

SOME UNORTHODOX THOUGHTS ABOUT  
RISING SEA LEVELS, BEACH EROSION,  
AND PROPERTY RIGHTS

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When legal problems arise involving migrating seashores, they are routinely posed as regulatory takings issues. The usual setting is a restriction on seawall construction,<sup>1</sup> a setback regulation, a claimed public easement across the beach, or (as in the most recent case to come before the U.S. Supreme Court)<sup>2</sup> asserted loss of littoral rights emanating from a beach nourishment program.

The conventional way of characterizing these cases is that they involve a landowner who wants to exercise its property rights and a government that wants to restrict those uses to achieve some public purpose, the question being who ought to pay for the (proprietary) burden thus imposed, and the (public) benefit thus achieved. I propose here an alternative way of looking at these controversies.

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. At what is literally a line drawn in the sand, the line of mean high tide (MHTL) is a property boundary.<sup>3</sup> Landward of that line are (usually) private littoral landowners.<sup>4</sup> Seaward of that line is (usually) the state, a public landowner. Each of those landowners has certain proprietary rights. I want to emphasize that I am here talking only about state proprietorship that is indisputable under any view of background

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<sup>1</sup> I will use the term seawall generically to describe a variety of wall-like structures, including revetments and bulkheads. Similar purposes are sometimes achieved with jetties or groins, structures that extend out into the water and may function to shift the deposition of sand toward or away from nearby beaches.

<sup>2</sup> *Stop the Beach Nourishment, Inc. v. Florida Dept. of Env. Protection* [et al.], No. 08-1151, granting review of *Walton County v. Stop the Beach Nourishment*, 998 So.2d 1102 (Fl. Supreme Court, 2008).

<sup>3</sup> Various terms are used. On non-tidal, navigable waters it is usually called the line of ordinary, or mean, high water, and those terms are also sometimes used for tidal waters. The technical issues and ambiguities involved in defining and measuring these locations is not in issue here. See generally Flushman, *Water Boundaries*, *Demystifying Land Boundaries Adjacent to Tidal or Navigable Waters* (2002),

<sup>4</sup> On the sea, owners of land adjacent to the water are called littoral; on rivers they are called riparian; legally the same rules apply. The terms can be used interchangeably.

principles of property law. For purposes of this article, I put aside any disputes about whether some state proprietary claims, like the customary uses of beaches in Oregon and Texas should—as Justice Scalia suggested some 15 years ago—be rejected as “pretextual”.<sup>5</sup>

Under ordinary circumstances there is nothing particularly obscure or mysterious about these rights. For example, the littoral owner has a right to occupy and make economically productive use of his land. The state has the right to have the public use the foreshore (the wet beach between high and low tide) for passage and recreation,<sup>6</sup> and to employ coastal wetlands seaward of the MHTL as habitat. Assuming a rather stable situation at the water’s edge, with the boundary moving modestly back and forth over time, these two uses can co-exist with little or no conflict.

But where the sea is substantially and continuously rising, or where violent storms periodically wipe away massive areas of sand beach, littoral owners are understandably anxious to protect their upland. Generally, they want to build some sort of protective device (I will use the term seawall here generically to describe all such devices) to hold back the rising sea or storm wave action. In the case of rising sea levels, absent a seawall, the ocean would migrate landward and the foreshore (with its public uses) would migrate with it. If a seawall is constructed, when the water rises to the elevation of the seawall, the foreshore and coastal wetlands disappear: the ocean simply meets the wall.<sup>7</sup> Moreover, the presence of a seawall intensifies the force of

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<sup>5</sup> See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994)(dissenting from a denial of certiorari).

<sup>6</sup> In some states, public use rights extend further upland, e.g. to the vegetation line, under a number of different legal theories and historical uses. See, e.g., Texas Open Beaches Act, Tex. Nat. Res. Code Ann. §61.011(a); [In re Application of Ashford](#), 50 Haw. 314, 315, 440 P.2d 76, 77 (1968); *Diamond v. State*, 112 Haw. 161, 169, 145 P.2d 704,712 (2006); *Glass v. Goeckel*, 473 Mich. 667, 692-93, 703 N.W.2d 58,72-3 (2005).

In other states, especially in New England, littoral owners have been granted title down to the low tide line, subject to some public use rights, and some states, like Massachusetts and Maine, have limited public uses on these privately owned foreshore areas to traditional fishing, fowling, and navigation, but not general passage and recreation. See, e.g., *Opinion of the Justices*, 365 Mass. 681, 313 N.E.2d 561 (1974); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989). Others take a broader view of the public trust limitations that remain on such grants, *Champlin’s Realty Assocs. v. Tillson*, 823 A.2d 1162,1167 (R.I. 2003).

