

NOTES

WATERING DOWN THE OCEAN STATE'S CONSTITUTION: HOW DEPARTURE FROM ORIGINAL MEANING BENEFITS WEALTHY OUT-OF-STATERS AT THE PEOPLE'S EXPENSE

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Rhode Island is home to 400 miles of shoreline enjoyed by locals and out-of-staters alike.¹ For this reason, it is known as ‘the Ocean State.’² One particularly wealthy Rhode Island beachgoer is Taylor Swift, whose ‘Holiday House’ is located on one of Rhode Island’s southernmost beaches.³ However, recently the state’s relationship with Swift’s coastline neighborhood became fraught.⁴ In 2023, the legislature passed H.B. 5174A (the “Shoreline Access Act” or “Act”), codifying public access to the shoreline.⁵ Swift’s neighbors and other affluent property owners sued, arguing the Act is a regulatory taking prohibited by the U.S. Constitution.⁶ In 2024, Rhode Island trial courts decided the Act is a taking and property owners are entitled to just compensation.⁷ However, the courts are wrong. There was no taking because the contested property has always belonged to the public pursuant to the original meaning of

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1. Marybeth Reilly-McGreen, *Mapping RI's Shoreline Access*, THE UNIV. OF R.I., <https://www.uri.edu/features/mapping-the-states-public-shoreline> [https://perma.cc/36BE-ST6Y] (last visited Oct. 8, 2025).

2. *Historical Information*, RI.GOV, <https://www.ri.gov/facts/history.php> [https://perma.cc/HT7U-J3RR] (last visited Oct. 8, 2025).

3. Penelope Green, *Taylor Swift is Summering in Rhode Island. Locals Just Shake It Off*, N.Y. TIMES, July 23, 2016. Taylor Swift’s Rhode Island beachfront ‘Holiday House’ is referenced in one of her recent songs. TAYLOR SWIFT, *The Last Great American Dynasty, on Folklore* (CD, Republic Records July 24, 2020).

4. *See generally* Roth v. State, 2024 WL 3488820, at *1 (R.I. Super. Ct. July 12, 2024) (One of Swift’s neighbors filed a takings claim against the state).

5. Shoreline Access Act, H.B. 5174, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023); 46 R.I. GEN. LAWS § 46-23-26 (2023).

6. *See generally* Stilts, LLC v. State, 2024 WL 3488823, at *1 (R.I. Super. Ct. July 12, 2024); Roth, 2024 WL 3488820, at *1 (The takings cases challenging Rhode Island’s beach access law); 46 R.I. GEN. LAWS § 46-23-26 (2023) (The beach access law that is alleged to be an illegal taking).

7. *See generally* Stilts, LLC, 2024 WL 3488823, at *1; Roth, 2024 WL 3488820, at *1 (The trial court decisions determining that the Act is a taking).

Rhode Island's State Constitution. The Act merely codified the state's constitutional public trust doctrine which is a background principle of state law.⁸ The state must appeal. A judgment in favor of the people would save taxpayer dollars and facilitate equitable access to the coast.

BACKGROUND: RHODE ISLAND SHORELINE ACCESS LAW

Rhode Island's public trust doctrine is constitutional.⁹ The State Constitution was last amended in 1986. The relevant provision states: "The people shall *continue* to enjoy and freely exercise . . . the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state."¹⁰ Because the constitution defines Rhode Islanders' shoreline rights by what the people "have been heretofore entitled," the scope of Rhode Island's public trust doctrine depends on the rights that the public has historically held.¹¹ Though the relevant constitutional language was drafted in 1986, historical analysis is necessary to understanding the constitution's proper meaning.¹²

Despite this constitutional language, beachfront property owners argue that the public trust doctrine is controlled by dicta from *State v. Ibbison*,¹³ a 1982 Rhode Island Supreme Court case. In *Ibbison*, six defendants were convicted of criminal trespass for walking along the beach during a beach clean-up event.¹⁴ A coastal property owner had informed the police that he believed his property extended to the "mean-high-water line," which was underwater at the time of the arrest.¹⁵ The defendants disagreed. They contended that they had not trespassed on private property because the public trust line was at least the "high-water mark" or "seaweed" line.¹⁶ This line is typically visible by sea debris and is the "mark left upon the shore indicating the highest elevation of the tidal water."¹⁷

The *Ibbison* Court rejected a use-based public trust line that was consistent with precedent and the constitution's meaning. Rather, it decided that it should "affix the boundary" as a static point in the sand.¹⁸ The *Ibbison* court relied on the U.S. Supreme Court case *Borax Consolidated Ltd. v. City of Los Angeles*.¹⁹ The *Borax* Court used the "mean high tide line" as the delineation between

8. Memorandum in Support of the State's Motion to Dismiss, 10, *Stilts, LLC v. State*, 2024 WL 3488823.

9. Sean Lyness, *A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine*, 26 ROGER WILLIAMS U. L. REV. 671, 674 (2021).

10. R.I. CONST. art. I, § 17 (emphasis added).

11. Lyness, *supra* note 9, at 674.

12. *Id.* at 671–74.

13. *State v. Ibbison*, 448 A.2d 728 (R.I. 1982).

14. *Id.* at 729.

15. *Id.*

16. *Id.*

17. Lyness, *supra* note 9, at 679.

18. *Ibbison*, 448 A.2d at 730.

19. *Id.* at 731; *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935).

private and public land at the shore.²⁰ The *Borax* method for finding this line involves a scientific analysis of the 18.6 year Metonic cycle.²¹ Sophisticated tools are necessary for measuring and determining where the *Borax* line is on any given beach.²² The constitutional use-based rule was replaced with a specific line accessible only by scientific measurement.

The *Ibbison* Court acknowledged disadvantages to its newly created line.²³ The court was “mindful that there is a disadvantage in that this point is not readily identifiable by the casual observer,” and that the line is often underwater.²⁴ However, it settled on the *Borax* line regardless of these concerns because it could be found “scientifically with the greatest certainty” and it “brings us in accord with many of the other states.”²⁵ The *Ibbison* court prioritized scientific certainty and conformity with national standards over workability for every-day Rhode Islanders hoping to access the beach. Further, it relied on national precedents rather than Rhode Island’s constitution, case law, and customs.²⁶

THE CONTROVERSY

In March 2022 the Rhode Island House of Representatives published a report on the state’s shoreline access.²⁷ The commission found that the *Ibbison* line placed the public trust property underwater for a majority of the day on Rhode Island’s south-facing beaches.²⁸ The committee alleged that the line frequently being underwater constituted a ‘de facto taking’ of the public’s constitutional right to lateral access along the shore. In addition, confusion over the proper public trust line had resulted in “[a]nnual beach confrontations, with beachgoers arrested after heated disputes with shorefront property owners, have become all too frequent.”²⁹ The report recommended legislative action to restore the public’s constitutional rights and prevent further unrest at the state’s shore.³⁰

20. *Borax*, 296 U.S. at 27.

21. *Id.*

22. Lyness, *supra* note 9, at 679; R.I. H.R., SPECIAL LEGISLATIVE COMMISSION TO STUDY AND PROVIDE RECOMMENDATIONS ON THE ISSUES RELATING TO LATERAL ACCESS ALONG THE RHODE ISLAND SHORELINE: FINAL REPORT 7 (2022); Janet Freedman & Megan Higgins, *What Do You Mean by Mean High Tide? The Public Trust Doctrine in Rhode Island*, R.I. COASTAL RESOURCES MANAGEMENT COUNCIL, <https://www.crmc.ri.gov/presentations/wdymbht2.pdf> [<https://perma.cc/ZHT4-X9B6>].

23. Lyness, *supra* note 9, at 682–83.

24. *Ibbison*, 448 A.2d at 732; *see also* Lyness, *supra* note 9, at 682.

25. *Ibbison*, 448 A.2d at 732.

26. Lyness, *supra* note 9, at 683.

27. R.I. H.R., SPECIAL LEGISLATIVE COMMISSION TO STUDY AND PROVIDE RECOMMENDATIONS ON THE ISSUES RELATING TO LATERAL ACCESS ALONG THE RHODE ISLAND SHORELINE: FINAL REPORT (2022).

28. *Id.* at 6.

29. *Id.*

30. *Id.* at 11.

