

**PROVIDING BEACH ACCESS IN TEXAS:
THE IMPLICATIONS OF *SEVERANCE V. PATTERSON* ON
THE TEXAS OPEN BEACHES ACT**

by

Kristin R. Hicks

A thesis submitted to the Faculty of the University of Delaware in partial fulfillment of the requirements for the degree of Master's of Science in Marine Studies

Fall 2012

© 2012 Kristin R. Hicks
All Rights Reserved

**PROVIDING BEACH ACCESS IN TEXAS:
THE IMPLICATIONS OF SEVERANCE V. PATTERSON ON
THE TEXAS OPEN BEACHES ACT**

by

Kristin R. Hicks

Approved: _____
Jeremy Firestone, Ph.D.
Professor in charge of thesis on behalf of the Advisory Committee

Approved: _____
Mark A. Moline, Ph.D.
Director of the School of Marine Science and Policy

Approved: _____
Nancy M. Targett, Ph.D.
Dean of the College of Earth, Ocean and Environment

Approved: _____
Charles G. Riordan, Ph.D.
Vice Provost for Graduate and Professional Education

ACKNOWLEDGMENTS

I would like to thank my advisory committee members for their support during the process of completing this research project. I would specifically like to note the contributions of Dr. Jeremy Firestone, whose knowledge and guidance throughout this project has been essential to its completion. I would also like to acknowledge the other members of my advisory committee, Dr. Josh Duke and Mr. Tony MacDonald. Their input and lively conversations during my thesis proposal and defense confirmed for me why this research has continued to be so interesting to me throughout my research project.

I would also like to thank Dr. Gerard Mangone for his support at the beginning of my time at the University of Delaware. Dr. Mangone supported my joining the program and introduced me to the issues of public access, which sparked an interest in the legal aspects of coastal management that will stay with me throughout my career. Dr. Mangone was a great mentor, and he will be missed.

I would also like to thank my colleagues in the Center for Marine Policy for providing me with practical experience in creating and analyzing marine policy. Dr. Biliانا Cicin-Sain and Dr. Miriam Balgos were instrumental in helping me gain the experience necessary to move into a professional position once I left the University, and the collaborative work that I have done with the other members of the Center has been invaluable.

A hearty thanks goes out to my fellow Marine Policy students, who made being a part of this program such a fun and rewarding experience. You are all amazing

people, and even though working in 008 was a bit distracting at times, you've all become great friends, and your support is greatly appreciated.

Finally, I would like to thank my family and friends, whose support was essential for finishing this research project. Their infinite patience while listening to me explain my project and the boundary delineations of shifting beaches was extraordinary, and their ability to keep a straight face when I started pulling out my diagrams was something to behold.

TABLE OF CONTENTS

ABSTRACT	viii
1 INTRODUCTION	1
Study Overview	3
Outcomes and Contributions	4
2 COASTAL MANAGEMENT ALONG THE GULF OF MEXICO IN TEXAS	6
Characteristics of the Gulf of Mexico Coastline	6
Texas Open Beaches Act.....	8
Development of the Open Beaches Act.....	8
Implementation of the Beach Access in Texas.....	11
Public Access Easements	11
Dune Protection Act and Setback Lines	12
Home Removal List and the Coastal Erosion Planning and Response Act (CEPRA).....	12
Beach Nourishment	14
Establishing Common Law Public Access Easements along the Gulf of Mexico Shoreline.....	15
3 REGULATORY TAKINGS JURISPRUDENCE: FEDERAL AND TEXAS.....	19
Federal Regulatory Takings Case Law.....	21
Reasonable Investment-Backed Expectations and the <i>Lucas</i> Per-Se Taking.....	24
Clarifying <i>Lucas</i> and the Per-Se Taking Rule	28
<i>Palazzolo v. Rhode Island</i>	29
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i>	30

	Texas Regulatory Takings Case Law	32
	Takings Claims Procedure.....	35
4	<i>SEVERANCE V. PATTERSON</i>	38
	Background of Case	38
	Fifth Circuit Court of Appeals.....	39
	Texas Supreme Court Decision	41
	Texas Supreme Court Rehearing and Fifth Circuit Court of Appeals Final Decision	44
	Implications of the <i>Severance v. Patterson</i> Decision.....	46
5	ALTERNATIVE BEACH ACCESS MODELS IN NEW JERSEY, OREGON AND CONNECTICUT.....	48
	New Jersey and the Public Trust Doctrine	48
	History and Development of the Public Trust Doctrine.....	49
	Expanding the Public Trust Doctrine in New Jersey.....	52
	Oregon and the Doctrine of Customary Use	54
	Application of the Doctrine of Customary Use to Beach Access in Oregon	56
	Connecticut and First Amendment Free Speech	59
	Public Forum Law and the First Amendment	59
	Public Forum Doctrine Applied to Private Property	61
	Public Forum Law Applied to Connecticut Beaches	63
6	APPLICATION OF ALTERNATIVE BEACH ACCESS MODELS TO TEXAS CASE LAW	66
	Public Trust Doctrine	66
	Expansion of the Texas Public Trust Doctrine to the Dry-sand Beach	69
	Public Forum Doctrine and First Amendment Free Speech.....	71
	Doctrine of Customary Use	75
7	POLICY CONSIDERATIONS FOR ALTERNATIVE BEACH ACCESS MODELS IN TEXAS.....	83

Increasing Construction Setbacks.....	83
Reducing Incentives for Purchasing At-Risk Properties along the Gulf of Mexico Coastline.....	86
Increasing Notice During Purchase of Property.....	88
8 CONCLUSION	91
Areas for Further Study	93
REFERENCES	95
Appendix	
A LIST OF CASES	99

ABSTRACT

The cornerstone of public beach access in the state of Texas is the Texas Open Beaches Act (OBA). Enacted in 1959, it guarantees the public the right to access the public beaches of the state. The OBA also relies upon a dynamic public access easement that shifts along with the line of vegetation, often known as a “rolling easement”. A 2010 challenge to the OBA involving a dispute between government action and private property rights, *Severance v. Patterson*, resulted in a Texas Supreme Court decision that limits the application of the rolling easement to the Gulf of Mexico coastline and potentially impacts the state’s ability to consistently manage beach access for the public.

A review of the legal and regulatory framework of public beach access in Texas provides a background for an analysis of beach access provision in three states that have been identified as potential alternatives for applying the rolling easement in Texas to the entire Gulf of Mexico coastline under common or constitutional law. The development and application of these methods in each state was reviewed, and the application of these methods to the regulatory framework in Texas was assessed for their potential to serve as a valid state defense against Fifth Amendment takings claims from private property owners.

The analysis of the alternative beach access methods shows that none of these methods will be successful at applying the rolling easement to the entire Gulf of Mexico coastline under the OBA, but would rather serve as tools for providing beach

access to individual parcels affected by the *Severance v. Patterson* decision. When combined with proactive public policy designed to mitigate development in hazard prone areas, these methods could close some of the gaps in beach access provision that were opened by the *Severance v. Patterson* decision.

Chapter 1

INTRODUCTION

The Texas portion of the Gulf of Mexico coastline spans a length of 367 miles and is composed of a system of loose sandy barrier islands. Twenty-five percent of the total population of Texas resides along the Gulf coast, and it is a popular tourist destination for both Texas residents and visitors. Thirty-three percent of the economic resources of Texas are located along the Gulf of Mexico coastline, and tourism revenue brings in approximately \$7.5 billion annually (Center for Texas Beaches and Shores 2006). The Gulf coast accounts for more than 25% of that tourism revenue, and it is the second most popular place to visit in the state (GLO Coastal 2020).

The Gulf of Mexico coastline also experiences some of the most severe beach erosion rates in the nation, with an estimated sixty percent of the Texas shoreline undergoing retreat. Many of these areas that are undergoing retreat are retreating at a rate of almost 10 feet of shoreline loss per year (USGS 2004). In addition to erosion, the Gulf coast experiences high rates of subsidence, sea-level rise, and recurring storm events (Peacock and Husein 2011). Access to beaches is an important aspect of tourism along the Gulf of Mexico, but shoreline retreat is leaving tourists with smaller and smaller portions of beach on which to engage in recreational activities.

The cornerstone of beach access provision in Texas has been the Texas Open Beaches Act (OBA), which was enacted in 1959 and adopted into the Texas Constitution in 2009. The Open Beaches Act provides the public of Texas with unrestricted access to all state-owned beaches along the Gulf of Mexico, according to

their rights as established through common law (Fasoyiro 2007). When defining the extent of state-owned beaches, the OBA relies upon an ambulatory public access easement, known as a “rolling” easement, which is dependent upon the location of the line of vegetation. As the vegetation line moves so does the public access easement, allowing the public to retain its ability to access the beaches along the Gulf of Mexico following a severe erosive event. Property owners are allowed to develop the land as they choose, but they do so on the understanding that any structures built on the property may eventually be required to be removed or relocated (Titus 1998).

As property values rose in Texas and coastal development became more lucrative along the Gulf of Mexico, property owners challenged the OBA and its rolling easement provisions. Several property owners brought Fifth and Fourteenth Amendment takings claims against the State following an action by the Texas General Land Office ordering the removal of homes from the public beach after a movement of the line of vegetation. One of these cases, *Severance v. Patterson*¹, was first decided by the Texas Supreme Court in 2010. In opposition to previous rulings in similar cases, the Texas Supreme Court determined that the rolling easement contained within the OBA did not exist as a matter of Texas common law, but rather it was a legislative construction of the OBA. As a result, in order for the state to be able to take action to remove structures located within the rolling easement it would be required to prove the existence of a public access easement on the newly exposed areas. If the State is unable to prove that such a public access easement exists, then the action would be subject to Fifth and Fourteenth Amendment takings claims.

¹ *Severance v. Patterson*, 54 Tex. Sup. J. 172 (2010)

The Texas Supreme Court's ruling in the *Severance v. Patterson* case has effectively rendered the rolling easement provisions of the OBA inapplicable to many parts of the Gulf of Mexico coastline. This has fragmented the State's ability to enforce the rolling easement, and leaves the State in a position where it will be faced with expensive tract-by-tract litigation to prove new public access easements following a movement of the line of vegetation. The State's reliance upon the rolling easement to manage beach access has resulted in a situation where there are few alternatives for providing beach access to newly exposed areas of beaches outside of costly eminent domain procedures.

Study Overview

The first goal of this project is to address the development of the OBA and how it has evolved to become the primary method by which the state of Texas manages access to the Gulf of Mexico coastline. The history and development of the OBA will be addressed, as well as the enforcement of the rolling easement by the Texas GLO along the shoreline. An analysis of federal and Texas takings jurisprudence will follow, in order to provide a necessary context for the Texas Supreme Court's decision in *Severance v. Patterson*. This background will also introduce the *Severance v. Patterson* case and how the Court's decision impacted the application of the rolling easement provisions of the OBA.

The second goal of this paper is to identify alternative methods by which Texas can expand the rolling easement to the entire Gulf of Mexico coastline. Three states are identified that employ beach access provision methods that may be applicable to the Texas coastline, and each of these methods are reviewed to identify how they are used to either protect current public access easements or acquire new ones. The first

two alternatives presented are based on common law doctrines, while the third is grounded in constitutional law. This analysis will also include a discussion of their evolution through federal and state case law, paying specific attention to those cases where Fifth and Fourteenth Amendment regulatory takings claims are made.

The final goal of this project is to identify how each of these alternative beach access models applies to the Texas Gulf of Mexico coastline. This analysis will involve examining applicable Texas case law, statutes, and regulations to determine how Texas courts might apply the regulatory takings doctrine to each alternative. It will also include a discussion of several public policy methods which Texas might employ to address the implications of *Severance v. Patterson* on beach access.

Outcomes and Contributions

In order to identify the implications of the *Severance v. Patterson* decision on Texas' ability to provide beach access, this project will conduct a detailed review of the legal framework for beach access provision in the state. This review itself is a contribution of this research, as it may serve to help illuminate some of the confusion regarding legal boundaries and responsibilities following the *Severance v. Patterson* case. Both the detailed review of the development of Texas common and constitutional law with regard to beach access, as well as the history and development of the doctrines themselves, may be useful to individuals or groups trying to understand some of the legal implications of the *Severance* case.

This project will also provide insight into alternatives for the state to address beach access provision following the *Severance* decision. Several common and constitutional law methods are assessed for their applicability to the Texas coastline, and these alternatives may prove to be useful in addressing the gaps in beach access

provision following the decision in *Severance v. Patterson*. In addition, there are several public policy options reviewed that may also contribute positively to the State's ability to manage beach access along the coastline. This analysis may serve as a starting point for reviewing what options are available to address the gaps created in the State's beach access management authority following the *Severance* decision.

Chapter 2

COASTAL MANAGEMENT ALONG THE GULF OF MEXICO IN TEXAS

The Texas Open Beaches Act of 1959 (OBA) represents one of the most comprehensive regulatory-based beach access programs in the country. The passage of the OBA defined the public's existing common law rights to access the Gulf of Mexico coastline, across both state-owned and privately-owned property. It also provided the State with the regulatory authority to ensure that the public's access to those beaches remained unencumbered. While the concept of free and open beaches as contained in the OBA is popular with Texas residents, certain provisions of the OBA are unpopular with private property owners. The ambulatory public access easement based on the line of vegetation, more commonly known as the "rolling" easement, is the most controversial aspect of the OBA. In November 2010 the Texas Supreme Court made the first of what would become several rulings in a case disputing the legality of the rolling easement and the Court's decisions in this case have serious implications for the provision of beach access in the state.

Characteristics of the Gulf of Mexico Coastline

The Texas economy is dependent on activities along the coastline, including commerce through coastal ports, recreational and commercial fisheries, and industry. Three of the largest ports in the country are located along the Texas coast², and cargo

² Houston, Beaumont, and Corpus Christi. (American Association of Port Authorities US Port Rankings by Cargo Tonnage 2010).

moves through the Gulf Intracoastal Waterway with an annual value of more than 25 billion dollars. In addition to shipping, oil and chemical operations are a vital industry along the Gulf Coast. The total economic impact from saltwater sport fishing is more than 1.79 billion per year, and the Gulf coast tourism region accounts for an estimated 28% of the direct travel spending annually in Texas (Texas General Land Office 2011 (a)).

The Texas coastline is also home to a large concentration of the total population of the state, with 25% of the state population located along the Gulf coast. By 2050, the population of Texas is projected to almost double, to 43 million people (Texas Water Development Board 2012). The increasing population is also contributing to intense development pressures along the Texas coastline. Coastal development along the Gulf of Mexico beaches is regulated under the Texas Open Beaches Act, but the lands adjacent to them are subject to municipal-regulations and development in these areas is likely to occur, as long as there is available federal flood and wind insurance (Jacobs et. al. 2007).

Erosion is occurring in the majority of the barrier island system, with large portions of the shoreline designated as “critical eroding areas”. Critical eroding areas are those areas of shoreline that are experiencing an historical erosion rate of greater than 2 feet per year (Texas General Land Office 2011(a)). Approximately 63% of the Texas coastline has a historical erosion rate of greater than 2 feet per year, and in several locations (Brazoria, Galveston and Jefferson counties) erosion has reached rates of over 10 feet per year (Gibeaut 2011).

Texas Open Beaches Act

The Texas Open Beaches Act was passed in 1959 in order to guarantee the public unrestricted access to the state-owned beaches of Texas. The OBA also guarantees the public the right of access along private property where the public has acquired a public access easement (Fasoyiro 2007). While it defines the public's rights of access to the Gulf of Mexico shoreline, the OBA does not create public ownership or new rights in private property. Rather, the OBA seeks to codify the public's existing common law rights of access to the Gulf coast (Fisher and Sunley 2007). The OBA states:

“it is declared and confirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or it has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide *to the line of vegetation* bordering on the Gulf of Mexico” (Tex. Nat. Res. Code § 61.001(a) (emphasis added)).

Development of the Open Beaches Act

The root of the OBA rests in the Texas public's assumptions about the ownership of the Gulf of Mexico coastline, and a resulting court case that challenged

those assumptions. Prior to 1958 there was little conflict between property owners and the government with respect to public access along the Gulf of Mexico coastline. This is because the public operated under the presumption that the state owned the entire coastline, both the submerged lands and the dry-sand beach (Holmes 2003). As the value of coastal land began to increase due to interest in commercial development and oil and gas leasing, private property owners began to challenge that idea. Property owners wanted the ability to restrict the public from accessing the land and subsequently be able to lease the land for commercial development or drilling. The State wanted title to the coastal areas to provide public access to the beach and preserve tourist income (Holmes 2003).

