

Severance v. Patterson: How Do Property Rights Move When the Dynamic Sea Meets the Static Shore?

Gwynne Hunter*

This Note examines the recent Texas Supreme Court case Severance v. Patterson, which held that Texas does not recognize “rolling easements”—easements that move with physical shifts of the shoreline. The court limited this holding to “avulsive” weather events, such as hurricanes, allowing easements to move with less perceptible erosion. This meant that plaintiff Severance’s house was allowed to stand after Hurricane Rita washed the beachfront inland to surround her house, since the public beach easement did not move with the sand and the surrounding land was thus still privately controlled.

The Note first explains how the Texas majority could have found that rolling easements do exist by eschewing the avulsion/erosion distinction. The Note next explores the takings implications of rolling easements, advocating for a different taking test than the one used by the dissent. Finally, the Note explores additional legal mechanisms that can be used to achieve fairness between private and public property owners in the case of rolling easements.

Introduction.....	272
I. <i>Severance v. Patterson</i>	273
A. Facts and Procedural History	273
B. Texas Supreme Court Holding.....	274
C. Dissents.....	276
II. Takings After <i>Severance</i>	279
A. The Avulsion/Erosion Distinction is Inappropriate for Beach Easements.	279
B. Takings Law is Unclear Whether Rolling Easements are Takings Requiring Just Compensation.	281

Copyright © 2013 Regents of the University of California.

* J.D., University of California, Berkeley, School of Law (Boalt Hall), 2013; B.A., Psychology, Wesleyan University, 2010. I would like to thank Professor Bob Infelise for guidance and encouragement for the duration of this process, and Katie Duncan for spending so much time editing and utilizing her extensive knowledge of takings law. Thank you to Heather Welles for providing insight on Texas legislation along with substantive feedback, and to Anuradha Sivaram, Nate Johnson, and publishing editors for their hard work.

1. The Evolution of the Takings Doctrine and Modern Takings Tests.	282
2. Rolling Easements Under Modern Takings Analysis.	286
C. Property Law Should Adjust to Balance Competing Important Property Interests Unique to Shorelines.....	289
1. Courts Must Recognize that the Public-Private Dichotomy Requires Compromise and Balancing.....	289
2. Courts Can Utilize Existing Tools to Reach Equitable Solutions in Takings Cases.	292
Conclusion	294

To apply static real property concepts to beachfront easements is to presume their destruction.

—Justice Medina, dissenting in *Severance v. Patterson*

INTRODUCTION

The legal question before the Texas Supreme Court in *Severance v. Patterson*¹ was whether public beach easements “rolled” with changes in the shoreline. In this case, Hurricane Rita moved the shoreline inland on Galveston Island to totally encumber Carol Severance’s property. Based on the history and nature of conveyances on Galveston Island, the court in *Severance* did not find a rolling easement. The Texas Supreme Court went further and eschewed rolling easements more generally, drawing a distinction between avulsive events and slower natural processes. However, this distinction does not make sense for hurricanes and especially for lesser weather events; a bright-line rule is not appropriate given the erosion-intensifying effects of climate change. Texas and other states should recognize rolling easements rather than drawing arbitrary distinctions in the law. Under this view, restrictions on building under the Texas Open Beaches Act or common law principles could result in a takings claim. While one *Severance* dissent stated that this rolling easement approach could not result in a taking, another dissenting justice indicated that a regulation recognizing rolling easements could lead to a taking, though no taking occurred in this case.

This Note analyzes the decision in the case and the paths not taken by the Texas Supreme Court. In this Note, I lay out the majority and dissenting opinions and the factual assumptions underlying the decision. I then argue that the distinction between avulsion and erosion is inappropriate for ocean beach easements, with the result that easements should roll. Following, I explain the current federal takings framework and examine how it would apply in the context of rolling easements. I argue that the per se takings tests are inapt in

1. 370 S.W.3d 705 (Tex. 2012).

this context and the court should apply a *Penn Central* analysis to rolling easements. This approach would balance the competing interests of states and private property owners unique to shorelines; it is situated between the two dissenting opinions in *Severance* and was not considered by the court. Finally, I explore tools to balance property interests once the court has reached a takings decision. Such an approach aligns with the objective of takings law: to arrive at a fair result for both parties.

I. *SEVERANCE V. PATTERSON*

A. *Facts and Procedural History*

The controversy in *Severance v. Patterson*² arose in 2005 when Hurricane Rita swept over Galveston Island, a sixty-four-square-mile island located fifty miles southeast of Houston. Hurricane Rita pushed the Gulf of Mexico's vegetation line landward, such that all of Carol Severance's property stood seaward of the line.³ The vegetation line is used to demarcate a public beach from private property.⁴ Severance's property had not previously been a public beach, but now that her land stood within the benchmark vegetation line, the state claimed that her property was on the beach and thus the house on the property violated the Texas Open Beaches Act (OBA).⁵ Because of this violation, the state informed Severance she could not exclude trespassers nor build on the property, and that her home was subject to removal at the state's discretion.⁶ Severance sued.⁷ She claimed that the state's interpretation of the OBA led to a taking of private property in violation of the federal Constitution.⁸

The district court dismissed the action.⁹ On appeal, the Fifth Circuit determined that Severance's Fifth Amendment takings claim was not ripe, but remanded to the Texas Supreme Court to resolve Severance's Fourth Amendment unreasonable seizures claim.¹⁰ After the Fifth Circuit confirmed

2. *Id.*

3. *Id.* at 712.

4. *Id.*

5. The OBA states, in relevant part:

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

TEX. NAT. RES. CODE ANN. § 61.011(a) (West 2012) [hereinafter OBA].

6. *Severance*, 370 S.W.3d at 720–21.

7. *Id.* at 712.

8. *Id.*

9. *Id.*

10. See *Severance v. Patterson*, 566 F.3d 490, 502 (5th Cir. 2009).

that the controversy was ripe,¹¹ the Texas Supreme Court issued an opinion¹² and later granted rehearing.¹³

The Texas Supreme Court held that public beach easements creep inland with erosion, but do not “roll” with land changes brought on by more sudden, avulsive events like hurricanes.¹⁴ The court noted that while easements encumbering shorefront property are necessarily dynamic, they are not so flexible as to accompany drastic shifts in shoreline.¹⁵ Underlying this outcome was the court’s historical finding that West Galveston Island has no inherent shoreline easement; the state requires express easements to access beachfront property on the island, and no express easement was made in the original West Galveston land grants.¹⁶ The court’s determination on movement of easements after avulsive events, coupled with the finding that the public had no right to use private beachfront properties on Galveston Island absent proof of an express easement, meant that when the beach moved quickly, there was no presumption that the public’s right to use the beach moves with it.¹⁷ As explained in the following section, this conclusion was critical to the outcome of the case.

B. Texas Supreme Court Holding

The Texas Supreme Court found that Texas does not recognize rolling easements. It therefore did not reach the additional certified questions of (1) whether recognition of rolling easements would derive from common law or the OBA,¹⁸ and (2) whether a property owner would be entitled to compensation for land use limitations resulting from a rolling easement.¹⁹

In determining whether Texas recognized rolling easements, the court’s analysis focused on the history of private property rights in Galveston Island. History of the island was critical because the OBA allows limitations on private land ownership if such limitations have existed since “time immemorial.”²⁰ The court extended its historical inquiry to the establishment of property rights

11. *Id.* at 500.

12. *Severance v. Patterson*, 345 S.W.3d 18 (Tex. 2010), *reh’g granted*, 370 S.W.3d 705 (Tex. 2012).

13. The court granted rehearing on March 11, 2011. *See Severance*, 370 S.W.3d at 712.

14. *Id.* at 723–24.

15. *Id.* at 724.

16. *Id.* at 738 (Medina, J., dissenting). The focus on the particular shoreline rights on Galveston Island leaves open the possibility that the *Severance* court may have held differently had the controversy arisen on mainland Texas shoreline. The implications of recognizing rolling easements are discussed later in this paper.

17. *Id.* at 726, 732 (majority opinion).

18. *Id.* at 708. The court suggested, by its analytic focus on Texas common law, that recognition of rolling easements would derive from common law rather than the OBA. *See id.* at 714. It did not explicitly answer the question, however, because it found that the state does *not* recognize rolling easements.

19. *Id.* at 708.

