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Stevens v. City of Cannon Beach: Does Oregon's Doctrine Of Custom Find A Way Around Lucas?

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STEVENS V. CITY OF CANNON BEACH: DOES OREGON'S DOCTRINE OF CUSTOM FIND A WAY AROUND *LUCAS*?

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I. INTRODUCTION

The Oregon Supreme Court recently issued an en banc decision in *Stevens v. City of Cannon Beach*[1] affirming a court of appeals decision to dismiss plaintiffs' claim of inverse taking. In so doing, the court confirmed its holding in *State ex rel. Thornton v. Hay*[2] that a public easement for recreation exists in the dry sand areas of the state's beaches under the doctrine of custom. The *Stevens* court stated that because custom as applied to Oregon's ocean shores[3] merely enunciates the "background principles of ... the law of property,"[4] its decision comported with the United States Supreme Court holding in *Lucas v. South Carolina Coastal Council*.[5]

Lucas is the most recent in a long line of Supreme Court "takings" decisions.[6] In that case, the Court applied what it termed a "second categorical rule"[7] and held that confiscatory regulations, those "[w]here

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1. 854 P.2d 449 (Or. 1993), *cert. denied*, No. 93-496, 1994 U.S. LEXIS 2238, 62 U.S.L.W. 3621 (U.S. Mar. 22, 1994).

2. 462 P.2d 671 (Or. 1969).

3. The term "ocean shore" is defined in OR. REV. STAT. § 390.605(1)(1991) as the land lying between extreme low tide of the Pacific Ocean and the line of vegetation.

4. Stevens v. City of Cannon Beach, 854 P.2d at 456 (quoting Lucas v. So. Carolina Coastal Council, 112 S.Ct. 2886, 2900 (1992)).

5. 112 S.Ct. 2886 (1992).

6. The Fifth Amendment of the United States Constitution stipulates, in part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This portion of the Fifth Amendment is known as the Takings Clause.

7. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2893, n.6 (quoting Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 295-296; and Agins v.

the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, ..."[8] were *per se* takings and required compensation. The Court qualified this categorical rule, however, and declared that it would not be applied when the "proscribed use interests were not part of [the property owner's] title to begin with."[9]

Decided just one year after *Lucas*, the *Stevens* case appears to test the same constitutional question. A major distinction between the cases, however, is in the method that each state used to assert public rights in otherwise privately owned property. South Carolina relied solely upon its police powers to proscribe certain "harmful uses" of coastal property through enactment of the Beachfront Management Act.[10] In contrast, the Oregon court affirmed the public's rights in the state's shorelands by finding that under the doctrine of custom the public always had a right to use the dry sand area of Oregon's beaches.[11] Under this theory, the statutes encompassed in Oregon's "Beach Bill"[12] serve only to codify the limitations which "inhere in the land," by virtue of state property law,[13] and do not "newly legislate[] or decree[]"[14] limitations on property rights.

Whether the doctrine of custom is a state property law that can withstand constitutional scrutiny is the subject of this Note. The search for answers to this inquiry begins with a review of the doctrine of custom, both through its common law history and a survey of the more recent decisions on the subject. The Note then analyzes Oregon's doctrine of custom and the application of this doctrine in light of the Supreme Court's takings analysis in *Lucas*.

Tiburon, 447 U.S. 255, 260 (1980)). The first categorical rule established by the Supreme Court was that a regulation compelling a property owner to suffer "physical invasion" of his property constituted a *per se* taking requiring compensation. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (New York law requiring landowners to allow cable companies to install permanent cable facilities in their apartment buildings was a taking).

8. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2895.
9. *Id.* at 2899.
10. S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. Supp. 1993).
11. State *ex rel.* Thornton v. Hay, 462 P.2d at 677.
12. OR. REV. STAT. §§ 390.605 -.770 (1991).
13. Stevens v. City of Cannon Beach, 854 P.2d at 456.
14. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2900.

