of native erasure, it is important to understand that custom's loss was a substantial one. Consider the traditions of communal farming. In England, the "commons" was created during the eighth and ninth centuries after frequent Viking raids necessitated significant economic and cultural changes.[186] The commons was shared land which the community farmed in grazing and tilling rotations, and on which they exercised hunting, fishing, wood-gathering, and other property-based rights.[187] Legal protections for these communal resources were incorporated into the common law under the Magna Carta and the Forest Charter.[188]

In the seventeenth century, Charles I's enclosure of the commons became one of the major justifications for both the English civil war and the execution of the monarch.[189] Later, when the monarchy was restored, many of the radical groups that had opposed enclosure—the Levellers, Diggers, and regicides—fled to America to escape persecution after Charles II's return to power.[190] These colonists had fought hard to preserve the commons in England and, unsurprisingly, they continued this custom after settling in America.[191]

Ironically, the 1805 New York Supreme Court decision *Pierson v. Post*,[192] which set forth how communal resources could be transformed into individual property, is one of the clearest examples of both the courts' awareness of native customary practices as well as the importance of custom to early Americans colonists.[193]

Pierson involved several land purchases recognizing the native custom of communal resources. There was a 1640 deed detailing the terms of a land purchase from the Shinnecock Indian Nation explicitly guaranteeing the tribe

186. Connor Bartlett McDermott, *Monopolizers of the Soil: The Commons as a Source of Public Trust Responsibilities*, 61 Nat. Res. J. 125, 138 (2021).

187. *Id.*

188. *See id.* at 136–37.

189. *See id.* at 137–40. The enclosure movement received royal assent beginning with Charles I's absolutist reign in 1625 which incentivized the common people to join with Parliament to overthrow Charles I.

190. These radical groups gained their strength from the common folk's dissatisfaction with Parliament's continuation of the enclosure movement. The Levellers wished to end enclosure and "[t]he Diggers largely believed that any alienation of the res was illegal, both according to customary common law and natural law as revealed by God." *Id.* at 144, 148 (noting "this sentiment made its way across the Atlantic when the Levellers, Diggers, and regicides fled the persecution that accompanied Charles II's return to power.").

191. These men and women brought knowledge of the doctrine with them when they emigrated from England, where opposition to the monopolization of public resources was deeply held. *See id.* at 134–35.

192. Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

193. *See id.* Although the case was nominally about ownership of a fox killed in the "wilderness," the more important outcome of the case was that the interests of the individual property owner prevailed over those of the communal user.

the right to continue using the purchased lands in common with the white settlers.[194] A 1659 deed for additional lands containing a similar agreement that the Shinnecock would "keepe [their] privilidges [sic] of fishing fowling hunting or gathering of berrys [sic] or any other thing for [their] use."[195] A 1640 deed reserved to the Shinnecock tribe the right to farm ("the libertie to breake up ground for theire use") while a 1669 deed promised them the privileges of hunting, fishing, and fowling in the town.[196] Similarly a 1665 deed from the Montauk Indians at Shelter Island also reserved the right of hunting, fishing and fowling in the town and a 1703 sale of land to the town reserved the tribe's right to "cut Flags, Bullrushes and such grass as they usually make their mats and houses of, and to dig ground nuts, mowing land excepted, anywhere in the bounds of the township of Southampton."[197]

The above documents recognized the custom of shared resources within native communities, yet the case itself was a fight between white residents over preserving the custom of communal resources. As Professor Bethany Burger notes, "the economic and population pressure in the wake of the Revolutionary War had created increasing competition for the common land and resources of the town" and residents were increasingly fighting over these shared resources, arguing both over the use of the commons for raising livestock, as well as over the taking of common goods such as oysters, fertilizer (i.e. sheep dung) and notably, *seaweed*.[198]

Pierson demonstrates that the English practice of communal resources continued in the colonies and that many early nineteenth century Americans

194. Specifically, it stated that the Indians reserved "the libertie to breake up ground for theire use to the westward of the creek afore mentioned on the west side of Shinecock plaine." Bethany R. Berger, *It's Not About the Fox: The Untold History of Pierson v. Post*, 55 Duke L.J. 1089, 1113 (2006).

195. *Id.*

196. *Id.* (The 1659 deed noted such farming rights, stating that "the settlers promised that if 'the said Indians should leave their places within these bounds whereupon they have permission to plant or dwell, that then the Said land or any parcell thereof shall not be imppriated to or by any peson what soever in pticuler [sic],' but would remain to the use of the town in common").

197. *Id.* (noting that "[a]t least while the Indians were troublesome enough to ensure compliance with these agreements and wealthy enough not to sell these reserved rights, the town would have prevented fencing or allotting a significant portion of the lands to individual residents").

198. As Professor Burger writes, when *Pierson* was decided:

> The commons were still crucial to Southampton's agricultural economy. The sheep pastured there were looked after by a common shepherd, and families competed for the right to the 'fertilizer' they left behind . . . . In 1796 the town residents voted that hogs be taken off the common, and that 'the trustees do everything in their power by making laws to prevent the oysters being taken away.' In 1798, hogs were again voted off the commons, and the trustees were further authorized to regulate the taking of seaweed.

Berger, *supra* note 194, at 1121 (internal citations omitted).

wished to maintain this tradition. Moreover, the case demonstrates that Anglo customs were often exercised in conjunction with similar, long-standing tribal traditions and thus, could have met Blackstone's antiquity criteria.

Pierson was not a custom case, but it shows that early nineteenth century courts were familiar with native customs and the fact that countless Anglo-Americans desired protection for their own similar customary practices. However, rather than citing to native customs as the basis for protecting the customary rights of countless Americans, courts declared customary rights inapplicable in America.[199]

Why did courts make this choice? Most likely, they believed they had no other option. Recognizing native customary practices as a source of property rights would have threatened both the foundations of American property ownership and the legal justifications for America's very existence.

C. Custom as a Threat to America

It is well established that the Anglo-American colonies generally adopted English common law.[200] Nevertheless, the justification for its adoption is more questionable. In explaining the common law's application in America, Justice Story wrote, "[o]ur ancestors brought with them its general principles, and claimed it as their birthright."[201] However, while it is true that the colonists claimed the common law as their birthright,[202] at the time, this was a controversial and widely contested claim.[203]It was also not supported by the common law itself.

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199. *See supra* Part III.A (discussing cases finding the law of custom inapplicable in the United States).

200. Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England's Modern Day*, 20 Cardozo J. Int'l & Compar. L. 771, 771 (2012) ("[A]mong the first legislative acts taken by many of the newly independent states was to adopt the already established, predictable, and structured body of English common law by way of a 'reception statute,' which gave legal effect to the existing laws to the extent that they had not been rejected by the new government.") Christopher Collier, *Why the First Law School in the United States Was Established in Connecticut*, 31 Int'l J. Legal Info. 205, 207 (2003). ("In the 1770's and 1780's most state legislatures passed 'reception' resolutions that declared the English common law in force except where it conflicted with local legal traditions.").

201. Van Ness v. Pacard, 27 U.S. 137, 144 (1829); see also Wheaton v. Peters, 33 U.S. 591, 658–59 (1834) ("It is insisted, that our ancestors, when they migrated to this country, brought with them the English common law, as a part of their heritage.").

202. *See* Anika C. Stucky, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 Okla. L. Rev. 403, 415 (2006) (citing Justice Story's statement that "our ancestors" claimed the common law "as their birthright").

203. *See infra* Part III.C.1. (discussing the controversy over the common law's application in America); *see also* Ellen Holmes Pearson, Remaking Custom: Law and Identity in the Early American Republic 20–21 (2011) (explaining this controversy).