20. *Id.* at 711 (citing OBA §§ 61.011(a), 61.013(a) (West 2012)).

on the island, predating Texas statehood.²¹ The majority found that the historic grants to private landowners on the West Beach of Galveston Island contained no right of public use or other inherent limitations on the landowners' property rights.²²

The court reconciled these historically strong property rights with the non-static nature of shoreline land by embracing a distinction between wet beach and dry beach.²³ The court explained that a landowner who purchased waterfront property did so knowing the risk that the "property may eventually, or suddenly, recede into the ocean."²⁴ In cases where the property becomes part of the wet beach or submerged in the ocean, the landowner loses the property to the public trust.²⁵ Up to that point, the dry beach continues to remain private, but may steadily shrink until the owner's house is perched on the ocean.²⁶

The court differentiated this physical loss of property into the ocean from extension of a state-created easement beyond the easement's original boundaries. It distinguished changes in the coastal beach brought on by "gradual and imperceptible erosion or accretion" on the one hand from "avulsive" events like hurricanes on the other.²⁷ The court held that easements for public use of a beach would shift with the slow process of erosion or accretion, but not with the drastic changes brought about by sudden, violent weather.²⁸ The court noted that easements on the newly created beachfront were still allowed, but the state would have to go through the regular easement-establishing processes to obtain those encumbrances.²⁹

The court offered several public policy justifications for its holding. First, the court noted that for any controversies arising from a slow-moving

21. *Id.* at 730.

22. *Id.* at 717.

23. "Th[e] understanding [that the state owned the wet and dry beaches] came to an end in 1958 when the Texas Supreme Court in *Luttes v. State* ruled that the state only owned the wet sand portion of the beach and that private landowners possessed ownership rights over the dry sand portion above the mean high tide line." Richard J. McLaughlin, *Rolling Easements as a Response to Sea Level Rise in Coastal Texas: Current Status of the Law After Severance v. Patterson*, 26 J. LAND USE & ENVT'L. L. 366, 370 (2011). Though *Luttes* involved mud flats rather than the ocean, "[t]he *Luttes* ruling shocked the public and generated sufficient public political pressure to force the Texas Legislature to enact the Texas Open Beaches Act (TOBA) the following year." *Id.* at 370.

24. *Severance*, 370 S.W.3d at 718.

25. The public trust is underwater land owned by the state of Texas outright. See OBA § 61.017(c)(2) (West 2012) ("Fee title to all submerged land as described in this code shall remain in the State of Texas.").

26. McLaughlin, *supra* note 23, at 370.

27. *Severance*, 370 S.W.3d at 724–25. This distinction is not new. ROBERT MELTZ, CONG. RESEARCH SERV., R42613, CLIMATE CHANGE AND EXISTING LAW: A SURVEY OF LEGAL ISSUES PAST, PRESENT, AND FUTURE 18 (2013), available at <http://www.fas.org/sgp/crs/misc/R42613.pdf>, at 20 ("The rule, dating back to Roman times, turns on whether the land-water boundary shift occurred slowly or quickly.").

28. The court reasoned that re-establishment of an easement after every minor shift in the sand was impractical and a "waste of public resources." *Severance*, 370 S.W.3d at 724.

29. *Id.* at 725. For example, the state could pay for the easement. *Id.* at 726.

easement, “landowners and the State have ample time to reach a solution.”³⁰ In addition, the court also considered adding inches to an existing beach easement to be conceptually different from—and inherently more fair than—allowing an easement on a “newly created” dry beach.³¹ The court found that while “beachfront property owners take the risk that their property could be lost to the sea,” they do not take the risk “that their property will be encumbered by an easement that they never agreed to and that the state never had to prove.”³² Finally, the court emphasized that putting an owner on notice of potential future loss of property did not excuse the state from actually proving or purchasing an easement, or compensating a landowner where there is a taking.³³

The court’s rationale for the distinction centered on fairness and notice to property owners.³⁴ The concern underlying this discussion of fairness and notice appeared to be protecting against threats to private property rights. Specifically, the court worried about landowners losing their right to exclude, describing the right as “substantial” and “valuable,”³⁵ and mentioning it multiple times throughout the opinion.³⁶

C. Dissents

Three separate dissenting opinions held that Texas recognizes rolling easements. The three dissenters found the majority’s distinction between gradual and sudden natural events arbitrary, asserting that disallowing a rolling easement in avulsive situations defeated the purpose of the rolling easement.³⁷ The dissents found the majority’s denial of rolling easements but acknowledgement of “dynamic” easements contradictory.³⁸ The dissents criticized the majority’s allegedly inconsistent position that a landowner was on notice that the property could be lost suddenly to the water, but not on notice that land between the water and the house could be subject to public easements.³⁹

The dissents also argued that the distinction between avulsion and erosion placed too large a burden on the state because it required the state to expend enormous resources to re-acquire public beach easements after every change in shoreline.⁴⁰ Given the frequency of hurricanes, this would place an unfair

30. *Id.* at 724.

31. *Id.*

32. *Id.* at 726.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 721, 724, 726, 727.

37. *Id.* at 737 (Medina, J., dissenting).

38. *Id.* at 747 n.4 (Guzman, J., dissenting).

39. *Id.* at 753 (Lehrmann, J., dissenting).

40. *Id.* at 744 (Medina, J., dissenting).

burden on the government, which would be required to earn back the public beach.⁴¹ The majority thus placed the entire burden of maintaining ownership of the shore on the state.⁴²

The dissents noted that case law did not support—and possibly argued against—the majority’s conclusion.⁴³ *Feinman v. State* for example, concluded “that the vegetation line is not stationary and that a rolling easement is implicit in the [Open Beaches] Act.”⁴⁴ Cases involving easements over streambeds or to oil and gas resources ran directly contrary to the *Severance* holding by explicitly embracing dynamic easements.⁴⁵

After deciding that Texas recognized rolling easements, the dissents proceeded to answer the two other certified questions. First, the dissents found that rolling easements were a product of Texas common law rather than the OBA.⁴⁶ They briefly explained that the OBA does not create any new rights, but rather “enforc[es] property rights that the state has previously and independently obtained” by prescription, dedication, or customary and continuous use.⁴⁷

The dissents split on the second certified question, whether natural destruction of coastal property would be considered a “taking” by the government.⁴⁸ The dissents disagreed about the potential for a takings claim as well as whether there was a taking in this case.⁴⁹ In their takings analyses, both dissents applied the test set forth by the Supreme Court in *Lucas v. South Carolina Coastal Council*:⁵⁰ for such property loss to be a “taking,” a

41. *Id.* at 737.

42. *See id.*

43. *Id.* at 752 (Lehrmann, J., dissenting); *see* McLaughlin, *supra* note 23, at 381 (“One very odd aspect of the Court’s holding is the distinction that it created between the legal effects of avulsive versus erosional changes to the beach. Never before had the state adopted a distinction between erosion versus avulsion in the coastal context . . . Texas has only applied the distinction to river cases[.]”).

44. *Feinman v. State*, 717 S.W.2d 106, 111 (Tex. App. 1986) (holding that: (1) the Open Beaches Act impliedly provided for “rolling” public beach easement; (2) the hurricane did not “obliterate” natural vegetation lines so as to require that line be reconstructed under Act, but merely moved line inward; and (3) there was sufficient proof of implied dedication of public beach easement up to natural vegetation line).

45. The majority “dismissed as ‘inconsistent with easement law’ a long line of Texas oil and gas cases cited by the dissent that establishes that easements may shift to ensure that the purpose of the dominant property interest is reasonably fulfilled.” McLaughlin, *supra* note 23, at 385 (quoting *Severance*, 370 S.W.3d at 725). Furthermore, “Texas has long recognized that roads acquired by prescription due to rains and washouts along a river bottom, would ordinarily vary some from a path established many years ago. It 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.* Importantly, these cases did not distinguish between avulsive and erosive events. *See, e.g., Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810 (Tex. 1972).

46. *Severance*, 370 S.W.3d at 735 (Medina, J., dissenting).

47. *Id.* at 741 (citing *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App. 1989), *cert. denied*, 493 U.S. 1073 (1990)).

48. *Compare id., with id.* at 749–50 (Guzman, J., dissenting).

49. *See id.* at 741 (Medina, J., dissenting); *id.* at 749–50 (Guzman, J., dissenting).

