ANCIENT AND REASONABLE: THE CUSTOMARY USE DOCTRINE AND ITS APPLICABILITY TO PRIVATE BEACHES IN FLORIDA

AMELIA ULMER*

I. INTRODUCTION

"No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long

* Amelia Ulmer is a 2021 graduate of the Florida State University College of Law where she received the Certificate in Environmental, Energy, and Land Use Law with honors. Ulmer is a 2017 graduate of the University of Florida where she received a Bachelor of Science in Wildlife Ecology. The Author would like to thank Professor Erin Ryan for her support and guidance during law school.

been recognized by this Court."[1] This note explores the nature of the preceding thought and proposes methods of balancing competing property interests while prioritizing beach access.

Florida's sun-soaked beaches and glistening ocean waters are some of the most beautiful, and valuable, coastal areas in the United States. Eighty percent of Florida residents live within ten miles of the coast and thus are able to enjoy the recreational, aesthetic, and economic benefits associated with living by the ocean.[2] Florida has approximately 825 miles of sandy coastline abutting both the Atlantic Ocean and Gulf of Mexico.[3] Florida's white sandy shores attract visitors from the world over and contribute to making tourism the state's number one industry with around 86.5 million yearly visitors generating approximately $67 billion of direct economic impact annually.[4] Thus, ensuring plentiful public access to beaches is crucial to safeguarding continued coastal tourism and protecting Florida's economy.

Promoting public beach access is also critical to ensuring that Florida residents who live by the coast, but do not own beachfront property, are able to fully enjoy the natural resources of the state they live in. The state itself is in the precarious position of balancing the promotion of public beach access and the preservation of the private property interests of oceanfront property owners. Protecting beach access is a vital issue in the state's current legal and sociopolitical landscape, and the rules distinguishing public and private access are controversial.

The area of beach below (seaward of) the mean high-water line is known colloquially as the "wet-sand beach" and is public land held in trust by the State for the use of its people.[5] Beachfront property access issues in Florida arise on areas of the beach above the mean high-water line.[6] The area of sand above (landward of) the mean high-water line, the "dry-sand beach" is not held in trust and is typically owned by the property owner of the adjacent beachfront

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1. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974). In *Tona-Rama*, the Supreme Court of Florida set a precedent for recognizing the importance of protecting the public's right to access and use Florida's beaches and oceans.

2. *Living Shorelines: Natural Protection of Florida's Coasts*, FLA. DEP'T. OF ENVTL. PROT. (last visited Oct. 2, 2019), https://floridadep.gov/rcp/rcp/content/living-shorelines.

3. *Beaches: About Us*, FLA. DEP'T OF ENVTL. PROT (last visited Oct. 2, 2019), https://floridadep.gov/water/beaches.

4. *Governor Scott Applauds Florida's Tourism Marketing*, FLGOV (last visited Oct. 2, 2019), https://www.flgov.com/governor-scott-applauds-floridas-tourism-marketing-2/.

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

6. *Id.*

lot.[7] This dry-sand area of the beach is where property issues and tensions arise regarding the public's right to beach access, because to access the wet sand the public must traverse the dry sand, and at high tide wet sand is often unavailable for recreation.

One way that many coastal areas in Florida have dealt with the dichotomy between public beach access and private property rights is by invoking a legal doctrine known as customary use.[8] The general idea underlying the doctrine of customary use is simple: where the public has established a right to use the land in a particular way, by continuous and uninterrupted use, owners of private property may not interfere with the public's continued exercise of that right.[9] In practice, of course, customary use is more complex. The elements of customary use that must be satisfied in Florida are that the custom must be ancient, reasonable, uninterrupted, and free from dispute to qualify for the purposes of permissible customary use.[10]

The applicability of the customary use doctrine to privately-owned dry-sand beaches has become a heated topic in Florida over the last decade or so. Until 2018, under precedent set by the Supreme Court of Florida, local governments were allowed to enact ordinances to recognize and regulate customary use on private beachfront property.[11] Property owners displeased with customary use could then seek judicial determination of actual custom rights, and the doctrine would end up being determined on a case-by-case basis.[12] However, in 2018 the state legislature passed House Bill (HB) 631, which lead to the passage of a new law on the establishment of recreational customary use.[13] Essentially, the new law streamlines the existing process for judicial determination of whether a customary use designation is appropriate for certain beaches by reversing the presumption of custom.[14] The bill prohibits governmental entities from recognizing previously enacted customary use ordinances, including those that were already in effect, or from adopting new ordinances without judicial review.[15]

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7. *Id.*
8. *See generally* Kranz, *supra* note 5.
9. Kranz *supra* note 5, at 19.
10. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974).
11. *See Id.*
12. *See generally* Trepanier v. Cty. of Volusia, 965 So. 2d 276 (Fla. 5th DCA 2007).
13. H.B. 631, 2018 Leg., Reg. Sess. (Fla. 2018); Fla. Stat. § 163.035 (2018).
14. Fla. Stat. § 163.035 (2018).
15. Fla. H.B. 631.

The passage of HB 631 has led to legal and sociopolitical battles in many areas of Florida, most notably in Walton County. HB 631 rendered Walton County's previously enacted customary use ordinance moot. The county filed a lawsuit in the Circuit Court for the First Judicial Circuit in Walton County asking the court to affirm customary use for the county's beaches.[16] On one side of the suit are gulf-front property owners who want to enjoy the dry-sand beach without interference from the public.[17] On the opposite side is the County, which is asking the court to affirm customary use for the county's beaches so tourists and local residents will continue to be able to use the dry-sand beaches for recreation.[18]

Only time will tell how the court will rule on customary use in Walton County. However, the importance of the issues raised in this case cannot be overstated. The doctrine of customary use walks a fine line between protecting private property interests and maintaining public beach access. In Florida, these issues involving beaches and private property rights are commanding significant attention.

