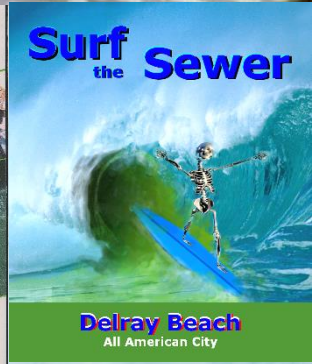
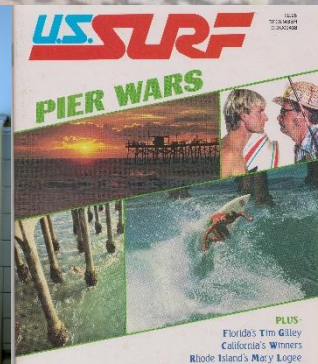


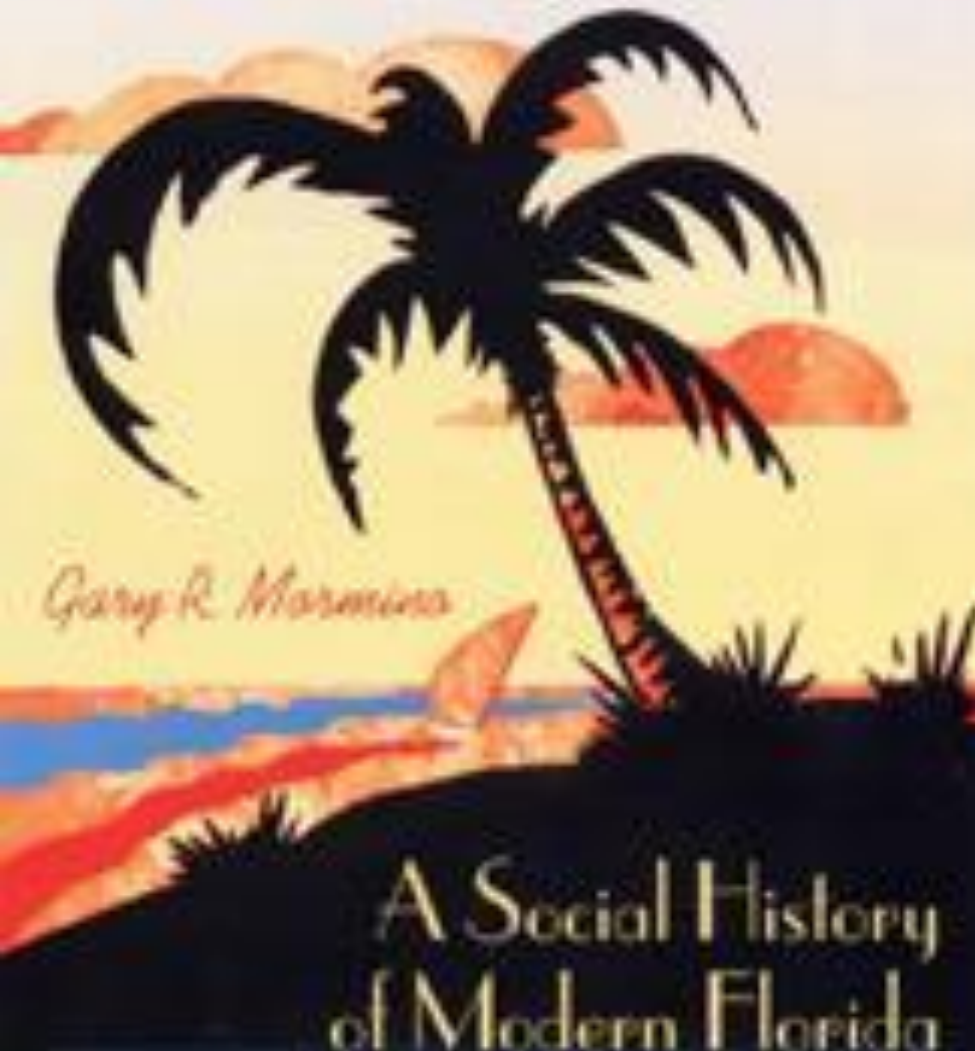
THE BEACH AS CONTESTED SPACE



Thomas T. Ankersen
University of Florida Levin College of Law
Florida Sea Grant



LAND OF SUNSHINE STATE OF DREAMS



“The most recurring image of Florida is that of a beach....

[a]n arena for creative and destructive tension: nature versus technology, personal freedoms versus communal control, and democracy versus plutocracy.”

-Gary Mormino, Chapter 9 – The Beach

(e.g. *Contested Space*)

