THE NEWSLETTER OF THE REAL PROPERTY & FINANCIAL SERVICES SECTION OF THE HAWAII STATE BAR ASSOCIATION

KA NU HOU

FROM THE CHAIR

October 2011

Aloha and welcome to the latest issue of Ka Nu Hou, the newsletter of the Real Property and Financial Services Section of the Hawaii State Bar Association.

Since this will be my last message as Chair of the Section, it is filled with many thanks to the current board members and past chairs and others who generously volunteered their time to fulfill the purposes of the Section. Thank you all for your contributions.

This year, we arranged and sponsored various seminars for Section members. Mahalo to section members **Professor David Callies** and **Ben Kudo** for putting on the biennial Land Use Seminar; **Greg Kugle** for presenting the Brown Bag session on shoreline issues; **Lorrin Hirano** for presenting the Brown Bag session on pending 2011 bills of interest to Section members; and **David Rair** for presenting the July seminar on 2011 Acts. We also wish to thank **Melissa Pavlicek** for presenting the Brown Bag session on procurement procedures and to **Anthony Ching** for his presentation on the Hawaii Community Development Authority.

If you were able to attend the well-received ALI-ABA seminar on Post-Modern Real Estate Transaction in August, you can thank **Jack Wong** and **Cindy Ching** and their staff for their work of organizing the seminar and also **Bernice Littman** for being our local representative on the esteemed panel of speakers.

Finally, we would like to thank **Deb Chun**, **Gino Gabrio** and **Mitch Imanaka** for editing and bringing to publication Volume 3 of the multi-volume Hawaii Real Estate Law Manual. They also coordinated presentation of that volume at this year's annual bar convention. Thank you for a job well done on this ambitious project and thank you for your continuing work to complete the upcoming Volume 4.

Still to come is the Section's annual luncheon meeting to be held at the Pacific Club on Thursday, December 15, 2011, prior to which ballots will be sent out for the election of new Board officers and directors.

Also, thank you to **Jennifer Benck**, **Nathan Natori** and **Kyle Sakumoto** for their efforts to update and relaunch our Section's website.

Annually, the Section awards two scholarships to law students at the William S. Richardson School of Law. **Nicolette Winter** was this year's recipient of the award of $2500, for her article "Trails in Hawaii: An Overview of Relevant Statutes and Legal Theories", which was published in our April 2011 newsletter. **Britt Bailey** was this year's recipient of the award for her article, "From Sea to Rising Sea: How Climate Change Challenges Coastal Land Use Laws", which is published in this newsletter. Congratulations to Nicolette and Britt.

Finally, thank you for letting me serve as your chair. Please continue to lend your assistance and support to **Kyle Sakumoto**, who will be the chair for 2012.

Grace Nihei Kido

In this Issue:

"Save the Dates":

Friday, November 18, noon to 1:00 p.m. – **Board meeting** at Carlsmith Ball board room, 1001 Bishop Street, 22nd Floor

Thursday, December 15, noon to 1:30 p.m. – **Annual Section Meeting and buffet lunch at the Pacific Club**. Look for the upcoming announcement and details to follow.

From Sea to Rising Sea: How Climate Change Challenges Coastal Land Use Laws

By E. Britt Bailey*

"With climate change there will be an unprecedented landward movement of water causing defensive property responses with an intensity never seen before. We simply cannot apply the old rules and have them make sense."

- Joseph L. Sax[1]

I. INTRODUCTION

The United States' 12,400 miles of ocean coastline is projected to become increasingly unpredictable as the effects of climate change alter sea levels, increase storm frequency and strength, and intensify erosive activity. Tasked with undertaking the profound and intricate mission of saving our coastlines in the midst of significant climate-related changes, coastal state governments are developing and implementing management strategies to ensure the long-term viability of the nation's coastlines. These strategies include not only restoring and rebuilding eroding beaches, but also simply yielding to naturally migrating shores. The efforts of the states present a conflict between private property rights[2] and the public interest. The tug-of-war between private rights and the public interest has been engaged repeatedly in the context of coastal protection measures within the United States. In light of climate change and its impending impacts to the coastline, the legal disputes are bound to become more intense and complex.

It is within this vibrant coastal setting—where the land meets the sea—that these two important legal interests, public and private, will continue to collide with momentous and increasing fervor. At the heart of this coastal collision are common law doctrines. Developed to protect the rights of the public as well as the rights of private coastal landowners, common law doctrines act as a guide in the event of legal uncertainty. The doctrines include the rights of the public to access and use the shoreline (public trust doctrine), and the rights of adjacent or upland private landowners to access and use the shoreline (doctrine of littoral rights, which includes the doctrine of erosion and accretion). In the face of the unprecedented and extraordinary effects of climate change, the combination of climate-related coastal management (and its likely restraints on coastal property) and the increasing defense of private property rights calls into question whether these common law doctrines continue to make sense for these changed circumstances.

Saddled with both the threat and reality of constitutional takings challenges, states are explicitly recognizing common law-based "background principles of law" as the basis for statutes outlining climate-related management strategies. Although consistent with Supreme Court precedent, utilizing common law doctrines as "background principles" fails to accommodate the transforming nature of law in response to climate change. Not only are the doctrines themselves becoming distorted by this application, but they are also contradicting their flexible nature and becoming static at a time when they arguably need to adapt and shift the most. The complexities of climate change may require that the common law evolve in response to changing conditions. Allowing the common law to shift under the new circumstances may not yield satisfactory solutions for all parties involved; however, halting its evolution in light of the impending threats associated with climate change will invariably become an obstacle to progress.

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* J.D. Candidate, December 2011, University of Hawai'i William S. Richardson School of Law. I thank the following people whose valuable guidance and direction helped shape this paper: Denise Antolini, Lynda Arakawa, Matthew Barbee, Michael Blumm, David Callies, Calvert Chipchase, Jamila Jarmon, Alison Kato, Jill Ramsfield, Joseph Sax, and Dean Avi Soifer. In addition, I thank my family for their endless support and patience.

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[1] Telephone Interview with Joseph L. Sax, James H. House & Hiram H. Hurd Professor of Envtl. Regulation, Emeritus, Univ. of Cal. at Berkeley (Feb. 18, 2010).

[2] Harvey M. Jacobs, *Introduction: Is All that is Solid Melting into Air*, *in* PRIVATE PROPERTY IN THE 21ST CENTURY 12 n.2 (Harvey M. Jacobs ed., 2004). In the United States, land is conceptualized as a bundle of rights. *Id.* When one owns land, ownership does not only mean possession of the physical soil, but also rights to use, sell, trade, or bequeath. *Id.* It includes water rights (the water sitting under the parcel), the right to control access, the right to harvest, and the right to develop. *Id.*

This comment begins by examining the effects of climate change on the ocean coastline of the United States. Part II provides an overview of state adaptation strategies in response to climate change as well as the common law doctrines that govern coastal property law at the crux of the legal tension. Part III examines the challenges climate change presents to the common law doctrines that guide legal disputes and court decisions. With a particular emphasis on legal challenges in both Texas (*Brannan v. Texas*[3] and *Severance v. Patterson*[4]) and Florida (*Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[5]), this analysis specifically focuses on assessing whether the common law doctrine of littoral rights can flex to accommodate changing circumstances. In seeking equitable solutions to the increasing legal tension at the water's edge, states may need to update and align the common law doctrines in response to the unprecedented conditions brought on by climate change. Part IV concludes with a look at future needs. Rather than misrepresent or distort common law doctrines that underpin adaptation responses, courts should embrace the changing nature of common law in response to climate change.

II. BACKGROUND

As owners and trustees of the nation's beaches,[6] twenty-three state governments are tasked with the complex mission of saving America's coastlines in response to approaching climate-related changes. Some coastal states have been proactively preparing for the effects of climate-related changes by developing state-based comprehensive strategies to reduce vulnerabilities[7] and implementing science-based setbacks at the county planning level.[8] Others are still drafting planning documents and policies in preparation of the anticipated changes.[9]

Whether states are at the implementation or drafting phase, they are likely to encounter litigation as private owners defend their property rights. Although coastal areas have historically been a source of legal tension, rising sea levels and the landward movement of coastal waters will likely generate legal conflict with an intensity never seen before.[10]

A. The Effects of Climate Change on the Coastal Lands

According to the Intergovernmental Panel on Climate Change (IPCC), there is an international scientific consensus that anthropogenic sources of carbon dioxide will continue to cause climate change.[11] Although recognizing that many factors influence climate, scientists have determined that human activities that increase the concentration of greenhouse gas emissions are responsible for most of the atmospheric warming observed over the past fifty years.[12] Even if human-related emissions levels stabilized, the accumulated concentration of greenhouse gas emissions would continue to cause warming well into the next century, inducing many changes in the global climate