In June 2023, the legislature took action by passing the Shoreline Access Act.³¹ The Act traced the history of Rhode Island's constitutional public trust doctrine, finding that the "lack of a workable, readily identifiable right of access to the shore by the public has led to confusion, conflict and disputes"³² The committee found the *Ibbison* dicta inconsistent with Rhode Islanders' constitutional right to access the shore. Therefore, the committee decided:

This act would provide that the public's rights and privileges of the shore established by Article I, Sections 16 and 17 of the State Constitution may be exercised where shore exists, on wet or dry sand or rocky beach up to ten feet (10') landward of the high tide line but not where no passable shore exists with abutting landowners afforded limited liability.³³

Unlike the *Ibbison* line, which would have prevented Rhode Islanders from walking along the shore in most instances, the Shoreline Access Act permits Rhode Islanders to exercise any of their constitutionally protected shoreline privileges at any time on any beach. The legislature chose the 10-foot landward rule based upon historical usage of Rhode Island beaches.³⁴ This historical nexus was critical because the Constitution defines shoreline privileges in part by how beaches have been used in the past.³⁵ Further, use of the seaweed line permits Rhode Islanders to easily determine public trust land rather than engaging in a complicated scientific analysis.

Beach front property owners filed suit shortly after the Act was passed. *Stilts, LLC v. State*³⁶ involves land owned by David Welch, the sole shareholder of Stilts, LLC. In 2017, Mr. Welch bought four residential lots on Charlestown Beach in North Kingstown "with the understanding, right, and expectation that the property is for private, exclusive use"³⁷ Upon the Shoreline Access Act's passage, Mr. Welch brought suit alleging that it violated the U. S. Constitution by taking his private property for public use without compensation.³⁸ Mr. Welch bought his property for private family enjoyment.³⁹

31. Shoreline Access Act, H.B. 5174, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023).

32. *Id.* § 1(1).

33. An Act Relating to Waters and Navigation, S. 0417, 2023 Gen. Assemb., Reg. Sess., 6 (R.I. 2023).

34. R.I. H.R., *supra* note 27, at 8. The ox carts which farmers historically used to gather seaweed at the shore were ten feet long. Therefore, Rhode Islanders historically used the beach up to ten feet landward of the seaweed line.

35. R.I. CONST. art. I, § 17. The Constitution states that the people shall "continue to enjoy and freely exercise all the rights of the fishery, and privileges of the shore, to which they have been heretofore entitled" *Id.* The words "continue" and "heretofore" suggest that the 1986 framers wished to preserve all historically privileged uses of Rhode Island beaches.

36. *Stilts, LLC v. State*, 2024 WL 3488823, at *1–2 (R.I. Super. Ct. July 12, 2024).

37. *Id.* at *2.

38. *Id.* at *3. In addition to the federal takings claim, Stilts alleged that the Act is an unreasonable seizure pursuant to the 4th Amendment and an inverse condemnation pursuant to the 5th and 14th Amendments. The state's motion for summary judgment was granted as to the 4th Amendment claim and denied as to the inverse condemnation claim. *Id.* at *13.

39. *Id.* at *2.

Therefore, *Stilts* contended that the “Act harms the privacy and peaceable enjoyment of its property . . . [and] diminishes and injures the use, value, and marketability of its property.”⁴⁰ The State responded by filing a motion to dismiss.⁴¹ Rhode Island’s superior court converted it to a motion for summary judgment, and then rejected the State’s request as it pertained to the federal takings claim.⁴² Citing *Cedar Point Nursery v. Hassid*’s definition of a per se taking, Judge Sarah Taft-Carter found that the Act “clearly results in the taking of ‘an interest in property.’”⁴³

On the same day, in July 2024, Judge Taft-Carter filed another decision for the case *Roth v. Rhode Island*.⁴⁴ The plaintiffs, the Roth family and ES710 LLC, own adjoining beachfront parcels on East Beach in Westerly, Rhode Island—Taylor Swift’s coastline neighborhood.⁴⁵ The plaintiffs’ deeds, which were purchased in 1988, specify “the Atlantic Ocean as the property’s southerly boundary.”⁴⁶ The plaintiffs contended that “[t]he Act uses a ‘recognizable high tide line’ that fluctuates and is whimsical and inconsistent.”⁴⁷ In doing so, the Act “expanded that pre-existing limitation on the Roths’ title from the MHT line to ten feet inland of the recognizable high tide line.”⁴⁸ They argued that this constitutes a violation of both Rhode Island’s state takings clause and the federal takings clause.⁴⁹ Again citing *Cedar Point Nursery v. Hassid* and *Ibbison*, Judge Taft-Carter dismissed the State’s motion for summary judgment because the plaintiff’s takings claims did not fail as a matter of law.⁵⁰

The *Stilts* and *Roth* decisions were met with outcry from the Rhode Island public. Judge Taft-Carter was personally attacked on social media pages dedicated to “Saving Coastal Access RI.”⁵¹ Pictures of the judge accompanied by captions stating: “I’m Judge Taft Carter[:] My family profits from building along the public shoreline,” and “Judge Taft-Carter should have recused herself” were posted to accounts with thousands of followers.⁵² Conflict of

40. *Id.* at *4.

41. Memorandum in Support of the State’s Motion to Dismiss, *supra* note 8.

42. *Stilts, LLC*, 2024 WL 3488823, at *1.

43. *Id.* at *11.

44. *Roth v. State*, 2024 WL 3488820, at *1 (R.I. Super. Ct. July 12, 2024).

45. *Id.* at *2–3.

46. *Id.* at *3.

47. *Id.* at *22.

48. *Id.* at *10.

49. *Id.* at *8–15. In addition, Plaintiffs allege that the Act constitutes an inverse condemnation pursuant to article 1, section 16 of the Rhode Island Constitution (Count V). *Id.* at *3.

50. *Id.* at *23.

51. SavingCoastalAccessRI (@savingcoastalaccessri), INSTAGRAM, <https://www.instagram.com/savingcoastalaccessri/> (on file with the Journal of Law, Ethics, and Public Policy).

52. Images posted by SavingCoastalAccessRI (@savingcoastalaccessri) INSTAGRAM, (July 17, 2024), <https://www.instagram.com/p/C9hhG2ixZ6p> [<https://perma.cc/W365-LEHT>] (on file with the Notre Dame Journal of Law, Ethics, and Public Policy). @savingcoastalaccessri had 3,800 followers as of February 2025.

interest allegations stem from her husband's career as a commercial and residential developer specializing in "coastal buffer management," a service popular among Rhode Island's shoreline property owners.⁵³ The judge has not addressed these allegations.

The decisions inflamed tensions between private property owners and the public. Shortly after Judge Taft-Carter's decisions were filed, plaintiff David Roth was charged with vandalism and spray painting over a beach public access sign near his property.⁵⁴ However, the Westerly Town Prosecutor dismissed the case against Mr. Roth because he "believes in giving second chances to people who make 'foolish' decisions."⁵⁵ Tensions will likely continue to broil because the Rhode Island Attorney General is expected to appeal the *Stilts* and *Roth* decisions soon.⁵⁶ When he does so, the Rhode Island Supreme Court has an opportunity to clarify that the *Ibbison* dicta is not controlling and vindicate the constitution's original meaning.⁵⁷

RHODE ISLAND'S CONSTITUTION SHOULD BE INTERPRETED ACCORDING TO ITS ORIGINAL MEANING

Originalism is an imperfect interpretive method.⁵⁸ One common criticism of originalism is that the federal Constitution is difficult to change. Though changing the Constitution's meaning may be popular or even advisable, originalist judges strive to refrain from amendment by interpretation. Conversely, 'living document' judges are more willing to alter the constitution's meaning as they see fit.⁵⁹ Though originalism is imperfect, the 'living document' alternative is harmful to the constitutional structure because it dilutes popular sovereignty. The people have less control over the law when it can be altered according to a judge's personal whim.

Rhode Island's Constitution should be interpreted according to its original meaning. Originalism makes sense in state constitutional interpretation because all state constitutions have been frequently and easily amended.⁶⁰ Including the

53. R.I. COASTAL ACCESS COMM'N, <https://www.ricoastalaccess.com/shoreline-access-commission/> [<https://perma.cc/8K3Y-RSDF>] (last visited Feb. 2, 2026).

54. Alex Nunes, *Westerly Drops Vandalism Case Against Beachfront Property Owner*, R.I. PBS (Sept. 27, 2024), <https://thepublicradio.org/shoreline-access/westerly-drops-vandalism-case-against-beachfront-property-owner/> [<https://perma.cc/MV3M-AM5W>].

