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Justified Trespass: How and Why Recreationists May Sometimes Enjoy America's Private Lands

by Matthew Kupono Carr

Editors' Summary: All Americans should have the opportunity to enjoy the beauty and wonder that our nation's lands have to offer. Yet while the number of public lands remains somewhat constant, the number of visitors to these places is rapidly increasing. Consequently, as America's recreational resources become more crowded, they are also becoming more degraded, less peaceful, and subject to more use limits. Meanwhile, several recreational opportunities exist on private lands. In this Article, Matt Carr explores the circumstances under which access to these "hidden gems" may be justified, setting forth the legal mechanisms that may be used to secure such access rights. While he acknowledges and respects the rights of landowners, he argues that public access to private lands can benefit society as a whole without unfairly burdening private landowners or negatively impacting the environment.

I. Introduction

When is private property public in part? This question, relevant throughout the United States, has particular significance on Maui, Hawaii. The 2000 publication of a now-popular guidebook, *Maui Revealed*,[1] catalyzed conflict between recreationists and landowners on Maui, where natural swimming holes exist primarily on private land.[2] Prior to the book's publication, public recreational use of private lands was largely limited to locals who knew of "hidden" waterfalls, swimming holes, and trails through word of mouth.[3] While landowners did not universally acquiesce to such use, conflict was typically limited to an occasional eviction, or at most a rare trespass prosecution. The new millennium brought complaints from private landowners about an influx of new visitors to their land and attendant degradation of resources,[4] personal injuries to visitors,[5] and invasions of privacy.[6]

One such complainant lived along a private road that provided sole terrestrial access to Blue Pool, a spectacular waterfall-fed coastal swimming hole that was once the domain of Maui residents but is now inundated with tourists. In the pre-*Maui Revealed* era, most visitors to the pool would park on a nearby public road and hike the private road to the pool, which Maui County has characterized as public due to its location on the seashore.[7] Use levels were usually low, or at least few complaints were heard. In 2000, however, the site was "revealed" to tourists,[8] who were typically not familiar

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1. Andrew Doughty & Harriett Friedman, Maui Revealed: the Ultimate Guidebook (2000). This guidebook is billed as an ultimate guide to Maui's natural treasures and is primarily aimed at tourists.

2. *See generally* Robert Smith, Hiking Maui—The Valley Isle (2003); Robert Stone, Day Hikes on Maui (3d ed. 2001).

3. *Id.*

4. Timothy Hurley, *Tourist "Bibles" Angering Hawaii Businesses, Officials*, Honolulu Advertiser, May 23, 2004, *available at* http://the.honoluluadvertiser.com/article/2004/May/23/ln/ln01a.html (last visited Mar. 21, 2006) (noting that *Maui Revealed* encourages visitors to hike, for example, both through sensitive East Maui Irrigation watershed land that is classed "conservation" and closed to the public, and through a state preserve to get to a secluded beach cove).

5. *Id.* (noting injuries to increasing numbers of *Maui Revealed*-inspired tourists who gained access to remote Maui and Big Island trails and did not fully appreciate the dangers of the remote environment to which they were led, including volcanoes, flash floods, and dangerous surf); *Guidebook Blamed by Couple Washed Away in Flash Flood*, USA Today, Nov. 18, 2004, *available at* http://www.usatoday.com/travel/news/2004-11-18-guidebook-flood_x.htm (last visited Jan. 2, 2005) (noting that some authorities say that such guidebooks "are leading visitors to remote areas where they could get into serious trouble") [hereinafter *Guidebook Blamed*].

6. *See* Hurley, *supra* note 4 (noting that after publication of *Maui Revealed*, one swimming hole, Blue Pool, has become so popular with tourists that on average 300 cars now park on the private dirt road leading to the site). It is likely that other owners of recreationally used land have their privacy similarly invaded. Along Hâna Highway, at least one landowner has closed access to a swimming hole by placing barbed-wire between the highway and the swimming hole below.

7. *See Guidebook Blamed*, *supra* note 5.

8. The site was included in at least two Maui hiking books, but tourists apparently seldom sought out these hiking books, instead preferring more comprehensive tourist-oriented guidebooks, such as best-selling *Maui Revealed*.

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with the site's rites of customary access and whose numbers[9] have potential to overwhelm small swimming holes and other recreational resources like Blue Pool. Consequences of the revelation include vastly increased illegal parking on the marked private road,[10] increased sunscreen contamination of the pool's fresh water, liability concerns generated by tourists hiking on unfamiliar jagged coastal lava rock, increased invasions of nearby landowners' privacy, and overcrowding that notably decreases the sense of tranquility that visitors ostensibly seek.[11]

Although public recreation on private land is largely invisible from a policy perspective,[12] its declining availability is cause for concern for landowners, public users of private land, and those who oversee and enjoy public lands.[13] Given the conflicting trends of increasing importance of public recreation on private land and decreasing availability of such recreation resources, it is submitted that in some cases when privileges of recreational access are not extended, the public nonetheless has a justifiable right of access that can be vindicated through one or more of five mechanisms. The five mechanisms that are discussed in detail later in Section IV are the following: (1) doctrine of custom; (2) public prescriptive easements; (3) public trust doctrine; (4) government- and nongovernmental organization-purchased easements; and (5) condemnation actions. This Article explores these recreation trends, possible justifications for access to private lands, and legal mechanisms that advance those justifications, using the Blue Pool scenario as a case study. The extent of problems facing Blue Pool, the unique geographical characteristics of the pool and its access points, and most importantly, the constant threat of access closure to this wonderful resource make Blue Pool an ideal resource around which to study justifications and legal mechanisms for ensuring needed availability of public recreational use of private lands. Also discussed are fairness concerns with respect to private landowners and approaches they may use to protect themselves and their land.

II. The Increasing Demand for Recreation on Private Lands

As extraordinary as America's public lands are, they cannot always supply recreational amenities demanded by the country's outdoor recreationists. Importantly, there are several constraints on the accessible supply of public recreational resources, including capacity, geography, and user wealth. Public lands also necessarily provide limited content; one cannot engage in every activity on every piece of public land. Last, private lands may occasionally contain features of such grandeur that exclusion of the public would be arguably unconscionable. Regrettably, given either the informal or adverse nature of this sort of recreation, there is little data on the extent of public recreational use of private land, except a showing of growing demand for it.[14]

Public users often seek the privilege of using private lands for recreation when there is little accessible supply of a desired public recreational resource.[15] This can occur when one does not live near public land,[16] when one cannot afford public land user fees,[17] and when public lands have reached their use quotas.[18] While each of these factors influences decisions to recreationally use private land even when public land exists, the last criterion—increasing congestion of public recreational resources—is particularly noteworthy from a policy perspective. Population growth coupled with a slow growth of parklands in some areas is causing a decrease in per-capita public recreation land in these areas, and experts expect this trend to continue.[19] Given this

9. In November 2004, for example, approximately 160,000 people visited Maui. State of Hawaii Department of Business, Economic Development & Tourism, *November 2004 Island Highlights*, *at* http://www.hawaii.gov/dbedt/main/news_releases/2004/043802.gif/view?searchterm=November%202004%20Island%20Highlights (last visited Mar. 21, 2006). In contrast, the total population of Maui County in 2003 was approximately 136,000. U.S. Census Bureau, *Hawaii Quick Facts: Maui County, Hawaii* (2004), *available at* http://quickfacts.census.gov/qfd/states/15/15009.html (last visited Mar. 21, 2006).

10. *See supra* text accompanying note 6.

11. At times, the pool is literally crawling with people, and with a stream of pictures being taken, loud talking, yelling, splashing, as well as locals with dogs, the quality of the experience is notably reduced. If the parking truly did average to 300 cars per day, *see id.*, this would mean that over 300 people were at a one-quarter-acre swimming hole, associated rocky coastal area, and private access trail.

12. Public uses of private land are not usually tracked because they are often informally approved or adverse, and, thus, the extent of such use is largely unknown to policymakers. *See* R. Jeff Teasley et al., *Private Lands and Outdoor Recreation in the United States, in* H. Ken Cordell et al., Outdoor Recreation in American Life: A National Assessment of Demand and Supply Trends 183 (1999). This is in contrast to the extensive data that federal and some state parks collect on users.

13. *See id.* at 184 (noting that public lands are increasingly unable to both meet recreation needs and remain pristine, and that private lands take recreation pressure off of public lands). *See generally* Alton J. Penz, *Outdoor Recreation Areas: Capacity and the Formulation of Use Policy*, 22 Mgmt. Sci. 139 (1975) (noting that even by 1975, national and state parks, national forests, wilderness areas, and seashores had begun suffering from overuse and misuse due to their "soaring popularity").

14. *See* Teasley et al., *supra* note 12, at 183.

15. *Id.* at 184.

16. *See, e.g.*, Vermont Agency of Natural Resources, Department of Forests, Parks & Recreation, *Public Recreation on Private Land, A Landowner's Guide* (2002), *available at* http://www.vtfpr.org/pdf/pubrec.pdf (noting that because 85% of the land in Vermont is privately owned, public recreation in private lands is very important to Vermonters). A citizen in Utah, on the other hand, would have plentiful public recreation resources before needing to resort to private lands. *See also* Teasley et al., *supra* note 12, at 216. The increased cost of gasoline is a further impediment to many less-affluent citizens' access to often faraway recreation areas. *See also* H. Ken Cordell & Carter J. Betz, *Trends in Outdoor Recreation Supply on Public and Private Lands in the U.S.*, *in* Trends in Outdoor Leisure and Tourism 77, 81 (William Gartner ed., 2000) (describing how federal land is often far from major population centers, but how state land is often much closer to these areas).

17. *See generally* Recreation.gov, *Federal Recreation Pass Programs*, *at* http://www.recreation.gov/recpass.cfm (last visited Mar. 21, 2006); Cordell & Betz, *supra* note 16, at 87 (noting a "dramatic" increase in state park user fees). Many national parks charge per-car fees of up to $20. *See, e.g.*, National Park Service, *Grand Canyon National Park—Fees*, *at* http://www.nps.gov/grca/pphtml/fees.html (last visited Mar. 21, 2006).

18. Desolation Wilderness, for example, because of its close proximity to Lake Tahoe and the Sacramento and Bay Area metropolises, has quotas in some areas of as few as two individuals. *See* U.S. Forest Service (Forest Service), USDA, *Desolation Wilderness Zone Quota List*, *at* http://www.fs.fed.us/r5/ltbmu/documents/recreation/zone.pdf (last visited Mar. 21, 2006). *See also* President's Commission on Americans Outdoors, Report and Recommendations to the President of the United States 129-30 (1986) [hereinafter President's Commission on Americans Outdoors] (noting the need to determine recreational carrying capacities of public lands and the possible need for quotas to ensure sustainability).

19. *See* Teasley et al., *supra* note 12, at 184; President's Commission on Americans Outdoors, *supra* note 18, at 147; Cordell & Betz,

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decrease, cost and distance factors in accessing public recreation lands,[20] and continually increasing demands for recreation,[21] it is important, especially in the Northeast,[22] to integrate public recreational use of private lands into regional planning and to understand the legal concepts attached thereto.[23]

The public is also drawn to private land to access special features not found in sufficient abundance, if at all, on nearby public recreation lands. Take, for example, a hypothetical stream for which all riparian land is privately owned. Public parks in the area offer baseball fields and other amenities, but there is no swimming site, save the inaccessible stream. In this case, and in less extreme cases across the country, members of the public might be expected to use a private resource—in this case a stream[24]—because there is no publicly held substitute nearby.[25] Given that approximately 75% of the non-Alaskan land in the United States is privately owned,[26] and that private land tends to be clustered,[27] it is not surprising that recreational features in some areas are found exclusively or primarily on private land. The 40% of American land that is public was not retained on the criterion of recreation potential until the mid-20th century,[28] and, thus, recreational gems were granted from the United States to the private domain. Further, many land grants were made prior to surveying, so the United States was sometimes unsure of exactly what it was privatizing.[29] No matter the cause, the result is geographical areas where the only practical choice for certain forms of recreation is to do so on private land.

One might also choose to recreate on private lands to access a truly outstanding and inimitable natural feature. Niagara Falls, for instance, is a wonder of nature to which most Americans would not dream they could have access denied. Although the Niagara River is public property below the falls,[30] the banks of the river were not always public: Niagara Falls State Park was the first state park in the country created by eminent domain.[31] While worries at the time were about overcommercialization rather than access limits,[32] it is possible that riparian landowners could have used their oligopoly to charge excessive entrance fees; also, the properties could have been subdivided, thereby subjecting access to the falls' edge to many landowners' whims, some of whom might be insensitive to the public's desire for access.

While there is much beauty and recreational potential in our public lands, it would be a mistake to ignore the recreational wonders of America's private land. Regrettably, the legislative foresight, financing, and political will that secured Niagara Falls for New Yorkers only manifested itself on a federal level in the last quarter of the 19th century, with the emergence of conservationists such as John Muir, Gifford Pinchot, Stephen Mather, and eventually President Theodore Roosevelt, whose vision, passion, and political prowess produced the beginnings of the U.S. national park and forest systems.[33] Given that it took over 100 years for the federal government to begin retaining public lands for conservation purposes, outstanding recreational features, such as those in Shenandoah National Park, the Columbia River Gorge, and amazingly, Redwood National Park, were granted to the private domain.[34] Demand for recreational access to such lands will likely continue so long as the public continues to find features thereon extraordinary.