In 1958 the Texas Supreme Court addressed this dispute by establishing the boundary of the state-owned lands and private property along the coastline. *Lutttes v. State* involved a dispute between a property owner and the State over the ownership of title to lands that were partially submerged throughout the year³. Lutttes argued that because he gained the land at question became part of his property through the process of accretion, and as such he possessed the title; the State argued that because the land in question was submerged under tidal waters, it owned the title. The Court resolved the dispute by establishing the boundary of the state-owned lands at the mean high tide line, and that any area landward of the mean high tide line was private property.⁴ Shortly after the Court's decision in *Lutttes* private land owners began erecting barricades, pilings and obstructions specifically intended to block the public from

³ *Lutttes v. State*, 324 S.W.2d. 167 (1958)

⁴ *Id.*

being able to access the beaches. In many areas these fences were erected down to the mean high water line and blocked vehicular access to the beach.⁵ The following year in 1959 the Texas Legislature called a special session and during this session the OBA was enacted to address the beach access implications of the *Luttet* decision (Ratliff 1976).

In the decades following the enactment of the OBA, commercial and industrial development intensified along the Gulf of Mexico coastline, and implementation and enforcement of the OBA began to grow increasingly contentious and complicated. Property owners and developers often closed off vehicular access to the beach, and local municipalities found it difficult to enforce the OBA, especially in the face of questions from the public about their rights under the OBA (Fisher and Sunley 2007). In 1991 the OBA was amended to clarify the state's authority under the OBA to provide for and manage beach access. In pertinent part, they provided the Commissioner of the Texas General Land Office (GLO) with the ability to promulgate rules in order to manage the coastline (Fisher and Sunley 2007). The amendments allowed the GLO to require the state and local governments to preserve dunes and beaches, prevent construction or encroachments upon public beaches, and to create beach access and use plans to ensure that beachfront construction would not interfere with or impair public beach access (Fasoyiro 2007). The 1991 amendments also gave the Texas attorney general, at the request of the GLO Commissioner, the authority to file suit in district court to "remove or prevent any improvement, maintenance, obstruction, barrier, or other encroachment on a public beach, or to prohibit any

⁵ *Luttet v. State*, 324 S.W.2d 167 (1958)

unlawful restraint on the public's right of access to a use of a public beach.”(Tex. Nat. Res. Code Ann. §61.018(a))

Implementation of the Beach Access in Texas

Public Access Easements

Under the OBA, a public beach along the Gulf of Mexico is defined as any beach area that extends inland from the mean low tide line to the line of vegetation, where the public has acquired an easement by “prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized by law and custom.”(Fasoyiro 2007) Under the OBA the public beach is also defined as any private beach where the public has established an easement across the property for access. When the line of vegetation shifts the boundary of the public beach will shift along with it, and this ambulatory boundary is what is commonly referred to as a “rolling” easement (Titus 1998).

Rolling easements prevent property owners from constructing shoreline stabilization structures, but allow them to develop the land in any other way they choose. If a property owner chooses to develop along the coastline, he does so on the understanding that he may be eventually required to relocate or remove any structures that become located seaward of the line of vegetation. The rolling easement has been advocated as an effective way to address sea-level rise and erosion along areas of coastal development. By contrast, the rolling easement was not included in the OBA as a means to address sea level rise, but rather it was the method by which the public would be ensured continuous access to the Texas Gulf coastline (Titus 1998).

Dune Protection Act and Setback Lines

The Dune Protection Act was passed in 1973 and it requires that any county with public beaches along the Gulf of Mexico establish dune protection lines. This dune protection line can be established up to 1,000 feet landward from the mean high water line, and any activities seaward of the mean high water line (Texas General Land Office 2005). The Dune Protection Act does not require that local governments set the dune protection line at any particular distance from the mean high water line, simply that they set one. The OBA requires that any dune project, walkover or fence must not impede public access to the Gulf shoreline (Texas General Land Office 2005).

Under the OBA and the Dune Protection Act, local governments are encouraged to implement some sort of setback line for construction along the coastline. These setbacks are completely voluntary, and there are no requirements for the width of these construction setbacks. The voluntary nature of these construction setbacks mean that they vary widely across the Gulf of Mexico coastline. Some locations in Texas have setback lines as far as 350 feet from the line of vegetation, and some areas allow construction directly up to the line of vegetation (Jacobs et. al. 2007).

Home Removal List and the Coastal Erosion Planning and Response Act (CEPRA)

Once a home or structure becomes located on a public beach, either in part or in full, the GLO Commissioner may request that the attorney general file suit to remove it from the public beach. The GLO also has the ability to suspend the removal of a home from a public beach, following a determination that: 1) the line of vegetation that serves as the boundary for the public beach has moved as the result of

a meteorological event; 2) the home was located landward of the natural line of vegetation before the event and; 3) the home does not present an imminent threat to public health and safety (Tex. Nat. Res. Code §61.0185(a)(1)-(3)). The enforcement of the OBA and the frequent shifting of littoral boundaries along the Gulf of Mexico prompted the Texas Real Estate Commission to require an addendum to coastal property documents which outlines the legal and economic implications of purchasing the property, including the possibility that the owner of the property may lose portions of the tract due to changes in the littoral boundary (Tex. Nat. Res. Code §33.135).

In 2006 the Commissioner of the GLO, Jerry Patterson, released his plan for OBA enforcement. This plan included the use of lawsuits to remove homes from the public beach and specific definitions of an imminent threat to public health and safety. The plan also outlined the implementation of the Coastal Erosion Planning and Response Act by establishing a fund to provide financial assistance to those property owners who are subject to relocation or removal of structures under the OBA (Fisher and Sunley 2007).

The Coastal Erosion Planning and Response Act (CEPRA) was enacted in 1999 and created the first coastal erosion response program for Texas. CEPRA develops and funds projects that include beach and dune restoration, shoreline protection using both hard and soft engineering, debris removal, and structure removal assistance (Texas General Land Office 2011(b)). Under CEPRA, when a property owner is served notice that they will be required to remove their home from the public beach, the property owner can be offered assistance, usually in the amount of \$40,000 per home. While this is not considered compensation for the removal of the home, it is

a policy method by which the state offers an incentive to comply with the order rather than turn to litigation.

Beach Nourishment

Beach nourishment is the most preferred method for addressing the impacts of the severe erosion along the Texas coastline. The OBA expressly forbids the construction of any “hard” engineered erosion control measures by property owners and the state expressly chooses to employ soft engineering methods. Many of the beach nourishment projects that are undertaken in the state are those areas are designated as critically eroding areas. These nourishment projects are generally funded under CEPRAs, and require a 25% match from the local municipality or property owner that will be benefitting from the nourishment project (Texas General Land Office 2011(b)).

Publicly funded beach nourishment projects provide the state with the opportunity to provide additional areas of public access to privately owned beaches. Beach nourishment projects are prohibitively expensive for one entity to fund, and often federal funds are used in conjunction with state and local funds in order to pay for beach nourishment projects. Beach nourishment projects are most successful when an entire beach is nourished, rather than individual parcels, and private property owners often become involved in publicly funded beach nourishment projects. In order to receive the benefits from the publicly funded project, the private property owners are required to make the resulting beach open to the public.

There are issues facing the use of beach nourishment as the primary erosion control method in Texas. The most pressing issue is the lack of a dedicated funding source for these projects. CEPRAs funding is not permanent – the state legislature must

appropriate funds for the program in 2-year cycles. There are also very few sources of sand that are of the quality needed to nourish a dry-sand beach intended for recreation (Texas General Land Office 2011(b)).

Establishing Common Law Public Access Easements along the Gulf of Mexico Shoreline

The OBA applies only to state-owned beaches and to private beaches where the public has acquired an easement to access the beach. When a public access easement has not been explicitly provided by the property owner, the public has the ability to prove a public access easement under common law. The three prevailing common law doctrines by which the public can establish an easement are the doctrines of prescription, dedication or customary use. Of the three, the doctrine of prescription has been the most effective way for the public to prove an easement. There are three requirements that must be met in order for the public to acquire a prescriptive easement. The public must show that it has used the property in a manner that is adverse or hostile to the property owner. This means that the use of the property by the public to access the beach must be inconsistent with the wishes of the property owner to the degree that the property owner, had he been aware of the use, would have taken action to stop the use (Pirkle 1994). The public must also show that the use of the property was open and notorious. This does not mean that the property owner must be aware of the use, but it is necessary that the use be so visible that the property owner is assumed to have not exercised his right to stop the use. Finally, the use of the property must be continuous; any break in the use of the property would negate the ability of the public to establish that it has been using the property in a way that is contrary to the wishes of the property owner (Slade et. al. 1997). In Texas, the statutory time

period during which adverse use must occur for it to be considered continuous is ten years.⁶

The doctrine of dedication is the common law rules by which a property owner may donate land to the public for the purpose of accessing the beach. There are two types of dedication – express and implied. An easement that has been expressly dedicated requires some formal recognition of the public’s right to use the property, such as the drawing up of a deed indicating the property owner’s intent to dedicate the land to the public (Pirkle 1994). Implied dedication is more typical, and relies on the actions of the property owner to establish intent to dedicate the land to the public. Under an implied dedication the actions of the property owner serve as a demonstration of his intent to donate the land to the public, and the use of such land by the public can serve as an acceptance of the property owner’s dedication.⁷ As with prescriptive easements, there are certain requirements that must be met in order for an implied dedication of private property to be found. The public must show that the property owner was responsible for creating the belief that he intended to dedicate the area to public use, that he was legally competent to dedicate the area, that the public relied on the property owner’s acts as the basis of its use, that the public will be served by the dedication, and that an offer was made and accepted (Slade et. al. 1997).

The majority of the public access easements established by common law in Texas are done so through the application of prescription or implied dedication. The third and least common way the public can acquire a public access easement under

⁶ Established in *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (1964)

⁷ Established in *Owens v. Hockett*, 151 Tex. 503 (1952)

common law is through the doctrine of custom. The doctrine of custom is similar in structure to the doctrine of prescription in that they both rely on the usage of property by the public and the lack of action on the part of the property owner to stop it. Customary use differs from prescription because the right to access the beach does not belong to one particular member of the public, but instead are applicable to all of the people in a particular area or region (Bederman 1996). In order for a public access easement to be established under customary use the public must use the property continuously, peaceably and in a reasonable manner. The use of the property by the public must be certain, obligatory, and consistent with other customs and laws. The most important requirement under the doctrine of customary use is that the public must have used the property since time immemorial (McKeon 1970). The doctrine of custom is not widely applied in the United States, and only a few cases in Texas have referenced an easement established by customary use.⁸ However, the doctrine of custom has been codified in the language of the OBA, and there are other states in the country that have successfully employed the doctrine of custom to provide public access easements to the public.

The application of public rights to private property has legal implications, especially due to the fact that it involves some of the most expensive property in the United States. In 2010 just such a legal dispute arose between a private property owner

⁸ *Matcha v. Mattox*, 11 S.W.2d. 95 (1986)

and the State of Texas, following the enforcement of the OBA regulations to a beach covered by the rolling easement. The Texas Supreme Court's ruling in this case has the potential to significantly change the GLO's ability to enforce the beach access provisions of the OBA, specifically with regard to the rolling easement. The case involves the public's rights under the rolling easement and the OBA, and private property owner's rights under the Fifth and Fourteenth Amendments to the U.S. Constitution preventing the government from taking private property without compensation.

Chapter 3

REGULATORY TAKINGS JURISPRUDENCE: FEDERAL AND TEXAS

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit federal, state, and local governments from taking private property for public use unless proper compensation is provided to the property owner. The Fifth Amendment states: “nor shall private property be taken for public use, without just compensation” (U.S. Const., Amend. V). The Fifth Amendment’s prohibition against government appropriation of private property is applied to state and local governments through the incorporation doctrine of the Fourteenth Amendment (Meltz 2009).

There are two types of recognized takings of private property that can occur – physical and regulatory. A physical taking has occurred when the government occupies or invades private property, or when it has authorized another party to do so. The right to exclude is one of the most important rights in the bundle that private property owners hold, and for this reason physical takings are seen as the “paradigmatic” type of taking (Meltz 2009). Permanent physical occupations by the government are viewed strictly by U.S. courts and almost always require compensation from the government when they occur.⁹ Examples of these types of permanent occupations include the installation of permanent structures by the

⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

government and the erosion of beachfront property caused by government construction of jetties. When a court must determine if a categorical physical taking has occurred, the magnitude of the physical occupation is not considered. Rather, the property owner merely has to show that the occupation is permanent, and that it has been authorized by the government.¹⁰

Courts have also recognized that government regulations may sometimes be so restrictive that they have the same effect as a physical occupation. Regulatory takings occur when a government regulation has so severely restricted the use of private property that the owner has been effectively burdened with what amounts to a physical occupation of their property (Meltz 2009). In the first case to address regulatory takings, the U.S. Supreme Court recognized that the government has the authority to regulate private property to a certain extent, but when a regulation goes “too far” it may be seen as a taking that requires compensation.¹¹ The test for determining if a regulatory taking has occurred is a much more difficult one than the test for determining a physical taking. This is due to the fact that the U.S. Supreme Court has recognized that the determination of a regulatory taking is case specific, and therefore the analysis can vary from court to court. While the analysis of a regulatory takings claim will change according to the facts of each case, the U.S. Supreme Court has

¹⁰ *Loretto v. Teleprompter Manhattan CATV Corp*, where the installation of permanent cable wires authorized by the government was seen as a permanent physical taking requiring compensation.

¹¹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)

attempted to establish a set of guiding principles that subsequent courts can use to conduct such an analysis.

Federal Regulatory Takings Case Law

The U.S. Supreme Court first explicitly recognized the existence of regulatory takings in 1922. In *Pennsylvania Coal Co. v. Mahon*, the Court attempted to determine whether a Pennsylvania restriction regulating the mining of coal was an appropriate exercise of the state’s police power, or if the restriction had unjustly impacted property rights protected by the Constitution. When discussing the extend of the government’s police power, the Court acknowledged that while some property rights are “enjoyed under an implied limitation and must yield to the police power”, these implied limitation could stretch the police power far enough to be considered an exercise of eminent domain requiring compensation.¹² The Court ruled that a “strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”¹³ When discussing how to determine if a restriction has stretched the police power too far, the Court looked to the magnitude of the diminution in value of the property. When the magnitude is great, an act of eminent domain has occurred and compensation must be paid for it.¹⁴

¹² Id. at 413

¹³ Id. at 416

¹⁴ Id. at 413

What the U.S. Supreme Court left unclear in *Pennsylvania Coal Co. v. Mahon* was how to determine the diminution in value, and how severe the diminution in value must be for a restriction to become a regulatory taking. In 1978, the U.S. Supreme Court heard another case involving the constitutionality of a governmental restriction, and it attempted to clarify some of the uncertainties left by the *Pennsylvania Coal Co. v. Mahon* decision. Up to this point, the Court had difficulty answering the question of what constitutes a regulatory taking. The Court had not developed any set criteria for determining when a restriction required compensation, and since *Pennsylvania Coal Co. v. Mahon*, the Court had engaged in essentially ad-hoc, factual inquiries.¹⁵ In *Penn Central Transportation Co. v. New York City*, the Court was faced with determining if New York City's enforcement of landmark preservation restrictions on Grand Central Station had sufficiently impacted the property interests of Penn Central Transportation Co., the owner of Grand Central Station. The Court determined that when a government regulation falls short of completely eliminating the use or value of private property, a regulatory taking may be found. Discussing the ad-hoc inquiries that had previously occurred, the Court acknowledged that several factors had emerged from these inquiries that could be used to balance the interests of the government and property owners during a regulatory takings analysis. The first is the economic impact of the regulation on the property owner, and the extent to which the

¹⁵ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)

regulation has interfered with distinct investment-backed expectations¹⁶. The character of the governmental action is also a factor; when the regulation more closely mirrors a physical occupation a taking may more readily be found.¹⁷

The *Penn Central* balancing test addresses some of the difficulties experienced by previous courts when hearing regulatory takings cases, but the lack of clear definitions for the three balancing factors left subsequent courts grappling with how to apply this balancing test. With regard to economic impact, the U.S. Supreme Court never established in *Penn Central* whether the economic impact criteria involved a reduction in the economic *value* of the property, or whether courts should consider the reduction in economic *use*. The majority of subsequent courts have opted to determine the economic impact of a regulation based on remaining economic use, rather than remaining economic value (Meltz 2009). The Court was also unclear as to what degree of economic impact would constitute a taking. It has generally been established that the economic impact of the regulation must be substantially severe in order to approximate a physical appropriation of property, and therefore constitute a regulatory taking. Courts have also recognized that a simple loss of economic use does not constitute a taking, because the government has the ability to regulate private property

¹⁶ In 1979, “distinct” investment backed expectations were changed to “reasonable” in *Kaiser v. Aetna*, 444 U.S. 164 (1979). There was no discussion of the change, and subsequent courts have used the two terms interchangeably.

