Where’s the Beach? Coastal Access in the Age of Rising Tides

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WHERE’S THE BEACH?

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Celeste Pagano*

As the dynamic and shifting strips of real estate we call beaches have for centuries raised tensions between public and private ownership and use, a variety of common law doctrines have evolved to manage those tensions. Legal scholars have championed one less-developed doctrine, rolling easements, as the solution to preserving beach access in the face of accelerating shoreline movements expected due to climate change. Stated simply, rolling easements allow for the public’s right to access a beach, once established under any of a variety of common law means, to migrate or “roll” with the movement of the beach itself.

Until recently, rolling easements were presumed by many to be the law of the State of Texas. Recently, the Texas Supreme Court decided this was not the case. After a five-year legal battle, the court held in Severance v. Patterson that beach access easements do not “roll” when there are sudden shifts in the shape of a shoreline. In doing so, the court upended decades of Texas precedent and signaled the beginning of the end of public access to many previously free and open beaches. The court’s reasoning rested largely on the application of the doctrine of avulsion, a centuries-old rule that is often recited but, in reality, so seldom applied to take away coastal access rights from the public that it is does not accurately reflect any “rule” at work in most of our coastal states. Instead, most of the very few American courts addressing sudden losses of land along coastlines have found ways to preserve public beach access once it exists. This accords with the multivalent values inherent in beachfront land, and with the

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particular weakness of the expectation interest in physically-shifting real estate. It is therefore my contention that the court in Severance incorrectly applied a doctrine that has always had an uneasy place in property law and ill serves the contemporary reality of beaches that are retreating due to sea level rise.

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I. INTRODUCTION

Beaches are by nature dynamic, shifting seaward and landward, growing in some places and shrinking in others. All irregularities of coastlines have formed through the work of thousands of years of geological processes.¹ Some of these processes originate on land—river channels and glacier scour have carved out bays; river sediment has laid the

foundation of deltas—and others are the work of the sea, caused by rising waters flooding inland valleys or by powerful wave energy carving cliffs and moving sand.\(^2\) Sea level rise has flooded valleys, cutting off headlands and turning them into islands.\(^3\) Wave action along the coast has moved sand, forming and destroying sandy beaches.\(^4\) Barrier islands, the site of much prime beachfront real estate along the Atlantic and Gulf Coasts, were formed and re-formed as the seaward side of flooded valleys succumbed to the power of the waves and “moved apace toward the retreating mainland” in a process called “island migration.”\(^5\) Those barrier islands are still moving, and our beaches are still evolving.\(^6\)

Shorelines are also typically the locus of tensions between questions of private ownership and public access to and protection of shorelines.\(^7\) Various common law doctrines have evolved to manage these tensions.\(^8\) One such doctrine, championed by legal scholars as the solution to preserving beach access as landscapes change, is rolling easements.\(^9\) Stated simply, rolling easements allow for the public’s right to access a beach, once established, to migrate or “roll” with the movement of the beach itself.\(^10\)

Until recently, rolling easements were presumed by many to be the law of the State of Texas.\(^11\) In the latest installment of *Severance v. Patterson*, a property-rights lawsuit that spent five years in federal and Texas courts, the Texas Supreme Court recently decided otherwise.\(^12\) In declining to find that Texas beach easements roll with changes to shorelines, the court upended decades of Texas precedent and signaled the beginning of the end of public

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2. *See id.* Sea level rise, in a period starting eighteen thousand years ago and continuing until four or five thousand years ago, made possible all of the coastal features described. *Id.* at 13.
5. *Id.* at 15-16.
10. *See Ratliff, supra* note 8, at 1006, 1010.
11. *See infra Part III.B.
access to many of Texas’s previously free and open beaches.\textsuperscript{13} The court’s reasoning rested on the application of the doctrine of avulsion, a doctrine often recited but so seldom applied to take coastal access from the public that its use in this way does not truly reflect any rule at work in our coastal states.\textsuperscript{14} It is therefore my contention that the Texas Supreme Court’s decision in \textit{Severance} incorrectly applied a doctrine that has always had an uneasy place in American property law and ill serves the contemporary reality of beaches that are retreating due to sea level rise.

Plaintiff Carol Severance, with the backing of the Pacific Legal Foundation, originally filed her complaint in a federal district court to challenge the Texas law of rolling easements.\textsuperscript{15} The district court dismissed her claims as unripe.\textsuperscript{16} The Fifth Circuit Court of Appeals disagreed, and certified to the Texas Supreme Court the question of whether or not rolling easements were, indeed, the law of Texas, despite numerous Texas appellate court decisions to the affirmative.\textsuperscript{17} More than a year and a half after hearing arguments, the Texas Supreme Court finally in November 2010 decided that rolling easements were \textit{not} the law—only to grant a rehearing four months later.\textsuperscript{18} After oral arguments were reheard, the landowner in \textit{Severance} sold her property, prompting the state to argue that the entire case had been rendered moot and that the original opinion should therefore be vacated.\textsuperscript{19} The Texas Supreme Court, perhaps seeing an opportunity to wash its hands of the matter, determined that the question of mootness was for the Fifth Circuit to decide and abated its original opinion pending a decision on that point from the Fifth Circuit.\textsuperscript{20} The Fifth Circuit, in turn, found the claim not moot and sent the question back to Texas,\textsuperscript{21} which in March 2012 issued its final opinion, substituting it for the November 2010 opinion that had come to the same result: Texas common law does not support the rolling easement.\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{13} Id. at 706.
  \item \textsuperscript{14} See infra notes 217–286 and accompanying text.
  \item \textsuperscript{15} Severance v. Patterson 485 F.Supp.2d 793, 796 (S.D. Tex. 2007), aff’d in part, question certified, 566 F.3d 490 (5th Cir. 2009), certified question answered, 345 S.W.3d 18 (Tex. 2010), withdrawn, superseded, and certified question answered by, 370 S.W.3d 705 (Tex. 2012).
  \item \textsuperscript{16} See id. at 805.
  \item \textsuperscript{17} See Severance v. Patterson, 566 F.3d 490, 500-04 (5th Cir. 2009), certified question answered, 345 S.W.3d 18 (Tex. 2010), withdrawn, superseded, and certified question answered by 370 S.W.3d 705 (Tex. 2012).
  \item \textsuperscript{18} Severance v. Patterson, 370 S.W.3d 705, 712 (Tex. 2012).
  \item \textsuperscript{19} See id. at 707.
  \item \textsuperscript{20} See Severance v. Patterson, 345 S.W.3d 18 (Tex. 2010), withdrawn, superseded, and certified question answered by, 370 S.W.3d 705 (Tex. 2012).
  \item \textsuperscript{21} Severance, 370 S.W.3d at 712.
  \item \textsuperscript{22} See id. at 712, 732.
\end{itemize}
Beneath the procedural merry-go-round of the *Severance* case lay a key dispute between some of the fiercest advocates for individual property rights, on the one hand, and advocates for the protection of oceans and beach access on the other. The parties recognized that the disputes exemplified in *Severance* and in the similar case of *Brannan v. Texas* will have profound effects on the existence of publicly-accessible beaches not just in Texas but in other states whose courts have yet to directly address the issue of rolling easements.

Though the Texas court ultimately addressed the problem with the common law doctrine of avulsion, those contested and shifting strips of property between the uplands and the sea also deserve a deeper analysis from the perspective of recent property law scholarship examining multiple values inherent in land. The common law doctrines of public trust, erosion, accretion, and avulsion have evolved to mediate questions of private ownership rights to the shore, while the doctrines of custom, dedication, and prescription have in some places provided for public access even on privately-owned portions of the land.

This article argues that an expansive view of the doctrines providing for public beach access, including rolling easements, is the most appropriate resolution to the tension between public and private interests in coastlines, particularly as climate change is expected to hasten the erosion of the beaches at issue. Texas’s example, therefore, should not be followed.

Looking to recent property law scholarship addressing ways in which property law does in fact protect a variety of normative values inherent in land beyond the economic interests represented in market value, this paper expands the analysis with respect to beach property in particular. It examines the values and interests inherent in beach property, concluding that the common law has correctly developed, and should continue to develop, in ways that protect public access to those beaches where the

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24. The Surfrider Foundation, which submitted an amicus brief in *Severance* and other Texas rolling easement cases, see *Severance*, 370 S.W.3d at 707 n.1, describes itself as “heavily committed to fighting for public beach access for all persons to enjoy the beautiful sandy beaches of the Texas Gulf coast.” *Texas Open Beaches Act*, SURFRIDER FOUND., http://www.surfrider.org/campaigns/entry/texas-open-beaches-act (last visited Oct. 23, 2012).


26. See infra Part II.B.

27. See infra Part IV.B.
wider community has come to expect and rely on access, even as those beaches migrate inland.

II. BACKGROUND

A. The Complexity of Beaches

Land is inherently complex, both because of its unique physical characteristics and because of the ways in which humans interact with it.\(^2\) This is certainly true of beaches.\(^3\) Physically, there is perhaps no surface on earth more complex than a beach. Beaches, the point of intersection between water and land, are by definition dynamic, constantly evolving, shifting seaward and landward, growing in some places and shrinking in others, with inlets breaking open and filling in.\(^4\) Currently, we are in a period when beaches are on average shrinking more than growing, moving inland more than seaward.\(^5\) Part of this beach loss is due to natural shifts in tidal patterns, some is due to subsidence of land on the mid-Atlantic and Gulf Coasts,\(^6\) and some is due to sea level rise associated with climate change.\(^7\) Beaches also serve a complex role in both land and water ecosystems.\(^8\) The health of a coastal area in turn affects the health of both the water and land environments it borders:\(^9\) coastal vegetation filters

\(^2\) Eduardo M. Peñalver, Land Virtues, 94 Cornell L. Rev. 821, 828-29 (2009). Land’s complexity is one of the foundational points of Peñalver’s virtue ethics-based analysis of property law. Id. at 822.

\(^3\) PILKEY & DIXON, supra note 1, at 20 (noting the dynamic nature of the beach environment).


\(^5\) See Peloso & Caldwell, supra note 7, at 53-54.