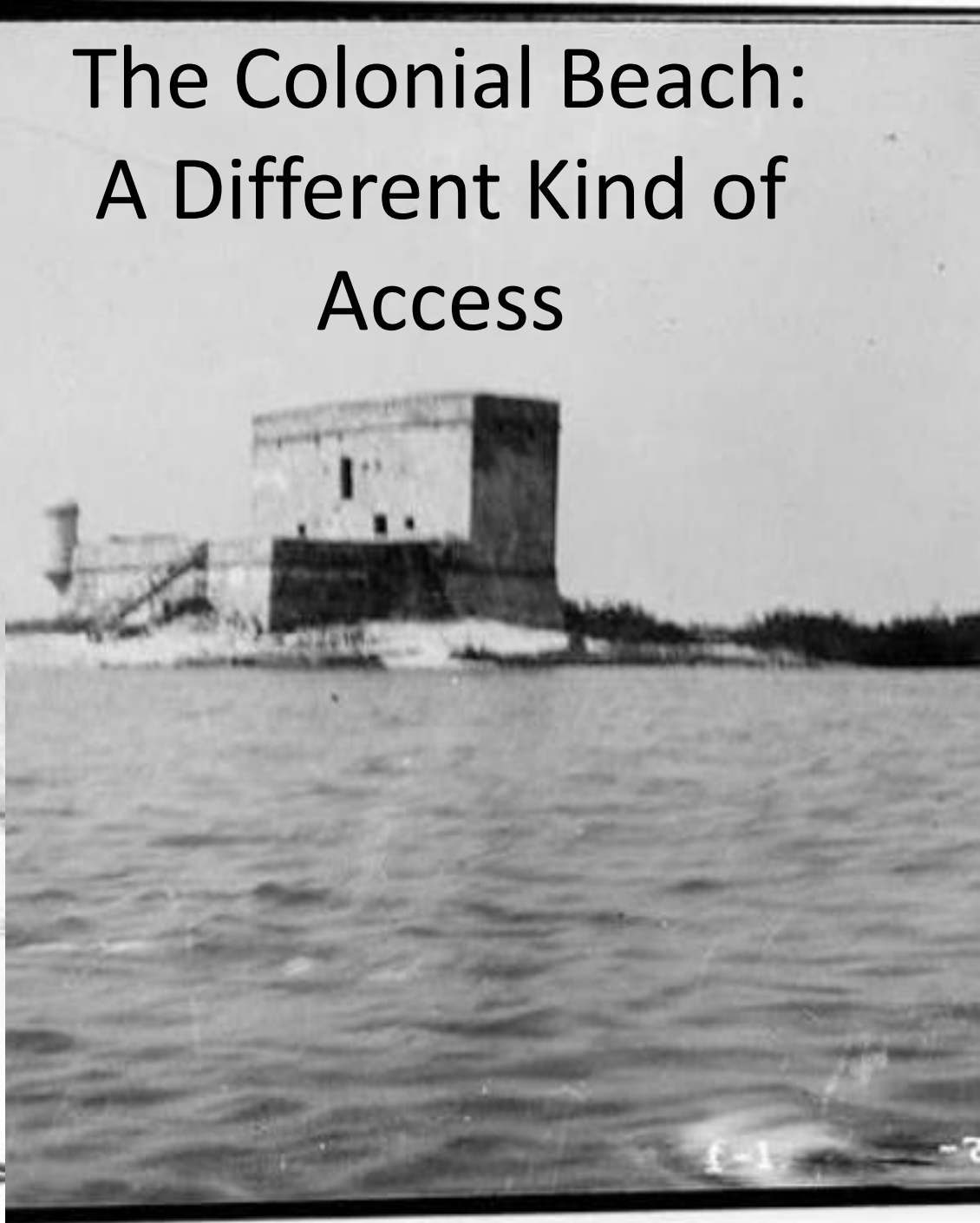
Today's Talk: Customary Use “Til’ The Memory of Man Runneth Not”

- The Pre-Colonial Beach
- The Colonial Beach
- The Post-Colonial Beach
- The Early Modern Beach
- The Modern Beach
- The Post-Modern Beach and Existential Threats
 - Whose Beach is it?
 - Where’s the Beach?