55. *Id.*

56. Nancy Lavin, *R.I. Superior Court Judge Sides with Property Owners in Shoreline Access Law Dispute*, R. I. CURRENT (July 15, 2024, 14:35 ET), <https://rhodeislandcurrent.com/2024/07/15/r-i-superior-court-judge-sides-with-property-owners-in-shoreline-access-law-dispute> [<https://perma.cc/66JK-YNKP>] ("Stage set for likely appeal to state's highest court by AG").

57. Lyness, *supra* note 9, at 697.

58. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

59. JEFFERY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 368 (2022).

60. *Id.* at 340–41.

Royal Charter which governed Rhode Island until 1842, Rhode Island has had three separate constitutions, which is greater than the national average.⁶¹ Its current constitution has been amended 14 times since its ratification in 1986 most recently in 2020.⁶² This frequent morphing renders amendment by interpretation unnecessary.⁶³ Considering the regularity with which Rhode Islanders have employed constitutional conventions and amendments, an interpretive method that dilutes popular sovereignty is unnecessary and inappropriate.

Originalism has several variations. For example, Justice Scalia used original public meaning originalism, which concerns the public's understanding of constitutional provisions at the time they were enacted.⁶⁴ However, other judges, such as Justice Thomas, use a more "pluralistic" originalism.⁶⁵ Rather than focusing solely on original public meaning, Thomas employs a broad historical analysis that considers original public meaning in tandem with the framers' original intent and the ratifiers' original understanding.⁶⁶ Thomas seeks "maximum agreement" of these sources to determine the Constitution's original "general" meaning.⁶⁷ This Note will employ Justice Thomas's general original meaning approach. Because the Constitution was enacted in 1986, the framers' thought processes are well documented. Engagement with the framers' understandings is helpful to discerning a fair interpretation of the state constitution's shoreline access provisions.

In addition, the Rhode Island Constitution is properly interpreted with attention to the historical development of its text. Though Rhode Island has had three constitutions since its founding, some of its constitutional text is drawn directly from the original 1663 Charter.⁶⁸ This is particularly true with regard to article I, section 17, which concerns the people's shoreline privileges.⁶⁹ Consequently, understanding the state shoreline access law requires acting as a "constitutional geologists, examining the textual layers from various eras in order to arrive at their interpretation."⁷⁰

61. *Id.* at 332; *see also* *Rhode Island Constitution*, BALLOTPEdia, https://ballotpedia.org/Rhode_Island_Constitution [<https://perma.cc/XSD2-3GDB>] (last visited Feb. 2, 2026).

62. BALLOTPEdia, *supra* note 61.

63. SUTTON, *supra* note 59, at 340.

64. John O. McGinnis & Michael B. Rappaport, *What is Original Public Meaning?* 76 ALA. L. REV. 223, 224 (2024).

65. Joel K. Goldstein, *Calling Them As He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 95 (2014).

66. RALPH A. ROSSUM, UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION 14 (2014).

67. *Id.* at 15.

68. Thomas R. Bender, *Dusting off Article I, Section 3: The Possibility of Constitutionally Required Exemptions from Rhode Island General Laws*, 53 R.I. BAR J. 13, 35 (2004).

69. R.I. CONST. art. I, § 17.

70. SUTTON, *supra* note 59, at 340 (quoting G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 332 (2003)).

Constitutional Geology: The Layers Behind Rhode Island's Right to the Shore

Rhode Islanders have had a constitutional right to access to the shoreline since the State's founding. In 1636, Roger Williams travelled to London to request a Royal Charter for the state of Rhode Island.⁷¹ The resulting 1663 Charter prioritized freedoms such as religious liberty and public access to the Coast. Specifically, the provision codifying the state's public trust doctrine stated that:

[T]hese presents shall not in any manner, hinder our any of our Loving Subjects whatsoever from Using and Exercising the Trade of Fishing upon the Coast of *New England*, in *America*; But that they, and every, or any of them shall have full and free power and liberty to Continue and Use the Trade of Fishing upon the said Coasts in any of the Seas thereunto Adjoining, or any Armes of the Seas, or Salt Water, Creeks, when they have been accustomed to Fish; and to Build and Set upon the Waste-Land belonging to the said Colony . . . as shall be necessary for the Salting, Drying and Keeping of their Fish to be taken or gotten upon the Coast.⁷²

The Charter's language is important to understanding the public trust doctrine because it was the state's governing document until 1843.⁷³ The Charter codified shoreline access "upon the said Coasts" and anywhere that the people "have been accustomed."⁷⁴ Further, the people were permitted to "[s]et" and "[b]uild" upon the land as necessary.⁷⁵ Colonial Rhode Islanders were accustomed to collecting seaweed and other objects along the coast.⁷⁶ When shipwrecks occurred, Rhode Islanders rushed to the shore in search of metal and other treasures.⁷⁷ Seaweed and shipwreck treasures on the coast did not belong to coastal property owners. Rather, there was a 'finders keepers' rule for whoever happened upon objects while walking along the shore.⁷⁸

The Royal Charter and colonial usage of the shore suggests that the public had leeway to walk along the shore. A public accessway so narrow as to prevent the public from coastal fishing and seaweed collection would be "historically indefensible."⁷⁹ In the colonial era and throughout the 19th century Rhode

71. Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 SUFFOLK U. L. REV. 313, 315 (1990).

72. *Id.* at 315–16 (quoting R.I. ROYAL CHARTER (1663) (emphasis added)).

73. Lyness, *supra* note 9, at 674 (citing PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., *THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE* 24, 26 (2011)); BALLOTEDIA, *supra* note 61.

74. Nixon, *supra* note 71, at 315.

75. *Id.*

76. Robert Thompson, *Emerging Issue: Coastal and Marine Spatial Planning: Beach Access, Trespass, and the Social Enactment of Property*, 17 ROGER WILLIAMS U. L. REV. 351, 365 (2012).

77. *Id.*

78. *Id.*

79. *Id.*

Islanders commonly used ox carts to collect seaweed from the coast.⁸⁰ Seaweed collection was important for Rhode Islanders because it allowed them to fertilize their gardens and farmlands. The average width of a seaweed collection cart was approximately ten feet. Therefore, Rhode Islanders “have been accustomed” to accessing a ten-foot zone along the shore.⁸¹

When the Royal Charter was replaced with Rhode Island’s Constitution, the framers preserved and prioritized shoreline access rights.⁸² Rhode Island was one of the last states to replace its Royal Charter with a democratic constitution.⁸³ Rhode Island’s constitutional formation was particularly contentious. “Dorr’s Rebellion” was a bloody conflict between supporters of the ultimately rejected “People’s Constitution” and the later ratified 1843 Constitution.⁸⁴ The groups were violent and even appealed to the U.S. Supreme Court because they could not agree on voting rights and government structure.⁸⁵ Despite this disagreement, the groups agreed that Rhode Island’s public trust doctrine should be preserved and constitutionally codified.⁸⁶ Both constitutional drafts explicitly referenced Rhode Islanders’ privileges of the shore.⁸⁷ This common ground, despite otherwise significant disagreement, demonstrates the importance of shoreline access to Rhode Islanders and the common understanding that the coast is public, rather than private land.⁸⁸

The ratified 1843 Constitution aimed to preserve the Shoreline Access rights as they had always been understood by Rhode Islanders. The constitution stated: “The people shall *continue to enjoy* and freely exercise all the rights of the fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state”⁸⁹ The constitutional text is consistent with the activities that Rhode Islanders had long conducted on the state’s beaches, such as gathering seaweed and treasure from shipwrecks.

The first interpretation of article I, section 17 was nearly 100 years after the constitution was ratified in the 1943 case *Jackvony v. Powel*.⁹⁰ In that case,

80. R.I. H.R., *supra* note 27, at 8.

81. Nixon, *supra* note 71, at 315.

82. Lyness, *supra* note 9, at 675–76.

83. Rhode Island was one of only two states to retain its Royal Charter after 1780. *Id.* at 675 n.18.

84. Memorandum in Support of the State’s Motion to Dismiss, *supra* note 8, at 5 n.2 (citing *City of Pawtucket v. Sundlun*, 662 A.2d 40, 46 (R.I. 1995)).

