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PUBLIC ACCESS TO COASTAL PUBLIC PROPERTY: JUDICIAL THEORIES AND THE TAKING ISSUE

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To perfect public rights of access in private coastal lands, courts apply the common-law doctrines of prescription, dedication, custom, and the public trust. Once these rights are perfected, the public may protect its interest in private lands under the doctrines of nuisance and purpresture, the public trust, and migrating easements, as well as other remedies normally available to private landowners. The scope of these public rights has important implications for fifth amendment takings challenges: regulations designed to protect preexisting public rights in private property will not constitute a taking.

Professor Finnell traces the evolution of these common-law doctrines for perfecting public access rights and identifies the factors that courts consider in analyzing fifth amendment takings challenges. He then evaluates the effectiveness of the different doctrines in procuring and protecting public rights in coastal lands. He concludes that the public trust doctrine should become the principal theoretical foundation for assuring reasonable public access to public property and for protecting public rights already established under other common-law doctrines, and should be a principal factor for courts to weigh when applying the multifactored fifth amendment takings analysis. Finally, Professor Finnell argues for a presumption of constitutionality and a deferential level of judicial review.

I. INTRODUCTION

Private property rights often conflict with public property rights where the land meets the sea. To protect public interests in tidal and submerged lands, courts apply the public trust doctrine, the federal navigational servitude, and a host of other judicial theories. The public trust doctrine provides that tidal and submerged lands seaward of the mean high tide line are held in trust for the public for navigation, fishing, and other public uses;[1] the federal navigational servitude protects the public's important interest in the flow of interstate waters by requiring courts to consider this interest in determining whether a fifth

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1. Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 798-99 (1988); *see infra* notes 112-31 and accompanying text (discussing the public trust doctrine).

amendment taking has occurred.[2]

The Supreme Court has handed down several important public trust and navigational servitude decisions during the last decade. The 1988 *Phillips Petroleum Co. v. Mississippi*[3] decision reaffirms nineteenth-century Supreme Court cases that gave expansive reach to the public trust doctrine.[4] As the *Phillips* Court recognized, upon admission to the Union each state acquired title to "all lands under waters subject to the ebb and flow of the tide,"[5] and "the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[6] The public's equitable interest can be terminated, however, as the 1984 case *Summa Corp. v. California ex rel. State Lands Commission*[7] illustrates. The *Summa* Court held that although California's Ballona wetlands were subject to the public trust doctrine when California was admitted to the Union, the State's failure to present its claim to a public trust easement in a federal patent proceeding barred subsequent enforcement of the public's equitable interest in the wetlands.[8]

The Supreme Court's 1979 decision in *Kaiser Aetna v. United States*[9] restricted the reach of the federal navigational servitude by holding that the servitude applies to "interstate waters that in their natural condition are in fact capable of supporting public navigation."[10] Waters made navigable because of private investment are not subject to the federal navigational servitude. *Kaiser Aetna* rejected the contention that the navigational servitude was coterminous with federal regulatory power; the servitude was restricted to naturally navigable waters.[11] *Phillips Petroleum,* in contrast, rejected the contention that the public trust doctrine applies only to physically navigable waters; it reaffirmed states' rights to define the public trust doctrine most expansively.[12] The combination of *Kaiser Aetna*'s restrictive view of the federal navigational servitude and *Phillips Petroleum*'s expansive view of the public trust doctrine leaves states with maximum power to protect the public's interest under the public trust doctrine.[13]

This Article analyzes the judicial theories for establishing and preserving public rights and assesses the implications of Supreme Court takings jurisprudence on public access, particularly in light of the public trust doctrine and fed-

2. *See* Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (navigational servitude did not apply, and government's attempt to create public right of access amounted to a taking); *infra* notes 300-31 and accompanying text (discussing navigational servitude).

3. 108 S. Ct. 791 (1988).

4. *E.g.*, Shively v. Bowlby, 152 U.S. 1 (1894); Knight v. United States Land Ass'n, 142 U.S. 161 (1891).

5. *Phillips Petroleum*, 108 S. Ct. at 795.

6. *Id.* at 794 (citing Shively v. Bowlby, 152 U.S. 1, 26 (1894)).

7. 466 U.S. 198 (1984). For additional ways in which the public's equitable rights may be terminated, see *infra* note 113.

8. *Summa Corp.*, 466 U.S. at 209.

9. 444 U.S. 164 (1979); *see infra* notes 322-37 and accompanying text.

10. *Kaiser Aetna*, 444 U.S. at 175.

11. *Id.* at 171, 175.

12. *Phillips Petroleum*, 108 S. Ct. at 795-98.

13. *See infra* notes 371-88 and accompanying text.

eral navigational servitude. The public rights analyzed in this Article have important implications for fifth amendment takings challenges:[14] private title to coastal land may already be burdened by preexisting public rights. If so, a regulation designed to protect the public's preexisting rights will not constitute a taking because it does not interfere with legitimate private expectations. The Article argues for wide judicial recognition of public rights, and suggests ways for courts to promote public access to public property.

Protecting and enhancing public access to public lands can be difficult. Governments can acquire public accessways through negotiated purchase or eminent domain.[15] They can also require dedication of accessways, without compensation, as a condition to subdivision or other coastal development permission.[16] Required dedications, though, require careful consideration of the taking issue, particularly in light of the Supreme Court's 1987 decision in *Nollan v. California Coastal Commission*.[17]

The Court in *Nollan* held that the California Coastal Commission's requirement that the Nollans dedicate a lateral accessway prior to getting a coastal development permit constituted a taking. The opinion, if narrowly interpreted, ought not deter coastal governments and agencies from promoting public access to public property through reasonable permit conditions, required dedications, and fees in lieu thereof. It certainly should not undermine state open beaches laws, such as those in Texas,[18] Oregon,[19] and the Virgin Islands,[20] which protect public property already acquired under various common-law doctrines.

Nollan's impact is strongly affected, though, by the Supreme Court's 1987 decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[21] *First English* held that governments are liable for compensation from the time of the taking when regulations amount to a taking.[22] In combination, *Nollan* and *First English* pose a significant threat to coastal public property. Government regulators may be so chilled by the prospect of *First English* tempo-

14. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

15. *Cf.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 243-45 (1984) (liberally construing "public use" requirement of fifth amendment).

16. *See generally* Nollan v. California Coastal Commission, 107 S. Ct. 3141, 3149-50 (1987) (extensive citations of required dedication cases). *But cf. id.* at 3141-50 (imposing the strict requirement that a governmental regulation must substantially advance a legitimate state interest).

17. 107 S. Ct. 3141, 3150 (1987) (coastal commission could not make a building permit contingent on granting beach access without compensating the landowner). *See generally* Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 376-97 (1988) (discussing California dedication law before *Nollan* and the implications of *Nollan*); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 352-56 (1988) (discussing *Nollan* in relation to other Supreme Court takings decisions); *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 240-50 (1987) (reviewing takings jurisprudence, including *Nollan*) [hereinafter *Supreme Court, 1986 Term*].

18. TEX. NAT. RES. CODE ANN. §§ 61.011-.025 (Vernon 1978 & Supp. 1988).

19. OR. REV. STAT. § 390.610 (1987).

20. Open Shorelines Act, V.I. CODE ANN. tit. 12, §§ 401-03 (1982).

21. 107 S. Ct. 2378 (1987); *see* Falik & Shimko, *supra* note 17, at 359-76; *The Supreme Court, 1986 Term, supra* note 17, at 240-50.

22. *First English*, 107 S. Ct. at 2388-89.

rary damages that, in their caution to guard the public purse, they may be less than diligent in protecting public lands.

One of the Supreme Court's 1987 takings cases provides a note of optimism for government regulators. *Keystone Bituminous Coal Association v. DeBenedictis*[23] strongly suggests that the Court will uphold stringent regulations against a takings challenge if the purpose of the regulation is to prevent public harm. *Keystone* also reaffirms recent Supreme Court cases which hold that the quantum of the landowner's property to which the diminution-in-value portion of the takings analysis applies may be greater than the discrete parcel or interest that is directly burdened.[24] *Keystone* does not offer direct support for public access cases, and the public harm necessary to come within the "nuisance exception to the taking guarantee"[25] is not always immediately apparent. Public nuisance and purpresture law,[26] however, may justify application of *Keystone*'s harm-prevention policy, as may an innovative application of the public trust doctrine.[27] Further, *Keystone* is significant for public access law since a reasonable accessway requirement has a much better chance of passing constitutional muster, because the quantum of property from which the diminution of value is computed will almost always be considerably greater than the discrete area in which the public's easement is located.

The public can resort to several theories to support claims to use privately owned "dry sands"[28] adjacent to the public's lands. Chief among these are dedication, prescription, custom, and the public trust doctrine, which are reviewed in Part II of this Article. Public nuisance, purpresture, public trust, and other remedies for protecting public rights are reviewed in Part III.

Even if the public has acquired rights under one of the available theories, government officials may be indifferent to, or not know of, facts that could prove the public's interest. Officials may be reluctant to assert the public's interest or

23. 107 S. Ct. 1232, 1245 (1987) (Court noted state use of police power to "prevent impending danger" does not require compensation).

24. *E.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978).

25. *Id.* at 145 (Rehnquist, J., dissenting) (the "nuisance exception . . . is not coterminous with the police power itself" and in Justice Rehnquist's view, New York's landmark preservation law did not come within the nuisance exception).

26. *See infra* notes 150-83 and accompanying text.

27. *See infra* notes 112-31 and accompanying text.

28. In State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), for example, the dry-sand area was defined as the land lying between the line of mean high tide and the visible line of vegetation. *Id.* at 586, 462 P.2d at 672-73. Since this area is affected by some tidal action, "dry" is something of a misnomer, especially when storms cause unusually high tides. *See infra* notes 252-62 and accompanying text. *See generally* D. BROWER, ACCESS TO THE NATION'S BEACHES: LEGAL AND PLANNING PERSPECTIVES (1978) (discussing public use legal theories and planning strategies); D. DUCSIK, SHORELINE FOR THE PUBLIC (1974) (discussing social and economic dimensions and legal aspects); NATIONAL ASS'N OF ATTORNEYS GENERAL, LEGAL ISSUES IN BEACH ACCESS (1977) (extensive review of various states' access laws); Wilson, *Private Property and the Public Trust: A Theory for Preserving the Coastal Zone*, 4 UCLA J. ENVTL. L. & POL'Y 57 (1984) (arguing for the public trust doctrine as principal base for public access); Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 UCLA L. REV. 1049, 1069-86 (1981) (urging public trust doctrine as proper doctrinal foundation for beach exactions); Comment, *Public Access to Receding Beaches*, 13 HOUS. L. REV. 984 (1976) (discussing Texas law and making case for "rolling easement"); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970) (comparing public use doctrines and easements through regulation).

to accept management responsibility. *Phillips Petroleum* provides some protection from lax public management by reaffirming the principle that equitable doctrines such as laches or equitable estoppel will rarely bar the public's property rights.[29]

II. COMMON-LAW DOCTRINES FOR PERFECTING PUBLIC RIGHTS IN PRIVATE COASTAL LANDS

A. *Prescription*

The elements of a prescriptive easement are similar to those required to acquire title by adverse possession. The claimant must prove actual, continuous, uninterrupted, adverse use, under claim of right, for the prescribed period.[30]

When argued in a supportive jurisdiction, the public prescription theory

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29. *Phillips Petroleum*, 108 S. Ct. at 799 (state law controls, and Supreme Court refused to apply equitable considerations when Mississippi law ruled them inapplicable).

30. *E.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 76 (Fla. 1974) (citing Downing v. Bird, 100 So. 2d 57, 64 (Fla. 1958)); Hunt Land Holding Co. v. Schramm, 121 So. 2d 697, 700 (Fla. Dist. Ct. App. 1960); Ivons-Nispel, Inc. v. Lowe, 347 Mass. 760, 761, 200 N.E.2d 282, 283 (1964).

Although prescription continues to be an important theory for establishing public rights in dry beaches, it has several conceptual and practical shortcomings. The "lost grant" theory, although increasingly less important, still causes confusion. *See* State *ex rel.* Haman v. Fox, 100 Idaho 140, 145, 594 P.2d 1093, 1098 (1979) (claim of right and long possession yield presumption of a grant to claimant which has been lost over time). *See generally* C. BERGER, LAND OWNERSHIP AND USE 524-26 (3d ed. 1983) (discussing history of fiction of lost grant, showing the sharp differences between that theory and modern prescription theory).

Permissive public use defeats prescription, and this is easily proved in some courts because of a presumption of permissive use of beach accessways. *See* Spiegle v. Borough of Beach Haven, 116 N.J. Super. 148, 158, 281 A.2d 377, 382 (1971) ("[W]here land is in a general state of nature and left unimproved by its owner, sporadic or even customary use of such property by a mere user is presumably permissive if there has been no actual deprivation of any beneficial use to the owner."); Dickinson v. Pake, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974) ("[W]e moved from the majority view that the user is presumed to be permissive; and the permissive presumption rule has been followed in this jurisdiction ever since."). In part, because of North Carolina's permissive presumption rule, one commentator concluded that because "[e]stablishing an easement by prescription . . . is burdensome, uncertain, and not judicially favored in North Carolina . . . this Comment does not recommend it as a judicial tool for establishing beach access in North Carolina." Comment, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C.L. REV. 159, 168 (1985).

Some jurisdictions refuse to allow the public, as contrasted with an individual claimant, to perfect an easement by prescription. *See, e.g.*, *Ivons-Nispel*, 347 Mass. at 761-62, 200 N.E.2d at 283 (holding that one individual met all the state's requirements for a prescriptive easement, but " 'persons of the local community' and the 'general public' are too broad a group to acquire by prescription an easement to use private beaches for bathing and for recreational purposes"). The Supreme Court of Idaho reached a similar conclusion in *Haman*, 100 Idaho at 145, 594 P.2d at 1098. An action was brought to perfect the public's rights in privately owned lake front property. The court first upheld the lower court's finding that the public use was permissive and thus did not meet the requirement of adverse use. *Id.* at 144, 594 P.2d at 1097. In order to avoid reaching another contention of the prescriptive claimants, the court held, " 'people of the State of Idaho' as distinguished from specific individuals cannot acquire prescriptive rights in and to private property absent some express statutory authority." *Id.* at 146, 594 P.2d at 1099. The court noted that it had "long ago abandoned the fiction of the lost grant," a theory which underlay some courts' refusal to allow prescriptive rights in the general public. *Id.* at 145, 594 P.2d at 1098. Nevertheless, the court refused to recognize the public's rights.

> [T]he rights contended for here are in the nature of an easement in gross. Being a personal right, the rule is that one individual's prescriptive use cannot inure to the benefit of anyone else. Personal prescriptive rights are confined to the actual adverse user and are limited to the use exercised during the prescriptive period.

can be quite effective. *Moody v. White*,[31] a suit to protect the public's rights under the Texas Open Beaches Act, is illustrative. The landowner had constructed a motel on land that was alleged to be public property acquired by easement, dedication, and custom.[32] Extensive testimony was taken from fishermen, ferryboat captains, law enforcement officials, long-time residents, and others. The court concluded that:

> [t]he public's use of the beach for many years was so open, visible and notorious that the appellants must have recognized the people's right to the beach. For many years in excess of the 10 year statutory period, the general public used the beach as their own: hunting, fishing, swimming, boating, sunning, and effecting many more uses.[33]

Although the court noted that in some jurisdictions the unorganized public is incapable of acquiring land by prescription, *Moody* concluded that in Texas the general public "may acquire beaches by prescription if it can be established that the public has met all the requirements for adverse possession."[34] The court therefore upheld the lower court injunction requiring removal of the motel.[35]

Permissive use can defeat an alleged prescriptive easement in the public, as *City of Daytona Beach v. Tona-Rama, Inc.*[36] illustrates. Defendant landowner had owned waterfront property in Daytona Beach for more than sixty-five years. He received a city license to construct a sky tower on the dry sand portion of the beach above the mean high tide line. Plaintiff, a nearby observation tower operator, protested the issuance of the permit, alleging that the public had acquired an exclusive prescriptive right to the use of defendant's land. The court denied the easement, noting that "[i]f the use of an alleged easement is not exclusive and not inconsistent with the rights of the owner of the land to its use and enjoyment, it [is] presumed that such use is permissive rather than adverse."[37] Then, tracing the historical uses of the area around the sky tower, the court found that "[t]he use of the property by the public was not against, but was in furtherance of, the interest of the defendant owner."[38]

Id. at 146, 594 P.2d at 1099.

Even when courts recognize the theory, claimants may need to bring a separate lawsuit for each parcel in which they assert an easement. *Cf.* State *ex rel.* Thornton v. Hay, 254 Or. 584, 594, 462 P.2d 671, 676-77 (1969) (explaining why prescription's need for individual lawsuits makes it less desirable than custom).

31. 593 S.W.2d 372 (Tex. Civ. App. 1979).
32. *Id.* at 374.
33. *Id.* at 377-78.
34. *Id.* at 378.
35. *Id.* at 380.
36. 294 So. 2d 73 (Fla. 1974).
37. *Id.* at 76.
38. *Id.* at 77. In dictum the court explained that even if it had found an easement in the public,

> the defendant-owner could make any use of the land consistent with, or not calculated to interfere with, the exercise of the easement by the public .... The erection of the sky tower was consistent with the recreational use of the land by the public and could not interfere with the exercise of any easement the public may have acquired by prescription, if such were the case.

Id. (citation omitted).

B. *Dedication—Express and Implied*

A landowner can expressly dedicate lands to public use, and the transfer to the public is complete upon acceptance by the public.[39] Implied dedications are also possible.[40] If a landowner's acts and conduct manifest an intent to dedicate land to the public, acts by the public in reliance thereon may constitute acceptance and complete the transfer of public rights.[41] Determining whether there was an intent to dedicate is the most troublesome problem in dedication law, as the following cases illustrate.

Seaway Co. v. Attorney General[42] involved implied dedication. Texas' open beaches law creates a prima facie presumption that the public has acquired an interest in the portion of the beach lying between the low high tide line and the seaward side of the vegetation line by prescription, implied dedication, or custom and cannot be excluded from using the area for ingress and egress to the sea.[43] The Act authorizes the Attorney General of Texas and certain other officials to enforce its provisions.[44]

Extensive evidence in *Seaway* proved that the public had regularly used the West Galveston beach in question for at least as long as anyone could remember, and that no one had ever considered it necessary to ask for permission to use the beach.[45] Only for a short time near the beginning of the century had any of the beach been fenced; even then, the gates were easily opened and people continued to traverse the beach. Galveston County had routinely maintained the beach, spending $82,000 from 1929 to the date of trial.

The Attorney General and others sued to force removal of barriers that reached from the line of vegetation seaward beyond the mean high tide line and to enjoin future erections seaward of the vegetation line.[46] The court held that the public had earlier perfected easements by implied dedication and prescription to "the area seaward from the seaward side of the line of vegetation to the line of mean high tide."[47] *Seaway*'s requirements for implied dedication were summarized in *Villa Nova Resort, Inc. v. State*:[48]

> (1) the landowner induced the belief that he intended to dedicate the area in question to public use; (2) the landowner was competent to do so, i.e., had fee simple title; (3) the public relied on the acts of the

39. *See* Moody v. White, 593 S.W.2d 372, 378 (Tex. Civ. App. 1979) ("Generally an express dedication is accomplished by deed or a written document"; acceptance problems may arise when it does not.).