<sup>7</sup> A surprising (and perhaps short-lived) recent 9<sup>th</sup> Circuit decision held that on an eroding shoreline the property line migrated landward, despite the presence of a seawall, to where the mean high water line would have intersected the land had there not been a seawall preventing its migration. Because the case involved an Indian Reservation and federal trust ownership of the

the wave action hitting against it, accelerating the loss of the sand beach and the foreshore.

The reason for reciting these very well-known facts is to suggest something that is not so well known, or at least not well-recognized. It makes an important difference in all these settings that the state is not simply a regulator, but is also a proprietor.<sup>8</sup> As a proprietor, it has pre-existing entitlements of its own that stand on a par with those of other proprietors, including its neighbors. In such settings, it is not simply diminishing some pre-existing entitlement that regulated party had. It is also safeguarding its own pre-existing rights.

The law is well settled that in its proprietary capacity the state is entitled to assert its ownership rights in the same way, and with the same vigor, as any other owner.<sup>9</sup> Of course, the state is also making

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land seaward of the mean high water mark, as contrasted with the usual state ownership under the equal footing doctrine, the court applied (invented) federal common law, and acknowledged that its decision might be of very limited application. One may hope so, as otherwise with rising seas and erosion from storms, many homes now behind seawalls would become trespasses on state property, as the 9<sup>th</sup> Circuit held in this case, *United States (Lummi Nation) v. Milner and Nicholson*, No. 05-36126 (decided Oct. 9, 2009). Regarding the application of federal common law to migratory shorelines involving treaty Reservations see *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). On the right to defend one's property generally, see note 14, *infra*.

<sup>8</sup> State ownership of tidelands is not simply a "legal fiction" or a metaphor (compare *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

<sup>9</sup> "Just as a private landowner...may press charges of trespass every time a cow wanders across the property line or call the authorities to report every land-use violation, the Government too may stand firm on its rights and use its power to protect public property interests." *Wilkie v. Robbins*, 551 U.S. 537, 127 S.Ct. 2588, 2602 (2007). See also *Intern. Soc. For Krishna Consciousness v. Lee*, 505 U.S. 672, 678, 112 S.Ct. 2701, 2705 (1992) ("Where the government is acting as a proprietor" different standards apply from when it is acting simply in its regulatory capacity). See also *Washoe County v United States*, 319 F.2d 1320, 1327-28 (Fed. Cir. 2003) ("...government was acting as a landowner whose neighbor sought permission to lay a pipeline across its property....[It] had no obligation as a neighbor to assist [its neighbors]...").

As Justice Brandeis put it many years ago, "The character of the state's ownership in the land and in the waters is the full proprietary right." *Port of Seattle v. Oregon & W.R. Co.*, 255 U.S. 56, 63 (1921). The exact nature of the state's proprietorship of tidelands is sometimes disputed (see, e.g., *Fabrikant v. Currituck County*, 621 S.E.2d 19, 27 (Ct. App. N.C. 2005), but it cannot be doubted that it has ownership rights sufficient to defend and protect the uses for which as sovereign it holds the lands beneath navigable waters. The position of most states is that "not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State. [\*State v. Pacific Guano Co.\*, 22 S.C. 50, 84 \(1884\)](#)." *McQueen v. South Carolina Coastal Council*, 354 S.C. 142,149, 580 S.E.2d 116,119 (2003).

And as a state court put it in one seashore case, "if the judge finds that the revetment was to be built on the Commonwealth's property, we do not hesitate to note that such a situation could never describe a compensable taking." E.g., *Wilson v. Massachusetts*, 31 Mass.App. 757,767, 583 N.E.2d 894,900, n. 15 (1992), *aff'd*. 413 Mass. 352, 597 N.E.2d 43 (1992).

the rules, and where it chooses to rest on its proprietary interests,<sup>10</sup> it should stand before a court like any other owner. When it makes such claims, its position as governor and rule-maker should carry no weight. As a proprietor, it should be neither worse off nor better off than any other proprietor.<sup>11</sup>

As an owner, the state's legal position might be more favorable than its position as a regulator. Illustratively, if a state as the owner of tidelands cuts off the private upland littoral owner of access to the water, in the conventional regulatory takings perspective, that would *a priori* seem to present the expropriation of a common law littoral right of access. But analyzed as a proprietary case, it may look entirely different. In a controversy where the state granted tideland it owned to a third party, who then filled those lands thereby cutting off water access by the littoral owner, the U.S. Supreme Court held that so long as the state's action was compatible with the purposes for which it owned the tideland, i.e., "in aid of commerce", the state could dispose of its tide lands free from any access claim of the upland proprietor."<sup>12</sup> It was exercising a legitimate proprietary right.

