

Spring 2016

Taking the Oceanfront Lot

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Taking the Oceanfront Lot

JOSH EAGLE*

Oceanfront landowners and states share a property boundary that runs between the wet and dry parts of the shore. This legal coastline is different from an ordinary land boundary. First, on sandy beaches, the line is constantly in flux, and it cannot be marked except momentarily. Without the help of a surveyor and a court, neither the landowner nor a citizen walking down the beach has the ability to know exactly where the line lies. This uncertainty means that, as a practical matter, ownership of some part of the beach is effectively shared. Second, the common law establishes that the owner of each oceanfront lot holds easement-like interests in adjacent state-owned land; and, the state holds similar interests in the oceanfront lot. For these two reasons, the legal relationship between the oceanfront owner and the state is more interdependent than it may seem at first. It is much more than the usual neighbor relationship.

Disputes over oceanfront property are often framed as cases of wrongful taking under the Fifth Amendment's Just Compensation Clause. The Supreme Court has historically applied its standard takings test for determining whether or not a state is liable for the impact of its rules on a landowner's rights. This Article is the first to examine the question of whether use of this standard test is optimal, or even logical, in cases between states and the owners of oceanfront land. Given the fact that climate change impacts such as sea-level rise are likely to increase rates of conflict along the legal coastline, the potential benefits of a test that takes into account the special relationship between these parties are significant. Support for an alternative test can be found in two sets of common law property rules, the upland rights and public trust doctrines, as well as in a mechanism that nineteenth-century courts used to resolve similar disputes.

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[T]he public right of way [in navigable waters] is paramount. . . . This does not mean that the riparian owner can make no use of the stream or its bed which will in any way interfere with the right of navigation. Such a requirement would be unreasonable In many cases, also, a little yielding of absolute right by both interests will permit both to obtain greater benefit from the stream.

– Henry Philip Farnham¹

INTRODUCTION

A state legislature seeks to protect its oceanfront beaches by establishing a no-build zone that prevents new construction within 300 feet of the sea.² A state’s highest court issues an order that requires an oceanfront landowner to allow members of the public to walk across the sandy part of her property.³

In both of these scenarios, it would not be difficult to argue that the government’s action has altered the owner’s prior property rights. Accordingly, the landowner

1. 1 HENRY PHILIP FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* 137–38 (1904). In this quote, Farnham describes the relationship between landowners, whose property abuts navigable rivers and streams, and the state, which holds title to the beds of those waterways for the benefit of the public. The central argument of this Article is based on the proposition that oceanfront landowners share a similar relationship with the state, which holds title to lands seaward of their property.

Although the common law referred to land on rivers and streams as riparian and land on oceans and lakes as littoral, I use the term “upland property” to refer to both. This is consistent with modern law, which generally does not distinguish between the two kinds of property. Joseph W. Dellapenna, *The Scope of Riparian Rights*, in 6 *WATERS AND WATER RIGHTS* § 6.01 n.2 (Amy K. Kelley ed., 3d ed., 2012).

2. *Cf. Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008–09 (1992). A state would, in reality, measure this distance not from the sea, but from the “legal coastline,” that is, the property boundary separating private uplands from state-owned lands. I use the generic term “legal coastline” because rules for locating the line vary among the states. JOSH EAGLE, *COASTAL LAW* 89–99 (2d ed. 2015) (noting that the location of the line is a matter of state law, except where title to the upland property can be traced to a federal patent). *See also Hughes v. Washington*, 389 U.S. 290, 291–92 (1967) (tracing title to the upland property to a time before the state constitution existed and determining federal law applied); *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935) (holding that rights and interests in tideland are matters of state law). For more on legal coastlines, see *infra* Part II.A.1.

3. *Cf. Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 363 (N.J. 1984); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456–57 (Or. 1993).

could claim, pursuant to the Takings Clause of the Fifth Amendment,⁴ that the government owes her just compensation for, respectively, a regulatory or judicial taking.⁵ How should a court determine whether the government is liable?

Historically, the Supreme Court has framed takings claims arising out of oceanfront property the same way it frames all unintentional takings claims.⁶ This standard takings model emphasizes the “extent of the diminution”⁷: the difference in a plaintiff’s property rights before and after the state has changed the rules. So, in the first case above, a court would be concerned with the impact of the no-build zone on the landowner’s right to use and enjoy her property. The outcome of the second case would likely ride on the extent to which the court order has modified the landowner’s prior right to exclude.

There is a problem, though, in applying a diminution-based model—insofar as it casts the plaintiff as a rights holder and the government as a rights taker—to oceanfront property cases.⁸ The fact is that each oceanfront lot shares a physical boundary with state property: along the legal coastline, the state is the plaintiff’s next-door neighbor and a rights holder as well.⁹ Because the state is a property owner, it is possible to view state legislation and court orders as something very different from regulation, that is, as assertions of the state’s own property rights.¹⁰

Viewed this way, the alleged taking of an oceanfront lot takes the form of a private nuisance action or a boundary dispute.¹¹ So, we can construe legislation establishing a no-build area as a claim that the state has the right to prevent activities on neighboring private property if those activities are likely to interfere with its use and

4. U.S. CONST. amend. V. State constitutions also contain takings clauses that are identical to or nearly identical to the version in the Fifth Amendment. *See, e.g.*, CAL. CONST. art. I, § 19; MASS. CONST. art. X; S.C. CONST. art. I, § 13.

5. The Supreme Court first recognized a cause of action for a regulatory taking in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and for a judicial taking in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 725–28 (2010) (plurality opinion). Both types of claims are based on the premise that the government can unintentionally, effectively condemn property through the adoption of new and different property rules. *See infra* Part I.A.

6. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 151 (1971) (describing the Court’s consistent use of a “dominant doctrinal model of takings law”).

7. Justice Holmes proposed this as a tool for assessing the impact of regulation in *Pennsylvania Coal*, 260 U.S. at 413. For more on the centrality of diminution in regulatory and judicial takings doctrine, *see infra* Part I.A.

8. Professor Michelman used the phrase “publicly inflicted private injury” as shorthand for the idea that takings law paints the government as actor and the property owner as acted upon. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1165 (1967).

9. In a brief paper, Professor Sax discussed some of the implications of owner-owner (considering both the private landowner and the government as possessing ownership rights) takings cases. *See* Joseph L. Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights*, 11 VT. J. ENVTL. L. 641 (2010).

10. The common law recognized and limited the state’s property rights with respect to tidal and submerged public trust lands. *See infra* Part II.A.

11. *See infra* Part I.B.3.

enjoyment rights; and, we can construe the court order as a claim that the state holds an appurtenant easement, for the benefit of the public, over the adjacent upland property.

What kind of test would be appropriate for determining whether the state has exceeded its rights in making these claims? Is there any reason to believe that, beyond accounting for the fact that the state is a property owner, a different type of test would produce better—more efficient and fairer—results?

Over the course of the nineteenth century, prior to the advent of the regulatory and judicial takings doctrines, courts developed a test specifically for disputes between the state and owners of waterfront land, including oceanfront land.¹² The facts in these cases were different from those of the modern oceanfront case: the disputes were not over rule changes, but rather over the impact of the state's actual property use on waterfront owners' riparian rights.¹³ For instance, in a common variant, the upland owner complained that rail lines constructed on adjacent state submerged lands interfered with the upland owner's common law right to enjoy access to the water.¹⁴

Although the tests courts used to determine government liability in these waterfront takings cases varied from state to state, the typical version resembled the test used in the private nuisance action, another kind of neighborly dispute.¹⁵ The "waterfront takings test" shared two key features with private nuisance law. First, it promoted fundamental uses of waterfront property, both public and private, by giving them priority in disputes.¹⁶ These fundamental uses were synched with key ecosystem services provided by waterways: the possibility of navigation, the facilitation of commerce, and opportunities for commercial and subsistence fishing.¹⁷ Second, the waterfront takings test attempted, where possible, to reconcile conflicting uses by using the same "unreasonable interference" metric used in nuisance law.¹⁸ This standard incorporates flexibility, allowing courts to consider whether the degree of interference is necessary to accomplish the state's objectives,

12. See *infra* Part I.B.

13. See Alfred E. McCordic & Wilson G. Crosby, *The Right of Access and the Right To Wharf Out to Navigable Water*, 4 HARV. L. REV. 14, 18–19 (1890).

14. See *infra* Part I.B.2.

15. See *infra* Part I.B.

16. See *infra* Part I.B.

17. James Salzman, *Valuing Ecosystem Services*, 24 ECOLOGY L.Q. 887, 887–88 (1997) (“[Ecosystem services are] basic services that support life itself—services such as purification of air and water, pest control, renewal of soil fertility, climate regulation, pollination of crops and vegetation, and waste detoxification and decomposition.”). See also J.B. Ruhl, *Valuing Nature's Services: The Future of Environmental Law?*, 13 NAT. RESOURCES & ENV'T. 359, 360 (1998); Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1136 (1999).

The common law calls these key ecosystem services “public uses” or “trust purposes.” See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 457 (1892); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1082–83 (D.C. Cir. 1984). In this Article, I use “trust uses” to describe the uses of trust property sanctioned by the law; I use “trust purposes” and “key services” to describe the products created by application of state trust law to trust property, for example, the supply of public navigational opportunities.

18. See *infra* Part I.B.

within the narrow geographic setting of the conflict.¹⁹ The typical version of the waterfront takings test essentially asked whether the government's action was reasonably necessary to protect a fundamental use.²⁰

Unlike diminution-based tests, the waterfront takings test was not concerned with how the private owner and the government had used their respective properties in the past.²¹ Instead, the test focused, like nuisance law, on resolving the conflict so as to accommodate both parties while maximizing property values moving forward.²²

This Article explores the question of whether the waterfront takings test, although developed for a different type of unintentional taking, might be—in comparison to the modern, diminution-based tests—a fairer and more efficient way to resolve regulatory and judicial takings cases involving oceanfront property. These concerns are of great importance, especially given the fact that the predicted effects of climate change, such as sea-level rise and enhanced storm damage, are almost certain to increase rates of conflict.²³

Part I of this Article summarizes the modern, diminution-based approach to takings and contrasts it with the approach embodied in the waterfront takings test. Part II examines two sets of common law property rules, private upland rights and the public trust doctrine, that were the foundation upon which courts built the waterfront takings test. Part III uses the facts of some modern oceanfront property takings cases to illustrate the challenges in, as well as the advantages and disadvantages of, applying the waterfront takings test to cases with typical modern features.²⁴ A brief conclusion follows Part III.

19. See *infra* Part I.B.

20. See *infra* Part I.B.

21. See *infra* Part I.B.

22. See *infra* Part I.B.

23. See, e.g., J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 79–82 (2012); 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, 567–74 (2007); Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools Takings Proof*, 28 J. LAND USE & ENVTL. L. 157 (2012).

24. I use the following cases as examples: *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Hughes v. Washington*, 389 U.S. 290 (1967), and *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993).

Interestingly, many of the U.S. Supreme Court's important takings opinions since 1982 were the result of waterfront property disputes. One landmark case, discussed at Part III.B *infra*, involved property located on Winnapaug Pond, a coastal, saltwater lagoon adjoining the Atlantic Ocean. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Others include *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

I. TWO APPROACHES TO TAKINGS

A. The Standard Test: Government Limitation of Vested Rights

The Takings Clause implicitly recognizes that federal and state governments have, through their eminent domain power, the authority to condemn private property.²⁵ The purpose of the Takings Clause is to place two limits on that authority: condemnations must be for “public use” and the government must pay “just compensation” to the owner of the condemned property.²⁶

In 1922, the Court recognized a claim for what later became known as a “regulatory taking.”²⁷ The theory behind the claim is simple. While many laws limit property rights, there is a point at which—from the owner’s perspective—the limitations are so severe that they equate to an *effective condemnation*: from the point of view of a landowner, there is no difference between an intentional condemnation and a law prohibiting her from using it, excluding others, and transferring it.²⁸ While the theory is simple, the law’s task of separating effective condemnations from lesser, noncompensable impacts is not. In *Pennsylvania Coal*, Justice Holmes relied primarily on “the extent of the diminution”—the injury to the plaintiff’s property rights—as a tool for detecting virtual equivalence.²⁹

25. The Takings Clause protects “[p]roperty interests . . . created and . . . defined by existing rules or understandings that stem from an independent source such as state law.” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). For examples of real property and the Takings Clause, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (statute might take fee title), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (statute takes mineral estate). For examples of personal property and the Takings Clause, see *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (statute takes interest on escrowed funds), *Andrus v. Allard*, 444 U.S. 51 (1979) (Takings Clause applicable to eagle feathers), and *Maritrans Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003) (Takings Clause applicable to oil tankers). For an example involving intellectual property and the Takings Clause, see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Takings Clause applicable to trade secrets). *But see Zoltek v. United States*, 442 F.3d 1345 (Fed. Cir. 2006) (relief for alleged taking of patent available only through patent infringement regime).

26. U.S. CONST. amend. V. State constitutions also contain takings clauses, identical or nearly identical to the version in the Fifth Amendment. *See, e.g.*, CAL. CONST. art. I, § 19; MASS. CONST. art. X; S.C. CONST. art. I, § 13.

27. *Pennsylvania Coal*, 260 U.S. at 415. The Court did not actually use the term “regulatory taking” until 1981. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 651 (1981) (Brennan, J., dissenting).

28.

Although our regulatory takings jurisprudence cannot be characterized as unified, [our] inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

29. 260 U.S. at 413. In his opinion, Justice Holmes was not clear regarding the units to be used in calculating diminution. *See id.*

The modern regulatory takings test—set out in *Penn Central Transportation Co. v. New York City*³⁰—continues to emphasize diminution. Under the *Penn Central* test, each of the two factors courts weigh in determining whether a taking has occurred relate to diminution. Under the first, courts are to consider “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct, investment-backed expectations.”³¹ This is an elaboration of Justice Holmes’s “extent of the diminution” test. The second factor, “the character of the governmental action,”³² is more opaque. Although courts have interpreted this language in several ways, the most common interpretation emphasizes the distributional effects of the regulation: the finding that a taking has occurred is more appropriate in cases in which the “[g]overnment [forces] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”³³ Stated differently, the “character” factor focuses on the extent to which diminutions have been evenly spread across affected property owners.

From 1922 until 2010, the Court limited the “virtually equivalent to a condemnation” claim to acts of the legislative and executive branches. In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*,³⁴ a plurality of the Court expanded the group of government actors that could take private property to include state courts: when a state’s highest court declares that “what was once an established right of private property no longer exists, it has taken that property.”³⁵ This language, and the Court’s repeated use of the word “eliminate” as a fulcrum of liability, make it clear that the judicial takings test is again framing takings in terms of diminution.³⁶

30. 438 U.S. 104 (1978).

31. *Id.* at 124.

32. *Id.*

33. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Courts have interpreted *Penn Central*’s “character of governmental action” factor in a variety of ways—at least nine. John D. Echeverria, *The “Character” Factor in Regulatory Takings Analysis*, in ALI-ABA COURSE OF STUDY: WETLANDS LAW AND REGULATION 146 (2005), Westlaw SK081 ALI-ABA 143; see also Steven J. Eagle, “Character” as “Worthiness”: A New Meaning for *Penn Central*’s Third Test?, ZONING & PLAN. L. REP., June 2004, at 1. The incorporation of distributional concerns into takings jurisprudence can be traced back to Justice Holmes’s discussion of “average reciprocity of advantage” in *Pennsylvania Coal*, 260 U.S. at 415. Other situation-specific interpretations of the character factor include (1) the nature of the private right limited by the challenged rule (e.g., limitations on the owner’s right to exclude are more deserving of compensation), and (2) the nature of the government interference (e.g., government action that results in permanent, physical occupation of the property always merits compensation). See *Horne v. Dep’t. of Agric.*, No. 14-275, slip op. at 7 (U.S. June 22, 2015); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

34. 560 U.S. 702 (2010).

35. *Id.* at 715 (plurality opinion).

36. *Id.* at 722, 725, 726. A court first used the term “judicial taking” to describe the effect of a significant judicial alteration of property law in 1933. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 25 P.2d 187, 188 (Colo. 1933). The first two cases in which a federal court held that a state court had taken property were in the late 1970s. *Sotomura v. Cnty. of*

For purposes of my argument, there are two important features of diminution-based takings tests. First, they are premised on an initial identification of pre-existing rights.³⁷ In order to calculate the extent of diminution, a court must first define what the owner's rights were prior to enactment of the rule. Diminution-based takings tests' reliance on established prior rights can be contrasted with another approach to resolving claims of alleged interference with property rights, namely private nuisance law. As explained below, private nuisance law considers, but does not put heavy weight on, a plaintiff's rights prior to defendant's alleged interference.³⁸ A second feature of diminution-based takings tests is that they frame the dispute between the government and the property owner as one dimensional: the property owner is the rights holder and the government is the rights cutter.³⁹ As Joseph Sax put it, "A court asks whether, and to what extent, the owner's ability to profit from the piece of property in question, *considered by itself*, has been impaired."⁴⁰ I argue below that this framing is not apposite to disputes arising out of oceanfront land in which both the state and the oceanfront owner hold property rights.

B. The Waterfront Takings Test: Origins and Evolution

The idea that courts should treat disputes between states and waterfront owners in a manner consistent with their status as neighboring property owners is an old one.

Haw., 460 F. Supp. 473 (D. Haw. 1978); *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986); see Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1471 (1990). The first case in which the Supreme Court recognized the judicial taking as a viable constitutional claim was *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010) (plurality opinion).

37. See Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 317–18 (2007) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014, 1069–70 (1992); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 164 (1980)); Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 50–53 (1964) (describing the importance of, and critiquing courts' approach to, the initial rights-mapping process); Thompson, *supra* note 36, at 1523 (noting the "Supreme Court's adoption (or at least purported adoption) of a positivist definition of property, under which the Court claims to protect only those rights delineated by common law or by state and federal statutes (as interpreted, of course, by relevant courts)").

38. In a private nuisance case, a court is tasked with resolving a use conflict between two landowners. Unless the defendant's activity involves negligent or ultra-hazardous behavior, the case will feature two lawful land uses, each of which would be permissible in isolation. Each party's land use interferes with the other's: so, for example, vibration of the candy maker's equipment makes it impossible for the doctor to treat patients, and the doctor's need for quiet makes it impossible to manufacture candy. *Sturges v. Bridgman*, (1879) 11 Ch. 852 (Eng.). A court's task is to determine, using a rubric that assigns priority to land uses, whose use the law ought to protect from unreasonable interference. Once a court makes that determination and awards a remedy, the case is over.

39. As noted above, the standard tests ultimately consider distributional effects of the challenged rule as well. See *supra* notes 37–38 and accompanying text.