III. The Justified Necessity of Compelled Public Access to Private Land

Despite efforts by various jurisdictions to encourage landowners to open their lands to the public for recreational use, success on a national level has been inadequate. A

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supra note 16, at 84-89 (noting: (1) per-capita increases in some types of recreation in some regions, but decreases in others; (2) a slowing rate of federal recreation land acquisition; and (3) trends in some places "translat[ing] into substantial decreases in the per-capita capacity of the American outdoor recreation supply system"). The author points further to overcrowding at Grand Canyon, Yosemite, Yellowstone, and Zion National Parks, to name but a few. *See generally* AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS, Introduction (Larry M. Dilsayer ed., 1994) (describing National Park System challenges, including continued overcrowding).

20. This is so especially in the Northeast. Cordell & Betz, *supra* note 16, at 85 (noting that as of 2000, the South, despite tremendous recent population growth, has kept per-capita recreation supply constant, but the North has not).

21. *Id. See also* Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 148, 179 (1999) (noting that the Bureau of Land Management recorded 72 million visits for recreation in 1990, and that the Forest Service experienced a doubling of recreational use in national forests between the late 1960s and 1990, with almost 300 million visitors that year. The authors also note that increased recreational demand has been stimulated by increased leisure time in the last 50 years and rising discretionary purchasing power.).

22. Cordell & Betz, *supra* note 16, at 85 (noting per-capita decreases in recreation in the Northeast).

23. *See, e.g.*, Laitos & Carr, *supra* note 21, at 220 (describing the need for coordination among all levels of government and among private landowners for ecosystem management with respect to recreation).

24. Streams may or may not be private, *see infra* Section IV.B. For the sake of this example, assume that both the stream and its shores are privately owned.

25. It is easy to imagine places where there is public land nearby, but the only suitable rock climbing faces, bird watching, sledding, wildlife viewing/hunting, and so forth exists on private land.

26. PATRICIA E. SALKIN ET AL., PRIVATE LANDS, PUBLIC BENEFITS: A POLICY SUMMIT ON WORKING LANDS CONSERVATION 5 (2001), *available at* http://www.nga.org/cda/files/LANDSPRIV.pdf (last visited Mar. 5, 2005).

27. PRESIDENT'S COMMISSION ON AMERICANS OUTDOORS, *supra* note 18, at 147.

28. *See* Laitos & Carr, *supra* note 21, at 148-49 (1999).

29. *See, e.g.*, Homestead Act of 1862, 43 U.S.C. §§161 et seq. (repealed 1976) (authorizing homesteading of 160-acre plots of land subject to preemption, even if the land was unsurveyed). *See generally* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 73-102 (5th ed. 2002).

30. *See* Sawczyk v. U.S. Coast Guard, 499 F. Supp. 1034, 1039 (1980).

31. *See* S. REP. NO. 107-179 (2001).

32. *See* ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 5-9 (3d ed. 1997) (describing European condemnation of the commercialization of Niagara Falls as an embarrassment to the nation).

33. COGGINS ET AL., *supra* note 29, at 105-06 and 112-18.

34. See PRESIDENT'S COMMISSION ON AMERICANS OUTDOORS, *supra* note 18, at 133, for a discussion of backlogged federal programs to purchase private land for national parks, forests, and wildlife refuges, especially in the East and South. *See also* Land and Water Conservation Fund, 16 U.S.C. §§460*l*-4 to 460*l*-11 (1963) (enabling federal agencies to purchase land and interests in land for creation of new, and enlargement of existing recreation areas); Columbia River Gorge National Scenic Area Act, 16 U.S.C. §544 (1986) (authorizing federal buy-back of areas of scenic wonder in the Columbia River Gorge); Redwood National Park Organic Act, 16 U.S.C. §§79 et seq. (1968) (establishing Redwood National Park through a series of buy-backs and authorizations for future land acquisitions).

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1995-1996 nationwide survey conducted by the U.S. Department of Agriculture (USDA) on rural landowners' attitudes to recreation on private land found that approximately 85% of landowners disapproved of open public recreational use of their land, although 50% allowed access to people they knew.[35] The trend is toward further limits on public access.[36] Surveyed landowners cited destruction of property, littering, poaching, liability, and disruption of privacy as reasons they were reluctant to allow the general public access to their lands.[37] On Maui other problems frustrate landowners, such as overcrowding and related parking and privacy issues, resource degradation, and a lessening of the serenity of places that were in large part people-free before being "revealed."[38] Given the tendency to publicize these problems when they occur, it is understandable that landowners are often reluctant to allow public access to their land. This reluctance and resulting drop in supply of private land available for recreation, in combination with ever-*increasing* recreation demand,[39] spotlights the need for legal and political answers to this public welfare policy problem.

While there are ways to encourage and increase privileged public access to private recreational resources by ameliorating landowners' fears and objections,[40] this Article instead explores potential public rights of access to the vast class of private, recreation-suitable land that is closed to the public. This notion of coercively secured public access to private land goes strongly against the right to exclude, and a great many Americans would question the justifiability of government regulations or judicial rulings that forced them to allow strangers onto to their land. But in some situations, when privileged access is denied, a public right of access is nonetheless justified. This section describes seven legal and moral justifications for securing such a right, at least one of which should be the foundation of any inquiry into recreational rights of access. As a list, the seven legal and moral justifications are: (1) special or unique recreational characteristics; (2) customary use; (3) held in trust for the people; (4) background principles of property law; (5) utilitarian standpoint; (6) vindicate heritage; and (7) government purchase. It must be stressed that access must always be justified before any of the five legal theories of access presented later in this Article can be used—the legal theories should not be employed simply for their amenability to facts of a case. One who attempts to unlock access to private land with an unjustifiable, yet factually fitting key of a legal theory may unhappily find that the door to access unlocks, but the judge nonetheless blocks passage because it is unjustifiable.

To explore the moral and legal principles that arguably justify access to private lands and undergird the theories of access presented in the following section, each principle will be discussed against the backdrop of two different recreational resources: Blue Pool[41] and a picnic spot on the front yard of the landowner who lives next to it. Most readers will find forced public access to the latter site to be outrageous, whereas access to the swimming hole will be somewhat less egregious—perhaps even desirable. The following seven principles explore and explain the intuition that access to the swimming hole is justifiable, whereas access to the picnic site is not. The legal theories that advance each justification are mentioned as well and will be discussed in greater detail in Section IV.

First, lands that have *special or unique recreational characteristics* should accordingly be used for public recreation. Swimming holes are clearly specially suited for recreation and, depending on their location, may be unique to the area; yards are too ubiquitous to qualify for this justification. As advanced above, private land may harbor an area's only recreational resources of a certain type, presenting a potential "holdout" problem if all landowners who own that resource decline to provide public access.[42] Failing a negotiated settlement, the government could solve the problem by compensating the landowner and purchasing a recreational easement or by condemning the recreational resource outright. These purchases and condemnations to provide needed recreational resources are well within state police power to provide for the public welfare, especially given the historical use of the power to disassemble monopolies over resources.[43]

Second, there may be a *customary use* of the recreational asset. While the customary use of swimming holes may exist, there is unlikely to be a public customary use of front yards for picnics. When members of the public have used a recreational resource for a period of years, in some jurisdictions they may have secured a right of access to it. As discussed above, public rights of access cut against private property rights; accordingly, it has been argued that the notion of using customs to define and vindicate property rights contravenes the primarily positivist nature of American jurisprudence.[44] The doctrine of custom has also been challenged because: (1) feudalism, the land tenure system under which the doctrine developed, never existed in the United States; (2) the United States has always had a property-inter-

35. *See* Teasley et al., *supra* note 12, at 214.

36. *Id.* at 214-15.

37. *Id.* at 214 & 216. *See also* Amy M. Cardwell, *The Hawaii Recreational Use Statute: A Practical Guide to Landowner Liability*, 22 U. Haw. L. Rev. 237, 248 (2000) (describing reasons why landowners in Hawaii often choose to deny access to their lands to the recreating public).

38. *See* Hurley, *supra* note 4.

39. *See* various cites *supra* note 13.

40. Illinois and Vermont have set forth public policies encouraging partnerships between government and private landowners that give incentives to private landowners who continue to give the public the privilege of access to their lands for recreation purposes. *See* Illinois Parks & Recreation, *Pilot Program Provides Recreation on Private Lands* (1995), *at* http://www.lib.niu.edu/ipo/1995/ip950558.html (last visited Mar. 30, 2006); Vermont Agency of Natural Resources, *supra* note 16. On Maui, an enterprising landowner recently began charging a $5 parking fee to hikers seeking entry to the "Swinging Bridges" trail and swimming holes. Tourist fees are slightly higher. There, the landowner is encouraged to allow the public privileged access to his resource because it is a means by which to make money off of his land. *See* Teasley et al., *supra* note 12, at 215 (noting the rareness of this setup). In contrast to this payment model of incentivization, owners of once-hidden and now tourist-inundated Twin Falls allow everyone free access, but operate a very successful fruit stand at the trailhead where they sell the fruit they grow on the property. Landowners who reap material gain from allowing access are more likely to do it.

41. See *supra* Section I, for a description of this resource.

42. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711, 755-57 (1986) for a full discussion of the "holdout problem."

43. *Id.* at 771-72. *See also* Kelo v. City of New London, 125 S. Ct. 2655, 35 ELR 20134 (2005), and discussion at *infra* note 170.

44. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1450-51 (1996). *See also* Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 Cornell L. Rev. 183, 202 (1993).

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est recording system that renders unrecorded customs superfluous; and (3) customs cannot be released and thus violate the Rule Against Perpetuities.[45] The most fundamental of these criticisms—the positivist critique—can be responded to by citing William Blackstone. In his *Commentaries on the Laws of England*, Blackstone sets forth several conditions for the recognition of customs, conditions intended in large part to protect property owners from the assertion of "inappropriate" customs.[46] Once a court finds that a custom comports with Blackstone's conditions, the custom is sanctioned by the court and as such is incorporated into the positivist common law.[47] Further, statutory law—the ultimate expression of positivism—can override judicially sanctioned customs if they are deemed inappropriate by the legislature. This serves as a check on the doctrine and on charges of "judicial activism." Last, customary law can, in most cases,[48] be seen as the ultimate in local-level "legislation": it provides a means for local flexibility in response to laws made in distant courtrooms and capitals.[49] In short, in spite of the positivist critique, custom remains an appropriate basis for law. The other critiques are similarly flawed, but have not all received extensive scholarly treatment.[50] The benefits of the doctrine are less controversial: utilitarian "best use" of land,[51] flexibility in light of statutory and common laws, and vindication of reliance. The doctrine of custom, as well as the doctrine of public prescriptive easements, discussed in Section IV, exist in part to vindicate traditions of access to private lands.

Third, river and tidal lands can be *held in trust for the people*. As explained in Section IV, all states hold certain water bodies in trust for the public because of their susceptibility to commerce,[52] or in some cases, to water recreation.[53] Accordingly, across much of America, public land runs in narrow ribbons through private property. The county of Maui has determined that Blue Pool is one such public land enclave[54]; the nearby yard, conversely, is inapposite to the public trust doctrine. This unique ribbon pattern of public land finds its roots in Roman and English jurisprudence; the doctrine was used to support the right of the king—and in practice, his subjects—to fish, navigate, and conduct commerce.[55] The doctrine was geographically limited by the rights vindicated: it applied only to the rivers and tidal lands on which one could fish, navigate, or conduct commerce. It is possible that the limited extent of these lands necessitated and justified the trust in the first place. This justification may still hold water. According to Prof. Joseph Sax, the trust is modernly based on three principles.[56] First, public ownership of certain resources is unwise because they are important to the public, e.g., the air and the sea, and modernly, recreational resources. Second, because some resources "partake so much of the bounty of nature, rather than of individual enterprise," they should be available to all citizens regardless of economic means, e.g., most recreational pursuits. Third, the government should advance the general public interest instead of redistributing public resources for private gain. Recent controversial expansions of the doctrine will be discussed below in Section IV.C.

Fourth, *background principles of property law may allow regulation of property without compensation because landowners were on notice of potential regulation*. In *Lucas v. South Carolina Coastal Council*,[57] Justice Antonin Scalia announced that even when a property suffers total loss of economic worth due to government regulation, the loss may nonetheless be uncompensable because title was always clouded by state common-law principles, e.g., the doctrines of custom and the public trust.[58] According to this logic, not only do these doctrines vindicate public access to private lands, but they vindicate the government's attempts to *regu-*

45. Bederman, *supra* note 44, at 1398-400 & 1407; John Chipman Gray, The Rule Against Perpetuities 564 (4th ed. 1942).

46. 2 William Blackstone, Commentaries on the Laws of England 22 (1884) [hereinafter Blackstone, Commentaries]. Bederman, *supra* note 44, at 1447. The most protective of the conditions, as discussed below in Section IV.A., include continuity, peacefulness, reasonableness, and certainty of the alleged customs.

47. *See* Loux, *supra* note 44, at 183.

48. The statewide application of the doctrine in *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (Or. 1969), is an example against this argument. *See infra* note 76.

49. *See, e.g.*, Bederman, *supra* note 44, at 1453. *See also* Loux, *supra* note 44, at 218.

50. The notion that feudalism was intrinsic to the development of the doctrine of custom in England, for instance, has been refuted as a historical fiction. *See* Loux, *supra* note 44, at 192. The other critiques have received little scholarly attention, unfortunately, although they have been repeated in several works. This lack of attention is especially curious given the manifest flaws in the critiques. The Rule Against Perpetuities is not a barrier to the imposition of customs because customs are not contingent interests—that is, the imposition of a custom is not contingent on any future event occurring—and it is hornbook law that the Rule Against Perpetuities finds its basis in contingent interests. 61 Am. Jur. 2d *Perpetuities* §81 (2005). Rather, customs are an indirect restraint on alienation. In jurisdictions following the *Restatement of Property* approach, such restraints need not be reasonable, only rational to be valid. Restatement (Third) of Property: Servitudes §3.5 cmt. A (2000). Accordingly, the Rule Against Perpetuities, which has been repeatedly used in criticizing the doctrine of custom, is actually inapposite to it. Finally, critics have repeatedly cited to *Graham v. Walker*, 78 Conn. 130, 133 (1905), for the notion that custom is inappropriate for use in the United States because of its long-standing property recording system. This critique, too, does not hold water. First, the property recording system may not have captured all customs at the time of the institution of the system and, thus, it cannot be seen to supplant the doctrine of custom. *Cf.* State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (Or. 1969). Also, it is arguable that custom should exist alongside a property recording system to the extent that informal rights of access are desirable.