40. *See id.*; Villa Nova Resort, Inc. v. State, 711 S.W.2d 120, 128 (Tex. Civ. App. 1986) ("Intent to dedicate may be implied by the grantor's conduct, open acts, or the surrounding circumstances.").

41. *See Villa Nova*, 711 S.W.2d at 128. *But see* Comment, *supra* note 30, at 171 (concluding on the authority of North Carolina cases involving streets and highways that "public user alone" is probably not sufficient evidence of acceptance).

42. 375 S.W.2d 923 (Tex. Civ. App. 1964) (writ ref'd n.r.e.).

43. *See* TEX. NAT. RES. CODE ANN. §§ 61.011-.025 (Vernon 1978 & Supp. 1988).

44. *Id.* § 61.018.

45. 375 S.W.2d at 931-35.

46. *Id.* at 926.

47. *Id.* at 935.

48. 711 S.W.2d 120 (Tex. Civ. App. 1986).

> landowner and will be served by the dedication; and, (4) there was an offer and acceptance of the dedication.[49]

The *Seaway* court emphasized that, although the landowner generally manifests an intent to transfer to public use in an implied dedication, the requisite intent need not be express.[50]

The California Supreme Court enunciated its theories of implied dedication in *Gion v. City of Santa Cruz* and *Dietz v. King*.[51] Acknowledging its earlier recognition of implied dedication in cases involving roadways, the *Gion* court admitted that it had "in the past been less receptive to arguments of implied dedication when open beach lands were involved" because of the undefined boundaries of those lands.[52] The court then noted that "beach areas are now as well-defined as roadways,"[53] and, relying on *Seaway* and other cases, concluded "that there was an implied dedication of property rights in both cases."[54]

In California, a common-law dedication of property to the public can be proved "either by showing acquiescence of the owner in use of the land under circumstances that negate the idea that the use is under a license or by establishing open and continuous use by the public for the prescriptive period."[55] The claimant must prove the owner's actual consent to the dedication if asserting dedication by acquiescence for a period of less than five years.[56] The owner's intent in this case "is the crucial factor."[57] If the claimant seeks to prove dedication by adverse use, however,

> inquiry shifts from the intent and activities of the owner to those of the public. The question then is whether the public has used the land "for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one."[58]

The *Gion* court rejected the landowner's argument that extended public use should be presumed to be under a license from the landowner.[59] Instead, the

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49. *Id.* at 128. *Seaway*'s theoretical rationale for implied dedication sounds both in gift law (offer to dedicate and acceptance) and equitable estoppel: "where others act on the faith of such dedication, the landowner will be estopped to deny the dedication, or make any future use of the property inconsistent with any purpose for which the land was dedicated." *Seaway*, 375 S.W.2d at 936.

50. *Seaway*, 375 S.W.2d at 936 ("The intent on the part of the owner, however, is not a secret intent, but is that expressed by visible conduct and open acts of the owner.").

51. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (state supreme court consolidated the *Dietz* and *Gion* cases).

52. *Id.* at 43, 465 P.2d at 59, 84 Cal. Rptr. at 171.

53. *Id.*

54. *Id.*

55. *Id.* at 38, 465 P.2d at 55, 84 Cal. Rptr. at 167.

56. *Id.*

57. *Id.*

58. *Id.* at 38, 465 P.2d at 56, 84 Cal. Rptr. at 168 (quoting Hare v. Craig, 206 Cal. 753, 757, 276 P. 336, 338 (1929)). The critical question is then "whether the public has engaged in 'long-continued adverse use' of the land sufficient to raise the 'conclusive and undisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of a mere license.'" *Id.*

59. *Id.* at 41, 465 P.2d at 57, 84 Cal. Rptr. at 169.

> For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years, therefore, he must either affirmatively prove that he has granted

owner must prove that he has "attempted to halt public use in [a] significant way"; otherwise, "it will be held as a matter of law that he intended to dedicate the property or an easement therein to the public."[60]

Although the California "dedication by adverse use" test resembles prescription law, the *Gion* court cautioned that

> analogies from the law of adverse possession and easement by prescriptive rights can be misleading .... What must be shown is that persons used the property believing the public had a right to such use. This public use may not be "adverse" to the interests of the owner in the sense that the word is used in adverse possession cases. If a trial court finds that the public has used land without objection or interference for more than five years, it need not make a separate finding of "adversity" to support a decision of implied dedication.[61]

Parties "need only produce evidence that persons have used the land as they would have used public land."[62] Citing *Seaway* and other cases, the *Gion* court noted the importance of evidence such as the governmental agency's maintenance of the land and various groups' use of the land.[63] The distinction between "dedication by adverse use" and prescription may be a distinction without a difference, however, if the California *Gion* test in fact still requires a showing of landowner's intent, as arguably it does. If so, the public's activities simply provide additional objective evidence of the landowner's intention.

Maryland's implied dedication law is less likely to promote public access

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> the public a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use.

Id.

60. *Id.* at 41, 465 P.2d 58, 84 Cal. Rptr. 170. The *Gion* result was facilitated by California's strong constitutional and statutory policies encouraging public use of shoreline recreational areas. *Id.* at 42, 465 P.2d 58, 84 Cal. Rptr. 170. The court was strongly influenced by the Texas *Seaway* case and California's own earlier precedents, however, and probably would have reached the same result even in the absence of these nonjudicial sources. County of Los Angeles v. Berk, 26 Cal. 3d 201, 605 P.2d 381, 161 Cal. Rptr. 742, *cert. denied*, 449 U.S. 836 (1980), supports this conclusion. Rejecting the contention that *Gion* was "revolutionary" and should not be given retroactive application, the *Berk* court noted that "[n]ot only were the principles upon which it relied firmly imbedded in prior decisional law, but they had previously been applied on at least one occasion to property of the general character here involved." *Id.* at 215, 605 P.2d at 390, 161 Cal. Rptr. at 751.

Berk raised questions of the applicability of implied dedication law to parties other than the record owner, such as the beneficiaries of a deed of trust. The court concluded that the

> public user ... must be held to impart knowledge of its occurrence to the world at large, and that when it has continued for the requisite period of time a dedication to the public will be implied in law which binds not only record owners but all persons having interests in the subject property ....

Id. at 220, 605 P.2d at 393, 161 Cal. Rptr. at 754. Recognizing that the dedicatory period may not have run, the court added that notice "should operate to burden the title received by the purchaser with all accumulated public interests, even if they not be ripened into an implied dedication at the time he receives title." *Id. Berk* also reaffirmed that estoppel normally will not defeat the state's public policy in favor of allowing public access to shoreline areas. *Id.* at 222, 605 P.2d at 395, 161 Cal. Rptr. at 756.

61. *Gion*, 2 Cal. 3d at 39, 465 P.2d at 56, 84 Cal. Rptr. at 168.

62. *Id.*

63. *Id.* The court explained that seasonal fluctuations of use would not negate adverse use so long as people used the land " 'when they wished to do so without asking permission and without protest from the land owners.' " *Id.* at 40, 465 P.2d at 57, 84 Cal. Rptr. at 169 (quoting Seaway Co. v. Attorney General, 375 S.W.2d 923, 936 (Tex. Civ. App. 1964)).

rights than California's. In *Department of Natural Resources v. Mayor of Ocean City*[64] the Maryland Supreme Court required "clear and unequivocal manifestation" of the landowner's intent.[65] The court would not infer an intent to dedicate from long public use; such an implication "without regard to any intent to dedicate on the part of the landowner is but a form of prescription, and as such, all of the requisites for prescriptive rights must be met."[66] The court concluded that the facts did not support a public easement by prescription or dedication.

Florida courts hold that *"the intention of the owner to set apart the lands for the use of the public is the foundation and essence of every dedication."*[67] This requirement established by the Florida Supreme Court in *City of Palmetto v. Katsch*[68] was reiterated by the Florida Court of Appeals in *City of Hollywood v. Zinkil*.[69] A landowner may manifest an intention to dedicate by conduct that includes "acquiescence of the owner in the use of his property by the public for public purposes."[70] Under the standard for implied dedication espoused in *Zinkil*, a presumption of landowner's intention to dedicate should arise upon a showing of particular facts. This presumption is apparently rebuttable, unlike the presumption that arises in a *Gion* "adverse dedication" case.[71]

New York's requirements for an express dedication are set forth in *Gewirtz v. City of Long Beach*.[72] The City of Long Beach had unrestricted title to ocean front property which it expressly dedicated to public use as a park in 1936.[73] Thereafter, the beach was regularly used by the public and maintained by the city. In 1970, after the city amended its beach ordinance so that the beach could be used only "for the residents of the City of Long Beach and their invited guests,"[74] nonresidents sued, alleging that the city had already made an irrevocable dedication to the general public and could not thereafter exclude nonresidents.[75]

The New York court applied a simple two-element test, asking whether the city landowner intended to dedicate and whether the public had accepted the

64. 274 Md. 1, 332 A.2d 630 (1975).

65. *Id.* at 8, 332 A.2d at 635. The dissenting judge in *Ocean City* pointed out that the Texas court in *Seaway*, in "essentially similar circumstances," held that the public had acquired an easement by implied dedication. 274 Md. at 22, 332 A.2d at 642 (Eldridge, J., dissenting). *Seaway*'s theory of implied dedication contains a strong element of estoppel: "It is sufficient if the record shows unequivocal acts or declarations of the land owner, dedicating the same to public use, and where others act on the faith of such declarations, the land owner will be estopped to deny the dedication . . . ." *Seaway*, 375 S.W.2d at 936. The dissenter in *Ocean City* argued that the facts of the case similarly raised an estoppel. *Ocean City*, 274 Md. at 22, 332 A.2d at 642 (Eldridge, J., dissenting).

66. *Ocean City*, 279 Md. at 8, 332 A.2d at 635.

67. City of Palmetto v. Katsch, 86 Fla. 506, 509-10, 98 So. 352, 353 (1923).

68. *Id.*

69. 283 So. 2d 581, 583 (Fla. Dist. Ct. App. 1973).

70. *Id.*

71. *Gion*, 2 Cal. 3d at 38, 465 P.2d at 56, 84 Cal. Rptr. at 168.

72. 69 Misc. 2d 763, 330 N.Y.S.2d 495 (N.Y. Sup. Ct. 1972), *aff'd mem.* 45 A.D.2d 841, 358 N.Y.S.2d 957 (N.Y. App. Div. 1974).

73. *Id.* at 764, 330 N.Y.S.2d at 499.

74. *Id.* (quoting City of Long Beach, N.Y., Charter § 98 (1922), *amended by* Local Law No. 9 (1970), *reprinted in* 1970 LOCAL LAWS OF CITIES, COUNTIES, TOWNS, AND VILLAGES 131, 132).

75. *Id.* at 767, 330 N.Y.S.2d at 502.

dedication.[76] The court believed that the intent to dedicate was unambiguous: the city had expressly dedicated the beach and boardwalk to the public.[77] The issue of acceptance received deeper analysis. Although the court ordinarily required acceptance, and indeed had required acceptance when the state dedicated land to a city for park purposes, a formal dedication of a street by the state or a municipality did not require acceptance.[78] Although the court held that acceptance probably was not required in the case, it proceeded to find implied acceptance "from the very act of dedication by the municipality."[79] The city played a dual role in the dedication process—the city's intent to dedicate was clear, and this clear intent brought about implied acceptance.[80] The court further found acceptance "in evidence of actual and continued public use."[81]

The completed dedication was irrevocable and, having dedicated the land to use as a public park, the city thereafter held the beach "subject to a public trust for the benefit of the public at large."[82] The beach therefore could "not be diverted to other uses or sold without express legislative authority."[83] The court concluded that a municipality may not totally exclude nonresidents from a public park, although minor differences in entrance fees might be justified because of direct costs borne by the taxpayers of the particular municipality.[84]

The *Gewirtz* public trust analysis deserves close attention. The public trust doctrine can provide a unifying theory for protecting the public's rights because, regardless of the theory under which the public acquired its interest, the public trust doctrine applies thereafter. This point will be elaborated later in this Article.[85]

C. *Custom*

The best known American custom case is *State ex rel. Thornton v. Hay*.[86] This 1969 Oregon Supreme Court decision considered whether the State had power to prevent landowners from enclosing the dry-sand area of their coastal land.[87] The court did not consider whether the enclosure violated Oregon zon-

76. *Id.* at 770, 330 N.Y.S.2d at 504.

77. *Id.* at 770, 330 N.Y.S.2d at 504-05. This express dedication was contained in a municipal ordinance. *Id.* at 770, 330 N.Y.S.2d at 505.

78. *Id.* at 771-72, 330 N.Y.S.2d at 506.

79. *Id.* at 771, 330 N.Y.S.2d at 505.

80. "When it thereafter adopted the ordinance mandated by the local law and proceeded to supervise, maintain and improve the ocean front facilities, which it had itself declared to be a public park, the city can be regarded as having accepted the facilities on behalf of the public." *Id.* at 771, 330 N.Y.S.2d at 506.

81. *Id.*

82. *Id.* at 775, 330 N.Y.S.2d at 509.

83. *Id.* at 777, 330 N.Y.S.2d at 511.

84. *Id.* at 779, 330 N.Y.S.2d at 513. In stating this proposition, the court gave careful consideration to the 1972 New Jersey Supreme Court decision in *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972). *Gewirtz*, 69 Misc. 2d at 778, 330 N.Y.S.2d at 512. *See infra* notes 116-18 and accompanying text (discussing *Avon-By-The-Sea*).

85. *See infra* notes 184-89 and accompanying text.

86. 254 Or. 584, 462 P.2d 671 (1969).

87. *Id.* at 585, 462 P.2d at 672.

ing laws, but considered instead whether the public may have acquired an interest in the land under alternative common-law theories.

The court first asked whether the public had acquired an interest under the law of implied dedication. It noted that since Oregonians had historically assumed that private land boundaries did not extend beyond the high water mark (vegetation line), the critical element of implied dedication—landowner's intent to dedicate—might be difficult to establish.[88]

The court next reviewed prescriptive easement law and concluded that "regardless of the generalizations that may apply elsewhere, [Oregon law] does not preclude the creation of prescriptive easements in beach land for public recreational use."[89] The court nevertheless saw a significant shortcoming in the law of prescription: "Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation."[90]

Thus bypassing implied dedication and prescription, the court chose the English doctrine of custom as the superior doctrinal base for protecting the public's interests in Oregon's dry-sand beaches. The opinion cited two definitions of custom. The first, as stated in *Bouvier's Law Dictionary*, required " 'such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates.' "[91] The second definition, as stated in *Blackstone's Commentaries*, required that the usage be (1) ancient; (2) exercised without interruption; (3) peaceable and free from dispute; (4) reasonable; (5) certain; (6) obligatory; and (7) not repugnant, or inconsistent, with other customs or with other law.[92] The public's use of Oregon's dry-sand beaches met all the requirements.[93]

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88. *Id.* at 592-93, 462 P.2d at 675.

89. *Id.* at 594, 462 P.2d at 676.

90. *Id.* at 595, 462 P.2d at 676.

91. *Id.* at 595, 462 P.2d at 677.

92. *Id.* at 595-97, 462 P.2d at 677.

93. *Id.* The court answered several objections to custom. To the contention that custom was "unprecedented" in Oregon, the court noted, "[W]e are not the first state to recognize custom as a source of law." *Id.* at 597, 462 P.2d at 677. To the contention that our political history is too short to apply custom, the court reminded that if "antiquity were the sole test of validity of a custom, Oregonians could satisfy that requirement by recalling that the European settlers were not the first people to use the dry-sand area as public land." *Id.* at 598, 462 P.2d at 678. To the contention that landowners had consented to the public use, the court repeated that the decision did not rest on the law of prescription and that "elements of consent are . . . wholly consistent with the recognition of public rights derived from custom." *Id.* at 599, 462 P.2d at 678.

Courts in this country have not uniformly accepted the doctrine of custom; however, the conclusion in Comment, *supra* note 30, at 174, that "[m]ost American jurisdictions have refused to recognize customary rights in beach property" is debatable, particularly when the authority cited is scrutinized. The decisions cited, Smith v. Bruce, 241 Ga. 133, 146, 244 S.E.2d 559, 569 (1978) (stating, in dictum, that the theory of custom has never been recognized in Georgia and will not be adopted as the law of this state in this case), and Gillies v. Orienta Beach Club, 159 Misc. 675, 289 N.Y.S. 733 (N.Y. Sup. Ct. 1935), *aff'd*, 248 A.D. 623, 623, 288 N.Y.S. 136, 137 (N.Y. App. Div. 1936) (concluding that "the right of custom . . . does not exist in the state of New York, and that, even if it did, the right claimed by the plaintiffs . . . is beyond the scope of the right of custom recognized by the English law"), arguably do not foreclose the possibility that the supreme courts of the respective states might, when carefully considering the issue of custom, yet apply the doctrine. This author agrees, however, that Department of Natural Resources v. Mayor of Ocean City, 274 Md. 1, 12-14, 332 A.2d 630, 637-38 (1975), is strong authority that the doctrine of custom will not

Thornton's custom rationale has influenced other courts.[94] In *United States v. St. Thomas Beach Resorts, Inc.*[95] a federal district court considered whether defendant's fences that ran from below mean low tide mark to fifty feet landward of the mean low tide mark obstructed the Virgin Islands shoreline in violation of the Virgin Islands Open Shorelines Act.[96] The court concluded that below the mean high tide line, defendant's fences constituted trespasses against the United States.[97] Landward of the low tide mark for fifty feet (or to the seaward boundary of natural vegetation, whichever is the shortest distance), defendant's fences violated the territory's Open Shorelines Act.[98]

St. Thomas Beach Resorts rejected the contention that the Open Shorelines Act accomplished an unconstitutional taking, holding instead that the public had a paramount right to use the shorelands under "firmly, well settled, long standing custom."[99] The court cited *Thornton v. Hay* and concluded that the Blackstonian requirements for custom were met.[100] The public's use of the beach at Bolongo Bay before defendant erected its fences

> (a) existed over a long period of time; (b) was free from dispute and was peaceable; (c) was exercised without interruption by anyone possessing a paramount right; (d) was exercised in a manner appropriate to the beach; (e) was exercised within a definable area; (f) was similar to that at other beaches in the jurisdiction; [and] (g) was not repugnant to other laws.[101]

The Florida Supreme Court has also considered the doctrine of custom. While the court's discussion of custom was not necessary to its decision in *City of Daytona Beach v. Tona-Rama, Inc.*,[102] the opinion suggests that Florida courts will apply the doctrine of custom. The *Tona-Rama* court noted that a "right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself."[103] The court added that the

> general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without

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be applied in Maryland. This author would not agree, however, with the commentator's conclusion that "given the doctrine's rejection elsewhere, North Carolina courts are unlikely to accept it." Comment, *supra* note 30, at 175. This author is more optimistic that custom, as well as the public trust doctrine, could (and indeed should) emerge as viable theories for guaranteeing public access to North Carolina's beaches.

94. A recent Texas case, Matcha v. Mattox, 711 S.W.2d 95, 98-99 (Tex. Civ. App. 1986) (writ ref'd n.r.e.), *cert. denied*, 107 S. Ct. 1911 (1987), embraced the doctrine of custom, and indicated that earlier Texas cases had approved the doctrine. *Matcha*'s chief influence, however, will most likely be its analysis of "migrating property rights." *Id.* at 99 (discussed *infra* at notes 190-206).