40. Sax, *supra* note 6 at 151 (emphasis original).

In the nineteenth century, courts developed what I call “the waterfront takings test” specifically for such disputes. The test has not disappeared from the law; rather, it seems to have been lost in the wash of modern takings law. The Supreme Court’s 2010 opinion in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*⁴¹ illustrates how modern courts overlook the idea, even when it appears before them.

Stop the Beach Renourishment began its life in the Florida courts as a regulatory takings case.⁴² On appeal to the United States Supreme Court, the case morphed into a judicial takings case. The issue was whether a state court, in the process of defining a property owner’s prior rights, should be liable for grossly erroneous mapping, or as the Court called it “overrul[ing] prior cases that establish property entitlements.”⁴³

Described in greater detail in Part III, the substantive property law issue in *Stop the Beach Renourishment* was whether, under Florida law, when the state deposited sand on submerged land adjacent to plaintiffs’ property, it infringed on plaintiffs’ upland rights. Because, in this scenario, the state is acting not as regulator but as property owner, it would seem appropriate to ask whether the state had the right to deposit sand on its property, without regard for its impact on neighboring private owners. In fact, at one point in the plurality opinion, Justice Scalia, citing to the 1957 Florida Supreme Court opinion in a case called *Hayes v. Bowman*,⁴⁴ describes the question in those terms: “the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners.”⁴⁵ After this, however, the plurality never returns to analyze the scope of the state’s property rights.

For reasons that are unclear, the plurality extracted only a fragment of Florida’s common law waterfront takings test from *Hayes v. Bowman*.⁴⁶ In *Hayes*, the Supreme Court of Florida actually held that the state (or the state’s grantee) *can* interfere with the rights of upland landowners, provided that it does not do so to an excessive degree.⁴⁷ This holding is consistent with the classic waterfront takings test, which allows a state (or the state’s grantee) unfettered rights to use trust lands, without

41. 560 U.S. 702 (2010).

42. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1120–21 (Fla. 2008).

43. *Stop the Beach Renourishment*, 560 U.S. at 727 (plurality opinion).

44. 91 So. 2d 795 (Fla. 1957).

45. *Stop the Beach Renourishment*, 560 U.S. at 730 (citing *Hayes*, 91 So. 2d at 799–800). The plurality also cites *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871), for the proposition that “[t]he Takings Clause . . . applies as fully to the taking of a landowner’s riparian rights as it does to the taking of an estate in land.” *Stop the Beach Renourishment*, 560 U.S. at 713. In *Yates*, Justice Miller states that “[the] riparian right is property, and is valuable,” and then finishes his sentence with the remainder of a waterfront takings test: “and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.” 77 U.S. (10 Wall.) at 504.

46. See 91 So. 2d at 799–800. For more on the plurality’s disjointed application of Florida property law in *Stop the Beach Renourishment*, see *infra* Part III.A.

47. See *Hayes*, 91 So. 2d at 799–800. As a general rule, state grantees have the same responsibilities to upland owners as the state. In effect, restrictions on state use, upon transfer, remain in force as a form of deed restriction. See *Bos. Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356 (Mass. 1979); *infra* Part II.C.

having to compensate upland owners, when the purpose of the use fits within that state's definition of valid public trust purposes.⁴⁸ When the purpose of the challenged use falls outside that definition, "the State [or its grantee] must so use the land as not to interfere with the recognized common law [and statutory] riparian rights of upland owners."⁴⁹ The fulcrum of liability under these circumstances is essentially whether the interference is excessive or unreasonable.⁵⁰ So, the *Hayes* court held that "common law riparian rights . . . must be recognized over an area as near 'as practicable' . . . between the upland and the Channel. This rule means that each case necessarily must turn on the factual circumstances there presented . . ."⁵¹ Because the defendant in *Hayes* did not unreasonably interfere with the plaintiff's rights, the defendant prevailed.⁵²

It is striking that the Court missed the opportunity to apply a test that was at its fingertips, applicable to the facts at hand, and deeply rooted in the common law of property.

1. Historical Context of Waterfront Disputes

From an early date, American courts emphasized the importance of sovereign interests in navigable waters.⁵³ In *Gibbons v. Ogden*,⁵⁴ the Supreme Court noted that "[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government."⁵⁵ About twenty years

48. See generally Daniel J. Morgan & David G. Lewis, *The State Navigation Servitude*, 4 LAND & WATER L. REV. 521 (1969). As discussed in Parts I and II, the classic trust purposes are navigation, commerce, and fishing. Barton H. Thompson, Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 50 (2006).

49. *Hayes*, 91 So. 2d at 799.

50. The *Hayes* court explains that each upland owner is entitled to an equitable quantum of each upland right, "giv[ing] due consideration to the lay of the upland shore line, the direction of the Channel and the co-relative rights of adjoining upland owners." *Hayes*, 91 So. 2d at 802.

51. *Id.* at 801. This approach agrees with earlier decisions of the Florida Supreme Court. See *Tampa S. R.R. Co. v. Nettles*, 89 So. 223, 223 (Fla. 1921) ("[T]he common law rights of a riparian owner to ingress and egress, navigation, fishing, bathing, and view in and over the waters [were] not so *unlawfully* invaded by the defendant company as to justify an injunction." (emphasis added)).

52. 91 So. 2d at 801–03.

53. It is an understatement to say that "navigable" and "navigability" are terms of art in the law. These words have many context-dependent legal meanings. See, e.g., Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643 (2013); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 764–66 (1986); Merritt Starr, *Navigable Waters of the United States—State and National Control*, 35 HARV. L. REV. 154 (1921); John F. Baughman, Note, *Balancing Commerce, History, and Geography: Defining the Navigable Waters of the United States*, 90 MICH. L. REV. 1028 (1992). In this Article, I use the term in its ordinary sense. I use the term "public waterways" to refer to those waters that lie above state-owned, tidal and submerged, public trust lands.

54. 22 U.S. (9 Wheat.) 1 (1824).

55. *Id.* at 190. See generally WILLIAM J. HULL & ROBERT W. HULL, *THE ORIGIN AND*

later, in *Pollard v. Hagan*,⁵⁶ the Court emphasized the close connection between a state's very identity as a state and its ownership interest in the lands underlying navigable waters:

This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty⁵⁷

Such statements were a reflection of the economic importance of coastal waters and rivers during the first half of the nineteenth century.⁵⁸ From colonial times until the development of railroads in the 1850s, there were two available means of commercial transport: wagon and water. At the founding of the nation, it was obvious to leaders and the public that waterborne commerce was the pathway to economic growth. In the 1780s, George Washington pushed Maryland and Virginia to lead construction of the Patowmack Canal: "The way is easy and dictated by our clearest interest. It is to open a wide door, and make a smooth way for the produce of that Country to pass to our Markets. . . ." ⁵⁹ Thomas Jefferson noted Americans' "decided taste for navigation & commerce."⁶⁰ By the early 1800s, waterways were by far the most efficient option for moving goods.⁶¹ Between 1817 and 1839, states invested heavily in the construction of canals, building systems totaling nearly 3000 miles.⁶²

Government construction of canals, which were often used to connect navigable segments of natural waterways, represented one approach to increasing the value of navigability services. Another way to enhance the value of this ecosystem service

DEVELOPMENT OF THE WATERWAYS POLICY OF THE UNITED STATES (1967).

56. 44 U.S. (3 How.) 212 (1845).

57. *Id.* at 230.

58. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 431–32 (1989) ("To the early settlers, the rivers furnished paths of exploration and avenues for the fur trade and log floats. Due to the density of forests and the difficulty of road construction, the watercourses provided transportation routes, and their shores afforded logical areas for settlement." (footnotes omitted)). *See generally id.* at 431–39.

59. WARREN ROBERTS, *A PLACE IN HISTORY: ALBANY IN THE AGE OF REVOLUTION, 1775–1825*, at 230 (2010) (quoting George Washington). *See generally* JOEL ACHENBACH, *THE GRAND IDEA: GEORGE WASHINGTON'S POTOMAC AND THE RACE TO THE WEST* (2004).

60. Letter from Thomas Jefferson to Count Gysbert-Charles van Hogendorp (Oct. 13, 1785), in 4 *THE WORKS OF THOMAS JEFFERSON* 469 (Fed. ed. 1904).

61. Jeremy Atack, Fred Bateman & William N. Parker, *The Farm, the Farmer, and the Market*, in 2 *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES* 250 (Stanley L. Engerman & Robert E. Gallman eds., 2000); Naomi R. Lamoreaux, *Entrepreneurship, Business Organization, and Economic Concentration*, in 2 *THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES* 418 (noting that, during the early 1800s, the ton-mile cost of wagon haulage was twenty times greater than the cost of using waterways and canals); *see also* Wilkinson, *supra* note 58, at 434 & nn.40–41.

62. Lamoreaux, *supra* note 61, at 418.

was to make access to waterways less expensive. States could do this by, for example, financing the construction of facilities, such as wharves and warehouses, that were useful in the loading and offloading of goods and people.⁶³ A shortage of such facilities would obviously render increases in the supply of navigable miles of waterway much less meaningful.

Beginning in the colonial era, American courts and legislatures invented an ingenious alternative to government financing: the subsidization of private investment through the granting of new rights to upland owners. In Massachusetts's Colonial Ordinance of 1641, the government extended the legal coastline seaward, giving upland owners title to adjacent state trust lands down to the low-water mark.⁶⁴ (Under English common law, the Crown owned up to the high-water mark.)⁶⁵ The purpose of the ordinance was "to induce persons to erect wharves below high water mark, which were necessary to the purposes of commerce."⁶⁶ Other jurisdictions took the less sweeping, but equally nontraditional,⁶⁷ approach of recognizing a "right to wharf out," that is, a right to use adjacent state trust lands for the construction of a wharf or to fill those trust lands out to the navigable channel.⁶⁸ These rules subsidized private investment by offering use of adjacent state trust lands free of charge and by giving upland owners the right to prevent the state and private parties from constructing wharves on adjacent trust lands.⁶⁹

It is easy to understand how this economic partnership between states and upland owners benefits both upland owners and the public. The public trust doctrine requires that states dedicate submerged and tidal lands (and in effect, the overlying "trust areas," that is, public waterways) to public use for navigation, commerce, and fishing.⁷⁰ To the extent that public access to each of these activities requires an upland interface, investment by upland owners is a substitute for funds that the state would otherwise have to expend to provide the same level of benefits. Moreover, by

63. A wharf is "a landing place or pier where ships may tie up and load or unload." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1559 (4th ed. 2007).

64. Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623, 631–33 (1998).

65. *Id.*

66. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 77 (1851); *see also* *Shively v. Bowlby*, 152 U.S. 1, 18 (1894) ("The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only.")

67. "The right to wharf out to navigable water is unknown to the common law of England. The erection of a wharf upon public lands without the consent of the Crown is a purpresture." *McCordic & Crosby*, *supra* note 13, at 14; *see also* *People v. Vanderbilt*, 26 N.Y. 287, 293 (1863) ("A purpresture is an invasion of the right of property in the soil, while the same remains in the king or the people.")

68. *McCordic & Crosby*, *supra* note 13, at 19–24.; *see also* *Shively*, 152 U.S. at 18–26 (describing how state law, through legislation or the doctrine of custom, incorporated the right to wharf out).

69. *See infra* Part II.B.1.

70. *See infra* Part II.A.

creating widely applicable legal incentives, the state is creating the possibility of competition in the business of providing upland interfaces. Absent collusion, more wharves and more competition will result in lower shipping costs.

At the same time, it is also easy to see how strengthening upland rights could lead to litigation between upland owners and the state. In a world of weak upland rights, the state is free to use or to sell its submerged lands as it sees fit.⁷¹ So, if the state desired to fill submerged lands and build a railroad in front of an upland owner's lot, thereby eliminating all of the upland owner's access to the water, it could do so without fear of liability. Similarly, the state could transfer those same lands to a railroad company for the same purpose without any concerns.⁷²

The increased commercial importance of railroads in the second half of the nineteenth century did, in fact, lead to repeated conflicts between the state (or state-transferee railroad companies) and upland property owners.⁷³ There were many reasons why it made economic sense for railroad companies to, where possible, install their lines along navigable rivers.⁷⁴ While states were eager to lend railroads the eminent domain power necessary to condemn private land or easements, it was simpler and less costly for the railroad to avoid eminent domain altogether: a state could transfer an easement to a railroad company to use state trust property for a nominal fee.

Absent upland rights, the railroad company would not have to pay anything beyond this nominal fee for installing lines along rivers. The existence of enforceable upland rights meant that, at the same time railroad companies used state lands, they were also "using" upland rights, interfering with landowners' valuable connections to the adjacent public waterways. These conflicts forced courts to determine the parameters of state and upland owners' property rights.

71. The only limits on state use of its trust property would be the public trust doctrine. See *infra* Part II.A.

72. Again, the state's ability to transfer trust property would be subject to limitations in the public trust doctrine. Whether a court would prevent a state from making a transfer would depend on, among other things, the court's interpretation of the exceptions to the public trust doctrine's "duty not to dispose." See *infra* Part II.A.

73. See *infra* Part I.B.2.

74. First, as a result of the importance of river-borne commerce prior to 1850, populations and trading centers were located along rivers. Second, river beds and valleys are flatter than surrounding areas, making installation of rail beds less expensive. Finally, state ownership of lands below the high-water mark made it cheaper to build rail lines on fill or pilings than across nearby, privately-owned land. See generally RICHARD T.T. FORMAN ET AL., ROAD ECOLOGY: SCIENCE AND SOLUTIONS (2003) (describing the interplay between ecology and the development of transportation routes); CARLOS A. SCHWANTES, RAILROAD SIGNATURES ACROSS THE PACIFIC NORTHWEST (1993) (describing the ways railroads acted as engines of regional development); Paul Blanton & W. Andrew Marcus, *Railroads, Roads and Lateral Disconnection in the River Landscapes of the Continental United States*, 112 GEOMORPHOLOGY 212, 213 (2009) (describing the development of railways along the banks of rivers).

2. The Common Law Development of the Waterfront Takings Test

American courts, during the first half of the nineteenth century, gave states nearly absolute control over use of state-owned submerged lands. During this period, courts gave states more power than even the English courts had given the Crown⁷⁵: the state was a sovereign owner of property whose use of that property always trumped competing private interests.⁷⁶ By the 1870s, however, courts in many states had come to recognize that this approach was inconsistent with the public-private partnership. The result was the development of a structured, fact-specific “waterfront takings test” that sought to maximize navigability services: protecting trust uses from more than minor interferences while at the same time protecting upland uses that were more or less consistent with maximizing navigability.⁷⁷

The development of the law in New York courts between 1850 and 1900 exemplifies this transition. In *Gould v. Hudson River Railroad Co.*,⁷⁸ the plaintiff owned a farm along the Hudson River. The plaintiff made use of his common law upland right of access to the adjacent waterway “for the purpose of removing produce and other lawful purposes.”⁷⁹ In granting incorporation to the railroad company, the State of New York authorized it to construct the rail line on private property (via use of the state’s eminent domain power) or on public property (below the high water mark of the river, that is, on state trust lands) along the Hudson River from New York City to Albany.⁸⁰ The railroad chose to install a solid embankment, topped by tracks, on trust property between Gould’s farm and the river.⁸¹ Gould sued, claiming that the railroad owed him just compensation for eliminating his right of access.⁸² The Court of Appeals of New York held that the railroad owed no compensation because only the “sovereign power, acting through the legislature” could “judge of the necessity” of destroying the “right of the appellant”⁸³: “It cannot be possible that such necessity is to be left to be judged of by the circumstances of each particular case.”⁸⁴

75. Under the English common law version of the public trust doctrine, the Crown was not free to use or transfer trust property without the consent of Parliament. See *infra* Part II.A.2.

76. See Molly Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789–1920*, 1980 WIS. L. REV. 1403, 1403–13.

77. It is also likely that the evolution of the test reflected a broader trend of legal conservatism. Molly Selvin notes that “[between 1870 and 1920], nineteen states . . . amended their constitutions by inserting the words, ‘or damaged’ into eminent domain provisions.” *Id.* at 1424 n.55. This language “resulted in [more and greater] judicial awards . . . in favor of private litigants and against state-sanctioned or state-constructed enterprises.” *Id.*

78. 6 N.Y. 522 (1852).

79. *Id.* at 545 (Edmonds, J., dissenting).

80. *Id.* at 544–45.

81. *Id.* at 545.

82. *Id.* at 523 (majority opinion).

83. *Id.* at 543.

84. *Id.* Other courts adopted the same rule on the rationale that the upland owner is simply a member of the public who enjoys easy access to trust amenities and thus has no standing to challenge legislative decisions to use trust property. See *Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532, 538–39 (1870).

A few years before the Court of Appeals of New York decided *Gould v. Hudson River Railroad Co.*, 6 N.Y. 522 (1852), Joseph K. Angell published the second edition of his *Treatise*

Forty years later, the Court of Appeals reversed course. The facts in *Rumsey v. New York & New England Railroad Co.*⁸⁵ were almost identical to those in *Gould*. With permission from the state, the railroad had installed its tracks along the Hudson on trust lands in front of Rumsey's brickyard.⁸⁶ Initially, the railroad had built a tunnel through the embankment beneath the tracks; the tunnel, or culvert, allowed the owners of the brickyard to convey bricks from the plant for loading onto barges.⁸⁷ Later, perhaps after having read the opinion in *Gould*,⁸⁸ railroad officials authorized further construction that blocked the useful culvert. The court opined that the *Gould* court had erroneously interpreted prior New York cases. Specifically, the *Rumsey* court read those cases as holding that the state (or its grantee) could completely eliminate private upland rights only where trust lands were used "to promote commerce and navigation" on the public waterway.⁸⁹

In addition to limiting the scope of the state's public trust trump card, the court made it clear that liability for use of trust lands outside that scope, that is, for nontrust purposes, could arise only where the interference with private rights was too extreme. Rumsey was not entitled to damages from the date the railroad was built, but from the date the railroad blocked the culvert and thereby eliminated the possibility of access.⁹⁰

The dramatic development of the common law in this area over the course of the nineteenth century is captured in a section of Henry Farnham's 1904 treatise *The Law of Waters and Water Rights* entitled "Rights Between Public and Individual." In contrast with sovereign supremacy inherited from English common law and expressed in cases such as *Gould*, Farnham describes a set of rules that describes the kind of mutual give-and-take befitting neighbors and partners:

[T]he public right of way [in navigable waters] is paramount. That is the principal use of the stream when it is navigable, and [private] rights must give way to it so far as necessary to preserve the right of navigation. This does not mean that the riparian owner can make no use of the stream or its bed which will in any way interfere with the right of navigation. Such a requirement would be unreasonable In many cases, also, a little yielding of absolute right by both interests will permit both to obtain

on the Right of Property in Tide Waters and in the Soil and Shores Thereof. Angell presents what appears to be a diametrically opposite rule: "Riparian proprietors . . . cannot be cut off from the water against their consent by any extraneous addition to their upland." JOSEPH K. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 171 (2d ed. 1847). The cases cited by Angell do pit uplands owners against the state; however, the conflicts are over state attempts to transfer upland rights to third parties, not over state use or transfers that interfere with upland rights. See *Bowman v. Wathen*, 3 F. Cas. 1076 (D. Ind. 1841). The former class of cases should be analyzed differently insofar as they represent a form of prohibited private-to-private condemnation. See *infra* Part II.B.1.