51. *See* Loux, *supra* note 44, at 203.

52. *See* Utah v. United States, 403 U.S. 9 (1971); The Daniel Ball, 77 U.S. 557 (1870).

53. *See* numerous case cites *infra* note 149.

54. *See Guidebook Blamed*, *supra* note 5.

55. Peter Egan, *Applying Public Trust Tests to Congressional Attempts to Close National Park Areas*, 25 B.C. Envtl. Aff. L. Rev. 717, 718 (1998).

56. Joseph L. Sax, Defending the Environment: A Strategy for Citizen Action, 163-64 (1971). For an extensive discussion of the doctrine, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

57. 505 U.S. 1003, 22 ELR 21104 (1992).

58. *Id.* at 1027. Justice Scalia did not specifically mention these doctrines, but other courts have found that such doctrines fall within the "background principles of the State's law of property and nuisance." *See* Stevens v. City of Cannon Beach, 317 Or. 131, 854 P.2d 449, 456, 24 ELR 20913 (Or. 1993) (holding that by custom the public had always held the dry sand beach in fee simple absolute and that the area was never part of the landowner's title; the court used the "background principles" concept in denying plaintiff's takings challenge); Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062, 1073 (Wash. 1987) (holding that the state's shoreline was held in public trust and that any restrictions on use mandated by the public trust doctrine could not be a taking). *See also* Bederman, *supra* note 44, at 1443-45.

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late access to such lands through the modern regulatory administrative state. This theory stands on uncertain grounds. On the one hand, many commentators support the argument; on the other hand, Justice Scalia penned a vigorous dissent to a denial of certiorari the U.S. Supreme Court issued in *Stevens v. City of Cannon Beach*,[59] a case in which the Oregon Supreme Court recognized public access to dry sand areas of beaches but, under the *Lucas* dicta, denied takings claims.[60] Thus, this issue is likely to remain unresolved until the Supreme Court hears a case on point. Applying the *Lucas* principle, the public trust doctrine covers Blue Pool. But since no doctrine covers the yard, the government will have to properly compensate the landowners should it wish to acquire access to it.[61]

Fifth, one might justify public access to a private recreational resource on the principle that *public access facilitates the best and highest use of the land from a utilitarian standpoint*. Using Blue Pool as an example, if only the landowner and her family swim there, the resource is probably not being used to its full potential. Allowing public access to the resource, within limits,[62] maximizes use of the resource and is thus more socially efficient.[63] This is especially true given society's limited supply of recreational resources. Two legal mechanisms advance this justification for access. First, public prescriptive easements are based on the notion that since manifestly valuable use is being made by trespassers, and the landowner has not acted to stop such use, the landowner must not value the land as much as the trespassers do.[64] This is classic utilitarianism. Additionally, if the people believe strongly in utilitarianism, and if it is the sole basis for asserting a right of access and no prescriptive easement claim can be made, then they should work within the system of established property rights and compensate landowners for deprivation of use.[65] Given America's abundant supply of grassy fields and its citizens' preference for privacy, especially near the home, it is unlikely that public access to private yards would be the "best and highest" use of the land or that landowners would allow a prescriptive easement to develop thereon.

Sixth, public access to private recreational land may *vindicate heritage*. It can be argued that Americans should be able to experience their history by hiking, say, the full Appalachian trail, part of which is on private land.[66] Relatedly, native peoples may want to visit sacred or historical sites on private land to vindicate their heritage[67] and connections to the past.[68] If the government agrees, it can purchase a recreational easement or condemn the land. Otherwise, the doctrine of custom can be used if there is a tradition of doing *x* on *y* land and the prima facie case, described below, is met. If the custom was well defined, it may be possible to secure a public prescriptive easement to access to the historical recreational resource. Access to some swimming holes, although probably not Blue Pool, may vindicate a person's heritage in this way; it is unlikely that access to a private yard for a picnic will ever support this justification.

Seventh, access to recreational resources could be justified because of *government purchase of a land interest for public access*. The government has the right to condemn land to provide for the general welfare, which includes providing the public with needed recreation resources.[69] If none of the above justifications exist, yet it is still desirable to secure public recreational access, the government should compensate landowners in full. This ensures that society does not benefit at the expense of a few private landowners. The government can secure recreational access by condemning and paying for either full fee or easement interests.[70] The full-compensation justification is the only one

59. 317 Or. 131, 854 P.2d 449, 24 ELR 20913 (Or. 1993).

60. Bederman, *supra* note 44, at 1445.

61. That said, depending on the scope of the regulatory taking, the yard may be included in the condemnation, and, thus, the public might gain the right to picnic as well as the right to swim. Several courts have encountered this "denominator problem," and its resolution remains unclear. *See*, *e.g.*, Eduardo M. Peñalver, *Regulatory Taxings*, 104 Colum. L. Rev. 2182, 2230 (2004).

62. To fail to include limits to public access would invite the opposite problem of underutilization: the "tragedy of the commons" described by Garrett Hardin in *The Tragedy of the Commons*, 162 Science 1243-48 (1968). Solutions to the tragedy include privatization, advocated by libertarians, and regulation for conservation, advocated by communitarians.

63. See Jeremy Bentham, Introduction to the Principles of Morals and Legislation (1789), for the original and enduring conceptualization of this idea.

64. Stewart E. Sterk, *Neighbors in American Land Law*, 87 Colum. L. Rev. 55, 78 (1987); William G. Akerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 Land & Water L. Rev. 79, 86 (1996).

65. *See*, *e.g.*, Eduardo M. Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 Ecology L.Q. 227, 269 (2004) (describing Frank Michelman's utilitarian theory of takings law, whereby the government ought to either pay "disutility" or "settlement" costs to the landowner, whichever is lower, if they together outweigh "efficiency gains" from the property interest acquired by the government). *But see* Rose, *supra* note 42, at 770 (describing the 19th century recognition of roads as "inherently public property" because they facilitated commerce, and arguing that this category can be applied to other contemporary uses).

66. *See, e.g.*, Kent Anderson, American Land Rights Ass'n, *A Socio-Cultural Assessment of Inholders Along the Appalachian Trail in the State of New Hampshire, at* http://www.landrights.org/OCS/SocioCultural/AppalachianTrailInholders_1.htm (last visited Mar. 30, 2006).

67. This heritage need not be ethnic or religious. The World Heritage Convention contains criteria describing what qualifies as "cultural" and "natural" heritage. United Nations (U.N.) Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151, *available at* http://whc.unesco.org/archive/convention-en.pdf. *See also* U.N. Educational, Scientific, and Cultural Organization, *More About the Convention*, *at* http://whc.unesco.org/ab_conve.htm (last visited Mar. 21, 2006). Australia has, under the World Heritage Convention, identified limited private lands that are World Heritage Sites. *See* David Farrier & Linda Tucker, *Beyond a Walk in the Park: The Impact of International Nature Conservation Law on Private Land in Australia*, 22 Melb. U. L. Rev. 564, 578 (1998).

68. Native Americans have lost access to many sites significant to their cultural/religious worldviews, including losses to private property owners, and would like to secure access to some of these sites. *See, e.g.*, J.Q. Jacobs, *Who Owns the Past, and Who Should?* (1997), *available at* http://www.jqjacobs.net/writing/heritage.html (last visited Mar. 21, 2006). Native Hawaiians, too, have lost access to many traditional hunting and gathering sites, as well as access to sites of cultural and/or religious significance, and greatly desire access to these sites, even when on private land. *See*, *e.g.*, Public Access Shoreline Hawaii by Rothstein v. Hawaii County, 79 Haw. 425, 438-52 (Haw. 1995).

69. *See, e.g.*, Stephen D. Osborne et al., *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 Envtl. L. 399, 409-10 (2003). *See also* Kelo v. City of New London, 125 S. Ct. 2655, 35 ELR 20134 (2005), and discussion at *infra* note 170.

70. The jurisdictions of King County, Washington; New Hampshire; Maryland; and Michigan all have programs to purchase easements for public use. *See* various cites *infra* note 154.

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that works equally well for Blue Pool and the hypothetical front yard picnic site.

Finally, there may be other justifications for compelled public access to private land, such as the necessity for members of the public to cross private lands in order to gain access to public lands that are otherwise inaccessible.[71] These justifications can always be advanced democratically, and without undue concentrated losses on landowners, through government condemnation or purchase.

IV. Legal Mechanisms for Securing a Right of Public Recreational Access to Private Lands

A public right of access to private lands for recreational purposes may be secured by employing one or more of the five legal theories of access below. Successful theory use demands the fulfillment of one or more conditions, and, thus, theory choice is informed both by the factual circumstances of each case as well as by existing access justifications described above. To fully understand each theory, their theoretical justifications, conditional prerequisites for use in court, application in case law, and applicability to Maui's Blue Pool will be discussed.

A. The Doctrine of Custom

The doctrine of custom is appropriately used to secure access to recreational resources when there is evidence of long-standing customary use. Such use of the doctrine can be traced at least as far back as 1876 England.[72] Fulfilling the prima facie case for the doctrine requires that the public use fulfill seven criteria delineated by the eminent English jurist, Blackstone: (1) immemorality; (2) continuousness; (3) peacefulness; (4) reasonableness; (5) certainty; (6) compulsoriness; and (7) consistency.[73] When every criterion is fulfilled, public access to the recreational resource vests from a privilege to a right.

The first criterion of custom is *immemorality*. According to Blackstone, a use is immemorial so long as evidentiary memory does not run to the contrary: "[I]f anyone can shew [sic] the beginning of it, it is no good custom."[74] By the mid-19th century, the burden had shifted, and the party attacking custom had to show that the use was *not* immemorial.[75] In the seminal decision of *State ex rel. Thornton v. Hay*,[76] the Oregon Supreme Court found that by the doctrine of custom, Oregonians had a right to access the dry sand areas of the Oregon beach. The *Thornton* court addressed the immemorality criterion—"ancient use" in the court's parlance—by equating it with "long and general" use.[77] The court found such use in that case because the public had recreated on Oregon beaches since the beginning of the state's land tenure system.[78] Similarly, ponds like Blue Pool have certainly been used for generations in Hawaii for swimming and bathing by native Hawaiians, and later, local residents. It may be difficult for landowners to prove that Blue Pool and other American recreational resources did not withstand "long and general" use by the public, but the original criterion may be even harder to meet.

The second criterion identified by Blackstone is *continuity* of the right of use.[79] In Blackstone's era, it seems that continuity was often conflated with immemorality of use.[80] The *Thornton* court interpreted this criterion to mean that the right was not interrupted by anyone possessing a paramount right.[81] While this means that the resource need not be used daily, monthly, or even yearly by the theory's asserter, the outer limits of non-use have not been litigated. In the context of Blue Pool, a litigant may or may not be able to meet this criterion depending on the time of suit. If the landowner closed access to the pool by posting no trespassing signs at some point prior to litigation, the right of use was not continuous. But if access to the pond had only recently been closed and the doctrine was being asserted as a defense to such closure, it could be argued that the right of access was continuous *before* the closure. This is arguably the theory advanced in *Thornton*, where the right of access was interrupted by the coastal landowner who had attempted to terminate the public's right of access.

Third, the use must be *peaceful*. This criterion seems often overlooked by both the courts and Blackstone himself.[82] Blackstone's treatise defines such use as "peaceable and acquiesced in, not subject to contention and dispute."[83] The *Thornton* court easily disposed of this criterion by noting the long-standing, peaceful use of the beach.[84] If suit were brought soon after the first landowner complains about public access, and it could be proved that previous landowners had acceded to the access, then this criterion could be met. Courts may employ a rebuttable presumption of peacefulness, as recreation typically is a peaceful pursuit, and landowners may have difficulty rebutting this sort of peaceful

71. *See, e.g.*, Cordell & Betz, *supra* note 16, at 80.

72. Hall v. Nottingham, 33 L.T.R. 697 (Ex. D. 1876) (noting, in unanimously upholding a petition to recognize public recreational use of private property:

> We are dealing, it must be remembered[,] with a matter affecting an individual owner of a small piece of land on the one hand, and the rights and privileges of all the inhabitants of an entire parish on the other; and it is so much for the physical and moral benefit and advantage of those inhabitants that they should have rational and healthful recreation, and that they should have a piece of ground on which they may be able to indulge in the exercise of all lawful sports, games, and pastimes, that I think the benefit and advantage accruing to them from the right claimed outweigh the injury and disadvantage arising therefrom to the owner of the land.)

73. *See* 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, 687 (2003); Blackstone, Commentaries, *supra* note 46.

74. *See* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?* (Sept. 30, 1999), available from Westlaw, SE18 ALI-ABA 699, 707.

75. *Id*. at 708.

76. 254 Or. 584, 462 P.2d 671 (Or. 1969). Several commentators have criticized cases like *Thornton* because they see importance in adhering to Blackstone's criteria in their original form, as in this view, property rights are best protected. *See, e.g.*, Bederman, *supra* note 44, at 1447-50. Other commentators laud the "modification" of the doctrine to current circumstances, e.g., the criterion of that the customary use be compulsory. *See, e.g.*, Callies, *supra* note 74, at 707.