85. *Id.* One member of the Dorr Rebellion, Martin Luther, brought legal action against the State, arguing that the Charter government was in conflict with Article 4 of the U.S. Constitution which guarantees “every State in this Union a Republican Form of Government.” Luther contended that the government failed to be republican because it restricted voting to only property-owning Rhode Islanders. The Court found that this was a political question unsuitable for the judiciary. It serves as a basis of the modern political questions doctrine in constitutional law. *Luther v. Borden*, 48 U.S. 1 (1849).

86. Memorandum in Support of the State’s Motion to Dismiss, *supra* note 8, at 3–6.

87. *Id.* at 5 n.2 (citing *City of Pawtucket v. Sundlun*, 662 A.2d 40, 46 (R.I. 1995)).

88. *Id.* at 3–6.

89. R.I. CONST. art. I, § 17 (emphasis added).

90. Lyness, *supra* note 9, at 676; *Jackvony v. Powel*, 21 A.2d 554, 556 (R.I. 1941).

the Rhode Island Attorney General sought to enjoin the Easton Beach Commission from placing a fence “between the high and low water lines as lies to the south of . . . Easton’s Beach.”⁹¹ The *Jackvony* court recognized that “there must have been some . . . privileges” of the shore, but declined to tie the public trust doctrine to a psychological line. Rather, the court found that the right of passage is defined by *use*. The court stated that “there was . . . a public right of passage along the shore, at least for certain proper purposes and subject, very possibly, to *reasonable* regulation by acts of the general assembly in the interests of the people of the state.”⁹² The *Jackvony* court grounded its reasoning in the Constitution’s text and caselaw referencing shoreline passageway in past state property cases.⁹³ According to these sources, the court could find no fixed line that the public understood to be the public trust doctrine. Rather, the public understood the Constitution to mean they could access the shoreline as reasonably necessary for certain purposes.

The *Jackvony* court outlined some purposes for which Rhode Islanders had always used the shore. Determining historically accepted purposes was important because the constitution referenced the privileges as things which the people “have been heretofore entitled under the charter and usages of this state”⁹⁴ The court examined judicial and legislative references to public usage of the shore to determine the historically “proper” purposes that define the scope of the public trust doctrine.⁹⁵ The *Jackvony* court found that:

Among the common law rights of the public in the shore . . . are rights of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and also, as necessary for the enjoyment of any of these rights, and perhaps as a separate and independent right, that of passing along the shore.⁹⁶

For the *Jackvony* court, the delineation between public and private lands hinged upon the amount of space necessary for historically accepted public uses of the shore.⁹⁷ Because state law had never referenced a specific line, the *Jackvony* court refrained from inventing one. Rather, it articulated a rule consistent with how Rhode Islanders had always used the public coast.

The *Ibbison* court’s rejection of *Jackvony* was met with immediate pushback from the public. Following the 1982 *Ibbison* decision, the Rhode Island General Assembly passed a resolution in 1983 to form a committee to organize a constitutional convention.⁹⁸ After voter approval and delegate selection, the convention proceeded in 1986.⁹⁹ The convention amended the public trust language to its current form, which now states:

91. *Jackvony*, 21 A.2d at 554.

92. *Id.* at 558.

93. Lyness, *supra* note 9, at 676–78.

94. R.I. CONST. art. I, § 17.

95. *Jackvony*, 21 A.2d at 558.

96. *Id.* at 556.

97. *Id.* at 558.

98. Lyness, *supra* note 9, at 684.

99. *Id.*

The people shall continue to enjoy and freely exercise all the rights of the fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, *including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore*; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly . . . to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state¹⁰⁰

The new provision was passed with substantial public support from the public: 67.5% to 32.5%, which was one of the highest of the ballot questions presented in that election.¹⁰¹

In addition, the 1986 convention included an amendment to Rhode Island's state takings clause. Following Rhode Island's state takings clause, the constitution specifies that:

The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of the fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.¹⁰²

This clause excludes regulation of Rhode Island's beaches from triggering litigation. Though it only applies to state takings claims, it remains informative on the scope of state property. Shoreline owners were put on notice that land necessary for exercising 'privileges of the shore' is not private, and therefore regulation ensuring such exercise not a taking.

Because the current constitutional language was framed in 1986, the framers' intentions are well documented. The convention's committee notes were published and accessible to the public prior to the election.¹⁰³ The notes discuss both the *Ibbison* and *Jackvony* decisions. They note *Jackvony* and its explicit recognition of a public right of passage along the shore as "central to the deliberations."¹⁰⁴ The committee "strongly affirmed" *Jackvony* because it

100. R.I. CONST. art. I, § 17 (emphasis added).

101. Lyness, *supra* note 9, at 684.

102. R.I. CONST. art. I, § 16.

103. Lyness, *supra* note 9, at 686 (citing CONST. CONVENTION AT PROVIDENCE, CONSTITUTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS: ANNOTATED EDITION 8–10 (1988)).

104. Lyness, *supra* note 9, at 687 (citation omitted).

was most aligned with Rhode Island's historical public trust doctrine.¹⁰⁵ The framers constitutionally codified *Jackvony's* shoreline privileges despite awareness that it was inconsistent with the recent *Ibbison* dicta.¹⁰⁶

Record of the Constitution's original meaning exists beyond just the official committee notes. The chairman of the 1986 constitutional convention, Kevin McKenna, was a litigious and politically active member of the Rhode Island community in the years following the amendments.¹⁰⁷ McKenna personally co-sponsored the coastline access amendments alongside convention delegate James Cavanaugh.¹⁰⁸ Ten years after the amendments, the pair was frustrated because they believed the plain meaning of the constitutional amendments was not being vindicated.¹⁰⁹ Represented by McKenna, Cavanaugh brought suit in *Cavanaugh v. Town of Narragansett*.¹¹⁰ *Cavanaugh* demonstrates the framers' intentions for the constitutional language they drafted. The former framers contended that Narragansett charging Rhode Islanders for access to the beach obstructed the public's 'perpendicular access' to the shore in violation of the people's constitutional rights.¹¹¹ 'Perpendicular access' refers to the theory that it is constitutionally permissible for Rhode Islanders to trespass private property in order to exercise their shoreline privileges.¹¹²

McKenna and Cavanaugh sought publicity and media coverage when litigating the *Cavanaugh* case. A retired Vietnam War Veteran and longtime Rhode Island Republican, Cavanaugh was proud of his role in framing the state constitution and was passionate about vindicating its plain meaning.¹¹³ The *Cavanaugh* litigation began when Cavanaugh repeatedly arrived at Narragansett town beach with his copy of the state constitution, refusing to pay for beach access. He believed that Narragansett's beach access fee inhibited the people's constitutionally protected right to walk along the shore. He told the *Providence Journal*, "[w]e did not intend to have the people parachute in."¹¹⁴ By enacting prohibitive legislation, local officials trampled on the people's rights. He said: "[W]e lose more damn freedoms in little town halls every day than we ever lost in all the wars this country ever fought."¹¹⁵

105. *Id.*

106. *Id.*

107. Antonia Noori Farzan, *The Little-Known Story of Why Narragansett Can Charge You Admission at Town Beach*, PROVIDENCE J. (Sept. 2, 2021, at 12:09 ET), <https://www.providencejournal.com/story/news/local/2021/09/02/why-narragansett-town-beach-can-charge-entry-fee-walk-on/8182935002/?gnt-cfr=1&gca-cat=p&gca-uir=false&gca-epti=undefined&gca-ft=0&gca-ds=sophi> [https://perma.cc/Q272-FQ2T].

108. *Id.*

109. *Id.*

110. No. WC 91-0496, 1997 WL 1098081, at *5–8 (R.I. Super. Ct. Oct. 10, 1997).

111. *Id.*

112. *Id.* at 3.