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[3] No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010).
[4] 566 F.3d 490 (5th Cir. 2009).
[5] 130 S. Ct. 2592 (2010).
[6] *See* Port of Seattle v. Or. & Wash. R.R. Co., 255 U.S. 56 (1921); United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 286 (1943) (Jackson, J., dissenting); Phillips Petroleum v. Mississippi, 484 U.S. 469, 475 (1988).
[7] *See, e.g.*, Maryland Comm'n on Climate Change, Climate Action Plan (Aug. 27, 2008), http://www.mdclimatechange.us/.
[8] *See, e.g.*, Kaua'i County, Haw., Ordinance 863 (Jan. 25, 2008). Kaua'i County, Hawai'i adopted the most aggressive shoreline building setback law in the nation, protecting coastal structures against 70 to 100 years of erosion. Surfrider Foundation, State of the Beach, Hawaii Erosion Response, http://www.surfrider.org/stateofthebeach (last visited Nov. 21, 2010).
[9] *See generally* Pamela Rubinoff et al., *Summary of Coastal Program Initiatives that Address Sea Level Rise as a Result of Global Climate Change* (2008), *available at* http://seagrant.gso.uri.edu/z_downloads/coast_haz_slr.pdf.
[10] Sax, *supra* note 1.
[11] Intergovernmental Panel on Climate Change, *Summary for Policymakers, in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 2-3 (2007) [hereinafter IPCC].
[12] Hervé Le Treut et al., *Historical Overview of Climate Change Science, in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 11, at 105.

system during the twenty-first century that will likely be larger than those observed during the twentieth century.[13] Based on the modeling of six possible emission scenarios, the IPCC projects that temperatures will increase between 1.8 and 4.0 degrees Celsius, or a change of about four degrees Fahrenheit, by 2099, causing sea level rise, erratic weather patterns, and coastal erosion.[14]

1. Sea level rise

Most of the world's sandy shorelines retreated during the past century, and sea level rise is an underlying cause.[15] With projected increases in average global temperatures over the next century, shorelines are bound to continue their retreat. Current estimates project a global 0.6-meter (1.97 feet) rise in sea levels by the year 2100.[16] A one-meter rise in sea level would submerge 25,000 square miles of American coastal lands.[17] With Eastern and Gulf coasts projected to be hardest hit, some states, such as Texas and Florida, could experience water inundation several miles inland.[18]

2. Coastal erosion

Coasts are dynamic systems, undergoing continuous physical adjustments through erosion, accretion, and avulsion.[19] "Erosion" is the gradual washing away of land bordering on a stream or body of water by the action of the water.[20] In contrast, "accretion" is a gradual and imperceptible process in which additions of sand, soil, or sediment creates new land that was previously submerged in water.[21] Accretion and erosion are distinct from "avulsion," in which the action of water causes a "sudden and perceptible" loss of coastal or riparian land.[22] Although these physical adjustments are part of a natural system, rising seas and increased storm activity associated with climate change will intensify the natural process leading to dramatically increased erosion and avulsive events in many states without a counterbalancing increase in accretion.[23]

Due to their geological features, the Atlantic and Gulf coasts are particularly susceptible to erosion. The low-lying shores and vast coastal plains of Florida, Alabama, Louisiana, Mississippi, and Texas determine the trends and rates of shoreline movement in the region.[24] The Gulf Coast of Texas and Florida currently represent worst-case

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[13] Gerald A. Meehl et al., *Global Climate Projections, in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 11, at 824-25. Twenty percent of emitted carbon dioxide is projected to remain in the atmosphere for many millennia, while more than half will remain for less than 100 years. *Id.*

[14] IPCC, *supra* note 11, at 13.

[15] *See* S.P. Leatherman, *Social and Economic Costs of Sea-Level Rise, in* SEA LEVEL RISE, HISTORY AND CONSEQUENCES 181-223 (Bruce C. Douglas et al. eds., 2001).

[16] Robert J. Nicholls et al., *Coastal Systems and Low-Lying Areas, in* CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY (2007).

[17] Seth Borenstein, *Rising Seas Will Reshape the U.S.*, L.A. TIMES, Sept. 23, 2007, at A16.

[18] *Id.*; James G. Titus et al., *Greenhouse Effect and Sea Level Rise: The Cost of Holding Back the Sea*, 19 COASTAL MGMT. 171, 189-92, 200 (1991).

[19] Erosion and accretion are opposing terms describing the often imperceptible decreasing or broadening of sands along a shoreline. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 42 (2d ed. 2002). Avulsion refers to a sudden and perceptible loss of land abutting water generally caused by a storm-like surge along the shoreline. *Id.*

[20] *See* Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52, 57 (Tex. App. 1993).

[21] Donna R. Christie, *Of Beaches, Boundaries and Sobs*, 25 J. LAND USE & ENVTL. L. 19, 29-30 (2009).

[22] *See* Cox v. F-S Prestress, Inc., 797 So. 2d 839, 843 (Miss. 2001).

[23] The Heinz Center, *Evaluation of Erosion Hazards: Report Brief*, at 2 (2000), http://www.heinzctr.org/publications/PDF/rprtbrf.pdf.

[24] Robert A. Miller et al., *National Assessment Of Shoreline Change: Part 1 Historical Shoreline Changes And Associated Coastal Land Loss Along The U.S. Gulf Of Mexico*, U.S. Geological Survey Open-file Report 2004-1043, at 14 (2004), *available at* http://pubs.usgs.gov/of/2004/1043/.

scenarios in terms of climate-related change.[25] Florida's Gulf coastline is eroding at an average of 0.8 meters per year (2.6 feet), and Texas' Gulf shores are eroding by an average of 1.8 meters per year (5.9 feet).[26]

Unlike the Gulf Coast, the Pacific coast is interspersed with sandy beaches and prominent headlands or cliffs.[27] Weaker rocks erode more quickly, forming coastal sediment, while the harder rocks remain as headlands or cliffs with a relatively high resistance to erosion.[28] In this environment, increased precipitation associated with climate change and higher groundwater levels may amplify cliff failure and retreat rather than rising sea levels.[29] The long-term shoreline erosion rate for northern and central California is 0.3 meters per year (0.9 feet), and the projected erosion rate for southern California is 0.2 meters per year (0.7 feet).[30] The erosion of beaches and coastal cliffs in this region will likely occur in large bursts during storm events as a result of increased wave height and storm intensity.[31] Because of these large events, erosion may outpace sea level rise.[32]

Coastal communities are expected to experience more frequent and destructive flooding, compromised water supplies, and decreases in the size and number of beaches due to climate-related changes.[33] Over the next sixty years, erosion alone may claim one in four homes within 500 feet of a U.S. coastline.[34] Without adequate planning, engineering, and development of policies and laws incorporating effective response strategies, the coast and its beaches, homes, businesses, and infrastructure will be increasingly vulnerable to the effects of impending climate change.

B. Overview of State Adaptation Strategies in Response to Climate Change

As of 2006, nearly two-thirds of the coastal states reported to the U.S. National Oceanic and Atmospheric Association (NOAA) that "coastal hazards" in light of impending climate changes are a high priority.[35] Recognizing the significance of climate change, these states have developed, or are in the process of developing, five-year strategies to address the challenges of flooding, shoreline erosion, and coastal storms.[36] The research and management community has termed this preparation for climate change impacts "adaptation."[37] In developing adaptation strategies, most coastal programs have focused on creating policy responses that account for the potential social, environmental, and economic impacts of accelerated sea level rise and resulting shoreline changes.[38] Although

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[25] Interview with Matthew Barbee, Univ. of Haw. Coastal Geology Grp., in Honolulu, Haw. (Mar. 15, 2010).
[26] Miller et al., *supra* note 24, at 14.
[27] C.J. Hapke, *Estimation of Regional Material Yield from Coastal Landslides Based on Historical Digital Terrain Modelling,* 30 EARTH SURFACE PROCESSES & LANDFORMS 679, 679-97 (2005).
[28] Guillaume Pierre & Philippe Lahousse, *The Role of Groundwater in Cliff Instability: An Example at Cape Blanc-Nez (Pas-de-Calais, France),* 31 EARTH SURFACE PROCESSES & LANDFORMS 31, 31-45 (2006).
[29] *Id.*
[30] C.J. Hapke, D. Reid, B.M. Ruggiero, & J. List, *National Assessment of Shoreline Change: Part 3: Historical Shoreline Changes and Associated Coastal Land Loss Along the Sandy Shorelines of the California Coast,* U.S. Geological Survey Open-file Report 2006-1219, 12 (2006), *available at* http://pubs.usgs.gov/of/2006/1219/.
[31] *Id.* at 25.
[32] Heinz, *supra* note 23, at 2.
[33] Andrew Bakun, *Global Climate Change and Intensification of Coastal Ocean Upwelling*, SCI. MAG., Jan. 12, 1990, at 198-201.
[34] *Id.*
[35] NOAA Office of Ocean & Coastal Resource Mgmt., *Coastal Zone Management Program-Enhancement Grant Assessment and Strategies: Coastal Hazards* (Sept. 2006), http://coastalmanagement.noaa.gov/issues/docs/hazards_summary.pdf.
[36] *Id.*
[37] Adaptation refers to "the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities." INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION, AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 6 (2007).
[38] Coastal States Org., *The Role of Coastal Zone Management Programs in Adaptation to Climate Change* (2007), *reprinted in* Coastal States Org., *The Role of Coastal Zone Management Programs in Adaptation to Climate Change: Second Annual Report* app. B at 9 (2008), *available at* http://www.coastalstates.org/wp-content/uploads/2010/07/CSO-2008-Climate-Change-Report2.pdf.

adaptations vary, states are primarily using some variation of rolling easements and beach nourishment to address the loss of coastal lands from erosion.