\(^8\) See PILKEY & DIXON, supra note 1, at 20, 23.

pollutants and debris that would otherwise enter the water,\(^{36}\) and coastal dunes soften the blow of storms that would otherwise cause seawater to flood lands.\(^{37}\) Socially, coastlines also serve a varied set of roles in societies.\(^{38}\) People are naturally drawn to large bodies of water.\(^{39}\) Land that fronts water attracts recreational users and is prized for use as homes, hotels, and restaurants.\(^{40}\) Waterways have also served as channels of commerce and as the site for people to make their livelihoods in industries such as fishing and crabbing.\(^{41}\) The beach itself can have a deep social value as a place of communal recreation, public gathering, and access to nature.\(^{42}\) A publicly-accessible beach can also serve to drive tourism that underlies the economic health of a community.\(^{43}\)

The complexity of beach property gives rise to a complex set of physical, social, and legal tensions. People have long been at physical
tension with the dynamic nature of the beach itself,\textsuperscript{44} seeking to fix it in place with groins and jetties; to dredge its inlets for deeper or more permanent channels for their boats; to protect their properties from the encroaching sea with walls, bulwarks, riprap, and other armoring techniques; to widen inviting stretches of sand with renourishment projects that pump in millions of tons of new sand.\textsuperscript{45} Quite often, these results of these efforts are disastrous.\textsuperscript{46} Human intervention often destroys beaches;\textsuperscript{47} in extreme cases, intervention can cause the disappearance of the very communities it is intended to save.\textsuperscript{48}

Existing beaches are also the locus of tension between conflicting groups of users. Land ownership can always give rise to tensions between people: nearly every landowner has one or more neighbors, and one’s use of the land necessarily affects others in a way that use of other property may not.\textsuperscript{49} At the shoreline, neighbor-to-neighbor tensions can arise between individual, private entities or entire communities.\textsuperscript{50} For example, a town might build a jetty that captures sand which would otherwise have sustained the beach belonging to downdrift neighbors—instead, one community’s beach grows while its neighbors’ beaches disappear, spurring conflict.\textsuperscript{51}

In addition to potential tensions between neighbors side-by-side along the shore, coastlines generate tensions between the property rights of private, upland landowners and the state, as guardian of the public’s rights to use the waters or the beach itself (whatever those rights may be).\textsuperscript{52} This tension often arises when the public has been using what it views as a public beach until a landowner steps up and asserts a right to exclude.\textsuperscript{53} As coastal properties have become more desirable, valuable, and crowded, those upland owners might include residents, the owners of hotels and

\textsuperscript{44} See Ratliff, supra note 8, at 1001.

\textsuperscript{45} See, e.g., id.; Pilkey & Dixon, supra note 1, at 51-53.

\textsuperscript{46} Allen v. Strough, 752 N.Y.S.2d 339, 342 (App. Div. 2002) (“[T]here is a significant body of scientific opinion which holds, essentially, that the use of hard structures to retard the process of erosion in one coastal location will merely exacerbate that process elsewhere.”). See also Pilkey & Dixon, supra note 1, at 51-53.

\textsuperscript{47} Dean, supra note 3, at 63-68.

\textsuperscript{48} Id. at 69-71 (describing the development of the City of Bay Ocean Park, in Oregon, and its subsequent disappearance after the construction of an ill-conceived jetty).


\textsuperscript{50} See, e.g., Pilkey & Dixon, supra note 1, at 47.

\textsuperscript{51} See id. at 175, photo 8-1 (showing neighboring coastal communities and the effects they may have on each other).

\textsuperscript{52} See, e.g., Peloso & Caldwell, supra note 7, at 109-19 app. A.

\textsuperscript{53} See e.g., Dean, supra note 3, at 210-11 (describing a conflict between private owners and the public regarding a stretch of beach in Martha’s Vineyard).
restaurants, people seeking vacation homes, or those who invest in homes to use as beach rentals.\textsuperscript{54}

\textbf{B. Existing Common Law Rights to Beach Access}

As the common law affecting beach access has developed to manage coastal complexity, the law has recognized the multivalent interests associated with beach land.\textsuperscript{55} The law’s efforts to resolve tensions around questions of ownership and access along shorelines go back at least as far as the codification of the public trust doctrine in the sixth century Codes of Justinian.\textsuperscript{56} The various doctrines that have evolved to manage this tension in the United States have always struck an uneasy balance, developing differently in different states and finding their contours challenged in litigation.\textsuperscript{57} Due to the oncoming wave of climate change, those same doctrines may need to adjust to rapid changes to the physical contours of the landscape.\textsuperscript{58} Like the sands that comprise the beach, legal doctrines often adapt to surrounding conditions and norms.\textsuperscript{59} As today’s courts face the challenge of managing competing legal rights to the beaches even as the physical environment changes, they have a significant body of law behind them.

1. Public Access Through the Public Trust Doctrine

Foremost among the doctrines protecting public access to the shore is the public trust doctrine.\textsuperscript{60} Under the ancient public trust doctrine, as adopted through English Common Law and adapted in the United States, the state holds shores and tidelands in trust for the public.\textsuperscript{61} Because of the trust, the state cannot convey its interest in tidal lands so as to impair the

\begin{footnotesize}
54. \textit{See, e.g.}, Sax, \textit{supra} note 40, at 535-36.
58. \textit{See} Williams et al, \textit{supra} note 32, at 11-12 (noting that coastal zones are particularly susceptible to climate change).
60. \textit{See} Sax, \textit{supra} note 40, at 474.
61. \textit{See id.} at 475.
\end{footnotesize}
right of the public to use the waters.62 The public trust doctrine originally protected the public’s right to use the waters to engage in a limited set of activities, typically fishing and navigation.63 Over time, states have expanded their public trust doctrines to protect an array of activities.64 These vary state-to-state, but sometimes include “bathing,” “recreation,” “passage,” “swimming,” “environmental protection,” and “other public purposes.”65 The boundary of public trust land also varies.66 In a majority of coastal states,67 the line between the public trust land and any privately-owned littoral land is the mean high tide or mean high water line, typically calculated as the land reached by water at the average of all the twice-daily high tides that occur over an 18.6 year lunar cycle.68 Louisiana and those parts of Texas conveyed under civil law Spanish land grants use slightly higher lines derived from civil law.69 Thus, the public trust doctrine in a majority of states effectively leaves to the states, in trust for the public, the so-called “wet sand,” the area between the low and high tides.70 A minority of states, all of them on the east coast, follow a low-tide rule.71 This rule limits the reach of the public trust to the line of the mean low tide line,72 which allows littoral owners to own the wet sand and leaves only the submerged shallows to the public trust.73

New Jersey alone applies the public trust doctrine to so-called “dry beach” above the high tide line, protecting a broad right to public beach...
access through an expansive view of the public trust.\footnote{74}{Timothy M. Mulvaney & Brian Weeks, “Waterlocked”: Public Access to New Jersey’s Coastline, 34 ECOLOGY L.Q. 579, 588 (2007). Hawaii and Oregon also recognize common law rights to the entire beach, but through the doctrine of custom. \textit{Id.} at 618 n.129; see infra notes 114–125 and accompanying text.} In the landmark cases of \textit{Matthews v. Bay Head Improvement Ass’n\footnote{75}{471 A.2d 355 (N.J. 1984).}} and \textit{Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.
\footnote{76}{879 A.2d 112 (N.J. 2005).}} the New Jersey Supreme court held that the public trust includes the right to traverse quasi-private beach property if reasonably necessary for access to the public trust lands at the foreshore.\footnote{77}{See \textit{Matthews}, 471 A.2d at 365-66; \textit{Raleigh Ave. Beach}, 879 A.2d at 121.} This expands the public trust further than in any other state, giving the public the right to cross from the nearest road or path to the water’s edge—perpendicular access—as well as lateral access along the wet sand.\footnote{78}{See \textit{Raleigh Ave. Beach}, 879 A.2d at 120-21.} \textit{Raleigh Avenue} further confirmed that a beach owned by a private club had to allow such access to all, and could charge fees only for the actual cost of beach services provided.\footnote{79}{\textit{Id.} at 113.}

The boundaries of mean high tide and mean low tide lines, fixed as they are in centuries of common law, are anything but fixed on the ground. Tides, currents, and storms constantly reshape the borders between land and sea as sand is added or removed.\footnote{80}{See Coasts in Crisis, Coastal Change, U.S. GEOLOGICAL SURVEY, http://pubs.usgs.gov/circ/c1075/change.html (last updated Aug. 4, 2008) [hereinafter Coastal Change].} In addition, sea level rise due both to land subsidence and to global warming is causing more shorelines to recede.\footnote{81}{\textit{Id.}} Where the tidelands are flat and slope only gradually to land, even a small vertical change in water level can move the horizontal tide lines inland by miles.\footnote{82}{Higgins, supra note 33, at 49.} A single strong storm can remove enough sand to shift the coastline radically: Hurricane Ike in 2008 caused the Galveston shore to retreat an average of 136 feet overnight.\footnote{83}{Letter from John Keecll, State Auditor, to Members of the Legislative and Audit Comm., \textit{A Review of Expenditures Related to Hurricane Ike at the General Land Office} (April 22, 2009), available at http://www.sao.state.tx.us/reports/main/09-033.pdf.} In contrast, where the sea meets the land in rocky cliffs like those along the Pacific Coasts instead of along gradual sloping beaches, losses to coastline are more infrequent.\footnote{84}{See Coastal Change, supra note 80.} But
when such losses occur they can be abrupt and dramatic, as sections of land calve off the cliffs and fall to the sea.\textsuperscript{85}

2. Resolving Ownership Boundaries: Erosion, Accretion, and Avulsion

The common law addresses the questions of ownership of the coastline through the doctrines of erosion, accretion, and avulsion.\textsuperscript{86} The first two apply a simple and intuitive adaptive strategy: when the boundary between land and water shifts gradually, the property line shifts too.\textsuperscript{87} The terms refer to distinct natural phenomena: erosion is the gradual loss of land due to natural forces; accretion is the gradual gain of land by sediments or deposits.\textsuperscript{88} Under erosion and accretion, if land is lost or gained “gradually and imperceptibly” the boundary between the public trust land and privately-held upland moves along with it.\textsuperscript{89} Thus, the ownership lines shift with the dynamic motions of the natural boundaries.\textsuperscript{90} In contrast, the doctrine of avulsion prescribes that if a sudden event—a beach restoration project pumping in tons of new sand, or a storm sweeping sand away—causes a perceptible gain or loss, then the event is termed “avulsion,” and the property line does not move.\textsuperscript{91}

The justifications for the erosion and accretion doctrines are both practical and just. First, and most practically, allowing the property line between neighbors to shift prevents the need for re-surveying the land with each small change in the line of a bank or shore.\textsuperscript{92} The second is fairness based, in that waterfront lands can be expected to shift, and a property owner bears both the risk of loss and the prospect of gain in land.\textsuperscript{93}


\textsuperscript{86} See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2598 (2010).


\textsuperscript{88} See id. A third doctrine of gradual adaptation, reliction, applies only to river environments: Reliction is the gain of land when a river contracts its banks or changes course gradually. See id. Like erosion and accretion, reliction causes property boundaries to shift. See id.


\textsuperscript{90} Id. at 728-729 (noting that the area of the land, which was completely submerged due to gradual erosion, reverted to the State and could later be sold).

\textsuperscript{91} See Stop the Beach Renourishment, 130 S. Ct. at 2611.

\textsuperscript{92} See JAMES G. TITUS, ENVTL. PROT. AGENCY, ROLLING EASEMENTS 92 (2011).

