

Fordham Environmental Law Review

Volume 25, Number 2

2015

Article 6

Local Government and the Closing of the Coast: Parking Bans and the Beach as a Traditional Public Forum

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LOCAL GOVERNMENT AND THE CLOSING OF THE COAST: PARKING BANS AND THE BEACH AS A TRADITIONAL PUBLIC FORUM

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I. INTRODUCTION

The lure of the ocean shore is so strong that an estimated 122 million people visit American beaches each year.¹ Accessing the coastal shore is not just a preferred pastime of many Americans; it is a right of all Americans. In every state, the public has some legal right to access and use the shoreline. The source of the right of access and the portion of the shoreline that the public has a right to use vary from state to state. The right and the extent of the right might be found in a state constitution,² a state statute,³ or a state court's interpretation of the Public Trust Doctrine,⁴ property law,⁵ the Doctrine of Custom,⁶ or some combination of these sources of law.

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1. NATALIE SPRINGUEL ET AL., ME. SEA GRANT COLLEGE PROGRAM, ACCESS TO THE WATERFRONT: ISSUES AND SOLUTIONS ACROSS THE NATION 4 (2007); see also TIMOTHY BEATLEY ET AL., AN INTRODUCTION TO COASTAL ZONE MANAGEMENT 2 (2d ed. 2002) (putting the number of visitors at 180 million).

2. See R.I. CONST. art. I, § 17.

3. See TEX. NAT. RES. CODE ANN. § 61.001(8) (West 2013).

4. See *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972); *Raleigh Ave. Beach Assoc. v. Atlantis Beach Club*, 879 A.2d 112, 117 (N.J. 2005); see also JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 5-13 (1994); DAVID C.

Even though the public has a right to access the shore in every state, local governments have been known to restrict on-street parking as a means of preventing nonresidents from accessing the shoreline.⁷ This article examines two potential legal challenges to the types of parking restrictions that as a practical matter eliminate beach

SLADE ET AL., COASTAL STATES ORG., INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS, AND LIVING RESOURCES OF THE COASTAL STATES 15–27 (2d ed. 1997).

5. For cases both recognizing and rejecting attempts to establish a public right to access and utilize a portion of the shoreline through either prescriptive easement or implied dedication, see JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 318–34 (3d ed. 2007).

6. See *State ex rel. Thornton v. Hays*, 462 P.2d 671, 677–78 (Or. 1969) (concluding that the use of the sandy shoreline by the general public could be traced back to the original settlers and the Native Americans and, therefore, the right to access and use was established by the common law doctrine of customary rights); see also *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1272 (Haw. 1995) (holding that traditional and customary rights of native Hawaiians could be practiced on public and private land that was either undeveloped or less than fully developed). See generally Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005), for a discussion of cases where courts have found that a customary property right militates against a takings claim based upon *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992).

7. Marc R. Poirier, *Beach Access*, in THE ENCYCLOPEDIA OF NEW ENGLAND: THE CULTURE AND HISTORY OF AN AMERICAN REGION 906, 907 (Burt Feintuch & David H. Watters eds., 2005) [hereinafter Poirier, *Beach Access*]; see also 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, 775 (1996) (discussing thoroughly New Jersey and Connecticut beach access conflicts, particularly with reference to civil rights) [hereinafter Poirier, *Environmental Justice*]; Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. C.R. & C.L. 143 (2005) (discussing attempts by local communities to prohibit outsiders from accessing local beaches in Southern California); Robert Thompson & Tracy Dalton, *Measuring Public Access to the Shoreline: The Boat-Based Offset Survey Method*, 38 COASTAL MGMT. 378, 390–91 (2010) (describing a statistical analysis of the availability of parking and shoreline access); Robert Thompson, *Affordable Twenty-Four Hour Access: Can We Save A Working Stiff's Place in Paradise?*, 12 OCEAN & COASTAL L.J. 91 (2007) (discussing barriers to coastal access based upon income).

access for nonresidents. The first argument is that beaches are public forums and, consequently, parking restrictions that unreasonably burden access to these forums unconstitutionally infringe upon the right to free speech guaranteed by the First Amendment to the United States Constitution. The second argument is that such parking restrictions prevent a class of persons (i.e., nonresidents) from gathering on the beach, thereby violating their First Amendment right to assemble.

Part II.A provides a brief historical overview of the connection between transportation improvements in the United States and the growth of visitation to America's ocean shores. The tremendous growth in visitors to beaches ultimately led to parking restrictions. Part II.B discusses briefly the source of a municipality's power to regulate on-street parking and the potential limitations on that power. Part II.C, then, examines when and why municipalities have been able to adopt constitutionally sound ordinances giving preferential on-street parking arrangements to residents. However, Part II.D.1 through Part II.D.8 argue that parking restrictions that seriously limit access to the ocean shoreline are unconstitutional because beaches are traditional public forums and parking restrictions that seriously hinder access to these forums unconstitutionally burdens our First Amendment rights to freedom of speech and to assembly. Lastly, Part II.D.9 examines whether parking bans near access points to public beaches are likely to survive freedom of speech and assembly challenges.

II. DISCUSSION

A. A Short History of a Developing Conflict: From Solitude to the Masses

When Henry David Thoreau made his four trips to Cape Cod starting in 1849 and ending in 1857, the shorelines away from the working waterfronts were largely deserted except when an event like a shipwreck or the running aground of a pod of blackfish (commonly known as pilot whales) drew large crowds to the shoreline.⁸ To get to a remote shoreline like Cape Cod, Thoreau traveled by stagecoach, and it was a slow and difficult trip that was only made by residents

8. HENRY DAVID THOREAU, *CAPE COD* 15–21, 141–45 (W.W. Norton 1951).

and the adventurous.⁹ In the 1700s and most of the 1800s, travel to parts of the coast beyond the larger coastal towns was greatly inhibited by a lack of well-maintained roads or railroads.¹⁰ However, with every transportation improvement, larger crowds arrived at the coast and along with them came more development.¹¹ First ferries and then a rapidly growing railroad system¹² created destination coastal resorts that supported large crowds in places like Old Orchard, Maine;¹³ Newport, Oregon;¹⁴ Palm Beach, Florida;¹⁵ Falmouth, Massachusetts;¹⁶ Newport, Rhode Island; Cape May and Atlantic City, New Jersey; and Coney Island in New York.¹⁷

Still, because railroads and ferries only reached isolated points along the coast, most of the shoreline remained largely inaccessible to anyone but the local population. This limitation began to change rapidly with the expansion of automobile ownership and government efforts to build and improve roads to spur economic development. At the beginning of the twentieth century trains ran along about 300,000 miles of set rails.¹⁸ By contrast, automobiles had almost 3,000,000

9. *Id.* at 28–39.

10. See KARL F. NORDSTROM, *BEACHES AND DUNES OF DEVELOPED COASTS* 8 (2000).

11. See *id.*; see also CINDY S. ARON, *WORKING AT PLAY: A HISTORY OF VACATIONS IN THE UNITED STATES* 3–4 (1999); John Davenport & Julia L. Davenport, *The Impact of Tourism and Personal Leisure Transport on Coastal Environments: A Review*, 67 *ESTUARINE, COASTAL & SHELF SCI.* 280, 280–82 (2006). For the importance of the automobile in transforming coastal tourism, see LENA LENČEK & GIDEON BOSKER, *THE BEACH: THE HISTORY OF PARADISE ON EARTH* 223–27 (1999).

12. Railroad mileage increased from twenty-three miles in 1830 to approximately 30,000 miles in 1860 and to 166,000 in 1890. See JON STERNGASS, *FIRST RESORTS: PURSUING PLEASURE AT SARATOGA SPRINGS, NEWPORT & CONEY ISLAND* 17 (2001).

13. Roy P. Fairfield, *The Old Orchard “Set-Off”*, 27 *NEW ENG. Q.* 227, 229–30 (1954).

14. PAUL D. KOMAR, *THE PACIFIC NORTHWEST COAST: LIVING WITH THE SHORES OF OREGON AND WASHINGTON* 69 (1998).

15. LENČEK & BOSKER, *supra* note 11, at 204–05.

16. See generally JAMES C. O’CONNELL, *BECOMING CAPE COD: CREATING A SEASIDE RESORT* (2003).

17. STERNGASS, *supra* note 12, at 17–18, 50–51, 76–82; see also LENČEK & BOSKER, *supra* note 11, at 223–27.

18. WARREN JAMES BELASCO, *AMERICANS ON THE ROAD: FROM AUTOCAMP TO MOTEL 1910–1945*, at 23 (1979).

miles of road available to them.¹⁹ Even though many of these miles were dirt and therefore difficult to traverse, automobile ownership allowed tourists and summer residents to reach shorelines that were previously inaccessible and to stay at more dispersed summer cottages, boardinghouses, and farms rather than traditional resort hotels.²⁰

Building roads for tourists became an explicit economic development strategy in coastal areas. For example, on Cape Cod, the Commonwealth of Massachusetts recognized the connection between roads and tourist dollars, and by 1915 Massachusetts had converted Thoreau's bumpy stagecoach ride into a comfortable automobile ride on paved and well-marked modern roads.²¹ Once the smooth roads were in place, the tourists and their cars flowed out onto the Cape. For instance, when the Massachusetts Highway Commission tracked the traffic in Sandwich at one of the bridges crossing the Cape Cod Canal on an August day in 1909, fifty-seven horse-drawn vehicles and seventy-five motor vehicles traversed the bridge.²² There were twenty-three horse-drawn vehicles and 559 motor vehicles across the bridge nine years later.²³ On a Sunday in 1936, state police counted 55,000 automobiles crossing one of the two bridges over the Cape Cod Canal.²⁴ By 1951, "over 200,000 tourists were visiting Cape Cod at one time, jamming the highways, overnight cabins, and restaurants."²⁵ Of course, the cars full of tourists have never stopped coming, and now Cape Cod is notorious for its "mammoth traffic jams on every summer weekend."²⁶

19. *Id.*

20. *Id.* at 27–28; see also DONA BROWN, *INVENTING NEW ENGLAND: REGIONAL TOURISM IN THE NINETEENTH CENTURY* 207 (1995).

21. See BROWN, *supra* note 20, at 208. For a discussion of how the automobile generally freed American tourists from the negative aspects of large resorts and railroad travel, see BELASCO, *supra* note 18, at 19–69.

22. O'CONNELL, *supra* note 16, at 47.

23. *Id.*

24. BROWN, *supra* note 20, at 209.

25. Lewis M. Alexander, *The Impact of Tourism on the Economy of Cape Cod, Massachusetts*, 29 *ECON. GEOGRAPHY* 320, 323 (1953); see also BROWN, *supra* note 20, at 207.

26. BROWN, *supra* note 20, at 209.

As visitation to the nation's shorelines increased, so did tensions with shoreline municipalities and property owners on one side and visitors on the other:

Throughout the coastal United States, conflicts over shore use and access intensified during the 1960s and 1970s because of increased population, changing vacation habits, the availability of automobiles, the improved interstate highway system, and increasing permanent suburban or retirement populations in shore towns.²⁷

In response to the growing crowds, shoreline municipalities began to take steps to keep "outsiders" off of "their" beaches.²⁸ Because most of the 122 million people who want to visit the beach live or stay too far away to walk to it, and because most beaches are not well served by public transportation (particularly outside urban areas),²⁹ the only reasonable way for many people to visit many beaches is to drive there and to park within walking distance of the beach.³⁰ Consequently, a "[s]omewhat more subtle means [than explicitly restricting access] of keeping beaches for limited populations include[] reserving the only convenient parking for local residents"³¹ Although a number of writers have noted the fact that parking restrictions are used to keep people from outside the immediate area off the beach, the legality of such parking restrictions remains unsettled.³²

27. See Poirier, *Beach Access*, *supra* note 7, at 906.

28. See Poirier, *Environmental Justice*, *supra* note 7, at 775. See also García & Baltodano, *supra* note 7, at 144–45, for a discussion of attempts by local communities to prohibit outsiders from accessing local beaches in Southern California.

29. See García & Baltodano, *supra* note 7, at 150.

30. See Thompson & Dalton, *supra* note 7, at 389–91 (showing in a study of access to the shoreline of Narragansett Bay, Rhode Island that there was no statistical correlation between shoreline access and the density of shoreline access points or the population density of the surrounding neighborhood, but there was a strong positive correlation between shoreline access and the available parking).