1. Rolling easements

Recognizing that large amounts of beaches and coastal wetlands are being lost to erosion and may increasingly disappear as sea levels rise, a few states have implemented what are called "rolling easements."[39] Rolling easements recognize the natural processes of coastal erosion by allowing property owners to develop near the shore on condition that they vacate the structures if and when they become threatened by an advancing shoreline.[40]

Several states recognize rolling easements in a variety of ways. Texas judicially recognized rolling easements as early as 1944.[41] More recently, California identified rolling easements as a viable adaptation in response to climate change in 2009.[42] Yet Texas and California are not alone in their application of rolling easements.[43] South Carolina, for example, also recognizes rolling easements.[44] In 1988, in response to the risks of a one-foot rise in sea level, South Carolina passed the Beachfront Management Act, which requires significant setbacks along the coast.[45] In the aftermath of a legal challenge to the Act in *Lucas v. South Carolina Coastal Council*,[46] the legislature modified the statute with a rolling easement policy that allows development while requiring landowners to remove structures should they become situated on an active beach.[47]

State policies allowing beaches to erode and give way to natural processes present a Faustian bargain for upland private property owners at risk of losing their proprietary investment. From a government standpoint, rolling easement policies present a feasible and efficient way of managing a retreating coastline. The adaptation costs little to nothing to employ while it preserves the shoreline for the public.[48]

Such easements are arguably fundamentally rooted in principles of property law such as the public trust doctrine and the doctrine of littoral rights.[49] Most states that recognize rolling easements, however, do so via statute or constitutional amendment.[50] Even with express authorization, instituting a policy of rolling easements will likely prompt legal disputes, as indicated by recent Texas litigation challenging the State's order to remove homes encroaching on an eroding public beach.[51]

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[39] *See* James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279, 1313 (1998); Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533, 574 (2007) (explaining that the term "rolling easement" is derived from the common law of Texas describing a broad collection of arrangements whereby human activities yield to naturally migrating shorelines).

[40] Titus, *supra* note 39, at 1313.

[41] State v. Balli, 190 S.W.2d 71 (Tex. 1944).

[42] CAL. NATURAL RES. AGENCY, 2009 CALIFORNIA CLIMATE ADAPTATION STRATEGY 77 (2009), *available at* http://www.climatechange.ca.gov/adaptation (follow link to report).

[43] California, Maine, North Carolina, South Carolina, and Rhode Island also expressly use the rolling easement policy to manage their shoreline. Caldwell & Segall, *supra* note 39, at 571.

[44] S.C. CODE ANN. § 48-39-290(D)(1) (2008).

[45] *Id.* §§ 48-39-10 to 360.

[46] 505 U.S. 1003 (1992).

[47] S.C. CODE ANN. § 48-39-290(D)(1) (West, Westlaw through 2010 Sess.). The term "active beach" is defined as "the area seaward of the escarpment or the first line of stable vegetation, whichever first occurs, measured from the ocean." *Id.* § 48-39-270(13).

[48] Titus, *supra* note 39, at 1327.

[49] Caldwell & Segall, *supra* note 39, at 574.

[50] *See, e.g.*, TEX. NAT. RES. CODE ANN. §§ 61.001-.254 (Vernon 2006); Matthew Tresaugue, *A Constitutional Right to Hit the Beaches? Voters Get to Decide on Public Access Measure*, HOUSTON CHRON., May 29, 2009, at B3.

[51] *See* Brannan v. State, No. 01-08-00179, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010); Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009).

2. Beach nourishment

At an estimated cost of one million dollars per mile,[52] beach nourishment projects restore eroding beaches by directly engineering and adding sand to the shoreline.[53] This artificial restoration rebuilds beaches while providing a buffer against increasing coastal erosion. It is the only management adaptation tool that serves the dual purpose of protecting coastal lands and preserving beach resources.[54]

Beach nourishment is designed to mimic nature by responding to changes in wave activity and current conditions.[55] Ideally, states design beach nourishment projects so that the range of seasonal shoreline fluctuation remains within acceptable limits during the project's life.[56] Whereas structural beach retention measures such as sea walls were more common thirty to fifty years ago, beach nourishment has become a recognized adaptation for managing the loss of sandy beaches in recent decades.[57]

C. The Collision at the Water's Edge: This Land is Your Land, This Land is My Land

Efforts to preserve natural coastlines have repeatedly incurred resistance from upland private property owners seeking to maintain personal uses of their beachfront land.[58] The resistance is steeped in firmly held beliefs about constitutional property protections and common law doctrines.

1. The takings clause

Although it is well settled that state courts have broad authority over state property law,[59] the takings clause of the Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation."[60] The Fourteenth Amendment applies this prohibition to the states.[61]

As applied to coastal states, the takings clause acts as a limitation on a government's ability to manage and protect the coastline and its beaches from the changes wrought by the dynamic natural processes of erosion, accretion, and avulsion. A "taking" occurs when the government directly appropriates or physically invades property.[62] In addition, government *regulation* of private property may constitute a taking if "[*it*] *goes too far*,"[63] such that the regulation becomes the equivalent of a "direct appropriation or ouster."[64] Although determining whether a regulation "goes too far" is generally a factual matter, when a regulation deprives a property owner of all economically beneficial uses of property, it constitutes a *per se* or categorical taking.[65] Such was the case involving David Lucas, whose challenge to South Carolina's Beachfront Management Act went all the way to the Supreme Court and has become a seminal coastal land use case.[66]

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[52] U.S. Geological Survey, *Coastal and Marine Geology Program: Limited Sand Resources for Eroding Beaches*, http://coastal.er.usgs.gov/wfla/factsheet (last updated Nov. 21, 2010).
[53] Caldwell & Segall, *supra* note 39, at 551.
[54] Titus, *supra* note 39, at 1313.
[55] CALIFORNIA DEP'T OF BOATING & WATERWAYS & STATE COASTAL CONSERVANCY, CALIFORNIA BEACH RESTORATION STUDY (2002), http://www.dbw.ca.gov/PDF/Reports/ BeachReport/Full.pdf.
[56] *Id.*
[57] *Id.*
[58] Regina McMahon, *The Lucas Dissenters Saw Katrina Coming: Why Environmental Regulation of Coastal Development Should Not Be Categorized as a "Taking,"* 15 PENN. ST. ENVTL. L. REV. 373, 384 (2007).
[59] *See* Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378-79 (1977); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 n.8 (1930); Fox River Paper Co. v. R.R. Comm'n of Wis., 274 U.S. 651, 657 (1927).
[60] U.S. CONST. amend. V. *See also* Michael A. Hiatt, *Come Hell or High Water: Re-Examining the Takings Clause in a Climate Changed Future*, 18 DUKE ENVTL. L. & POL'Y F. 371, 380 (2008).
[61] U.S. CONST. amend. XIV, § 1.
[62] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536-37 (2005).
[63] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (emphasis added).
[64] *Lingle*, 544 U.S. at 537.
[65] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1046 (1992).
[66] *Id.* at 1006-07.

South Carolina's Beachfront Management Act (BMA) authorized the South Carolina Coastal Council to establish an erosion baseline for land seaward of the newly mapped erosion setback line as "critical area."[67] Land within the critical area is subject to additional permits by the Coastal Council.[68]

In 1986, David Lucas purchased two residential lots in the Wild Dune development on the Isle of Palms, a barrier island east of Charleston, South Carolina.[69] As part owner of the Wild Dune development, Lucas intended to construct a single-family home on each coastal lot.[70] The land, located seaward of the erosion setback line, was known to be unstable and subject to flooding and a shifting shoreline.[71] Upon seeking additional permits for construction in the critical area, the Coastal Council barred Lucas from building any permanent structures on the property.[72] The Coastal Council based its decision on the instability of the land within the critical area created through the passage of the BMA.[73] Lucas filed suit against the Coastal Council, alleging a constitutional taking without just compensation.[74] The state trial court held in favor of Lucas, finding that the BMA, as applied, rendered a taking of the complete value of his lots.[75] The court awarded Lucas $1.2 million.[76]

The U.S. Supreme Court ultimately agreed with the state trial court's decision that the application of the BMA created a taking of Lucas' property.[77] Writing for the majority, Justice Scalia wrote that Lucas must be compensated because the BMA deprived him of "economically productive or beneficial use of his land . . . and compensation must be paid to sustain it."[78]

Although advocates of private property rights celebrated the decision in *Lucas*, the scope of the decision proved to be fairly narrow.[79] Moreover, Scalia's opinion left a doorway open for states to assert protections from compensable takings through its discussion of "background principles of the [s]tate law of property."[80]

2. Defining background principles of state property law

In *Lucas*, Justice Scalia pointed out that a state's defense against a taking may be grounded in "background principles of state law,"[81] but he provided little guidance as to this new[82] term's meaning. In essence, Justice Scalia opened the door but did not tell states what was on the other side. Nearly ten years later, in the 2001 *Palazzolo v. Rhode Island*[83] decision, the U.S. Supreme Court offered some guidance on what "background principles of state law" encompassed.