\textsuperscript{93} See id. at 135.
Avulsion is said to be different because sudden events cannot be anticipated by the property owners.\(^94\) Therefore, when land is lost or gained suddenly, the property line between neighbors does not change.\(^95\) Under the traditional doctrine of avulsion, when an extreme weather event or flood leaves a lasting change in the course of a river, all of the property owners along the river own precisely the land they did before, whether or not it still fronts the water, or is perhaps partly under water (in which case, it may be subject to the public trust).\(^96\) Likewise, when the boundary between the land and the sea moves suddenly, the property line between the owner and the state does not change.\(^97\)

The doctrine of avulsion is a long-standing formula of common law, repeated many times in hornbooks and opinions and most recently applied by the U.S. Supreme Court in *Stop the Beach Renourishment v. Florida Department of Environmental Protection.*\(^98\) That case exemplifies the type of avulsion involving additions to land. In 2003, the State of Florida approved permits for two cities to renourish 6.9 miles of beach by adding about seventy-five feet of dry sand seaward of the mean high-water line.\(^99\) Under Florida’s Beach and Shore Preservation Act,\(^100\) the renourishment project would set the previous mean-high water line, designated the “erosion control line,” as the boundary between the beach and the littoral landowners’ property.\(^101\) As a result, the littoral properties would no longer be in contact with the water, and their owners would lose the right to exclude others from accessing the dry sand beach in front of their properties.\(^102\) After a series of appeals by a nonprofit corporation composed of neighboring landowners, the Florida Supreme Court ruled that the doctrine of avulsion permitted the State to reclaim the restored beach on behalf of the public.\(^103\) The U.S. Supreme Court agreed.\(^104\) The landowners challenged this plan as an unconstitutional taking of their littoral rights—namely, their right to accretions and their right to maintain contact with the

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\(^94\) *See id. at 119-20.*

\(^95\) *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot., 130 S. Ct. 2592, 2598 (2010).*

\(^96\) *See id. at 2599; Trs. of Freeholders & Commonalty of Town of Southampton v. Heilner, 375 N.Y.S.2d 761, 770-71 (Sup. Ct. 1975).*

\(^97\) *Stop the Beach Renourishment, 130 S. Ct. at 2599.*

\(^98\) *Id. at 2600, 2612.*

\(^99\) *Id.* at 2594.

\(^100\) *Beach and Shore Preservation Act, FLA. STAT. §§ 161.011-161.45 (2006).*

\(^101\) *Stop the Beach Renourishment, 130 S. Ct. at 2594.*

\(^102\) *Id.* at 2599.

\(^103\) *Id. at 2600.*

\(^104\) *Id. at 2613.*
Despite the fact that the decision left unanswered questions regarding judicial takings, all eight participating justices agreed that the petitioners failed to establish that they had ever “had rights to future accretions and contact with the water superior to the State’s right to fill in its submerged land.”

In theory, avulsion is a two-way doctrine. Just as littoral landowners, like the plaintiffs in Stop The Beach, are at risk of losing their exclusive rights to access a beach that abruptly expands seaward, under the doctrine of avulsion as it is typically stated, states in turn are at risk of losing the public’s right to access a beach that abruptly shifts landward. With the property line static, the landowner could own land all the way to, and even under, the water. This has happened frequently in the context of inland waterways such as rivers and swamps. For example, when a California levy burst, it caused the Joaquin River to create a new swampland, which became navigable by boat. The court in that case found that the newly submerged land was still owned by the littoral owner who had owned it before the flood, but subject to the public’s public trust rights of navigation and fishing. However, as discussed infra Part III.A, the doctrine of avulsion has rarely been applied this way in the context of a tidal coastlands. As applied to coastal lands, loss of publicly accessible beach by avulsion is actually the exception, not the rule.

105. Id. at 2600.
106. See id. at 2602. Justice Scalia, in a plurality joined by Chief Justice Roberts and Justices Alito and Thomas, opined that there could be such a judicial taking, though one had not occurred here. See id. at 2596, 2602. The other justices, however, did not find it necessary to determine the issue in order to decide the case. Id. at 2613 (Kennedy, J., concurring), 2618 (Breyer, J., concurring). The judicial takings aspect of the case has spawned much academic debate. See, e.g., Michael C. Blumm & Elizabeth B. Dawson, The Florida Beach Case and the Road to Judicial Takings, 35 WM. & MARY ENVTL. L. & POL’Y REV. 713, 713 (2011); Eduardo M. Peñalver & Lior Jacob Strahilevitz, Judicial Taking or Due Process?, 97 CORNELL L. REV. 305 (2012).
108. See Pelosi & Caldwell, supra note 7, at 58, 103.
110. Id. at 129.
111. Id. at 140–41; see also United States v. 461.42 Acres of Land in Lucas Cnty., 222 F. Supp. 55, 58 (N.D. Ohio 1963) (finding no loss of title where farmland on the shore of Lake Erie had become submerged swampland over three decades due to a large storm that had wiped out a dike).
3. Other Common-Law Rights of Access: Prescription, Dedication, and Custom

In the majority of states, where public trust extends to the high-tide line, the public trust doctrine still provides no right of access to privately owned beach area upland of the high-tide line, an area commonly extending to a vegetation or dune line and sometimes referred to as the “dry sand.”\(^{112}\) Public access to such privately-owned beaches is allowed only by the operation of other common-law doctrines: custom, prescription, or dedication.\(^{113}\)

The states where common law grants the broadest access rights to the public through the doctrine of custom are Oregon and Hawaii.\(^{114}\) The doctrine of custom holds that a customary use of land operating since “time immemorial” can have the effect of law.\(^{115}\) Both Hawaii and Oregon cases invoke customary rights, established by “long and general usage” where “the memory of man runneth not to the contrary,”\(^{116}\) to use the entire beach. Hawaii’s Supreme Court looked to custom, encompassing both English common law of public trust and Native Hawaiian custom, to declare that people have a right to access all parts of the beach, up to the “highest wash of the waves.”\(^ {117}\)

Oregon’s customary right was confirmed through the landmark case of *State ex. rel Thornton v. Hay*\(^ {118}\) in 1969, which arose when the defendant landowners sought to enclose the dry sand area of their property between high-tide line and the vegetation line.\(^ {119}\) The landowners’ action violated a new law intended to prevent resorts from erecting barriers that would hamper Oregonians’ “free and uninterrupted use” of all beaches in the state.\(^ {120}\) The parties in *Hay* all recognized the land lying seaward of the mean high-tide line as a state recreation area, but disputed the legal status of the dry sand area.\(^ {121}\) The Oregon Supreme Court found that the disputed


\(^{113}\) *See id.* at 854-60.

\(^{114}\) *See, e.g., City of Daytona Beach v. Tony-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974).

\(^{115}\) *See id.* (citation omitted).


\(^{118}\) 462 P.2d 671.

\(^{119}\) *Id.* at 672.

\(^{120}\) *See OR. REV. STAT. § 390.610* (2011).

\(^{121}\) *Hay*, 462 P.2d at 672.
area had been subject to public use “since the beginning of the state’s political history,” as the customs of Native Americans carried forward.\footnote{122} Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach . . . .\footnote{123} The court also noted that state and local officers had policed, and local municipalities had cleaned, the dry sand.\footnote{124} Disagreeing with the defendants’ arguments that the court had imposed an unprecedented interpretation and that nothing arising since Oregon’s statehood could be termed “ancient,” the court replied that the custom was and always had been so notorious that property owners were presumed to be on notice of this public right.\footnote{125}

A majority of coastal states, however, lack a blanket customary right protecting public access to all beaches.\footnote{126} Instead, those states where the public trust extends to the mean high water line have taken a patchwork of approaches to determining access to dry sand.\footnote{127} Custom, if established, applies only to specific beaches: “If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner.”\footnote{128} In states that recognize custom wherever it can be proven as to a particular piece of land, only parcel-by-parcel litigation can establish custom and resolve public and private rights to use any particular stretch of beach.\footnote{129}

Other states lacking broad public trust or customary rights to all beaches have found common law rights to use specific beaches through the doctrine of dedication.\footnote{130} Under widely accepted common-law principles, an offer to dedicate a piece of property to the public may be express or implied.\footnote{131} Allowing public use of the beach, public maintenance of beach amenities, and police patrols of the beach have been held to constitute implied acceptance of offers for beach dedications.\footnote{132} California courts
have found an implied dedication where public use of the beach continues without objection from the owner for more than five years.\footnote{133}{Id. at 858.}

An easement by prescription, like its close cousin adverse possession, arises only where the use is actual, continuous, uninterrupted for the statutory period, and adverse.\footnote{134}{Id. at 859.} It is the last element—the adverse nature of the use—that typically foils public claims to beach easement via prescription.\footnote{135}{Id.} Where the public’s use is not inconsistent with the use rights of the owner to the land, it is presumed that the use is permissive rather than adverse.\footnote{136}{See Titus, supra note 9, at 1313.}

For example, in \textit{City of Daytona Beach v. Tony-Rama},\footnote{137}{294 So. 2d 73 (Fla. 1974).} the Florida Supreme Court confirmed that though it did not happen where the upland owner had “welcomed,” not opposed, the visitors’ use of the lands for “untold decades.”\footnote{138}{Id. at 76-77.}

\section*{C. Rolling Easements}

Once an access easement is established by the workings of the common law, the question remains as to whether the easement “rolls,” or moves with the sand.\footnote{139}{See, e.g., Trs. of Freeholders & Commonalty of Town of Southampton v. Heilner, 375 N.Y.S.2d 761, 770-72 (Sup. Ct. 1975).} It is clear that the public trust area migrates with the water, whether the events causing the change are sudden or gradual.\footnote{140}{Titus, supra note 9, at 1313-14.} What is in contention is whether public access rights to dry sand should also migrate as that dry sand moves. Public-access advocates have argued for rolling easements as necessary to preserve public rights, particularly in light of rising tides due to climate change.\footnote{141}{JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:16 (West 2009 rev. ed.).} The rolling easement doctrine asserts that an existing public access easement shifts as the beach on which it is located shifts, whether by accretion, erosion, or avulsion.\footnote{142}{Id.; see also Severance v. Patterson, 370 S.W.3d 705, 736-37 (Tex. 2012) (Medina, J., dissenting).} This accords with principles of easement law, which in several circumstances allow for the location of easements to shift due to natural forces.\footnote{143}{Id.} For example, a right-of-way to a dock or river may change location as the shoreline moves.
or as the river changes course, and drainage easement described by reference to existing ditch may change location as the ditch meanders over time. Along beaches, even the Texas Supreme Court acknowledges that existing easements are “dynamic” and do shift with the forces of accretion and erosion; it is only with respect to avulsive shifts that the court declined to extend the principle.