50. 505 U.S. 1003 (1992).

regulation must restrict a use the owner had in his title.⁵¹ It follows that such a use cannot be prohibited by state common law nuisance and property principles. Here, the dissents disagreed on this test as applied to the *Severance* property. Two dissenters found neither to be the case in *Severance*: the owner had never possessed the ability to exclude the public from an easement; and state nuisance and property laws under the OBA mandated removal of dangerous structures on the beach.⁵²

In a separate dissent, and in contrast to the other dissenters, Justice Guzman found that rolling easements could result in a taking, particularly where they interfered with an owner's home (as opposed to land around the home).⁵³ While the "public's reasonable use of a rolling easement over a private beach does not generally entitle a property owner to compensation," she reasoned, "such an easement would unreasonably burden a servient estate if the property owner was unable to use and maintain her home."⁵⁴ Thus government regulations restricting the use of the land and home would constitute a taking entitled to compensation.⁵⁵ Guzman attempted to reach a compromise by concluding that while easements could "roll" landward with sudden storms, property owners like *Severance* should not be required to remove or be prohibited from using their properties in order to accommodate the easement.⁵⁶ Guzman's dissent argued for a reasonable balance between private and public property rights, noting that "the law of easements does not allow an easement holder to unreasonably burden the servient estate."⁵⁷

Guzman concluded that the *Severance* easement fell into the category of invasive rolling easements requiring compensation.⁵⁸ The easement caused *Severance* to sacrifice of all beneficial use of her property (since government regulation either required removal of her house or prevented home maintenance and therefore significantly diminished the value of the home), thereby satisfying the *Lucas* takings test.⁵⁹ Guzman believed the *Lucas* exceptions—(1) a use not originally in title and (2) a use prohibited by state common law nuisance or property principles—did not apply here.⁶⁰ First, the public-use easement was not a divestment of title because it was not a total interest in *Severance's* land.⁶¹ Second, no Texas common law principles prohibited use or

51. *Id.* at 1029.

52. Other takings rules, such as the *Penn Central* test, were not plead by Plaintiff and therefore were not discussed in the court's opinion. This approach would balance the competing interests of states and private property owners by weighing the character of the action, investment expectations, and impact on the claimant. See *Penn Central* analysis *infra*.

53. *Severance*, 370 S.W.3d at 749–50 (Guzman, J., dissenting).

54. *Id.*

55. *Id.*

56. *Id.* at 744, 750.

57. *Id.* at 744.

58. *Id.* at 750.

59. *Id.* at 749–50.

60. *Id.*

61. *Id.* at 750.

maintenance of a home on the beach. Thus, Guzman concluded that while a rolling easement allowing public use around Severance's house would not have "unreasonably" burdened the estate, the action to remove Severance's home crossed the border into the realm of takings.⁶²

II. TAKINGS AFTER *SEVERANCE*

While the Fifth Amendment to the Constitution simply provides, "[n]or shall private property be taken for public use, without just compensation," takings law is convoluted, often contradictory, and seemingly inconsistent.⁶³ The determination of whether government action constitutes a taking requiring compensation can have significant financial consequences for the property owners receiving compensation and for the government doling out payments. Though the *Severance* majority did not reach the question of takings, a future court in Texas or another coastal state may recognize rolling easements and may therefore need to decide whether a rolling easement effects a taking.

This Part first describes one way in which the Texas court or another coastal-state court could reach the takings question. Because *Severance* relied so heavily on the unique history of land grants on Galveston Island, the court might reconsider its decision to not recognize rolling easements under a different factual scenario, especially if more members of the court accept the inaptitude of the avulsion/erosion distinction. If Texas recognizes rolling easements, the Texas Supreme Court would eventually face a takings question. In the second part of this Part, I explain the current takings tests and discuss the dissent's application of these tests. Finally, this Part concludes that a court would likely not find a taking requiring just compensation in the *Severance* scenario using the dissent's takings test. I argue that the dissent may have mistakenly applied a per se takings test when a balancing test under *Penn Central* would have been more appropriate.⁶⁴

A. *The Avulsion/Erosion Distinction is Inappropriate for Beach Easements.*

The Texas Supreme Court could have found that West Galveston Island beach easements roll. Instead, the Court distinguished avulsive events from slower erosion, and on that basis held that easements did not roll in avulsive situations. However, scholars have eschewed this distinction between avulsive

62. *Id.* at 720–21 (majority opinion) ("Severance received a letter from the [Texas General Land Office] requiring her to remove the Kennedy Drive home because it was located on a public beach. A second letter reiterated that the home was in violation of the OBA and must be removed from the beach, and offered her \$40,000 to remove or relocate it if she acted before October 2006. She initiated suit in federal court.").

63. U.S. CONST. amend. V.

64. The majority did not opine on the takings issue because it had "not been asked to determine whether a taking would occur if the State ordered removal of Severance's house." *Severance*, 370 S.W.3d at 712–13.

events and slower land changes, especially in the context of hurricane-prone shores like the Gulf Coast.⁶⁵ These scholars argue that the line between avulsion and erosion is becoming increasingly blurry as rising sea levels—fueled by global warming—intensify and hasten the process of erosion.⁶⁶ The distinction between shoreline changes on Severance's own property caused by Hurricane Rita or previous weather events was not clear-cut.⁶⁷ However, the Texas majority reasoned that such a distinction was necessary to be fair to shorefront property owners; otherwise, a beach easement could relocate overnight and suddenly encumber an owner's home and property.⁶⁸

The dissents argued that the fairness justification for the avulsion/erosion distinction was nonsensical in this context.⁶⁹ Individuals who purchase property in the Gulf of Mexico, particularly on West Galveston Island, are well aware that the area is subject to frequent hurricanes and "avulsive" storms.⁷⁰ The owner knowingly takes a risk by purchasing land along a temperamental shoreline. Thus, in the dissenters' view, the majority's fairness argument was inapt because landowners are on notice of the type of weather events.⁷¹ Indeed, the majority acknowledged notice of risk in recognizing that the owner could lose her property immediately if it were to fall into the sea, since it would then belong to the state under public trust doctrine.⁷² Thus, the majority and dissent both recognized the risk of sudden loss and indicated that at least some degree of notice is inherent in a purchasing landowner's title. However, members of the court disagreed on how far this notice extends.

65. See McLaughlin, *supra* note 23, at 382 ("[T]he 'avulsion' versus 'erosion' approach . . . does not accurately reflect geologic reality along the Texas coast."); Celeste Pagano, *Where's the Beach? Coastal Access in the Age of Rising Tides*, 42 SW. L. REV. 1 (2013) ("[M]y contention is that the Court in *Severance* incorrectly applied a doctrine that has always had an uneasy place in property law and ill serves the contemporary reality of beaches that are retreating due to sea level rise.").

66. See Joseph Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion and Property Rights*, 11 VT. J. ENVTL. L. 641, 641 (2010).

67. McLaughlin, *supra* note 23, at 382. ("Exactly how to allocate what proportion of the cause of the shift in the vegetation line that occurred as a result of ongoing erosion prior to and after 1999, as opposed to changes directly and solely caused by Hurricane Rita, may never be known. Rita was clearly not the sole cause of the exposure of Ms. Severance's property to the beach and Gulf; the property certainly has been subjected to episodic erosional events over centuries.").

68. *Severance*, 370 S.W.3d at 723; *accord* *Severance v. Patterson*, 566 F.3d 490, 502 (5th Cir. 2009) ("[There are] obvious conceptual difficulties in concluding that an easement is established by implied dedication or prescription, for example, over areas on which the public has never set foot."). It is also a misconception that the line demarcating the public beach boundary will be a clear or straight one. "[T]he seaward advance of vegetation does not usually occur as a line marching seaward but rather in a patchy pattern of vegetation that may eventually fill in and form a new vegetation line." McLaughlin, *supra* note 23, at 383.

69. See, e.g., *Severance*, 370 S.W.3d at 739 (discussing extensive disclosure of risk by state).

70. *Id.* at 737 ("Hurricanes and tropical storms frequently batter Texas's coast. Avulsive events are not uncommon.").

71. The dissent could have also emphasized that fairness is an underlying principle of the takings doctrine. Thus, arguably the more appropriate forum for weighing fairness factors would have been under one of the established takings tests, rather than through the ad hoc analysis of the avulsiveness of each storm.

72. *Severance*, 370 S.W.3d at 724, 726.