Anthony Palazzolo was president of Shore Gardens, Inc. (SGI). In 1951, SGI acquired a parcel of land in the Misquamicut section of the town of Westerly, Rhode Island.[84] Located on the inland side of a barrier beach, between

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[67] *Id.* at 1008-09 (citing S.C. CODE ANN. § 48-39-280(A)(2)) (West, Westlaw through 2010 Sess.).
[68] S.C. CODE ANN. § 48-39-130.
[69] *Lucas*, 505 U.S. at 1006. Lucas purchased the lots for $975,000. *Id.*
[70] *Id.*
[71] Dana Beach & Kim Diana Connolly, *A Retrospective on Lucas v. South Carolina Coastal Council: Public Policy Implications for the 21st Century*, 12 SOUTHEASTERN ENVTL. L.J. 1, 3 (2003).
[72] *Lucas*, 505 U.S. at 1007.
[73] *Id.* at 1008.
[74] *Id.* at 1009.
[75] Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991).
[76] *Id.*
[77] *Lucas*, 505 U.S. at 1033.
[78] *Id.* at 1030.
[79] *See* Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 325 n.26 (2005).
[80] *Lucas*, 505 U.S. at 1029.
[81] *Id.*
[82] Prior to Justice Scalia's writing of the *Lucas* opinion, "background principles of property law" was an unknown legal term. Sax, *supra* note 1; Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 ECOL. L.Q. 805, 820 (2010).
[83] 533 U.S. 606 (2001).
[84] Palazzolo v. State, 746 A.2d 707, 709 (R.I. 2000).

the crest of the beach and the shore of a 460-acre saltwater coastal estuary called Winnapaug Pond, SGI sold off eleven individual subdivided house-lots to various purchasers between 1959 and 1960.[85] After this series of transactions, SGI retained title to a twenty-acre remnant, eighteen acres of which were occupied by marshland and subject to daily tidal inundation.[86]

From 1965 through 1977, Rhode Island's regulations governing alterations to coastal wetlands grew more stringent, evolving into a virtual development prohibition as of 1977.[87] In 1978, the Rhode Island Secretary of State revoked SGI's corporate charter, and Palazzolo, the sole shareholder, became the automatic successor to SGI's previously owned property.[88]

Charged with protecting the State's coastal properties, the Rhode Island Coastal Resources Management Council (CRMC) was responsible for administering coastal development under the Coastal Resources Management Program (CRMP).[89] In March 1983, Palazzolo filed an application with the CRMC, seeking approval to fill the full eighteen acres of salt marsh.[90] The CRMC rejected the application.[91] In January 1985, Palazzolo filed another application to fill the wetlands on the property so he could create a recreational beach facility.[92] CRMC again denied the application.[93] Palazzolo subsequently sued the State of Rhode Island, asserting that the State's wetlands regulations, as applied by the CRMC, had taken his property without compensation in violation of the Fifth and Fourteenth Amendments.[94] He sought $3,150,000 in damages, based on the value he claimed the land would have been worth after filling the wetlands and developing the property as seventy-four lots for single-family homes.[95]

Both the Rhode Island Superior Court and the Rhode Island Supreme Court found that the denial of Palazzolo's application was not a taking for which compensation was owed.[96] The Rhode Island Supreme Court held that Palazzolo had no right to challenge regulations predating 1978, when he obtained legal ownership of the property.[97] Although much of the Supreme Court's decision is focused upon the issue of ripeness, one of the more interesting and pertinent aspects of the case involves the discussion of notice.[98] In support of the lower court's argument, the Rhode Island Supreme Court relied on its interpretation of background principles of law, finding that a purchaser or a successive title holder with notice of an earlier-enacted regulation is barred from claiming that it constitutes a taking.[99]

The U.S. Supreme Court disagreed with the Rhode Island Supreme Court's reasoning and rejected the Rhode Island Supreme Court's holding based on prior notice.[100] Writing for the majority, Justice Kennedy stated: "Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."[101] He further stated, "It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background

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[85] *Id.* at 709-710.
[86] *Id.* at 711.
[87] *Id.*
[88] *Id.* at 715.
[89] *Id.* at 710.
[90] *Id.* at 711.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 709.
[97] *Id.*
[98] Palazzolo v. Rhode Island, 533 U.S. 606, 616 (2001).
[99] *Id.* at 626-627.
[100] *Id.* at 627.
[101] *Id.*

principle of the State's law by mere virtue of the passage of title."[102] The Supreme Court remanded the case to determine due compensation.[103]

On remand, the Rhode Island Superior Court began its analysis by considering the "background legal principles which bear on the extent of plaintiff's property interest" as a way to prevent takings compensation.[104] Relying on the *Lucas* decision,[105] the court identified a common law background principle as sufficient to bar Palazzolo's takings claim.[106] Succinctly stated, the court maintained that because of the public trust doctrine, Palazzolo could not have expected to develop his subdivision absent the consent of the State.[107] Therefore, the government did not need to compensate the property owner since the regulated or prohibited use was "not part of his title to begin with."[108]

Palazzolo signaled to states and the courts the importance of utilizing traditional or historical common law doctrines as the cornerstone of both regulations and regulatory decisions for the purposes of resolving cases at the early stages of litigation and limiting successful takings claims.[109]

3. Common law doctrines as background principles of state property law

Since the 1992 *Lucas* decision, numerous courts have used background principles of common law as a defense to uphold government regulations challenged by constitutional violations of property rights.[110] In nearly all of the instances, the regulations expressly prohibit conduct that most likely would have been prohibited by common law doctrines.[111] This use is consistent with Justice Scalia's emphasis in *Lucas* on common law doctrines as the basis for background principles.[112]

The sheer historical importance of the nation's coastline, both from an economic and an environmental standpoint, has given rise to common law doctrines ensuring access to and use of the shoreline for the public as well as adjacent private landowners. The common law doctrines include the "public trust doctrine" and the "doctrine of littoral rights," which includes the doctrine of erosion and accretion.[113]

a. The public trust doctrine

Unlike legislatively imposed restrictions that may or may not be considered pre-existing principles of property law, there is little dispute that the public trust doctrine, derived from ancient common law, constitutes a background principle of property law.[114] The doctrine creates the foundation for public rights along the shore and

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[102] *Id.* at 629-30.
[103] *Id.* at 633. The Court directed the state court to determine whether compensation was due under the factors established in *Penn Central Transp. Co. v. City of New York*. *Id.* at 616. The *Penn Central* case governs partial regulatory takings and provides a balancing test whereby several factors must be examined in determining whether a private landowner must be compensated. 438 U.S. 104 (1978). The factors include assessing the character of the government action, the economic impact of the regulation, and the extent to which the regulation has interfered with investment-backed expectations. *Id.* at 124.
[104] Palazzolo v. State, No. WM99-0297, 2005 WL 1645974, at *15 (R.I. Super. Ct. July 5, 2005).
[105] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
[106] *Palazzolo*, 2005 WL 1645974, at *15 (finding the common law-based public trust doctrine sufficient to bar a takings claim).
[107] *Id.* at *24 (quoting *Lucas*, 505 U.S. at 1027).
[108] *Id.*
[109] Blumm & Ritchie, *supra* note 79, at 326.
[110] Blumm & Ruhl, *supra* note 82, at 806.
[111] *Id.* at 818.
[112] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).
[113] *See generally*, JACK H. ARCHER ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS (1994); BRUCE S. FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS (2002).
[114] Blumm & Ritchie, *supra* note 79, at 342 (discussing McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119-20 (S.C. 2003); Coastal Petroleum v. Chiles, 701 So. 2d 619, 624 (Fla. Dist. Ct. App. 1997); Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 987 (9th Cir. 2002); R.W. Docks & Slips v. State, 628 N.W.2d 781, 987 (Wis. 2001); Wilson v. State, 583 N.E.2d 894, 901 (Mass. App.), *aff'd*, 597 N.E.2d 43 (Mass. 1992)).

may place limitations on a coastal property owner's title.[115] The doctrine derives from two bedrock tenets: Roman law and English law. Dating from the sixth century A.D.,[116] the Roman Emperor Justinian declared "[t]he things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore."[117] William the Conqueror brought this concept, held within Rome's civil code, to the British Isles.[118] When placed into English common law, the doctrine provided that title to the shoreline rested with the King in trust for the benefit of the people.[119] As such, the enumerated resources of the shores could not be reduced to private ownership but remained within the realm of the public.

Thirteen centuries later, the U.S. Supreme Court first articulated the public trust doctrine.[120] In 1821, a New Jersey landowner brought a claim of trespass against an individual for harvesting oysters in an area along the Raritan River that the landowner believed was his tidal waters.[121] The Court rejected the landowner's claim, stating that a riparian owner did not have an unqualified right to the resources within the tidal waters.[122] Nearly twenty years later, the Court solidified the law regarding public ownership of the shoreline when it found the original thirteen colonies succeeded to the English crown the ownership of submerged lands under tidal waters and that after independence, the newly formed state governments held title to such lands.[123]

Since the mid-1850s, the U.S. Supreme Court has played a major role in defining the geographic scope, content, and legal effect of the public trust doctrine. A seminal application of the public trust doctrine came in the 1894 case of *Shively v. Bowlby*.[124] At issue in *Shively* was whether the State of Oregon owned the soil below the high-water mark near the mouth of the Columbia River in Astoria. Although the Supreme Court of Oregon concluded that "when the State of Oregon was admitted to the Union, the tide lands became its property, and subject to its jurisdiction and disposal,"[125] the U.S. Supreme Court opinion is significant for its review of relevant caselaw.[126] The Court held that Oregon's tide lands were owned by the State and that "the title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several States, subject . . . to the rights granted to the United States by the Constitution."[127] Nearly a century later, in the 1988 case of *Phillips Petroleum Co. v. Mississippi*, the U.S. Supreme Court again recognized that "the individual states have the authority to define the limits of the lands held in public trust."[128]

In defining the boundaries of the public trust, states have interpreted the doctrine in diverse ways. For example, Mississippi recognizes that "lands under waters subject to the ebb and flow of the tide, regardless of whether the waters are navigable, are within the public trust."[129] California courts recognize the lands along the coast held in public trust as those shifting with the mean high tide line.[130] Florida claims title to "lands under navigable waters,

