IN THE SUPREME COURT OF TEXAS

NO. 09-0387

CAROL SEVERANCE, PETITIONER,

v.

JERRY PATTERSON, COMMISSIONER OF THE TEXAS GENERAL LAND OFFICE; GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS; AND KURT SISTRUNK, DISTRICT ATTORNEY FOR THE COUNTY OF GALVESTON, TEXAS, RESPONDENTS

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Argued November 19, 2009
Reargued April 19, 2011

JUSTICE WAINWRIGHT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE GREEN, JUSTICE JOHNSON and JUSTICE WILLETT joined.

JUSTICE WILLETT delivered a concurring opinion.

JUSTICE MEDINA delivered a dissenting opinion, in which JUSTICE LEHRMANN joined and JUSTICE GUZMAN joined in part.

JUSTICE GUZMAN delivered a dissenting opinion.

JUSTICE LEHRMANN delivered a dissenting opinion, in which JUSTICE MEDINA joined.

CHIEF JUSTICE JEFFERSON did not participate in the decision.

After issuing an opinion in this certified question proceeding, we granted respondents' motion for rehearing and heard reargument of the case. Petitioner sold the real property at issue and we abated our proceeding to allow the certifying court, the United States Court of Appeals for the

Fifth Circuit, to consider respondents' motion to dismiss the case as moot. *Severance v. Patterson*, 345 S.W.3d 49 (Tex. 2011). The Fifth Circuit denied the motion by order dated September 28, 2011, and we reinstated our rehearing of the certified questions. We withdraw our opinion of November 5, 2010, and substitute the following in its place.[1]

Pursuant to article V, section 3-c of the Texas Constitution and Texas Rule of Appellate Procedure 58.1, we accepted the petition from the United States Court of Appeals for the Fifth Circuit to answer the following certified questions:

> 1. Does Texas recognize a "rolling" public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?
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> 2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the [Open Beaches Act]?
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> 3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the

[1] Prior to issuance of our original opinion, we received amicus briefs from Professor Matthew Festa of the South Texas College of Law; the Galveston Chamber of Commerce; the Surfrider Foundation; Surfside Property Owners; the Texas Chapter of American Shore and Beach Preservation Association; the Texas Conference of Urban Counties; the Texas Landowners Counsel; and the Texas Wildlife Association. On rehearing, we received amicus briefs from Blackburn & Carter, P.C.; Joyce Bowman; Brazoria County; Barbara Clark; Evelyn Clark; Luis Decker; Dewey A. Doga; the Economic Development Alliance for Brazoria County; the City of Galveston; Galveston Chamber of Commerce; the Park Board of Trustees of the City of Galveston; J. D. Gregory; Harris County; Harris County Attorney's Office, Harris County Commissioners Court, and the Texas Conference of Urban Counties (collectively); the City of Houston; the Houston Air Alliance; the Port of Houston Authority; Patricia Janki, M.D.; Steve and Carol Jones; Kendall County and County Attorney Donald W. Allee; Marie B. McDonald; Richard McLaughlin, Endowed Chair for Marine Policy and Law at the Harte Research Institute for Gulf of Mexico Studies at Texas A&M University–Corpus Christi, and Frederick J. McCutchon, Wood Boykin & Wolter PC; Jerry Patterson, Commissioner of the Texas General Land Office (individually); Sonya Porretto; Brooks Porter; State Representative Richard Peña Raymond; Michael R. Riley; D. Ruth Rumsey; Travis W. Rutledge et al.; Save our Beach Association and Friends of Surfside; A.R. "Babe" Schwartz; Charlotte Stirling; the Surfrider Foundation; the Village of Surfside Beach; the Texas Chapter of the American Shore and Beach Preservation Association; the Texas Public Policy Foundation; David Todd; Travis County; and We Texans and Texas United for Reform and Freedom (jointly).

> houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

Severance v. Patterson, 566 F.3d 490, 503–04 (5th Cir. 2009), *certified questions accepted*, 52 Tex. Sup. Ct. J. 741 (May 15, 2009). The central issue in this case is one of first impression for this Court: whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement.

Oceanfront beaches change every day. Over time and sometimes rather suddenly, they shrink or grow, and the tide and vegetation lines may also shift. Beachfront property lines retract or extend as previously dry lands become submerged or submerged lands become dry. Accordingly, public easements that burden these properties along the sea are also dynamic. They may shrink or expand gradually with the properties they encumber. Once established, we do not require the State to re-establish easements each time boundaries move due to gradual and imperceptible changes to the coastal landscape. However, when a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public easement on the public beach does not "roll" inland to other parts of the parcel or onto a new parcel of land. Instead, when land and the attached easement are swallowed by the Gulf of Mexico in an avulsive event, a new easement must be established by sufficient proof to encumber the newly created dry beach bordering the ocean. These public easements may gradually change size and shape as the respective Gulf-front properties they burden imperceptibly change, but they do not "roll" onto previously unencumbered private

beachfront parcels or onto new portions of previously encumbered private beachfront parcels when avulsive events cause dramatic changes in the coastline.[2]

We have carefully considered the state officials' arguments on rehearing. The State argues that the answer to the first question is "yes." In other words, the State claims that it is entitled to an easement on privately owned beachfront property without meeting the law's requirements for establishing an easement—a dedication, prescription, or custom. Under the common law, the State's right to submerged land, including the wet beach, is firmly established, regardless of the water's incursion onto previously dry land. In contrast, the State has provided no indication that the common law has given the State an easement that rolls or springs onto property never previously encumbered. There are policies that favor and disfavor the right the State claims, but the right cannot be found in the law. The law allows the State to prove an easement as would anyone else.

I. Introduction

As we acknowledge continuous and natural physical changes in the West Galveston shoreline, we must also recognize ages-old private property rights that are protected by law. Private property ownership pre-existed the Republic of Texas and the constitutions of both the United States and Texas.[3] *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977) (citing *Pa. Coal Co.*

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[2] Distinctions in legal consequences between gradual erosive versus dramatic avulsive changes in waterfront property have been recognized in Texas common law for over a century and by the English common law for at least two and a half centuries. *See* Part III.A., ___ S.W.3d at ___, *infra*.

[3] The Bill of Rights, including the Fifth Amendment protection of property rights, was not part of the original Constitution ratified in 1788. After an outcry that the Constitution did not protect the rights of individuals vis-a-vis the government, twelve amendments to the Constitution were proposed to the people for ratification, and ten were ratified. *Bute v. Illinois*, 333 U.S. 640, 651 (1948); ROBERT J. ALLISON, AMERICAN ERAS: DEVELOPMENT OF A NATION (1783–1815) 208 (1997). They became know as the Bill of Rights.

v. Mahon, 260 U.S. 393 (1922)); *In re Knott*, 118 S.W.3d 899, 902 (Tex.App.—Texarkana 2003, no pet.). Both constitutions protect these rights in private property as essential and fundamental rights of the individual in a free society.

Private property rights have been described "as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions." *Eggemeyer*, 554 S.W.2d at 140.[4] These constitutional protections underlie our analysis in this proceeding. The question to the Court is to define the scope of the property rights at issue.

Generally, an owner of realty has the right to exclude all others from use of the property, one of the "most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435–36 (1982) (characterizing the right to exclude as "one of the most treasured strands in an owner's bundle of property rights" and observing that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property"); *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945) ("property" denotes the group of rights "to possess, use and dispose of it"); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 634 (Tex. 2004); *Marcus Cable Assoc., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002).

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[4] Private property rights are considered fundamental rights under the Constitution. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (describing "one's right to life, liberty, and property" as "fundamental rights"); *In re Kemmler*, 136 U.S. 436, 448 (1890) ("Protection to life, liberty, and property rests primarily, with the states, and the [14th] amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship . . . ."); *Kelo v. City of New London*, 545 U.S. 469, 510–11 (2005) (Thomas, J., dissenting) ("The Public Use Clause, in short, embodied the Framer's understanding that property is a natural, fundamental right . . . ."); *see* James Madison, *Property*, 27 Mar. 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al., eds., 1983) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.").

Limitations on property rights may be by consent of the owner, state condemnation with payment of just compensation, appropriate government action under its police power (such as addressing nuisances), sufficient proof of use by persons other than the owner that creates an estoppel-based right to continuing use (easements) or pre-existing limitations in the rights of real property owners that have existed "since time immemorial," in the words of the Texas Open Beaches Act (OBA).[5] TEX. NAT. RES. CODE §§ 61.001(8). The State of Texas takes the position that owners of private property adjacent to the beach in West Galveston Island have never had the right to exclude the public from their property in the dry beach. Because there is no such limitation established in the property owner's deed to the property at issue, or agreed to by the owner, and the State has not attempted to prove an easement on the property, this legal position raises the question of whether limitations on real property rights on the western portion of Galveston Island existed since time immemorial, as required by the OBA.