Of course the outcome in that case was rather extreme. In general, as I suggest below, I think in seashore cases the courts should seek

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<sup>10</sup> Of course, it has a choice. It can forego its status as an owner, and rely on its regulatory authority, in which case, if the regulation is challenged as a taking, the constitutional regulatory takings analysis would apply. My assumption here is that in some instances involving sea level change, the state might well be better off, or at least as well off, resting on its proprietary rights, as I seek to illustrate in discussing the Stop the Beach Nourishment case, *infra*.

<sup>11</sup> There are various situations where government is acting both as a proprietor and as a sovereign. The government uses its regulatory authority to implement its proprietary rights, as on national forests, where private parties claim easements across public land. *United States v. Jenks*, 22 F.3d 1513,1518 (10 Cir. 1994)(permit process used to effectuate easement across its land and limit use to scope of easement). Another situation is where municipally owned airports are authorized to implement noise regulations. Obviously there is a potential for conflict in such situations, but courts have been able to deal with the problem, e.g. assuring that regulation given for that limited purpose is used solely for the protection of proprietary rights, such as preventing noise that amounts to a nuisance. *British Airways Board v. Port Authority of N.Y.*, 558 F.2d 75 (2 Cir. 1977). See also *State ex rel. King v. H.F. Wilcox O. & G. Co.*, 162 Okla. 237, 19 P.2d 572 (1933)(State as sovereign regulates production, and is also a competing landowner of oil land). There is also no reason why a court can't separate out two different claims by the state, one as an owner, and the other as a regulator, and apply the proper standards to each.

<sup>12</sup> *United States v. Mission Rock Co.*, 189 U.S. 391, 405,407 ((1903), citing *Shively v. Bowlby*, 152 U.S. 1 (1894). See also cases cited in note 35, *infra*. State laws and regulations expressly recognize the state's interest in tidelands as "proprietary" and not merely regulatory, e.g. 310 Code Mass. Regs. §9.02 ("...waterways in which the fee simple, any easement, or other proprietary interest is held by the Commonwealth in trust for the benefit of the public").

an equitable balance between the legitimate claims of both the upland owner and the state, as some regulatory schemes do now. Thus, for example, in exchange for permission to construct a seawall, a littoral owner might be required to permit public access across its upland and/or to provide some mitigation for lost habitat formerly within the publicly owned foreshore.

In addition to the desirability of balanced resolution of today's seashore cases, as contrasted with the either/or outcomes provided in regulatory takings cases, there are other reasons that may make regulatory takings analysis inapt for these cases:

- The categorical takings rules usually do not fit these cases. As the sea rises, if the accretion/erosion rule is applied, the sea and the state's migratory ownership will cover the upland. That looks like a physical invasion of the upland owner's property, but it hardly seems appropriate that application of the traditional common law erosion rule would *ipso facto* constitute a taking of the upland owner's property.<sup>13</sup> Conversely, application of a traditional defense-of-property rule on behalf of the upland owner would (as described above) allow the state's proprietary interest to be destroyed.<sup>14</sup>
- Traditional common law rules don't fit contemporary circumstances. For example, in previous eras, the foreshore was not important for public recreational use or as habitat, and

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<sup>13</sup> The alternative view is that nature will take its course and landowners have to retreat when the sea moves inland. See, e.g., *Arrington v. Mattox*, 767 S.W.2d 957,958 (Ct. App. TX, 1989), cert. denied 493 U.S. 1073 (1990) ("This public right of use or easement migrates and moves landward or seaward with the natural movements of...the line of mean low tide.").

<sup>14</sup> E.g., "...every landowner exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose....[i]f they act bona fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves." Bayley, J., in *Rex v. Commissioners*, 108 Eng.Rep. 1075, 1077 (1828); *Katenkamp v. Union Realty Co.*, 6 Cal.2d 765, 59 P.2d 473 (1936). Contra, regarding a nuisance suit for seawater storm damage from a neighbor's seawall, see *Grundy v. Thurston County*, 155 Wash.2d 1, 117 P.3d 1089 (2005). Traditional conceptions of the right to defend one's property against natural hazards have undergone considerable re-thinking in light of the modern importance given to protection of wildlife, and modern courts struggle to accommodate the public and private values. See, e.g., *Commonwealth v. Hagan*, 2000 WL 11337827 (Ct. Comm. Pleas Pa 2000); *State v. Thompson*, 136 Idaho 322, 33 P.3d 213 (2001); *Christy v. Hodel*, 857 F.2d 1324, 1334-35 (9 Cir. 1988); *Baldwin v. Fish and Game Comm'n.*, 436 U.S. 371 (1978). See generally Lauri Alsup, "The Right to Protect Property", 21 *Envtl. L.* 209 (1990).

the right (even the obligation under the English common law, known as *innyng*) of upland owners to defend against rising waters was not in conflict with public ownership of the sea up to the (migrating) line of mean high tide. Nor was the migratory boundary that moved with accretion and erosion uni-directional, as it is with modern sea-level rise, so it was not so threatening to upland owners.