31. See Poirier, *Beach Access*, *supra* note 7, at 907.

32. See, e.g., ARCHER ET AL., *supra* note 4, at 108 ("Parking restrictions could also serve as an effective deterrent to beach use. It remains to be seen, however,

This article examines two potential constitutional challenges to parking restrictions that as a practical matter eliminate beach access for nonresidents. First, local parking restrictions that unnecessarily limit public access to public beaches unconstitutionally burden the right to free speech because public beaches should be treated as traditional public forums. Public beaches are analogous to public parks and often act as public thoroughfares, both of which are quintessential public forums. Second, such parking restrictions prevent people outside the neighborhood from gathering on the public beach, thereby violating their right to assemble. These parking restrictions, however, are typically the product of municipal ordinances. Consequently, before discussing the potential legal challenges to parking restrictions that block access, this article will briefly discuss the source of a municipality's power to regulate on-street parking and the potential limitations on that power.

B. Parking and the Police Power

Generally, municipal governments may regulate the time, place and manner of parking on public streets within their jurisdiction pursuant to their delegated police power.³³ The police power rests with the state and each state may delegate aspects of the police power to municipal corporations differently.³⁴ The power to enact reasonable parking regulations may be explicitly delegated by the

whether parking restrictions that are clearly intended to restrict beach access will withstand challenge.”).

33. See generally 7A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24:648 (3d ed., rev. vol. 2011); *Meekins v. City of New York*, 524 F. Supp. 2d 402 (S.D.N.Y. 2007); *Homes on Wheels v. City of Santa Barbara*, 15 Cal. Rptr. 3d 132 (Cal. Ct. App. 2004); *State v. Hofland*, 857 A.2d 1271 (N.H. 2004); *Allen & Reed, Inc. v. Presbrey*, 144 A. 888 (R.I. 1929).

34. See, e.g., *City of Lafayette v. County of Contra Costa*, 154 Cal. Rptr. 374, 377 (Cal. Ct. App. 1979) (citations omitted):

The [state] legislature is possessed of the entire police power of the state, except as its power is limited by the provisions of the constitution. The determination as to what portion, if any, of a state's police power shall be delegated to its lesser political entities is left to its people through constitutional processes or through their legislatures.

state³⁵ or it may be implied from their delegated authority to regulate traffic.³⁶ The common law rule, however, has always been that public streets are presumed to be open to any member of the public.³⁷ Moreover, the right to travel on a public street or highway includes the right to park for legitimate purposes that are a normal part of travel. This right to park cannot be arbitrarily or unreasonably restricted through municipal parking regulations.³⁸ Furthermore, even though each municipality has a special interest in the traffic and parking problems on its own streets, it cannot regulate its streets without regard for neighboring communities and nonresidents

35. See, e.g., R.I. GEN. LAWS § 31-12-12(a)(1) (2013); see also *Levine v. Police Comm'n of Fairfield*, 612 A.2d 787, 795 (Conn. App. Ct. 1992); *Associated Students of the Univ. of Mont. v. City of Missoula*, 862 P.2d 380, 382 (Mont. 1993); *Yunker v. Village of Ossining*, 41 A.D.3d 470, 471–72 (N.Y. App. Div. 2007).

36. See *Salomone v. City of Canton*, 175 N.E.2d 663, 666 (Ill. App. Ct. 1961); *City of Rapid City v. Rensch*, 90 N.W.2d 380, 383 (S.D. 1958).

37. See *Lafayette*, 154 Cal. Rptr. at 376–77 (footnote omitted) (citations omitted):

Fundamentally it must be recognized that in this country “Highways are for the use of the traveling public, and all have . . . the right to use them in a reasonable and proper manner, and subject to proper regulations as to the manner of use.” . . . “The streets of a city belong to the people of the state, and the use thereof is an inalienable right of every citizen, subject to legislative control or such reasonable regulations as to the traffic thereon or the manner of using them as the legislature may deem wise or proper to adopt and impose” “Streets and highways are established and maintained primarily for purposes of travel and transportation by the public, and uses incidental thereto. Such travel may be for either business or pleasure The use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right, of which the public and individuals cannot rightfully be deprived . . . [A]ll persons have an equal right to use them for purposes of travel by proper means, and with due regard for the corresponding rights of others.”

See also *Citizens Against Gated Enclaves v. Whitley Heights Civic Ass’n*, 28 Cal. Rptr. 2d 451, 454 (1994); *People v. Speakerkits, Inc.*, 633 N.E.2d 1092 (N.Y. 1994) (citing *N.Y. State Pub. Emps. Fed’n. v. City of Albany*, 527 N.E.2d 253, 255 (N.Y. 1988)) (“[T]he common-law rule [is] that the ‘right to use of the highways is said to rest with the whole people of the State, not with the adjacent proprietors or the inhabitants of the surrounding municipality.’”).

38. *Salomone*, 175 N.E.2d at 665; *Triplett v. City of Corbin*, 269 S.W.2d 188, 188 (Ky. 1954).

because traveling on public streets is not solely a municipal affair but instead a matter of statewide concern.³⁹

Although a municipality can regulate parking in a number of different ways, this article examines only two types of parking restrictions: resident only parking zones and complete prohibitions of on-street parking. Unlike restrictions that limit the amount of time that someone can park on the street, ordinances that completely prohibit people from parking within a reasonable walking distance of a beach access point can, as a practical matter, make the beach inaccessible for people who live outside the immediate neighborhood and, therefore, such restrictions should face special scrutiny when challenged.

C. Preferential Parking for Residents

At first glance, a municipal ordinance that allows residents to park on certain streets while prohibiting nonresidents from parking on the same streets might seem to violate the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court, however, has held that municipal ordinances that create preferential parking for neighborhood residents can withstand a constitutional challenge.

In *County Bd. of Arlington County, Va. v. Richards*, the County adopted a zoning ordinance that was intended to stop people who were commuting to commercial and industrial districts from parking in an adjoining residential neighborhood.⁴⁰ Pursuant to the ordinance, no one could park in the designated residential areas between 8:00 AM and 5:00 PM on weekdays without a parking permit.⁴¹ Permits, which were free, were only available to residents, to persons doing business with residents, and to some visitors.⁴² Commuters who had regularly parked in a newly restricted residential area sued to enjoin enforcement of the ordinance, in part, as a violation of the Equal

39. *Lafayette*, 154 Cal. Rptr. at 376 (quoting *Ex parte Daniels*, 192 P. 442, 444 (Cal. 1920): “While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state.”)

40. *Cnty. Bd. of Arlington Cnty., Va. v. Richards*, 434 U.S. 5, 5–6 (1977).

41. *Id.*

42. *Id.* at 5.

Protection Clause. While the Virginia Supreme Court ultimately held that the ordinance violated the Equal Protection Clause, the United States Supreme Court disagreed. The Arlington Court noted, “[t]he Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington’s rationally promote the regulation’s objectives.”⁴³

The goals that the ordinance promoted were to reduce air pollution from automobile commuting, to provide more convenient parking for the neighborhood residents, and to enhance the quality of life in the neighborhood by reducing noise, traffic hazards, and litter. The court found that the stated goals were legitimate and that the parking restrictions rationally promoted these goals. Thus, barring nonresidents from parking on a public street was held to be constitutional in this case.⁴⁴

On busy days at the beach, residents living next to or near access points could certainly have problems similar to those that were addressed in the Arlington County ordinance. Parking spaces can be hard to find. Visitors can be noisy as they unload and load their cars. If garbage and bathroom facilities are inadequate or nonexistent, visitors might leave their garbage on the street and even urinate in the bushes.⁴⁵ Consequently, a municipal ordinance barring nonresidents from parking near access points would not, on its face, violate the Equal Protection Clause of the United States Constitution. However, such an ordinance might be challenged in two other ways. First, such an ordinance might violate the public’s right to access a traditional public forum, thereby violating their First Amendment right to speech. Second, such an ordinance might violate the public’s First Amendment right to assemble. Under the Equal Protection Clause, the parking bans only need to be “rationally related to a legitimate state interest.”⁴⁶ As will be discussed fully in Part II, if the parking ban infringes upon First Amendment rights, then the ordinance must

43. *Id.* at 7.

44. *Id.* at 7–8.

45. *See, e.g.,* García & Baltodano, *supra* note 7, at 188; C. Eugene Emery, *Anglers, Residents Spar Over Beach Lot*, PROVIDENCE J., Sept. 19, 2008.

46. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). *See also* Fla. State Conference of NAACP Branches v. *City of Daytona Beach*, 54 F. Supp. 2d 1283, 1287 (M.D. Fla. 1999); *Curse v. U.S. Dep’t of Labor*, 843 F.2d 456, 463 (11th Cir. 1988).

be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁴⁷

D. Access to the Beach and the Rights to Free Speech and Assembly

1. Free Speech and the Public Forum Doctrine

The First Amendment of the United States Constitution states, in part, “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble.”⁴⁸ Through the doctrine of incorporation, the Supreme Court has used the Fourteenth Amendment to extend the First Amendment protections of speech and assembly to the states and hence to municipal governments which exercise delegated state power.⁴⁹ Thus, freedom of speech is among the fundamental rights and liberties protected by the Due Process Clause of the Fourteenth Amendment from impairment by state action, and any government action which chills constitutionally protected speech or expression contravenes the First Amendment.⁵⁰

To explain how an on-street parking ban could possibly be an unconstitutional infringement on the right to free speech, one must start by examining the importance that the courts have placed on the character of the place where the speech is being infringed upon.

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the “place” of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated “differ depending on the character of the property at issue.” Specifically, we have identified three types of fora: “the

47. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983).

48. U.S. CONST. amend. I.

49. *Gitlow v. New York*, 268 U.S. 652, 666 (1928); *De Jonge v. Oregon*, 299 U.S. 353, 363 (1937).

50. 16A AM. JUR. 2D *Constitutional Law* § 465 (1979); *Wolford v. Lasater*, 78 F.3d 484, 488 (10th Cir. 1996).

traditional public forum, the public forum created by government designation, and the nonpublic forum.”⁵¹

The constitutionality of a law that restricts speech can hinge on a court’s characterization of the place where speech is restricted because the designation will determine the level of scrutiny.

When a regulation restricts the use of government property as a forum for expression, an initial step in analyzing whether the regulation is unconstitutional is determining the nature of the government property involved.⁵² The nature of the property determines the level of constitutional scrutiny applied to the restrictions on expression.⁵³

Laws that infringe on speech on governmental property that have been traditionally open to the public for expressive activity or that has been expressly dedicated to speech activity are examined using the strict scrutiny standard. If, however, the property is not a traditional public forum and the government has not dedicated it to First Amendment activity, the law is examined only for its reasonableness.⁵⁴ “Traditional public forums” are places that by long tradition have been devoted to assembly and debate; “designated public forums” or “limited public forums” are a place created by the government for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects; and “nonpublic forums” are government properties that are not by tradition or designation forums for public communication.⁵⁵

To determine whether beaches might indeed be traditional public forums, one needs to look at what types of places have been held to be traditional public forums and at the factors that the courts have looked at when deciding whether a place qualifies as a traditional

51. *See* *Frisby v. Schultz*, 487 U.S. 474, 479–80 (1988) (citations omitted).

52. *See* *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990).

53. *See* *United States v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000) (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995)); *see also* *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677–78 (1998); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44–46 (1983).

54. *See, e.g., Kokinda*, 497 U.S. at 727; *Paulsen v. Lehman*, 839 F. Supp 147, 157–58 (E.D.N.Y. 1993).

55. *See* *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 269 (9th Cir. 1995).

public forum. Many courts have held that, barring special circumstances, streets and parks are the quintessential public forums.⁵⁶ This is because those areas “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁵⁷ Similarly, sidewalks have been held to be traditional public fora.⁵⁸

Quite importantly, one does not have to show that the specific street in question has been used for public debate in order for it to be treated as a traditional public forum: “[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.”⁵⁹ Thus public places that have been “historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’”⁶⁰

2. Are Public Beaches Traditional Public Forums?

Even if streets, sidewalks, and parks are quintessential traditional public forums and even if any laws that inhibit free speech within those forums must be strictly scrutinized, it may not be immediately apparent how any of this applies to the laws that prohibit on-street parking near shoreline access points. To make the connection clearer, this section will ask and answer two questions: first, whether beaches can properly be considered public forums; and, second, if beaches are public forums, whether parking restrictions that make it impractical

56. See, e.g., *Eagon ex rel. Eagon v. City of Elk City*, 72 F.3d 1480, 1486 (10th Cir. 1996); *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287 (7th Cir. 1996).

