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Walling Out: Rules and Standards in the Beach Access Context

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WALLING OUT: RULES AND STANDARDS IN THE BEACH ACCESS CONTEXT

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The overwhelming majority of U.S. states facially allocate exclusionary rights and access privileges to beaches by categorically deciding whom to wall in and whom to wall out. In the conventional terms of the longstanding debate surrounding the design of legal directives, such "rules" are considered substantively determinant ex ante and, in application, analogically transparent across similarly situated cases. Only a small number of jurisdictions have adopted "standards" in the beach access context, which—again, on the conventional account—sacrifice both determinacy and transparency for the ability to accommodate ex post the complexities of individual cases. This Article contends that beach access policy illustrates the familiar limitations of this conventional rules-versus-standards account in two elucidating ways. First, the implementation of contemporary beach access law suggests that the gap between rules and standards with respect to the virtue of determinacy is not nearly as wide as

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the conventional account allows. In short, beach access rules are not and cannot in actuality be divorced from context, while beach access standards take shape through applications that reveal core archetypes. Second, while beach access rules reflect the virtue of transparency in the sense that they minimize some forms of arbitrariness, standards offer their own, robust version of transparency, which is grounded in promoting dialogue and demanding accountability. The Article offers these contentions not to press the view that standards are necessarily superior to rules en masse, but, instead, to prompt reflection on the nearly uniform and seemingly impulsive rule fetishism that has held sway in the beach access context.

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INTRODUCTION

Proponents of erecting walls—both real and figurative—to address myriad issues, from immigration to pollution to trade, often turn to the proverb "good fences make good neighbors" brought to prominence in Robert Frost's 1962 poem, *Mending Wall*.[1] Frost's work, though, is no more

1. *See*, *e.g.*, Charles Selle, *'Walling in or Walling out' Is Folly We Can't Afford*, CHI. TRIB. (Jan. 23, 2019, 10:40 AM), https://www.chicagotribune.com/suburbs/lake-county-news-sun/opinion/ct-lns-selle-trump-wall-st-0124-story.html [perma.cc/CB2L-WQ9L].

a polemic plea for building walls than an impassioned appeal against them. The narrator in the poem, engaged in conversation with a fellow farmer, is instead in search of *reasons* for and against the annual ritual of rebuilding the loose-stone barriers that characterized much of the early twentieth century New England landscape. "Before I built a wall," suggests the narrator, "I'd ask to know [w]hat I was walling in or walling out, [a]nd to whom I was like to give offense."[2]

Today, the overwhelming majority of U.S. states facially allocate exclusionary rights and access privileges to privately-titled dry sand beaches by categorically deciding whom to wall in and whom to wall out.[3] In a great many jurisdictions, waterfront titleholders seemingly can exclude from the beach all comers in all instances without cause; in select others, they are categorically precluded from constraining third-party access to the beach regardless of the circumstances. In the conventional terms of the debate surrounding the design of legal directives, such "rules" are considered substantively determinant ex ante and, in application, analogically transparent across similarly situated cases. Only a small number of jurisdictions have adopted beach access "standards," which, consistent with the *Mending Wall* narrator's counsel, more flexibly engage in reasoning ex post that is sensitive to the complexities of individual cases. Standards do so, though, only—again, in accord with conventional terms—at the sacrifice of determinacy and transparency.

This Article contends that beach access policy illustrates the familiar limitations of the conventional rules-versus-standards account in two elucidating ways. First, the implementation of contemporary beach access law suggests that the gap between rules and standards with respect to the virtue of determinacy is not nearly as wide as the conventional account allows. Second, while rules reflect the virtue of transparency in the sense that they minimize some forms of arbitrariness, standards offer their own, robust version of transparency.

Part I elicits the first claim through a historically sensitive charting of three overarching approaches to beach access: robust exclusionary rights,

2. Robert Frost, *Mending Wall*, *in* THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED 33–34 (Edward Connery Latham ed., 1969).

3. Lands flowed by the tide are owned by the state and impressed with a public trust for the benefit of all. *See generally* COASTAL STATES ORG., INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d ed. 1997). Public ownership in tidal waterways extends up to the mean high-tide line in most states, though select states limit public ownership to the area seaward of the low-tide line. *See* James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1916 (1995). This Article concentrates on access to and use of beaches landward of those operative lines demarcating strict public ownership.

unfettered access privileges, and a reasonable access norm. It suggests that interpreting what on their face are the rigid, acontextual rules of robust exclusionary rights and unfettered access privileges, respectively, cannot in actuality be divorced from context. When new contexts arise, these rules do not automatically determine the scope of their own application; instead, beachgoers and titleholders reflect on whether the policies underpinning those rules apply in a new context and, where necessary, call on judges to perform their role of exercising judgment in determining whether to craft an exception to the rule, fashion a qualification to it, or recognize a distinction by reference to norms and policies that negates its application wholesale. In this regard, this Part suggests that these beach access "rules" are not wholly distinct from what, on their face, are those more open-ended "standards" protecting reasonable access that take shape through applications that reveal core archetypes.

Part II, in advancing the second claim, concedes that rule-like approaches have been appropriately lauded for their transparency in that they require decisionmakers to treat like cases alike and thereby minimize some forms of arbitrariness or bias. However, the Part submits that standard-based approaches offer their own version of transparency—one grounded in promoting dialogue, demanding accountability, and insisting on justification—that is also of great import. On this latter version, rules might be characterized by a *lack of* transparency if controversies are allegedly decided by application or nonapplication of a rule based on a blanket assertion of what that rule entails while the actual reasons for deciding whether a hard case is within or outside the rule go unexpressed.

Highlighting the determinacy and transparency features of standards is not offered here to press the ultimate claim that, in all circumstances, standards necessarily are superior to rules, standards necessarily reveal value judgments, or rules necessarily suppress or conceal those judgments. Rather, the Article concludes more modestly with the hope that developing an understanding of these features will prompt reflection on the near uniformity and seeming impulsivity of the rule fetishism that has held sway in the beach access context to date.

I. RULES AND STANDARDS: DETERMINACY

Even where codified through legislation or administrative regulations on coastal permitting, policies regarding access to and use of dry sand beaches in most U.S. states largely have their roots in interpretations of the common law doctrines of implied dedication, prescription, custom, and the public trust. Beach access in a vast majority of states construes each of these

common law doctrines in narrow terms by recognizing *robust exclusionary rights* in those who hold title to dry sand beaches. Select outliers offer broader readings of these common law doctrines, and thereby afford *unfettered access privileges* or *reasonable access*. Though laws respecting unfettered access privileges are similar to reasonable access approaches in their relatively expansive view of the public's interest in accessing beaches, they mirror the law in those jurisdictions respecting robust exclusionary rights in terms of their lack of patent attention to context.

Drawing on the historical development of beach access policy in three states—Texas, Oregon, and New Jersey—as illustrative of the three alternate approaches outlined above, this Part proceeds in three Sections. The first Section explains that, in the conventional terms of the long-running rules-versus-standards debate, Texas's and Oregon's approaches reflect "rules" that are determinate ex ante but have the propensity to be over- and under-inclusive given the irreducible complexity and evolving nature of our moral perspectives and policy goals.[4] It then critiques this view on the grounds that beach access rules cannot in actuality be divorced from context, for the rules themselves do not determine whether they are applicable in every conceivable factual circumstance. The second Section asserts that beach access rules—again, in conventional terms—are distinct from the types of "standards" on which New Jersey's approach rests, the latter of which can more flexibly and purposively accommodate complex and evolving perspectives and goals at the sacrifice of determinacy.[5] It then critiques this view on the grounds that standards take shape through applications in archetypical cases. The Part concludes in a third Section that the rule-based and standards-based approaches to beach access are, in actuality, far more similar than the traditional "determinacy of rules" and "flexibility of standards" descriptions allow.

A. "RULES" ON THE BEACHFRONT

This Section articulates the historical development of what on their face are, respectively, the exclusionary and unfettered access "rules" of Texas and Oregon, respectively. Thereafter, it questions these rules' supposed determinacy upon reflection as to how they have been applied by courts in

4. *See* John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923, 931–41 (2012) (describing the conventional positions); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 267–71 (1974) (same); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1694–99, 1739 (1976) (same).

5. *See* Lovett, *supra* note 4, at 931–41.

individual cases.

1. Robust Exclusion

Prior to Texas's gaining independence, Mexican law prohibited the colonization of the lengthy stretch of beach along Galveston Island—a stretch that today is within geographical reach for more Texans than any other given its proximity to the city of Houston—without approval of Mexico's President.[6] When Texas became a republic in 1836, all lands on the island thus were subject to significant public interests. In 1840, the Republic granted private title to Galveston's "West End" to Levi Jones and Edward Hall.[7] Soon after Texas entered the Union in 1845, the state's legislature confirmed the validity of the grant to Jones and Hall and many similar grants statewide.[8]

From the date of the Jones and Hall grant, it remained an open question which Texas lands above the low tide line, if any, still were impressed, even where title rested in private hands, with public interests. In its 1958 decision in *Luttes v. State*, the Texas Supreme Court rejected the State's claim that, under the public trust doctrine, these lands included the dry sand beach; instead, it held that public trust rights existed only in those lands seaward of the mean high-tide line.[9] A year later, the Texas legislature passed a statute purporting to establish enforcement procedures for instances in which the state acquires an access easement to beach area landward of the mean high-tide line via the common law doctrines of prescription, implication, and custom.[10] For several decades, state appellate courts conceived of these common law easements quite broadly, and many dry-sand beaches titled in private hands were thereby considered accessible to the public.[11] In 2011, though, the Texas Supreme Court in *Severance v. Patterson*[12] reduced what had come to be known as the 1959 "Open Beaches Act" to a misnomer.

According to *Severance*, every dry-sand beach in Texas that today is titled in private hands actually is *closed* to the public unless the state proves

6. General Law of Colonization, art. 4 (Mex., Aug. 18, 1824), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 97 (1898).

7. Severance v. Patterson, 370 S.W.3d 705, 716 (Tex. 2012).

8. *Id.*

9. Luttes v. State, 324 S.W.2d 167, 169, 181 (Tex. 1958).

10. *See* TEX. NAT. RES. CODE ANN. § 61.001(8) (West 2019).

11. *See, e.g.*, Seaway Co. v. Attorney Gen., 375 S.W.2d 923, 935 (Tex. Civ. App. 1964) (finding an implied dedication "of the area seaward from the seaward side of the line of vegetation to the line of mean high tide" to members of the public where successive owners "generally" allowed the public—at least beyond a four year period in which a fence existed—"to use the beach each year").

