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IT'S ALL MINE, STAY OFF, AND LET ME DO
WHAT I PLEASE: AN ABYSS BETWEEN THE
RIGHTS AND DESIRES OF COASTAL PROPERTY
OWNERS AND PUBLIC PRIVILEGES AND
PROTECTIONS?

*Colin H. Roberts**

I. INTRODUCTION

In this paper, I will examine three established, or at least commonly claimed, rights of coastal (littoral)¹ property owners in the United States: (1) the right to receive sediments seaward of the mean high-water line deposited by accretions and ownership of new land uncovered by relictions, (2) the right to exclusive use of their dry sand property, and (3) the right to build what they wish on their oceanfront lot. Each of these asserted “rights” at times butts heads with laws designed to preserve and protect the public’s right to enjoy the coast and the ocean, including the public trust doctrine, environmental statutes, and zoning regulations. Taking each of these property claims in turn, my goal is to see who, if anybody, is winning the battle between property owners and the general public for the use of littoral zones. Does the answer vary with location? What factors are giving the winner the upper hand? When these public and private rights are at odds, can the two be reconciled in a manner that respects the owner’s desires while concomitantly maintaining public utility, or is this a fruitless endeavor because the two are diametrically opposed? In what respects does the law need to be clarified to potentially obviate issues?

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1. A note on terminology: Littoral means abutting an ocean, sea, or lake as opposed to riparian, which refers to rivers and streams. I will use terms like coastal, littoral, upland, beachfront, and oceanfront interchangeably to describe the land immediately adjacent to the Pacific and Atlantic Oceans. BLACK’S LAW DICTIONARY 1018 (9th ed. 2009).

Starting with “It’s All Mine,” I will explore how the phenomena of accretion, dereliction, and avulsion, both natural and artificial, affect the extent of an owner’s title to his or her coastal lot. I will also extensively discuss a fairly recent United States Supreme Court case, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, that has important ramifications for determining the boundary of an owner’s littoral lot. Next, with “Stay Off,” I will examine how different states have found or created public access and use rights over private littoral property and dealt with issues arising from owners’ assertions of exclusivity. Lastly, under “Let Me Do What I Please,” I will look at how zoning ordinances and environmental laws, as well as condemnation, have been used in different states to limit an owner’s ability to build certain structures on their lots—from buildings to sea walls and piers—for the benefit of the general public. In what cases have the courts found the government went too far in restricting the owner’s use of his or her littoral property, and in what cases have they said the danger to the environment or the public’s entitled use outweighed the owner’s desire to construct what he or she wishes?

Each of these disputes has important political, economic, and social implications because it pits a select group of private property owners, who are often wealthy and influential, against the general public, whose desire to be near the ocean is steadily growing.² On a grander scale, these legal issues highlight the continuing debate over how to best utilize our natural resources and the corresponding struggle for control.

II. “IT’S ALL MINE”

Littoral property owners pay vast amounts of money to live steps from the ocean, separated only by a beautiful sandy or rocky beach on which they can relax and pursue recreation. It is no surprise then that littoral owners want to hold title to as much of the beach as possible, which of course also increases the value of their property. However, unlike other kinds of property, the boundary of a coastal lot is ambulatory, shifting with the dynamics of the coastline caused by the ocean, weather, and other natural and man-made phenomena. These alterations have important legal implications for oceanfront owners. Not only do they affect the size of a littoral owner’s land, they may also

2. “According to the United States Commission on Ocean Policy, ‘[b]etween 1970 and 2000, the population of coastal watershed counties grew by 37 million people . . . and is projected to increase by another 21 million by 2015.’” DONALD C. BAUR ET AL., OCEAN AND COASTAL LAW AND POLICY 45 (2008) [hereinafter BAUR].

relate to issues of beach access and zoning, which I will explore in subsequent sections of this paper.

A. *Accretion, Reliction, and Avulsion*

Coastal owners generally own the land up to the ocean's high-water mark, with the state holding the tidal waters and the land beneath them pursuant to the public trust doctrine,³ a common law doctrine that enumerates and "preserves the public's right to use waterways for 'commerce, navigation, and fisheries,' with subsequent court decisions expanding the doctrine to include recreational activities and environmental protection."⁴

For instance, in California, a littoral owner takes to the ordinary high-water mark of neap tides, as distinguished from spring tides.⁵ In neap tides, the high tide is relatively low and the low tide is relatively high, so the difference between low tide and high tide is small; spring tides, on the other hand, have extreme low tides and high tides, and so the fluctuation is greater.⁶ Unlike in California, in Delaware, Maine, Massachusetts, New Hampshire, and Virginia littoral owners take to the low-water mark instead.⁷

Littoral property owners have long had the common law right to receive extensions of land created by accretion and reliction.⁸ Accretion is defined as "the gradual, imperceptible process of accumulation of land by depositing of material from the water."⁹ Although the accumulation of material such as sand, rocks, and mud, known as alluvion, is gradual and imperceptible,¹⁰ over the course of time, the resulting additional dry

3. *Id.* at 48.

4. Colin H. Roberts, *Boaters Beware: Chapter 595 Anchors State Lands Commission's Vessel Removal Power*, 43 MCGEORGE L. REV. 723, 725 (2012).

5. 54A CAL. JUR. 3D *Real Estate* § 957 (2012).

6. *Tides – Tidal Moments*, SAILING ISSUES, <http://www.sailingissues.com/navcourse6.html> (last visited Apr. 29, 2012).

7. Katie Tannenbaum, *Beach Access*, BEACHAPEDIA, http://www.beachapedia.org/Beach_Access#Surfrider_Foundation.E2.80.99s_Stance_on_Beach_Access (last visited Apr. 29, 2012) [hereinafter *Beach Access*].

8. *See, e.g., Jones v. Johnston*, 59 U.S. 150, 156 (1855) ("Land gained by the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining.").

9. THOMAS STRONG, RIPARIAN RIGHTS ¶ 14, available at <http://www.pdhoneonline.org/courses/1124/1124content.pdf> (last visited Apr. 29, 2012).

10. *Id.*

land becomes apparent.¹¹ Reliction (sometimes referred to as “dereliction”) “is the uncovering of previously submerged land by a permanent rescission of a body of water, rather than a mere temporary or seasonal exposure of the land.”¹² Therefore, when the ocean washes sand ashore, gradually broadening the beach and pushing the ordinary high tide line further out, or the receding ocean exposes new land,¹³ the littoral owner gains the additional land notwithstanding the state’s title.

Accretion can be natural or artificial, with artificial accretion being directly caused by human activities.¹⁴ Whether accreted land is natural or artificial may determine the littoral owner’s right to it.¹⁵ For instance, in California, the state retains land created by artificial accretion, but

[a]ccretion is not artificial merely because human activities far away contributed to it; it must have been the direct cause of the accretion . . . [t]he larger the structure or the scope of human activity the farther away it can be and still be a direct cause of the accretion, although it must always be in the general location of the accreted property to come within the artificial accretion rule.¹⁶

However, with certain limitations, other states allow littoral property owners to retain land created by artificial accretions.¹⁷

When the change in the breadth of the beach is not gradual or imperceptible but rather rapid and readily noticeable, the process is

11. See *County of St. Clair v. Lovington*, 90 U.S. 46, 68 (1874) (“The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.”).