Legal encumbrances or reservations on private property rights on the West Beach of Galveston Island dating from original land grants during the Republic of Texas or at the inception of the State of Texas could provide a basis for recognizing public easements on privately owned portions of these beaches or rolling public easements. Prior to 1836, Mexican law precluded colonization of Galveston's beachfront lands for national defense and commercial purposes without

[5] In *Lucas v. South Carolina Coastal Council*, the Supreme Court noted that pre-existing restrictions in the "background principles of the [s]tate's law" of property could limit the rights of property owners. 505 U.S. 1003, 1029 (1992). However, merely pronouncing such a limitation on property rights, whether by judicial decree or executive fiat, would raise serious, constitutional concerns. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592 (June 17, 2010); *Lucas*, 505 U.S. at 1029. The OBA's reference to "time immemorial" and the Supreme Court's reference to "background principles of [a] [s]tate's law" seem to connote a similar concept. In Texas, non-consensual limitations on property rights not adjudicated and accompanied by due process must have existed since time immemorial to constitute legitimate limitations on the inherent rights of private beachfront property owners.

approval of the "federal Supreme Executive Power" of Mexico, presumably the Mexican President. However, in 1840 the Republic of Texas, as later confirmed by the State of Texas, granted private title to West Galveston Island without reservation by the State of either title to beachfront property or any public right to use the privately owned beaches. Public rights to use of privately owned property on West Beach in Galveston Island, if such rights existed at that time, were extinguished in the land patents by the Republic of Texas to private parties. In some states, background principles of property law governing oceanfront property provide a basis for public ownership or use of the beachfront property. Such principles are not extant in the origins of Texas. Indeed, the original, unrestricted transfer by the Republic to private parties leaves little occasion for the argument that background principles in Texas common law at the inception of this jurisdiction provide a basis for impressing the West Beach area with a public easement, absent appropriate proof.

The OBA provides the State with a means of enforcing public rights to use of State-owned beaches along the Gulf of Mexico and of privately owned beach property along the Gulf of Mexico where an easement is established in favor of the public by prescription or dedication or where a right of public use exists "by virtue of continuous right in the public since time immemorial . . . ." TEX. NAT. RES. CODE §§ 61.011(a), .013(a). Promulgated in 1959, the OBA did not purport to create public easements along Texas's ocean beaches, but recognized that mere pronouncements of encumbrances on private property rights are improper. Because we find no right of public use in historic grants to private owners on West Beach or inherent limitations on their property rights, the State must establish under principles of property law encumbrances on privately owned realty along the West Beach of Galveston Island. For an easement to roll, there must first be an easement.

II. Background

In April 2005, Carol Severance purchased three properties on Galveston Island's West Beach. "West Beach" extends from the western edge of Galveston's seawall along the beachfront to the western tip of the island. One of the properties, the Kennedy Drive or Kennedy Beach property, is at issue in this case.[6] A rental home occupies the property. The parties do not dispute that no easement has ever been established on the Kennedy Drive property. A public easement for use of a privately owned parcel seaward of Severance's Kennedy Drive property pre-existed her purchase. That easement was established in a default judgment, dated August 1, 1975,[7] in the case of *John L. Hill, Attorney General v. West Beach Encroachment, et al.*, Cause No. 108,156 in the 122nd District Court, Galveston County, Texas. Five months after Severance's purchase, Hurricane

[6] Severance owned three properties on West Beach—on Gulf Drive, Kennedy Drive and Bermuda Beach Drive. Her original lawsuit included all three properties, but she only appealed to the Fifth Circuit the district court's judgment dismissing her claims as to two properties. After oral argument to this Court on the certified questions, Severance sold one of two remaining homes at issue in a FEMA-funded buy-out program. Only the Kennedy Drive property remained subject to this litigation at the time we issued the original opinion.

[7] Attached to the amicus curiae brief submitted by Kendall County is a partial copy of an agreed judgment signed by the same trial court in the same case a month later, on September 8, 1975. Kendall County argues that the judgment established an easement on Severance's Kennedy Drive property. This argument and the judgment suffer from several deficiencies: 1) The issue was not raised by any party in this litigation in federal or state court. 2) The judgment was agreed to by two defendants and covers nine properties on Galveston's West Beach. It purports, however, to establish an easement along the entire West Beach and bind many landowners who were not parties to the lawsuit. 3) The September 1975 judgment was neither tried to a jury nor a judge but was agreed, as the parties had a right to do. However, a number of concerns would arise if a couple of property owners were sought out to agree to such an easement on their properties and then attempt to bind the many other property owners along the West Beach. 4) The easement the agreed judgment purports to establish runs from mean low tide to the vegetation line. Physically, such an easement could only encumber those private properties on the front row adjacent to the beach in September 1975. There is no evidence that the property Severance owned on Kennedy Drive was on the front row of West Beach in September 1975. Logic suggests that with a number of hurricanes re-contouring Galveston's beaches since 1975, including Hurricane Rita in 2005, the Kennedy Drive property was not on the front row in 1975. In fact, the court in *Matcha v. Mattox* cites evidence that the Galveston Beach vegetation line was moved landward from 125 to 150 feet by Hurricane Alicia in 1983. 711 S.W.2d 95, 97 (Tex.App.—Austin 1986, writ ref'd n.r.e.). 5) The September 1975 judgment states that Exhibits "B" and "C" attached thereto define the vegetation line along the beach at that time. Neither exhibit was included with the judgment attached to the amicus brief.

Rita devastated the adjacent property burdened by an easement and moved the line of vegetation landward. The entirety of the house on Severance's Kennedy Drive property is now seaward of the vegetation line. The State claimed a portion of her property was located on a public beachfront easement and a portion of her house interfered with the public's use of the dry beach. When the State sought to enforce an easement on her private property pursuant to the OBA, Severance sued several state officials in federal district court. She argued that the State, in attempting to enforce a public easement without proving its existence, on property not previously encumbered by an easement, infringed upon her federal constitutional rights and constituted (1) an unreasonable seizure under the Fourth Amendment, (2) an unconstitutional taking under the Fifth and Fourteenth Amendments, and (3) a violation of her substantive due process rights under the Fourteenth Amendment.

The state officials filed motions to dismiss the case on the merits and for lack of jurisdiction. The federal district court dismissed Severance's case after determining her arguments regarding the constitutionality of a rolling easement while "arguably ripe" were deficient on the merits. *Severance v. Patterson*, 485 F. Supp. 2d 793, 800, 805 (S.D. Tex. 2007). Not presented with the information concerning the Republic's land grant, the court held that an easement on a parcel seaward of Severance's property pre-existed her ownership of the property and that after an easement to private beachfront property had been established between the mean high tide and vegetation lines, it "rolls" onto new parcels of realty according to natural changes to those boundaries. *Id.* at 802–04. Severance only appealed her Fourth and Fifth Amendment challenges to the rolling easement theory. On appeal, the Fifth Circuit determined her Fifth Amendment takings claim was not ripe, but

certified unsettled questions of state law to this Court to guide its determination on her Fourth Amendment unreasonable seizure claim. *Severance*, 566 F.3d at 500, 503–04.

We issued an opinion addressing the certified questions on November 5, 2010. *Severance v. Patterson*, 345 S.W.3d 18 (Tex. 2010, reh'g granted). On the State's motion, we granted the request for rehearing on March 11, 2011. While rehearing was pending in this Court, Severance sold the remaining property at issue in her suit to the City of Galveston in June 2011 as part of a disaster-assistance program funded by the Federal Emergency Management Agency. *See* 42 U.S.C. § 5170c. The State then requested that we vacate our November 5, 2010 opinion and return the matter to the Fifth Circuit to dismiss as moot. The State also filed a similar motion before that Court. We abated our rehearing on July 29, 2011 to allow the Fifth Circuit to resolve the mootness issue raised by the State. Following briefing by the parties, the Fifth Circuit issued an order dated September 28, 2011 denying the State's request, concluding that the statutory threat of civil penalties imparted continued vitality to Severance's action. After the Fifth Circuit determined that the dispute between the parties continues to present a live controversy, we reinstated, on October 7, 2011, our consideration of the matter on rehearing.

A. Texas Property Law in Coastal Areas

We have not been asked to determine whether a taking would occur if the State ordered removal of Severance's house, although constitutional protections of property rights fortify the conclusions we reach. The certified questions require us to address the competing interests between the State's asserted right to a rolling public easement to use privately owned beachfront property on Galveston Island's West Beach and the rights of the private property owner to exclude others from

her property. The "law of real property is, under [the federal] Constitution, left to the individual States to develop and administer." *Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (quoting *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592, 2612 (2010) ("The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established."); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377 (1977) (explaining that "subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law" (citation omitted)).

Certainly, there is a history in Texas of public use of public Gulf-front beaches, including on Galveston Island's West Beach. On one hand, the public has an important interest in the enjoyment of the public beaches. But on the other hand, the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners. The boundary distinguishing private property rights is set forth in the definition of public beaches, prudently set forth in the OBA.

1. Defining Public Beaches in Texas

The Open Beaches Act states the policy of the State of Texas for enjoyment of public beaches along the Gulf of Mexico. The OBA declares the State's public policy to be "free and unrestricted right of ingress and egress" to State-owned beaches and to private beach property to which the public "has acquired" an easement or other right of use to that property. TEX. NAT. RES. CODE § 61.011(a). It defines "[p]ublic beach[es]" as:

> any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom. This definition does not include a beach that is not accessible by a public road or public ferry as provided in Section 61.021 of this code.