Few courts outside of Texas have addressed the question head-on. An appellate court in Florida facing the question in *Trepanier v. County of Volusia* essentially rejected rolling easements, concluding that an easement might exist only if it could been shown by custom that the easement had at some point been located on the land in dispute. The court explained, “it is not evident . . . that the areas subject to the public right by custom would move landward . . . to preserve public use on private property that previously was not subject to the public’s customary right of use.” However, the rule was ultimately not applied: on remand, the trial court found that the easement had indeed been “intermittently” located on the subject property. The Supreme Court of Vermont also explicitly rejected the rolling easement doctrine in the context of a road that ran alongside an eroding lake front. A similar case in Delaware also declined to apply the doctrine to a road easement, but distinguished road easements from beach access easements. After noting that the property at issue was not a riparian property, the court stated:

Although the concept of an easement that moves with the shoreline has been recognized elsewhere, that concept is inapplicable here. The Lake Drive right-of-way is not an easement to cross private lands to reach a public area (such as a beach) that itself moves with the water. . . Rather, Lake Drive is a public street, laid out as a dedicated parcel of real property, and as such was intended and designed to carry traffic around

144. Bess v. Cnty. of Humbold, 5 Cal Rptr. 2d 399, 401 (1992); Godfrey v. City of Alton, 12 Ill. 29, 31 (1850).
147. Id.
149. 965 So. 2d 276, 293 (Fla. Dist. Ct. App. 2007).
150. Id. at 293.
Silver Lake. Lake Drive was located adjacent to—but never upon—the private lands of the plaintiffs. This might leave the door open for a future Delaware court to adopt the rolling easement doctrine with respect to easements on beaches.

Commentators scrutinizing other states for evidence of the wide acceptance rolling easements find few clear precedents. The North Carolina Supreme Court approvingly cited one of the earlier Texas rolling easement cases in support of its own more modest assertion that an easement for a path providing perpendicular beach access could shift with the dunes, and an unpublished Nebraska opinion also cited Texas’s Feinman decision approvingly in rejecting a claim of compensation for erosion caused by drainage easement. In sum, as scholars have increasingly embraced the doctrine of rolling easements as it existed in Texas until Severance, the other courts to weigh in on the matter, even in dicta, have been split. Nevertheless, few cases in all of U.S. legal history have actually applied the doctrine of avulsion to extinguish existing public access to beach lands.

D. Statutory Overlays

The federal government and states have also sought to regulate beach access through legislation and regulation. The federal government, recognizing the need for careful management of the development of coastal resources, passed the Coastal Zone Management Act (“CZMA”) in 1972. Through the CZMA, the federal government seeks to work in cooperation with state and local government for the effective management of coastal development. The CZMA provides for grants and assistance, but it leaves most regulatory authority to the states, through their own Coastal Commissions. Some states have also attempted to legislate for

154. Id. at 68.
157. See infra Part III.A.
159. 16 U.S.C.A. § 1451(a).
160. Id. §§ 1451-66.
161. Id. §§ 1451(i), 1456(c).
162. See id. §§ 1455, 1456(c).
stronger beach access rights.\textsuperscript{163} For example, after the New Jersey Supreme Court set forth the state’s broad version of the public trust in \textit{Matthews v. Bay Head} and \textit{Raleigh}, the New Jersey Department of Environmental Protection codified those decisions by promulgating rules specifically protecting the public’s visual and physical access to the water.\textsuperscript{164}

In Texas, a 1958 decision in \textit{Luttes v. Texas}\textsuperscript{165} established the high tide line as the limit to public trust land in Texas.\textsuperscript{166} Because this raised considerable alarm among people who had until then believed that the public had a right to use the entire beach, including dry sand,\textsuperscript{167} the legislature sought to preserve the public’s access to dry sand by passing the Open Beaches Act (“OBA”).\textsuperscript{168} The OBA provides for public access and restricts the littoral owner’s rights to construct improvements on the dry sand area “if the public has acquired a right of use or easement to or over such area by prescription, dedication, or has retained a right by virtue of continued right in the public.”\textsuperscript{169} This last limitation was important: in enacting the OBA, the state did not seek to create any new easements, which could constitute regulatory takings and thus require compensation under the Fifth Amendment to the U.S. Constitution.\textsuperscript{170} Rather, the OBA sought to preserve and regulate whatever right of access already existed under the common law.\textsuperscript{171} Chiefly, where public easements exist, the OBA allows the state to deny permits to construct or repair structures seaward of the vegetation line.\textsuperscript{172} The state has used this power to deny permits for walls and fences that would exclude the public, to deny permits for home

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\item 163. Mulvaney & Weeks, \textit{supra} note 74, at 584-85.
\item 164. \textit{Id.} at 594-95
\item 165. 324 S.W.2d 167 (Tex. 1958).
\item 166. \textit{Id.} at 191 (setting the line). There are two different measures of the public trust boundary in Texas, depending on whether the land in question was transferred from the sovereign under Mexican (Spanish) civil law, or from the State of Texas after the adoption of English Common law in 1840. \textit{See id.} at 192. The mud flats under dispute in \textit{Luttes} were controlled by civil law. After a lengthy analysis of the civil law, the court determined that, in areas of Texas conveyed under Spanish land grants, the shore extends to the mean of the higher of the gulf’s two daily high tide lines (the “mean higher high tide”), as opposed to the mean of all high tide lines (the “mean high tide”), which is the boundary under common law. \textit{Id.} at 192.
\item 167. \textit{See} Severance v. Patterson, 370 S.W.3d 705, 738 (Tex. 2012); \textit{see also} Matcha v. Mattox, 711 S.W.2d 95, 99 (Tex. App. 1986) (“No one ever asked these persons if they had permission to use the beach and no one ever tried to stop them from that use. These persons just ‘figured’ everyone had the right to use the beach.”); Neal E. Pirkle, \textit{Maintaining Public Access to Texas Coastal Beaches: The Past and the Future}, 46 \textit{BAYLOR L. REV.} 1093, 1093 (1994).
\item 168. \textit{TEX. NAT. RES. CODE ANN.} §§ 61.001-61.254 (West 2011).
\item 169. \textit{Id.} §§ 61.001(8), 61.012-61.013.
\item 170. \textit{See} U.S. CONST. amend. V; \textit{see also} discussion \textit{infra} Part II.E.
\item 171. \textit{See} \textit{TEX. NAT. RES. CODE ANN.} §§ 61.001(8), 61.011(a), 61.012, 61.013(a).
\item 172. \textit{See id.} §§ 61.013, 61.015.
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expansion and repairs, and to deny restoration of utility services to properties damaged by hurricanes. In addition, the OBA allows the state to order the removal of any structures that it deems a public hazard or significant impediment to the public’s ability to exercise its right to access the beach.

A later amendment to the OBA sought to put purchasers on notice as to the nature of their rights. It requires that any contract for conveyance of Texas Gulf Coast property contain a “Disclosure Notice Concerning Legal and Economic Risks of Purchasing Coastal Real Property Near a Beach.” The required language of the notice includes the following:

IF YOU OWN A STRUCTURE LOCATED ON COASTAL REAL PROPERTY NEAR A GULF COAST BEACH, IT MAY COME TO BE LOCATED ON THE PUBLIC BEACH BECAUSE OF COASTAL EROSION AND STORM EVENTS.

AS THE OWNER OF A STRUCTURE LOCATED ON THE PUBLIC BEACH, YOU COULD BE SUED BY THE STATE OF TEXAS AND ORDERED TO REMOVE THE STRUCTURE.

THE COSTS OF REMOVING A STRUCTURE FROM THE PUBLIC BEACH AND ANY OTHER ECONOMIC LOSS INCURRED BECAUSE OF A REMOVAL ORDER WOULD BE SOLELY YOUR RESPONSIBILITY.

The goal of this language is to put property purchasers on notice that their properties might, through natural forces, “come to be located on the public beach.” Thus, the characterization of a resulting beach as “public” should not come as a surprise to any owner. In addition, the language warns that the party affected “could be sued by the State of Texas and ordered to remove the structure.”

Later, in 2009, largely through the efforts of the Surfrider Foundation and other beach-access advocates, the central language of the OBA became part of the Texas Constitution.
Since the passage of the OBA, the state and littoral owners have litigated a series of cases over the existence and extent of common law easements that would make the OBA applicable to beaches along the Texas Gulf shore. The culmination of those cases, *Severance v. Patterson*, pitted two nation-wide advocacy groups against each other, both aware that the outcome of this case could determine the fate of public beach access in Texas and beyond, as more miles of shoreline succumb to rising tides.

E. Takings Concerns

Texas, New Jersey, and other states that have sought to impose statutory control over the public’s beach access rights have had to tread carefully in order to avoid takings claims. The Fifth Amendment to the U.S. Constitution and similar provisions in most state constitutions prohibit the taking of private property for public use without just compensation. Under *Penn Central Transportation Co. v. New York City*, whether a particular regulation is a taking under the Fifth Amendment is an “essentially ad hoc, factual inquir[y]” based on several factors, including the economic impact of the regulation on the property owner, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action.

Later cases established two situations that will always result in a finding of a taking. First, *Loretto v. Teleprompter Manhattan CATV...
Corp. held that any regulation that entails a “permanent physical occupation” of a property is always a taking, even if the economic impact of the invasion is minimal. Second, Lucas v. South Carolina Coastal Commission held that a government regulation effects a taking if it denies an owner of all economically beneficial use of land. Lucas also delineates an exception to the takings doctrine: a land use regulation based in “background principles” of common law is not a taking. A regulation that does “no more than duplicate the result that could have been achieved in the courts” requires no just compensation. Therefore, in the context of beach access, to the extent that the public trust doctrine, custom, easement, prescription, or dedication would allow the public to use a beach, the government regulation of that beach would not be a taking—even if it constituted a physical invasion, and even if it deprived an owner of all economically beneficial use of her property. If rolling easements are indeed a background principle of common law in Texas, this exception shields the state’s beach-access enforcement actions under the OBA, and now under the OBA’s parallel provision in the Texas Constitution, from U.S. constitutional challenges.

III. IN DISPUTE

A. Avulsion Reconsidered

If a subject hath land, adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it, or, though the marks be defaced, yet if by situation and extent of quantity and bounding upon the firm land the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety . . .

186. 458 U.S. 419 (1982).
187. Id. at 434-35. In this case, the prohibited regulation would have required the owner of an apartment building to permit a cable television company to install and maintain a cable box and related wires on the roof. Id. at 421.
189. Id. at 1027.
190. Id. at 1029.
191. Id.
192. This was the conclusion of a Texas appellate court in Brannan v. State, 365 S.W.3d 1, 21 (Tex. App. 2010), which is further discussed infra Part IV.A.
Avulsion is any sudden and perceptible change in the channel of a stream or location of a shoreline. The ostensible general rule is that, in the event of avulsion, title lines remain fixed. Property-rights proponents would use the rule of avulsion to assert private ownership, including a right of exclusion, over beaches that move inland due to hurricanes. However, despite the frequent repetition of the basic rule in hornbooks and as dicta in case law, the rule of avulsion has rarely been applied to take beach land away from the public. In short: on properties bordering tidal waters, the risk of loss does not, in practice, run both ways.