12. Michael V. Powell, *Riparian Boundaries in Texas*, LOCKE LORD LLP (2006) at 7, available at <http://www.lockelord.com/files/News/52bf6f9c-4dcc-4b59-a7e2-25f214016565/Presentation/NewsAttachment/7178e364-c72e-4129-8646-268a72c9fc05/Riparian%20Boundaries%20-%20Powell.pdf> [hereinafter Powell].

13. With climate change causing sea level rise, relicions are bound to be much less common than accretions, if not nonexistent. For further discussion of sea level rise see *infra* Part IV.B.

14. Powell, *supra* note 12, at 8.

15. See *id.* at 9 (describing how “a riparian owner does not obtain title to an accretion when he or she caused that accretion” under Texas law).

16. 63 CAL. JUR. 3D *Water* § 745. See also *State ex rel. State Lands Comm’n. v. Superior Court*, 900 P.2d 648, 650-51 (Cal. 1995).

17. See, e.g., *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc.*, 512 So.2d 934 (Fla. 1987) (holding that, in Florida, a landowner takes land created by artificial accretion as long he or she did not participate in the activities creating it).

known as avulsion.¹⁸ Unlike accretion, new land added to the edge of a littoral property owner's lot by avulsion goes to the state, not the landowner.¹⁹

*B. "A Case Study": Stop the Beach Renourishment, Inc. v. Florida
Department of Environmental Protection*

In Florida, the boundary between state land and littoral property is the mean high-water line, defined as the average height of high waters over a nineteen-year period.²⁰ Under Florida law, littoral owners have "the right of access to the water, the right to use the water for certain purposes, the right to have an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property."²¹ Unlike California, littoral property owners can claim land created by artificial accretion, as long as the owner did not cause the accretion himself; but similar to California, littoral owners do not take land added by avulsion, natural or artificial.²²

In 1961, the Florida legislature passed the Beach and Shore Preservation Act (BSPA), which "establishes procedures for 'beach restoration and nourishment projects' designed to deposit sand on eroded beaches (restoration) and to maintain the deposited sand (nourishment)."²³ Under BSPA, local governments apply to the Florida Department of Environmental Protection (Department) for funds to do a restoration or nourishment project.²⁴ If the project involves filling submerged lands, authorization is required from the Board of Trustees of the Internal Improvement Trust Fund (Board).²⁵ The Board sets a fixed "erosion control line" (ECL) that replaces the moving mean high-water line as the boundary between littoral property and state land.²⁶ Therefore, when accretions add land and push the mean high-water line seaward, the boundary between private and state lands does not move to the new high-water line; the boundary remains at the ECL and the littoral

18. OXFORD ENGLISH DICTIONARY 826 (1989).

19. *See State ex rel. State Lands Comm'n.*, 900 P.2d at 660.

20. *Stop the Beach Renourishment v. Florida Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2598 (2010).

21. *Id.*

22. *See id.*

23. *Id.* at 2599 (internal citations omitted).

24. *Id.*

25. *Id.*

26. *Id.*

owners do not take title to the accretions.²⁷ However, littoral owners retain all other common-law littoral rights.²⁸ If the beach erodes back past the ECL over a substantial distance, the Board may on its own restore the beach to the ECL, and must restore it if asked by a majority of the owners and lessees in the affected area.²⁹ If the Board does not act within one year, the project is canceled and the ECL is retracted.³⁰

In 2003, the city of Destin and Walton County applied to restore 6.9 miles of beach eroded by hurricanes by adding seventy-five feet of sand seaward of the mean high-water line (what would become the ECL).³¹ The Department stated its intent to issue the permits and the ECL was accepted by the Board.³² A group of littoral property owners in the project area formed a nonprofit corporation, Stop the Beach Renourishment, Inc. (SBR), and expressed their disapproval for the project, but the permits were still issued.³³ SBR next challenged the project in state court under Florida's Administrative Procedure Act.³⁴ The appellate court determined that BSPA "eliminated two of the [SBR] Member's littoral rights: (1) the right to receive accretions to their property; and (2) the right to have contact of their property with the water remain intact."³⁵ Because the BSPA, in the court's opinion, amounted to an unconstitutional taking "which would 'unreasonably infringe on [littoral] rights,'" the local governments were required to show that they "owned or had a property interest in the upland property."³⁶

Although the District Court of Appeal vacated and remanded the Department's approval for the permits, it also certified the question to the Florida Supreme Court of whether BSPA, on its face, amounted to a taking of littoral property owners' rights without just compensation.³⁷ The Florida Supreme Court determined that it did not because accretions are "a future contingent interest, not a vested property right," and "there is no littoral right to contact with the water independent of the littoral

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 2600.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

right of access, which the Act does not infringe.”³⁸ The Florida Supreme Court also admonished the Court of Appeal “for not considering the doctrine of avulsion, which it concluded permitted the State to reclaim the restored beach on behalf of the public.”³⁹ SBR’s request for rehearing was denied, but the United States Supreme Court granted certiorari to determine whether the Florida Supreme Court’s upholding of the project constituted a “judicial taking.”⁴⁰

The United States Supreme Court held that the Florida Supreme Court’s decision that the BSPA is constitutional did not create a “judicial taking” of land contrary to the Fifth Amendment Takings Clause as applied to Florida via the Fourteenth Amendment.⁴¹ The Court stated that in order for there to be a taking SBR must have shown that they “had rights to future accretions and contact with the water superior to the State’s right to fill in its submerged land.”⁴² The Court noted that this case featured the collision of “[t]wo core principles of Florida property law”⁴³:

First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners. Second, . . . if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner’s contact with the water. The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not.⁴⁴

The Supreme Court agreed with the Florida court that the beach restoration project was merely reclamation of the public’s land by the state.⁴⁵ Furthermore, because there is no difference between artificial and natural avulsion under Florida law, the Florida Supreme Court’s decision did not eliminate the right to accretions, it “merely held that the right was not implicated by the beach-restoration project, because the doctrine of avulsion applied.”⁴⁶

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 2613.

42. *Id.* at 2611.

43. *Id.*

44. *Id.* (internal citations omitted).

45. *See id.* at 2612.

46. *Id.*

The Supreme Court acknowledged that it might not be fair to littoral property owners that state-created avulsions change the nature and value of their oceanfront property and perhaps state-created avulsions should be treated differently from natural avulsions in regards to its effect on rights to accretions. The Court was handcuffed by the fact that Florida law recognizes no difference between the two because “[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established.”⁴⁷ The Court declined to hold that “the Florida Supreme Court’s decision eliminated a right of accretion established under Florida law.”⁴⁸

The Court quickly dispelled SBR’s second argument, that the BSPA project constituted a taking because it abridged the owners’ right to have the ocean contact their property, agreeing with the Florida Supreme Court that there is no right to contact with the water independent of the right of access, which was not affected by the project.⁴⁹ The Court stated that a right to contact with the water is simply unworkable because land created by avulsion automatically goes to the state.⁵⁰

This case is a good example of a state’s interest in holding land and maintaining it for the benefit of the public. All coastal states face the dilemma of how to treat added littoral land, and it is clear that—at least with regard to these Florida restoration projects—the public is “winning.”