II. LEGAL BACKGROUND

A. A Brief Look at Lucas v. South Carolina Coastal Council

Two years prior to South Carolina's 1988 enactment of its Beachfront Management Act,[15] the petitioner in *Lucas* had paid nearly $1 million for two parcels of land, with the intention to develop them for residential purposes. Provisions in the Act subsequently identified the land as lying in a "critical area,"[16] a designation which absolutely precluded the erection of any permanent, habitable structures on the property.[17]

In response to petitioner's claim for taking without just compensation, the trial court found that the ban on construction "deprived Lucas of any reasonable economic use of the lots, ... eliminated the unrestricted right of use, ... and render[ed] them valueless."[18] Based on this finding, the court awarded damages. The Supreme Court of South Carolina reversed, determining that the Act was "properly and validly designed to preserve ... South Carolina's beaches"[19] and that petitioner's proposed construction would threaten this public resource. Therefore, the court ruled that no compensation was owing.

The United States Supreme Court reversed, stating that although:

> the property owner necessarily expects the uses of his property to be restricted ... by the State in legitimate exercise of its police powers,.... [t]he notion ... that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with ... the Takings Clause.[20]

The Court further stated that a "limitation so severe [could] not be newly legislated or decreed ... but must inhere in ... the restrictions that background principles of the State's law of property ... already placed upon land ownership."[21] The case was remanded to the South Carolina

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15. S.C. CODE ANN. §§ 48-39-10 to -360 (Law. Co-op. Supp. 1993).
16. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2889.
17. S.C. CODE § 48-39-290(A) (Law. Co-op. Supp. 1993).
18. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2890.
19. Lucas v. So. Carolina Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991).
20. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2899.
21. *Id.* at 2900.

court to determine whether such restrictions in fact existed prior to the passage of the contested legislation. Only under such circumstances could the restriction be upheld without compensating the petitioner.

B. The Doctrine of Custom

The doctrine of custom[22] has been recognized in English common law, since at least the early 17th century, as vesting a property right in the land for the benefit of a local community.[23] Once an easement was created by custom, it became appurtenant to the land and the rights of the members of the locality were established in English property law.[24] Creation of an easement by custom required that the custom "must have continued from time immemorial, without interruption, and as a right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created."[25]

Very few cases have been litigated in the United States concerning the doctrine of custom. Several early cases recognized the existence of custom as a possible means of creating property rights,[26] but based on the facts of those cases, the doctrine was not applied. A few states have rejected the doctrine as not being suitable to the conditions that exist in this country.[27] Not until the Oregon court's decision in *State ex rel.*

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22. For an interesting and comprehensive overview of this doctrine, *see generally,* Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law:* State *ex rel.* Thornton v. Hay, 4 ENV. L. 383 (1974).

23. *See, e.g.,* Gateward's Case, 77 Eng. Rep. 344, 345 (K.B. 1607), Rowles v. Mason, 123 Eng. Rep. 892 (C.P. 1612) (finding that the difference between prescription and custom was that custom was not to be alleged in a person, but in the land).

24. Tyson v. Smith, 112 Eng. Rep. 1265 (Ex. 1838).

25. *See* 3 H. TIFFANY, LAW OF REAL PROPERTY § 935, at 623 (3d ed. 1939).

26. Perley v. Langley, 7 N.H. 233 (1834) (a habit of residents to remove seaweed from a local beach could only give rise to a *profit à prendre*, not a customary right); Littlefield v. Maxwell, 31 Me. 134 (1850) (the public as well as an individual may acquire a right of way by custom).

27. Graham v. Walker, 61 A. 98 (Conn. 1905) (rejecting doctrine as unadaptable to conditions of political society existing in that state); Gilles v Orienta Beach Club, 289 N.Y.S. 773 (1935) (rejecting doctrine because this country does not have the same ancient history as England, thus protection against lost records, an integral purpose of the English doctrine, is not needed here); State *ex rel.* Haman v. Fox, 594 P.2d 1093 (Idaho 1979) (rejecting custom because public use only went back to 1912, not "time immemorial").

Thornton v. Hay[28] did an American court specifically vest property rights using a custom theory.[29]

In more recent years, the doctrine has been affirmatively adopted in Hawaii,[30] Texas,[31] and the U.S. Virgin Islands.[32] Additionally, the doctrine of custom has been supported by several commentators as a legitimate method for declaring public rights in otherwise private coastal property.[33]

C. The Oregon Law: State ex rel. Thornton v. Hay *and Beyond*

The seminal case for the doctrine of custom in Oregon is *State ex rel. Thornton v. Hay*.[34] In that case, landowners were enjoined from building fences or other improvements on their land between the ordinary high tide level and the vegetation line because such action violated the Oregon Beach Bill.[35] The trial court found that the public had gained

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28. 462 P.2d 671 (Or. 1969).