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[115] *Lucas*, 505 U.S. at 1028-29.
[116] *See generally* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (providing an overview of states incorporating the public trust doctrine).
[117] JUSTINIAN'S INSTITUTES 55 (P. Birks & G. McLeod trans., 1987).
[118] Hiller v. English, 35 S.C.L. (4 Strob.) 486, 522 (1848).
[119] Sean T. Morris, *Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?*, 52 CATH. U. L. REV. 1015, 1019 (2003).
[120] Arnold v. Mundy, 6 N.J.L. 1, 50 (N.J. 1821).
[121] *Id.* at 8.
[122] *Id.* at 50.
[123] Martin v. Waddell, 41 U.S. 367, 416-417 (1842).
[124] 152 U.S. 1 (1894).
[125] Bowlby v. Shively, 30 P. 154, 160 (Or. 1892).
[126] *See Shively*, 152 U.S. at 11-49.
[127] *Id.* at 41.
[128] 484 U.S. 469, 475 (1988).
[129] *Id.* at 476.
[130] Caldwell & Segall, *supra* note 39, at 553 (citing Lechuza Villas W. v. Calif. Coastal Comm'n, 70 Cal. Rptr. 2d 399, 399-404 (App. 1997)). The mean high-tide line is determined by averaging the reach of all high tides in a particular area over the course of a nineteen-year reference period. NOAA, TIDE AND CURRENT GLOSSARY 15 (2000), *available at* http://tidesandcurrents.noaa.gov/publications/glossary2.pdf.

within the boundaries of the state, which have not been alienated, including beaches below mean high water lines . . . by virtue of its sovereignty, in trust for all the people."[131]

In 1968, Hawai'i adopted an expanded public trust doctrine establishing the boundary of the public trust shoreline according to the following terms: "along the upper [mauka] reaches of the wash of [the] waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves."[132] Five years later, in *County of Hawaii v. Sotomura*, the Hawai'i Supreme Court declared "public policy . . . favors extending to [the] public use and ownership as much of Hawaii's shoreline as is reasonably possible."[133] Therefore, in contemporary Hawai'i, the entire sandy beach extending to the edge of the defined shoreline is regarded as public domain. Although each coastal state autonomously characterizes its boundaries of shoreline trust lands, all states abutting an ocean hold and protect in title and trust some portion of our country's beaches for the benefit of the public.

b. Littoral rights and the doctrine of erosion and accretion

In addition to the public trust doctrine, other common law doctrines guide the use of the shores and the changing nature of the coast. Littoral rights guarantee that abutting private owners have special rights of access, wharfage, and use of the waters.[134] Within the littoral right to access coastal waters, property owners whose lands abut the shoreline have rights to maintain contact with the body of water and gain land through accretions.[135] As a separate common law doctrine within the bundle of littoral rights, the doctrine of accretion and erosion guides the shoreline ownership as nature shifts the property boundaries landward and seaward.[136]

Because the public trust doctrine provides coastal states with title to the shoreline for the public, littoral rights ensure access and usage for private landowners abutting an ocean, sea, or lake.[137] The adjacency to waterways provides these coastal owners with certain additional rights above and beyond those provided to the general public.[138] As with other real property rights, states determine the extent of littoral rights.[139] Some states hold that littoral rights are not absolute.[140] Others hold that vested rights of a littoral owner may not be denied or destroyed, but that they may be qualified, subordinate, and subject to the paramount interest of the state.[141] Therefore, littoral rights may be subject to and limited by the public trust doctrine.[142] North Carolina is one such state where littoral rights are subordinate to public trust rights.[143]

Despite the deviations, most states agree that littoral rights do not constitute property rights per se, but are qualified rights.[144] Therefore, littoral rights are subject to reasonable regulation by the state in its exercise of the police power.[145] The rights of littoral property owners, however, may not be arbitrarily destroyed or impaired.[146] If the rights are destroyed, the littoral owner may seek compensation.[147] With the use of beach nourishment as an

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[131] Krieter v. Chiles, 595 So. 2d 111 (Fla. Dist. Ct. App. 1992) *(*quoting FLA. CONST. art. X, § 11).
[132] *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).
[133] 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973).
[134] KALO ET AL., *supra* note 19, at 42.
[135] *Id.*
[136] *Id.*
[137] *Id.* The term riparian is sometimes inaccurately used as relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water not having the character of a watercourse. *See* BLACK'S LAW DICTIONARY 1327 (6th ed. 1990). The proper word to be employed in such connections is "littoral." *See id.*
[138] Lakeside Lodge, Inc. v. Town of New London, 960 A.2d 1268 (N.H. 2008).
[139] Fed. Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 252 (1954).
[140] *See* Gustafson v. City of Lake Angelus, 76 F.3d 778 (6th Cir. 1996) (applying Michigan law).
[141] *See* R.W. Docks & Slips v. State, 628 N.W.2d 781 (Wis. 2001).
[142] *Id.*
[143] *See* Slavin v. Town of Oak Island, 584 S.E.2d 100 (N.C. Ct. App. 2002).
[144] *Gustafson*, 76 F.3d at 790.
[145] *See* New Jersey v. Delaware, 552 U.S. 597 (2008).
[146] *See* Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1885).
[147] *See* Yates v. City of Milwaukee, 77 U.S. 497 (1870).

adaptation for restoring beaches lost to erosion, it is increasingly important that states clearly and reasonably account for alterations to the littoral owner's rights of use and access to the coast.

Within the littoral right of access is the doctrine of accretion and erosion.[148] The doctrine of accretion generally states that if the sand or soil naturally builds or accretes along a shoreline, the private landowner benefits by taking title to the additional land.[149] Courts have repeatedly affirmed this rule.[150] As explained by the Supreme Court in 1874 and again in 1890, "alluvial soil added . . . to your land becomes yours by the law of nations . . . [It] is an imperceptible increase added so gradually no one can perceive how much is added at any moment in time."[151]

In contrast to the doctrine of accretion, the doctrine of erosion states that when sand or soils gradually and imperceptibly erode through natural forces, the upland private owner loses property.[152] Therefore, it seems only fair to allow coastal owners the benefits of accretion if they can just as easily lose title to land through erosion.[153] Applied jointly, the doctrine of accretion and erosion acts to balance and offset a coastal property owner's loss from erosion and gains from accretion. Sea level rise and associated increases in coastal erosion threaten to upset the equitable nature of the reciprocal doctrine of erosion and accretion. On a broad scale, climate change and its coastal impacts may upend common law-based littoral rights in novel and potentially disturbing ways.

III. ANALYSIS

As states scramble to protect and preserve coastlines from the effects of sea level rise and related increases in erosion, adjacent private property owners are preparing to defend their property and rights from the outcome of state-selected adaptation tools. Courts, particularly those seeking equitable solutions to legal disputes concerning potential shoreline rights violations, should be aware of the unprecedented challenges that climate change poses to coastal land use laws and underlying common law doctrines. In addition, states, undoubtedly motivated to insulate the use of climate-related adaptations from legal takings challenges, should recognize and resolve areas of legal vulnerability as best as possible.

Given the unparalleled rate at which the Gulf Coasts of both Texas and Florida are eroding, there is little wonder why courts in those states have the difficult task of resolving takings challenges in response to climate-related adaptations and coastal management strategies. As mentioned, Texas and Florida's Gulf coastlines represent the nation's worst-case climate-related scenario.[154] Acknowledging the challenges awaiting both individual owners of lands adjacent to these rapidly eroding shores and the states as managing owners of the shoreline, Texas and Florida are the canaries in the legal mine.

The Texas cases of *Brannan v. Texas*[155] and *Severance v. Patterson*[156] as well as Florida's *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*[157] portend the legal complexity stemming from challenges to statutorily-based adaptation strategies, provide lessons for coastal states seeking to strengthen their legal posture against such challenges, and signal important legal questions for coastal land use law in the context of climate change.

In both Texas and Florida, the cases expose the shortcomings of the common law doctrines as applied to the scope and scale of climate change effects. Although state legislatures are not explicitly claiming that the statutes being

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[148] KALO ET AL., *supra* note 19, at 42-43.
[149] *See, e.g.*, United States v. Harvey, 661 F.2d 767 (9th Cir. 1981); Smith v. United States, 593 F.2d 982 (10th Cir. 1979); Brainard v. State, 12 S.W.3d 6 (Tex. 1999).
[150] *See, e.g.*, Georgia v. South Carolina, 497 U.S. 376 (1990).
[151] County of St. Clair v. Lovingston, 90 U.S. 46, 66 (1874) (quoting the Justinian Institutes). *See also* Jefferis v. E. Omaha Land Co., 134 U.S. 178 (1890).
[152] KALO ET AL., *supra* note 19, at 43.
[153] *Id.*
[154] Barbee, *supra* note 25.
[155] No. 01-08-00179, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010).
[156] 566 F.3d 490 (5th Cir. 2009).
[157] 130 S. Ct. 2592 (2010).

challenged codify common law doctrines, courts are reaching these conclusions. In light of Justice Scalia's emphasis on common law derived background principles of state law,[158] it seems essential that the courts invoke traditional common law doctrines as a basis for overcoming a compensable takings claim. The consequences, however, are equally significant.