This note will provide a full and in-depth analysis of why customary use should be applicable in Florida, not only in Walton County, but potentially statewide. The elements of customary use—that a custom must be ancient, reasonable, uninterrupted, and free from dispute—have been met, at least in Walton County and likely across the state. Thus, the public should have the right to enjoy Florida's dry-sand beaches, whether or not those beaches are privately owned.

Moreover, this note will explore alternative methods for ensuring public access to dry-sand beaches—for example, adopting laws and regulations similar to those implemented by other states, or adopting novel methods for dealing with the issue of beach access.

This note examines the applicability of the customary use doctrine to dry-sand beaches in Florida and explores methods for ensuring maximum public beach access statewide. Part II will discuss relevant background law surrounding beach access in Florida, focusing on the state's public trust littoral rights.[19] It will also introduce customary use, describing the doctrine's origin in

16. Staley Prom, *Lawsuit Filed to Protect Customary Use in Walton County, Florida*, SURFRIDER FOUNDATION (Dec. 19, 2018), https://www.surfrider.org/coastal-blog/entry/lawsuit-filed-to-protect-customary-use-in-walton-county-florida.

17. Tom McLaughlin, *Two Property Owners Escalate Walton County Customary Use Debate*, THE WALTON SUN (July 8, 2019, 4:21 PM), https://www.waltonsun.com/news/20190708/two-property-owners-escalate-walton-customary-use-debate.

18. Prom, *supra* note 16.

19. *Infra* Part II.

English common law and examining how the doctrine has been applied historically in American common law.[20] Part III will provide an in-depth analysis of customary use as it has been applied in Florida.[21] It will first examine the two seminal Florida beach access cases, *City of Daytona Beach v. Tona-Rama* and *Trepanier v. County of Volusia*, to establish the elements of customary use.[22] Part III will then examine the current state of the issue of customary use in Florida, using Walton County as a case study.[23] It then examines *Alford v. Walton County*, the Walton County customary use ordinance, the passage of HB 631, the issuance of Executive Order 18-202, and the ongoing legal and sociopolitical battles happening over beach access.[24] Part IV will provide potential solutions to the issue of beach access in Florida.[25] It will begin with an analysis of the applicability of customary use in Florida, examining and disposing of counterarguments that customary use is inapplicable to Florida's dry-sand beaches.[26] Part V will consider alternative methods to customary use for maximizing beach access in Florida by describing how other states (and countries) have safeguarded public beach access.[27] It will describe easements and legislative acts from other states.[28] Part V will provide an ultimate proposed solution to the problem of beach access in Florida.[29]

II. BACKGROUND: LITTORAL RIGHTS IN FLORIDA AND AN INTRODUCTION TO CUSTOMARY USE

A. Littoral Rights in Florida

Before delving into the specifics of customary use and public beach access, it is first important to understand the basic tenants of littoral rights in Florida.

Article X Section 11 of the Constitution of the State of Florida establishes the public trust doctrine in Florida.[30] This section

20. *Id.*
21. *See generally infra* Part III
22. *Infra* Part III.
23. *Id.*
24. *Id.*
25. *See generally infra* Part IV.
26. *Infra* Part IV.
27. *Id.*
28. *Infra* Part V.
29. *See generally infra* Part V.
30. Fla. CONST. art. X, § 11.

mandates that "[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, *including beaches below mean high water lines*, is held by the state, by virtue of its sovereignty, in trust for all the people."[31] This constitutional establishment of the public trust is important because it provides that private use of state-owned lands may only be used for private interests when this use is not contrary to public interest.[32] Further, this section of Florida's constitution clarifies that the mean high-water line is the boundary between public and private lands.

The definition of mean high-water line (colloquially called, and hereinafter referred to, as MHWL) is encoded in Florida Statutes § 177.27(14).[33] The MHWL is the average height of high waters over a lunar cycle period of 19 years, based on available data.[34] The area below (seaward of) the MHWL is known as the "wet-sand beach" because it is covered by water during high tide, and is usually still wet at other times.[35] The area above the MHWL is known as the "dry-sand beach."[36] This area of the beach does not become flooded with the tides and is what one would imagine when thinking of Florida's classic white-sand beaches.

The wet-sand beaches are held in trust by the state, and are therefore sovereign public land, available for recreational use by all of Florida's citizens.[37] Beachgoers almost always have the right to access the wet sand beach and typically cannot be excluded from enjoying this area. The dry sand beach is not sovereign land. Stretches of dry-sand beach are typically privately owned by the property owner of the adjacent beachfront lot.[38] Thus, absent any sort of governmental intervention, property owners are able to exclude members of the public from utilizing the dry-sand beaches they have ownership rights to. This dry-sand area of the beach is where beach access issues arise and where customary use comes into play.[39]

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31. *Id.* (emphasis added).

32. *Id.* ("Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but *only when not contrary to the public interest*.") (emphasis added).

33. Fla. Stat. § 177.28 (1974).

34. *Id.*

35. Kranz, *supra* note 5, at 11.

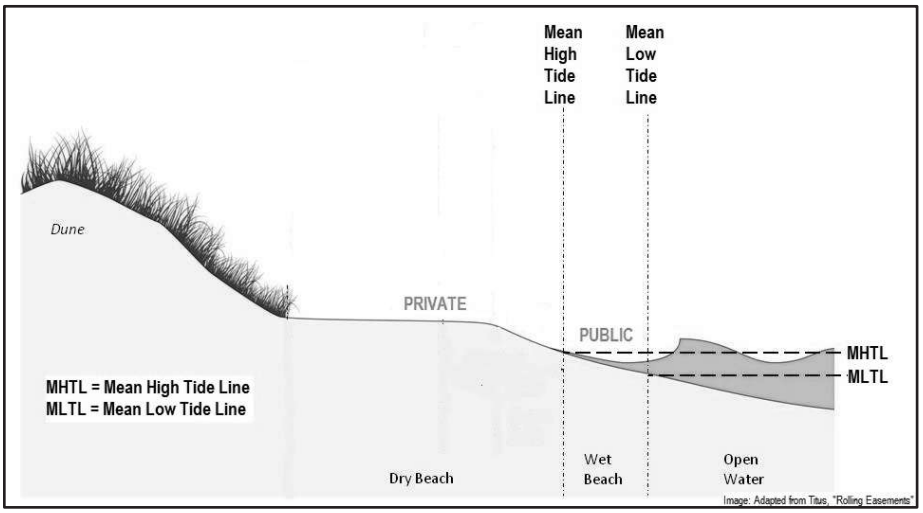
36. *Id.*

37. *See* Fla. CONST. art. X, § 11.