C. Drawing a Line in the Sand: Where is the Property Line Between State and Private Property?

As exemplified by *Stop the Beach Renourishment*, accretion, reliction, and avulsion are complicated, inexact doctrines that have important implications for littoral property owners. This observation begs the question: should there be more defined standards, such as set measurements, to determine when these processes occur, rather than relying on vague terms such as “gradual” and “perceptible”? If so, what should these standards be? If, hypothetically, a storm washes ashore two or three inches of sediment in a few days, is that amount so nominal that it should be considered an accretion even if a keen observer could see the difference?

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 2612-13.

Furthermore, as alluded to by the Supreme Court in *Stop the Beach Renourishment*, the law may not be completely fair to oceanfront coastal owners.⁵¹ Should Florida littoral owners' be entitled to land created by artificial avulsion in a manner similar to artificial accretion, or is it an unfair windfall for littoral owners to get a new chunk of private property regardless of how it was created, and especially if the state footed the bill?

There is not even consensus across the country on where high-tide lines lie in a legal and scientific sense. While California calculates it based on neap tides,⁵² others states, such as Florida, do not distinguish between neap and spring tides.⁵³ Still others simply use the vegetation line.⁵⁴ The federal government calculates the high-tide line as the "average height of all tides over a full tide cycle of 18.6 years."⁵⁵ Some have proposed the uniform adoption of this standard, but this would cause chaos for owners of existing structures.⁵⁶

The backdrop for these questions and issues is the broader struggle between public and private interests that this paper attempts to encapsulate. The state holds submerged land in public trust,⁵⁷ but littoral owners pay vast amounts to own a piece of the beach. However, a compromise has generally been reached allowing owners to hold much of the beach as private property, with corresponding private rights, subject to certain limitations. Complications to this general arrangement will be examined in the following sections. The state and littoral owners have essentially played to a draw, but as *Stop the Beach Renourishment* illustrates, the state sometimes gets the upper hand because it makes the rules.

51. *See id.*

52. ENCYCLOPEDIA OF COASTAL SCIENCE 248 (M. Schwartz ed., 2005).

53. *See Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2598 (explaining that Florida uses "the average reach of high tide over the preceding 19 years," thus, differences in spring and neap tides are not specifically important).

54. WALLACE KAUFMAN & ORRIN H. PILKEY, JR., *THE BEACHES ARE MOVING: THE DROWNING OF AMERICA'S SHORELINE* 248 (7th prt. 1998) [hereinafter *THE BEACHES ARE MOVING*]. *See also* 15A N.C. ADMIN. CODE § 7H.0305 (a)(5) (2012) ("The vegetation line refers to the first line of stable natural vegetation, which shall be used as the reference point for measuring oceanfront setbacks. This line represents the boundary between the normal dry-sand beach, which is subject to constant flux due to waves, tides, storms and wind, and the more stable upland areas. The vegetation line is generally located at or immediately oceanward of the seaward toe of the frontal dune or erosion escarpment.").

55. *THE BEACHES ARE MOVING*, *supra* note 54, at 248.

56. *Id.*

57. *See Stop the Beach Renourishment, Inc.*, 130 S. Ct. at 2598.

III. "STAY OFF"

The right of exclusion is perhaps the most cherished property right in the proverbial bundle of sticks; it is, after all, what makes private property "private." Understandably, oceanfront owners want to lie on their private beaches and gaze at the crashing waves without having to stare at the back of people's heads and without being disturbed by the noises they make, or worse, the trash they may leave behind. However, because tidelands are held in public trust, littoral owners cannot always simply kick others off. Perhaps the phrase "Stay Off" is a bit misleading because this article intends to discuss how courts and legislatures have used the common law and statutes to determine when there is a right of public beach access and use, not the *per se* legality of efforts made by oceanfront property owners to prevent others from crossing their beaches. A whole paper could be devoted solely to that topic.⁵⁸ However, the legality of these efforts to exclude is often dictated by the legal concepts this article will discuss.

A. Beach Access and Use Under the Public Trust Doctrine

While land below the high-water line is held in public trust by the state, the dry-sand beach above it is not within the state's purview under the traditional public trust doctrine.⁵⁹ This arrangement has led to two issues regarding beach access:

- (1) public rights to so-called perpendicular access—that is, the right to proceed from an upland position toward the ocean across the property owner's private property (including the dry-sand beach) to a point on the wet-sand beach (the area of the beach that lies seaward of the mean high tide line); and
- (2) public rights to so-called lateral access—that is, once on the beach, the right to proceed up and down the beach by use of the dry-sand portion

58. Examples of the measures littoral owners have taken to exclude beachgoers from reaching the ocean from their land include "removing beach access signage, putting up no trespassing or private property signs, adding vegetation to block or hide access points or make it appear as if it is private property, erecting fences and hiring private security to turn away beachgoers." *Beach Access*, *supra* note 7. Malibu, California has had a number of infamous incidents and legal battles over beach access. *See, e.g.*, Martin Kasindorf, *Malibu's Rich and Famous Fight to Keep Beach Private*, USA TODAY, May 3, 2002, <http://www.usatoday.com/news/nation/2002/05/03/malibu-usatcov.htm>.

59. BAUR, *supra* note 2, at 48.

and to use that portion of the beach for recreational activities such as sunbathing.⁶⁰

However, “[a]s a general rule, lateral or horizontal access along the wet sand area is a public right.”⁶¹

The United States Supreme Court has never explicitly answered whether the public trust doctrine applies to public rights of beach access and use. However, two cases have “shed light on this question.”⁶² In *Nollan v. California Coastal Commission*, the California Coastal Commission attempted to condition the issuance of a permit for rebuilding an oceanfront home on the owners granting a public easement across their land to reach two adjacent public beaches, without the owners receiving any compensation for the easement.⁶³ The Coastal Commission claimed that this was necessary to promote the legitimate state interest of counteracting the new, bigger home’s obstruction of a view of the ocean.⁶⁴ However, the Court struck the condition down, holding that the easement created a taking of a property right and that it had no “essential nexus” with removing obstacles to a clear view of the ocean.⁶⁵ Therefore, “by requiring states to closely link the condition imposed on the beachfront property owner to the problem the condition seeks to resolve, [*Nollan*] arguably raises the bar for states seeking to invoke the [public trust] doctrine to impose easements allowing lateral access across beach property.”⁶⁶

The second case was decided the following year. In *Phillips Petroleum Co. v. Mississippi*, the Court acknowledged that various states have expanded the public trust doctrine to include recreational and economic activities beyond the traditional purposes of fishing, commerce, and navigation.⁶⁷ Therefore, by implication, the public trust doctrine can be utilized to permit the beach access necessary to carry out these protected activities.⁶⁸

While the United States Supreme Court has not explicitly ruled on whether beach access and use are rights protected under the public trust doctrine, various state courts have dealt with the issue. For instance, in

60. *Id.*

61. *Id.* at 162.

62. *Id.* at 49.

63. 483 U.S. 825, 828 (1987).

64. *Id.* at 828-29.

65. *Id.* at 836-37.

66. BAUR, *supra* note 2, at 49.

67. 484 U.S. 469, 482-83 (1988).