¹⁷ *Penn Central Transportation Co. v. New York City* at 124

under its police power. Only when that power is significantly overextended does the act require compensation (Meltz 2009).

Reasonable Investment-Backed Expectations and the *Lucas Per-Se Taking*

With regard to regulatory takings cases involving coastal property, the analysis of reasonable investment-backed expectations has become an important part of the case law following *Penn Central*. The analysis of investment-backed expectations by the U.S. Supreme Court in *Penn Central* attempted to incorporate and balance the property owner's rights with the interests of the government during a regulatory takings analysis. The analysis is required to consider whether the regulation at issue interferes with the expectations that a property owner may have invested economic resources in. Subsequent courts following *Penn Central* have identified several situations where property owners may not have sufficient investment-backed expectations to prove a taking.

One year after the decision in *Penn Central* the U.S. Supreme Court heard *Kaiser-Aetna v. United States*. This case involved the conversion of a small privately-owned pond into a large marina, and the owner's desire to restrict access to the marina to its users. The dispute in this case arose after significant amounts of money had already been invested in the project and permits from the Army Corps of Engineers to provide a channel to navigable water were approved. The U.S. Supreme Court determined that while the consent of individual officials who represent the government

cannot bind the United States, it can create expectations on the part of the property owner. If these expectations are significant enough, the government may be required to provide compensation to the property owner once it takes over the management of the property.¹⁸

One of the main considerations during an analysis of a property owner's investment-backed expectations is the regulatory climate at the time when the property was purchased. If the regulatory climate at the time of purchase of the property was such that the property owner could have reasonably foreseen that the regulation may be enacted, courts often will determine that the property owner did not have a sufficient investment-backed expectation. When examining the regulatory climate, courts look at such considerations as whether the property was purchased in a heavily regulated field. If the field was strictly regulated, the property owner could not have reasonably assumed that the restriction impacting his property would not have been passed. Courts also look to see if the property owner was provided with notice of impending regulation, or that the purchase of property brings him or her under the authority of a specific regulation. While the presence of government notice does not absolutely prevent a property owner from proving sufficient investment-backed expectations¹⁹, courts have given this factor weight when applying it to the consideration of the pre-acquisition regulatory climate (Byrne 2009).

¹⁸ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)

¹⁹ *Palazzolo v. Rhode Island*, 533 U.S.606 (2001)

In 1992 the U.S. Supreme Court established a per-se takings rule for regulatory takings. In *Lucas v. South Carolina Coastal Council*²⁰, the U.S. Supreme Court ruled that when a property owner has been forced to sacrifice all economically beneficial uses of his property, the property owner has suffered a taking.²¹ David Lucas purchased two beachfront residential lots in Charleston County, South Carolina with the intention of developing the properties. Two years later South Carolina enacted the Beachfront Management Act (BMA) which prevented Lucas from developing any permanent habitable structure on his two properties. Lucas filed suit against the state in the Court of Common Pleas, claiming that the BMA's prohibition against construction on his parcels was a taking of his property. The trial court agreed, ruling that the BMA directly created the construction ban, and that this prohibition rendered Lucas' properties valueless. The trial court ruled that South Carolina was required to provide Lucas compensation in the amount of \$1,2032,387.50.

South Carolina appealed the trial court's decision to the South Carolina Supreme Court, who overturned the trial court's decision. When bringing his claim, Lucas never contested the validity of the BMA. He conceded that the BMA was a valid legislative measure by which the State of South Carolina can manage the coastline, and never challenged the regulation itself – Lucas merely sought compensation for the alleged taking. The South Carolina Supreme Court's analysis

²⁰ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)

²¹ *Id.* at 1019

turned on the theory that “since no individual has the right to use his property so as to create a nuisance or otherwise harm others”²², the state has not taken private property when it acts under its police power to stop nuisance-like activity.

Lucas appealed his case to the U.S Supreme Court, where the Court decided to decide the question of whether the complete elimination of a property’s value through a legislative act affected a compensable taking, regardless of the intent of the legislation. The Court first turned to per-se physical takings cases which established that when a permanent physical occupation occurs the government is required to provide compensation, even when the public interests involved are significant. The Court then held that regulations that are so restrictive as to prohibit all economically beneficial use of the property must be treated the same as permanent physical occupations.²³ Under the ruling in Lucas, when all economically viable use has been prohibited a balancing of the private and public interests is unnecessary – a per-se taking has occurred, and the property owner is due compensation.

While the per-se taking rule established in Lucas appears at first glance to make it easier for property owners to prove a regulatory taking, the rule itself is actually a very narrow one. A property owner must establish two facts to prove a per-se regulatory taking. First, the property owner must show that *all* economically viable uses of their property have been removed. A property owner left with a token interest

²² Id. at 1051, quoting *Keystone v. Bituminous*

²³ Id. at 1029

in their property following a government restriction will fall under the *Lucas* test, but if any value more than that remains the case will be decided on a *Penn Central* balancing analysis.

The U.S. Supreme Court in *Lucas* also further narrowed the per-se takings rule by allowing that a regulation that served as a simple reflection of the “background principles of the State’s law of property and nuisance” that existed when the property was purchased would not fall under the rule and could resist compensation.²⁴ In order for a regulation to be determined a part of the State’s recognized property or nuisance law, the U.S. Supreme Court determined that five criteria must be met: 1) it must be a state law or doctrine, not a federal one; 2) the law cannot have been newly legislated; 3) the restriction must do nothing that couldn’t be achieved in state courts; 4) the restriction must be applicable to all landowners; and 5) the law or doctrine cannot have an ambiguous application (Bramley 2011). Specific to the issue of beach access, in its discussion of background principles the *Lucas* Court acknowledged that pre-existing permanent easements would fall under background principles of state law.²⁵

Clarifying *Lucas* and the Per-Se Taking Rule

The line of cases applying a *Penn Central* type takings analysis show that it is often difficult for a property owner to prove a regulatory taking under the multiple—factor analysis. This made the categorical takings rule under *Lucas* attractive to property owners who were trying to prove that government regulation has severely

²⁴ Id. at 1029

²⁵ *Lucas v. South Carolina Coastal Council* at 1028

impacted their property rights. These cases had the effect of further clarifying the *Lucas* categorical takings rule, and when it can be applied.

Palazzolo v. Rhode Island

In 2001 the U.S. Supreme Court was asked to clarify the per-se taking rule established in *Lucas* with regard to determining investment-backed expectations. In *Palazzolo v. Rhode Island*²⁶ the Court was asked to address whether receiving pre-acquisition notice of a regulation affecting coastal property would immediately bar a takings claim. Palazzolo became the owner of property along the Rhode Island shoreline in 1978, and in 1983 petitioned the state for the development of the property. In 1971, prior to Palazzolo acquiring the properties, Rhode Island enacted legislation that created the Council, tasked with protecting coastal properties. Through the Rhode Island Coastal Resources Management Program, the Council severely limited development on protected coastal wetlands, of which Palazzolo's property qualified. Following a string of applications to the Council for development that were denied, Palazzolo brought an inverse condemnation suit against the state, claiming that the actions of the Council denied him "economically, beneficial use of his property."²⁷ The State responded that because the regulations were already in place when Palazzolo became the sole owner of the property, he was unable to bring a takings claim against the state. The state courts concluded that under the background principles rule in *Lucas* and the reasonable investment-backed expectations rule of *Penn Central*, Palazzolo was barred from bringing a takings claim because he had notice of the

²⁶ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)

²⁷ *Id* at 16

earlier regulations.²⁸ The Court addressed the State’s argument by reasoning that applying the state’s theory would in effect put a statute of limitations on the Takings Clause, and that the post enactment transfer of title would prevent the state from being able to be held accountable for any land use restrictions.²⁹

The State also asserted that the land use restrictions at issue here serve as *Lucas* background principles of state property law which could not be challenged by those who acquire property following the enactment of the regulations.³⁰ The Court dismissed this argument, saying that a regulation does not become a background principle of law merely by its enactment. Rather, *Lucas* background principles are “those common, shared understandings of permissible limitations derived from a State’s legal tradition”.³¹

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency

At issue in *Tahoe-Sierra* whether a development moratorium placed on property during the creation of a comprehensive land use plan constituted a regulatory taking. In 1969 the Lake Tahoe Basin came under the governance of the Tahoe Regional Planning Agency (TRPA), created under a compact between California and Nevada, local municipalities and the US Forest Service. The purpose of the compact was to set goals for the protection of the Lake Tahoe Basin, and the TRPA was given

²⁸ Id. at 626

²⁹ Id. at 626

³⁰ Id. at 629

³¹ Id. at 629, quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)

the authority to regulate development in the Lake Tahoe Basin. In 1980 the TRPA began the process of developing a comprehensive land-use plan for the Lake Tahoe Basin, a process which missed several deadlines over a four-year period. In 1984 as it was working to meet a deadline to adopt a new regional plan, the TRPA enacted an 8-month moratorium on all development projects and new proposals. A large class of property owners gathered and sued the TRPA, Nevada, and California separately, and the suits were eventually consolidated into the District Court of Nevada. These property owners asserted that the moratorium on building enacted by the TRPA constituted a taking of their property without compensation. The property owners argued that they had suffered a categorical taking under *Lucas*, and that therefore a *Penn Central* type of test was not appropriate.³²

The Court first cites the distinction made in *Penn Central*, and reiterated in the majority of takings case law, that a takings analysis must take into account the parcel as a whole, rather than dividing the parcel into discrete segments.³³ It then turned to the decision in *Lucas*, which established that a categorical taking can only occur if nothing less than a “complete elimination of value” occurred.³⁴ The Court stated that the property owners could not separate the segment of time under which the property was unable to be developed and then seek a categorical taking for that segment. An application like this would result in a situation where any delay caused by a regulation

³² *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)

³³ *Id.* at 327, quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)

³⁴ *Id.*

could become a total ban, and the permit process would become subject to takings claims.³⁵ The Court refers to the *Lucas* categorical taking as an “extraordinary case”, and that the default rule remains the *Penn Central* analysis.

Justice Rehnquist discussed the valuation of property under *Lucas* in his dissent to the majority opinion in *Tahoe-Sierra*. Justice Rehnquist felt that the Court in the *Tahoe-Sierra* decision interpreted *Lucas* as being primarily concerned with the value of property. He felt that this was incorrect, as the decision in *Lucas* could only apply when all economic use has been denied. The categorical takings rule in *Lucas* was based on a total deprivation of use, and even when temporary, this requires compensation from the government. He felt that the court’s view of value as essential to a *Lucas* analysis proved too much, because Lucas’ property retained some value in the possibility that the development ban would be lifted.³⁶

Texas Regulatory Takings Case Law

The takings clause of the Texas Constitution contains stricter language than that of the U.S. Constitution. The Texas Constitution provides that compensation is required when private property is “taken, damaged or destroyed” for public purposes, unless consent is provided by the property owner (T.X. Const., Art. I, Sec. 17). An examination of Texas case law shows little deviation from the takings decisions of the federal courts. In 2005, the Texas Supreme Court referred to the state and federal

³⁵ Id.

³⁶ Id.

takings doctrines as “comparable”, and stated that it generally looks to federal cases for guidance when deciding takings issues.³⁷ The Texas Supreme Court generally decides regulatory takings cases under the ad-hoc *Penn Central* balancing test. One slight difference from federal case law is that Texas courts generally focus on two prongs during the ad-hoc regulatory takings analysis: the economic impact of the regulation on the property owner and the extent to which the regulation interferes with distinct investment-backed expectations.³⁸

When determining whether a regulation has impacted a property owner enough to require compensation Texas courts focus on the severity of the economic impact on the property owner, and the unreasonableness of the interference with property rights. When determining the degree of economic impact, Texas courts undergo a simple comparison of the value that has been removed from the property against the value that remains in the property. This analysis does not include a consideration of the loss of any anticipated gains or potential future profits that may have been gained from the property.³⁹ In order for a taking to be found, the Texas Supreme Court requires that the level of economic impact be so severe that it approximates a physical

³⁷ *Brannan v. State of Texas*, 2010 Tex. App. LEXIS 799 (Tex. App. Houston 1st Dist. Feb. 4, 2010)

³⁸ *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (1998) quoting *Penn Central Transportation Co.*

³⁹ *Id.*

appropriation of property.⁴⁰ Being deprived of some of the investment-backed expectations is not enough to affect a taking. Lost profits are a relevant factor in the balancing test, but the government is not required to guarantee the profitability of every land parcel under its authority, and “it is not the government’s duty to underwrite risk as an extension of obligations under the takings clause.”⁴¹ The requirement that the economic impact be drastic enough to approximate a physical appropriation presents claimants with a difficult task, because as shown in *Lucas*, often some value remains in a piece of property even if development and profits are not a consideration.⁴² The standard in Texas takings jurisprudence is that the courts must determine if a regulation substantially advances a legitimate state interest⁴³, rather than merely analyzing whether the government could have rationally decided that a regulation achieved a legitimate objective.”⁴⁴ As outlined by the Texas Supreme Court, specific legitimate state interests include the protection of residents from the

⁴⁰ *Sheffield Development Co. v. City of Glenn Heights*, 140 S.W.3d 660 (2004).

⁴¹ *Id.*

⁴² *Lucas v. South Carolina Coastal Council* at 1044

⁴³ *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987), established that in order for a government regulation to pass constitutional muster, it must substantially advance a legitimate state interest. *Dolan v. City of Tigard*, 512 U.S. 374 (1994), established that the state interest must have a relationship to the purpose of the exaction taking place. The substantially advance requirement has since been rejected by the U.S. Supreme Court in *Lingle v. Chevron*, 544 U.S. 528 (2005). This may mean that the substantially advance requirement is no longer applicable, but the Texas courts have not addressed the ruling in *Lingle*.

⁴⁴ *Mayhew v. Town of Sunnyvale* at 933

“ill effects of urbanization”, enhancing quality of life, and *protecting a beach system for recreation, tourism and public health*.⁴⁵ Under Texas takings jurisprudence, in order for a claimant to prevail against the State in a regulatory takings claim, he is required to prove that the state intentionally performed certain acts in the lawful exercise of its authority, that those acts resulted in a taking, and that the taking was for public use.⁴⁶

The Texas Supreme Court has also addressed the issue of whether public access easements are considered a background principle of state property law in an investment-backed expectations analysis. In 2005, the Texas Court of Appeals heard a case involving several of the issues that were addressed in the *Severance v. Patterson* decision. The Court determined that there is a “fundamental distinction between a governmental taking of an easement through an act of sovereignty and judicial recognition of a common law easement acquired through historical public use”.⁴⁷

Takings Claims Procedure

The takings jurisprudence of both Texas and the U.S. indicate that there is a hierarchy of takings claims based on the potential success for a claimant. Per-se takings claims require less analysis from courts, so plaintiffs will generally move for

⁴⁵ *Mayhew v. Town of Sunnyvale* at 934, emphasis added

⁴⁶ *Villareal v. Harris County*, 226 S.W.3d 537, 541 (Tex. App.—Houston [1st Dist.])

⁴⁷ *Brannan v. State*, 2010 Tex. App, LEXIS 799 (Tex. App. – Houston [1st Dist.])

summary judgment on these claims first. The physical per-se takings claim as most recently established in *Loretto* generally require less proof from plaintiffs, so this is the first type of claim brought. The second is the per-se regulatory taking claim as established under *Lucas*, where the plaintiff must prove that they have suffered a total loss of property as a result of the restriction. When involving a regulatory takings claim, it is generally difficult to prove that a physical occupation has occurred, so plaintiffs rely on the categorical takings test in *Lucas*. As outlined previously, the *Lucas* test is a fairly narrow one, and very few plaintiffs can prove a total loss of economic use. This results in many claims being decided under the *Penn Central* multi-factor balancing test. *Penn Central* tests are generally difficult for property owners to survive due to the numerous factors which are involved in the analysis, any one of which can find in favor of the government.