1. The Law of Conquest

The common law did not automatically apply to conquered lands. Instead, under the common law theory of conquest, the law of the indigenous inhabitants continued in force until it was specifically replaced. The theory of conquest originated in Sir Edward Cox's reports regarding the 1608 case *Calvin v. Smith*,[204] which concerned the issue of what parts of the Empire were entitled to the protection of English law. "In his *Commentaries*, Blackstone used [*Calvin's Case*] to declare that because England gained possession of the American colonies by conquest," English common law did not apply.[205] Specifically, Blackstone asserted that because the Americas were conquered lands,[206] Americans could not claim the common law's authority, meaning, they had no legal basis to demand the rights and legal protections of Englishmen and thus, no legal basis for the Revolution.[207]

Blackstone included a discussion of *Calvin's Case* in all editions of his *Commentaries*. He also expanded on his original treatment in the seventh addition, published in 1775, which Ellen Holmes Pearson suggests was "probably in response to colonial leaders' increasingly strident demands for the rights and legal protections of Englishman."[208] Unsurprisingly, Blackstone's assertion

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204. Calvin's Case, 77 Eng. Rep. 377 (1608).

205. Ellen Holmes Pearson, Remaking Custom: Law and Identity in the Early American Republic 20 (2011) (explaining "that *Calvin's Case* set up two kinds of colonies: those England claimed through the settlement of a deserted and uncultivated land; and those already-populated lands that England procured through conquest or treaty").

206. Whether America was conquered is a contentious point. Significant amounts of Indian land were not received through conquest but through treaty negotiations or various types of deceit and theft. As a result, many tribes that lost their lands did not believe they had been conquered:

> Creek leaders, for instance, were appalled to learn that Georgia was to acquire a large portion of their hunting land, for they 'did not believe that they had been conquered . . . . Britain had signed a treaty ceding its claims in North America, but the Creeks had not, and for that reason the swaggering attitude of American officials must have seemed to the Creeks to rest on the faulty premise that Britain somehow had the authority to surrender the Creeks' land.'

Amy E. Den Ouden, *Book Reviews*, 48 Am. J. Legal Hist. 343, 345 (2006) (reviewing Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier (2005)); *see also* M. Alexander Pearl, *The Consequences of Mythology: Supreme Court Decisionmaking in Indian Country*, 71 UCLA L. Rev. 6, 36 (2024) (discussing *Johnson v. M'Intosh* and noting "[t]here is no specificity with respect to when the conquering actually occurred, or which Indian tribes had been conquered").

207. *See* Pearson, *supra* note 205, at 20 (explaining Blackstone's argument that because "the English brought America under their rule by conquest of the indigenous people or by treaties, [the] English common law, therefore, had 'no allowance or authority' in Anglo-America," and Americans could not claim the common law's authority, "they being no part of the mother country, but distinct (though dependent) dominions").

208. *Id.* ("In the later edition he included more direct references to the American colonies.").

that the common law did not apply in the colonies provoked considerable opposition.[209] It also created a legal conundrum.

According to the theory of conquest, if English citizens conquered land that was already populated and possessed of its own laws, the Crown was entitled to make alterations to existing laws but, until it did so, the laws of the conquered country remained in force.[210] The exception, as Blackstone noted, was that the rule of conquest did not apply "to any colony, which was settled by English emigrants, after the Indian natives had ceded, or withdrawn themselves, from the territory."[211] Consequently, for the American colonists to have a legal claim to rights as Englishmen and, more importantly, for the colonists to have the claim that their rights as Englishmen had been violated (their justification for revolution), the American colonies needed to be deserted rather than conquered lands.[212]

2. The Vanishing Indian

American common law is grounded in the fiction that by the time the English colonists established their settlements in America, the native people had disappeared. This fiction was used to claim the common law, justify the revolution and, later, combat the English assertions of cultural and political superiority that followed the cessation of hostilities.[213] The result was a retelling of American history in which the native people simply vanished.[214]

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209. Although Blackstone presented America's acquisition by conquest as historical fact, the idea was hardly a settled matter when he published his *Commentaries*. Debates of the nature of America's acquisition remained unresolved. *See id.* at 20–21.

210. *See id.* at 21.

211. *Id.* at 21 (quoting Blackstone).

212. One of the factors leading to the American revolution was the British government's enactment of the 1765 Stamp Act, which aroused vehement opposition in America. "The colonists argued that the stamp tax, levied on a variety of paper products, was an unconstitutional violation of their rights as *Englishmen*." Gordon S. Wood, *Federalism from the Bottom Up*, 78 U. Chi. L. Rev. 705, 717 (2011) (emphasis added) (reviewing Alison L. LaCroix, The Ideological Origins of American Federalism (2010)). They argued that "they could not be taxed without their consent, and that consent could be given only by their representatives in their respective colonial legislatures, not by Parliament." *Id.*

213. *See* Pearson, *supra* note 205, at 21 ("[T]o suggest origin in conquest was to admit that the United States was, and would always be, under Britain's control, and that only Britain's monarch could bestow upon them the right to use the common law.").

214. Consequently, a historical retelling

> that peacefully erased Native Americans from landscape strengthened the notion that Englishman had no competition for the land, therefore, no conquest was necessary . . . . In light of the conquest theory's assumption that a conquered people accompanied a conquered land, it was in Americans' interest to portray their land as unpopulated or containing an easily removed people.

Id. at 21–22.

Colonial law professor St. George Tucker exemplified such efforts when he refuted Blackstone's assertion that America was a conquered land, by claiming the colonies did not come into English possession by conquest but by colonists "settling a vacant territory."[215] Colonial jurist James Wilson recited a similar fiction when he described the colonization of America as occurring after a confident and independent group of English citizens "undertook, at their own expense, expeditions to the distant country, took possession of it, planted it, and cultivated it."[216] In both accounts, the history of America's founding is a story of peacefully settled lands that entirely omits the near constant struggles with the native inhabitants. As Professor Ned Blackhawk writes, "violence" was central "to the making of early America."[217]

Depictions of America as an empty land allowed Americans to tell a fictional origin story, in which, by the time English settlers arrived in significant numbers, the native people had withdrawn from the territory and voluntarily ceded their land to whites. By the early nineteenth century, this myth of the vanished Indian was ubiquitous.[218] It pervaded popular culture, spreading quickly through literature, history, and news accounts.[219] The following poem printed by a Philadelphia magazine a few months after the Constitutional Convention is typical.[220] The poem was written by Philip Freneau after visiting an Indian burial ground:

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215. *Id.* at 147.

216. *Id.*

217. Ned Blackhawk, The Rediscovery of America: Native Peoples and the Unmaking of U.S. History 9 (2023).

218. *See, e.g.*, Monica E. Eppinger, *The Challenge of the Commons: Beyond Trespass and Necessity*, 66 Am. J. Compar. L. 1, 5 (2018) (noting "[s]ettlers' imagination of unclaimed space on a continent that had clearly been populated gave rise to the figure of the vanished Native, the Indians who 'perhaps tragically, were removed from the area, or died out, or ceased to be "really" Indian, or simply disappeared at some point between the appearance of the "last" one and the present moment.'"). *See also* Mandell, *supra* note 61, at 179, 304 (describing the "vanishing Indian" trope's prevalence in early nineteenth-century speeches and writings); Kathryn E. Fort, *The Vanishing Indian Returns: Tribes Popular Originalism, and the Supreme Court*, 57 St. Louis U. L.J. 297, 300 (2013) (noting "[w]hat has been identified as the 'vanishing Indian' stereotype, promulgated in the early Republic and reaching an apex in the 1820s").

219. "As historian Brian Dippie writes, 'There is something almost callous about the enthusiasm with which artists and writers went about their self-appointed task of preserving not the Indian, but a record of the Indian.'" Sarah Fling, *The Myth of the Vanishing Indian: Art in the White House Collection*, The White House Hist. Ass'n, https://perma.cc/6BRS-BWA2.