12. *Severance*, 370 S.W.3d at 705.

the impossible: that, upon the lapsing of the extensive statute of limitations afforded under the common law doctrines referenced in the Act, it has acquired a public easement across a strip of sand that, in effect, is fixed to specific metes and bounds.[13] The impossibility of the state's meeting this burden results from two inter-related realities. First, the locations of the vegetation line and the mean high-tide line (and, thus, the dry-sand beach between the two) vary—sometimes markedly—*most every year* as a result of coastal storms. Despite this variability, *Severance* focuses not on the purpose of a public beach easement but, instead, its geographical coordinates, going so far as to require the public to reestablish any previously acquired easement simply because the precise grains of sand underfoot have changed.[14] Second, per *Severance*, where the state does not currently hold a common law easement, private owners can construct *physical barriers* to the public's accessing Texas beaches, and thereby foreclose the establishment of a new public easement or the reestablishment of any preexisting public easement in perpetuity.[15] In imposing on the state a burden that it could never meet, the state supreme court's interpretation and articulation of Texas law effectively extended to coastal titleholders the right to wall out the public at their will.

Texas's approach assumes that a "single" owner of every oceanfront parcel can be identified and that these owners have near absolute power to control the dry sand sitting within the metes and bounds of their deeds. The robust exclusionary rights afforded these owners are not filtered in terms of the instances in which autonomy is exercised out of a desire to protect one's legitimate interests in, for example, preserving privacy or ensuring security, or, alternatively, out of a desire to dominate or isolate others.[16] On this view, owners' autonomy cannot be limited except, perhaps, in the most extreme and temporary circumstances of necessity.[17]

13. *Id.* at 708, 714–15 (noting that "the dry beach often is privately owned" and rejecting the claim that the public can acquire an easement thereon—by prescription, dedication, custom, or otherwise—that "can 'roll' from a parcel previously encumbered . . . to a distinct parcel not so encumbered . . . [or] from one portion of a parcel to another part of the same parcel").

14. *See*, *e.g.*, Richard J. McLaughlin, *Rolling Easements as a Response to Sea Level Rise in Coastal Texas: Current Status of the Law After* Severance v. Patterson, 26 J. LAND USE & ENVTL. L. 365, 382–83 (2011); *see also* Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305, 353–54 (2010).

15. *Severance*, 370 S.W.3d at 719 (interpreting the Open Beaches Act to "prohibit[] anyone from creating, erecting, or constructing any 'obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public' to access Texas beaches *where the public has acquired a right of use or easement*" (emphasis added)).

16. *See* Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 154 (2009).

17. *See*, *e.g.*, Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV.

2. Unfettered Access

An Oregon statute passed in 1967 allows for a perpetual public easement to "free and uninterrupted use" of all privately-owned dry sand beaches along the state's 362-mile coastline.[18] Contra Texas's approach, Oregon's approach envisions the beach as offering a particularly special forum for sociability.[19] Oregon's legislation sets forth no illusions that "the anonymity of the bathing suit" creates marked opportunities for especially meaningful interactions across status groups; publicly accessible beaches cannot, in and of themselves, serve as a mystic cure for a highly stratified society.[20] However, it reflects an understanding of beaches as providing a platform, if even for only the most casual perfunctory exchanges, for people of different backgrounds and circumstances, borrowing the words of Gregory Alexander, "to meet and engage with each other as concrete persons rather than as imagined others."[21]

The Oregon Supreme Court blessed the Oregon legislature's approach in 1969 in the face of a challenge by an owner who sought to wall off the

889, 941 (2009) (referring to temporary entry in situations of dire necessity); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 962 (1995) ("It is familiar to find rules that have explicit or implicit exceptions for cases of necessity or emergency. It is unfamiliar to find rules without any such exceptions.").

18. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 674 (Or. 1969). Only Hawaii grants similar public rights. *See In re* Ashford, 440 P.2d 76, 77–78 (Haw. 1968).

19. *See* James Freeman, *Democracy and Danger on the Beach: Class Relations in the Public Space of Rio de Janeiro*, 5 SPACE & CULTURE 9, 19 (Feb. 2002). Sociability refers to our capacity "to recognize and show concern for other human beings, to engage in various forms of social interaction; [and] to be able to imagine the situation of another." *See* Martha Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 23 (2007).

20. *See* Freeman, *supra* note 19, at 19; *see also* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 805–07 (2009).

21. GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING 196–98 (2018) (suggesting that accessible public spaces offer the educative promise of "indiscriminate . . . mingling"); Alexander Gazikas, *The Low Water Mark for Beach Access: Defending Government Protection of Intertidal Recreation as a Lawful Exercise of State Power*, 17 U.N.H. L. REV. 287, 302 (2019) (referring to beaches as serving an "equalizing function"); Marc R. Poirier, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SE. ENVTL. L.J. 71, 103 (2006) ("Public places open to all have an important benefit, though one intangible and difficult to quantify—they civilize us."); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 779 (1986) ("[R]ecreation can be a socializing and educative influence."); Bethany Berger, *Takings at the Water's Edge* (working paper) (on file with author) (describing waterfront lands as "the gathering places of the world" and "an outlet for ever more crowded and atomized residents to meet"). This perspective rings of Frederick Law Olmstead's assertion in the mid-nineteenth century that public parks offer space for socialization and educational influence across socioeconomic classes. *See* FREDERICK OLMSTEAD, *Public Parks and the Enlargement of Towns*, *in* CIVILIZING AMERICAN CITIES: A SELECTION OF FREDERICK LAW OLMSTEAD'S WRITINGS ON CITY LANDSCAPES 74–81 (S. Sutton ed., 1971).

beach in front of his coastal resort for his paying guests.[22] In *Thornton v. Hay*, the court found that the "first European settlers on [present-day Oregon's] shores" found the "aboriginal inhabitants" accessing and using the beach for a variety of purposes and that the "newcomers" had continued these customs through "actual practice[]" since statehood.[23] While the court said that the available evidence likely was sufficient to hold that the public had acquired an easement to this specific resort owner's beach by prescription, it pointed to the "unbroken" custom of beach use statewide in concluding that *all* of "the dry-sand area along the Pacific shore" is subject to a public easement.[24] By apparently allocating a property right to everyone in the state to go to the beach of his or her choosing, Oregon's beach access law crafts a social life quite distinct from that created under Texas's approach by offering each person an expansive range of recreational and socialization options.

3. Rules and Determinacy

Rules akin to Texas's robust exclusionary command and Oregon's unfettered access policy generally are lauded for their determinacy.[25] However, in actuality, such rules are only easy to apply—and thus only determinate—in easy cases. These rules do not automatically determine the scope of their own application when hard cases inevitably come along.[26]

22. *Thornton*, 462 P.2d at 673.

23. *Id.* at 673–74.

24. *Id.* at 676–77; *see also* Stevens v. City of Cannon Beach, 854 P.2d 449, 456–57 (Or. 1993) (holding that Oregon's customary public rights in ocean beaches precluded a takings claim challenging regulations limiting development on beaches titled in private parties); Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 839 (2013) (discussing the likes of *Stevens* in the course of questioning the self-contained nature of the background principles inquiry in regulatory takings jurisprudence). Applications of the doctrine of custom ordinarily involve remarking on the circumstances and context in which a longstanding use by the non-owning public will transform an owner's right to exclude into a right of access that the public can comfortably expect will continue into the future. *See*, *e.g.*, City of Daytona Beach v. Tona-Roma, Inc., 294 So. 2d 73, 78 (Fla. 1974). Yet *Thornton*'s application fulfills the public need to access and use beaches by categorically deeming all portions of all beaches in the state open to the public on the rather implausible deduction—at least based on the limited record before the court—that the public regularly had accessed each portion of each and every one of those beaches in the past. Indeed, in dicta, the Oregon Supreme Court recognized as much in a later decision in making the seemingly contradictory assertions that "[w]e do not retreat today from anything said in [*Thornton*]" and "nothing in [*Thornton*] fairly can be read to have established beyond dispute a public claim by virtue of 'custom' to the right to recreational use of the entire Oregon coast, no matter what the topography of a particular place." McDonald v. Halvorson, 780 P.2d 714, 724 (Or. 1989).

25. *See* Kennedy, *supra* note 4, at 1688–89; Lovett, *supra* note 4, at 926; Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590–92 (1988); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–63 (1992).

26. *See*, *e.g.*, Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1286 (2008); Sunstein, *supra* note 17, at 961; KARL LLEWELLYN, THE

Instead, in new contexts litigants force judges to perform the task of interpreting rules to determine whether those rules apply.[27] For an instructive if gruesome example, a New York court famously declined in *Riggs v. Palmer* to follow the decedent's will, made in due form, stating that all of his property would pass to his grandson, Elmer Palmer, when Palmer murdered his grandfather to accelerate this inheritance.[28]

In performing this interpretive task in a given instance, a judge must exercise moral and practical judgment by looking to the reasons the state adopted the rule in the first place, the values and norms that rule supposedly protects, the consequences it sought to promote, and the situations within which it was supposed to operate, as well as any countervailing norms and interests that might not have been implicated or obvious in the factual setting that led to the creation of the rule in the first place.[29] A rule crumbles when judges cannot live with the result that mechanical application of that rule in a new context dictates.[30] In this way, rules and standards are not as distinct with regard to determinacy as they appear on the conventional account.[31]

In the beach access context, consider, for instance, the acontextual

BRAMBLE BUSH 71 (1930). Mark Kelman goes so far as to say that "*all* cases are hard cases." MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 23 (1987).

27. *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 817 (1989) ("[J]udges are an interpretive community conscious of their obligation to act as independent moral choosers for the good of society, in light of what that society is and can become. . . . [T]here are no rules that can be understood apart from their context.").

28 Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889).

29. *See*, *e.g.*, Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1427 (2013).

30. *See*, *e.g.*, Rose, *supra* note 25, at 578 ("[S]traightforward common law crystalline rules have been muddied repeatedly by . . . equitable second-guessing."); Sullivan, *supra* note 25, at 54 ("[T]o avoid injustice at the margin, legislatures and courts simply invent end-runs around [rules]."); Sunstein, *supra* note 17, at 957 ("Often rules will be too crude, since they run up against intransigent beliefs about how particular cases should be resolved.").