57. *Perry*, 460 U.S. at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

58. See *Int’l Caucus of Labor Comms. v. City of Montgomery*, 111 F.3d 1548, 1550 (11th Cir. 1997) (“A sidewalk, although specifically constructed for pedestrian traffic, also constitutes a public forum.”) (citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)); see also *United States v. Grace*, 461 U.S. 171, 177 (1983).

59. *Frisby*, 487 U.S. at 481.

60. See *Grace*, 461 U.S. at 177; see also *Perry*, 460 U.S. at 45; *Carey v. Brown*, 447 U.S. 455, 460 (1980); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941); *Hague*, 307 U.S. at 515.

for anyone to reach the beach, except for people living or staying near access points to the beach, can violate a public's right to access the traditional public forum.

3. Are Beaches Different from "Traditional" Parks for Purposes of Public Forums Analysis?

In *Paulsen v. Lehman*,⁶¹ the founder of a Christian Evangelical organization sued the New York State Office of Parks, Recreation, and Historic Preservation and its commissioner (SOP), alleging that they violated his right to freedom of expression and free exercise of religion by prohibiting him from distributing non-commercial religious literature in a state park without a permit.⁶² At the very beginning of his opinion, Judge Spatt states SOP's position, which was that beaches are very different places than parks, roads, and other traditional public forum, because beaches perform a very different function in our public lives. Judge Spatt's opening provides an almost adoring description of beaches before he restates SOP's position:

Say the word "beach" to most Americans and they will conjure images of cool breezes beneath a piercing sun, swimmers diving under breaking waves, ships bobbing on the horizon line, and evening strolls along a boardwalk under an azure sky. "Beaches" have been the subject of plaintive poems, raucous records, and comedic as well as melancholic motion pictures.

So far as the defendants in this case are concerned, it is this visualization of the "beach experience" which lies at the heart of the controversy now before the Court. The plaintiff wishes to distribute his noncommercial religious literature at Jones Beach State Park, perhaps the most utilized beach area on all of Long Island. The defendants contend that the plaintiff's activities should be restricted, to allow the citizens of Long Island to "attend the beach and

61. *Paulsen v. Lehman*, 839 F. Supp. 147 (E.D.N.Y. 1993).

62. *Id.* at 150.

commune with nature and relieve the stress and concerns of day to day life,” without such disruption.⁶³

According to SOP, “tradition and custom ma[d]e the beach area unsuitable for distribution of leaflets, as are public access areas such as the entrances to park offices, restaurants, restrooms, theater, and first aid areas.”⁶⁴ While SOP conceded that sidewalks within Jones Beach State Park might be designated public forums, it argued that the beach was a non-public forum.⁶⁵

The court in *Paulsen* could not find any cases decided by the United States Supreme Court or the Second Circuit discussing the forum status of beaches.⁶⁶ In fact, the court could only find one federal case that discussed “the forum status of a combined beach and state park setting”⁶⁷ That case was *Naturist Society, Inc. v. Fillyaw (Fillyaw I)*,⁶⁸ and, because the *Paulsen* court found the “striking similarities in the physical composition of the forum,” the court looked to the Eleventh Circuit for guidance.⁶⁹

In *Fillyaw I*, a group that advocated nudism sought permission to distribute literature and circulate petitions at John D. MacArthur Beach State Park in Palm Beach County, Florida.⁷⁰ One of the main disputes in *Fillyaw I* was whether the beach itself was a public forum. The defendant argued that beaches were not like city parks, which are quintessential public forums, because people engage in behaviors, such as wearing limited clothing, which would make unsolicited communication more intrusive and unwelcome. While the district court accepted the defendant’s arguments distinguishing

63. *Id.*

64. *Id.* at 155.

65. *Id.* at 154–55.

66. *Id.* at 159–60.

67. *Id.* at 160.

68. *Naturist Soc’y, Inc. v. Fillyaw*, 958 F.2d 1515 (11th Cir. 1992) [hereinafter *Fillyaw I*].

69. *Paulsen*, 839 F. Supp. at 160.

70. *Id.* (citing *Naturist Soc’y, Inc. v. Fillyaw*, 736 F. Supp. 1103, 1106 (S.D. Fla. 1990)). The *Paulsen* court also found support in *Gerritsen v. City of L.A.*, 994 F.2d 570, 576 (9th Cir. 1993), where the Ninth Circuit rejected the defendant’s contention that certain “blue-line” areas in Los Angeles’ El Pueblo Park were distinct from the rest of the park for First Amendment purposes due to their “special ambience.” *Paulsen*, 839 F. Supp. at 160–61.

beaches from other parks, the Eleventh Circuit court in *Fillyaw I* rejected these arguments.

The *Paulsen* court chose to follow *Fillyaw I* and extensively quoted from the appellate court's decision:

Moreover, the facts the district court recites do not render the park a non-public forum. City parks are quintessential public forums. In these parks, as at the beach, the public may swim, play games, rest, and enjoy the surroundings. Although the district court remarked on the small size of John D. MacArthur Beach State Park, most city parks are even smaller, presenting the same space problems the district court contemplated. As at the beach, people sunbathe in city parks, sometimes in less than the usual amount of clothing, and they often arrange their possessions around themselves, making it difficult to move when someone approaches them. As at John D. MacArthur Beach State Park, many city parks suffer a shortage of law enforcement personnel. In short, *none of the facts the district court found adequately distinguish John D. MacArthur Beach State Park from a typical city park for First Amendment purposes.*⁷¹

Following *Fillyaw I*, the *Paulsen* court held that Jones Beach State Park was a public forum, even though its main attraction was its extensive beach.

Even though the *Paulsen* court extensively quotes *Fillyaw I* and, in doing so, strongly suggests that the beach is as much part of the public forum as the rest of the park, the court does not specifically state in its holding that the sand portion of Jones Beach State Park is included in the public forum. This could be due to the limited relief that was requested by the plaintiff. Although the plaintiff did not concede that the beaches were not part of the public forum, he nonetheless decided not to contest that issue and to instead only seek greater access to the pedestrian walkways and thoroughfares, the central mall area, and the boardwalk.⁷²

71. *Paulsen*, 839 F. Supp. at 160 (emphasis in original) (citations omitted).

72. *Id.* at 152–53, 170.

When the Eleventh Circuit decided *Fillyaw I*, it remanded the case back to the district court. In *Naturist Society v. Fillyaw (Fillyaw II)*,⁷³ the court directly addressed the question of whether stricter limits on speech could be applied to the sandy beach than to other parts of the park. In addition to many other challenges to the rules governing speech at MacArthur Beach State Park, the plaintiffs challenged a rule that prohibited them from approaching people on the beach to discuss their issue or to pass out leaflets.⁷⁴ Considering that the appellate court in *Fillyaw I* held that sunbathing, skimpy clothes, and other aspects of enjoying the beach did not justify treating beaches differently than city parks for purposes of forum analysis,⁷⁵ the *Fillyaw II* court, perhaps surprisingly, held that prohibiting any speech activity on the beach was an allowable time, place, and manner restriction.⁷⁶ Quite importantly, for the purposes of this article, the *Fillyaw II* court does not dispute that the beach is a public forum.⁷⁷ Nonetheless, because the legal analysis of the *Fillyaw II* is flawed and because the case could cause confusion as to whether beaches are traditional public fora, it is necessary to look at *Fillyaw II* in some detail.

The *Fillyaw II* court began by laying out the test by which all time, place and manner restrictions must be judged: “such restrictions are legitimate only if they ‘are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’”⁷⁸ The park’s rules were content neutral⁷⁹ so the court focused on whether the rules were narrowly tailored, promoted a significant governmental interest, and whether there were adequate alternative channels for communication.

As can be seen in the quote below, the *Fillyaw II* court sought to distinguish MacArthur Beach State Park from other busier beaches

73. *Naturist Soc’y, Inc. v. Fillyaw*, 858 F. Supp. 1559 (S.D. Fla. 1994) [hereinafter *Fillyaw II*].

74. *Id.* at 1562–63.

75. *Fillyaw I*, 958 F.2d at 1522–23.

76. *See Fillyaw II*, 858 F. Supp. at 1569.

77. *Id.* at 1567.

78. *Fillyaw I*, 958 F.2d at 1523 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

79. *Fillyaw II*, 858 F. Supp. at 1566–67.

and to show that the state had a significant interest in protecting the park's unique character.

MacArthur Beach State Park . . . was purchased in order to preserve the undeveloped natural beauty of the Florida landscape for the enjoyment of citizens and tourists [T]he goal of the Florida Department of Natural Resources [is] to provide an alternative to the noisy, commercialized parks and beaches which now predominate the state. Secluded and protected, MacArthur Beach State Park offers visitors . . . a tranquil environment, which is uncharacteristic of the traditional public park.

The defendant argues that the rules challenged by the plaintiffs are narrowly tailored to serve the following interests of the state: (1) to protect the rights of individual beachgoers to their privacy and freedom from confrontations with demonstrators; (2) to ensure park visitors a unique recreational experience based on the natural environment; and (3) to promote park aesthetics.⁸⁰

Even though the court acknowledges that it “would be completely inconsistent with First Amendment principles to hold that visitors to [MacArthur Beach] carry with them an inherent right to privacy and freedom from demonstrators,” the court goes on to hold that “the state may have a legitimate interest in providing a certain degree of privacy and freedom from demonstrators in particular areas of the park, to the extent that may be necessary to prevent interference with the intended use of those areas.”⁸¹ Without evidence, the court states that it is “a well-known fact” that tourists and residents are attracted to Florida’s “unique natural recourses” and that the state “obviously has a significant interest in continuing to offer, and remaining able to deliver, this unique recreational experience”⁸² Thus, the court finds that “[i]n those areas of the park where visitors may experience the park’s unique environment on a most intimate level, such as on

80. *Id.* at 1567.

81. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

82. *Id.*

the beach or the nature trails, they are entitled to some privacy and freedom from solicitation.”⁸³

While the *Fillyaw II* court was willing to severely limit freedom of speech on rather secluded beaches, apparently these limitations could not be applied to popular and at times crowded beaches such as Jones Beach State Park in New York, which was the subject of *Paulsen v. Lehman*.⁸⁴ Still, it is far from obvious that handing out pamphlets and similar activities would really “severely undermine” “the visitor’s ability to appreciate the sights and sounds of nature.”⁸⁵ For example, would a person’s visit to the beach really be “severely undermined” if a stranger politely asked them if they would care for a hand bill with information about a particular issue? The intrusion seems minor at worst and hence, the total prohibition seems unnecessary. Similarly, someone sitting on the beach with a sign of a reasonable size would seem unlikely to defeat the purposes of the park.

In fact, the court’s short discussion of the possibility of prior political activity on the beach seems to lend some support to the conclusion that allowing some political speech on the beach will not seriously disrupt people’s enjoyment of the beach. The plaintiffs argued that the rules had been applied in a discriminatory manner to them because another organization had been allowed to solicit political support on the beach. According to the plaintiffs, “an organization known as Florida Free Beaches entered MacArthur Beach State Park, approached beach goers, and distributed visors with messages urging people to vote in favor of beach bonds.”⁸⁶ The court, however, found no evidence of discrimination because there was no evidence that the defendants ever knew that the political activity was going to occur. The court, unfortunately, does not look at the consequences of this political activity. If Florida Free Beaches had spent the day “severely undermining” the beach goers attempts to appreciate nature, one might think that the park staff and administrators would have received complaints and that these complaints would have been used to help justify the park’s severe restrictions on speech on the beach. However, as was mentioned

83. *Id.* at 1568.

84. *Paulsen v. Lehman*, 839 F. Supp 147 (E.D.N.Y. 1993).

85. *Fillyaw II*, 858 F. Supp. at 1568.

86. *Id.* at 1567.

above, the court found that there was no evidence in the record indicating that the park staff even knew the political activity had occurred, which means that no complaints were introduced as evidence.

In *Smith v. City of Fort Lauderdale*,⁸⁷ the Eleventh Circuit's decision had strong similarities to *Fillyaw II*. In *Smith*, the city of Fort Lauderdale prohibited soliciting, begging, or panhandling on the beach.⁸⁸ While the Eleventh Circuit held that the public beach was conclusively a public forum,⁸⁹ it also held that the City had a significant interest in "eliminating nuisance activity on the beach"⁹⁰ Finally, the court deferred to the city's judgment on the necessity for the complete prohibition:

The [c]ity has made the discretionary determination that begging in this designated, limited beach area adversely impacts tourism. Without second-guessing that judgment, which lies well within the [c]ity's discretion, we cannot conclude that banning begging in this limited beach area burdens "substantially more speech than is necessary to further the government's legitimate interest."⁹¹

Thus, while the court held that the beach is a traditional public forum, it allowed the city to use regulations to eliminate one type of expressive activity, i.e., begging, from that forum in order to protect the local tourism economy.