68. BAUR, *supra* note 2, at 50.

Matthews v. Bay Head Improvement Ass'n,⁶⁹ the New Jersey Supreme Court expanded on their previous ruling in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, which held that the public trust doctrine protected recreational activities on municipally owned dry-sand landward of the high-water mark,⁷⁰ to hold that the public has a right of access on a privately owned beach to pursue public trust activities.⁷¹ The New Jersey court did not base its decision on legal doctrines like “prescriptive easements or customary law, but rather on the fact that in reality, the public must be able to use the dry-sand area of a beach in order to enjoy the wet-sand area.”⁷² In summarizing its expansive view of the public trust doctrine,⁷³ the court commented that “the public trust doctrine [is] not [perceived] to be ‘fixed or static,’ but one to ‘be molded and extended to meet changing conditions and needs of the public it was created to benefit.’”⁷⁴ Similarly, California, Hawaii, North Carolina, and Washington courts have concluded that the public has access rights under the public trust doctrine.⁷⁵

However, courts in several other states have been less receptive to the idea that the public trust doctrine provides a right of access across private littoral property, advancing a restrictive view of the doctrine.⁷⁶ In a Massachusetts Supreme Court decision, the court refused to incorporate a right of access within fishing and navigation rights, holding that a bill allowing public right of passage “between the mean high water line and the extreme low water line” was unconstitutional.⁷⁷ The court stated that they could find no authority for the proposition that the public trust doctrine “include[s] a right to walk on the beach.”⁷⁸ As previously mentioned, Massachusetts is one of the few states where littoral owners take to the mean low-water line as opposed to the high-water line,⁷⁹ so

69. 471 A.2d 355, 364 (N.J. 1984).

70. 294 A.2d 47, 54-55 (N.J. 1972).

71. See URBAN HARBORS INST. OF THE UNIV. MASS. BOS., PUBLIC TRUST DOCTRINE AND PUBLIC ACCESS IN NEW JERSEY 2-5 (Jan. 2003), available at http://www.localswell.com/files/NJDEP_-_Public_Access_in_NJ__1_.htm [hereinafter Public Access in New Jersey].

72. *Id.* at 3; see also *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363 (N.J. 1984).

73. See BAUR, *supra* note 2, at 50-51.

74. *Matthews*, 471 A.2d at 365 (quoting *Borough of Neptune City*, 294 A.2d at 308).

75. BAUR, *supra* note 2, at 51.

76. *Id.* at 51-52.

77. Opinion of the Justices to the House of Representatives, 313 N.E.2d 561, 564 (Mass. 1974).

78. *Id.* at 567.

79. *Beach Access*, *supra* note 7.

the public trust doctrine does not come into effect until below the low-water mark, located on land that is permanently submerged. Therefore, because the wet sand area between the high- and low-water marks (foreshore) is private property, and the court refused to expand the public trust doctrine to allow access across it, the public can only fish or navigate off of private beaches by entering the water at a public access point and then laterally swimming, boating, or simply wading through the submerged land.

The Supreme Court of Maine followed suit in *Bell v. Town of Wells*.⁸⁰ Despite the fact that, like Massachusetts, littoral owners in Maine take to the low-water mark, a state statute “declared [that] (1) ‘the intertidal lands of the State are impressed with a public trust’ and (2) the rights of the public in intertidal lands under that public trust included a right to use that land for recreation.”⁸¹ However, the court stated that a littoral owner held the intertidal land “subject only to the public’s right to fish, fowl, and navigate.”⁸² Therefore, the statute was on its face an unconstitutional taking because the common law reserved no public right to recreation.⁸³ It is perplexing that fishing and fowling are activities protected by the public trust doctrine, but the right to recreation (a more generic and potentially less intrusive activity) is not. This shows that the common law scope of the public trust doctrine can be vital.

Lastly, a decision by the Maryland Court of Appeals ruled that a claimed public trust right to recreate on dry-sand would damage the littoral owner, who desired to build a condominium, in a manner “specifically proscribed” by the Charter of Maryland.⁸⁴

B. Other Provisions in the Law Permitting Beach Access and Use

Besides the public trust doctrine, states have used various methods to protect the public’s right to access and use of the beach. For instance, the state constitutions of Alaska and California guarantee a public right of access to navigable waters.⁸⁵ Therefore, the right to perpendicular and lateral beach access can be inferred.⁸⁶ Moreover, “North Carolina also has a constitutional provision that can be interpreted to support a public

80. 557 A.2d 168 (Me. 1989).

81. BAUR, *supra* note 2, at 51 (quoting *Bell*, 557 A.2d at 176).

82. *Id.* at 51-52.

83. *Bell*, 557 A.2d at 176-177.

84. Dep’t. of Natural Res. v. Mayor and Council of Ocean City, 332 A.2d 630, 637 (Md. 1975).

85. BAUR, *supra* note 2, at 50.

86. *Id.*

right to beach access.”⁸⁷ Some states, including North Carolina and Washington, actually have statutory provisions granting a public right of access.⁸⁸ The California Coastal Act creates a balance, setting a goal of maximizing public access and recreational opportunities while simultaneously recognizing “constitutionally protected rights of private property owners.”⁸⁹ The Coastal Act allows the Coastal Commission to set conditions on the issuance of permits, including “the dedication of easements or payment of mitigation fees,” as long as they meet the essential nexus test established by the Supreme Court in *Nollan*.⁹⁰

Beach access advocates have said that Oregon “may have the best legal protection for the public’s use and access to its coastal land.”⁹¹ Its 1967 Beach Bill states that access is guaranteed and “establishes a state easement on all beaches between the low water mark and the vegetation line.”⁹² Because the vegetation line is higher than where the tides will reach, “the general effect is to grant public access to otherwise dry sand beaches.”⁹³

The public has also acquired access rights through common law doctrines such as “public easements by prescription, dedication, or customary use” and the Coastal Zone Management Act (CZMA).⁹⁴ A prescriptive easement over private littoral property can be created by the public’s open and notorious adverse use of the property continuously “for a certain prescriptive period.”⁹⁵ An easement by dedication occurs when the littoral owner acquiesces in the public’s use of the land and there is “maintenance or patrolling of the beach by municipal authorities.”⁹⁶ Easements can also be inferred from the doctrine of customary use, which “relies on public use that is ancient, exercised without obligation, reasonable and not offensive to an existing law or custom.”⁹⁷

87. *Id.*

88. *Id.*

89. *Id.* (quoting California Coastal Act, CAL. PUB. RES. § 30001.5 (West 2013)).

90. Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, 93-94 (2011); see also *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 838 (1987).

91. *Beach Access*, *supra* note 7.

92. *Id.*

93. Patricia Pattison & Donald Sanders, *The Dynamic Boundaries of Oceanfront Property*, 40 REAL EST. L.J. 5, 20 (2011).

94. BAUR, *supra* note 2, at 162.

95. *Id.*

96. *Id.*

97. *Id.*

Although the CZMA is federal legislation, it incorporates state involvement through states' development of their Coastal Management Programs (CMPs).⁹⁸ After a state's CMP is approved by the federal government in accordance with the federal consistency requirement, the federal government must comply with the state's policies "to the maximum extent practicable" when taking action that has "reasonably foreseeable effects" on the coastal zone.⁹⁹ The CZMA encourages states "to provide [] public access for recreational purposes" through their CMPs.¹⁰⁰ Before a state's CMP is approved, the program must address access to public beaches and other public coastal areas of importance.¹⁰¹ Additionally, some CMPs provide processes for the public to acquire access rights across private property. For instance, California's Coastal Access Program allows private property owners to offer public access across their property for recreational use under the Offer to Dedicate (OTD) Public Access Easement Program.¹⁰² Since 2006, 205 OTDs have been created.¹⁰³

While the public trust doctrine is a powerful tool in creating a public right of access across private littoral property, it is by no means the exclusive method. In fact, as shown, some states have had more success in recognizing these rights through other legal concepts and procedures.