31. *See* Kennedy, *supra* note 4, at 1710 ("The different values that people commonly associate with the formal modes of rule and standard are conveyed by the emotive or judgmental words that the advocates of the two positions use in the course of debate about a particular issue."); Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L.J. 81, 105 (2010) ("Even the most careful legal design would be unable to predict, allocate, and decide in advance all possible states-of-the-world regarding the bundle of property rights."); Lovett, *supra* note 4, at 937 (suggesting that, given the blurred nature of rules and standards, the fairness, efficiency, and democratic governance justifications for one design versus the other often "dissolve into irreconcilable, and perhaps ultimately rhetorical, conflict"); Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–32 (1991); Sullivan, *supra* note 25, at 61 (explaining that the "distinctions between rules and standards . . . mark a continuum, not a divide"). Cass Sunstein describes the rules-standards continuum as involving progressively more discretionary steps from untrammeled discretion (at one pole) to rules to "rules with excuses" to presumptions to factors to standards to guidelines (at the other pole). Sunstein, *supra* note 17, at 960–68.

application of Texas's seemingly robust exclusionary rule if the City of Galveston conveyed to private parties all beaches on the island that currently are titled in public hands. Strict adherence to this "rule" effectively would limit the public's access to and, thus, use of all lands flowed by the tide of the Gulf of Mexico—which, incontrovertibly, are held in trust for the public—to those individuals who have access permission from a waterfront owner or who can secure access to those lands by water or air transport. Consider, too, how an acontextual application of Oregon's doctrine of custom would leave unaddressed the reality that there are longstanding practices that, when replicated moving forward, may be *contrary* to public need as conceived in light of changing times and conditions. For a simple example, contemplate the claim, levied in some states in the past, that the public customarily used the beach for automobile travel.[32] Faced with such a claim today, it is not evident that judges would be doing their job if they cemented the public's ability to continue this use in perpetuity merely because of its historical exercise and without reflection on the purposes of the practice and the values served by the perpetuation—or cessation—of it.[33]

These hypothetical examples illustrate that determining whether rules should apply in hard cases *requires* standards. The laws in Texas and Oregon are, of course, grounded in different presumptions. The essential if implicit question, though, in each of these jurisdictions is the same: whether the reasons behind the exclusion or access requested are sufficient under the circumstances to rebut the standing presumption. Judges who failed to acknowledge as much merely would be assuming that "rules" have a built-in structure that makes them easy to state, and shielding their eyes from their unavoidable task of exercising normative judgment, all the while, if unintentionally, staking out a normative position.[34] Texas judges executing their role properly, however, would confront head-on the consequences of a purely privatized coastline to determine whether that state of affairs should be respected or, instead, excepted from the rule in a given case that may have similar though not identical facts. Similarly, Oregon judges executing their role properly would confront head-on the evolving understandings of environmental science that have illuminated the damage vehicular traffic can

32. *See*, *e.g.*, Trepanier v. County of Volusia, 965 So. 2d 276, 291 (Fla. Dist. Ct. App. 2007) ("Driving and parking on the beach . . . may be viewed as a customary use in its own right based on . . . a historic custom of using the beach as a thoroughfare.").

33. *But see* Sir John Baker, *Prescriptive Customs in English Law, 1300–1800*, *in* 33 LIMITATION AND PRESCRIPTION (Harry Dondorp, David Ibbetson & Eltjo J. H. Schrage eds., 2019) (noting that, under English law, an act declared customary remains so unless and until lifted by statute).

34. Judges, therefore, are never "simple rule applier[s]." Kennedy, *supra* note 4, at 1770.

inflict on coastal ecological systems.[35] That context matters does not suggest that rules are useless; rather, it suggests that rules are useful when tailored to circumstances that we have some passable ability to predict the contours of—though never with absolute precision—in advance.[36]

B. "STANDARDS" ON THE BEACHFRONT

This Section—again, with attention to historical developments—distinguishes the exclusionary and unfettered access rules of, respectively, Texas and Oregon from the standards-based framework of New Jersey, the latter of which is rooted in the public trust doctrine. It contends that the flexibility often attributed to such a standards-based framework is not as expansive as the conventional account suggests.

1. Reasonable Access

New Jersey was established in 1664 as a real estate investment company, with a grant of property from King Charles II to his brother James, the Duke of York.[37] James then conveyed those rights to two proprietors, Lord John Berkeley and Sir George Carteret.[38] Because, under English law, the King could not convey any rights that he held in trust for the public, those rights were not conveyed to Berkeley and Carteret, but rather were retained by the Crown. Accordingly, under the public trust doctrine, no property owner in present-day New Jersey ever possessed these rights beyond the

35. *See*, *e.g.*, Chelsea Harvey, *Why You Really Need to Stop Driving on Beaches*, WASH. POST, (June 3, 2015, 12:43 PM), https://www.washingtonpost.com/news/energy-environment/wp/2015/06/03/why-you-really-need-to-stop-driving-on-beaches [perma.cc/4CBW-XEF6].

36. *See* Shawn J. Bayern, *Against Certainty*, 41 HOFSTRA L. REV. 53, 55–58 (2012) (explaining that the application of rules requires interpretative judgments about the contexts within which that rule should apply); Radin, *supra* note 27, at 809 ("Over time the 'same' action in response to the 'same' directive can go from being compelled by a rule to not being compelled by a rule, or vice versa."); Sunstein, *supra* note 17, at 1022 ("The need for interpretation during encounters with concrete cases means that *ex post* assessments of some sort are an inescapable part of law.").

37. *See* Graham v. Township of Edison, 173 A.2d 403, 405 (N.J. 1961). The next several paragraphs draw in considerable part from Timothy M. Mulvaney & Brian Weeks, *"Waterlocked": Public Access to New Jersey's Coastline*, 34 ECOLOGY L.Q. 579 (2007).

38. Berkeley and Carteret had visions of establishing a feudal society in which they would, as the land's lords, collect tributes from its occupants. *See* Grant of Land from James, Duke of York, to John Lord Berkeley, Baron of Straton, & Sir George Carteret (June 24, 1664), https://avalon.law.yale.edu/17th_century/nj01.asp [perma.cc/HH9A-CK93]. That the occupiers later successfully resisted Berkeley and Carteret's oppressive scheme by claiming that they held freehold title as a result of their laboring to cultivate and develop the land does not alter the fact that title to all property in New Jersey today is based on and can be traced back to these original conveyances from King Charles II. *See* BRENDAN MCCONVILLE, THESE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY (1999). It, of course, is the uncomfortable and undeniable truth that all "freehold titles" in New Jersey, like the proprietary claims themselves, were created in forcible disregard of the interests of the members of the Indian nations who originally lived on the land.

reigning monarch of England and, following the transfer of royal rights to state legislatures at the close of the Revolutionary War, the State of New Jersey itself.

In its 1821 decision in *Arnold v. Mundy*, New Jersey's Supreme Court explicitly recognized that these public trust rights included access to and use of navigable waters and tidal shores for purposes of fishing and transporting persons and commercial goods.[39] It follows that these public rights protected under the public trust doctrine, unless somehow specifically and appropriately abrogated by the State with respect to a given parcel in the intervening period, sit in the chain of title to all properties that include navigable waters or border tidal waterways statewide.[40] Thus, where the State conveys title to navigable waters or tidal shores to private parties, those parties' interests, per *Arnold*, generally remain subject to the public's rights of access and use.

After *Arnold*, the public trust doctrine case law in New Jersey remained relatively quiet through the first half of the twentieth century. During that time, the state's urban waterfronts were densely developed with largely industrial uses, while several oceanfront cities with sandy beaches and railroad access—such as Asbury Park, Long Branch, Atlantic City, and Cape May—grew into popular resorts.[41] Outside of these urban areas and resorts, though, the state's beaches remained largely undeveloped and were used only for fishing, fowling, and associated activities.[42] The New Jersey coastline changed rapidly after World War II, though, due to the popularity of the automobile and improvements to New Jersey's highways, including the modernization of tunnels from New York City and construction of the Garden State Parkway.[43] In short order, New Jersey's entire 128 miles of sandy beaches had come within reach of the region's increasingly prosperous middle class.[44]

39. Arnold v. Mundy, 6 N.J.L. 1, 12 (1821); *see also* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892); Martin v. Lessee of Waddell, 41 U.S. 367, 411–12 (1842).

40. Some courts seem to suggest that the state may terminate public trust rights by transferring public trust property to a private party via a deed that expressly states that the transfer is unencumbered by such rights. *See*, *e.g.*, Greater Providence Chamber of Commerce v. Rhode Island, 657 A.2d 1038, 1040 (R.I. 1995). In New Jersey, though, "the sovereign never waives its right to regulate the use of public trust property." Karam v. N.J. Dep't of Envtl. Prot., 705 A.2d 1221, 1228 (N.J. Super. Ct. App. Div. 1998), *aff'd* 723 A.2d 943 (N.J. 1999); *see also* Glass v. Goeckel, 703 N.W.2d 58, 62 (Mich. 2005) (holding that the rights encompassed under the public trust doctrine are inalienable).

41. DOMINICK MAZZAGETTI, THE JERSEY SHORE: THE PAST, PRESENT & FUTURE OF A NATIONAL TREASURE 65–66, 81–82, 107–09 (2018).

42. *Id.* at 212–14.

43. *Id.* at 260–64.

44. *Id.* at 254.

Starting in the 1970s, the state's courts were called upon more and more to resolve disputes between private property owners and the newly expanded beach-going public. These courts sided with the public at most every turn. In 1972, the state's supreme court recognized that the State owns not only all tidal waterways and the underlying submerged lands, but also the shore seaward of the mean high-tide line.[45] Soon thereafter, it held that a municipality may not restrict use of a portion of its beach to its residents.[46] And, a bit later, an appellate court concluded that municipalities may not discriminate against nonresidents in their beach fee schedules or other beach access or use policies.[47] These rulings, the New Jersey Supreme Court would explain in its 1984 decision in *Matthews v. Bay Head*, rested on a perception of the public trust doctrine not as a "fixed or static" principle but instead one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit."[48]

The *Matthews* court made two important declarations: First, public trust uses in New Jersey reach beyond fishing and transportation to recreation and socialization, and, second, the character of the property at issue, not merely the identity of the titleholder as private or public, determines whether and the extent to which the public has rights to recreate and socialize landward of the mean high-tide line.[49]

As to this latter point, the beaches in dispute in *Matthews*, spanning the entire 1.5-mile oceanfront of the Borough of Bay Head, were privately owned but managed by a private association—the Bay Head Improvement Association ("Association")—that provided services similar in type and scale to those provided by many coastal municipalities.[50] The sole purpose of the Association was to offer and manage beach access and use for the benefit of the Borough's residents, with Association staff serving as lifeguards, maintaining the beach, and selling beach badges required for

45. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972); *see also* Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881, 886–88 (N.J. 1981).

46. Van Ness v. Borough of Deal, 393 A.2d 571, 574 (N.J. 1978); Hyland v. Borough of Allenhurst, 393 A.2d 579, 581–82 (N.J. 1978) (concluding that a municipality abused its power by barring beachgoers from use of municipally maintained toilet facilities adjacent to a public beach).