- The rate and magnitude of the rising sea levels is physically quite different from the historical experience out of which the common law rules grew. It is neither gradual like traditional accretion/erosion/reliction; nor is it sudden and violent like traditional avulsion. We are facing a historically distinct situation that is not a good factual fit with either of those rules.

In thinking about how to analyze these cases, the enemy waters problem provides a helpful analogy. Those cases also involve two neighboring owners at odds over an invasive natural hazard.<sup>15</sup> The evolution of doctrine in those cases is instructive. Traditionally, the law acknowledged only one owner's rights. In some jurisdictions the so-called common enemy doctrine applied. It permitted an owner to defend his property, and thus to do whatever he wished on his own land to get rid of the unwanted water. That approach took no account of the owner who was not physically positioned to defend himself.<sup>16</sup> The other traditional approach, the so-called civil law rule, held that the natural situation must be left alone, that one must simply abide whatever natural flows brought.

Today both of those extreme solutions has given way to a balancing approach that seeks an accommodation sensitive to the fact that both owners have a legitimate interest, and are innocent victims of a phenomenon beyond their control.<sup>17</sup> In effect a balancing approach has replaced an either/or approach, and rigidity of result yielded to a

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<sup>15</sup> See generally Rest. (Second)Torts §833.

<sup>16</sup> In parallel to the problem presented by rising sea levels, the common enemy doctrine held that a threatened landowner need not concern himself with the effect of his action, but could "deal with it in such a manner as best suits his own convenience;...includ[ing] walling the water...out..." Pflum v. Wayne Co. Bd. Of Comm'rs, 892 N.E.2d 233 (Ct. App. Ind. 2008).

<sup>17</sup> E.g., Page Motor Co., Inc. v. Baker, 182 Conn. 484, 488-9, 438 A.2d 739, 741 (1980): "...the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined b the trier."

consequentialist accommodation of competing entitlements, that recognizes the legitimacy of each party's proprietary claim.

A California opinion written some 40 years ago put the issue nicely, though it used a contrast between the tort and property mentalities to illustrate the difference between flexibility and rigidity: It said, "...we are urged to consider the reasonable use rule as an attempt to cope with the problem [enemy waters] through the use of tort rather than property concepts.....Such words as 'right', 'servitude', and 'easement' connote a state that is fixed and definite, and they cannot be applied in those terms to describe flexible legal relations dependent upon varying circumstances....[W]hile tort terminology is not necessarily a panacea, a court is more likely to produce an acceptable result if it analyzes 'prerequisites of liability' rather than merely the 'rights of the parties.'"<sup>18</sup> Whatever the proper label may be, the idea is that the presence of two legitimate pre-existing rights calls for reasonable accommodation, rather than an either/or resolution.

A recently filed case in South Carolina may be illustrative of the poor fit that traditional rules bring to contemporary problems. The alleged facts are that a spit of land with the ocean on one side and an inlet on the other has valuable undeveloped real estate along its spine. The water is rising and eroding the shore away. The state has a setback law that is measured by an estimate of the rate of erosion (40 years back from the shore, at the present rate of erosion). Application to build a seawall was denied.<sup>19</sup> While such a law makes good sense in a stable or very slowly changing situation, in the circumstance of a rapidly disappearing beach, the set-back rule would, it is said, soon put all the privately owned land within the setback zone, making it worthless to the owner.

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<sup>18</sup> Keys v. Romley, 64 Cal.2d 396, 405,408, 412 P.2d 529, 535, 536 (1966).

<sup>19</sup> Such a situation seems to be presented in a recently-filed case, Kiawah Development Partners v. South Carolina Dept. of Health & Env. Control, 2009-CP-10-2847 (Ct. Comm. Pleas, Charleston County, filed May 5, 2009). The setback law is S.C. Code §48-39-280. See also S.C. Coastal Conserv. League v. S.C. Dept. of Health & Env. Control, 548 S.E.2d 887 (S.C. Ct. App. 2001) and F. Patrick Hubbard, "The Impact of Lucas on Coastal Development [etc.], 16 Southeastern Env. L.J. 65,80 (2007).