87. *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999).

88. *Id.* at 956 ("Like other charitable solicitation, begging is speech entitled to First Amendment protection."); see *Loper v. N.Y. City Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993) (holding "begging is at least 'a form of speech'" because of the lack of material distinctions between begging and other forms of charitable solicitation); see also *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (holding charitable organizations' solicitations for contributions are protected speech).

89. *Smith*, 177 F.3d at 956 ("Additionally, this Court's precedent conclusively establishes that the Fort Lauderdale Beach area covered by Rule 7.5(c)—consisting of beach and sidewalk spaces—is a public forum.").

90. *Id.*

91. *Id.* (quoting *One World Family Now v. City of Miami Beach*, 175 F.3d 1282, 1287 (11th Cir.1999)).

In *U.S. v. Frandsen*,⁹² the Eleventh Circuit in dicta again seemed to signal its willingness to allow greater restrictions on speech on the beach than elsewhere in the park:

The state park in *Fillyaw* is almost identical to the national park in this case. Both the national park here and the state park in *Fillyaw* are open to the general public and consist of beaches, sidewalks, and parking areas. Particularly applicable to the present case, we explained in *Fillyaw*: “[T]he park is more than a beach. In particular, it contains parking lots, a nature center, and walkways. Speech and expressive conduct in these areas may not pose the same evils as on the beach. In declaring the park a non-public forum based solely upon its beach characteristics, the district court ignored other areas of the park which are not beach.”⁹³

The *Frandsen* court struck down the national park’s requirement that the plaintiffs obtain a permit before passing out pamphlets because there was no specific time within which the Superintendent had to respond to an application for a permit. Consequently, the court’s comment on the alleged evils of speech activity on beaches is dicta because the permit requirement was unconstitutional as long as any portion of the national park was a public forum. Moreover, the court’s selective quoting of *Fillyaw I* is potentially misleading. In the paragraph immediately following the one quoted by *Frandsen*, the *Fillyaw I* court disagrees with the determination of the trial court that beaches are markedly different than other public parks. For example, the *Fillyaw I* court points out that in city parks and at the beach, people swim and sunbathe in “less than the usual amount of clothing”⁹⁴

*Leydon v. Town of Greenwich*⁹⁵ is a more recent case that looked at whether a beach could be a public forum.⁹⁶ In *Leydon*, the plaintiff

92. *United States v. Frandsen*, 212 F.3d 1231 (11th Cir. 2000).

93. *Id.* at 1241 n.4 (quoting *Fillyaw I*, 958 F.2d 1515, 1522 (11th Cir. 1992)).

94. *Fillyaw I*, 958 F.2d at 1522–23.

95. *Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. 2001).

96. *Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910, 916 (9th Cir. 2006) (“The airspace is not, as the Center argues, an extension of

sought an injunction to stop the Town of Greenwich from enforcing an ordinance that limited access to a town park with a beach to town residents and their guests.⁹⁷ The plaintiff argued that the town's residents only policy violated: (1) the First Amendment of the United States Constitution, (2) the first article (§§ 4, 5, and 14) of the Connecticut Constitution, and (3) a state common law doctrine under which municipal parks are held in trust for the use of all members of the public.⁹⁸ While the appellate court ruled that the town's ordinance violated the town's trust obligations to the public, the Connecticut Supreme Court chose not to decide whether a common law doctrine existed under which Greenwich held the park for use by the public at large. Instead, the Connecticut Supreme Court decided the case solely on constitutional grounds. This was a somewhat unusual approach because normally the court would have considered the plaintiff's common law claim to avoid making an unnecessary constitutional adjudication. However, the court deviated from its normal practice for two reasons:

First, we are persuaded that the plaintiff's constitutional claim is plainly meritorious, whereas the common-law doctrine upon which the Appellate Court relied never before has provided the basis for a holding of a court of this state. Second, that common-law doctrine, if it exists, would be subject to legislative abrogation, whereas the constitutional principles advanced by the plaintiff are not.⁹⁹

Following reasoning of the *Paulsen* and *Fillyaw I* courts, the *Leydon* court had no trouble finding that the park was a public forum for First Amendment purposes. Greenwich Point contained many of the features that are commonly associated with public parks, such as picnic shelters, ponds, a marina, a parking lot, open fields, a nature

the fora below, namely the beaches. We do not express an opinion as to whether the beaches are public fora because the record is not developed on this point and this categorization is not necessary to our analysis. But even assuming that the beaches are public fora, the airspace above is not a public forum by extension.”).

97. *Leydon*, 777 A.2d at 557–58.

98. *Id.* at 560–61.

99. *Id.* at 565 n.20; *see, e.g., Packer v. Bd. of Educ.*, 717 A.2d 117, 124 (Conn. 1998).

preserve, walkways, trails, picnic areas with picnic tables, a library book drop, and a beach.¹⁰⁰ The *Leydon* court was unconvinced that the presence of a natural beach should make any difference in their analysis: “The fact that Greenwich Point has a boundary on the Long Island Sound that serves as a beach for swimming, sun bathing and other activities in no way alters its character as a park.”¹⁰¹ In the court’s view, Greenwich Point was a traditional public forum.

The *Leydon* court went further, however, and opined that a park that was a beach without any of the features often found in city parks could nonetheless be a traditional public forum: “We do not mean to suggest that a municipal beach without some or all of the other attributes of Greenwich Point would not constitute a park—and, therefore, a traditional public forum—for first amendment purposes.”¹⁰² After finding that the park was a public forum, the court in *Leydon* also found that Greenwich had “failed to explain why the ordinance’s virtual ban on nonresidents is a reasonable time, place or manner restriction on the use of the park by such nonresidents.”¹⁰³ Moreover, the court in *Leydon* ruled that even if one assumed Greenwich had a compelling interest in restricting access, Greenwich had not shown that the ordinance was not narrowly tailored and, therefore, the ordinance was unconstitutional.¹⁰⁴

The *Leydon* court, however, did not rest its decision on the U.S. Constitution alone. Instead the *Leydon* court also determined that the Greenwich ordinance violated free speech and assembly protections provided by the Connecticut Constitution. In doing so, the *Leydon* court did not use the forum-based approach, but instead adopted the “compatibility” test set forth in *Grayned v. Rockford*.¹⁰⁵ Pursuant to the compatibility test, “the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”¹⁰⁶ Thus, the *Leydon* court actually looked to see what type of speech activities occur on beaches and whether those activities were a significant problem.

100. *Leydon*, 777 A.2d at 570.

101. *Id.* at 570–71.

102. *Id.* at 571 n.29.

103. *Id.* at 572.

104. *Id.* at 572–73.

105. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

106. *Leydon*, 777 A.2d at 574 (quoting *Grayned*, 408 U.S. at 116).

The court in *Fillyaw II* also cited *Grayned* when determining whether the MacArthur Beach State Park had a legitimate interest in prohibiting speakers from approaching people on the beach with information concerning a clothing optional lifestyle.¹⁰⁷ The ruling in *Grayned*, however, does not fully support the *Fillyaw II* decision. *Grayned* struck down restrictions on picketing on a sidewalk in front of a school, but upheld a prohibition on the use of amplification systems.¹⁰⁸ In other words, *Grayned* upheld restrictions on the manner of expression, but struck down restrictions on the place of expression. By contrast, *Fillyaw II* upheld a rule that banned the plaintiffs from engaging the public at any time and in any manner in a place, i.e., the beach.¹⁰⁹

4. What Types of Expressive Activities Occur on Beaches?

Even though the *Leydon* court opined that no specific inquiry into the actual use of a space is required once a space has been determined to be a traditional public forum under the forum based approach,¹¹⁰ the court in *Leydon* did look at the record for evidence of speech activity on the beach at Greenwich Point when applying the compatibility test:

107. *Fillyaw II*, 858 F. Supp. 1559, 1567–68 (S.D. Fla. 1994).

108. *Grayned*, 408 U.S. at 106, 119.

109. *Fillyaw II*, 858 F. Supp. at 1569. Later in the case, *Fillyaw II* again cites *Grayned* to support the court's decision to uphold a prohibition on the use of amplification equipment anywhere in the park. *Id.*

110. *Leydon*, 777 A.2d. at 567–68 n.23 (“We note that, as a general matter, under the forum-based approach adopted by the United States Supreme Court, courts do not conduct a particularized inquiry into the manner in which the specific public property at issue historically has been used. The inquiry, rather, is whether, in light of the objective characteristics of that property, it is a street, sidewalk or park in the traditional or conventional sense of those terms. If so, the property is a public forum for purposes of first amendment analysis.”); see also *United States v. Grace*, 461 U.S. 171 (1983) (“[P]ublic places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’”); *Warren v. Fairfax Cnty.*, 196 F.3d 186, 191 (4th Cir. 1999) (“Since it is so likely that any given street, sidewalk, or park meets all three characteristics of a traditional public forum a court can generally treat a street, sidewalk, or park as a traditional public forum without making a ‘particularized inquiry.’”).

[P]hotographs were introduced into evidence at trial to show a sand castle exhibition on the beach, along with a sand sculpture depicting a giant hand clawing its way onto a ledge cut into the beach with an adjacent sign stating: “Stamford Law Student Gaining Access to Greenwich Beach.” The plaintiff also introduced into evidence copies of pamphlets distributed on the beach seeking to mobilize support and contributions for the town’s legal effort, in conjunction with the association, to defeat the plaintiff’s lawsuit. Finally, testimony adduced at trial indicated that candidates for public office have campaigned at Greenwich Point, and that both the Democratic and Republican parties and the National Association for the Advancement of Colored People have hosted gatherings there.¹¹¹

The *Leydon* court also noted that it was easy to think of expressive activities that would not conflict with a day at the beach. For example, one might sit or walk “on the beach in a T-shirt that expresses a particular political view or religious conviction” or “participat[e] in a silent vigil.”¹¹²

Because a broad range of communicative activities is constitutionally protected, one should not be surprised to find such constitutionally protected activities occurring on beaches. In addition to pamphleting, picketing, and t-shirts with slogans, protected communication includes dancing, music, and other forms of artistic expression.¹¹³ In fact, the cases above discuss communicative activity. For example, in *Fillyaw II* the court mentions that members of the organization known as Florida Free Beaches approached beach goers and distributed visors with messages encouraging support for a bond measure for beaches.¹¹⁴

111. *Leydon*, 777 A.2d at 570–71 n.28.

112. *Id.* at 575.

113. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1298 (1993).

114. *Fillyaw II*, 858 F. Supp. at 1567. The plaintiffs argued that they were being discriminated against because other groups had exercised their rights to speech on the beach. *Id.* The court, however, rejected this argument because there was no evidence that the defendant either issued a permit to the group or knew about their political activity on the beach. *Id.*

The *Paulsen* court noted a great deal of expressive activity occurring at Jones Beach State Park:

Over the years, the grounds of Jones Beach State Park have been used for “milk runs” by the Easter Seals Society, professional photography sessions, baptismal and other services and literature distribution by various religious organizations, folk dancing groups, scientific and nature studies, go-cart racing, lifeguard union activities, live radio broadcasts, celestial navigation courses, salt marsh research, baton twirling competitions, local union picketing, an annual “Greekfest” and a bike tour benefit. Obviously, many of these events are non-commercial, expressive activity.¹¹⁵

While the court is not absolutely clear as to which of these activities occurred on the beach, at a minimum, the Greekfest did occur on the sand itself.¹¹⁶

The discomfort that some of the judges have with allowing communicative and expressive activities on beaches seems misguided because beaches are often the site of artistic and political activities. For instance, the organized mass beach cleanup is a political organizing tool and an act of political theater that is intended to bring the problem of ocean pollution to the attention of the larger public. In fact, this form of expression now includes International Coastal Clean-Up Day, which in 2012 occurred in eighty-eight countries and forty-four U.S. states.¹¹⁷ Another example of creating a spectacle on the beach to raise public awareness is the Annual Bay Swim that is sponsored by Save the Bay in Rhode Island. While the swimming of Narragansett Bay is an important fundraising event for the environmental organization, hordes of jubilant swimmers stumble wet onto the beach at the finish creating a photo-op for the local

115. *Paulsen v. Lehman*, 839 F. Supp. 147, 165 (E.D.N.Y. 1993) (citation omitted).