47. Slocum v. Borough of Belmar, 569 A.2d 312, 317 (N.J. Super. Ct. Law Div. 1989) (declaring a municipality breached its fiduciary duties to the public by raising beach admittance fees rather than property taxes to generate revenue solely to benefit its residents and by charging fees that were "disproportionately and inequitably" higher on weekends, when mostly nonresidents use the beaches, as opposed to lower fees on weekdays when mostly residents use the beaches).

48. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (quoting *Borough of Neptune City*, 294 A.2d at 47).

49. *Id.* at 368–69.

50. *Id.* at 359.

entry in the summer months.[51] The Borough, in turn, supported the Association through cooperative municipal resolutions, free office space, tax-exempt real estate, free liability insurance coverage, and public funding of beach protection structures.[52]

Viewing the Association "in its totality," including attending to the Association's "purpose, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront," the court deemed the entity "quasi-public."[53] On a beach held by a quasi-public entity, concluded the court, "[t]he public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand."[54] To determine the extent of public access to and use of the dry sand required in this context, *Matthews* identified several non-exclusive considerations that it deemed relevant, including (1) the location of the dry sand in relation to the foreshore, (2) the usage of the upland dry sand area by the private owner, (3) the extent and availability of publicly owned upland dry sand areas in the vicinity, and (4) the nature and extent of the public demand.[55]

Matthews does not present a formula into which one simply can plug defined variables to determine automatically whether a given beach should be deemed quasi-public and, if so, the precise extent of public access and use that should be available. However, the decision sets an important baseline for instances in which private entities and municipalities are intertwined in a manner that resembles the symbiotic relationship between the Association and the Borough. Moreover, it establishes a framework for contextualized judgments in future borderline cases in which private entities might be conceived as standing in the shoes of a municipality, if in less complete terms than was the case in *Matthews* itself. Still further, the holding, while saying nothing explicit about beaches owned by private parties distinctly independent of any government entity, sent an important signal of inclusivity on New Jersey's oceanfront.

The circumstances surrounding a rather unique non-profit venture illustrate both the progress and limitations of *Matthews*' concentration on the character of the property at issue. In 2002, an ambitious collection of young surfers founded an initiative known as the Habitat Paddle to Build that ultimately would gain considerable media attention up and down the eastern

51. *Id.*
52. *Id.* at 360.
53. *Id.* at 368.
54. *Id.* at 366.
55. *Id.* at 365.

seaboard.[56] Over the course of a single month, the group planned to take on the grueling task of paddling surfboards the full length of New Jersey's coastline in an effort to raise funds and awareness for the charitable home building organization, Habitat for Humanity.[57] In advance of the trip, the group contacted the U.S. Coast Guard to advise it of their intentions. The Coast Guard's Marine Event Coordinator responded that the group's plans did not implicate federal strictures because the paddling journey would not trigger any of the relevant federal criteria relating to vessel size, water quality protections, or shipping interference.[58] This official did, though, close his letter with a reminder that the paddlers' efforts would need to be conducted in accord with all "state and local law and regulation that applies during the time and at the location of the event."[59]

Based on a first-hand account of one of the paddlers, who penned a daily journal of the trek for a New Jersey newspaper, it is readily apparent that it was the *Matthews* line of state and local law and regulation to which the group had been referred by the Coast Guard that allowed the project to succeed.[60] The group spent four weeks traversing across beaches to get to the water; walking the shores with a Habitat for Humanity banner; and routinely stopping for a rest, a snack, or to chat about the organization's mission with thousands of locals and visitors alike on myriad beaches, including those of Bay Head and multiple other towns with quasi-public beach management arrangements akin to that at issue in *Matthews*.[61] By and large, the paddlers' access to and use of New Jersey's beaches was welcomed with open arms.[62]

The group did, though, encounter stretches of beach that had been walled off to the public by the gates and security guards of privately-owned oceanfront homes, hotels, condominiums, and beach clubs. In some of these instances, the paddlers were able to gain permission from the owners to step onto the beach; in others, they stayed in the water and the area flowed by the

56. *See*, *e.g.*, *"Habitat Paddle to Build" A Very Worthy Cause*, ASBURY PARK PRESS, June 4, 2006, at H14; Katia Raina, *Friends Paddle N.J. Coast to Help Habitat for Humanity*, PRESS OF ATLANTIC CITY, July 13, 2002, at C1; Suzanne Zionts, *Surf Group Raises Money to Build Homes for Needy*, COURIER-POST, July 4, 2002, at 5B.

57. *See* Zionts, *supra* note 56.

58. Letter from Geoffrey M. Pagels, Chief Warrant Officer, U.S. Coast Guard, Marine Event Coordinator, to Timothy M. Mulvaney, Professor of Law & Assoc. Dean for Faculty Research, Tex. A&M Sch. of Law (February 10, 2002) (on file with author).

59. *Id.*

60. *Habitat Paddle to Build Journal Series*, OCEAN COUNTY OBSERVER, June 30, 2002–July 28, 2002 (on file with author).

61. *See id.*; Zionts, *supra* note 56.

62. *Habitat Paddle to Build Journal Series*, *supra* note 60.

tide; and, in still others, they were forced to pack up the team van and drive, sometimes a sizable distance, to the next public access point.[63] Several years after the conclusion of their journey, the New Jersey Supreme Court would issue its landmark beach access decision in a case, *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc*., involving one such private enclave.[64]

The dispute in *Raleigh Avenue* had begun unexceptionally with local resident Anthony Labrosciano exiting the area flowed by the tide—following, presumably, a stroll or a swim—onto a segment of beach owned by the Atlantis Beach Club ("Atlantis").[65] Mr. Labrosciano proceeded to walk across the dry sand in an effort to leave the beach at the foot of Raleigh Avenue, which presented the most direct route to his home.[66] Atlantis's security detail asked him to stay off the beach.[67] When he refused, Atlantis called the police and ultimately pursued a trespass charge.[68] A citizens' group, the Raleigh Avenue Beach Association, of which Mr. Labrosciano was a member, filed its own suit asserting that Atlantis was depriving people of their coastal access and use rights.[69] The State of New Jersey immediately sided with the citizens' group in charging that Atlantis's exclusionary practices were inconsistent with the public trust doctrine.[70]

Unlike the quasi-public beach association in *Matthews*, Atlantis was a distinctly private organization. The *Raleigh Avenue* court, though, took the significant step of extending application of the *Matthews* considerations to beaches titled in such private hands. It asserted that "reasonable access to the sea is integral to the public trust doctrine" and that use of the dry sand beach is "ancillary" to use of the ocean regardless of the identity of the party who holds underlying title to that beach.[71] The decision rests on an evaluative

63. *See* E-mail from Christopher McCann to Timothy M. Mulvaney, Professor of Law & Assoc. Dean for Faculty Research, Tex. A&M Sch. of Law (October 3, 2020) (on file with author) (recounting first-hand experiences on the Habitat Paddle to Build).

64. Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 113–25 (N.J. 2005).

65. *Id.* at 116.

66. *Id*.

67. *Id*. Atlantis's demanding that Mr. Labrosciano stay off the beach is a mere illustration of the Atlantis's exclusionary efforts. *See*, *e.g.*, E-mail from Brian Weeks, Deputy Attorney Gen., State of N.J., to Timothy M. Mulvaney, Professor of Law & Assoc. Dean for Faculty Research, Tex. A&M Sch. of Law (October 1, 2020) (on file with author) (recounting, in the course of recollecting his investigative efforts as counsel for the State of New Jersey in the *Raleigh Avenue* litigation, an Atlantis security guard's precluding a couple that had walked from the water across the dry sand on Atlantis's property without incident from *leaving* the beach through Atlantis's gate).

68. *Raleigh Avenue*, 879 A.2d at 116.

69. *Id.*

70. *Id*.

71. *Id*. at 120. The *Raleigh Avenue* decision stated that allowable beach fees may cover only the actual costs of basic beach services, including lifeguards, trash removal, showers, toilets, and

term—what one scholar describes as a "reasonable access norm"—that provokes reflection by titleholders and beachgoers alike about what behavior is acceptable and expected by others in a given context.[72]

Raleigh Avenue's reasonable access approach is distinct from the seemingly "crystalline" Texas tenet that a person who holds title to the dry-sand portion of a beach may wall out others from that beach at will.[73] It also differs from the facial stiffness of Oregon's imperative in that it does not purport to fortify historical public uses for all time.[74] *Raleigh Avenue*, in addition to reiterating the importance of the character of the property in evaluating the extent to which the public has rights to access and use dry sand beaches titled in private hands, serves as a powerful symbol for the proposition that no owner can exercise control over property in a way that unreasonably interferes *with contemporary public needs* concomitant to the enjoyment of public waterways.[75]

administrative costs. *Id.* at 118, 124–25. In essence, the court approved a two-tiered fee structure: one for members in private facilities and one for the general public in the public area. The private club, Atlantis, may charge whatever the market will bear for use of its private facilities, such as cabanas, umbrellas, gazebos, etc., without regulation under the public trust doctrine. Such fees remain subject to other government police power regulations, such as taxation, consumer protection, health and safety laws, and regulation of the sale of alcoholic beverages. However, Atlantis may not appropriate public assets and use them as if they were the private assets of a for-profit entity.

72. *See* ALEXANDER, *supra* note 21, at 180, 188–90. Upon application of the *Matthews* considerations, the *Raleigh Avenue* court deemed the *entire* Atlantis beach—approximately 480 feet in length along the water's edge and 340 feet wide when measured from the water's edge to Atlantis's landward-most property line—subject to public access and use. In support of this conclusion, the *Raleigh Avenue* court pointed to the lack of a public beach in the municipality, the fact that the public accessway nearest Raleigh Avenue was more than a half-mile away, high demand from hundreds of residents immediately inland of the beach, and the longstanding prior free public use of the beach. The two dissenting justices generally agreed that the *Matthews* considerations should be extended to cases involving beaches titled in private hands that do not have any connection to a municipality, but, in applying those considerations, would have afforded the public access to and use of just a ten-foot-wide strip of dry sand along the length of Atlantis's beach. *See Raleigh Avenue*, 879 A.2d at 125–29 (Wallace, J., dissenting).

73. *See* Lovett, *supra* note 4, at 929; Rose, *supra* note 25, at 578.

74. In this comparative sense, *Raleigh Avenue* makes evident that resorting to a standard does not automatically translate into "weaker" protection of property rights. *See* Lehavi, *supra* note 31, at 113.

