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**RISING SEAS AND COMMON LAW BASELINES:
A COMMENT ON REGULATORY TAKINGS DISCOURSE
CONCERNING CLIMATE CHANGE.**

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Rising Seas and Common Law Baselines:
A Comment on Regulatory Takings Discourse Concerning Climate Change

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This paper examines adaptation in Property Law to rapid changes in resource character through climate change. My general concern is with judicial disfavoring of legislative adjustments of common law entitlements. My specific concern focuses on regulatory takings challenges to legislative programs to adapt to rising sea levels. Legal adaptation to fast and large changes in resources, such as through sea-level rise, probably will require inventive legislation. It already has become a cliché that climate change changes everything. But many courts privilege common law rights over legislative realignment, invoking the Takings Clause or other constitutional provision. The paper will examine this problem in the context of current cases wrestling with legislation that purports to govern the allocation of rights to beaches between private owners and the public.

Sea levels have risen at an accelerating rate in recent years.¹ Substantial sea level rise is nearly certain to occur in the next decades as a consequence of global warming regardless of what mitigation measures government or private citizens adopt.² Public and private land will disappear beneath the waves and buildings will be destroyed. Predicted more severe storms may well aggravate the loss of land and buildings. The mean high tide line, which typically marks the division between public trust tidelands owned by the public and privately owned dry land, will move inland. Under traditional common law rules governing erosion, the migration of the mean high tide line will change ownership of locations from private owners to the public. The seas will engulf wetlands, which may establish themselves in locations formerly dry and inland. Private owners, of course, have the incentive to resist these outcomes, either through armoring the shore or through legal arguments. Public officials will have complex incentives or duties: protecting environmental resources (such as dunes and wetlands), securing public rights, promoting economic development, and satisfying constituents including littoral property owners. But the

¹ IPCC, Climate Change 2007: Synthesis Report, 30-31, at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

² David Farenthold, Rise In Sea Level Threatens Atlantic Coastline, Wash. Post, October 28, 2009, at B3, at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/27/AR2009102703915.html>.

dramatic changes being brought about by climate change will require rapid changes in rules based upon scientific understandings and balancing of competing interests that legislatures accomplish better than courts.

Because my underlying interest in this paper is jurisprudential, I will not argue here for any particular regulatory approach for adapting to rising sea levels. Instead, I will consider three scenarios, all of which reflect recent judicial decisions or legislative proposals. First is public finance of beach restoration accompanied by fixing the formerly moving line between public and private land; this is the approach at issue in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*.³ Second is the advance of public easements over eroding, formerly unburdened private land; this is the problem addressed in *Severance v. Patterson*.⁴ The third considers plausible proposals to enact legislation now to restrict the ability of private land owners to erect seawalls or other structures to protect their land predicted to be inundated or pass to public ownership; something like this is proposed by Meg Caldwell in a recent article.⁵ Each scenario raises regulatory takings issues. In decisions addressing these issues, courts have laid weight on whether public restraints on private rights inhered in the common law. This strikes me as unjustified and threatens the ability of responsible public authorities to respond to sea level rise in an environmentally responsible way.

So this paper analyzes the takings implications of different legal adaptations to sea-level rise with particular attention to the normative precedence given common law rights. The weight given common law rights over legislative regulation may be endemic to the regulatory takings area but was thrown into relief in *Lucas* where the Court equated non-compensable limitations on use from “background principles” with pre-existing common law rules.⁶ More seems at issue here than unfairness to owners from reasonably unanticipated changes in law more generally, but a concern about whether use limitations can be said to “inhere in the title” or are viewed merely as legislative regulations external to title. To some extent, the way the courts think about common law rights also bedevils the judicial takings debate both because of how we view the judiciary as being above politics and the formally retroactive nature of common law rule making.