95. 386 F. Supp. 769 (D.V.I. 1974), *aff'd mem.*, 529 F.2d 513 (3d Cir. 1975).

96. *Id.* at 770.

97. *Id.* at 771.

98. *Id.* at 772.

99. *Id.* The court explained that the act merely codified the customary right.

100. *Id.* at 773.

101. *Id.* (citing 1 BLACKSTONE, COMMENTARIES *75-78).

102. 294 So. 2d 73 (Fla. 1974); *see supra* notes 36-38 and accompanying text.

103. *Tona-Rama, Inc.*, 294 So. 2d at 78.

interruption for many years.[104]

One reason, then, that defendant's sky tower was allowed to remain on the beach was that this use was "consistent with the general recreational use by the public."[105]

Much of Hawaii's land law is unique; hence its *In re Ashford*[106] custom decision, although antedating *Thornton* by a year, has proved less influential. The question in *Ashford* was what King Kamehameha V intended in an 1866 royal patent that located the makai boundaries as running *ma ke kai* (along the sea).[107] The appellee-landowners contended that the phrase meant the mean high water line as set by the U.S. Coast and Geodetic Survey; the appellant State of Hawaii contended that it meant the "high water mark that is along the edge of vegetation or the line of debris left by the wash of waves during ordinary high tide."[108] The Hawaii Supreme Court held that "ma ke kai is along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves."[109]

The *Ashford* court theorized that "Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage,"[110] and that it was correct to accept the testimony of two kamaaina witnesses living in the area of appellees' land "that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris."[111]

D. *Public Trust Doctrine*

Under the public trust doctrine, lands seaward of the mean high tide line are held by the sovereign in trust for the public.[112] Although the sovereign state

104. *Id.*
105. *Id.*
106. 50 Haw. 314, 440 P.2d 76, *reh'g denied*, 50 Haw. 452 (1968).
107. *Id.* at 315, 440 P.2d at 77.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 316, 440 P.2d 77-78.
112. *See* Shively v. Bowlby, 152 U.S. 1, 57 (1894); *see also* Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 795 (1988) ("Consequently, we reaffirm our long-standing precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.").

The question of the reach of the public trust doctrine should be separated from the question of the dividing line at the water's edge for *title* purposes. The "high tide" states hold that private property ends at the mean high water mark, leaving the foreshore (the area between mean low tide and mean high tide) in public ownership. The "low tide" states hold that private property ends at the mean low water mark, thereby leaving the foreshore as part of the littoral owner's title, unless it has been otherwise alienated. *See, e.g.*, Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 303, 177 S.E.2d 513, 516 (1970) (establishing North Carolina as a high-tide state); Opinion of the Justices, 365 Mass. 681, 685, 313 N.E.2d 561, 565 (1974) (private titles extend "as far as mean low water line or 100 rods from the mean high water line, whichever was the lesser measure."). Although the state, without paying compensation, could interfere with private rights in tidal area (foreshore) to promote fishing and navigation, unilateral legislative declaration of a public right to walk in tidal area interfered with private owner's right to exclude, and would be an unconsti-

has ownership, dominion, and sovereignty over trust lands, and can abandon or extinguish the public's equitable right under some circumstances, a state's decision to extinguish the *jus publicum* is subject to a high degree of judicial scrutiny and will be set aside if particular standards are not met.[113]

Different jurisdictions give different meanings to the public trust doctrine.[114] In this Article, the doctrine is used in three ways: (1) to serve as the theoretical basis by which the public initially acquires an easement in the land of another; (2) to assure a higher degree of judicial scrutiny and protection of public rights originally acquired by some other theoretical means, such as prescription, dedication, or custom; and (3) to provide a factor in resolving takings disputes. This section of the Article explores the first usage: public trust theory as the initial source of the public's rights in the dry sand beach.

New Jersey's Supreme Court is a leader in applying the public trust doctrine to protect the public's rights to use dry sand beaches. This favorable New Jersey view of the public trust doctrine can be traced at least as far back as 1821.[115] In a 1972 application, the court in *Neptune City v. Avon-By-The-Sea*[116] prohibited oceanfront municipalities from charging nonresidents higher beach user fees than residents. The court relied on the public trust doctrine, and held that it was "not limited to the ancient prerogatives of navigation and fishing, but extend[ed] as well to recreational uses, including bathing, swimming and other shore activities."[117] The court held that "where the upland sand area is owned by a municipality . . . and dedicated to public beach purposes . . . the public trust doctrine dictates that the beach and the ocean waters must be open to all on

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tutional taking). Massachusetts' interpretation of the public trust doctrine in tidal lands (*e.g.*, the foreshore), unlike the New Jersey interpretation, did not include recreation. Opinion of the Justices, 365 Mass. at 688, 313 N.E.2d at 567 (comparing Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 308-309, 294 A.2d 47 (1972)). It bears emphasizing, however, that Massachusetts recognized the public trust right of navigation and fishing even within the tidal area of the private owner's land; the Massachusetts court in *Opinion of the Justices* simply would not recognize that the scope of Massachusetts' public trust doctrine included recreation, which would otherwise support recognition of a lateral public accessway without compensation. *Id.* Other jurisdictions include recreational, ecological, and other broad public uses within the public trust doctrines. *See infra* note 114 and accompanying text (recognizing that the scope of the public trust doctrine is determined by state law). *See generally* 1 R. POWELL, REAL PROPERTY, ¶ 163, at 698 n.13 (1984) (differentiating between "high tide" and "low tide" states).

113. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892):

> The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, . . . and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels . . . in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained . . . .

Id.

114. *See Phillips Petroleum*, 108 S. Ct. at 794 ("But it has been long-established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." (quoting Shively v. Bowlby, 152 U.S. at 26)).

115. Arnold v. Mundy, 6 N.J.L. 1, 71 (N.J. Sup. Ct. 1821); *see* Comment, *Navigable Waters—Public Trust Doctrine*, 15 RUTGERS L.J. 813, 823-32 (1985) (tracing history of public trust doctrine and concluding *Matthews*, *infra* note 122, was not an unconstitutional taking because there was no interference with investment-backed expectations).

116. 61 N.J. 296, 294 A.2d 47 (1972).

117. *Id.* at 309, 294 A.2d at 54.

equal terms and without preference and that any contrary state or municipal action is impermissible."[118]

In 1978 the New Jersey Supreme Court extended *Avon-By-The-Sea*. In *Van Ness v. Borough of Deal*[119] the court considered the public's rights in a casino beach which was owned by a municipality, but, unlike the beach in *Avon-By-The-Sea*, had never been formally dedicated to the use of the general public. The court deemed the lack of formal dedication immaterial because the "beach is dedicated to recreational uses including bathing, swimming, surf fishing and other shore activities."[120] The court also rejected the contention that the public trust doctrine did not apply because the area in front of the casino in its natural state had been unsuitable for normal beach activities and became a useful beach area only after a bluff was leveled and graded. The court required the municipally owned beach to be opened to the general public.

The holdings in *Avon-By-The-Sea* and *Van Ness* were limited to public rights in the dry sand areas of municipally owned beaches.[121] The 1984 case of *Matthews v. Bay Head Improvement Association*[122] however, addressed the extent of the public's interest in privately owned dry sand beaches. Construed most narrowly, *Matthews* considered only "whether, ancillary to the public's right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality, but by a quasi-public body."[123] A not-for-profit association owned six parcels of the seventy-six parcels of Bay Head land bordering the beach. The association owned land at the end of seven streets that extended through the upper dry sand to the mean high water line; it also leased other upper dry sand areas from private owners of beachfront property. Membership in the association was generally limited to residents of Bay Head, and, with minor exceptions, only members were allowed to use the beach during the normal summer daytime beach hours. The court found that the association was the municipality's beach maintenance arm, had a virtual monopoly, and should be characterized as "quasi-public" in nature.[124] Under this construction, *Matthews* simply extends application of the rationale of *Avon-By-The-Sea* and *Van Ness* for muncipally owned land to land owned by a quasi-public association.

Matthews, however, should be construed more broadly. The court stated: "Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably neces-

118. *Id.* at 308-09, 294 A.2d at 54.

119. 78 N.J. 174, 393 A.2d 571 (1978).

120. *Id.* at 179, 393 A.2d at 573-74.

121. *Id.* at 176, 393 A.2d at 572; *Avon-By-The-Sea*, 61 N.J. at 299-300, 294 A.2d at 49.

122. 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984).

123. *Id.* at 312, 471 A.2d at 358.

124. *Id.* at 328-30, 471 A.2d at 367-68. The court added, "a nonprofit association that is authorized and endeavors to carry out a purpose serving the general welfare of the community and is a quasi-public institution holds in trust its powers of exclusive control in the areas of vital public concern." Id. at 332, 471 A.2d at 367. "Indeed, the Association is frustrating the public's right under the public trust doctrine. It should not be permitted to do so." Id. at 332, 471 A.2d at 368.

sary."[125] The opinion includes extensive history and analysis of why the public trust doctrine should apply to privately held dry sand beaches.[126] Although this part of the opinion was arguably not necessary to the final holding, it seems clear that, in future cases, the New Jersey Supreme Court will apply the public trust doctrine to privately owned dry sand beaches.

Because *Matthews* requires that the public have reasonable access[127] to the foreshore and dry sand, the critical question becomes: what constitutes "reasonable access?" One possible approach, which the *Matthews* court adopted and which is analyzed further in the next section of this Article, is to borrow from the analytical techniques of the law of nuisance. Under this approach the

> touchstone . . . is that the particular circumstances must be considered and examined before arriving at a solution that will accommodate the public's right and the private interests involved. . . . The test is whether those means [e.g., availability of nearby publicly owned beaches or streets to the wet sands] are reasonably satisfactory so that the public's right to use the beachfront can be satisfied.[128]

As with many land use issues, the solution will "depend on the circumstances."[129] But "where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner."[130] Relevant factors include "[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner."[131]

E. *Comparison of Acquisition Theories*

Prescription and implied dedication continue to be useful in establishing public rights in private coastal lands. But each doctrine has significant shortcomings. Permissive use often defeats prescription,[132] and a lack of landowner's intention to dedicate often defeats implied dedication.[133] Even if these requirements are met, claimants must bring a separate lawsuit for each parcel in which they assert a public easement.[134]

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125. *Id.* at 332, 471 A.2d at 365.

126. *Id.* at 332, 471 A.2d at 360-63.

127. The court stated:

> [W]hile the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded *reasonable access* to the foreshore as well as a suitable area for recreation on the dry sand.

Id. at 326, 471 A.2d at 365-66 (emphasis added).

128. *Id.* at 324-25, 471 A.2d at 365.

129. *Id.* at 325, 471 A.2d at 365.

130. *Id.*

131. *Id.*

132. *See supra* notes 30, 36-38 and accompanying text.

133. *See supra* notes 42-77 and accompanying text; *see also supra* note 41 and accompanying text (discussing problems of acceptance by the public).

134. *See supra* note 90 and accompanying text.

Prescription, which modern courts treat as closely resembling adverse possession,[135] applies only if there has been open, adverse use by the public. A landowner who wants to prevent a prescriptive period from running is therefore motivated to prevent any public use at all, for if she gives permission to the public (which theoretically prevents prescription from applying) she runs the risk of impliedly dedicating a public easement of passage. To avoid both prescription and implied dedication, the landowner will therefore have to construct a fence or other unsightly barrier.

Custom, as applied in *Thornton v. Hay*,[136] is superior to prescription and implied dedication as a doctrinal base for supporting public access. The doctrine has deep roots in the English common law[137] but has not always been uniformly recognized by American courts. *Thornton* has influenced other state supreme courts[138] and may signal a more receptive judicial attitude to the doctrine of custom, at least in promoting public access to beaches.

Carol Rose offers some provocative arguments why custom should support increased public access to beaches.[139] She first analyzes why law has long given special protection to commerce, free speech, and other social practices. Practices, she asserts, "that enhance the sociability of the practitioners have greater returns with great scale: one cannot get too much of them."[140] Professor Rose also notes society's "increasing perception of recreation as having something analogous to scale returns, and as a socializing institution."[141] If we accept Professor Rose's arguments, "we might believe that unique recreational sites ought not be private property; their greatest value lies in civilizing and socializing all members of the public, and this value should not be 'held up' by private owners."[142] This approach would broaden public rights in dry sands, the area between the mean high tide line and the vegetation line, which, although subject to tidal action, is often held in private ownership.[143] Public recreational use is arguably the most valuable use of the dry sands, and the public's long customary use of many of these lands arguably has resulted in its acquisition of customary rights.

The *Matthews* case[144] shows the relevance of the public trust doctrine to the

135. *See supra* note 30 and accompanying text.

136. State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); *see supra* notes 86-93 and accompanying text.

137. *See supra* notes 91-93 and accompanying text.

138. *See supra* notes 94-105 and accompanying text; *see also* supra note 93 (disagreeing with the conclusion in Comment, *supra* note 30, that North Carolina courts are not likely to accept the doctrine of custom).

139. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

140. *Id.* at 777.

141. *Id.* at 779.

142. *Id.* at 780.

143. "Wet sands" below the mean high tide line have historically been treated as public property. *See supra* note 28 (defining "dry sand") and *infra* notes 252-55 and accompanying text (relating "dry sand" and "wet sand" concepts to *Nollan*). *But see supra* note 112 (discussion of "low tide" states).

144. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355 (1984); *see supra* notes 122-31 and accompanying text.

question of public access over privately held dry sands. The New Jersey Supreme Court coupled "the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine"[145] and applied the public trust doctrine to ensure *reasonable* public access.[146] Other courts should follow the *Matthews* lead, for the public trust doctrine is a state common-law doctrine[147] that is flexible enough to accommodate this application.

III. COMMON-LAW DOCTRINES FOR PROTECTING EXISTING PUBLIC INTERESTS IN BEACHES

A. *General Governmental Remedies*

Many public accessways to beaches are held by a state or local government in its capacity as an ordinary proprietor. Some lands and waters are held in trust for the public. In order to ensure access to these public lands, a state or local government can generally avail itself of the same remedies available to private landowners.[148] It is questionable, however, whether private individuals and

145. *Matthews*, 95 N.J. at 326, 471 A.2d at 365.

146. *Id.* at 332, 471 A.2d at 369.

147. *See supra* note 114; *see also* Comment, *supra* note 30, at 200 (recommending that the "North Carolina courts expand the public trust doctrine to include recreational use of the dry-sand beach"); Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1, 16-18 (1972) (discussing public trust doctrine in North Carolina); Comment, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis*, 49 N.C.L. REV. 888 (1971) (same).

The rationale for a public trust theory of public rights to use the beach is not dissimilar to the rationale which supports an easement of necessity. When an estate is land locked, its value is diminished and its use inhibited unless there is an easement for ingress and egress implied in the conveyance. The elements of an easement for ingress and egress implied by necessity are (1) the dominant and servient estates were originally owned by the same person; (2) the roadway is a necessity; and (3) the necessity for the roadway existed at the time the tracts were severed. Waggoner v. Gleghorn, 378 S.W.2d 47, 48 (Tex. 1964). Use of the beach for access to the public trust lands can be analogized to use of an easement across private land to reach landlocked property. *See generally* Chavez, *Public Access to Landlocked Public Lands*, 39 STAN. L. REV. 1373 (1987) (discussing public access to lands managed by the Bureau of Land Management and concluding that public trust doctrine not yet applicable to whatever lands contain little or no water). *But cf.* Leo Sheep Co. v. United States, 440 U.S. 668, 679-80, 682 (1979) (refusing to imply a right of way on the grounds of common-law necessity because congressional intent to reserve rights of way was not clear and because of "the substantial impact that such implications would have on property rights granted over 100 years ago"). Arguably, though, public expectations protected by the public trust doctrine predate the original conveyances from the state, and the rationale for applying the public trust doctrine is significantly distinguishable from the rationale supporting implied easements of necessity.

For a discussion of the public trust doctrine's relevance to takings disputes, see *infra* notes 228-99 and accompanying text (discussing *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), and the relationship of the takings issue to the public trust doctrine). Although the public trust doctrine was not before the Supreme Court in the *Nollan* case, *see infra* notes 278-99 and accompanying text, in many takings cases the public trust doctrine will be relevant, *see infra* notes 378-80 and accompanying text. When courts apply the usual multi-factored balancing test in takings disputes, an important factor will often be the proximity of proposed development to public trust lands, *see infra* notes 286-90 and accompanying text, and the reasonableness of the regulation in protecting *reasonable* public access to public property.

148. *See, e.g.*, Camfield v. United States, 167 U.S. 518 (1897).

> [T]he Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. . . . To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor.

Id. at 524.

public interest organizations have standing to bring actions to protect public interests in the event the attorney general or other designated public representative fails to do so. The states' different standing requirements for abating public nuisances, removing purprestures, and redressing breaches of the public trust are not analyzed in this Article, but often pose impediments to individual action.[149]

B. *Public Nuisances and Purprestures*

Public nuisance has been defined as "an act or omission 'which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects.' "[150] The term encompasses a multitude of offenses against the public.[151] Purpresture, akin to a public nuisance, is an encroachment that injures the public as an aggregate body in the enjoyment of public lands or navigable streams.[152] A purpresture is often also a public nuisance, although it is possible to have a purpresture that is not a public nuisance.[153] This portion of the Article focuses on the nuisance aspect of obstruction of lateral and vertical access to tidal and submerged lands, and, by

149. *See, e.g.*, Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp., 68 So. 2d, 382, 384 (Fla. 1953) ("To entitle private individuals to maintain actions to enjoin public nuisances, it must be shown that they have sustained special or peculiar injuries different in *kind*, not merely in *degree*, from the injury to the public at large."). For reference to a statute that liberalizes standing, see State *ex rel.* Gardner v. Sailboat Key, Inc., 295 So. 2d 658, 660 (Fla. Dist. Ct. App. 1974) ("An action to abate a public nuisance may be brought by a citizen of the county in the name of the state (§ 60.05(1) Fla. Stat., F.S.A.), without the necessity of prior application to the state's attorney to bring the suit and without necessity for the citizen relator to show he has sustained or will sustain special damages or injury different in kind from injury to the public at large." (citation and footnote omitted)). *See generally* Comment, *Public Nuisance: Standing to Sue Without Showing "Special Injury"*, 26 U. FLA. L. REV. 360 (1974) (analyzing Save Sand Key, Inc. v. United States Steel Corp., 281 So. 2d 572 (Fla. Dist. Ct. App.), *appeal dismissed*, 286 So. 2d 206 (Fla. 1973), and arguing that the trend is away from "special injury" toward "injury-in-fact").

150. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 90 at 643 (5th ed. 1984) [hereinafter PROSSER & KEETON] (citing STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND, 1890 105; SALMOND, LAW OF TORTS 233 (8th ed. 1934); Mayor of Alpine v. Brewster, 7 N.J. 42, 80 A.2d 297 (1951)).

151. Examples include obstruction of navigable waters, obstruction of a public highway or impeding travel thereon, encroachment of a public street and matters offensive to the senses, though not injurious to health. J. JOYCE & H. JOYCE, NUISANCES § 414 (1906). A public nuisance must affect an interest common to the general public and is, therefore, distinguishable from a private nuisance. It is possible, however, that a public nuisance will also be a private nuisance in a particular case.