When a takings claim is brought against the government, it can be brought “as-applied” or “facial”. As-applied claims are much more common, and involve property owners bringing suit against the government for a taking applied to their particular piece of property. As-applied claims are generally awarded compensation, rather than an injunction against the execution of the government action. This is because the government is not restricted by the Fifth and Fourteenth Amendments from taking private property – it is merely required to pay compensation when it does so. When a property owner brings a facial regulatory takings claim, the property owner is making an argument that the application of the governmental action constitutes a taking when applied to any private property, not just the claimants. These claims are significantly

more difficult to prove, and challenge the enactment of the regulation itself, rather than simply seeking compensation for the taking (Meltz 2009). The difficulty in proving these types of claims was highlighted by Justice Stevens in his dissent of the *Palazzollo v. Rhode Island* case. Justice Stevens reasoned that when a regulation that has been deemed invalid constitutes a taking, that injury only applies to the property owner at the time the regulation was enacted. A subsequent property owner cannot recover the value of property that was removed from another party.⁴⁸ The regulatory takings claim brought in *Severance v. Patterson* was just such a claim, where Severance sought to enjoin the application of the rolling easement to her property rather than seek monetary compensation from the State of Texas for the removal of her property.

⁴⁸ *Palazzollo v. Rhode Island*, 533 U.S. 606 (2001) at 642

Chapter 4

SEVERANCE V. PATTERSON

Background of Case

Carol Severance, a California resident, purchased three beachfront properties along West Beach in Galveston Island, Texas in 2005. Only one of these properties is at issue in this case, and a rental home is located on the property. When Severance purchased the property it was burdened with a public access easement seaward to the vegetation line. In September of 2005 Hurricane Rita completely removed the property that was subject to the public access easement and moved the line of vegetation landward, so that the rental home became located on the public beach as defined by the OBA. In 2006 Severance was provided notice that her property was subject to removal under the OBA, and was offered \$40,000 per home in assistance from the newly established Coastal Erosion Planning and Response Act (CEPRA) to remove or relocate her homes. Severance refused the CEPRA assistance, and instead filed suit against the Texas Attorney General, the Galveston County District Attorney, and Commissioner Patterson of the GLO.⁴⁹

Carol Severance filed for declaratory and injunctive relief in federal court to prevent the officials from enforcing the order to remove her home pursuant to the

⁴⁹ The “Officials”

OBA⁵⁰. Severance claimed that because the boundary of her property migrated landward following Hurricane Rita, her property was no longer encumbered by the public access easement. She also claimed that the enforcement of the removal of her homes would constitute an illegal Fourth amendment seizure and a Fifth and Fourteenth amendment taking by the government without proper compensation. The Federal District court dismissed her claims, ruling that Texas recognizes a rolling beachfront easement, that the existence of this easement pre-dated Severance's purchase of her property, and that no constitutional violation resulted from the uncompensated change in the easement's location.⁵¹

Fifth Circuit Court of Appeals

Severance appealed the District Court's ruling to the U.S. Court of Appeals for the Fifth Circuit, relying on her Fourth Amendment claim of an unreasonable seizure, and the unconstitutional taking claim under Fifth and Fourteenth Amendment.

The Fifth Circuit examined Texas case law and determined that although Texas courts have uniformly held that no taking results when state officials conclude that a public beach access easement has rolled on to private property, the Texas Supreme Court had not addressed whether this imposition is consistent with state law. The Fifth Circuit identified two assumptions that the previous appellate court decisions relied on and determined that they were open for debate. The first assumption, that the rolling

⁵⁰ Carol Severance was a California resident at the time of the case. She brought the claim in federal district court, claiming that Texas state courts would be unable to provide her with any remedy.

⁵¹ *Severance v. Patterson*, 485 F. Supp. 2d 793, 802-04 (S.D. Tex. 2007)

easement is based in common law and not a construction of the OBA, was unclear because the case used to establish the rolling easement as common law also characterized the rolling easement as “implicit in the Act”⁵². The second assumption, that the rolling easement may require the property owner to remove any structures once the property becomes located landward of the vegetation line was unclear because the case used to establish that rule also consistently referred to the fact that the beach’s boundaries had essentially remained stable, and therefore declined to consider the constitutionality of the OBA.⁵³ Based on the “uncertainty and ambiguity” of Texas law concerning the rolling easement, the Fifth Circuit found that Severance might be awarded compensation by the Texas Supreme Court.

Severance also claimed that the enforcement of the removal of her homes under the OBA would meet all of the elements of a Fourth Amendment seizure claim: a 1) meaningful interference with her possessory interests in her property, which is 2) unreasonable because the interference is unjustified by state law or, if justified, uncompensated.⁵⁴ The Fifth Circuit found that although Severance had a clear potential claim under the Fourth Amendment, a “clear-cut resolution of the respective property rights of Severance and the State is impossible”, due to the uncertainties of Texas state law that the Fifth Circuit Court needed clarified.⁵⁵ The Court determined that the relevant case law provided no consistent rationale for creating or sustaining a

⁵² *Severance v. Patterson* 566 F.3d 490 (5th Cir. 2009)

⁵³ *Id.* citing *Seaway Co. v. Attorney General*

⁵⁴ *Id.*

⁵⁵ *Id.*

rolling beachfront access easement. The Court also determined that there were “conceptual difficulties” in concluding that an easement can be acquired by dedication or prescription over land where the public had never set foot.⁵⁶ In order to address Severance’s claims, the Fifth Circuit found it necessary for the Texas Supreme Court to resolve the questions of Texas law, and certified the following questions to the Court:

1. Does Texas recognize a “rolling easement” that gives the public access to and use of beaches on the Gulf of Mexico without proof of “prescription, dedication or customary rights” in the property?
2. If so, does it come from common law doctrines or the construction of the Texas Open Beaches Act?
3. To what extent, if any, is a landowner entitled to compensation under Texas statutory law or the Texas Constitution when an easement rolls over his or her property, when no easement has been found by dedication, prescription or custom?⁵⁷

Texas Supreme Court Decision

The Supreme Court of Texas accepted the certified questions from the Fifth Circuit Court of Appeals, and identified the central issue of the case as whether or not

⁵⁶ Id.

⁵⁷ Id.

the private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement.⁵⁸ An analysis of the history of Severance's property followed, and the Court determined that following the original grant of the land the Republic of Texas did not reserve the oceanfront for public use. This resulted in the Court relying on the principles of Texas property law, as there was no basis for inherent title restrictions or historic custom.⁵⁹

The court determined that the state has never had a right in privately owned beachfront property when an easement has not been proven. The Court acknowledged that the boundaries of easements are necessarily dynamic, but when the land originally burdened by the easement becomes submerged, the easements "do not automatically move to the new properties: they must be proven."⁶⁰ The Court then turned to a discussion of littoral property rights, and the changes that can occur along a littoral boundary. The Court referred to the principle that land that is "gradually and imperceptibly added or taken away" is gained or lost by the property owner. The Court then defined avulsion, relying on English common law, as the "sudden and perceptible change in land" and that avulsion does not divest a property owner of his or her title.⁶¹ The Court's rationale is that during gradual and imperceptible changes of coastal boundaries the public use also moves along the new boundaries gradually and imperceptibly. It would be a large expense to force the state to prove a new easement

⁵⁸ *Severance v. Patterson*, 54 Tex. Sup. J. 172 (2010)

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

for these gradual movements, and the easement would always be able to be proven. Following an avulsive event, however, it would be impossible for the state to prove continued public use in the new dry beach, and it would be “unfair to impose such drastic restrictions through the OBA upon an owner in those circumstances without compensation.”⁶² The Court then established that Texas does not recognize a rolling easement in situations where the line of vegetation has moved due to an avulsive event, because Texas common law does not allow for boundary movement as a result of avulsion.⁶³ The Court then held that the doctrine of avulsion cannot be used to change the boundary between public and private ownership at the high tide line.

The Court turned to a number of Texas Courts of Appeals cases in order to demonstrate that the concept of the rolling easement had not been firmly established within the relevant case law. *Feinman* held that public easements for use of dry beach can roll with the vegetation line. The Texas Supreme Court rejected the holding in *Feinman* because only one of the cases *Feinman* relied on was a Texas case, *Luttes v. State*, and that case did not discuss rolling or migratory easements. The Court then turned to *Arrington v. Texas* and dismissed its holdings because it relied heavily on *Feinman*. Finally, the Court considered *Matcha v. Mattox*, the first case in Texas to address the concept of a rolling easement in West Beach. The Court in *Matcha* reasoned that Texas law recognizes the long history of public use of Galveston’s beaches. The *Severance* Court, however, did not follow *Matcha*’s conclusion of customary use because *Matcha* did not establish whether or not there is a customary

⁶² Id.

⁶³ Id.

right to rolling easements, which would impose “inherent limitations on private property”.⁶⁴ The final conclusion of the Court was that, although public easements in the dry beach are dynamic, these easements do not roll to encumber parts of parcels or new parcels following avulsive events. New public easements can be established along adjacent private property, but only if proven “pursuant to the Open Beach Act or the common law.”⁶⁵

Texas Supreme Court Rehearing and Fifth Circuit Court of Appeals Final Decision

Following the Texas Supreme Court’s decision in *Severance v. Patterson*, many of the groups advocating for the rolling easement filed amicus briefs and petitions for the Supreme Court to rehear the case.⁶⁶ The Court agreed to rehear the case, and following an abatement to allow the Fifth Circuit Court of Appeals to issue a mootness decision⁶⁷, reheard the case on April 19, 2011. The Court withdrew its November 2010 decision and substituted the March 30, 2012 decision in its place.⁶⁸

In its revised opinion, the Texas Supreme Court viewed the State’s argument as turning on the theory that private property owners in West Beach “have never had

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ *Severance v. Patterson*, 2012 Tex. LEXIS 260; 55 Tex. Sup. J. 501 (2012)

⁶⁷ Following the issuance of the original decision by the Texas Supreme Court *Severance* sold the home at issue in the case. The State filed a petition to dismiss the case as moot. The Fifth Circuit denied the motion.

⁶⁸ *Severance v. Patterson*, 2012 Tex. LEXIS 260; 55 Tex. Sup. J. 501 (2012)

the right to exclude the public from their property in the dry beach”.⁶⁹ The Court reasoned that because this limitation was not present in the deed to the property, was not agreed to by the owner, and that the state has not proven an easement on the property by dedication or prescription, the application of the rolling easement to the property would be dependent upon finding that the public has acquired an easement through the application of customary use. The Court then turned to Severance’s property and examined the grant of that area at the beginning of the Republic of Texas, and found that there were no limitations placed on the grant at the time that it was made. This effectively negated the application of the doctrine of customary use for Severance’s property because there is no history of public use of the area since “time immemorial”⁷⁰.

The Court also addressed the issue of investment-backed expectations briefly in its reference to Justice Medina’s dissent to the initial opinion, wherein he referred to the notice that Severance received that her property may be subject to removal under the OBA as a reason why the enforcement of the OBA could not be considered a taking.⁷¹ The Court dismissed this reasoning as incorrect because simply putting a property owner on notice that her property may be removed does not exempt the state from being required to prove or pay for an easement where one does not exist, and that a disclosure of enforcement does not remove the property owner’s rights.⁷²

⁶⁹ Id.

⁷⁰ As established in *State ex. rel. Thornton v. Hay*, “time immemorial” can be considered the beginning of the state in the U.S. (254 Ore. 584, (1969))

⁷¹ *Severance v. Patterson*, 2012 Tex. LEXIS 260; 55 Tex. Sup. J. 501 (2012)

⁷² Id.

The Court's final conclusion was that as there were no limitations placed on private property rights at the time of the 1840 land patents, there are currently no limitations on private property or continuous rights in the public since time immemorial that can serve as a basis for the rolling easement along Severance's property. Thus, following an avulsive event and a shifting of the line of vegetation, the state will be required to either prove a new public access easement under the rules of dedication or prescription, or purchase the easement from the private property owner.

Implications of the *Severance v. Patterson* Decision

In addition to having an impact on the state's ability to require the removal of homes from the public beach under the OBA, the decision in *Severance v. Patterson* has implications for sea level rise and shoreline management. There are large areas of the Gulf coast where properties have been completely submerged due to sea level rise and erosion (McLaughlin 2011). The Texas Supreme Court's decision in *Severance v. Patterson* establishes that property boundaries may shift due to small, imperceptible accretions, but that any changes due to avulsion do not alter property boundaries. On a shoreline where erosion occurs much more frequently and drastically than accretion, Texas coastal managers face having to provide public access to beaches that are quickly disappearing, and no public beach to replace them. The *Severance* decision also impacts the state's ability to prevent private property owners from erecting seawalls and beach protection structures, which have been shown to increase erosion and shoreline retreat along neighboring sections of shoreline (Bailey 2010).

Beach nourishment is also a major concern following the *Severance v. Patterson* decision. Large beach nourishment projects are an expensive endeavor, and states rely on funding from federal and local sources in order to complete these large projects. There are stipulations attached to federal beach nourishment funds that require that any beaches that are nourished with federal funds must provide public access to the nourished beach, in both the foreshore and the dry-sand (OCRM 2000). The *Severance* Court specifically refrained from addressing how artificial accretions or additions would affect ownership or access to the new land. This lack of clarity with regard to artificial additions has the potential to increase the contentious nature of beach nourishment project negotiations between the state and private property owners. This became immediately apparent shortly after the release of the Texas Supreme Court's decision. A \$40 million dollar beach nourishment project was in place by the Texas General Land Office for West Galveston Island, in order to rebuild the beach following Hurricane Ike in 2008. The GLO abandoned the project following the *Severance v. Patterson* decision, citing questions the decision raised about the use of public funds to nourish private beaches (Rice 2010). Following the cancellation of the project, the homeowners of West Galveston Island attempted to get the project back on track by negotiating for a public easement across the nourished beach, but refused to sign a rolling easement, which was Commissioner Patterson's demand for the project (Texas GLO 2010).

Chapter 5

ALTERNATIVE BEACH ACCESS MODELS IN NEW JERSEY, OREGON AND CONNECTICUT

In its *Severance v. Patterson* decision, the Texas Supreme Court established that in order for the state to be able to enforce the provisions of the OBA on private property following a movement of the line of vegetation, there must be a public access easement established across the property. There are several coastal states that currently provide beach access under authority that is rooted in common or constitutional law, and they may serve as an alternative method by which the state can enforce the OBA regulations following the *Severance* decision.

New Jersey and the Public Trust Doctrine

The public trust doctrine is one of the oldest tenets of common property law and every state has rules governing the use of public trust resources. During the height of the environmental movement in the U.S. legal scholar Joseph Sax authored a seminal work on the potential of the public trust doctrine for modern environmental protection. Sax advocated that the principles of the public trust doctrine provided states with the authority to regulate the environment, and a responsibility to regulate it for the good of the public (Sax 1970). Forty years later, many states have used their authority under the public trust doctrine to regulate beach access along their coastlines.

History and Development of the Public Trust Doctrine

The public trust doctrine requires that certain areas of the shoreline are to be held in trust by the State for the benefit of the public. The doctrine has evolved from a concept first articulated in Roman civil law, as codified in the Code of Justinian in 530 AD. This first expression of the public trust doctrine articulated that “By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations.”(Slade et. al. 1997, quoting the Justinian Institutes)

The modern interpretation of the public trust doctrine developed from the evolution of property law in England. Under English common law, the sovereign was the sole owner of all land, and he subsequently divided these lands among favored nobles. These nobles would then pass the lands down through inheritance, and these properties would rest with the family in fee simple. At the time of the creation of the Magna Charta, the idea that the foreshore was not the sole property of the sovereign had come popular, and was most notably articulated by Sir Matthew Hale in his seminal work *De Jure Maris*. Hale defined the shoreline as the area between the high water and low water mark and he established the idea of the *jus publicum*, the representation of the public’s interest in the shoreline (Mangone 2010). This concept was then adopted by the United States as it turned to English common law to form the basis of the legal system in the new nation.

The public trust doctrine as it is applied today is essentially a dual property right in the shoreline, waterways and tidelands. The *jus privatum* represents the interest that a property owner is afforded with the purchase or inheritance of property.

Examples of these rights include the right to exclude people from the property and the right to transfer the title of the property. Property owners also possess rights specific to riparian (along a riverine waterway) or littoral (along the shore of a lake or the sea) property. Littoral land riparian rights generally address the property owner's ability to use and enjoy the shoreline and include the right to access the water, construct wharves and piers, and the right to soil gained by accretion or reliction.

The *jus publicum* represents the common right of the public to access the tidelands and waterways for the purposes of fishing, navigation and conducting waterborne commerce. This property right is vested in the state as the owner of the land, but it is held and managed in trust for the use of the public. As dual property rights, the *jus publicum* and the *jus privatum* rights exist at the same time. However, when a conflict between the two property rights arises, the rights of the public under the *jus publicum* will supersede the rights under the *jus privatum* (Slade 1997).