116. *Id.* at 153.

117. OCEAN CONSERVANCY, WORKING FOR CLEAN BEACHES AND CLEAN WATER 18–19 (2013), available at http://issuu.com/lfranke/docs/tfs_datareport_web_full (globally, 561,633 volunteers collected 10,149,988 pounds of trash during the 2012 cleanup).

newspapers and television stations. A spokesperson is on hand from Save the Bay to respond to the reporters' questions and to promote the group's message that more needs to be done to protect the state's marine environment.

Beach cleanups can also respond to a localized pollution event. While the participants surely hope to lessen the damage caused by the polluting event, such cleanup efforts also create the opportunity to make a broadly disseminated political statement when the media covers the cleanup. For instance, the Rhode Island chapter of Surfrider¹¹⁸ organized a series of shoreline cleanups after the spoils from a dredging project were dumped just offshore and large amounts of debris began washing up on the sand and cobble beaches of the Rhode Island Sound.¹¹⁹ The dredge materials came from a nearby fishing port and contained just about everything that might ever be found on a fishing boat.¹²⁰ Rather than holding a press conference at the fishing port, the environmental group chose to meet with the newspaper and television reporters during the beach cleanup. This allowed newspaper readers and television viewers to see pictures of piles of trash (space heaters, knives, oil filters, beer cans, lobster pots, rubber gloves, and so forth). The readers and viewers also saw Surfrider taking responsibility for the beach, which arguably made Surfrider seem more credible when it accused the U.S. Army Corps of Engineers and fishing community of not taking responsibility.

Beach protests can also be in response to specific development threats. For example, when a liquefied natural gas (LNG) terminal was proposed offshore of Malibu, a group called Coastal Advocates staged a large protest on the beach that included such international stars as Pierce Brosnan and Halle Berry.¹²¹ The stars and surfers wore t-shirts saying "No LNG," and created a media event on the beach. Another example of a project-specific, beach protest in California

118. See SURFRIDER FOUND., <http://www.surfrider.org> (last visited Feb. 9, 2014) (an international nonprofit organization that supports protecting the ocean and coastal resources and public access to the shoreline).

119. See Elizabeth Gudrais, *Volunteers Clean Beaches after Pt. Judith Dredging*, PROVIDENCE J.-BULL., Feb. 4, 2007, at B1.

120. *Id.*

121. *Stop the BHP Billiton LNG Terminal Now!*, COASTAL ADVOC., <http://www.coastaladvocates.com/facts.html> (last visited Feb. 8, 2014).

occurred when a toll road was proposed near the shore in San Diego County. Surfrider and other organizations opposed the new highway because they asserted that it would degrade the natural beauty and serenity of the area and because erosion from the construction of the road could destroy some world-class surf breaks.¹²² The beach below the proposed toll road became an important site for promoting opposition to the new road.

Protests at the beach, however, did not begin with the environmental movement. For instance, the beaches of St. Augustine, Florida, were important sites for protest during the Civil Rights Movement. In 1963 and 1964, protests by blacks on the whites-only beaches turned violent and attracted national attention to the segregationist laws of this tourist destination.¹²³ The exclusion of African Americans from public beaches was not limited to Florida or even the South. For example, Robert García and Erica Flores Baltodano have written about segregated beaches of Southern California¹²⁴ and Marc R. Poirier has written about exclusionary beach access policies and racial discrimination in New Jersey and Connecticut.¹²⁵

While beaches have clearly been the sites for political protests, beaches are commonly used for all sorts of political and expressive activities. For instance, the *Leydon* court noted that political pamphlets had been passed out at the beach and political candidates had campaigned in the park.¹²⁶ Furthermore, just as many communities have summer concerts in their parks, for example, there

122. *Save the Trestles: Stop the 241 Toll Road Extension*, SURFRIDER FOUND., <http://savetrestles.surfrider.org> (last visited Feb. 8, 2014). These surf breaks are collectively known as Trestles. These breaks include Cotton's Point, Upper Trestles, Lower Trestles, and Church. MATT WARSHAW, *THE ENCYCLOPEDIA OF SURFING* 649–50 (2005). Trestles are considered by many to be America's most consistent surf break and it has been featured in over fifty surf movies and videos. *Id.*

123. See MAXINE D. JONES & KEVIN M. MCCARTHY, *AFRICAN AMERICANS IN FLORIDA* 113–15 (1993); DAVID R. COLBURN, *RACIAL CHANGE AND COMMUNITY CRISIS: ST. AUGUSTINE, FLORIDA, 1877–1980*, at 98 (1991); DAN R. WARREN, *IF IT TAKES ALL SUMMER: MARTIN LUTHER KING, THE KKK, AND STATE'S RIGHTS IN ST. AUGUSTINE, 1964*, at 127–28 (2008).

124. García & Baltodano, *supra* note 7, at 153–54.

125. Poirier, *Environmental Justice*, *supra* note 7, at 755–811.

126. *Leydon v. Town of Greenwich*, 777 A.2d 552, 570–71 n.28 (Conn. 2001).

are musical performances on the beach in Rhode Island every summer. The Rhode Island Philharmonic performs to a large crowd at Narragansett Beach, Rhode Island, every July.¹²⁷ Music on the beach is also an important component of the Governor's Bay Day activities at Rhode Island state parks when live musicians perform from temporary stages, on-the-beach broadcasts of radio stations can be heard from loudspeakers across the beach, and a wide range of groups engage in educational activities.¹²⁸ Narragansett Beach also acts as the starting and finishing line for numerous runs that support various charitable organizations. For instance, the Rhode Island State Police 5K Foot Pursuit begins and ends at the beach each year.¹²⁹

5. Are Beaches Public Thoroughfares?

In the most recent case to consider whether a beach can be a public forum, *Kroll v. Incline Village General Improvement District*,¹³⁰ the court ruled that the beach in question was not a public forum. The plaintiffs in *Kroll* sued the Incline Village General Improvement District (IVGID or District) because only owners of property that was part of the District when it acquired the beach property in 1968 had full access to the beach. The plaintiffs, all of whom owned property that was added to the District after 1969, sued to gain access to the beach, arguing that the beach was a traditional public forum and that the District was violating their First Amendment right to free speech by excluding them from the beach.¹³¹ While the plaintiffs relied on *Leydon* to argue that the beach was a traditional public forum, the United States District Court for Nevada opined that the *Leydon* court's interpretation of federal law was not consistent with the Ninth

127. For the 2013 summer pops schedule, see *2013 Summer Pops Series*, R.I. PHILHARMONIC ORCHESTRA & MUSIC SCHOOL, <http://www.ri-philharmonic.org/Orchestra/Concerts/SummerPops/tabid/251/Default.aspx> (last visited Feb. 8, 2014), which includes three traditional parks and the Narragansett Town Beach.

128. *2011 Governor's Bay Day*, OFF. OF GOVERNOR LINCOLN D. CHAFEE, <http://www.governor.ri.gov/bayday/index.php> (last visited Feb. 8, 2014).

129. For information about and pictures from this year's run, see *About the Race*, R.I. ST. POLICE, <http://www.risp.ri.gov/5k> (last visited Feb. 8, 2014).

130. *Kroll v. Incline Vill. Gen. Improvement Dist.*, 598 F. Supp. 2d 1118 (D. Nev. 2009).

131. *Id.* at 1121.

Circuit's interpretation and, therefore, not persuasive.¹³² According to the *Kroll* court, the Ninth Circuit evaluated three factors in determining whether an area constitutes a traditional public forum:

(1) [T]he actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area; (2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area; and (3) [the] traditional or historic use of both the property in question and other similar properties.¹³³

As for the first part of the Ninth Circuit's public forum test, the *Kroll* court stated that the District's "beach properties are not public thoroughfares, and there has never been free public access to the area."¹³⁴ The beach in *Kroll* was on freshwater Lake Tahoe, and thus, its geomorphology differed in important ways from the open ocean beaches that are the subject of this article. Open ocean beaches are subject to much more wave energy and can be much wider and longer. So while the beach in *Kroll* may not have been used as a thoroughfare, open ocean beaches frequently serve this purpose.

The use of open ocean beaches as thoroughfares might, in fact, prove decisive in some cases if an individual inquiry is required. While many town beaches and state beaches are clearly analogous to city parks for purposes of public forum analysis, many other public access points where parking is restricted lead to "unimproved" beaches. There are no lifeguards, no bathhouses, no concerts, and no

132. *Id.* at 1127 n.7.

133. *Id.* at 1127 (quoting *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1100–01 (9th Cir. 2003)).

134. *Id.* As for the second part of the test, the court found that "there are also clear boundaries delimiting the area, including gates, signs, and IVGID employees who control access to the properties. These boundaries are not cosmetic differences, but rather clearly demarcated boundaries that necessarily would alter visitors' expectations of its public forum status." *Id.* at 1128. As for the last part of the part of the Ninth Circuit's public forum test, the IVGID court noted "the beach properties have never been used as public parks, but only as beach recreation areas for the limited set of IVGID property owners whose property was a part of IVGID as of 1968." *Id.*

refreshment stands. However, even if, for the sake of argument, one entertains the view that beaches without facilities are not analogous to parks for purposes of public forum analysis, the courts have also stated that public thoroughfares are traditional public forums, and, upon closer examination, one can see that beaches often act as public thoroughfares.

At first glance, one might not associate open ocean beaches with thoroughfares. The tendency to define thoroughfares as major streets seems particularly common in transportation planning. For instance, the Planning and Development Department for Houston, Texas, defines a “thoroughfare” as a street that is “more than 3 miles long; connects freeways and principal thoroughfares; [has] more than 20,000 vehicles per day; [and they are] usually spaced one-half to one mile apart.”¹³⁵ Even if beaches do not convey such heavy traffic, beaches in many areas are in fact used for travel by automobiles.¹³⁶ For example, the right to drive automobiles on the beach is protected by Oregon’s Beach Bill¹³⁷ and the Texas Open Beach Law.¹³⁸ The right to drive on beaches is also fiercely defended in the National Seashores of Cape Cod in Massachusetts and the Outer Banks of North Carolina.¹³⁹ Even though traffic on these beaches does not come close to 20,000 vehicles per day, that does not mean that they are not thoroughfares, because historically, the definition of what is a thoroughfare has been broader than the one frequently used in transportation planning.

The Oxford English Dictionary provides the following range of definitions for “thoroughfare,” which are clearly relevant to public forum analysis:

135. See *Planning and Development: Major Thoroughfare & Freeway Plan*, CITY OF HOUS., <http://www.houstontx.gov/planning/DevelopRegs/mobility/MTFP.html> (last visited Feb. 8, 2014).

136. See, e.g., Joseph Matuk & Carolyn LaBarbiera, *Beach Driving: Part 2*, SURFRIDER FOUND. (Aug. 13, 2012), <http://www.surfrider.org/coastal-blog/entry/beach-driving-part-ii>.

137. OR. ADMIN. R. 736-021-0060 (2013) (Motor Vehicles and Other Motorized Devices).

138. TEX. NAT. RES. CODE ANN. §§ 61.0011(d)(3), 61.022(b) (West 2013).

139. *Cape Hatteras National Seashore: Off-Road Vehicle Use*, U.S. NAT’L PARK SERV., <http://www.nps.gov/caha/planyourvisit/off-road-vehicle-use.htm> (last updated Jan. 21, 2014).

(1) A passage or way through. (a) In general sense; also *fig.* Now usually merged in sense c, exc. in phr. *No thoroughfare*, no public way through or right of way here. (b) *spec.* A town through which traffic passes; a town on a highway or line of traffic. *Obs.* (c) A road, street, lane, or path forming a communication between two other roads or streets, or between two places; a public way unobstructed and open at both ends; *esp.* a main road or street, a highway.

When applying the public forum analysis, courts have not surprisingly found a wide variety of places to be public thoroughfares. For example, in *United States v. Kokinda*, the court referred to public sidewalks as thoroughfare, stating, “[t]he municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service’s sidewalk is not such a thoroughfare.”¹⁴⁰ In *United Church of Christ v. Gateway Economic Development Corporation of Greater Cleveland, Inc.*, the court held that a walkway on the grounds of a privately owned sports stadium was a public thoroughfare because it was used by the public to go between public streets.¹⁴¹ In *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, Justice Kennedy wrote in his concurring opinion that “the public spaces in the airports are broad, public thoroughfares.”¹⁴² While the majority of the court disagreed, Blackman, Stevens and Souter joined in his concurring opinion.

