LIFE'S A BEACH:
OCEANFRONT PROPERTY ISSUES

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I. INTRODUCTION

The Public Trust Doctrine has caused significant angst for several oceanfront property owners. The Doctrine, recognized as part of the common law in every state, requires the states to hold their navigable waters and submerged land in trust for the public.[1] Originally based on Roman principles, it was adopted by the English common law and carried forward to the states.[2] The original concept was that there are some things, like air, flowing water, and the sea, that belong to everyone. Everyone has the right to go to the sea shore.[3] The English common law specifically classified the rights as public or private; the public rights should be held in trust for the public benefit. Since the dominant title was in the public rights, the private shoreline landowners had no right to harm the public trust or to decrease the public's ability to enjoy it. The transition of the Doctrine from England to the United States was described in a U.S. Supreme Court decision in 1894.[4] There was no universal or uniform law; as long as the states protected the public trust they had the power to apply their own views of justice and policy.[5]

Varying interpretations and implementation of the Public Trust Doctrine by the states frequently create a tension between public rights and private ownership of oceanfront properties. This paper compares the Doctrine as enforced in Florida and Texas; in both states oceanfront landowners have argued that the enforcement of the Doctrine has resulted in takings claims under the 5th Amendment of the U.S. Constitution.

The clash between public and private interests in Florida is currently being litigated in a case that is being considered by the U.S. Supreme Court. Florida has a renourishment program in which the state restores eroding beaches by adding sand; the restored beaches are then deemed public property. Private landowners have challenged the renourishment program as an illegal taking; they argue that the newly

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[1] *See* DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (2d ed. 1997).
[2] Lydia L. Butler, *The Commons Concept: An Historical Concept With Modern Relevance,* 23 WM. & MARY L. REV. 835, 844 (1982).
[3] Madeline Reed, *Seawalls and the Public Trust: Navigating the Tension Between Private Property and Public Beach Use in the Face of Shoreline Erosion,* 20 FORDHAM ENVTL. L. REV. 305, 312 (2009).
[4] Shively v. Bowlby, 152 U.S. 1, 14-15 (1894).
[5] *Id.* at 26.

restored beaches compromise their rights of accretion and direct contact with the water.

Texas, in its Open Beaches Act, mandated that all beaches be open to the public. It established a public easement between the mean low tide mark to the vegetation to facilitate public access. When erosion and hurricanes remodel the shorelines, private owners find that their houses have become located on public beaches, or easements, and subject to removal orders. Several landowners have brought takings claims against the state when houses were deemed to be on a public beach.

Before discussing the legislation and litigation in each state, it may be helpful to discuss some of the terminology commonly used:

1. Owners of oceanfront property are sometimes referred to as *beachfront* owners or *upland* owners.
2. Legislatures and courts have used the term *riparian owner* broadly to describe all waterfront owners, however, "[t]he term riparian owner applies to waterfront owners along a river or stream, and the term *littoral owner* applies to waterfront owners abutting an ocean, sea, or lake."[6]
3. Littoral ownership includes rights to *accretion* and *reliction.* Accretion means the gradual and imperceptible accumulation of land along the shore or bank of a body of water. Reliction (or dereliction) is an increase of the land by a gradual and imperceptible withdrawal of any body of water. "Gradual and imperceptible" means that, although witnesses may periodically perceive changes in the waterfront, they could not observe them occurring.[7]
4. Littoral ownership is subject to *erosion,* the gradual and imperceptible wearing away of land from the shore or bank.
5. *Avulsion* is the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream. (*Alluvion* describes the actual deposit of land that is added to the shore or bank.)[8]

   > [t]he principal significance of the distinction between erosion, [reliction,] and accretion on the one hand, and avulsion on the other, is that the owner of the [upland] loses title to land that is lost by erosion and ordinarily becomes the owner of land that is added to his land by accretion [or reliction], whereas if an avulsion has occurred, the boundary line remains the same regardless of the change in the . . . shoreline.[9]

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[6] Bd. of Trs. of The Internal Improvement Tr. Fund v. Sand Key Assocs., Ltd., 512 So.2d 934, 936 (Fla.1987).

[7] *See generally* BLACK'S LAW DICTIONARY (8th ed. 2004); FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION − THE FLORIDA EXPERIENCE 385-92 (1968); 65 C.J.S.. *Navigable Waters* §§ 81, 86, 93 (1966).

[8] *See* Mark S. Dennison, *Proof of Accretion or Avulsion in Title Boundary Disputes Over Additions to Riparian Land,* 73 AM. JUR. PROOF OF FACTS 3d 167, § 2, at 180 (2003).

[9] Stop the Beach Renourishment, Inc. v. Fla. Dep't.' of Envtl. Prot., 998 So.2d 1102, 1114 (Fla. 2008).

6. Many states use the *mean high water lines (MHWL*) as the boundary between public lands and private uplands; it represents an average over a nineteen-year period. The lands seaward of the MHWL are sometimes referred to as the *foreshore.* The State holds the foreshore in trust for its people for the purposes of navigation, fishing and bathing.

II. OCEANFRONT PROPERTY ISSUES IN FLORIDA

In December, 2009 the Supreme Court heard oral arguments in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection.*[10] At issue is "whether Florida can restore eroded beaches in front of private homes and designate the newly emerged beach as public property."[11] Pursuant to a 1961 law, discussed below, the state renourishes beaches by dredging sand from one area and placing it on an eroded beach. The threatened beach is thereby widened and available to the public. Six oceanfront property owners are arguing that the expanded beaches should become their private property unless the state undertakes eminent domain proceedings to condemn them for public use.

A. *Beach and Shore Preservation Act*[12]

The Florida Legislature determined that "beach erosion is a serious menace to the economy and general welfare of the people of [Florida] and has advanced to emergency proportions."[13] Because it is "a necessary governmental responsibility to properly manage and protect Florida beaches . . . from erosion,"[14] the legislature also provided funding for beach nourishment projects. The Department of Environmental Protection received the authority to determine which beaches were critically eroded and in need of restoration.