85. 30 N.E. 654 (N.Y. 1892).

86. *Id.* at 654.

87. *Id.*

88. The railroad did not build its track until 1854, but I suppose it is possible that its lawyers had not read the 1852 opinion in *Gould* in the intervening two years.

89. *Rumsey*, 30 N.E. at 655.

90. *Id.* at 656.

greater benefit from the stream. When it is said that the right of the public is paramount, nothing more is meant than that the riparian owner can do nothing to close the highway. . . . Conversely, the right of public navigation is not such as to destroy the rights of the riparian owner. The right cannot be exercised to the unnecessary or wanton destruction of private rights, or so as to deprive riparian proprietors of the use of the stream for legitimate purposes which will not unreasonably interfere with the right of navigation. . . . The rights may be said to be reciprocal, each modifying the other, each to be used so as not to interfere with the other right.⁹¹

Many state courts ultimately adopted a waterfront takings test that reflected these principles.⁹² Although language varied, the test generally included three rules: If the state or its transferee used trust lands for trust purposes, no compensation was owed; if the use of trust lands was beyond the scope of the trust, compensation was owed for unreasonable interference with upland rights; along the same lines, the state was entitled to, without compensation, prevent upland owners from exercising upland rights if the exercise of those rights interfered with trust uses of public waterways.⁹³

Application of these tests was fact intensive. Courts policed the scope of the public trust, inquiring whether in fact the particular state use of trust lands was truly

91. 1 FARNHAM, *supra* note 1, at 137–38.

92. *See, e.g.*, *Mauldin v. Cent. of Ga. Ry.*, 61 So. 947 (Ala. 1913); *Pearson v. Rolfe*, 76 Me. 380 (1884); *Buchanan v. G. R. Log Co.*, 12 N.W. 490 (Mich. 1882); *Comm'rs of Burke Cnty. v. Catawba Lumber Co.*, 21 S.E. 941 (N.C. 1895); *Trullinger v. Howe*, 97 P. 548 (Or. 1908); *Providence Steam-Engine Co. v. Providence & Stonington Steamship Co.*, 12 R.I. 348, 369 (1879) (Potter, J., concurring); *A.C. Conn Co. v. Little Suamico Lumber & Mfg. Co.*, 43 N.W. 660 (Wis. 1889).

93. Federal courts have long employed a somewhat similar test to determine when the federal government owes compensation to upland owners for impacts of projects undertaken to maintain or improve navigability. *See, e.g.*, *United States v. Rands*, 389 U.S. 121 (1967); *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *Owen v. United States*, 851 F.2d 1404 (Fed. Cir. 1988); *Alameda Gateway, Ltd. v. United States*, 45 Fed. Cl. 757 (1999). The federal government's interest in navigable waterways—known as the navigation or navigational servitude—is, unlike states' interests, based not on the ownership of land but on the power to regulate interstate commerce under the Commerce Clause. *Rands*, 389 U.S. at 122–23; *Owen*, 851 F.2d at 1408 (citing *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724–25 (1865); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 (1824)); *Alameda Gateway*, 45 Fed. Cl. at 763 (quoting *Gibbons*, 22 U.S. at 192) (citing *Gilman*, 70 U.S. at 724). In fact, most commentators characterize the government's interest not as property, but rather as the authority to maintain or improve navigability without liability, that is, as a takings defense. *See, e.g.*, Richard W. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine*, 48 OR. L. REV. 1 (1968); Eva H. Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1 (1963). *But see* *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356, 359 (5th Cir. 1931) (noting that federal navigation servitude is a “right possessed in common” by the American people, and as such gives citizens affirmative rights to use navigable waters “for all legitimate purposes of travel or transportation”). Due to the fact that the navigation servitude is not property, the test courts use to assess the federal government's liability does not reflect, as the waterfront takings test does, the complexities of owner-owner relationships.

in furtherance of trust purposes.⁹⁴ In deciding whether a state's land use unreasonably interfered with the exercise of a particular upland owner's rights, courts considered the physical features of the specific parcel of upland property.⁹⁵ Finally, courts carefully considered the extent to which an upland owner's actions would actually interfere with the provision of key trust services.⁹⁶

Courts in a few states continued (and still continue) to employ the absolutist rule that the state can use trust lands, and restrict upland owners' rights, without the fear of liability. Some states, such as Washington and New Jersey, literally adopted the *Gould* rule, taking the view that upland rights are pure licenses.⁹⁷ Other states ostensibly apply the waterfront takings test, but do so in a way that leads to *Gould*-like results. In these states, courts interpret the term "trust uses" broadly, far beyond navigation, commerce, fishing, and recreation.⁹⁸ In doing so, courts increase the size of the realm in which states can operate without liability.⁹⁹ As noted in Part II.C, an unprincipled approach to broadening the definition of trust uses is harmful not only to upland owners, but also to the public.

94. See *Natcher v. City of Bowling Green*, 95 S.W.2d 255, 259–60 (Ky. Ct. App. 1936) (holding that the city's construction of dam for water supply was outside scope of trust purposes; city liable for unreasonable interference with plaintiff's upland rights); *State v. Preston*, 207 N.E.2d 664, 667 (Ohio Ct. App. 1963) ("It is clear in this case that this [bridge built across public waterway] is a nonnavigational improvement.").

95. See *Krieter v. Chiles*, 595 So. 2d 111, 112–13 (Fla. Dist. Ct. App. 1992) (denying permit to build dock in part on the grounds that plaintiff had other means of access from property); *Becker v. Litty*, 566 A.2d 1101, 1105 (Md. 1989) (finding that although bridge interferes with plaintiffs' right of access, the fact that plaintiffs have other means of access from their property means interference is not unreasonable).

96. See *Pearson*, 76 Me. at 391 (stating that "the rights of the public and those of the riparian owners are both to be enjoyed with a proper regard to the existence and preservation of the other. . . . In streams which are only floatable, the riparian owner is only bound not to obstruct its reasonable use for that purpose") (quoting JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND 198 (1883)).

97. See, e.g., *Eisenbach v. Hatfield*, 26 P. 539 (Wash. 1891); *Stevens v. Paterson & Newark R.R. Co.*, 34 N.J.L. 532 (1870). Even in states that recognize upland rights as property rights, the law treats those rights as contingent easements, that is, as rights that can be exercised under specified conditions: where they do not unreasonably interfere with key-service provision. See *Krieter*, 595 So. 2d at 112. The difference between absolute-sovereignty states and contingent-easement states is that, in the former, the state could—at least on positive law grounds—eliminate all upland rights without compensation. In contingent-easement states, a law or judicial opinion eliminating all rights, without a clear showing that doing so was necessary in all cases in order to protect trust uses, would run afoul of the Takings Clause. Cf. *Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568 (Okla. 1990).

98. See *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971) (en banc); *Colberg, Inc. v. State*, 432 P.2d 3, 9 (Cal. 1967) (en banc).

99. *Morgan & Lewis*, *supra* note 48, at 530.

3. Timeless Takings: Economic Development Versus Expectations

The evolution of the waterfront takings test in some ways parallels the evolution of law for resolving disputes over consumptive water use.¹⁰⁰ Professor Morton Horwitz argued that, in response to forces of economic development, American courts gradually moved from rules that protected traditional uses of water to rules that could accommodate new commercial and industrial uses: “By the time of the Civil War, however, most courts had come to recognize a balancing test [for resolving conflicts between water users], making ‘reasonable use’ of a stream ‘depend on the extent of the detriment to the riparian proprietors below.’”¹⁰¹

As Horwitz observed, riparian businesses wishing to put water to new uses faced an obstacle: time. The English common law rules for consumptive water use entitled every riparian owner to the right to the “natural flow” of the river, thus giving downstream users substantial power. By protecting earlier, traditional uses of water, the natural flow doctrine effectively locked in the prior generation’s version of an economy.¹⁰²

The “reasonable use” test developed by American courts represented a significant departure from natural flow. Most importantly, the reasonable use test effectively took time—long-standing, vested use—out of the equation. Under this approach, the downstream user continued to have a water right, but could no longer object to *de minimis* interference. In order to enjoin an upstream use, the downstream user was required to show unreasonable interference, a much higher burden of proof. Horwitz notes that courts based this change on something more than economic benefit to the new user and the public. American courts reconceived the fundamental use of property as productive use, in contrast to English law’s emphasis on quiet enjoyment.¹⁰³

Courts’ assignment of greater weight to upland owners’ rights in battles versus the state created widespread benefits. In the case of upland rights such as the right of access and the right to wharf out, stronger private rights increase both the value of upland property and the value of the key ecosystem services provided by trust areas: more (and less expensive) access to key services such as navigation and fishing decreased the costs of goods and travel, and increased the availability of subsistence and recreational hunting and fishing opportunities. In other words, strengthening upland owners’ rights generated direct benefits for upland owners *and* the public. Moreover, unlike changes to water law, the recognition of stronger upland rights did not impose costs on other upland owners.¹⁰⁴

Insofar as it represented a departure from absolute sovereign control of trust property, one might see the waterfront takings test as a loss to the public. The

100. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 31–53 (1977).

101. *Id.* at 40 (citing *Snow v. Parsons*, 28 Vt. 459, 462 (1856)).

102. *Id.* at 35–40.

103. *See id.* at 36.

104. Harry Scheiber has illustrated similar effects in California’s development of appropriative water rights and in other areas of nineteenth-century common law development, challenging Horwitz’s account of “winners and losers in the courts.” Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 230 (1984).

structure of the test, though, is ingenious: it protects waterways' ability to produce key trust services while simultaneously motivating private investment that enhances the value of those services. The test is also efficient in that it allows both upland owners and the state to undertake valuable activities that do not unreasonably interfere with the production of key services.

The most important difference between the *Gould* rule and the evolved, two-step waterfront takings test is that the latter, like the "reasonable use" rule for consumptive water use and unlike the *Penn Central* test, places little to no weight on prior rights.¹⁰⁵ While prior rights are often viewed as synonymous with property, there are important areas in which property law has demoted temporal concerns in order to promote social (including both private and public) gains.¹⁰⁶ Most relevant, private nuisance law—like the waterfront takings test, a tool for resolving disputes between neighbors—places only minor importance on the question of "who was first?"¹⁰⁷ Instead, the goal is to "prioritise[] property rights so that more fundamental rights trump the less fundamental."¹⁰⁸

In thinking about application of the waterfront takings test to modern cases, a subject discussed fully in Part III, it is important to keep in mind that, like private nuisance law, the test is functional, logical, efficient, and fair only to the extent that *neither* party can fully rely on prior rights. As Farnham stated, "a little yielding of absolute right by both interests will permit both to obtain greater benefit."¹⁰⁹

Abandoning the emphasis on prior rights should not strike fear into the hearts of upland owners and conservatives. First, of course, a return to the traditional alternative, that is, the rule of absolute sovereign control of submerged lands, would destroy the value of upland rights altogether by allowing the state to eliminate them whenever it so desired. Second, as Justice Scalia emphasized in *Lucas*, atemporal mechanisms such as private nuisance law have traditionally been fundamental to the

105. *Gould v. Hudson River R.R.*, 6 N.Y. 522, 546 (1852) (noting that vested rights "remain[] still in and belong[] only to the state").

106. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (explaining why the law often adopts muddy rules instead of clearly defining entitlements).

107. The *Restatement (Second) of Torts* provides that an intentional land use constitutes a private nuisance if "the gravity of the harm outweighs the utility of the actor's conduct." RESTATEMENT (SECOND) OF TORTS § 826 (1979). Factors to weigh in assessing harm include the extent and character of the harm; the social value of the "use or enjoyment invaded" by the defendant's activities; "the suitability of the particular use or enjoyment invaded to the character of the locality"; and the costs plaintiff would have to incur to avoid suffering harm. *Id.* § 827. The "utility of the actor's conduct," *id.* § 826, is a function of the social value of the defendant's land use, of "the suitability of the conduct to the character of the locality," and of the costs to defendant of preventing harm. *Id.* § 828. Because a locality's character is something that can arise only with the passage of time, consideration of character on either side of the equation results in greater protection for established uses. This is the modern version of the now defunct defense of "coming to the nuisance." Even where "coming to the nuisance" facts do not help the defendant prevail, they might provide the equitable basis for a court-ordered side payment. See *supra* note 38.

108. ALLAN BEEVER, *THE LAW OF PRIVATE NUISANCE* 21 (2013).

109. 1 FARNHAM, *supra* note 1, at 137.

definition of property.¹¹⁰ Third, courts and society have recognized the key services promoted by the waterfront takings test as fundamental for many centuries; where there is long-standing social consensus regarding fundamental rights used as a fulcrum in an atemporal test, the results—while perhaps unwelcome to one of the parties in the case at hand—should not be unsettling or demoralizing to upland owners generally.¹¹¹ Finally, the primary purpose of any atemporal dispute-resolution mechanism, including the waterfront takings test, is to free up property for economic development.

While it is obvious that conservatives would be unhappy about a return to the *Gould* rule—and an unlimited state trump card—it is less obvious why such a rule would also be detrimental to the interests of environmentalists, hunters, and fishermen. Part II will make this clear: first, the purpose of the public trust doctrine is to limit state discretion with respect to trust property to ensure that that property continues to produce the key services that only that property can produce; second, as the scope and power of the state’s trump card expand, the power of upland owners to protect the key services that make their properties so valuable.

II. THE COMMON LAW INFRASTRUCTURE OF THE WATERFRONT TAKINGS TEST

Since 1970, much ink has been spilled on the public trust doctrine.¹¹² Nearly all of this work explores use of the doctrine as a tool that courts can, should, cannot, or

110. It is possible to read Justice Scalia’s reference in *Lucas* to private nuisance law as a “background principle[] of the State’s law of property” as an implicit nod to the concept of timeless takings. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). After all, whether a land use constitutes a private nuisance is context dependent. *See supra* note 107. Given context dependence, one would be hard pressed to describe a right eliminated by a law meant to curb a private nuisance as vested.

The use of a timeless approach is also consistent with the traditional notion that each parcel of real property is unique. An excellent example of how the law expresses this concept is the availability of specific performance as a remedy for breach of a real estate sales contract. JOSEPH WILLIAM SINGER, *PROPERTY* 521 (3d ed. 2010) (“[L]and is unique and money is not likely to be an adequate substitute for conveyance of title.”); WILLIAM B. STOEBOCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 10.5 (3d ed. 2000). That such a view is traditional is evidenced by features of English common law, such as the doctrine of ameliorative waste that aimed to ensure that future generations would inherit exactly what their predecessors had owned. *See* 2 THOMPSON ON REAL PROPERTY § 19.08 (David A Thomas, N. Gregory Smith, eds., 3d ed. 2014).

111. As Carol Rose notes, superficially muddier rules can be more predictable than crystalline rules, especially when muddy rules incorporate “socially understood conventions” and apply to disputes among “persons with some common understanding.” Rose, *supra* note 106, at 609. This is likely the case with respect to oceanfront property, given its cultural importance and the fairly consistent legal treatment of waterways and shores over many millennia. *See* Richard Perruso, *The Development of the Doctrine of Res Communes in Medieval and Early Modern Europe*, 70 *TJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 69, 70–75 (2002) (explaining Roman law as it pertains to coastal property).

112. In a 1970 article, Joseph Sax revived discussion of the public trust doctrine after seventy-five years of scholarly neglect. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L. REV.* 471 (1970).

should not use to protect the environment.¹¹³ The doctrine has rarely been framed as a set of property rules defining states' rights to use and enjoy, exclude, and alienate trust property.¹¹⁴ Although *Stop the Beach Renourishment* boosted interest in the doctrine of private upland rights, it has received much less scholarly attention than its public counterpart.¹¹⁵ Moreover, there are few articles that examine the relationship between upland rights and the public trust doctrine or attempt to weave them into a coherent set of rules for legal coastline property.¹¹⁶

This Part focuses on important aspects of the two doctrines that prior literature has ignored. It presents the public trust doctrine as a set of rules that define the state's rights and responsibilities as a property owner;¹¹⁷ it provides a modern, comprehensive view of the oceanfront owner's core and upland rights; it illustrates how the property rules that make up the public trust doctrine are meant not only to protect the public interest, but also—and to an even greater degree—the property rights of oceanfront owners; and, finally, it explains how the opposite is also true: that is, how upland rights both protect and serve the interests of the public.¹¹⁸

113. See Thompson, *supra* note 48, at 48 nn.1–2.

114. Those authors who do focus on the relationship between the public trust doctrine and property law do so in a way that frames the doctrine primarily as a takings defense. See, e.g., John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931 (2012); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987).

115. Most commentary on *Stop the Beach Renourishment* is on the judicial takings cause of action. See, e.g., D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903 (2011); Josh Patashnik, Note, *Bringing a Judicial Takings Claim*, 64 STAN. L. REV. 255 (2012). Those authors who focus on upland rights do so within the context of the case. See, e.g., Donna R. Christie, *Of Beaches, Boundaries, and SOBs*, 25 J. LAND USE & ENVTL. L. 19 (2009); Mary Doyle & Stephen J. Schnably, *Going Rogue: Stop the Beach Renourishment as an Object of Morbid Fascination*, 64 HASTINGS L.J. 83 (2012); Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the Ius Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL'Y 37 (2011).

116. These articles tend to focus on consumptive water rights. See, e.g., Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649 (2010); Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989).

117. James Huffman has argued for interpretation of the public trust doctrine as a pure rule of property. His views of the property interests involved and of approaches to reconciling those interests with the rights of upland owners are much narrower than those presented here. See James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989); Huffman, *supra* note 114.

118. Because the two doctrines are largely matters of state law, rules are not uniform across all coastal states. The general concepts, however, are consistent; cases where significant deviations exist will be noted. The treatment here centers on the law as it pertains to oceanfront property. Both doctrines apply to land adjacent to and under all public waterways. There are certain aspects of the law, particularly as it relates to the consumptive use of fresh water, that raise issues beyond the scope of this paper.