One of the first disputes between private property rights and public trust rights in the United States occurred in New Jersey over the cultivation of oysters along the Raritan Bay. Following a conflict involving the seizure of oysters from privately planted oyster beds, the New Jersey Supreme Court reached back to the Magna Charta and English Common law to determine that the rivers, bays, ports and seacoasts, as well as the land submerged beneath them, were free for the use of the citizens for the purposes of passage, navigation, fishing, fowling and sustenance.⁷³ In a title dispute along the same oyster beds twenty-one years later, the U.S. Supreme Court was asked to address the same issue that the New Jersey Supreme Court addressed in *Arnold v.*

⁷³ *Arnold v. Mundy*, 6 N.J.L. 1 (1821)

Mundy. The U.S. Supreme Court ruled in this case that the lands in dispute had originally been conveyed not as fully private property, but rather as a “public trust for the whole community, to be freely used by all for navigation and fishery, as well for shellfish and floating fish”.⁷⁴

With regard to establishing the public trust doctrine in U.S. law, the case that is cited most often as representing the first explicit expression of the public trust doctrine is *Illinois Central Railroad Co. v. Illinois*.⁷⁵ This case occurred in 1892, and the U.S. Supreme Court was asked to settle a dispute surrounding a land grant by the State of Illinois to Illinois Central Railroad Co. Illinois granted large portions of the bed of lake Michigan, as well as some of the Chicago waterfront, to Illinois Central, who had plans to use the land to develop a north-south railway along the Chicago waterfront. Following a public backlash against the land grant Illinois revoked it, which resulted in litigation between the state and the railroad company that lasted for almost 19 years. Illinois Central argued to the courts that the state had no authority to revoke the grant it had originally made, and attempted to have the land grant reinstated. The U.S. Supreme Court ruled that Illinois did not have the authority to grant the land initially, because the state could not grant the title to those lands for purely private purposes. Title to public trust lands could only be conveyed if the grant would be for the public benefit, or in no way negatively affect the public benefit.⁷⁶

⁷⁴ *Martin v. Lease of Waddell*, 41 U.S. 367 (1842)

⁷⁵ *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892)

⁷⁶ *Id.*

Expanding the Public Trust Doctrine in New Jersey

The public trust doctrine is not a uniform doctrine, due to the fact that each state acts as the sovereign entity and is free to define the boundaries and uses of their public trust doctrines. The recognized boundaries and uses of the public trust lands vary from state to state, according to the state's common law. Some states, including Delaware and Massachusetts, have a fairly restrictive public trust doctrine, where private property extends to the mean low water mark (Slade 1997). States such as Hawaii and Maine have somewhat liberal public trust doctrines, recognizing uses such as recreation and tourism as traditional uses of the public trust lands. Arguably the most liberal public trust doctrine with respect to beach access is New Jersey's. New Jersey courts have expanded the boundary of the public trust doctrine boundary past the mean high water mark and on to the dry-sand beach. It has also expanded the protected uses of the public trust lands to include activities such as recreation and sunbathing. New Jersey courts have discussed the public trust doctrine in the context of a "dynamic and evolving" doctrine, rather than one that is static. They have also acknowledged that the public trust doctrine is a tool that can be used to address management issues along the shoreline.⁷⁷ The first case to articulate the principles of the public trust doctrine in the U.S. occurred in New Jersey⁷⁸ and it established the first statement of the public trust uses in New Jersey as not limited to just the traditional uses of navigation, fishing and commerce. The uses of the public trust lands were later defined to include "recreational uses, including bathing, swimming and

⁷⁷ *Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J.296 (1972)

⁷⁸ *Arnold v. Mundy*, 6 NJL 1 (1821)

other shore activities”.⁷⁹ While the conflict at issue in the case concerned the use of an oyster bed, the New Jersey Supreme Court recognized that the public trust lands were to be used for “fishing, fowling, sustenance and all other uses of the water and its products”.⁸⁰

In one of the most expansive readings of the public trust doctrine, the New Jersey Supreme Court determined that the public’s right to enjoy the public trust lands included the right to access the dry-sand beach along the shore. In *Matthews v. Bay Head Improvement Association*, the Court held that in order for the public to be able to fully enjoy their public trust rights of recreation, the public must be afforded some measure of dry-sand to be able to rest. The Court reasoned that “to say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge upon, if not effectively eliminate, the rights of the public trust doctrine.”⁸¹ The Court also held in this case that private land “is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry-sand may be used by the public incidental to the rights of bathing and swimming.”⁸²

Twenty years after the *Matthews* ruling the New Jersey Supreme Court again addressed the issue of the public trust doctrine as applied to private property. This case

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984)

⁸² *Id.*

involved a fully private beach club⁸³, which had a policy of refusing non-members access to its beaches. The Court ruled that the beach club was required under the public trust doctrine to allow both lateral and perpendicular access to the beach, and that it was required to allow the public reasonable use of the dry-sand beach. In addition to requiring the club to allow the public to cross and reasonably use the dry sand, the beach club was prohibited from charging non-members exorbitant access fees, which would in effect act as an impediment to public access.⁸⁴

Oregon and the Doctrine of Customary Use

The doctrine of custom is another long-standing tenet of English common law that has been used by states in the U.S. to provide the public with the right to access the shoreline. The doctrine of custom originated in medieval England, where feudal villages were subject to mayoral control. In many of these villages the residents received privileges based on the continuous usage of particular areas of their village for certain activities. These activities occurred over centuries, prior to any formal recording of property rights. As formal property rights were becoming established in English law, it was understood that by virtue of their continuous occurrence, certain rights were to be afforded to the public of a certain village. These rights became known as customary rights. Customary rights generally favored the public of a community, and were generally tied to specific geographic locations. These locations were small and locally situated places, such as specific fields or beaches. Rights

⁸³ The entity at issue in the Matthews case was a “quasi-public” entity.

⁸⁴ *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 370 N.J. Super. 171 (2004)

granted by custom were not full property ownership rights, but rather provided the public with easements for access or use. Common examples of access rights granted by custom were the right to access a particular beach to place a fishing net for drying, or the right to pasture animals in a particular field. Customary rights are considered to be local, “something to be enjoyed by individuals living in certain districts” (Bederman 1996).

In order for an activity to be considered a valid customary right, the usage of the place must meet several requirements, as originally outlined by Sir William Blackstone’s *Commentaries on the Laws of England*. The use of the particular area must be continuous, without seeing any interruption. The use must be peaceable, reasonable, and certain. This is due to the fact that for a customary right to be considered legal, the use also must be considered obligatory by the community, as well as consistent with other customs or laws. Finally, the most important test of a customary right is that the usage must have occurred since “time immemorial” (Bederman 1996).

The doctrine of custom had been relatively dormant in the United States for many years. Several of the first cases in the United States to deal with the application of custom rejected its use based on the fact that feudalism did not occur in the United States, and therefore there were no mayoral rights to be conferred through the application of custom. Property rights had also been recorded since the very beginning of the country, and the entire system of land ownership was fundamentally different than that of early England (Bederman 1996). Courts also expressed concern that the system of land use established in America would be impeded by the application of the doctrine of custom as fully as it was in England (Bederman 1996). These courts

generally preferred the acquisition of access or usage easements through prescription, rather than through custom. Several courts also chose to question whether the doctrine of custom could ever be applied in the United States, due to the impossibility of satisfying the requirement of the usage having occurred since time immemorial.

Application of the Doctrine of Customary Use to Beach Access in Oregon

The relative dormancy of the application of custom was ended in 1959 with the Texas Open Beaches Act. In the OBA, the Texas legislature identified custom as one of the common law ways that the public could access easements along the Gulf of Mexico (Tex. Nat. Res. Code § 61.001(a)). Litigation following the enactment of the OBA further established that the OBA did not itself provide the public with the public easement, but rather codified the existing common law doctrines that already existed in the Texas common law, which included the doctrine of custom.⁸⁵

The most expansive application of the doctrine of customary use to beach access along a shoreline occurred in 1967. Oregon enacted a piece of legislation modeled after the Texas Open Beaches Act, titled the “Beach Bill”, in 1967. The Beach Bill guaranteed access to the state's beaches for the public, as well as established a public access easement on all of Oregon's beaches between the line of vegetation and the mean high water mark. The Beach Bill prevented property owners from erecting any structure in the area of the easement. The language of the Beach Bill referenced the “rights of the State of Oregon and the public in Oregon seashores as established by prescription or otherwise” and recognized that “over the years the

⁸⁵ *Matcha v. Mattox*, 711 S.W.2d 95 (1986)

public has made frequent and uninterrupted use of lands abutting, adjacent and contiguous to the public highways and state recreation areas” (Bender 1998).

In 1969 beachfront property owners along the Oregon shoreline constructed fences on the dry-sand area between the vegetation line and the mean high water mark. Acting under the authority provided by the Beach Bill, the Attorney General sought to enjoin the property owners from constructing the fences, which were intended to block access to the beach. The State relied primarily on the use of prescription to support the public’s access easement, and therefore the basis of its right to require the property owners to remove the fences. The case was appealed to the Oregon Supreme Court, which chose to decide the case on the basis of the doctrine of custom, rather than on the basis of prescription as argued by the State. The Court reasoned that deciding the case on the basis of prescriptive rights would eventually fill the courts with tract-by-tract litigation, as prescriptive easements can only be applied parcel by parcel. The Court then identified the doctrine of custom as a better basis for the public’s access easement, because it would allow the entire coastline of Oregon to be treated uniformly. The Court turned to the requirements of customary access rights as outlined by Blackstone, and determined that the dry-sand beaches of the Oregon coastline fulfilled all of these requirements. The Court traced recreational uses of the dry-sand beach back to the aboriginal inhabitants of the state, and the continuance of these habits by European settlers. According to the Court, as long as there has been an established system of land ownership and property rights in Oregon, the public has used the dry-sand beach along the coastline for recreation. The Court then applied the customary access easement to the entire Oregon coastline, stating that “ocean-front

lands from the northern to the southern border of the state ought to be treated uniformly.”⁸⁶

The public access easement based on custom was again brought before the Oregon Supreme Court in 1989, which ruled that there were inconsistencies in the *Thornton* decision and that the customary access easement had not been established beyond dispute.⁸⁷ The customary easement was addressed again in a regulatory takings case by the Oregon Supreme Court in 1994, where the Court cited *Thornton* in its decision that landowners had no right to place structures on the dry-sand beach to exclude the public. The rationale in this case was that the historic public use of the dry-sand beach in Oregon sufficiently served as a background principle of state law, and therefore the regulation barring them from erecting structures on the dry-sand beach did not constitute a regulatory taking. The landowners in this case appealed to the U.S. Supreme Court which denied certiorari. Judge Scalia, in his dissenting opinion, commented that the issue in the case “involves a holding of questionable constitutionality”. He also asserted that “it is by no means clear that the facts – either as to the entire Oregon coast or as to the small segment at issue here – meet the requirements for the English doctrine of custom.” Justice Scalia felt that the barrier to the Court’s ability to review the case was the lack of a record of the facts compiled in the *Thornton* case, and therefore the Court had no way to rule on the takings claim.⁸⁸

⁸⁶ *State ex. rel. Thornton v. Hay*, 254 Or. 584 (1969)

⁸⁷ *McDonald v. Halvorson*, 308 Or. 340 (1989)

⁸⁸ *Stevens v. City of Cannon Beach*, 317 Or. 131 (1994), cert. denied, 510 US 1207 (1994).

Connecticut and First Amendment Free Speech

In addition to providing public access based on the public trust doctrine and custom, the right of the public to access the shoreline has also been protected under the First Amendment to the Constitution. This defense is novel, and has only been applied in one state. In Connecticut, the First Amendment freedoms of speech and assembly were used successfully as the rationale preventing a municipality from barring a Connecticut resident from accessing the beach.

Public Forum Law and the First Amendment

The freedoms afforded citizens by the First Amendment include the ability to gather and express themselves without impediment. The First Amendment of the Constitution provides that “Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble” (U.S. Const., Amend. I). The understanding that public and government owned property are places where these freedoms are strictly upheld was first articulated by Justice Roberts in *Hague v. CIO*⁸⁹: “streets and parks may rest in governments, [but] they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.”⁹⁰ This idea has developed into what is now known in constitutional law as the public forum doctrine, and this doctrine outlines those locations where the freedoms of speech and

⁸⁹ *Hague v. Committee for Industrial Organization (CIO)*, 307 U.S. 496 (1939)

⁹⁰ *Id.*

assembly will be strictly upheld, and those areas where the government may be able to restrict them.

In *Perry Education Association v. Perry Local Educators' Association* the U.S. Supreme Court further developed the public forum doctrine by categorizing the types of locations where First Amendment rights of free speech and expression are most protected. The three categories identified by the Supreme Court are: 1) the traditional public forum; 2) the designated, or limited, public forum; and 3) the non-public forum.⁹¹ The type of forum that a location qualifies as decides how strongly the First Amendment freedoms will be protected, and what the government must do in order to be able to restrict them. A traditional public forum is a government-owned area that is open to all forms of expression that are covered under the First Amendment. The most common examples of a traditional open forum are sidewalks, streets and parks. Citizens who are located in traditional public forums enjoy strong First Amendment protections, and the government is prohibited from restricting speech and assembly unless it can prove that the restriction is necessary to serve a compelling state interest. The government must also show that the restriction is narrowly tailored in order to achieve the compelling state interest.⁹² Designated (limited) forums are those areas that the government has expressly dedicated for the purpose of assembly and free speech. In a designated forum the government is generally able to limit the expression to certain speakers or topics, provided that the restriction isn't discriminatory toward one viewpoint. Examples of dedicated forums are university meetings, school board

⁹¹ *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)

⁹² *Id.*

meetings, and municipal theaters. Once an area has been designated for First Amendment expressive activities, the government is under the same restrictions as it would be if the forum was a traditional open forum. Nonpublic forums are all other public property, and the government is allowed to restrict expression in these areas, provided that the restriction is reasonable and not based on the speaker's viewpoint.

Public Forum Doctrine Applied to Private Property

The U.S. Supreme Court has also addressed the public's ability to exercise its right of free speech in private property in *Pruneyard Shopping Center v. Robins*⁹³. In *Pruneyard*, the U.S. Supreme Court was asked to rule on the applicability of the public forum doctrine to a privately-owned shopping mall that operated in a quasi-public nature. Students soliciting support for political activities in a shopping mall were asked to leave pursuant to the mall's strict policy prohibiting solicitation. The students left the shopping mall immediately, and then brought suit in California against the mall, claiming a violation of their right to exercise free speech. The California Court of Appeals affirmed a lower court's ruling that the students' right to free speech had not been violated, because there were numerous other forums to exercise their rights in before it was necessary to use private property.⁹⁴

The California Supreme Court reversed the lower courts' decisions, ruling that the California Constitution protects the right to exercise free speech, even when on private property. This is because the California Constitution contains an affirmative grant of the right to express free speech, rather than a distinct restriction against

⁹³ *Pruneyard Shopping Center et. al. v. Robins et. al.*, 447 U.S. 74 (1980)

⁹⁴ *Id.*

government interference with free speech. In pertinent part, the California Constitution states that “(e)very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.”⁹⁵ The owner of the Pruneyard shopping mall appealed to the U.S. Supreme Court, claiming that the California Supreme Court ruling was in effect a regulatory taking and a violation of the Fourteenth Amendment.

In its decision, the U.S. Supreme Court made two significant findings. The first was that a State has the ability to provide its citizens with rights in its constitution that are more expansive than the rights provided in the federal Constitution, provided that those rights do not interfere with any federally provided rights.⁹⁶ When addressing the claim that the California Supreme Court’s ruling was a regulatory taking, the Court ruled that while the First Amendment of the U.S. Constitution does not prohibit restrictive policies on solicitation in a privately-owned mall⁹⁷, it does not stop a state from using its police power or sovereign authority from enacting provisions that are more broad than those contained in the U.S. Constitution.

When addressing the regulatory takings claim, the Court found that there was nothing in the facts that supported the idea that allowing peaceful and orderly solicitation in the shopping mall would unreasonably impact the use of the mall. The

⁹⁵ CA Const., Art. I, Sec. 2 (a).