38. Kranz, *supra* note 5, at 11.

39. Note that this paradigm changes slightly for renourished beaches. When state or federal dollars are used to renourish a beach, the new dry-sand beach that is created is typically owned by the state and remains in state ownership up to the former MHWL (which

Figure 1.
A diagrammatic representation of the terms MHWL, wet-sand beach, and dry-sand beach.[40]



B. Customary Use

The doctrine of customary use is, at its most fundamental core, the idea that where the public has, over time, established a right to use the land in a particular way, owners of private property may not interfere with the public's continued exercise of that right.[41] The elements that must be present in order for a claim of customary use to be valid in Florida are outlined in *City of Daytona Beach v. Tona-Rama*.[42] For a customary use right to be present, the custom "must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons, and it must be certain and reasonable as to the subject matter or rights

will then be a line in the dry sand), which takes on a new designation as an Erosion Control Line (ECL). Fla. Stat. §§ 161.141, 161.151(3) (2018). The beach above the ECL remains privately owned, but the beach below (seaward) of the ECL remains in state ownership, free for the public to use, even though it is technically now dry-sand beach. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 710 (2010). Property owners still maintain riparian rights over the beach, but the public is free to recreate on the new dry-sand beach below the ECL. *Id.*

40. Common Law Tools to Promote Beach Access, FLORIDA SEA GRANT (last visited Oct. 4, 2019) https://www.flseagrant.org/wateraccess/common-law-statutes/. Note that the term MHWL is not necessarily the same as MHTL, definitionally, but in practice (and for the purposes of this note), they have the same meaning.

41. Kranz *supra* note 5, 19.

42. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974).

created."[43] In more succinct language, this means that a custom must be ancient, reasonable, uninterrupted, and free from dispute to qualify under the customary use doctrine.[44]

1. History of Customary Use: English Common Law Roots

The concept of customary use first originated in the United Kingdom.[45] The doctrine is rooted in England's ancient system of feudal nobility and royal land grants.[46] Under English common law, customary use is applicable when the public has been using the land in question in a particular fashion since "time immemorial."[47] Time immemorial is the period of time before which "there is no recollection or record to prove a custom, right, or claim."[48] According to an English statute from the year 1275, time immemorial is anything happening before the coronation of King Richard the I in 1189.[49] This period of time is also known as "legal memory."[50]

The English intended the doctrine of customary use to be used for the benefit of the community, not for the benefit of individuals.[51] This distinguishes custom from the related doctrines of adverse possession and prescriptive easements, which allow for the creation of private rights from uninterrupted use or occupancy of another's land.[52] Most early custom cases in England spoke to the use of property for purposes of production, but as time went on the law also began to recognize the validity of the customary use of property for recreational purposes.[53] The gradual recognition of the legitimacy of recreational customary use in England prefigures the acceptance of

43. *Id.*

44. *Id.*

45. DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 33 (Cambridge Univ. Press ed., 2010).

46. *Id.* at 32.

47. *Id.*

48. Time Immemorial, Black's Law Dictionary (2d ed. 1910), available at https://thelawdictionary.org/time-immemorial/ (last visited Oct. 5, 2019).

49. *Id.*

50. Legal Memory, Black's Law Dictionary (2d ed.1910), available at https://thelawdictionary.org/legal-memory/ (last visited Oct. 5, 2019).

51. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 263–64 (1893).

52. Adverse Possession, Black's Law Dictionary (2d ed. 1910), available at https://thelawdictionary.org/legal-memory/ (last visited Dec. 10, 2019).

53. Alyson Flournoy et al., *Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy*, UF L. SCHOLARSHIP REPOSITORY, 2019, at 9–10.

customary use in the United States, where the doctrine is essentially always applied exclusively to the customary recreational use of land.[54]

2. History of Customary Use: Custom Comes to America

Customary use law has a long history in the United Kingdom, but its applicability to the American legal system of property rights is more tenuous. The most common situation in which the customary use doctrine is applied in the United States is in cases involving the public's right to access, for purposes of recreation, privately owned dry-sand beaches.[55]

Though adopted along with much of English common property law, customary use was not applied in the United States until the 1850s.[56] 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.[57] Further, American lawmakers at the time were generally unwilling to favor the feudal-based laws of their English predecessors.[58]

After its introduction in the mid-19th century, customary use was not applied again until 1969 in the seminal case of *State ex rel. Thornton v. Hay*.[59] In *Thornton*, the Supreme Court of Oregon held that the public had acquired the right to access, for the purposes of recreation and enjoyment, the state's privately-owned dry-sand beaches based on the principles of customary use.[60] The court reasoned that because Native Americans had been utilizing the beach for thousands of years, municipal governments paid to keep the beach clean, and people generally assumed the dry sand beach was public, customary use applied and could prevent private landowners from excluding beachgoers from the dry sand.[61] Other states, most notably Hawaii and Texas, have followed Oregon's lead regarding the application of customary use to privately owned dry

54. *Id.*

55. *See generally* Kranz, *supra* note 5.

56. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1401–07 (1996).

57. Flournoy *supra* note 53, at 11.

58. *Id.*

59. *See* State *ex rel.* Hamon v. Fox, 594 P.2d 1093, 1101 (Id. 1979); State *ex rel.* Thornton v. Hay, 254 Or. 584 (1969).