A. States' Property Rights

1. What States Own

The original thirteen states took title to submerged lands that King George III had owned prior to the revolution.¹¹⁹ Under English common law, the public trust doctrine covered lands beneath waters subject to the ebb and flow of the tide; the catalog of protected public uses of trust areas included only navigation, commerce, and fishing.¹²⁰ At the moment of statehood, each of the thirty-seven later-admitted states received title to submerged lands within their boundaries held by the federal government.¹²¹ Later-admitted states obtained title to these lands on the basis of the equal footing doctrine—each state is entitled to begin its journey as a state with the same basic rights and privileges.¹²²

In *Illinois Central Railroad v. Illinois*, the Supreme Court held that the English courts had simply used “the ebb and flow of the tide” as a convenient test for determining which waterways were “public navigable waters.”¹²³ Because the primary purpose of the doctrine was to protect the public’s interest in navigation, and because many navigable waterways in the United States were not ebb-and-flow waters, the Court held that the American version of the public trust included lands beneath navigable rivers and lakes.¹²⁴

Because the case at hand involved a dispute over the submerged lands beneath Lake Michigan, the Court did not address the issue of whether, after its ruling, the ebb-and-flow test had any continued import; that is, whether the American version of the doctrine gave states ownership of lands beneath all ebb-and-flow waters, even if they were nonnavigable. Given the Court’s rationale for including lands beneath navigable rivers and lakes within the public trust, it is reasonable to infer that the Court would similarly have found lands beneath navigable ebb-and-flow waters, such as the open ocean, to be within the trust. What was less clear was whether states continued to hold title to lands such as shallow marshlands, which lay beneath nonnavigable, ebb-and-flow waters.

After a long hiatus, the Court finally found occasion to resolve this uncertainty in the late 1980s. In *Phillips Petroleum Co. v. Mississippi*,¹²⁵ the plaintiff claimed the right to extract oil from tidally influenced, nonnavigable-in-fact wetlands by virtue of leases it had entered into with private parties claiming to hold title to those lands.

119. See Wilkinson, *supra* note 58, at 439–40.

120. *Id.* at 447, 465. For discussion of confusion surrounding the equal footing doctrine and submerged lands, see John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951); James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 30–62 (1997).

121. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 474 (1988). The United States, or another prior sovereign owner, for example, Spain, may have transferred title to some of the submerged lands within a state’s boundaries prior to statehood. *Shively v. Bowlby*, 152 U.S. 1, 50–51 (1894).

122. Wilkinson, *supra* note 58, at 444.

123. 146 U.S. 387, 435–36 (1892).

124. *Id.* at 436.

125. 484 U.S. 469 (1988).

The State of Mississippi argued that those private parties did not, and had not ever, owned the lands leased to the plaintiff.¹²⁶ In answering the question left open by *Illinois Central*, the Court held that, in denominating navigable, nontidal waters as state trust property, *Illinois Central* did not “simultaneously withdraw[] from public trust coverage” ebb-and-flow submerged lands.¹²⁷

Another important physical scope issue relates to the specific location of the legal coastline, that is, the line marking the landward extent of state trust lands. The location of the line is a matter of state law.¹²⁸ Twenty-two of twenty-three ocean-bordering states use averages of tidal datums to determine their legal coastlines.¹²⁹

In states that use datums, such as the mean high-tide line (MHTL), identifying the exact location of the legal coastline is a two-step process. The first step, marking the MHTL, is beyond the realm of a layman. It requires a surveyor armed with information about the height of an imaginary horizontal plane (representing “‘the average height of all the high waters at that place over a considerable period of time,’ . . . there should be ‘a periodic variation in the rise of water above sea level having a period of 18.6 years’”¹³⁰) to connect that plane with enough specific points on the beach to generate an estimate of the MHTL. Despite the need for a trained professional, the MHTL is an objective fact: it is a function of the horizontal water-level plane and the physical profile of the beach.¹³¹

126. *Id.* at 472.

127. *Id.* at 479.

128. Again, the exception to this general rule is that federal common law governs where title can be traced back to a federal patent. *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935). Although a full discussion is beyond the scope of this Article, it is past time for the Court to overturn the “federal patent rule.” For an explanation, see *Hughes v. Washington*, 389 U.S. 290, 294–95 (1967) (Stewart, J., concurring); see also Charles E. Corker, *Where Does the Beach Begin, and to What Extent Is This a Federal Question*, 42 WASH. L. REV. 33 (1966).

129. See STEACY DOPP HICKS, U.S. DEP’T OF COMMERCE, NAT’L OCEANIC & ATMOSPHERIC ADMIN., UNDERSTANDING TIDES 56 (2006), available at http://tidesandcurrents.noaa.gov/publications/Understanding_Tides_by_Steacy_finalFINAL11_30.pdf [<https://perma.cc/R88E-4NP6>]. “A datum is a reference from which linear measurements are made. It can be a physical point, line, or plane. It can also be an invisible point, line, or plane positioned by a statistical treatment of the numerical values of a particular natural phenomenon.” *Id.* at 51. The twenty-third, Hawaii, uses a very different approach. Hawaii uses the “highest reach of the highest wash of the waves,” which is marked by the debris line or the seaward extent of vegetation. *Diamond v. State*, 145 P.3d 704, 716 (Haw. 2006); see also HAW. REV. STAT. § 205A-1 (2008).

130. *Borax*, 296 U.S. at 26–27 (quoting H. A. MARMER, U.S. DEP’T OF COMMERCE, U.S. COAST & GEODETIC SURVEY, TIDAL DATUM PLANES 76, 81 (1927)).

131. An agency of the federal government, the National Geodetic Survey (formerly the U.S. Coast and Geodetic Survey), recalculates various tidal measurements, including mean high tides, about every twenty to twenty-five years. U.S. DEP’T OF COMMERCE, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., TIDAL DATUMS AND THEIR APPLICATIONS 14 (2000), available at http://tidesandcurrents.noaa.gov/publications/tidal_datums_and_their_applications.pdf [<https://perma.cc/82AS-QMPR>]. The process involves averaging data collected through one Metonic cycle. “The Metonic cycle . . . is named after the Greek astronomer Meton who observed that 19 solar years, approximately, are equal to 235 lunar months.” R. Newton

Locating the legal coastline, which can diverge from the MHTL, requires objective knowledge of state law as well as subjective judgments about legal facts. The legal coastline might be different from the MHTL for two reasons. In most states, when the beach profile is altered either by sudden “avulsive” events, such as a storm, or by artificial accretions, such as those that might be caused by groins or jetties, the MHTL moves, but the legal coastline does not.¹³² So, marking an accurate boundary requires knowledge of whether the state in which the property is located has special rules for either avulsive or artificially induced change and, if so, a determination as to whether alterations to the beach profile are the result of sudden events or nonnatural structures or actions. Whether a change is sudden or gradual is not a question for surveyors; rather, it is a legal distinction that can only finally be made by a court of law.¹³³

Mayall, *Betwixt and Between Dates*, 82 SCI. MONTHLY 210, 210 (1956). The significance of this correlation is that it provides a logical period, or epoch, for averaging tidal events such as high tides.

These nineteen-year averages are then used to locate points along the coast at which the mean high-tide plane intersects with land. The agency determines exact locations for selected points; other points along the line are extrapolated using computer models. U.S. DEP’T OF COMMERCE, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., *supra*, at 14.

132. Accreted land is dry land added to an upland parcel caused by the slow attachment of sediment, “by small and imperceptible degrees.” *Jones v. Johnston*, 59 U.S. (18 How.) 150, 156 (1855). The opposite of accretion is erosion, the slow disappearance of sediment. Slow increases or decreases in the amount of dry land can also occur from “reliction,” a decrease in water levels, or from a rise in water levels. *EAGLE*, *supra* note 2, at 13. In many, but not all states, the law distinguishes between these slow forms of change and rapid forms of change: where change occurs slowly, the legal coastline moves with the water line; where it occurs rapidly, the legal coastline remains where it was prior to the event. Compared with the legal vocabulary of slow change, the lexicon of rapid change is impoverished. All rapid change is generally known as “avulsion.” *Id.* In this Article, I use the terms “negative avulsion” and “positive avulsion” to distinguish between rapid landward and seaward change, respectively. See also Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305 (2010); Katrina M. Wyman & Nicholas R. Williams, *Migrating Boundaries*, 65 FLA. L. REV. 1957, 1969 (2013).

For more on rules pertaining to artificial accretion, see Joseph W. Dellapenna, *Boundaries Along a Waterbody*, in 6 WATERS AND WATER RIGHTS § 6.03 (Amy K. Kelley ed., 3d ed., 2012). Admittedly, these rules are far more complicated than I describe. So, for example, states might move the MHTL, giving title to accreted land to the upland owner where the artificial accretion is caused by a third party, but where it is a result of the owner’s actions. See *Brundage v. Knox*, 117 N.E. 123, 128 (Ill. 1917). Or, states might distinguish between artificial accretion caused by “human activities . . . in the immediate vicinity of the accreted land.” *State ex rel. State Lands Comm’n v. Superior Court*, 900 P.2d 648, 665–66 (Cal. 1995). For a description of the ways in which states do and do not treat avulsive events differently from gradual change, see Dellapenna, *supra*.

133. For a complete discussion of the problems in distinguishing avulsive events from erosion and accretion, see generally Sax, *supra* note 132. The difficulty in determining whether accretion or erosion has been caused by natural or artificial forces is illustrated by cases such as *Superior Court of Sacramento County*, 900 P.2d 648. For a surveyor’s description of the process of locating legal coastlines, see George M. Cole, *Tidal Water Boundaries*, 20 STETSON L. REV. 165 (1990). See also BRUCE S. FLUSHMAN, WATER BOUNDARIES: DEMYSTIFYING LAND

2. The Right To Alienate

The state's property rights with respect to trust lands are shaped to a large extent by a restriction on its right to alienate. The origins of the public trust doctrine can be traced to a single sentence in Chapter 33 of the Magna Carta: "All kydells [weirs] for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the seashore."¹³⁴ Weirs are nets installed on a fixed set of pilings arranged perpendicular to the banks of a river or coastline; they were, and still are, used to catch schools of fish as they migrate up or down a river or along the coast.¹³⁵

English courts interpreted Chapter 33 broadly to prevent the sovereign from alienating, or "disposing," property interests in royally owned submerged lands¹³⁶—if such disposals would interfere with key services provided by the waters above, such as navigation, commerce, and fishing.¹³⁷ So, for example, a royal grant of rights to install fish weirs would be a prohibited disposal because private rights to install and use weirs would interfere with the public's ability to access all three of these services: weirs would interfere with public fishing because they would prevent fish from passing upstream and down; they would interfere with navigation because vessels cannot pass across or through weirs; and they would interfere with commerce because they would allow one party privileged access to the public resource.

In *Illinois Central Railroad v. Illinois*,¹³⁸ the "lodestar" U.S. Supreme Court opinion on the public trust doctrine,¹³⁹ American courts identified the key issue in

BOUNDARIES ADJACENT TO TIDAL OR NAVIGABLE WATERS (2002).

134. *The Public Trust Doctrine in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 766 (1970).

135. D.J. Pannett, *Fish Weirs of the River Severn*, 26 FOLK LIFE 54 (1987).

136. See *The Public Trust Doctrine in Tidal Areas*, *supra* note 134, at 766.

137. "[T]he King has the property, but 'the people have the necessary use.'" THE READING OF THE FAMOUS AND LEARNED ROBERT CALLIS, ESQ. UPON THE STATUTE OF SEWERS, 23 HEN. VIII. C.5, at 67 (William John Broderip ed., 4th ed. 1824) (1622) (translated from Latin). As discussed below, English courts would allow the sovereign to make such disposals with the approval of Parliament.

At the time of American independence, English common law recognized only navigation, commerce, and fishing. See generally Wilkinson, *supra* note 58 (describing the traditional trust purposes derived from English common law). Today, twenty-seven states recognize recreational use as a service protected by the public trust doctrine. Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007); Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

138. 146 U.S. 387 (1892).

139. Sax, *supra* note 112, at 489; see *State v. Superior Court of Lake Cnty.*, 625 P.2d 239, 249 (Cal. 1981) (describing *Illinois Central* as the "seminal case on the scope of the public trust doctrine" (quoting *City of Berkeley v. Superior Court of Alameda Cnty.*, 606 P.2d 362, 365 (Cal. 1980))); see also *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115, 1118 (Alaska 1988); *In re Water Use Permit Applications*, 9 P.3d 409, 439–40 (Haw. 2000); *Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983); *Bos. Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 365–66 (Mass. 1979); *Glass v.*

“duty not to dispose” cases as the effect that the transfer of submerged lands has on a key-service provision.¹⁴⁰ The effect does not have to be physical. In *Illinois Central*, for example, the state transferred title to submerged lands to a railroad company that intended to develop an extensive wharf system on those lands.¹⁴¹ The state grant documents explicitly retained navigation rights for the public.¹⁴² Although the Court ultimately held that the state had violated its duty not to dispose, it did not do so on the ground that the wharves would result in too much physical interference with public rights. Rather, the concern was that the transfer would, by granting the railroad an effective monopoly over the transshipment of goods in Chicago Harbor, interfere with the trust service of “commerce”—the public would lose its freedom to choose among wharf facilities as well as the economic benefits associated with competition among those facilities.¹⁴³

In later cases, courts have applied the duty not to dispose to state actions beyond the actual transfer or use of submerged lands. So, for example, in *National Audubon Society v. Superior Court of Alpine County*,¹⁴⁴ the Supreme Court of California held that withdrawal permits issued by the state’s water agency might have violated the duty not to dispose because the withdrawals would, by decreasing water levels in Mono Lake, diminish trust services provided by the lake.¹⁴⁵ Although it is possible to read the case as a case of literal disposal (as water levels in the lake declined, the owners of land bordering on the lake might be able to take title to formerly submerged lands under rules covering slow, imperceptible relictions), the court does not present the case in this way.¹⁴⁶

In *Illinois Central*, the majority noted some exceptions to states’ “duty not to dispose”:

The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.* . . . In the

Goeckel, 703 N.W.2d 58, 88 (Mich. 2005) (citing *People v. Silberwood*, 67 N.W. 1087, 1087 (Mich. 1896)); *Lawrence v. Clark Cnty.*, 254 P.3d 606, 609 (Nev. 2011); *State v. Cent. Vt. Ry., Inc.*, 571 A.2d 1128, 1132 (Vt. 1989).

Although the *Illinois Central* opinion is not clear on the point, most states have interpreted the holdings of *Illinois Central* as federal law. See Wilkinson, *supra* note 58, at 453–56. *But see* Gwathmey v. State, 464 S.E.2d 674, 683 n.5 (N.C. 1995) (noting *Illinois Central* “did not involve North Carolina law”).

140. I use the term “duty not to dispose” to refer to the public trust doctrine’s restriction on alienation. See EAGLE, *supra* note 2, at 194–232.

141. 146 U.S. at 433–34.

142. *Id.* at 444.

143. See Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 924–25 (2004).

144. 658 P.2d 709 (Cal. 1983) (en banc).

145. *Id.* at 721 (“We conclude that the public trust doctrine, as recognized and developed in California decisions, protects navigable waters from harm caused by diversion of nonnavigable tributaries.”).

146. See *infra* Part III.B for a discussion of such “indirect disposals” and the controversy surrounding this interpretation of the duty not to dispose.

administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, *they cannot be placed entirely beyond the direction and control of the State.*¹⁴⁷

State courts have widely adopted the first two exceptions, allowing the state to make disposals that either enhance trust uses or do not substantially impair them.¹⁴⁸ The first exception would allow a state to transfer trust lands in perpetuity to, for example, an upland owner who wished to build a commercial wharf or a recreational marina. The idea is that both the wharf and the marina would enhance the trust use of navigation by providing the public with places to land their vessels. In addition, the wharf would facilitate the trust use of commerce by reducing the costs related to the offloading of goods and people. The second exception is slightly more opaque; echoing the problems expressed by the dissent in *Illinois Central*, courts have had a more difficult time deciding what size of transfer constitutes a “substantial impairment” and what size does not.¹⁴⁹

The third, and less frequently discussed, exception to the duty not to dispose might be called the “recourse” exception. Implicit in the language cited above, and in language elsewhere in the *Illinois Central* opinion, is the idea that transfers of trust property are problematic only to the extent that they place the provision of key services “entirely beyond [state] direction and control.”¹⁵⁰ So, for example, the doctrine would allow a transfer of limited temporal duration, such as a revocable license or a lease—even if it did not serve a public purpose and resulted in substantial impairment—because the “State [reserved] the right to revoke those powers and exercise them in a more direct manner.”¹⁵¹

147. *Illinois Central*, 146 U.S. at 453–54 (emphasis added).

148. See, e.g., *State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211 (Alaska 2010); *State ex rel. State Lands Comm’n v. Superior Court*, 900 P.2d 648, 655 (Cal. 1995); *Boone v. Kingsbury*, 273 P. 797, 812 (Cal. 1928); *Superior Pub. Rights, Inc. v. State Dep’t of Natural Res.*, 263 N.W.2d 290, 296 (Mich. Ct. App. 1977).

149. As Justice Shiras wrote:

The opinion of the majority, if I rightly apprehend it, likewise concedes that a State does possess the power to grant the rights of property and possession in such lands to private parties, but the power is stated to be, in some way restricted to “small parcels, or where such parcels can be disposed of without detriment to the public interests in the lands and waters remaining.” But it is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable.

146 U.S. at 467 (Shiras, J., dissenting).

150. *Id.* at 454.

151. *Id.* at 453–54.

3. The Right To Exclude

Because a guarantee of public access to key services such as navigation, commerce, and fishing is at the heart of the public trust doctrine, a right to exclude the public from trust property is counterintuitive. Courts have recognized, however, that unlimited access to those services can jeopardize the state's ability to maximize short- and long-term value.¹⁵² As the number of people on a beach increases, for example, there will be a point at which the summed benefits begin to decrease.¹⁵³ Too much fishing will result not only in short-term losses but in long-term damage as well.¹⁵⁴ In addition, courts have also recognized that not all trust uses are compatible with one another.¹⁵⁵ So, the state might exclude one sector of the public—jet skiers—if it wishes to ensure the ability of a given area to provide opportunities for forms of recreation that require a quieter environment.¹⁵⁶

4. The Right To Use and Enjoy

Limits on the state's rights to use and enjoy trust property are derivative of the restriction on disposals. If the goal of the doctrine is to ensure continued public access to key services, then the doctrine must prevent the state from using trust property in ways that interfere, in the same way disposals would, with access to those services. In other words, the doctrine regulates “self-disposals” just as it regulates disposals.¹⁵⁷

A contrary rule would allow the state to circumvent the duty not to dispose. Imagine that a state legislature was interested in transferring a large tract of submerged land to a private party interested in developing the property for residential housing. A straight transfer of the property to the developer would violate the duty

152. See *Ventura Cnty. Commercial Fishermen's Ass'n v. Cal. Fish & Game Comm'n*, No. B166335, 2004 WL 293565 (Cal. Ct. App. Feb. 17, 2004) (holding that the State closure of certain ocean areas to fishing supported by need to protect fish populations from overuse).