29. One Hawaii case, *In re* Ashford, 440 P.2d 76 (Haw. 1968), has been cited by some commentators as authority for the doctrine of custom. That case received little support in the Hawaiian court system because of its particular facts, and has not been followed.

30. Kalipi v. Hawaiian Trust Co., 656 P.2d 745 (Haw. 1982) (finding right for native Hawaiians to enter private property for purposes of gathering bamboo, kukui nuts, etc., has been established by custom).

31. Matcha v. Mattox, 711 S.W.2d 95 (Tex. Ct. App. 1986), *cert. denied,* 481 U.S. 1024 (1987). Interestingly, Texas stands alone by actually incorporating the doctrine of custom into its Open Beaches Act. 2 TEX. REV. CIV. STAT. ANN. § 61.024 (West 1978).

32. United States v. St. Thomas Beach Resorts, Inc., 386 F.Supp. 769 (D.V.I. 1974), *aff'd without op.*, 529 F.2d 513 (3d Cir. 1975) (finding that property owner's rights have always been subject to the paramount right of the public to use the sand beach as established by custom).

33. *See* Commentary, *Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches,* XXV U. FLA. L. REV. 586, 592 (1973) (urging adoption of the custom doctrine by Florida Legislature as the "best judicial remedy"); *See, generally* Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 644 (1989) (public's long customary use of the [dry sands] arguably has resulted in its acquisition of customary rights).

34. 462 P.2d 671 (Or. 1969).

35. OR. REV. STAT. §§ 390.605 -.770 (1991) (the portion of the Bill which plaintiffs violated, § 390.640(1, 3) stated in pertinent part "[u]nless a permit therefor is granted..., no person shall make an improvement on any property lying seaward of the [vegetation line]." Vegetation line is defined in § 390.770 as that "land located along the Pacific Ocean between the Columbia River and the Oregon-California boundary between

rights to the dry sand through meeting the criteria of an easement by prescription.[36]

The Oregon Supreme Court affirmed, but finding that prescriptive easements "applied only to the specific tract of land before the court, and [that] doubtful prescription cases could fill the courts for years with tract-by-tract litigation,"[37] the court searched for a broader basis upon which to decide the case. Noting that the subject lands are *sui generis*, and that they had been "used by the public according to a unbroken custom running back in time as long as the land had been inhabited,"[38] the court chose as the "better legal basis"[39] the English common law doctrine of custom.[40]

While recognizing that this doctrine had little support in American law,[41] the court concluded that an absence of precedent did not "militate

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extreme low tide and the lines of vegetation ... established by the United States Coast and Geodetic Survey of 1947").

36.

> In Oregon ... an easement by prescription can be created in favor of one person in land of another by uninterrupted use and enjoyment of land in a particular manner for the statutory period, so long as use is open, adverse, under claim of right, but without authority of law or consent of owner.

State *ex rel.* Thornton v. Hay, 462 P.2d at 675-76.

37. *Id.* at 676.

38. *Id.* at 676-77.

39. *Id.* at 676.

40. *Id.* at 676-78. The court found two definitions of custom upon which to base its conclusion that the public use of Oregon's beaches met the requirements for this doctrine. First, BOUVIER'S LAW DICTIONARY which defined custom as "such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates." Second, the court paraphrased BLACKSTONE'S COMMENTARIES and found that a custom could be recognized as law by being 1) ancient, or used so long that memory of man runneth not to the contrary; 2) exercised without interruption; 3) peaceable and free from dispute; 4) reasonable; 5) certain; 6) obligatory, not left to the option of the landowner; and 7) the custom must not be repugnant or inconsistent with other law. In his argument in favor of granting review, Justice Scalia criticizes the Oregon court's analysis of these requirements, finding it "remarkable" that the discussion of the doctrine "took less than one full page of the Pacific Reporter" and claiming that the Oregon court misread Blackstone when "it appl[ied] the law of custom to the entire Oregon Coast." Stevens v. City of Cannon Beach, No. 93-496, 1994 U.S. LEXIS, at *12 n.5 (Scalia, J., dissenting).