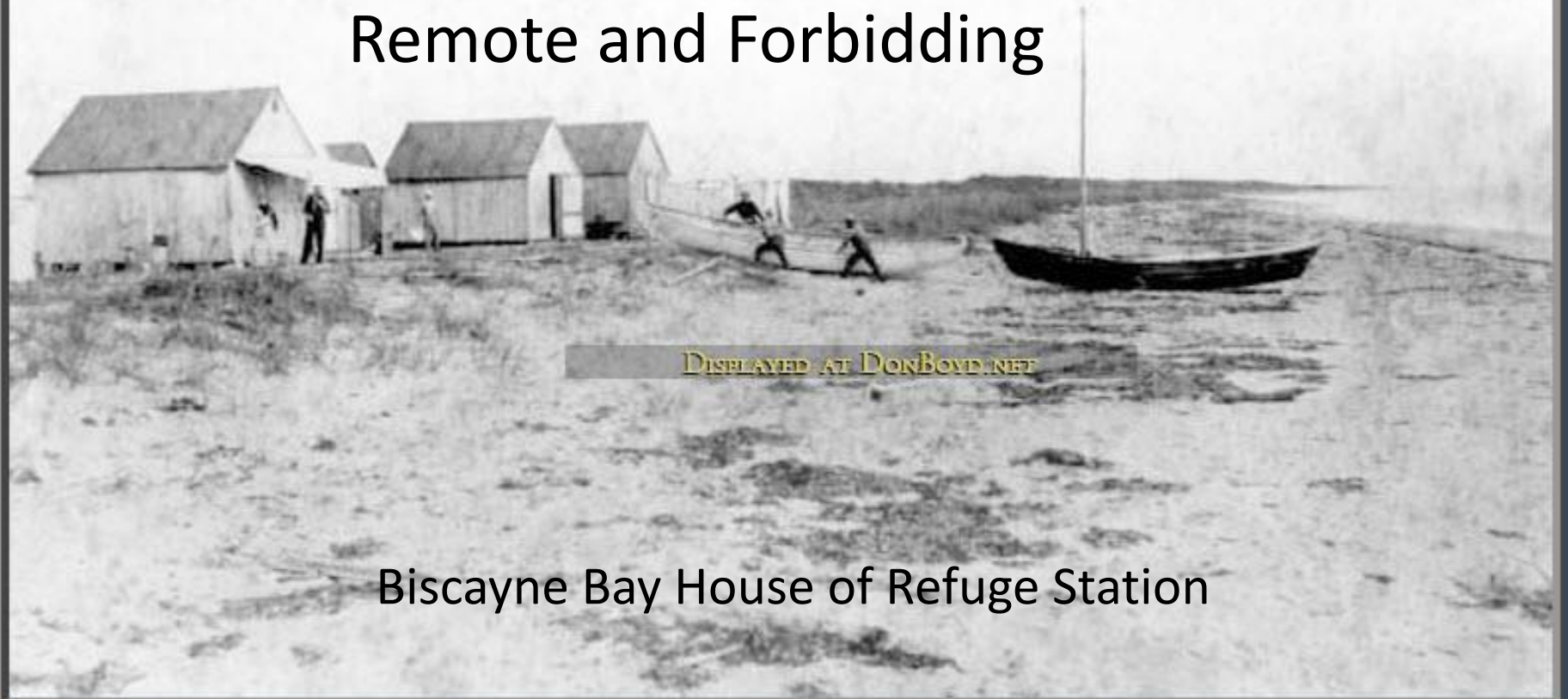
The Pre-Colonial Beach



The Colonial Beach: A Different Kind of Access



The Post Colonial Beach: Remote and Forbidding



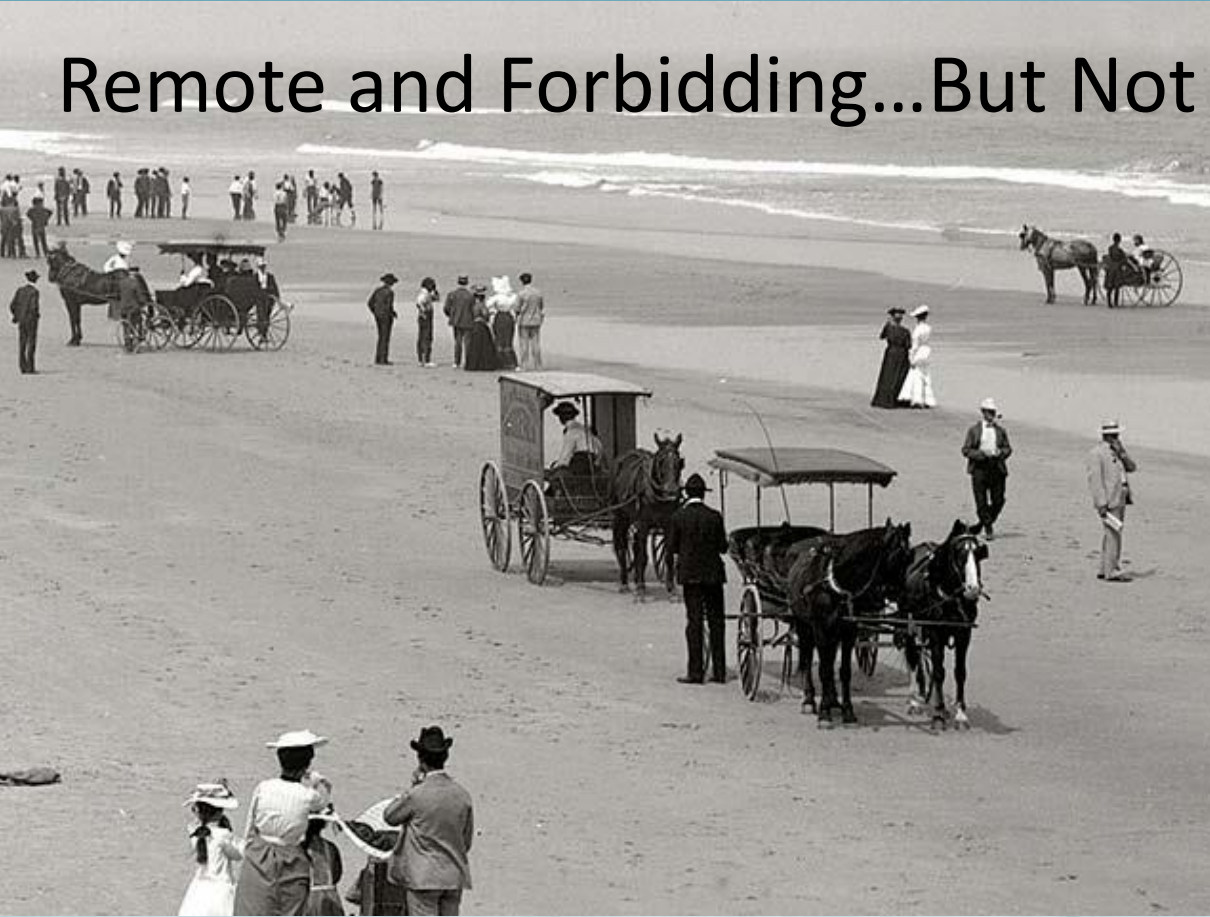
Biscayne Bay House of Refuge Station

1887

USCG photo

“The beach was as remote and forbidding as the vast Everglades,” remembered Charles Pierce.... “No one thought of building much near the ocean, because it would eventually sweep any structure away. Beach land was cheap, particularly compared to the good farmland behind it.” (Describing Palm Beach, 1870)

Remote and Forbidding...But Not For Long...



“surfbathing, a perfectly safe gigantic trough provided by nature.”
Halifax Journal, 1887

“It is only within the past few weeks that bathing on the outer beach has become popular, and we predict that the day is not far distant when this part of Santa Rosa Island will become the Coney Island of the South.” – *The Pensacolian, 1887*

The Early Modern Beach: Morality and Virtue Contested



***Societies Demand Halt
On Proposed Naughty
Bathing Suit Parade***



The Wartime Beach: No Day at the Beach



The Modern Beach: Not Everyone's Day at the Beach

In 1958, an Alabama visitor asked to be driven along the ocean at Daytona Beach, but was told he couldn't. "Isn't this a shame the visitor responded. "This is God's ocean and these people want to restrict people from enjoying it. But that won't last long."