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

78. *Id.*

79. *See generally* Callies, *supra* note 74, at 708.

80. *Id*.

81. *See Thornton*, 254 Or. at 596.

82. Callies, *supra* note 74, at 710.

83. Blackstone, Commentaries, *supra* note 46.

84. *See Thornton*, 254 Or. at 596.

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use. Not surprisingly, use of Blue Pool seems as peaceful as use of Hawaii's beaches.

Fourth, the customary use must be *reasonable*. It appears that the first custom to fail this test was litigated in *Miles v. Benet*,[85] where the custom was for the manorial lord to be the first to put his livestock out to pasture. Recreational customs are ordinarily more reasonable. Recreational use of a resource may be defined as reasonable if it does not unduly infringe on the privacy rights of landowners or degrade the resource. Most recreational uses qualify under this definition, although "reasonable" may be defined differently in different jurisdictions. For instance, a jurisdiction may define a custom as unreasonable if it reduces a landowner's enjoyment of her land. However, many intrusions on a landowner's enjoyment of land are routinely deemed reasonable.[86] An intrusion on enjoyment does not automatically win a landowner a victory under the theory of private nuisance, for instance, because the activity causing the intrusion could be deemed reasonable.[87] Accordingly, this definition of reasonableness could be looked at as an application of the notion that recreational uses must be *practiced* in a reasonable manner. Courts might thus note that if a custom is used too intensely, it might be unreasonable as applied even though the custom is not per se unreasonable. In *Botton v. State*,[88] for example, recreational use of a lake was permitted, but there were problems with vandalism of nearby properties. The Supreme Court of Washington required the state to issue use permits in such a way as to encourage individuals to use the resource reasonably.[89] The *Thornton* court dismissed the criterion more easily, and found that because the dry sand area of the beach was easily defined and confined, use of it fulfilled the reasonableness criterion.[90] It is likely that the customary uses of Blue Pool and its environs for swimming and hiking are reasonable classes of recreational use. To buttress this claim, claimants can point to the Hawaii Water Code, which describes recreational and scenic uses of water as "beneficial."[91]

Blackstone's fifth custom criterion is that the use be *certain*. This criterion has also been given lax treatment by American courts.[92] Regardless, the criterion can be broken into three components: (1) certainty of custom practice; (2) certainty of custom locale; and (3) certainty of persons benefitting from the custom.[93] First, practice of the custom, be it of hiking, swimming, or hunting, must be certain to have existed according to the terms of the other criteria. This may be proved with anecdotal evidence of past use, evidence of worn trails, dated photos picturing past use, and so forth. Such proof certainly exists in regard to Blue Pool. Second, the locale of the custom must be certain. Historically, the doctrine was limited to recognizing customs on individual pieces of land within a local community,[94] but with the *Thornton* court's brief treatment of certainty of use, recognized customs were expanded to include areas of the Oregon coast where use was far from certain.[95] In the majority of cases where small and well-defined recreational resources such as Blue Pool's swimming holes are at issue, this subcriterion should be easy to fulfill. Third, the identity of the persons benefitting from the custom must be certain. Again, the tradition of a constrained definition of a benefitted class, where "courts [would] not uphold a claim on behalf of a class whose membership cannot be ascertained,"[96] has been expanded by *Thornton*, which defined the benefitted class as the large, but definable Oregon public.[97] Depending on the level of specificity demanded by the court, this last facet of the certainty criterion could be difficult to satisfy.

The sixth Blackstonian criterion is that the custom be *compulsory*.[98] This criterion is appropriate when the doctrine is used as a defense against malfeasance, where failure to practice the custom is a but-for cause of an injury. This is illustrated by the 1690 case of *Pain v. Patrick*,[99] where the alleged custom was upkeep of a bridge's right-of-way. If the custom were not compulsory, it would not make sense to use it as cause of action against those who allegedly were charged with the bridge's upkeep. The criterion makes less sense in the context of recreation on private land, and illustrates the antiquity of the doctrine. Should judges find no custom in cases where recreational users were not obliged to such use? The answer, at least in some modern cases, appears to be no. In *Thornton*, the question of compulsory use was recharacterized; rather, *landowners* were obliged to recognize the public's right of access.[100] Thus, in *Thornton*, the criterion was turned on its head,[101] and in other cases, it is ignored or conflated with other criteria.[102] How judges interpret this criterion in a novel modern context is highly uncertain.

Last, Blackstone noted that customs must be *consistent* with one another. This is another criterion that is largely

85. Y.B. 2 Hen. 4, fol. 24, Trin., pl. 20 (1401). *See also* Callies, *supra* note 74, at 712.

86. Neighbors' use of leaf-blowers and lawnmowers routinely reduce landowners' enjoyment of their property, for example, but nobody seriously questions the reasonableness of these activities.

87. 9 Powell on Real Property §64.02(3)(a) (2006) (noting that unreasonableness is measured by balancing the utility of the defendant's conduct against the gravity of the harm the conduct puts on the plaintiff). How any given court or jury will weigh utility of recreation against harm caused thereby to determine reasonableness is a fact- and jurisdiction-specific question.

88. 69 Wash. 2d 751, 420 P.2d 352 (Wash. 1967). *See also* Callies, *supra* note 74, at 715 (describing unreasonable exercises of a lawful custom).

89. *Botton*, 420 P.2d at 356. Similar limits could be put on lawnmower use, see *supra* note 86, or more relevant to this Article, recreational use of private property.

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

91. *See* Douglas W. MacDougal, *Private Hopes and Public Values in the "Reasonable Beneficial Use" of Hawaii's Water: Is Balance Possible?*, 18 U. Haw. L. Rev. 1, 49 n.232 (1996).

92. Callies, *supra* note 74, at 716. Also ignored is the requirement that those benefitting from the custom live in the locale where the custom is exercised. *Compare* Callies, *supra* note 74, at 719 (noting that "to avail oneself of a customary right, one must both live in the district in which the custom is alleged, and practice the customary right in that same district"), *with Thornton*, 254 Or. at 596 (extending a right of access to dry sand areas of Oregon beaches to the public, with no realistic limits on access to non-residents of Oregon).

93. Callies, *supra* note 74, at 716.

94. Laura C. Harris, Public Access Shoreline Hawaii v. Hawaii County Planning Commission: *Expanding Hawaii's Doctrine of Custom*, 3 Ocean & Coastal L.J. 293, 294 n.7 (1997).

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

96. Callies, *supra* note 74, at 706 n.17.

97. *Thornton*, 254 Or. at 597.

98. Callies, *supra* note 74, at 722.

99. 87 Eng. Rep. 191 (1690). *See also* Callies, *supra* note 74, at 722.

100. *Thornton*, 596 Or. at 597.

101. *Id.*

102. Callies, *supra* note 74, at 722.

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self-evident and often conflated with others.[103] Obviously, the court cannot sanction two customs that are contradictory, and Blackstone provides little guidance on what to do if such a clash occurs.[104] Customs that conflict with public recreational access to private land seem unlikely in most cases, e.g., Blue Pool and *Thornton*. It can be argued that customs of public access conflict with the American common-law custom of exclusion from private property; in such case, given the weight of judicial decisions favoring the right to exclude, the latter should override the former. The condition that all sanctioned customary uses must be peaceful, i.e., no conflict stemmed over exclusion, prior to a lawsuit on the custom, however, makes conflicts with the custom of exclusion unlikely. The custom of exclusion need not inhibit customs of access.

It seems, in sum, that the doctrine of custom holds promise for securing a public right of access to private recreational resources. The doctrine is not applicable in cases where the resource was not peacefully accessed prior to suit, and there are questions about how to apply the ancient doctrine to modern contexts vis-à-vis the compulsory and consistency criteria. Additionally, courts may take issue with the reasonableness of recreation customs, which is a fact-specific inquiry. While the doctrine has received recent attention, for most of American legal history it was widely disregarded.[105] The doctrine is therefore largely undeveloped in American jurisprudence and in most jurisdictions cases will involve novel questions of law.[106] Still, the common law recognizes, and justifications exist, for the proposition that customary rights in certain cases ought to be vindicated.[107] This includes the right of the public to access recreational resources on private lands.

B. Public Prescriptive Easements

The doctrine of prescriptive easements is premised on the theory that "if one makes non-permissive use of another's land, and the landowner fails to prevent such use, such acquiescence is conclusive evidence that the use[ ] is rightful."[108] At base, the theory rests on the utilitarian assumption that since plainly valuable use is made by trespassers (or else they would not do it), and the landowner has not acted to enjoin such use despite knowledge of it, she must value the property less than the trespassers.[109] She has sat on her rights. That non-permissive, open, and notorious use is required for a prescriptive easement differentiates the doctrine from its antecedent, the doctrine of custom.[110] Whereas custom vindicates utility in the form of encouraging "peaceful" communitarian use of customarily used resources, prescriptive easements vindicate utility in the form of assigning rights to the highest valued opposing use.[111] The doctrines' scopes also distinguish them from one another: prescriptive easements must be confined to the land in controversy, whereas customs are not bound by this limitation, thereby avoiding tract-by-tract litigation.[112] Otherwise, given their common origin, the doctrines are similar. Accordingly, theory choice will be informed more by facts than by theoretical justifications.

Prescriptive easements can be held both by private entities and the public.[113] Public prescriptive easements may pose special problems because it is often unclear in which entity title to the servitude is vested; consequently, in many jurisdictions it is unclear who is to maintain the easement and who is liable in case of negligence.[114] Notwithstanding this difference, there are three conditions that one must meet to establish a prescriptive easement: (1) open and notorious; (2) adverse and hostile; and (3) continuous and uninterrupted. Claimants have the burden of proof regardless of whether the theory is used offensively or defensively.[115]

Essential to the rationale of the doctrine of prescriptive easements is that the use be *open and notorious* such that a reasonable landowner would be put on notice.[116] This usually means that the use cannot have been concealed, and the doctrine assumes constructive knowledge when "use by the public has been so frequent, widespread, and common that a reasonable property owner would have been aware of it."[117] If the landowner was not reasonably aware of the use, use of the theory is no longer justifiable. In the context of Blue Pool, given the quantum of use,[118] its open and notorious use is manifest. In regard to other recreational resources, easement maintenance, e.g., trails, community knowledge, publication of location (either in print or on the Internet), and such can provide evidence of open and notorious use.[119]

Second, use must be *adverse and hostile* to the landowner's property interest.[120] Use is "adverse" if it is an in-

103. *Id.* at 723.

104. *Id.*

105. *Id.* at 703-04.

106. Notably, the doctrine has been embraced to differing extents in Hawaii, Oregon, Texas, and the U.S. Virgin Islands, and has been rejected in New England. Bederman, *supra* note 44, at 1408. Treatment of the doctrine in Hawaii is covered in depth in Harris, *supra* note 94. Hawaii has among the broadest interpretations of the law of custom, given its unique historic roots. *See generally* Harris, *supra* note 94, at 297-98.

107. Callies, *supra* note 74, at 705-06.

108. William G. Akerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 Land & Water L. Rev. 79, 86 (1996).

109. Stewart E. Sterk, *Neighbors in American Land Law*, 87 Colum. L. Rev. 55, 78 (1987); *see* Akerman & Johnson, *supra* note 108, at 86.

110. *See* Akerman & Johnson, *supra* note 108, at 81-83. As explained in Section IV.A., *supra*, in most jurisdictions there is no requirement that one make non-permissive, open, or notorious use to mount a successful claim of custom. This is an important distinction between the two doctrines.

111. *See* Sterk, *supra* note 109, at 78-79.

112. State ex rel. Thornton v. Hay, 254 Or. 584, 595, 462 P.2d 671 (Or. 1969). Indeed, this was a primary reason the Oregon court chose the theory of custom. *Id.*

113. 2 Am. Jur. Proof of Facts 3d 197, §2 (2004) [hereinafter Am. Jur. POF].

114. *See* Stewart E. Sterk, *Publicly Held Servitudes in the New Restatement*, 27 Conn. L. Rev. 157, 159-62 (1994). Note that in the case of landowner liability for an easement, most states have limits on liability for recreational use of private land, as discussed in Section VI, *infra*.

115. Am. Jur. POF, *supra* note 113, §3.

116. *Id.* §5.

117. SE Penn. Transp. Auth. v. Penn. Pub. Util. Comm'n, 95 Pa. Cmmw. 341, 505 A.2d 1046 (Pa. Commw. Ct. 1986).

118. *See* Hurley, *supra* note 4.

119. Am. Jur. POF, *supra* note 113, §5.

120. In some courts, this requirement includes the notion of "exclusivity," sometimes applied as part of the prescriptive easement test. Because the use is hostile to the landowner's, it is presumed "exclusive" of the landowner's. Am. Jur. POF, *supra* note 113, §2.