Coastal communities have historically used the beaches as a way of passing between points. From the time the colonists first settled the country to the present, one can find examples of beaches being used as a natural thoroughfare between places. For example, when describing the development of the communities around Old Orchard, Maine, from the 1630s through the nineteenth century, Roy Fairfield describes “the hard-packed beach [as] the main ‘road’ between the scattered coastal communities.”¹⁴³ The beach remained the main

140. *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

141. *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc.*, 383 F.3d 449, 452 (6th Cir. 2004).

142. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 700 (1992) (Kennedy, J., concurring).

143. Fairfield, *supra* note 13, at 228.

transportation route for over one hundred years.¹⁴⁴ Another example can be found in Timothy Dwight's early travelogue, *Travels in New-England and New-York*, published in 1823. In it, Dwight discusses how traveling along the wet beach is the easiest access to Provincetown, Massachusetts.¹⁴⁵ A contemporary example of the importance of the beach as a thoroughfare connecting communities can be found in the recent case originating on North Carolina's Outer Banks: *Sansotta v. Town of Nags Head*.¹⁴⁶ In that case, the court upheld the town's order to demolish six cottages because they were an "obstruction [that] threatened public safety by hampering the ability of emergency vehicles to travel along the beach."¹⁴⁷

In addition to using the beach to travel between human settlements, the original colonists used the beaches as thoroughfares that led to the bounty of the ocean and bays; and the bounty was truly diverse. For example, the earliest court cases concerning the Public Trust Doctrine clearly state that the colonists had the right to access the shoreline to acquire fish, shellfish, and waterfowl.¹⁴⁸ According to the historian William Cronon, "whether rocky or sandy, the seashore was a zone of abundance from which both groups [Native Americans and the first European settlers] obtained food."¹⁴⁹ For instance,

144. *Id.*

145. TIMOTHY DWIGHT, *TRAVELS IN NEW-ENGLAND AND NEW-YORK* 83–84 (1823).

146. *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013).

147. *Id.* at 543.

148. *See Shively v. Bowlby*, 152 U.S. 1, 16 (1894) (holding that shorelines are subject to "'a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish,'—and not as 'private property'" (quoting *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 409, 413 (1842)); *see also Martin*, 41 U.S. (16 Pet.) at 414 ("[T]he men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another, as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell-fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another.").

149. *See WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 30–31 (1983). The abundance along the shore that the Europeans encountered was beyond anything they had ever experienced. One of the early European visitors described the alewives were spread across a

lobster was so plentiful in Rhode Island in Colonial times that there was a law limiting the number of times per week servants could be fed lobster.¹⁵⁰ Lobster populations remained so large in the 1800s that residents could still walk to the shore and harvest lobsters at low tide.¹⁵¹ Of course, the gathering of shellfish by Native Americans and settlers was not restricted to New England. For example, in *State ex rel. Thornton v. Hay*,¹⁵² the Oregon Supreme Court established the public's customary right to use the beach, in part, by noting that the Native Americans gathered clams and cooked them on the beach, which was an activity that was then adopted by the settlers.¹⁵³

Early Americans also traveled the shore gathering the ocean's flora. Near the beginning of *Cape Cod*, Thoreau tells of joining a crowd of people down at the shoreline to witness the horror of a shipwreck from the previous night.¹⁵⁴ As he walks along the beach, he comes upon farmers busily loading wagons with seaweed that had been thrown up on the beach by the storm.¹⁵⁵ The practice was not restricted to Massachusetts. For example, the farmers of Rhode Island would rush in their wagons down to the beach after storms to collect the ocean's valuable natural fertilizer before the other farmers carted it away.¹⁵⁶ In Rhode Island, the right to make one's way along the beach to collect seaweed was not restricted to the owner of the

beach knee deep for a quarter mile as they struggled through their annual migration from the ocean, up the streams, and into the freshwater ponds to spawn. *Id.* at 22–23. “One observer described how a person running over exposed clam banks was soon ‘made all wet by their spouting of water.’” *Id.* at 30–31. For a discussion of the New England Native Americans' acquiring a diversity of seafood and engaging in recreational activities on the shore, see generally HOWARD S. RUSSEL, *INDIAN NEW ENGLAND BEFORE THE MAYFLOWER* (1980).

150. THE UNCOMMON GUIDE TO COMMON LIFE OF NARRAGANSETT BAY 93 (Frederick D. Massie ed., 1998); see also *Martin*, 41 U.S. (16 Pet.) at 414; *Shively*, 152 U.S. at 17.

151. THE UNCOMMON GUIDE TO COMMON LIFE OF NARRAGANSETT BAY, *supra* note 150, at 93.

152. *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969).

153. *Id.* at 673 (“The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam-digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood.”).

154. THOREAU, *supra* note 8, at 15–19.

155. *Id.* at 18.

156. BETTY J. COTTER, *SOUTH SHORE: RHODE ISLAND* 43 (1999).

beach front parcel, and the Rhode Island Constitution still protects the right of every citizen to gather seaweed from the beach.¹⁵⁷

When Thoreau walked along Cape Cod's Great Beach, he also encountered the "wreckers," who travelled up and down the beach looking for different types of goods from wrecks that were thrown up from the sea.¹⁵⁸ For most of this nation's history, ships carried much of the country's goods, and shipwrecks were not uncommon along the Eastern Seaboard.¹⁵⁹ While many lives and fortunes were lost in shipwrecks, the goods and wreckage that washed up on the beach was a welcome opportunity for coastal residents. In *Cape Cod*, Thoreau describes the wide array of riches that wreckers—who he calls "the true monarch of the beach"—had salvaged from the sea, including driftwood, rope, tow-cloth ("half a dozen bolts at a time"), all sorts of clothes, iron, pear and plum trees, turnip-seeds, twenty barrels of apples still in good shape, nutmegs, a valise, and an assortment of coins.¹⁶⁰ According to Thoreau, "the inhabitants [of Cape Cod] visit the beach to see what they have caught as regularly as a fisherman his weir or a lumberer his boom; the Cape is their boom."¹⁶¹ In other words, for coastal residents, the beach was a thoroughfare that they traveled in search of material gain. Coastal residents traveled the beach long after a ship had wrecked because the ocean could cast up salvageable items long after the actual disaster. In fact, during the days of coal burning steam ships, people who lived near the beaches of southern Rhode Island, used to carry coal away in buckets after a ship wrecked.¹⁶²

Of course, the wrecker's bounty is not what it once was. In the eighteenth and early nineteenth century when almost everything people used was transported up and down the coast by ships,

157. R.I. CONST. art. I, § 17. For a discussion of how important rockweed, clams, and driftwood were to the coastal communities on Cape Cod, see John R. Stilgoe, *A New England Coastal Wilderness*, 71 *GEOGRAPHICAL REV.* 33, 43 (1981).

158. THOREAU, *supra* note 8, at 59–60; *see also* JOHN R. STILGOE, *ALONGSHORE* 11 (1994).

159. Stilgoe, *supra* note 157, at 57–68.

160. THOREAU, *supra* note 8, at 61, 73–74, 109, 114–16. Thoreau also talks about a lighthouse keeper claiming \$1,000 worth of blackfish that ran aground during the night. *Id.* at 144.

161. THOREAU, *supra* note 8, at 115.

162. COTTER, *supra* note 156, at 54.

shipwrecks were inevitable because captains lacked accurate nautical charts and advanced weather forecasts. However, when the United States Coastal Survey began to publish large numbers of accurate navigational charts in the middle of the nineteenth century, the country's losses from shipwrecks dropped markedly.¹⁶³

Yet, even if shipwrecks are rarer, the products of global trade still find their way into the sea and eventually onto the beaches; but they do so in a very different way. While we do not see the numerous gliding sails of alongshore shipping that Thoreau witnessed from the beach, the world's goods still move by ship. Over a hundred million containers—each the size of a semi-truck—are shipped around the world each year.¹⁶⁴ A typical container ship might carry 3,000 forty-foot containers, stacked fifteen to twenty abreast and six or seven high.¹⁶⁵ Every year around 10,000 of these containers are lost at sea, usually during severe storms.¹⁶⁶ If a single lost container breaks open, it might disgorge 17,000 hockey gloves, a million Lego pieces, or any other buoyant product which will then float along (perhaps for years) in the ocean's currents until they was ashore, often in large numbers.¹⁶⁷ In one noteworthy event in 1990, 78,932 Nike sneakers from five containers were lost while crossing the Pacific on their way to the United States.¹⁶⁸ When the shoes started to wash up onto beaches in Washington and Oregon in large numbers, people discovered that if one washed them with a little bleach, they were perfectly good.¹⁶⁹ Unfortunately, beachcombers would find an assortment of mismatched styles and sizes.¹⁷⁰ Relatively quickly, though, an informal communication network evolved to facilitate

163. See MARK MONMONIER, *COASTLINES: HOW MAPMAKERS FRAME THE WORLD AND CHART ENVIRONMENTAL CHANGE* 56 (2008).

164. See Janice Podsada, *Lost Sea Cargo: Beach Bounty or Junk?*, NAT'L GEOGRAPHIC, June 19, 2001, http://news.nationalgeographic.com/news/2001/06/0619_seacargo.html.

165. MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* 4 (2006).

166. Podsada, *supra* note 164.

167. *Id.*

168. CURTIS EBBESMEYER & ERIC SCIGLIANO, *FLOTSAMETRICS AND THE FLOATING WORLD: HOW ONE MAN'S OBSESSION WITH RUNAWAY SNEAKERS AND RUBBER DUCKS REVOLUTIONIZED OCEAN SCIENCE* 70–74 (2009).

169. *Id.* at 73.

170. *Id.*

exchanges to match mismatched sneakers.¹⁷¹ In other words, a new system of communicative activity arose amongst a group of people who all engaged in the same beach activity: beachcombing.

Even if only the big container spills attract the media's attention, the ocean can still offer smaller rewards to those who walk the beach regularly. For instance, the waters off my beaches have an active lobster fishery. Because lobstermen seem to be very good at losing lobster pots with their attached ropes and buoys during storms, the beachcomber frequently finds the lobstermen's wave pummeled gear along the shore, especially in winter. Consequently, I have an ample (and I like to believe admirable) supply of rope for any project I might choose to undertake or for any fanciful scheme my boys might imagine. Evidently, Thoreau, like me, was a salvager of rope. In *Cape Cod* he describes one of his finds:

We also saved, at the cost of wet feet only, a valuable cord and buoy, part of a seine, with which the sea was playing, for it seemed ungracious to refuse the least gift which so great a personage offered you. We brought this home and still use it for a garden line.¹⁷²

Clearly Thoreau's satisfaction in scavenging the rope is not just with the money saved, but also in the fun of discovery and finding. Indeed, the beach has long been a thoroughfare to discovery and collecting. Stephen Kellert, who is one of the leading scholars working in the area of sociobiology, has argued that beach exploration is an ancient and unusually fulfilling activity:

Vast numbers of Americans engage in walking and exploring beaches, shores and wetlands. The mental and physical benefits associated with heightened awareness and contact with the coast may be among the most ancient outdoor recreational activities known.

...

The naturalist appeal of the coast is probably due to the abundant opportunities this environment provides for

171. *Id.* at 73–74.

172. THOREAU, *supra* note 8, at 117.

exploration and discovery The coastal environment is an unrivaled habitat for exploring, discovering and engaging feelings of wonder and mystery, in an almost childlike manner independent of age.¹⁷³

While we may not know how many centuries humans have wandered and explored the shoreline for pleasure, historians have documented that at least since the early nineteenth century, collecting marine plants and animals from the tidal zone has been a popular hobby in the United States. Books and magazine articles were written explaining how to wander the shore and seek out, identify, and bring home marine specimens.¹⁷⁴ One can imagine early nineteenth century amateur naturalists, many of whom were women,¹⁷⁵ walking up and down the beach with an array of bottles for collecting in search of new specimens, which would certainly been a topic of conversation.

These days perhaps collecting for most people is purely an impulsive event that occurs when the ocean has left something interesting in one's path. They also might not walk along the beach to get anywhere in particular or to gather anything by design; they simply enjoy walking the coastal margin.¹⁷⁶ Even though the beach is

173. Stephen R. Kellert, *Coastal Values and a Sense of Place*, in AMERICA'S CHANGING COASTS: PRIVATE RIGHTS AND PUBLIC TRUST 12, 17 (Diana M. Whitelaw & Gerald R. Visgilio eds., 2005).