The dissent could have enhanced its argument by emphasizing the tenuousness of the avulsion/erosion distinction in light of climate change and rising sea levels.⁷³ Sea level rise speeds the process of erosion⁷⁴ and enhances the avulsive nature of hurricanes and other events.⁷⁵ This blurs the distinction between the “slow” process of erosion and the “suddenness” of avulsion.⁷⁶ It also means that more natural events are likely to be avulsive. After *Severance*, litigious landowners have incentive to categorize every weather event as “avulsive.”⁷⁷ In addition, the *Severance* holding encourages homeowners to solidify their property lines with beach armoring, which degrades the neighboring beach through faster erosion rates.⁷⁸ This process is compounded by the reduction in state spending for beach renourishment programs on private land, which would otherwise replace lost sand or slow the process of erosion by planting vegetation.⁷⁹

A future court that reassesses sea level rise, owner notice, and government burden may find that easements roll with avulsive events just as they roll with erosion.⁸⁰ The next question is whether this “new” encumbrance imposed due to a rolling easement on private property constitutes a taking.

B. Takings Law is Unclear Whether Rolling Easements are Takings Requiring Just Compensation.

According to the Fifth Amendment, “Nor shall private property be taken

73. “Though [*Severance*] involves landward migration as the result of a hurricane, it could just as easily have arisen in connection with sea level rise (or hurricane impacts enhanced by sea level rise.” Meltz, *supra* note 27, at 19. “Coastal areas along much of the Gulf of Mexico are exceptionally susceptible to changes due to relative sea-level rise and storm damage because the land is relatively lowlying and is subject to high levels of land subsidence.” McLaughlin, *supra* note 23, at 366.

74. Pagano, *supra* note 65, at 6.

75. John R. Nolon, *Regulatory Takings and Property Rights Confront Sea Level Rise: How Do They Roll?*, 21 WIDENER L.J. 3, 7–8 (2012).

76. “The pivotal question is whether movement in the land-water boundary owing to climate-change-caused sea level rise is fast enough to be avulsive, leaving the property line unmoved, or gradual enough to be erosion, reducing the shoreowner’s property.” Meltz, *supra* note 27, at 18. “[T]he Texas court ruling raises again the question . . . as to whether climate-change-caused sea level rise should be considered gradual or avulsive.” *Id.* at 20.

77. McLaughlin, *supra* note 23, at 391 (“No one can predict how the courts will apply the term ‘avulsion’ to the coast. There is no workable basis for distinguishing between storms that cause the public easement to migrate versus storms that do not. As written, *Severance* invites beachfront property owners to characterize every storm as ‘avulsive.’”).

78. McLaughlin, *supra* note 23, at 383 (“This gradual advance and establishment of the vegetation line and protective dunes will not occur if houses or structures are in the area where the beach would normally build up and create conditions for vegetation to grow. Thus, the presence of houses in the would-be vegetation zone prevents the establishment of vegetation and the formation of dunes, leaving the coast in a degraded and more hazardous state.”); *id.* (“By weakening the ability of the state to control or remove structures seaward of the dune vegetation line, shoreline retreat will accelerate.”).

79. *Id.* at 367.

80. After all, “[h]urricanes, tropical storms, strong winds, and high tides are always present along the Gulf of Mexico. These episodic natural events cannot be separated and disentangled from one another as envisioned by the majority in *Severance*[.]” *Id.* at 381–82.

for public use, without just compensation.”⁸¹ The takings provision presents two major questions for courts: Is the government action for a public use? Is the government action a “taking” requiring just compensation?⁸² The public use test is broad in scope.⁸³ Here, the answer to the first inquiry is clear: a taking for a public beach easement serves the public purpose of providing beach access to all citizens.⁸⁴ The regulations at issue also serve a legitimate concern for public safety.⁸⁵

As to the second inquiry, the Supreme Court has struggled to devise a consistent, broadly applicable test to guide lower courts. In this subsection I trace the case history and present the current per se and balancing tests. I compare these methods to the *Severance* dissent’s takings analysis. Then, I postulate how the *Severance* case and other rolling easement cases would fare under the appropriate takings analysis and present the views of other legal scholars who have considered the issue. Finally, I advocate that the court and state legislature should address this issue by balancing fairness principles like notice and investment-backed expectations rather than relying on per se tests.

1. *The Evolution of the Takings Doctrine and Modern Takings Tests.*

The government can acquire land either by condemning it outright or restricting use of the land such that the regulations are tantamount to a legal action to acquire the land. In the case of such a taking, an individual may pursue a takings claim against the government in court. The *Penn Central*⁸⁶ balancing test is the preeminent takings test, used unless the case falls into one of the per se categories of takings.⁸⁷ In *Penn Central*, the Supreme Court outlined a three-factor takings test.⁸⁸ In determining whether the government

81. U.S. CONST. amend. V.

82. *Id.* Courts also consider whether their “property” is at stake, especially in intellectual property cases. *See* Bd. of Regents v. Roth, 408 U.S. 564 (1972) (property rights did not extend to job with termination clause); *see also* Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) (property rights extend to interest in an “interest on lawyers’ trust account”); *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (property can be purely economic). In *Severance*, it is clear that privately held, real property is at issue so we need not inquire into the nature of the property. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (one of the many takings cases involving real property, demonstrating that such property is clearly subject to the takings doctrine).

83. *See, e.g., Berman v. Parker*, 348 U.S. 26 (1954) (city’s acquisition of private property to eliminate substandard housing constituted a public use); *Kelo v. City of New London*, 545 U.S. 469 (2005) (city’s exercise of eminent domain to revitalize downtown area was a legitimate public use).

84. *See, e.g., Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (public access to beach is in the public interest).

85. *See Severance v. Patterson*, 370 S.W.3d 705, 720 (Tex. 2012); *see also Lucas*, 505 U.S. at 1003.

86. *Penn Cent. Transp. Co. v. New York City*, 483 U.S. 104 (1978).

87. The per se categories (physical invasion in *Loretto* and total taking in *Lucas*) are discussed later in this section.

88. *Penn Central*, 483 U.S. at 124, 127, 136. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court offered yet another test to decide the question. The *Agins* Court presented a two-pronged inquiry: a takings occurs if the ordinance either (1) does not substantially advance a state interest, or (2) denies

had “taken” private property such that just compensation is required, the Court considered: (1) the character of the governmental action; (2) the extent to which the action interfered with reasonable investment-backed expectations; and (3) the economic impact on the claimant.⁸⁹ The first factor, character of the government action, can refer to whether the invasion was physical (in which case the court would be more likely to find a taking)⁹⁰ or regulatory, as well as the justification for the action. For example, an invasion for the purpose of abating nuisance-like behavior would weigh against finding a taking.⁹¹ The second factor, reasonable investment-backed expectations, takes into account whether the claimant was surprised by the government action⁹² as well as whether the claimant could still make reasonable use of the property despite the government action.⁹³ Finally, the economic impact factor looks at the economic productivity of the remaining property, or alternatively, the degree to which the government action diminished the property value.⁹⁴

For certain types of “more egregious” takings, the Supreme Court has devised per se taking rules, eliminating the need for *Penn Central* balancing in situations where the rules apply. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court held a permanent physical occupation by the government—even one as small as a cable box—is a per se taking.⁹⁵ The Court said such a taking would be clearly demarcated by a fixed structure. It is unclear from *Loretto* whether an easement like the one in *Severance* would be considered a

an owner economically viable use of his land. *Id.* at 260. This ill-conceived test is now effectively void. *Lingle v. Chevron*, 544 U.S. 528 (2005), overruled the first part of the *Agins* test, recognizing it as a substantive due process, not takings, inquiry. The second part of the test, while a *Penn Central* factor, is not in itself dispositive. *See Mugler v. Kansas*, 123 U.S. 623 (1887) (holding that the taking of a brewery did not require payment of just compensation, even though it denied the owner use of his business, because the brewery was a nuisance). Thus, courts have effectively reverted to the multi-factor balancing test from *Penn Central*.

While discussion of *Agins* and *Lingle* may appear superfluous given the Court’s circuitous path, it is important to understand that the Supreme Court does not set a clear example for lower courts to follow. Courts continue to apply different versions of the takings test, given that the theoretical underpinnings of each version are muddled. Thus, this section highlights that the Texas Supreme Court or other courts could potentially reach different outcomes in takings cases depending on which test(s) they use and how they apply those tests to the facts.