75. The *Raleigh Avenue* court's rationale mirrors in basic respects a concurring opinion by Oregon Supreme Court Justice Arno H. Denecke in the Oregon case of *Thornton v. Hay* described above. Justice Denecke wrote:

> I agree with the decision of the majority; however, I disagree with basing the decision upon the English doctrine of "customary rights." . . . I base the public's right upon the following factors: (1) long usage by the public of the dry sands area, not necessarily on all the Oregon beaches, but wherever the public uses the beach; (2) a universal and long held belief by the public in the public's right to such use; (3) long and universal acquiescence by the upland owners in such public use; and (4) the extreme desirability to the public of the right to the use of the dry sands. When this combination exists, as it does here, I conclude that the public has the right to use the dry sands. . . . "The law regarding the public use of property held in part for the benefit of the public must change as the *public need* changes."

2. Standards and Determinacy

Adherents to the conventional rules-versus-standards account described at the outset of this Part are likely to characterize New Jersey's reasonable access standard as indeterminate.[76] There are at least two counter-charges to this characterization. First, to the extent this standard is less determinate than the rules of Texas and Oregon (which, as asserted above, is no foregone conclusion given that the scope of the Texas and Oregon rules are often themselves indeterminate without attention to context), it may well be acceptable; after all, ensuring determinacy does not trump reaching the right result in all circumstances. Second, though—and as this Section sets out in more detail below—the very charge of wholesale indeterminacy is misplaced.[77] Just as robust exclusionary and unfettered access rules are, as noted above, less determinate than the conventional account makes them out to be, a reasonable access standard is more determinate than that account generally allows.[78] Key precedential applications give standards of this sort their shape.[79] The following pages offer two illustrative exemplars of how New Jersey's reasonable access standard achieves some modicum of determinacy by reference to baseline cases.

State *ex rel.* Thornton v. Hay, 462 P.2d 671, 678–79 (Or. 1969) (Denecke, J., concurring) (emphasis added) (quoting 1 WATER AND WATER RIGHTS: A TREATISE ON THE LAW OF WATER AND ALLIED PROBLEMS 202 (Robert Emmet Clark ed., 1967)).

76. *See* Radin, *supra* note 27, at 796 ("If rules do not tie judges' hands with their logical or analytic application, the traditional view is that judges will have personal discretion in how to apply the law.").

77. *See* Singer, *supra* note 29, at 1387–88.

78. *Id.* at 1390. Indeed, standards may in some instances be *more* determinate than rules. *See*, *e.g.*, Al Katz & Lee E. Teitelbaum, *Pins Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1, 31–33 (1977).

79. *See* Sunstein, *supra* note 17, at 984–85 ("Encounters with particular cases will confound the view that things really have been fully settled in advance. . . . Even laws that appear confining, and quite rule-like, may require interpreters to give them content at the point of application."); *id.* at 989 ("[C]ategories receive their human meaning by reference to typical instances. When we are asked whether a particular thing falls within a general category, we examine whether that thing is like or unlike the typical or defining instances."); Lehavi, *supra* note 31, at 87 (explaining how a standard "delegates power to courts to fill [the standard] with content through interpretation"); Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1223 (2010) (suggesting that where "like circumstances have presented themselves before, and precedent has been established to the effect that certain specific behavior falls inside or outside the directive, the citizen may draw the simple analogy and follow suit"). Similarly, lawyers do not face extreme difficulties in advising their clients on the viability of, for instance, nuisance or negligence claims, despite the standard-like nature of the reasonableness provisions that drive those doctrines. *See* Singer, *supra* note 29, at 1389. Where core archetypes are *not* instructive, the moral reflection that standards prompt is a valuable feature, not a bug, of a standards-based approach.

i. Limiting Access

The matter of *Bubis v. Kassin* arose in the Village of Loch Arbour, a small municipality consisting of a beach approximately 300 feet deep along 1000 feet of ocean frontage.[80] Of this frontage, a private citizen, Joyce Kassin, held title to the southern-most 300 foot by 650 foot portion and the Village held title to the remainder.[81] In earlier litigation, Kassin had been ordered to provide an access easement across her land to the water.[82] In this follow-up suit, Sophie Bubis—who lived across the street and to the immediate west of Kassin—sought a declaration of her rights to use the dry sand portion of the Kassin property for recreational and social purposes.[83]

In *Bubis*, an appellate court deemed it important that Kassin already provided a public easement allowing transit across her land to the water; permitted, in accord with an earlier court order, some public uses within a small corridor of dry sand along the entire ocean frontage of her property at all times; and, on the one to two days per year in which the Village's public beach reaches capacity, allowed the public to use the entire beach on the northern-most 300 foot by 100 foot portion of her property.[84] In applying *Raleigh Avenue*, the court held that Kassin need not provide public access to and use of the dry sand beach beyond that already provided in light of its findings that (1) the Village had an adjacent public beach "sufficient to satisfy the 'public demand;' " and (2) unlike the beach club in *Raleigh Avenue*, Kassin had never used the property for commercial purposes or charged fees to any of her guests or members of the public, both of whom nevertheless benefit from the lifeguarding and other services she offers on the beach.[85]

ii. Extending Access

During the period in which the *Bubis* litigation took place, state representatives—in the course of evaluating a private beach club's routine dune-maintenance permit application—uncovered a document relating to beach access in a municipality several miles to the north of the Village of Loch Arbour. This document would serve as the focal point of future litigation over the implementation of *Raleigh Avenue*'s precepts.[86] Via this

80. Bubis v. Kassin, 960 A.2d 779, 781 (N.J. Super. Ct. App. Div. 2008).
81. *Id.*
82. *Id.*
83. *Id.* at 782.
84. *Id.* at 781–82, 786–87.
85. *Id.*
86. *See* E-mail from Brian Weeks, Deputy Attorney Gen., State of N.J., to Timothy M. Mulvaney, Professor of Law & Assoc. Dean for Faculty Research, Tex. A&M Sch. of Law (January 13, 2018) (on

document, which was signed by a representative of the beach club and an Assistant Commissioner in the State's Department of Environmental Protection in 1993, the beach club purported to grant (1) a construction easement to the State to enter its property "to pump, place, transport and spread sand beach fill" on its property as part of a beach nourishment project; (2) "a continuing easement for the purpose of conducting periodic beach nourishment" during the anticipated duration of the project; and (3) "a perpetual easement for a right of limited public access" allowing only north-south pedestrian transit along a narrow corridor at the new, post-beach-re-nourishment water's edge.[87] The State would soon come to learn that this former Assistant Commissioner had signed nearly identical agreements with eight other private beach clubs in the Borough.[88]

The State filed suit seeking reformation of these agreements in light of the intervening holding in *Raleigh Avenue* indicating that upland sand on property owned by a private entity is subject to reasonable public access and use under the public trust doctrine.[89] Under the caption *Chiesa v. D. Lobi Enterprises*, an appellate panel remarked that "public policy reflects the common conscience and changes in its demands with the needs and widely held feelings of the times."[90] Sources of such public policy, explained the court, include judicial decisions involving "new applications of old principles," like that in *Raleigh Avenue*.[91] The court upheld a trial judge's decision deeming the limited public access provision in the 1993 agreement "contrary to [the] public interest and unenforceable."[92]

iii. Archetypes

Bubis and *D. Lobi Enterprises* do not offer private titleholders and would-be beachgoers absolute certainty on the extent of beach access and use to which the public is entitled statewide. However, *Bubis*'s conclusion that portions of a noncommercial beach owned by a single person adjacent to a public beach sufficient to accommodate demand can reasonably remain

file with author).

87. Chiesa v. D. Lobi Enters., No. A-6070-09T3, 2012 N.J. Super. Unpub. LEXIS 2218, at *1 (N.J. Super. Ct. App. Div. Sept. 28, 2012).

88. *See* MaryAnn Spoto, *N.J. Appellate Panel Tells Sea Bright Club It Must Open Beach to Everyone*, NEWJERSEY.COM (Sept. 28, 2012), https://www.nj.com/politics/2012/09/nj_appellate_panel_tells_sea_b.html [perma.cc/6TKD-89CX].

89. *D. Lobi Enters.*, 2012 N.J. Super. Unpub. LEXIS 2218, at *1–2.

90. *Id.* at *17.

91. *Id* at *17; *see also id.* at *18 ("Certainly, after the *Raleigh Avenue* ruling, both parties to the 1993 Agreement should have recognized that the limited public access to the 80 feet of oceanfront tidal property the Club owned might be questionable. . . .").

92. *Id*. at *2.

part of that private owner's exclusive domain and *D. Lobi Enterprises*' resolution that the access and use terms set out in a 1993 agreement with commercial beach clubs related to a publicly-funded beach replenishment project were unreasonable provide shape to *Raleigh Avenue*'s reasonable access norm and the deliberations that it facilitates.[93] Generalizations of this nature reveal that New Jersey's reasonable access standard is not especially distinct from the seemingly more concrete rules common in other states, which, as noted above, themselves operate through interpretation of their scope as they are applied to resolve actual disputes.[94]

C. ON REFLECTION: DETERMINACY AND BEACH ACCESS

The foregoing pages have explored what, on their face, are beach access policies that take the form of *rules* (grounded in robust exclusionary rights or unfettered access privileges) or *standards* (reasonable access). The former often are generally extolled for their determinacy, while the latter generally are praised for their flexibility. However, this Part has contended that these features are not nearly so static. When new contexts arise, a robust exclusionary rule or an unfettered access rule does not automatically determine the scope of its own application; instead, titleholders and beachgoers reflect on whether exclusionary or access policies apply in this new context and, where necessary, call on judges to determine whether to craft an exception, fashion a qualification, or recognize a distinction. Rules, that is, are less determinate (and more flexible) than they appear on their face. Meanwhile, standards, like New Jersey's reasonable access approach,

93. In this respect, the New Jersey experience mirrors that of Scotland. In 2003, Scotland passed a land reform act that created a presumption of "responsible access" across not only coastal areas but a large swath of the country's interior. Land Reform (Scotland) Act 2003, (ASP 2) § 2(1) ("A person has access rights only if they are exercised responsibly."). The statute relied on context-sensitive standards to address several key issues, including the extent to which landowners can claim a right of privacy around their dwellings that eclipses the right of responsible access and make decisions about land uses that might impede unrestrained access. *See* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 777–90 (2011). The Scottish courts have, over time, given these standards content. *Id.* at 790–815. After an especially thorough exposition of the Scottish courts' engagement, Professor Lovett concludes that "a property regime that pivots on an ex ante presumption of access can incorporate exceptions to this presumption that employ open-textured standards of reasonableness," *id.* at 817, without generating unnecessarily high "information processing costs and coordination costs" that critics anticipated at the outset, *id.* at 742.