60. State *ex rel.* Thornton v. Hay, 254 Or. 584, 587–88 (1969).

61. *See* Kranz, *supra* note 5, at 10.

sand beaches.[62] There have also been a few important cases in Florida which address the applicability of customary use to the privately owned dry sand beaches of the sunshine state.

III. CUSTOMARY USE IN FLORIDA

The doctrine of customary use has the potential to be applied to any parcel of land (so long as the requisite elements are met) within the United States. However, customary use is most often applied with respect to dry-sand beaches in coastal states where there is a dispute between private property and public access. Because of Florida's hundreds of miles of beaches, many miles of which are privately owned, the Sunshine State has seen its fair share of debate over whether the doctrine of customary use is applicable, at all, and specifically with respect to privately owned dry-sand beaches.

The debate over customary use in Florida began in 1974 with *City of Daytona Beach v. Tona-Rama*[63] and continues even today, as this note is being written, with the ongoing litigation over Walton County's customary use ordinance.[64] Ultimately, the issue will likely not be resolved until the Florida Supreme Court again rules on the validity of customary use. Thus, the history and current debates over the doctrine are worth exploring.

A. Tona-Rama and Trepanier: Setting Precedent

There are two main, precedent-setting, cases which tackle the issue of customary use in Florida. *Tona-Rama* sets the guidelines for customary use and *Trepanier* further explores the applicability of those guidelines to specific beaches.[65]

1. Tona-Rama

In 1974, the first of these precedential cases, *City of Daytona Beach v. Tona-Rama*, was heard.[66] The Defendant in *Tona-Rama* had owned a stretch of oceanfront property in Daytona Beach,

62. *Id. See infra* Part IV.

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

64. Prom, *supra* note 16.

65. *See generally Tona-Rama*, 294 So. 2d; Trepanier v. Cty. of Volusia, 965 So. 2d 276 (Fla. 5th DCA 2007).

66. *See generally Tona-Rama*, 294 So. 2d.

Florida for over sixty-five years.[67] On this property, the Defendant operated a pier that extended into the Atlantic Ocean and featured recreational attractions like fishing space, helicopter flights, and a skylift.[68] The Defendant's pier occupied a stretch of dry-sand beach, on which the Defendant obtained a permit from the city to construct an observation tower.[69] The litigation in *Tona-Rama* began when the owner of a nearby observation tower challenged the issuance of the Defendant's construction permit.[70] The Plaintiff alleged, amongst other complaints that "by continuous use of the property for more than [twenty] years, the public had acquired an exclusive prescriptive right to the use of the land of the defendant."[71]

The Supreme Court of Florida began their opinion in *Tona-Rama* by stating that the Court "recognize[s] the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida."[72] The Court further held that "[t]he general public may continue to use the dry sand area for their usual recreational activities . . . 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."[73] The Court found that the public's interest in lands that have been used recreationally for a significant amount of time is paramount to private interests in the same lands.[74] Where such an interest exists, private landowners may, of course, utilize their land, but they may not do so in a way that would interfere with the public's right to enjoy that land.[75] Ultimately, the Court found for the Defendant, holding that the Defendant's use of their land to construct an observation tower would not interfere with the public's enjoyment of the dry-sand beach, but rather would add to this enjoyment, and therefore the construction permit was permissible.[76] However, the opinion made clear that if the construction of the observation tower had a negative impact on the public's use of the land, the case would likely have come out differently.[77]

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67. *Id.* at 74.

68. *Id.* Defendant's pier extended over an area of dry-sand beach equal to approximately 15,300 square feet.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 75.

73. *Id* at 78.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

Tona-Rama is a case crucial to understanding customary use in Florida for more than just the dicta described above. As the first case tackling the applicability of the customary use doctrine in Florida, the *Tona-Rama* court had the job of establishing what elements must be met for the doctrine to be applicable to a certain parcel of land. The *Tona-Rama* court holds that, if a use of land is ancient, reasonable, uninterrupted, and free from dispute, the customary use doctrine can be applied.[78] These four elements are essential to the ongoing debate over the doctrine in Florida.

2. Trepanier

The second precedential key to understanding the customary use debate in Florida took place decades later, in 2007, in the case *Trepanier v. County of Volusia*.[79] The Appellants in *Trepanier* owned lots of beachfront property, including stretches of dry-sand beach, running along the Atlantic Ocean in New Smyrna Beach, Florida.[80] Because of storm-activity in the area, portions of the Appellant's beachfront property eroded severely.[81] A county regulation mandated that, because of the erosion, public use of the beach must shift inland, now taking up a portion of the Appellant's property.[82] Appellants sued, and then appealed the trial court's decision, complaining that the county inappropriately set up driving lanes on a section of the beach owned by the Appellants.[83]

The *Trepanier* court began their opinion by referring directly to *Tona-Rama*, stating again, that "the public may obtain a superior right to use private property upland of the mean high tide line by custom when the recreational use of the area has been 'ancient, reasonable, without interruption, and free from dispute."[84] The court then highlighted again that "the recognition of a right through 'custom' means that the owner cannot use his property in a way that is inconsistent with the public's customary use or 'calculated to

78. *Id.* "Use" in this context could refer to any way in which the land is being utilized. In this context, and most others, the "use" being considered is recreation.

79. *See generally* Trepanier v. Cty. of Volusia, 965 So. 2d 276 (Fla. 5th DCA 2007).