When a local government applies for funding for beach restoration, a survey of the shoreline is conducted to determine the mean high water line (MHWL) for the area.[15] A key feature of the Act is that once the MHWL is established, any additions to the upland property landward of the MHWL that result from the restoration project remain the property of the upland owner, but are subject to all governmental regulations, including a public easement for traditional uses of the beach.[16]

After the MHWL is established, the Board determines the area to be protected by the project and locates an erosion control line (ECL).[17] After the ECL is recorded

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[10] 2009 WL 4323938 (U.S.).
[11] Jess Bravin, *Beach Erosion Weighted in Property-Rights Case,* WALL ST. J., Dec. 3, 2009, *available at* http://online.wsj.com/article/SB125981177975774187.html
[12] Beach and Shore Preservation Act. Ch. 61-246, § 1, Laws of Fla. (codified at §§ 161.011-161.45, Fla. Stat. (2005)).
[13] *Id.* at § 161.088.
[14] *Id.*
[15] *Id.* at § 161.141.
[16] *Id.*
[17] *Id.* at § 161.161(3). In locating the ECL, the Board is "guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration

it becomes the new fixed property boundary between public lands and upland property.[18] Once the ECL has been established, the common law no longer operates "to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process."[19]

The upland owners' littoral rights, including, but not limited to, rights of ingress, egress, view, boating, bathing, and fishing are expressly preserved.[20] The State is prohibited from erecting structures on the beach seaward of the ECL except as required to prevent erosion.[21] The Act specifically declares that the State has no intention "to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property."[22] Additionally it provides that "[i]f an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."[23]

B. *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*[24]

The beaches of the City of Destin and Walton County were placed on the list of critically-eroded beaches after they were damaged by Hurricane Opal (1995), Hurricane Georges (1998), Tropical Storm Isidore (2002), and Hurricane Ivan (2004). Destin and Walton County initiated a lengthy process of beach restoration through renourishment. The process culminated in the filing of an Application for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands on July 30, 2003. The application proposed to dredge sand from another coastline area and to place it on the eroded beach.[25] A coastline survey was completed to determine the mean high water line (MHWL) for the restoration area; the Board of Directors for the Internal Improvement Trust Fund (Board) subsequently established an erosion control line (ECL) at the surveyed MHWL. After it was recorded, the ECL would

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project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible." § 161.161(5).

[18] *Id.* at § 161.191(1).

[19] *Id.* at § 161.191(2).

[20] *Id.* at § 161.201.

[21] *Id.*

[22] *Id.* at § 161.141.

[23] *Id.*

[24] 27 So.3d 48, (Fla. 1st Dist. Ct. App. 2006). STBR is a not-for-profit association that consists of six owners of beachfront property in the area of the proposed project. At the administrative and district level, Save Our Beaches, Inc. was a co-party. The administrative law judge and the First District determined that Save Our Beaches lacked standing to maintain its claims as its approximately 150 members were not necessarily owners of beachfront property in the affected area. Save Our Beaches, 27 So.3d at 55. Save Our Beaches is no longer a party to the litigation.

[25] Save Our Beaches, 27 So.3d at 50.

become the boundary between publicly owned land and privately owned upland.[26] The Department issued a Notice of Intent to Issue the permit.

Stop the Beach Renourishment (STBR), a not-for-profit association that consists of six owners of beachfront property in the area of the proposed project, filed two petitions for formal administrative hearings; the first challenged the issuance of the permit and the second raised constitutional issues. A formal administrative hearing was held on STBR's permit challenge, but its constitutional challenge was deferred for determination in court proceedings.[27] Following the administrative hearing, the administrative law judge recommended that the Department enter a final order issuing the permit; it was determined that the permit was properly issued pursuant to existing statutes and rules.

In the First District Court of Florida, STBR challenged the final order, claiming that it was unconstitutional because it was issued pursuant to an unconstitutional statute. STBR asserted that the Beach and Shore Preservation Act, which fixes the shoreline boundary after the ECL is recorded, unconstitutionally divests upland owners of common law littoral rights by severing these rights from the uplands.[28] According to STBR, after the recording of the ECL the State becomes owner of the land to which common law littoral rights attach because it owns all lands seaward of the ECL. STBR further argued that the littoral rights, which are expressly preserved by the Act,[29] are an inadequate substitute for the upland owners' common law littoral rights that are eliminated.

The First District found for STBR, agreeing that the Act divests upland owners of their littoral right to receive accretions and relictions[30] and eliminates the right to maintain direct contact with the water.[31] The court noted that although the Act has language intending a preservation of common law riparian rights, in actuality it does not operate to preserve the two rights at issue. Therefore, the final order issued pursuant to the Act resulted in an unconstitutional taking of the littoral rights to accretion and to contact with water without an eminent domain proceeding as required.

C. *Walton County v. Stop the Beach Renourishment, Inc* [32]

On appeal the Florida Supreme Court quashed the decision of the First District Court of Appeals[33] holding that the Beach and Shore Preservation Act does not unconstitutionally deprive upland owners of littoral rights without just compensation. In reviewing its reasons for the reversal, the supreme court first emphasized, "While we review decisions striking state statutes *de novo,* we are obligated to accord

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[26] Beach and Shore Preservation Act. § 161.191(1).
[27] Save Our Beaches, 27 So.3d at 51.
[28] Beach and Shore Preservation Act. § 161.191(1).
[29] *Id.* at 161.201.
[30] Section 161.191(2) provides that the common law rule of accretion and reliction no longer operates once the ECL is recorded.
[31] *See* Save Our Beaches, 27 So.2d at 60.
[32] 998 So.2d 1102 (Fla. 2008).
[33] *Id.* at 1105.

legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible. A determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid."[34]

Second, the court described the nature of the relationship at common law between the public and upland owners in regard to Florida's beaches. It acknowledged that private riparian owners hold the bathing, fishing, and navigation rights described above in common with the public, but, in fact have no rights in navigable waters and sovereignty lands that are superior to other members of the public. However, upland owners hold several special or exclusive common law littoral rights:

> (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water. These special littoral rights "are such as are necessary for the use and enjoyment" of the upland property, but "these rights may not be so exercised as to injure others in their lawful rights.[35]

The court noted that although the Florida common law has clearly described littoral rights as constitutionally protected private property rights, the exact nature of these rights rarely has been clearly distinguished.[36] However, the case law has consistently defined the rights to access, use, and view as *easements* incidental to the littoral holdings that are property rights that may be regulated by law.[37] Generally speaking, "[a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement."[38] The littoral rights to accretion and reliction are distinguished from the rights to access, use, and view in that the rights to access, use, and view are rights relating to the present use of the foreshore and water, but the rights to accretion and reliction are contingent, future interests that only become a possessory interest if and when land is added to the upland by accretion or reliction.[39]

The court noted that Florida's common law has attempted to bring order and certainty to the state's dynamic shoreline boundaries in a manner that reasonably balances the affected parties' interests. For example, the doctrine of accretion was created to balance the rights and risks of both the private and public owners. The court noted that "[h]e who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by

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[34] *Id.* at 1109.
[35] *Id.* at 1111.
[36] *Id.*
[37] *Id.* at 1112.
[38] *Id. citing* Restatement (Third) of Property § 1.2(1) (2000).
[39] *Id.* at 1112.

accretion,"[40] and that accretion is necessary to preserve the riparian right of access to the water.

The Florida Supreme Court determined that there was no material or substantial impairment of the littoral rights under the Act because "[l]ike the common law, the Act seeks a careful balance between the interests of the public and the interests of the private upland owners."[41] The Act prevents further loss of public beaches by authorizing the addition of sand. "In doing so, the Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline."[42] To maintain a balance of interests, the Act benefits private upland owners by restoring beach already lost and by protecting their property from future storm damage and erosion. In addition the Act expressly preserves the upland owners' littoral rights to access, use, and view, including the rights of ingress and egress. In order to protect the upland owners' view the Act prohibits the State from erecting structures on the new beach except those necessary to prevent erosion.

The court concluded that the littoral right to accretion was not an issue; accretion is only a right for the private owner to gain land that is gradually deposited. In this case the state is adding sand because hurricanes and tropical storms, avulsive events, had diminished the beaches. The court reasoned that since under the common law the public already had the right to restore, up to the MHWL, its shoreline lost by an avulsive event,[43] the Act added no new public right that was adverse to the private landowners' rights. "In the context of restoring storm-ravaged public lands, the State would not be doing anything under the Act that it would not be entitled to accomplish under Florida's common law."[44] Although the Act impacts the landowners' rights to future accretions, it balances that loss with its assumption of the future risk of erosion.

Additionally, the court observed that "under Florida common law, there is no independent right of contact with the water. Instead, contact is ancillary to the littoral right of access to the water."[45] It exists only to preserve the upland owner's core littoral right of access to the water. "We have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water . . . there is no littoral right to a seaward boundary at the water's edge in Florida." The court noted that the renourished beach may be wider than the typical foreshore, but direct access to the water is preserved under the Act "[b]ecause the Act safeguards access to the water and because there is no right to maintain a constant boundary with the water's edge, the Act, on its face, does not unconstitutionally eliminate the ancillary right to contact."[46]

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[40] *Id.* at 1113 (*citing* St. Clair County v. Lovingston, 90 U.S. (23 Wall.) 46, 67, 23 L.Ed. 59 (1874)); FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 386 (1968).
[41] *Id.* at 1115.
[42] *Id.*
[43] *Id.* at 1116.
[44] *Id.* at 1118.
[45] *Id.* at 1119 (*citing* Bd. of Trs. of The Internal Improvement Tr. Fund v. Sand Key Assocs. Ltd., 512 So.2d 934, 936 (Fla. 1987)).
[46] *Id.* at 1120.

Two justices dissented from the Florida Supreme Court decision, saying "the legislative setting of this erosion control line does eliminate valuable property rights which have been recognized by this Court. Thus, the act can be saved by the payment of just compensation but cannot be constitutionally applied without it."[47] There were two major concerns expressed by the dissent. First, they questioned whether the established erosion-control line (ECL) represents the pre-avulsion or pre-critical-erosion mean high water line (MHWL). If not, then the Act has been unconstitutionally *applied* the Act to the property owners.

Second, they questioned the logic of the majority in determining that contact with the water is only an ancillary concept to the right of access. Because contact with the water is included in the definition of riparian and littoral property, the dissent argues that it is an essential right.[48] "In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no *protection* under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land *must touch* the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL."[49]

D. *Arguments before the U.S. Supreme Court*

1. Petitioner's Arguments

The petitioner, Stop the Beach Renourishment, Inc., presented three questions for the Court to answer:

> The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?
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> Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?
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> Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process

[47] *Id.* at 1121.
[48] *Id.* at 1122.
[49] *Id.*

> clauses of the Fifth and Fourteenth Amendments to the United States Constitution?[50]

To support its argument for a judicial taking the STBR offered evidence that, "For 100 years it has been a bedrock principle of Florida law that owners of littoral property had constitutionally protected property rights in the direct access to the ocean and the right to accretion."[51] As in the dissent to the Florida Supreme Court case, the petitioner argued that by definition landowners must own to the mean high water line to possess littoral rights. The implication is that littoral rights include contact with the water. A judicial taking results when "the legislative and executive branches of the State of Florida have decided to sever an oceanfront property owner's contact with the ocean by unilaterally altering and replacing the MHWL as the property boundary for a 6.9 mile stretch of beach with a fixed "Erosion Control Line" ("ECL")."[52]

Regarding their rights of accretion, STBR argued that the Florida Supreme Court wrote a new definition when it determined that only "a *contingent, future interest* that only becomes possessory if and when land is added to the upland by accretion or reliction."[53] The petitioner concluded that a judicial taking occurred when the court, even though authorized by statute, had private property taken without compensation to the owners.[54]

In reference to their second issue, the petitioner argued that the Florida court's approval of legislation that eliminated littoral rights, replacing them with statutory rights, violated the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.[55] The petitioner asserted that it is not acceptable to swap constitutional littoral rights for statutory rights. In the argument, it was not made clear how the common law littoral rights had become constitutional rights.