Id. § 61.001(8).[8] Privately owned beaches may be included in the definition of public beaches. *Id.* The Legislature defined public beach by two criteria: physical location and right of use. A public beach under the OBA must border the Gulf of Mexico. *Id.* The OBA does not specifically refer to inland bodies of water. Along the Gulf, public beaches are located on the ocean shore from the line of mean low tide to the line of vegetation, subject to the second statutory requirement explained below. *Id.* The area from mean low tide to mean high tide is called the "wet beach," because it is under the tidal waters some time during each day. The area from mean high tide to the vegetation line is known as the "dry beach."

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[8] In 2009, Texas voters approved an amendment to the Constitution to protect the public's right to use "public beach[es]" of the Gulf of Mexico. TEX. CONST. art. I, § 33. Public beaches are defined, similar to the OBA, as state-owned beaches and "any larger area" in the wet or dry beach "to which the public has acquired a right of use or easement . . . or retained a right by virtue of continuous right." Although not at issue in this case, the amendment provides:

> Section 1. Article I, Texas Constitution, is amended by adding Section 33 to read as follows:
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> Sec. 33. (a) In this section, "public beach" means a state-owned beach bordering on the seaward shore of the Gulf of Mexico, extending from mean low tide to the landward boundary of state-owned submerged land, and any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired a right of use or easement to or over the area by prescription or dedication or has established and retained a right by virtue of continuous right in the public under Texas common law.
>
> (b) The public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach. The right granted by this subsection is dedicated as a permanent easement in favor of the public.
>
> (c) The legislature may enact laws to protect the right of the public to access and use a public beach and to protect the public beach easement from interference and encroachments.
>
> (d) This section does not create a private right of enforcement.

The second requirement for a Gulf-shore beach to fall within the definition of "public beach" is the public must have a right to use the beach. This right may be "acquired" through a "right of use or easement" or it may be "retained" in the public "by virtue of continuous right in the public since time immemorial . . . ." *Id.* The OBA does not create easements for public use along Texas Gulf-front beaches. *Id*. at § 61.011(a); *Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 929–30 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

The wet beaches are all owned by the State of Texas, which leaves no dispute over the public's right of use. *See Luttes v. State*, 324 S.W.2d 167, 169, 191–92 (Tex. 1958); TEX. NAT. RES. CODE §§ 61.011, .161 (recognizing the public policies of the public's right to use public beaches and the public's right to ingress and egress to the sea); Richard J. Elliott, *The Texas Open Beaches Act: Public Rights to Beach Access*, 28 BAYLOR L. REV. 383, 384 (1976) (State-owned beaches are the strips of coastal property "between mean low tide and mean high tide, which runs along the entire Gulf Coast, regardless of whether the property immediately landward is privately or state owned."). However, the dry beach often is privately owned and the right to use it is not presumed under the OBA.[9] The Legislature recognized that the existence of a public right to an easement in the privately owned dry beach area of West Beach is dependent on the government's

[9] The OBA includes two stated presumptions for purposes of ingress and egress to the sea. It provides that the title of private owners of dry beach area in Gulf beaches "does not include the right to prevent the public from using the area for ingress and egress to the sea." TEX. NAT. RES. CODE § 61.020(a)(1). In 1991, the OBA was amended to add a second presumption that imposed "on the area a common law right or easement in favor of the public for ingress and egress to the sea." *Id.* § 61.020(a)(2). Although the constitutionality of these presumptions has been questioned, that issue is not before us. *See Seaway Co. v. Att'y Gen.*, 375 S.W.2d 923, 929–30 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.); Shannon H. Ratliff, *Shoreline Boundaries, Part I: Legal Principles*, Texas Coastal Law Conference, May 19-20, 2005 20 n.42 *reprinted in* Plaintiff's Appendix of Record Excerpts and Cited Materials at tab 6, *Severance v. Patterson* (No. 09-0387), ___ S.W.3d ___ (also noting the same constitutional concern).

establishing an easement in the dry beach or the public's right to use of the beach "by virtue of continuous right in the public since time immemorial . . . ." TEX. NAT RES. CODE § 61.001(8). Accordingly, where the dry beach is privately owned, it is part of the "public beach" if a right to public use has been established on it. *See id.* Thus, a "public beach" includes but is broader than beaches owned by the State in those instances in which an easement for public use is established in the dry beach area. *Id*. Public beaches include Gulf-front wet beaches, State-owned dry beaches and private property in the dry beaches on which a public easement has been established.

In this case, before Hurricane Rita, Severance's house on the Kennedy Drive property was landward of the vegetation line. After Hurricane Rita, because the storm moved the vegetation and high tide lines landward, the property between Severance's land and the sea, on which a public easement had been established, was submerged in the surf or became part of the wet beach. Severance's Kennedy Drive parcel and her house are no longer behind the vegetation line but neither are they located on the wet beach owned by the State. At least a portion of Severance's Kennedy Drive property and all of her house are now located in the dry beach. The question is, did the easement on the property seaward of Severance's property "roll" onto Severance's property? In other words, because Severance's house is now located in the dry beach, is it thereby subject to an enforcement action to remove it under the OBA? The Fifth Circuit's first question, its threshold inquiry, encompasses both whether an easement can "roll" from a parcel previously encumbered by an easement established by prescription, dedication, or custom to a distinct parcel not so encumbered as well as whether a previously established easement can roll from one portion of a parcel to another part of the same parcel. From the Fifth Circuit's opinion, we understand that no easement has been

proven to exist on Severance's property under the OBA or the common law. *See Severance*, 566 F.3d at 494 (noting that no easement had been established on Severance's property by prescription, implied dedication, or continuous right). Severance contends, and it is not disputed, that there are no express limitations or reservations in Severance's title giving rise to a public easement. The answer to the rolling easement question thus turns on whether Texas common law recognizes such an inherent limitation on private property rights along Galveston's West Beach, or whether principles of Texas property law provide for a rolling easement on the beaches along the Gulf Coast.

2. History of Beach Ownership Along the Gulf of Mexico

Long-standing principles of Texas property law establish parameters for our analysis. It is well-established that the "soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people." *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943); *Landry v. Robison*, 219 S.W. 819, 820 (Tex. 1920) ("For our decisions are unanimous in the declaration that by the principles of the civil and common law, soil under navigable waters was treated as held by the state or nation in trust for the whole people."[10]); *De Meritt v. Robison Land Comm'r*, 116 S.W. 796, 797 (Tex. 1909) (holding "[i]n the contemplation of law," soil lying below the line of ordinary high tide, "was not land, but water"); *see also* TEX. NAT. RES. CODE § 11.012(c) ("The State of Texas owns the water and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries provided in this section, including all land which is

[10] "The bays, inlets, and other waters along the Gulf Coast which are subject to the ebb and flow of the tide of the Gulf of Mexico are defined as 'navigable waters.'" *Lorino*, 175 S.W.2d at 413 (citing *City of Galveston v. Mann*, 143 S.W.2d 1028, 1033 (1940); *Crary v. Port Arthur Channel & Dock Co.*, 92 Tex. 275, 47 S.W. 967, 970 (1898)).

covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide."). These lands are part of the public trust, and only the Legislature can grant to private parties title to submerged lands that are part of the public trust. *Lorino*, 175 S.W.2d at 414; *see also TH Invs., Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 182–83 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (holding that lands submerged in the Gulf belong to the State) (citations omitted).

Current title to realty and corresponding encumbrances on the property may be affected in important ways by the breadth of and limitations on prior grants and titles. We review the original Mexican and Republic of Texas grants and patents to lands abutting the sea in West Galveston Island.[11] The Republic of Texas won her independence from Mexico in 1836. Mexico's laws prohibited colonization of land within ten leagues of the coast without approval from the president. General Law of Colonization, art. 4 (Mex., Aug. 18, 1824), *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897 [hereinafter "GAMMEL, THE LAWS OF TEXAS"] 97 (Austin, Gammel Book Co. 1898).[12] At the time that Texas became a republic, privately owned West Galveston lands were subject to significant governmental restrictions.

However, in November 1840, the Republic of Texas granted private title to West Beach property to Levi Jones and Edward Hall in a single patent (the "Jones and Hall Grant"). Jones and Hall Grant Papers, *available at* http://www.glo.texas.gov/cf/land-grant-search/index.cfm (search

[11] The briefs and the record do not address the effect of the early land grant of Galveston's West Beach.