– The visitor was Martin Luther King



St Augustine Beach
June 25, 1964

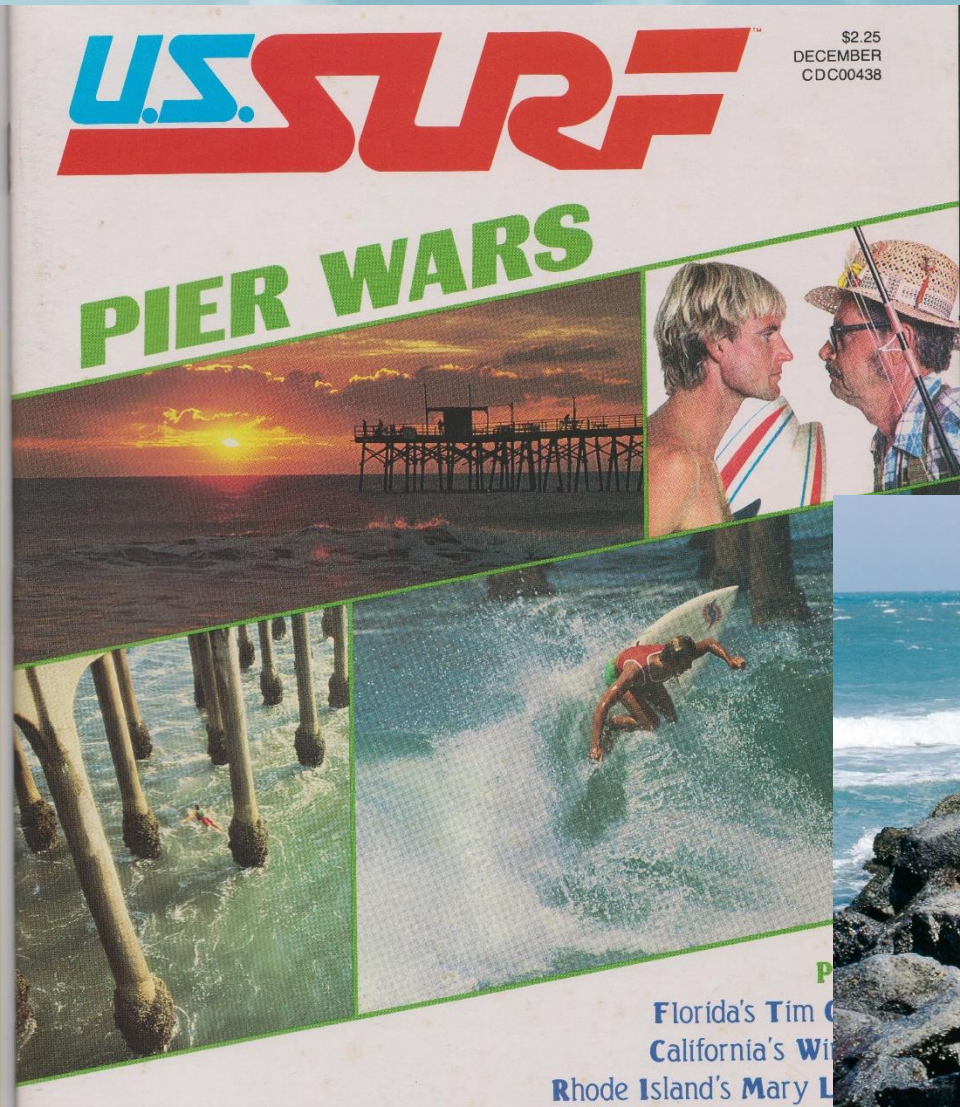
The Modern Beach: Hedonism at High Tide



The Late Modern Beach: Getting There is Half the Contest



The Late Modern Beach: Contested - and Crowded - Space



What did we know? And When Did We Know It?

5/21/61 SAT

HOW CAN WE SAVE OUR BEACHES?

Florida's No. 1 Asset Is Washing Away

By DICK MORGAN
Of The Times Staff

Florida's most priceless asset is also becoming its biggest problem.

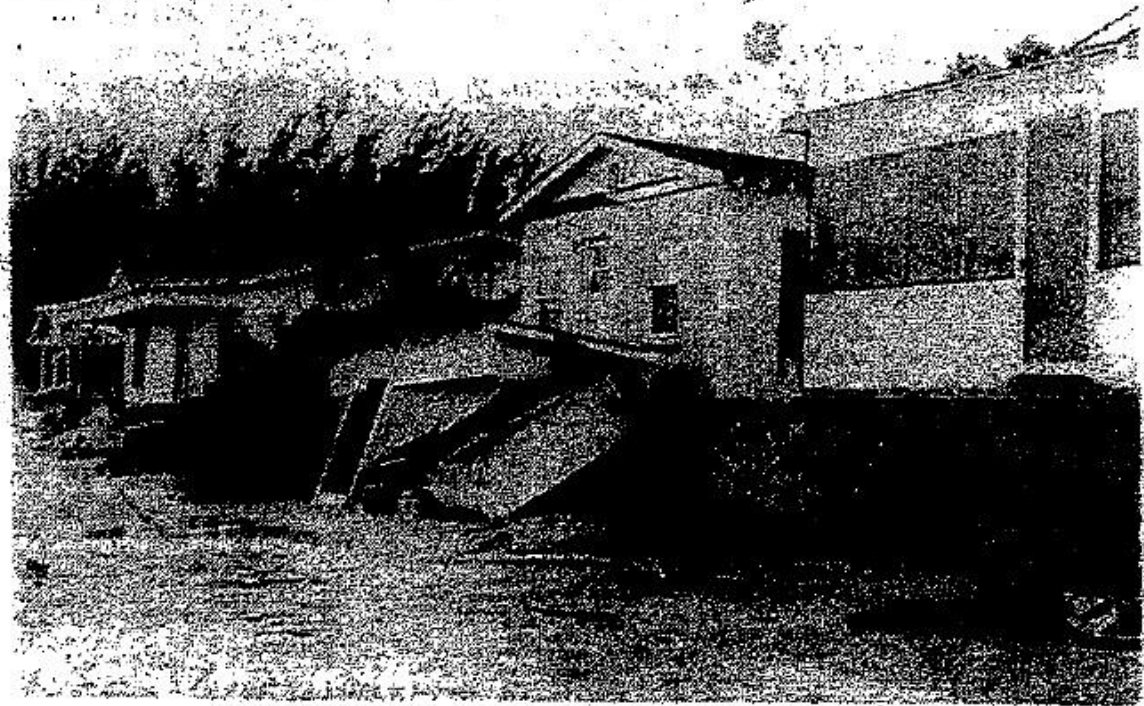
The Sunshine State's 800 miles of sandy beaches — principal drawing card for a \$1.5 billion tourist industry — are eroding at an alarming rate. An estimate