Last, STBR alleged that, "Regardless of the intent, the effect of the Florida Supreme Court's decision is the same: an uncompensated taking. . . . The Florida Supreme Court's opinion effects a "sudden change in state law, unpredictable in terms of the relevant precedents" in violation of the Due Process Clause of the Fourteenth Amendment."[56]

2. Respondent's Arguments

In the Respondent's Brief, only one question was presented.

> Does the Florida Supreme Court's opinion upholding the state's Beach and Shore Preservation Act - which authorizes publicly-

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[50] Brief for Petitioner, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl Prot, 2009 WL 4323938 (U.S.).
[51] *Id.* at 4.
[52] *Id.* at 5.
[53] *Id.* at 8.
[54] *Id.* at 24.
[55] *Id.* at 34.
[56] *Id.* at 40.

> funded beach restoration projects solely in critically eroded areas, carefully balances public and private interests, maintains existing ownership of all upland property, and preserves all relevant common law littoral rights in protecting private property and carrying out the State's responsibility to manage and protect its beaches - constitute a "judicial taking" under the Fifth and Fourteenth Amendments of the United States Constitution?[57]

According the respondent, the central issue in this case is whether Florida's Beach and Shore Preservation Act constitutes an unconstitutional taking of the littoral right of potential future accretion from owners of beachfront property that requires compensation. In building its argument the respondent generally restated the majority opinion from the Florida Supreme Court case. It first emphasized that the Act is more than forty years old, and was enacted under its state constitutional duty to protect the state's beaches, which are held in trust for the people.[58] The Act, applying "only to critically eroded beaches, allows the state to restore storm-ravaged shorelines by placing sand on sovereign submerged lands.[59] Both the public and private upland owners receive substantial benefits. Under the Act, sand placed landward of the ECL becomes the property of the upland owners. All the private landowners are losing are speculative future accretions; in return they are gaining security against the reciprocal risk of from future storm damage and erosion to their property and resulting loss of lands.

In response to Petitioner's argument that the "right" to have property remain in contact with the water was also taken, Respondent recited the Florida Supreme Court's recognition that the asserted "right" is only a means of ensuring the right of access, which the Act specifically preserves.[60]

3. Oral Arguments

The case was argued before the U.S. Supreme Court on December 2, 2009.[61] The first issue briefly discussed by the Court was the judicial taking. Justice Ginsburg asked why the case, that had originally begun as a legislative taking, had become a judicial taking.[62] The answer was that the Florida Supreme Court had effected a judicial taking when it denied littoral rights of landowners. Several times during the oral arguments the issue again arose; the Justices were apparently not all convinced that there was such a thing as a judicial taking.

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[57] Brief for Respondent, Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Envtl Prot., 2009 W.L. 1206633 (U.S.).
[58] FLA. CONST. art. X, § 11.
[59] Brief for Respondent, Stop the Beach Renourishment, Inc. v. Fla. Dep't.' of Envtl Prot., 2009 W.L. 1206633 (U.S.).
[60] *Id.* at 5.
[61] Stop the Beach Renourishment, Inc. v. Florida Dep't' of Envtl Prot., 2009 W.L. 4323938 (U.S.).
[62] *Id.* at 3.

A second issue, one that received greater attention, was the allegation that the Petitioner had lost contact with the water. Justice Scalia noted that contact with the water can be eliminated by an avulsion, but the Petitioners denied that the state restoration of beaches constituted an avulsion. Justice Breyer commented that the landowners could still walk across the sand to make contact with the water.[63]

Of more concern to the court was the fact that the increased sand would allow the public more use of the beach, thereby affecting the landowners' quiet enjoyment of their land. As a result of the renourishment, there would be an approximately 75 feet of additional sand placed on the beach. Several justices speculated that hot dog stands could be placed on this sand, whereas before the renourishment the foreshore was relatively small and damp or submerged most of the time.[64] The Court sympathized with the landowners that the additional sand could bring beach activity that was not welcomed. Justice Scalia commented that a decision for the state could result in the Spring Break Act of 2010.[65]

Next, the Court questioned if there was really a taking when the state had provided additional benefits to the landowners. The private beach is saved from further erosion and has been enlarged.[66] They questioned whether there was a taking or an exchange.

One can only speculate on the decision of the Court. One journalist guessed that the more conservative Justices, Chief Justice Roberts, and Justices Scalia, Alito, Thomas, and Kennedy are more likely to recognize a taking, but would not agreeo that there would be much compensation.[67] More liberal justices did noto appear to be convinced that the Florida Supreme Court had dramatically departed from precedent.

III. THE TEXAS APPROACH

A. *Establishing the Texas Shore*

The Texas saga of *beach title*, as perhaps both an end and beginning, can be traced to 1958 and the defining case of *Luttes v. Texas*.[68] At issue in *Luttes* was the title to approximately 3,400 acres, near Port Isabel and Padre Island, which after accretion had arguably transformed the property from sea bottom into mud flats. Successful at trial and through the Waco Court of Civil Appeals, the State of Texas maintained that title to the disputed area remained with the State as either being submerged land or, if not submerged, not having risen due to genuine accretion and therefore not being upland or *fast land*. Complicating the decision is the derivation of the littoral owner's title from a Mexican land grant, the interplay of civil and common law, and what is meant by *shore*.

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[63] *Id.* at 8-9, 28-39.
[64] *Id.* at 12-18.
[65] *Id.* at 40.
[66] *Id.* at 19-24, 46-48.
[67] Bravin, *supra* note 11.
[68] Luttes v.Texas, 324 S.W. 2d 167 (1958).