[12] The Mexican federal government "feared that an influx of foreigners along the border of the United States, or along the coast, might become too powerful, and betray the country to a foreign power." LEWIS N. DEMBITZ, A TREATISE ON LAND TITLES IN THE UNITED STATES § 73, at 558 (1895).

abstract number 121, Galveston County);[13] *see Seaway*, 375 S.W.2d at 928. After admission to the Union in 1845, the State of Texas by legislation in 1852 and 1854 first confirmed the validity of the Jones and Hall Grant and then disclaimed title to those lands. In 1852, the State declared that it "hereby releases and relinquishes forever, all of her title to such lots on Galveston Island as are now in the actual possession and occupation of persons who purchased under the [Jones and Hall Grant]." Act approved Feb. 16, 1852, 4th Leg., R.S., ch. 119, § 1, 1852 Tex. Gen. Laws 142, *reprinted in* 3 GAMMEL, THE LAWS OF TEXAS, at 1020; Act of Feb. 8, 1854, 5th Leg., R.S., ch. 73, § 1, 1854 Tex. Special Laws 125–26, *reprinted in* 4 GAMMEL, THE LAWS OF TEXAS, at 125–26 (confirming the 1840 Jones and Hall Grant and "disclaim[ing] any title in and to the lands described in said patent, in favor of the grantees and those claiming under them").[14] In the 1854 Act, the State affirmed its intent to grant ownership of all land in West Beach up to the public trust to Jones and Hall with no express reservation of either title to the property or a public right to use the beaches.[15] The

[13] All Internet materials as visited March 14, 2012 and available in clerk of Court's file.

[14] The Act reads: "Be it enacted by the Legislature of the State of Texas, That the patent issued by the Commissioner of the General Land[O]ffice, on the twenty-eighth day of November, eighteen hundred and forty, to Levi Jones and Edward Hall, for lands on Galveston Island, be, and the same is hereby confirmed, and the State of Texas disclaims any title in and to the lands described in said patent, in favor of the grantees and those claiming under them." Act of Feb. 8, 1854, 5th Leg., R.S., ch. 73, § 1, 1854 Tex. Special Laws 125–26, *reprinted in* 4 GAMMEL, THE LAWS OF TEXAS, at 125–26.

[15] There is some historical evidence that the Republic made an abortive attempt to parcel and sell title to lands on West Galveston Island starting in 1837. *See* Act approved June 12, 1837, 1st Cong., 1 Repub. Tex. Laws 267 (1838), *reprinted in* 1GAMMEL, THE LAWS OF TEXAS, at 1327, (authorizing sales of title to lots on Galveston Island by auction); Annual Report of the Secretary of the Treasury, Nov. 1839, *reprinted in* 3 HARRIET SMITHER, JOURNALS OF THE FOURTH CONGRESS OF THE REPUBLIC OF TEXAS 1839–1840, at 35, 45 (Austin, Texas State Library 1931) (reporting treasury receipts "on account Sales Galveston Island"). In an 1860 mandamus proceeding, in light of then-lingering questions about the validity of Jones and Hall's title to West Beach, a district court directed the land commissioner to issue a single land patent to Jones and Hall for all of West Beach. *See Franklin v. Kesler*, 25 Tex. 138, 142–43(1860) (describing the patent issued pursuant to mandamus). The February 15, 1852 act expressly vested title in those claiming successor title under the Jones and Hall Grant, and the February 8, 1854 act confirms the Jones and Hall Grant in its entirety. Further, *Wilcox v. Chambers* confirmed that if title of coastal lands were granted to foreigners (non-Mexican individuals) prior

government relinquished all title in the Jones and Hall Grant, without reserving any right to use of the property. The Republic could have reserved the right of the public to use the beachfront property, "but the plain language of the grant shows the Republic of Texas did not do so." *Seaway Co.*, 375 S.W.2d at 929. All the Gulf beachland in West Galveston Island that extended to the public trust was conveyed to private parties by the sovereign Republic of Texas as later affirmed by the State of Texas.

Having established that the State of Texas owned the land under Gulf tidal waters, the question remained how far inland from the low tide line did the public trust—the State's title—extend. We answered that question in *Luttes v. State*. This Court held that the delineation between State-owned submerged tidal lands (held in trust for the public) and coastal property that could be privately owned was the "mean higher high tide" line under Spanish or Mexican grants and the "mean high tide" line under Anglo-American law.[16] 324 S.W.2d 167, 191–92 (Tex. 1958). The wet beach is owned by the State as part of the public trust, and the dry beach is not part of the public trust and may be privately owned. *See generally id*. Prior to *Luttes*, there was a question whether

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to 1840, the grants are presumed void absent specific approval by the Mexican President. 26 Tex. 181, 187 (1862).

Legislation and a patent (the "Menard Grant") conveyed oceanfront property on the east side of Galveston Island to private parties in 1836 and 1838. *City of Galveston v. Menard*, 23 Tex. 349, 391 (1859).

[16] Severance's parcel is not subject to Spanish or Mexican law. So, we refer to the mean high tide line throughout this opinion. On January 20, 1840, Texas adopted the common law of England as its rule of decision, to the extent it was not inconsistent with the Constitution of the Republic of Texas or acts of its Congress. Act approved Jan. 20, 1840, 4th Cong., R.S., § 1, 1840 Repub. Tex. Laws 3–4, *reprinted in* 2 GAMMEL, THE LAWS OF TEXAS, at 177–80; *Miller v. Letzerich*, 49 S.W.2d 404, 408 (Tex. 1932) (explaining that "the validity and legal effect of contracts and of grants of land made before the adoption of the common law must be determined according to the civil law in effect at the time of the grants"). Because the Jones and Hall Grant was made in November 1840, land granted under that patent is governed by the common law. *See* William Gardner Winters, Jr., *The Shoreline for Spanish and Mexican Grants in Texas*, 38 TEX. L. REV. 523 (1960) (discussing the history of Spanish and Mexican land patents and common law basis for shoreline boundaries).

the public trust extended to the vegetation line and included the dry beach. The State argued that it did. *Luttes* rejected that proposition and established the landward boundary of the public trust at the mean high tide line. *Luttes*, 324 S.W.2d at 187.

These boundary demarcations, linked to vegetation, high tide, and low tide lines are a direct response to the ever-changing nature of the coastal landscape because it is impractical to apply static real property boundary concepts to property lines that are delineated by the ocean's edge. The sand does not stay in one place, nor does the tide line. While the vegetation line may appear static because it does not move daily like the tide, it is also constantly affected by the tide, wind, and other forces of nature.

A person purchasing beachfront property along the Texas coast does so with the risk that her property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust. We explained in *State v. Balli*:

> Any distinction that can be drawn between the alluvion of rivers and accretions cast up by the sea must arise out of the law of the seashore rather than that of accession and be based . . . upon the ancient maxim that the seashore is common property and never passes to private hands . . . . [This] remains as a guiding principle in all or nearly all jurisdictions which acknowledge the common law . . . .

190 S.W.2d 71, 100 (Tex. 1945). Likewise, if the ocean naturally and gradually recedes away from the land moving the high tide line seaward, a private property owner's land may increase at the expense of the public trust. *See id.* at 100–01. Regardless of these changes, the boundary remains fixed (relatively) at the mean high tide line. *See Luttes*, 324 S.W.2d at 191–93. Any other approach

would leave locating that boundary to pure guesswork. *See Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 n.1 (Tex. 1976).

In 1959, the Legislature enacted the Open Beaches Act to address responses to the *Luttes* opinion establishing the common law landward boundary of State-owned beaches at the mean high tide line. Because the State could no longer lay claim to the dry beach as part of the public trust, some feared that this holding might "'give encouragement to some overanxious developers to fence the seashore'" in the dry beach as some private landowners had "erected barricades upon many beaches, some of these barricades extending into the water." TEX. LEGIS. BEACH STUDY COMM., 57TH LEG., R.S., THE BEACHES AND ISLANDS OF TEXAS [hereinafter "BEACH STUDY COMM., BEACHES AND ISLANDS OF TEXAS"] 1 (1961), *available at* http://www.lrl.state.tx.us/scanned/interim/56/56_B352.pdf; TEX. LEG. INTERIM BEACH STUDY COMM., 65TH LEG., R.S., FOOTPRINTS ON THE SANDS OF TIME [hereinafter "BEACH STUDY COMM., FOOTPRINTS"] 22 (1969), *available at* http://www.lrl.state.tx.us/scanned/interim/60/B352.pdf (quoting Richard M. Morehead, *Texas Coast Gets Wave of Attention at Session*, DALLAS MORNING NEWS, May 30, 1959, at 10 (quoting Rep. Bob Eckhardt (Hou.))). The OBA declared the State's public policy for the public to have "free and unrestricted access" to State-owned beaches, the wet beach, and the dry beach if the public had acquired an easement or other right to use that property. TEX. NAT. RES. CODE § 61.011(a). To enforce this policy, the OBA prohibits anyone from creating, erecting, or constructing any "obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public" to access Texas beaches where the public has acquired a right of use or easement. *Id.* § 61.013(a). The Act authorizes the removal of barriers or other obstructions on

> state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico *if the public has acquired a right of use or easement* to or over the area by prescription, dedication, or has *retained a right by virtue of continuous right in the public*.

Id. §§ 61.012, .013(a) (emphasis added).