In an earlier paper, I argued that the character of many common law property rules reflect more the institutional limitations of the common law than a fixed normative judgment about the content of those rules.⁷ The resources of modern legislation and ongoing administrative regulation broaden the capacity of government to register and reflect a broader array of interests and values than could common law courts. Thus, I argued, common law courts refused to recognize security interests in personal property or protect a resident’s interest in existing natural

³ 998 So. 2d 1102 (Fla. 2008); cert. granted, 2009 U.S. LEXIS 4458 (U.S., June 15, 2009).

⁴ 566 F. 3d 490 (5th Cir. 2009).

⁵ Meg Caldwell and Craig Holt Segall, No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast, 34 Ecology L. Q. 533, 567 (2007).

⁶ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, (1992).

⁷ The Public Nature of Property Rights and the Property Nature of Public Law.

light not because these claims were unattractive but because they could not be protected in common law adjudication without daunting negative consequences. Legislative and administrative innovations effectively solved these problems through establishing a recording system for security interests in personal property and through zoning set back and height limitations, thus protecting a broader array of interests with reasonable efficiency. My claim was not that legislative adjustments of property rights are always superior to common law rules but that they are 1) legitimate parts of property law, 2) have capacities to recognize a broader array of interests, 3) manage information to prevent private losses, 4) adjust private rights to public needs.

At bottom, *Stop the Beach Renourishment* challenges the constitutionality of Florida's Beach and Shore Preservation Act.⁸ Under the Act the state, at the request and with the assistance of the relevant local government, restores eroded beaches at public expense. As part of the process, the state fixes a new boundary between the tidal public trust lands and adjacent private littoral lands, based on the historic mean high tide line. After the boundary is fixed, the property line does not move seaward or landward so long as the state maintains the restored beach. The point of this is obvious. It would be absurd for the state to restore the beach if much of the new land was to become privately owned. At the same time, the restored beach protects adjacent private littoral lands from erosion and storm damage. No private land actually is taken, as the beach has to be eroded to qualify for restoration. The private owners claim that the Act deprives them of the property right to obtain future increases from accretion. The Act also provides other protections to the littoral owners, such as guarantees of their unimpeded views of and access to the sea.

The Supreme Court case challenges as a "judicial taking" the Florida Supreme Court's interpretation of its precedent to conclude that the littoral owners never had at common law a distinct right to own future accretions. While there are numerous problems with a judicial takings theory based on state court interpretation of state common law, I want here to focus on the framing of the case around what the Florida common law baseline was. The Florida Supreme Court felt that it needed to parse the common law rights of the private owners, and the U.S. Supreme Court granted certiorari to determine whether that parsing might violate the federal constitution. But none of this should matter. The Act plainly changed the way the boundaries of the littoral lands would be determined and did so to enable a new approach to reversing beach erosion based on modern technology, fairly balancing private and public interests. There is no suggestion here that the littoral owners relied on or were surprised by the change; indeed, the Act was enacted in 1970, long before the 1987 court decision primarily relied on by the owners as precedent, and there was no evidence of when the owners actually acquired their lands. The landowners did not introduce any evidence of loss of value; it seems most likely that the state's action increased the value of their property by essentially ruling out the likelihood of erosion and providing an adjacent wide sandy beach.

⁸ Fla. Stat. Ann. §§ 161.011 *et seq.* (2006).

The petitioners' arguments in *Stop the Beach Renourishment* does not invoke key elements in regulatory takings doctrine. The state does not occupy any land that formerly had been private. The owners do not claim that their property has suffered a great economic loss nor that the Act surprised them so that their reasonable economic expectations have been frustrated. Nor do they argue that they have been deprived of a common law property interest explicitly bargained for, as in *Mahon*. Rather they complain *simpliciter* that they had enjoyed a common law right to accretion that has been eliminated by the Act and by the ruling of the Florida Supreme Court. They have lost a stick in the bundle. It is a puzzle why such an argument should have any traction today. No one disputes that the common law can be superseded by statute.