89. *Penn Central*, 483 U.S. at 124.

90. *See United States v. Causby*, 328 U.S. 256 (1946) (noting that a physical invasion of airspace would be a taking in some circumstances).

91. *See Mugler*, 123 U.S. 623 (shutting down brewery not a taking where sale of alcohol prohibited and therefore brewery considered a public nuisance).

92. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (“[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.”).

93. *See Penn Central*, 483 U.S. at 135 (“The Landmarks Law’s effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion.”).

94. *Id.* at 131 (discussing diminished property value); *id.* at 135 (discussing value of remaining parcel).

95. 458 U.S. 419 (1982).

permanent physical occupation.⁹⁶ The case also does not make it clear whether required removal of a structure, such as Severance's house, equates with permanent physical occupation, or whether it is a permissible regulatory taking.⁹⁷ The *Severance* dissent did not apply *Loretto* because it was not clear that the test would apply and another per se test was more apt for the circumstances of the case.

The dissent in *Severance* relied on the per se test from *Lucas v. South Carolina Coastal Council*.⁹⁸ In *Lucas*, David Lucas purchased beachfront lots in South Carolina with the intention to build single-family homes on the lots.⁹⁹ Before he constructed the homes, the state enacted a Beachfront Management Act, which barred Lucas from erecting permanent habitable structures on the lots.¹⁰⁰ The Supreme Court was asked to determine whether the "dramatic" reduction in property value resulting from the prohibition constituted a taking.¹⁰¹ The *Lucas* per se rule asks whether the government action is a "complete taking" such that the owner is deprived of all beneficial use of her property.¹⁰² If so, just compensation is required.¹⁰³ However, if the use denied by the government was never part of the claimant's title to begin with, compensation is not required.¹⁰⁴ For example, if the claimant never had a right to create a nuisance on her property, she could not receive compensation from the government for barring her nuisance activity.¹⁰⁵ Thus, immediately after the *Lucas* opinion, it appeared that "coming to a taking"—purchasing property absent the right to use the property in a particular way—barred a claim for compensation when a regulation prohibited those uses.¹⁰⁶

The Court circumscribed *Lucas* in *Palazzolo v. Rhode Island*,¹⁰⁷ where it explicitly held that a property owner *could* "come to the taking" and be compensated for the taking. However, the Court failed to specify when such claims would be successful. In *Palazzolo*, the state enacted a regulation designating certain parcels, including the land Palazzolo later purchased, as "coastal wetlands" and prohibiting development on such lands.¹⁰⁸ Later,

96. Either way, *Nollan* does seem to say that such an easement would be a taking. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 842 (1987) ("[I]f [the Commission] wants an easement across the Nollans' property, it must pay for it.").

97. See discussion of *Tahoe-Sierra* *infra* notes 113–20 and accompanying text.

98. 505 U.S. 1003 (1992).

99. *Id.* at 1006–07.

100. *Id.* at 1007.

101. *Id.*

102. *Id.* at 1015.

103. *Id.* at 1015–16.

104. *Id.* at 1027.

105. *Id.* at 1022.

106. *Id.* at 1026 ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.").

107. 533 U.S. 606, 630 (2001).

108. *Id.* at 614.

Palazzolo, as the owner of a parcel on coastal wetland, applied for a permit to fill his parcel in preparation for development.¹⁰⁹ The Court held that an owner did not waive his right to challenge a regulation as a taking simply because he purchased the property after enactment of the challenged regulation.¹¹⁰ The Court suggested that where a landowner purchased property knowing it to be devoid of a certain right, courts could take that fact into consideration when deciding whether the government needed to compensate for depriving that right.¹¹¹ However, the fact that the owner's "bundle" of property rights was initially missing a particular "stick" was not alone determinative.¹¹²

The final piece in the takings law puzzle is *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,¹¹³ which formalized a distinction between regulatory and physical takings.¹¹⁴ In *Tahoe-Sierra*, the Court held that a moratorium on development at Lake Tahoe was not a taking under *Lucas*. The Court reached this conclusion by reasoning that *Lucas* required a total taking, both in time and space; a moratorium was only temporary.¹¹⁵ The Court found this temporary prohibition on development a permissible exercise of police power.¹¹⁶ It distinguished between physical and regulatory takings, finding that the latter involved a more complex assessment of facts and economic effects.¹¹⁷ The *Tahoe-Sierra* analysis can be visualized as a two-by-two matrix: physical/nonphysical crossed with regulatory/nonregulatory. Where there is a physical invasion and no supporting regulatory policy, the Court will find a taking.¹¹⁸ Where there is temporary regulation but no physical invasion, the court will evaluate whether compensation is required under *Penn Central* but generally will not find a taking.¹¹⁹ However, the Court was not clear on whether a physical invasion pursuant to regulation would also be a taking. This latter scenario could arise in a *Severance*-like situation where the

109. *Id.* at 606.

110. *Id.* at 627.

111. *Id.* at 634 (O'Connor, J., concurring).

112. *Id.* ("Evaluation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'").

113. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

114. "Regulatory" refers to a regulation that limits land use but does not physically occupy the land, for example a prohibition on development. *See id.* "Physical" refers to actual occupation of land, for example placement of a cable box on one's property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

115. *Tahoe-Sierra*, 535 U.S. at 341–42.

116. *Id.* at 335.

117. *Id.* at 323. The Court remanded for analysis under *Penn Central* to determine whether just compensation was required for a thirty-three month moratorium, taking into account that this was a regulatory taking, and therefore the taking had to be viewed in light of the entire timeframe of the land.

118. *See United States v. Gen. Motors Corps.*, 323 U.S. 373 (1945) (temporary government use of warehouse during wartime was a taking); *Loretto*, 458 U.S. 419 (permanent physical intrusion from cable box was a taking).

119. *See Tahoe-Sierra*, 535 U.S. 302 (remanding determination of whether a 33-month moratorium constituted a taking under the *Penn Central* balancing test).

government physically invades private property with an easement or mandatory house removal, but does so pursuant to regulation like the OBA.

Tahoe-Sierra captures how, in shifting from bright-line rules to balancing multiple factors and creating categorical distinctions in the interest of fairness, takings law has become harder to follow. The Court must use previous cases to carve a path to fairness, a path that becomes windy where the specific facts and contexts vary dramatically between cases. The Court is then left to reconcile unintended or unconsidered fallouts from takings cases when the circumstances change.¹²⁰

2. Rolling Easements Under Modern Takings Analysis.

Landowners faced with losing their property to the government argue that rolling easements should be considered takings under the Fifth Amendment. Texan landowners, for example, argue that requiring removal of a home under the OBA is a taking because it eliminates all economically viable use of the land.¹²¹ They also argue that the OBA, aside from outright requiring house removal, takes land by converting private land to public use; it removes “sticks” from the landowner’s “bundle of rights” such as the right to exclude, permanently depriving the owner of all economically viable use of his or her land.¹²²

However, there are several defenses to such takings claims: (1) the controversy may arise from defects in a landowner’s claim, like nuisance issues, rather than from government action; and (2) the state may assert affirmative defenses of public trust doctrine, satisfaction of due process and public interest.

Texas’s position in *Severance* serves as good illustration of how a state would use these defenses. First, the OBA only removes a house when the structure violates Texas state nuisance laws.¹²³ The right to create a nuisance is not part of one’s property title from the outset, which it must be to constitute a *Lucas* taking.¹²⁴ Second, the conversion from public to private property can occur via natural or storm-induced erosion, rather than by government action,

120. For example, the *Lucas* Court did not make clear what it meant by “total taking.” See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (“Regrettably, the rhetorical force of our ‘deprivation of all economically feasible use’ rule is greater than its precision, since the rule does not make clear the ‘property interest’ against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.”). While it may have been a prudent showing of judicial restraint to leave this phrase open to interpretation, it left future courts dealing with slightly different issues, such as translating “total taking” to a temporal context in *Tahoe-Sierra*, with even less guidance.

121. Holmes, *supra* note 137, at 123, 140 (citing *Lucas*).

122. *Id.* at 144–45.

123. *Id.* at 124; OBA §§ 61.013, 61.0183 (West 2012).