Setback laws are usually a good management tool, keeping development and the demand for seawalls back enough to assure maintenance of a public foreshore. But where protection of one property interest threatens to swallow the other, such measures don't do the job. Either the setback law takes the upland tract, or it doesn't. If the property is very valuable for development, it would seem that whatever public uses would be lost to the public as the result of a seawall might be dealt with by requiring some sort of mitigation payment as the price for permitting a seawall. There may be a variety of other accommodations. The important point is that dramatically rising sea levels, and intensified storm-caused erosion, are going to present many variations on this sort of problem, and traditional rules are poorly calculated to deal with them.

The Florida case now before the U.S. Supreme Court, though arising out of erosive storm damage, rather than out of sea level rise, is also illustrative of the unsuitability of the conventional rules, and standard regulatory takings analysis, to such situations.<sup>20</sup> The actual setting in that case is a state statute that substitutes a fixed property line for the migratory MHTL. But effectively the claim is that the state by building a public beach in front of the littoral tract is destroying two elements of a littoral owner's property right, physical adjacency to the water and the right to future accretions.

As the case has been presented and briefed (putting aside a judicial takings issue, and other jurisdictional matters), it presents a regulatory taking claim: the landowner had certain pre-existing property rights and expectations (adjacency, accretions), and the government has stripped them away to achieve some public benefit. Thus conceived, the dispute turns on questions such as whether adjacency, rather than merely access, is a littoral right under Florida law; whether adjacency would be considered a property right by state law in the context of a beach nourishment program that maintained access; and whether the claimed right to future accretions, which are only a contingent possibility, are property rights. (Because the case

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<sup>20</sup> *Stop the Beach Nourishment, Inc. v. Florida Dept. of Env. Protection [et al.]*, No. 08-1151, granting review of *Walton County v. Stop the Beach Nourishment*, 998 So.2d 1102 (Fl. Supreme Court, 2008).

arose as a facial challenge to the statute, the Penn Central standards are not at issue in the case before the Court).

My suggestion is that the case, thus conceived, misses a fundamentally important point. The state also has important property rights. The case should turn on a balancing between the littoral owner's claimed property rights and the state's property rights as the owner of the land seaward of the MHTL. From my reading of the various papers in the case, that issue wasn't even raised except in the Amicus brief of the Coastal States Organization.

In any event, the shape of the Florida case would be entirely different if it turned out that the beach nourishment program could be defended as an exercise of a pre-existing property right that the State itself had as a proprietor. If that were so, then even if some pre-existing property rights of the littoral owner was impaired or even destroyed, the issue in the case would be entirely different from the issues in a regulatory takings case.

What is the potential proprietary interest of the State? I am not an expert on Florida law, and I am not asserting that the following would necessarily be recognized by Florida courts but here is one possible way to look at the Florida case from a state-proprietary perspective.

The legal posture of the state (entirely apart from the statute in question in the case) would be that it was simply filling in its own submerged land. Such a deliberate filling process, it would assert, is not accretion under Florida law, and therefore the new land is a state-owned beach. Since the filling would have assertedly been done in accord with the purposes for which, under Florida law, the state owns the area water-ward of high tide, that is, for "navigation, commerce, fishing, bathing and other easements allowed by law"<sup>21</sup>, the result would be that the former littoral owner is legally no longer a littoral owner, and that the state itself owns the newly created littoral property. Under such circumstances any future accretions would inure to it, and it would suffer any future erosion. In such a case, there could be no regulatory taking, as no regulation of the littoral

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<sup>21</sup> Adams v. Elliott, 128 Fla. 79, \_\_\_, 174 So. 731, \_\_\_ (1937).

owner's property would be required, and no law would need to set a fixed state/private property boundary.

There is a good deal of authority favoring such a position. I have already mentioned the U.S. Supreme Court decision in the Mission Rock case from California.<sup>22</sup> Indeed, that was a major issue in the early development of San Francisco. In the mid-19<sup>th</sup> century the waterfront was filled and littoral owners were cut off by docks and other structures built on tidelands in front of their properties.<sup>23</sup> If you visit the city, you may notice that Front Street (whose name once meant what it said) is now about 4 (filled) city blocks from the waterfront.