First Of 4 Articles

ed 300 to 500 acres of prime beach frontage, valued at more than \$10 million, are vanishing each year under the relentless assault of currents, waves and winds.

Although Florida needs its beaches more than any other state, it has been dangerously backward in waging the war on erosion. Florida probably contains more mistakes in coastal protection than any other place in the world.

EROSION CONTROL methods that long ago were abandoned



HIGH TIDES IN 1950 HURRICANE . . . left Indian Rocks looking like this.

without regard to possible adverse effects on adjacent Projects have been conceived in desperation and built with most complete lack of knowledge of the complicated engineering problems involved.

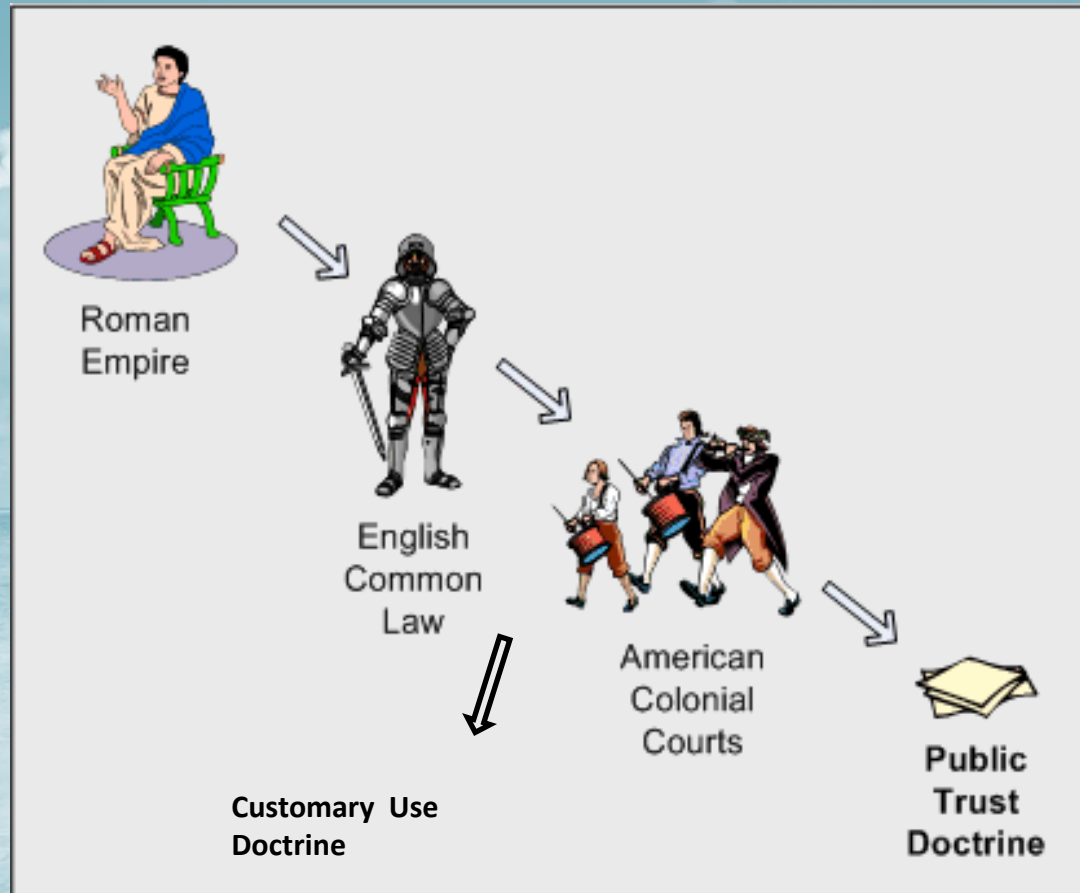
IT IS NO accident that erosion is most critical in areas of most residential and commercial development — Palm Beach, Miami on the East Coast, Clearwater to Sarasota on the West Coast.

These highly - populated areas, where fortunes have been invested in real estate, are being up to 30 feet of beach erode each year, and are particularly vulnerable to the threat of hurricane storm tide damage. Many severely - eroded areas can reasonably expect to be inundated someday by a foot storm tide.