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fringement on the landowner's rights such that she has a cause of action against the intruder.[121] If the user has acknowledged the superior rights of the landowner, the use may lose its "adverse" nature.[122] Given the common-law cause of action of trespass, it is ordinarily assumed that public use of private land is adverse to landowners' interests. However, in the case of vacant, unimproved, or unfenced land, this presumption of adverse use breaks down in some jurisdictions.[123] In Hawaii, a person who enters on "unimproved and apparently unused" land that is neither fenced nor otherwise enclosed does so "with license and privilege" unless notice against trespass has been communicated directly by the landowner or indirectly through conspicuous posting.[124] On qualifying land, public recreational access is thus legally sanctioned and no trespass action can follow; accordingly, the public loses its right to a prescriptive easement because the use is no longer legally "adverse." Since the owner of the private dirt road that provides access to Blue Pool has so far acquiesced to its use, the use is not adverse. Accordingly, a prescriptive easement cannot be found on the access road.[125]

Last, the use must be *continuous and uninterrupted* for the statutory period established by state statute. Uses are "continuous" when they are exercised by the public whenever the public so desires.[126] Accordingly, recreational use of the resource can be intermittent and yet "continuous" so long as use is available when needed.[127] Proof of easement maintenance,[128] photos, publication, or testimony from community members about the duration and continual availability of access[129] is often enough to satisfy this condition.[130] Relatedly, the condition that the use must be "uninterrupted" ensures that if the landowner has previously tried to stop use of the resource, the value he puts in his land (as demonstrated by his enforcement efforts) will be recognized by enjoining the creation of an easement. Proof that use of the easement was unimpeded during the statutory period ordinarily satisfies this criterion.[131] Assuming, arguendo, that access to Blue Pool is adverse, if access has not been blocked during the Hawaii statutory period of 20 years,[132] these twin criteria can be met.

Prescriptive easements are a legal mechanism that can be used to secure public access when landowners do not want the public on their land but yet refuse to invest effort in affirmatively blocking[133] continuous uses of their property. In most other cases, the exclusion-loving landowner is well-protected. First, all qualifying uses must be "open and notorious" and, thus, landowners will not lose their land without being on notice of the trespassers. Second, if landowners interrupt the use, the statutory period resets.[134] Third, even if an easement is found, the easement's impacts must be reasonable.[135] Finally, there are a variety of defenses, including permissive use, insanity, control over both dominant and servient estates, government ownership, and so forth that could be applicable.[136]

C. The Public Trust Doctrine

The public trust doctrine is an ancient doctrine that originally vindicated the historically essential rights of the public to fish, navigate, and conduct commerce on tidally influenced water bodies, even when title to the bottom is technically private.[137] As applied in the United States, each state retains sovereign supervisory control over trust land to facilitate beneficial management of public trust resources.[138]

Modernly, while every state has recognized the doctrine, application differs in two important respects: (1) which water bodies fall within the ambit of different states' trusts; and (2) which uses the states' trusts protect. As will be shown, even if a water body is held in trust, not all states will vindicate a right to use it recreationally. On the other hand, some states that protect recreational uses of trust land protect more than water uses such as swimming and canoeing, and go so far as to protect non-water uses such as sunbathing, nature appreciation, and hiking.[139]

The threshold question in any public trust inquiry is whether the water body in question falls within the ambit of the trust. As early American courts began to take note of large American rivers that were not subject to the ebb and flow of the tide as were most English rivers,[140] "navigability" became the touchstone of the public trust test,[141] al-

121. Am. Jur. POF, *supra* note 113, §6. Note that physical injury to the property is not necessary, as some causes of action, e.g., trespass, require no such injury.

122. *Id. See, e.g.*, Kessinger v. Matulevich, 925 P.2d 864 (Mont. 1996) (holding that a neighbor's use of a road for recreational purposes was by its nature not "adverse"). *But see generally* Am. Jur. POF, *supra* note 113, for numerous examples where the court recognized "adverse" recreational uses and found easements.

123. Am. Jur. POF, *supra* note 113, §3.

124. Haw. Rev. Stat. §708-800 (1993) (Hawaii Penal Code). In practice, this constriction of the doctrine of trespass does not cover many recreational resources in Hawaii on private land; anecdotal evidence suggests that land in Hawaii is often well signed against trespassers.

125. Conceivably, an action may lie for an easement by estoppel. This action would be appropriate in cases where the claimant can prove reliance on the license for access. Such a double-edged sword is unlikely to cut the landowner who kindly gives permissive access if such permission is not unduly open ended.

126. Am. Jur. POF, *supra* note 113, §7.

127. *Id.*

128. *Id.*

129. *See, e.g.*, Application of Ashford, 50 Haw. 314, 440 P.2d 76 (Haw. 1968) (noting that kama'aina [local] witnesses may testify to the location of seashore boundaries dividing private and public land).

130. Am. Jur. POF, *supra* note 113, §7.

131. *Id.*

132. *See* Haw. Rev. Stat. §669-1(b) (2005) (describing the adverse possession prescriptive period). In Hawaii, the elements to establish a prescriptive easement are the same as those necessary to acquire title by adverse possession, including the prescriptive period. Ryan v. Tanabe Corp., 97 Haw. 305, 311 (Haw. 1999).

133. Landowners can interrupt use through physical barriers, verbal warnings, calling law enforcement, and so on.

134. Am. Jur. POF, *supra* note 113, §8. The prescriptive period does not begin to run until all elements are present. *Id.*

135. *Id.* §10.5.

136. *Id.* §11.

137. *See, e.g.*, Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 52 (Mont. 1984) (noting that "streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people").

138. *See*, *e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 261 (Cal. 1971); Golden Feather Community Ass'n v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 1283-84 (Cal. Ct. App. 1989).

139. *See, e.g.*, Matthews v. Bay Head Ass'n, 91 N.J. 559 (N.J. 1982); *Marks*, 6 Cal. 3d at 259.

140. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 436 (1892).

141. *Compare* The Steamboat Thomas Jefferson, 23 U.S. 428 (1825) (holding that admiralty "navigable waters" meant the sea or waters subject to the ebb and flow of the tide, the so-called English Naviga-

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though non-navigable tidelands were left within the ambit of the doctrine despite their non-navigability.[142] The federal and state governments share concurrent jurisdiction over what measure of "navigability" is required for the water body to be held in trust; the relatively narrow federal test may be augmented by broader state tests if the state desires to expand the reach of the trust.[143]

The federal test is rooted in the traditional view that the trust vindicates fishing, navigation, and commerce.[144] Accordingly, it requires that a water body be "navigable," meaning that it (1) was used or susceptible for being used (2) in its ordinary condition at the time of statehood (3) for "highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[145] Alternatively, parcels subject to the ebb and flow of the tide may be included within the federal definition of the trust.[146] Blue Pool likely does not meet the federal navigability test in the first respect because when Hawaii became a state in 1959, the pond, sandwiched between the rocky shoreline and a 30-foot waterfall, probably could not have been defined as a "highway of commerce." It is arguable that tourist visitation, a form of commerce, may have occurred in 1959, or that the pond was susceptible to such use in 1959; it is unknown if the courts would recognize this argument.[147] Proof problems regarding extent of use, water height, and so forth complicate the issue. Nonetheless, the pond's location on the coast apparently makes it subject to the ebb and flow of the tide, according to the county of Maui; accordingly, Blue Pool is held in trust by the state.[148] It is important to note that the access road to the pool is *not* similarly held in trust, and, thus, this doctrine fails to provide any meaningful contribution to the legal status of recreational access to the swimming hole.

Even if a water body does not qualify for the public trust under the federal test, it may qualify under the applicable state test. In many states, the "navigation" test has been expanded beyond the traditional trust triad to include the right to recreate.[149] In the second half of the 20th century, state courts began to adopt the view that recreation should be recognized in their navigation tests, which were often crafted a century earlier, when waterborne recreation was not common.[150] One Arkansas court went so far as to say that "our definition of navigability . . . is a relic of the steamboat era."[151] While the states have crafted divergent navigability tests, many of these "new" tests seem to have one common characteristic: recognition of recreation by floatation, which makes sense given the "navigation" label that is universally applied to the test.

Once it is determined that a water body falls under the public trust doctrine, the nature and scope of the state trust obligation must be ascertained. Usually, the nature and scope of a state's trust duties are coextensive with the trust uses it chooses to recognize, unless there is a specific statement by the state otherwise. As the ultimate statement of this duty, the California Supreme Court recognized that "the public uses to which [trust lands] are subject are sufficiently flexible to encompass changing public needs. . . . [T]he legislature, acting within the scope of its duties as trustee . . . determine[s] wither [sic] public trust uses should be modified or extinguished."[152] Accordingly, a private landowner cannot enjoin a judicially recognized "chang[ed] use" unless the state legislature has specifically abrogated that use. If a state recognizes, for instance, canoeing as a trust use, in most states no private landowner could stop public canoeing on the thin ribbon of trust land, absent a state abrogation of that use. This assumes, of course, that the recreationist can access the trust land without trespassing, as the theory makes no provision for access across non-trust land to reach trust land. Almost all uses of Blue Pool seem protected, if one can get there legally, as the scope of the trust in Hawaii is perhaps the largest in the nation, backed by a constitutional statement of the doctrine.[153]

D. Government- and Nongovernmental Organization-Purchased Easements

Many jurisdictions have developed schemes whereby taxpayer money is spent (or not collected) as consideration to landowners who agree to open their land for public recreational use. Through these statutory schemes, the government is authorized to acquire recreational easements in re-

bility Test) *with* The Daniel Ball, 77 U.S. 557 (1870) (establishing the modern navigability test).

142. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 18 ELR 20483 (1988) (noting that all tidelands passed to the state upon its entry to the Union).

143. *See* Joseph L. Sax et al., Legal Control of Water Resources: Cases and Materials 494-514 (2000).

144. *The Daniel Ball*, 77 U.S. at 563. *See also* Utah v. United States, 403 U.S. 9, 11 (1971) (noting that "the lake served as a highway and it is that [which] distinguishes between navigability and non-navigability").

145. *The Daniel Ball*, 77 U.S. at 563. *See also* Shively v. Bowlby, 152 U.S. 1, 26-28 (1892).

146. *See, e.g.*, *Phillips Petroleum Co.*, 484 U.S. at 799-800.

147. *Cf.* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 652 (1986).

148. *See Guidebook Blamed, supra* note 5.

149. *See, e.g.*, Arkansas v. McIlroy, 268 Ark. 227 (Ark. 1980) (finding that the Mulberry River was held in trust because of its recreational, and thus commercial, values, despite being navigable by canoe during only part of the year); Elder v. Delcour, 364 Mo. 835 (Mo. 1954); Muench v. Pub. Serv. Comm'n, 261 Wis. 492 (Wis. 1952); Luscher v. Reynolds, 153 Or. 625, 56 P.2d 1158 (Or. 1936); Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (Minn. 1893); Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 6 ELR 20363 (Cal. Ct. App. 1976); People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Kelly ex rel. MacMullen v. Hallden, 51 Mich. App. 176 (Mich. Ct. App. 1974) (including recreation by oar and motor boats in the navigation test); State ex rel. Brown v. Newport Concrete Co., 44 Ohio App. 2d 121, 127 (Ohio Ct. App. 1975) (noting: "Ohio holds these waters in trust for those Ohioans who wish to use the stream for all legitimate uses, be they commercial, transportational, or recreational."); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). *But cf.* Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 678 N.E.2d 201 (N.Y. 1997) (refusing to extend the public trust to the right to fish).

150. *See, e.g.*, *McIlroy*, 268 Ark. at 227.

151. *Id.* at 236.

152. Marks v. Whitney, 6 Cal. 3d 251, 260-61 (Cal. 1971). *See also* In re Water Use Permit Applications, 94 Haw. 97, 130-31 (Haw. 2000) (recognizing a similar control over the public trust in the Hawaii Legislature).

153. *See In re Water Use Permit*, 94 Haw. at 135 (noting in dicta that

> [w]hatever practices the ancients may have observed in their time, therefore, we must conclude that the reserved trust encompasses *any* usage developed in ours, including the "ground water" uses proposed by the parties in the instant case. The public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances.

(emphasis added). *See also* Haw. Const. art. XI, §1.

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turn for payment to the landowner, often through land tax reductions. The schemes are similar to those authorizing conservation easements, although a key difference is that with respect to conservation easements, public access is not a priority for easement negotiators.[154]

At least one jurisdiction has developed a detailed scheme specifically targeted to provide for public recreational access on private land given a cooperative landowner who agrees to provide such access in return for payment.[155] While this scheme can serve as a model, there is no reason that the plethora of conservation easement statutes and the unique approaches that they embody cannot also be adapted to provide for public recreational easements. Indeed, as described below, many jurisdictions have included the facilitation of public recreation as a permissible purpose of conservation easements. At minimum, any statute providing for cooperative purchase of recreational easements must provide both incentives to the landowner to get her to register, and protections for these acceding landowners from liability and undue intrusion. While landowners donate for a variety of reasons, including a "deep and personal commitment to the future of the land"[156] and a desire to allow public access, ignoring other incentives and the need for landowner protection would greatly impede a program's success.[157]

The Community Trail Preservation Program[158] in King County, Washington, exemplifies a locally implemented scheme focused specifically on "encourag[ing] the voluntary granting of trail easements."[159] King County advanced this goal by providing landowners with both incentives and protections. As an incentive, parcels with qualifying easements are entitled to a 90% reduction in local property taxes on the entire parcel, not just the portion encumbered by the recreational easement.[160] Protection of the landowner is twofold: the ordinance allows for both negotiated restrictions on use of the easement and negotiated indemnification from liability, notwithstanding recreational use liability limits enacted by the state legislature.[161]

Other states have more generally provided for the acquisition of recreational easements by including recreation within the enumerated goals of state conservation agreements.[162] Accordingly, landowners granting recreational access are provided the same benefits and protections given to landowners granting more traditional conservation easements that do not provide for public access. While landowners are free in most states to negotiate the terms of their donated conservation easement,[163] the government may not be inclined to grant the incentives and protections afforded easement donors in King County simply because the enabling statute at issue is focused more on open space preservation than on recreation and does not explicitly provide for the protections given to King County donors. This notwithstanding, recreational easements developed under the auspices of conservation easement legislation are a legitimate means in many states to secure public recreational access to private lands. For example, in New York, recreational easements on over 104,000 acres of land in the Adirondack Mountains were secured, mostly from private paper companies, contributing greatly to the long-term availability of recreational resources in the Empire state.[164]

Regardless of the mechanism for encouraging the sale or donation of easements that allow for public recreational access, the Internal Revenue Service (IRS) provides incentives above and beyond those that may be provided by states and their subdivisions. If an easement is donated for "conservation purposes," the IRS may provide the donor with estate, income, and other tax relief that may exceed income generated from sale of the easement.[165] Among other things, an easement is donated for "conservation purposes" if it "preserv[es] . . . land areas for outdoor recreation by, or [for] the education of the general public."[166] According to this definition, all easements that provide recreational access to the public qualify for IRS tax relief.