Of central importance in *Luttes* in determining the division between sea bottom and the privately owned upland, is precisely what is meant by *high tide*, or the averaging of high tide. Is it the highest point that a wave reaches during summer or winter months, not otherwise driven by storm? Or is it an average of high tides over some period of time, considered by the Court to be the Anglo-American rule?[69] Although prior decisions had dealt at least peripherally with fixing the boundary of the shore, the *Luttes* Court largely discounted the decisions as not having the issue squarely before them, the statements constituting dicta, or simply not be persuasive.[70] In its final determination fixing the boundary of state owned submerged lands and the privately owned upland, at least insofar as property deriving from Mexican land grants, *Luttes* rejected referencing the *tides*[71] levels to wave action, and instead relied on the level as determined by *tide gauges*, and applied to "that part of the land regularly covered and uncovered by the tide, the upper line of which is best determined by the 19 year average of daily highest water readings.[72]

The effect of *Luttes* was to establish a shoreline boundary which is not dependent upon wave action, therefore providing no visible indicator such as the vegetation, and which will likely be covered by water at least some part of each day.[73] Practically applied, the public could then be excluded from what otherwise appeared to be the sandy beach areas, due to the scouring of waves, abutting the sea to the extent those areas were beyond the tide gauge average high tide measurements. That public impact was acknowledged within its decision on the Motion for Rehearing, when the Court the recognized concerns of amicus curiae that "the shore at Surfside Beach in Brazoria County and various other Gulf beaches commonly used for public recreation, will be much narrowed (from seaward to landward) and thus undesirably limited in usage)."[74]

B. *The Texas Open Beaches Act – The Public Easement*

Following the *Luttes* decision, the Texas Legislature, in 1959, implemented what is now known as the Texas *Open Beaches Act*,[75] referred to hereinafter as the *OBA*.[76] Included within the *OBA*, but generally not related to the scope of this article, are specific requirements for implementation of the Act, including rule making by the Commissioner of the General Land Office, permits and applications,

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[69] *Id*. at 183.
[70] *Id.* at 185-85.
[71] *Id*. at 186, n.2. ("The tide is the rising and falling of the waters of the seat that is produced by the attraction of the sun and moon, uninfluenced by special winds, seasons, or other circumstances . . . .").
[72] *Id*. at 186 *see also*, Luttes v.Texas, 324 S.W.2d at 187 (noting that the averaging duration is specified as the *regular tidal cycle* of 18.6 years).
[73] Luttes v. Texas, 324 S.W.2d at 520-21.
[74] *Id*. at 191.
[75] The Texas Open Beaches Act was initially codified as §5415-d, Vernon's Annotated Texas Statutes, but has been re-codified in chapter 61 of the Texas Natural Resource Code.
[76] Modifications to the Texas Constitution, as adopted Nov. 3, 2009, further incorporated the definition and easement concept of *public beach* as contained in the Texas Open Beaches Act. *See* TEX. CONST. art. 1, §33.

land use plans by local governments, and consideration of specific circumstances such as existing seawalls. Crucial to the interpretation of the Act, however, is the *OBA*'s broadly espoused purpose of:

> Affirm[ing] . . . that the public, individually and collectively, shall have the free and unrestricted *right of ingress and egress to and from* the state-owned beaches bordering on the sea-ward shore of the Gulf of Mexico, *or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public,* the public shall have the free and unrestricted right of ingress and egress to the larger area extending *from the line of mean low tide to the line of vegetation* bordering on the Gulf of Mexico.[77]

Beach is further generally defined again as the state owned beach, presumably that area considered by the *Luttes* court to extend from the sea to the mean high tide line, or the larger area inclusive of the area from mean low tide to the line of vegetation if a public easement is present.[78] Interference by construction, erection or creation of any barrier which inhibits lawful ingress or egress to or from the *public beach*, defined as the area of low tide to the line of vegetation or such larger area if the public has acquired the previously detailed easement rights, with the addition of estoppel, is a violation.[79] Offenses may result in an order to remove the obstruction, and possible civil penalties ranging from fifty dollars to two thousand dollars for each day of the violation.[80]

Of particular note in the *OBA* is the creation of a prima facie public easement within the adopted *beach* definition from the mean low tide line to the line of vegetation.[81] The effect is to create the presumption of a common law right in the public to use the beach landward to the vegetation line for ingress and egress to the sea, irrespective of the underlying title.[82] Rather than the claimant of the easement establishing the necessary elements, a contesting property owner is placed in the difficult position of a negative showing, i.e. that there has been no dedication, prescription, estoppel or continuous right in the public with regard to the property.[83] In heavily populated areas of the Texas coast, such as Galveston, Houston, and other coastal metropolitan areas, the impact of the prima facie easement is likely of less importance due to the greater use, and availability of evidence of use, by the public. In more remote areas, bearing in mind that the Texas coast is comprised of some 367 miles of coast fronting on the Gulf of Mexico and more than 3,300 miles of bay

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[77] Tex. Nat. Res. Code Ann. §61.011(a) (emphasis added).
[78] Tex. Nat. Res. Code Ann. §61.012.
[79] Tex. Nat. Res. Code Ann. §61.013(a)-(c).
[80] Tex. Nat. Res. Code Ann. §61.018(c).
[81] Tex. Nat. Res. Code Ann. §61.020.
[82] *Id.* § 61.020(a).
[83] *See* Villa Nova Resort v. Texas, 711 S.W.2d 120 (Tex. Civ. App.-Corpus Christi 1986) (considering necessity or affirmative pleading of easement).

shores,[84] proof of the easement elements of dedication, prescription, or common use could be much less available.