C. A Change of Heart?: The Curious Case of the Texas Open Beaches Act

Similar to the Oregon Beach Bill, Texas passed the Texas Open Beaches Act (TOBA) in 1959 which guarantees unrestricted coastal access.¹⁰⁴ However, subsequent legislation and court decisions have undermined, and perhaps outright eliminated, this guarantee.¹⁰⁵

98. *Federal Consistency Overview*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <http://coastalmanagement.noaa.gov/consistency/welcome.html> (last visited Apr. 29, 2012).

99. *Id.*

100. BAUR, *supra* note 2, at 162.

101. *Id.*

102. See OCRM in Your State, California *Coastal Management: Enhancing Public Access to Our Coast*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <http://coastalmanagement.noaa.gov/inyourstate/#> (click "CZMP" on "Control Panel" on right; then click the orange icon that appears furthest south in California on the map) (last visited Apr. 29, 2012).

103. *Id.*

104. See *Beach Access*, *supra* note 7.

105. See, e.g., *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012); H.R. 770, 2009 Leg., 81st Sess. (Tex. 2009).

In June 2009, the Texas legislature passed House Bill 770 [HB 770], which “allows for private development on public beaches on the Bolivar Peninsula, essentially privatizing them.”¹⁰⁶ Many Texans have criticized HB 770 saying it “sets a dangerous precedent for the entire Texas Coast and the public’s right to access and use public beaches,” and the Texas Land Commissioner refused to enforce it.¹⁰⁷ Governor Rick Perry, who allowed HB 770 to pass into law without his signature, nonetheless stated that a provision in the law allowing littoral owners to rebuild and repair their homes, “affect[s] the Texas Open Beaches Act [and] is vague, broad and incomplete, and will likely result in litigation between homeowners and the state.”¹⁰⁸ This was the case even in the event of a meteorological occurrence (i.e. hurricane that erodes a beach). In response, later in 2009, voters overwhelmingly approved Proposition 9, which created a constitutional amendment affirming the public’s right to access and use the state’s beaches.¹⁰⁹ Beach access advocates felt assured that Proposition 9 would prevent future legislation incongruous with TOBA.¹¹⁰

But the biggest blow to TOBA, in the form of the case *Severance v. Patterson*,¹¹¹ was yet to come. In April 2005, Carol Severance “purchased three rental homes on Galveston Island.”¹¹² Shortly after, “Hurricane Rita damaged [her] properties and moved the vegetation [line] further landward.”¹¹³ After discovering that Severance’s property was seaward of the vegetation line, and hence on a public strip of the beach, state officials offered her \$40,000 to remove her property so as to comply with the state’s use of a rolling easement¹¹⁴ in TOBA.¹¹⁵

106. *Beach Access*, *supra* note 7.

107. *Id.*

108. Rick Perry: Statement About HB 770 (June 19, 2009), <http://governor.state.tx.us/news/signature/12634/>.

109. Rob Nixon, Texas Constitution: Public Beach Easement Does Roll, WAITING FOR THE NEXT SWELL (May 24, 2011), <http://robnixon.blogspot.com/2011/05/texas-constitution-public-beach.html> [hereinafter Nixon].

110. *See Beach Access*, *supra* note 7.

111. 370 S.W.3d 705 (Tex. 2012).

112. Richard J. McLaughlin, *Rolling Easements as a Response to Sea Level Rise in Coastal Texas: Current Status of the Law After Severance v. Patterson*, 26 FLA. ST. U. J. LAND USE & ENVTL. L. 365, 377 (2011), available at http://www.law.fsu.edu/journals/landuse/vol26_2/mclaughlin.pdf [hereinafter McLaughlin].

113. *Id.*

114. *See* Forrest Wilder, *Beach Bummer: The Texas Supreme Court Guts the Open Beach Act*, THE TEXAS OBSERVER, Mar. 30, 2012, available at <http://www.texasobserver.org/forrestforthetrees/beach-bummer-the-texas-supreme-court-guts-the-open-beaches-act> [hereinafter Wilder] (explaining that “[t]he state, for decades,

Severance and several other littoral property owners rejected the offer and filed suit to prevent the state from removing the owners' property pursuant to TOBA.¹¹⁶

In her suit, Severance alleged that removal of her property would constitute a taking without just compensation in violation of the Fifth Amendment of the U.S. Constitution, "violation of substantive due process [under the Fourteenth Amendment] . . . and . . . an unreasonable seizure of her property [under the Fourth Amendment]."¹¹⁷ The Federal District Court dismissed her suit after finding that her constitutional claims were not ripe until the state actually removed her property.¹¹⁸ Severance appealed her Fourth and Fifth Amendment claims, and a Fifth Circuit panel affirmed the dismissal of the Fifth Amendment claim but held her Fourth Amendment claim to be ripe.¹¹⁹ The Fifth Circuit panel certified three questions to the Texas Supreme Court including, *inter alia*, whether Texas recognizes a rolling easement that allows public access and use of the beaches "without proof of prescription, dedication or customary rights," and if so, whether that public right is "derived from common law doctrines or from a construction of [T]OBA."¹²⁰

In November 2010, The Texas Supreme Court answered these certified questions holding "that because deeds dating from the Republic of Texas *in 1840* didn't explicitly mention a public right of access, no such right automatically exists."¹²¹ Furthermore, the court held that easements wiped out by an avulsive event, such as a hurricane, do not "'roll' upland," whereas an easement "destroyed by imperceptible erosion" does roll upland.¹²² Accordingly, when an easement is destroyed by an avulsive event, the state must prove an easement is "established by custom, dedication, or prescription in each individual case."¹²³ This decision was met with strong public outcry. The Texas

has enforced a 'rolling easement,' so that when erosion, sea-level rise or storms push the beach back, the strip of public beach moves too."). For further discussion of rolling easements, *see infra* Part IV.B.

115. McLaughlin, *supra* note 112, at 377-78.

116. *Id.* at 378 (internal quotation marks omitted).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 378-79.

121. Wilder, *supra* note 114 (emphasis in original).

122. Timothy Mulvaney, *Mulvaney Guest Blog on Severance's Latest Development: Mootness?*, LAND USE PROF BLOG (July 6, 2011), http://lawprofessors.typepad.com/land_use/2011/07/mulvaney-guest-blog-on-severances-latest-development-mootness.html [hereinafter Mulvaney].