80. *Id.* at 278.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 281.

interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area."[85]

After setting the above baseline, the *Trepanier* court recognized that, more than dedication or prescriptive easements, custom is the best way to establish the public's right to use the Appellant's private property.[86] The court's opinion then became an exploration of the elements of custom laid out in *Tona-Rama*, and their applicability to the instant case.[87]

Ultimately, the *Trepanier* court decided that the intent of the supreme court in *Tona-Rama* was to declare the public's right of customary use only for the area of beach at issue in that case.[88] Following from this reasoning, the Fifth District Court of Appeal held that customary use does not automatically apply to all of Florida's dry sand beaches, as *Tona-Rama* implies, and instead customary use must be assessed on a case-by-case basis.[89] The court reasoned that "the specific customary use of the beach in any particular area may vary, but proof is required to establish the elements of a customary right."[90] Evidence of an existing custom must be presented to validate the existence of the claimed custom.[91] The court further reasoned that *Tona-Rama* "require[s] proof that the general area of the beach where Appellants' property is located has customarily been put to such use and the extent of such customary use on private property is consistent with the public's claim of right."[92] Adjacent to the reasonings on custom, the court further held that if a recreational custom exists for a particular area, no takings claim can be made for the area in which custom applies.[93]

Ultimately, the *Trepanier* court reversed the trial court's ruling of summary judgment in favor of the Appellee.[94] The court held that there were still genuine issues of material fact related to the customary use claim that required further legal proceedings.[95]

The *Trepanier* decision neither validates nor invalidates customary use in Florida. Rather, *Trepanier* implies that a public

85. *Id.* at 286–87.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 289.
90. *Id.*
91. *Id.* at 290.
92. *Id.*
93. *Id.* at 293.
94. *Id.*
95. *Id.*

recreational custom could potentially apply to any of Florida's privately-owned dry-sand beaches, so long as the requisite elements, as set forth in *Tona-Rama* are properly satisfied.

Tona-Rama, and subsequently *Trepanier*, set the foundation for Florida's customary use debate. However, the issue of whether customary use is a valid and applicable doctrine in Florida has not been set in judicial nor legislative stone, and thus continues to cause significant debate in many of the state's coastal areas.

B. The Walton County Conundrum

Naturally, with no solid judicial or legislative ruling on the matter, the applicability of customary use is still open to interpretation throughout the state. Recently, the issue has come to the forefront of legal and sociopolitical debates in Walton County, Florida. The County established a customary use ordinance in 2017, which was soon thereafter rendered moot by the statewide passage of HB 631.[96] The passage of HB 631 (and subsequent establishment of Florida Statutes section 163.065) has created much confusion and conflict in Walton County, ultimately leading to a lawsuit that (at the time of this note)[97] is ongoing.

This portion of the note will explore the customary use issues in Walton County, both to provide information about an ongoing issue of great importance to many people (both private landowners and public beachgoers), and to serve as a case study with which to explore customary use in Florida, generally.

1. Alford v. Walton County: The Debate Begins

The debate over customary use in Florida extends back to *Tona-Rama* in 1974, but the current dispute in Walton County began much more recently. In 2016, Walton County enacted their "customary use ordinance," declaring the doctrine valid for all dry-sand beaches in the county.[98] The ordinance meant that the public, be they locals or tourists, had the ability to freely recreate on all of

96. Alford v. Walton County, No. 3:16-cv-362/MCR/CJK, 2017 WL 8785115, *superseded by statute*, Fla. Stat. § 163.065 (2018).

97. This note is being written in Fall 2019. Information contained herein reflects the most current analysis and report of the litigation over customary use in Walton County. However, more information will certainly be released after this note has been published. Therefore, this note should serve not as an end-all guide to customary use, but as a baseline, providing information on the current state of the doctrine, and a prescription for how issues could be resolved in the future.

98. WALTON CTY., FLA., CUSTOMARY USE ORDINANCE No. 2016-23, § 1 (2016), *amended by* ORDINANCE No. 2017-10, §§ 1-3 (2017).

Walton County's beaches, public or private, accessing both the wet-sand and the dry-sand. The ordinance was not popular with many homeowners, who preferred having the ability to keep their private beachfront property just that, private.

The issuance of the Customary Use Ordinance sparked litigation in the county, leading to the *Alford* case. In 2016, the Alfords, owners of beachfront property in Walton County, brought suit against the county.[99] The Alfords alleged, among other complaints, that the Customary Use Ordinance was invalid because the doctrine of customary use is grounded in common law and its applicability must be determined on a case by case basis.[100] The Alfords argued further that the county exceeded their delegated authority by enacting an ordinance that established customary use on all of the county's beaches.[101]

Ultimately, the court found against the Alfords, upholding the county's Customary Use Ordinance.[102] Based on an analysis of *Tona-Rama* and *Trepanier*, the *Alford* court determined that the Ordinance did not conflict with any general or special Florida law, and therefore was by default valid.[103] The court granted summary judgment in favor of the county, upholding the Customary Use Ordinance until the *Alford* decision was usurped, a little over a year later, by the passage of HB 631.[104]

2. HB 631: The New Law of the Sand

In 2018, the Florida legislature passed House Bill 631, a general bill from the Civil Justice and Claims subcommittee.[105] The Bill included a provision that "prohibit[s] [local governments] from adopting or keeping in effect ordinances or rules based on customary use," without judicial determination of an outstanding custom.[106] Prior to the bill, under the *Tona-Rama* precedent, local governments could enact ordinances to recognize and regulate customary use on private property.[107] Property owners could seek judicial

99. *Alford*, 2017 WL 8785115, at 1.

100. *Id.* Note that the Alford's reasoning here echoes that of the fifth district in *Trepanier*.

101. *Id.*

102. *Id.* at 16.

103. *Id.*

104. *Id.*

105. Fla. H.B. 631.

106. *Id.*

107. *See eg.,* WALTON CTY., FLA., CUSTOMARY USE ORDINANCE No. 2016-23, § 1 (2016), *amended by* ORDINANCE No. 2017-10, §§ 1-3 (2017). The Walton County ordinance is the

determination of actual customary use rights, and customary use would end up being determined on a case-by-case basis, as suggested in *Trepanier*.