A. How Climate Change Challenges Common Law Doctrines

As the latest collection of contentious coastal land use cases depict, it is worth asking whether the doctrines being applied and debated, particularly the common law doctrines associated with a private coastal owner's littoral rights, provide balanced and sustainable legal solutions in the face of climate-related land use impacts. The Texas cases of *Brannan* and *Severance* reveal the lack of equilibrium in an otherwise proportional doctrine of erosion and accretion. Florida's *Stop the Beach Renourishment* case, decided by the U.S. Supreme Court in 2010,[159] challenges aspects of littoral rights in a wholly different way. In *Stop the Beach Renourishment,* six private property owners asserted that the State violated the Fifth Amendment by taking the rights to future accretions and destroying the right to have contact with the water when the state nourished and restored a beach severely impaired by erosion.

1. How rolling easements test the doctrine of erosion and accretion: A look into Texas' Brannan and Severance cases

In *Brannan* and *Severance*, the use of the common law doctrine of erosion and accretion as the underpinning to the rolling easement policy brings to light the doctrine's shortcomings as applied to the scope and scale of coastal climate change impacts. Texas statutory and common law have long recognized the public right of access to and use of public beaches. The Texas Open Beaches Act, passed in 1959, declared that it was state public policy to allow the public an unrestricted right of access to state-owned beaches.[160] If the public acquires an easement or right of use by prescription, dedication, or custom to the dry sand above the mean high-tide line, the Act provides a means of enforcing the public's rights by recognizing a "rolling beach easement" that expands and contracts landward and seaward, creating dynamic natural boundaries of the beach.[161] As defined by the seaward boundary of the beach up to the vegetation line, the public's beach easement rights are superior to the property rights of beachfront landowners should coastal erosion cause a private home to be located on the public beach.[162]

Although Texas courts have upheld the rolling easement doctrine by finding it proper under the Texas Open Beaches Act and common law principles,[163] *Brannon* and *Severance* respectively challenged the Act in 2001 and again in 2006. The *Brannan* case, initially filed in 2001 and ultimately decided by the Texas Court of Appeals in February 2010, challenged the State's protection of the public beach after it sought removal of beachfront homes within the Village of Surfside Beach seaward of the vegetation line.[164] *Severance*, filed in 2006, challenges the State's enforcement of the rolling easement policy after severe erosion caused Carol Severance's homes to be located seaward of the natural vegetation line, thus on the public beach.[165]

In 2001, Angela Mae Brannan, as executrix of the estate of Bob Brannan, and other affected owners of the Village of Surfside Beach, sued the State of Texas for taking action to remove houses that had become encroachments on the public beach in violation of the Texas Open Beaches Act and its rolling easement policy.[166] After Tropical Storm Frances hit the Gulf in 1998, the beach severely eroded; as a result, the homes stood between the water's edge

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[158] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).
[159] *Stop the Beach Renourishment, Inc.,* 130 S. Ct. at 2595.
[160] TEX. NAT. RES. CODE ANN. § 61.011(a) (West, Westlaw through 2009 Sess.).
[161] *Id.*; *see also* Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009); Brannan v. Texas, No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799 (Feb. 4, 2010).
[162] *Severance*, 566 F.3d at 494.
[163] *See, e.g.,* Feinman v. State, 717 S.W.2d 106, 111 (Tex. App. 1986).
[164] *Brannan,* 2010 Tex. App. LEXIS 799, at *4.
[165] *See Severance,* 566 F.3d at 494.
[166] *Brannan,* 2010 Tex. App. LEXIS 799, at *3.

and the new vegetation line.[167] The plaintiff's main contention was that "because the houses were built outside of the easement before the line of vegetation moved landward[,] the public's use of the beach [should] co-exist with the houses."[168]

The court upheld the State's rolling easement policy as embodied in the Open Beaches Act, finding the policy proper under both the Act as well as common law principles.[169] The court recognized the State's rolling easement as grounded in the common law.[170] The court held that once the rolling easement is established, "it is implied that the easement moves up or back" to shift with the natural movements of the beach.[171]

In the dramatic 2007 *Severance* case, a private property owner challenged the State of Texas' enforcement of its rolling beach easement policy as a violation of the Fifth Amendment's takings clause.[172]

In April 2005, Carol Severance purchased two beachfront properties on West Galveston Island.[173] She improved the two properties, each containing a single-family home, and began renting them to raise income.[174] In September 2005, Hurricane Rita struck the Gulf Coast, causing significant erosion.[175] Due to the storm-based erosion, the vegetation line shifted landward, and the homes were subsequently located on a public beach.[176] Enforcing its rolling easement policy, the State of Texas requested that Carol Severance move her homes to the upland portion of her property landward of the relocated vegetation line.[177]

Although the case challenged the Texas Open Beaches Act,[178] the U.S. District Court recognized a rolling beach easement moving with the natural boundaries of the shoreline as rooted in Texas common law.[179] In distinguishing its holding from the *Lucas* and *Palazzolo* decisions, the court held that the "public's rolling beach easement was established long before Severance ever purchased her rental properties, and the easement is one of the 'background principles' of Texas littoral property law."[180]

In both *Brannan* and *Severance*, the use of the common law doctrine of erosion and accretion as the underpinning to Texas' rolling easement policy exposes the lack of balance to an otherwise proportional doctrine. A significant basis of the doctrine of erosion and accretion involves a rough proportionality such that a property owner knows she may gain or lose land over time. At its core, the doctrine is one of equity.

In light of projected climate change impacts, it is fair to say that in most circumstances, a coastal property owner will not have much, if anything, to gain. When used to support challenges to adaptations meant to manage sea level rise and resulting erosion, the doctrine will "consistently work to the detriment of private property owners [such that] there is no longer any implicit fairness or symmetry."[181]

As courts continue to resolve cases involving the use of rolling easements, they may be guided by a lopsided common law doctrine. Because property owners will have nothing to gain by a state's use of rolling easements, its application will continue to be fiercely challenged. These challenges, based on the complete loss of citizens' homes

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[167] *Id.* at *5.
[168] *Id.* at *3.
[169] *Id.*
[170] *Id.* at *6.
[171] *Id.* at *39.
[172] Severance v. Patterson, 485 F. Supp. 2d 793, 797 (S.D. Tex. 2007). Severance also alleged the Texas Open Beaches Act effected an illegal seizure under the Fourth Amendment. *Id.* at 798.
[173] *Id.*
[174] *Id.*
[175] Severance v. Patterson, 566 F.3d 490, 494 (5th Cir. 2009).
[176] *Id.*
[177] *Id.*
[178] *Id.* at 492.
[179] *Severance*, 485 F. Supp. at 804.
[180] *Id.*
[181] Hiatt, *supra* note 60, at 384.

and investments, warrant a deeper look into the practical nature of the policies and may indicate a need for the common law doctrine to shift to accommodate the transforming nature of climate-related impacts.

2. How beach nourishment projects may upend common law based littoral rights: An assessment of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*

Based on common law doctrine, littoral rights can make sense for the modern day challenges of climate change if adjusted accordingly. For states buttressing their shorelines by restoring and nourishing eroding beaches, the challenges stemming from *Stop the Beach Renourishment* should signal the need to closely examine and, where necessary, clarify state-based littoral laws.

Initially filed in July 2005, the case involves Stop the Beach Renourishment, Inc., a non-profit association consisting of six Florida property owners, which contended that the State of Florida violated its constitutional rights by taking private property for public use without just compensation when it restored 6.9 miles of eroded beach pursuant to statutory law.[182] Following the 2008 Florida Supreme Court's holding that the State's beach nourishment project did *not* constitute a taking of private property, the Supreme Court of the United States granted certiorari in 2009 to review the case.[183]

In 1961, the Florida legislature enacted the Beach and Shore Preservation Act.[184] According to the Act, the Florida Department of Environmental Protection must conduct a survey to determine the mean high tide line (MHTL)[185] for the area upon commencement of a beach nourishment project.[186] After the MHTL is established, an erosion control line (ECL), guided by the line of mean high water, becomes the new *fixed* property boundary between public lands and upland property owners.[187] As specified by the Act, "once the [ECL] . . . is established . . . the common law no longer operate[s] to increase or decrease the proportions of any upland property lying landward of such line."[188]

One of the most significant issues in *Stop the Beach Renourishment* involved the upland property owners' claims that the State of Florida violated their common law littoral rights.[189] Stop the Beach Renourishment, Inc. asserted that the State's Beach and Shore Preservation Act unconstitutionally violated the upland owners' common law littoral rights by fixing the otherwise dynamic shoreline, thereby severing their contact with the water and divesting them of their right to receive accretions.[190]

Florida courts have held that littoral rights are constitutionally protected private rights, but the exact nature of these rights has rarely been described in detail.[191] Such vagueness led the trial court to find that the State's beach nourishment project was a taking of the property owners' littoral rights.[192] On appeal, having never before "addressed whether littoral rights are unconstitutionally taken based solely upon an upland owner's direct contact with the water,"[193] the Supreme Court of Florida reversed the lower court's decision.[194] Holding that the upland