41. State *ex rel.* Thornton v. Hay, 462 P.2d at 677. The Oregon court cited only one instance where an American court had referred to custom as a property law concept. Perley *et ux.* v. Langley, 7 N.H. 233 (1834). In that case the New Hampshire court stated that "a mere easement ... may be claimed by custom," but rejected plaintiff's

against the validity of a custom when the custom does in fact exist."[42] Further, the court noted that "[t]he rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his."[43]

Shortly after the *Thornton* case was decided, the Oregon Supreme Court had an opportunity to reconsider the validity of the custom doctrine. In *State Highway Commission v. Fultz*,[44] the court reviewed a circuit court decision that the public had acquired a recreational easement in the ocean shore by means of implied dedication or prescription. Determining that "oceanfront lands from the northern to the southern border of the state ought to be treated uniformly,"[45] the court found that *Thornton* was dispositive of the issue and that the doctrine of custom applied.[46]

Subsequent cases, however, served to limit the *Thornton* holding. In *State v. Bauman*[47], the court refused to extend the theory of custom to create a public easement in sand dunes lying landward of the vegetation line, even though the public had been using such property as a recreational area.[48] More recently, in *McDonald v. Halvorson*,[49] the court held that the doctrine of custom would not apply to lands unless they actually abutted the Pacific Ocean.[50] Thus, the public did not have

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claim that a *profit à prendre* may be so claimed.

42. State *ex rel.* Thornton v. Hay, 462 P.2d at 678.

43. *Id.*

44. 491 P.2d 1171 (Or. 1971) (a quiet title action and a challenge to that section of the Beach Bill which allowed the State Highway Commission to deny a permit to build a road and a revetment across the ocean shore).

45. *Id.* at 1172 (quoting State *ex rel.* Thornton v. Hay, 462 P.2d at 676).

46. *Id.* at 1173.

47. 517 P.2d 1202 (Or. App. 1974).

48. Finding that the owner's attempt to block the public's use, through posting no trespassing signs and fencing in the property, failed the test of continuity, and that no other properties "similarly situated" were used as recreational areas, the court determined that the requirements of custom as adopted by the Oregon court had not been met. State v. Bauman, 517 P.2d at 1206. *See supra* note 40 and accompanying text for explanation of the required components of the doctrine.

49. 780 P.2d 714 (Or. 1989).

50. *Id.* at 715. The contested property in the case was separated from the ocean by a rocky sill, an elevated portion of land that provided only a narrow opening to the ocean. The geological landscape created a "cove" that was mostly fresh water, fed by fresh water streams upland of the subject property. Although the cove was occasionally influenced by ocean waters (at high tide some seawater would flow into the cove), the

a recreational easement in a small beach on the landward side of a mostly inland cove because the location did not "suggest any likelihood of consistent utilization by ancient inhabitants."[51]

III. STEVENS V. CITY OF CANNON BEACH

A. Facts

Plaintiffs Stevens owned two vacant lots in the dry sand area of the city of Cannon Beach, Oregon. They applied to the city for a permit to construct a seawall as a first step toward construction of a motel or hotel. The lots had been zoned by the city for residential or hotel use, but parts of them were subject to an Active Dune and Beach Overlay Zone,[52] which required plaintiffs to obtain a city building permit prior to construction.

The overlay zone was created to implement a portion of the Oregon Land Conservation and Development Commission's (LCDC) Statewide Goal 18 which limited development on beaches and active foredunes.[53] In addition, since the lots were part of Oregon's ocean shore, the plaintiffs were required to apply for a building permit from the Oregon Parks and Recreation Department prior to development.[54] The defendants in the case were the City of Cannon Beach and the Parks and Recreation Department, both of which had denied plaintiffs' permit requests.

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court found that it was not an intertidal pool, and therefore, was not part of the ocean. *Id.* at 723. Justice Scalia erroneously implies that the *McDonald* decision should have been controlling in *Stevens*. Stevens v. City of Cannon Beach, No. 93-496, 1994 U.S. LEXIS 2238, at *6 (Scalia, J., dissenting). The *McDonald* decision focused on whether the disputed land was "similarly situated" with that to which, based on the ruling in *Thornton*, the doctrine of custom applied. The Oregon court ruled that the land was not similarly situated, and, therefore, the doctrine of custom could not apply to vest rights in the public to use that land. *Stevens*, however, involved land which was almost identical to the land in dispute in *Thornton* (both properties were on Cannon Beach), so the Oregon court had no reason to apply the limiting ruling of *McDonald*.