The OBA does not alter *Luttes.* It enforces the public's right to use the dry beach on private property where an easement exists and enforces public rights to use State-owned beaches. Therefore, the OBA, by its terms, does not create or diminish substantive property rights. The statute cannot truly be said to create any new rights. *See* BEACH STUDY COMM., FOOTPRINTS 17 (noting that the OBA "does not and can not, declare that the public has an easement to the beach, a right of access over private property to and from the State-owned beaches bordering on the Gulf of Mexico"); Elliott, 28 BAYLOR L. REV. at 392 ("In terms of pure substantive law, the Open Beaches Act probably creates no rights in the public which did not previously exist under the common law."). In promulgating the OBA, the Legislature seemed careful to preserve private property rights by emphasizing that the enforcement of public use of private beachfront property can occur when a historic right of use is retained in the public or is proven by dedication or prescription. *See* TEX. NAT. RES. CODE § 61.013(a), (c). The OBA also specifically disclaims any intent to take rights from private owners of Gulf-shore beach property. *Id.* § 61.023 (noting that "[t]he provisions of this subchapter shall not be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach bordering on the seaward shore of the Gulf of Mexico . . . ."); *see Seaway Co.*, 375 S.W.2d at 930 ("There is nothing in the Act which seeks to take rights from an owner of land."). Within these acknowledgments, the OBA proclaims that beaches should be open

to the public. Certainly, the OBA guards the right of the public to use public beaches against infringement by private interests. But, as explained, the OBA is not contrary to private property rights at issue in this case under principles of Texas law. The public has a right to use the West Galveston beaches when the State owns the beaches or the government obtains or proves an easement for use of the dry beach under the common law or by other means set forth in the OBA.[17]

In 1969, the Legislature's Interim Beach Study Committee, chaired by Senator A.R. "Babe" Schwartz of Galveston County, confirmed that:

> [The OBA] does not, and can not, declare that the public has an easement on the beach, a right of access over private property to and from the State-owned beaches bordering on the Gulf of Mexico. *An easement is a property interest; the State can no more impress private property with an easement without compensating the owner of the property than it can build a highway across such land without paying the owner*.

BEACH STUDY COMM., FOOTPRINTS 17 (emphasis added). The Legislature created the Interim Beach Study Committee, among other reasons, to assure that beach development be undertaken to serve the best interests of the people of Texas and to study methods of procuring right-of-ways for roads parallel to the beaches, easements for ingress and egress to the beach, parking for beach access, methods for negotiating with landowners for additional easements, and rights for landowners to construct works for the protection of their property. *Id.* at 1–2.

[17] In 1961, the Texas Legislative Beach Study Committee further evidenced its recognition that private property rights exist in the dry beaches by proposing to the 57th Legislature that it come up with practical methods for not only procuring easements for ingress and egress to beaches but also methods of "negotiations with landowners for additional easements" for the "use and pleasure of the public, provided such lands or easements can be obtained without cost to the State." BEACH STUDY COMM., BEACHES AND ISLANDS OF TEXAS xi. If Gulf-front dry beach property were State-owned or already impressed with an easement for public use, negotiations to obtain them would not be necessary.

B. Background on Severance's Property

Carol Severance purchased the Kennedy Drive property on Galveston Island's West Beach in 2005. The Fifth Circuit explained that "[n]o easement has ever been established on [her] parcel via prescription, implied dedication, or continuous right." 566 F.3d at 494.[18] The State obtained the *Hill* judgment in August 1975 that encumbered a strip of beach seaward of Severance's property. Severance's Kennedy Drive parcel was not included in the 1975 judgment. However, the parties dispute whether or not Severance's parcel is subject to a rolling easement.

In 1999, the Kennedy Drive house was on a Texas General Land Office (GLO) list of approximately 107 Texas homes located seaward of the vegetation line after Tropical Storm Frances hit the island in 1998. In 2004, the GLO again determined that the Kennedy Drive home was located "wholly or in part" on the dry beach in 2004, but did not threaten public health or safety and, at the time, was subject to a GLO two-year moratorium order. When Severance purchased the property, she received an OBA-mandated disclosure explaining that the property may become located on a public beach due to natural processes such as shoreline erosion, and if that happened, the State could sue, seeking to forcibly remove any structures that come to be located on the public beach. *See* TEX. NAT. RES. CODE § 61.025. Winds attributed to Hurricane Rita shifted the vegetation line further inland in September 2005. In 2006, the GLO determined that Severance's house was entirely within the dry beach.

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[18] The district court opinion mentions in a parenthetical phrase that Severance admitted that an easement existed on her properties when she purchased them. On rehearing at the district court, Severance objected to the statement. The Fifth Circuit, as quoted, appears to disagree with it. The State has not asserted either that an easement existed on Severance's Kennedy Drive property when she purchased it or that she admitted to its existence, but the State does contend that, essentially, a virtual easement always exists on private property in the dry beach by virtue of the "rolling easement" theory. *See* JUSTICE MEDINA's dissent, ___ S.W.3d at ___; JUSTICE LEHRMANN's dissent, ___ S.W.3d at ___.

The moratorium for enforcing the OBA on Severance's properties expired on June 7, 2006. Severance received a letter from the GLO 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. The Fifth Circuit certified questions of Texas law to this Court.

III. Public Beachfront Easements

The first certified question asks if Texas recognizes "a 'rolling' public beachfront access easement, *i.e.*, an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication, or customary rights in the property so occupied?" 566 F.3d at 504. We have never held that the State has a right in privately owned beachfront property for public use that exists without proof of the normal means of creating an easement. And there is no support presented for the proposition that, during the time of the Republic of Texas or at the inception of our State, the State reserved the oceanfront for public use. In fact, as discussed above, the Texas Legislature expressly disclaimed any interest in title obtained from the Jones and Hall Grant after our State was admitted to the Union. *See* Part II.A.2, *supra*; *see also Seaway Co.*, 375 S.W.2d at 928 ("On November 28, 1840, the Republic of Texas issued its patent to Levi Jones and Edward Hall to 18,215 acres of land on Galveston Island. This grant covered all of Galveston Island except the land covered by the Menard Grant covering the east

portion of the Island.").[19] Therefore, considering the absence of any historic custom or inherent title limitations for public use on private West Beach property, principles of property law answer the first certified question.

A. Dynamic Nature of Beachfront Easements

Easements exist for the benefit of the easement holder for a specific purpose. An easement does not divest a property owner of title, but allows another to use the property for that purpose. *See Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002) (explaining that an easement relinquishes a property owner's right to exclude someone from their property for a particular purpose) (citations omitted). The existence of an easement "in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner." *Coleman v. Forister*, 514 S.W.2d 899, 903 (Tex. 1974). An easement appurtenant "defines the relationship of two pieces of land"—a dominant and a servient estate. *See* 7 THOMPSON ON REAL PROPERTY § 60.02(f)(1), at 469 (David A. Thomas, ed. 2006). Because the easement holder is the dominant estate owner and the land burdened by the easement is the servient estate, the property owner may not interfere with the easement holder's right to use the servient estate for the purposes of the easement. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 207 (Tex. 1963) (citation omitted); *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987).

Easement boundaries are generally static and attached to a specific portion of private property. *See Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.) ("Once

[19] The State argues that four courts of appeals opinions establish legal limitations dating back to "time immemorial" on private title to West Galveston property. *See* TEX NAT. RES. CODE § 61.001(8). These opinions are discussed further at Part III.C, *infra*.

established, the location or character of the easement cannot be changed without the consent of the parties."); *see also* 7 THOMPSON ON REAL PROPERTY § 60.04(c)(1)(ii), at 538–40. "As a general rule, once the location of an easement has been established, neither the servient estate owner nor the easement holder may unilaterally relocate the servitude." JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:13, at 7–30 (2009). Therefore, a new easement must be re-established for it to encumber a part of the parcel not previously encumbered. *See id.*

Like easements, real property boundaries are generally static as well. But property boundaries established by bodies of water are necessarily dynamic. Because those boundaries are dynamic due to natural forces that affect the shoreline or banks, the legal rules developed for static boundaries are somewhat different. *See York*, 532 S.W.2d at 952 (discussing erosion, accretion, and avulsion doctrines affecting property boundaries and riparian ownership in the Houston Ship Channel).

The nature of littoral property boundaries abutting the ocean not only incorporates the daily ebbs and flows of the tide, but also more permanent changes to the coastal landscape due to weather and other natural forces.

Courts generally adhere to the principle "that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly" added to or taken away from their banks or shores through erosion, the wearing away of land, and accretion, the enlargement of the land. *Id.* at 952. "Riparian" means "[o]f, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake)." BLACK'S LAW DICTIONARY 1352 (8th ed. 2004). "Littoral"

means "[o]f or relating to the coast or shore of an ocean, sea, or lake . . . ." *Id.* at 952. "Accretion" is the process of "gradual enlargement" of riparian or littoral land. *York*, 532 S.W.2d at 952. Closely related, "erosion" is "the gradual wearing away of the land." *Brainard v. State*, 12 S.W.3d 6, 10 n.1 (Tex. 1999). *See also* BLACK'S LAW DICTIONARY at 582 (8th ed. 2004) (defining "erosion" in relevant part as "the gradual eating away of soil by the operation of currents or tides"). Avulsion, by contrast, as derived from English common law, is the sudden and perceptible change in land and is said not to divest an owner of title. *York*, 532 S.W.2d at 952. We have never applied the avulsion doctrine to upset the mean high tide line boundary as established by *Luttes*.[20] 324 S.W.2d at 191. We have previously recognized the import of gradual additions to oceanfront land holding that additions to the property above the high tide line caused by accretion belong to the upland owner. *State v. Balli*, 190 S.W.2d 71, 100 (Tex. 1944); *see also Lakefront Trust, Inc. v. City of Port Arthur*, 505 S.W.2d 606, 608 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.) (citing the general rule).