As an alternative to conservation easements, state-level purchases of land, and condemnation actions, many states have authorized their subdivisions to purchase land in fee for the public good. More relevantly, some have specifically enabled purchases for recreational access, thereby mooting the takings issue. The state of Hawaii, for example, has authorized its counties to purchase land for public rights-of-way to the shoreline, sea, and "inland recreational areas" when such access cannot be gained by conditioning development on the provision of public access.[167] The state insti-

154. *See, e.g.*, Maryland Environmental Trust, under which public access is not required. Maryland Environmental Trust, *Commonly Asked Questions About Conservation Easements*, *at* http://www.dnr.state.md.us/met/ce.html (last visited Mar. 21, 2006); *see also* Michigan Farmland and Open Space Preservation Act, which also does not require public access but provides tax relief. MICH. COMP. LAWS §324.36101 (2005); Michigan Department of Agriculture, *Frequently Asked Questions*, *at* http://www.michigan.gov/mda/0,1607,7-125-1567_1599_2558-10312—,00.html (last visited Mar. 21, 2006). See SALKIN ET AL., *supra* note 26, for an excellent discussion of the concept of public benefits on private lands and schemes such as conservation easements.

155. KING COUNTY, WASH., CODE §§21A.14.350 to 21A.14.390 (King County, Wash. Ord. 14259 (2001)).

156. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1, 42 (2004).

157. *See generally id.* (describing the necessity of monetary incentives, though urging caution in devising the monetary incentive schemes).

158. KING COUNTY, WASH. CODE, *supra* note 155.

159. *See* King County Department of Development & Environmental Services, *Equestrian Community Trail Dedication FAQ*, Information Bulletin 52 (2003), *available at* http://www.metrokc.gov/ddes/acrobat/cib/52.pdf (last visited Mar. 21, 2006). Note that these easements allow both equestrian and hiking access. *Id.*

160. *Id.*

161. *Id.*

162. *See, e.g.*, New York's conservation easement statute, N.Y. ENVTL. CONSERV. LAW §49-0301 (McKinney 1984) (noting the "preservation of [natural] areas that are significant [is necessary] to the maintenance, enhancement, and improvement of recreational opportunities . . . ."). *See also* Pennsylvania's conservation easement statute, 32 PA. CONS. STAT. §5053 (2001) (noting purpose of conservation easements is, inter alia, to assure availability of recreational space).

163. Of course, if the landowner is too recalcitrant, the threat of eminent domain always looms.

164. *See* New York Department of Environmental Conservation, *Governor Pataki Announces Agreement to Protect More Than 104,000 Acres of Adirondack Forestland*, *at* http://www.dec.state.ny.us/website/dlf/sable.html (last visited Mar. 21, 2006).

165. *See generally* STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS (1995) (giving an excellent guide to tax ramifications of easement purchases); *see also* McLaughlin, *supra* note 156.

166. I.R.C. §170(h) (1986).

167. *See* HAW. REV. STAT. §115-2. Note that the main holding of *Nollan v. California Coastal Comm'n*, discussed *infra*, dealt with the nexus requirement between conditions on development and the harms being ameliorated by the conditions. 483 U.S. 825, 17 ELR 20918 (1987).

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tuted this scheme to ameliorate the results of its findings "that the absence of public rights-of-way is a contributing factor to mounting acts of hostility against private [property owners] and that the absence of public access . . . constitutes an infringement upon the fundamental right of free movement in . . . recreational areas." This alternative should be a component of any state's recreation scheme as most state populations continue to burgeon and recreation demand continues at the least to correspondingly increase.[168] State reports indicate that they are only partially heeding this suggestion.[169]

E. Condemnation Actions

Finally, if there is a lack of either justification or facts suitable for the employment of one of the above public access mechanisms, the government can always acquire land against an owner's wishes to provide for the public good.[170] Takings jurisprudence has ostensibly developed to protect property rights to the extent contemplated in the U.S. Constitution; accordingly, this Article assumes that takings jurisprudence affords a "proper" level of protection to private property owners.[171] The Supreme Court has often struggled to define the scope of a "taking," and this struggle is exemplified by the nebulous standards applied to government acquisitions of public recreational easements.[172] Such easements are, however, assuredly constitutionally condemnable,[173] although not necessarily statutorily authorized.[174]

Modern takings jurisprudence recognizes two forms of taking, for which different tests apply: (1) physical takings; and (2) regulatory takings.[175] As described below, physical takings are any permanent occupation of physical property by the government[176]; regulatory takings, on the other hand, are actions by the government that go "too far" in regulating property and thus constitute an effective taking of it.[177] Although it is clear that outright condemnation of an easement is not a regulatory taking, it is not clear that such condemnation thus automatically falls under the rubric of physical takings because recreational easements are only debatably a permanent occupation of physical property. Accordingly, condemnations of this type of interest fall into a gray area of takings law. The answer seems to be that recreational easements are considered physical takings despite their arguably temporary nature. It is only through forceful dicta and related inferences that the law declares this proposition; there are no federal cases holding such easements as physical takings.

Modern takings jurisprudence begins with the 1978 case of *Penn Central Transportation Co. v. New York City*.[178] In *Penn Central*, the New York City Landmarks Commission refused to allow the construction of an office building above Grand Central Station, and the plaintiff complained of a taking. The Supreme Court explained that although it could not develop a single test to determine when "justice and fairness" require that the government compensate for economic injuries as a result of its actions, its past takings jurisprudence had identified several factors such as the economic impact on the claimant, interference with "investment-backed expectations," and the character of the government action as bearing on whether there was a taking.[179] These criteria are widely known as the "Penn Central Test" and are applied to regulatory takings and temporary physical invasions of property.[180]

The Court carved out a separate category of "physical takings" in the seminal case *Loretto v. Teleprompter Manhattan CATV Corp*.[181] The case dealt with a New York statute requiring landlords to allow cable companies to install small cable boxes on their buildings. The Court justified its holding that the government must in all cases pay a property owner compensation in the case of a permanent physical invasion because "property rights in a physical thing have been described as the rights to possess, use and dispose of it. To the extent that the government permanently occupies physical property, it effectively destroys each of these rights."[182] Accordingly, by this logic, since the government permanently dispossessed the owner of his principle property rights, it should pay fair compensation to him. The Court noted that when the invasion is merely temporary, however, the balancing test provided in *Penn Central* should be employed because the fact of a taking by the government is less clear in that circumstance and a bright-line rule such as that in *Loretto* is thus inappropriate.[183]

In his dissent, Justice Harry Blackmun characterized the majority's new rule as a "formalistic quibble" over whether

168. *See* Teasely et al., *supra* note 12, at 184.

169. National Ass'n of State Park Directors, The 2005 Annual Information Exchange 30 (2005) [hereinafter National Ass'n of State Park Directors] (detailing state land acquisitions, or the lack thereof, for park purposes).

170. The notion of the "public good" was recently expanded in *Kelo v. City of New London*, 125 S. Ct. 2655, 35 ELR 20134 (2005). In that case, the Supreme Court noted that, "for more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." 125 S. Ct. at 2664. Accordingly, the highly deferential "rational basis" test has been applied to eminent domain. *Id*. at 2669 (Kennedy, J., concurring). Providing public recreation would certainly meet that test. States, however, have begun limiting local governments' eminent domain powers, and, thus, the import of *Kelo* ultimately depends on state legislative responses to it. *See*, *e.g.*, *Hands Off Our Homes*, Economist, Aug. 18, 2005, at 21-22; Donald Lambro, *Alabama Limits Eminent Domain in Defiance of Supreme Court Ruling*, Cal. L. Student J., Aug. 2005, at 8.

171. Obviously, there is strong debate on what extent modern takings jurisprudence comports with the constitutional scheme as developed by the drafters of the U.S. Constitution.

172. See *infra* Section V., for a discussion of the fairness of this approach.

173. *See* discussion in *supra* note 170. *See also* Richard J. Kohlman, *Condemnation of Easements*, 22 Am. Jur. *Trial* 743 §2 (2006) (noting in footnote two the many uses to which easements have been put); Kamrowski v. State, 31 Wis. 2d 256, 265 (Wis. 1966) (approving state purchase of a "scenic easement").

174. 26 Am. Jur. 2d *Eminent Domain* §414 (2006) (noting that all condemnations must be authorized by statute). *See, e.g.*, Haw. Rev. Stat. §46-1.5(6) (granting counties the power to condemn land if in the "public interest").

175. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 22 ELR 21104 (1992).

176. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

177. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

178. 438 U.S. 104, 8 ELR 20528 (1978).

179. *Id*. at 123-24.

180. *See, e.g.*, Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 318, 32 ELR 20627 (2002); *Loretto*, 458 U.S. at 442.

181. 458 U.S. 419 (1982).

182. *Id.* at 435 (internal citations and quotation marks omitted).

183. *See id.* at 442.

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property has been "permanently occupied" or "temporarily invaded" and noted that the approach is "dangerous" and "potentially misguided."[184] He would have applied Justice Sandra Day O'Connor's *Penn Central* balancing test in all takings cases.[185] While Justice Blackmun's opinion did not carry the day, it does highlight the inherent difficulties in applying the majority's rule. Recreational easements exemplify this. It can be argued that recreational easements are "permanent occupations" because the public has a permanent right to occupy the land, subject to the terms of the easement. But it can be argued with equal force that a recreational easement is quite unlike a cable box, or even a utility easement, and is a mere "temporary invasion" because the public does not stay on the parcel: members of the public come to the easement, recreate, and leave. This debate was addressed in at least two other Supreme Court later cases.

Three years prior to *Loretto*, the Supreme Court had decided *Kaiser-Aetna v. United States*,[186] a seminal takings case based on an analog to a recreational easement. In that case, the Court required the U.S. Army Corps of Engineers (the Corps) to pay compensation to a homeowner's association that managed a private marina if the Corps wanted to require the landowner to open the marina to public navigation. In essence, the Corps wanted to create a recreational easement without paying the landowner for deprivation of use. In dicta, the Court noted that "even if the [g]overnment physically invades only an easement in property, it must nonetheless pay just compensation."[187] The Court went on to hold that the "right to exclude [is] so universally held to be a fundamental element of the property right [that it] falls within this category of interests that the [g]overnment cannot take without compensation." The case seemed to establish that acquisition of recreational easements must be accompanied by fair compensation to affected landowners.

In 1987, seven years after *Kaiser-Aetna* and four years after *Loretto*, the Supreme Court decided *Nollan v. California Coastal Commission*.[188] In *Nollan*, plaintiffs were landowners who were required by the California Coastal Commission to provide an easement across the beach fronting their property in return for a permit to build a new house on their property. The case thus did not concern an outright condemnation of a recreation easement, as is the focus of this section. The Court held that such an exaction was a taking.[189] In forceful dicta, Justice Scalia discussed the "temporary physical invasion" problem addressed by Justice Blackmun's dissent in *Loretto*:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. . . . We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[190]

Although this statement is dicta and was not premised on the facts before the Court, the Supreme Court seems ready to formally characterize recreational easements as "physical invasions" that are always compensable. Accordingly, government entities developing easement programs should be aware that their acquisitions are likely to be considered "takings" by the federal courts.[191]

V. Opening Private Lands to Public Recreation Is Not Unfair to Landowners

Although two of the legal theories presented above for compelling public access to private land provide just compensation to the landowner,[192] three do not. While many may not take issue with compelled public access to private land, the notion of *uncompensated* access may strike many as unfair. Landowners paid fair market value for their properties; in many cases they paid more than surrounding properties precisely because they wanted to own the recreational resources in question. Why should the public get access to these resources at no cost? Why should the burden be concentrated on the landowner, and not spread among those who desire use of the resource?

A. The Common-Law Notion of Fairness: Prescriptive Easements, the Public Trust, Custom, and the Declaratory Theory of Law

With respect to the three theories that provide for free public access to private recreational resources, the justifications for non-compensation differ. These theories—custom, prescriptive easements, and the public trust doctrine—provide appropriate and fair means of securing a public right of recreational access to private lands. It is worth reemphasizing that this is only the case when the facts surrounding such access support both the justifications that rationalize the theory and the legal conditions necessary for its employment.

As described above in Section IV.B., prescriptive easements are justified on the utilitarian assumption that since manifestly valuable use is made by trespassers, and the landowner has not acted to stop such use despite knowledge of it, the landowner must value the property less than the

184. *Id.* at 442-43.

185. *Id.* at 451.

186. 444 U.S. 164, 10 ELR 20042 (1979). Note that this case is not a typical easement case but is instead predicated on navigational servitudes.

187. *Id.* at 180.

188. 483 U.S. 825, 17 ELR 20918 (1987).

189. *Id.* at 841-42.

190. *Id.* at 831.

191. This Article does not address the entirely separate question of takings under state law. If the Supreme Court were to hold otherwise, Justice O'Connor's "balancing test" of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 8 ELR 20528 (1978), would apply.

192. Government- or nongovernmental organization-purchased easements and condemnation actions of easement or fee interests.