153. See M.C. De Ruyck, Alexandre G. Soares & Anton McLachlan, *Social Carrying Capacity as a Management Tool for Sandy Beaches*, 13 J. COASTAL RES. 822 (1997).

154. NAT'L ACAD. OF SCIS., NAT'L RESEARCH COUNCIL, *EVALUATING THE EFFECTIVENESS OF FISH STOCK REBUILDING PLANS IN THE UNITED STATES* 9 (2014).

155. *Carstens v. Cal. Coastal Comm'n*, 227 Cal. Rptr. 135, 143 (Ct. App. 1986) (“[T]he public trust doctrine . . . does not prevent the state from preferring one trust use over another.”).

156. *Weden v. San Juan Cnty.*, 958 P.2d 273 (Wash. 1998) (en banc) (upholding county ban on the use of personal watercraft for navigation because of their impacts on other trust uses, namely quiet recreation such as wildlife viewing).

157. Although the “duty not to dispose” cases dominate the record of public trust litigation, there are also many public trust doctrine cases challenging the state's use of property as outside the scope of the public trust doctrine. Illustrating the close relationship between the public trust and upland rights doctrines, the issue often arises in upland owners' suits seeking compensation for interference with upland rights. Recall that, under the waterfront takings test, the state has no liability where it is using submerged lands for trust purposes; thus, upland owners' first argument is often that the interfering state use is outside the scope of the trust. So, for example, in *Colberg, Inc. v. State*, 432 P.2d 3 (Cal. 1967), the State of California built two bridges that allegedly interfered with the plaintiff's right of access. These cases provide evidence of the important role that upland owners can play in enforcing the public trust doctrine. See *infra* Part II.C.

not to dispose and would not fall within any exceptions.¹⁵⁸ It would not be consistent with the goals of the doctrine to allow the state to fill the area, then transfer the newly filled land to the developer. The most coherent approach is to look at all state actions—whether transfer, state use, or permitting private activity—as potential disposals, and to weigh them under the duty not to dispose.

B. Upland Owners' Property Rights

If trust property is an asset, and the services provided by that property are dividends and members of the public are shareholders, then the upland owner is a preferred shareholder. The upland owner has rights in key services that are both different from and superior to the rights of other members of the public. The upland owner also derives greater benefit from these services than the average citizen because they increase the value of her private property.

1. Upland Rights

As described above, the owner of an oceanfront lot possesses two types of rights: upland rights and standard property rights such as the rights to exclude, use and enjoy, and alienate. The two types of rights, however, cannot neatly be separated; upland rights might make the most sense when viewed as defined components of the owner's right to use and enjoy. Each of the three most significant upland rights held by the oceanfront owner—the right of access, the right to wharf out, and the right to accretions—is meant to protect her access to the key services provided by the adjacent public waterway.¹⁵⁹

From a historical perspective, it appears that the common law established rights such as the right of access not only as a means of enhancing the value of key services, but also as a way to clarify that the upland owner's right to use and enjoy included rights to limit its neighbor the state's right to use and enjoy. In other words, upland rights represent the clarification of entitlements in pursuit of more efficient dispute prevention and resolution vis-à-vis the state.¹⁶⁰

158. There is no reason to believe that states could not make use of the *de minimis*, or no substantial impairment, exception to *Illinois Central* in this context. Whether a state use fits within this exception requires a subjective judgment. Courts might look at the absolute amount of the acreage used or at the impact of the use on provision of trust services. *Cf.* *Cnty. of Orange v. Heim*, 106 Cal. Rptr. 825 (Ct. App. 1973) (striking down attempted trade of trust lands for private lands, even though there was little net loss of acreage, because the state lands provided two-thirds of public access to Newport Bay).

159. *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 445–46 (1892) (citing *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871)); *see also* *Schramm v. Spottswood*, 109 So. 3d 154, 161 (Ala. 2012); *State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1211–12 (Alaska 2010); *Port Clinton Assocs. v. Bd. of Selectmen*, 587 A.2d 126, 132 (Conn. 1991); *Nedtweg v. Wallace*, 208 N.W. 51, 52–53 (Mich. 1926); *Sherwin v. Bitzer* 106 N.W. 1046, 1048 (Minn. 1906); *St. Louis, K. & N. W. R. Co. v. St. Louis Union Stock-Yard Co.*, 25 S.W. 399, 401 (Mo. 1894); *Lawrence v. Clark Cnty.*, 254 P.3d 606, 615 (Nev. 2011); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984); *Town of N. Hempstead v. Gregory*, 65 N.Y.S. 867, 868 (App. Div. 1900).

160. This clarification of state/upland rights might be called “coastal Coase,” because it

Courts attempting to apply a diminution-based takings approach to interference with upland rights will necessarily struggle with identifying what an upland owner's prior rights were. For example, under the common law, the public trust doctrine allows states to eliminate upland rights without compensating the upland owner if the state action eliminating the rights is necessary to protect trust services. At the same time, in the absence of such necessity, the state cannot eliminate the rights without compensation. Because of the unique relationship with the state, and because the exercise of upland rights requires the use of trust lands, upland rights are a very unproperty-like form of property.

a. Pure Access

The right of pure access, usually simply called the right of access, is the right of the oceanfront owner to travel unimpeded from her lot to the public waterway. As owner of the adjacent submerged lands, the state is the only party that can impede travel; it can do that through self- or third-party disposal of those lands.

The state might interfere with travel by, for example, building a highway along the coast. The highway, or the pilings on which it is constructed, might prevent the upland owner from physically reaching the public waterway. If the pilings are tall enough, the upland owner could still reach the waterway, but her path would be partly impeded.¹⁶¹ The state could also interfere with travel by transferring full or partial rights in its property to a third party.¹⁶² As noted above, the classic pure access litigation from the nineteenth and early twentieth century involved state transfers of easements to railroad companies that found it easier and cheaper to buy one easement from the state than to acquire hundreds of easements from private landowners.¹⁶³

Thus, the target of the right of pure access is the state. It is possible that a private party might interfere with access, but this would occur only if the state has authorized that interference or if the private party violates the terms of its deed from the state.¹⁶⁴ The right of pure access is best viewed as akin to a negative easement, albeit, as discussed further below, a contingent one: the upland owner can prevent the state from disposals that interfere unreasonably with her right to travel onto state property, unless the state's actions are directed at enhancing the provision of a key service.

b. The Right To Wharf Out

Throughout much of history, the most important key services related to navigability.¹⁶⁵ Thus, for an upland owner to have access to those services, she would

establishes a property-based framework for resolving disputes. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

161. In Florida, the landowner would have an additional claim: Florida is unique in recognizing an upland right to an unobstructed view of the public waterway. *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987); *see also* Eric Biber, Case Note, *A House with a View*, 109 YALE L.J. 849 (2000).

162. *See* *Rumsey v. N.Y. & New Eng. R.R.*, 30 N.E. 654 (N.Y. 1892).

163. *See supra* notes 71–75 and accompanying text.

164. In other words, the trust lands transferee steps into the shoes of the state.

165. Navigation, commerce, and fishing all rely on movement by means of navigable waters.

need more than pure access; she would need the means to connect to the navigable channel. If the adjacent trust lands were shallow, densely populated with sea grasses, or otherwise nonnavigable, then the upland owner would have pure access, but would lack access that mattered. Unlike the right of pure access, which is effectively a negative easement over the adjoining trust land, the construction of wharf extending seaward of the legal coastline would require that the upland owner possess an affirmative easement: a right to build and maintain a structure indefinitely on adjoining trust property.

In terms of enforceable rights, the American right to wharf out has three component parts, two of which target state action. First, the upland owner holds an affirmative easement over the adjoining state property: the right to build a structure in order to connect with the navigable channel.¹⁶⁶ Second, the upland owner holds a negative easement that burdens that same property: the right to prevent the state from authorizing a third party to construct a wharf there.¹⁶⁷ Interestingly, the first right—the actual right to wharf out—is more contingent than the second.¹⁶⁸ The state is entitled to deny the upland owner the right to wharf out where the structure would interfere with the provision of key services.¹⁶⁹ The state is not entitled to allow a third party to construct a wharf seaward of an upland owner's property under any circumstances.¹⁷⁰ Unlike the right of pure access, the right to wharf out not only targets the state, but also targets neighboring upland owners. Where the shoreline is irregular (imagine a cove), each upland owner is entitled to wharf out; thus, one upland owner may not build a structure that prevents another from building her own.¹⁷¹

There are several examples of the ways in which courts and legislatures have modified the right to wharf out in response to changed understanding or valuation of a key-service provision. First, it was common in the nineteenth and early twentieth centuries for states to allow upland owners to wharf out by filling in adjacent state lands out to the navigable channel.¹⁷² Second, prior to the last half-century, the state

166. Joseph W. Dellapenna, *Introduction to Riparian Rights*, in 6 *WATERS AND WATER RIGHTS* § 6.01(a)(2) (Amy K. Kelley ed., 3d ed., 2012).

167. *See Wicks v. Howard*, 388 A.2d 1250 (Md. Ct. Spec. App. 1978).

168. A negative easement violates sovereign power less than an affirmative easement.

169. *See, e.g., Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 445–46 (1892) (“[T]he right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceased.”); *Krieter v. Chiles*, 595 So. 2d 111, 112–13 (Fla. Dist. Ct. App. 1992) (upholding denial of permit to wharf out because the wharf would be built in a state marine park).

170. *See, e.g., McGibney v. Waucoma Yacht Club, Inc.*, 182 A.2d 622, 623–24 (Conn. 1962) (citing *Shorehaven Golf Club, Inc. v. Water Res. Comm’n*, 153 A.2d 444, 446–47 (Conn. 1959)); *Rochester v. Barney*, 169 A. 45, 47–48 (Conn. 1933); *State v. Sargent & Co.*, 45 Conn. 358, 373 (1877); *Owen v. Hubbard*, 271 A.2d 672, 678–80 (Md. 1970) (citing *Causey v. Gray*, 243 A.2d 575, 581 (Md. 1968)); *City of Baltimore v. Balt. & Phila. Steamboat Co.*, 65 A. 353, 358 (Md. 1906); *Mayor of Balt. v. St. Agnes Hosp.*, 48 Md. 419, 420–21 (1878); *Balt. & Ohio R.R. v. Chase*, 43 Md. 23, 36 (1875); *Dugan v. Mayor of Balt.*, 5 G. & J. 357, 367–68 (Md. 1833).

171. *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1260 (R.I. 1999) (citing *Nugent v. Vallone*, 161 A.2d 802, 805 (R.I. 1960)); *see Wicks*, 388 A.2d at 1253–54.

172. *See, e.g., Hayes v. Bowman*, 91 So. 2d 795, 800 (Fla. 1957) (describing Florida

claimed that the proposed structure would interfere with navigation as its primary basis for rejecting applications to wharf out. In recent years, states have frequently rejected applications on the grounds that structures would be harmful to marine life, that is, would interfere with the key service of recreation.¹⁷³ Along the same lines, many states have eliminated the right to wharf out from oceanfront property altogether.¹⁷⁴

c. The Right to Accretions

Perhaps the oldest property law problem in the coastal law arena is the issue of how to reassign ownership rights after the waterline moves.¹⁷⁵ The two options are a mobile and immobile boundary. The mobile, or migrating, boundary allows upland lots and trust lands to grow or shrink in area as land is added or subtracted or as water levels rise or decrease. An immobile boundary does not distinguish lands by their physical characteristics. As land is added or water levels decrease, the state would acquire title to those newly formed uplands; in the opposite scenario, the upland owner would acquire title to the newly submerged land.¹⁷⁶

English law applied both rules, depending on the facts. Where the addition or subtraction of land, or changes in water level, was slow and imperceptible, the mobile-boundary rule governed. On the other hand, avulsive events—changes that were not slow and imperceptible—did not move the boundary.¹⁷⁷

For the most part, American state courts have adopted what Professor Sax calls “the accretion/avulsion distinction.”¹⁷⁸ In property rights terms, both the upland owner and the state have the right to a migratory boundary when change is slow and imperceptible.¹⁷⁹ As evidenced by the Florida Supreme Court’s decision in *Stop the*

statutes allowing filling of state lands out to the navigable channel). This use of trust lands, which now seems preposterous to most who read about it, was common and generally accepted throughout the United States through the first half of the twentieth century. Joseph W. Dellapenna, *Introduction to Riparian Rights*, in 6 WATERS AND WATER RIGHTS § 6.01(a)(7) (Amy K. Kelley ed., 3d ed., 2012). According to this treatise, some state statutes still permit it, although it would, of course, be subject to federal permission. *Id.* at 6-61 n.266.

173. See *Krieter*, 595 So. 2d at 112–13. Protecting marine life is connected to both the traditional key service of fishing and the more modern key service of recreation. Many members of the public enjoy nonconsumptive use of marine life, for example, wildlife viewing.

174. See, e.g., Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. REV. 1427, 1499 (2005).

175. See generally Sax, *supra* note 132 (describing the legal issues surrounding accretion and avulsion); Wyman & Williams, *supra* note 132 (same).

176. See generally Sax, *supra* note 132 (describing the legal issues surrounding accretion and avulsion); Wyman & Williams, *supra* note 132 (same).

177. See generally Sax, *supra* note 132 (describing the legal issues surrounding accretion and avulsion); Wyman & Williams, *supra* note 132 (same).

178. Sax, *supra* note 132, at 306. There are notable exceptions, namely Texas, which applies the mobile boundary rule to all coastal change. *Severance v. Patterson*, 345 S.W.3d 18, 32 (Tex. 2010).

179. See *United States v. Milner*, 583 F.3d 1174, 1186 (9th Cir. 2009); *Shell Island Homeowners Ass’n v. Tomlinson*, 517 S.E.2d 406, 417 (N.C. Ct. App. 1999).

Beach Renourishment,¹⁸⁰ at least some state courts view the right to accretion as a purely contingent right: that is, the right does not vest until the size of the oceanfront lots actually increases.¹⁸¹

In the negative avulsion scenario, where natural forces have rapidly shrunk the area of the oceanfront lot, the common law holds that the upland owner possesses a “right of reclamation.”¹⁸² This common law right gives the upland owner a reasonable period of time to fill in the avulsively submerged former upland, that is, to reclaim her property.¹⁸³

The trend in American law is to favor migrating boundaries over immobile ones.¹⁸⁴ The rationale supporting this trend is consistent with the overall flavor of upland rights, that is, the maintenance of special access privileges. The migratory boundary helps to preserve the upland owner’s connection to the water by ensuring that the legal coastline is almost always identical to the land/water interface.¹⁸⁵

2. Core rights

As Professor Sax has argued:

Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user.¹⁸⁶

The oceanfront lot illustrates this proposition well. Its owner both benefits from, and is limited by, the fact that the state is her next-door neighbor and, importantly, that the public trust doctrine requires the state to maintain key services. The special benefits of ownership are incorporated into the upland rights doctrine while the burdens take the form of limitations on core rights. As Farnham wrote: “[t]he rights

180. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1115 (Fla. 2008).

181. *See id.* at 1118–22.

182. *See, e.g., Phila. Co. v. Stimson*, 223 U.S. 605, 623 (1912); *Beach Colony II v. Cal. Coastal Comm’n*, 199 Cal. Rptr. 195, 202 (Ct. App. 1984).

183. *Phila. Co.*, 223 U.S. at 623; *Beach Colony II*, 199 Cal. Rptr. at 202. The cases are unclear as to how long this right endures following the avulsive event. In addition, federal laws, specifically Section 10 of the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (2012), and Section 404 of the Clean Water Act of 1972, 33 U.S.C. § 1344 (2012), could make it difficult or impossible for the upland owner to act on the common law right, despite the fact that she owns title to the underlying land.

184. *See generally* Sax, *supra* note 132 (describing the legal issues surrounding accretion and avulsion).

185. *Id.* For an explanation of why I say “almost always,” see *supra* notes 143–144 and accompanying text.

186. Sax, *supra* note 6, at 152.

may be said to be reciprocal, each modifying the other, each to be used so as not to interfere unreasonably with the other right.”¹⁸⁷

a. The Right To Alienate

The upland owner is not free to transfer upland rights to a third party.¹⁸⁸ In other words, the law requires that ownership of the oceanfront lot and the appurtenant upland rights remain in common ownership. This rule reinforces the notion that economic development is the rationale underlying both the upland rights and public trust doctrines: segregating upland rights from the oceanfront land would open the door to future coordination problems that could decrease the provision of key services.¹⁸⁹

b. The Right To Exclude

In certain cases, for example, where the property includes sandy beach prone to frequent change in a state using a datum-based system for locating the legal coastline, the oceanfront lot owner’s right to exclude—along the seaward boundary of the property—is as a practical matter very difficult, if not impossible, to enforce.¹⁹⁰ In states that distinguish between accretion and avulsion, between artificial and natural accretion, or both, location of the legal coastline becomes even more difficult: artificial accretion, like avulsion, results in physical disparity between the MHTL and the legal coastline. In other words, identification of the boundary would require a surveyor *and* a quiet title action.

How far landward does this area of nonexcludability extend? Sax has described a “zone [on the seashore] that is neither wholly public nor wholly private.”¹⁹¹ Of course, the upland owner must have an enforceable seaward boundary somewhere on her property.

Some might object to the idea that one could call the oceanfront lot “property” under these conditions. However, the fact is that the rule creating the uncertainty of hindering trespass enforcement is the same rule that ensures that the lot maintains its connection to the water. Without a mobile and elusive boundary, the oceanfront owner would bear a constant risk of losing all of her upland rights; any addition of land, uplift, or reliction would transform the upland owner into an ordinary owner,

187. 1 FARNHAM, *supra* note 1, at 137–38.

188. Joseph W. Dellapenna, *Introduction to Riparian Rights*, in 6 WATERS AND WATER RIGHTS § 6.01(a)(1) (Amy K. Kelley ed., 3d ed., 2012).

189. The transfer of upland rights to a third party would defeat efficiency in that it would create a bilateral monopoly problem between the once-upland owner and the owner of her former rights in the adjacent trust lands.

190. Trespass law is frequently put forward as an example of a “clear, crystalline rule.” Rose, *supra* note 106, at 594; Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 13–14 (1985). As cases such as *State v. Ibbison* illustrate, however, when both the owner and the public have difficulty locating the boundary, trespass can only rarely be enforced. 448 A.2d 728 (R.I. 1982) (overturning beach trespass conviction on due process grounds).