The passage of HB 631 was made legislatively official in the Florida Statutes as section 163.035.[108] This codification of the bill states 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."[109] This law requires a governmental entity (such as a local county government), at a public hearing, to adopt a formal notice of intent to affirm the existence of recreational customary use.[110] Further, 163.035 codifies the *Tona-Rama* test for customary use, finally setting in stone that the requirements for the doctrine to be applicable in Florida be that a "recreational customary use be ancient, reasonable, without interruption, and free from dispute."[111]

Essentially, 163.035 is meant to streamline the process for local governments seeking to obtain judicial determination of whether a customary use designation is appropriate on certain beaches. Ideally, this new process would reduce ongoing litigation between property owners and local governments by taking the customary use decision out of the hands of governments and leaving the decision to the courts.[112] However, 163.035's prohibition on governmental entities keeping customary use ordinances that were already in place, or from adopting new ordinances without judicial review, caused conflict almost immediately after the law was enacted.[113] The sponsors of HB 631 advertised the new rule as a way to reduce conflict and limit litigation.[114] However, the law has not achieved these goals and has seemingly caused an increased amount of litigation, at least in the Florida Panhandle.[115] A popular

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prime example of the type of sweeping local government action HB 631 was designed to prohibit.

108. § 163.035, Fla. Stat. (2018).

109. *Id.*

110. *Id.*

111. *Id.*

112. Note that Walton County's original Customary Use Ordinance still provided an opportunity for judicial recognition. The County and private entities both had the ability, under the ordinance to bring suit, either to enforce the ordinance, or challenge it. WALTON CTY., FLA., CUSTOMARY USE ORDINANCE No. 2016-23, § 1 (2016), *amended by* ORDINANCE No. 2017-10, §§ 1-3 (2017).

113. *Id.*

114. Flournoy, *supra* note 53, at 29.

115. *Id.*

misunderstanding of 163.035 has emboldened private landowners, causing many to claim what they see as a new right to prohibit the public from entering their stretch of the beach.[116]

Worth noting is that the statute does not actually change the balance between public rights and private rights, it just shifts the burden of proof procedurally. Despite this, 163.035 has created a class of suits by private landowners that could threaten public beach access.[117] Though likely unintended at its inception, HB 631 has produced a very real threat to beach access, both on private beaches, which were once areas of established customary use, and on other dry-sand beaches across the state of Florida.

The passage of HB 631 almost immediately caused confusion and created outcry from members of the public who found themselves unable to enjoy many privately-owned dry-sand beaches that they were once able to frequent freely.[118] In response to the general disgruntlement of the public after the passage of HB 631, then Florida Governor Rick Scott issued Executive Order 18-202.[119] Executive Order 18-202 issued a moratorium on state agencies adopting any rule or restriction to inhibit public beach access.[120] The Order also urged local governments not to adopt any new rules that would restrict beach access and directed the Florida Department of Environmental Protection to advocate for the public's right to beach access.[121] Ultimately, the Order left local governments even more unsure of how to move forward after HB 631, even with the Department of Environmental Protection acting as a liaison between the public and the government. Essentially, in the wake of the Order, local governments are still unable to enact new customary use ordinances (without judicial determination) but also may not further restrict beach access. This has left governments with little room to work with in regard to public beach access.

3. Current Litigation in Walton County

As hinted at in Part i of this section, one area of Florida that has felt a significant impact from HB 631 and Order 18-202 is Walton

116. *Id.*

117. *Id.*

118. *See* Tom McLaughlin, *Simmering Hostilities Meet Tourists in South Walton*, THE WALTON SUN (Apr. 13, 2019, 11:41 AM), https://www.waltonsun.com/news/20190413/simmering-hostilities-greet-tourists-in-south-walton.

119. Fla. Exec. Order No. 18-202 (July 12, 2018).

120. *Id.*

121. *Id.*

County.[122] The public is largely opposed to HB 631, as they can no longer freely recreate on the dry-sand beaches of Walton County as they were once able to thanks to the Customary Use Ordinance.[123] Members of the public have been left with significantly less beach to enjoy in Walton County. As expected, private landowners support HB 631, which theoretically gives them the ability to exclude beachgoers from the portion of the dry sand beach they own.[124] Further, homeowners can potentially have beachgoers charged with trespassing for being on the dry sand beach in front of their property.[125] However, in practice, law enforcement officers are rarely willing to do this; although, there have been instances where beachgoers have been asked to move to the wet sand or to a public access beach.[126]

Unsurprisingly, the tense sociopolitical battle over customary use in Walton County has also led to a battle in the courts. In December 2018, Walton County filed a lawsuit in the Circuit Court for the First Judicial Circuit in Walton County asking the court to affirm customary use for the county's beaches.[127] The County is asking the court to hold that the use of beaches in Walton County has been ancient, reasonable, without interruption, and free from dispute, thus, giving the public the right to use the dry-sand beaches for recreation.[128]

Since the suit was filed, dozens of private homeowners have joined in opposition to the county, asking the court to hold that customary use is inapplicable to the county's dry-sand beaches. Private landowners argue that recreational use of Walton County's beaches has not continued since time immemorial.[129] Homeowners further argue that imposing customary use results in a violation of the Takings Clause of the Fifth Amendment of the United States

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122. *See supra* Part III, subsection (b)(i).

123. Tom McLaughlin, *Two Property Owners Escalate Walton County Customary Use Debate*, THE WALTON SUN (July 8, 2019, 4:21 PM), https://www.waltonsun.com/news/20190708/two-property-owners-escalate-walton-customary-use-debate; *see* WALTON CTY., FLA., CUSTOMARY USE ORDINANCE No. 2016-23, § 1 (2016), *amended by* ORDINANCE No. 2017-10, §§ 1-3 (2017).

124. Prom, *supra* note 16.

125. Greg Allen, *Private Beaches In Florida Spark Battle With Residents and County*, NPR (Sept. 10, 2018, 3:11 PM), https://www.npr.org/2018/09/10/634666036/private-beaches-in-florida-spark-battle-with-residents-and-county.

126. *Id.*

127. Prom, *supra* note 16.

128. *Id.*

129. *See supra* Part II.b. which defines "time immemorial" as the year 1189 according to British common law principles. The validity of this claim will be explored in the following section on the applicability of customary use to beaches in Florida.