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trespassers. Because knowledge of the law is imputed, if the landowner does not stop obvious trespassers over a period of years, she can be seen to have "given" the property to them. Additionally, the landowner had the state prescriptive period to keep trespassers from establishing a claim, and since the landowner sat on her rights, as with laches, is arguably fair for her to lose them in favor of the trespasser's claim. Accordingly, public prescriptive easements are arguably fair.

Those landowners forced to provide free public access to rivers and tidelands because the public trust doctrine has been asserted have lost nothing, according to the law. The public trust doctrine has since the inception of the Union reserved supervisory control or title to rivers and tidelands to the government, and by extension, the people. Accordingly, landowners are not fairly compensated because they never completely owned the resource in the first place.[193] That many states have expanded the range of permissible trust uses is irrelevant to fairness concerns; the land is public, and so long as the state is not sanctioning nuisances, expanded uses such as sunbathing on the beach, kayaking on rivers, and such are not unfair to landowners and are well-within the sovereign supervisory control granted to the states.

Last, and perhaps least defendable in an America somewhat divorced from 16th century England, is the doctrine of custom. When customs are asserted, the public vindicates a right of access and the landowner is not compensated. This is arguably justified because landowners are on notice of the doctrine through the fiction of imputed knowledge of the law and, thus, should adjust property purchase prices given evidence of possible customs discovered through ordinary due diligence. If the custom is strong enough to be proved in court, it is axiomatic that it should be evident during ordinary due diligence. Such customs are a potential cloud to the buyer's title, and a buyer who fails to investigate such a cloud does so at her peril.

In the most unfair case, such as when the doctrine of custom is asserted for the first time in a jurisdiction and the court announces that one side loses even though the doctrine had not been earlier recognized, landowners should take issue not with the theory of custom, but with the declaratory theory of adjudication.[194] The declaratory theory posits that courts merely announce the law, and even when new causes of action are "created" in a jurisdiction—such as custom—the state of the law has always been that way.[195] Thus, the defendant therapist in the famous case *Tarasoff v. University of California Regents*[196] was held guilty for conduct that was nowhere explicitly proscribed prior to the California Supreme Court's issuance of its opinion in *that* case. This seems very unfair, and many commentators agree.[197] However, the opposite result would be similarly unfair: if the ruling is indeed a correct statement or interpretation of the law, then the plaintiff in the very first action should not be prejudiced because judicial recognition did not come earlier. Consequently, whenever the judiciary interprets the law, unfairness to one party is possible.[198] However, because the declaratory theory is firmly grounded in American jurisprudence,[199] the unfairness is institutionally placed on non-prevailing parties.

Similarly, the landowner may claim she was not aware of on-the-ground customs when she purchased her property. In these cases, the problem is not purported ignorance of law, but rather, of fact. The difference is immaterial. Purchasers of property must thoroughly investigate their property and any potential clouds on title; that is, in light of the doctrine of caveat emptor and its variations, buyers must do their due diligence before purchase.[200] Landowners should note that members of the public asserting the theory of custom must prove, inter alia, immemorial and continuous use. If such proof can be made,[201] then constructive knowledge of the custom is appropriately imputed on the buyer, as the evidence in such case is ostensibly strong.

In short, given background principles of property law,[202] landowners should have paid a price for the property that reflects it in its totality, including encumbrances created by customary public recreation. Thus, landowners should theoretically not lose economically because of the doctrine of custom. Finally, if the polity feels that the doctrine is inappropriate to their locale, state legislatures have the power to override judicial pronouncements of the common law.[203]

B. Philosophical Takes on the Sanctity of Private Land

The level of sanctity given to private property has fluctuated throughout the history of the United States. This fluctuation is due to changes in American settlement patterns and perhaps, more importantly, due to changes in the country's eco-

193. In even the most unfair case—the first cases in a jurisdiction where the theory was employed, thereby truly putting landowners in the jurisdiction on notice—the declaratory theory of adjudication sanctions applying the law to these first litigants.

194. *See generally* Albert Kocourek, *Retrospective Decisions and* Stare Decisis *and a Proposal*, 17 A.B.A. J. 180 (1931); David Lehn, *Adjudicative Retroactivity as a Preclusion Problem*: Dow Chemical Co. v. Stephenson, 59 N.Y.U. Ann. Surv. Am. L. 563, 574 (2004); W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1491 (2004).

195. *See, e.g.*, Kocourek, *supra* note 194, at 180.

196. 17 Cal. 3d 425 (Cal. 1976) (recognizing that therapists are liable in tort to those who were injured by a therapist's client when the client told the therapist that he intended to hurt the later-injured party. Defendant therapist was held liable despite the fact that *that very opinion against him* was the first statement/interpretation of the law under which he was held guilty.).

197. See generally the sources cited *supra* note 194.

198. See generally Sarratt, *supra* note 194, for an exploration of the theory of judicial takings in the context of the doctrine of custom and the background principles of property law set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 22 ELR 21104 (1992). Thus far, the theory is just that—the Supreme Court has avoided the question since its assertion in *Lucas*, excepting Justice Scalia's dissent to a denial of certiorari discussed in *supra* note 58. Sarratt, *supra* note 194, at 1494.

199. The esteemed Justice Oliver Wendell Holmes, however, has criticized the theory. Heyward D. Armstrong, Rogers v. Tennessee*: An Assault on Legality and Due Process*, 81 N.C. L. Rev. 371 n.198 (2002).

200. *See generally* Richard A. Lord, *Contracts for the Sale or Lease of Land: Caveat Emptor, Warranties, and Representations*, 17 Williston on Contracts §50:30 (4th ed. 2004).

201. For instance, if the seller had posted no "no trespassing" signs, there was a well-worn trail to the recreational resource, or the buyer was from the community and there was open and notorious use of the property for public recreation, it would not be unfair to impute constructive knowledge on the buyer.

202. *Lucas*, 505 U.S. at 1027.

203. *See, e.g.*, In re the Marriage of Gilbert A. & Gladys J. Walrath, 17 Cal. 4th 907, 952 P.2d 1124 (Cal. 1998) (noting that "the legislative history of Assembly Bill No. 26 expressly states that former Civil Code section 4800.2 was enacted to 'reverse[ ] the [common law] rule of In re Marriage of Lucas, 27 Cal. 3d 808 [citation] (1980), and cases following it." (alterations supplied)).

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nomic system.[204] These fluctuations, however, have oscillated around classical liberal property theory,[205] which, at its base, posits that personal autonomy over property is the best way to secure liberty, happiness, and security.[206] On the one hand, as the country becomes more crowded and our human and ecological interconnections become more apparent, society is beginning to challenge both the centrality of this theory in the American property paradigm and the assumptions that underlie it.[207] For instance, modern zoning laws and environmental regulation and the growing ubiquity of covenants, conditions, and restrictions on homes within subdivisions that limit everything from house color to basketball hoops evidence this trend. On the other hand are the neo-conservative thinkers who seek to elevate the interests of landowners above all competing interests and who fear an "erosion" of property rights as one on liberty itself.[208]

Classical liberal property theory has been criticized on many grounds. The most prominent critique is against the classical-liberal exaltation of the individual relative to the community, and the consequences of that questionable exaltation.[209] Others criticize the theory because it ignores the interconnectivities between land and the environment in which it exists,[210] is based on questionable assumptions and goals,[211] is based on a frontier mentality that is anachronistic,[212] and is overly simplistic.[213] These critiques and others have spawned several alternative and somewhat overlapping conceptualizations of "property" in the United States, including: postmodern theory[214]; property rights foundationalist theory[215]; communitarian property theory[216]; the "Social Relations" model of property[217]; the legal realist approach to property[218]; "Green Property"[219]; the "Social Evolution" model of property[220]; and the "Natural Use" conceptualization of property.[221] It is clear that the classical liberal perspective is not the only one from which to understand "property." With these views in mind, and especially given the legal justifications advanced in the preceding section, the notion of a public right to recreationally access private property need not be offensive to, and can even be in harmony with, the American concepts of "property" and "property rights."

VI. Public Recreational Access Must Be Balanced With Protection of Landowners and Their Lands

This Article has explored the impending shortage of recreation lands for public use and responded with justified legal mechanisms for securing public recreational access to private lands. Justified or not, however, unlimited public access to private property for recreational purposes will impede at least somewhat on landowners' sense of privacy, may cause the landowner to fear liability in case of public injury, and may degrade the land. Plaintiffs or government agencies responsible for opening private land to the public must ensure that they do so in a manner that is sensitive to landowners' needs and ecological protection. To run roughshod over landowners' interests causes unnecessary mistrust, anger, frustration, and possibly, litigation; to run roughshod over the environment risks the ironic ruin of these sought-after recreational and ecological gems.

The island of Maui is one such overused gem. On any given day, there are over 40,000 tourists on Maui, in addition to the some 125,000 residents.[222] Tourists are especially intensive users of Maui's recreational assets; unlike most residents, they typically recreate nearly constantly. Once *Maui Revealed* brought word of Blue Pool to the tourist market, use of the pool jumped tremendously.[223] Fortunately, few parcels of private property in America will experience the demand put on Maui's recreational resources.

A. Ecological Impacts of Opening Private Lands to Public Recreational Use

There is no question that opening private lands to public recreational use will cause environmental degradation to the

204. *See* Vincenzo Vinciguerra, *The Dialectic Relationship Between Different Concepts of Property Rights and Its Significance on Intellectual Property Rights*, 10 Jun. J. Tech. L. & Pol'y 155, 162 n.37 (2005) (advancing the idea that the Great Depression made people less hostile against property restrictions); Eric T. Freyfogle, *Ethics, Community, and Private Land*, 23 Ecology L.Q. 631, 642-46 (1996) (arguing that the capitalist frontier mindset continues to affect society's attitude towards property, and that the interconnectivity of property has accordingly been derogated by society).

205. Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 Vt. L. Rev. 299, 302 (1995).

206. *Id.* at 306.

207. *See, e.g.*, Freyfogle, *supra* note 204, at 645-46 (noting that "[w]hat was happening [with the advent of zoning and modern environmental laws] was that ownership norms were continuing to shift, moving beyond the age of industry toward something else, something that valued individual freedom a bit less and communal well-being a bit more").

208. *See* Frazier, *supra* note 205, at 305.

209. *See* Freyfogle, *supra* note 204, at 644, noting:

> By exalting the individual, liberalism has yielded many benefits: we value people more these days as individuals, try to educate them, help them in times of need, and otherwise treat them with dignity. Too often, however, liberalism degenerates into the claim that individual liberty is the supreme goal, that autonomy is an end rather than a means. The far different reality is that people are social animals, and they thrive best today, as in the past, in group settings—in families, neighborhoods, tribes, clubs, and churches. For groups like these to prosper, they too need the law's respect. They too need protection from the forces pushing so hard against them.

210. *See* Frazier, *supra* note 205, at 306-07.

211. *See* Freyfogle, *supra* note 204, at 644-45, noting that

> [p]erhaps as much as any part of our culture, our ideas of private ownership bear the imprint of all these constricting forces: the frontier ethic; the focus on man as the locus and measure of value; the dominance of economic growth based on market transactions; and the elevation of the liberated individual over conflicting visions of communal well-being.

212. *See id.* at 642-46.

213. *See* Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1454 (1996).

214. *See* Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. Colo. L. Rev. 599, 602 (1991). Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 Const. Comment. 259, 261 (1992).

215. *See* Alexander, *supra* note 214, at 164.

216. *See id.* at 263.

217. *See* Singer, *supra* note 213, at 1461.

218. *Id.* at 1458.

219. *See generally* Frazier, *supra* note 205.

220. *See* Eric T. Freyfogle, *Owning the Land: Four Contemporary Narratives*, 13 J. Land Use & Envtl. L. 279, 297 (1998).

221. *Id.* at 301.

222. *See generally supra* note 9.

223. *See supra* note 6.

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opened lands. This has occurred on Maui, for instance, where recreational pressures are severe.[224] There is, however, ordinarily a question of how *much* damage recreationists will cause, whether such a level of damage is acceptable, and finally, whether it is best to leave some land beyond recreationists' use. Although none of the theories of access discussed in this Article directly contemplate environmental damage in their tests for access, all but the condemnation action provide indirect ecological protection.

In 2000, an article called *Recreation Impacts and Management in Wilderness: A State of Knowledge Review* was released, under the auspices of the U.S. Forest Service.[225] From the article's review of the nascent field of recreation ecology, several ecological impacts resulting from recreation can be identified, including: tree damage; soil exposure; soil erosion; vegetation loss; trash; human waste; degradation of water quality; introduction of exotic species; and wildlife disturbance.[226] Impacts associated with less traditional forms of recreation were also cataloged, including those involving rock climbing, which is said to affect plant communities both at the access zone and along the rock face.[227] The article noted, however, that these impacts do not increase linearly with increased use; rather, impacts are generated mostly from the first few users, with each additional user contributing marginally less to further damage.[228] Further, research reveals that many impacts are avoidable and often caused by uninformed or careless behavior, such as: littering; cutting switchbacks; creating new trails; improper disposal of human and food waste; wildlife and cultural resource disturbance; and cutting trees and tree limbs.[229] The question of acceptability of impacts depends on the number of impacts and their extent; however, this question can only be answered by landowners, and can be enforced either informally or through judicial fora.