Hurricane Donna revealed the destructive power of a tropical storm to thousands of Florida newcomers who before had witnessed this disaster of nature. Flood tide created by the storm

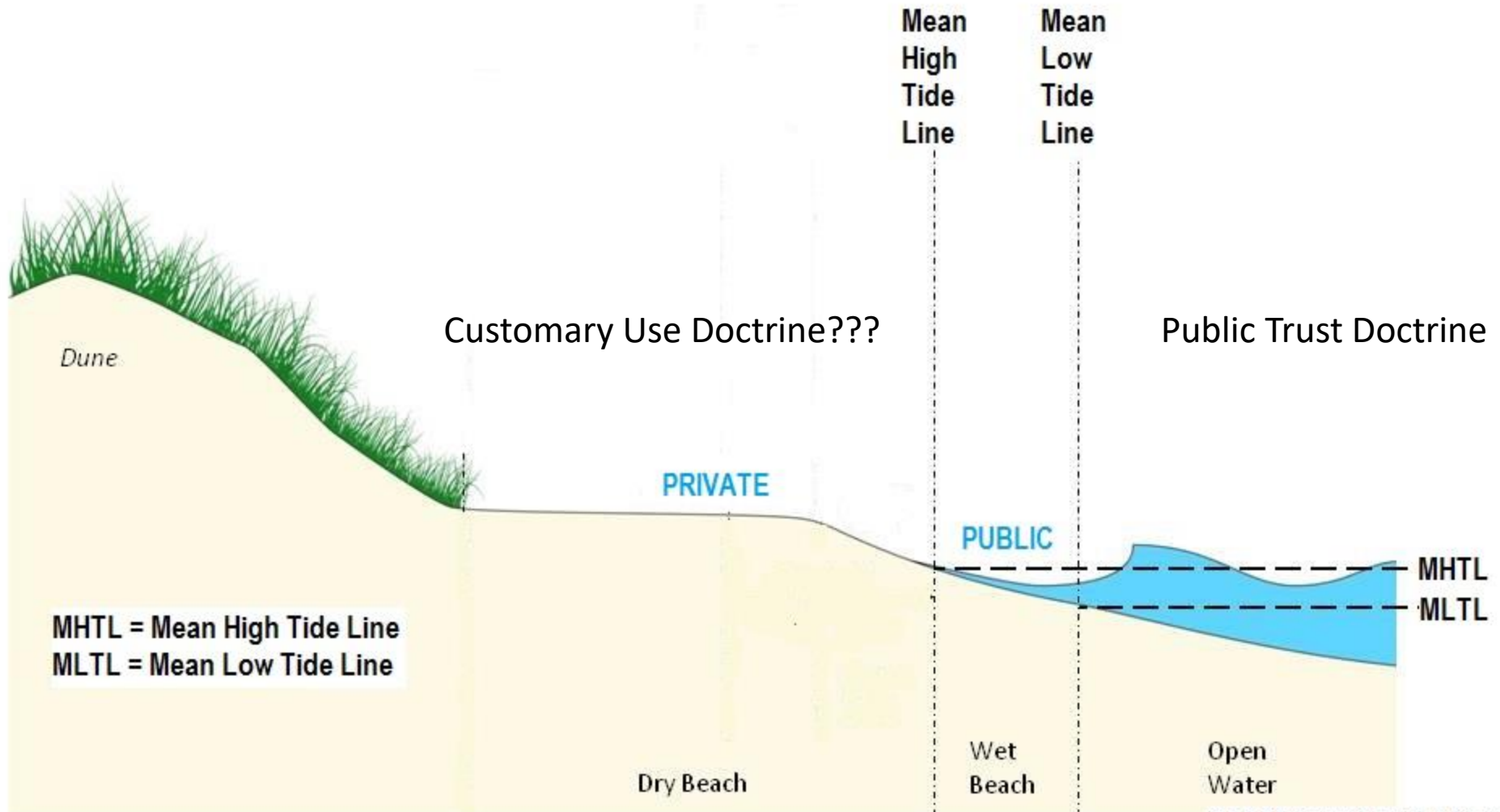
—Times Photo

Who Owns the Beach? All Roads Lead from Rome... And Run through England






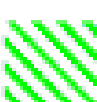
“by the law of nature these things are common to all mankind; the air, running water, the sea and consequently the shores of the sea.” - Institutes of Justinian (A.D. 530)