123. *Id.*

Attorney General “excoriated” the decision saying that the court eliminated the public’s right of access and use of dry-sand without citing “a single case, rule, precedent, principle, empirical study, scientific review, or anything else.” The Attorney General, along with Jerry Patterson, the Texas Land Commissioner, and the defendant in the case, called for a rehearing.¹²⁴

Due to this pressure, the court granted a rehearing in 2011, and a decision was handed down on March 30, 2012.¹²⁵ In a 5-3 decision,¹²⁶ the Court reaffirmed its earlier decision, saying “the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners” and that a right of public enjoyment of the state’s beaches is “unsupported by historic jurisprudence” and “a limitation on private property rights.”¹²⁷ Jerry Patterson said that TOBA, at least in this area of Galveston, “is dead,” calling it “truly a sad day.”¹²⁸ Critics commented that although the court stated that the public easement rolls if the changes to a beach are gradual and imperceptible, the court ignored the “No. 1 truth of Texas’ coastal geology” that the “beaches are eroding rapidly,” particularly in light of rising sea levels caused by climate change.¹²⁹

This case represents a dramatic change in Texas’ law governing public beach access and use. In just two decisions, Texas went from a framework that was one of the most protective of the public’s right to access and use the state’s beaches, to one of the most restrictive, pro-littoral owners frameworks. Making the Texas court’s ruling even more remarkable is that just one year before the first *Severance* decision, Texans voted to entrench their right to access and use beaches in the state’s constitution.¹³⁰ Clearly, the will of the many was ignored to the benefit of a few. This illustrates that the one interpreting the rules can decide the outcome of the game. It remains to be seen if other states’ laws protecting public access are vulnerable to similar court challenges.

124. Wilder, *supra* note 114.

125. *Id.*

126. The 2010 decision was decided 6-2, so one Justice changed positions during the rehearing. *See* Mulvaney, *supra* note 122.

127. Wilder, *supra* note 114.

128. *Id.* (internal quotation marks omitted).

129. *Id.*

130. *See* Nixon, *supra* note 109 (“While we wait [for the court’s decision on the rehearing of *Severance v. Patterson*] it is important to remember that in November of 2009, Texas Voters overwhelmingly decided to enshrine their public beaches and access to those beaches within the Texas Constitution with the passage of Proposition 9.”).

D. Is the Public Winning the Fight for Beach Access?

Although there are gradations and a few prominent counterexamples, it might seem that, in general, the public is winning the battle with littoral property owners because most coastal states have some form of recognition of public access rights across private property.¹³¹ While theoretically true, in reality, these rights are rarely exercised.¹³² Not only are many oceanfront owners good at deceiving and deterring the public from crossing and using their private beaches, but much of the public is either oblivious to the fact that they have these rights, or are simply unconcerned with them.¹³³

Much of this can be attributed to inadequate infrastructure. For instance, “[m]ost states report having an insufficient number of public coastal access points, with some states averaging less than one access [point] for every ten miles of shoreline.”¹³⁴ Furthermore, where there is access, many states lack proper, or have poorly maintained, amenities such as signs denoting access, public restrooms and showers, trashcans, and parking spaces.¹³⁵ Accordingly, educating the public about their rights and lobbying for expanded funding to improve amenities have become important causes for interest groups that advocate for beach access.¹³⁶

While the law may generally support the public’s rights, external factors have swung the pendulum back in favor of coastal property owners.¹³⁷ Time will tell whether changes in the law and policy will alter the balance of power between the beach-going public and private upland owners.

E. The Need for Clarity in States’ Beach Access Laws

It is clear that public beach access rights vary widely from state to state.¹³⁸ While some states value highly public access rights, others are more sensitive to, and accommodating of, private property rights.¹³⁹ Because beach access varies so much from state to state, state

131. *See Beach Access, supra* note 7.

132. *See id.*

133. *See id.*

134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

legislatures and courts should do more to clarify their particular state's position so that littoral owners have knowledge of their rights vis-à-vis the general public's rights. As we have seen, some states are very forthcoming about their beach access laws, whereas others have not taken a clear position.¹⁴⁰ Not only does a state need to inform littoral property owners of if, when, and how the public may cross and use their land, but state legislatures and courts should also take a greater role in explaining why public beach access is an important right worthy of protection. Littoral owners have the right to know why their right of exclusion is treated differently than landlocked property owners and to understand the balance of policies and priorities the state has undertaken in reaching its decision.

IV. "LET ME DO WHAT I PLEASE"

Like other property owners, littoral property owners purchase their lots with certain hopes and expectations of what they can do with their property.¹⁴¹ While it is true that landlocked owners are subject to certain zoning ordinances and building codes, littoral owners encounter an additional set of challenges and laws when seeking to build on their coastal lots; as we have seen, things are just different and more complex when it comes to owning coastal property.¹⁴² Littoral property "is often wedged between a coastal highway and the mean high water mark, leaving little flexibility for locating structures on land."¹⁴³ Coastal development can obstruct access to views of the beach, jeopardize public trust rights, harm coastal ecosystems, and deplete resources.¹⁴⁴ Additionally, the regulations meant to abate these societal ills are always susceptible to takings claims.¹⁴⁵ Depending on the perspective, these regulations are usually seen as either red tape that unfairly restricts a beachfront owner's rights or important public protections. The following is an examination of some of these laws and the issues they have raised.

140. *See id.*

141. *See* BAUR, *supra* note 2, at 163.

142. *See id.* at 160.

143. *Id.*

144. *Id.*

145. *Id.*

A. Setbacks and Other Methods Used to Regulate Coastal Development

States use a variety of laws and procedures to protect coastal regions from overdevelopment.¹⁴⁶ Permits for “certain designated activities, or for all activities within a designated coastal region” are a popular methodology.¹⁴⁷ For example, the conflict in *Lucas v. South Carolina Coastal Council* stemmed from the permit the appellant littoral owners needed to obtain to build their new home, and South Carolina’s Beachfront Management Act which requires builders to obtain permits before developing new structures in certain areas, including erosion control devices like sea walls and bulkheads.¹⁴⁸ Like other states, over the years, South Carolina has amended this act to include more precise coastal regulation tools.¹⁴⁹

One such regulatory tool is the establishment of coastal setbacks. Setbacks are imaginary lines representing a distance from the water’s edge where coastal development can begin.¹⁵⁰ Not only do setbacks ensure that littoral owners do not build too close to the state-owned public trust lands, but they also limit the risks to structures from erosion and violent storms which cause high surf.¹⁵¹ Approximately half of coastal states have implemented setbacks lines “creating areas at the shoreline where development is prohibited or strictly regulated.”¹⁵²

Setbacks can be placed at a reference point such as the average high-tide line, the extreme high tide line, or the vegetation line, or at a simple numerical measurement such as one hundred feet.¹⁵³ However, the National Oceanic and Atmospheric Administration (NOAA) is critical of the latter, calling them “arbitrary setback line[s].”¹⁵⁴ NOAA claims that numerical setbacks, while easy to establish, do not always accurately reflect erosion rates.¹⁵⁵ For instance, a one hundred foot setback line “may not be adequate in a highly erosive area but may be too restrictive

146. *See id.*

147. *Id.* at 161.

148. *Id.*

149. *Id.*

150. *Construction Setbacks*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/initiatives/shoreline_ppr_setbacks.html (last visited Apr. 29, 2012) [hereinafter *Construction Setbacks*].

151. *Id.*

152. BAUR, *supra* note 2, at 163.

153. *Construction Setbacks*, *supra* note 150.