220. *See* Brian W. Dippie, The Vanishing American: White Attitudes and U.S. Indian Policy 10–25 (1982) (examining the development and prevalence of the vanishing Indian stereotype in early nineteenth-century American popular culture and literature); *see also* Mandell, *supra* note 61, at 24, 145–46, 178–79 (discussing the vanishing Indian trope in late eighteenth and early nineteenth-century popular literature and poetry); *see also* Mandell, *supra* note 61, at 189–90 (discussing an early 1800s newspaper and other accounts of the "last" Indians in different New England towns and noting "how many Indians described as the last ones in town were also noted as having children and even grandchildren."). *See generally*

> By midnight moons, o'er moistening dews
> In habit for the chase arrayed,
> The hunter still the deer pursues,
> The hunter and the deer a shade!
> And long shall timorous fancy see
> The painted chief, and pointed spear,
> And Reason's self shall bow the knee
> To shadows and delusions here.[221]

In discussing this poem, historian Brian Dippie writes, "Even in 1787 the Indian seemed a spectral presence. His eastern hunting grounds were graveyards now . . . he could be viewed with detachment as a legitimate American ghost."[222]

The vanishing Indian was also a common feature in late eighteenth and early nineteenth century political discourse.[223] In 1787, Thomas Jefferson described Virginia's Indian tribes as remnants, writing they are no longer "pure" and have "lost their language[s]."[224] In 1813, John Adams described the Indian families of his childhood as now vanished, "the Girls went out to Service and the Boys to Sea, till not a Soul is left."[225] Justice Story echoed these themes in an 1828 address, stating:

> By a law of their nature, they seemed destined to a slow, but sure extinction. Everywhere, at the approach of the white man, they fade away. We hear the rustling of their footsteps, like that of the withered leaves of autumn. They pass mournfully by us, and they return no more.[226]

Similarly, in 1829, in his first annual address to Congress, President Andrew Jackson joined this refrain, referring to the Narragansett and Mohegan

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James Fenimore Cooper, The Last of the Mohicans: A Narrative of 1757 (1826) (an example of the vanishing Indian trope).

221. Philip Freneau, *The Indian Burying Ground*, Poetry Found., https://perma.cc/J9M9-8MGN.

222. Dippie, *supra* note 220, at 3.

223. *See* Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 St. Louis U. L.J. 297, 312 (2013) (noting that the "societal and cultural understanding of the vanishing Indian informed political leaders from the local to national level" and "informed their decision-making processes and their policy initiatives").

224. Thomas Jefferson, Notes on the State of Virginia (1788), *reprinted in* Thomas Jefferson, Notes on the State of Virginia: Electronic Edition 142–52 (2006) (ebook), https://perma.cc/8PLG-4UFA.

225. Letter from John Adams to Thomas Jefferson (June 28, 1812), *reprinted by* Nat'l Archives: Founders Online, https://perma.cc/7PNC-3ZVL.

226. Legal opinions echoed these sentiments. *See, e.g.*, Worcester v. Georgia., 31 U.S. 515, 580 (1832) (describing how "in some of the old states, Massachusetts, Connecticut, Rhode Island and others, . . . small remnants of tribes . . . who, by their reduced numbers, had lost the power of self government"); United States v. Cisna, 25 F. Cas. 422, 423 (C.C.D. Ohio 1835) (referring to "remnants of tribes which resided in Massachusetts, Connecticut, and other Eastern states"); Danzell v. Webquish, 108 Mass. 133, 134 (1871) (describing "[t]he remnants of the Indian tribes, residing within the limits of the Commonwealth").

nations as tribes who "ha[d] left but remnants to preserve for a while their once terrible names."[227]

D. Native Custom and Property Rights

The myth of the vanished Indian was needed to justify the application of the common law and the legal grounds for the revolution. It also became an integral part of the legal justification for American property ownership.[228]

In America's foundational property law case, *Johnson v. M'Intosh*,[229] the Supreme Court ruled that Indian lands could only be acquired by the federal government and not individual purchasers. To reach this decision, the court needed to explain how land was acquired from the native inhabitants. The law of conquest would have been the easiest basis for justifying native land dispossession yet, by 1823, when *M'Intosh* was decided, it had already been established that the law of conquest did not apply to the settlement of America. Thus, Marshall needed to rely on some alternate basis for property ownership. For this, he turned to the idea of the vanishing Indian.

In *M'Intosh*, Marshall declared that America's indigenous people were not like other conquered people who could be "incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected."[230] Instead, he described the original inhabitants as "fierce savages . . . whose subsistence was drawn chiefly from the forest" and wrote that

227. In the same speech, he predicted that "the fate of the Mohegan, the Narragansett, and the Delaware is fast overtaking the Choctaw, the Cherokee, and the Creek." President Andrew Jackson, President of the United States, First Annual Message to Congress (Dec. 8, 1829), *reprinted by* UVA Miller Ctr., https://perma.cc/76J9-MENB. *See also* Jedidiah Morse, A Report to the Secretary of War of the United States on Indian Affairs 23–24, 68–74 (1822) (referring to the Narragansett, Mashpee, Mohegan, and other New England Indians and noting, "Should the Government of the United States[] provide an Asylum for the remnants of these depressed and wretched people . . . a portion of them might be persuaded to take shelter in it from the ruin which otherwise seems inevitably to await them."); William Wood, *Indians, Tribes and (Federal Jurisdiction)*, 65 Kan. L. Rev. 415, 437 (2016) (discussing 1899 Secretary of the Interior memorandum describing Narragansett, Shinnecock, and other New England tribes as "[t]hese Indians were and their remnants are residents of that portion of the country which constituted the Territory of the thirteen original states" (citing Memorandum from Sec'y of the Interior to Comm'r of Indian Affairs (June 23, 1899))).

228. It served to legitimate takings by state, local, and federal government and by individuals in successive waves of settlement. As Professor Monica Eppinger writes, the myth of the vanished native "establishes the idea of an unpopulated blank slate and thus perpetuates a sense of terra nullius as well as a sociopolitical vacuum, rightfully or at least unavoidably filled by the social processes and political schemes of settler colonists." Eppinger, *supra* note 218, at 5–6.

229. 21 U.S. (8 Wheat.) 543 (1823).

230. *Id*. at 589.

as "game fled into thicker and more unbroken forests, . . . the Indians followed."[231] Then, the soil "being no longer occupied by its ancient inhabitants,"[232] it was divided among the subjects of the European ruler. According to Marshall, the "law which regulates, and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances."[233] In its place, he applied the law of *terra nullius*, which states that:

> [I]f adventurers acting 'under the authority of an existing government' discovered a vacant land and took possession of it, the government that authorized their venture has the right to dispose of the discovered land in the same way as it can 'dispose of the national domains' in the mother country.[234]

Thus, *M'Intosh* further cemented the importance of declaring native people, as well as their customs and traditions, gone.[235]

E. Public Trust Doctrine

The myth of the vanishing Indian helped justify the American revolution, the legal dispossession of Native American lands and the application of the common law. It also resulted in the elimination of customary rights in America.

The elimination of custom was a necessary side effect of the "vanishing Indian" myth. Declaring that the native population had vanished prior to colonial settlement meant that native customs could not serve as the basis for a customary rights claim. Nevertheless, although the doctrine was declared dead, a desire to recognize certain customary rights did not disappear. Alternatives were used to fill the gap, and the most common substitute for custom was the public trust doctrine.

The public trust doctrine is an ancient legal principle recognizing that certain resources—the air, running water, the sea, and the shores—are "common to mankind" and cannot be individually owned.[236] Under English law, the public

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231. *Id.*at 590–91.
232. *Id.* at 591.
233. *Id.*
234. James Muldoon, *The Cherokee Nation, John Marshall, and the Stadial Theory of Development*, 53 UIC J. Marshall L. Rev. 1, 12 (2020).
235. The myth of the vanishing Indian continues to have problematic implications today, particularly for eastern tribes. Eastern tribes were often left under the control of state government and state laws regulated land ownership and use, natural resources, and economic activity on these reservations. States (like the colonies before them) appointed guardians, or trustees, to oversee the administration of these laws and the tribes' affairs. This history, combined with the vanishing Indian myth, means that Eastern tribes have often had greater difficulty proving their continued existence and gaining federal recognition and acquiring trust lands. *See, e.g.*, Littlefield v. Dep't of the Interior, 144 S. Ct. 1117 (2024) (describing the Mashpee's fight for federal recognition).
236. *See* Mulvaney & Weeks, *supra* note 177, at 582–84 (discussing the history of the public trust doctrine).

trust doctrine gained more specificity. The Magna Carta explicitly protected public access to navigable waterways and came to stand for the idea of state ownership of submerged lands in perpetuity.[237] Public trust lands and resources were deemed the permanent property of the realm and were held by the Crown in trust for all subjects.[238] Then, centuries later, the public trust doctrine was adopted by American courts.[239]

Under the public trust doctrine, a state holds public trust lands, waters, and living resources in trust for the benefit of its citizens and limits the private use of such waters and land.[240] It is not limited to the water and the shore but in practice, most cases implicating the public trust doctrine concern lands bordering bodies of water.[241]

In many ways, the public trust doctrine and the doctrine of custom are similar.[242] In fact, some scholars have suggested the public trust doctrine

237. *Id.* Some scholars have argued the public trust also included other rights such as the right to land one's boat with its catch, to empty and dry the nets, and to bring the fish from the shore to the nearest road to market. *Id.* at 584. *See also* James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279, 1363 (1998).