On rehearing, respondents and the dissents of JUSTICE MEDINA AND JUSTICE LEHRMANN, along with several amici, contend that the legal distinction between avulsion and erosion is immaterial. On the contrary, the distinct legal consequences arising from the difference between avulsive and gradual changes in land due to natural causes have been recognized in Texas law for

[20] Some states apply avulsion to determine that the mean high tide line as it existed before the avulsive event remains the boundary between public and private ownership of beach property after the avulsive event; therefore, allowing private property owners to retain ownership of property that becomes submerged under the ocean. *See Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116–17 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, ___ U.S. ___, 130 S. Ct. 2592 (2010); *Cinque Bambini P'ship v. State*, 491 So. 2d 508, 520 (Miss. 1986). We have not accepted such an expansive view of the doctrine, but we need not make that determination in this case.

over a century. *See Denny v. Cotton*, 22 S.W. 122, 125 (Tex. Civ. App. 1893, writ ref'd) (stating the distinction in relation to riparian ownership). Avulsion is a rapid and perceptible change; accretion and erosion are gradual and imperceptible changes. *York*, 532 S.W.2d at 952 (concerning waters of the Houston Ship Channel) (citing *Denny*, 22 S.W. at 125); *Manry v. Robison*, 56 S.W.2d 438, 443–44 (Tex. 1932) (discussing the effect of erosion as dispossessing riparian landowners of their title). "The rule is long established that a change is 'gradual and imperceptible' if 'though the witnesses may see, from time to time, that progress has been made, they could not perceive it while the progress was going on.'" *Brainard*, 12 S.W.3d 6, 18 (Tex. 1999) (quoting *Denny*, 22 S.W. at 124); *see Nebraska v. Iowa*, 143 U.S. 359, 368 (1892). The venerable authority Sir William Blackstone explained in 1766, also in the context of property ownership, that different legal consequences are occasioned by gradual changes versus sudden changes: ". . . the law is held to be, that if th[e] gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining" but if the change be "sudden and considerable, in this case it belongs to the king." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND [hereinafter BLACKSTONE, COMMENTARIES] *262 (1766); *see Cnty. of St. Clair v. Lovingston*, 90 U.S. 46, 67 (1874) (quoting Blackstone). "So that the quantity of the ground gained, and the time during which it is gaining, are what make it either the king's, or the subject's property." BLACKSTONE, COMMENTARIES *262; *see also York*, 532 S.W.2d at 952. Analogously, the legal implications of erosion differ from those of avulsion in the context of easements. The holding in this case arises in part from the distinction between avulsive and gradual changes along the beach, but we do not

decide whether this distinction in physical changes on the beaches necessarily has the same legal effects on riparian landowners.

Property along the Gulf of Mexico is subjected to hurricanes and tropical storms, on top of the everyday natural forces of wind, rain, and tidal ebbs and flows that affect coastal properties and shift sand and the vegetation line. This is an ordinary hazard of owning littoral property. And, while losing property to the public trust as it becomes part of the wet beach or submerged under the ocean is an ordinary hazard of ownership for coastal property owners, it is far less reasonable, and unsupported by ancient common law precepts, to hold that a public easement can suddenly encumber an entirely new portion of a landowner's property or a different landowner's property that was not previously subject to that right of use. *See, e.g.*, *Phillips Petrol.*, 484 U.S. at 482 (discussing the importance of "honoring reasonable expectations in property interests[,]" but ultimately holding the property owner's expectations in that situation were unreasonable). Gradual movement of the vegetation line and mean high tide line due to erosion or accretion, as opposed to avulsion, has very different practical implications.

Like littoral property boundaries along the Gulf Coast, the boundaries of corresponding public easements are also dynamic. The easements' boundaries may move according to gradual and imperceptible changes in the mean high tide and vegetation lines. However, if an avulsive event moves the mean high tide line and vegetation line suddenly and perceptibly, causing the former dry beach to become part of State-owned wet beach or completely submerged, the adjacent private property owner is not automatically deprived of her right to exclude the public from the new dry beach. In those situations, when changes occur suddenly and perceptibly to materially alter littoral

boundaries, the land encumbered by the easement is lost to the public trust, along with the easement attached to that land. Then, the State may seek to establish another easement as permitted by law on the newly created dry beach and enforce an asserted public right to use the private land.

It would be impractical and an unnecessary waste of public resources to require the State to obtain a new judgment for each gradual and nearly imperceptible movement of coastal boundaries exposing a new portion of dry beach. These easements are established in terms of boundaries such as the mean high tide line and vegetation line; presumably public use moves according to and with those boundaries so the change in public use would likewise be imperceptible. Also, when movement is gradual, landowners and the State have ample time to reach a solution as the easement slowly migrates landward with the vegetation line. Conversely, when drastic changes expose new dry beach and the former dry beach that may have been encumbered by a public easement is now part of the wet beach or completely submerged under water, the State must prove a new easement on the area. Because sudden and perceptible changes by nature occur very quickly, it would be impossible to prove continued public use in the new dry beach, and it would be unfair, and perhaps unlawful, to impose such drastic restrictions through the OBA upon an owner in those circumstances without compensation. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992) (explaining the circumstances from which an action for inverse condemnation may arise).

If the public is to have an easement on newly created and privately owned dry beach after an avulsive event, the State must prove it, as with other property. Having divested title to all such West Beach property in the early years of the Republic and of the State of Texas, the State can only acquire or burden private property according to the law. Thus, a public beachfront easement in West

Beach, although dynamic, does not roll under Texas law. The public loses that interest in privately owned dry beach when the land to which it is attached becomes submerged underwater. While these boundaries are somewhat dynamic to accommodate the beach's everyday movement and imperceptible erosion and accretion, the State cannot declare a public right so expansive as to always adhere to the dry beach even when the land to which the easement was originally attached is violently washed away. This could divest private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners. *See Flower Mound*, 135 S.W.3d at 634 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994)). We have never held the dry beach to be encompassed in the public trust. *See Luttes*, 324 S.W.2d at 191–92.

We hold that Texas does not recognize a "rolling" easement.[21] Easements for public use of private dry beach property change size and shape along with the gradual and imperceptible erosion or accretion in the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. The division between public and private ownership remains at the mean

[21] This rule is a tenet of Texas common law, subject to ordinary grounds of modification, e.g., where private property rights for given beach areas are altered in conveyances of those lands.

high tide line in the wake of naturally occurring changes, and even when boundaries seem to change suddenly.[22]

Declining to engraft a "rolling easement" theory onto Texas property law does not render the State powerless to regulate Texas shorelines, within constitutional limits. For example, the State, as always, may validly address nuisances or otherwise exercise its police power to impose reasonable regulations on coastal property, or prove the existence of an easement for public use, consistent with constitutional precepts.

The dissents would reach a different result, arguing the public has the right to use the dry beach regardless of the boundaries of private property or the legal protections accorded those rights. That approach would raise constitutional concerns. "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' . . . is to use words in a manner that deprives them of all their ordinary meaning." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (citation omitted). Legal scholars have opined on the subject.

> Since a simple legislative declaration of policy, [such as declaring a right to an easement across private property], cannot provide the requisite due process, the affirmative policy statement of the Open Beaches Act, without more would appear patently unconstitutional. The legislature has apparently sought to avoid such constitutional problems by qualifying affirmatively-declared public rights with an interesting condition precedent. That condition is that the public must have *already acquired* these identical rights under the common law doctrines of prescription or dedication.

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[22] We do not address how artificial accretions or other artificial changes in the coastal landscape affect ownership. *See New Jersey v. New York*, 523 U.S. 767, 783–84 (1998) (explaining the littoral boundaries remained as they were before artificial land-filling increased the surface area of Ellis Island).

Elliott, 28 BAYLOR L. REV. at 385–86; *see also* Neal E. Pirkle, *Maintaining Public Access to Texas Coastal Beaches: the Past and the Future*, 46 BAYLOR L. REV. 1093, 1108 (1994) (noting that the consensus is that the OBA "creates no substantive rights for the public," but codifies existing common law). The legislature's Beach Study Committee opined that the OBA "does not and can not, declare that the public has an easement to the beach." BEACH STUDY COMM., FOOTPRINTS 17.

According to JUSTICE MEDINA's and JUSTICE LEHRMANN's dissents, an easement could remain in the dry beach even if the land encumbered by the original easement becomes submerged by the ocean and the dry beach is composed of new land that was not previously encumbered by an easement. This argument is likewise based on the premise that an alleged easement previously established did not just encumber the dry beach portion of Severance's parcel, but that it encumbered the entire lot. This is inconsistent with easement law. *See Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.) ("Once established, the location or character of the easement cannot be changed without the consent of the parties."); 7 THOMPSON ON REAL PROPERTY § 60.04(c)(1)(ii), at 538–40. While the specific use granted by an easement is a fundamental consideration, there is no persuasive Texas authority to support the dissents' contention that an easement forever remains in the dry beach, i.e., can move onto a new portion of the parcel or a different parcel, absent mutual consent or proof under law. *See* JON W. BRUCE & JAMES W. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:13, at 7–30 (2009). This would result in depriving oceanfront property owners of a substantial right (the right to exclude) without requiring compensation or proof of actual use of the property allegedly encumbered whenever natural forces cause the vegetation line to move inland so that property not formerly part of the dry

beach becomes part of the dry beach. This argument blurs the line between ownership and right to use of a portion of a parcel—the dry beach—and is in tension with our decision in *Luttes* that set the boundary between State and privately owned property at the mean high tide line. *See* 324 S.W.2d at 191–92.