⁹⁶ *Pruneyard Shopping Center et. al. v. Robins et. al.*, 447 U.S. 74 (1980)

⁹⁷ This ruling was made in *Lloyd Corp. v. Tanner*, where the U.S. Supreme Court ruled that private property does not lose its private character because the public is invited to use it for specific purposes. It also stated that the private character of a store and privately owned adjacent property does not change when clustered in a large shopping mall. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)

owner of the mall has the ability to restrict expressive activities through time, place and manner regulations, but it cannot bar them from engaging in those activities all together.⁹⁸

Public Forum Law Applied to Connecticut Beaches

In one of the only cases where the freedom to assemble has been used to provide the public with beach access, the Connecticut Supreme Court applied the principles of the public forum doctrine to determine whether the desire of a citizen to access a municipally-owned public beach in order to gather and express himself was protected under the First Amendment. In 2001 the Connecticut Supreme Court heard a case brought by a resident of Connecticut, Brandon Leydon, seeking to prevent the town of Greenwich Point, Connecticut from enforcing a municipal ordinance barring non-residents from using the municipal beach. Leydon argued that he had the right to access the beach under the public trust doctrine, as well as a right to access the beach under the First Amendment for the purposes of expression and assembly. Leydon asserted that the ordinance prevented him from exercising his right to assemble in a public forum, as well as his right to express himself by engaging with the other people located on the beach.⁹⁹

The Court first had to determine whether a municipally-owned public beach could be classified as a traditional public forum. The *Leydon* Court determined that the beach itself served as a public forum under the First Amendment, due to the “park-like

⁹⁸ Id.

⁹⁹ *Leydon v. Town of Greenwich*, 254 Conn. 904 (2001)

characteristics of the beach”.¹⁰⁰ The Court considered the shelters, ponds, parking lots, the marina, nature preserve, walkways, trails and picnic areas as evidence that the municipal beach operated in a manner similar to a public park. The court also expressly noted that any municipal beach that didn't possess some or all of the characteristics of the Greenwich Point beach wouldn't be considered a public forum for First Amendment purposes.¹⁰¹

Once the Court established that the beach in Greenwich Point served as a traditional open forum for First Amendment purposes, the Court then had to determine whether the municipal ordinance limiting access to the beach to residents was an appropriate restriction under the public forum doctrine. In order to restrict expression or assembly in a traditional open forum, the restriction must advance a compelling state purpose and be sufficiently narrow in scope. The Court determined that the municipal ordinance must be shown to be a reasonable time, place or manner restriction, and that the town failed to show that the ordinance barring non-residents from the beach met these criteria. The Court went on to determine that even if the ordinance was reasonable, it was not sufficiently narrow enough in scope to pass muster under the public forum doctrine because it barred everyone but residents from using the beach for the purposes of expression and assembly.¹⁰² Leydon's desire to access the beach for the purpose of assembling and conversing with the other people on the beach fell under the types of expressive activities protected by the First

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

Amendment,¹⁰³ and the municipal ordinance unlawfully restricted him from being able to exercise these rights.

Each of these common law and constitutional law doctrines have been used to either protect the public's right to access an area, or provide the public with access to new beaches. These methods represent potential alternatives for Texas to employ when managing beach access following the *Severance* decision. Several of the cases referenced were conflicts over regulatory takings claims, and these cases provide insight into how the Texas courts might address these doctrines.

¹⁰³ It is also noteworthy that the Connecticut Court of Appeals in the *Leydon* case upheld Leydon's claims under the public trust doctrine. The Connecticut Supreme Court did not set aside the public trust doctrine; rather, the Court decided to rule on the basis of First Amendment Free Speech.

Chapter 6

APPLICATION OF ALTERNATIVE BEACH ACCESS MODELS TO TEXAS CASE LAW

The alternative beach access models identified in the previous chapters have all been successful at providing the public with access to the dry-sand beach in other coastal states. Applying the rationale of the court decisions in those cases to the Texas Gulf coastline post-*Severance* can provide some insight into whether an alternative to the rolling easement is applicable to Texas. Determining whether the beach access methods identified from New Jersey, Oregon and Connecticut are applicable under Texas common and constitutional law can provide a starting place for addressing the state's fragmented beach access management authority.

Public Trust Doctrine

In Texas there is a limited amount of case law specifically addressing the public trust doctrine. There are several aspects of coastal management in Texas that contribute to this lack of case law. The state's responsibilities for managing public trust resources are established in Texas common law, but many of these responsibilities are also contained in the OBA, as it is the regulatory mechanism by which the state implements many of its responsibilities. When the state takes an action pursuant to the OBA, or when a citizen brings a complaint against the state for a failure to appropriately manage the coastline, a challenge is brought against the

regulations implementing the OBA, rather than against the common law basis for the Act. When a discussion of the common law basis of the OBA occurs, the OBA is constructed such that courts turn to a discussion of the doctrines of prescription, dedication or customary use.

Until the Texas Supreme Court's decision in *Luttet v. State* the general assumption of Texas residents was that the entire Gulf of Mexico coastline was owned by the state and that it was open to the entire public (Fisher and Sunley 2007). When the Texas Supreme Court clarified the state's ownership of the coastline in *Luttet v. State* as extending only to the mean high-water mark, it based its decision on the traditional boundaries of the public trust doctrine.¹⁰⁴ As a response to the *Luttet* decision, the Texas legislature passed the Open Beaches Act to restore some measure of the state's management authority over the dry-sand beaches along the Gulf of Mexico and to further clarify the public's right to access the beach for recreation. The OBA applies to both public beaches and private beaches, but only those private beaches where an easement has been established based on the common law doctrines of prescription, dedication, or customary use. The public trust doctrine is never specifically addressed in the OBA. The state has managed the shoreline according to the rules and regulations of the OBA since its passage, which has resulted in legal challenges addressing the particulars of the implementation of the OBA and very few instances in which public trust claims have been brought before the courts.

While the case law dealing with the public trust doctrine is limited, public trust principles have been articulated in some case law, as well in coastal management

¹⁰⁴ *Luttet v. State*, 324 S.W.2d 167 (Tex. 1958)

regulations. The public trust doctrine as it has evolved in Texas strongly emphasizes the state's role and responsibilities as the trustee of the natural resources of the state. This is reflected in the Texas Constitution, which establishes that the conservation and preservation of the natural resources of Texas, including the navigation of its inland and coastal waters, are the "declared public rights and duties" of the state and that the Texas legislature has the responsibility to pass "all laws as may be appropriate thereto." (T.X. Const., Art. XVI) The Coastal Public Lands Management Act of 1973 also reflects this idea, stating that the "natural resources of the surface estate in coastal public land shall be preserved. These resources include the natural aesthetic values of those areas, and the value of the areas in their natural state for the protection and nurture of all types of marine life and wildlife." (Tex. Nat. Res. Code Ann. Chapter 33.001(b)) Additionally, Texas courts have noted that the purpose of state ownership of the beds and waters of navigable waters is to protect the public's interests in the "scarce natural resources" and that the state is entitled to regulate those waters and land to "protect its citizens' health and safety and to conserve natural resources."¹⁰⁵

The Texas courts have established the boundaries and the traditional uses of public trust lands, but have not developed what the state's management authorities are under the public trust doctrine. In Texas, the state owns the title to any land covered by the bays, inlets and arms of the Gulf of Mexico, which are considered public land that the state holds in trust for the benefit of the people.¹⁰⁶ The Texas Supreme Court's ruling in *Luttet v. State* clarified that the boundary of the land that the state

¹⁰⁵ *Cummins v. Travis County Water Control and Improvement Dist. No 17*, 174 S.W.2d 34 (Tex. App. 2005).

¹⁰⁶ *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52 (1993)

owns title to extends from the water to the line of mean high tide (an area known as the “foreshore”).¹⁰⁷ Despite the U.S. Supreme Court’s ruling in *Illinois Central* that a state may not grant away its interest in the public trust, Texas courts have ruled that the state has the ability to grant away submerged lands with no implied reservation in favor of the public trust.¹⁰⁸ The state’s responsibilities as trustee allows it to regulate the waters and submerged lands in order to protect the health and safety of the citizens, and to conserve natural resources. The Texas public trust doctrine provides the public with the right to access the foreshore for the purposes of passing and re-passing, navigation, and fishing as well as “other lawful purposes”.¹⁰⁹

Expansion of the Texas Public Trust Doctrine to the Dry-sand Beach

New Jersey's long-standing view of the public trust doctrine as a living tool for coastal management is likely the basis for its expansive understanding of the public trust doctrine to the dry-sand beach of both municipally-owned and privately-owned property. Texas has a much more limited view of the public trust doctrine, preferring to rely on the legislative authority of the OBA and the OBA’s common law basis of prescription, dedication or customary use. Without such an expansive view of the public trust doctrine, Texas courts are not likely to turn to the public trust doctrine as a tool to expand the public's right of access to the dry-sand beach.

¹⁰⁷ *Luttet v. State*, 324 S.W.2d 167 (1958)

¹⁰⁸ *Natland Corp. v. Baker’s Point, Inc.*, 865 S.W.2d 52 (1993)

¹⁰⁹ *Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935)

The rationale of the New Jersey courts for including the public's rights in the foreshore, as well as the boundaries of the foreshore itself, within the public trust begins with the view that the public possesses the right to access the foreshore for recreation. In Texas, the courts recognize recreation as a public trust use, and swimming and bathing along the beaches of the Gulf of Mexico has long been a considered a right of the public (Fisher and Sunley 2007). While recreation is a protected use of public trust land, it is difficult to apply the expanded public trust theory of *Matthews v. Bay Head* and *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.* to the Texas coastline. In *Matthews* the public trust doctrine was applied to the dry-sand beach of a municipally-owned beach¹¹⁰; in Texas municipally-owned beaches will not be affected by the decision in *Severance*, so the rolling easement will still apply. *Raleigh Avenue v. Atlantis* addressed the application of the public trust doctrine to the beaches of privately-owned property, but the New Jersey Superior Court did not rule that the public required access to the *entire* dry-sand beach. Rather, the Court ruled that that the public had the right to “some enjoyment of the dry-sand area”.¹¹¹ In order for public trust doctrine to serve as the common law basis for the application of the rolling easement to the entire Gulf coast of Texas, the state would most likely have to make an argument that the public requires access to the entire dry-sand beach in order to have “some enjoyment of the dry-sand area”.

¹¹⁰ *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984)

¹¹¹ *Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc.*, 370 N.J. Super. 171, 851 A.2d. 19 (2004)

Another complicating factor in applying the public trust doctrine to the dry-sand beaches of Texas is the fact that the state has the ability to grant title of submerged lands to private property owners without a reservation for the public trust. The state must be very explicit in the language of the grant that it the title includes no reservation for the public trust, it has the ability to do so.¹¹² In those areas where this is the case, it becomes much more difficult to apply an expanded public trust doctrine to the dry-sand beach, as the state would still have little authority under the public trust doctrine to enforce the rolling easement along some areas of private property.

Public Forum Doctrine and First Amendment Free Speech

The public forum doctrine establishes those locations where a citizen is allowed to engage in the First Amendment freedoms of speech and expression with little interference from the government. Traditional public forums are those areas where the government's ability to restrict free speech is severely limited. These areas are generally government-owned and have been devoted to assembly and debate by government decree or long-standing tradition. In order for a dry-sand beach to be considered a traditional public forum, it must possess those amenities that make it similar in nature and function to a public park, in addition to meeting the other characteristics of a traditional public forum as established in *Perry Education Association v. Perry Local Educators' Association*.¹¹³ In *Leydon v. Town of*

¹¹² *State v. Lain*, 162 Tex. 549 (1961), referring to Texas Supreme Court's decision in *City of Galveston v. Menard*, 23 Tex. 349 (1859)

¹¹³ *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983)

Greenwich Village these amenities included walkways, parking lots, marinas, a nature preserve, trails and shelters. Along the Texas Gulf coastline, the beaches that would provide the amount and type of amenities required to be considered a traditional public forum are those beaches that are either state or municipally-owned, and therefore not impacted by the *Severance* decision. This means that in addition to finding that a beach possesses the necessary public amenities to be considered a public park, the court must also find that the Texas Constitution provides broader free speech protections that could be applied to private property, as was the case in *Pruneyard*. The Texas Constitution does provide an affirmative statement of the rights of the public with regard to free speech, rather than the restrictive statement contained in the First Amendment of the U.S. Constitution. In pertinent part, the Texas Constitution states that “every person shall be at liberty to speak, write or publish his opinions on any subject...and no law shall ever be passed curtailing that liberty of speech” (Texas Const. Art. I Sec. 8). Under *Lloyd Corp. v. Tanner*¹¹⁴ the U.S. Supreme Court established that private property cannot be considered a public forum, but in *Pruneyard* the Court limited *Lloyd Corp.*, ruling that a state constitution may provide stronger protections than that of the U.S. Constitution. In 2004 the U.S. Eighth Circuit Court of Appeals heard the case of a man arrested for refusing to stop soliciting signatures for a petition at a mall in Texas. The petitioner argued that the Texas Constitution provided broader free speech protections than those in the U.S. Constitution, and therefore the U.S. Supreme Court’s ruling in *Pruneyard* applied. The Court in this case reviewed the case law with regard to the Texas Constitution’s

¹¹⁴ *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)

provisions for free speech and acknowledged that when considering a provision of the Texas Constitution, it may consider the text and history of the constitutional provision, the framers' intent, public policy, and the construction of similar provisions by federal and state courts must support that claim.¹¹⁵ Any party who is arguing that the Texas Constitution should be construed more broadly than the U.S. Constitution is required to show how the federal interpretation is inappropriate. It may be possible for a provision of the Texas Constitution to be construed more broadly than the U.S. Constitution, but that broad interpretation must come as a result of the text, history and purpose of the provision.¹¹⁶ The argument that the Texas Constitution provides a more broad application of protected free speech may be made, as the review of the text, history, public policy and intent of the Texas Constitution would include a review of those provisions of the OBA that have been incorporated into the Texas Constitution.

Even if a *Pruneyard*-type analysis allows for a private beach to be considered a public forum, it is rare that the private properties affected by the *Severance* ruling would possess the types of amenities required to consider a beach a public park. Most of the private parcels along the Texas Gulf coast are single-family residences, and as such would not have walkways, bike paths or public restrooms. This fact severely limits the applicability of the public forum doctrine to the entire coastline; the public forum doctrine would apply on a parcel-by-parcel basis, and only to a select few, if any, of those parcels. It is also unclear how the public forum doctrine would apply to these parcels once an erosion event has occurred and the original dry-sand beach has

¹¹⁵ *Cross v. State of Texas*, 2004 Tex. App. LEXIS 6098

¹¹⁶ *Id.*

been removed. Neither the public forum doctrine nor *Leydon v. Town of Greenwich* provides any guidance of how a traditional public forum would be classified following an erosion event. The dry-sand beach used by the public as a historical meeting place would have been washed away, and the courts would most likely be faced with determining where the boundaries of the traditional public forum lie, and how that boundary moves with the line of vegetation.

Further complicating the application of the public forum doctrine to the dry-sand beaches of Texas, a recent ruling in the Ninth Circuit Court of Appeals has found that dry-sand beaches cannot be considered traditional public forums. The facts in this case are similar to those in *Leydon*: the plaintiff brought suit against a quasi-municipal corporation, claiming that when it barred him from the dry-sand beach in front of its property it violated his First Amendment rights of free speech and expression. The Ninth Circuit Court of Appeals looked at the three necessary factors to determine whether the beach at issue qualified as a traditional public forum: the purpose and use of the property, the physical characteristics of the area, and the traditional or historical use of the property in question or similar properties.¹¹⁷ The beach in question was governed by a restrictive covenant that reserved access to the beach for residents, and those residents often constructed barriers such as fences to prevent the public from accessing the dry-sand beach. The court ruled that since these structures had effectively barred the public from the beach, the purpose and use of the beach by the public did not qualify it as a traditional public forum, since they would not have been able to access the beach to engage in speech and assembly. While this case makes it

¹¹⁷ *Wright v. Incline Village General Improvement District*, No. 3:08-CV-00119-LRH-VPC (Nev. 2009).

more difficult for a dry-sand beach to be considered a traditional public forum, the existence of the rolling easement along the Texas Gulf coastline creates some significant differences between the beach at issue in the Nevada case and Texas beaches. Under the OBA, property owners are forbidden from erecting similar structures barring the public from the dry-sand beach past the line of vegetation, and any restrictive covenants in place barring the public from the beach would have been unenforceable past the line of vegetation. This ruling would affect only those properties that had fences constructed prior to the adoption of the OBA and subject to a similar type of restrictive covenant.