The majority of cases applying the doctrine of avulsion to tidal waters in fact deal with additions to land, whether through human-deposited fill or through natural causes that deposit large quantities of sand or fill on previously submerged waters. One generally recognized exception to the rule of avulsion applies to some of these situations. According to that exception, upland owners do not gain title to new land created by their own actions, under the reasoning that a party should not be able to claim additional acreage by dumping fill onto previously submerged land and taking it away from the state. In contrast, in cases where new land accumulates rapidly by action of the state or by natural causes, courts have typically followed the general rule: while gradual shifts do cause lot lines to move, more rapid shifts do not.

But while cases dealing with additions to land are relatively frequent, legal opinions addressing the loss of land are far less so, and the vast majority involve property riparian to rivers or inland lakes, not along tidal waters. In fact, only a handful U.S. cases have found avulsion where the

194. 65 C.J.S. Navigable Waters § 111 (2010).
195. Id.
196. See e.g., Severance v. Patterson, 370 S.W.3d 705, 724-725 (Tex. 2012).
197. A search for avulsion cases (described infra note 201) yielded over 70 opinions involving additions to land and only 21, including Severance, involving losses of land along tidal waterways.
198. See Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., 512 So. 2d 934, 938 (Fla. 1987).
199. Id.
201. A Westlaw search for avulsion (ALLCASES property & avulsion /p (beach coast! shore!) yields 402 results. Of those, 11 use “avulsion” as a medical term or otherwise in ways not pertaining to real property and 15 address only aspects of real property unrelated to additions to and losses of coastal land. Of those that remain, the great majority, or 276 opinions, involve property along inland rivers and lakes, where courts do tend to apply the classic rules. Of the cases that addressed property rights along oceans, bays, and the Gulf of Mexico, 75 cases addressed situations involving additions to land. See, e.g., Stop the Beach Renourishment, Inc. v. Dep’t of Envtl Prot., 130 S. Ct. 2592 (2010); Strough v. Incorporated Village of West Hampton
result would be to find private ownership of a coastal property that would otherwise have been owned by a state.202

Sometimes, courts facing disputes over lost beaches resolve the question by finding that the allegedly avulsive event was erosive instead.203 Whether something is erosion or avulsion turns out to be a thorny factual issue. Where there is a question of whether a particular shift in shoreline is erosive or avulsive, there is a presumption of erosion, which is overcome if the loss occurred suddenly.204 The test used in Texas, for example, to distinguish erosion from avulsion is to call erosion any situation where “though the witnesses may see, from time to time, that progress has been made, they could not perceive it while the progress was going on.”205 In Texas, even storm-related losses have sometimes failed to overcome that presumption.206 More often, courts have declined to find whether a loss of shoreline was erosive or avulsive and have decided cases on other grounds.207

Cases that have found against the state in coastal avulsion are rare. In the most cited example, the Point Lookout case, the New York town of Hempstead sought to claim title to lots that had recently become submerged, apparently as a result of a shift in currents caused by a nearby seawall that the town had built.208 There was some evidence that the...
seawall had “diverted the currents of Jones Inlet in a westerly direction, and caused added force to the waters thrown against the subject properties,” causing large portions of the land to wash out during subsequent storms.\(^{209}\)

Even though the storms in question happened over a three-year period, which would have made a finding of erosion plausible, the court was firm in insisting that the “losses were not gradual and imperceptible and the losses were caused by what might well be described as a cataclysm or catastrophe.”\(^{210}\) The court also went out of its way to say that in awarding compensation to the plaintiffs it was not addressing any negligence of the town in building the wall—presumably to avoid setting a precedent that would open the town to further litigation.\(^{211}\)

Instead, the court’s finding of avulsion against the state was a very convenient way to right what the plaintiffs undoubtedly saw as an injustice brought on them by the town.\(^{212}\)

Thus, rather than being the case that typifies the rule, \textit{Point Lookout} may be the exception that proves the rule—it cites avulsion but can be explained by other means. Other cases provide even less support for the contention that the common law of avulsion takes disappearing beach land from the public. One tax case references an award of condemnation proceeds for land taken by the City of New York for public beach—the proceedings had found that good title rested with the littoral owners because land had been lost to avulsion—but details about the matter are few.\(^{213}\)

In one Maryland example, a court applied the classic rule to land that was only temporarily flooded, holding that the original owners did have title to the land that reappeared when waters receded.\(^{214}\)

As applied, the rule did not deny the public access to a previously existing beach; it simply declined to extend public access to a previously private beach. Finally, in the case that rejected rolling easements in Florida, where an appellate court held that an easement existed only if it could be shown to have existed on that parcel in the past, the trial court on remand found evidence that the beach had “intermittently” been located on the claimant’s property.\(^{215}\)

This factual finding enabled the trial court to decide in favor of the state, keeping the beach public, despite the appellate court’s holding.\(^{216}\)

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\(^{209}\) Id. at 444.

\(^{210}\) Id.

\(^{211}\) See id.

\(^{212}\) See id.

\(^{213}\) Jamieson Assocs., Inc. v. Comm’r, 37 B.T.A. 92, 98 (1938), aff’d in part, rev’d in part and remanded sub nom., Seaside Improvement Co. v. Comm’r, 105 F.2d 900 (2d Cir. 1939).

\(^{214}\) Md. Dep’t of Natural Res. v. Mayor of Ocean City, 332 A.2d 630, 638 (Md. 1975).


\(^{216}\) Trepanier, 2010 WL 2849823.
Given the lack of case law to support the black letter rule, a more nuanced reconsideration of the doctrine of avulsion is called for. This turns out to be at the crux of Severance.

B. Severance v. Patterson and Rolling Easements in Texas

“Ultimately, this case is about whether the state of Texas can constitutionally recognize and enforce a ‘rolling’ public beach easement.”

The Texas Supreme Court’s recent decision in Severance v. Patterson marks the end of the decades-old doctrine of rolling beach easement in Texas. The litigation began as many of these cases do, when a landowner whose properties were partially or completely seaward of the vegetation line after a storm objected to the state’s assertion of authority to order the removal of homes that encroached upon the public beach. What made the case unusual was that the landowner, Carol Severance, was a California attorney who had recently purchased the properties at issue and pursued the litigation with the backing of the Pacific Legal Foundation, a group that advocates for individual property rights.

The U.S. District Court that originally heard the case properly noted that at the crux of all the plaintiff’s claims was the question of whether the state could “constitutionally recognize or enforce a ‘rolling’ public beach easement,” and emphatically concluded that it could. Relying on previous Texas case law, the court noted that where an easement had been established by custom, prescription, or dedication, the existence of that easement and its migration with the movements of the vegetation line fit into the familiar Lucas exception for “background principles of common

220. The Pacific Legal Foundation (“PLF”) lists as one of its missions its Coastal Lands Rights Project, whose purpose is “defending property rights in the coastal zone” through targeted litigation. Property Rights Litigation, supra note 23. The PLF also supported the plaintiffs in the Brannan litigation. See id.; see also Brief of Appellant, Brannan v. Texas, 365 S.W.3d 1, 6, 21 (Tex. App. 2010) (No. 01-08-00179-CV), available at http://www.pacificlegal.org/document. doc?id=269.
222. Id. at 802-03.
law,” and therefore did not constitute a taking under the Federal or Texas constitutions.223

The Fifth Circuit Court of Appeals, however, did not find the answer to that question quite so clear.224 In a scathing critique of Texas courts, the Fifth Circuit derided what it saw as inconsistencies in Texas law on the common-law basis for beach easements and on the question of whether or not such easements roll.225 It declared that the courts that had approved of rolling easements did so under no principled common law reason, “only mutually inconsistent post hoc rationales.”226

The appellate court’s criticisms were not altogether unjustified; the patchwork of Texas cases that had addressed beach easements over the years were in some ways inconsistent with each other and even internally inconsistent.227 The district court in Severance addressed this by explaining that, in Texas, public easements up to the vegetation line of all beaches are assumed unless an upland landowner can prove that it either never existed or was relinquished.228 In fact, Texas beach easement law is more complex. An early case, Seaway v. Attorney General of the State of Texas,229 came before a Texas Court of Civil Appeals in 1964, just a few years after the passage of the OBA.230 The Attorney General brought suit to require the owners of land in Galveston to remove barriers seaward of the vegetation line in order to not interfere with the public’s right of access to the beach.231 The state presented extensive testimony as to the public’s longstanding use of the beach for swimming, fishing, boating, camping, and as a road for vehicles, dating back to at least the 1880s, when one of the elderly witnesses recalled the beach being used as a road for travelers by horse and buggy.232 Maps, almanacs, and descriptions of roads and postal routes also

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223. Id. at 803-04; see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1028-29 (1992).
224. See Severance v. Patterson, 566 F.3d 490, 500-02 (5th Cir. 2009), certified question answered, 345 S.W.3d 18 (Tex. 2010), withdrawn, superseded, and certified question answered by 370 S.W.3d 705 (Tex. 2012).
225. See id. at 502.
226. See id. at 499 n.8.
227. See id. at 498-99 (illustrating the piecemeal analysis set forth in earlier cases on similar issues and characterizing such cases as “utterly inconsistent”).
228. Seeverance v. Patterson, 485 F. Supp. 2d 793, 796, 802 (S.D. Tex. 2007), aff’d in part, question certified, 566 F.3d 490 (5th Cir. 2009), certified question answered, 345 S.W.3d 18 (Tex. 2010), withdrawn, superseded, and certified question answered by 370 S.W.3d 705 (Tex. 2012). (citing TEX. NAT. RES. CODE ANN. § 61.020 (V.C.T.A 2011)) (stating that a showing that the area in question is seaward of the vegetation line is prima facie evidence of a common law easement).
230. See id. at 925.
231. Id. at 926.
232. See id. at 932.
evidenced use of the beach as a road until at least the mid-19th century. Based on this, the court in Seaway found that an easement existed by both dedication and prescription. Therefore, the Attorney General’s action to require removal of the new barriers did not violate the takings or due process clauses of the United States or Texas Constitutions. In Seaway, the record showed that the mean high tide line had not moved throughout the relevant period of use; thus, at issue was the existence of the easement at all, not whether that easement “rolled” or shifted with the vegetation line.