Given these impacts, it can be argued that some land ought to be kept from the despoiling hands of the public; that perhaps landowners ought to be able to manage their lands for ecological preservation. This is probably true, and will probably happen even given enthusiastic employment of the theories of access discussed in this Article. This is so because the granting of recreational access will seldom impair more than a "beaded necklace of land" across a given parcel. This metaphor is chosen because most outdoor recreation consists of linear travel (necklace string) to one or more points around which the recreationist may want to roam (necklace beads). Thus, the impact necklace may have two beads (a starting point and ending point) or multiple beads (many locations of interest along path), and the beads will be differently sized depending on how much roaming is incited by the feature. This pattern of access is common to such diverse recreational pursuits as hiking, kayaking, and rock climbing. Even granting that within this necklace great disturbance may occur, the necklaces are usually dwarfed by the lands around them.[230] Additionally, land without currently existing customs of use—that is, America's most untrammeled land—can be kept permanently from non-purchased rights of access. For these many untrammeled lands, arguably those most worthy of protection, landowners can easily keep the doctrines of custom and public prescriptive easements out of operation by asserting their right to exclude and thereby preserve.[231] If the government, on the other hand, is interested in easement acquisition or condemnation, it will likely be forced to consider the ecological ramifications of its actions through modern environmental impact statement laws before asserting its prerogatives.

In short, this Article does not open a door to public recreation at the expense of ecological protection; rather, it at least preserves the status quo by suggesting merely the legal sanctioning of already occurring public use. This Article does not advocate for the opening of previously untrammeled areas since those actions are rarely justified.[232] In extreme cases, where recreational impacts loom large, already impacted areas may not qualify for legally sanctioned public access because the degradation caused thereby is too ecologically harmful for judicial sanction.[233]

B. Schemes for Protecting Both Landowners and the Environment

Given the import of allowing public access to private land for recreational use, it is important to consider the ways that disturbances to landowners and the environment may be minimized. While, as noted above, limiting use of the resource does not have a linear effect on ecological protection, it probably does have a strong positive correlation to landowner happiness. Accordingly, it is important to manage

224. *See supra* notes 1-6 and accompanying text.

225. Yu-Fai Leung & Jeffrey L. Marion, Recreation Impacts and Management in Wilderness: A State of Knowledge Review (Forest Service Proceedings, RMRS-P-15-Vol-5) (2000). *See also* David N. Cole, *Biophysical Impacts of Wildland Use*, *in* Trends in Outdoor Recreation, Leisure, and Tourism 257 (William Gartner ed., 2000) (generally corroborating the Leung & Marion study).

226. Leung & Marion, *supra* note 225, at 26-27. The authors note a lack of research at the ecosystem level, and with respect to non-conventional recreation, such as caving, rock climbing, and the use of poles for hiking.

227. *Id.* at 35.

228. *Id.* at 36.

229. *Id.* at 38.

230. *Id.* at 25 (noting that while Great Smoky Mountains National Park may be said to have an aggregate disturbed area of just over 10 million square feet, including campsites and trails, this represents a mere 0.05% of the park area. Similarly, in Jefferson National Forest, it was revealed that camping had disturbed only 0.0007 to 0.015% of the wilderness.).

231. See Sections IV.A. and IV.B. for an explanation of how this works. This is one method by which these two doctrines may be said to indirectly allow for environmental protection. Also notable is the doctrine of custom's "reasonableness" element; case law suggests that undue environmental degradation may be seen as "unreasonable" and therefore may defeat claims for a customary right of access. *See supra* notes 85-91 and accompanying text.

232. One possible exception is if there was a truly unique and magnificent natural feature on previously untrammeled private land; it is arguable that there exists some sort of human right to see such an awesome sight. Nonetheless, none of the theories advanced in this Article, except for government acquisition of easements or condemnation of land, would be applicable. Theoretically, these two types of government action would be constrained by environmental analysis, thereby protecting the environment.

233. Landowners attempting to block public access on this ground may cite to the custom element of "reasonableness" if the doctrine of custom is being employed. If a right of access based on a prescriptive easement were alleged, landowners might plead to the judge for equitable relief, given the ecological burdens the landowner and society as a whole would bear should access be allowed in such case. Finally, if pollution became too large of a problem, claims may lie under environmental laws such as the Clean Water Act, 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607, or the Endangered Species Act, 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

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both the quantity of visitors to private land and their activities once there.

One strategy that has been effective in many communities for limiting public access to a resource is to create parking restrictions. By providing only a certain amount of space for recreationists to park or time limits on parking, use of the easement is necessarily limited. In most places, if parking is restricted, so is the recreational resource, as public transportation in most cases does not exist in the rural areas where these recreational assets are found. Parking could also be provided for at a distance from the easement to make access more difficult. This added difficulty of access may disincentivize all but the most determined users—those who value the resource most.

Regulating the actions of the public once on private land is probably harder than limiting their access. Nonetheless, the Leave No Trace program, begun by federal wilderness management agencies in partnership with the National Outdoor Leadership School, has had successes in reaching millions of visitors.[234] Its Seven Principles,[235] if heeded, could likely forestall most impacts to America's private land by public recreationists. Landowners concerned about the ecological quality of their lands might consider posting signs at public points of access, noting that the public is entering private land that must be respected and perhaps suggesting solutions to any problems facing the resource.[236] Given the American tradition of respecting the land of our neighbors, it stands to reason that when the public is a guest on private land, especially when notified of that fact and how they can help preserve the resource they are about to enjoy, they will try to protect the resource to the extent that they can.

Also important is the notion of using scope as a shield. When landowners are faced with increasing numbers of people using customary access or prescriptive easements, they may use the scope of the original custom or prescriptive easement as a defense against the masses. With respect to the doctrine of custom, claimants must establish a certainty of the people benefitting from the custom. While this element will be treated differently in different jurisdictions, it stands to reason that if a custom is alleged on the basis of community use but is now being exercised by, for instance, tourists, such additional use by tourists exceeds the scope of the custom. Likewise, it is hornbook law that easements are defined by their scope, and, thus, landowners can use similar arguments with respect to the scope of alleged prescriptive easements. However, while landowners may be able to prove that current easement use exceeds the scope contemplated at the time of the easement's creation, jurisdictions have developed different tests for what constitutes an unacceptable expansion of easement use, ranging from allowing "reasonable" expansion of use to holding sacred the scope originally contemplated by the parties.[237] Scope is a jurisdictionally qualified shield.

When the mechanism used to provide access involves a purchased easement, the servient estate may negotiate with the dominant estate for easement restrictions that will protect the landowner from the harms mentioned above. The terms of the easement may, for instance, define limits to the amount of people that can enter in a day, define maximum limits of concurrent users, establish opening and closing times for the easement, or provide for a permit scheme. If a permit scheme is established, perhaps overseen by a local government body, the holder of the dominant estate may limit use to those who have proper permits, and penalties may be assigned. The primary advantages to a permit scheme over relying solely on easement rules posted at entry points is that the holder of the dominant estate has a record of who used the easement and may charge for the permit. The permit system would accordingly reduce use of the easement—getting a permit is a hassle and there may be limited permits—and it would create a more enforceable legal obligation by the permittee to treat the property well. Additional restrictions on use could be advanced through permit quotas[238] and price differentials on permits whereby tourists pay more than resident users.[239] However, restricting use of the easements to residents outright would likely violate the dormant U.S. Commerce Clause.[240]

Finally, many landowners are wary of lawsuits from members of the public hurt while using the private recreational resource. This fear is largely unfounded, as most states have enacted "recreational use" statutes that provide the landowner, if access is provided to the public without or at nominal charge, much more protection than is afforded by the confusing mandates of the common law.[241] Application of the statutes varies by state, and may be limited to undeveloped lands[242] that are open to the public.[243] Hawaii, follow-

234. Leung & Marion, *supra* note 225, at 38.

235. The principles are: (1) plan ahead and prepare; (2) travel and camp on durable surfaces; (3) dispose of waste properly; (4) leave what you find; (5) minimize campfire impacts; (6) respect wildlife; and (7) be considerate of other visitors. Leave No Trace Center for Outdoor Ethics, *Leave No Trace Principles*, *at* http://www.lnt.org/programs/lnt7/index.html (last visited Mar. 21, 2006).

236. For instance, if trail-widening is a problem, a sign could be erected admonishing members of the public to "STAY ON TRAIL!"

237. *See* Annotation, *Scope of Prescriptive Easement for Access (Easement of Way)*, 79 A.L.R. 4th 604 §2 (2005) (noting the approach set forth in the *Restatement (Third) of Property* §477 and variations on it); James L. Buchwalter, Annotation, *What Constitutes, and Remedies for, Misuse of Easement*, 111 A.L.R. 5th 313 §19 (2005) (describing cases where misuse of an easement was or was not accepted by courts when the theory was proffered by landowners seeking to enforce trespass or quiet-title actions).

238. *See, e.g.*, Vermont Endangered and Threatened Species List, Vt. Stat. Ann. tit. 10, §33(d)(1) (establishing that 10% of moose hunting permits were to be issued to nonresident hunters). Absolute quotas have also been upheld in Olympic National Park, where quotas are imposed on some popular trails during the summer, *see* National Park Service, *The Olympic Wilderness*, *at* http://www.nps.gov/olym/wic/reservations.htm (last visited Mar. 21, 2006), and in the Desolation Wilderness near Lake Tahoe, California. *See* Desolation Wilderness, *supra* note 18.

239. *See, e.g.*, Daly v. Harris, 215 F. Supp. 2d 1098 (D. Haw. 2002) (holding that the state of Hawaii may charge a $3 fee to nonresidents for use of a state park where residents were charged no fee at all, saying that under the privileges and immunities clause, the state had fulfilled its "rational basis" test).

240. *See, e.g.*, Young v. Coloma-Aragan, No. CIV.00-00774HG-BMK, 2001 WL 1677259 (D. Haw. Dec. 27, 2001) (noting that "eliminating tourists from the bay is not a proper reason for the ban as it directly contradicts the very purpose of the commerce clause"); Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 285 (1977) (noting that "a statute that leaves residents free to destroy a natural resource while excluding aliens or non residents is not a conservation law at all").

241. *See generally* Terence J. Centner, *Revising State Recreational Use Statutes to Assist Private Property Owners and Providers of Outdoor Recreational Activities*, 9 Buff. Envtl. L.J. 1 (2001).

242. *See* Cardwell, *supra* note 37.

243. *See*, *e.g.*, Georgia Power Co. v. McGruder, 229 Ga. 811 (Ga. 1972) (explaining that since the defendant had posted "keep out" signs on the property, he was not protected by the recreational use statute because the aim of the statute was to encourage landowners to open

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ing the Model Act[244] on which most states' recreational use laws are modeled, only attaches liability to landowners when they willfully or maliciously fail to warn against a known dangerous condition, charged for access, or where the injured person was a house guest.[245]

VII. Conclusion

Population growth is leading to a decline in per-capita public recreational resources in many areas. Meanwhile, there is a concurrent decline in private landowners' willingness to provide access to their recreation-susceptible lands. The result, recognized as early as the 1970s, is that each year America's recreational resources become more crowded and, consequently, more degraded, less peaceful, and more subject to use limits.[246] Since local, state, and federal acquisition of recreational land is in many places failing to keep pace with demand,[247] and since this trend is only expected to worsen as population growth accelerates and park spending decelerates,[248] other than reversing this trend, the only solutions are to (1) reduce growing public demand for recreation, or (2) route some demand for recreation to America's vast private lands. Unfortunately, as described above, in many cases and for many reasons, landowners may not voluntarily open their lands to public recreationists despite government or private incentives to do so. Further, reducing demand for public recreation is clearly not in the interest of the government.[249]

Given these limitations, it is submitted that along with further encouraging landowners to voluntarily give access and lobbying local, state, and federal governments to acquire more recreation land in key areas, carefully scrutinized mandated availability of public recreational access to private land is warranted. Such access can be fairly and sustainably provided through the doctrines of custom, the public trust, and public prescriptive easements, or through government acquisition of easements or condemnation of recreation land. In addition to helping ameliorate the recreation supply problem the United States is facing, such access would also vindicate the public's understandable desire to take advantage of unique features not found in sufficient abundance, if at all, on public lands. Taken together, these three sensible solutions will benefit society as a whole in many ways without unfairly burdening America's landowners or unduly denigrating our environment.

their property to the public for recreational use). Landowners who do not affirmatively close their land to the public, i.e., those who allow a prescriptive easement to vest on their property, most likely qualify for protection because by virtue of the prescriptive easement, it is clear that the property is at least literally open to the public or else the prescriptive easement would not have vested. This interpretation may vary depending on the specific recreational use statute at issue; it is a plausible argument that while the property was not affirmatively "closed" to the public, it was never affirmatively "opened" to the public either, and encouragement of such opening of property is the basis behind the recreational acts.

244. 24 Suggested State Leg. 150 (Council of State Governments 1965).

245. Haw. Rev. Stat. §501-1.

246. *See generally* Penz, *supra* note 13. *See also supra* note 19.

247. For instance, U.S. Congress has not appropriated much money for the Land and Water Conservation Fund. 16 U.S.C. §§460*l* to 460*l*-11 (1963). Coggins et al., *supra* note 29, at 936. *See also supra* note 19 (noting regional declines in per-capita recreation supply and a slowing rate of federal recreation land acquisition); *supra* note 34 (noting federal reacquisition of lands in the Columbia River Gorge, the Appalachian Trail, Shenandoah National Park, and Redwood National Park); and National Ass'n of State Park Directors, *supra* note 169 (noting 2004 acquisition of state parkland).

248. Cordell & Betz, *supra* note 16, at 88, noting that

> our interpretation of the most salient trends in the US supply system leads us to conclude that its sustainability is stressed and in many ways threatened. Continuing but slowing growth in the land and water area managed by [all levels of] government, flat budgets . . . and great reliance on non-appropriated funding sources . . . are not the characteristics of a vigorous and healthy system. In the face of very rapid population expansion, these trends quickly translate into substantial decreases in the per-capita capacity of the American outdoor recreation supply system.

249. *See generally* President's Commission on Americans Outdoors, *supra* note 18 (noting throughout the importance of outdoor recreation to a healthy populace).