C. *Significant Conflicts Arising Under the Open Beaches Act*

1. The Right to Exclude

Although in place for an extended time, the *OBA* has generated relatively few appellate cases, and even then not with participation by the Texas Supreme Court. *Seaway Company v. Attorney General of the State of Texas*,[85] decided in 1964, serves as the first, and still a primary authority, case to test the validity of the new *OBA*. In *Seaway*, the state sued to force removal of barriers erected in approximately 1958[86] on the *beach* area of Galveston's western beach. The owner, Seaway Company, alleged that the *OBA* and its application was unconstitutional as violating the obligations of contract, taking property without just compensation, and depriving it of property without due process. Although Seaway sought to bring into dispute the prima facie characterization of the *OBA*, the court found no reason to question constitutionality on that issue, instead finding that there was ample evidence of public use to qualify without the necessity of reliance on the presumption of easement.[87] The Court observed:

> There is nothing in the Act which seeks to take rights from an owner of land. Apart from the presumption, it merely furnishes a means by which the members of the public may enforce such collective rights as they may have legally acquired by reason of dedication, prescription or which they may have retained by continuous right.[88]

The *Seaway* court discussed at some length the evidence of the use of the Galveston beaches, including for purposes as roadways, fishing, bathing, and cattle grazing over a significant number of years. Citing maps and documentary evidence showing use of the Galveston beaches as roads, stage coach lines, mail routes, together with testimony of memories of the public using the Galveston beach for fishing, swimming, and camping, the Court found ample evidence of public use of the *beach* to the line of vegetation. In finding support for dedication of the beach, the Court summarized the concept as an "act of throwing open property to the public use, without any other formality, is sufficient to establish the fact of dedication to the public; and if individuals, in consequence of this act, become interested to have it continue so, the owner cannot resume it"[89] Additionally, the Court sustained a

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[84] Website of the Texas General Land Office, http://www.glo.state.tx.us/coastal.html (last visited March 1, 2010).
[85] Seaway Co. v. Attorney General of Texas, 375 S.W.2d 923 (Civ.App.-Houston 1964).
[86] *Id.* at 935.
[87] *Id.* at 930.
[88] *Id*.
[89] *Id*. at 936.

finding of prescription based on adequate evidence of the common adverse possession criteria: continuous, adverse use of the beach by the public, under a claim or right, for ten or more years.[90]

2. The Other Side of the Coin – Exclusion of the Owner

A perhaps more contentious impact of the *OBA* began to manifest itself in the mid 1980's. While it may be speculated that many littoral property owners were at least willing, if not happy, to share their *beach* with the general public, *Matcha v. Mattox*[91] began a line of cases considering the implications of beach erosion with regard to the easement of the *OBA*. Specifically, beach erosion, whether gradual or due to severe storms, began forcing the state mandated easement boundary landward, in what has become known as a *migrating* or *rolling easement* along the Texas coast. As the vegetation line described in the *OBA* moved in response to erosion, property owners found that houses and other structures which were once landward of interference with the public beach were now located upon the easement area of the beach. Upon being determined to be within the easement area, owners and their property became subject to either denial of permits to improve or rebuild their improvements, or were being ordered to remove the offending structures.[92]

The Matchas owned a frame house in the Sea Isle subdivision in Galveston. Following a severe hurricane in 1983 the house was essentially destroyed. What little remained, such as the pilings, floors, and some walls were then located entirely on the seaward side of the line of vegetation, and thus within the *OBA* easement, due to erosion from the storm.[93] The Matchas began reconstruction of their house, even after notice of possible violation, resulting in an application by the Texas Attorney General for a temporary injunction prohibiting their reconstruction of the house. The trial court's holding found the *OBA* easement was based on all of the statutory grounds: dedication, prescription and custom.[94] In its review, however, the Court of Civil Appeals disregarded the dedication and prescription methods and recognized the easement as occurring though custom, even though the two Texas cases cited only referred to the concept without reliance in their decisions.[95] Having found the easement to exist by custom, the Matcha court then confirmed that the easement would migrate with the boundary established by the line of natural vegetation:

> Indeed, the theory of a migratory public easement is compatible with the doctrine of custom and the situations that often give rise to

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[90] *Id*. at 937.
[91] Matcha v. Mattox, 711 S.W.2d 95 (Tex. Civ. App.-Austin 1986).
[92] *See* Moodyv. White, 593 S.W.2d 372 (Tex. Civ.-Corpus Christi 1979); Matcha v. Mattox, 711 S.W.2d 95 (Tex. Civ. App.-Austin 1986); Feinman v. Texas, 717 S.W.2d 106 (Tex. Civ. App. –Houston 1986); Gulf Holding Co. v. Brazoria County, 497 S.W.2d 614 (Tex. Civ. App.-Houston 1973) (removal of fence; no balancing of equities required).
[93] Matcha v. Mattox 711 S.W.2d at 97. The trial court estimated the erosion to have moved the vegetation line landward by up to one hundred fifty feet.
[94] *Id*.
[95] *Id*. at 98-99 (citing City of Galveston v. Menard, 23 Tex. 349 (1859) and Moody v. White, 593 S.W.2d 372 (Tex. Civ. App.-Corpus Christi 1979)).

> 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, if it is to reflect the reality of the public's actual use of the beach, must migrate as did the customary use from which it arose.[96]

Arguments that the easement is static have universally failed, including a rather compelling observation that an easement tied to public use could not exist where improvements had been positioned.[97] Specifically, the 1988 hurricane Frances damaged the Arringtons' Galveston home, and much like the *Matcha* case left its remains seaward of the line of vegetation. The Arringtons applied for permission to repair their home, but were denied due to its post hurricane location within the area defined as *beach*. The appellate case is one reviewing the grant of summary judgment, but the underlying theory asserted by the property owners alleged an unconstitutional taking of their property. The novel interpretation posed was that "the boundary of the public beach easement does not move with the new vegetation line unless there is also a showing by [the state] that the public actually used the area now bounded by that line and thereby acquired a prescriptive easement on the incremental portion."[98] Essentially stated, the property owners' argument was that an easement based on prescription or dedication requires use by the public, and that use by the public cannot exist because the public has been excluded from that previous landward property. In a relatively brusque opinion, the *Arrington*[99] court approved the rolling easement theory noting that "once a public beach easement is established, it is implied that the easement moves up or back to each new vegetation line, and the State is not required to repeatedly re-establish that an easement exists up to that new vegetation line."[100]

The recent case *Brannan v. Texas*[101] again presents the basic fact pattern of damaged improvements, in the Village of Surfside Beach (south of Galveston), which due to erosion became located seaward of the vegetation line. *Brannan* presents the direct question of dedication of the *OBA* easement by three intervening owners, and specifically generalized proof of public use, as opposed to use of the specific property at issue, justifying the easement under the *OBA*:

> Because the State solely relies on the common law to show an easement was historically established at Surfside Beach, our analysis focuses on whether an easement has been proven to exist

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[96] Matcha v. Mattox, 711 S.W.2d at 100. *Accord*, Feinman v.Texas, 717 S.W.2d 106 (Tex. Civ. App. –Houston 1986) (approving the movement of the public easement with that of the vegetation line).