Constitution.[130] The property owners' claims on the applicability of customary use are valid, and will be explored in depth in the following section. The takings claim, however, is not relevant to this case. Under the precedent set forth in *Trepanier*, takings claims are invalid where the public has a customary use right.[131] Were the court to determine that customary use is inapplicable, there would be no takings claim, as the public would be excluded from the homeowners' private property. Alternatively, should customary use be found to be applicable, the takings claim would also be invalid because of the *Trepanier* precedent.

How this case will play out in the courts is currently unclear. Parties are presently still in the process of adding petitioners and scheduling hearings. Most recently, Judge Green, the Walton County judge presiding over the case, heard arguments from the attorneys representing the property owners, arguing that the case should be dismissed.[132] Attorneys representing the property owners have argued that the case should be dismissed because county attorneys failed to provide proper notice of the suit (and its declaration to seek customary use) to all of the private property owners in Walton County.[133] The case has not proceeded past these procedural points, as Judge Green seems to be waiting until he is certain every proper party—and only the proper parties—are accounted for and represented before he makes any rulings on substantive issues.[134]

Further complicating the matter is a recent ruling from the Supreme Court of the United States, holding that private property owners can file suit directly to federal courts when the property owners feel their rights have been violated by state or local governments.[135] This ruling could potentially help private property owners in the ongoing customary use litigation in Walton County.

Ultimately, only time will tell how the court will rule on the current Walton County case. Regardless of how Judge Green rules, it is unlikely that his holding will be the last of the customary use litigation involving these panhandle beaches. It is improbable that

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130. U.S. CONST. amend. V.

131. Trepanier v. Cty. of Volusia, 965 So. 2d 276, 293 (Fla. 5th DCA 2007).

132. *Walton's Customary Use Case Again Delayed by Notification Issues*, THE WALTON SUN (Nov. 12, 2019, 5:24 PM), https://www.waltonsun.com/news/20191112/waltonrsquos-customary-use-case-again-delayed-by-notification-issues.

133. *Id.*

134. *Id.*

135. Tom McLaughlin, *Supreme Court Ruling Could Impact Walton Customary Use Case*, THE WALTON SUN (June 24, 2019, 5:33 PM), https://www.waltonsun.com/news/20190624/supreme-court-ruling-could-impact-walton-customary-use-case; *see generally* Knick v. Twp. of Scott, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019).

the losing party would not appeal the case, and it is likely that the case will even be taken all the way to the Supreme Court of Florida. HB 631 and its effects have caused so much confusion and conflict in coastal Florida since its inception that a clear standard is needed to lessen confusion, put an end to the stream of costly litigation over the issue, and let both the public and private property owners know once and for all what the state of their beaches will be.

IV. THE SOLUTION

The remainder of this note will be a prescription for the Florida Supreme Court on how they should rule on the customary use issue and alternatives to customary use that would allow for an increase in public beach access across the state.

The doctrine of customary use should be found to be applicable for all[136] dry-sand beaches in Florida, pursuant to the precedent set in *Tona-Rama*.[137] The main argument of opponents to customary use is that recreational use of Florida beaches has not continued since "time immemorial."[138] The time immemorial element, as well as the other elements of customary use, are addressed below in relation to their validity on Florida dry-sand beaches.

A. Element One: Ancient

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. Native Americans have inhabited the area of Florida that is currently Walton County for around 13,000 years.[139] Undoubtedly, these peoples would have been utilizing the abundant resources available on the beach. Assuming that since no Europeans were using the beach before 1189 then nobody was using the beach

136. "All" in this context would mean all dry-sand beaches in Florida that are either privately owned or public (*i.e.*, held by the state, local governments, etc.). Naturally excluded from this definition would be beaches owned by the federal government, for military purposes or otherwise, which are governed by their own sets of standards.

137. *See supra* note 76.

138. *See supra* note 124 and accompanying text.

139. *Native American History of Walton County, Florida*, ACCESS GENEALOGY https://accessgenealogy.com/florida/native-american-history-of-walton-county-florida.htm. (last visited Nov. 15, 2019).

is a Eurocentric view of the issue and does not take into account the actions of peoples living on the beaches of Florida long before 1189.

Further, it does not seem appropriate to base the time immemorial standard on the English common law date of 1189. There has been enough case law in American jurisprudence to develop a new national standard for what qualifies as "ancient" in the United States. *Thornton* holds that, since the public had freely enjoyed recreational access to Oregon's dry-sand beaches since a system of land tenure was developed in the state, the "ancient" standard was met.[140] Further, the *Tona-Rama* court held that the public had been using the beach recreationally for decades, and, therefore, the "ancient" standard had been met.[141] Evidently, there is precedent for the "ancient" element to be met in America by dates more recent than the time immemorial standard set by 1189. Thus, following the *Tona-Rama* precedent and persuasive authority from other jurisdictions, this first element of customary use should be found valid in Walton County and on the rest of Florida's dry-sand beaches.

B. The Remaining Elements

In the instant case in Walton County, the only issue truly being debated is whether customary use has continued since time immemorial.[142] Therefore, the remaining elements of customary use can be dismissed rather quickly, though they are still worth exploring.

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."[143] So, as long as the public is using the dry-sand beach in a way that is not egregious, they are using the beach in a reasonable way. Recreation in the form of sunbathing, jogging, surfing, fishing, or the like is unlikely to be so boisterous or disruptive that it would be considered unreasonable. As long as the recreation is not so boisterous or disruptive that law enforcement agencies are called to break it up, the recreation is most likely reasonable.[144]

The third element of customary use is that the use of the land in question must be "uninterrupted." In *Tona-Rama*, the court held

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140. State *ex rel.* Thornton v. Hay, 254 Or. 584, 596 (1969).

141. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974).

142. *See supra* note 124 and accompanying text.

143. *Thornton*, 254 Or. at 596.