152. *See* Shively v. Bowlby, 152 U.S. 1, 13 (1893) ("[E]very building or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation."); Williams v. Guthrie, 137 So. 682, 685 (Fla. 1931) ("A 'purpresture,' or more properly speaking 'porpresture,' is an invasion of the right of property in the soil while the same remains in the king or sovereign."); State v. Goodnight, 70 Tex. 682, 686, 11 S.W. 119, 120 (1888) (" '[A] purpresture strictly is an encroachment upon a public right in lands or navigable streams that does not operate as an obstruction or injury to individual members of the public, but only to some right in incident and peculiar to it in its aggregate capacity as such.' " (quoting H. WOOD, THE LAW OF NUISANCE § 84 at 87 (1875))).

153. *See* Shively v. Bowlby, 152 U.S. 1, 13.

> An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance; and an unauthorized encroachment upon the soil itself is known in law as a purpresture. Purpresture is also a particular kind of nuisance. The word is derived from the French word *pourpris*, which signifies an inclosure.

People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 146, 4 P. 1152, 1155 (1884).

analogy, obstruction of highways, navigable streams, or access to other public lands.

The 1888 Texas Supreme Court case of *State v. Goodnight*[154] is a purpresture and public nuisance case with important implications for protecting public access to beaches. Defendant Charles Goodnight enclosed over 600,000 acres of Texas' public school land and over 14,000 acres of Texas' unappropriated public domain by constructing fences on his own ranch and, where the fences were not complete, by preventing passage with line riders.[155] This enclosure prevented use of the public lands for grazing purposes, interfered with movement of stock to market, and obstructed public travel.[156]

The Texas Supreme Court defined a purpresture as "an encroachment upon a public right in lands or navigable streams that does not operate as an obstruction or injury to individual members of the public, but only to some right incident and peculiar to it in its aggregate capacity as such."[157] The court concluded that the enclosures were both a purpresture and public nuisance.

> The inclosure of public lands for private use, whether viewed as a wrong merely to the body politic or as an infringement of the privileges of its citizens, is a nuisance subject to be abated at the suit of the State, and an injunction is a well recognized and appropriate remedy.[158]

Goodnight differs in at least two aspects from many purpresture cases. First, the purpresture did not physically intrude upon public land; the fences and line riders were located on adjoining private property.[159] Second, the court apparently held that encroachment upon an intangible public right[160]—the value of the public land for sale or lease—is a purpresture.

The *Goodnight* court's willingness to apply purpresture law to intangible public rights suggests some modern adaptations, especially in light of the Supreme Court's recent recognition that public rights protected by the public trust doctrine can include, in addition to navigation, "bathing, swimming, recreation, fishing, and mineral development."[161] Perhaps developments on adjacent private lands that substantially interfere with the aggregate public rights protected by the public trust doctrine can be enjoined as common law nuisances or

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154. 70 Tex. 682, 11 S.W. 119 (1888).

155. 70 Tex. at 685-86, 11 S.W. at 119.

156. *Id.* In addition, these inclosures were contrary to state policy and expressly forbidden by statute. *Id.* at 686-87, 11 S.W. at 119-20.

157. *Id.* at 686, 11 S.W. at 119 (citing H. WOOD, THE LAW OF NUISANCE § 84, at 87 (1875)).

158. *Id.* The suit for injunction in this case was brought by the state through its attorney general. The court viewed this as the procedurally correct manner due to legislation recently passed by the Texas legislature. *Id.* at 689, 11 S.W. at 120.

159. The State's petition alleged that the defendant had "enclosed the lands of the State; not that they [had] erected the enclosures upon [the state's lands]." *Id.* at 687, 11 S.W. at 120.

160. *Id.* at 686, 11 S.W. at 119.

161. Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 798 (1988) (citing Treuting v. Bridge and Park Comm'n of City of Biloxi, 199 So. 2d 627, 632-33 (Miss. 1967)); *see also* Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) ("sufficiently flexible to encompass changing public needs .... [such as] ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.").

purprestures. This is another way of explaining the result in the *Matthews* public trust case, discussed above,[162] requiring reasonable public access to privately held dry sand beaches.

By contrast, California purpresture cases appear to require a physical encroachment on public lands. In the 1884 case of *People v. Gold Run Ditch & Mining Co.*,[163] for example, defendant, a hydraulic mine owner, dumped its hydraulic debris into a nonnavigable stream which flowed into the navigable Sacramento River. The California Supreme Court held that the debris constituted both a public nuisance because of its interference with navigation (interference with the flow of the water) and a purpresture (an unauthorized encroachment upon the soil itself).[164] In *Yokohama Specie Bank, Ltd. v. Unosuke Higashi*,[165] decided during World War II, the California District Court of Appeals held that a building constructed without license upon the tide lands of the state became at once the property of the state. The building was a purpresture, which belonged to the state as the owner of the soil to which the building was affixed.[166]

Obstructions of public highways have been a rich source of purpresture and public nuisance law.[167] For example, in *Smith v. McDowell ex rel. Hall*,[168] defendant constructed an area way and stairs on a major street.[169] The issue was whether "power exists in the corporate authorities to vacate a street, or a portion of a street, for the benefit and use of a private person."[170] The court stated that the streets were dedicated to the use of the public as streets, and the village held them "in trust for such uses and purposes, and none other."[171] Although under proper circumstances the state legislature might abandon streets to further the public interest, the court clarified that its general reference to the village's power to "vacate" should not be construed as blanket authority to abandon any street.[172] The court stated:

> The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is, not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it.[173]

Therefore, the village can exercise the right to "vacate the same" only after

162. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355 (1984); *see supra* notes 122-31 and accompanying text.

163. 66 Cal. 138, 4 P. 1152 (1884).

164. *Id.* at 147, 4 P. at 1155-56.

165. 56 Cal. App. 2d 709, 133 P.2d 487 (1943).

166. *Id.* at 712, 133 P.2d at 488.

167. *E.g.*, Smith v. McDowell *ex rel.* Hall, 148 Ill. 51, 35 N.E. 141 (1893); Mamolella v. First Bank of Oak Park, 97 Ill. App. 3d 579, 423 N.E.2d 204 (1981); State *ex rel.* State Highway Comm'n v. Johns, 507 S.W.2d 75 (Mo. Ct. App. 1974); Hale County v. Davis, 572 S.W.2d 63 (Tex. Civ. App. 1978); Hill Farm, Inc. v. Hill County, 425 S.W.2d 414 (Tex. Civ. App. 1968).

168. 148 Ill. 51, 35 N.E. 141 (1893).

169. *Id.* at 54, 35 N.E. at 141.

170. *Id.* at 60, 35 N.E. at 142.

171. *Id.* at 62, 35 N.E. at 143.

172. *Id.* at 63, 35 N.E. at 143.

173. *Id.*

proper determination that the street is "no longer required for the public use or convenience."[174] Having found that the construction was a purpresture and a public nuisance, the court then added that "as the municipality itself cannot be justified in creating a nuisance, no one can justify the creation of a nuisance under a license from it."[175]

The Wisconsin Supreme Court recently applied private nuisance law in *Prah v. Maretti*,[176] a case concerning access to sunlight. Although access to sunlight is distinguishable in important ways from access to public beaches, *Prah* is instructive in showing a modern court's willingness to apply nuisance law in novel ways. In *Prah* the court held that a proposed residence might so unreasonably interfere with the neighbor's passive solar collector as to constitute an actionable private nuisance.[177] Although the builder had complied with all applicable land-use controls, the court noted that this did not automatically bar a nuisance claim.[178] If the proposed use unreasonably interferes with a neighbor's enjoyment of his property, the use constitutes a nuisance.[179]

The public ought to have a parallel right under public nuisance law to protect its access to public lands. If a littoral or riparian owner proposes construction that unreasonably interferes with the public's access to lands held in common by the public, a court should enjoin the private construction as a public nuisance. *Goodnight* arguably is authority for this approach by its application of purpresture and public nuisance law even when a construction does not physically intrude upon public land.[180]

Goodnight, though, was an easy case with respect to causation. Evidence was clear that Goodnight's acts alone denied public access. In most beach access cases, no single proposed house will substantially interfere with the public's rights of access. The cumulative effects of many houses will cause the loss of public access. "Acts Harmless in Themselves Which Together Cause Damage"[181] present classic hornbook problems. If the judiciary closes its eyes and refuses redress against each individual because that individual's contribution was harmless in itself, redress will be completely denied. To provide redress, several courts have held that acts which viewed individually are innocuous may be tortious if, in combination, they cause damage; the standard of care applica-

174. *Id.* at 65, 35 N.E. at 144.

175. *Id.* at 67, 35 N.E. at 144. Quoting Judge Dillon, the court noted that "[t]he king . . . can not license the erection or commission of a nuisance; nor in this country, can a municipal corporation do so by virtue of any implied or general power." *Id.*

176. 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

177. The Wisconsin Supreme Court had earlier adopted the RESTATEMENT (SECOND) OF TORTS definition of private nuisance as " 'a nontrespassory invasion of another's interest in the private use and enjoyment of land.' " *Id.* at 231, 321 N.W.2d at 187 (quoting RESTATEMENT (SECOND) OF TORTS § 821D (1977)).

178. *Id.* at 242, 321 N.W.2d at 192 (citing Bie v. Ingersoll, 27 Wis. 2d 490, 135 N.W.2d 250 (1965)).

179. "The phrase 'interest in the private use and enjoyment of land' as used in sec. 821D [of RESTATEMENT (SECOND) OF TORTS] is broadly defined to include any disturbance of the enjoyment of property." *Prah*, 108 Wis. 2d at 232, 321 N.W.2d at 187.

180. State v. Goodnight, 70 Tex. 682, 11 S.W. 119 (1888); *see supra* notes 154-60 and accompanying text.

181. PROSSER & KEETON, *supra* note 150, § 52, at 354.

ble to each defendant requires consideration of all surrounding circumstances, including other defendants' activities.[182]

Courts then must fashion tests of reasonableness that measure each individual's actions against a standard that considers the impact upon the public if every other landowner, similarly situated, is allowed to proceed as requested. If it is reasonably foreseeable that the totality of probable construction would be an actionable nuisance if undertaken by a single developer, then no individual should be allowed to proceed without showing a plan that would protect public access for some reasonable future period.[183]

C. *Public Trust Doctrine*

Public accessway easements, whether originally acquired by prescriptive easement,[184] implied dedication,[185] custom,[186] or otherwise, should be treated as held by the state in trust for the public. The public's easement is appurtenant to the public's dominant interest, protected by the public trust doctrine,[187] in the area below the mean high tide line. *Gewirtz v. City of Long Beach*[188] provides support for the proposition that once the public acquires an easement in property appurtenant to public trust land, the easement should also be held in public trust. In *Gewirtz* the Supreme Court of Nassau County, New York held that the municipality's express dedication of land to the public for park purposes was irrevocable and thereafter the park was held in a public trust for the benefit of the public at large. Consequently, the park could not be diverted to other uses or sold without express legislative authority.[189]

Public access easements acquired by implication should not be treated differently from the fee simple titles to parks and streets acquired by express dedication. In the case of public ways of ingress and egress to publicly owned tidal and submerged lands, the easements are appurtenant to the public's trust lands and should be held in trust. The scope of the trust could be the public purposes

182. PROSSER & KEETON, *supra* note 150, § 52, at 354.

183. The difficulties of cumulative impact are well illustrated in the Supreme Court's *Nollan* case. Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987); *see infra* notes 228-99 and accompanying text (analyzing *Nollan*).

184. *E.g.*, City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974); *see supra* notes 30-38 and accompanying text.

185. *E.g.*, Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); *see supra* notes 39-85 and accompanying text.

186. *E.g.*, State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); *see supra* notes 86-111 and accompanying text.

187. *Cf.* Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 326, 471 A.2d 355, 365 (1984) (public trust doctrine requires that "public must be given both access to and use of privately-owned dry sand areas as reasonably necessary."). Whether the easement is "vertical," such as an accessway from the nearest road to the beach, or "lateral," such as an accessway running parallel with the water's edge and along the water's edge, it would benefit the public's tidal and submerged lands protected by the public trust doctrine. *See supra* notes 112-31 and accompanying text (discussing *Matthews* and the public trust doctrine).

188. 69 Misc. 2d 763, 330 N.Y.S.2d 495 (N.Y. Sup. Ct. 1972), *aff'd mem.*, 45 A.D.2d 841, 358 N.Y.S.2d 957 (1974).

189. *See* Smith v. McDowell, 148 Ill. 51, 64-67, 35 N.E. 141, 144 (1893).

for which the interests were dedicated, so long as these purposes are consistent with the public purposes for which the dominant lands are held in trust.

Easements acquired pursuant to the doctrines of custom and prescription could, like express and implied easements, also be treated as appurtenant to the dominant tidal and submerged lands held in trust for the public. The scope of the easements could be limited to the public purposes supported by ancient custom or the adverse uses giving rise to the prescriptive right, if these purposes are consistent with the public purposes for which the dominant lands are held in trust.

D. *Migrating ("Rolling") Easements*

Easements generally have fixed boundaries that remain unchanged.[190] The burdened landowner can prevent the easement holder from using the landowner's land outside the easement's defined boundaries.[191] This general principle is unworkable, however, for lands strongly affected by the sea. If the general principle of fixed boundaries is pushed to its logical conclusion—if the boundaries of public easements to use the dry sand beach are frozen once perfected—erosion could result in the public's easement being entirely covered by water, or reliction could leave the public easement far landward of the water's edge and useless for its original purposes.[192]

Legal doctrine has long sought to differentiate littoral and riparian land law from land law generally.[193] Legal boundaries of the fee simple title change, for

190. *Compare* Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 208-09 (Tex. 1963) (easement for pleasure and recreation over a 1000-acre ranch including the right to study nature, picnic, hike, ride horses, camp out, bird watch, and other similar activities unenforceable, *inter alia*, because of lack of definiteness or certainty in the servitudes sought to be established on the servient estate) *and* Speight v. Anderson, 226 N.C. 492, 496, 39 S.E.2d 371, 374 (1946) (prescriptive easement requires user "confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed.") *with* West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985) (applying "substantial identity" test but allowing question to go to jury) and Matcha v. Mattox, 711 S.W.2d 95, 99 (Tex. App. 1986) ("Although an easement is generally a static real property concept, several Texas opinions have recognized that easements bordering on a body of water may be moved by the water's action."), *cert. denied*, 107 S. Ct. 1911 (1987). *See generally* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 8.9 (1984) (discussing scope and location of easements); Comment, *supra* note 30, at 168 ("The *Slick* decision suggests that the North Carolina Supreme Court will apply the substantial identity test liberally when considering beach easements.").

191. R. CUNNINGHAM, *supra* note 190, § 8.9, at 458-61.

192. *See Matcha*, 711 S.W.2d at 100 ("An easement fixed in place while the beach moves would result in the easement being either under water or left high and dry inland, detached from the shore. Such easement, meant to preserve the public right to use and enjoy the beach, would then cease functioning for that purpose."). *See generally* Dinkins, *Texas Seashore Boundary Law: The Effect of Natural and Artificial Modifications*, 10 HOUS. L. REV. 43 (1972) (discussing movement of dry sand beach boundaries). Dinkins writes:

> The doctrine of reliction increases the upland estate when the water permanently uncovers the land, leaving it dry. . . . Accretion is the addition of land to the upland estate by the water depositing alluvion imperceptibly over a long period of time. . . . State law generally allows the owner of the upland estate to take title to accretion resulting wholly from natural causes. . . . Erosion changes the boundary slowly and imperceptibly, and the littoral owner loses title to the eroded portion of his land.

Id. at 46, 50 (footnotes omitted).

193. *See, e.g., Matcha*, 711 S.W.2d at 99 ("The law in this State has recognized migrating prop-

the most part, when natural boundaries such as the mean high tide line change.[194] Consider, for example, disputes between littoral landowners and the public. Tidal and submerged lands seaward of mean high tide land are held by the sovereign in trust for the public.[195] Even if the record title includes lands below the mean high tide line, the private and public interests will be determined by the location of the ever-changing mean high tide line.[196] Erosion will cause a loss of private dominion;[197] reliction and alluvion will cause a gain of land to the private landowner.[198]

The common law has also accounted for changes at the water's edge when public easements are at issue. The well known English case of *Mercer v. Denne*,[199] for example, considered the fishermen's custom of drying fishing nets on the beach. When the landowner attempted to stop this practice, the court not only recognized that the fishermen had acquired a right through custom to dry their nets on the shore, but also held that although the beach area had migrated over the years, "[t]he custom began at the boundary between beach and sea" and "would always be adjacent to the boundary for the time being between the beach and the sea."[200]

The unfortunate facts in *Matcha v. Mattox ex rel. People*[201] arose against this history of coastal land law. In 1982 the Matchas built a beach house on their Galveston beach lot immediately landward of the natural vegetation line. In the summer of 1982 powerful Hurricane Alicia hit the Matcha's beach house and almost totally destroyed it. The hurricane caused such significant erosion to the natural vegetation line that, after the hurricane passed, the Matchas' beach house was located seaward of the newly eroded natural vegetation line. Under the Texas Open Beaches Law, which preserves for the public any previously

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erty rights in several contexts, . . . [and] the rule is well-established that erosion and accretion along a river can move property lines."). *See generally* Dinkins, *supra* note 192, at 46-50 (discussing legal implications of movement of dry sand beaches).

194. *See* Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 793 (1988) (holding that Mississippi acquired " 'fee simple title to all lands naturally subject to tidal influence, inland to today's mean high water mark' " (quoting Cinque Bambini Partnership v. State, 491 So. 2d 508, 510 (1986)).

195. *Phillips Petroleum*, 108 S. Ct. at 794; Shively v. Bowlby, 152 U.S. 1 (1894).

196. *E.g.*, County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied*, 419 U.S. 872 (1974); City of Corpus Christi v. Davis, 622 S.W.2d 640 (Tex. Ct. App. 1981).

197. *E.g.*, County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied*, 419 U.S. 872 (1974); City of Corpus Christi v. Davis, 622 S.W.2d 640 (Tex. Ct. App. 1981).

198. Reliction and alluvion are defined *supra* at note 192. Hughes v. Washington, 389 U.S. 290 (1967); Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890).

199. 2 Ch. 538 (1905).

200. *Id.* at 579. In Nonken v. Bexar County, 221 S.W.2d 370 (Tex. Civ. App. 1949), the court had a similar problem with the movement of a roadway acquired by prescriptive easement. The road had moved approximately thirty-five feet from its location shown in 1913 field notes. *Id.* at 374. Against an argument of loss due to non-use, the court stated that a dirt road, due to rains and washouts in the river bottom, would ordinarily vary from the earlier established path. However, "[i]t does not follow that rights acquired by the public years ago were lost by failure of the public to travel the full width of the old road." *Id. See also* Barney v. Keokuk, 94 U.S. 324, 336-39 (1876) (riparian owner's title would ordinarily include accretions from natural causes, but when city filled waterward of original high water mark, riparian owner's "bare legal title" waterward of the original mark was subject to public's easement and use); Godfrey v. City of Alton, 12 Ill. 29, 35 (1850) (waterward boundary of public landing dedicated on navigable water course fluctuates with margin of water; otherwise, "enjoyment would be precarious, and often destroyed.").

201. 711 S.W.2d 95 (Tex. Ct. App. 1986), *cert. denied*, 107 S. Ct. 1911 (1987).

existing public interest in the beach area between the low water mark and the natural vegetation line,[202] the Matcha's house was now located within the boundaries that were presumptively subject to a public easement. Soon after the hurricane, the Matchas began filling their lot and planting grass seaward of the natural line of vegetation. When they began rebuilding their house, the attorney general obtained a temporary injunction prohibiting continuation of repairs.