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[182] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1106 (Fla. 2008).
[183] *Id., cert. granted*, 129 S. Ct. 2792 (2009) (No. 08-1151).
[184] FLA. STAT. ANN. §§ 161.011-161.45 (2006).
[185] NOAA, *supra* note 130, at 15.
[186] FLA. STAT. ANN. § 161.141 (West, Westlaw through 2010 Act 282).
[187] *Id.* § 161.191(1) (emphasis added).
[188] *Id.* § 161.191(2).
[189] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,130 S. Ct. 2592, 2595 (2010). Although state interpretations of common law littoral rights vary widely, Florida's common law littoral rights doctrine includes the rights of access, use, and view. Bd. of Trs. of the Internal Improvement Tr. Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987). Within the right to access is the right of contact with the water. KALO ET AL., *supra* note 19, at 42. In addition, Florida recognizes a right to accretion as a distinct, contingent, and future littoral right. *See* Brisknell v. Trammel, 82 So. 221 (Fla. 1919).
[190] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1107 (Fla. 2008).
[191] Webb v. Giddens, 82 So. 2d 743, 745 (Fla. 1955).
[192] Save our Beaches v. Fla. Dep't of Envtl. Prot., 27 So. 3d 48, 56 (Fla. Dist. Ct. App. 2006).
[193] *Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1119.
[194] *Id.* at 1120.

owners have no independent right of contact with the water, the court declared that contact with the water is ancillary to the littoral right of access to the water.[195] The court reasoned that nothing was lost because the property owners explicitly retained access to the ocean.[196]

The Florida Supreme Court sidestepped the facial claim that the Beach and Shore Preservation Act divested the owners of future rights to accretion by applying the common law doctrine of avulsion.[197] The court held that under Florida common law, hurricanes, such as 1995's Hurricane Opal that led to the erosion of the beach in question, are considered avulsive events.[198] Under the doctrine of avulsion, the owner of the lost land (in this instance, the State of Florida) may reclaim a sudden loss of land without a change in title.[199] By allowing the state to reclaim its storm-damaged shoreline by adding sand to submerged lands, the Florida Supreme Court determined the Act not only followed common law, but it also remained facially constitutional.[200]

In its June 2010 decision, the U.S. Supreme Court agreed that the beach nourishment project fell under Florida's doctrine of avulsion.[201] The U.S. Supreme Court held that the Florida Supreme Court did not eliminate a right of accretion established under Florida law.[202] Given the changeable nature of applicable doctrines as they relate to beach nourishment adaptations, coastal states may want to begin addressing the implications of those projects and their impact on the littoral rights of upland owners.

B. Seeking Equitable Solutions While Limiting Legal Conflict: Lessons Learned from the Gulf Coast

In seeking equitable solutions in the face of climate-related effects, both coastal private property owners and states need to acknowledge that "equitable" may mean both parties are equally unhappy. Not only are states struggling with how best to manage, protect, and preserve rapidly eroding coastlines, but private beachfront owners are left to intensely defend their disappearing properties and associated rights. Both parties to the coastal land use conflict are bearing losses and facing unprecedented changes.

In the inevitable event of a coastal property dispute, courts are left to sort out how best to functionally and equitably respond to the unique conditions along the shoreline. In the Texas and Florida cases outlined above, the courts relied on background principles of common law to uphold the states' statutory-based adaptation strategies. As applied to the scope and scale of climate change effects, the cases revealed the shortcomings of the common law-based doctrines. In upholding Texas' rolling easement policy, the *Brannan* and *Severance* cases exposed the lack of equilibrium to the otherwise proportional doctrine of erosion and accretion. In supporting the Beach and Shore Preservation Act in *Stop the Beach Renourishment,* both the Florida Supreme Court and the U.S. Supreme Court revealed the importance of addressing just how beach nourishment as a climate change adaptation affects the littoral rights of private landowners as well as those of the state.[203]

The inadequacies of background common law doctrines in relation to climate change adaptations present challenges for state-based coastal land use laws. States may be reluctant to enact or amend legislation that aligns common law doctrines with the changing circumstances arising from climate change. If the common law doctrines shift too much in relation to new climate conditions, states run the risk of obviating a statutory background principles defense. In light of *Lucas* and *Palazzolo*, just how much laws can flex to accommodate the impacts from climate change will be an increasingly thorny matter.

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[195] *Id.*
[196] *Id.* at 1119.
[197] *Id.* at 1116.
[198] *Id.*; *see also* Georgia v. South Carolina, 497 U.S. 376, 404 (1990) (stating where avulsion has occurred, the boundary line remains the same regardless of the change in shoreline).
[199] *Stop the Beach Renourishment, Inc.,* 998 So. 2d at 1117.
[200] *Id.*
[201] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot, 130 S. Ct. 2592, 2613 (2010).
[202] *Id.* at 2612.
[203] *Stop the Beach Renourishment, Inc.,* 998 So. 2d at 1117; *Stop the Beach Renourishment, Inc.,* 130 S. Ct. at 2612.

In spite of the ambiguous boundaries of background principles of law, states should address the transforming nature of climate change to law itself. States, through legislative action, may be able to make minor adjustments that reduce legal challenges and allow agencies to steadily continue to protect the shoreline in the midst of rising seas. It is more likely, however, that climate change and its immense impacts will necessitate the evolution of common law to best balance the public and private interests in the ever-changing shoreline.

1. Can common law doctrines flex to accommodate the changing circumstances created by climate-related conditions?

Using common law doctrines to sort out coastal land use challenges may require acknowledging climate change's transforming nature to law itself. As the Texas and Florida cases demonstrate, excessive erosion of the shoreline is creating unparalleled tension for not only landowners, but also the law. Given the challenges arising for coastal land use law, the question becomes whether the common law doctrines underlying coastal land use law can adapt to the new circumstances, and if so, whether they should.

Perhaps the greatest strength of the common law is "its flexibility and ability to achieve justice and fairness in individual cases."[204] Inherent in its very nature, "common law can evolve to provide remedies for injuries not imagined a century or even a decade ago."[205] Oliver Wendell Holmes, one of America's most influential commentators on the common law, argued that the common law "is to be conceived of as an organic growth responsive to necessities and ideas evolving over time . . . always reaching for—but never achieving—consistency."[206]

Guided in large part by state common law, private property has been subject to different interpretations by state legislatures and state courts over time.[207] Legislatures and courts have consistently adjusted property arrangements to better serve the needs of the community and its changing conditions.[208] The mere grant of legislative power in a constitution implies the right of the legislature to take the lead in changing common law if necessary.[209] The court's role is to interpret statutes, apply regulations, and, where necessary, fine-tune common law rules.[210] The resulting laws defining the rights and responsibilities for landowners "have been changing ever since private property was introduced."[211]

Longstanding case law demonstrates that the nature of littoral rights and the effect of erosion and accretion on riparian lands are primarily issues of state law.[212] Although climate change and its impending impacts may provide the optimal basis for shifting the common law to be better aligned with present-day needs, states may be reluctant to modify the doctrines. With the opinions and decisions of both *Lucas* and *Palazzolo* coloring the recent past, states may be especially hesitant to modify the common law doctrines out of concern that they will no longer be considered background principles of state property law.

As a result, state courts are drawing upon unrevised common law doctrines to defend against takings challenges to state legislation aimed at protecting the coast, even as the courts struggle to ground the conditions in background principles of law. For example, in the 2010 *Brannan* decision, the Texas Court of Appeals denied compensation to the landowner's estate when her homes became subject to the sea and declared that the actions at issue were "not an act of the government."[213] Yet, even as the court acknowledged the situation was beyond the

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[204] Michael D. Axline, *The Limits of Statutory Law and the Wisdom of Common Law, in* CREATIVE COMMON STRATEGIES FOR PROTECTING THE ENVIRONMENT 53, 71 (Clifford Rechtschaffen & Denise Antolini eds., 2007).
[205] James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas,* 35 ECOLOGY L.Q. 1, 24 (2008).
[206] Benjamin Kaplan, *Encounters with O.W. Holmes, Jr., in* HOLMES AND THE COMMON LAW: A CENTURY LATER 1-2 (Benjamin Kaplan ed., 1981).
[207] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 6 (1992).
[208] Dill v. State, 332 A.2d 690, 702 (Md. Ct. Spec. App. 1975).
[209] *Id.*
[210] ERIC T. FREYFOGLE, THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD 261 (2003).
[211] *Id.* at 120-21.
[212] *See, e.g.,* City of St. Louis v. Rutz, 138 U.S. 226, 249-50 (1891) (asserting that rights with respect to accretion or reliction are governed by the law of the state).
[213] Brannan v. Texas, No. 01-08-00179-CV, 2010 Tex. App. LEXIS 799, at *65 (Feb. 4, 2010).

control of the government and therefore beyond compensation, it grounded its approval of the Texas Open Beaches Act and its rolling easement policy in the common law doctrine of erosion and accretion, thereby exposing the disproportionate nature of an otherwise balanced doctrine.[214]

In Florida's *Stop the Beach Renourishment*, the Florida Supreme Court acknowledged that the "common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners."[215] Nonetheless, both the state supreme court and the U.S. Supreme Court upheld the Beach and Shore Preservation Act, finding that the Act, based on Florida common law, achieves a reasonable balance between public and private interests in the shore.[216]

Texas and Florida are not alone in their coastal struggles. Other state courts adjudicating takings challenges are referencing common law doctrines in their decisions to not compensate private landowners. For example, as noted above, the superior court of Rhode Island in re-examining the *Palazzolo* decision found a common law doctrine sufficient as a background principle to bar compensation to Mr. Palazzolo.[217] In 2009, the Hawai'i Intermediate Court of Appeals upheld a state statute[218] that eliminated oceanfront landowners' rights to future accretions.[219] Even as the Hawai'i statute radically departed from the general doctrine of accretion whereby adjacent private landowners gain title to gradually accreting lands, the court drew upon the common law-based public trust doctrine as a fundamental principle of Hawai'i constitutional law.[220] The court held that the statute did not effectuate a takings violation because the existence of the common law doctrine diminished any expectations that oceanfront owners may have in future accretions.[221] It may very well be that in both Rhode Island and Hawai'i, the common law-based public trust doctrine adequately served to resolve the legal conflicts between the parties. These examples serve more to demonstrate the court's seeming reluctance to simply defer to the legislature and any newly decreed laws without substantiation from settled common law.