174. STILGOE, *supra* note 158, at 302.

175. *Id.* at 305–08.

176. This appears to have been the case in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), where the public used the beach as a thoroughfare between two public beach parks. Because the public travelled along this shoreline thoroughfare, and because the boundary between the Nollan's purely private property and the shoreline below the mean high tide line was inescapably ambiguous, the California Coastal Commission sought an access easement across a portion of the Nollan's property that would not always be subject to the public trust. *Id.* at 827–28. For a discussion of the ambiguity of the property boundary between the Nollan's purely private property and the public trust property and how using the beach as a thoroughfare created conflicts between the public and the Nollans, see Robert Thompson, *Cultural Models and Shoreline Social Conflict*, 35 COASTAL MGMT. 211, 216–18 (2007) [hereinafter Thompson, *Cultural Models*]. For a more generalized discussion of the ambiguity of shoreline property lines and the reliance on social norms rather than property rules, see Robert Thompson, *Beach Access, Trespass, and the Social Enactment of Property*, 17 ROGER WILLIAMS U. L. REV.

less of a traditional thoroughfare for these strollers or runners, the beach is still a place for communicative activity. Vacationers stroll down the beach chatting and local residents stop to talk with neighbors and friends who they meet along the way.

People, however, often walk along the beach not only for pleasure, but because it can still be the fastest, safest, and most pleasant route from point A to point B. In beach communities, the streets can be narrow, circuitous, busy, and without sidewalks. Thus, for example, in Rhode Island, residents of the summer cottages at Carpenter's Beach¹⁷⁷ and the members of the Willows private beach club can form a steady stream of strollers on a nice day as they head down to the Vanilla Bean for ice cream or to the Ocean Mist or Murphy's Family Pub for a drink or a meal.

6. Examples of Specific Debates on the Beach

Not long ago, I have become aware of a particular example of people exercising their rights to speech and association on one of my local beaches. My family adopted a rescue dog and I soon discovered that most dog owners talk to each other while walking their dogs on the beach. Frequently, friendly chats with other dog owners drift into discussions concerning the town or state's dog management policies, particularly as the date for banishing dogs from that beach approaches. The banishment is in anticipation of tourist season. These beach management discussions are wholly political in nature. As the date approaches, the casual conversation about one another's dogs and favorite dog walks shifts to the unfair treatment dog owners and their pets.¹⁷⁸ Several people who I have met casually while

351 (2012), and Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 *OCEAN & COASTAL L. J.* 47 (2006).

177. For a full description of Carpenter's Beach, see Robert Thompson, *Affordable Twenty-Four Hour Access: Can We Save a Working Stiff's Place in Paradise*, 12 *OCEAN & COASTAL L. J.* 91 (2007).

178. A Google search for "beach dog bans" will quickly demonstrate that summertime beach banishments for dogs are not uncommon and are frequently unpopular among dog owners. For an example from North Carolina, see Rob Morris, *Southern Shores Decline to Ease Summer Dog Ban*, *THE OUTER BANKS VOICE* (Mar. 1, 2011), <http://outerbanksvoice.com/2011/03/01/southern-shores-declines-to-ease-summer-dog-ban>. For an example from Georgia, see Orlando Montoya, *Georgia Beach Bans Dogs On Summer Days*, *GBP NEWS* (May 26,

walking my dog on the beach have tried to recruit me into a group that is lobbying for summer time access to the beach. I, however, have exercised my right to free association and declined the invitation. In fact, I have also engaged in lively debate with other dog owners when I have opined that the summer time banishment is justified because too many of our fellow dog owners do not pick up their dog's droppings. Some discussions in which I have expressed this opinion have terminated with the other dog lovers exercising their right to disassociate themselves from me. My dog, though, has no such right, so the two of us, firm in my convictions, continue happily down the beach.

Debates between user groups are not limited to the proper time and place for walking dogs. Surfers and fishermen provide another example of a resource conflict that gets debated on the beach. For example, in some places, such as Montauk on New York's Long Island, the surfers—like the dogs—have simply been banished for certain months of the year, suggesting that the fishermen have greater political clout. The sign of the fishermen's victory is the sign on beach communicating to Montauk surfers that they cannot be surfers at this particular surf break from March 31st until December 16th.¹⁷⁹

7. Signs as Speech

Signs on or along the beach, like the one aimed at would be surfers, are not uncommon. One can find an assortment of signs either on the beach or positioned to be viewed from the beach that are intended to communicate with people walking along the beach, providing further evidence that beaches are often forums for public speech. One sees a variety of "private beach" signs. For instance signs can announce that the beach above the mean high tide line is private—not that anyone knows where that boundary line really is.¹⁸⁰

2012, 12:00 PM), <http://www.gpb.org/news/2012/05/25/georgia-beach-bans-dogs-on-summer-days>. For an example from California, see Ronald Dam, *Dog Beach Ban Not So Popular*, GBP NEWS (Aug. 12, 2012, 3:28 AM), <http://palosverdes.patch.com/groups/politics-and-elections/p/dog-beach-ban-not-so-popular>.

179. James Kindall, *Surf's Still Up, Legally, for Montauk Wave Riders*, N.Y. TIMES, Mar. 25, 2009, available at http://www.nytimes.com/2009/03/29/nyregion/long-island/29surfli.html?_r=0.

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

One sees signs that ask people to stay off of the sand dunes, which might be a legitimate effort to protect a fragile ecosystem or just another attempt to assert private ownership.¹⁸¹ One also sees “for sale” signs, which are an invitation to purchase and defend your own stretch of beach. One last example from the Northeast are signs put up seasonally by the U.S. Fish and Wildlife Service prohibiting humans (with or without dogs) from walking on portions of the beach when the nesting least terns and snowy plovers use these areas for nesting and feeding.

Before moving onto the next section, it is worth emphasizing how these policy debates (whether dogs should be on the beach, whether we should close off parts of the beach to protect endangered species, whether surfers and surfcasters should control a space, or who owns the beach) help us to see how the beach should properly be considered a public forum. The court in *Wolin v. Port of N.Y. Auth.* considered how “[t]he propriety of a place for use as a public forum [] turn[s] on the relevance of the premises to the protest”¹⁸² As the *Wolin* court explained, “this relation may be found in two ways. In some situations the place represents the object of protest, the seat of authority against which the protest is directed. In other situations, the place is where the relevant audience may be found.”¹⁸³ The beach is a particularly appropriate place to reach an audience that would be particularly interested in speech dealing with beach use, management, access, and ownership.

181. For a discussion of how the communicative intent of private beach signs can range from threats to polite requests for civility, see Thompson, *Cultural Models*, *supra* note 176.

182. *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83, 90 (2d Cir. 1968).

183. *Id.* (citations omitted). In *Wolin*, the plaintiff was attempting to hand out anti-war literature at a bus terminal. The court found that was a proper place to try to reach a particularly relevant public:

Here, the plaintiff is attempting to communicate his antiwar protest to the general public and to a special audience—servicemen traveling to and from their bases, particularly buses arriving from Fort Dix. The public is there, more than 200,000 persons a day, and it is likely that the concourse areas are more appropriate for the proposed activity than a narrow sidewalk. And servicemen on leave are in the Terminal also in great numbers.

Id. at 90–91.

8. Do Ordinances Restricting On-Street Parking Exclude Nonresidents from the Beach?

Even if one accepts that beaches are traditional public forums, the parking restrictions that have been discussed in this article do not explicitly prohibit anyone from accessing the beach; one simply cannot park next to the public access point and then walk to the traditional public forum along public roads and right-of-ways. In fact, if an ordinance banning on-street parking is going to achieve its objectives (i.e., eliminating the negative externalities that beachgoers impose on the neighborhood), then the geographic extent of the ban must apply to all streets that are within walking distance of the access point. Thus, for example, shoreline anglers in Rhode Island have increasingly made the argument that the parking bans result in an actual loss of coastal access.¹⁸⁴ According to Bob Moeller, chairman of the Rhode Island Saltwater Anglers Association's public access committee:

[Fishermen in Rhode Island] still have a huge problem with lack of public parking at most ROWs [public rights-of-way]. No-parking signs on streets adjacent to ROWs are put up by the cities and towns at the request of a few agitated neighbors. The end result is the loss of public access to the shoreline for the majority of Rhode Islanders. This has to change so the public can fish, use and enjoy the 400 miles of public shoreline that our state offers.¹⁸⁵

Still, is an ordinance unconstitutional if it is designed to keep people from parking near a public access point and, in doing so, keeps people from accessing a traditional public forum? We can begin answering this question by recognizing that the ordinance does not make the shoreline inaccessible to all people. The beach is still accessible to the class of people who are fortunate enough to live within walking distance of the access point or who rent a house or room within walking distance of it. The court in *Florida State*

184. Tom Meade, *Greater Awareness of Public Access Helps Anglers*, PROVIDENCE J.-BULL. (Apr. 30, 2006), available at 2006 WLNR 7504090.

185. *Id.*

*Conference of NAACP Branches v. City of Daytona Beach*¹⁸⁶ recognized that this type of ordinance creates two classes of people: one class of people who can easily exercise their First Amendment rights and a second class of people who will have a much more difficult time exercising those same rights.¹⁸⁷ In *Florida State Conference of NAACP Branches*, the court struck down a traffic management plan that gave greater access to the beach to certain individuals than others.¹⁸⁸

The beach in Daytona Beach, Florida, is on the ocean facing side of a barrier island. To reach the beach from the mainland where the majority of the city's population is, drivers must cross one of six bridges. By 1999, Daytona Beach had also become the location of an annual event known as the Black College Reunion (BCR), which started out as a reunion for two historically black colleges and which grew to include 105 historically black colleges and universities.¹⁸⁹ In 1999, the City intended to impose a Traffic Management Plan (TMP) during BCR. The TMP called for the six bridges to be closed to vehicle traffic during times of traffic congestion. The bridges, however, would not be closed to individuals holding special passes which were only available to Daytona Beach residents, business owners and employees, and registered hotel guests.¹⁹⁰ All other individuals were free to walk to the beaches, walk to a shuttle stop and ride a shuttle to the beach, or wait for the bridges to reopen.¹⁹¹

The court acknowledged that Daytona had legitimate and important concerns, but it also stressed that the plaintiffs who were participating in the BCR had fundamental constitutional rights:

This case involves the difficult balance of competing interests, such as public safety, traffic congestion, access to homes, work, and facilities, and protection of property,

186. Fla. State Conference of NAACP Branches v. City of Daytona Beach, 54 F. Supp. 2d 1283 (M.D. Fla. 1999).

187. *Id.* at 1287–29.

188. *Id.* at 1289.

189. *Id.* at 1284.

190. *Id.* at 1285.

191. *Id.* Daytona also admitted that it had no objective standard to determine when the bridges would be either shut down or reopened. *Id.*

with constitutional rights, such as freedom of association, travel, and speech and equal protection of the laws.¹⁹²

Despite the city's legitimate concerns, the court held that the TMP unconstitutionally burdened the plaintiff's fundamental rights:

The right to assemble is protected by the First Amendment to the United States Constitution. Restrictions of this right are proper only when they relate to the time, place, or manner of the assembly and "are narrowly tailored to serve significant governmental interests and leave open ample alternative channels of communication." Requiring a residence, business ownership, rental of a hotel room in a beach community, or a job in order to be given priority in the right to assemble denies individuals "an equal opportunity to be heard" and to assemble. The right to assemble is "available to all, not merely to those who can pay their own way."¹⁹³

Quite importantly, the court's conclusion was not altered by the fact that those "who are physically able may walk from the mainland over the bridges to the beach side" were free to do so.¹⁹⁴

In *Leydon*, the Connecticut Supreme Court similarly found that the town ordinance unconstitutional because the ordinance made it extremely difficult, though not impossible, for nonresidents to access the beach.¹⁹⁵ The Town of Greenwich ordinance limited access to Greenwich Point, which was a beach park, to town residents and their guests.¹⁹⁶ Although the ordinance did not absolutely ban anyone from accessing the beach, which the Connecticut Supreme Court determined to be a traditional public forum, the court held that requiring a nonresident to be accompanied by a resident amounted to virtually banning nonresidents:

192. *Id.* at 1286.

193. *Id.* at 1288 (citations omitted).