The *Severance* case presents a scenario just as likely to be relevant to sea level rise as *SBR*, but adopting an opposite adaptation public policy: allowing natural forces to dictate the shape of the coastline. *Severance* also makes a big deal out of the common law origins of a statutory system, the Texas Open Beach Act. To some extent, the OBA itself directs analytic focus to the common law, as its provisions turn on whether the public has enjoyed an easement on the state's privately-owned beaches "by prescription, dedication, or has retained a right by virtue of continuous right in the public."⁹ But Judge Jones treats as relevant both to any takings analysis and her peculiar search and seizure approach whether the rolling nature of any easement existed at common law or was created by the OBA. For example, she ruled that the owner's takings claim was not ripe because presenting her claim in state court would not be futile under *Williamson* because it is unclear whether Texas courts would deny compensation to the landowner, because they have not issued a definitive ruling on whether the rolling nature of the easement comes from the common law or the Act, "a critical component of takings analysis". Slip op at 7.

Texas follows the public trust law of a majority of states in holding that public ownership of the foreshore extends to the mean high tide or wet sand line. Following judicial clarification of this rule, the Texas legislature in 1959 passed the OBA, which provides: "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."¹⁰ The effect of this is to enable courts to find the existence of public easements on the dry sand beaches. More to the point of this paper, these are "rolling easements" that move landward with the beach due to erosion or sea level rise, so that state and local officials can bring actions seeking injunctions to force landowners to remove homes and other improvements from private land that has become beach and subject to the easement.

⁹ Tex. Nat. Res. Code § 61.012 (2009).

¹⁰ Tex. Nat. Res. Code § 61.011 (a).

It is important to note that the Texas scheme builds upon and expands the effect of the public trust doctrine. Normal erosion or sea level rise will move the ownership boundary landward and private land will become public when tide waters normally lap over it. But the Texas beach easements roll landward in advance of complete public ownership and before water destroys houses and renders private land uninhabitable. For this reason, Texas law interests environmentalists looking for means to manage retreat before rising sea waters.¹¹ And for this reason, Texas law has generated many regulatory takings challenges, all of which have been rejected by Texas appellate courts.¹²

Most everyone acknowledges that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” It seems that there is something about how the common law shapes property rights that appeals to conservative judges as a moral baseline. I can think of three possible explanations. First, conservative theorists sometimes privilege judicial over legislative law making on the ground that legislators respond to the self-interested lobbying of special interests while judges have sufficient insulation to shape law based on principle, such as efficiency or citizen autonomy. The theoretical and empirical problems with this view are substantial and sorting them out seems inappropriate for an event such as this.¹³ Suffice it to say for the moment that its premise is undercut by the very theory of judicial takings upon which the Court granted certiorari in *SBR*: Courts (except this U.S. Supreme Court) cannot be trusted to preserve property rights!

Second, common property law rules sometimes are thought to embody natural law principles. The U.S. Supreme Court itself has described the littoral owner’s right to accretion as vouchsafed by natural law:

The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim ‘qui sentit onus debet sentire commodum’ [‘he who enjoys the benefit ought also to bear the burdens’] lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his.¹⁴

One can understand the intuitive justice, all other things being equal, of allowing party A to obtain the benefit of random shifts in property boundaries if party A must tolerate losses from the

¹¹ See James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How To Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279 (1998).

¹² See, e.g., *Arrington v. Mattox*, 767 S.W. 2d 957 (Tex. App. 1989).

¹³ See Neal Komesar, *Imperfect Alternatives*, 149-50 (1994).

¹⁴ *County of St. Clair v. Lovingsston*, 90 U.S. 46, 68-69 (1874); see also *Nebraska v. Iowa*, 143 359, 360-61 (1892).

same risk. But these statutory adaptations to sea level rise address concerns far beyond a simple bilateral game. The doctrine of accretion may have some weak normative appeal as a useful default, but only when no other ethical values or policy goals compete with it. As Professor Sax's historical scholarship in his paper for this conference shows, the early English cases fashioning the rule for littoral owners assumed that littoral owners would improve new alluvial land for grazing while the crown, the owner of the tidelands, would suffer no harm from its passing into private ownership. In other words, it was seen as likely to make the littoral owner better off without injuring anyone else.