[97] Arrington v. Tex. General Land Office, 38 S.W.3d 764 (Tex. Civ. App.-Houston 2001)

[98] *Id*. at 766.

[99] Arrington v. Tex. General Land Office, 38 S.W.3d 764. The same property owners appear in a similar suit, Arrington v. Mattox, 767 S.W.2d 957 (Tex. Civ. App.-Austin 1989).

[100] Arrington v. Texas General Land Office, 38 S.W.3d at 766.

[101] Brannan v. Texas, 2010 W.L.375921 (Tex. Civ. App.-Houston 2010) (on Motion for Rehearing, opinion not yet released).

> under the common law, without relying on the part of the Open Beaches Act that states that an easement exists *at this location*.[102]

In its analysis the Court in *Brannan* notes the public use of the beach areas in question extending back forty years, to the 1960's.[103] Indeed, there appears to have been significant evidence of public use for the forty year period referenced by the Court. Even comments in Brannan's deposition referred to use of the beach "forever,"[104] and certainly as in the early 1970's. Unasked and unaddressed, however, is the importance of the prohibition during that period of, due to the *OBA*, preventing public use of the *beach,* or even posting trespassing notices.[105]

3. Property Owner's Last, Best Hope

Whereas the Texas courts of civil appeal have uniformly accepted the constitutionality of the *OBA* and its *rolling easement* concept, some glimmer of hope for littoral property owners remains in the federal forum. In 2006 the United States Circuit Court of Appeals for the Fifth Circuit, in the *Mikeska*[106] case, reversed and remanded for further findings a dismissal on summary judgment in favor of the City of Galveston. Although the suit by property owners was due to Galveston's refusal to reconnect utilities following damage to the homes of the owners. As with previously mentioned cases, the fact pattern is that of a properly sited improvement suddenly being found located in the *OBA* easement area following a severe storm and ensuing erosion. Rather than proceeding in state court, the appellant property owners filed suit against Galveston requesting a preliminary injunction to force restoration of utilities, which was granted, and proceeded with a suit for damages based on violation of "substantive due process and equal protection under color of state law in violation of 42 U.S.C. §1983."[107] With regard to the due process claim, the Fifth Circuit did not find adequate evidence offered by Galveston to satisfy the rational basis test for not reconnecting utilities. Although recognizing the city *might* have discretionary authority to connect utilities, no showing of relation to a legitimate public interest was presented.[108] Equal protection was implicated when the city, apparently, reconnected some properties similarly situated, but not others. Of central importance was Galveston's failure to produce any rationale for the variation in the treatment of properties prompting the Fifth Circuit to remand for additional evidentiary findings.

Although the *Mikeska* case does not represent a solid *win* for littoral property owners in Texas, it perhaps does sound as the warning bell that the Fifth Circuit has misgivings about the application of the *OBA*. In a subsequent and pending case,

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[102] *Id*. at 9 (emphasis added).
[103] *Id.* at 11 (discussing the affidavit of Ellis Picket who first began visiting Surfside Beach in the 1960s).
[104] *Id*. at 5.
[105] Tex. Nat. Res. Code Ann. § 61.014.
[106] Mikeska v. City of Galveston, 451 F.3d 376 (5th Cir. 2006).
[107] *Id*. at 379.
[108] *Id*. at 380.

Severance v. Patterson,[109] the Fifth Circuit, in a 2-1 decision, has directly posited to the Texas Supreme Court questions, the answers to which will impact the easement aspect of the *OBA*.

Contrary to prior cases, the *Severance* case considers whether or not there may be a fourth amendment seizure present when the *OBA* easement rolls not onto property which previously abutted the beach, but rather onto property which was not previously burdened by the *OBA* easement. Carol Severance, plaintiff in the case, is a California resident represented by a public interest group, the Pacific Legal Foundation. The residency and representation of the plaintiff would seem to be incidental, but becomes of note in the dissent with Judge Wiener's apparent contempt, referring to Severance's "quixotic adventure"[110] where the "real object of these Californians' Cervantian tilting at Texas's OpenBeachesAct . . . is clearly not to obtain reasonable compensation for a taking of properties either actually or nominally purchased by Severance, but is to eviscerate the *OBA*."[111]

By way of facts, Severance, in 2005, purchased two lots on West Galveston Island. The lots were for rental purposes, each with a single family residence structure. Although there was disagreement as to whether either lot was subject to the *rolling easement* prior to Severance's purchase,[112] she did receive the statutory notice at the time of purchase warning of the effect of the *OBA* easement.[113] Without substantial discussion, however, the majority opinion stated that "no easement has ever been established on either parcel via prescription, implied dedication, or continuous right."[114] In 2005 Hurricane Rita caused the *dry beach*, including the vegetation line, to migrate landward to the point that both of Severance's homes were eventually determined by the Texas Commissioner of the General Land Office to be subject to removal pursuant to the *OBA*. Severance brought suit for a declaratory judgment based on substantive due process, a due process takings claim, and fourth amendment seizure. The substantive due process claim was later dropped. Going forward on the takings and seizure claims, the Court engaged in an extensive review of the Texas cases dealing with creation of an easement by custom, and the rolling easement issue, resulting in an observation that the Texas precedents at the court of appeals level had "no 'fixed' background principles of state law . . . articulated, [but] only mutually inconsistent post hoc rationales."[115] Faced with "the uncertainty and ambiguity of Texas law concerning rolling easements,"[116] the majority determined that as to the takings issue, they could not make a determination that the dispute was *ripe* for resolution.