113. Farzan, *supra* note 107.

114. *Id.*

115. *Id.*

The *Cavanaugh* case suggests that there was consensus among the framers about the people's right to walk along the shore, but disagreement about perpendicular access. The Superior Court Judge presiding over the bench trial, Frank J. Williams, was also a delegate to the convention.¹¹⁶ Though he lost election for chairman to McKenna, he helped frame the shoreline amendments. The *Cavanaugh* decision reveals that the delegates were not of uniform mind on the meaning of the amendments. While Williams agreed with McKenna and Cavanaugh that walking along Narragansett beach is constitutionally protected, he thought perpendicular access to the beach is not a constitutional right and must be legislatively enacted.¹¹⁷ Even following Judge Williams's decision, Cavanaugh continued to provoke Narragansett until the town refused to litigate.¹¹⁸ Narragansett began permitting Cavanaugh to enter the beach for free rather than risk an adverse court ruling.¹¹⁹ However, Cavanaugh remained upset about the departure from the Constitution's original meaning: "[O]nly in Rhode Island does the Constitution, in plain old-fashioned English . . . mean something else."¹²⁰

THERE IS NO TAKING BECAUSE THE ACT MERELY CODIFIES A BACKGROUND
PRINCIPLE OF STATE LAW

Federal Takings Law Protects Rhode Islanders' Private Property

On first impression, it seems that Shoreline Access Act is a taking. In *Lucas v. South Carolina Coastal Council*,¹²¹ Justice Scalia explained that while there is no "set formula" for determining when a regulation goes "too far," courts have generally engaged in "ad hoc, factual inquiries."¹²² For example, *Palazzolo v. Rhode Island*¹²³ triggered the *Penn Central* test, an ad hoc, factual inquiry, because it involved a regulation causing the diminution of shoreline property value. However, there are "two discrete categories" of regulatory takings that do not require a *Penn Central* analysis.¹²⁴ First, when the regulation denies the owner "all economically beneficial use" of his land, as was the case in *Lucas*.¹²⁵ Second, when the owner endures a physical invasion of his property.¹²⁶ For permanent invasions, as was the case in *Loretto v. Teleprompter*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. 505 U.S. 1003 (1992).

122. *Id.* at 1015.

123. 533 U.S. 606, 616 (2001).

124. *Lucas*, 505 U.S. at 1015.

125. *Id.* at 1027.

126. *Id.* at 1015.

Manhattan CATV Corp.,¹²⁷ compensation is warranted “no matter how minute the intrusion, and no matter how weighty the public purpose behind it”¹²⁸

One might argue that *Penn Central* should apply in *Stilts* and *Roth* because the Shoreline Access Act does not necessarily facilitate permanent physical invasions. In *Lucas*, Scalia qualified his decision that physical invasion takings warrant compensation: “at least with regard to permanent invasions.”¹²⁹ However, in *Cedar Point Nursery v. Hassid*, the Court clarified that physical invasion is a per se taking even when it is not permanent.¹³⁰ Like the Rhode Island Shoreline Access Act, the *Hassid* legislation “appropriates for the enjoyment of third parties the owner’s right to exclude.”¹³¹ The Shoreline Access Act’s appropriation is arguably even more expansive than the *Hassid* legislation. In *Hassid*, a particular class of individuals (union organizers) had the right to occupy private land for only 3 hours per day, 120 days per year.¹³² By contrast, the Rhode Island Act would permit any member of the public to access the shoreline at any time.¹³³ Rhode Island limits access only by the intended use, which must be for a constitutionally designated “privilege of the shore,” such as walking, swimming, or gathering seaweed.¹³⁴

If the disputed shoreline belongs to the *Stilts* and *Roth* plaintiffs, this is likely a per se taking because the Shoreline Access Act permits broader access to private land than the *Hassid* legislation did. The Shoreline Access Act creates an issue strikingly similar to a hypothetical addressed by the Court in *Nollan v. California Coastal Commission*.¹³⁵ *Nollan* was an exaction case which conditioned a construction permit on a deal that would give the public an easement to walk along the beach, through the Nollan’s property.¹³⁶ If there had been no exaction and the Coastal Commission simply required the Nollans to grant an easement, the Court noted that “we have no doubt there would have been a taking.”¹³⁷ If the Rhode Island Act extends public access onto private land as the *Nollan* easement would have, the Act is a per se regulatory taking.

127. 458 U.S. 419 (1982). See also *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (ruling that the owner of a private marina must be compensated for the imposition of a private marina on his land).

128. *Lucas*, 505 U.S. at 1015.

129. *Id.*

130. 594 U.S. 139 (2021).

131. *Id.* at 149.

132. *Id.*

133. *Id.* The 9th Circuit found that *Hassid* was not a per se taking because although it involved physical invasion, it did not “allow random members of the public to unpredictably traverse property 24 hours a day, 365 days a year.” *Id.* at 146. Though the 9th Circuit would not have compensated the *Hassid* plaintiffs absent a *Penn Central* analysis, the 9th Circuit may have found that compensation was warranted for legislation as broad as the Rhode Island Shoreline Access Act; R.I. GEN. LAWS § 46-23-26(c) (2023).

134. R.I. GEN. LAWS § 46-23-26 (2023).

135. 483 U.S. 825 (1987).

136. *Id.* at 828.

137. *Id.* at 831.

Unlike *Palazzolo v. Rhode Island*, *Stilts* and *Roth* involve a per se regulatory taking because the Act facilitates physical invasion onto the plaintiff's land.

A 'Background Principles' Defense Can Defeat the Takings Claim

However, compensation is not warranted if the disputed land does not belong to the *Stilts* and *Roth* plaintiffs. Despite *Stilts* and *Roth*'s similarity to *Cedar Point*, compensation is unnecessary because the Act merely codifies a background principle of state law. In *Lucas*, Justice Scalia explained that permanent invasion takings "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."¹³⁸ Such limitations "must inhere in the title itself, in the restrictions that background principles of the State's law of property . . . already place upon land ownership."¹³⁹ Scalia explained that background principles may be drawn from state law and "existing rules or understandings."¹⁴⁰ Other than nuisance, Scalia did not elaborate on examples of what may be considered a 'background principle.' The background principles defense to takings claims has been described as *Lucas*'s "most important legacy."¹⁴¹

Background principles need not exist as express law prior to an alleged regulatory taking. The *Lucas* majority noted that titles may be subject to an "implied limitation" and "must yield to the police power" in such instances.¹⁴² When background principles render a potential regulatory taking uncompensable, it is because "[t]he use of [the] properties for what are now expressly prohibited purposes was *always* unlawful, and . . . it was open to the State at any point to make the implication of those background principles of . . . property law explicit."¹⁴³ Background principles are not necessarily explicit or obvious to the public. However, if they exist, the state may act at any time to make such principles known to owners and initiate enforcement.

However, a background principle cannot be created anew by the legislature. When making background principles explicit, legislation must "do no more than duplicate the result that could have been achieved in the courts."¹⁴⁴ In other words, the background principle must be a part of the common law or mature legislative text that a Court could make explicit through case law. In the absence of judicial action, the legislature may act to do what the courts could have done. Further, a law does not become a background principle by its mere enactment.¹⁴⁵ As the Court found in *Palazzolo v. Rhode Island*, an owner who

138. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992).

139. *Id.* at 1029.

140. *Id.* at 1030.

141. Sean B. Hecht, *Taking Background Principles Seriously in the Context of Sea-Level Rise*, 39 VT. L. REV. 781, 781 (2015).

142. *Lucas*, 505 U.S. at 1027 (citing *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 413 (1922)).

143. *Id.* at 1030.

144. *Id.* at 1029.

145. Hecht, *supra* note 141, at 785–86.

acquires land after a regulation takes effect may still bring a takings claim.¹⁴⁶ This is because the regulation does not gain status as a ‘background principle’ automatically upon enactment.

The background principles defense to a takings claim is not without limits. Though at first the defense may seem extraordinary, Scalia clarified in *Lucas* that it is “surely unexceptional.”¹⁴⁷ The mere existence of background principles does not per se preclude a takings claim. There may still be a taking if an act “goes beyond what the relevant background principles would dictate.”¹⁴⁸ Therefore, it is necessary to determine the relevant background principles on Rhode Island shoreline property and the limits of such principles. In *Lucas*, Scalia specified that to win, “South Carolina must identify background principles of nuisance and property law that prohibit the uses he [Lucas] now intends”¹⁴⁹ There were no such background principles in *Lucas*. However, in my opinion the relevant background principles exist in Rhode Island.

Rhode Island’s Public Trust Doctrine Is a Background Principle

The Supreme Court has not provided much guidance on how to determine whether a particular thing is a background principle. Though the Court has vaguely addressed what types of things may be background principles, it has not articulated set guidance for background principle determinacy. At most, the Court has provided “confusing, seemingly inconsistent hints” that scholars have described as a “we know it when we see it” approach to designating background principles.¹⁵⁰ The Court has described background principles as “common, shared understandings of permissible limitations . . . derived from a state’s legal tradition.”¹⁵¹ Some scholars have elaborated that background principles are things that were never included in an owner’s bundle of sticks.¹⁵²

Though Supreme Court case law on background principles is quite vague, scholarly commentary on background principles is widespread. Some scholars have proposed certain years which a law must predate in order to be a background principle.¹⁵³ David Dana proposed an “originalist approach” to background principle determinacy focused on the year 1868.¹⁵⁴ Pursuant to his theory: “If a particular category of ‘private property’ was favorable to the public

146. 533 U.S. 606 (2001).