A later case, Moody v. White, affirmed a trial court judgment finding an easement at common law over the land up to the vegetation line on a section of beach in Port Aransas, Texas, via “either prescription, dedication, or custom.” Ultimately, the Moody court decided that the exact manner of establishing the easement did not matter, instead reading into the Open Beaches Act “the common law doctrine of custom and usage as a means for acquiring the beaches of Texas for the general public.” Here, the court was not bothered by (contested) testimony that the vegetation line had shifted somewhat over the years. The court found it unnecessary to describe the exact limits of the easement claimed for by the public:

On one boundary the public beach is determined by the line of mean low tide, while the landward side is marked by the line of vegetation. Although these boundaries do tend to shift occasionally, they can be determined at any given point in time. The rule has been established that

233. Id. at 939.
234. Id. at 937.
235. See id. at 940 (referring to the court order upholding the easement, which demonstrates the constitutionality of upholding the easement after the court’s careful consideration).
236. See id. at 939 (substantiating the stability of the tide line and vegetation line over time).
238. Id. at 380. This could be problematic: one of the elements of prescription is that the use be “hostile,” and one of the elements of implied dedication—the only kind of dedication even possibly implicated here—is that the use be permissive. This lack of attention to precisely when the common-law easements arose may have ultimately bolstered the Fifth Circuit’s characterization of Texas case law as “utterly inconsistent” on this point. Severance v. Patterson, 566 F.3d 490,4992 (5th Cir. 2009), certified question answered, 345 S.W.3d 18 (Tex. 2010), withdrawn, superseded, and certified question answered by 370 S.W.3d 705 (Tex. 2012). However, it is certainly possible for a single easement arising by implied dedication during the tenure of one owner and to meet all of the elements of prescription under a subsequent owner, or vice-versa.
239. Moody, 593 S.W.2d at 379.
240. See id. (stating the non-dispositive nature of the evidence of the vegetation line movement).
easements may shift from time to time, just as navigable rivers may change course by avulsion.\footnote{241}

The court did not seek to locate the easement based on the location of the beach at any particular point in the past, instead looking to the historical usage of the beach to recognize an easement from the mean low tide to the line of vegetation.\footnote{242} This dictum was the first articulation of a common law doctrine of rolling easements in Texas.

\textit{Matcha v. Mattox}\footnote{243} was the first Texas case to explicitly hold that a beach access easement rolled.\footnote{244} The \textit{Matcha} court upheld a trial court’s judgment that prohibited the plaintiffs from rebuilding their hurricane-damaged house so as to interfere with the public’s right of free access to and over the beach, which had eroded “about one hundred twenty-five to one hundred fifty feet” in the hurricane.\footnote{245} Relying on the testimony of witnesses and historical evidence of the use of the beach for travel as early as 1836, the court had no trouble finding that an easement to the beach had been established by custom.\footnote{246} From there, the court went on to hold that the “easement follows the beach as it moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation.”\footnote{247} Looking to the migratory nature of the line between the state’s submerged property and private beachfront property and to the law of avulsion, the court held that, under the law of custom, the easement moved:

\begin{quote}
Indeed, the theory of migratory public easements is compatible with the doctrine of custom and the situations that often give rise to a custom. A public easement on a beach cannot have been established with reference to a set of static lines on the beach, since the beach itself, and hence the public use of it, surely fluctuated landward and seaward over time. The public easement . . . must migrate.\footnote{248}
\end{quote}

This is an imminently practical statement: the very notion of a customary use of beach implies a custom of using the beach wherever it was at the time. The court also noted the practical purposes for the doctrine, noting that fixing a static easement would “produce completely unworkable

\begin{footnotes}
\footnote{241}{\textit{Id.}}
\footnote{242}{See \textit{id.}}
\footnote{243}{711 S.W.2d 95 (Tex. App. 1986).}
\footnote{244}{See \textit{id.} at 100 (stating that applying “static real property concepts” would produce an “unworkable” outcome).}
\footnote{245}{\textit{Id.} at 97.}
\footnote{246}{\textit{Id.} at 99, 101.}
\footnote{247}{\textit{Id.} at 99.}
\footnote{248}{\textit{Id.} at 100.}
\end{footnotes}
results” which “would result in the easement being either under water or left high and dry inland, detached from the shore.”

Following on the heels of Matcha, another Texas appellate court in Feinman v. State further clarified that “[n]ot only can title change because of the advances and retreats of the sea, but the location and extent of easements along waterways can change because of accretion or erosion to land along a waterway.” The court went on to explain that rolling easements upheld the purposes of the OBA in ensuring the public’s right to access to state-owned beaches and to any private beach on which a public easement has arisen.

Another case citing both Feinman and Matcha in support of rolling easements is Arrington v. Mattox. There, the plaintiffs built a retaining wall and a fence on their property seaward of the vegetation line. The Attorney General filed suit, claiming encroachment of a public easement in violation of the OBA, and a trial court granted the State’s motion for summary judgment. Texas District Court found that an easement both existed and rolled, via “prescription, dedication, and custom,” citing Feinman as an implied dedication and Seaway as an example of easement by prescription. The trial court went on to explain that property was not unconstitutionally taken without compensation, as the OBA just enforces common law of prescription, dedication, and custom and does not create a new easement. Finally, in 2001, the original Brannan plaintiffs filed suit on very similar facts; there too, the district and appellate courts ruled for the state based on the existence of a rolling easement.

Despite appeals filed by landowners, the Texas Supreme Court heard none of the cases outlined from Luttes to Brannan. It was in this legal context that Carol Severance and the Pacific Legal Foundation brought the case in federal court. On examining their claims in appeal, the Fifth Circuit Court of Appeals concluded that if rolling easements were not the law of Texas, then the appellant may have had potentially valid claims both

249. Id.
251. Id. at 110.
252. See id. at 111.
254. Id. at 957.
255. Id.
256. Id. at 958.
257. See id. (“[T]he court merely enforced an already existing public easement established by custom, prescription, or public dedication.”).
for a Fifth Amendment taking and for a Fourth Amendment seizure.\(^{260}\)

After roundly criticizing the various Texas rolling easement decisions for their apparent inconsistencies, the Fifth Circuit certified to the Texas Supreme Court the key question: are rolling easements the law of Texas?\(^{261}\)

It appeared that the Texas high court would at last be forced to speak on an issue where it had maintained decades of silence.

The court took over a year to issue its first opinion on the matter,\(^{262}\) during which time the \textit{Brannan} decision further underscored the Texas appellate courts’ understanding that rolling easements were indeed the law.\(^{263}\) The court then reframed the issue in a way that solidly benefitted the plaintiff—“The central issue is . . . whether private beachfront properties on Galveston Island’s West Beach are impressed with a right of public use under Texas law \textit{without proof of an easement}. . .”\(^{264}\) —and held that, in cases of avulsion, public beach easements do not “roll.”\(^{265}\)

The state, in a Joint Motion for Rehearing,\(^{266}\) characterized the court’s November 2010 opinion as “reinvent[ing], in breathtaking fashion, a bedrock principle of Texas property law.”\(^{267}\) The state pointed out the apparent inconsistency in the court’s acknowledgement that public easements are dynamic while simultaneously declaring that those same easements “become suddenly fixed in place in response to an unspecified subset of so-called avulsive events.”\(^{268}\) The court took the unusual step of granting the rehearing in March 2011.\(^{269}\) Meanwhile, Severance sold her property to FEMA in order to take advantage of a federal buyout program

\begin{itemize}
  \item \(^{260}\) See Severance v. Patterson, 566 F.3d 490, 502 (5th Cir. 2009), \textit{certified question answered}, 345 S.W.3d 18 (Tex. 2010), \textit{withdrawn, superseded, and certified question answered by} 370 S.W.3d 705 (Tex. 2012).
  \item \(^{261}\) \textit{Id.} at 503-04.
  \item \(^{262}\) The court accepted the certified question on May 15, 2009; heard oral arguments on November 19, 2009; and issued its opinions nearly one year later on November 5, 2010. Severance v. Patterson, 345 S.W.3d 18 (Tex. 2010), \textit{withdrawn, superseded, and certified question answered by} 370 S.W.3d 705 (Tex. 2012).
  \item \(^{263}\) The \textit{Brannan} litigation is further discussed \textit{infra} Part IV.A. During the court’s silence on \textit{Severance}, the \textit{Brannan} plaintiffs also filed an appeal with the Texas Supreme Court. Petition for Review at 17, Brannan v. State, 365 S.W.3d 1 (Tex. App., Apr. 20, 2010) (No. 10-0142), \textit{available at} http://www.search.txcourts.gov/Case.aspx?cn=10-0142.
  \item \(^{264}\) Severance v. Patterson, 370 S.W.3d 705, 706 (Tex. 2012).
  \item \(^{265}\) \textit{Id.} at 723-26.
  \item \(^{266}\) Joint Motion for Rehearing for Defendants-Appellees, Severance v. Patterson, 345 S.W.3d 18 (Tex. 2010) (No. 09-0387), \textit{available at} www.supreme.courts.state.tx.us/ebriefs/09/09038710.pdf.
  \item \(^{267}\) \textit{Id.} at 7.
  \item \(^{268}\) \textit{Id.} at 3.
  \item \(^{269}\) Severance v. Patterson, 370 S.W.3d 705, 712 (Tex. 2012).
\end{itemize}
for homes that had been subject to repeated flooding. At that point the state requested that the court vacate its November 2010 opinion on the grounds that Mrs. Severance’s sale of the property had rendered moot both the original case and the certified questions from the Fifth Circuit. Rather than vacating its opinion or ruling on the mootness issue either way, in July 2011, the court abated its decision until a ruling from the Fifth Circuit could determine the issue of mootness. The Fifth Circuit in turn volleyed the case back to the Texas Supreme Court, opining in October 2011 that, because Mrs. Severance could still conceivably be subject to penalties under the Texas Open Beaches Act, the issues were not moot. This move, which kept the litigation alive, was regarded as a victory by the Pacific Legal Foundation. The State and various amici vigorously contest the Fifth Circuit’s characterization of the Texas OBA, asserting that no party has any standing to levy penalties against Mrs. Severance now that she no longer owns the property. Nevertheless, the Texas Supreme Court accepted the Fifth Circuit’s ruling on the mootness question and, in March 2012, issued a new opinion in response to the rehearing, holding once again that Texas does not recognize rolling easements created by avulsive events. The Fifth Circuit, noting that this confirms the existence of a possible Fourth Amendment claim, has since reversed the original district court decision for the state and has remanded the case for new proceedings.

In March 2012, as in November 2010, the court relied on the textbook doctrine of avulsion to determine that “when a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public easement on the public beach does not ‘roll’ inland . . . .” Instead, in order for the public to retain access, a new easement must be established to encumber the newly-created beach. The court based its decision on the

270. See id. at 711 n.6.
271. See id. at 712.
277. Severance v. Patterson, 682 F.3d 360 (5th Cir. 2012).
279. Id.
classic rule of avulsion and justified it in the language of reasonable expectations, declaring that it is “far less reasonable” to expect a public easement to encumber new portions of dry sand than to expect to lose land to the public trust as property becomes submerged. Yet, the court did not explain why it should be so, and, as will be argued below, owner-expectation arguments are particularly weak with respect to disappearing beach property. In fact, there was plenty to give Mrs. Severance reason to believe that she might lose her right to exclude in exactly the way she did. First, prior case law had established the existence of rolling easements in Texas. Second and even more obviously, when she purchased the property she received a statutory notice required under the Open Beaches Act. She had been informed that coastal erosion and storms could cause her house to become located on a public beach and that the state could order removal of her house in that event.