Where common law doctrines no longer adequately resolve coastal land disputes, they may need to evolve to better fit the changing conditions. The *Lucas* and *Palazzolo* decisions may, however, act to create a static property regime. By requiring courts to identify a background principle of state property law to overcome a takings challenge, such a regime may inevitably become an anachronism and an obstacle to progress.[222] If the common law should become crystallized, it would cease to be the common law of history and would be an inelastic and arbitrary code.[223]

In light of the urgency of climate change and its impacts, the common law's adaptability to new situations may prove crucial.[224]

2. If freed from the constraints of *Lucas* and *Palazzolo*, how could states update and align the common law doctrine of littoral rights to better suit the unique challenge of large-scale sea level rise?

Large-scale sea level rise due to climate change may be beyond the scope of common law-based littoral rights. Simply put, the littoral rights doctrine could not have anticipated the sheer unprecedented enormity of the projected loss of coastal land due to climate change. The doctrine of littoral rights should either evolve to adapt itself to new circumstances, or the courts should recognize that the doctrine might not be applicable to the anthropogenically-derived changes to the shoreline. Although there is nothing inherently wrong with the Texas and Florida courts using common law as a basis for statutes and policies designed to protect and preserve the coastline, modifying the common

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[214] *Id.*
[215] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1114 (Fla. 2008).
[216] *Id.* at 1120; Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2612 (2010).
[217] Palazzolo v. State, No. WM99-0297, 2005 WL 1645974, at *15 (R.I. Super. Ct. July 5, 2005).
[218] HAW. REV. STAT. § 669-1(e) (2008).
[219] Maunalua Bay Beach Ohana v. State, 122 Haw. 34, 50, 222 P.3d 441, 457 (App. 2009).
[220] *Id.* at 54, 222 P.3d at 461.
[221] *Id.*
[222] FREYFOGLE, *supra* note 210, at 259.
[223] *In re* Hood River, 227 P. 1065, 1086-87 (Or. 1924).
[224] Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift,* 39 ENVTL. L. 43, 78 (2009).

law for current circumstances may yield benefits. For example, clearly delineated common law doctrines provide transparency and openness, leading to balanced, or at least better understood, outcomes for private landowners.[225] In addition, by better aligning common law doctrines, the public may be able to more accurately measure the effects of newly devised climate-related statutes on private owners.[226]

If the Texas courts revise the littoral rights doctrine, or simply do not use it as a basis for its rolling easement policy, the courts, at a minimum, would not be guided by a disproportional doctrine. As a basis for its policy, littoral rights, in particular the doctrine of erosion and accretion, should be one of balance and fairness. Continuing to reference unrevised common law doctrines in the face of climate change may simply intensify the fierce challenges facing the courts.

In Florida's *Stop the Beach Renourishment* case, the Florida Supreme Court utilized the common law doctrine of avulsion as its legal basis for addressing the challenges arising from the State's beach nourishment project.[227] In referring to the action as an avulsion,[228] the court was either signaling a change in the preexisting understandings of avulsion, or was pointing to a lack of an adequate doctrinal foundation to the State's project.[229] On review by the U.S. Supreme Court, Justice Scalia, writing the plurality opinion, agreed with the Florida Supreme Court's application of the doctrine of avulsion to the beach nourishment project in question.[230] Justice Scalia recognized that the Florida Supreme Court's opinion "described beach restoration as the reclamation by the State of the public's land," and stated that therefore it sufficed that its characterization of the littoral right to accretion is consistent with relevant principles of Florida law.[231]

Although Florida law treats hurricanes as avulsive events,[232] methodically planned beach nourishment projects may be better grounded under the lesser-recognized doctrine of "artificial accretion." States like California and Texas recognize the doctrine of artificial accretion.[233] The doctrine states that accretion arising from artificial means, such as the erection of a structure below the mean high tide line, becomes the possession of the state.[234] Additionally, when accretion is caused by the construction of artificial works, the upland boundary no longer moves but becomes fixed at the ordinary high-water mark at the time the artificial influence is introduced.[235]

Under an artificial accretion label, the public would have better recognized the parameters of ownership within the beach nourishment context. Likewise, by better defining public and private property rights associated with climate-related adaptations, courts may more readily resolve future takings challenges.

IV. CONCLUSION

In a changing world it is impossible that it should be otherwise.

- Justice Sutherland[236]

As states struggle to manage and protect their coastlines from the impacts of climate change, they must also safeguard against takings challenges by invoking background principles of common law currently held static by the

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[225] FREYFOGLE, *supra* note 210, at 263.
[226] *Id.*
[227] Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102, 1116 (Fla. 2008).
[228] Surfrider Foundation's Amicus to the U.S. Supreme Court added to the avulsion muddle by advocating the beach nourishment project as an "artificial avulsion"—a term unknown until now. Brief for Surfrider Foundation as Amicus Curiae Supporting Respondents at 20, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010) (No. 08-1151).
[229] *Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1114.
[230] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2611 (2010).
[231] *Id.* at 2612.
[232] Bryant v. Peppe, 238 So. 2d 836, 838 (Fla. 1970).
[233] *See, e.g.*, City of Los Angeles v. Anderson et al., 275 P. 789 (Cal. 1929); Dalton & Sons Co. v. Oakland, 143 P. 721 (Cal. 1914); Lorino v. Crawford Packing Co., 175 S.W.2d 410 (Tex. 1943).
[234] *See City of Los Angeles*, 275 P. at 791; Dalton & Sons Co. v. City of Oakland, 143 P. 721 (Cal. 1914).
[235] California *ex rel.* State Lands Comm'n v. United States, 457 U.S. 273, 277 (1982).
[236] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

decisions of *Lucas* and *Palazzolo*. As noted by Joseph Sax, it is worth recognizing that in other periods of uncontrollable change, property rules have flexed:[237] "Rather than compensate all the owners disadvantaged by the industrial revolution . . . property rules changed to promote and encourage development."[238] For example, both the industrial and environmental eras left "uncompensated victims in their wake."[239] Background principles of property law could not "explain the failure to compensate" owners of affected land.[240] Recognizing the social changes underway, courts encouraged adaptive behavior through noncompensation.

Climate change and its impacts epitomize yet another era of social and legal transformation. Its unprecedented scope presents unique challenges to American property law. Its harms are serious and the severity of the associated injuries will only increase over the course of the next century.[241] By stifling the common law under the aegis of the *Lucas* and *Palazzolo* background principles requirement, states and courts are unable to adequately shift the law in response to the challenges of climate change. However unsettling a shifting common law may be, allowing the law to flex creates better alignment with present day needs.[242] As Justice Kennedy stated in his concurring opinion in *Stop the Beach Renourishment*, "State courts generally operate under a common-law tradition that allows for incremental modifications to property law."[243]

Climate change is beginning to transform life on Earth. Rising seas threaten to inundate low-lying areas and islands, erode shorelines, damage property, destroy ecosystems, and jeopardize dense coastal populations.[244] Climate change impacts may present even greater justifications for state-based legal evolution than did products liability in tort law, which generated repeated reliance upon, and justification for, state common law development.[245] After all, federalism permits states "to perform their separate functions in their separate ways."[246]

State-based legal evolution is sensible for two primary reasons. First, the impacts of climate change are often intensely local, affecting local ecologies, values, and customs.[247] Second, no one is quite sure how to approach the specifics of climate change and necessary adaptations yet, suggesting that this field of law may benefit from the oft-cited "laboratory of the states"[248] aspects of common law.[249]

Instead of misrepresenting or distorting common law doctrines underpinning adaptation responses, courts need to embrace the changing nature of common law in response to climate change. As Justice Sutherland pointed out in 1933,

> The final question to which we are thus brought is not that of the power of the . . . courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts . . . to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered

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[237] Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1449 (1993).
[238] *Id.* at 1450.
[239] *Id.* at 1499.
[240] *Id.*
[241] Massachusetts v. EPA, 549 U.S. 497, 523-24 (2007).
[242] FREYFOGLE, *supra* note 210, at 261.
[243] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2615 (2010) (Kennedy, J., concurring).
[244] Nicholls et al., *supra* note 16, at 319.
[245] Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE. L. REV. 475, 517-18 (2002).
[246] Younger v. Harris, 401 U.S. 37, 44 (1971).
[247] Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common Law Public Trust Doctrines*, 34 VT. L. REV. 781, 807 (2010) (pointing to scholars arguing for common law experimentation and/or local law dominance in the same vein as products liability cases).
[248] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country.").
[249] Andrew Halkyard & Stephen Phua Lye Huat, *Common Law Heritage and Statutory Diversion—Taxation of Income in Singapore and Hong Kong*, 2007 SING. J. LEGAL STUD. 1, 24.

> conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.[250]

In essence, the old legal rules must shift to make sense in a rapidly changing world. As messy, complex, and disconcerting as changing common law doctrines of property may be, to keep them from evolving along with contemporary needs is to turn property into something far different than it is—an organic, flexible institution capable of responding to diverse aims.[251]

[250] Funk v. United States, 290 U.S. 371, 383 (1933).
[251] FREYFOGLE, *supra* note 210, at 259.

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