124. *Lucas*, 505 U.S. at 1029.

and thus does not violate due process and is also in the public interest.¹²⁵ The OBA merely provides a way for the public to enforce its right to access the public beach.¹²⁶

There are also several affirmative defenses for the government action. The *Lucas* “background principles” could shield takings claims where rolling easements are considered an integral feature of state law. “If rolling easements are indeed a background principle of common law in Texas, this exception shields the state’s beach-access enforcement actions under the OBA, and now under the OBA’s parallel provision in the Texas constitution, from use constitutional challenges.”¹²⁷ The state may also defend against takings claims by invoking the public trust doctrine, which posits that the government must preserve certain resources for public use.¹²⁸ While this may work in other states, it is unlikely to be adopted successfully in Texas because of Texas’s history of strong private property rights.¹²⁹ Texas, unlike most states, may grant submerged lands to individuals unburdened by an implied reservation favoring the public trust.¹³⁰ Thus, it is “highly unlikely that [Texas] will apply the [public trust] doctrine to the more controversial situation of creating public easements on dry-sand beaches.”¹³¹ In other words, Texas’s unusually strong private-rights position effectively counteracts the argument that states typically reserve the beach for public use. If Texas is able and willing to grant underwater land—which in other states is almost always publicly held¹³²—to private ownership,¹³³ it will be very difficult to argue that drier lands should fall under public title.

Despite these arguments, legal scholars who have considered this issue conclude that rolling easements do not present successful takings claims

125. Holmes, *supra* note 137, at 124. However, the OBA does seem to assume existence of an easement. “[B]ecause its use of the phrase, ‘the public *has acquired* a right of use or easement[.]’ [the OBA] seems to declare *prima facie* the existence of an easement on all Gulf-facing beaches rather than to require a finding of a public easement by prescription, dedication, or custom[.]” McLaughlin, *supra* note 23, at 372. A 1991 amendment to the act “eliminated the requirement that the public’s easement be ‘subject to proof’ and replaced it with language that provides that in beach areas located seaward of the vegetation line it is presumed that ‘there is imposed on the area a common law right or easement in favor of the public.’” *Id.* at 372–73.

126. *Severance v. Patterson*, 370 S.W.3d 705, 733 (Tex. 2012) (Medina, J., dissenting).

127. Pagano, *supra* note 65, at 27–28.

128. *Id.* at 12.

129. McLaughlin, *supra* note 23, at 376.

130. *Id.*

131. *Id.* at 377.

132. See, e.g., *People ex rel. State Lands Comm’n. v. Long Beach*, 19 Cal. Rptr. 585 (Cal. Ct. App. 1962) (noting that California became owner of tidelands upon admission to the union).

133. See *Natland Corp. v. Baker’s Port, Inc.*, 865 S.W.2d 52, 59–60 (Tex. App. 1993) (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473, 481–84 (1988)) (noting that when the State of Texas does grant submerged lands to individuals, there is no implied reservation in favor of the public trust).

because of overriding public interest concerns.¹³⁴ First, public trust doctrine could protect the state's ownership in its shorelands.¹³⁵ "As long as state courts are able to ground such extensions of public trust lands in traditional common law, no Fifth Amendment taking from beachfront property owners is likely to be discerned."¹³⁶ Second, like the *Severance* dissent, scholars generally analyze potential beach easement takings under *Lucas*.¹³⁷ As described above, where rolling easements are considered an integral feature of state law, the *Lucas* background principles test will shield those easements from a takings challenge.

Another potential avenue for takings claims is the Due Process Clause of the Fifth Amendment, which states, "nor shall any State deprive any person of . . . property, without due process of law."¹³⁸ Procedural Due Process is relevant to takings cases because landowners may assert that they have been deprived of property without due process of law—i.e., without notice. However, a takings claim is unlikely to be successful under Due Process, at least for erosion cases, because of the lengthy notice periods and small property devaluation during that period.¹³⁹ Because property is lost to the sea over decades and each loss is economically insignificant (or nearly so), courts will not find that such minimal discount in value is an unconstitutional deprivation of rights.¹⁴⁰ Even where property is "taken" in an avulsive event, such that there is less warning, it would be difficult for landowners to claim they had no notice that such a deprivation may occur. Thus, the state could argue that there

134. See, e.g., Erin Crisman-Glass, *The Legal Implications of Sea Level Rise in Washington*, 19 (final unpublished draft paper), available at <http://cse.washington.edu/cig/files/waccia/chrismanglassfinaldraft.pdf> ("[R]olling easements will rarely, if at all, be deemed a categorical taking that denies the property owner all economically viable use of the land."); McLaughlin, *supra* note 23, at 369. However, a counterargument is that just because a rolling easement is clearly in the public interest does not mean that the government can avoid paying for it.

135. "Shorelands" refers to land extending 200 feet inland from the high tide mark on the shore. Crisman-Glass, *supra* note 134, at 4–5. The state has ownership of such lands, or at least a portion of such lands, because public trust doctrine typically reserves submerged lands (up to the high tide line) for state ownership. Pagano, *supra* note 65, at 12.

136. Meltz, *supra* note 27, at 19. Meltz notes, "On the other hand, if courts use sea level rise as an occasion to expand public trust doctrine beyond its traditional state-law parameters or to otherwise shrink littoral rights, the possibility of a so-called 'judicial taking' may arise." *Id.* "As yet, however, no court has ever found a judicial taking in a final decision." *Id.*

137. "In cases involving the removal of houses under the OBA, the most applicable takings case is *Lucas v. South Carolina Coastal Council* because it established a 'total takings' test to determine when a government regulation results in a taking." Mark D. Holmes, *What About My Beach House?: A Look at the Takings Issue As Applied to the Texas Open Beaches Act*, 40 HOUS. L. REV. 119, 123 (2003). Accord Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Response to Professor Huffman*, 37 ECOLOGY. L.Q. 805, 806 (2009).

138. U.S. CONST. amend. V; see also U.S. CONST. amend. XIV.

139. McLaughlin, *supra* note 23, at 379 ("[James G.] Titus believes that regulatory takings claims under the Fifth and Fourteenth Amendments of the United States Constitution would generally not be successful because affected property owners do not suffer large economic deprivations based on the fact that many decades may pass before the property is lost to the rising sea, and this implies a small discounted value for any future loss.").

140. See *id.*

is no lack of “due process of law” if landowners are aware that they may legally lose title during a hurricane.

Some scholars suggest that even if rolling easements would otherwise be takings, states may still be able to skirt a takings review altogether by reframing the interests at stake. Currently, states rely on their regulatory authority to defend takings claims.¹⁴¹ But the state is not merely a regulator of land; it is also an easement owner. Thus, the state may be able to defend its actions alternatively through property law by asserting its proprietary rights.¹⁴² This approach may be more appropriate for shoreline cases, as it aims to avoid the categorical rules dictating either/or outcomes in takings cases.¹⁴³ It is not clear what this would look like in practice. At the very least, if applied in *Severance*, the state would not suddenly lose ownership, but rather the state and private owner would remain co-owners of the shore; the logistics of this ownership could be renegotiated in more extreme cases such as *Severance*.

*C. Property Law Should Adjust to Balance Competing Important
Property Interests Unique to Shorelines.*

The *Severance* court and takings law in general treats the beachfront as a dichotomy: either the land goes to the beach, or it goes to the private property owner. Only one dissenter, Justice Guzman, proposed a compromise by allowing the *Severance* house to stand, while imposing a public beach easement on the surrounding land. In this section, I explore ways to achieve maximum fairness even after a court reaches a takings decision. I argue that the solution to the private/public tug-of-war for the beach is to reconceptualize the issue as one requiring balancing rather than an either/or (taking/no taking) solution. This argument aligns with, and elaborates upon, Justice Guzman’s dissent. By envisioning the problem as a balancing act, states can start working with private property owners now to reach realistic compromises and prepare for more drastic sea level rise before it occurs. I also argue takings law has the capacity to adapt to this conceptualization and allow for a more equitable balancing of interests.

*1. Courts Must Recognize that the Public-Private Dichotomy Requires
Compromise and Balancing.*

According to the *Severance* majority and all but one dissenter, the case presented a black-and-white issue: either the land surrounding Carol *Severance*’s house was part of the beach—in which case she lost any right to keep her house standing or otherwise control her property—or it was under her

141. Sax, *supra* note 66, at 641; see *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding constitutionality of city zoning).

142. *Id.* at 643 n.10.