JUSTICE MEDINA's dissent also dismisses Severance's grievance as a gamble she took and lost by purchasing oceanfront property in Galveston and argues that she would not be entitled to compensation even though an easement had never been established on her parcel, a portion of which is now in the dry beach. It notes the OBA requirement of disclosure in executory contracts of the risk that property could become located on a public beach and subject to an easement in the future. *See* TEX. NAT. RES. CODE § 61.025. This is incorrect for three reasons. First, beachfront property owners take the risk that their property could be lost to the sea, not that their property will be encumbered by a easement they never agreed to and that the State never had to prove. Second, putting a property owner on notice that the State may attempt to take her property for public use at some undetermined point in the future does not relieve the State from the legal requirement of proving or purchasing an easement nor from the constitutional requirement of compensation if a taking occurs. We do not hold that circumstances do not exist under which the government can require conveyance of property or valuable property rights, such as the right to exclude, but it must pay to validly obtain such right or have a sufficient basis under its police power to do so. *See Nollan*, 483 U.S. at 841–42 (noting that public use of private beaches may be a "good idea" but "if [the state] wants an easement across [private] property, it must pay for it."). As Justice Oliver Wendell Holmes, Jr. explained, "[A] strong public desire to improve the public condition is not

enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Third, simply advising in a disclosure that the State may attempt to enforce an easement on privately owned beachfront property does not dispose of the owner's rights.

Our holding does not necessarily preclude a factual finding that an easement exists. We have determined that the history of land ownership in West Beach undermines the existence of a public easement "by virtue of continuous right in the public since time immemorial, as recognized in law and custom," TEX. NAT. RES. CODE § 61.001(8), and Texas law does not countenance an easement rolling onto previously unencumbered beachfront property due to the hurricane. We do not have a sufficient record to determine whether an easement has been proven, and the question was not certified. *See Severance*, 566 F.3d at 503–04.

B. Inherent Limitations on Private Property Rights

The public may have a superior interest in use of privately owned dry beach when an easement has been established on the beachfront. But it does not follow that the public interest in the use of privately owned dry beach is greater than a private property owner's right to exclude others from her land when no easement exists on that land. A few states have declared that long-standing property principles give the state (and therefore, the public) the right to use even privately owned beachfront property. For example, the Oregon Supreme Court has held that the dry beach is subject to public use because the public use was presumed inherent in the history of title transfers to such lands. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (citing *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)). The state of Oregon's view is that private property

owners along the beach "never had the property interests that they claim were taken" in the dry sand, the area between the high water line and vegetation line. *Id.* at 457. The Court explained "the common-law doctrine of custom as applied to Oregon's ocean shores . . . is not 'newly legislated or decreed'; to the contrary, to use the words of the *Lucas* court, it 'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." *Id.* at 456 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992)). The Supreme Court of Hawaii has held that issuance of a Hawaiian land patent confirms only a limited property interest as compared to typical land patents on the continental United States. *See Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1268 (Haw. 1995). It explained that "the western concept of exclusivity is not universally applicable in Hawai'i" in the context of private property rights. *Id*. New Jersey extends the public trust doctrine to encompass use of the dry beach as well as public ownership of the wet beach. *See Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 49 (N.J. 1972) ("[T]he public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference . . . ."); *see also Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984). Unlike the West Beach of Galveston Island, these jurisdictions have long-standing restrictions inherent in titles to beach properties or historic customs that impress privately owned beach properties with public rights.

On the other hand, the Supreme Court of New Hampshire held that a statute that recognized a general recreational easement for public use in the "dry sand area" (comparable to our dry beach), violates the takings provisions of the state and federal constitutions, except for those areas where

there is an "established and acknowledged public easement." *Opinion of the Justices*, 649 A.2d 604, 609 (N.H. 1994). The public trust ends at the high water mark and private property extends landward beyond that. *Id.* at 608. The Supreme Court of Idaho applied the public trust doctrine to Lake Coeur d'Alene and held that the public trust doctrine was inapplicable in an action to force owners to remove a seawall. *State ex rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979). The private property at issue was obtained by patent from the U.S. Government in 1892 and the seawall was built above the mean high water mark of the lake. *Id.* at 1095, 1102.

C. Custom in Texas

A few Texas courts of appeals have reached results contrary to the holding in this opinion. In *Feinman v. State*, the court held that public easements for use of dry beach can roll with movements of the vegetation line. 717 S.W.2d 106, 110–11 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). The reasoning in the *Feinman* opinion includes little to support this conclusion in the context of avulsive changes to the oceanfront.[23] *Feinman* states that "[c]ourts have upheld the concept of a rolling easement along rivers and the sea for many years without using the phrase 'rolling easement,'" and cites, but does not discuss, seven cases for its holding.[24] *Id.* at 110. Only one of the opinions is from a Texas court, *Luttes*, and neither it nor the other cited cases discuss

[23] To the extent that *Feinman*'s analysis concerns only gradual changes to the beachfront, it is generally consistent with our holding today. *See* 717 S.W.2d at 110. *Feinman* does not consider the legal implications of the difference between avulsive and gradual changes to the coast, concluding the distinction to be immaterial to its decision because it apparently viewed the distinction not relevant to the question of an easement, only title to property. *See* 717 S.W.2d at 114–15. We disagree with the latter conclusion.

[24] The cited cases are *Barney v. City of Keokuk*, 94 U.S. 324, 339–40 (1876); *Luttes*, 324 S.W.2d 167; *Cnty. of Haw. v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973); *Horgan v. Town Council*, 80 A. 271 (R.I. 1911); *City of Chicago v. Ward*, 48 N.E. 927 (Ill. 1897); *Godfrey v. City of Alton*, 12 Ill. 29, 36 (1850); and *Mercer v. Denne*, [1905] 2 Ch. 538 (Eng.). *Feinman* issued two months after *Matcha v. Mattox*, 711 S.W.2d 95 (Tex.App.—Austin 1986, writ ref'd n.r.e.), and does not cite it for support of a migratory easement. 717 S.W.2d at 113.

rolling easements. *Feinman* further cited no Texas authority for the contention that a continuous right or custom dating from "time immemorial" is a basis to encumber private property rights along West Beach. *Id.* Our decision in *Luttes* established the landward boundary of title to the public trust along Gulf-front beaches and it likewise does not address rolling easements. *See* 324 S.W.2d at 167. The *Sotomura* opinion is based on different common law notions of public rights to and limitations on private ownership of beaches in Hawaii, as discussed above. *Cnty. of Haw. v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973). And *Feinman* neither addressed the legal significance of the Jones and Hall grant on the question of public encumbrance on private beach properties of Galveston's West Beach nor identified any basis in historic Texas law for a continuous legal right or custom on which to ground the existence of a rolling easement. *Feinman's* specific holding is that a rolling easement is "implicit" in the OBA, a conclusion with which we do not agree. *See* 717 S.W.2d at 111.

The State's reliance on *Feinman* for the conclusion that a rolling easement exists by virtue of custom on private beachfront property generates significant tension with the prior decision of *Seaway*, which determined there was no such rule of law.

> It would no doubt have been good policy for the Republic to have reserved the right of ingress and egress [in the Jones and Hall Grant] so the people could more effectively enjoy the State-owned seashore and waters, but the plain language of the grant shows the Republic of Texas did not do so . . . . The sovereign must fully honor its valid conveyances and contracts. We do not know that we clearly comprehend the appellees' position that the judgment can be upheld on the theory that the use of the beach by the public has become a part of our tradition and common law and the easement exists by reason of continuous right in the public. We suppose they seek to have us hold that the seashore is held in trust by the sovereign at common law for the people and to enjoy it there must be a means of egress and ingress to enable them to enjoy such use and therefore the sovereign has no power

> to cut off convenient access. *We know of no such rule of law. In our extensive research we have found no cases so holding nor have any been cited us.*

375 S.W.2d at 929 (emphasis added). *Feinman* reached the same conclusion. 717 S.W.2d at 110–11. *Feinman* did not hold that custom supported imposition of a public easement, explicitly stating it was unnecessary to do so. 717 S.W.2d at 113. Instead, *Feinman* held that an easement by implied dedication had been proven by "[e]vidence show[ing] daily systematic use of the whole area," while the State in this case asserts that such proof is not necessary. *Id.*[25]

One other appellate decision also recognizes a rolling easement, relying on *Feinman* and *Matcha v. Mattox*. *See Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (citing both *Feinman* for the proposition that a rolling easement is "implicit" in the OBA and *Matcha v. Mattox*, 711 S.W.2d 95, 100 (Tex.App.—Austin 1986, writ ref'd n.r.e.), for the idea that established public beach easements may "shift[] with the natural movements of the beach"). Finally, the *Seaway* opinion did not address the issue of a rolling easement but held that the State proved an easement by evidence submitted to a jury at trial, interestingly relying on testimony that the line of vegetation at issue had remained the same "for at least 200 years." 375 S.W.2d at 927, 930, 939.