The trial judge concluded that the public had earlier acquired rights in the beach area and that "such public right of access, use, and easement follows the beach as the beach moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation . . . ."[203] Finding that the Matchas' improvements after the hurricane occupied a portion of the beach protected by common law and the Texas Open Beaches Law, the court held that the beach house, sand piles, and vegetation plantings constituted interferences with the free and unrestricted public right of access to the beach. The court accordingly ordered the Matchas to remove the beach house and other structures and refrain from any activity that interfered with the public's access to and use of the beach area.

The Texas Court of Appeals upheld the lower court judgment mainly because of its conclusion that the public had acquired an interest in the Matchas' land by custom.[204] The court deemed the theory of a migratory public easement compatible with the doctrine of custom.

> A public easement on a beach cannot have been established with reference to a set of static lines on the beach, since the beach itself, and hence the public use of it, surely fluctuated landward and seaward over time. The public easement, if it is to reflect the reality of the public's actual use of the beach, must migrate as did the customary use from which it arose. The law cannot freeze such an easement at one place any more than the law can freeze the beach itself. Custom is, after all, a reflection in law of a long-standing public practice, and therefore the legal result should mirror the factual reality as closely as possible.[205]

Both the Texas Supreme Court and the United States Supreme Court denied review.[206]

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202. TEX. NAT. RES. CODE ANN. § 61.011-.025 (Vernon 1978 & Supp. 1988).

203. *Matcha*, 711 S.W.2d at 97.

204. *Id.* at 98.

205. *Id.* at 100.

206. The Texas Supreme Court refused the writ because there was no reversible error. The United States Supreme Court denied certiorari in Matcha v. Mattox, 107 S. Ct. 1911 (1987). Shortly after *Matcha* was decided, another appellate court in Texas ruled that the public's easement on the beach rolled landward and seaward with the vegetation line and that this concept was implicit in the Open Beaches Act. Feinman v. State, 717 S.W.2d 106 (Tex. Ct. App. 1986). The owners' challenge to the constitutionality of the rolling easement theory on due process and equal protection grounds was rejected because they had not raised the issue at the trial level. *Feinman*, 717 S.W.2d at 115. In contrast to Texas, a Maryland court refused to recognize a rolling easement theory when an Atlantic hurricane shifted the line of the beach inland. Department of Natural Resources v. Mayor and City Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975). In Department of Natural Resources v. Cropper, 274 Md. 25, 332 A.2d 644 (1975), a Maryland court refused to prevent the littoral owner from exercising a legal right incident to ownership—*e.g.*, constructing a house on his property—after changes in the coastline placed his property seaward of a dune. The court, however, left open

IV. THE TAKING ISSUE

The fifth amendment's prohibition of takings without just compensation[207] is often implicated when public rights are asserted on private lands. Two types of cases present little dispute on the takings issue. If the public has earlier acquired an interest by prescription, dedication, or other common-law theory,[208] governmental enforcement of the public's rights is not a taking.[209] If the public does not have an interest, but the government unilaterally authorizes a permanent, public easement across private lands, courts will undoubtedly characterize this unilateral attempt to create a public easement as a taking requiring just compensation.[210]

The Supreme Court, while conceding that takings jurisprudence cannot be reduced to a "set formula,"[211] has attempted to clarify takings law in several recent cases. The Court's position on the remedies question is now clear: regulation may, at some point, constitute a taking, and, if so, just compensation must be paid for the temporary taking.[212] But the threshold question of whether an otherwise valid regulation has gone "too far"[213] still remains one of the most difficult issues in property law.

Generally, the Supreme Court applies a multifactored balancing approach to takings questions. Important factors include the following:

(1) the character of the government action, especially whether there is a permanent physical occupation or appropriation;[214]

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the issue of the public's right to use the dry sand beach in a manner that did not unreasonably interfere with the owner's possessory rights. *Cropper*, 274 Md. at 28, 332 A.2d at 646.

207. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation") is applied to the states through the fourteenth amendment. U.S. CONST. amend. XIV, § 1. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1240 n.10 (1987); Chicago B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897).

208. *See supra* notes 30-147 and accompanying text.

209. *But cf.* Hughes v. Washington, 389 U.S. 290 (1967) (landowner entitled to accretions under applicable federal law at time of patent even though subsequent state law provided that accretions belonged to the State of Washington). Justice Stewart's concurring opinion in *Hughes* explained that "unpredictable" prospective changes in state property law can constitute a compensable taking, although changes conforming with "reasonable expectations" would not. *Id.* at 297 (Stewart, J., concurring). Thus, if the public's easement was perfected before the original patent or was perfected subsequent to the patent, but pursuant to reasonably expected common law or statutory theories, no taking would occur. If the public's interest were perfected subsequent to the original grant under statutory or common law that had changed sharply and "unpredictably" subsequent to the grant, a credible takings question might arise.

210. *See* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145 (1987). The Court stated:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

Id.

211. Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 123-24 (1978).

212. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 107 S. Ct. 2378, 2389 (1987).

213. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

214. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982). *Cf. Penn Central Transp. Co.*, 438 U.S. at 128 ("[G]overnment actions that may be characterized as

(2) whether the regulation "substantially advances legitimate state interests";[215]

(3) whether the regulation prevents a public harm or confers a public benefit;[216]

(4) the economic impact of the regulation, especially the extent to which the regulation interferes with distinct investment-backed expectations,[217] the extent of the diminution of value (whether the regulation denies economically viable use of the property),[218] and the extent to which the regulation achieves an average reciprocity of benefit and burden;[219] and

(5) whether the regulation is fair and just.[220]

The Court will sometimes find a regulatory taking without engaging in a multifactored balancing process. The clearest example of a "per se"[221] taking is

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acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' ").

215. *See, e.g., Nollan*, 107 S. Ct. at 3146; *see also Penn Central*, 438 U.S. at 127 ("a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). *See generally* Peterson, *supra* note 17, at 339-58 (discussing the effect of *Nollan* on takings jurisprudence).

216. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1244 (1987); Miller v. Schoene, 276 U.S. 272 (1928); Mugler v. Kansas, 123 U.S. 623 (1887); *see also* Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (Fla. 1981) (including in a list of factors to be considered: "Whether the regulation confers a public benefit or prevents a public harm"). *Cf. Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting) (referring to the "nuisance exception to the taking guarantee": government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use").

217. *See, e.g., Penn Central*, 438 U.S. at 127 (attributing the "distinct investment-backed expectations" test to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)). *See generally* Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. URBAN & CONTEMP. L. 3 (1987) ("In *Penn Central* . . . Justice Brennan added a new factor to the judicial lexicon of the taking clause. A taking may occur . . . when legislation frustrates "distinct investment-backed expectations.").

218. *See, e.g., Pennsylvania Coal Co.*, 260 U.S. at 413.

219. *See, e.g.*, Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914). Justice Holmes distinguished *Pennsylvania Coal* from *Plymouth Coal* as follows: "unlike the Kohler Act, the statute challenged in *Plymouth Coal* dealt with 'a requirement for the safety of the employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.' " Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1244 (1987) (quoting *Pennsylvania Coal Co.*, 260 U.S. at 415). *Cf. Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) ("Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.' " (quoting *Pennsylvania Coal Co.*, 260 U.S. at 415)). A similar economic factor is described in R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS 136 (1981), as balancing public benefits against private losses. "Courts often deem cost-benefit analysis of the challenged regulation to be a relevant, perhaps even decisive, factor in takings litigation." *Id.* (citing State Dep't of Ecology v. Pacesetter Constr. Co., 89 Wash. 2d 203, 571 P.2d 196 (1977)).

220. *Cf., e.g., Penn Central*, 438 U.S. at 123 (" 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' ") (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (Fla. 1981) (including, in a list of factors to be considered: "Whether the regulation is arbitrarily and capriciously applied"). A most influential article is Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-15, 1221-23 (1967) (including a "utilitarian test" that considers "efficiency gains," "demoralization costs," and "settlement costs," and a "fairness test" that asks, "whether a specific decision not to compensate is fair.").

221. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982); United States v. Causby, 328 U.S. 256, 265 (1946). *Cf.* Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145 (1987) (permanent physical occupation occurs when individuals have permanent and continuous right to pass over real property).

unilateral governmental action that causes a *permanent physical invasion* of private land.

Loretto v. Teleprompter Manhattan CATV Corp.[222] is the leading case holding that a minor but permanent physical invasion may constitute a taking. When a permanent physical occupation occurs—for instance, the required cable television wire across the landlord's building in *Loretto*—" 'the character of the government action' not only is an important factor in resolving whether the action works a taking but is determinative."[223] The Court viewed permanent physical occupations as "perhaps the most serious form of invasion of an owner's property interests."[224] The *Loretto* per se test was premised on the Court's concern that

> an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. . . . [S]uch an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.[225]

Loretto announced a "very narrow"[226] holding; it did not alter the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property."[227] Drawing the fine line between a reasonable regulation of use and an unconstitutional appropriation of a public easement still remains difficult, though, as illustrated in the important 1987 Supreme Court decision in *Nollan v. California Coastal Commission*.[228]

A. Nollan *and Required Dedications*

Nollan considered whether the California Coastal Commission could require landowners to dedicate a lateral public access easement as a condition to receiving a permit to build a new house.[229] The five-member majority said no, grounding its decision on two theories. First, the Court concluded that the intended public accessway constituted a "permanent physical occupation" within the *Loretto* rule,[230] yet declined to rule that the *Nollan* facts required a "per se"

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222. 458 U.S. 419 (1982).
223. *Id.* at 426.
224. *Id.* at 435.
225. *Id.* at 436 (emphasis omitted).
226. *Id.* at 441.
227. *Id.*
228. 107 S. Ct. 3141 (1987).
229. The California Coastal Act required the Nollans to obtain a coastal development permit from the California Coastal Commission. CAL. PUB. RES. CODE §§ 30106, 30212 & 30600 (West 1986). Although the Nollans were replacing a small bungalow with a new, two-story house, the greater than 10% increase in the size of the building triggered the permit requirement. *Nollan*, 107 S. Ct. at 3143-44.
230. *Nollan*, 107 S. Ct. at 3145. *But cf. Loretto*, 458 U.S. at 430 ("More recent cases confirm the

declaration.[231] Second, recognizing that a land use permit reasonably conditioned on a dedication of land was not necessarily a taking,[232] the Court considered whether the nexus between the regulation and the state interest satisfied the requirement that the regulation "substantially advance" the state interest.[233] The Court concluded that the Coastal Commission's justification for the access requirement was insufficiently related to its legitimate coastal regulatory purposes.[234]

Justice Scalia, writing for the majority, noted that prior Supreme Court cases had "not elaborated on the standards for determining what constitutes a legitimate state interest or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."[235] Scalia's important footnote 3 explained:

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.[236]

The dissent argued that the *Nollan* majority subjected the substantial-advancement-of-a-legitimate-state-end question to a surprisingly high degree of judicial scrutiny: "the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this cen-

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distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property.").

231. The following briefs argued that the Supreme Court should treat the *Nollan* facts as constituting a "per se" taking under *Loretto:* Brief for Appellants at 14; Brief for Breezy Point Cooperative, Inc. as Amicus Curiae in Support of Appellant at 16; Brief Amicus Curiae of the California Association of Realtors in Support of Appellants at 11. The Brief for the United States as Amicus Curiae Supporting Reversal at 9 contains this argument:

> [W]e believe that no one factor is determinative of appellants' takings claim. The Coastal Commission's lateral access dedication requirement is not a per se taking simply because it implicates a physical invasion of appellants' property. . . . In our view, a more structured and determinate inquiry is both possible and appropriate.

Amicus Curiae Brief Supporting Reversal, at 9.

232. *Cf. Nollan*, 107 S. Ct. at 3149 (citing most major subdivision exaction cases favorably, but specifically excepting the California state court cases).

233. *Nollan*, 107 S. Ct. at 3146 ("We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' ") (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)). "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Id.* at 3146-47.

234. *Nollan*, 107 S. Ct. at 3148 ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion' ") (quoting J.E.D. Assoc., Inc. v. Town of Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

235. *Id.* at 3147.

236. *Id.* at 3147 n.3.

tury."[237] In fact, the Supreme Court normally does subject a State's exercise of the police power to a most deferential level of scrutiny.[238]

What, then, triggered *Nollan*'s higher degree of judicial scrutiny? *Nollan* did not specifically hold that *all* fifth amendment takings challenges will receive heightened scrutiny even if due process or equal protection challenges would not.[239] The distinctive factor in *Nollan* most probably was the threat of a permanent physical invasion, which thereby raised the spectre of a *Loretto*-type taking.[240] Although the Court properly refused to rely entirely on the dedication as a per se taking under *Loretto*, *Nollan* is best read as standing for the proposition that all use regulations purporting to license permanent physical occupations by the public will be subjected to higher judicial scrutiny.[241] As a corollary, *Nollan* should not be read as holding that all fifth amendment challenges will be subjected to heightened scrutiny, although, as analyzed below, Justice Scalia may intend this approach.

Justice Scalia's majority opinion implicitly raised, without answering, these additional questions: Does *Nollan* signal that the Court will always address the substantial-relation-to-a-legitimate-end question before engaging in a multifactored balancing process? If so, will the Court subject the substantial-relation question to heightened scrutiny?

Judging from Justice Scalia's dissent in *Pennell v. City of San Jose*,[242] he

237. *Id.* at 3151 (Brennan, J., dissenting). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7 (2d ed. 1988) (discussing the rise and fall of the *Lochner* era).

238. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("fairly debatable" test for validity of legislative classifications under substantive due process facial challenge). A rational basis test is the usual standard of judicial review in equal protection challenges. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); *see Nollan*, 107 S. Ct. at 3151 n.1 (Brennan, J., dissenting).

239. *But cf. Supreme Court, 1986 Term, supra* note 17, at 247 (*Nollan* "indicates that all regulations will now be subjected to a level of scrutiny far higher than the Court previously has used in assessing claims of regulatory takings."). As discussed above, the *Loretto*-type "permanent physical occupation" in *Nollan* may have triggered the Court's higher scrutiny. *See Nollan*, 107 S. Ct. at 3145. However, even in a regulatory taking case a government entity with a very loose "*Nollan* nexus" will likely not fare well, as *Nollan* does not explicitly rule out heightened scrutiny in all takings challenges. *Cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1242 (1987) (The lower courts "were both convinced that the legislative purposes set forth in the statute were genuine, substantial, and legitimate and we have no reason to conclude otherwise.").

240. *See supra* notes 222-28 and accompanying text.

241. The nexus issue in subdivision exaction cases, for example, will probably now receive stricter scrutiny. State courts have produced wide variations concerning the required nexus between the lands exacted and the public need. Views have ranged from Illinois' strict *Pioneer Trust* test, *see* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961) (burden cast upon subdivider must be "specifically and uniquely attributable to this activity"), through Texas' mid-range *Turtle Rock* test, *see* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex. 1984) (requiring the "reasonable connection" analysis supported by the ALI MODEL LAND DEVELOPMENT CODE § 2-103, at 38 (1976)), to California's more liberal *Ayres* and *Associated Home Builders'* test, *see* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 640-41, 484 P.2d 606, 611-13, 94 Cal. Rptr. 630, 635-37 (reasonable conditions conforming to welfare of lot owners and general public upheld), *appeal dismissed*, 404 U.S. 878 (1971). It is instructive to note that the *Nollan* majority cited *Pioneer Trust*, *Turtle Rock*, and numerous other state cases favorably. *Nollan*, 107 S. Ct. at 3149-50. The *Nollan* Court's conspicuous exclusion of "the California state courts," *id.*, is a strong signal that California's liberal nexus test will no longer be constitutionally acceptable.

242. 108 S. Ct. 849 (1988).

may prefer that the Court answer the nexus question first and, if there is an insufficient nexus, declare a taking. In *Pennell*, Justice Scalia cited *Agins v. City of Tiburon*,[243] which noted, without holding, that a zoning law effects a taking if the ordinance does not substantially advance legitimate state interests.[244] He then concluded that the "tenant hardship" provision of the San Jose rent control statute at issue in *Pennell* failed to meet the *Agins* test and "effect[ed] a taking of property without just compensation."[245] The analysis Justice Scalia proposed in *Pennell* resembles his analysis of the nexus issue in *Nollan*. But the majority in *Pennell* concluded that the "substantial relationship" question was "premature,"[246] presumably because the ordinance was being challenged facially instead of as-applied to a specific landowner.

The "substantial relationship" question under takings analysis resembles the police power analysis under substantive due process, under which an ordinance is presumed constitutional and is subjected to a narrow scope of judicial review.[247] If a *Pennell*-type rent control case again reaches the Court—but as a challenge to the ordinance's constitutionality with respect to a specific landowner as opposed to the facial challenge in *Pennell*—is the Court likely to find it an unconstitutional taking without engaging in a multifactored balancing process? If the Court agrees with Justice Scalia that the absence of a sufficient nexus is determinative of the taking issue, it might. The intriguing question, though, is whether the Court will apply *Nollan*-type heightened scrutiny and require the regulating city to carry the burden of demonstrating that the nexus is met. To do so, of course, would signal judicial review more akin to the discredited *Lochner* era[248]—at least for fifth amendment regulatory "takings" of "property."

Some of the dissenting justices' arguments in *Nollan* should not have been dismissed so readily. The arguments raise three factors, in particular, that de-

243. 447 U.S. 255, 260-63 (1980).

244. *Pennell*, 108 S. Ct. at 861 (Scalia, J., dissenting in part, concurring in part).

245. *Id.* at 863 (Scalia, J., dissenting in part, concurring in part).

246. *Id.* at 856.

247. *See supra* note 238.

248. *See supra* note 237 and accompanying text. *Lochner* involved heightened scrutiny both in (1) the *means* to end inquiry and (2) the legitimate *ends* inquiry. The Court said there were certain ends, *viz.* redress of inequality in bargaining power, that government cannot pursue. Lochner v. New York, 198 U.S. 45, 57 (1905). *Nollan* overtones of *Lochner* are principally audible in the *means* to end inquiry. By conceding, for example, that assuring visual access to the ocean would be a legitimate end of the police power, the Scalia opinion does not seem to suffer from the more serious *ends* scrutiny of Justice Peckham's *Lochner* opinion. *See generally* G. GUNTHER, CONSTITUTIONAL LAW 453-58 (11th ed. 1985) (contrasting the two opinions):

> Justice Peckham recognized that "health" is a legitimate end of the police power . . . . With respect to health, he was not satisfied that the means adequately promoted that legitimate state end. But there was another arguable end of the law . . . [—]unequal bargaining position . . . [and] perceived economic inequalities[—] . . . [that were] not within the objectives contemplated by the police power . . . . It is difficult to perceive a basis for the Lochner majority's view of impermissible ends other than an improper reading of a particular economic philosophy into the Constitution.