238. "The King had no power to convey those rights and any attempt to do so would have been considered invalid usurpation of the" people's rights. Mulvaney & Weeks, *supra* note 177, at 584.

239. Arnold v. Mundy, 6 N.J.L. 1, 3 (N.J. 1821) (explaining that the American public had the same rights in navigable rivers here as in England and the same rights to use the oceans and the shore).

240. The doctrine also places limitations on the state's ability to transfer interests in such lands and waters, particularly if such transfer will prevent public use. Jennifer Dick & Andrew Chandler, *Shifting Sands: The Implementation of* Lucas *on the Evolution of Takings Law and South Carolina's Application of the* Lucas *Rule*, 37 Real Prop. Prob. & Tr. J. 637, 691 (2003) ("The law of public trust establishes the right of the public to enjoy public trust lands, waters, and natural resources [and] enables the state to hold these lands, waters, and natural resources in trust for its citizens. As a trustee, the state is limited in its ability to transfer public trust property. The state can transfer the property, but only with the continued burden that the property be used to benefit the public.").

241. The public trust doctrine is usually only used in reference to lands bordering bodies of water. *See, e.g.*, Katie Hill, *Cage Fights: Oyster Farming User Conflicts and Regulatory Responses in Three Southeastern States*, 32 N.Y.U. Env't L.J. 207, 218 (2024) ("Typically applied to water resources, the public trust doctrine requires that states must, at a minimum, manage coastal waters to protect the public's navigation, commerce, and fishing rights."); David A. Strifling, *Plugging the Holes in Wisconsin's Groundwater Policy*, Wis. Law., June 2022, at 40, 43 ("The public trust doctrine holds that some resources, usually considered to be those connected to navigable waters, deserve special protection and should be preserved for future generations."); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003). The public trust doctrine is most typically applied to submersible lands and adjacent areas, usually in the state sovereign context.

242. *See, e.g.*, Patrick A. Parenteau, *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow's Ear*, 30 B.C. Env't Aff. L. Rev. 101, 120 (2002). (describing the doctrine of custom as "closely aligned with the public trust doctrine"); Giulianna K. Ruiz, *Informing Expectations Through Visual Cues: Creating the Assurance of Justice in Regulatory*

is simply a version of the doctrine of custom, yet these same scholars have struggled to explain why only one was eliminated.[243] Giulianna Ruiz posits that the difference may stem from the fact that custom is a "more expansive doctrine."[244] David Callies rejects this explanation, noting that customary rights are actually less expansive because they "inhere in at least an entire definable community . . . to use a particular parcel of land rather than all land similarly situated."[245] In contrast, the public trust gives "the public certain rights over water or waterfront land . . . rather than a discrete segment."[246]

Hope Babcock suggests the difference may be that "unlike the public trust doctrine, which applies to the land itself," the doctrine of custom only applies to the uses to which the land has been put.[247] She notes, "[i]ts principles arose from habits of use and understandings about local custom, not from any particular value of the land concerned."[248] Babcock also concedes, "[t]his may be a distinction without a difference, since ruining the land would necessarily interrupt or prevent its customary use."[249]

This Article suggests that scholars such as Callies and Babcock have struggled to propose a viable explanation for the different treatment of custom and the public trust because the best explanation for the difference is an uncomfortable one: only custom required a recognition of native rights.[250] Unlike custom, the public trust doctrine did not contain an immemorial requirement

Takings Jurisprudence, 36 Seton Hall L. Rev. 1309, 1327–28 n.113 (2006) (stating that "the 'law of custom' is strikingly similar to the public trust doctrine, as the rationale behind the law of custom is that rights and access to certain natural resources have always been enjoyed by the public, thus providing notice to landowners that they are taking the land subject to that custom, and therefore the right to exclude the public is not part of private property rights"). *See also* Madeline Reed, Note, *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, 316 (2009) (describing the *PASH* case "although . . . based on ancient Hawaiian custom, . . . echoes the common law Public Trust *jus privatum* and *jus publicum* dichotomy").

243. According to Huffman, "The doctrine [of custom] is simply a version of adverse possession that allows for the acquisition of public rights where private rights previously existed." James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 Env't L. 527, 561 n.145 (1989). He further notes that "[a]lthough it has been sparingly used by American courts, its use in relation to navigable waters has achieved what could have been otherwise accomplished under the public trust doctrine." *Id.*

244. Ruiz, *supra* note 242, at 1327–28 n.113.

245. Callies, *supra* note 126, at 702.

246. *Id.*

247. Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 Harv. Envtl. L. Rev. 1, 34 (1995).

248. *Id.*

249. *Id.*

250. American courts cited the Magna Carta as the basis for the application of the public trust doctrine, but it is doubtful that explanation would have been sufficient if the public trust doctrine had required a recognition of native rights. See Wermiel, Magna Carta in Supreme

and could transfer seamlessly from English common law to American common law. Nevertheless, although an unwillingness to recognize native rights is the best explanation for this difference, it is no longer a sufficient justification. It is time to reevaluate custom's inapplicability in the United States and to consider its revival.

IV. Revitalizing Custom

The potential benefits of revitalizing the doctrine of custom are significant. Many tribes still practice their ancient customs and there are written and archeological records that make it possible to demonstrate their antiquity. Such records include the writings of the early European explorers, which go back centuries,[251] and the archeological record dating back millennia. With this proof, many native customs could easily satisfy the Blackstonian requirement of dating from "time immemorial," i.e., 1189.

A. Proving Native Custom

In his book, *Between Land and Sea: The Atlantic Coast and the Transformation of New England*, Christopher Pastore writes that the archeological record of the Narragansett Bay area shows that shellfish such as clams, quahogs, and mussels were incredibly important in the lives of coastal Native Americans and that the use of these shellfish dates back thousands of years.[252] The proof of this ancient and sustained usage can be found in the huge mounds of discarded clam shells, the remains of which are still visible along the Northeast coastline.[253] Moreover, the archeological record demonstrates that the quahog, a specific

Court Jurisprudence, in Magna Carta and the Rule of Law 111, 137 (Daniel B. Magraw Jr., Andrea Martinez & Roy E. Brownell II eds., 2014).

251. *See generally* John Smith, A Map of Virginia. With a Description of the Countrey, the Commodities, People, Government and Religion (1612), *reprinted by* Encyc. Virginia, https://perma.cc/2D9H-7ZFJ (describing this 1608 journey to Virginia and the people and places he encountered); Antonio de Herrera Y Tordesillas, Historia General de los Hechos de los Castellanos en las Islas i Tierra Firme del Mar Oceano [General History of the Deeds of the Castilians in the Islands and the Mainland of the Ocean Sea] (1726) (describing Ponce de Leon's voyage to Florida).

252. Such customs were also noted by colonial settlers like William Wood, who identified Indian women as the principal harvesters of shellfish. According to Wood, "'In winter [Indian women] are their husband's caterers, trudging to the clam banks for their belly timber . . . .' Only three or four days after having given birth, one 'bare-footed mother . . . ,' carrying her child wrapped in beaver skin, 'paddle[d] in the icy clam banks.'" Christopher L. Pastore, Between Land and Sea: The Atlantic Coast and the Transformation of New England 26 (2014).