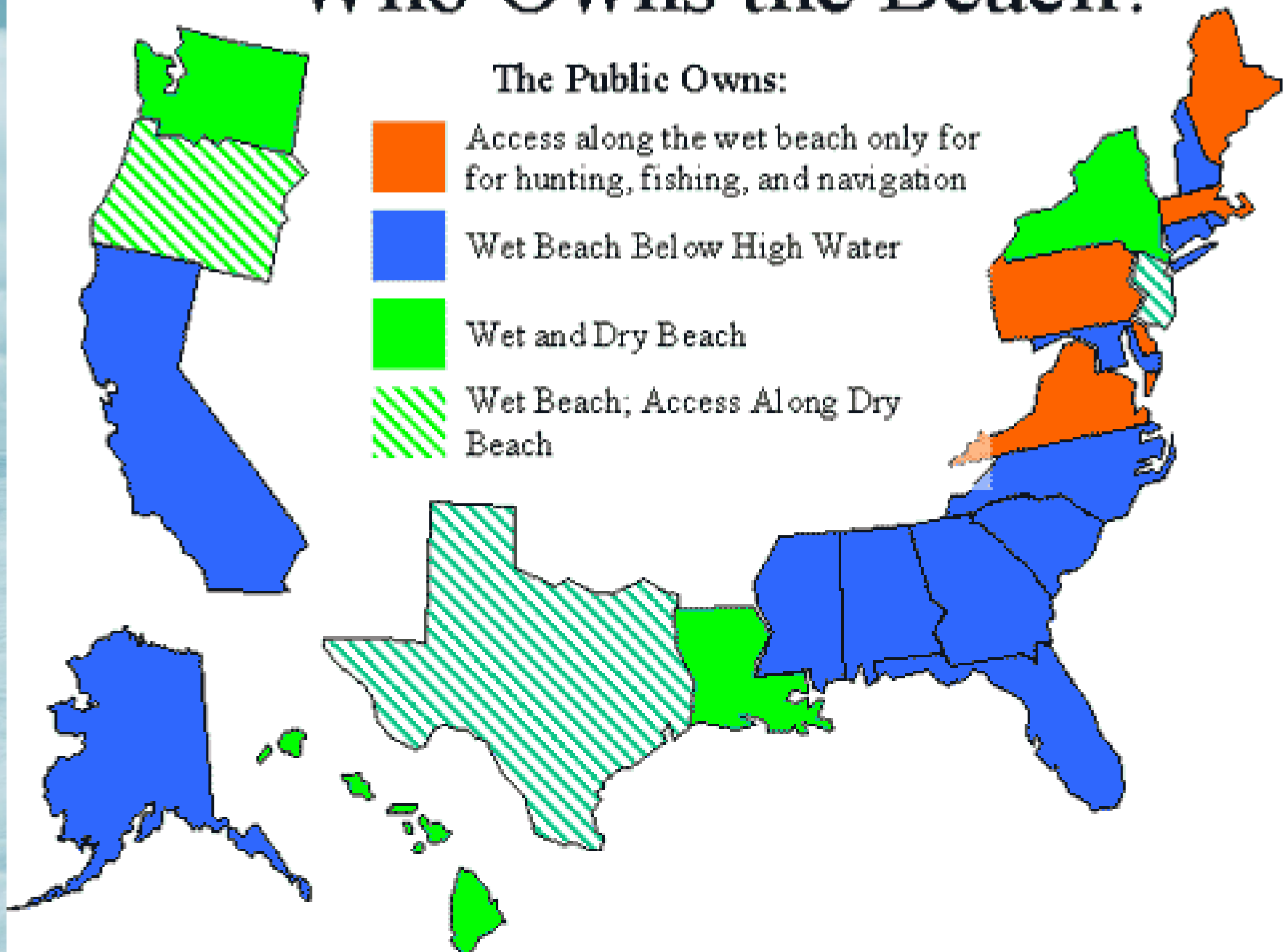
Who Owns the Beach?



Who Owns the Beach?

The Public Owns:

-  Access along the wet beach only for for hunting, fishing, and navigation
-  Wet Beach Below High Water
-  Wet and Dry Beach
-  Wet Beach; Access Along Dry Beach



The Common Law and Customary Use

- Common law is judge-made law (or judge-found law)
 - Property law examples: nuisance, trespass
- Arose out of necessity from the absence of codified law in feudal England (different from Continental Europe)
- Consolidated over time as England morphed into a kingdom, court systems evolved and precedent became the basis for adjudication

The Common Law and Customary Use

- Arose from a “gap” in the common law of prescription (adverse possession, prescriptive easement)
 - Adversity requirement
 - Distinct person or persons
- Early English Courts needed to address the gap where there was no adversity, no intent and no distinct person(s), e.g. the villagers
 - Found that customary use for of private property for communal activities could ripen in into a right if it were exercised from “time immemorial”)

Customary Use: Early English Cases

Villagers v. Lord of the Manor, (Eng., 1600s)