147. *Lucas*, 505 U.S. at 1030.

148. *Id.*

149. *Id.* at 1031.

150. David A. Dana, “Background Principles” in the Law of Takings, 73 AM. U. L. REV. 1789, 1812–13 (2024).

151. *Palazallo*, 533 U.S. at 630.

152. See, e.g., Dana, *supra* note 150, at 1808.

153. *Id.* Dana proposed the year 1868 because it was the year the takings clause was incorporated against the states. Other scholars, such as Blumm and Ritchie, proposed the year 1916 due to Justice Rehnquist’s reference to that year in a discretionary opinion. See Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV’T L. REV. 321, 358 (2005).

154. Dana, *supra* note 150, at 1793

prior to 1868, that should be read into the word 'private property' in the Fifth Amendment" due to the clause's incorporation against the states in that year.¹⁵⁵ According to Dana, this originalist method would inject much needed objectivity into background principles determinacy.¹⁵⁶ In addition to historical chronology, values such as consensus and notice are important for determining if a law is sufficiently ingrained as to be a background principle according to Dana.¹⁵⁷

A state's common law public trust doctrine may constitute a background principle.¹⁵⁸ Public trust doctrine could derive from several sources. In any given state, it may be constitutional, statutory, or from the common law.¹⁵⁹ It is an "open question" in Supreme Court case law whether background principles are solely common law or can be constitutional and legislative.¹⁶⁰ Therefore, while common law public trust doctrines certainly count as background principles, there is a question of whether a constitutional public trust doctrine, such as Rhode Island's, may constitute a background principle.

While not controlling, federal court precedent suggests that public trust doctrines serving as background principles need not be limited to common law. In 1971 Washington enacted the Shoreline Management Act, which was at issue in *Esplanade Properties, LLC v. City of Seattle*.¹⁶¹ The Act restricted types of development at the State's shore.¹⁶² The city subsequently denied a shoreline development permit pursuant to the Act, resulting in a takings claim.¹⁶³ The Ninth Circuit found that the Act at issue in *Esplanade* was not a taking because the State's public trust doctrine was a background principle of state law that had always restricted the type of development at issue.¹⁶⁴ The Ninth Circuit found that the state's "flesh[ing] out" of specific public trust principles from the

155. *Id.* at 1816.

156. *Id.*

157. *Id.* at 1792–93.

158. *Id.* at 1820–22. Public trust doctrine was recognized by the Court in *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (holding "the State holds title to soils under tidewater, by the common law . . . in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.")

159. See Blumm & Ritchie, *supra* note 135.

160. Dana, *supra* note 150, at 1811. In *Palazzolo*, Kennedy said that the court has never addressed the full range of sources for what may constitute a background principle. *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–30 (2001). But *Cedar Point* seems to add constitutional provisions and policies as a source of background principles. See *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). Because it is accepted that public trust is a background principle and public trust may be constitutional, it seems likely that constitutional provisions (at least as relating to public trust) may be considered background principles.

161. 307 F.3d 978, 980 n.2 (9th Cir. 2002).

162. *Id.*

163. *Id.* at 979–80.

164. *Esplanade*, 307 F.3d at 981.

common law doctrine's "base" was permissible and not a taking.¹⁶⁵ Further, the Act was a necessary extension of the state's public trust doctrine because "a long history of sale of tidelands and shoreland resulted in the privatization of a vast majority of these lands"¹⁶⁶ In addition to public trust doctrine, federal courts have found that even less concrete state doctrines, such as custom, may serve as background principles adequate to defeat a takings claim.¹⁶⁷

Dicta Is Insufficient to Disrupt a Background Principle Rooted in Constitutional Original Meaning

A new issue presented by *Stilts* and *Roth* is that there are two competing meanings of Rhode Island's public trust doctrine. The Shoreline Access Act codifies the state's public trust doctrine according to the constitution's original meaning. Therefore, pursuant to the Act, the public has access to the shore ten feet landward of the seaweed line to conduct specified activities. However, the *Stilts* and *Roth* plaintiffs contend that the *Ibbison* dicta is controlling as to the state's public trust doctrine. If they are correct, then the Act is a taking and they must be compensated. The critical question becomes: Is dicta issued prior to the relevant constitutional language's enactment sufficient to disrupt a background principle derived from the state constitution's original meaning?

In my view, the answer is no. The *Ibbison* dicta does not override the Rhode Island Constitution's status as a background principle. Because the Supreme Court has offered little guidance on background principle determinacy, this Note's analysis relies on the factors proposed by David Dana: originalism, cultural consensus, and fair notice.¹⁶⁸

Pursuant to historical chronology, the constitutional use-based line codified by the Shoreline Access Act is a background principle undisrupted by the *Ibbison* line. At the time the Takings Clause was incorporated against the states in *Chicago, Burlington & Quincy Railroad v. City of Chicago*¹⁶⁹ in 1897, Rhode Island's shoreline property had contained restrictions for several centuries. The 1843 Constitution protected the people's right to "continue to enjoy . . . the privileges of the shore."¹⁷⁰ These privileges were a continuance with lineage to the state's 1643 Charter, which authorized the people to continue to access the shore as they "have been accustomed."¹⁷¹ By reference to local historical practices, the *Jackvony* court interpreted "privileges of the shore" to

165. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 741 (2006).

166. *Id.*

167. See Hecht, *supra* note 141, at 781 n.4 ("[T]he common law doctrine of custom constitutes a background principle of Oregon state law for the purpose of a takings analysis and restricts private ownership of the dry sand beach." (citing *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994))).

168. Dana, *supra* note 150, at 1789.

169. 166 U.S. 226, 238 (1897).

170. Lyness, *supra* note 9, at 676.

171. Nixon, *supra* note 71, at 316.

mean lateral public access across state beaches.¹⁷² These constitutional “privileges of the shore” existed as limitations on private property in Rhode Island at the time of the Fifth Amendment’s incorporation. Therefore, this historical state limitation should be read into the Fifth Amendment’s definition of “private property” in the Takings Clause. This would honor the Rhode Island property limitations that predated the Fifth Amendment’s application to the state.

The *Ibbison* line is not a background principle pursuant to Dana’s historical chronology approach. *Ibbison* was not decided until 1982, well after the Fifth Amendment was incorporated against the states. In deciding *Ibbison*, the Rhode Island Supreme Court did not use legal principles with lineage predating the Fifth Amendment’s incorporation. Rather, it settled on the *Ibbison* line after reviewing federal caselaw disconnected from Rhode Island’s local history.¹⁷³ The *Ibbison* line, which requires advanced scientific analysis to determine, has no historical basis in Rhode Island property law. Further, it is merely dicta rather than a controlling precedent.

In addition, the constitutional use-based line codified by the Act is a background principle pursuant to Dana’s “consensus” approach to determinacy.¹⁷⁴ According to the consensus approach, a background principle is more likely to exist when there is an “overwhelming consensus within the legal culture” in favor of the principle before current private property owners took title.¹⁷⁵ Shortly after the Rhode Island Supreme Court settled on the *Ibbison* line, the people convened a constitutional convention with the express purpose of protecting their “privileges of the shore” as they had always been.¹⁷⁶ The constitutional language condemning the *Ibbison* line was approved by an overwhelming majority of the people. The state’s swift rejection of the *Ibbison* dicta shortly after its issuance suggests that it was never so ingrained in the state’s legal culture as to negate the use-based line’s standing as a background limitation on private property. The people’s rejection of *Ibbison* by constitutional convention occurred well before the *Stilts* and *Roth* plaintiffs acquired title to their properties in 1988 and 2017.

Finally, the use-based line is proper pursuant to the ‘notice’ approach to background principle determinacy. Pursuant to this approach, a law is more likely to be a background principle if owners had “specific notice” that the government claimed a right to their property before they acquired title.¹⁷⁷ When proposing this method, Dana assumed that notice in many cases would require buyers to hire “expert, proactive” lawyers capable of reviewing state law to assess whether background principles exist.¹⁷⁸ While this may be true in many scenarios, it is not the case in Rhode Island. The only thing a prospective buyer

172. *Jackvony v. Powel*, 21 A.2d 554, 558 (R.I. 1941).