94. *See*, *e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 611–16 (1992). John Lovett asserts that "litigants (and their lawyers) who confront broad standards just after their enactment bear considerably higher litigation and uncertainty costs than do litigants who confront the same standards 20 or 30 years later, after the courts (and the legislature) have chiseled them down into more crystalline rules." Lovett, *supra* note 4, at 929. *But see* Radin, *supra* note 27, at 814–15 (contending that strong social agreement in advance of the development of case law can serve as a sufficient marker).

that appear open-ended take shape through applications that reveal core archetypes and, therefore, result in "holdings" that take a form similar to the rules that were thought to be so clear in Oregon and Texas. In sum, then, a state's options on how to allocate property interests at the water's edge—be it via a regime of robust exclusionary rights, unfettered access privileges, or reasonable access—are more similar than the conventional account allows.

II. RULES AND STANDARDS: TRANSPARENCY

The previous Part issued a challenge in the beach access context to the conventional view that rule-like systems are far superior to standard-like systems with regards to the extent to which they produce determinate outcomes. Despite the stark variations in the form and substance of these legal directives on their face, rule-like systems—as illustrated by the beach access laws of Texas and Oregon—in actuality do not, respectively, ignore the value of beaches as fora for sociability or deem that value of such significance that it trumps all others in all cases. Similarly, standard-based systems—as exemplified by New Jersey's beach access law—do not leave everything up for grabs; rather, some semblance of determinacy emerges through applications of the standards in core cases.

If, indeed, these various jurisdictional approaches to beach access are more similar than the conventional determinacy thesis suggests, how else might the approaches be meaningfully distinguished? One possibility, emphasized here, lies in the virtue of transparency.[95] The first Section below explains that rule-like systems have been lauded for their transparency, in the sense that they are more likely to lead decisionmakers to treat like cases alike and thereby minimize arbitrariness or bias.[96] The second Section contends, though, that standard-based systems offer their own version of transparency that is grounded in promoting dialogue, demanding accountability, and insisting on justification. Rules may not be transparent in these ways that standards are because rule interpretation, if presented as mere rule application, may obfuscate the reasons for applying or distinguishing a rule in a hard case.

A. THE TRANSPARENCY OF BEACH ACCESS RULES

Some scholars would understand beach access rules as tending to declare the meaning of any operative principles upfront and, thereafter,

95. For one of many concise, insightful summaries of the wide range of abstract arguments for and against the pro-rules and pro-standards positions, see KELMAN, *supra* note 26, at 40–45.

96. *See*, *e.g.*, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 69 (1983).

concentrate decisionmaking on neutral categorizations that are based on ex ante conditions.[97] Such an approach allows those operative principles to self-implement—independently and objectively—moving forward,[98] rather than opening the door to judicial creativity and arbitrariness.[99] This transparency of rules leads to impartial decisionmaking.[100] Through mechanical enforcement of a robust exclusionary rule or an unfettered access rule, all are equally protected by law, for each similarly situated person is sure to be treated alike where cases are decided prospectively. The value, then, of these rules is that they give those persons potentially impacted by a beach access policy warning as to whether or not a legal directive will apply to their courses of conduct.[101] Moreover, merely avoiding the *appearance* of arbitrariness may itself be of some value, in that it helps to maintain potentially impacted persons' confidence in the system of democratic lawmaking more generally.[102]

Caution is, of course, necessary to assure that the transparency benefits of rules of this sort are not overstated. The claim that rules are transparent is based on several assumptions, including that rules unambiguously mean exactly what they say, that they are complete and resolve all disputes within their domain, and that they are, therefore, honest about the considerations that go into dividing cases to which a given rule is applicable from cases to which that rule is not. That a rule requires similarly situated persons to be treated similarly is a positive trait as far as it goes; however, those implementing such a rule will face the immediate complication of having to

97. *See*, *e.g.*, Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 322 (1985); *see also* Lovett, *supra* note 4, at 937 (explaining the conventional view); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (same).

98. *See* Radin, *supra* note 27, at 793–95 (describing this "deductive" or "analytic" view of a rule as "self-applying to the set of particulars said to fall under it"); Sullivan, *supra* note 25, at 58 (portraying this view in similar terms).

99. *See* Schlag, *supra* note 97, at 390–91.

100. *See* F. A. HAYEK, THE CONSTITUTION OF LIBERTY 220–33 (Ronald Hamowy ed., 2011 ed. 1960) (associating rules with an impartiality norm); Kennedy, *supra* note 4, at 1688; Shiffrin, *supra* note 79, at 1214 ("Other things being equal, rules, understood as legal directives that instruct 'a decision-maker to respond in a determinate way to the presence of delimited triggering facts,' offer precision and transparency." (quoting Sullivan, *supra* note 25, at 58)); Sunstein, *supra* note 17, at 974; FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 149–55 (2009).

101. *See* SCHAUER, *supra* note 100, at 194–98.

102. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) ("When one is dealing . . . with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one's sense of justice to say: 'Well, that earlier case had nine factors, this one has nine plus one.' Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.").

determine *whether* persons are, in fact, similarly situated.[103] Applying a rule in a hard case requires interpretation, which, in turn, requires resorting to reasons that are outside the rule itself.

By not demanding an open, particularized assessment on that score in a judicial opinion, rules conceivably may actually inhibit the transparency of law rather than advance it.[104] If judges need not give reasons for interpreting a rule in one way rather than another, they simply can phrase the rule in a way that decides the case before them without openly acknowledging that their phrasing of that rule is an interpretation, elaboration, or specification of the original rule, whose creators did not include the detail necessary to decide its application in this new case.

It follows, therefore, that siding with a rule-based approach, such as robust exclusion or unfettered access, may be most accurately understood as a determination that the risk of injustice from the inherent limitations of deciding similar situatedness case-by-case exceeds the risk of injustice from the arbitrariness of over- and under-inclusiveness that can result from applying these rules in a rather rigid fashion.[105] Rules, proponents argue, are transparent about this determination—transparent about this *choice*—at the outset.[106]

B. THE TRANSPARENCY OF BEACH ACCESS STANDARDS

Standards, however, are characterized by their own less-celebrated though still robust version of transparency. Understanding this latter version of transparency begins with an appreciation for the rudimentary idea that recognizing one party's claim to a property interest regularly has the effect of rejecting or limiting the claims of others.[107] After all, according to

103. *See* Sunstein, *supra* note 17, at 994 ("A familiar understanding of equality requires the similarly situated to be treated the same; a less familiar but also important understanding requires the differently situated to be treated differently, also in the interest of equality.").

104. *See* Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1456–62 (2008) (discussing the possibility that the application of rules without regard to their normative justification or concern for the specific context in which they are being applied may lead to unjust results); Sunstein, *supra* note 17, at 975.

105. *See* Sullivan, *supra* note 25, at 62; Sunstein, *supra* note 17, at 990.

106. Even taking the proponents' position at face value, this is not always the case. Jeremy Bentham famously—or infamously—advocated promoting among the public the view that the law consists of rules, while recognizing that, covertly, the law actually consists of standards on which judges reflect in operating the court system. GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION, 195–96 (2d ed. 2019).

107. *See* Timothy M. Mulvaney, *A World of Distrust*, 120 COLUM. L. REV. F. 153, 156–57 (2020); Timothy M. Mulvaney, *Property-as-Society*, 2018 WIS. L. REV. 911, 941; Timothy M. Mulvaney, *Non-*

landowners increased legal power to intensify land uses unavoidably requires them to surrender their ability to halt activities by others that interfere with those uses.[108] Given that there are almost always property claims on both sides when considering the meaning of ownership, the unavoidable task for lawmakers is to decide which actions to safeguard and which actions to restrain.[109] There is, in the words of Eric Freyfogle, "no morally neutral place . . . to hide" when it comes to allocating property interests.[110]

A reasonable access approach to the beachfront makes visible and affirms, rather than obscures and denies, judges' responsibility to reach via normative reasoning the type of allocative decision required to resolve parties' competing claims to the dry sand, both because judges have *to think about* reasons and because they have *to explain* that reasoning in written opinions that require articulation of otherwise inchoate and intuitive judgments.[111] It accomplishes this end by applying pressure in two

Enforcement Takings, 59 B.C. L. REV. 145, 165–66 (2018); *see also* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 13 (1927) ("[D]ominion over things is . . . *imperium* over our fellow human beings."). Other rights, such as free speech, often are not "rivalrous" in this sense. *See* Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1039 (1996).

108. *See*, *e.g.*, Eric T. Freyfogle, *Taking Property Seriously*, *in* PROPERTY RIGHTS AND SUSTAINABILITY: THE EVOLUTION OF PROPERTY RIGHTS TO MEET ECOLOGICAL CHALLENGES 43, 50 (David Grinlinton & Prue Taylor eds., 2011) (explaining that, in such an instance, property rights do not increase overall but rather are "simply reconfigured"); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1, 17 (1993) (" '[P]rivate rights' always have social consequences."); Joseph William Singer, *Property Law as the Infrastructure of Democracy* 10 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-16), http://ssrn.com/abstract=1832829 (citing the "principle of noncontradiction" that "all owners must be limited in what they can do on their land so that all owners can have quiet enjoyment of their land"); Joseph William Singer, *Something Important in Humanity,* 37 HARV. C.R.-C.L. L. REV. 103, 111 (2002) ("[N]o meaningful fairness argument can be wholly nonconsequentialist."). For this reason, framing adjustments in property laws as "strengthening" or "weakening" individual property claims can be misleading and counter-productive. *See*, *e.g.*, Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449, 492–501 (2010).

109. *See* C.B. Macpherson, *Liberal-Democracy and Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 199, 201 (C.B. Macpherson ed., 1978) (juxtaposing the "individual right to exclude" with the "individual right to equal access"); Sanne H. Knudsen, *Remedying the Misuse of Nature*, 2012 UTAH L. REV. 141, 151 (suggesting that addressing the "uncomfortable and unclear question" of "where to draw the line between [land] use and misuse" is "inevitable given that people and nature are intertwined"); Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOY. L. REV. 243, 258 (2006) ("[R]egulations are generally designed to limit one person's freedom to protect another's freedom. In such cases, the question is not whether government should intervene but on whose behalf it should do so.").

110. *See* Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 84 (2010); *see also* Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANADIAN J.L. & JURIS. 161, 201 (1996) (arguing that "[n]o model of property avoids value choice[s]").