191. Sax, *supra* note 132, at 356.

because the state would own the new swath of dry land. Furthermore, the publicness objected to is the same publicness that makes upland property more valuable than ordinary property: if the trust lands adjacent to the oceanfront lot were private (or not open to the public), the owner of the oceanfront lot would not be entitled to walk off her property at high tide. As Justice Holmes would say, the rule of nonexcludability from some indefinite dry-sand zone creates “average reciprocity of advantage.”¹⁹²

c. The Right To Use and Enjoy

The state’s use of its property in furtherance of a key-service provision can limit activities on the oceanfront lot and, therefore, the oceanfront owner’s ability to exercise her upland rights. Imagine that a state devotes an area of near-shore trust lands to an ecological restoration project in order to enhance the key services of recreation and fishing. This use would impose limits on uses of adjacent uplands that might generate harmful pollution runoff; it would also make it more likely that the state would deny her application to wharf out. At the same time, however, by increasing the ecological quality of the adjacent waters, and by limiting her private neighbors’ uses, the state project would likely enhance the value of her property.

Another specific, oft-discussed state restriction on the use of upland property is the rule preventing the upland owner from installing “hard erosion control devices,” for example, seawalls, riprap, or bulkheads, on her property.¹⁹³ From the property owner’s perspective, such bans fundamentally limit her right to use and enjoy her property by requiring her to submit to forces of nature that threaten to reduce the size of or eliminate her lot. Courts have thus far upheld state bans on several grounds: first, that the state is entitled, like the upland owner, to a mobile boundary; and, second, that the detrimental impacts of such structures on state property, namely the public beach seaward of the legal coastline, constitute a substantial interference with public property, that is, a public nuisance.¹⁹⁴

192. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

193. 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 (1998). North and South Carolina have adopted bans on new hard structures. 15A N.C. ADMIN. CODE 7H.0308(a)(1)(B) (2015); S.C. CODE ANN. § 48-39-290(B)(2) (2014).

194. *Sams v. Dep’t of Env’tl. Prot.*, 63 A.3d 953, 986 (Conn. 2013) (finding that plaintiff’s construction of seawall without an approved coastal site plan “constituted a public nuisance”); *Shanahan v. Dep’t of Env’tl. Prot.*, 47 A.3d 364, 365–68 (Conn. 2012) (finding plaintiff who built seawall waterward of high tide line in violation of Department of Environmental Protection regulations, considering such violations “a public nuisance for which the department may issue a cease and desist order”); *Shell Island Homeowners Ass’n v. Tomlinson*, 517 S.E.2d 406, 414 (N.C. Ct. App. 1999) (dismissing plaintiff’s takings claim because erosion and migration are “a consequence of being a riparian or littoral landowner” and thus does not entitle property owners to erect structures in “statutorily designated areas of environmental concern to protect their property”).

C. Cross-Protection: How the Public Trust Doctrine Serves Upland Owners and How Upland Rights Serve the Public

While it is easy to portray the public trust doctrine as protecting the public's interest in state property and the upland rights doctrine as a guardian of private rights, each of the two doctrines functions to protect the rights of both private owners and the public.¹⁹⁵ "Cross-protection" is consistent with the unique physical and economic relationship between the two parties.¹⁹⁶

195. See, e.g., Huffman, *supra* note 114, at 174 (finding that the public trust doctrine "pit[s] private rights against public rights, and to the senior right goes the spoils"); Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees' World*, 39 *ECOLOGY L.Q.* 123, 159 (2012) ("Private riparians' placement of piers illustrates the clash of riparian rights and public rights in navigable waters.").

196. There are other locations where private and public property share a common boundary, for example, at the outskirts of public parks, and along roads and highways. In those scenarios, the law includes special provisions that define and balance private and public interests. Courts have established a rule, for example, that the federal government has the right to use the Property Clause of the U.S. Constitution as a form of private nuisance law to restrict the use of private or state property adjacent to federal lands. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 537–38 (1976); *Camfield v. United States*, 167 U.S. 518, 525–26 (1897); *Minnesota v. Block*, 660 F.2d 1240, 1248–49 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); see also Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 *MINN. L. REV.* 1 (2001).

One can argue that property relationships between the state and businesses regarding public roads are similar, if not identical, to relationships along the legal coastline. See Sax, *supra* note 37, at 74–75. In some waterfront cases, courts have made this analogy. See *Rumsey v. N.Y.*, and *New Eng. R.R.*, 30 N.E. 654, 656 (N.Y. 1892) ("[The] distinction to be made between the rights which pertain to an owner of land upon a public river and one upon a public street . . . is not perceived.") In *Judicial Takings*, Professor Thompson uses the elevated railway cases as another set of examples (in addition to beach and water cases) where the protection offered to a landowner by a judicial takings rule would be particularly important. Thompson, *supra* note 36, at 1463–65. In these cases, the state transferred property rights in its roads, in the form of an easement, to railroad companies for the installation of rail lines. Adjacent landowners sued the railroad companies, claiming that the "darkness, noise, smoke, dirt, and cinders" produced by the defendants resulted in a taking of the landowners' common law negative easements protecting "light, air, and access." *Id.* at 1463. In deciding these cases, the New York courts referenced some prior waterfront cases, but did not view them as precedential. *Story v. N.Y. Elevated R.R.*, 90 N.Y. 122, 156 (1882) (rejecting the argument that the decision in *Gould* was apposite to the dispute at hand).

There are several reasons why the analogy between roads/road-front owners and waterways/upland owners is not perfect. As a historical matter, the legal traditions pertaining to waterways are much older than those pertaining to highways. Moreover, Roman and English law, from which the upland rights and public trust doctrines are derived, treated the latter as state property and the former as trust property. EAGLE, *supra* note 2, at 186–93. Even if we were to consider roads as trust property, the common law did not provide road-front property owners with a set of named rights vis-à-vis the state along the lines of the rights provided to the waterfront property owner by the upland rights doctrine. (Interestingly, English and American common law did restrict certain road-front owners' right to exclude due to their status as road-front owners, under the "law of innkeeping." See Frederic W. Peirsol, Note, *An Innkeeper's "Right" to Discriminate*, 15 *FLA. L. REV.* 109 (1962). As noted below, this rule

The public trust doctrine creates value for upland owners. In the traditional waterfront takings cases, this value came from access to commerce. In the modern oceanfront takings cases, *Hughes, Stevens, Nollan, Lucas, and Stop the Beach Renourishment*, the plaintiffs were all residential homeowners.¹⁹⁷ Although residential property owners are unconcerned with the transshipment of goods, the value differential between ordinary and oceanfront residential property does depend upon access (physical and visual) to trust property.¹⁹⁸ By limiting development of trust property and by ensuring its publicness, the public trust doctrine protects the value of this access.¹⁹⁹ The landowner's right of access guarantees a direct pathway to the wet-sand beach directly between the residence and the sea; but, it is the publicness of the wet-sand beach that allows the landowner the ability to walk off of her property at high tide (in a MHTL state).²⁰⁰ The value of a beachfront home can also be correlated to the quality of the adjacent trust areas: the width of the beach,²⁰¹

may have a parallel with respect to beachfront property.) And, while roads are artificial creations, geographic features such as rivers and oceans (and riverfront and oceanfront land) are not. Unlike roads and parcels bordering roads, we cannot add to the supply of public waterways and upland property. One notable exception would be the expansion of the system of public waterways through improvements, for example, dredging, or the construction of canals. Such projects can, but do not as a rule, create new *public* waterways. Compare *Kaiser Aetna v. United States*, 444 U.S. 164, 176–78 (1979) (dredging of harbor from existing pond adjacent to Pacific Ocean does not create a public waterway), with *United States v. Appalachian Power Co.*, 311 U.S. 377, 407, 427–29 (1940) (improvements convert private, nonnavigable waterway into public waterway). Finally, the often uncertain location of the boundary between private and state property is a feature unique to waterfront property and creates a distinctive relationship between the parties. See *supra* Part II.A.3.

197. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702 (2010); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) *cert. denied*, 510 U.S. 1207 (1994); *Hughes v. State*, 410 P.2d 20 (Wash. 1966).

198. Okmyung Bin, Thomas W. Crawford, Jaime B. Kruse & Craig E. Landry, *Viewscapes and Flood Hazard: Coastal Housing Market Response to Amenities and Risk*, 84 LAND ECON. 434 (2008) (modeling value provided by visual and physical access). Residential buyers in popular oceanfront communities pay a substantial premium for upland property. In Delaware, for example, a home on the beach is worth about sixty percent more than a comparably sized home just 500 feet inland. George R. Parsons & Joëlle Noailly, *A Value Capture Property Tax for Financing Beach Nourishment Projects: An Application to Delaware's Ocean Beaches*, 47 OCEAN & COASTAL MGMT. 49, 60–61 (2004). This premium exists despite increased risk of storm damage, higher insurance costs, and very large crowds on the beach throughout the summer season. (The public has legal access to about sixty-three percent of dry sand beach in Delaware. BEACHAPEDIA, *State of the Beach/State Reports/DE/Beach Access*, http://www.beachapedia.org/State_of_the_Beach/State_Reports/DE/Beach_Access [https://perma.cc/9VB7-QYCQ] (last modified May 2, 2013)).

199. Rose, *supra* note 53, at 718 (coining and explaining the term “publicness” in the beach context).

200. As Professor Rose explains, people value not only the ability to walk on the public beach, but also the “publicness” of the beach, which allows them to experience the benefits of social interaction. *Id.* at 777–81.

201. Sathya Gopalakrishnan, Martin D. Smith, Jordan M. Slott & A. Brad Murray, *The Value of Disappearing Beaches: A Hedonic Pricing Model with Endogenous Beach Width*, 61

pleasant smells,²⁰² unpolluted water,²⁰³ and healthy wildlife populations.²⁰⁴ To the extent that the state abides by its public trust responsibility to maintain key service provisions, it protects all these sources of private value.

With regard to private rights, the public trust doctrine plays an underappreciated role in protecting upland owners. Under the *Illinois Central* exceptions to the duty not to dispose,²⁰⁵ a state can use or transfer out its trust lands *without liability* when the use or transfer is in furtherance of trust purposes. To the extent a state's courts (or constitution) define "trust purposes" narrowly, the state will be constrained in its ability to transfer or use trust lands without payment to upland owners—its zone of liability-free activity will be smaller. On the other hand, where state courts interpret "trust purposes" broadly, that zone will be larger, and the state will thus have more power to destroy upland rights without compensating upland owners.²⁰⁶ Of course, a broader definition also threatens the public beneficiaries of the trust by freeing the state to dispose of lands for purposes far afield from the classic navigation, commerce, fishing, and recreation.²⁰⁷

In a mirrored way, the upland rights doctrine protects public value and public rights. The value to the public of key services is a function of the quality of those services and the ease with which the public can access them. As owners of the strip of land separating the public at large from trust areas, the land-sea interface, upland owners are in a position to help the state on both fronts. With respect to navigation-related services, upland owners can provide vital infrastructure and a competitive market for access. Because their businesses or residential experiences depend upon the quality of key services, upland owners have an incentive to pressure the state on issues such as water pollution, fisheries conservation and management, and navigational improvements.

Upland rights also serve as a back up to the duty not to dispose. If a state makes a transfer outside the scope of "trust purposes," and that transfer impacts an upland owner's rights, the upland owner can sue for compensation. The threat of such litigation should dissuade states from making transfers beyond the scope of trust purposes. If the state goes forward, the upland owner's lawsuit effectively has two purposes: to seek compensation for infringement of his rights and to protect the

J. ENVTL. ECON. & MGMT. 297, 297 (2011).

202. David McEwen & Philip Wolstoneholm, *Pump Station Odor Control in a Tourist Location*, 11 PROC. OF THE WATER ENV'T FED'N 345 (2010).

203. Christopher G. Leggett & Nancy E. Bockstael, *Evidence of the Effects of Water Quality on Residential Land Prices*, 39 J. ENVTL. ECON. & MGMT. 121, 121 (2000).

204. Roy Brouwer, Sebastiaan Hess, Yi Liu, Pieter van Beukering & Sonia Garcia, *A Hedonic Price Model of Coral Reef Quality in Hawaii*, in THE INTERNATIONAL HANDBOOK ON NON-MARKET ENVIRONMENTAL VALUATION 37, 55 (Jeff Bennett ed., 2011).

205. See *supra* notes 147–151 and accompanying text.

206. See *Colberg, Inc. v. State*, 432 P.2d 3, 9 (Cal. 1967) (en banc); Morgan & Lewis, *supra* note 48, at 533. Under the test, a state can transfer trust property without liability to the owner of adjacent uplands if the transfer is in furtherance of trust purposes or if the transfer does not lead to unreasonable interference with the owner's rights.

207. See *Wernberg v. State*, 516 P.2d 1191, 1197 (Alaska 1973) (holding that a broad interpretation of trust purposes "would stifle private economic development of waterfront land" by allowing state to eliminate upland rights without compensation).

public at large from the effects of the state transfer.²⁰⁸ In other words, the upland owner is a plaintiff with unique standing to challenge public trust violations.

III. APPLYING THE WATERFRONT TAKINGS TEST TO MODERN CASES

How would modern courts use the waterfront takings test to resolve cases involving oceanfront property? In regulatory takings cases challenging state statutes, state courts would use the waterfront test to determine the boundary between upland and state property rights, then decide whether state use or state restrictions on upland use were consistent with that boundary. In judicial takings cases, federal courts would determine whether the state's highest court had, consistent with precedent, faithfully applied that state's version of the test to the facts at hand.²⁰⁹

In order to assess the potential of the test, this Part examines whether and how it could have been applied to oceanfront property cases the Supreme Court has decided in the last half century. These cases fit into two categories. In the first category, which includes *Hughes* and *Stop the Beach Renourishment*, the facts are similar to those found in the classic waterfront cases. Specifically, each of those two cases involves use of state property that abridges upland rights. In the second category of cases, including *Nollan*, *Stevens*, and *Lucas*, the fact patterns are distinctly modern and differ from the traditional cases in two important ways. First, in each of the cases, the state is not physically using its property but rather is attempting to use regulation in order to protect trust uses, that is, the provision of key services. Second, in order to achieve this end, the state is limiting upland owners' core rights to use and enjoy and to exclude.

A. State Use and Upland Rights: *Stop the Beach Renourishment* and *Hughes*

In cases where courts first applied the waterfront test, it was alleged that the state or its transferee had made direct, physical use of trust lands, to the detriment of adjacent upland owners. *Stop the Beach Renourishment* presents identical facts. The

208. A good example of this can be found in *Colberg*, 432 P.2d at 9. In that case, the State of California constructed two bridges that blocked a harbor used by the upland owner, a shipyard. The state argued that the bridges were "consistent with the improvement of commercial traffic and intercourse" and represented a "use of navigable waterways for purposes of commerce." *Id.* at 11–12. The plaintiff's claim, although ultimately unsuccessful, largely rode on its ability to convince the court that using submerged lands for bridges was outside the scope of the trust. *Id.* at 12–13.

209. If one accepts that the rules that make up the public trust doctrine are federal law, by virtue of the broad language of *Illinois Central*, then it might also be possible, in either setting, for the U.S. Supreme Court to develop and apply a federal version of the test. *Cf.* *Wilkinson*, *supra* note 58, at 453–64. The argument would be that, consistent with *Illinois Central*, a federal waterfront takings test would ensure that states fulfill their responsibilities to their citizens to maximize key services provided by trust property. The use of a federal test would allow the Court to move closer to the normative, constitutional definition of property, at least in this particular context. *See* *Thompson*, *supra* note 36, at 1523–27. Interestingly, Professor *Wilkinson* suggests that state public trust doctrines have roots in the U.S. Constitution. *Wilkinson*, *supra* note 58, at 458–59. A full exploration of the desirability and contours of a federal test is beyond the scope of this Article.

State of Florida, through the Beach and Shore Preservation Act (BSPA),²¹⁰ authorized Walton County to fill state trust lands in order to use them as a renourished beach.²¹¹ The plaintiff, Stop the Beach Renourishment, Inc., was a “nonprofit corporation formed by people who own beachfront property bordering the project area,” that is, adjacent upland owners (“Members”).²¹² The plaintiff alleged that the BSPA’s rule for locating the boundary between upland and state trust property following the renourishment project²¹³ constituted a taking of two rights belonging to Members: the “right of contact,” that is, the right to have one’s land remain in physical contact with the water, and the right to accretions.²¹⁴

Under Florida common law, littoral owners hold four upland 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.”²¹⁵ Also as a matter of common law, “[t]hrough subject to regulation, these littoral rights are private property rights that cannot be taken from upland owners without just compensation.”²¹⁶ The State holds “lands seaward of the [mean high-water line], including the beaches between the mean high and low water lines, in trust for the public for the purposes of bathing, fishing, and navigation.”²¹⁷

Although the plaintiff alleged that state use of its trust property would result in a compensable taking of Members’ upland rights, the two Florida courts that weighed plaintiff’s case applied neither *Penn Central* nor Florida’s version of the waterfront takings test.²¹⁸ (And, neither of the two courts referred to, or cited, these tests.) Instead, the Florida courts applied the provisions of Florida Administrative Code rule 18-21.004(3), which provides that “a governmental entity [may] conduct[]

210. Beach and Shore Preservation Act, 1961 Fla. Laws ch. 61–246 (codified as amended at FLA. STAT. ANN. §§ 161.011–161.45 (West 2012)).

211. *See id.* § 161.101(1); *see also id.* § 161.041(1).

212. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 711 (2010).

213. The rule can be found in section 161.191 of the Florida Statute. The effect of the rule is that the MHTL prior to renourishment would, after renourishment, become a permanent boundary between the upland property and the state-owned sandy fill. *See* FLA. STAT. ANN. § 161.191 (West 2012). The interposition of sandy fill between the upland property and the sea would convert the upland owner to an ordinary owner because she would no longer share a boundary with state trust lands: an upland lot is only an upland lot (with appurtenant upland rights) to the extent it extends to the legal coastline. The landowner would no longer have “step-in” access to the ocean, but would have to walk across the new state land to get to the water. In addition, because she was no longer an upland owner, she could no longer receive the potential benefits of accretion. *See id.*

214. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1115, 1119 (Fla. 2008). The “right of contact” is mentioned in an earlier Florida case. *Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987). It does not appear, however, to be a distinct upland right in any state. *See* Joseph W. Dellapenna, *Introduction to Riparian Rights*, in 6 *WATERS AND WATER RIGHTS* § 6.03 (Amy K. Kelley ed., 3d ed., 2012).

215. *Walton Cnty.*, 998 So. 2d at 1111.

216. *Id.*

217. *Id.* at 1109.