253. *See, e.g.*, Matthew W. Betts and M. Gabriel Hrynick, *Introduction: North American East Coast Shell Middens, North American East Coast Shell Midden Research*, 10 J. North Atlantic, v-viii (2017).

type of clam, was particularly important to coastal New England tribes for food and decoration.[254]

The interior of the quahog was used to make beads known as wampum, and these beads have been discovered at archeological sites throughout New England and the Mid-Atlantic dating back thousands of years.[255] Today, the use of quahogs and other shellfish for both food and decoration remains an important custom of the Narragansett and other New England tribes. As Michael Thomas, knowledge keeper for the Mashantucket Pequots, stated during the Annual Gathering of Shellfish Commissions in New Haven, Connecticut on February 3, 2024, "For us [wampum] is something that touches every generation."[256]

Wampum is one example of a provable ancient custom that continues today; however, this example is not unique. The archeological record demonstrates the customary use of many other natural resources. For instance, ancient pipe specimens have been discovered at numerous archeological sites throughout the Midwest demonstrating that tribes have quarried steatite or soapstone to make pipes for thousands of years.[257] In addition, many tribes continue to use these sites to obtain the raw materials they need to continue this tradition.[258] The proof of such ancient and continuing customary uses means that, were the doctrine of custom to be revived, it could be used to protect this custom and the related natural resources.

The archeological record can also demonstrate customary trade routes.[259] In California, for example, the existence of the Camino Real, a road connecting

254. Linda Murray Berzok, American Indian Food, 84 (2005); *see also* Little Egg Harbor Chamber of Commerce, *supra* note 64.

255. Elizabeth S. Peña, *Wampum Diplomacy: The Historical and Archaeological Evidence for Wampum at Fort Niagara*, 35 Ne. Hist. Archaeology 15, 15 (2006) ("Marine shell beads have been recovered from sites in Western New York dating as far back as the Archaic Period, ca. 3000–1000 B.C.").

256. Judy Benson, *Tribal Elder Shares Indigenous Shellfishing Tradition*, Conn. Sea Grant (Feb. 14, 2024), https://perma.cc/4BSX-D2ZV (noting also that his son was learning the custom from a master wampum maker in the Narragansett tribe).

257. For example, pipes found at Mound City historical site in Ohio are estimated to be at least 2,000 years old. American Indian tradition also indicates that the act of quarrying pipestone was a spiritual activity as well; it required acts of reverence including making offerings of tobacco. Diana Yates, *Study of Pipestone Artifacts Overturns Centuries Old Tradition*, U. Ill. News Bureau (Dec. 18, 2012), https://perma.cc/H97L-QKWL.

258. It is telling that Pipestone monument in Ohio was created specifically to protect tribal rights to quarry for pipestone. Only members of federally enrolled tribes may quarry for pipestone at the monument. *See Quarry Permits*, Nat'l Park Serv., https://perma.cc/CMR6-UCDL.

259. This can be done through the discovery of imported objects like copper beads or flint. Archeologists working in southern New England have uncovered, among numerous other items, copper beads from the Great Lakes region and flint from Ohio and New York. *See, e.g.*, Michael G. Mihalicz et al., Indigenous Entrepreneurship: A Community Driven Approach to New Venture Creation (2022) (describing the discovery of pre-contact trade goods).

Spanish missions and forts, was first documented by the Spanish Franciscan friar Junipero Serra in 1769.[260] However, the archeological record shows that this road had been in use for thousands of years prior.[261] In fact, the archeological record indicates that aboriginal roads predate many modern roads and rail lines, which suggests that these pathways could also be protected under the doctrine of custom.[262]

B. Non-Native Continuation of Native Custom

Many native nations still practice their ancient customs. However, many of these traditional practices are no longer exclusively Native American. Over the centuries, many tribal customs were adopted by and then continued by neighboring non-native communities. One well-known example is the famous New England Clambake. This tradition traces its origins to the cooking customs of the indigenous coastal tribes of New England but today, there are at least as many non-native New Englanders who exercise this custom.[263] Similarly, thousands of years ago, Native Americans created rough foot trails extending up and down the East Coast and used them for hunting and trade. These trails were then transformed by European settlers into more permanent transportation routes and today, these trails continue to be used, often for recreational purposes, including many that are protected under the Federal Trails Act.[264]

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260. He "planted a cross and founded the Mission San Diego near the Kumeyaay village of Nipawai." Mark R. Day, *Aboriginal Pathways and Trading Routes Were California's First Highways*, ICT News (Dec. 19, 2016), https://perma.cc/4M5R-ASE2. However, records from that period note that the trade route was well established by the time of the friar's arrival. "The Franciscan explorer Pedro Font, who accompanied the Juan Bautista de Anza expedition from Arizona to California, also witnessed woven cotton blankets imported form the Southwest being worn by the Chumash Indians on the coast and islands of the Santa Barbara channel." *Id.*

261. *Id.* ("The noted anthropologist Alfred Kroeber chronicled the discovery of a woven burial cloth imported from the Pueblo Indians near Buena Vista Lake in what is today California's Kern County" that would have moved along this route. Similarly, "according to a study published by James Davis of U.C. Berkley's anthropology department . . . shows . . . [that] [t] he Achomawi tribe, located in California's Pit River Valley, traded salmon and tule baskets with the Northern Paiute in exchange for bows, baskets and shell beads.").

262. Aboriginal roads also pre-dated at least 15 modern roadways, such as U.S Route 101 from the Oregon border to Ventura, State Highway 1 from Rockport south to Bodega Bay, U.S. Route 99 from the Oregon border to Los Angeles, and U.S. Route 50 from Oakland to Manteca and from Sacramento to the Nevada border. *Id.*

263. Helena Touhey, *A Summertime Ritual: Clambakes Are a Timeless New England Tradition*, Newport Life Mag. (Aug. 16, 2024) (noting the Native American origins of the tradition was also its evolution describing the modern clambake as an "invented tradition that has firmly planted itself in New England culture, over time asserting itself as an established tradition").

264. *See* James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. Land Use & Env't L. 93, 101 (1999).

Native customs were also adopted by non-native individuals and groups that joined tribal communities. In fact, non-native people often joined tribal communities specifically because they wished to partake in their customs and practices.[265] In the nineteenth century, the native tradition of shared resources was particularly appealing to non-native individuals impacted by the transition from communal ownership to private property regimes.[266] As Professor Mandell notes, "Indian reservations became reservoirs of antimarket traditions that drew poor whites and blacks threatened by an increasingly uncertain, impersonal economy."[267] Many of these non-Indian residents (particularly men) then intermarried with native women and adopted tribal customs and traditions.[268]

Today, the perpetuation of tribal customs by people of mixed racial heritage has become a contentious issue in many federal recognition fights.[269] These fights typically involve questions regarding whether such mixed-race

265. As Professor Angela Riley has noted, "Indigenous cultures are as exceptionally collectivist as American culture is individualistic." Angela R. Riley, *Before* Mine!*: Indigenous Property Rights for Jagenagenon*, 136 Harv. L. Rev. 2074, 2080–81 (2023) (reviewing Michael Heller & James Salzman, Mine!: How the Hidden Rules of Ownership Control Our Lives (2021)). She notes that "in indigenous property systems the property, particularly land, is often believed to be non-fungible." *Id.*

266. *See supra* Part III.B (discussing *Pierson v. Post*). New England tribes actively resisted the acquisitive values of their Anglo-American neighbors. Mandell, *supra* note 61, at 10. For example, in 1810, visiting minister Curtis Coe commented that each Narragansett "seldom tills more than an acre of land & and may cut a little hay." A half century later, tribal leaders estimated that their members still cultivated only about 60 acres. Mandell, *supra* note 61, at 12.

267. Mandell, *supra* note 61, at 2 (discussing land management and resource use laws for the Mashpee in Massachusetts, the Mohegan in Connecticut, and the Narragansett in Rhode Island). As Professor Angela Riley has noted, "Historically, U.S. law not only failed to respect the collectivist world views of Indigenous Peoples, but virtually since inception it has also been hellbent on destroying any and all beliefs that are integral to indigeneity." Riley, *supra* note 265, at 2082.