The fourth amendment seizure claim, on the other hand, was determined to be ripe for review.[117] The allegation of meaningful interference with Severance's

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[109] Severance v. Patterson, 556 F.3d 490 (5th Cir. 2009).
[110] *Id.* at 504.
[111] *Id*.
[112] *Id*. at 494.
[113] *Id*. n. 3.
[114] *Id*. at 494.
[115] *Id*. at 499.
[116] *Id*. at 500.
[117] *Id*.

possessory property interest either unjustified or, if justifiable, without compensation, was sufficient to assert the Fourth Amendment claim.[118] The Court again was left in a quandary without clear guidance as to Texas recognition of rolling easements and those arising by custom. The interim decision, which is awaiting response, was to seek clarification by certifying three questions to the Texas Supreme Court:

> 1. Does Texas recognize a "rolling" public beachfront access easement, i.e., an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?
>
> 2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the *OBA*?
>
> 3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?[119]

The answer to these questions may ultimately decide the viability of the *OBA* as currently written. A finding that common law doctrines do not create the *OBA* rolling easement would seemingly remove the easement by *custom* from consideration, placing the state in the more difficult evidentiary position of proving actual public use. Without custom, imposing the *OBA* rolling easement on property over which the public has not tread, as in *Severance*, would seem to remove prescription or dedication as options. If no easement is found to have existed prior to imposition by the *OBA*, compensation may be the order of the day.

Somewhat analogous to *Severance*, is the Oregon case of *C. Stevens v. City of Cannon Beach*.[120] Although the *Stevens* case was denied its petition for writ of certiorari by the Supreme Court, the dissent by Scalia and O'Connor to the denial provides what might be another very small opportunity within the federal courts for the landowner subjected to the Texas rolling easement of the OBA.

Stevens dealt with the Oregon application of the law of custom to its beaches. The Oregon Supreme Court had previously held[121] that custom applied to *all* of Oregon's beaches, and therefore the public could not be excluded from the dry sand

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[118] *Id*. at 502.
[119] *Id*. at 504.
[120] C. Stevens v. City of Cannon Beach, 510 U.S. 1207, 114 S.Ct. 1332 (1994) (denying app for writ of certiorari).
[121] Oregon, *ex rel*. Thornton v. Hay, 462 P.2d 671 (Or. 1969).

areas; essentially the theory used in many of the Texas OBA cases. Similarly, Oregon in 1967 adopted the Oregon Beach Bill,[122] in many ways the equivalent of the Texas *OBA*. Confusing the issue in Oregon was the later *McDonald*[123] case which seemingly rejected the blanket application of use by custom to the entire coast. Although *McDonald* distinguished its holding by characterizing the land in issue as that abutting a cove, and not the ocean proper,[124] the court considered the *Hay* case holding to apply to similarly situated properties, and not the entire coast.[125]

Justice Scalia in his *Stevens* dissent attacks the *Hay* case reliance on the theory of custom and as to the method, or perhaps better said its lack of developed factual basis, of its application. Absent sufficient findings to justify the use of custom, Scalia favored grant of the petition to determine whether or not the Oregon system denied rights through "pretextual procedural rulings . . . by invoking nonexistent rules of state substantive law,"[126] or "a holding of questionable constitutionality, and . . . serious in the sense that the landgrab (if there is one) may run the entire length of the Oregon coast."[127] Although the composition of the United States Supreme Court has changed, should the Texas Supreme Court evince either a lack of recognition of the theory of custom, or that is necessary to provide each parcel an individualized review, Justice Scalia may be presented with another opportunity to address the issues left unresolved in his *Stevens* dissent.

IV. CONCLUSION

The Public Trust Doctrine, which requires the states to hold their navigable waters and submerged land in trust for the public, is part of the common law in every state. There is no uniform law that is applied in every state; to protect the public trust states have the power to apply their own views of justice and policy. Legislation in both Florida and Texas has caused private owners to charge the states with unconstitutional takings in violation of the Fifth Amendment.

In Florida oceanfront owners have challenged the Beach and Shore Preservation Act, a state statue that permits the state to renourish critically eroded beaches by adding sand to them. Although the private owners benefit by having larger beaches and by no longer suffering the risk of erosion, they also charge that they lose their right of accretion and their right to contact with the water. In effect, the state is adding larger beaches that the public may use in ways that disturbs the private owners' right of quiet enjoyment. The case is currently being considered by the U.S. Supreme Court.

Unlike Florida, Texas has not greatly, if at all, relied upon the public trust doctrine. The *Luttes* case effectively eliminated the question of the state applying the doctrine to claim that the state's title encompasses the dry beach. The Texas Open Beaches Act was the legislature's response, essentially supplanting the public

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[122] 1967 Or. Laws, ch. 601; codified in Or. Rev. Stat. § 390.605-390.770 (2009).
[123] McDonald v. Halvorson, 780 P.2d 714 (Or. 1989).
[124] Thornton v. Hay, 462 P.2d at 723.
[125] *Id.* at 724.
[126] C. Stevens v. City of Cannon Beach, 114 S.Ct at 1334 (Scalia, J., dissenting).
[127] *Id.* at 1335.

trust doctrine in its mandate that the *beaches* shall remain available to the public. To date the *OBA* has been most successful. The chief friction has come, not so much from those wishing to establish a private beach, but rather from those who are essentially ejected from their home or improvements by the rolling easement of the *OBA*. Challenges of constitutionality and compensation have not been successful at the state level. In contrast, the U. S. Court of Appeals for the Fifth Circuit is seemingly more receptive to constitutional questioning of the *OBA*, including the validity of the rolling easement, the necessary proof, and whether its application violates takings law. Dependent on the answers to the questions certified to the Texas Supreme Court by the U. S. Fifth Circuit Court of Appeals, there is the possibility that application of the rolling easement may become much more difficult or expensive from the state's perspective. At a time when governments are plagued with budget deficits, being faced with a decision which could either serve to allow exclusion of the public from *the beach*, or require the state to pay compensation is not a decision that one would envy the Texas Supreme Court.