218. *See id.* at 1116; *Save Our Beaches, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 27 So. 3d 48, 52 (Fla. Dist. Ct. App. 2006).

restoration and enhancement activities [on submerged lands], provided that such activities do not unreasonably infringe on riparian rights.”²¹⁹

Under this framework, the State was faced with a difficult challenge: the conversion of trust lands adjacent to Members’ upland tracts to sandy, state-owned beach completely eliminated Members’ “right of contact” and right to accretions. The State’s best argument regarding the first right was simply that Florida common law did not recognize a discrete “right of contact,” that is, a right to remain an upland owner. Rather, the common law gave Members a right of access.²²⁰ With respect to the right to accretions, the State’s best argument was that the right was not a present right but rather a right to gain title to accretions should they occur in the future.²²¹ Having framed the Members’ rights in this way, the State argued that the renourishment project did not infringe at all on the Members’ right to accretions, and that it did not unreasonably infringe on their right of access because the Members could walk across the filled trust lands to reach the water.²²²

An administrative law judge agreed with the State, as did the Florida Department of Environmental Protection. Florida’s First District Court of Appeals did not agree, holding that “the Beach and Shore Preservation Act deprives the members of their constitutionally protected riparian rights without just compensation for the property taken.”²²³ The Supreme Court of Florida reversed on the grounds that the right to accretion was a “contingent right,” the right to contact was subsidiary to the right of access, and the BSPA did not unreasonably interfere with that right of access.²²⁴

At the United States Supreme Court, the issue was not whether the statute had taken the Members’ upland rights. Rather, the question was whether the Supreme Court of Florida had taken the Members’ “right of contact,”²²⁵ by declaring it not to be a separate right, and their right to accretions, by declaring it to be a “contingent

219. FLA. ADMIN. CODE ANN. r. 18-21.004(3)(b) (2015).

220. There was language in an earlier case suggesting that the right of contact was subsidiary or ancillary to the right of access: “the right of access to the water . . . includ[es] the right to have the property’s contact with the water remain intact.” Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934, 936 (Fla. 1987).

221. The State also apparently argued that the BSPA authorized the elimination of upland rights. *Save Our Beaches*, 27 So. 3d at 53–54. This argument would seem ill-suited to a takings case alleging that the statute eliminated upland rights.

222. The BSPA prohibited the State from erecting structures on the filled trust lands. FLA. STAT. § 161.201 (West 2012). This prohibition would ensure no future obstacles to Members’ access to the water.

223. *Save Our Beaches*, 27 So. 3d at 60.

224. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1118–21 (Fla. 2008). The court also held that, pursuant to the doctrine of avulsion, the Members would not own the filled state lands. *Id.* at 1116. It is not clear what necessitated this finding. In that same section of the opinion, the court makes a very confusing argument as to why the BSPA, on its face, does not require compensation. The argument goes something like this: After an avulsive event, the legal coastline remains the same and both upland owners and the state are entitled to reclaim their property; thus, when negative avulsion occurs, the state has a right to reclaim its beach. *Id.* at 1116–18.

225. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 733 (2010).

future interest.²²⁶ In other words, the case morphed, on certiorari, from a regulatory takings case into a judicial takings case.

After holding that the Takings Clause applied to state judicial opinions in the same way that it applied to state legislation,²²⁷ the Court was required to announce a test for determining when the State owed compensation. The Court rejected the plaintiff's suggestion that it adopt the test suggested by Justice Stewart in his concurring opinion in *Hughes v. Washington*: "[A] judicial taking consists of a decision that 'constitutes a sudden change in state law, unpredictable in terms of relevant precedents.'²²⁸ Instead, the Court announced a more straightforward test: whether the state court opinion "eliminat[ed] an established property right."²²⁹

Unlike the Supreme Court of Florida, the Court did not have to dig deeply into Florida precedent to determine the exact nature of the Members' upland rights.²³⁰ Instead, the Court took an alternate approach. First, perhaps in its eagerness to find a vested or "established" right, the plurality misstated Florida law, citing *Hayes v. Bowman* for the proposition that "the State as owner of the submerged land . . . has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral owners."²³¹ Florida law, as in all states that distinguish

226. *Id.* at 713 n.5. The Florida Supreme Court borrowed this term from the law of future interests; it was probably not the best term to use, given that contingent future interests are property. In a condemnation action, for example, the holders of such interests may be entitled to compensation. RESTATEMENT (FIRST) OF PROP. § 53 cmt. c (1936).

227. *Stop the Beach Renourishment, Inc.*, 560 U.S. at 715 ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.") (emphasis omitted).

228. *Id.* at 728 (quoting 389 U.S. 290, 296 (1967)).

229. *Id.* at 726.

230. Although the question of whether the test adopted by the Court is a wise one with respect to other kinds of property, courts applying any vestedness-based takings test will struggle with the nature of upland rights. Even in states with strong upland rights doctrines, such as Florida, such rights must yield to the State's paramount interests in protecting trust uses. So, for example, in *Krieter v. Chiles*, 595 So. 2d 111 (Fla. Dist. Ct. App. 1992), a Florida court upheld the state's denial of an upland owner's request for a permit, pursuant to her common law right to wharf out, to build a dock on state trust lands adjacent to her property. As the court stated, upland rights are "qualified right[s] which must give way to the rights of the state's people." *Id.* at 112. In short, the strength of upland rights—whether or not they are "established"—is highly dependent on property-specific facts. In this way, upland rights are similar to parties' rights to use and enjoy in the context of a private nuisance case. *See supra* Part II.B. This is why the waterfront takings test bears resemblance to private nuisance law in that it does not emphasize vestedness.

231. *Stop the Beach Renourishment, Inc.*, 560 U.S. at 730. This is an incorrect use of *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957), because, as noted above, the *Hayes* court goes on to elaborate that the State can interfere with the rights of upland owners where such interference is not unreasonable. *See supra* notes 49–51 and accompanying text. In addition to the fact that the plurality's use of *Hayes* is incorrect, it is impossible for the State to fill submerged lands—at least those adjacent to upland property—without literally interfering with upland rights: filling converts an upland owner to an ordinary owner. *See supra* note 213. The question of whether such literal interference constitutes actionable interference, as the full, correct version of Florida's waterfront takings test makes clear, depends on the purpose of the state's use and, if

between accretion/erosion and positive/negative avulsion, holds that avulsive events do not change the legal coastline. Most states, including Florida, also have rules that prevent landowners from benefiting from artificial accretion; so, for example, a landowner cannot use groins to trap sand and thus increase the size of his lot. The Court noted, however, that Florida law permitted the State to benefit from its own acts of artificial avulsion.²³² So, when the State fills in its trust lands with sand, it continues to own the resulting property.

The Court's analysis of Florida law on artificial avulsion is technically correct. However, the Court (as well as the Supreme Court of Florida) could and should have used Florida's waterfront takings test to resolve the dispute. As noted above, the Supreme Court of Florida had established the test in cases such as *Hayes v. Bowman*: if the State or its transferee used trust lands for trust purposes, no compensation was owed; if the use of trust lands was beyond the scope of the trust, compensation was owed for unreasonable interference with upland rights.²³³

In assessing the plaintiff's claim for compensation, the Florida court's first task would thus be to decide whether the use of state trust lands for a new beach was in furtherance of an established trust use. Florida law has long recognized recreation as a trust use.²³⁴ Under the facts of *Stop the Beach Renourishment*, the renourished beach would serve three purposes.²³⁵ First, it would protect upland property and structures on that property from future damage caused by storms and other natural forces. Second, it would protect the public beach (seaward of the MHTL) from future avulsive events.²³⁶ Third, it would provide the public with a dry-sand beach for

that use is outside the scope of the trust, whether the interference is unreasonable. *See supra* notes 49–51 and accompanying text. The Court's use of *Hayes* is also incorrect in that the language cited indicates that the State cannot fill its lands in ways that “interfere with the rights of the public.” *Stop the Beach Renourishment, Inc.*, 560 U.S. at 730. In *Hayes*, for example, the State had transferred trust lands to the defendant so that the defendant could fill in those lands and build a residential development on the fill. Because Florida courts have adopted both the “duty not to dispose” rule from *Illinois Central* and its exceptions, Florida law allows the State to interfere with the rights of the public so long as the interference is not substantial. *Pembroke v. Peninsular Terminal Co.*, 146 So. 249, 257–58 (Fla. 1933). Thus, the plaintiff in *Hayes* did not argue that the State's transfer to the defendant was unlawful or that the defendant was not in lawful possession of the filled lands. *Hayes*, 91 So. 2d at 798.

232. *Stop the Beach Renourishment, Inc.*, 560 U.S. at 730 (relying on *Martin v. Busch*, 112 So. 274 (Fla. 1927), for this finding.)

233. *See Hayes*, 91 So. 2d at 801; *Duval Eng'g & Contracting Co. v. Sales*, 77 So. 2d 431, 434 (Fla. 1954); *Tampa S. R.R. Co. v. Nettles*, 89 So. 223, 223 (Fla. 1921).

234. *Watson v. Holland*, 20 So. 2d 388, 391 (Fla. 1944) (“The primary uses of most of the beaches have always been bathing, recreation, fishing and navigation.” (quoting *White v. Hughes*, 190 So. 2d 446, 450 (Fla. 1939))).

235. The BSPA defines “beach and shore preservation” as “erosion control, hurricane protection, coastal flood control, shoreline and offshore rehabilitation, and regulation of work and activities likely to affect the physical condition of the beach or shore.” FLA. STAT. ANN. § 161.021(2) (West 2012). The statute provides that the purposes of renourishment are “to reduce potential upland damage or mitigate adverse impacts caused by improved, modified, or altered inlets, coastal armoring, or existing upland development.” *Id.* § 161.088.

236. Florida law provides that when the MHTL moves landward due to erosion, the legal coastline moves with it; but, when the MHTL moves landward due to avulsion, the legal

recreational use. Two of these three purposes are within the scope of the state's public trust doctrine. As a result, it is clear that the State was within its rights to renourish the beach and did not owe the plaintiff compensation for the loss of any of its upland rights.

As noted at the outset, this is the same result—no compensation—reached by both the Florida courts and the Supreme Court. So, why does it matter? Both decisions resulted in far more sweeping impacts than would have resulted from application of the waterfront test. The Florida opinion created two new interpretations of upland rights (left standing by the U.S. Supreme Court), even though these interpretations were unnecessary to deciding the case. The Court's opinion opens the door, when it did not have to, to a statute eliminating all upland owners' rights to accretions. As noted below, the Supreme Court deemed a similar measure to be potentially problematic in *Hughes v. Washington*.

The impact of the Supreme Court's opinion is even more severe. Although both artificially lowering the water level of a lake and installing sand do result in avulsive change, the two actions are technically different: the former is avulsive reliction and the latter is the avulsive addition of sediment. A willing court could easily distinguish between the two activities on that ground for policy reasons; creating land by fill is much easier, especially with respect to oceanfront land. By equating them in the eyes of Florida law, the Supreme Court has created the possibility that Florida can fill any of its submerged land, for any purpose, without liability.²³⁷ In other words, the State can eliminate all upland property in Florida whenever and wherever it likes. On the other hand, application of the waterfront takings test would have limited the use of compensation-free filling to situations in which filling was in furtherance of public recreational use of the beach (or another specified trust purpose). Moreover, application of Florida's waterfront test would have put context-dependent limits on both the location and spatial dimensions of future filling activities. As the Supreme Court itself noted in *Yates v. Milwaukee*, the test does not allow a State to destroy upland rights "arbitrarily or capriciously."²³⁸ The best interpretation of this language, consistent with Farnham's statement of the test, is that the State can take actions to maintain trust services only to the degree they are necessary. Thus, for example, the State would have to show that the width of renourished beach was the minimum necessary in order to accomplish its goals.²³⁹

coastline remains where it was prior to the avulsive event. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1113–14 (Fla. 2008); *Bryant v. Peppe*, 238 So. 2d 836, 838–39 (Fla. 1970). Thus, after an avulsive event resulting in land loss ("negative avulsion"), the formerly public area of the beach would be submerged. A wet-sand beach would continue to exist at the land-water interface, but that area would be within the bounds of the upland parcel, and thus unavailable for public use.

237. Will the Supreme Court's interpretation of Florida law now be binding precedent in Florida courts? If the Court had found a taking, its interpretation of Florida law would seem to be binding. But, given the finding of no taking, the answer is less clear.

238. 77 U.S. (10 Wall.) 497, 504 (1870).

239. This is consistent with the Supreme Court of Florida's view in *Walton County*, 998 So. 2d at 1120 n.16 ("Of course, the State is not free to unreasonably distance the upland property from the water by creating as much dry land between upland property and the water as it pleases. There is a point where such a separation would materially and substantially impair

Hughes v. Washington was also a case involving upland owners' rights to accretions.²⁴⁰ The law and facts of *Hughes*, however, are substantially different from those in *Stop the Beach Renourishment*. An abridged version of the facts and law in the case follows.

In the early 1960s, Stella Hughes owned a tract of land near, or possibly bordering, the Pacific Ocean.²⁴¹ The seaward boundary of the property was uncertain because, long prior to Ms. Hughes's acquisition of the property, accretion had added land to the boundary of the property as it had been located in 1889.²⁴² This accretion had continued to add land up until the date Ms. Hughes filed suit against the State of Washington.²⁴³ In the case, the State claimed that it owned all the land that accreted after 1889; Ms. Hughes claimed she owned it.²⁴⁴

When Washington became a state in 1889, it adopted a constitution that contained the following provision:

Section 1 Declaration of State Ownership. The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes²⁴⁵

Between 1889 and 1966, courts in the State of Washington, including the state's highest court, interpreted this constitutional language in two different ways. For the most part, courts interpreted the words "up to and including the line of ordinary high tide" to refer to the location of the high-tide line on the effective date of the constitution, November 11, 1889.²⁴⁶ The competing interpretation was that those words recognized a migratory legal coastline, that is, that the legal coastline was the current line of ordinary high tide.²⁴⁷ In a prior case, *Ghione v. State*,²⁴⁸ decided in 1946, the Supreme Court of Washington had held that owners of riverfront property

the upland owner's access, thereby resulting in an unconstitutional taking of littoral rights." (citations omitted)). Under the approach taken by Justice Scalia, such limits would not apply.

240. 389 U.S. 290 (1967).

241. *Id.* at 291.

242. *Id.*

243. *Id.*

244. *Id.*

245. WASH. CONST. art. XVII.

246. In the lower courts, there had been "73 lawsuits affecting 322 private ownerships . . . to establish [the location of the legal coastline with respect to specific parcels of property]." *Hughes v. State*, 410 P.2d 20, 26 (Wash. 1966) (en banc). "In every one of these cases the court has divided the accreted lands on the same formula: those accreted lands formed prior to statehood are the property of the private upland owner; those accreted lands formed since statehood are public beach and shore." *Id.* at 26–27 (quoting, with approval, the opening brief filed by the State of Washington in the case). The leading expert on Washington law in this area, Professor Charles E. Corker of the University of Washington School of Law, challenged the State's assertion of consistency among these lower court opinions. Corker, *supra* note 128, at 87–88.

247. *Hughes*, 410 P.2d at 30 (Hill, J., dissenting).

248. 175 P.2d 955 (Wash. 1946).

were entitled to a migratory boundary. Language in the opinion indicating that this rule also applied to oceanfront property could be characterized as either part of the holding or mere dicta.²⁴⁹

In deciding Ms. Hughes's case in 1966, the Supreme Court of Washington held that Article XVII froze the state's legal coastline in 1889; while accretions prior to that date belonged to Ms. Hughes, accreted land formed after that date belonged to the state.²⁵⁰ Ms. Hughes asked the U.S. Supreme Court to hear her appeal.

On certiorari, the Court first had to decide the question of whether, because Ms. Hughes's title could be traced to a prestatehood grant from the federal government, federal common law established the boundaries of her property.²⁵¹ If the Court answered this question in the affirmative, then she was entitled to all accretions, both pre- and post-1889.²⁵² On the other hand, if the Court held that state property law governed, then the state owned post-1889 accretions.²⁵³ Justice Stewart believed that state law applied.²⁵⁴ He also believed, however, that the inquiry should not end there. Based on the facts raised, Justice Stewart addressed two takings questions. First, whether Article XVII of the Washington Constitution took upland owners' right of accretion in 1889 by freezing the legal coastline; and second, if Article XVII was ambiguous, whether the Supreme Court of Washington took accreted land belonging to Ms. Hughes when it ignored (or overturned) its earlier ruling, in *Ghione v. State*, that Article XVII did not freeze the legal coastline.²⁵⁵ As to the second, Justice Stewart wrote:

To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.²⁵⁶

Application of a vested-rights-based test to resolve either of these questions would result in all-or-nothing results: either the state could or could not eliminate the right to accretion with respect to any waterfront property in the state. Such result is inconsistent with the relationship between upland owners and the state and with the common law upland rights and public trust doctrines. A blanket declaration in this context is the equivalent of declaring a particular, lawful land use to constitute a private nuisance regardless of where it occurs. Interestingly, a judicial interpretation of Article XVII as freezing the legal coastline suffers from the same problem: it would put all trust lands in the state to a particular use (as areas in which

249. *Id.* at 961; *Hughes*, 410 P.2d at 29.

250. *Hughes*, 410 P.2d at 29.

251. *Hughes v. Washington*, 389 U.S. 290, 290–92 (1967).

252. The Court found that federal common law established a migratory boundary, that is, a boundary that moved with accretion and erosion. *Id.* at 293–94.

253. State law, as expressed in the Supreme Court of Washington's opinion in the case, established that the boundary was fixed in 1889. *Hughes*, 410 P.2d at 29.

254. *Hughes*, 389 U.S. at 295 (Stewart, J., concurring).

255. *See id.* at 295–97.

256. *Id.* at 296.

accumulation of sediment could occur) without any protection against unnecessary or unreasonable impacts on upland owners.

Hughes also raises a particularly interesting question in that the state's courts, as early as 1891, had adopted the *Gould* rule of absolute sovereign control instead of the waterfront takings test:

[T]ide-lands of this state . . . belong to the state in actual propriety, and . . . the state has full power to dispose of the same, subject to no restrictions, save those imposed upon the legislature by the constitution of the state and the constitution of the United States; and, if this be true, it necessarily follows that no individual can have any legal right whatever to claim any easement in, or to impose any servitude upon, the tide-waters within the limits of the state, without the consent of the legislature.²⁵⁷

Thus, state law would not have provided the Supreme Court of Washington (or the U.S. Supreme Court) with an option for balancing the State's need to restrict Ms. Hughes's right to accretions against the impact that such a restriction would have on her ability to use and enjoy her property.²⁵⁸

Given the very significant amount of accretion in the area, freezing the boundary at 1889 levels would have resulted in nearly two hundred yards of public property between Ms. Hughes and the Pacific Ocean. Ms. Hughes would have a very good argument that the State's use of this much submerged land, for a trust purpose, but to her detriment, was unnecessary. While a full exploration is beyond the scope of this Article, it would be consistent with the arguments I have made in this Article for federal courts to find that if the U.S. Constitution established the parameters of the public trust doctrine, then it also established parameters of upland rights vis-à-vis the state.²⁵⁹ In other words, state courts would not be free to apply the rule of absolute sovereignty to resolve disputes with upland owners, but would instead be required to apply a federal common law version of the waterfront takings test.²⁶⁰

257. *Eisenbach v. Hatfield*, 26 P. 539, 541 (Wash. 1891).