Present littoral boundary issues arise in a vastly different natural and legal context. Sea level rise will move boundaries in one direction, landward, with minor variations. This suspends the moral calculation upon which the appeal of an accretion rule stands. More importantly, sea level rise poses alarming challenges to environmental resources and public health and safety. The state has important if sometimes conflicting interests in protecting wetlands, sand dunes, habitat, storm buffers, and economic infrastructure. Modern real estate development, despite its many benefits, has both contributed to climate change and made adjustment to it far more difficult. At the same time, the state also has vastly greater scientific understanding, technological capacity, and organizational resources to address sea level rise than it did in the pre-modern era. Modern legislation, appropriations, and administrative oversight provide far more commensurate law making resources than common law adjudication. While any statutory proposals should be scrutinized for fairness, any natural law arguments for retaining the common law should be dismissed.

Third, some libertarian lawyers embrace common law property rules precisely because older cases assume no legislative activity to address underlying resource allocations. Such lawyers distrust all efforts of the democratic state that diminish to any extent values incident to property and thus argue that all reductions in property rights must be compensated. Common law rules typically predate the administrative state, look primarily to the interests of litigants, and presume that judicial decision through adjudication will be the principal means of law making. Moreover, older decisions are blissfully ignorant of the types of environmental harms that the rational pursuit of self interest can generate. Thus, treating common law property rules as normative can delegitimize legislative innovations without coming to grips with their goals or substance.

The *Lucas* decision remains the *locus classicus* of this method, in the Court's equation of background principles of property with common law nuisance rules, the baseline entitlement par excellence. But nuisance litigation notoriously fails to weigh adequately the broad public interests present in environmental disputes. Within the *Lucas* framework, shoreline protection legislation could be upheld if it replicated common law principles but not on the basis that they implement reasonable and necessary protections for the environment and public safety. Indeed, it seems to be the appeal of enshrining the common law baseline that it avoids frank discussion of the public interests involved in environmental protection or the weight properly afforded to

private interests of various sorts. Property rights advocates fear environmental legislation because the proliferation of externalities and the threats to long term welfare threaten to justify dramatic incursion on private dominion over resources. Invoking the common law is a way of obfuscating that reality and talking about something else.

Another case that demonstrates judicial invocation of the common law to derail legislation without discussion of its fairness or efficiency is *Phillips v. Washington Legal Foundation*.¹⁵ The case considered a claim that so-called IOLTA accounts, mandated for lawyer trust funds, in which lawyers pool client funds too small to earn interest individually into accounts that earn cumulative interest used to support indigent legal services, violate the Takings Clause. *Phillips*, rather bizarrely, addressed only whether the interest earned on such IOLTA accounts belongs to the client whose funds the lawyer deposits, even though those funds by definition were too meager to earn interest. Even though positive state and federal law treated the interest earned under IOLTA accounts to be owned by the entity that administered indigent legal representation, because the owner of the principal could not earn interest on those funds, and even though IOLTA accounts by definition apply only to lawyer trust funds existing after the positive law went into effect, the Court resorted to the general common law rule that interest follows principal to hold that owner of the principal in the IOLTA fund owns the interest. Fortunately for the administration of justice, the Court subsequently held that the compensation due the owner of the principal was zero.¹⁶ The latter decision highlights the ideal character of the first holding because it illustrates that the right found had been purely notional. Both decisions were 5 to 4.