The public forum doctrine could apply to some parcels along the Texas Gulf coastline, but those parcels would be very limited. When applying the public forum doctrine to private property the Texas courts would be required to take into consideration the provisions of the OBA contained in the Texas Constitution, but the single-family home nature of the private properties at issue following the *Severance* decision make it unlikely that they would be considered to have the type of characteristics of a public park.

Doctrine of Customary Use

Of the three alternative beach access models identified from other states, the doctrine of customary use has the most potential to serve as a basis for the application of the rolling easement to the entire Texas Gulf coastline. Under the OBA customary use is one of the methods by which the public can establish an easement across private property that will be subject to the provisions of the OBA (Tex Nat. Resource Code Ann. 61.001(8)). The OBA defines a public beach as any beach, whether owned publicly or privately, where the public has acquired the right of access or use “by

prescription, dedication, presumption, or has retained a right by *virtue of continuous right in the public since time immemorial, as recognized in law and custom.*”(Tex Nat. Resource Code Ann. 61.001(8), emphasis added) The provisions of the OBA that contain language addressing the doctrine of customary use are also contained in the Texas Constitution, as tenets of the OBA were adopted into the Texas Constitution by 77% of the population by referendum in 2009.

There is also precedent in Texas case law for applying the doctrine of customary use to dry-sand beaches. The Texas Court of Appeals has established that the public is able to acquire easements by the custom of historical recreational use of a beach, and that those easements cover the beach as a whole, rather than any static parcel of land.¹¹⁸ Texas courts have also acknowledged that the public easement is migratory, since the easement could not have been established on static lines along the beach. In order for the public easement to reflect the public’s actual use of the beach, the easement must be able to migrate along with the beach, as did the customary use from which the easement came. According to the Court, customary access is a reflection in law of long-standing public practice, and therefore the access easement must resemble the public’s practice as closely as possible.¹¹⁹ In *Matcha v. Mattox*, the Texas Court of Appeals determined that the public “retained a right of use and an easement because of continuous right in the public since time immemorial as recognized by law and custom”.¹²⁰ The Court relied upon factual evidence provided in

¹¹⁸ *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App. 1979)

¹¹⁹ *Matcha v. Mattox*, 711 S.W.2d 106 (Tex. App. 1986)

¹²⁰ *Id.*

a line of previous cases which addressed boundary disputes along the coastline to determine that the public had acquired an easement by customary use.¹²¹ The Texas Supreme Court has also ruled that the provisions of the OBA do not empower the state to take rights away from private citizens, but rather it provides the public with a means to enforce a historically existing right of customary use.¹²²

The requirements for proving an easement by customary use are very similar to the requirements to prove an easement by prescription, which has been the preferred argument for providing a public access easement under the OBA. The main difference between customary use and prescription is that under the doctrine of customary use, the public has to have used the beach since “time immemorial”, where under the doctrine of prescription there is a discrete length of time established by the courts. Prescription has also been more attractive as a defense because it applies parcel by parcel, rather than the entire shoreline, and is therefore easier to prove. While it is more difficult to prove an easement by customary use, it is promising because the prevalent use of prescription to prove public access easements means that much of the evidence needed to prove an easement by customary use has already been gathered and presented to Texas courts.

The Oregon Supreme Court’s decision to apply an easement by customary use to the entire shoreline in *State ex. rel. Thornton* is particularly interesting with regard to the Texas coastline because of the close relationship between the OBA and the

¹²¹ Customary use was addressed in each of these cases, but the cases were ultimately decided on other grounds, while acknowledging that the evidence provided was sufficient to show historical recreational use.

¹²² *Arrington v. Mattox*, S.W.2d 957 (Tex. App. 1989)

Oregon Beach Bill. The State of Oregon defended an action to remove a structure based on a public access easement acquired by prescription, which is how the majority of public access easements to date have been established under the OBA. The Oregon Supreme Court, however, upheld the easement under the doctrine of customary use rather than the doctrine of prescription. The Court reasoned that determining the validity of the easement on prescriptive rights would fill the courts with tract-by-tract litigation, as prescriptive easements can only be applied parcel by parcel. On the contrary, deciding the case on customary access grounds would allow the court to treat the entire coastline of Oregon uniformly.¹²³ This reasoning can also be applied to the Texas Gulf coastline post-*Severance*, as the uncertainty of the public access easements will surely be brought before Texas courts.

The Oregon Supreme Court referred back to Blackstone's Commentaries in its *Thornton v. Hay* decision, and reviewed the six requirements for establishing customary use. First, the usage of the dry-sand beach for recreation must have been ancient, and "that the memory of man runneth not to the contrary."¹²⁴ The court observed that the Oregon coastline had been used for recreation since "the beginning of the state's political history"¹²⁵, and European settlers had found aboriginal inhabitants using the dry-sand beach for clam digging and cooking fires.¹²⁶ The second and third requirements are that the recreation across the dry-sand area was

¹²³ *State ex. rel. Thornton v. Hay*, 462 P.2d 671 (Ore. 1969)

¹²⁴ *Id.*, quoting Blackstone's commentaries

¹²⁵ *Id.*

¹²⁶ *Id.*

continued without interruption, and was peaceable and occurred without dispute. While the use of the property does not need to have been exercised continuously, it cannot have been stopped by a person with a “paramount right”; if it is otherwise, the use is considered to have been interrupted. The evidence presented in the case indicated that the public’s use of the dry-sand area had never been interrupted, and that it was peaceable. The fourth requirement is that the customary use must have been reasonable. The Oregon court found that because any inappropriate use of the dry-sand beach would have been halted by municipal police officers, while recreational use of the beach had not been, such use was reasonable. The fifth requirement is that the use must have been certain with respect to the property’s boundaries. The Court ruled that the visible boundaries of the dry-sand area and the character of the land placed a clear limit on the types of activities that could occur in the easement, specifically recreation. Finally, the use of the property cannot have interfered with any other laws and customs, which it did not.

The rolling easement of the Texas OBA mirrors very closely the easement upheld by the Oregon Supreme Court in *Thornton v. Hay*. In order for the state to prove an easement along the entire Texas coastline it would have to prove that the public use of the beach is ancient, and specifically that that public has used the beach for recreation since the beginning of the original land grant. While the state would likely need to complete further research to garner sufficient evidence to meet its burden of proof that recreation along the beach is “ancient”, verbal accounts and pictures demonstrate a long-standing tradition of using the dry-sand beaches for recreation, especially for the purposes of fishing and navigation (Fisher and Sunley 2007). In addition, the disputes regarding public access to the dry-sand beaches of

Oregon and Texas are similar, with few disputes occurring until development pressures increased the potential value of the dry-sand beach to property owners.

To meet the continuous and uninterrupted use requirement, the state could attempt to show that because the public assumed that the state owned the entire coastline, both the public and property owner used the dry-sand beach without dispute or interruption. Shortly after the Texas Supreme Court's decision in *Luttet v. State* the OBA was passed, which allowed the public use of the dry-sand beach of the Gulf of Mexico coastline until the *Severance v. Patterson* decision in 2009. The short two-year period however between the decision in *Luttet v. State* and the passage of the OBA could prove to be a difficulty in establishing the continuous and uninterrupted use requirement, because the main catalyst for the passage of the OBA was the erection of fences blocking public access to some private beaches. The boundaries of the easement in Oregon and Texas are exactly the same, from the mean high tide line to the line of vegetation. Both Oregon and Texas beaches have been policed by municipal officers as well, satisfying both the fourth and fifth requirements. Finally, the state will have to prove that the customary use of the beaches does not run afoul of any other law or custom, which does not appear to be the case because the OBA specifically includes the use of custom to establish public beaches.

The Texas Supreme Court's final decision in *Severance v. Patterson* addressed the use of the doctrine of custom to establish a rolling easement along the Gulf of Mexico coastline, although in dicta only. The Court acknowledged that restrictions on private property that date back to the original land grants during the Republic of Texas or at the beginning of the State of Texas could provide a basis for a public access easement based on customary use. The Court next turned to the original land grant of

West Galveston Island, and found that there was no reservation of public rights when the Republic of Texas granted private title to the area. The Court then discussed two cases that have considered the doctrine of customary use in West Galveston Island, *Feinman v. Texas*¹²⁷ and *Matcha v. Mattox*¹²⁸, and determined that the State had not provided sufficient proof of customary use to establish a public access easement. This is because the evidence provided to the courts in *Matcha* and *Feinman* did not show that recreation occurred in the West Galveston areas back to “time immemorial”, nor was any legal basis presented for recognizing that the public had an inherent limitation on West Galveston property titles or any continuous legal right since “time immemorial”. The Court addressed the issue of time immemorial, stating that the application of the concept to Texas would require going back to the time of the original land grant. The Court also referred to the evidence provided by the state that the public had used many of the parcels before, but the Court dismissed the extrapolation of “flimsy evidence” to the entire coastline of the state.¹²⁹

Vehicular access to the beach is an important part of coastal recreation in Texas, and vehicles have long been used to access the shoreline. They are an important part of recreational activities, as well as fishing and boating. In many cases the dry-sand beaches were considered the main thoroughways between coastal towns, as it was often easier to travel across the beach than it was to travel the roads between the towns (Fisher and Sunley 2007). Some of the evidence presented in earlier cases of

¹²⁷ *Feinman v. Texas*, 717 S.W.2d 106 (Tex. App. – Houston [1st] 1986)

¹²⁸ *Matcha v. Mattox* (11 S.W.2d. 95 1986)

¹²⁹ *Severance v. Patterson*, 2012 Tex. LEXIS 260; 55 Tex. Sup. J. 501

historical use of the beach by the public referred to roads being built and people using these roads as thoroughfares. Many Texas residents feel that restricting or prohibiting vehicular access to the beaches would result in a “privatizing” of the beaches (Brief for the Surfrider Foundation, *Severance v. Patterson*, 54 Tex. Sup. J. 172 (2010)). Including the importance and history of vehicular access to the beach in evidence presented to courts of historical use of the beach by the public, and showing the impact of restricting vehicular access on the public’s ability to move across the beach could strengthen an argument for a customary use easement.

Of the three alternative methods identified, none of them provide Texas with a clear-cut rationale to apply the rolling easement to the entire Texas coastline of the Gulf of Mexico. While each of them has potential to apply the rolling easement on a parcel-by-parcel basis, only customary use has the potential in Texas case law to provide a coastline wide easement. However, recent treatment of the doctrine of custom by the Texas Supreme Court in the *Severance v. Patterson* decision indicates that Texas courts consider “time immemorial” to be a much longer period of time than the court did in Oregon, making it more difficult to prove continuous historical use. In the absence of a fully viable alternative to applying the rolling easement across the whole Texas Gulf coastline, proactive public policy measures will be required to fill the gaps left open by the *Severance* decision.

Chapter 7

POLICY CONSIDERATIONS FOR ALTERNATIVE BEACH ACCESS MODELS IN TEXAS

In the absence of a common law basis for the rolling easement along the entire coastline, the state may have to rely on the adoption of proactive public policy measures and participation in programs that are designed to decrease the risk of owning expensive property along the Gulf of Mexico coastline. The adoption or expansion of programs and policies that address the risk of owning property in hazard-prone areas and increase the undertaking of hazard mitigation measures by property owners will go a long way to reduce the number of homes that are impacted by erosion and therefore impede public access. There are currently several programs and initiatives designed to address these issues, and many of them can be strengthened or altered to better address the public access issues created by the *Severance v. Patterson* decision.

Increasing Construction Setbacks

One policy option to continue to reduce the instance of public beaches becoming lost to erosion or avulsion would be to strengthen the use of setback measures along the Gulf of Mexico coastline. Setback measures can provide a significant erosion buffer between the receding shoreline and waterfront property. Currently in Texas there are no mandatory setback regulations, but rather voluntary setback measures encouraged by the state to be established in the municipal dune

protection plans. In Texas, setback measures can vary from as much as 350 feet away from the line of vegetation, and as little as 25 feet away from the line of vegetation.

The adoption of mandatory setback regulations would result in a much-extended period of time for new construction to become located on the dry-sand beach. The larger erosion buffer will prevent the homes from becoming located on the dry-sand beach as often. This has two benefits: in those areas where the beach is a public beach and subject to a rolling easement, the home will not become subject to removal under the OBA as easily; in those areas where the beach is private and not subject to a rolling easement, the beach will less likely be littered with dangerous debris from homes having been located on the beach. The realities of sea level rise are such that the erosion setback would eventually disappear, but it would significantly reduce the incidence of homes becoming subject to it.

Mandatory setbacks are a positive management tool for addressing some of the issues created by the removal of the rolling easement, but measures that are seen as impacting private property rights are incredibly unpopular in Texas. In 2008, the GLO proposed new regulations under the OBA that encouraged the use of erosion planning measures in advance of applying for state funding for erosion control projects and disaster response assistance (Mulvaney 2008). When the proposed regulatory changes were presented to the public, several groups voiced unhappiness with the proposed changes. Local governments and private property owners felt that the proposed rules were unnecessarily restrictive, would lower property values, and might negatively affect the tax base.¹³⁰ The City of Galveston was a particularly vocal opponent of the

¹³⁰ The City of Galveston's setback is currently established at 25 feet from the line of vegetation.

proposed changes, claiming that there was no reasoning provided for the denial of private property rights, and that the regulations were essentially an unfunded mandate. The proposed regulations were withdrawn for consideration in November of 2008 (Hofrichter 2009).

Mandatory setbacks that are significantly more restrictive than those that existed before may also have takings implications similar to those in *Lucas*. In *Lucas*, the U.S. Supreme Court ruled that the strict setback limits restricting all development imposed by the South Carolina Coastal Council affected a taking of Lucas' property. At the time of Lucas' purchase of the property there were no restrictions on development. This is not the case in Texas, where many municipalities currently implement some form of setback requirement. The setback requirements are not made mandatory by the state, but many coastal municipalities have established some sort of construction setback. This may give weight to the argument that anyone engaging in new construction should have assumed that they were in a heavily regulated area, and that the adoption of more stringent setback requirements was a reasonable assumption.

Also crucial to the categorical takings decision in *Lucas* was the fact that the setback regulations enacted by the South Carolina Coastal Council rendered Lucas' property completely valueless. The courts have determined that if any value remains in the property following the adoption of new rules a takings decision would be made under the *Penn Central* balancing test, rather than the categorical takings test established in *Lucas*. If setback requirements were enacted that did not completely prohibit the property owner from developing the property, then *Lucas* would not apply.

The adoption of stricter mandatory setback requirements could also include special permits, such as the special permits that South Carolina enacted after the Lucas decision, to further lessen the impact to the property owner. These special permits could be modeled after those situations in which the Commissioner of the GLO can allow a home to stay on the public beach, when it does not pose an imminent danger to human health and safety.

Reducing Incentives for Purchasing At-Risk Properties along the Gulf of Mexico Coastline

There are currently programs available to assist coastal homeowners in addressing the risks and recovery from coastal storms and hazards. These programs may often exacerbate the problem by providing an incentive for risky behavior rather than minimizing the costs of recovering from hazard-prone property. One of the most widely-known programs in place designed to minimize the risk of building in flood-prone areas is the National Flood Insurance Program (NFIP), which aims to provide insurance and assistance for property owners in flood-prone areas. The NFIP is managed by the Federal Emergency Management Agency (FEMA) and it subsidizes insurance rates in flood-prone areas in exchange for the adoption of voluntary floodplain management actions by local governments. While this program is designed to incentivize the adoption of effective measures that work to address flood issues, the program has had the effect of removing much of the risk of constructing and purchasing property in hazard-prone areas. Following a large storm, many property-owners along expensive beachfront areas can expect to have the NFIP insurance pay for the cost of rebuilding the home, rather than having to bear the cost of reconstruction as a result of purchasing property in a hazard prone area. It has been

estimated that the number of repetitive loss properties covered by the NFIP has increased by over 50% over the last ten years (Huber 2012). The NFIP is also currently operating at a loss, due to the rising costs of reconstruction and the fact that insurance premiums do not accurately reflect the full risk of flood damage. In addition, the implementation of the NFIP results in insurance rates for the highest-risk properties also being the most heavily subsidized. This leaves those homeowners who are at a lower risk but still in need of flood insurance priced out of the market (Huber 2012). The NFIP has had the overall effect of increasing property damage and risk to human life in coastal areas, rather than reducing it (Jacob and Showalter 2007).

In June of 2012 Congress passed a 5-year reauthorization and reform measure for the NFIP. The bill extended the NFIP for five years and included a number of reforms to the program. The majority of the reforms to the NFIP were designed to increase the financial viability of the program, with reforms like increasing the cap on premium increases from 10% to 20%. The reforms also included phase-outs for some of the most severe repetitive-loss properties, addressing one of the most consistent criticisms of the NFIP (Berginnis 2012).