On rehearing, three justices filed dissenting opinions. All rejected as illogical the legal distinction between gradual and rapid shoreline movements—between erosion and avulsion—in the context of Texas coastlines. The dissent pointed in part to impracticality of the doctrine, noting that the majority’s view creates the need to factually distinguish avulsion from erosion after every storm, making every coastal noticeable change into a possible opportunity for litigation, and also emphasized the practical result: a great loss to the public.

IV. VALUES AND PRINCIPLES

Recently, progressive property scholars have offered an alternate lens, or perhaps more exactly, a related set of lenses, through which to view the institution of property. Four leading scholars of progressive property

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280. Id. at 723.
282. See Severance, 370 S.W.3d at 740 (Medina, J., dissenting).
283. See id.
284. Id. at 732.
285. See id. at 722-23, 750.
286. Id. at 733-34.
published a joint *Statement of Progressive Property* in 2009, asserting that the dominant “conception of property as protection of individual control over valued resources” is “inadequate as the sole basis for resolving property conflicts or for designing property institutions.” Instead, these scholars call for a richer analysis of the human values implicated by property law—values including both individual and social interests, the promotion of human flourishing, and the establishment of freedom and stability essential to a democratic society.

Beach property, in particular, calls out for this kind of thicker analysis, because of its inherent physical and social complexity. This section analyzes multiple human values as applied to oceanfront land in particular and concludes that the rational-actor, investment-backed expectation interest associated with the control of property has always been an uneasy fit with the realities of beach land. Expectations on the part of a coastal owner that she will be able to defend her property against the advance of the sea are sometimes harmful, often futile, and generally unreasonable. In fact, she can reasonably expect both physical and legal encroachments. Instead, the law has frequently protected, and should continue to protect, other interests inherent in these unique environments. The argument of this section is both normative and descriptive. Far from being mere ideals, the multivalent values highlighted in recent scholarship have sometimes found protection under the common law.

Additionally, the only doctrine that could be applied to strip the public of already-established rights to use a beach, the doctrine of avulsion, has been applied in that way so rarely that loss of public access by avulsion is actually the exception and not the rule.

289. See *id.* at 743-44; see also *Democratic Estates*, supra note 287, at 1052-54. Professor Singer has held that property law concerns “not just relations between persons and things but relations among persons with respect to valued resources.” *Id.* at 1047; see also *Joseph William Singer, Entitlement: The Paradoxes of Property* 1, 6 (2000).
291. See *Democratic Estates*, supra note 287, at 1052-53 (illustrating that the values property law aims to protect are rooted in common law).
292. See *id.* at 1053-55.
293. See supra text accompanying notes 195-197.
The common law developments that give special protections to beaches, while noteworthy, are not aberrant. As others have shown, property law often works to protect parties other than the fee owners of affected parcels, to promote democratic values, to protect valuable resources, to promote virtue, or to provide an environment for human flourishing. The doctrines of custom, prescription, and dedication as applied to beaches are not deviations from or exceptions to the root of property law; they are an expression of the principles of property law. In addition, the “hornbook” rule of avulsion is inaccurate, particularly where it would conflict with underlying principles of property. Finally, this section argues that rolling easements appropriately manifest property’s underlying democratic principles.

A. Expectations

1. Brannan: A Tale

In 1998, Tropical Storm Frances pushed Texas shorelines inland, including the gulf-side beach in the Village of Surfside, at the southern tip of a narrow barrier island called Follett’s Island. As a result of the storm, several houses that had stood landward of the vegetation line in Surfside stood on the beach itself. The State of Texas and the Village of Surfside Beach won an injunction under the Texas Open Beaches Act ordering the removal of fourteen houses now located on a public-access beach. Homeowners protested, giving rise to the litigation that continues as Brannan v. State.

The course of the Brannan litigation involved two telling developments. First, Severance v. Patterson placed squarely before the Texas Supreme Court the question of whether public beach easements in Texas “roll,” or migrate inward when the sands shift. Second, subsequent storm surges destroyed eleven of the fourteen houses at issue in

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294. See Alexander et al., supra note 288, at 743-44.
297. See, e.g., Breemer, supra note 290.
298. See Brannan v. State, 365 S.W.3d 1, 5-6 (Tex. App. 2010).
Brannan, washing some of them out to sea. 300 Still, the owners of the remaining three houses persisted in pursuing their claim for damages for what they saw as uncompensated takings of their properties. 301 Despite the fact that the Texas Supreme Court had just heard arguments in Severance and was therefore expected to resolve the very legal question at issue in Brannan, the plaintiffs urged the appellate court not to delay its decision pending the outcome in Severance, “because delay in the legal resolution of this case could cause the three remaining houses to also fall . . . which would make the injunction portion of the appeal moot.” 302 It was in the Brannan plaintiffs’ interests to get through the litigation as soon as possible, so that if the injunction were found to be a taking, the owners might receive just compensation under the Fifth Amendment before their houses, and therefore the value of the property allegedly taken, had also washed away.

2. Reasonable Investment-Backed Expectations

The Brannan tale outlined above demonstrates that, in analyzing whether a particular government action is a taking under the Penn Central test, justifications based on an owner’s investment-based expectation interest in property is particularly inapplicable here, on land that we know is disappearing. Projections of sea-level rise for the twenty-first century range from a few centimeters to over a meter. 303 Even a one-foot rise would cause approximately 100 feet of erosion at most U.S. beaches, though the amount of erosion will vary significantly with local topographical conditions. 304 For areas like Galveston, characterized by low-lying topography gently sloping to the sea, even a slight rise in sea level will result in “significant horizontal displacement of the shoreline . . .” 305 The same is true of much of the mid-Atlantic Coast, particularly in North Carolina, Virginia, Maryland,
Delaware, and New Jersey. These changes would also increase the reach of storm surges, leading to potentially catastrophic flooding and losses. Barrier islands, representing hundreds of miles of Atlantic and Gulf Coast beaches, are expected to experience significant inland migration.

And yet, those who would give property owners a right to exclude the public from beaches that migrate onto their lands base their arguments on their investment-backed expectations. The value of the “settled expectations” of property owners has long been a dominant underpinning of property theory. However, there are situations in which a flexible legal regime is more appropriate. This is especially true when the physical property itself is exposed to radical change.

The area of land under dispute in shoreline-access cases is the highly dynamic strip of land between mean high tide and the vegetation line. Should waters rise more, such that the upland owner’s entire parcel is at regular intervals covered by the waves, owners will have conceded their entire parcel to the public trust. Will we then rush to protect the right to exclude of the owner of the next property inland, who after all will be the new “beachfront” owner? At a certain point, we are assigning rights to the deck chairs on the Titanic. As one commentator has noted, “the magnitude of a landowner’s loss will be directly proportional to his own folly.”

3. The Market-Distorting Effects of Subsidized Flood Insurance

The argument for grounding coastal property rights in the expectation interest is made even weaker in light of the distorting effects of publicly-subsidized flood insurance. Claims of market-based expectations in coastal land are complicated by the availability of flood insurance through the National Flood Insurance Program (“NFIP”). The NFIP was originally conceived both to provide compensation for flood damage and to minimize the risks of damage by giving local communities incentives to participate in

308. DEAN, supra note 5, at 22.
310. Id. at 442.
311. See id. at 440-41.
313. See Peloso & Caldwell, supra note 7, at 58.
314. Reed, supra note 117, at 337.
floodplain management. Instead, as critics of the NFIP are quick to note, the program has encouraged more development in flood-prone areas by reducing the perception of risk. The NFIP has distorted the perception of risk among coastal homeowners, paying them to rebuild even properties that have experienced numerous flood losses, while charging premiums that have not been sufficient to insure against foreseeable risks. Some of the shortfall is due to intentional subsidy of premiums for homes built before the program began; the rest is due to faulty accounting. Absent the NFIP, some properties would be uninsurable on the private market, or insurable only at very steep rates. Some might point to the lack of affordable insurance as a market failure demonstrating the need for the NFIP to begin with. However, it could also be pointed out that risks that are uninsurable might be risks that should not be taken. As one proponent of a more market-based approach put it, “something approaching the market rate is absolutely essential to signal to consumers that lakeshore views are expensive.”

To date, an expectation that modestly priced insurance will always be available to repair or replace a flood-damaged home has led many homeowners to build in areas that are risky or flood-prone. In arguing for the phasing out of the NFIP, one commentator suggests that it might be appropriate to treat differently people who have owned their homes for a long time, allowing them to continue to enjoy the subsidy, but phasing out the low-cost insurance for those who purchase now, when we are all too

316. Id. at 443; Adam F. Scales, A Nation of Policyholders: Governmental and Market Failure in Flood Insurance, 26 MISS. C. L. REV. 3, 12 (2007).
318. Ortiz, supra note 315, at 448 (citing the example of a Houston-area homeowner whose home experienced fifteen flooding events in an eighteen year period, resulting in $806,000 in total compensation on a home worth $115,000).
320. See, e.g., JUSTIN D. PIDOT, COASTAL DISASTER INSURANCE IN THE ERA OF GLOBAL WARMING: THE CASE FOR RELYING ON THE PRIVATE MARKET 49 (2007) (noting how the NFIP’s failure to adequately capitalize against foreseeable, severe risks resulted in a need for $23 billion in claims to be paid directly from the federal treasury after Hurricane Katrina in 2005); Scales, supra note 316, at 16-17 (detailing the accounting problems leading to the NFIP’s actuarial unsoundness, and concluding that “none of the prices charged to NFIP policyholders—including the unsubsidized ones—reflect a realistic picture of their risk.”); Dominic Spinelli, Reform of the National Flood Insurance Program: Congress Must Act Before the Next Natural Disaster, 39 REAL ESTATE L.J. 430, 440-41 (2011).
321. See Scales, supra note 316, at 15-16.
322. Spinelli, supra note 320, at 435.
323. Scales, supra note 316, at 44.
324. See id. at 6.
325. PIDOT, supra note 320, at 47-48.
aware of the trend toward global warming and shrinking coastlines. An NFIP reform legislation passed by the House last year would do just that.\footnote{See Flood Insurance Reform Act of 2011, H.R. 1309, 112th Cong. § 5 (2011). The reform would also phase out subsidized premiums for second homes and “repetitive loss properties.” Id. A Senate version of the bill would have similarly ended subsidized premiums for “severe repetitive loss properties.” Flood Insurance Reform and Modernization Act of 2011, S. 1940, 112th Cong. § 106 (2011). Both versions of the bill also contain other reforms aimed at making the NFIP solvent, including premium increases and, in the Senate version, exemption of non-primary residences from subsidized rates. Id.; see also H.R. 1309.}