173. *State v. Ibbison*, 448 A.2d 728 (R.I. 1982).

174. Dana, *supra*note 150, at 1835.

175. *Id.*

176. Memorandum in Support of the State’s Motion to Dismiss, *supra* note 8, at 7–8.

177. Dana, *supra*note 150, at 1844–45.

178. *Id.* at 1845.

had to do to understand that the use-based line was a limitation on his property was read the state constitution. If he had done so, he would see that the people had a right “not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore”¹⁷⁹ A reader would have also seen that the state considers shoreline legislation “an exercise of the police powers . . . liberally construed” to ensure public access to shore.¹⁸⁰ The original meaning of the constitution is easily discernible to the lay reader by its plain meaning. In codifying this language, the Shoreline Access Act merely reaffirmed legal principles that were already accessible to buyers in the state constitution. If the *Stilts* and *Roth* plaintiffs had read the constitution, they would be aware that the public had shoreline privileges which could overlap with their titles.

Further, the *Ibbison* decision could not have disrupted notice to buyers. One might argue that buyers may have ignored the state constitution due to the *Ibbison* dicta. If a buyer is sophisticated enough to look beyond the constitution’s plain language to state court dicta, he might find the *Ibbison* line. However, upon reading *Ibbison*, the prospective buyer would realize that it provides no assurance that his property would be secure at the coast. Because the *Ibbison* court set the burden of proof for trespass unworkably high, shoreline owners cannot reasonably bring trespass actions.¹⁸¹ It is unlikely that the average beach trespasser is capable of scientifically determining the *Ibbison* line and knowingly crossing it. Absent proof beyond reasonable doubt that a trespasser purposely crossed the *Ibbison* line, an owner has no way to enforce the boundaries of his property.¹⁸² Therefore, even if prospective buyers read *Ibbison*, they would gain notice only that trespass is unreasonably difficult to enforce on Rhode Island beaches. The *Stilts* and *Roth* plaintiffs should have known that the public could access the shore near their property.

A Ruling in Favor of the People Would Likely Survive Federal Appeal

If the Rhode Island Supreme Court rules that the Act’s use-based line is a background principle of state law, the plaintiffs could appeal to the federal Supreme Court. The state should not worry that the Court would balk at a background principles defense to takings. Like in *Esplanade*, the Supreme Court would likely find that Rhode Island’s Act is not a taking because it codifies the state’s public trust doctrine.¹⁸³ Rhode Island’s public trust doctrine is more specific and concrete than the doctrine approved by the Ninth Circuit in *Esplanade*. Permissible public uses of the shore are explicit within the state constitution, and the Act mirrors these rights in legislation.¹⁸⁴ Like in *Esplanade*, legislative action was necessary because the public trust doctrine was being unduly trampled on and privatized. Rhode Island’s public trust

179. R.I. CONST. art. I, § 17.

180. *Id.* at art. I, § 16.

181. Thompson, *supra* note 76, at 360.

182. *State v. Ibbison*, 448 A.2d 728, 728 (R.I. 1982).

183. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 984 (9th Cir. 2002).

184. R.I. CONST. art. I, § 17.

doctrine always prevented shoreline landowners from excluding the public from certain shoreline privileges. Therefore, the Supreme Court would likely rule that there was no taking.

One might argue that the Supreme Court would take issue with the State's interpretation of its public trust doctrine due to the *Ibbison* dicta. There is an open question of whether a state supreme court's alteration of shoreline property rights may constitute a judicial taking. In *Stop the Beach Renourishment Act v. Florida*, owners of Florida coastline property brought a takings claim in response to a beach-restoration act that would have prevented their property lines from touching the water.¹⁸⁵ The Supreme Court of Florida found that there was no such right in state law, and therefore the takings claim was defeated. On appeal to the U.S. Supreme Court, a plurality of justices found that the Florida Supreme Court correctly applied state property law principles to find that the contested right to touch the water did not exist, and there was therefore no judicial taking by the Florida Court.¹⁸⁶ In Parts II and III of the opinion, some justices noted that if a court declares that what was once an established right of property no longer exists, there is a judicial taking in violation of the Takings Clause.¹⁸⁷

Stop the Beach is instructive on how the Court would treat *Stilts* or *Roth* on appeal from the Rhode Island Supreme Court. *Stop the Beach* is a rare Supreme Court opinion in which the Justices relied heavily on state law to reach their conclusion.¹⁸⁸ This reveals that if *Stilts* or *Roth* were appealed, the Court would likely engage with Rhode Island state law to determine whether the Shoreline Access Act is proper. Because Rhode Island's public trust doctrine is constitutional, this means the Court would engage in state constitutional interpretation. The Court could find, like in *Stop the Beach*, that the state supreme court correctly applied state law. Alternatively, the Court could find that the Act is beyond the scope of Rhode Island's public trust doctrine. That finding would result if the Court determined the Act does more than merely make background principles "explicit," as was authorized by *Lucas*.¹⁸⁹ If the Court finds as much, the *Stop the Beach* plurality left open the question of whether this would constitute a judicial taking in violation of the Takings Clause.

However, the state should not worry that the Supreme Court will second-guess its determination that its constitutional public trust doctrine is a

185. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 707 (2010); J. B. Ruhl & Michael C. Blumm, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 *ECOLOGY L.Q.* 805, 831 (2010).

186. *Stop the Beach*, 560 U.S. at 707–729.

187. *Id.* at 713–729. This principle was first expressed by Justice Scalia (and joined by Chief Justice Roberts, Justice Thomas, and Justice Alito). While Justice Kennedy concurred with the Court's holding, he disagreed that the plurality should decide whether a judicial decision interpreting state property rights could constitute a taking. Because the court makeup has changed since 2010, it is possible (and perhaps likely) that the modern Court would rule differently.

188. Hecht, *supra* note 141, at 781; *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

189. *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014 (1992).

background principle of state law. The Supreme Court rarely chooses to overturn a state court's interpretation of its own law.¹⁹⁰ In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, the Hawai'i Supreme Court ruled that an act restricting development was not a taking due to a preexisting rule granting Native Americans gathering rights.¹⁹¹ Unlike the state law at issue in Rhode Island, the Hawai'i background principles were rooted in unwritten custom that permitted Native Americans to gather resources on lands owned in fee simple by others. The Hawai'i Supreme Court admitted to relying on the "Aloha Spirit" rather than traditional principles of land ownership in reaching its decision.¹⁹² However, the U.S. Supreme Court denied certiorari and the federal takings claim was defeated. In Rhode Island, a ruling in favor of the people would be rooted in the original meaning of its constitution—a source arguably more concrete than the "Aloha Spirit."

A RULING IN FAVOR OF THE PEOPLE IS OPTIMAL AS A MATTER OF ETHICS AND PUBLIC POLICY

Stilts and *Roth* are particularly interesting because they involve a clash of two classically libertarian ideals.¹⁹³ The plaintiffs argue that the government cannot take their beachfront property absent compensation. Libertarian legal theorists are typically skeptical of background-principles defenses to taking claims due to possible subversion of property rights.¹⁹⁴ In contrast, the state argues that the people's constitutional rights should not be trampled on. The state constitution guarantees Rhode Islanders the ability to "freely exercise . . . the privileges of the shore."¹⁹⁵ Protecting the original meaning of constitutionally enshrined individual liberties and historically rooted privileges is surely libertarian.¹⁹⁶ It is particularly so in Rhode Island's unique constitutional context, which presents the public trust doctrine as an individual freedom to be "exercised" rather than a community-based restriction. For this reason, the earliest Rhode Island shoreline access activists included Republicans and veterans interested in protecting freedoms vulnerable to "little

190. Blumm & Ritchie, *supra* note 135; see also Ruhl & Blumm, *supra* note 163, at 839–41 (arguing that "a Court committed to states-rights federalism would seem unlikely to attempt to police a state court's view of the development of its common law, especially concerning venerable property concepts" and that this type of "close federal oversight" of state courts' interpretation of their public trust doctrines would be inconsistent with a Court interested in judicial restraint).

191. *Pub. Access Shoreline Hawaii v. Hawai'i Cnty. Plan. Comm'n*, 903 P.2d 1246 (1995), *cert. denied*, 517 U.S. 1163 (1996); Blumm & Ritchie, *supra* note 135, at 349.

192. *Pub. Access Shoreline Hawaii*, 903 P.2d at 1271 n.4.