144. *Id.*

that the consistent use of the land over the course of several decades constituted uninterruptedness.[145] Again, this element should apply not only in Walton County, but for all Florida beaches, as it is hard to think that any Floridian beach has not been used consistently for the last several decades.

The final element of customary use to explore is that the use must be "free from dispute." This element is inherently tenuous since the mere fact that there is discussion over the validity of customary use means that the doctrine's applicability is in dispute. However, as described in the preceding paragraphs, it would be difficult to prove that recreation on Florida's beaches has not continued, uninterrupted, for many decades, and that this recreation is not reasonable. Thus, as long as it is indisputable that people have been reasonably recreating on Florida's beaches for a sufficiently long and uninterrupted period of time, the custom is also free from dispute, and the final element of customary use is satisfied.

Thus, recreational custom on Florida beaches is ancient, reasonable, uninterrupted, and free from dispute. If the use satisfies these criteria, the beachfront property owners suffer no harm of reasonable, investment-backed expectations and, thus, have no takings claim.

Since all of the elements of customary use are satisfied in accordance with logic and precedent, should the Supreme Court of Florida hear a case assessing the validity of the doctrine, it should hold that customary use is applicable for all private, dry-sand beaches in Walton County and in Florida at large.

C. Alternative Solutions

The goal behind declaring customary use valid in Florida would be to ensure that the public has access to as much of the state's dry-sand beaches as possible for recreation and enjoyment. Of course, there are ways other than custom to ensure maximum beach access. If Florida cannot apply customary use, the actions taken below by other U.S. states could provide a guideline for how Florida can ensure maximum public beach access.

Texas has a variety of regulations in place to ensure a significant amount of the state's beaches are available for public recreation. The Texas Open Beaches Act, though weakened by subsequent

145. *Tona-Rama*, 294 So. 2d at 77.

legislation,[146] is still valid law and holds that the public has unrestricted rights to all state-owned beaches.[147] Texas Constitutional Amendment No. 9 was enacted to protect the public's right to access and use the public beaches bordering the Gulf of Mexico.[148] Altogether, Texas has around 614 public beach access sites, which equals about one access site for every half mile of shoreline and currently meets the state's demand for access.[149] One way for Florida to increase public beach access, then, would be to follow Texas' lead and simply provide more beach for the public to enjoy and more points at which the public can access the beach.[150]

One of the states with the longest history of promoting public beach access is Oregon. The landmark Beach Bill and precedent set in *Thornton* guarantee the public's right to access all of Oregon's beaches.[151] In Oregon, rights-of-way and easements provide access to coastal waters and cannot be sold unless this public access, or the potential for public access, is retained. Overall, Oregon's coastal policies essentially guarantee the public unrestricted access to recreate on the state's beaches. Adopting a piece of legislation similar to Oregon's Beach Bill in Florida would be an excellent way to promote and increase public beach access in the Sunshine State and would likely be a popular law with most members of the public (save those who own private, oceanfront property who would like to keep their property private).

A final state that sets excellent precedent for beach access is Hawai'i. In *Public Access Shoreline Hawai'i v. County of Hawai'i County Planning Commission*, the Hawai'i Supreme Court recognized that Hawai'ian natives and members of the public have the right to use the state's sandy beaches.[152] Hawai'i has statewide beach access policies which provide that all land up to the vegetation line (what in Florida would be the dune area where vegetation begins to grow) is free for public use.[153] Local laws in certain areas of Hawai'i also guarantee public beach access points every half mile,

146. Tex. H.B. 770.

147. *Beach Access*, BEACHAPEDIA, http://www.beachapedia.org/Beach_Access (last visited Nov. 15, 2019).

148. *Id.*

149. *Id.*

150. Approximately 23% of the shoreline in Florida is publicly owned, and there are approximately 2,000 public beach access points. *State of the Beach*, BEACHAPEDIA, http://www.beachapedia.org/State_of_the_Beach/State_Reports/FL/Beach_Access (last visited Dec. 10, 2019).

151. *Id. See generally* State *ex rel.* Thornton v. Hay, 254 Or. 584 (1969).

152. *Beach Access*, BEACHAPEDIA, http://www.beachapedia.org/Beach_Access (last visited Nov. 15, 2019).

153. *Id.*

maximum.[154] Again, Hawai'i is another state that sets an interesting example for how Florida could allow for more public beach access.

Were Florida to follow the examples set forth in Texas, Oregon, or Hawai'i, it makes sense to do so through statewide legislation. Enacting legislation in Florida similar to Oregon's Beach Bill would provide a final rule promoting beach access. Additionally, ensuring beach access through legislation would still allow potentially injured parties to seek remedies through the courts. Though a blanket-bill like Oregon's seems unlikely to pass in Florida, a potentially viable option would be to pass a bill that grants the public the right to use Florida dry-sand beaches up to the dune-line, similar to Hawai'i's vegetation-line rule. This would still give property owners the right to exclude the public from their private property landward of the dune-line, which in many areas of Florida provides a substantial amount of property that would remain private. A bill as proposed here would also allow for the public to more freely recreate on Florida's beaches. Ultimately, should customary use be declared invalid in Florida, there are still options for state or local governments to take to ensure more public beach access.

V. CONCLUSION

Florida's beaches are her most prized, beautiful, and valuable natural resource. Members of the public and private landowners may disagree on many topics, but they can all agree that the beaches in Florida are perfect for recreation and enjoyment.

Despite their serene beauty, Florida's beaches are a hotbed for legal battles over property rights. There is currently fevered legal and sociopolitical debate across Florida, chiefly in Walton County, over whether customary use, a legal doctrine that gives the public free access to recreate on beaches, is applicable. A reasonable interpretation of customary use would show that the doctrine applies to Florida's dry-sand beaches. Though there are other ways to ensure public beach access, customary use is the simplest and most effective way to ensure that Florida's most prized natural resource can be enjoyed by all of her citizens from and for time immemorial.

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154. *Id.*