194. *Id.*

195. *Leydon v. Town of Greenwich*, 777 A.2d 552, 573 (Conn. 2001).

196. *Id.* at 558.

The ordinance bars all nonresidents who are unaccompanied by a town resident from Greenwich Point, a public beach park. Thus, any nonresident who is unable to find a town resident to accompany him or her to Greenwich Point cannot engage in *any* activity there, *including* expressive and associational activity. Moreover, it is reasonable to presume that, for many reasons, most nonresidents who might wish to gain admission to Greenwich Point will be unable to find a town resident willing to serve as a host. Even if a nonresident can find a town resident to accompany him or her to Greenwich Point, the mere fact that he or she is required to do so places more than an incidental burden on the nonresident's expressive and associational rights. It, therefore, is inarguable that the ordinance significantly limits the ability of nonresidents to engage in constitutionally protected activities at Greenwich Point.¹⁹⁷

The correlation between the availability of parking and the ability to access the shoreline can in fact be measured. For example, Thompson and Dalton conducted boat-based offset surveys on upper Narragansett Bay on fifty-two randomly selected days in the summers of 2006 and 2007.¹⁹⁸ During each survey, every person along the shoreline was accurately mapped and entered into a geographic information system (GIS).¹⁹⁹ The researchers also mapped shoreline access points and entered the number of legal parking spots available at each access point into the GIS.²⁰⁰ The researchers then computed a Spearman's rho correlation coefficient to assess the relationship between the amount of legal parking available at an access point and the number of people observed using the shoreline adjacent to the access point.²⁰¹ There was a very strong positive correlation between the number of legal parking spaces and people using the shoreline.²⁰² A similar analysis was used to measure

197. *Id.* at 566–67 n.22.

198. *See* Thompson & Dalton, *supra* note 7, at 384.

199. For a full discussion of the methodology, *see id.* at 384–85.

200. *Id.* at 389–91.

201. *Id.* at 390–91.

202. *Id.* at 389–91.

the correlation between the number of access points and people using the shoreline and between the population density of the surrounding neighborhood and people using the shore. No correlation was found between access and access points and access and population density.²⁰³ Clearly, people are accessing the shore when parking were available and are accessing it in much lower numbers when parking is not available.

Figure 1 shows the same relationship between parking and shoreline access graphically rather than statistically.²⁰⁴ Figure 1 is a map of the ocean shoreline in Washington County, Rhode Island. The circles show where parking lots are available at public access points.²⁰⁵ The circles are proportionate symbols; in other words, if one circle is twice as large as another circle, then that parking lot has twice as many parking spaces. Even though the Rhode Island Constitution provides that everyone has a right to access the entire length of the State's shoreline,²⁰⁶ one can see that both the parking lots and the parking spaces are clustered and that large stretches of the coastline have no public parking. On the bar chart below the Rhode Island coastline, the *x*-axis represents the same length of shoreline.²⁰⁷ The *y*-axis shows the number of people for every ten linear feet of shoreline.²⁰⁸ Each horizontal dashed line on the chart

203. *Id.* at 391.

204. In this map of the ocean shoreline of Washington County, Rhode Island, a circle represents each parking lot and the size of the circle represents the number of parking spaces in each lot. The number of people along each ten linear feet of shoreline is represented by the bar chart. Each horizontal line is equal to five people.

205. On-street parking is prohibited almost everywhere along the portion of Rhode Island coast shown in this map. The state, the towns, or private parties own the parking lots. All of the parking lots charge a fee.

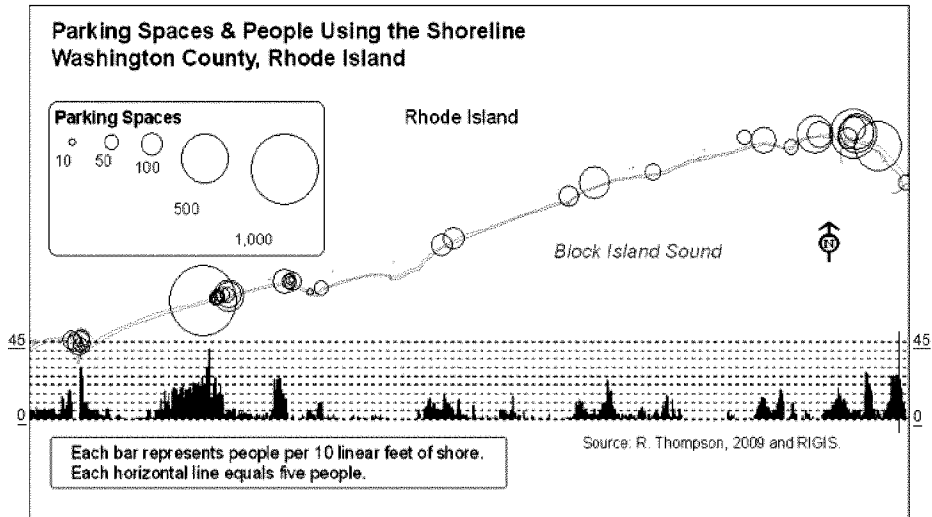
206. R.I. CONST. art. I, § 17.

207. The *x*-axis is actually on a somewhat smaller scale than the map of the Rhode Island shoreline because it is a straight line while the shoreline is diagonal and curved. Still, the graph and the shoreline line up well because the angle of the shoreline is rather consistent.

208. The number of people along the beach is based upon aerial photographs that were taken on July 29, 2006, starting at 1:00 PM. The photographs were taken from a single engine Skyhawk flying parallel to the shore at approximately 800 feet altitude. The photographer shot overlapping frames and attempted to shoot as perpendicular to the shore as possible. Two passes were made: one using a 50-millimeter lens and one using an 85-millimeter lens. Oblique aerial photographs

represents five people. One can see that wherever there is a concentration of parking lots, many people are on the shoreline. Wherever there are no parking lots, there are few or no people, even though the entire shoreline is theoretically open to the public.

Figure 1. Parking and Shoreline Access along Rhode Island's Southern Shore.²⁰⁹



were used because the researchers wanted to be able to count people under beach umbrellas. The researchers used one to 5,000 scale ortho-photographs to position each aerial photograph along the correct length of shoreline. Because the aerial photographs were oblique, geo-referencing them distorted the images. Typically, only the center of the photograph was used, which is the least distorted. Moreover, the researchers were interested in the intensity of access along the shoreline and not density of use across the beach; therefore, the distortions were not significant for the purposes of this study. After the aerial photographs were geo-referenced in a geographic information system (ESRI ArcGIS), each person on the beach was digitized. Thus, a geo-database was created within which each person was a separate record with geographic coordinates. Another geo-database was created within which each ten feet of linear shoreline was a separate record containing four coordinates to form a polygon that had a width of ten feet and a height that covered the beach. Then a program was written to count each digitized person within each polygon.

209. Figure 1 created by and on file with author.

9. Should On-Street Parking Bans Surrounding Public Access Points Survive a Constitutional Challenge?

Whether a specific local ordinance banning on-street parking near public shoreline access points is unconstitutional will depend on the facts surrounding the adoption of that particular ordinance, the reasons that local officials used to support their exercise of the police power, the character of the constitutional challenge, and, hence, the level of scrutiny that a court would apply.

Even though such ordinances banning parking are aimed at nonresidents, challenges based upon the Equal Protection Clause of the Fourteenth Amendment seem unlikely to prevail. The Equal Protection Clause requires that “all persons similarly circumstanced shall be treated alike.”²¹⁰ If the ordinance bans all street parking, then it does treat everyone the same. But even if the ordinance allows residents to park while banning nonresidents, the *Arlington* court upheld this type of preferential treatment of residents stating, “[t]he Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington’s rationally promote the regulation’s objectives.”²¹¹

Because the objectives were proper and the parking restrictions promoted those objectives, the differential treatment was constitutional. Thus, parking restrictions near public access points should probably survive an equal protection challenge if they are “rationally related to a legitimate state interest.”²¹² Certainly many beachfront neighborhoods could have problems with visitors to the beach being loud, leaving trash, or even urinating in the bushes; and certainly the state has an interest in curbing these behaviors. Because parking bans could help to alleviate these types of problems, they probably do not violate the Equal Protection Clause.

210. See *Curse v. U.S. Dep’t of Labor*, 843 F.2d 456, 463 (11th Cir. 1988).

211. *County Bd. of Arlington County, Va. v. Richards*, 434 U.S. 5, 7 (1977); see also *Washington v. Davis*, 426 U.S. 229, 239 (1976); *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir. 1980) (noting that a party bringing an equal protection claim must be similarly situated to a group receiving preferential treatment). When government action “fails to treat classes alike, it may constitute a violation of the equal protection clause.” *Curse*, 843 F.2d at 463.

212. *Fla. State Conference of NAACP Branches v. City of Daytona Beach* 54 F. Supp. 2d 1283, 1287 (M.D. Fla. 1999).

Even though these types of parking bans would probably pass constitutional muster under the Equal Protection Clause, the Free Speech and Freedom of Assembly protections provided by the First and Fourteenth Amendments would be reviewed under a more demanding level of scrutiny. Because public beaches should be considered public forums, the courts should not use the rationally related standard when reviewing those facts and the local government's reasoning for adopting the restrictive parking ordinances.²¹³ When deciding whether to apply strict scrutiny or intermediate scrutiny, the court would initially determine whether the ordinance distinguishes between prohibited and permitted speech on the basis of content or whether the ordinance is content neutral.²¹⁴ If an ordinance imposes content-based restriction on speech in a public forum, that ordinance is subject to strict scrutiny and the government must show that the ordinance is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.²¹⁵ However, if the ordinance is content neutral, then intermediate scrutiny is appropriate; therefore, the ordinance would only have to be "narrowly tailored to serve a significant government interest," and "leave open ample alternative channels of communication."²¹⁶

Local governments should have a tough time arguing that the bans are narrowly tailored time, place, and manner restrictions. While beach users might cause problems in a neighborhood in which they are parking and while the government could conceivably have a significant interest in alleviating or eliminating these problems, one has difficulty imagining how a complete ban on parking can be conceived of as "narrowly tailored." The narrowly tailored requirement is demanding, particularly when entire behaviors are banned.

213. *See* *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) ("The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum . . . [if so] a state's right to limit protected expressive activity [thereon] is sharply circumscribed . . .") (citations omitted).

214. *Frisby v. Schultz*, 487 U.S. 474, 481–82 (1988).

215. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

216. *Id.*

A statute is narrowly tailored if it targets and eliminates no more than the exact source of the “evil” it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription’s scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because “the substantive evil-visual blight— [was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself.”²¹⁷

In the case of bans on parking, parking itself is not the problem about which people often complain, but instead the associated externalities, such as noise, garbage, and public urination. All of these problems could be controlled by less restrictive means than complete bans on parking. For example, noise is more commonly a problem in the evening hours and at night. Thus, a town could adopt an ordinance restricting parking during the evening and at night, which would be less restrictive. A town could also prohibit amplified music. Installing trash receptacles could control littering. Public urination could be taken care of by installing restrooms, placing portable toilets at the access point, or at least posting a sign informing the public where the next, reasonably close public facility can be found. These management efforts could be paid for in part or full through parking fees. Furthermore, if the problem is inadequate parking for everyone who wants to use the access point, the town can place time limits on parking.

III. CONCLUSION

Many Americans highly value access to the ocean shore. As has been demonstrated in this article, Americans go to their beaches to engage in many activities, including ones that demonstrate that beaches can be public forums. Inarguably, beaches are places where people have long assembled. However, beaches have also become

217. *Frisby*, 487 U.S. at 485–86 (citations omitted) (alteration in original).

contentious places where property owners on or near the shore have worked to restrict access to the shore through their neighborhoods. Not infrequently, local government has responded to the complaints of these property owners by establishing parking restrictions around public access points.

While some might belittle the importance of our beaches, they are deeply loved public spaces that are every bit as important to us as our city parks. Thus, the public's ability to access public beaches must be as diligently protected as access to our other quintessential public forums: city parks and thoroughfares. Because parking bans near access points are not narrowly tailored and because they place a substantial burden on the public's ability to access a traditional public forum and to exercise the right to assemble there, these bans are susceptible to constitutional challenges under the First and Fourteenth Amendments. If a court finds a parking ban to be unconstitutional, the local community still has other management tools available to deal with such significant concerns as garbage, noise, and limited available parking. Well thought out and well crafted management plans are surely preferable to the loss of public access to the shore and to fundamental rights.