258. Freezing the legal coastline can be viewed as either the elimination of the upland owner's right to accretions, or a state decision to retain title to submerged lands despite the fact that nature has filled them with sediment.

259. The Court would have to address language in recent opinions. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) (“[T]he individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”).

260. *Yates v. Milwaukee* contains a version of the waterfront test: “[The] riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.” 77 U.S. (10 Wall.) 497, 504 (1871). Although the case involves upland property located in Wisconsin, the Supreme Court does not give any indication that it is applying Wisconsin law. Reading this opinion as applying federal common law is consistent with a similar reading of *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 435–36 (1892). See *supra* note 139.

B. Externalities of Upland Use as Easements: Lucas and Palazzolo

Although nineteenth-century courts first developed the waterfront takings test to resolve conflicts between direct state use and upland rights, the economic and legal relationships between upland owners and the state support, as a conceptual matter, application of the same principles to other conflicts. For example, in *Lucas*, the State adopted a law that, among other things, attempted to prevent landowners from building too close to the ocean.²⁶¹ It is not difficult to frame this restriction as an effort to protect the State's ability to use its lands for trust purposes or to frame the external effects of building too close to the beach as requiring the upland owner to hold an affirmative easement over trust lands.

In *Smith v. Maryland*,²⁶² the Supreme Court suggested that the public trust doctrine includes the power to protect key services:

But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. . . . [The State] may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held.²⁶³

This language can be read as a statement that a state's police power includes the power to regulate in order to protect key services. An alternate reading would construe it to mean that a state's power to regulate in order to protect key services is distinct from the police power. The second reading is more compelling, especially given the last sentence. The power to protect services "results from the ownership of the soil"; this would not be true of the police power.²⁶⁴ Moreover, the last clause is a logical and inevitable interpretation of the "duty not to dispose": it makes little sense for the public trust doctrine to prevent land transfers that would interfere with public access to trust uses while at the same time permitting the state to abdicate "its duty to preserve unimpaired those public uses for which the soil is held."²⁶⁵ States hold title to submerged lands not because they are valuable in and of themselves, but because holding title enables states to ensure public access to key services.²⁶⁶

Mr. Lucas owned two pieces of land which were entirely seaward of what the state law called the "baseline."²⁶⁷ Under the terms of the law, he was not permitted

261. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007–08 (1992).

262. 59 U.S. (18 How.) 71 (1855).

263. *Id.* at 74–75 (citations omitted).

264. *Id.* at 75; see generally Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007) (describing the police power).

265. *Smith*, 59 U.S. (18 How.) at 75.

266. See Wilkinson, *supra* note 58, at 459 n.138 ("[T]he public trust doctrine prevents the substantial impairment of public rights in navigable waterways . . ."); see also *Woodruff v. N. Bloomfield Gravel Mining Co.*, 18 F. 753, 785 (D. Cal. 1884).

267. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

to build a residential structure seaward of the baseline, that is, on his property.²⁶⁸ Both the Supreme Court of South Carolina and the U.S. Supreme Court applied the standard regulatory takings test to resolve the case.²⁶⁹ At the state supreme court, Mr. Lucas lost on “no property” grounds: because the state legislature had declared that building too close to the beach constituted a public nuisance, and because Mr. Lucas had no right to use his land so as to create a public nuisance, the legislation did not take any of his property.²⁷⁰ The U.S. Supreme Court rejected this argument on the ground that giving state legislatures the power to declare anything a public nuisance would give states a takings trump card of unlimited scope.²⁷¹ State legislatures could legislate to prevent nuisances, wrote Justice Scalia, but only when such rules were rooted in the “background principles of the State’s law of property,” that is, when the state could have prevented the activity in question by taking landowners to court.²⁷²

Although he does not discuss or mention the State’s waterfront takings test, Justice Scalia’s logic is entirely consistent with application of the test. The Supreme Court of South Carolina adopted the waterfront takings test in 1913.²⁷³ Applying that test to the facts of *Lucas*, the first question would be whether, in the specific case of Lucas’s property, the rule was necessary to protect trust services, namely the public beach seaward of Mr. Lucas’s property. There are several arguments that the State could make in support of this claim. First, homes built too close to the beach in areas subject to frequent and severe erosion are likely to spend some time seaward of the legal coastline, that is, literally on the public beach. Second, allowing landowners to build too close to the beach is likely to result in landowners’ future need or desire to construct seawalls or other structures that would be harmful to the public beach. At the same time, the setting of Mr. Lucas’s properties could support a strong counterargument that prohibiting him from building on his land was not necessary for the protection of trust services. Specifically, because South Carolina had adopted the challenged rule in 1988, after all other lots in the area had been built upon, Mr. Lucas could argue that the homes he would build would not significantly add to the threat.

Application of the waterfront test in *Palazzolo v. Rhode Island*²⁷⁴ would have helped the Supreme Court of Rhode Island and the U.S. Supreme Court contend with a troublesome vestedness issue; namely, does the takings clause have “an expiration date”?²⁷⁵ In *Palazzolo*, the landowner owned a twenty-acre parcel that shared a boundary with the state along Winnipaug Pond, “an intertidal inlet often used by residents for boating, fishing, and shellfishing.”²⁷⁶ Mr. Palazzolo’s property

268. *Id.* at 1009.

269. *Id.* at 1015–16. *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 899–902 (S.C. 1991).

270. *Lucas*, 404 S.E.2d at 899–902.

271. *Lucas*, 505 U.S. at 1026.

272. *Id.* at 1029.

273. *See* *McDaniel v. Greenville-Carolina Power Co.*, 78 S.E. 980 (S.C. 1913).

274. 533 U.S. 606 (2001).

275. *Id.* at 627.

276. *Id.* at 613.

contained a large section of “salt marsh subject to tidal flooding” with the rise and fall of water levels in the inlet.²⁷⁷

After several attempts to obtain state permission to fill the salt marsh on his property in order to develop it, Mr. Palazzolo sued the state, claiming that state rules regulating the fill of sensitive wetlands (as the state had classified his) resulted in an effective condemnation of his property.²⁷⁸ Mr. Palazzolo lost his case in the state courts; among other rationales, the Supreme Court of Rhode Island held that Mr. Palazzolo could not obtain compensation because the state had adopted the rules he complained of prior to the date he acquired his property.²⁷⁹ The court focused on language in *Penn Central* to the effect that “[t]he economic impact of the regulation on the claimant” will be measured with an eye toward “the extent to which the regulation has interfered with distinct investment-backed expectations.”²⁸⁰ It reasoned that, where an individual has notice of restrictions on his property at the time of purchase, he cannot reasonably make investments in the property based on a belief that those regulations will not apply to the property in the future.²⁸¹

The Supreme Court took the case on certiorari and ultimately remanded the case back to Rhode Island. The Justices who voted to remand the case, while all agreeing that the “notice rule” did not bar the claim, had sharply different views on why this was true.²⁸² Under a waterfront takings test analysis, the fact that the property owner had notice of the restriction would be of no import. The test acknowledges the primacy of the longstanding relationship between the upland owner and the state; put differently, the test seeks to promote the provision of key trust services. The law should not prevent an upland owner from using his property in furtherance of trust purposes; similarly, laws preventing uses that unreasonably interfere with trust services are simply “the result that could have been achieved in the courts.”²⁸³

In *Palazzolo*, the direct ecological connection between the salt marsh and trust services—the creation of opportunities for fishing and shellfishing in Winnipaug Pond—would have strongly supported a finding that filling that marsh would have had an unreasonable impact.²⁸⁴ This finding would, of course, depend on the State’s ability to prove the existence of that connection, and that the loss of salt marsh on Mr. Palazzolo’s property would have more than a negligible impact on the provision of key services.

277. *Id.*

278. *Id.* at 615.

279. *Id.* at 616.

280. *Id.* at 633–34 (O’Connor, J., concurring) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

281. *Id.* at 626–30 (Kennedy, J.).

282. *Id.* at 626–30; *id.* at 632–33 (O’Connor, J., concurring); *id.* at 636–37 (Scalia, J., concurring).

283. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

284. See Donald F. Boesch & R. Eugene Turner, *Dependence of Fishery Species on Salt Marshes: The Role of Food and Refuge*, 7 ESTUARIES 460 (1984) (describing the benefits of salt marshes); Charlene Van Raalte, *What’s the Use of a Salt Marsh?*, 39 AM. BIOLOGY TCHR. 285 (1977) (same).

C. Externalities of Trust Use as Easements: Nollan, Stevens and Public Use of Private Dry-Sand Beaches

Perhaps the most controversial oceanfront property takings cases are those where the State, through legislation but more commonly through the courts, limits upland owners' rights to exclude the public from the dry-sand part of the beach.²⁸⁵ Such cases include *Nollan*²⁸⁶ and *Stevens*,²⁸⁷ as well as cases which never made it to the Supreme Court, like the New Jersey beach cases.²⁸⁸ If upland property is viewed as ordinary property, then limits on the right to exclude can seem radical.²⁸⁹ If, on the other hand, upland property owners are viewed as not only privileged beneficiaries of, but also partners in, the public trust, and if such limits are judiciously applied, then such measures might seem fairer. More important, it is possible to view these limits as consistent with the well-established common law maxim of legal coastline property, "[t]he rights may be said to be reciprocal, each modifying the other, each to be used so as not to unreasonably interfere with the other right."²⁹⁰

A state's best argument is that the limitation on the right to exclude is necessary in order to maintain the value of the recreation service provided by the wet-sand beach. (Recall that courts use the "necessary" requirement to prevent "arbitrary and capricious" use of the state's trust trump card.²⁹¹) A dry-sand trust easement is essentially the inverse of the right to wharf out: it is an easement appurtenant to trust lands that extends over upland property. Like the right to wharf out, the state's right to establish such an easement should depend on the physical setting of the adjacent property.²⁹²

285. Rose, *supra* note 53, at 753–58.

286. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

287. *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

288. The most important New Jersey beach case, *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984), was not a takings case. It was brought as something akin to a quiet title action, seeking a public right to use a privately-owned, dry-sand beach. Given that the state's courts ruled in favor of the public, the landowners could have filed for certiorari to the Supreme Court under a judicial takings theory. Given the result in *Stop the Beach Renourishment*, it is possible that a landowner would, in the future, follow that course of action.

289. There are long-standing rules of property that place significant limitations on property owners' rights to exclude. Specifically, under the ancient English "law of innkeeping," the innkeeper "has no right to say to one, you shall come into my inn, and to another you shall not." *Rex v. Ivens*, 173 Eng. Rep. 94, 96 (1835). Admittedly, the rationale for this rule differs because the beachfront owner is not inviting anyone onto her property. At the same time, the rule was based on the road-side location of inns and justified as an exchange for the privilege of operating an inn. See Joseph H. Beale, Jr., *The Medieval Innkeeper and His Responsibility*, 18 GREEN BAG 269 (1906) (describing the business of an innkeeper in medieval England).

290. 1 FARNHAM, *supra* note 1, at 137–38.

291. See *supra* notes 238–239 and accompanying text.

292. As noted earlier, rights to wharf out "differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only." *Shively v. Bowlby*, 152 U.S. 1, 18 (1894) (emphasis added).

So, for example, in *Nollan*, the alleged taking in the case would have been the State's acquisition of a right-of-way easement across the dry-sand portion of the Nollans' property. (The State of California had demanded that the Nollans dedicate the easement in exchange for a permit to build a larger home on their oceanfront lot.) Justice Scalia's view was that, standing alone, the State's imposition of an easement would have been a taking.²⁹³ This assessment is based on a standard, vested-rights analysis: the right to exclude is "most essential" and a rule limiting the right to exclude in this way, that is, opening the private property to public use would "no doubt" be a taking.²⁹⁴

Under the waterfront test, as noted above, the first question would be whether the limitation on the Nollans' property was necessary to the preservation of key services in the area. The Nollans would have a strong argument that this was not the case: after all, there were two public, dry-sand beaches within a quarter mile of their property; the addition of more dry-sand access would not seem necessary to the supply of recreational services. The State could argue other specifics: for example, that the seawall on the Nollans' property had reduced the amount of public wet-sand beach and, therefore, the use of their dry-sand beach was necessary; that the same seawall would not only have buffered the Nollans from visual disruption (seeing the public), but also physical and visual infringement of their privacy; that, as Justice Brennan noted,²⁹⁵ impacts on the Nollans would be limited given the fact that the dry-sand portion of the beach was only ten-feet wide at high tide; and that, given the difficulty of enforcing trespass rules on unstable beaches like the Nollans', limiting their right to bring trespass cases would not be a significant alteration of their rights.²⁹⁶

The advantage of applying the waterfront test to this case is that it would avoid extremes. The Court's ruling would not prevent the state from acquiring easements in the future, but rather would provide the state with an incentive for describing and measuring the harms generated by proposed projects in ways that would satisfy the Court's tests in *Nollan*²⁹⁷ and *Dolan v. City of Tigard*.²⁹⁸ In states like New Jersey, where the dedication of lateral access has been formalized into a rule, the waterfront test would allow landowners to argue that allowing such access on their property was unnecessary and unreasonable.

293. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831–32 (1987).

294. *Id.* at 831.

295. *Id.* at 853–54 (Brennan, J. dissenting).

296. On sandy beaches, upland owners and the public will often have difficulty pinpointing the exact location of the boundary. If the upland owner, for example, hired a surveyor to stake out the location of the MHTL, the resulting line would remain accurate only as long as the inputs—the mean high-tide plane and the beach profile—did not change. While the former is only subject to change every 18.6 years or so, the latter is in a state of continual change, rates of change being of course dependent upon the extent of wave and wind activity in the area and the geology of the land (waves and wind move sand more easily than rock). Thus, the accuracy of the surveyed line would decrease with the passage of time; as days and weeks went by, neither the landowner nor the public could be certain as to the precise location of the boundary. *See supra* notes 128–133 and accompanying text.

297. 483 U.S. 825.

298. 512 U.S. 374 (1994).

Such arguments would also be available in cases with facts such as those presented by *Stevens*.²⁹⁹ In an earlier Oregon case, *State ex rel. Thornton v. Hay*,³⁰⁰ the Supreme Court of Oregon held that the public had a customary right to use “ocean-front lands” from the “northern to the southern border of the state”³⁰¹ In a case decided later, about five years before *Stevens*, the Supreme Court of Oregon interpreted *Thornton* as requiring a “factual predicate” before a court could recognize a public right to use a specific beach.³⁰² In other words, while the first case opened all oceanfront land to public use, the second narrowed the holding to particular tracts of oceanfront land. In *Stevens*, the Supreme Court of Oregon was loyal to the more recent holding, but—according to Justices Scalia and O’Connor—found the dry-sand part of Stevens’s property open to the public, but without the requisite factual inquiry.³⁰³

All of this confusion could be avoided with use of the waterfront takings test. In fact, the reason the Oregon courts seemed to pull back from *Thornton* in *McDonald* was that the beach in question there was virtually inaccessible by anyone other than the landowners and one neighboring property owner. Under the waterfront test, it would be nearly impossible for the State to show that public access to this property was necessary to maintain the provision of recreational services.³⁰⁴

CONCLUSION

Based on the frequency with which the Supreme Court has heard oceanfront property cases over the past three decades, it is very likely that the Court (and state courts) will regularly confront similar issues in the future. The waterfront takings test offers the possibility of resolving these conflicts in a manner that is more consistent with the owner-owner relationship between the parties and, more important, has the potential to result in more optimal use of valuable coastal property.³⁰⁵

299. *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

300. 462 P.2d 671 (Or. 1969).

301. *Id.* at 676.

302. *McDonald v. Halvorson*, 780 P.2d 714, 724 (Or. 1989). The court seemed to be mixing a prescriptive theory with the theory of custom. For an explanation of the difference between the two, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996).

303. *Stevens*, 510 U.S. at 1212 (Scalia & O’Connor JJ., dissenting from denial of certiorari). More accurately, the Justices argued that the *Stevens* court relied on factual findings that, in fact, were never made in *Thornton*.

304. Although the Supreme Court of New Jersey did not apply the waterfront test in cases such as *Matthews v. Bay Head Improvement Association*, 471 A.2d 355 (N.J. 1984), it did employ a similar, measured approach to public, dry-sand access. In *Matthews*, the court allowed public access only to the property at issue in the case, and under a set of conditions that limited the amount of that access so as to not unreasonably burden the upland owner. *Id.* at 331–33 (holding that upland owner, beach club, must make only a “reasonable quantity” of daily and seasonal passes available to non-residents and is permitted to charge “reasonable fees” for those passes to offset costs of lifeguards, beach-cleaning, and insurance).

305. While there are some costs involved in using different tests for different kinds of property, those costs would not seem to be significant here. The primary costs would be related

It is easy to understand why courts have, until now, found it appealing to frame all takings cases as stories in which the government is the rights cutter and the property owner is the rights holder; diminution-based tests, measuring the impacts of government action on private rights, provide a convenient methodology and is intuitively consistent with a sense of what is just to the landowner. But, real property is unique, and oceanfront property is even more so. No other form of property is defined by its shared boundary with state-owned land and is so dependent on adjacent state-owned land for its value. As nineteenth-century courts realized, an excessive emphasis on prior rights did not represent an optimal conflict-resolution mechanism in waterfront cases: for one thing, it would have put limits on the ability of upland owners and the state to maximize the value of their respective property over the long term. These courts' alternative approach for determining government liability, embodied in the waterfront takings test, made substantially more sense.

to sorting property into categories and development of the law. Identifying oceanfront land is not difficult. And, nineteenth-century courts have done at least some of the work toward development of the law.

Interestingly, there are only a few articles that have explored the relationship between the takings clause and different types of property. *See, e.g.*, Robert Brauneis, *Eastern Enterprises, Phillips, Money, and the Limited Role of the Just Compensation Clause in Protecting Property "in Its Larger and Juster Meaning,"* 51 ALA. L. REV. 937 (2000) (Takings Clause and money); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1608 (1993) (Takings Clause and public rights in intellectual property); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689 (2007) (Takings Clause and patents).