268. Mandell, *supra* note 61, at 59 (describing how New England tribes embraced newcomers while also maintaining their tribal culture and traditions). *See also* Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 Am. Indian L. Rev. 1, 24 (1997) (noting "The single whites in Indian country were typically men, including soldiers, traders, and missionaries. By the time unmarried white women began to arrive, the Indian men of that area had probably been killed, removed, or so impoverished that they hardly made attractive prospective mates."). *See generally* Memorandum, *Recommendation and Summary of Evidence for Proposed Finding of Federal Acknowledgement for the Narragansett Tribe*, U.S. Dep't of the Interior (July 29, 1982), https://perma.cc/EL5S-8C7N (describing how the Narragansetts refuted the claim that intermarriage with white and black spouses had made them less Indian).

269. *See* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 944 (D. Mass. 1978) (noting that "a very large number [of Mashpee men] were killed . . . [during the Revolutionary War, leaving some] 70 widows . . . out of a population of a few hundred[, a] situation [that] encouraged a considerable influx of unattached non-Indian males, mostly black.").

individuals remain racially and legally Indian. These disputes also demonstrate how members of other racial groups helped perpetuate native customs and traditions.

Consider the Shinnecock of New York. In the 1930s, the Shinnecock were denied federal recognition after the Department of State concluded they were too intermarried with Black people, declaring they "are not Indians at all; . . . . They are Negroes."[270] In 2010, this recognition decision was revisited and the court found that while the tribe's racial ancestry was clearly mixed, these descendants had nevertheless continued the customs and traditions of their Shinnecock ancestors.[271] The court then granted the Shinnecock federal recognition.[272] The adoption and perpetuation of ancestral tribal customs helped the Shinnecock gain federal recognition. It could also make them, and other similarly situated groups, eligible for rights under a revived doctrine of custom.[273]

C. The Benefit of Revitalizing the Doctrine of Custom

Professor David Bederman described custom as "a cheap and easy solution to the nagging problem of public rights in private property. Custom is ancient.

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270. Wood, *supra* note 226, at 441–42 (citing Allen Harper, U.S. Bureau of Indian Affairs, Report on the Shinnecock and Poosepatuck Indian Reservations, in Relation to the Reorganization Act 1, 10 (Jan. 1936)).

271. *Id.* at 442 n.88, 444 ("pointing to a supposedly 'complete extinction of Indian culture' among the Shinnecock" but also "stating that 'a few superficial practices . . . remain'" (quoting Allen Harper, U.S. Bureau of Indian Affairs, Report on the Shinnecock and Poosepatuck Indian Reservations, in Relation to the Reorganization Act 1, 10 (Jan. 1936)).

272. A federal district court decision found that "the Shinnecock Indians are in fact an Indian Tribe" under federal law. New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 489 (E.D.N.Y. 2005). Shortly thereafter, in 2010, the Interior Department added them to the list of federally recognized tribes. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 66124 (Oct. 19, 2010) ("[T]he Shinnecock Indian Nation, New York, is an Indian entity recognized and eligible to receive services from the BIA.").

273. Cultural adoption also went in the other direction, and some tribal communities adopted ancient English customs and continued these practices long after they were discarded by the colonists. For example, the Mashpee of Cape Cod combined their communal customs with that of the English settlers. By the 1800s they had adopted the English term 'proprietor' "for men entitled to pieces of the village commons—who could, like their white counterparts, lay claim to and enclose land[s]." Mandell, *supra* note 61, at 10–11. Similarly, the Narragansett tribe adopted the archaic English land grant ceremony, livery of seisin, once practiced in feudal England as a way to convey property. *Id.* The ceremony involved the grantor giving "possession of the land to the grantee by handing over a twig, a clod of dirt, or a piece of turf," or by "tell[ing] the grantee that possession was being given, followed by the grantee's entering the land." *Livery of Seisin*, Black's Law Dictionary (12th ed. 2024). This was done to mark the transfer of ownership and give notice to interested parties. *See also* James Warren Springer, *American Indians and the Law of Real Property in Colonial New England*, 30 Am. J. Legal Hist. 25, 44 (1986).

Custom extols community. Custom makes us feel good."[274] Bederman did not believe the doctrine was applicable in the United States, but he recognized the widespread benefits that could result if it did apply.[275]

Most of the criticisms of the doctrine are that, in the United States, it is unnecessary or inapplicable. Even the most justifiable criticism, that it might affect predictability and burden future interests, is outweighed by the doctrine's benefits. The typical arguments against the doctrine of custom are well articulated in the 1905 case *Graham v. Walker*,[276] in which the Connecticut Supreme Court suggested that the greatest impediment to instilling the English doctrine of custom in American law comes from America's lack of a manorial system.[277] According to the Walker Court, feudalism and traditions grounded in local land institutions provided the foundation for English customary law which, according to the court, developed in the absence of a land recording system.[278] As the court noted, "Feudalism never existed here. There were no manors or manorial rights. A recording system was early set up, and has been consistently maintained, calculated to put on paper, for perpetual preservation and public knowledge, the sources of all titles to or [e]ncumberances affecting real estate."[279] In short, the court feared the use of customary law could endanger the stability and predictability of America's recording system. [280]

Famed scholar John Chipman Gray makes a more forceful version of this argument in his seminal work *The Rule Against Perpetuities*, in which he suggests custom could not only create uncertainty, but also serve as an impediment to progress. He writes:

> [I]n a country like most parts of America, where a population, sparsely scattered at first, has rapidly increased in density, such [customary] rights might become very oppressive. The clog that they would put on the use and transfer of land would far outweigh any advantage that could be acquired from them. Especially it should be remembered that they cannot be released, for no inhabitant, or body of inhabitants, is entitled to speak for future inhabitants. Such rights form perpetuities of the most objectionable character.[281]

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274. David J. Bederman, *The Bederman Lecture on Law and Jurisprudence: Public Law and Custom*, 61 Emory L.J. 949, 955–56 (2012).

275. *See* Stephen D. Osborne, Jennifer Randle & Michael Gambrell, *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 Envt'l L. 399, 414–15 (2003) ("Courts may support such access rights under the doctrine of custom—at least in Oregon—because many of the same fundamental reasons the Oregon Supreme Court adopted the doctrine for beaches . . . also apply to rivers and their beds and banks.").

276. 61 A. 98 (Conn. 1905).

277. *Id.* at 99.

278. *Id.*

279. *Id.*

280. *Id.*

281. John Chipman Gray, The Rule Against Perpetuities 564 (Roland Gray ed., 4th ed. 1942).

Gray's argument was that customary rights impeded development. However, what Gray would have considered the highest and best use of land a century ago is arguably no longer the same today. Gray was worried about ensuring the easy transfer of land but, as Professor Carol Rose has noted, today, there are certain activities on property we are increasingly willing to recognize as a "public good" and that protecting these rights would justify a possible increase in uncertainty.[282]

1. For the Public in General

The doctrine of custom provides a method of protecting public access to currently unprotected but important lands and natural resources. As Professor James Vinch notes, customary rights "could include trails across private property, portages around rapids on private land, gathering of seaweed on the beach or cattails from a private marsh."[283] As long as a group has a customary right to use the land in some way, this right could negate the property owner's right to destroy the land upon which the resource is found.[284] Consequently, custom provides a potentially powerful avenue for protecting a wide array of natural resources.[285]

Unlike the public trust doctrine, typically limited to oceans, waterways, and beaches,[286] the doctrine of custom can be used to protect any land that

282. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711, 740 (1986).

283. James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. Land Use & Env't L. 93, 97 (1999).

284. *See, e.g.*, Babcock, *supra* note 248, at 49 (noting that by "[l]ooking at coastal and wetland resources through a common law lens, one can see how their destruction creates a public, and in some cases, a private nuisance. The harms that ensue—flooding, loss of water supply for drinking, agricultural, or industrial purposes, and loss of livelihood through destruction of species—are classic nuisance injuries which can be avoided by preventing the destructive activity.").