It is striking that *Phillips*, like the shoreline cases, involves the principle of accession, that the new small element is presumed to be part of the larger contiguous ownership. One might think that the Rehnquist Court might be attaching natural law status to the broader principle of accession. But the greatest modern enthusiast for the principle of accession, Tom Merrill, makes only a very qualified claim for it. He finds it to promote efficiency (at least to a greater extent than the “first possession” principle) because it recognizes the prowess of the owner of the dominant asset by assigning him the gain. But this rationale has no purchase in the cases of shoreline accretions or IOLTA account interest; both are out of the hands of the owner either by natural force of economic reality. Merrill also recognizes several normative objections to accession. So it is hard to see any normative principle in favor of accession as such that could justify a court giving it precedence over direct statutory directives.¹⁷ The Court merely states that the common law rule must apply when in positive law it does not. It changes the subject from the constitutional merits of the common law.

With these considerations in mind, let us turn to what barriers this attachment to common law baselines impose on prospective statutes adapting to sea rise caused by climate warming. It

¹⁵ 524 U.S. 156 (1998).

¹⁶ *Brown v. Washington Legal Foundation*, 538 U.S. 216 (2003).

¹⁷ Thomas W. Merrill, *Accession and Original Ownership*, 1 J. Legal Analysis 459 (2009).

is not the goal of this little paper to analyze what legal strategies are best for addressing the various consequences of sea rise. Rather, I want to consider the takings issues raised by one measure prominently discussed by others, mandating retreat before sea level rise in order to permit wetlands and sand dunes to be reestablished landward. Any such policy would be applied selectively to rural coastlines where dunes and marshes already exist, and would be justified by the ecological essentiality of such natural features for water quality, fisheries, and storm protection. The statute at issue in *Lucas* can be readily understood as such a measure; it prohibited construction of a permanent structure seaward of a line plausibly expected to be underwater in a few years.

For present purposes, consider a state statute less immediately and severely restrictive. Commentators have suggested that all the law need do to ensure a policy of retreat is to prohibit “armoring,” that is erection of erosion control structures such as levees and jetties.¹⁸ Such laws predictably will permit rising sea levels to deprive some private owners of their land. The land will be flooded and thus rendered unusable, which has been enough for a regulatory taking since *Pumphelly*. Moreover, the public trust doctrine transfers ownership of submerging lands to state ownership as the boundary line moves landward, which creates an effect strongly resembling inverse condemnation.

But there are substantial arguments against treating an anti-armoring statute as causing a regulatory taking. Such a statute would prohibit construction that could harm other property owners and the environment generally. Shoreline fortifications force rising water elsewhere, increasing the flooding of those not construction such defenses. The statute under discussion arguably solves a prisoner’s dilemma, taking away some of the pressure to armor that all would feel in the absence of the statute or an improbable agreement among many littoral owners, making coastal area property owners as a group better off.¹⁹ Armoring would also force rising waters onto existing wetlands and prevent reestablishment of wetlands in geologically suitable locations further inland, thus seriously reducing the quantity of wetlands in violation of long-standing cornerstones of environmental policy. These factors should weigh in any analysis. In which regard, it should be noted that the *Lucas* per se rule would not apply, as littoral owners’ land would continue to be used and valuable for several years before the waters rise.

Most importantly, the destruction of the owner’s estate will be caused by sea-level rise, not the statute, which only forbids a devise to postpone the problem but imposes substantial harms on others. Littoral owners may have tort claims against large emitters of greenhouse gases. Indeed, they might have a better takings claim against the United States for failing to curb emissions than against the government enacting the prohibition of armoring, although I know of no precedent for a government omission (rather than an act) providing a basis for a takings claims. Similarly, the exchange of ownership from the private owners to the government under

¹⁸ Several such state statutes are discussed in Caldwell, et al, *supra* note x, at 570-74.