In a 1909 Massachusetts case, *Home for Aged Women v. Commonwealth*,<sup>24</sup> a state river basin commission built a dam and a lock on the Charles River, and filled a strip of submerged land in front of the plaintiff's riparian tract, making the filled land a public park. The riparian sued on the ground that the newly created park blocked their riparian right of access to the river, and sought damages. The court denied their claim, holding that "the waters and the land under them beyond the line of private ownership are held by the state, both as the owner of the fee and as the repository of sovereign power, with a perfect right of control in the interest of the public. The right of the Legislature ...has been treated as paramount to all private rights...."<sup>25</sup> The court cited the street access analogy, and said that if the public interest requires the discontinuance of the street, the abutting owner's right of access comes to an end.<sup>26</sup>

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<sup>22</sup> See note 12, *supra*.

<sup>23</sup> *Eldridge v. Cowell*, 4 Cal. 80 (1854). The predecessor of the plaintiff acquired his waterfront lot in 1847, and conveyed it to the plaintiff in 1852. A submerged lot water-ward of the plaintiff was conveyed to the defendant in 1848, and in 1851 a law was passed authorizing its filling in to improve waterfront commerce. The plaintiff was cut off from water access and asserted violation of his riparian rights, and also nuisance. The Court upheld the filling, and the cutting off on the ground that it was legitimate "to destroy the easement, in order to subserve the general good". The court added that no riparian right of the plaintiff had been violated since he took in 1852, after the 1851 law was passed and with knowledge of it, but that would suggest his predecessor's pre-1851 riparian rights were lost when the tract was sold, precisely the sort of claim the U.S. Supreme Court rejected in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

<sup>24</sup> 202 Mass. 422, 89 N.E.124 (1909). See also *Carpenter v. City of Santa Monica*, *infra* note 36, at 789 ("tide lands...filled rapidly and not gradually and imperceptibly, belong to the state...and do not belong to the upland owner"). *Bentz v. McDaniel*, 872 So.2d 978,980 (Dist. Ct. App. FL 2004): "Filling is not a gradual and imperceptible process which would qualify as natural accretion."

<sup>25</sup> 202 Mass., at 427.

<sup>26</sup> *Id.*, at 429.

The Massachusetts judiciary later distinguished that case on the ground that the park there was part of a larger project for the improvement of navigation, and that the state holds the land beneath navigable waters for the limited purpose of protecting navigation and fisheries.<sup>27</sup> While it is true that the earlier case spoke about the project there as part of an “improvement to a navigable highway,”<sup>28</sup> it also spoke much more generally in the same passage, saying that grants of land bounded by tide water are impliedly subject to paramount government uses of the water front “for the promotion of commerce and the general welfare.”<sup>29</sup> And it emphasized the state’s proprietary posture, saying “there is no change within the boundaries of the [private upland owner’s] estates, and the adjacent land and water [below the MHTL] are held in a separate ownership, for a public use, under which it may be appropriated as the interests of the public require.”<sup>30</sup>

Definition of the scope and purpose of the state’s proprietorship is a matter of state law, and it varies from state to state. In some states, it is rather strictly limited to navigation, fishing and fowling, but in others it is considerably more broadly defined.<sup>31</sup> As noted earlier, Florida includes bathing and recreation as one of its public trust uses,<sup>32</sup> and enhancing public beaches, particularly where loss of beach land through storm-caused erosion is serious, might well be considered a legitimate proprietary use under that state’s background principles of property law.

Another possible state proprietary claim could arise if—as the Florida Supreme Court found—the earlier loss of beach was caused by

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<sup>27</sup> 173 N.E.2d, at 277. Notably, the U.S. Supreme Court has conceived the state’s ownership of tidelands more broadly, as including commerce. See note 12, *supra*.

<sup>28</sup> 202 Mass., at 431

<sup>29</sup> *Ibid*.

<sup>30</sup> *Id.*, at 434.

<sup>31</sup> E.g., *Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58 (2005); *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971); *Orion Corp. v. State*, 109 Wash.2d 621, 747 P.2d 1062 (1987); *Borough of Neptune City v. Borough of Avon-By-the-Sea*, 61 N.J. 296, 294 A.2d 47 (1972); *Mesenbrink v. Hosterman*, 210 P.3d 516,518 ((Idaho, 2009); *In re Water Use Permit Applications for the Waiahole Ditch*, 94 Haw. 97, 9 P.3d 409 (2000); *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill.2d 65, 360 N.E.2d 773 (1976); *Cinque Bambini Partnership v. State*, 491 So.2d 508 (Miss. 1986); *White v. Hughes*, 139 Fla. 54, 190 So.2d 446,449 (1939)(navigation, fishing and bathing). See generally David C. Slade, et al., eds., *Putting the Public Trust to Work* (2d ed. 1997).