285. For example, Cornell University "owns a severed 50 percent mineral interest on 155,340 total acres of land across 12 northern Wisconsin counties"—a legacy of the public lands allocated by the Morrill Act of 1862. On one 160-acre parcel within that portfolio lies the Blue Hills Pipestone Quarry, a sacred site listed on the National Register of Historic Places in 2003 as the Wajiwan ji Mashkode Archaeological District. However, Cornell's mineral ownership rights in the sacred 160-acre Ozhaawashiko-Bimadinaa "Blue Hills Pipestone Quarry" harms the pipe-making practice, according to St. Germaine, a career educator and knowledge-keeper for the Ojibwe community. A customary right might help the tribe protect this practice despite the lands being in private ownership. *Cornell's Mineral Interest on Indigenous Wisconsin Land Harms Pipe-Making Tradition, Ojibwe Knowledge-Keeper Says*, Cornell Daily Sun (Apr. 7, 2024), https://perma.cc/NZM5-HGRX.

286. *See* Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1870 (2000) ("Public trust lands are typically defined as lands lying under navigable waters which are held in a public trust by the state and are open to the public for public trust uses. Lands lying below the mean low-water mark are, by definition, lands lying under navigable waters. Lands under navigable waters also include those lands lying between the mean high-water mark (or mean

meets its use requirements. It is a particularly good option for protecting lands important for recreational and other non-commercial activities that do not fall under the public trust doctrine.[287] For instance, custom could potentially encompass areas where people have hiked or enjoyed other forms of outdoor recreation for generations. Notably, many of the trails and footpaths currently protected under the Federal Trails Act began as ancient Native American footpaths.[288] Nevertheless, there are many similar historic paths and trails that remain unprotected.

Custom might also provide an effective basis for protecting lakes or other waterways that do not fall under the public trust doctrine. Consider Oswego Lake in Oregon. Oregonians have used Oswego Lake since statehood and there is clear evidence that Native Americans used it long before that, but in 2012, the state sought to privatize the lake.[289] In response, two members of the public sued, claiming such privatization violated the state's public trust doctrine.[290] The state argued the public trust doctrine did not apply. Ultimately, the state lost, but the outcome was far from certain.[291] However, the outcome was far from certain.[292] In such cases, custom might be a more straightforward and predictable basis than the public trust doctrine for protecting public access to such waterways.[293]

Custom may also be a simpler and more effective means of protecting public use rights in general.[294] One underappreciated fact of the *Thornton* case is

high-tide line) and the mean low-water mark (or mean low-tide line) even though, at times, such lands will not be covered by ocean waters. Public trust use rights are defined narrowly in some jurisdictions and more broadly in others. In their broader form the rights include commerce, navigation, fishing, bathing, and various forms of water-related recreation.").

287. As Professor Babcock has noted, the doctrine of custom has "as much to do with the protection of physical locations where recreational activities can take place, as with commerce or any historical provenance." Babcock, *supra* note 248, at 49–52.

288. "In 1876, the Appalachian Mountain Club was formed in part to use the existing natural footpaths and to construct other paths to 'explore the mountains of the Northeast and the adjacent regions, for both scientific and artistic purposes, and in general, to cultivate an interest in geographic studies.'" Vinch, *supra* note 264, at 97.

289. *See* Michael C. Blumm & Ryan J. Roberts, *Oregon's Amphibious Public Trust Doctrine: The Oswego Lake Decision*, 50 Env'T L. 1227, 1263 (2020) (noting indigenous tribes frequented the shores of Oswego Lake and that documented canoe use on nearby waters by Native Americans suggests commercial activity existed before white settlement).

290. Kramer v. City of Lake Oswego, 285 Or.App. 181, 183 (Ct. App. 2017).

291. Kramer v. City of Lake Oswego, 446 P.3d 1, 19, *opinion adhered to as modified on reconsideration*, 455 P.3d 922 (2019)

292. The case turned on the navigability of the lake. *See Kramer*, 285 Or. App., at 211–12.

293. Professor Stephen Osborne has suggested that the doctrine of custom "could provide an additional legal basis for broad public access" and that one of the arguments for such custom would be to "establish use by Native American canoes or other craft." Osborne et al., *supra* note 275, at 415.

294. Courts in New Jersey invoked the public trust doctrine as grounds for creating easements by necessity over private beach properties for the benefit of the public. Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. Chi. L. Rev. 1015, 1062–63

that the public had already acquired the use rights at issue in the case through the doctrine of prescription (a variant of adverse possession applicable to easements). The problem, as Professor Stephanie Stern notes, was that "[b]asing the decision on prescription would have led to years of fact-intensive parcel-by-parcel litigation whereas custom accomplished the same legal purpose, more bluntly perhaps, but with far less judicial and litigation expense."[295]

An additional benefit of custom is that it may be a less controversial means of protecting land and natural resources than other possible options, such as the public trust doctrine. As Professor Carol Rose suggests, "a group capable of generating its own customs ought to be a less objectionable holder of 'public property' than the unorganized general public."[296] Professor Amnon Lehavi further notes that, "at least within the limits of the community, the increasing participation enhances the value of the activity rather than diminishing it: the larger the 'investment' by the group, the higher the rate of return per unit invested."[297]

D. Benefits For Native People

The revival of customary rights would be particularly beneficial for native people. It would give tribes an important tool for protecting their customs and traditions while also helping to reverse the centuries of erasure that native people and their cultures were subjected to. The fight for the protection of California's Camino Real exemplifies both benefits.

Currently, the California Mission Foundation is seeking to have the Camino Real protected as a United Nations Educational, Scientific and Cultural Organization ("UNESCO") World Heritage site.[298] However, a growing number of indigenous Californians object to this designation and the implication that this pathway, one of many ancient trails, is the only one worthy of protection simply because it became important to the Spanish conquerors.[299] As Valentin Lopez, chairman of the Amah Mutsun Tribal Band, said,

(2008). Specifically, the courts reasoned that the state's duty under the public trust doctrine to preserve public beach access implied the existence of public easements over private lands as necessary to ensure access. *Id.* Courts in California and Texas chose to rely on theories of prescriptive easements or implied dedication to secure access and use rights for the public. *Id.*

295. Stephanie Stern, *Protecting Property Through Politics: State Legislative Checks and Judicial Takings*, 97 Minn. L. Rev. 2176, 2189–90 (2013).

296. Rose, *supra* note 282, at 743 ("[A] customary public comes closer to the management capacities of a" governmentally organized "public.").

297. Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 Urb. Law. 1, 25–26 (2004) (citing Rose, *supra* note 282, at 769).

298. Cathy Castillo, *Should El Camino Real Be Honored?* Cal. Catholic Daily (Aug. 23, 2016), https://perma.cc/2KNQ-M87D.

299. *Id.* (noting opponents of the designation say it would only "honor and glorify the brutal conquest of Indian lands"); *see also* Day, *supra* note 260; *see generally* Valentin Lopez, *Why the California 'Mission Bell' Markers Must Come Down*, The Los Angeles Times (Mar. 21,

"[W]e need to focus on our own native pathways and trading routes. We want UNESCO to recognize these, not just the route the Spaniards used to conquer our people."[300] Unfortunately, UNESCO designation is rare, and the likelihood of multiple UNESCO designations is low. The doctrine of custom could solve this problem by providing a more achievable means of protecting these pathways and celebrating their unique cultural importance.[301]

Cases concerning tribal recognition or treaty enforcement also show how tribes, and their citizens, would benefit from reviving the doctrine of custom. The example of the Mashpee is illustrative. Some of the Mashpee tribe's allotted lands had deeds that reserved access to usufructuary rights for tribal members, such as the right to gather seaweed and marsh hay.[302] The fact that the "tribe has continuously exercised" these "rights to ceded lands" became an important part of the court's decision to grant the tribe federal recognition.[303] Luckily, the Mashpee had been able to enforce these rights, but if they had been prevented from such gathering due to opposition from the private property owners, they would have lost this tradition and, possibly, their chance for federal recognition.