Id. at 456. *See also Supreme Court, 1986 Term*, *supra* note 17, at 250 ("Especially troubling is the Court's assertion that regulations that diminish the value of property rights are subject to a different and more exacting standard of review under the takings clause than are economic regulations under the due process or equal protection clauses.").

serve further analysis: (1) the explanation of why the boundary issue is different when unique coastal lands are at issue;[249] (2) the reciprocity of advantage that accrues from reasonable dedication requirements from all littoral owners;[250] and (3) the cumulative effect when the totality of probable construction will be unreasonable although each individual's development, considered alone, seems innocuous.[251]

The Nollans' beachfront lot lies on the Faria Beach shoreline between the Pacific Coast Highway and the Pacific Ocean. A public beach and recreation area is located a quarter of a mile north of the Nollan house, and another public beach area lies 1,800 feet south. A concrete seawall, which runs behind all the houses between the two public beach areas, separates the beach area from the developed part of the Nollan lot. The lateral passageway at issue would, when coupled with similar ones behind all other houses, have provided a continuous accessway between the two public beach areas and would have been located waterward of the seawall and landward of the mean high tide line.

The Faria Beach shoreline " 'fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean high tide line.' "[252] When this author first tried to walk on the public's tidelands behind the Nollans' house, a minor rainstorm had caused the water to lap against the seawall; public passage would have required walking through the breaking tide.[253] On the next day, though, some dozen or more feet of beach were uncovered, albeit entirely wet from the seawall to the water's edge.[254] No one, including littoral owners, would have any reasonable means of locating the historic mean high tide line.[255] And because of the ambulatory nature of beaches in general,[256] it would be inappropriate to mark the boundaries as might be done with ordinary non-migrating lands.

The majority should not have equated boundary dispute problems of ordinary land with the special problems that exist when the coastal boundaries migrate. They should have been more sensitive to the unique property problems where land and sea meet, as was the Texas *Matcha* court in the migrating public

249. *See Nollan*, 107 S. Ct. at 3155-56 (Brennan, J., dissenting).

250. *See id.* at 3158 (Brennan, J., dissenting).

251. *See id.* at 3162 (Brennan, J., dissenting).

252. *Id.* at 3155 (Brennan, J., dissenting) (quoting Joint Appendix volume 1, *Nollan*, at 67).

253. Author's notes from visit to the area surrounding the Nollan house, October 23, 1987, at approximately noon.

254. Author's notes from visit to the area surrounding the Nollan house, October 24, 1987, in mid-afternoon.

255. "The historic mean high tide line determines the lot's oceanside boundary." *Nollan*, 107 S. Ct. at 3143. *See generally* Dinkins, *Texas Seashore Boundary Law: The Effect of Natural and Artificial Modifications*, 10 HOUS. L. REV. 43, 44 (1972) (in Texas, the mean high tide line is based on an 18.6 year average incorporating the highest mark of two daily tides).

256. "Unlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is *not* constant." *Nollan*, 107 S. Ct. at 3156, n.6. *See generally* R. POWELL & J. ROHAN, 5 POWELL ON REAL PROPERTY ¶ 717(1) n.6 (1987) (citations to cases and other authorities considering accretion and other shoreline boundary problems); Note, *The Federal Rule of Accretion and California Coastal Protection*, 48 S. CAL. L. REV. 1457, 1461-62 (1975) (describing migrating nature of beaches).

easement case.[257]

The *Nollan* majority also inadequately considered Justice Brennan's analogy of the public access easement to required dedications of sidewalks in front of private residences.[258] The sidewalk-by-highway analogy is even more instructive when one considers that the boundaries of a navigable "highway" and its adjacent wet sand "sidewalk" do not remain fixed. The public-trust highway[259] behind the Nollan house is regularly used, and legally so, by surfers and strollers.[260] Just as government should provide safe walkways along land highways, it should provide them along public waterways. Although the public may know that wet sands are usually public tidelands protected by the public trust doctrine, the inherent migration of coastal boundaries will cause confusion concerning the public's right of passage for both the private landowner and the public. The public needs a margin of safe passage on the shore, without fear that, because of a shifting mean high tide line, lands previously public are now private.

The majority opinion is also deficient in failing to accept as applicable one of the major exceptions to the takings guarantee: the Coastal Commission's dedication requirement afforded the Nollans and all other similarly regulated Faria Beach landowners an "average reciprocity of advantage."[261] The Nollans, though burdened by the dedication requirement, received an offsetting benefit because all their neighbors were similarly burdened.[262] On days when the tide is close to the seawall, the Nollans and their guests likely trespass, perhaps unintentionally, on neighbors' lands in order to stroll along the shore. Would they not increase their enjoyment of their own coastal lot if they (and the rest of the public) were privileged to walk closer to the seawall?

Of course, the Faria Beach landowners probably acquiesce to their neighbors' trespasses. In fact, Faria Beach landowners probably have long acquiesced to the public strolling seaward of the wall. In a suit to quiet title, adequate evidence may well exist to prove that the Nollans' land between the seawall and mean high tide line is subject to an easement under prescriptive easement, implied dedication, or other common-law theory.[263]

As this Article argues above, courts should fashion tests of reasonableness in nuisance cases that measure each individual's actions against a standard that considers the impact upon the public if every other landowner, similarly situ-

257. *See supra* notes 192-93 and accompanying text.

258. *See Nollan*, 107 S. Ct. at 3157 (Brennan, J., dissenting).

259. The public trust doctrine applies to all lands subject to the ebb and flow of the tide. Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 794 (1988) (citing Shively v. Bowlby, 152 U.S. 1 (1894)). The state's public trust doctrine is defined by state law, and California acquired title to public trust lands upon becoming a state. *See* National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 434, 658 P.2d 709, 718, 189 Cal. Rptr. 346, 355 (1983) (citing City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330 (1980)).

260. *See Nollan*, 107 S. Ct. at 3156-57 (Brennan, J., dissenting). Use by strollers and surfers was confirmed in Interview with Dan Ray, California Coastal Commission, in Santa Barbara, Cal. (Oct. 23, 1987).

261. *Pennsylvania Coal Co.*, 260 U.S. at 415; *see supra* note 219 and accompanying text; *Nollan*, 107 S. Ct. at 3158 (Brennan, J., dissenting).

262. *Nollan*, 107 S. Ct. at 3144; *id.* at 3158 (Brennan, J., dissenting).

263. *Id.* at 3161 (Brennan, J., dissenting). *See, e.g., supra* notes 51-60 and accompanying text.

ated, were allowed to proceed as requested.[264] The *Nollan* majority inadequately considered this cumulative impact problem.

The California Coastal Commission found, among other things, that the Nollans' new house would increase blockage of the view of the ocean and would increase private use of the shorefront. These effects would "cumulatively 'burden the public's ability to traverse to and along the shorefront.' "[265] In light of this finding, Justice Brennan argued in his dissent that "the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of development in many areas calls for far-sighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development."[266] State agencies will need more flexibility than *Nollan* allows if they are to implement Congressional policies focusing on the overall impact of development.[267]

Perhaps the *Nollan* litigation could have been avoided by better implementation of California coastal law. The Nollans' lot is part of a long coastal tract originally owned by the Faria family.[268] Did the coastal commission, or, at an earlier time, local government, have an opportunity to secure adequate accessways through the subdivision control process?[269] The ideal time for setting aside reasonable vertical and lateral accessways is at the subdivision approval stage.[270] *Nollan* would not prohibit such reasonable dedications, assuming the nexus requirement is met, as it undoubtedly could have been with the Faria

264. Tort law addresses cumulative impact issues in a similar manner. *See supra* notes 181-83 and accompanying text. For an analogous use of the cumulative impact concept in "affecting commerce" cases under the commerce clause, see Perez v. United States, 402 U.S. 146, 154 (1971) ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class."); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."); United States v. Darby, 312 U.S. 100, 123 (1941) ("competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great").

265. *Nollan*, 107 S. Ct. at 3144 (quoting Joint Appendix volume 1, at 65-66).

266. *Id.* at 3161-62 (Brennan, J., dissenting).

267. *Id.* at 3162 (Brennan, J., dissenting).

268. Interview with Dan Ray, California Coastal Commission, in Santa Barbara, Cal. (Oct. 23, 1987).

269. Subdivision of much of the Faria coastal land "happened from 1973 on," *id.*, which would have occurred while the California Coastal Commission and its predecessor commission had jurisdiction. California Coastal Zone Conservation Act of 1972, 1972 CAL. STATS. A-181 (repealed Jan. 1, 1977); California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (West 1986 & Cum. Supp. 1988). *But cf. Nollan*, 107 S. Ct. at 3143, for implication that subdivision may have occurred much earlier ("The building on the lot was a small bungalow.... After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.").

270. *See generally* D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 202-12 (2d ed. 1986) (discussing subdivision controls). As discussed *supra* at note 241, *Nollan* casts substantial doubt on California's previous subdivision exaction cases while citing favorably a substantial number of cases from other jurisdictions. One cited case, City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984), required a "reasonable connection" analysis, a position taken in ALI MODEL LAND DEVELOPMENT CODE § 2-103 at 38 (1976). *Turtle Rock* required a consideration of the public "need" for the exaction and the offsetting "benefit" to the residents of the particular subdivision. 680 S.W.2d at 807. If reasonable exactions of reasonable accessways had been required when the entire Faria coastal tract was subdivided, the public need and offsetting benefits to the subdivision residents should have been easily demonstrated.

tract.[271] Although the reciprocity of advantage and cumulative impact aspects should have received more attention in *Nollan*, these factors would receive considerable weight, and normally should be determinative, when a larger subdivision is being platted.

Looking to the future, *Nollan* should not prevent the California Coastal Commission from promoting the coastal act's access policies through reasonable vertical and lateral access requirements. True, there must at least be a reasonable fit between the regulatory end furthered and the burden on the landowner.[272] The Commission should be able to meet this standard, however, for many vertical and even lateral accessways, just as governments will undoubtedly be able to require dedication of streets, sidewalks, and even parks and school sites where large areas are considered by subdivision permits.[273]

B. *The Public Trust Doctrine and the Taking Issue*

Takings disputes at the water's edge often implicate the public trust doctrine, and the 1988 Supreme Court decision in *Phillips Petroleum Co. v. Mississippi*[274] vividly reaffirmed the doctrine's potential significance. As discussed earlier, the public trust doctrine might be the theoretical basis for a public right in private lands,[275] or it might trigger higher judicial scrutiny and protection of public rights acquired in some other manner.[276] The doctrine is also relevant in resolving some taking disputes.[277]

Does the *Nollan* majority opinion implicate the public trust doctrine? Justice Blackmun, in dissent, thought not: the parties did not argue the doctrine, and the California decisions did not rest on it.[278] Clearly the majority in *Nollan* did not reach the question whether the public had earlier acquired an easement in the Nollan lot between the seawall and the mean high tide line.

> [T]he commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a pre-existing public right of access had to be asserted through a quiet title action . . . which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring.[279]

It was therefore not appropriate for the Commission to argue—as an alternative theory to, say, the implied dedication theory the California Supreme

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271. *Nollan*, 107 S. Ct. at 3150.

272. *Id.* at 3148.

273. *Cf. id.* at 3157 n.7 (Brennan, J., dissenting) (citing authority for upholding reasonable exactions of sidewalks in front of private residences).

274. 108 S. Ct. 791 (1988).

275. *See supra* notes 114-31 and accompanying text.

276. *See supra* notes 187-89 and accompanying text.

277. *See infra* notes 286-90, 396-414 and accompanying text.

278. "I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine." *Nollan*, 107 S. Ct. at 3162 (Blackmun, J., dissenting).

279. *See Nollan*, 107 S. Ct. at 3146 (citing CAL. CIV. PROC. CODE § 738 (West 1980)).

Court espoused in *Gion v. City of Santa Cruz*[280]—that the public had an easement under a public trust rationale similar to the one enunciated by the Supreme Court of New Jersey in *Matthews v. Bay Head Improvement Association*.[281] California's Attorney General presumably could still assert the public's rights in the disputed Nollan area, arguing in part that the public trust doctrine supports a public easement. Similarly, it would have been premature for the Commission to argue that an earlier acquired easement was held in trust for the public—the theory a New York Supreme Court adopted in *Gewirtz v. City of Long Beach*.[282] Even so, these potential arguments raise two questions which still deserve careful attention. First, what is the relationship of the public trust doctrine to the taking issue? And second, did the Supreme Court's analytical approach to resolving the *Nollan* takings dispute necessarily implicate the public trust doctrine even if the majority made no reference to it?

If a regulated area is within the tidally influenced area subject to the public trust doctrine, the state, upon admission to statehood, will have fee simple title, and the taking issue will not arise because there is no private property to be taken.[283] If the state has earlier relinquished all the public's equitable trust rights, then the taking issue may arise, assuming courts will validate the state's relinquishment of the *jus publicum*.[284] If applicable state law holds that earlier conveyances into private ownership pass only the *jus privatum* and are still subject to the *jus publicum*, the private owner may have only a "naked fee"[285] and a taking most likely will not occur.

Nollan concerned regulation of private land lying landward of the historic mean high tide line and therefore beyond the area normally subject to the public

280. 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); *see supra* notes 51-60 and accompanying text.

281. 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984); *see supra* notes 122-31 and accompanying text.

282. 69 Misc. 2d 763, 330 N.Y.S.2d 495 (N.Y. Sup. Ct. 1972), *aff'd mem.*, 45 A.D.2d 841, 358 N.Y.S.2d 957, *appeal denied*, 35 N.Y.2d 644, 324 N.E.2d 370, 364 N.Y.S.2d 1025 (1974); *see supra* notes 188-89 and accompanying text.

283. The *Phillips Petroleum* decision reaffirmed that "the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide." *Phillips*, 108 S. Ct. at 795. *Phillips* also recognized that a state's definition of trust purposes can relate to public uses beyond physical navigation. *Id.* at 798. *But see id.* at 800 (O'Connor, J., dissenting) (arguing for limitation of public trust to physical navigation and commerce purposes). Additional uses recognized by state law might include "bathing, swimming, recreation, fishing, and mineral development." *Id.* at 798. The public trust doctrine will therefore reach not only nonnavigable waters on the seashore that are affected by the tide, but will also apply to *all* tide waters connected to the sea, even, as in *Phillips*, to nonnavigable waters by a navigable, tidal river.

284. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 457 (1892). Justice Harlan wrote:

> It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, *and* grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State.

Id. at 452 (emphasis added).

285. *See* People v. California Fish Co., 166 Cal. 576, 598, 138 P. 79, 88 (1913) ("naked title to the soil").

trust doctrine.[286] Takings disputes involving lands lying in close proximity to public trust lands can still implicate the public trust doctrine, however, as two wetlands cases illustrate. The first, *Just v. Marinette County*,[287] upheld stringent regulation of Wisconsin wetlands. The Wisconsin Supreme Court noted:

> This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state. They . . . are subject to the state public trust powers.[288]

The second case, *Graham v. Estuary Properties, Inc.*,[289] embraced the *Just* rationale and reached a similar conclusion. Both *Just* and *Estuary Properties* rejected the takings challenges and, in doing so, placed major emphasis upon the proposed development's harm to adjacent lands, particularly to submerged lands held in trust for the public. Proximity to public trust lands is a relevant takings factor, however, only if courts apply the usual multifactored balancing test.[290] Nonetheless, the *Nollan* Court found a taking before the balancing stage; thus the public trust doctrine was never implicated in *Nollan*.

In a per se taking analysis, such as the analysis the Court applied to the unilateral permanent physical invasion in *Loretto v. Teleprompter Manhattan CATV Corp.*,[291] courts find a taking without applying the usual multifactored analysis.[292] The Nollans and several *amici* tried to convince the Court that the facts required a per se taking determination.[293] The Court declined to treat a permit condition case as a per se case, however, in part because of the implications of such a decision for reasonable subdivision controls and other reasonable permit conditions.[294] *Nollan* can be classified as a physical invasion case. The Court closely examined the facts because of the physical invasion of the Nollans' land, then found a taking because the nexus between the burden on the Nollans and the governmental end was inadequate.[295] Under this explanation, *Nollan* is a per se physical invasion case since the nexus that might otherwise validate a permit condition or subdivision exaction was absent.

An alternative explanation of the *Nollan* rationale is that *Nollan* constitutes a new category of takings cases in which the Court first considers the nexus question and, if the connection is insufficient, declares a taking without engaging in a multifactored balancing process. As discussed above, Justice Scalia appears

286. *Nollan*, 107 S. Ct. at 3143.

287. 56 Wis. 2d 7, 201 N.W.2d 761 (1972); *see* Bryden, *A Phantom Doctrine: The Origins and Effects of* Just v. Marinette County, 1978 AM. B. FOUND. RES. J. 397, 410-12 (administration of fill permits in Wisconsin and Minnesota rarely drastically reduced value of land; ideology and politics, not constitutional law, were the major factors limiting severity of conservancy zoning).

288. 56 Wis. 2d at 18-19, 201 N.W.2d at 769 (citations omitted).

289. 399 So. 2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 (1981).

290. *See supra* notes 214-20 and accompanying text.

291. 458 U.S. 419 (1982); *see supra* notes 221-25 and accompanying text.

292. *See supra* notes 221-27 and accompanying text.

293. *See supra* note 231.

294. *See supra* notes 241, 269 and accompanying text.

295. *Nollan*, 107 S. Ct. at 3145, 3148.

to be pointing toward this kind of threshold analysis in all takings cases.[296] However one classifies *Nollan*, the Court declared a constitutional taking without engaging in a multifactored analysis. The public trust doctrine was therefore not implicated.

Many future coastal access cases may well implicate the public trust doctrine. *Nollan* did not brand all required dedications for public use as per se takings. It simply required that such dedications be reasonably related to their purpose and that, before reaching other takings factors, the regulation must pass an "essential nexus" test.[297] If the regulating authority can prohibit a proposed use, then it can substitute a condition for the prohibition.[298] There must be, however, a substantive fit between the condition and the original purpose for the regulation. "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' "[299] Although the Nollan exaction did not meet the Court's nexus test, future permit conditions might well meet it, at which point the Court's takings analysis will require application of the balancing test, which in turn may implicate the public trust doctrine.

C. *The Federal Navigational Servitude and the Taking Issue*

The navigational servitude, stemming from the commerce clause of the United States Constitution,[300] expresses "the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation."[301] Its purpose is to assure that navigable waters continue "to serve as continuous highways for the purpose of navigation in interstate commerce."[302]

If Congress in a proper exercise of the navigation power burdens expectations arising from private property ownership, compensation may not be required constitutionally to the extent the burdened expectations were subject to the navigational servitude.[303] The affected landowner's title never included

296. *See supra* notes 242-48 and accompanying text.

297. *Nollan*, 107 S. Ct. at 3148.

298. *Id.* at 3147.

299. *Id.* at 3148 (quoting J.E.D. Assocs. v. Town of Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14 (1981)).

300. *See* U.S. CONST. art I, § 8, cl. 3.

301. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

302. *Kaiser Aetna*, 444 U.S. at 177; United States v. Willow River Power Co., 324 U.S. 499, 507-09 (1945); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 71-72 (1913); Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RESOURCES J. 1, 19 (1963); *see also* Comment, *Navigation Servitude—The Shifting Rule of No Compensation*, 7 LAND & WATER L. REV. 501, 509 (1972) (discussing history of servitude and effect of 1970 amendment to 33 U.S.C. § 595a concerning locational values); Note, *The Navigation Servitude: Post Kaiser-Aetna Confusion*, 20 VAL. U.L. REV. 445, 445 (1986) (tracing history of servitude and concluding that although *Kaiser Aetna* was an attempt to limit the doctrine, it only increased the confusion); Note, *Recreational Rights in Public Water Overlying Private Property*, 8 VT. L. REV. 301, 328 (1983) (discussing *Kaiser Aetna* in relation to Vermont law); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 205, 207 (1980) (critical analysis of *Kaiser Aetna*).