143. *Id.* at 644–45.

ownership and no public beach existed. While these positions each may be legally defensible based on the existence or nonexistence of a rolling easement, I argue that they are not the only possible ways to conceptualize the problem, and they create too harsh a result for either party. Alongside a takings analysis, a court can use legal tools to insure greater fairness no matter whether the court ultimately finds a taking.

One way to avoid the dichotomous perspective of regulators and the regulated is to view landowners and the government as competing proprietors—i.e., as neighbors. This idea was first proposed by Joseph Sax: “In short, I suggest that most such cases should be seen as disputes between two neighboring proprietors, the state and a littoral owner, each of which has legitimate proprietary interests at stake.”¹⁴⁴ According to Sax, “[t]he state is not simply a regulator, but is also a proprietor. In [beachfront] settings, the state is not simply diminishing some pre-existing entitlement that regulated parties (other proprietors) enjoyed. It is also safeguarding its own pre-existing rights.”¹⁴⁵

In this view, the parties are understood as neighboring landowners with competing ownership interests, rather than as participants in a command-and-control regime.¹⁴⁶ This perspective recognizes both fundamental ownership interests—the “bundle of rights” inherent in private property ownership on the one hand and the state’s inherent right to preserve its public spaces on the other—while vying for a compromise rather than a winner.¹⁴⁷ Viewing private and public interests as neighbors reaching a compromise also recognizes the economic concerns on both sides of the coin: coastal states have a strong interest in their tourism industry,¹⁴⁸ while private property owners stand to lose major investments.¹⁴⁹

With this approach, neither side is wrong or right, because each has

144. *Id.* at 641.

145. *Id.* at 643. *See also id.* at 644 (“When the state makes [proprietary interest] claims, its position as governor and rule-maker should carry no weight.”); *id.* (“The courts should seek an equitable balance between the legitimate claims of both the upland owner and the state.”); *id.* at 647 (“Where protection of one property interest threatens to swallow the other, [setback] measures do not do the job.”); *id.* at 653 (“My point is simply that in a case like [Florida’s], the state is at the least entitled to place itself on an equal proprietary plane with the landowner who is challenging it.”).

146. *But see* Crisman-Glass, *supra* note 134, at 12 (“[P]rotections inherent in the current statutory and regulatory framework . . . provide some of the responsiveness and flexibility necessary to adapt to issues associated with sea level rise.”).

147. “[A]n expansive view of the doctrines providing for public beach access, including rolling easements, is the most appropriate resolution to the tension between public and private interests in coastlines, particularly as climate change is expected to hasten the erosion of the beaches at issue.” Pagano, *supra* note 65, at 6.

148. “Coastal counties are among the most densely populated areas in the United States—more than a third of all Americans live near the coast, and activities along or on the ocean contribute more than \$1 trillion to the nation’s economy.” Nolon, *supra* note 75, at 9 (internal citations omitted).

149. “These owners are no longer allowed to exclude the public. In addition, the owner can no longer borrow money against the land and has also effectively lost the right to re-sell it. In essence, the owner’s land is completely valueless.” Holmes, *supra* note 137, at 141.

important interests to protect. This perspective would be more accommodating to state interests in preserving public beaches,¹⁵⁰ without requiring the state to extend all compromise through expensive tax relief¹⁵¹ or other accommodations for private property owners.¹⁵² Viewing beach ownership as competing property rights would also accommodate the temporal dimension of sea level rise, allowing governments to plan for future land change, rather than regulate the shoreline in real time, defending itself on a case-by-case basis.¹⁵³

Conceptualizing the divide as competing proprietary interests also addresses environmental concerns.¹⁵⁴ The state is both directing private property owners to manage land in a certain way, and also protecting its own duty¹⁵⁵ to ensure environmentally sustainable development.¹⁵⁶ Environmental stewardship is especially important now, since climate change will increase the severity of hurricanes and raise sea levels in the coming decades.¹⁵⁷ The state

150. Giving greater deference to state interests would allow for public beach preservation solutions like “prohibiting shoreline armoring, requiring removal of buildings, purchasing development rights or the land itself, and imposing moratoria on rebuilding after storm events.” Nolon, *supra* note 75, at 2.

151. See *id.* at 30–31 (noting one option for compromise between private landowners and the state is “reduced assessments for real property tax purposes when land is encumbered by a conservation easement”). But see *id.* at 31 (“There is a limit, of course, to how far states and local governments can go in forgoing tax payments in the interest of coastal conservation.”); Pagano, *supra* note 65, at 47 (“[R]isks that are uninsurable might be risks that should not be taken.”).

152. “[The current system] perpetuates a cycle of foolish investment backed by foolish expectation, financed in part at taxpayer expense.” Pagano, *supra* note 65, at 49. “[T]he public has grown to have the unrealistic expectation that beaches will always remain where they are.” *Id.* at 48. “[I]rrational expectations on the part of the public lead to ill-advised public policy like expensive renourishment projects or armoring that ends up spending a great deal of public money to protect individual properties.” *Id.* In Washington, there is even an exemption for bulkheads built to protect houses from “loss or damage by erosion.” Crisman-Glass, *supra* note 134, at 11.

153. Pagano, *supra* note 65, at 46 (“Should waters rise more, . . . owners will have conceded their entire parcel to the public trust. Will we then rush to protect the right to exclude of the owner of the next property inland, who after all will be the new ‘beachfront’ owner? At a certain point, we are assigning rights to the deck chairs on the Titanic.”). Accord Holmes, *supra* note 137, at 136 (“[The] ‘rigid construction’ [of the OBA] suggested by the landowners would greatly diminish the purpose of the [Act] and would favor private interests over public interests because private citizens would eventually end up ‘owning [the] land under the sea.’”).

154. “The health of a coastal area in turn affects the health of both the water and land environments it borders[.]” Pagano, *supra* note 65, at 7; *id.* at 41–42 (“[H]uman values [are] implicated by property law—values including both individual and social interest, the promotion of human flourishing, and the establishment of freedom and stability essential to a democratic society. Beach property, in particular, calls out for this kind of thicker analysis, because of its inherent physical and social complexity.”).

155. This duty is imparted to the Texas Coastal Coordination Council, a board that administers Texas’s Coastal Management Program. The board includes a member from the Texas Commission on Environmental Quality. See STATE OF TEXAS COASTAL COORDINATION COUNCIL, REPORT TO THE 82D LEGISLATURE (2011), available at http://www.sunset.state.tx.us/82ndreports/ccc/CCC_RL.pdf.

156. “Due to the oncoming wave of climate change, [the] doctrines [managing coastal land] may need to adjust to rapid changes to the physical contours of the landscape.” Pagano, *supra* note 65, at 10.

157. “Sea levels are predicted to rise nearly two feet over the coming century. Even a one-foot rise would cause approximately 100 feet of erosion at most U.S. beaches[.]” *Id.* at 45. “In addition to sea level rise, climate change causes the temperature of seawater to increase. This rise in sea temperature in tropical areas will increase the ferocity of future hurricanes” Nolon, *supra* note 75, at 7. “While

is less capable of ensuring environmentally sustainable shores if those shores are under private ownership and management, since the state cannot or will not fund beach renourishment programs that benefit private owners. *Severance* serves as a case in point: days after the decision, General Land Commissioner Patterson cancelled a \$40 million beach renourishment project because Texas law prohibits spending public money to benefit private property. Because of avulsive events which could erase the government's easements along the beach and return the beachfront to private owners, the state decided that its investment in its beaches was no longer worth the cost given the minimal public benefit.¹⁵⁸ The program would have placed fresh sand on six miles of West Galveston beach.¹⁵⁹

Recognizing rolling easements is one possible vessel for this reimagined ownership. One scholar found that, among the three options—preventing development, deferring action, and establishing rolling easements—the latter was the most advantageous for both private and public owners.¹⁶⁰ Rolling easements are economically efficient (at least for new purchasers);¹⁶¹ offer a fairness compromise;¹⁶² and are politically feasible in most areas.¹⁶³ Rolling easements are also a good option because they can be established even where a shoreline is already armored (“hardened”).¹⁶⁴ Rolling easements also have minimal impact on property values¹⁶⁵ and “can encourage the building of smaller, more mobile structures that can be relocated easily.”¹⁶⁶

2. *Courts Can Utilize Existing Tools to Reach Equitable Solutions in Takings Cases.*

A court deciding a takings issue can incorporate this reimagined view of beach ownership in constructing an equitable remedy for the private landowner. As previously discussed, where courts find that a rolling easement exists, they

‘[t]he Gulf Coast population has long been at risk from hurricanes . . . [and] global sea level rise,’ these risks are magnified by climate change.” *Id.* at 8.