The desire to treat new purchasers differently from those who have long been in their homes stems from what is essentially an expectations argument. The distinction highlights the weakness of the individual expectation argument with respect to dynamic land. Those who purchased their homes decades ago, the thinking goes, did not know better; today we do.\footnote{Another advocate of reform, noting the effect that the loss of insurance subsidy would have on housing prices, proposes phasing out the subsidy over fifteen years but allowing it to transfer with the house during that time. Scales, supra note 316, at 45.}

4. Distortions in Policy

Irrational expectation interests can distort law and policy. Recent commentators have noted that the main obstacles to appropriate beach use are political, because the public has grown to have the unrealistic expectation that beaches will always remain where they are.\footnote{See Peloso & Caldwell, supra note 7, at 107-08.} Courts have applied the takings doctrine to protect what is not a rational interest deserving protection under \textit{Penn Central}. In addition, irrational expectations on the part of the public lead to ill-advised public policy like expensive renourishment projects or armoring that ends up spending a great deal of public money to protect individual properties. Scientists have noted that all such attempts to hold back the sea will fail eventually; armoring simply postpones the inevitable.\footnote{Scales, supra note 316, at 6.} Nevertheless, the existence of a renourishment program or of beach armoring in turn increases the public’s confidence in the safety of those properties as places to buy or build expensive improvements, which increases the magnitude of insurance losses in the event of storms and makes flood insurance payouts more expensive.\footnote{See \textit{Dean}, supra note 3, at 108-09.} This perpetuates a cycle of foolish investment backed by foolish expectation, financed in part at taxpayer expense. In sum, expectation interests on the part of individual owners are a particularly weak shoal on which to construct law and policy.
B. The Public’s Interests

The question remains, then, as to the more robust interests that underlie the law of the shores. The expectation interest described in the previous section is at tension with other interests, including the interests of the coastal environment, the beach-going public, and the needs of the community, both present and future. Property rights are limited, not absolute; people are not situated as autonomous individuals but rather in relationship to one another and to community.  

Beaches are unlike other types of property. One court noted, “[t]he sandy portion of the beaches are [sic] of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and have for fishermen and bathers, as well as a place of recreation for the public.” Those traditional uses have given rise to a reliance interest on the part of the public. Some property rights arise from reliance, a reliance grounded in long-term relationships. As stated by Joseph William Singer, “[a]t crucial points in the development of [some] relationships . . . the legal system requires a sharing or shifting of property interests from ‘owner’ to ‘non-owner’ in order to protect the more vulnerable party.” Singer goes on to describe the reliance interest at the heart of such relationships. One illustration of this theory, according to Singer, occurs in the legal doctrine of custom. He asserts that the doctrine of custom protects several kinds of reliance, meeting a public expectation, filling a public need, and, in the case of beaches, promoting equal access to recreation. Currently, only Oregon and Hawaii protect public access to all beaches by broad application of the doctrine of custom. Nevertheless, the existence of a reliance interest in beach access on the part of the public appears repeatedly in case law—even in states that do broadly apply the legal doctrine of custom.

332. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974).
334. Id.
335. Id. at 623.
336. Id. at 672.
337. Id. at 673-74.
338. Id.
Cases illustrate varying degrees of public reliance on access to the dry sand area of the beach, whether the formal legal regime protects it or not. In *State ex rel. Thornton v. Hay*, the Oregon Supreme Court noted that the earliest European settlers to Oregon, adopting the practices of the Native Americans who preceded them, used the foreshore for clam-digging and the dry sand for their cooking fires, and continued to freely use the beach for recreation throughout the state’s history.

The evidence presented in the Texas cases have similarly evidenced the public’s long-standing use of some of Texas’ beaches. The appeals court in *Seaway Company, Inc. v. Attorney General of Texas* reiterated the jury’s findings that the subject beach, a portion of West Beach in Galveston, had “since a time before November 28, 1840 . . . been continuously, as a matter of common practice, used by the public, individually and collectively as a public way and for use in connection with fishing, swimming, and camping.” The court described in detail historical evidence of the use of the beach as a road, including a congressional designation of the beach as a mail route as early as 1838; a newspaper article describing a stage coach route along the beach; maps dating from 1845 to 1875 depicting the beach as a road; and testimony from elderly witnesses, one of whom testified that he “used to drive a horse and buggy down before the time of automobiles.” The witnesses also provided ample testimony of the use of the beach for swimming, fishing, recreation, and camping: “Some would put up tents on Saturday afternoon and stay until [five] o’clock on Sunday afternoon.” The court’s record in another Galveston case, *Moody v. White*, also included “over 200 pages of testimony . . . from fishermen, ferryboat captains, law enforcement officials, long-time residents of the area, and others which support the jury’s finding of public use of the beach” for a variety of uses. While the building of roads has eliminated the need to use the beach as a main thoroughfare, to this day people do use parts of Galveston’s beaches, up to

341. *See, e.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974).
345. *Id.* at 927.
346. *Id.* at 931-33.
347. *Id.* at 932-33.
349. *Id.* at 377.
the vegetation line, for parking their cars, and the use of the beaches for recreation and fishing has been uninterrupted.\textsuperscript{350}

In Florida, beaches serve an important cultural role. As one particularly poetic Florida court noted:

There is probably no custom more universal, more natural, or more ancient, on the sea-coasts . . . than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the life-giving touch of its healing waters and its clear dust-free air . . . . The people of Florida—a State blessed with probably the finest bathing beaches in the world—are no exception to the rule. Skill in the art of swimming is common amongst us. We love the oceans which surround our State. We, and our visitors too, enjoy bathing in their refreshing waters.\textsuperscript{351}

Of course, Florida beaches also serve an important economic role, both as drivers of tourism and as physical buffers between storm surges and developed property.\textsuperscript{352} Florida legislation prioritizes the physical protection of the state’s beaches through ongoing beach restoration, beach nourishment, and erosion control projects.\textsuperscript{353} Florida’s Beach and Shore Preservation Act describes beach erosion as “a serious menace to the economy and general welfare of the people of [the] state . . . .” and declares the physically protecting the state’s beaches to be a “necessary governmental responsibility.”\textsuperscript{354}

Florida’s priorities highlight how the reliance interest in beaches inures not just to people as individuals, but to entire communities. Economically, beaches have served to drive tourism that sustains many beach communities.\textsuperscript{355} Socially, beaches provide a place for outdoor gathering. Particularly when located in or near urban areas, outdoor space available to the public is a necessary component of a healthy community.\textsuperscript{356}

Recognizing these as the values underlying beach access law is not novel. The common law, as it has developed, has already recognized multiple values.\textsuperscript{357} As progressive property scholars have noted, the law already places limits on the right to exclude in other contexts. Under the doctrine of easements by necessity, for example, conveyors of landlocked

\begin{itemize}
  \item \textsuperscript{350} Brannan v. State, 365 S.W.3d 1, 16-17 (Tex. App. 2010).
  \item \textsuperscript{351} White v. Hughes, 190 So. 446, 448-49 (Fla. 1939).
  \item \textsuperscript{352} See City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 77 (Fla. 1974).
  \item \textsuperscript{354} Id. § 161.088.
  \item \textsuperscript{355} DEAN, supra note 3, at 230.
  \item \textsuperscript{356} Alexander, supra note 288, at 806.
  \item \textsuperscript{357} See, e.g., Peñalver, supra note 28, at 883.
\end{itemize}
parcels may be required to allow access across their land, and under the common law doctrine of necessity, owners may not exclude people in immediate danger.\textsuperscript{358} Owners must also permit police or firefighters to enter their property.\textsuperscript{359} Further, under federal legislation, owners of public accommodations may not exclude people on the basis of race,\textsuperscript{360} and residential landlords may not discriminate in tenant selection on the basis of family composition. None of these intrusions is regarded as a taking.

In this context, it makes sense that avulsion has actually rarely been applied to take away public beach. Instead, the law has protected the stronger interests at stake, the interests built on the interconnectedness of community.\textsuperscript{361} The dissenting justices of the Texas Supreme Court were correct in their characterization of the court’s rule:

The Court also illogically distinguishes between shoreline movements by accretion and avulsion . . . This means a property owner loses title to land if, after a hurricane or tropical storm, such land falls seaward of the mean high tide. On the other hand, this same hurricane, under the Court’s analysis, requires the state to compensate a property owner for the land that now falls seaward of the vegetation line unless it was already a part of the public beachfront easement. Under the Court’s analysis, the property line may be dynamic but beachfront easements must always remain temporary; the public’s right to the beach can never be established and will never be secure.\textsuperscript{362}

The distinction between shoreline movement by erosion and those caused by avulsion is, indeed, an “illogical” application of common law in this context. It is also likely to give rise to excessive litigation over whether particular shifts in the shoreline are erosive or avulsive. Changes that appear “avulsive” in the snapshot of a moment may later appear as part of a larger pattern of shifts, some large some small, both landward and seaward, over time. Texas’s recent decision therefore incentivizes lawsuits by those who would extinguish public access, as a littoral owner motivated enough to file a claim for injunctive relief immediately after any heavy storm will fare better than one who waits for natural forces to shift the lines back seaward a few feet.

The Fifth Circuit observed that resolving the rolling easements question would prove “vital to the rights of thousands of Texas beachfront

\textsuperscript{358} Id.
\textsuperscript{359} See Reliance Interest, supra note 295, at 675.
\textsuperscript{360} Peñalver, supra note 28, at 882, 882 n.243.
\textsuperscript{361} Id. at 749.
The observation vastly underestimated the matter’s impact: dismantling the rolling easements doctrine in Texas will “prove vital” to the rights of the millions who live in or visit Texas beachfront communities. As the easements granting the public access to miles of Texas’s beaches disappear, entire communities of people who live near, but not on, the beach will find a basic ingredient of their communities and economies under threat. Coupled with the losses to individual property owners inevitable due to climate change, these communities will experience the collective loss of accessible coastlines whenever the sands shift abruptly inland.

As noted above, the one frequently-cited case that did apply avulsion to take away public beach land was an outlier and can be explained by virtue of the fact that there, a public action had caused the loss of the beach to begin with. Other cases that have recited the traditional rule of avulsion have not applied in to take away public beach. Instead, the laws affecting shorelines have long protected a broad set of values. Rolling easements, long recognized in Texas, are the appropriate and logical extension of existing public rights to dry sand and should be recognized in states that have yet to address this issue. It would be perfectly consistent with American law for state courts to decline to apply avulsion to undercut rolling easements and take away the public’s rights to use migrating beaches. In states that choose the wiser path, the beach may move inland, but we may still spread our towel on it.

363. Severance v. Patterson, 566 F. 3d 490, 498 (5th Cir. 2009), certified question answered, 345 S.W.3d 18 (Tex. 2010), withdrawn, superseded, and certified question answered by 370 S.W.3d 705 (Tex. 2012).


365. See Maloney et. al, supra note 112.