303. *Kaiser Aetna*, 444 U.S. at 175.

those interests reserved under the superior navigational servitude; therefore, "property" has not been "taken" in the constitutional sense.

United States v. Cress[304] and *United States v. Willow River Power Co.*[305] illustrate the difficulties of determining whether the navigational servitude applies. In each case, the asserted property interest was the advantage of having water fall a particular distance at a particular rate of speed. When the government's improvements in a navigable waterway caused the level of water to rise, the head of water decreased, and landowners asserted a compensable taking.

In *Cress* the Supreme Court found a compensable taking because the head of water was created by water falling into a nonnavigable tributary, the water level of which had risen when the governmental authority improved the navigable waterway.[306] Although the facts closely resembled those in *Cress*, the Supreme Court in *Willow River* distinguished *Cress* by finding that the water did not fall into a nonnavigable tributary but rather into a navigable waterway subject to the dominant navigational servitude.[307] The Court noted " '[t]he owner of the bank has no *jus privatum*, or special usufructary interest, in the water.' "[308] The owner's interest was simply "a privilege or a convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but it is not an interest protected by law when it becomes inconsistent with plans authorized by Congress for improvement of navigation."[309]

The navigational servitude is well established in American jurisprudence.[310] Tidal and submerged lands had special status in the English common law as well as in earlier legal systems.[311] In 1894 the Supreme Court explained in *Shively v. Bowlby*[312] that the King of England had a *prima facie* right to the shore between the ordinary high water and low water mark.[313] Indeed, the King had "both the title and dominion of the sea, and of rivers and arms of the

304. 243 U.S. 316 (1917).

305. 324 U.S. 499 (1945).

306. *Cress*, 243 U.S. at 329-30.

307. *Willow River*, 324 U.S. at 506-07. *But cf. id.* at 513 (Roberts, J., dissenting) ("the Government's answer admitted averments of the petition that the dam and power plant were located *near* a point where the [nonnavigable] Willow River discharges in the [navigable] St. Croix River").

308. *Id.* at 507 (quoting 1 J. LEWIS, TREATISE ON THE LAW OF EMINENT DOMAIN 118 (3d ed. 1909)).

309. *Id.* at 509. A defensible argument can be advanced that the Court in *Willow River* impliedly overruled *Cress*. The Court seemingly glossed over the fact that the water in *Willow River* also fell directly into a nonnavigable stream (albeit very close to a navigable waterway) because the Court concluded that the policy underlying *Cress* was unsound.

310. *E.g., Kaiser Aetna*, 444 U.S. at 175; United States v. Rands, 389 U.S. 121, 123 (1967); United States v. Twin City Power Co., 350 U.S. 222, 224 (1956); *Willow River*, 324 U.S. at 509; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 63 (1913); Scranton v. Wheeler, 179 U.S. 141, 163 (1900); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1865).

311. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791, 794 (1988); Shively v. Bowlby, 152 U.S. 1, 11-12 (1894); Packer v. Bird, 137 U.S. 661, 666-67 (1891). *But cf.* MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 513, 609 (1975) (extensive historical analysis illustrates how "[i]nvention, misconception, and treatise writing" contributed to doctrinal development).

312. 152 U.S. 1 (1894).

313. *Id.* at 12.

sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England."[314] These waters and the lands covered by them were considered public in nature. Although the title, *jus privatum*, was in the King, "the dominion thereof, *jus publicum*, [was] vested in him as the representative of the nation and for the public benefit."[315] The *jus publicum* included uses "for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects."[316] Although the King might grant such waters and wetlands to an individual, "this title, *jus privatum*, whether in the King or in a subject, [was] held subject to the public right, *jus publicum*, of navigation and fishing."[317] The Court in *Shively* concluded: "The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution."[318] Thus, in the United States the *jus publicum* is subject to state trusteeship[319] except in fields such as interstate navigation which are subject to a supreme, but often concurrent, federal trusteeship.[320]

The federal navigational servitude and public trust doctrine are both grounded in this conceptual split between the *jus privatum* and *jus publicum*.[321] Indeed, American jurisprudence requires both doctrines because of the nature of our federal system. With a single government, as in England, all the *jus publicum* would be encompassed by the public trust doctrine, without need for a separate "navigational servitude."

One of the more important navigational servitude and takings cases is the Supreme Court's 1979 decision in *Kaiser Aetna v. United States*.[322] Kaiser Aetna dredged and developed a marina in Kuapa Pond, a "fishpond" having a

314. *Id.* at 11.

315. *Id.*

316. *Id.*

317. *Id.* at 13.

318. *Id.* at 57-58.

319. For the common-law doctrine, see, *e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892); Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 416-17, 432 P.2d 3, 8-9, 62 Cal. Rptr. 401, 406-07 (1967), *cert denied*, 390 U.S. 949 (1968); Hayes v. Bowman, 91 So. 2d 795, 798-99 (Fla. 1957).

For provisions giving constitutional status to the trust doctrine, see, *e.g.*, CAL. CONST. art. X, § 5; FLA. CONST. of 1968 art. X, § 11. *See generally* Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988) (summarizing and reaffirming nineteenth-century cases); Shively v. Bowlby, 152 U.S. 1 (1894) (principal nineteenth-century case tracing the evolution and acceptance in the United States).

320. *See Shively*, 152 U.S. at 57 ("Upon the American Revolution, [public trust] rights . . . were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States."); *accord Phillips Petroleum*, 108 S. Ct. at 796 ("[L]ands under navigable freshwater lakes and rivers were within the public trust given the new States upon their entry into the Union, subject to the federal navigation easement and the power of Congress to control navigation on these streams under the Commerce Clause.").

321. *Cf. Shively*, 152 U.S. at 13 (discussing *jus privatum* and *jus publicum*); S. MOORE, HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 533 (1888) (discussing *jus publicum*); J. PHEAR, RIGHTS OF WATER 44-46 (1859) (discussing *jus publicum*).

322. 444 U.S. 164 (1979).

unique legal status in Hawaii law.[323] The Army Corps of Engineers did not assert its jurisdiction when Kaiser Aetna first dredged the pond and built retaining walls and bridges. The Corps even acquiesced when, in 1961, it was advised of additional improvements to the marina waters, including construction of a channel that would allow boats ingress and egress from the bay. The first dispute between Kaiser Aetna and the Corps arose in 1972 when the Corps required a permit for future construction, filling, and excavation in the marina and prohibited Kaiser Aetna from denying public access to marina waters. The Corps asserted that the pond had become a "navigable water" as a result of the improvements.[324]

The ensuing litigation raised three major issues: (1) Were activities affecting Kuapa Pond subject to federal regulatory jurisdiction? (2) If so, were the activities in Kuapa Pond subject also to the federal navigational servitude? (3) If the activities were subject to federal regulatory jurisdiction but were not subject to the federal navigational servitude, was the Corps' requirement of public access to the marina waters an unconstitutional taking?[325] The Supreme Court and lower courts all agreed that Kuapa Pond was a navigable water subject to federal regulatory jurisdiction, although they differed on the applicable theory of navigability.[326] The greatest dispute among the parties and, indeed, among the

323. *Id.* at 167; *see* HAW. CONST. art. XI, § 6; Organic Act of 1900, ch. 339, § 95, 31 Stat. 141 (*reprinted in* 1 HAW. REV. STAT. 36 (1985)).

324. *Kaiser Aetna*, 444 U.S. at 167-69. For a discussion of the term "navigable waters of the United States" under the Rivers and Harbors Act of 1899, see generally Finnell, *The Federal Regulatory Role in Coastal Land Management*, 1978 AM. B. FOUND. RES. J. 169, 179-89.

A quasi-estoppel aspect of *Kaiser Aetna* arguably limits the case's precedential value. The Army Corps of Engineers let Kaiser Aetna build for a while before asserting regulatory jurisdiction. *Kaiser Aetna* nevertheless remains a significant takings and federal navigational servitude case, particularly when considered in conjunction with Vaughn v. Vermilion Corp., 444 U.S. 206 (1979). *See infra* note 378 and accompanying text.

325. *Kaiser Aetna*, 444 U.S. at 169; *see* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

326. The district court, applying the traditional tests of "navigability in fact," *see, e.g.*, The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870), "navigable capacity," *see, e.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-08 (1940), and "ebb and flow of the tide," *see, e.g.*, The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825); Waring v. Clarke, 46 U.S. (5 How.) 441, 463-64 (1847); United States v. Stoeco Homes, Inc., 498 F.2d 597, 606, 610 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975), concluded that, prior to Kaiser Aetna's alterations, Kuapa Pond was not "navigable in fact" because there was "no evidence that the barrier beach and the pond's stone walls ever admitted the possibility of even the shallowest boats floating directly from Kuapa Pond to the open bay." United States v. Kaiser Aetna, 408 F. Supp. 42, 49 (D. Haw. 1976). The court also thought evidence was lacking to establish jurisdiction under the "navigable capacity" test. *Id.* at 49-50. The district court rested its jurisdictional conclusion on the "ebb and flow" test, *id.* at 50, applying the rationale of *Stoeco Homes*.

The Ninth Circuit concluded, for different reasons, that Kuapa Pond was navigable. It accepted, *arguendo*, Kaiser Aetna's contention that the pond in its natural state was not navigable within the meaning of the ebb and flow test because "that test determines the outer limits of an admittedly navigable water body and does not serve to render navigable a separate and distinct water body not otherwise navigable." United States v. Kaiser Aetna, 584 F.2d 378, 381 n.2 (9th Cir. 1978). Rather, the court rested its jurisdictional conclusion on the *Daniel Ball* test as elaborated by the *Appalachian Power* "navigable capacity test," namely "whether the water 'has "capability of use by the public for the purpose of transportation and commerce." ' " *Id.* at 382 (quoting *Appalachian Power*, 311 U.S. at 410 (quoting The Montello, 87 U.S. (20 Wall.) 430, 441 (1874))).

All members of the Supreme Court, in the Court's six-to-three decision, agreed the fishpond was subject to federal jurisdiction. Justice Rehnquist's majority opinion grounded its conclusion on traditional tests as enunciated in *The Daniel Ball* and *Appalachian Power*, emphasizing that *Appa-*

Supreme Court Justices and lower court judges, was whether the navigational servitude extends to all navigable waters subject to regulation under the Rivers and Harbor Act of 1899.[327] This question was critical because of the takings challenge: if the federal navigational servitude attached to all navigable waters as defined within the Rivers and Harbors Act, then no taking could occur because Kuapa Pond would be subject to the navigational servitude. The Supreme Court held that "navigable waters" and the navigational servitude are not coextensive;[328] the Ninth Circuit erred in holding that the alterations that resulted in federal jurisdiction subjected Kuapa Pond to the federal navigational servitude.[329] The Court accepted the reasoning of the district court: the navigational servitude applies to "interstate waters that *in their natural condition are in fact capable of supporting public navigation.*"[330] Waters such as Kuapa Pond which are made navigable because of private investment are not subject to the navigational servitude.[331]

The final dispute in *Kaiser Aetna* was whether the Corps' public access condition constituted a taking. The majority noted that Congress had *power* under the commerce clause to assure the public a free right of access to the marina.[332] The opinion further emphasized that "[w]hether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question."[333] Since the Court held that regulation by the Corps in Hawaii Kai Marina did not enjoy the immunity of the navigational servitude, Corps regulations were subject to traditional takings analysis. The Court concluded that "the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking."[334]

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lachian Power indicates that "congressional authority over the waters of this Nation does not depend on a stream's 'navigability.'" *Kaiser Aetna*, 444 U.S. at 174. The Court's decisions in Wickard v. Filburn, 317 U.S. 111 (1942), United States v. Darby, 312 U.S. 100 (1941), and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), Justice Rehnquist added, demonstrate that "a wide spectrum of economic activities 'affect' interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved." *Kaiser Aetna*, 444 U.S. at 174. In dissent, Justice Blackmun concluded that federal jurisdiction rested, in premarina days, on the "ebb and flow" test and, in postmarina days, also on the "navigable-in-fact" test. *Id.* at 181-84 (Blackmun, J., dissenting). For reasons similar to the district court's, Justice Blackmun would "stop short of agreeing with the Government's contention that the pond has been shown to be navigable under the *Appalachian Power* test." *Id.* at 184 n.3. (Blackmun, J., dissenting).

327. Rivers and Harbors Appropriation Act of 1899, ch. 425, § 10, 30 Stat. 1151 (codified at 33 U.S.C. § 403 (1982)).

328. *Kaiser Aetna*, 444 U.S. at 172 ("[T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation.").

329. *Id.* at 165-66.

330. *Id.* at 175 (emphasis added).

331. *Id.* at 179-80; *see* Phillips Petroleum Co. v. Mississippi, 108 S. Ct. 791 (1988). In *Phillips Petroleum*, the Court rejected a similar contention, asserted by Justice O'Connor in dissent, that the public trust doctrine applies only to physically navigable waters. *See id.* at 803 (O'Connor, J., dissenting).

332. *Kaiser Aetna*, 444 U.S. at 174.

333. *Id.*

334. *Id.* at 178 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)). Among Justice Holmes' famous phrases in *Pennsylvania Coal* is, "The general rule at least is, that while property

The Court noted that private effort and investment "can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the land-owner's property."[335] The "right to exclude,"[336] the Court held, fell within this category of expectancies. The Corps' public access requirement was not a case of "insubstantial devaluation," but was one that would "result in an actual physical invasion of the privately owned marina."[337]

Kaiser Aetna prefigured the per se taking result of *Loretto v. Teleprompter Manhattan CATV Corp.*[338] Nevertheless, *Kaiser Aetna* is a highly questionable takings case when viewed in light of subsequent Supreme Court decisions discussed below.[339] *Kaiser Aetna* held that the right to exclude is a "fundamental element" of property.[340] Within a year, however, the Court explained in *Pruneyard Shopping Center v. Robins*[341] that the right to exclude is relative, not absolute.[342]

Kaiser Aetna concluded that the Corps' public access requirement was constitutionally impermissible because it "result[ed] in an actual physical invasion of the privately owned marina" and the devaluation of Kaiser Aetna's private property would not be "insubstantial."[343] *Kaiser Aetna*-type physical invasion will now undoubtedly trigger the heightened takings scrutiny of *Nollan v. Cali-*

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may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415.

335. *Kaiser Aetna*, 444 U.S. at 179.

336. *Id.* at 179-80.

337. *Id.* at 180.

338. 458 U.S. 419 (1982); *see supra* notes 222-28 and accompanying text. The *Loretto* court held that a minor but permanent physical invasion—a cable installation on the roof and side of a building—constituted a per se taking. Tracing many older cases, the Court stated, "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Id.* at 427. *Loretto* distinguished *Kaiser Aetna* in this manner: "Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character." *Id.* at 433. Nevertheless, *Loretto* quotes this telling explanation from *Kaiser Aetna*: " 'the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation.' " *Id.* at 433 (quoting *Kaiser Aetna*, 444 U.S. at 180); *see also supra* notes 229-41 and accompanying text (discussing Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987), and the similar question of how the Court characterized a lateral accessway).

339. *See, e.g.*, Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

340. *Kaiser Aetna*, 444 U.S. at 179-80.

341. 447 U.S. 74 (1980).

342. The Court stated:

> It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. And here there has literally been a "taking" of that right . . . . But it is well established that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."

Id. at 82 (citations omitted) (quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)).

343. *Kaiser Aetna*, 444 U.S. at 180.

fornia Coastal Commission.[344] However, *Kaiser Aetna*-type facts do not merit a per se takings determination for the same reasons that the *Nollan* facts did not merit one.[345] First, a court should ask whether the *Nollan* nexus test is met. If the "fit" between the private burden and the governmental goal is adequate, the court should then apply the multifactored balancing analysis.[346]

A *Kaiser Aetna*-type takings challenge should not be heard at all until the case is "ripe."[347] The *Kaiser Aetna* case was not ripe because a per se determination was inappropriate and, unlike *Nollan*, there was a proper nexus in *Kaiser Aetna* between the Corps' public access requirement and the governmental end it furthered.[348] Therefore, the *Kaiser Aetna* Court should have applied the usual multifactored balancing test. The determinative factor under this test, besides physical invasion, was economic impact.[349] The *Kaiser Aetna* record, however, was insufficient to support a determination on economic impact. The Court thus erred in resting its takings determination in part on a finding that the resultant diminution in property value was "not insubstantial."[350]

Takings jurisprudence does not focus on one discrete part of property and apply a takings analysis only to that part. The Supreme Court in *Penn Central Transportation Co. v. New York City*[351] did not focus only on the airspace above Grand Central Station. Even if the landowners were denied all development approval in that airspace, the Court would still consider the entire parcel on which Grand Central Station was located as well as Penn Central's holdings adjacent to Grand Central in determining whether a taking had occurred.[352] Upon consideration of Penn Central's total quantum of property, the Court held that New York's historic preservation law did not constitute a taking.[353] Simi-

344. 107. S. Ct. 3141 (1987).

345. *Id.* at 3145 n.1; *see also Pruneyard*, 447 U.S. at 82-83 (1979) (although the "right to exclude others" had been literally "taken," not every destruction or injury constitutes an unconstitutional taking; rather, multifactored analysis was required, and the California constitutional protection of free expression in private shopping centers outweighed temporary physical occupations).

346. *See Nollan*, 107 S. Ct. at 3148-49; *see also supra* notes 214-20 and accompanying text (discussing balancing factors applied by the Court).

347. *See, e.g.*, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985); *see also* Note, *Ripeness for the Taking Clause: Finality and Exhaustion in* Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 13 ECOLOGY L.Q. 625 (1986) (examining *Williamson County* in light of prior takings cases, ripeness, and exhaustion of administrative remedies); *cf.* Pennell v. City of San Jose, 108 S. Ct. 849, 856 (1988) ("premature" to consider rent control ordinance on present record).

348. *Cf. Kaiser Aetna*, 444 U.S. at 191 (Blackmun, J., dissenting) ("[T]he Government's interest in vindicating a public right of access to the pond is substantial."). The Corps' access refinement directly furthered this end.

349. *See id.* at 180. The Court stated:

> This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.

Id.

350. *Id.*

351. 438 U.S. 104 (1978).

352. *Id.* at 130-31.

353. *Id.* at 131.

larly, in *Keystone Bituminous Coal Association v. DeBenedictis*,[354] the Court did not look only at the "right of support" or at the specific coal that was required to remain in place. Rather, the Court considered the support estate and mineral estate together and considered all the potentially removable coal.[355] In view of these larger quantums of property, the Court held that the Pennsylvania Subsidence Act requirement that substantial amounts of coal be left in place to provide surface support did not constitute a taking.[356] Justice Brandeis' eloquent dissent in *Pennsylvania Coal Co. v. Mahon*,[357] in which he argued consideration of the total quantum of property, is now conventional takings jurisprudence.[358] Justice Rehnquist's *Kaiser Aetna* opinion was therefore deficient in focusing exclusively on the marina without considering the large development surrounding the marina that had undoubtedly benefited greatly from its waterfront location and governmentally licensed access to the sea.