<sup>32</sup> *Adams v. Elliott*, 128 Fla. 79, 174 So. 731 (1937).

avulsion, and the public-private boundary did not move landward. In such an event, the foreshore between high and low tide (which formerly had been publicly owned and available for public use) would now be located entirely on land owned by the littoral proprietor, and the public might not have a legal right of access to it.<sup>33</sup> In such a case, assuming it could practically be accomplished without also filling the littoral owner's submerged land, perhaps by building a structure around the littoral owner's submerged land,<sup>34</sup> a filling project seaward of the public/private property line (on land which is now wholly submerged) to assure the existence of a publicly-owned, publicly-usable foreshore would almost certainly be within even the most traditional state definition of the scope of public trust proprietorship

Finally, there is the question whether the kind of fill in the Florida-type beach nourishment program would even qualify as an accretion that would belong to the littoral owner. If not, the argument that the sand placed on state land just seaward of the MHTL is an accretion, and belongs to the upland owner, would be legally erroneous. The issue is whether dumping dredged sand on the land is within the historic scope of the accretion rule under the background accretion property law rule.

The historic common law development up to and including Blackstone did not deal with artificial accretions one way or another. Even when artificial accretions were first said to come within the accretion rule in America in the 19<sup>th</sup> century, the cases involved gradual additions of alluvion generated by structures like jetties and

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<sup>33</sup> Traditionally, submergence, the boundary would not move, but there would be a public easement in the water; whether it would include public use of the intertidal zone is unclear. The upland owner could reclaim the land if the water later declined, under a doctrine known as re-emergence. But there is no historical authority for the right of the state to fill such land.

Some states have changed the common law rule by statute. North Carolina law, e.g., now provides that the seaward boundary of all property, which adjoins the ocean, is the mean high water mark," N.C. Gen. Stat. §7-20(a). See Joseph J. Kalo, "North Carolina Oceanfront Property and Public Waters [etc.], 83 N.C.L.Rev. 1427 (2005).

<sup>34</sup> Alternatively, it would be necessary to fill the privately-owned area between the pre-erosion, pre-avulsion MHTL, and the current MHTL. The Florida Supreme Court seemed to think the state could do that without compensating the littoral owner, which seems a novel view of the right of reclamation of avulsively eroded land. In any event, such a situation would present some perplexing issues in order have a publicly owned foreshore, which is yet another reason to doubt the contemporary value of the avulsion rule. See, on this point generally, Sax, "The Accretion/Avulsion Puzzle [etc.]," \*\* Tulane Env. L.J. \*\*\* (2010)(forthcoming).

groins, and not dredging and dumping of sand, as in some modern beach nourishment cases. There is at least some reason to think that judges did not think the accretion rule applied to such fill projects.<sup>35</sup>

It is now the law virtually everywhere that an artificial, rather than natural, process does not prevent alluvion from qualifying as accretion, so long as it hasn't been created by the littoral owner himself.<sup>36</sup> That is clearly the law in Florida, as was held in a case a state beach nourishment project was accomplished by construction of a jetty which gradually caused alluvion to build up in front of the defendant's littoral tract.<sup>37</sup> However, traditional doctrine requires that the process be gradual and imperceptible to qualify as an accretion, and it is doubtful that a beach nourishment program effectuated by dredging and then dumping sand would meet those tests.<sup>38</sup> In Florida

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<sup>35</sup> See Justice Holmes' opinion in *Marine Ry. & Coal Co. v. United States*, 257 U.S. 47, 66 (1921); see also the language of *Gibson v. United States*, 166 U.S. 269 (1897) and *Transportation Co. v. Chicago*, 99 U.S. 635, 635-42 (1878), which acknowledge that legitimate public projects on public submerged lands (such as dikes) cutting off riparian's access to the water did not constitute an expropriation of the riparian's property, though such cases may have assumed only a narrowly conceived pre-existing servitude in favor of navigation. See also *Home For Aged Women v. Commonwealth*, 202 Mass. 422, 89 N.E. 124 (1909)(project included fill for parkland). And in *Bruning v. City of New Orleans*, 165 La. 511, 115 So. 733 (1928), where the city had filled in submerged land to create a park, the court denied the upland owner's claim of ownership and said, "[t]here is, of course, no such thing as a 'right of batture, alluvions, and accretions' on the shore of Lake Ponchartrain, an arm of the sea [citation omitted] nor in any case as to lands reclaimed by artificial process and with public money [citations omitted]" (p. 526).