- Dancing around the Maypole
- Cricket on the Pitch



Customary Use in The United States: The Early Years



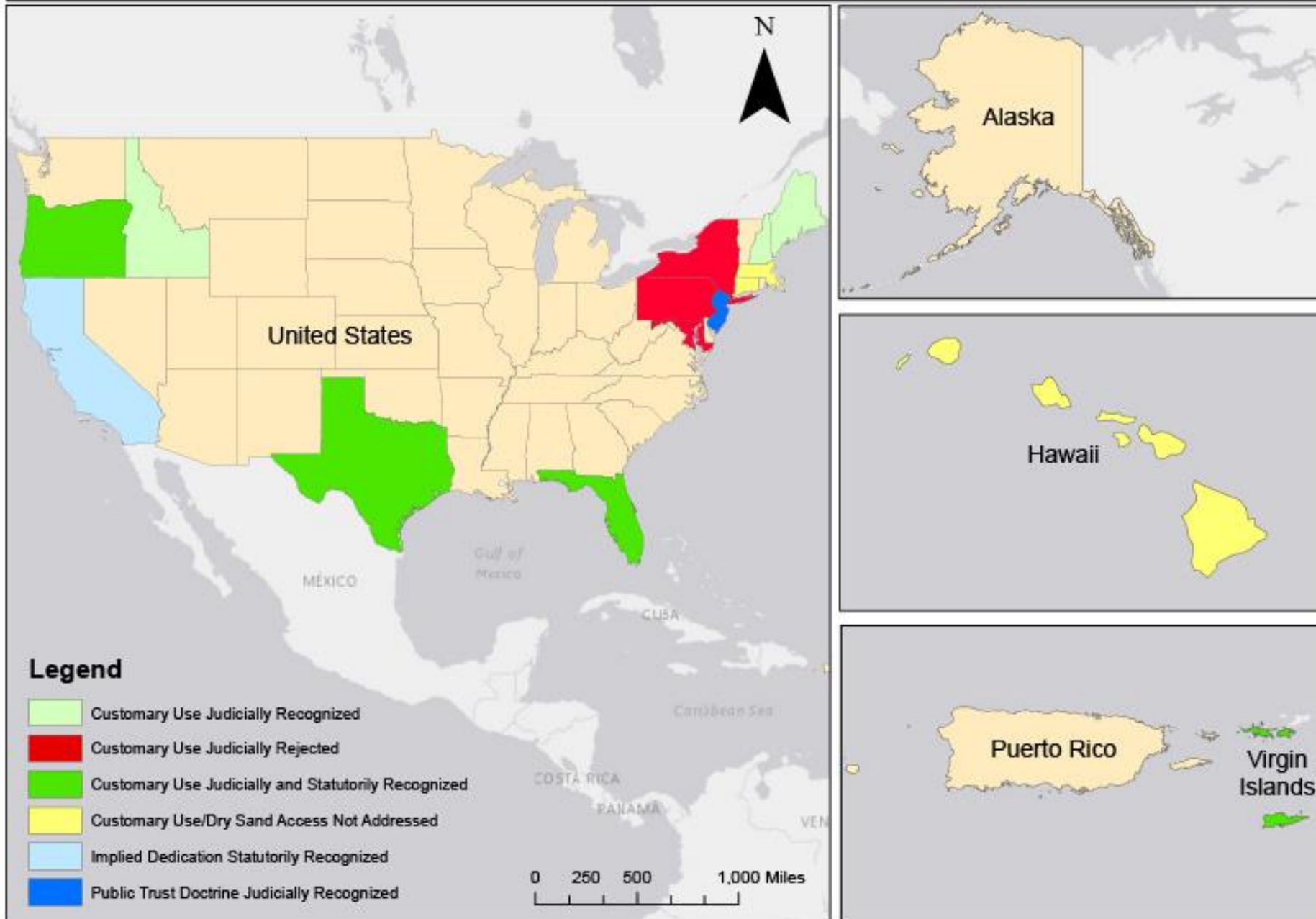
- Some Early 19th Century recognition
- (New Hampshire, Maine, Mass.)
Largely utilitarian uses
 - River landings
 - Gathering & storing seaweed
- Some states flatly rejected it (New York, New Jersey Connecticut)
 - Rationale doesn't obtain in the U.S.
 - Feudal doctrine
 - Time immemorial makes no sense
 - Doesn't work with sophisticated land titling & registration (northwest ordinance)



The Modern Resurrection of customary use: It's all about the beach

- OREGON - State ex Rel Thornton v Hayes (1969)
 - Applied to all beaches; all at once
- TEXAS – The Open Beaches Act (1959)
 - Rooted in custom
- HAWAII – Rooted in indigenous law with elements of common law – Public Shoreline Access v Hawai'i City Planning Commission (1995)
- U.S. VIRGIN ISLANDS – U.S. v St. Thomas Beach Resorts (1974)
 - Rooted in custom
- FLORIDA...

Legal Basis for Public Access to the Dry Sand Beach Based on Customary Use and Related Doctrines



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

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



Recognize this guy?



Customary Use Doctrine: Tona Rama

- If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner.
- However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.

Customary Use: Post-Tona Rama

- *Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995)
- The court interpreted Tona-Rama, stating that courts must determine the degree of customary and ancient use that particular beaches have supported.
- And here we are...

WARNING

PRIVATE PROPERTY
BEGINS 50 FEET
TOWARDS THE
OCEAN FROM
THIS SIGN.

NO TRESPASSING !

ARRESTS MAY BE
MADE UNDER
FSS 810.09.

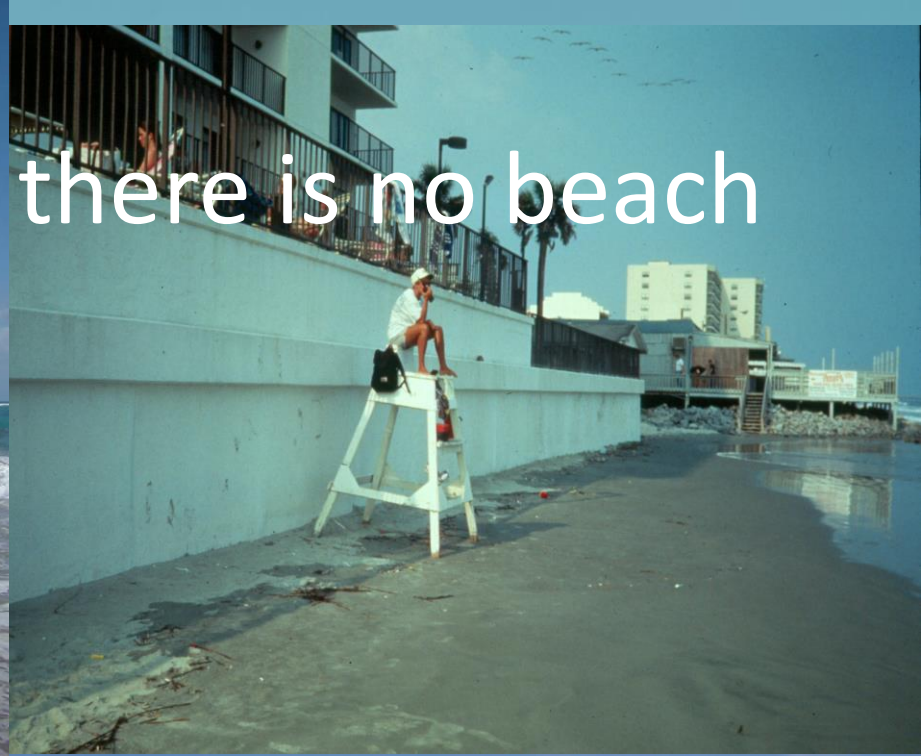




The Post Modern Beach and its Existential Threats



What does it matter if there is no beach





Or it looks like
this...