193. A libertarian is a person with "a belief in or commitment to individual liberty." Randy E. Barnett, *Is the Constitution Libertarian?*, 9 CATO SUP. CT. REV. 9, 10 (2009).

194. See Ruhl & Blumm, *supra* note 163, at 807 ("The proliferation of background principles capable of defeating takings claims has disturbed libertarian property advocates, who call for increased reliance on the Constitution's takings clause to restrain regulatory controls.").

195. R.I. CONST. art. I, § 17.

196. See Barnett, *supra* note 193, at 18–26 (arguing that originalism is compatible with, and even essential to, protecting libertarian ideals).

town halls.”¹⁹⁷ These activists rightly recognized that local governments’ departure from constitutional original meaning leaves liberties vulnerable to grassroots tyranny.¹⁹⁸

In addition, *Stilts* and *Roth* are unique because parties on both sides allege that the other has effected a taking. The Shoreline Access Act sets up a classic regulatory taking pursuant to the *Cedar Point* conception of per se physical takings. However, the state alleges that local governments’ continued reliance on the *Ibbison* dicta constitutes a “*de facto* taking from the public.”¹⁹⁹ This is because pursuant to *Ibbison*, “the public can’t safely and legally use the shore . . . for most of the day without being subject to the wetness and push of the surf.”²⁰⁰ Therefore, the public is deprived of its constitutional right to “freely exercise . . . the privileges of the shore.”²⁰¹ By asking the public to compensate them for wrongly privatized land, the plaintiffs are attempting to take what has always belonged to the people of the state. The people should not have to pay for land which was always their own. Ignoring the people’s repeated attempts to recognize the original meaning of their rights through legislation and constitutional convention may amount to a *de facto* taking of their sovereignty.

The Rhode Island Supreme Court should find in favor of the people and affirm its constitution’s original meaning because doing so is correct as a matter of law. However, the state’s position is also optimal as a matter of ethics and policy. The *Ibbison* court’s reliance on scientific principles and national standards rather than the state’s constitution and case law was poor judgment. The resulting *Ibbison* line is inaccessible to the average person and unworkable for both beachgoers and shoreline property owners. State and local officials’ continued reliance on the *Ibbison* line, despite the people’s explicit rejection of it in the 1986 constitutional convention, is an abrogation of the people’s power over the state law. The activist *Ibbison* court should never have attempted to alter constitutional rights rooted in state history. Though the *Stilts* and *Roth* plaintiffs allege that the shoreline access act is a taking, *nemo dat quod non habet*: no one can give what they do not have. The state is not taking anything from the plaintiffs because they have nothing to give. It is wrong to make the people pay for the *Ibbison* court’s poor judgment. The state constitution’s original meaning should be restored, but not at the people’s expense.

If Rhode Island courts continue to rule in favor of the *Stilts* and *Roth* plaintiffs on appeal, the State would be compelled to either repeal its Shoreline Access Act or compensate the plaintiffs. While it is not clear the exact amount for which the plaintiffs would be compensated, it would surely be expensive—perhaps prohibitively so. Just compensation is typically the “fair market value” for the taken property, or in other words, ““what a willing buyer would pay in

197. Farzan, *supra* note 107.

198. The term “grassroots tyranny” was coined by Clint Bolick in *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* 1 (1993).

199. R.I. H.R., *supra* note 27, at 6 (2022).

200. *Id.*

201. R.I. CONST. art. I, § 17.

cash to a willing seller' at the time of the taking."²⁰² The *Roth* plaintiffs' properties, located at 3 and 7 Niantic Avenue on Watch Hill Beach, are valued at roughly \$16 million and \$30 million, respectively.²⁰³ The high within the range of the properties expected sale is \$39.61 million. Houses in this neighborhood may be particularly sought after because they share a backyard beach with Taylor Swift, whose \$33 million oceanfront mansion is a short eight-minute walk down the street.²⁰⁴ Also sharing this beach is the private beach club resort Ocean House, where it is rumored that Taylor Swift will wed Travis Kelce in June 2026.²⁰⁵ The *Roth* plaintiffs and their neighbors are just one example of the kind of beachfront neighborhood the state may be required to compensate. Over 400 of Rhode Island's 1,200 square miles are coastal.²⁰⁶ Compensating all plaintiffs affected by the Shoreline Access Act could cost the state millions of dollars. This cost would likely be passed on to the taxpayers.

The crux of the State's 'background principles' argument is that there is no taking because the shore never belonged to the *Roth* or *Stilts* plaintiffs. Consequently, it is curious that the state continually utilizes 'progressive' messaging to explain its public trust doctrine. The Act itself states that "the public trust duty to preserve the public's rights and privileges of the shore is a progressive and evolving doctrine that is expected to adjust to changing circumstances."²⁰⁷ Similarly, in the state's motion to dismiss *Stilts*, it twice mentioned that Rhode Island's public trust doctrine is "progressive."²⁰⁸ This is odd rhetoric in the takings context. The state's argument that its constitution has always excluded certain shoreline privileges from private ownership is an intuitive defense. The plaintiffs have no valid claim because the shore has been publicly owned since the state's founding—not because of a progressive doctrine that allows the state to take properties at whim.

Progressive descriptions of the state's public trust doctrine give what is a valid regulation an unconstitutional gloss. If the public trust doctrine is characterized as a theory constantly "evolving" and "expected to adjust to changing circumstances," this implies that the doctrine may come to encompass

202. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (quoting *United States v. Miller*, 317 U.S. 369, 374 (1943)).

203. See ZILLOW, https://www.zillow.com/homedetails/3-Niantic-Ave-Westerly-RI-02891/66077410_zpid/ [<https://perma.cc/J53X-79KG>] (archived May, 2026) (for 3 Niantic Ave.); ZILLOW, https://www.zillow.com/homedetails/7-Niantic-Ave-Westerly-RI-02891/120751067_zpid/ [<https://perma.cc/QC5U-QLVQ>] (archived May, 2026) (for 7 Niantic Ave.).

204. Green, *supra* note 3; ZILLOW, https://www.zillow.com/homedetails/16-Bluff-Ave-Westerly-RI-02891/65996995_zpid/ [<https://perma.cc/T9D7-WPZ4>] (Archived May, 2026).

205. Madison Malone Kircher, *What We Know (so far) about Taylor Swift and Travis Kelce's Wedding*, N.Y. TIMES (Jan. 7, 2026); *Accommodations*, OCEAN HOUSE, <https://www.oceanhouseri.com/accommodations/> [<https://perma.cc/4YTN-5TNA>] (last visited Oct. 29, 2025).

206. Matthew D. Sleprow, *Shoring Up the Limits of Rhode Island's Public Trust Doctrine: Greater Providence Chamber of Commerce v. State of Rhode Island Makes It Simple as One, Two, Fee*, 1 ROGER WILLIAMS U. L. REV. 183, 191 (1996).

207. Shoreline Access Act, H.B. 5174, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023).

208. Memorandum in Support of the State's Motion to Dismiss, *supra* note 8.

what was once private land.²⁰⁹ Such a doctrine would surely be unconstitutional absent compensation. If the state could “adjust” the meaning of the doctrine whenever it wishes, the background principles defense would swallow the constitutional protection entirely.²¹⁰ It is particularly odd that the state continually describes its doctrine as progressive when the core of its argument makes the opposite claim: that the public trust doctrine has been the same since the state’s founding, and it has always prohibited privatization of certain shore usages. The state advocates for vindication of its constitution’s original meaning, but does so with rhetoric cloaked in progressive principles. The state should appeal *Stilts and Roth* without a progressive gloss.

Judges and lawyers of the Rhode Island Bar have departed from the state constitution’s original meaning by issuing *Ibbison* and continuing to legitimize it. Though the Shoreline Access Act will allow Rhode Islanders to exercise their shoreline privileges, it may come at a hefty price to the taxpayers. Rhode Islanders should not have to compensate coastal neighborhoods in order to exercise their constitutional rights. Though federal law regulates takings, it does not require the people to pay for the Rhode Island Bar’s *Ibbison* mistake. The Shoreline Access Act is not a taking because the contested property has always belonged to the people according to the Constitution’s original meaning. The state must appeal in order to save taxpayer dollars and facilitate equitable access to the coast.

209. Shoreline Access Act, H.B. 5174, 2023 Gen. Assemb., Reg. Sess. (R.I. 2023).

210. *Id.*