¹⁹ See *id.*, at 574-75.

the public trust doctrine would be the result of natural forces not legal will. Moreover, the private owners' erection of defenses can be seen to invade the rights of the sovereign to gain by sea level rise. As the court recently held in *United States v. Nicholson*, "[B]ecause both the upland and tideland owners [the Lummi Indian tribe] have a vested right to gains from the ambulation of the boundary, the Homeowners cannot permanently fix the property boundary, thereby depriving the Lummi of tidelands that they would otherwise gain."²⁰

One issue that property owners likely will raise is that such a statute deprives littoral owners of their common law right to wall out the sea. At common law a landowner could erect a sea wall protect against erosion and was not liable for the diversion of the waters onto the land of his neighbors, a variant of the common enemy rule for casual surface water.²¹ Reflecting the view embedded within *Stop the Beach Renourishment* and *Severance*, upland owners could claim that the right to armor the coastline is inherent in littoral title, so that a statute prohibiting it deprives them of their property right.²² Indeed, in two significant modern cases involving construction of sea walls, state supreme courts have had to resort to creative interpretations of state common law to reject landowner's claims that they had a common law right to wall out sea water. In *Shell Island Homeowners Association v. Tomlinson*,²³ the North Carolina Court of Appeals, rejected a property owners constitutional challenge to a state statute prohibiting construction of seawalls. The property owners based their takings claim on the argument that "the protection of property from erosion is an essential right of property owners."²⁴ The court summarily rejected the argument as having "no support in the law", although a highly sympathetic Professor Kalo of the University of North Carolina commented that "the issue of whether waterfront property owners have any common law right to erect hardened structures in statutorily designated areas of environmental concern is not as simple as the court makes it appear."²⁵ In *Grundy v. Thurston County*, the Washington Supreme Court held that common enemy rule did not apply to sea water, despite language in prior decisions strongly suggesting that it did.²⁶ Thus these courts felt had to sift moldy common law precedents to find their accordance with contemporary statutory approaches, much in the way that court performed in

²⁰ 2009 U.S. App. LEXIS 22253 (9th Cir., October 9, 2009).

²¹ See, e.g., *Cass v. Dicks*, 44 P. 113, 114 (Wash. 1896). In *Cass*, the court quoted with approval from a treatise: If a land owner whose lands are exposed to inroads of the sea, or to inundations from adjacent creeks or rivers, erects sea-walls or dams, for the protection of his land, and by so doing causes the tide the current, or the waves to flow against the land of his neighbor, and wash it away, or cover it with water, the land-owner so causing an injury to his neighbor is not responsible in damages to the latter, as he has done no wrong, having acted in self-defense and having a right to protect his land and his crops from inundation." *Id.*

²² "[I]f the State refuses to allow construction of some protective device, the oceanfront property owners, whose houses other structures face destruction from the relentless forces of nature, believe that they are being denied the exercise of some fundamental common law littoral right to protect their property." Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1431-32 (2005).

²³ 517 S.E. 2d 406 (1999).

²⁴ *Id.* at 414.

²⁵ Kalo, *supra*, note 14, at 1489.

²⁶ 117 P. 3d 1089 (Wash. 2005).

Stop the Beach Renourishment. Similar to that case as well, the buildings at issue in *Shell Island* were permitted after the regulations challenged were adopted, so that unfair surprise was not at issue. The displacement of a common law was advanced as an independent ground for the invalidity of the challenged statutory approach, so that courts felt that they had to interpret the common law not to include the rule.

The purpose of this little essay is to argue that courts need not worry about the old common law rule, adopted under vastly different assumptions. No constitutional nor jurisprudential principle gives it precedence over the subsequent statute. There may be circumstances where a ban on armoring might constitute a regulatory taking, for example, where the law had led an owner to rely on a legal right to armor that was taken away at a time that amounted to a wipeout. In such circumstances, it should not matter whether the baseline rule was common law or statutory, nor whether the change was a new statute or a clear change in the common law. Moreover, even if not a constitutional violation, a new statutory prohibition may provide some compensation for reasons either of fairness or politics. There may be unfairness to littoral owners from the application of a common law rule shifting boundaries with the mean high tide line when sea level rise creates a one way shift. The one point argued here is that the replacement of a common law rule with a statutory one, as such, should have no bearing on whether a regulatory taking has occurred.