158. Harvey Rice, *Californian Behind Galveston Beach Suit May Get Millions*, HOUS. CHRONICLE (Nov. 20, 2010), <http://www.chron.com/news/houston-texas/article/Californian-behind-Galveston-beach-suit-may-get-1694918.php>.

159. *Id.*

160. James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 75 MD. L. REV. 1279, 1321 (1998).

161. *Id.* at 1321–22.

162. *Id.* at 1321.

163. *Id.*

164. *Erosion Control Easements*, U.S. DEP’T OF COMMERCE, http://coastalmanagement.noaa.gov/initiatives/shoreline_ppr_easements.html (last visited Nov. 11, 2012) (“As the beach disappears at the base of the hard stabilization structure, the rolling easement steps over the structure, enabling the public to walk along the landward side of the armored shore—an area that used to be private property.”).

165. *Id.* (property values reduced one percent or less when property is encumbered by a rolling easement, according to a 1998 study). However, it is unclear whether this would still be the case with avulsive storm events; it seems likely that the risk of sudden encumbrance of a public beach easement and/or removal of one’s house would significantly affect property values.

166. *Id.*

will likely find no taking has occurred either under the per se *Lucas* test or due to *Penn Central* factors because of adequate warning, lack of investment-backed expectation, and public interest in preserving public beaches. However, the objective of takings law is to achieve fairness by weighing different factors and looking to the particular circumstances; the ultimate result in any given case will either be a win or loss: either there is or is not a taking. Thus, in the interest of achieving a less harsh result for the private property owner than loss of home or use of land, the inquiry should not end there. A court can extract from takings law a number of tools to ease this transition for private property owners who risk losing their investments overnight.

Courts can use the concept the “fairness” of rolling easements in the erosion context for more avulsive circumstances. Courts can offer amortization periods for landowners whose land is suddenly encumbered by a public beach easement. The owners could be given a certain amount of time to find a new residence, during which period the owner is not allowed to make improvements to the property.¹⁶⁷ This amortization period could be accompanied by extensive notice of such requirements upon purchase, as well as some compensation or required state or private insurance purchase to ease the financial burden of the landowner.¹⁶⁸

Courts have used amortization periods in sensitive cases involving homes and private property rights. In *Village of Valatie v. Smith*,¹⁶⁹ the city passed an ordinance whereby mobile homes were no longer conforming uses in the town’s zoning scheme. The city, however, did not want to suddenly remove all mobile homes and force residents to relocate. Such a drastic measure would be unfair, it believed, especially since the homes conformed with applicable zoning laws when they were built. The city therefore decided to allow the homes to stand until title passed to a new owner, at which point the amortization phase ended and the home was removed. The New York Supreme Court held this amortization period constitutional.¹⁷⁰

Aside from amortization, there are a number of means by which parties can achieve fairness in an easement context. The *Severance* dissent noted that

167. See generally *A Helping Hand, LLC v. Balt. Cnty.*, 355 Fed. Appx. 773 (4th Cir. 2009).

168. States should increase insurance offerings because the national program, the National Flood Insurance Plan, is in questionable shape after Hurricane Sandy of 2012. See *Federal Flood Insurance is Underwater, Too*, WASH. POST (Nov. 2, 2012), http://www.washingtonpost.com/opinions/hurricane-sandy-highlights-financial-woes-of-federal-flood-insurance/2012/11/02/813e3358-244d-11e2-ba29-238a6ac36a08_story.html. Prior to 2005, the Insurance Plan did not have an emergency fund. The program ended up borrowing \$17 billion from the Treasury that year after hurricanes Katrina, Rita, and Wilma wreaked havoc on coasts. While the program recently implemented a reserve fund, the health of the program after Sandy is uncertain. The article advocates utilizing private insurance companies “to hedge some of the huge flood risks that would otherwise fall entirely on taxpayers.” *Id.*

169. 83 N.Y.2d 396 (1994).

170. *Id.* at 400–01. Amortization periods do not always alleviate takings concerns because they allow a use and then take that use away. When the state later takes a right away, it may confront takings litigation. The landowner may argue that if the use was permissible at one time, the state cannot later take away that use without compensation.

Carol Severance received a number of “fairness” benefits—she was given notice upon purchase of the house and was offered compensation if she moved within a certain time period.¹⁷¹ Furthermore, she had the opportunity to sell her house to a disaster relief service. In fact, Severance made more than \$1 million from the sale of two rental properties under the Federal Emergency Management Agency’s hazard mitigation buy-out program.¹⁷² The program buys homes in areas subject to repeat flooding to ensure nothing is built there again and, after Hurricane Rita, the program paid for damaged homes at pre-hurricane values.¹⁷³ A quarter of the funding came from the Texas General Land Office, the same agency that Severance sued.¹⁷⁴ With such insurance available, homeowners will feel even less incentivized to pay attention to notice, since any risk of losing their homes will be fully compensated.¹⁷⁵

It is crucial that states take a firm position in setting the standards for home ownership in a certain area. For example, states should disallow shoreline armoring because of the overall negative effects on the shoreline¹⁷⁶ or provide stronger notice to home purchasers.¹⁷⁷ Buyers could be explicitly and extensively notified upon purchase of the risk that a hurricane could encumber their land with a public beach. If buyers are more aware of the financial risk they take in purchasing shorefront property, prices may lower to reflect this reality. In addition, notice and restrictions would change buyers’ investment-backed expectations, thereby influencing a *Penn Central* analysis of whether there is a taking in the first place. The state can attempt to mitigate this downfall in property values by purchasing conservation easements on the current owners’ property—to provide some financial resources but limiting future development—or by initially distributing some property taxes from raised values inland to those owners on the shore. If states do not proactively address these issues, they will find that they are unable to carry out critical beach renourishment programs because the land is privately owned.

CONCLUSION

In *Severance v. Patterson*, private landowners narrowly won the battle over the beach against the State of Texas. However, there is reason to believe, based on the majority’s own reasoning, the dissents, and a number of commentaries, that this holding can be limited to West Galveston Island. This

171. *Severance v. Patterson*, 370 S.W.3d 705, 720–21 (Tex. 2012) (the state offered Severance \$40,000 to move or relocate).

172. McLaughlin, *supra* note 23, at 397.

173. *Severance*, 370 S.W.3d at 720–21.

174. *Id.*

175. See McLaughlin, *supra* note 23, at 390–91.

176. “[W]here the sea is substantially and continuously rising, and where storm surges more often wipe away large areas of beach and other coastal areas, littoral owners will be much more inclined to try to build protective devices to hold back the sea.” *Id.* at 368.

177. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034–35 (1992).

is because the civil law grants on the island were unusual in their lack of automatic provision of a public beach. Thus, a future court may hold that rolling easements exist and that a taking has not occurred. This outcome is important from an environmental policy perspective because it places the shoreline in public control, which means less environmentally damaging beach armoring, slower erosion, and more money for beach renourishment projects.

However, this paper posits that even if there is a taking, the private/public debate does not warrant an either/or outcome. With fundamental rights and significant financial investments at stake on both sides, courts should not approach the question looking for a legal “winner.” Rather, both sides must work together to reach an equitable solution. The state need not bargain away environmental concerns, but it should balance those concerns, and its own interest in preserving public beaches, with adequate notice and in some cases compensation to landowners. Coastal states should develop setback policies,¹⁷⁸ armoring restrictions, and purchase notifications, in anticipation of the significant sea level rise predicted to occur over the next century. Prospective solutions to beachfront property ownership will help prevent courts and governments from drowning in litigation with each big wave.

178. A Maine state agency promulgated coastal sand dune rules barring a project in a coastal sand dune system “if, within 100 years, the project may . . . be eroded as a result of changes in the shoreline such that the project is likely to be severely damaged after allowing for a two foot rise in sea level over 100 years.” Meltz, *supra* note 27, at 20. However, setback provisions may be vulnerable to takings claims after *Lucas* and should therefore be implemented with caution. See, e.g., U.S. DEP’T OF COMMERCE, *supra* note 164.