Reviving the doctrine of custom could ensure that tribes don't have to worry about the loss of customary practices, and potential federal recognition often linked to the continuation of these practices. It is well known that many tribes have faced significant opposition to the exercise of customary usages on private property even when such usages are ostensibly protected in deeds or treaties.[304] For example, the 1837 treaty with the Chippewa Band of Indians guaranteed

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2022) https://perma.cc/5CYF-QEJ9 (describing the efforts by many indigenous advocates seeking the removal of the mission bells installed to celebrate the Spanish mission system.).

300. Day, *supra* note 260.

301. *Id.*

302. *See* Letter from Bryan Newland, Assistant Secretary, Bureau of Indian Affs., to Brian Weeden, Chairman, Mashpee Wampanoag Tribe 10 n.83 (Dec. 22, 2021) (discussing 1949 title report "describing a deed to a 33-acre beachfront lot that 'reserved the right of the Proprietors of Mashpee to go over [the] land to gather seaweed and marsh hay'") (citing Frederick D. Nichols, Title Report re: Condemnation Proceedings U.S. District Court No. 7359, Civil, 229 acres, South Mashpee, Mass., 1–2 (Aug. 10, 1949)).

303. *See id.*; *see also* Bethany Sullivan & Jennifer Turner, *The Continued Impact of* Carcieri *on the Restoration of Tribal Homelands: In New England and Beyond*, 27 Roger Williams U. L. Rev. 322, 348 (2022) (describing "1940s title report prepared for condemnation proceedings brought by the Department of the Navy against lands for which Mashpee tribal members had some sort of easement to cross to gather seaweed and marsh hay").

304. *See, e.g.*, Lyng v. Northwest Cemetery Association, 485 U.S. 439, 453 (1988) (establishing that the government had no obligation to allow tribes to practice their religious customs on "its land"). Similar results were reached in Apache Stronghold v. United States, 101 F.4th 1036, 1044, 1063–65 (9th Cir. 2024) (en banc), Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008), Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1162 (6th Cir. 1980), and Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980). *See generally* Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 Yale L.J. 1623 (2004) (discussing the difficulties Native Americans have experienced attempting to access their sacred sites on non-tribal property).

their right to gather wild rice on the ceded portions of their land.[305] Nevertheless, in 1990, the tribe was forced to sue the federal government to enforce this right.[306] Ultimately the tribe won, but they needed to take their case all the way to the Supreme Court.[307] Custom might have provided an easier and less divisive means of protecting this right.

Attempts to protect native customs often face more opposition and greater hurdles than efforts to protect non-indigenous traditions.[308] Dan Tarlock suggests the reasons for this difference may stem from the fact that native communities were particularly resistant to integration, making them a greater threat to nineteenth century "push for assimilation."[309] According to Tarlock, this resistance decreased Anglo-Americans' tolerance for indigenous cultural practices.[310]

A second obstacle faced by native communities wishing to protect traditional customs is the belief that native customs are static and thus, practices that are not pristine replicas of earlier traditions are inauthentic and unworthy of protection.[311] The Canadian Supreme Court's decision in *Van der Peet v. The Queen*[312] exemplifies this problem. In *Van der Peet*, the Court held that a native fisherman could be prosecuted for selling fish without a license because aboriginal rights were limited to customs that were "a central and

305. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 176–78 (1999).

306. *Id.* at 185.

307. Today, the gathering of wild rice remains both an important cultural and economic practice for the tribe. Kevin Abourezk, *Wild Harvest*, The Nature Conservancy (Aug. 27, 2021), https://perma.cc/VDG2-3HYB.

308. Compare the treatment of Native American religious and historical sites, *see supra* note 304, with the many federal laws that have been passed to preserve the historic religious sites of other communities. For example, the National Historic Preservation Act was revised in 1992 to specifically authorize grants to religious properties. National Historic Preservation Act of 1966 § 101(e)(4), 16 U.S.C. § 470a(e)(4) (1994) (current version at 54 U.S.C. § 302905) ("Grants may be made under this subsection for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant."). *See generally* Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. Rev. 1139, 1163–4 (2002) (describing the numerous different ways federal funds have been used to preserve non-Indigenous religious institutions despite constitutionally mandated separation of church and state).

309. A. Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 Ariz. St. L.J. 539, 556 (1999) (noting a "push for assimilation into a dominant culture focused society's concern on remnant, usually non-European, groups who resisted integration and assimilation. Modern law is highly Weberian and thus can tolerate only limited exceptions").

310. *Id.*

311. *See* Eric R. Wolf, Europe and the People Without History 18 (1982) (noting that tribes were expected to practice "pristine replicas of the pre-capitalist, post industrialist past in the sinks and margins of the capitalist, industrial world.").

312. Van der Peet v. The Queen [1996] 2 S.C.R. 507, 553.

significant part of the society's distinctive culture."[313] The Court found that the tribe engaged in customary fishing practices but held this traditional practice only included ceremonial use and exchanges between family or kin and did not extend to commercial sales. The Court was unwilling to imagine how native customs might evolve and adapt over centuries.[314] The doctrine of custom, which would be applied to native and non-native customs, might help courts better understand how an ancient custom translates into modern practice if they also had experience protecting their own cultural traditions.

Finally, as the modern indigenous rights movement understands, recognizing a people's custom or heritage may be closely intertwined with the eventual recognition of indigenous rights more generally and self-determination specifically.[315] The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") outlines the right of indigenous peoples to self-determination and defines this as including the right to "freely determine their political status and freely pursue their economic, social and cultural development."[316] Specifically, it declares that the right to self-determination is closely linked with the "right to maintain, protect and develop the past, present and future manifestations of [indigenous] cultures, such as archaeological and historical sites [and] artefacts."[317] Erica-Irene Daes, former special rapporteur of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, has emphasized the particular importance of protecting cultural heritage of indigenous people, noting "[t]he protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples."[318] Many indigenous

313. *Id.*

314. Tarlock, *supra* note 309, at 578.

315. "Recognizing a people's intangible heritage might be uncomfortably close to recognizing a people." Julian Lucas, *UNESCO's Quest to Save the World's Intangible Heritage*, New Yorker (Mar. 2, 2024), https://perma.cc/PC3P-AHN8. Richard Kurin, a former director of the Smithsonian Center for Folklife and Cultural Heritage, attributes this partially to a national distrust of state meddling in culture. "The U.S. has quit and rejoined UNESCO twice since its founding and began withholding dues from the agency when it accepted Palestine as a member state. . . Israel, Russia, Canada, New Zealand, and Australia are other major holdouts, and it seems pertinent that all of them have intractable relationships with Indigenous and minority populations." *Id.*

316. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter "The Declaration"]. "[T]he UNDRIP also obligates signatory states—including both France and the United States—to take 'effective measures' to protect this cultural heritage." Matthew H. Birkhold, *Cultural Property at Auction: The Trouble with Generosity*, 39 Yale J. Int'l L. Online 87, 91 (2014).

317. The Declaration, *supra* note 316, at art. 11. *See also id.* at art. 31 (referencing the right of indigenous peoples to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions").

318. *Id.*

people echo this view explicitly, linking their efforts to protect traditional culture and knowledge to their goal of achieving self-determination.[319]

V. Conclusion

The death of custom has been greatly exaggerated or, more accurately, it has been entirely fabricated. Custom's near-total elimination was part of the centuries-long erasure of native people and their culture, and this alone warrants the doctrine's revival. However, the benefits of custom extend beyond righting past wrongs. The doctrine of custom provides a much-needed pathway for protecting the treasured traditions of modern Americans, both native and non-native. Current methods of protection are limited and largely ineffective while the potential benefits of customary law are extensive. Consequently, although it has now, ironically, become an American tradition not to recognize the doctrine of custom, this is one custom that should be eliminated.

319. *See, e.g.*, Paul Kuruk, *Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States*, 34 Pepp. L. Rev. 629, 635 (2007); *see also* Sarah A. Garrott, *New Ways to Fulfill Old Promises: Native American Hunting and Fishing Rights as Intangible Cultural Property*, 92 Or. L. Rev. 571, 605–06 (2013) (arguing that hunting and fishing culture could be used to protect rights of self-determination).