154. *Id.*

155. *Id.*

in a very stable environment.”¹⁵⁶ NOAA recommends establishing setbacks that are more closely linked with erosion rates.¹⁵⁷ Often setback lines are placed at thirty times the annual erosion rate with the hope that the structure will last long enough to pay off the typical thirty-year mortgage.¹⁵⁸ However, even these setback lines are not always adequate; they do not account for “catastrophic storm events” like Hurricane Katrina.¹⁵⁹ Basing setbacks on erosion rates can also be difficult and costly because determining the erosion rate requires the accumulation of a good deal of data, some of which is not readily available.¹⁶⁰ Because erosion rates vary with time, setback lines must be periodically examined and moved.¹⁶¹ For instance, “South Carolina updates their setback lines and erosion rate data every 8-10 years.”¹⁶² Furthermore, although setback lines based on erosion rates have “more scientific validity and receiv[e] deference in judicial proceedings,” these complex formulations often confuse littoral owners, “who can more readily understand the impact of a fixed setback distance in conceiving their expectations of uses of the land.”¹⁶³

Some states have taken more indirect paths to limit coastal development. For instance, Massachusetts has refused to pay for coastal infrastructure damaged by storms, erosion, and other natural events.¹⁶⁴ The rationale is that if citizens know that the state will not repair roads, sewer lines, and beach barriers for them, they will be dissuaded from coastal development, thereby shifting costs to littoral owners.¹⁶⁵ Alternatively, states can impose higher costs on littoral owners for repairs of damaged infrastructure or assess additional taxes to fund anticipated damage.¹⁶⁶ However, these strategies are not without their risks as states can and have been ensnared in landowner lawsuits alleging that erosion was “caused by inadequate construction or maintenance of projects.”¹⁶⁷

156. *Id.*

157. *See id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. BAUR, *supra* note 2, at 163.

164. *Id.* at 161-62.

165. *Id.*

166. *Id.* at 162.

167. *Id.*

B. Sea Level Rise and Rolling Easements

Climate change has led to rising sea levels along nearly the entire coastline of the United States, “and the rate of that rise is expected to accelerate in the coming decades.”¹⁶⁸ Rising sea levels present a myriad of risks including greater beach erosion, coastal flooding, and saltwater intrusion into aquifers.¹⁶⁹ According to the United States Environmental Protection Agency (EPA), there are three basic responses to sea level rise: (1) shore protection, including beach renourishment projects and construction of seawalls and bulkheads; (2) accommodation through “coping strategies,” such as placing buildings on pilings; and (3) retreat, where people gradually move further inland as the sea level rises.¹⁷⁰ Of the three options, the EPA suggests that retreat is best in the long run.¹⁷¹ In terms of accommodation, only so much can be done, and the option becomes no longer sustainable.¹⁷² Although shoreline protection is a viable option for stopping the water, it carries a bevy of negative repercussions and risks because it would “eventually eliminate tidal wetlands, destroy ocean habitat through dredging, expose millions of people to the hazards of living below sea level, and become economically unsustainable in many areas where it initially seemed successful.”¹⁷³

Accordingly, some areas have accepted retreat through the form of rolling easements. With rolling easements, littoral owners cannot stop the ocean from coming in through shore protection measures, but all other types of public and private use are allowed.¹⁷⁴ As the water moves further inland, the easement “automatically moves or ‘rolls’ landward,” allowing wetlands and other tidal habitats to “migrate naturally” without disturbing the natural disposition of sediments.¹⁷⁵ The advantage of rolling easements is that “[u]nlike setbacks, which prohibit development,” rolling easements place no constraints on the littoral

168. JAMES G. TITUS, *ROLLING EASEMENTS 1* (Climate Ready Estuaries 2011), <http://www.epa.gov/cre/downloads/rollingeasementsprimer.pdf> (last visited Feb. 10, 2013).

169. *Id.*

170. *Id.*

171. *See id.* at 130-32.

172. *Id.* at 1.

173. *Id.* at 1, 4.

174. *Erosion Control Easements*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coastalmanagement.noaa.gov/initiatives/shoreline_ppr_easements.html (last visited Apr. 29, 2012) [hereinafter *Erosion Control Easements*].

175. *Id.*

owner (other than prohibiting shore protection); in essence, littoral owners can

build anywhere on their property with the understanding that they will not be able to prevent shoreline erosion by armoring the shore, or the public from walking along the shore—no matter how close the shoreline gets to their structure. If erosion threatens the structure, the owner will have to relocate the building or allow it to succumb to the encroaching sea. . . . [E]ventually, as the shore continues to erode, the structure that was once on private property, will be sitting on public land. At this point, the private owner could decide to relocate the structure inland. Alternately, the property owner could allow the structure to remain until it becomes unsafe and pay rent to the state for use of public land.¹⁷⁶

Therefore, with rolling easements the beachfront owner has greater latitude to determine how and when to confront the problem of sea level rise: “[l]andowners are not prevented from using their property; they simply are prevented from protecting it when doing so eliminates tidelands.”¹⁷⁷ This allows the state to retain sovereignty of public trust lands while giving the littoral owner the feeling invoked by private property rights. Consequently, the state becomes less vulnerable to takings claims.¹⁷⁸

C. *An Overview of Coastal Regulations and Takings Claims*

The United States Supreme Court has identified two prototypical types of takings scenarios: (1) the government’s “permanent physical invasion” or confiscation of property, and (2) a regulation that “goes too far” in limiting what the owner may do with his or her property.¹⁷⁹ While “it is generally incontrovertible that there has been a taking of private property requiring compensation” with the former, the latter requires much more thought and analysis.¹⁸⁰ More contemporary Supreme Court cases have focused on the “economic impact of the regulation on the

176. *Id.*

177. James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1390 (1998), available at <http://www.epa.gov/climatechange/effects/downloads/takings.pdf> [hereinafter Titus, *Rising Seas*].

178. *Id.*

179. BAUR, *supra* note 2, at 165.

180. *Id.*

property owner and the degree to which the owner's distinct investment-backed expectations have been frustrated," finding that "when the landowner has lost all economically beneficial use of the property, generally a taking has occurred."¹⁸¹

For example, in *Lucas v. South Carolina Coastal Council*,¹⁸² a coastal developer sought to build residential homes on a barrier island off the coast of South Carolina.¹⁸³ When he applied for a permit, he was denied by the Coastal Council because his proposal violated the state's Beachfront Management Act's mandatory setback lines.¹⁸⁴ As a result of the denial, Lucas was "effectively prohibit[ed] from building any structures on the property."¹⁸⁵ Lucas challenged the denial of his permit, but the South Carolina Supreme Court rejected his claim of a regulatory taking, reasoning that the statute "sought to prevent serious public harm that results from unwise beachfront development."¹⁸⁶ However, the Supreme Court of the United States did find that the setback could constitute a taking because it "deprived the land of all its economic viability," and the state eventually purchased the property from Lucas.¹⁸⁷

Even more difficult for the Supreme Court to adjudicate are the cases, like *Nollan*, "that fall in between a physical invasion and a total loss of property value."¹⁸⁸ For these, the Court has to undertake case-by-case inquiries that include "factors such as character of the governmental action and economic impact of the regulation to determine a taking of property."¹⁸⁹ In *Palazzolo v. Rhode Island*,¹⁹⁰ the Court tackled the issue of whether a landowner is precluded from bringing a takings claim when the regulation at issue predates the owner's acquisition of the property.¹⁹¹ In the case, the littoral owner sought to fill coastal wetlands in order to develop his property, but a state statute prevented him from doing so.¹⁹² The Court rejected the state's argument that Palazzolo lacked standing because he acquired title to the property after the statute's enactment, stating that they were not willing "to put an expiration date on the

181. *Id.*

182. 505 U.S. 1003 (1992).