<sup>36</sup> E.g., 63 A.L.R.3d 249, 255-56 (1975 *County of St. Clair v. Lovington*, 23 Wall. 46, 23 L.Ed. 59,64 (1874). Artificial accretion cases usually involve accretion in the traditional sense, as, for example, where a jetty or dike causes alluvion to drift to shore and build up gradually. California is an exception: On tidelands, where the state is the adjacent owner, artificial accretions do not belong to the upland owner. *Carpenter v. City of Santa Monica*, 147 P.2d 964, 63 Cal.App.2d 771 (Dist. Ct. App. 1944). *State ex rel. State Lands Comm'n v. Superior Court*, 11 Cal.4<sup>th</sup> 50, 900 P.2d 648 (1995)(exception for distant artificial accretions). See also *Bruning v. City of New Orleans*, note 35, *supra*.

<sup>37</sup> ). *Bd. Of Trustees of Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934,937 (Fla. 1987)(state-built jetty caused accretion);

<sup>38</sup> E.g., *In re Driveway in New York*, 46 Misc. 157, 93 N.Y.S. 1107 (1905), where the court rejected the view that filled-in land should be treated as an accretion, saying the accretion rule only applies to gradual and natural deposits of soil at the edge of the upland property. Federal beach replenishment program held to be avulsion in *City of Long Branch v. Liu*, 363 N.J.Super. 411,833 A.2d 106 (Superior Ct. 2003). See also *Id.*, 2009 WL 1393221 (N.J.Super. App. Div. 2009): "We do not find it necessary in order to resolve this issue that we delve into the distinctions drawn by the common law with respect to boundary lines between accretion ... and avulsion ....It is undisputed that the enhanced beachland to which defendants seek to lay claim and for which they seek compensation was the result of a public agency spending public funds. We can perceive no policy justification which would permit defendants to reap such a private monetary benefit from those public efforts." But see *Wildwood Crest v. Masciarella*, 51 N.J. 352, 359, 240 A.2d 665 (1968). "...artificially filled tide lands filled rapidly and not gradually and imperceptibly,

an appellate court has said that “[f]illing is not a gradual and imperceptible process which would qualify as natural accretion.”<sup>39</sup> Indeed, an older Florida case held that a state lake-lowering project, which exposed shore land, was not a reliction (legally the mirror-image of accretion), one reason being that the water did not recede “by imperceptible degrees.”<sup>40</sup> And Florida courts recognize the common law rule that “boundaries do not shift when the loss of land occurs suddenly...rather than gradually.”<sup>41</sup> Presumably the same rule would apply to gain of land.

Perhaps the proprietary claims that I have spelled out here, would fail in whole or part under Florida’s analysis of its background principles of state property law.<sup>42</sup> My point here is simply that at the least the State is entitled in a case like this to place itself on an equal proprietary plane with the landowner who is challenging it. It may prevail in whole or in part as a proprietor.<sup>43</sup> If it does, its valid proprietary action cannot constitute a taking. Of course, it is not obliged to follow that path. It can always opt to defend its actions under the regulatory takings rubric.

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belong to the state or its grantees and do not belong to the upland owner.” *Carpenter v. City of Santa Monica*, 147 P.2d 964, 972, 63 Cal.App.2d 771, 789 (Dist. Ct. App. 1944).

<sup>39</sup> *Bentz v. McDaniel*, 872 So.2d 978 (2004).

<sup>40</sup> *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927).

<sup>41</sup> *Trepanier v. County of Volusia*, 965 So.2d 276 (2007); *Walton County v. Stop the Beach Renourishment*, 998 So.2d 1102, 1116 (2008).

<sup>42</sup> Courts seem quite able to make doctrine fit a desired outcome. *State v. Gill*, 259 Ala. 177, 66 So.2d 141 (1953) was an Alabama case, where the government simply dumped waste mud from a dredging project in front of the upland tract. The court held (quite justly, if without much legal support) that the new land was accreted to the littoral owner.

<sup>43</sup> As I indicated earlier, I think the property rule should be one of seeking balance. Thus, even though as an owner the state might totally cut off the littoral owner, the more balanced result set out in the Florida statute seems desirable, giving the upland owner access and use, and limiting development on the public beach. Subjecting upland owners to public access along the shore is hardly the end of the world, as anyone who has ever vacationed in Hawaii knows. There all beaches, even in front of the most luxurious hotels and the richest residents’ homes, are publicly accessible up to the vegetation line. And still Hawaiian tourism and real estate prospers. See [In re Application of Ashford](#), 50 Haw. 314, 315, 440 P.2d 76, 77 (1968). The seaward boundary between private upland and public beach is “along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris...”, re-affirmed in *Diamond v. State*, 112 Haw. 161,169, 145 P.3d 704,712 (2006).