111. *See*, *e.g.*, Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821, 825–26 (1962); *see also* ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 265 (2003) ("Good reasoning is often stimulated when

directions. From one direction, this approach eliminates the facade of judges being able to hide behind a robust exclusion or unfettered access rule as if that rule's application is an objective, neutral act that need not be justified in service of the common good.[112] From the other direction, it gives comfort to judges who might feel hamstrung by a rigid rule behind which they would prefer *not* to hide.[113]

Relatedly, a reasonable access approach prompts judges—"create[s] a habit of mind"[114]—to consider the perspective of anyone who might be affected by the allocation of the exclusionary and access interests at stake.[115] Such an approach encourages—indeed, *forces*—courts to analyze cases openly, in a manner that elicits direct discussion.[116] Consider, for instance, a scenario—hypothetical here, though disturbingly reminiscent of behavior in many coastal communities in the not-so-distant past—in which the aforementioned Kassin's efforts were part of a covert pattern by private titleholders in a homogenous coastal community to intimidate a subset of would-be beachgoers from more diverse inland communities on the basis of race.[117] Here, Kassin's exclusionary tactic is not aimed so much at a

lawmakers take the time to explain why they did what they did. . . .").

112. *See*, *e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 18 (1992); *see also* Radin, *supra* note 27, at 813. In Frank Michelman's words, such an approach calls on judges to "confront the parties in the flesh." Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 35 (1986). A rigid, rule-based approach, on the other hand, allows the "deferment" of concerns. *See* Schlag, *supra* note 97, at 411.

113. *See*, *e.g.*, David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 414 (2015).

114. *See* Sullivan, *supra* note 25, at 69.

115. *Cf.* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 60–70 (1990) (characterizing productive deliberation as that consisting of the consideration of multiple perspectives).

116. Shiffrin, *supra* note 79, at 1226–27 ("The process by which deliberation affects behavior and articulates cognition may be more akin to a slow, sometimes clogged, drip than to a quick, direct injection.").

117. Past public and private discrimination in this context—through supposedly color-blind and race-neutral residency restrictions, beach fee policies, parking limitations, prohibitions on wearing swimwear on local streets or eating on the beach, the creation of members-only coastal associations, and the like—has been masterfully documented by Marc Poirier and Andrew Kahrl, among others. *See* ANDREW W. KAHRL, FREE THE BEACHES: THE STORY OF NED COLL AND THE BATTLE FOR AMERICA'S MOST EXCLUSIVE SHORELINE 12–13 (2018); ANDREW W. KAHRL, THE LAND WAS OURS: HOW BLACK BEACHES BECAME WHITE WEALTH IN THE COASTAL SOUTH 4–6 (2012); Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 CONN. L. REV. 719 (1996); *see also* Note, *Public Access to Beaches: Common Law Doctrines and Constitutional Challenges*, 48 N.Y.U. L. REV. 369, 393 n.171 (1973) ("One would have to live in a vacuum not to suspect that many beach restrictions are based in part on racial motivation, intermingled with the idea of building a wall between city and suburb."); REBECCA DE SCHWEINITZ, IF WE COULD CHANGE THE WORLD: YOUNG PEOPLE AND AMERICA'S LONG STRUGGLE FOR RACIAL EQUALITY 181 (2009) ("Recreational facilities were one of the most common ways that young people

"private" versus "public" conflict akin to that at issue in the actual matter of *Bubis v. Kassin* as it is on an identity-defining version of "resident" versus "nonresident" conflict.[118] In this hypothetical context, then, a decision on whether Kassin must provide additional public access to and use of the dry sand beach to which she holds private title is not considering the value of promoting sociability generally, but on challenging an insidious, divisive, and prejudiced form of sociability.[119] While a rule often presumptively equates the powers that rule confers with reason and can thus blind us to potentially unjust uses of those powers, a standard openly triggers a demand for reason-giving on the uses of powers by the likes of this hypothetical Kassin along a continuum from legitimate to oppressive.[120]

By providing lucidity on all that is at stake, the reasonable access approach calls for upfront conversation and communication on what makes access valuable and how that value ought to be considered in the face of any downsides that might come with sacrificing the titleholder's ability to exclude.[121] Rather than leaving judges with the option of carving out exceptions to rules or distinguishing their applications—an option that some judges may not have the confidence to exercise, even if they see the latent contradictory principles that underlie most all property conflicts—the reasonable access approach compels open contemplation *every time* with regards to any shifting understandings of what expectations are legitimate, what distribution of opportunities is appropriate, which exercises of which powers are justifiable, and what obligations are fair to assume that we, as citizens, owe to each other.[122] Rather than dissociating the task at hand from these inquiries or masking them behind a cloud, a standards-based regime

collectively experienced Jim Crow.").

118. *See* Poirier, *supra* note 117, at 743–44 ("[T]he shore municipalities often limited beach use to a town's residents, or put beach fees or other barriers in the way of nonresidents' use of town beaches.").

119. *See* Poirier, *supra* note 21, at 105–06, 118 (suggesting that a general requirement of reasonable access can counter discriminatory efforts without having to confront the challenges in applying extant constitutional and statutory antidiscrimination protections).

120. *See* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 535 (1988) (book review).

121. *See* Poirier, *supra* note 21, at 97–99 ("Different uses are congestible in different ways; one owner's highly desired oil transshipping facility may have down sides acceptable to her, but affect nearby owners' and other stakeholders' homes and fishing in ways that make them unhappy.").

122. *See* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 49–50 (1986) ("[T]he only thing remotely like a solution [to a moral dilemma] is, in fact, to describe and see the conflict clearly and to acknowledge that there is no way out."); Kennedy, *supra* note 4, at 1773 (contending that a standard "denies the judge the right to apply rules without looking over his shoulder at the results"); Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review) (contending that formal rules promote "substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes").

consistently brings these inquiries to the fore.[123]

Enhanced transparency touches not only judges but individual actors in social and market settings. A robust exclusionary rule or an unfettered access rule can create, in the words of Morton Horwitz, a "consciousness that radically separates law from politics."[124] Such messaging suggests that beachgoers and titleholders may well be less prone to put themselves in a position where, ultimately, they might have to ask a judge, respectively, to carve out an exception or to recognize a distinction to what they have been led to believe is a firm robust exclusionary rule or unfettered access rule than they would be to ask a judge to apply a reasonable access standard.[125] The substance of the law in a rule-like regime therefore may have a propensity to be less "full" and, in turn, less contemporarily sharp than that in a standard-based regime.[126] A standard-based regime recognizes and confronts the impermanency of the powers conferred by law, prompting lawsuits focused on justifying the exercise of power on select occasion, but, far more commonly, encouraging ongoing mutual engagement and honest dialogue on competing perspectives outside the courtroom.[127] In effect, the

123. *See* NUSSBAUM, *supra* note 122, at 50. Of course, rules can at times make it easier for judges to stand by positions that are unpopular with the majority when they should do so. Scalia, *supra* note 102, at 1180; Sunstein, *supra* note 17, at 975.

124. *See* Horwitz, *supra* note 122, at 566.

125. Carol Rose implicitly makes this point in the course of discussing the unequal distribution of knowledge and access to information. *See* Rose, *supra* note 25, at 600. My raising it here is not to deny the reality that litigation is extremely costly and, therefore—even with robust legal aid services, non-profit ventures, public advocates' offices, and the like—can lead to extensive inequalities if it is relied upon too heavily as either a shield or a sword. *See* Sunstein, *supra* note 17, at 977. A related point is that one's conception of a rule or standard inevitably will be a product of the extent to which that rule or standard is enforced. *See* KELMAN, *supra* note 26, at 49–50. Louis Kaplow addresses the question of cost from a different angle. Kaplow, *supra* note 94, at 557. Kaplow suggests that, generally, rules are more expensive to create than standards but standards are costlier for individuals to interpret when deciding how to conduct themselves and for adjudicators to apply to prior conduct. *Id.* at 562–63. In Kaplow's view, it follows that rules are economically efficient where the rules will be implicated frequently and in substantially similar settings. *Id.* at 563. *But see* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 8 (1993) (suggesting that transparent standards create an inexpensive way of "gaining a rough idea of the law's content").

126. *See* Michelman, *supra* note 112, at 34–36 (discussing how balancing tests engage judges in transparent forms of public reason and, in turn, how judicial engagement prompts public engagement).

127. *See* Shiffrin, *supra* note 79, at 1217 ("For the people to whom they apply . . . , open-ended standards may encourage greater levels of moral deliberation than would clear guidelines."); *id.* at 1222-25 ("I contend that the uncertainty of application is, in the appropriate context, among [a standard's] virtues because it requires that the citizen who aims to be compliant, whether from motives of justice or motives of prudence, grapple with the relevant moral concepts directly."); *see also* KELMAN, *supra* note 26, at 62 ("A reliance on standards is premised on the hope of moral dialogue and ultimate consensus. . . . Rules do not depend on ongoing dialogue to gain dimension or content."). Much like the Scottish experience is instructive with respect to issues of determinacy, *see supra* note 93, that experience is instructive with respect to transparency, too. As one commentator describes it, the reality that a good

communication stimulated by a standard-based regime both allows for the expression of competing social visions *and* disciplines those expressions.[128]

The combination of impacts—on judges and members of the public—stemming from the transparency of a reasonable access approach can create a constructive cycle of sorts: judges, by forthrightly reciting and analyzing the interests on all sides of exclusion/access disputes and explaining the justifications for their allocative choices amidst competing claims, can drive public engagement and discussion; in turn, such public engagement and discussion can—given the communal and contemporary nature of any reasonableness standard[129]—shape the decisions made by judges in related cases in the future.[130] Requiring judges to explain why access or exclusionary interests are entitled to protection lays to bare their value judgments and any assumptions on which those judgments rest, thereby subjecting them to meaningful scrutiny by other courts and the public at large.[131] It also controls choice in the following way: having to explain something to others may deter judges from initial intuitions when, despite their best efforts, the opinion just "will not write" in the sense that they realize that they cannot present arguments in a way that is convincing given the counterarguments that must be addressed. Writing the reasoning down can, therefore, change the result by giving judges an impetus to change their minds. In turn, then, a reasonable access approach increases the likelihood that those who do not prevail in an access dispute will be offered a justification that, however hard to swallow, should be accepted by reasonable persons in their shoes under the circumstances.

deal of Scotland is subject to access encourages "landowners, access takers, and local officials . . . to enter into a long term, evolving dialogue about how to accommodate each other's needs—landowner's legitimate management interests, homeowners' privacy and personal enjoyment needs, and the public's interest in responsible access taking." Lovett, *supra* note 93, at 782.

128. *See* Singer, *supra* note 120, at 543.

129. *See* KELMAN, *supra* note 26, at 61 ("A typical standard ('Don't act *unreasonably*,' 'Enforce *fair* bargains') requires that the enforcing community . . . can come to some consensus on the meaning of the value term, that the group can come to share a conception of reasonableness or fairness.")

130. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1528–33 (1988) (explaining how interpretations of constitutional provisions that lack precision can interact in constructive ways with political movements and citizen engagement); Shiffrin, *supra* note 79, at 1126 (explaining how standards can be understood to "partially delegate authority back to citizens"); Sunstein, *supra* note 17, at 958 (suggesting that contextualized decisionmaking seek to "make space for the democratic goals of participation and responsiveness").

131. *But see* David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415, 428 (2013) (describing rules' propensity to drive the "transparency of discretion . . . underground").

C. ON REFLECTION: TRANSPARENCY AND BEACH ACCESS

Highlighting the transparency virtues of a reasonable access regime—promoting dialogue, demanding accountability, and insisting on justification—is not meant to endorse the view that standards-based approaches are superior to rule-like approaches in all circumstances,[132] that standards necessarily reveal value judgments,[133] or that rule-like approaches necessarily suppress or conceal those judgments.[134] In some contexts, courts could directly address foundational normative principles in the application of a rule over time, such that the transparency gains from resorting to a standard are quite minimal; in others, a standard could be so opaque in operation that it is not prompting the type of justificatory conversation touted here;[135] and, in still others, nontransparency virtues of rules may supersede the collective virtues of siding with standards. This highlighting exercise does, though, support the claim that the transparency virtues of beach access standards deserve attention. A transparent standards-based framework cannot absolutely guarantee a more rational and intelligible doctrinal framework. However, it seems sufficiently apt, at least generally, to *establish the conditions* under which such rationality and intelligibility can emerge, for it puts on the table the value judgments at stake for all to see.[136]

132. *See*, *e.g.*, KELMAN, *supra* note 26, at 20 ("[N]o polar position has such killer force as to negate utterly its opposite.").

133. *See* Kennedy, *supra* note 4, at 1741 (explaining that the application of a standard could be done in a way that "smuggl[es] in [a] substantive policy the lawmaker had rejected").

134 *See*, *e.g.*, Rose, *supra* note 25, at 607 (suggesting that "there is a much softer, more sociable . . . side to crystal rules and to the commerce that accompanied their development," which "[a]t least some Enlightenment thinkers thought . . . would enlarge sociability and . . . be a constitutive force in ever larger communities of 'interest' "). Transparent choices could, of course, be made by a legislature and incorporated into a clearly written statute that operates in a rule-like fashion. For instance, in most states, the state legislature has confirmed that the area between the mean low-tide line and the mean high-tide line is impressed with public rights. *See* Kehoe, *supra* note 3. Even there, though, the rule is not unequivocal; for instance, public access to the foreshore may be limited in select locales under certain conditions in the interests of national security. *See*, *e.g.*, SUSAN M. KENNEDY, A PRACTICAL GUIDE TO BEACH ACCESS AND THE PUBLIC TRUST DOCTRINE IN NEW JERSEY 20 (Tony MacDonald ed., 2017), https://www.monmouth.edu/uci/documents/2018/10/beach-access-report.pdf [perma.cc/UE33-SWJB].

135. Indeed, the Supreme Court has interpreted the federal Constitution's Due Process Clause to void enforcement of statutes that are unacceptably vague. *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

136. *See* Han, *supra* note 113, at 362. Beach access, of course, loses its salience where the beach is no longer. Conservative estimates suggest that sea levels in the United States will rise two feet, on average, by the year 2100; other estimates forecast a rise of anywhere from six to eleven feet. *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., GLOBAL AND REGIONAL SEA LEVEL RISE SCENARIOS FOR THE UNITED STATES 3 (Jan. 2017), https://tidesandcurrents.noaa.gov/publications/techrpt83_Global_and_Regional_SLR_Scenarios_for_the_US_final.pdf [perma.cc/4QQQ-SNTR]; Robert M. DeConto & David Pollard, *Contribution of Antarctica to Past and Future Sea-Level Rise*, NATURE, March 2016, at 591–597. On undeveloped shores, dune and beach ecosystems naturally migrate landward as sea levels rise

CONCLUSION

In the conventional terms of the long-running debate surrounding the design of legal directives, "rules" bring a determinacy and transparency to the law that "standards" sacrifice in the interest of accommodating the complexities of individual cases. On their face, the allocations of rights and privileges with respect to nearly all dry sand beaches in the United States fall decidedly into the rules camp, for they categorically determine whom to wall in and whom to wall out. In Hohfeldian terms,[137] the private titleholder to

and other impacts of climate change rear their heads. However, the ever-expanding presence of hardened structures near the water's edge along so much of the U.S. coastline drastically interferes with this migration pattern. ORRIN H. PILKEY & J. ANDREW G. COOPER, THE LAST BEACH 14–16, 49 (2014). In some instances, this migration is halted by pre-existing and, in hindsight, ill-advised residential and commercial development that, for political and other reasons, is now difficult to phase out; in others, though, the migration is halted by "coastal protection" measures erected for this very purpose. *Id.* at 44–77. For a contemporary example of the latter, the federal government recently partnered with the State of Texas to propose construction of a one hundred-mile long, gated barrier that would lie both in and alongside the Gulf of Mexico in an effort to provide temporary protection for existing coastal structures and businesses against the increasing dangers of rising seas and storm surges. *See* Nick Powell, *Army Corps Gives Nod to $31B 'Ike Dike' Plan for Texas Coast*, HOUS. CHRON. (Oct. 26, 2018), https://www.houstonchronicle.com/news/houston-texas/houston/article/Army-Corps-gives-nod-to-31B-Ike-Dike-plan-13340756.php#article-comments [https://perma.cc/SA7N-843M].

All hardened structures—from homes and businesses to gated barriers—have a propensity to promote widespread erosion on their seaward side and thereby threaten the existence of dry sand beaches. *See*, *e.g.*, James R. Drabick, Note, *"Private" Public Nuisance and Climate Change: Working Within, and Around, the Special Injury Rule*, 16 FORDHAM ENVTL. L. REV. 503, 535 (2005). These structures operate to transfer wave and water energy to the beach, rather than allowing it to dissipate and fluctuate naturally. *See generally* PITFALLS OF SHORELINE STABILIZATION: SELECTED CASE STUDIES (J. Andrew G. Cooper & Orrin H. Pilkey eds., 2012). The concentrated energy rebounds off the face of the structures and whisks sand into the sea, reducing the size of the beach. *See id.* at 50. At the same time, these structures can prevent natural sand replacement from rivers and coastal bluffs. *Id.* at 51. In total, then, the rebalancing process of the beach across the seasons is thus inhibited. *Id.* at 65, 67. With increased erosion and reduced sand supply, the beach in front of a hardened structure will retreat to the base of that structure until no dry sand beach remains, cutting off the public's ability to use that beach and choking transit to any neighboring beaches that survive. *See* Orrin H. Pilkey & Howard L. Wright III, *Seawalls Versus Beaches*, J. COASTAL RES. (SPECIAL ISSUE NO. 4) 41, 63 (1988) ("Comparison of totally stabilized and totally unstabilized reaches of individual barriers indicates that dry beach width is consistently narrower in front of hard stabilization.").

Decisionmakers, both public and private, face hard choices in the face of competing claims by coastal landowners and the rights of the public along a coastline that is under marked threat from sea-level rise and other climate-induced phenomena. When compared to the potentially discussion-halting consequences of what on their face are rule-like beach access regimes, it seems possible that a transparent approach to resolving competing claims at the water's edge—one that demands frank discussion on the justifications for affording access and promoting exclusivity—might provide greater assurance that the issue of beaches will, at minimum, be among other matters of consideration in the development of policies to adapt to and mitigate the effects of sea-level rise and other phenomena associated with a changing climate.

137. In a pair of highly influential articles published over a century ago, Wesley Hohfeld developed an analytical framework for understanding interests in property as relational pairs. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710

the dry sand beach in most jurisdictions—including, as illustrated herein, Texas—holds a robust right to exclude others without cause and the public correlatively holds no privileges of access and use; meanwhile, in select states, such as Oregon, the public holds an unfettered privilege to access and use beaches and the private titleholder holds no right to exclude. An outlier in following a standards-based approach, New Jersey allocates to the public reasonable access and use privileges and, in turn, accords private titleholders a right to exclude those who enter unreasonably.[138]

This Article has contended that the implementation of these beach access policies illustrates the familiar limitations of the conventional rules-versus-standards account in two elucidating ways. First, in terms of determinacy, deciding whether a given beach access rule applies has required contextualized assessment; likewise, standards pertaining to beach access have taken shape through applications in archetypical cases. That the question of reasonable access is asked directly in New Jersey, while, in the likes of Texas and Oregon, it takes the form of indirectly asking whether it would be reasonable to craft an exception, fashion a qualification, or recognize a distinction with regards to the extant rule, does only marginal work in distinguishing these jurisdictional approaches. Second, as to transparency, while rules admittedly require decisionmakers to treat like cases alike and thereby minimize some forms of arbitrariness, standards offer their own robust version of transparency, which is grounded in promoting dialogue, demanding accountability, and insisting on justification.

That this Article celebrates the determinacy and transparency features of standards should not be understood as endorsing the view that, in all circumstances, standards necessarily are superior to rules, standards necessarily reveal value judgments, or rules necessarily suppress or conceal those judgments.[139] Rules undoubtedly have their place. At the same time, though, they cannot be instinctively understood as a panacea for resolving

(1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913). Under this framework, if one individual holds a specific entitlement (a right, privilege, power, or immunity), the other person involved in that relationship holds the opposite of that entitlement (correlatively, a duty, no-right, liability, or disability).

138. Where "hardly any corner of property law is immune from the inexorable tendency of lawmakers to demand that people act reasonably," the fact that New Jersey is one of just two states to require reasonable access to the beach indicates that beach access law has not reflected a more general trend in property law. *See* ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD 804 (2012).

139. Indeed, according to Mark Kelman, "there will remain in any legal dispute a logically or empirically unanswerable formal problem, that granting substantially greater discretion or limiting discretion through significantly greater rule boundedness in the formation of the prevailing legal command is always perfectly plausible." KELMAN, *supra* note 26, at 16.

all conflicts or left to operate in a manner that ignores the possibility that, in their implementation, unfairness can result and dominating hierarchies can perpetuate. A reasonable access standard in the beachfront context charts a path that is sensitive, over time, to the value of determinacy but is simultaneously transparent in its engagement with contemporary human needs. In a given jurisdictional context, it may or may not be a path worth emulating; to reject a reasonable access standard out of hand, though, is to ignore the sacrifices that decision requires.