183. BAUR, *supra* note 2, at 165.

184. *Id.*

185. *Id.*

186. *Id.* at 46.

187. *Id.* at 165.

188. *Id.*

189. *Id.*

190. 533 U.S. 606 (2001).

191. BAUR, *supra* note 2, at 165.

192. *Id.*

Takings Clause.”¹⁹³ However, the Court held that the regulation did not amount to a total taking because Palazzolo could develop a small portion of his property that was upland of the salt marsh, which would have been worth roughly \$200,000 if developed.¹⁹⁴ But critics argue that the results of the cases in this gray area of takings jurisprudence are so perplexing, inconsistent, and arbitrary that neither littoral owners nor the state can act with confidence that their actions are or are not allowed by law.¹⁹⁵

Lucas exemplifies that setbacks are quite susceptible to takings claims. If the setback makes property unbuildable, a littoral owner likely has a valid takings claim.¹⁹⁶ An issue is also presented if the state creates a setback that is landward of an existing structure.¹⁹⁷ While the structure is usually “grandfathered in” and allowed to remain, it typically must comply with the new setback if the structure is damaged and in need of being rebuilt.¹⁹⁸ NOAA advises that setbacks “should clearly stipulate when (or if) it would be allowable for a building damaged or destroyed by a storm or chronic erosion to be rebuilt” and points to Maine’s rule as a good example: if the repairs will cost more than half of the existing structure’s value, it must comply with the setback.¹⁹⁹ NOAA suggests that one way to avoid takings claims is to “ensure [that] waterfront lots are sufficiently deep to allow for relocation as the shore retreats.”²⁰⁰ In addition, NOAA asserts that states should create clear rules on whether and how setbacks move as the beach receives alluvion through natural and artificial accretion.²⁰¹ As an example, NOAA points to New Jersey’s rule that denies a setback waiver for an accreting beach unless the applicant “can show the accreted beach offers sufficient increased protection from erosion.”²⁰²

In theory, perhaps the best way to avoid takings claims with setbacks is to not use them and to instead utilize rolling easements.²⁰³ Because rolling easements only prevent littoral owners from buttressing the shore, owners “do not suffer large economic deprivations, and the many decades that will pass before the property is lost imply a small present

193. *Palazzolo*, 533 U.S. at 608-09..

194. BAUR, *supra* note 2, at 46-47.

195. *See id.* at 166.

196. *Construction Setbacks*, *supra* note 150.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

discounted value for whatever future loss one expects.”²⁰⁴ Rolling easements usually only reduce property values by less than one percent.²⁰⁵ Therefore, “the government could acquire rolling easements through eminent domain for less than one percent of current land values.”²⁰⁶ However, NOAA states that rolling easements are most effective when used in conjunction with setbacks and other restrictions,²⁰⁷ so while rolling easements are an extremely effective and low-risk coastal regulation tool, they are not a panacea for the problem of coastal overdevelopment.

*D. Does the “Winner” of this Battle Depend on
One’s Definition of “Winning?”*

Declaring a winner between private beachfront owners and the state in development of coastal zones is not an easy task. While unchallenged, the state can regulate littoral owners to the point that they can build little more than sand castles on their property. However, takings claims have provided littoral owners with ample recourse when the regulations are completely burdensome and unfair. When the regulations are less severe, but still quite restrictive, court decisions are precarious and inconsistent. So, whom do we declare the victor: the state that can push the edge of reasonableness or the littoral owner who can help define the edge of reasonableness through litigation?

Results can vary from one type of regulation to another. If winning is defined as being in control, the state wins with setbacks because it decides where coastal development begins and ends. Then again, courts can pull the states back if they overreach. With rolling easements, the littoral owner gets to do what he or she wants with the property, but when the water comes rushing in, the littoral owner has few options—move or let the property be swept away so that in the end, the state gets what it wants anyway.

However, by formulating fair, reasoned, and clear coastal development policies, the state can create an environment more conducive to win-win scenarios for the general public and littoral owners.

204. Titus, *Rising Seas*, *supra* note 177 at 1390.

205. *Erosion Control Easements*, *supra* note 174.

206. Titus, *Rising Seas*, *supra* note 177 at 1390.

207. *Erosion Control Easements*, *supra* note 174.

E. Recommendations for Improved Coastal Development Regulations

By heeding some of NOAA's criticisms and advice and taking other logical steps forward, states can create more effective and clear coastal regulations that foster consensus among the public and beachfront owners and leave everyone more informed.

When devising setbacks, states should rely on science-based erosion rates rather than choosing arbitrary distances from the water's edge. However, states should also translate and explain this scientific information in a comprehensible manner for littoral owners so that they can better understand the possible uses of their property. Because this data can be difficult and expensive to obtain, states should act now to ensure that their coastal agencies maintain good, readily accessible records of the state's entire coastline, so that a solid foundation of available information is built for future use. This data should be frequently collected so that the records can be constantly updated with only minimal changes necessary, as opposed to needing to note drastic changes because large amounts of time have passed between collections.

Additionally, states should ensure that oceanfront lots are sufficiently deep to allow for relocation as water moves in, and they should take catastrophic events like hurricanes and tidal waves into account when formulating distances where it is safe for development to begin. Like Maine and New Jersey, states also need to clearly delineate policies regarding (1) whether existing structures seaward of later-established setbacks can be rebuilt if damaged, and (2) whether setbacks move after the beach accretes.

Finally, states that have not already done so should adopt the use of rolling easements. While other coastal regulations and procedures will continue to be needed to address various coastal development issues, rolling easements are essential tools in mitigating many of these concerns. As sea levels continue to rise and the public's desire to visit beaches increases, preserving natural shorelines will continue to be a major state interest. Rolling easements provide the easiest, lowest-risk, and most accommodating way to meet these goals.

V. CONCLUSION

People fortunate enough to own oceanfront property encounter a unique set of issues that landlocked property owners do not. Their rights and desires at times conflict with laws and policies that seek to protect the public's right to enjoy coastal zones, and if they cannot be reconciled, then one right must be prioritized over the other.

Although property owners have the right to receive additional land created by artificial accretions and relictions, we have seen the highest court in the land declare that, fair or not, owners do not continue to have these rights after the state undertakes a project to restore beaches for the public's benefit. However, *Stop the Beach Renourishment* was an extraordinary case, and although some changes in the law may be helpful, the state and littoral owners have generally forged a compromise that benefits everyone.

Public access laws vary greatly from state to state. Some states have created or interpreted laws in favor of public access and use over private littoral property, while others have not. Furthermore, courts have used a variety of common law doctrines and statutes in making their determinations. While it may seem that the public has the upper hand in this battle, the reality is that few people exercise their public access and use rights because they are not aware they have them, and there are insufficient amenities conducive to creating a pleasurable experience at the beach. States should take a proactive role in defining their respective public access laws and explaining to littoral owners why the public needs to be able to cross their land.

States have regulated coastal development in a variety of ways. However, they should address several details before implementing setbacks so that they can obviate many littoral owners' frustrations and, consequently, possibly avoid takings claims. Rolling easements will become an increasingly important tool as sea levels continue to rise with climate change and the public's desire to flock to the nation's beaches grows even stronger. Not only do rolling easements provide littoral owners with greater options for use of their lands, but they help to create a regulatory environment where everyone gets to enjoy coastal zones in their own way. Accordingly, everyone wins.