Under the NFIP FEMA has implemented the Community Rating System (CRS), which provides communities with discounts on their NFIP flood insurance premiums for implementing floodplain management techniques that are designed to help protect people and property during flood events. The insurance premium discounts for the CRS go up to 45%, and there are four series of activities that communities can engage in to acquire these discounts: public information, mapping and regulations, flood damage reduction, and flood preparedness (FEMA 2010). Participation in the CRS is done at the community level and participation by Texas

communities is widespread, but not substantial. This is because many communities have gone through the process of joining the CRS, but they have relatively high scores¹³¹ and do not engage in many of the hazard mitigation activities required for credit under the CRS (Peacock and Husein 2011). This may be due to the fact that Texas communities tend to focus on the larger and more expensive flood mitigation projects, such as structural approaches, rather than the incremental CRS point-earning activities such as information provision and public outreach (Brody, Kang and Bernhardt 2010). Increasing participation in those types of activities could significantly lower many communities CRS scores, subsequently lowering flood-insurance premium rates and making it easier for property owners to purchase flood insurance. An updated Community Rating System Coordinator's Manual, the guide to CRS classification criteria, is expected to be issued during the second half of 2012. The updated manual will contain changes that are designed to increase the effectiveness of flood mitigation techniques and outreach and coordination activities.

Increasing Notice During Purchase of Property

A large part of preserving public beach access through policy mechanisms involves reducing the amount of construction along the dry-sand beach and increasing the amount of space between construction and the vegetation line. As discussed previously, the enforcement of public beach access regulations often results in private property owners bringing takings claims against the government enforcing the regulations. One method that State can employ to assist property owners in becoming more aware of the risks and potential implications of purchasing at-risk coastal

¹³¹ A higher score in the CRS indicates a higher level of flood risk.

property, and thus that has the potential to reduce litigation fees that are incurred to defend takings claims, is the creation of regulations aimed at improving the notice and knowledge of rules and their implications for property purchasers.

In *Penn Central* the U.S. Supreme Court discussed the importance of notice to a property owner's reasonable investment-backed expectations. While subsequent courts have specifically stated that simply providing notice to a property owner does not remove the possibility of a regulatory taking, it can contribute to the level of expectation a property owner holds. In addition, regulations involving property along the coastline are complex and often times difficult to understand. Providing property owners with sufficient notice of the risks associated with sea-level rise, coastal hazards, and the regulatory structure and climate surrounding the property may help property owners begin to accept the full amount of risk that is associated with waning coastal property (Ruppert 2011).

Currently, the notice that is included with the purchase of coastal property in Texas during a transaction indicates that the property being purchased is at risk for removal or relocation under the OBA. The decision in *Severance* presents an ideal opportunity to revise these notice statutes, as the current ones may no longer apply to the property being purchased. These revisions could include additions to the number of places this notice is to be included, as well as the type and level of detail of the information to be presented to property owners.

Increasing the amount of knowledge that property owners have about the purchases they are making, including both the regulatory and environmental climate can help reduce the incentive to purchase property in at-risk areas. Increased notice, when combined with increased activity in programs like the CRS and more stringent

setback regulations, could decrease the amount of property that becomes located on the beach, and therefore increase the amount of area that remains open and free for the public to access.

Chapter 8

CONCLUSION

The Texas Supreme Court's decision in *Severance v. Patterson* has the potential to significantly change the state's authority to regulate beach access along the Gulf of Mexico coastline under the Texas Open Beaches Act. While there are several other states that have provided their citizens with access to the beach under the common law or constitutional law of the state in question, none of these methods will likely be sufficient to restore the rolling easement under the OBA to the entire Texas Gulf coastline. The public trust doctrine has not been developed as fully in Texas as it has in New Jersey, and there is little chance that the Texas courts would follow the New Jersey's courts rationale for expanding the public trust doctrine and apply the public trust doctrine to the entire dry-sand beach. Establishing dry-sand beaches as traditional public forums where First Amendment free speech is protected could serve to provide public beach access to some private parcels. In order for this argument to be successful, however, the state would have to show how the Texas Constitution intended for the beaches to be open for free speech, and that the construction and available amenities at those beaches sufficiently resemble a municipal park. The application of the doctrine of customary use provides the most potential for re-establishing the rolling easement across the entire Gulf of Mexico coastline, but the Texas courts have indicated that the factual history of use of Texas beaches that it has been provided with to date is not sufficient to prove use of the beach since "time immemorial".

The uncertainty associated with options for re-establishing the rolling easement across the entire Gulf of Mexico coastline suggests state coastal managers should proactively rely on policy measures and programs that are designed to reduce the amount of property succumbing to erosion and eventually impairing public access. Implementing mandatory setback regulations could go far in addressing the issue of construction at the vegetation line, but previous attempts at increasing setback limits in Texas have faced strong opposition. In addition, the implementation of mandatory setback regulations could have takings implications for the state if they are too strict in their construction. Addressing construction in risk-prone areas would be more successful if programs that have the effect of incentivizing development rather than increased mitigation, such as the NFIP, are reformed. Eliminating subsidies to heavily risk-prone properties will require property owners to fully internalize the cost of building in hazardous areas. Increasing the participation of Texas communities in programs like the Community Rating System would also increase the information available to property owners about the risks of building or purchasing property in hazardous areas. Finally, if programs are put in place to increase the amount and content of notice provided to individuals about the risk of constructing or purchasing coastal property, those individuals may be better prepared to address the consequences of owning property that may eventually succumb to the dynamics of the Gulf of Mexico coastline.

The intersection of private property and state management authority along the coastline is an area that is contentious across the entire country, and especially difficult to navigate in Texas. Texas residents have a strong belief that the beaches should remain open and available for everyone, but they are also fiercely protective of

their individual property rights. Addressing these issues requires care, detailed planning and extensive stakeholder involvement at any stage of rule-making that addresses beach access issues, in order to minimize the amount of litigation and level of conflict involved with the implementation of new rules and regulations.

Areas for Further Study

One of the ripest areas for further research with regard to the *Severance v. Patterson* case is developing a more comprehensive body of evidence supporting the use of the beach since “time immemorial” for the establishment of a customary access easement across the Gulf of Mexico coastline. This would include studies on the details of the use of the beach back to time of the original land grants and further development of the history of vehicular access to the beach, especially with regard to the use of the beach as a highway. These studies should span the entire Gulf of Mexico coastline, and also identify the original land grants and any reservation of rights in favor of the public at the time of the grant.

The *Severance v. Patterson* decision will impact the location of property boundaries along the Gulf of Mexico coastline, but it will also have economic implications for the Texas Gulf coast. Economic studies on the cost of litigating takings claims and adverse judgments against the state as compared to the cost of purchasing public access easements through eminent domain procedures would help illuminate some of the hidden costs of managing public access along the Gulf of Mexico shoreline.

As it currently stands, there is likely no way that the rolling easement provisions of the Texas Open Beaches Act can be applied to the entire Texas Gulf coastline through customary use, public forum doctrine or the public trust doctrine.

The best near-term option for Texas to address the gaps left by the *Severance* decision is to employ public policy methods to continue to provide public access to those areas where a previously existing public access easement has been washed away by an erosive event. Undertaking these actions will result in fewer structures becoming located on the beach and reducing future impediments to the public enjoying Texas beaches.

REFERENCES

- Bederman, David. 1996. The Curious Resurrection of Custom: Beach Access and Judicial Takings. 96 *Columbia Law Review* 1375.
- Bender, Steven. 1998. "Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches". 77 *Oregon Law Review* 913.
- Berginnis, Chad. 2012. "Breaking News: NFIP Reform Passes Congress." *News and Views*, 25(3). Association of State Floodplain Managers, June 2012.
- Bramley, Julia. 2011. Supreme Foresight: Judicial Takings, Regulatory Takings, and the Public Trust Doctrine. 38 *Boston College Environmental Affairs Law Review* 445.
- Brody, Samuel, Jung Eun Kang and Sarah Bernhardt. 2010. "Identifying factors influencing flood mitigation at the local level in Texas and Florida: the role of organizational capacity". *Natural Hazards*, 52(1): 167-184.
- Byrne, Peter. 2009. *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*. The 12th Annual CLE Conference on Litigating Regulatory Takings and Other Legal Challenges to Land Use and Environmental Regulation. November 6-7, 2009, South Royalton, VT.
- Cheong, So-Min. 2011. "Policy Solutions in the U.S." *Climatic Change*, 106:57-70.
- Dolan, Garrett and Davin Wallace. 2011. Policy and Management Hazards Along the Upper Texas Coast. *Ocean and Coastal Management*, (2012).
- Fasoyiro, Laurencia. 2007. "Does the Open Beaches Act Seek to 'Take' Private Property for Public Use Without Just Compensation?" 9 *Texas Tech Administrative Law Journal* 115.
- Federal Emergency Management Agency. _____. National Flood Insurance Program Community Rating System: A Local Official's Guide to Saving Lives, Preventing Property Damage, Reducing the Cost of Flood Insurance. FEMA Brochure 573.

- Fisher, Eddie and Angela Sunley. 2007. *A Line in the Sand: Balancing the Texas Open Beaches Act and Coastal Development*. Proceedings of Coastal Zone 2007, Portland, Oregon, July 22-26, 2007.
- Gibeaut, James et al., The Texas Shore Line Change Project, Bureau of Economic Geology, <http://www.beg.utexas.edu/coastal/intro.php> (last visited May 28, 2012).
- Hofrichter, . 2009. Recent Development, Texas's Open Beaches Act: Proposed Reforms Due to Coastal Erosion. 4 *Environmental and Energy Law and Policy Journal* 147.
- Holmes, Mark. 2003. "What About My Beach House? A Look at the Takings Issues as Applied to the Texas Open Beaches Act". 40 *Houston Law Review* 119.
- Huber, Dan. 2012. *Fixing a Broken National Flood Insurance Program: Risks and Potential Reforms*. Center for Climate and Energy Solutions. Available at: <http://www.c2es.org/docUploads/flood-insurance-brief.pdf>
- Mangone, Gerard J. 2006. Marine Boundaries: States and the United States. The *International Journal of Marine and Coastal Law*. 21(2), pp. 121-171.
- Mangone, Gerard J. 2010. American Beach Law and Policies. *Ocean and Coastal Management*. 53(2010), pp. 454-467.
- McKeon, Steve. 1970. Public Access to Beaches. *Stanford Law Review*. 22(3), pp. 564-586.
- Meltz, Robert. 2009. *Substantive Takings Law: A Primer*. 12th Annual CLE Conference on Litigating Regulatory Takings and Other Legal Challenges to Land Use and Environmental Regulations. November 6-7, 2009, South Royalton, VA.
- Morton, Robert and F. Michael Speed. 1996. Evaluation of Shorelines and Legal Boundaries Controlled by Water Levels on Sandy Beaches. *Journal of Coastal Research*, 14(4).
- Morton, Robert, Tara Miller, and Laura J. Moore. 2004. *National Assessment of Shoreline Change: Part 1 Historical Shoreline Changes and Associated Coastal Land Loss Along the U.S. Gulf of Mexico*. Open File Report 2004-1043. U.S. Geological Survey. 45 p.

- Mulvaney, Timothy. 2008. Public Comment Period Comes to a Close on Controversial New Regulations Affecting Coastal Development in Texas. *Water Log* 28(2), August.
- NOAA Office of Ocean and Coastal Resource Management. 2000. "State, Territory and Commonwealth Beach Nourishment Programs: A National Overview". Technical Document No. 00-01, OCRM Program Policy Series.
- Peacock, Walter Gillis and Rahmawati Husein. 2011. *The Adoption and Implementation of Hazard Mitigation Policies and Strategies by Coastal Jurisdictions in Texas: The Planning Survey Results*. Report prepared for the Texas General Land Office and the National Oceanic and Atmospheric Administration. GLO Contract No. 10-059-000-3758.
- Park, Young Hun and Billy Edge. 2011. Beach Erosion along the Northeast Gulf Coast
- Pirkle, Neal. 1994. *Maintaining Public Access to Texas Coastal Beaches: The Past and the Future*. 46 *Baylor Law Review* 1093.
- Ratliff, Mike. 1976. Public Access to Receding Beaches. 13 *Houston Law Review* 984.
- Rice, Harvey. "Stalemate over easement kills beach renourishment project." *Houston Chronicle*, November 30, 2010. Available at: <http://www.chron.com/dispatch/story.mpl/metropolitan/7318278.html>
- Ruppert, Thomas. 2011. Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers? *Journal of Land Use and Environmental Law* 26(2).
- Sax, Joseph. 1970. The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention. *Michigan Law Review* 68(3), 471-566.
- Slade, David, R. Kerry Kehoe, and Jane Stahl. 1997. Putting the Public Trust Doctrine to Work. Coastal States Organization, 2nd Edition.
- Texas General Land Office. 2005. *Coastal Dunes: Dune Protection and Improvement Manual for the Texas Gulf Coast*. Fifth Edition. Texas General Land Office, Austin, TX.
- Texas General Land Office. 2011. *Coastal Texas 2020: A Clear Vision for the Texas Coast*. Prepared for Members of the 109th U.S. Congress and 79th Texas Legislature. Texas General Land Office, Austin, TX.

Texas General Land Office. 2011. *Coastal Erosion Planning and Response Act: A Report to the 82nd Legislature*. Texas General Land Office, Austin, TX.

Texas Water Development Board. 2012. *Water for Texas 2012: State Water Plan*.

Available at:

http://www.twdb.state.tx.us/publications/state_water_plan/2012/2012_SWP.pdf

Titus, James. 1998. Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners. *57 Maryland Law Review* 1279.

Appendix A
LIST OF CASES

- Arnold v. Mundy*, 6 N.J.L. 1 (1821)
- Arrington v. Mattox*, S.W.2d 957 (Tex. App. 1989)
- Borough of Neptune v. Borough of Avon-by-the-Sea*, 61 N.J.296 (1972)
- Brannan v. State of Texas*, 2010 Tex. App. LEXIS 799 (Tex. App. Houston 1st Dist. 2010)
- Cummins v. Travis County Water Control and Improvement Dist. No 17*, 174 S.W.2d 34 (Tex. App. 2005).
- Diversion Lake Club v. Heath*, 86 S.W.2d 441 (Tex. 1935)
- Dolan v. City of Tigard*, 512 U.S. 374 (1994)
- Hague v. Committee for Industrial Organization (CIO)*, 307 U.S. 496 (1939)
- Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892)
- Kaiser Aetna v. United States*, 444 U.S. 164 (1979)
- Leydon v. Town of Greenwich*, 254 Conn. 904 (2001)
- Lingle v. Chevron*, 544 U.S. 528 (2005)
- Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)
- Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)
- Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)
- Luttes v. State*, 324 S.W.2d. 167 (1958)
- Martin v. Lease of Waddell*, 41 U.S. 367 (1842)
- Matcha v. Mattox* (11 S.W.2d. 95 1986)

Matthews v. Bay Head Improvement Association, 95 N.J. 306 (1984)

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (1998)

McDonald v. Halvorson, 308 Or. 340 (1989)

Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979)

Nolan v. California Coastal Commission, 483 U.S. 825 (1987)

Owens v. Hockett, 151 Tex. 503 (1952)

Palazzolo v. Rhode Island, 533 U.S.606 (2001)

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)

Pruneyard Shopping Center et. al. v. Robins et. al., 447 U.S. 74 (1980)

Raleigh Avenue Beach Association v. Atlantis Beach Club, Inc., 370 N.J. Super. 171, 851 A.2d. 19 (2004)

Seaway Co. v. Attorney General, 375 S.W.2d 923 (1964)

Severance v. Patterson 566 F.3d 490 (5th Cir. 2009)

Severance v. Patterson, 54 Tex. Sup. J. 172 (2010)

Sheffield Development Co. v. City of Glenn Heights, 140 S.W.3d 660 (2004)

State ex. rel. Thornton v. Hay, 254 Or. 584 (1969)

Stevens v. City of Cannon Beach, 317 Or. 131 (1994), cert. denied, ___ US ___(1994).

Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency et al., 535 U.S. 302 (2002)

Texas River Barges 21 S.W.2d 441 (Tex 1935)

Villareal v. Harris County, 226 S.W.3d 537, 541 (Tex. App. Houston 1st Dist. 2006)

Wright v. Incline Village General Improvement District, No. 3:08-CV-00119-LRH-VPC (Nev. 2009).