In short, the *Kaiser Aetna* majority opinion on the taking issue is flawed in at least three respects. First, it incorrectly treated the Corps' access requirement as a per se taking. Second, the record on economic impact was not ripe for a multifactored takings analysis. And third, even if the record was ripe, the Court did not consider the total quantum of Kaiser Aetna's property—its total "investment-backed expectations."[359]

Even if the case had been deemed ripe for a takings analysis, the majority reasoned from an erroneous premise concerning the diminution in value. The Court treated the marina's *fair market value* as relevant.[360] A large portion of the marina's fair market value, however, was attributable to the marina's location adjacent to navigable Maunalua Bay,[361] which gave the marina owners ability to enter into and return from the bay. The Court should not have included this portion of the fair market value in the base from which it computed the extent of diminution. Substantial Supreme Court authority prior to *Kaiser Aetna* refused to consider these public values as part of the *private* value of ripa-

354. 107 S. Ct. 1232 (1987).

355. *Id.* at 1250.

356. *Id.*

357. 260 U.S. 393, 416 (1922).

358. Justice Brandeis wrote:

> It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.

Id. at 419 (Brandeis, J., dissenting); *see Keystone*, 107 S. Ct. at 1250; *Penn Central*, 438 U.S. at 130-31.

Another part of Justice Brandeis' *Pennsylvania Coal* dissent is now a well accepted part of takings jurisprudence: "He may not so use it as to create a public nuisance.... The restriction here in question is merely the prohibition of a noxious use." *Pennsylvania Coal*, 260 U.S. at 417 (Brandeis J., dissenting).

359. *See* sources cited *supra* note 217.

360. *Kaiser Aetna*, 444 U.S. at 177-78.

361. *Id.* at 190 (Blackmun, J., dissenting).

rian or littoral private property.[362] The extent of diminution in *Kaiser Aetna* consequently was calculated from an inflated base; if properly calculated, Kaiser Aetna's loss of expectation may have been relatively insubstantial, or at least not so substantial as to be constitutionally impermissible.

True, Congress amended the Rivers and Harbors Act in 1970 to require that "in all condemnation proceedings . . . fair market value [shall be] based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters."[363] However, assuming, *arguendo*, that this provision applies in a regulatory taking context, a takings challenge is still not ripe until the trial court has made findings concerning the extent of diminution. Further, the "property" to be considered under this provision does not include only the marina; Kaiser Aetna's entire holdings surrounding the marina would also be part of the property from which the Court computes the extent of diminution.

In the future, the Army Corps of Engineers ought to "condition[ ] permission for connection with other waterways on a right of free public access," as the dissenting opinion in *Kaiser Aetna* suggested.[364] Private landowners will almost certainly challenge this practice because of *Nollan* as well as dictum in the *Kaiser Aetna* majority opinion.[365] Even so, courts applying a future takings analysis should at least give closer scrutiny to the correct extent of diminution. The diminution resulting from a permit condition requiring public accessways should be measured from a base that includes only those values attributable to the *jus privatum* and not to those values, such as the value of access to navigable waters, that are properly attributable to the *jus publicum*. Congress' intention in drafting the 1970 amendment to the Rivers and Harbors Act,[366] expressly applicable to condemnation proceedings, undoubtedly was not to extinguish the *jus publicum*.[367] Hence, the riparian or littoral landowner's private property should not include these values when diminution is being calculated for takings clause purposes.

A Corps requirement of dedication of public access as a condition to issuance of an excavation and fill permit should fare better under today's takings jurisprudence. Courts should employ a *Nollan* analysis[368] rather than the per se *Loretto*-type analysis[369] which *Kaiser Aetna* seems to have employed. Since the Corps can show a proper nexus between the burden on private landowners and

362. *See, e.g.*, United States v. Rands, 389 U.S. 121, 123-24 (1967); United States v. Commodore Park, Inc., 324 U.S. 386, 390-91 (1945); Scranton v. Wheeler, 179 U.S. 141, 160 (1900). *But cf.* Comment, *supra* note 302, at 512-13 (arguing that the 1970 amendment to 33 U.S.C. § 595a overrules *Rands*).

363. Pub. L. No. 91-611, § 111, 84 Stat. 1818, 1821 (1970) (codified at 33 U.S.C. § 595a (1982)).

364. *Kaiser Aetna*, 444 U.S. at 191 (Blackmun, J., dissenting).

365. *Id.* at 180.

366. *See supra* note 363.

367. *See supra* note 284 and accompanying text (discussing when the *jus publicum* can be extinguished).

368. *See supra* notes 230-41 and accompanying text.

369. *See supra* notes 222-24 and accompanying text.

the advancement of a public goal, the physical invasion aspect becomes just one among several factors for the court to consider. The courts should now regard the quantum of Kaiser Aetna's property[370] as greater than the discrete marina to which the Corps sought to provide public access; it should also include the surrounding homesites which are so clearly benefited by marina dredging and access to and from the surrounding navigable bay. Since the Court will apply a multifactored balancing test—and only when the case is ripe on such issues as the economic impact from the regulation—a reasonable public access requirement now seems much more likely to pass constitutional muster than in the days of *Kaiser Aetna*.

Finally, *Kaiser Aetna*'s restriction of the navigational servitude to naturally navigable waters[371] should be compared with the 1988 decision in *Phillips Petroleum Co. v. Mississippi*,[372] which holds that lands subject to the ebb and flow of the tide are subject to the public trust doctrine.[373] The fishpond in *Kaiser Aetna* had long been subject to the ebb and flow of the tide,[374] yet Justice Rehnquist's majority opinion refused to subject the pond to the federal navigational servitude.[375] The *Kaiser Aetna* Court concluded that Kuapa Pond was not subject to the navigational servitude because it became physically navigable only as a result of Kaiser Aetna's improvements; it was not navigable in its natural state.[376] *Phillips Petroleum*, however, held that physical navigability is not the sole criterion for the public trust doctrine; all tidally affected lands are subject to the doctrine.[377] The result in *Kaiser Aetna* was probably controlled by the treatment of Hawaii fishponds as "private property," a characterization that the United States accepted in the Treaty admitting Hawaii to the Union. *Kaiser Aetna* should therefore be narrowly construed. Most waterfront development will not occur in such a unique situation. Assume, for example, facts similar to *Kaiser Aetna* in an area not physically navigable in its natural state but made so only through private effort.[378] Assume further that the area is subject to the ebb

370. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1250 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978); *supra* notes 351-58 and accompanying text.

371. *See supra* note 330 and accompanying text.

372. 108 S. Ct. 791 (1988).

373. *Id.* at 795.

374. *Kaiser Aetna*, 444 U.S. at 166.

375. *Id.* at 172-73.

376. *Id.* at 178-79; *see supra* text accompanying notes 323-24.

377. *Phillips Petroleum*, 108 S. Ct. 795.

378. *Cf.* Vaughn v. Vermilion Corp., 444 U.S. 206 (1979) (per curiam) (system of manmade canals subject to tidal fluctuations and navigable in fact). One issue in *Vaughn* was "whether channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways, are . . . open to use by all citizens of the United States." *Id.* at 208. The Court held that *Kaiser Aetna* controlled and that "no general right of use in the public arose by reason of the authority over navigation." *Id.* at 209. The Court separated a different issue:

> [I]f a private citizen on his privately held real property and with private funds creates a system of artificial navigable waterways, *in part by means of diversion or destruction of a pre-existing natural navigable waterway*, does the artificially developed waterway system become part of the "navigable waterways of the United States" and subject to the use of all citizens of the United States?

Id. at 208 (emphasis added). The Court noted that *Kaiser Aetna* and the principal cases on which it

and flow of the tide and that nothing in state law treats the area as private property. These facts are much more common than the peculiarities of the Hawaii fishpond in *Kaiser Aetna* and, when these facts arise, the state can stringently regulate the area subject to the public trust doctrine without raising any takings problem. The Corps of Engineers accordingly can condition a permit upon reasonable public access. Its rationale would not be the federal navigational servitude; by definition, the servitude would not apply.[379] Rather, the rationale would be that the tidally affected area is subject to the public trust doctrine[380] and that nothing has been taken because the public's access rights were part of the *jus publicum*.

V. CONCLUSIONS AND RECOMMENDATIONS

A literal reading of *Phillips Petroleum* in combination with *Kaiser Aetna* leaves maximum power in the states. The extent of this power is clarified by the holding in *Phillips Petroleum* that all lands subject to the ebb and flow of the tide are within the state's public trust doctrine.[381] It is arguable that the only part of the historical *jus publicum* under federal trusteeship is the superior navigational servitude imposed by the commerce clause.[382]

Kaiser Aetna rejected the contention that the navigational servitude was

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relied did not deal with this specific fact situation; accordingly, the Court remanded for further proceedings not inconsistent with *Kaiser Aetna*.

Phillips Petroleum held that lands subject to the ebb and flow of the tide at the time of statehood are subject to the public trust doctrine, unless they were earlier transferred free of the trust. *Phillips*, 108 S. Ct. at 795, 799. An area not physically navigable in its natural state but made so through private effort should be subject to the public trust doctrine under *Phillips Petroleum*, but outside the reach of the federal navigational servitude under *Kaiser Aetna* and *Vaughn v. Vermilion*.

379. *Kaiser Aetna*, 444 U.S. at 172-73; *see supra* notes 330-31 and accompanying text.

380. *Phillips Petroleum*, 108 S. Ct. at 795.

381. *Id.*

382. *Phillips Petroleum* reemphasized the breadth of power given the states under the public trust doctrine by citing the cases which originally recognized this power.

> "At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders . . . ."

Phillips Petroleum, 108 S. Ct. at 794 (quoting Shively v. Bowlby, 152 U.S. 1, 57 (1894)). The *Phillips Petroleum* Court also recognized that

> [i]t is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction . . . .

Phillips Petroleum, 108 S. Ct. at 794 (quoting Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891)). The individual states are also given the authority to define the limits of the land held in public trust and to recognize private rights in these lands. *Phillips Petroleum*, 108 S. Ct. at 794 (citing *Shively*, 152 U.S. at 26). In *Phillips Petroleum* the court "reaffirm[ed] [its] longstanding precedents which held that the States, upon entry into the Union, received ownership of all lands under water subject to the ebb and flow of the tide." *Phillips Petroleum*, 108 S. Ct. at 795.

But these state powers are not unlimited. *Shively* made very clear that the trustee responsibilities and powers of the states are "subject to the rights surrendered by the Constitution to the United States." *Shively*, 152 U.S. at 57. The public trust lands under navigable freshwater lakes and rivers are also "subject to the federal navigation easement and the power of Congress to control navigation on those streams under the Commerce Clause." *Phillips Petroleum*, 108 S. Ct. at 796 (citing Barney v. Keokuk, 94 U.S. 324, 338 (1877)); *see also* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892)

coterminous with federal regulatory power;[383] it restricted the servitude to naturally navigable waters.[384] On the other hand, *Phillips Petroleum* rejected the contention, accepted by the dissenters, that the public trust doctrine applied only to physically navigable waters; it reaffirmed states' rights to define the public trust doctrine most expansively.[385]

The public trust doctrine and federal navigational servitude have overtones, in part, of property concepts.[386] They are also, to a substantial degree, representations of sovereign power.[387] *Kaiser Aetna* and *Phillips Petroleum*, in tandem, constitute a victory for state sovereign power to protect the *jus publicum*—the public's equitable interests in navigation, commerce, fishing, recreation, ecological values, oil and gas rights, and anything else protected by a particular state's public trust doctrine.[388]

The public trust doctrine should become the theoretical foundation for assuring reasonable public access to coastal public property. It should become a principal theory supporting public rights of access to public property,[389] for protecting public rights already perfected under other common-law theories,[390] and a key factor for courts to weigh when applying the multifactored takings analysis.[391]

Government can currently require dedications of reasonable accessways, without compensation, as a condition to issuance of coastal development permis-

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(state power "subject always to the paramount rights of Congress to control their navigation so far as may be necessary for the regulation of commerce").

The supremacy clause of the United States Constitution also presents a very real power retained by the federal government that could be used, if necessary, to preempt state regulation, including, presumably, state exercise of state sovereign trustee powers in its public trust lands. *See* U.S. CONST. art. VII. Yet, reading *Phillips Petroleum* in conjunction with *Kaiser Aetna* shows that the states do now wield maximum power in public trust lands. The federal navigational servitude and Congress' authority to control navigation are the major powers that the federal government has heretofore used in the public trust area. The restriction of the navigational servitude to only "naturally navigable" waters in *Kaiser Aetna* coupled with the broad power of the states recognized in *Phillips Petroleum* leaves little trustee responsibility and power in the federal government.

383. *Kaiser Aetna*, 444 U.S. at 172-73.

384. *Id.*

385. *Phillips Petroleum*, 108 S. Ct. at 798-99.

386. In Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198 (1984), the Supreme Court said that the public trust doctrine was barred because of the failure on the part of California officials to assert it in a prior patent proceeding: "The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest . . . must have been presented in the patent proceeding or be barred." *Id.* at 209.

387. *Cf.* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 455-56 (1892) ("The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.").

388. *Cf. Phillips Petroleum*, 108 S. Ct. at 798.

389. *See supra* notes 112-31 and accompanying text; *see also* Comment, *supra* note 30, at 162 (recommending "expansion of the public trust doctrine by the North Carolina courts as the best judicial method to provide public beach access in North Carolina").

390. *See supra* notes 184-89 and accompanying text.

391. *See supra* notes 214-20, 274-99 and accompanying text.

sion. The exaction must first pass the *Nollan* "nexus" test,[392] but once the *Nollan* hurdle is cleared, the exaction will be tested by the normal multifactored analysis.[393]

The effect of the regulation on public rights protected by the public trust doctrine should be an important factor in coastal regulatory cases. This Article suggests that *Nollan*'s heightened scrutiny, although currently applicable to regulations that raise the specter of a *Loretto*'s-type permanent physical invasion,[394] should not apply to all takings cases. Even in an exaction, such as in *Nollan*, which threatens permanent physical occupation by the public, after the court requires the government to demonstrate that the exaction substantially advances a legitimate state purpose, the takings analysis should proceed with a presumption of constitutionality and a deferential level of judicial review.[395]

Whatever scope of judicial review the courts apply, the public's rights under the public trust doctrine should receive considerable weight at the multifactored balancing stage. Courts should recognize that proximity of regulated lands to public trust lands will be relevant to all the traditional takings factors. In analyzing the "character of the government action,"[396] for example, courts should be aware of the government's sovereign duties under the public trust doctrine.

"Whether the regulation 'substantially advances legitimate state interests,' "[397] is arguably an independent factor not subject to balancing. Most courts, however, probably consider this factor at the balancing stage. For example, courts probably differentiate protecting children's safety from protecting purely aesthetic values.[398] If courts weigh this factor in the balancing analysis, they should give considerable weight to the regulation's protection of the *jus publicum*.[399]

Just v. Marinette County[400] and *Graham v. Estuary Properties*[401] illustrate the relevance of the public trust doctrine when the state regulates lands adjacent to trust lands. Those courts rejected the private landowners' takings challenges, in part, to prevent harm to public rights. Public nuisance and purpresture law prohibit certain harms to public interests, and regulations that prevent harms that would otherwise constitute public nuisances and purprestures should not constitute takings because of the importance of the harm prevention factor in

392. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3146-48 (1987); *see supra* notes 233-34 and accompanying text.

393. *See supra* notes 214-20 and accompanying text.

394. *See supra* notes 239-48 and accompanying text.

395. See *supra* notes 237-41 and accompanying text.

396. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); *supra* note 214 and accompanying text.

397. *See supra* note 215 and accompanying text.

398. For another view of the relationship of the governmental end served to the taking issue, see F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 264 (1973) (concluding that if the public purpose is sufficiently strong the balancing test may not be applied).

399. *See supra* notes 112-13 and accompanying text.

400. 56 Wis. 2d 7, 210 N.W.2d 761 (1972).

401. 399 So. 2d 1374 (Fla.), *cert denied*, 454 U.S. 1083 (1981); *see supra* notes 287-89 and accompanying text.

takings jurisprudence.[402] Although these doctrines are limited by the difficulties in proving causation, courts can apply a standard of reasonable conduct that includes consideration of the foreseeable activities of others similarly situated.[403] Even if the proposed activity of a regulated individual, viewed alone, seems innocuous, the activity may pose the kind of public harm that can be prohibited without compensation when viewed alongside the cumulative activities of others.

The public trust doctrine is also directly relevant to economic impact factors. In determining "distinct investment-backed expectations,"[404] for example, the court should consider the reasonableness of the expectations of purchasers of coastal land. Coastal lands are unique, and common-law principles from ancient times to the present reflect these unique qualities through, *inter alia*, migrating boundary principles,[405] the public trust doctrine,[406] and the federal navigational servitude.[407] In calculating diminution in value,[408] which is often a principal factor, courts must carefully account for public values that are not included in the private owner's "property" for purposes of the fifth amendment takings clause. This Article criticizes *Kaiser Aetna* for failing to segregate particular noncompensable locational expectations.[409] The public's rights—the *jus publicum*—should not be included in the private owner's compensable "property"; these are public rights protected by the public trust doctrine and the federal navigational servitude.

Reasonable coastal access exactions secure an "average reciprocity of advantage,"[410] one of the "exceptions" to the "taking guarantee" identified by Justice Rehnquist.[411] In *Keystone Bituminous Coal Association v. DeBenedictis*[412] Justice Stevens showed how average reciprocity and a second exception, the "nuisance exception,"[413] relate.[414] Each person burdened by a harm-prevention regulation is also reciprocally benefited because similarly situated neighbors are also burdened. The lesson for coastal regulation is obvious: coastal landowners may be burdened by reasonable public access exactions; nevertheless, they are reciprocally benefited, both as individual landowners and as beneficiaries of the *jus publicum*.

This Article recommends that government regulators continue to promote reasonable public access to public property, including exactions of reasonable vertical and lateral accessways as conditions to granting coastal development

402. *See supra* notes 150-83 and accompanying text.
403. *See supra* notes 181-83 and accompanying text.
404. *See supra* note 217 and accompanying text.
405. See supra notes 190-206 and accompanying text.
406. *See supra* notes 112-14 and accompanying text.
407. *See supra* notes 300-20 and accompanying text.
408. *See supra* note 218 and accompanying text.
409. *See supra* notes 357-67 and accompanying text.
410. *See supra* note 219 and accompanying text.
411. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 147 (1978) (Rehnquist J., dissenting).
412. 107 S. Ct. 1232 (1987).
413. *See Penn Central*, 438 U.S. at 145 (Rehnquist J., dissenting).
414. *Keystone*, 107 S. Ct. at 1245.

approval. True, the prospect of *First English* "temporary damages"[415] is intimidating, especially because, in Justice Stevens' words, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[416] The *Nollan* nexus requirement is not insurmountable, however, and, in many cases, the public may have already acquired an easement under one of the common-law theories discussed earlier in this Article.[417]

Prescription and implied dedication will continue to be useful in establishing public rights in private coastal lands, but, as discussed above, each doctrine has significant shortcomings.[418] Future judicial attention may, and arguably should, focus more on the applicability of the public trust doctrine and the ancient doctrine of custom.[419] At a time when *Nollan* and *First English* may discourage government regulators from promoting public access through regulation, it is particularly important for courts and advocates of the public interest to establish and protect accessways to public property under all available common-law theories.

415. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 2378 (1987); *see supra* notes 21-22 and accompanying text.

416. *Nollan*, 107 S. Ct. at 3163 (Stevens, J., dissenting).

417. *See supra* notes 28-147 and accompanying text.

418. *See supra* notes 28-147 and accompanying text.

419. *See supra* notes 92-147 and accompanying text.