The first Texas case to address the concept of a rolling easement in Galveston's West Beach is *Matcha v. Mattox*. In 1983, Hurricane Alicia shifted the vegetation line on the beach such that the Matchas' home had moved into the dry beach. *Id.* at 96. The court held that legal custom—"a

[25] Alternatively, the State contends that this Court should take judicial notice of such evidence discussed in cases several decades old. But even the State's cited authority declined to rely on a trial court judgment purporting to adjudicate the vegetation line because it was "not of record in this appeal." *See Matcha*, 711 S.W.2d at 100.

reflection in law of a long-standing public practice"—supported the trial court's determination that a public easement had "migrate[d]" onto private property. *Id*. at 100. The court reasoned that Texas law gives effect to the long history of recognized public use of Galveston's beaches, citing accounts of public use dating back to time immemorial, 1836 in this case. The *Matcha* opinion, as with *Feinma*n, fails to cite any Texas authority holding that custom establishes a rolling beachfront easement.

Even if a custom of public use on West Galveston beaches were recognized, the State would still have to establish the basis in custom of the right in the public to a rolling easement to have existed since time immemorial. The *Matcha* court's upholding, based on proof at trial, of long-standing "custom" in public use of Galveston's beaches would still fall short of establishing that a custom existed to give effect to a legal concept of a rolling easement, which would impose inherent limitations on private property rights. 711 S.W.2d at 100; *see Trepanier v. Cnty. of Volusia*, 965 So. 2d 276, 293 (Fla. App. 2007) (criticizing *Matcha* for making a policy judgment that a public easement migrates and noting the distinction between a custom of use and whether such right of use is migratory); *cf. Scureman v. Judge*, 747 A.2d 62, 67–68 (Del. Ch. 1999) (rejecting application of the "rolling easement" concept in *Feinman*).

None of the four Texas courts of appeals cases cited in support of a rolling easement date back to time immemorial nor do they provide a legal basis for recognizing the claimed inherent limitation on West Galveston property titles or continuous legal right since time immemorial. We disapprove of the courts of appeals opinions to the extent they are inconsistent with our holding in this case. *See Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex. App.—Houston [14th

Dist.] 2001, no pet.); *Feinman*, 717 S.W.2d at 108–11; *Moody v. White*, 593 S.W.2d 372, 379 (Tex. Civ. App.—Corpus Christi 1979, no writ); *Matcha*, 711 S.W.2d at 98–100; *but see* Pirkle, 46 BAYLOR L. REV. at 1106–07 (questioning whether the rolling easement theory should apply to easements by prescription and dedication).

In her dissent, JUSTICE GUZMAN argues that the Court should split the baby by pronouncing that private property owners must forfeit to the State some but not all of their property rights, notwithstanding the absence of proof of an easement and without the payment of just compensation. She contends that the State can order beachfront property owners to let the public use their private land in the dry beach as long as the house on the land is not ordered removed. Her view would create an anomalous circumstance in which a homeowner on the West Galveston beachfront could, sitting in her den, look out her window, without recourse, as strangers play beach volleyball in her yard. Under JUSTICE GUZMAN's dissent, the private homeowner would have no right to keep strangers from using the property she purchased surrounding her beachfront home.

The State's position and the dissents suffer from the same fundamental flaw. They all fail to cite any authority for the proposition that background principles of Texas property law preclude private beachfront property owners from ever having had the right to exclude strangers from their land, as other Texas property owners do. The Texas appellate opinions discussed, being at most a few decades old, are not authority going back to "time immemorial" and they do not cite any authority for such an ancient, inherent limitation. *See* Pirkle, 46 BAYLOR L. REV. at 1108 (stating that "English courts required custom to be immemorial, in other words, dating back to before King Richard I" (King of England from 1189-1199), and in translating the concept of "time immemorial"

to Texas, concluding that if Spanish or Mexican civil law governed at the time of the original grant, "the public would have no customary right" in the lands) (citing *Delaplane v. Crenshaw*, 56 Va. (15 Gratt.) 457, 473 (Va. 1860)). In fact, the one authority to specifically discuss the topic expressly refutes the existence of any such legal authority in Texas. *See Seaway*, 375 S.W.2d at 929.

JUSTICE GUZMAN's dissent cites the *Menard* case and a dissent in *Luttes v. State*, 324 S.W.2d 167, 197 (Tex. 1959) (Smith, J., dissenting, on motion for rehearing), for the proposition that there should be a "balance between public and private use" of the seashore as a predicate for her conclusion that the public has a right to use private property. *See City of Galveston v. Menard*, 23 Tex. 349 (Tex. 1859). She quotes *Menard*, at 394:

> This *species of property*, being land covered with navigable water, embraces several rights that may be separated, and enjoyed by different persons, and may become thereby, *partly private and partly public*; as, the right to the soil, a right to fish in its waters, the right to navigate the waters covering it, etc.

___ S.W.3d ___ (Guzman, J., dissenting) (emphasis added). She then pronounces a "historic presumption of the public's right to use the dry beach." *Id.* at ___. Of course, the dissent in *Luttes* is not precedential. Importantly, the "species of property" in dispute in *Menard* is a grant to "that part of the Galveston bay . . . usually covered with salt water, which constitute[s] what is called the 'flats.'" *Menard*, 23 Tex. at 391. The reasoning in *Menard* concerns property that is entirely underwater or within the wet beach, i.e., property in the public trust owned by the State. It is inapposite to the Kennedy Beach property in the dry beach in this case and does not support the contention that private property owners in the dry beach must share their land with anyone who wishes to use it for beach recreation. While JUSTICE GUZMAN accurately quotes the case, the

Menard opinion makes clear that the "shore" to which she refers does not include the dry beach. *Id*. at 399–400 (noting that the "shore" extended "to the line of the highest tide in winter" under the civil law but only to the "line of ordinary high tide" at common law). The State's and the dissents' contention also fails to explain the source of such limitations on beachfront property rights in light of the Republic's and the State's unrestricted conveyances in the Jones and Hall grant of this previously state-encumbered land to private owners at the inception of the Republic and reaffirmed by the Legislature after Texas became a state. *See Seaway*, 375 S.W.2d at 929 ("We may not imply such a reservation in the face of the language of the grant even though there is evidence that there was a road down the beach at the time of the grant.").

Although not clear, it appears the State and the dissents also contend that Galveston's West Beach property owners lost the right to exclude the public from their private property after Texas became a state through some type of custom, notwithstanding the position's implicit acknowledgment that they have failed to establish such a right "since time immemorial." Their reasoning is hard to discern. They seem to argue that evidence, in other cases, of use of beach parcels washed away decades ago is sufficient to establish a custom justifying encumbrance of private properties on the beachfront today. As pointed out, there is no evidence in this record of such use. However, they attempt to characterize proof in other cases of prior public use on different beachfront properties as a type of legally cognizable custom that is sufficient to pronounce a current right in the public to use private West Galveston property today. Their position juxtaposes evidence of public use with the existence of a legal custom they contend establishes a public easement, arguing that the former proves the latter. That reasoning melds the concept of a legal custom with

proof of an easement and begs the question, why the State does not simply prove up an easement to encumber private homeowners' properties. And they do not explain the logic of extrapolating their view of such a custom from judicially noticed evidence of public use in one area throughout the entirety of Texas' ocean shores. Crediting that view would dispossess many beachfront property owners along the Texas coast of the land they purchased, raise constitutional questions and bring into consideration, potentially, tremendous liability of the State for just compensation.

Alternatively, they seem to theorize that custom is a legal doctrine that need not be proven, just recognized by a judge. That view is unsupported by historic jurisprudence of this State and we decline the invitation to pronounce such a limitation on private property rights today. Their view also raises paramount concern for the constitutions' protection of this individual liberty. Without just compensation for a public purpose, neither the federal nor the state constitution allows a taking nor JUSTICE GUZMAN's theorized partial taking of private property. The Court's holding is consistent with constitutional protections of individual property rights, and effectuates the OBA's protection of public right to use public beachfront property that is either "acquired" by prescription or dedication or "retained by virtue of continuous right in the public since time immemorial . . . ." *See* TEX. NAT. RES. CODE § 61.001(8).

IV. Conclusion

Land patents from the Republic of Texas in 1840, affirmed by legislation in the new State of Texas a few years later, conveyed the State's title in West Galveston Island to private parties and reserved no ownership interests or rights to public use in Galveston's West Beach. Texas law has not otherwise recognized such an inherent limitation on property rights along the West Beach.

Accordingly, there are no inherent limitations on title or continuous rights in the public since time immemorial that serve as a basis for engrafting public easements for use of private West Beach property. Although existing public easements in the dry beach of Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements do not spring or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beaches Act or the common law.[26]

_____

Dale Wainwright
Justice

OPINION DELIVERED: March 30, 2012

[26] We need not address whether the OBA is the exclusive means to establish public beachfront easements.