51. McDonald v. Halvorson, 780 P.2d at 724.

52. Stevens v. City of Cannon Beach, 854 P.2d at 451 (citing ZONING ORDINANCE OF CANNON BEACH 79-4A, § 3.180).

53. *Id.* at 458.

54. ORE. REV. STAT. § 390.640 (1991). *See supra* note 35.

The plaintiffs brought an inverse condemnation action, alleging that the permit denials resulted in "as applied"[55] takings of private property for a public purpose in violation of the Fifth Amendment. They also alleged that LCDC Goal 18 was unconstitutional on its face because it "denie[d] [plaintiffs] economically viable use of [their] land."[56]

The trial court dismissed both of plaintiffs' claims for uncompensated takings. It found that since plaintiffs were not denied permission to build a hotel, but rather were denied the ability to construct a seawall, their "as applied" takings claim would fail.[57] In addition, the court found that since Goal 18 made provisions for certain economically viable uses of private beaches and dunes, no facial taking could have been effected.[58]

B. Arguments

On appeal, plaintiffs presented two arguments supporting their position. First, they claimed that since the ruling in *Thornton* allows the State to deny them the ability to develop their land, and thus all viable economic use, it conflicts with the Supreme Court's decision in *Lucas*. Plaintiffs also contended that even if *Thornton* were still viable, its holding could not be applied to them because they had acquired their property before the court's 1969 decision in that case.

Defendants responded by asserting that *Lucas* allows the State to resist compensating property owners when the proscribed use interests were not part of the title to begin with, and that under the Oregon property law of custom, the plaintiffs never had the right to develop the property in such a way as to interfere with the public's right to use the ocean shore. Further, defendants argued that *Thornton* did not create a new legal principle, but merely applied an existing one; that is, the principle of easement by custom grounded in Oregon property law. Thus, defendants argued, there could be no retroactive application to plaintiffs' property.

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55. An "as applied" taking describes a situation where a statute effects a taking of a particular property by preventing the owner's desired use of that property.

56. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2893.

57. *Id.* at 459.

58. Stevens v. City of Cannon Beach, 854 P.2d at 459.

C. *Disposition*

The Oregon Supreme Court affirmed the lower court's decision to dismiss plaintiffs' claims. Finding support in both *Thornton*[59] and *Lucas*,[60] the court confirmed that the "bundle of rights" that plaintiffs owned did not include the right to exclude the public from the ocean shores. Since this right never existed under Oregon property law, plaintiffs could have no claim for compensation under the Fifth Amendment. In arriving at its conclusion, the court undertook a thorough discussion of *Thornton*, reaffirming its commitment to the doctrine of custom as a basis for determining ownership rights under Oregon property law.

IV. DISCUSSION

The Oregon court's analysis in *Stevens* seems to bypass the questions the Supreme Court usually asks when deciding takings cases, such as: is the Oregon Beach Bill a regulation that "goes too far?"[61] does it "deprive[] property owners of all economically viable uses of land?"[62] or does it effect a "physical invasion"[63] of the property? By concluding that the doctrine of custom, as a state property law, has created an easement in the public to use the ocean shore beaches, Oregon has apparently found the "background principles of property law"[64] needed to protect itself against a takings claim under *Lucas*.

The *Lucas* Court expressly limited its holding to those cases where the state has attempted to regulate land use under "new" principles.[65] Throughout its opinion, the majority stated that if the state's property law had already precluded the activity banned by legislation, there would not be a taking. The Court "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the

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59. "Thornton is directly on point." Stevens v. City of Cannon Beach, 854 P.2d at 453.

60. "[P]roscribed use interests were not part of plaintiffs' title to begin with." *Id.* at 460.

61. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

62. Agins v. Tiburon, 447 U.S. 255, 260 (1980).

63. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 438.

64. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2901.

65. *Id.* at 2900.

landowner's title."[66] Focusing such exceptions on limitations that "inhere in the title itself," the *Lucas* Court made it clear that it would defer to "existing rules or understandings that stem from ... state law to define the range of interests that qualify for protection as "property" under the Fifth ... amendment[]."[67]

"The very first issue in a 'takings' case, to use the [Supreme] Court's own words, is for owners to identify those interests that 'were ... part of [their] title to begin with,' those things included in 'the "bundle of rights" that they acquire[d] when they obtained title.'"[68] Current Oregon property law, arguably since *Thornton*, definitely since the subject case, would, under the doctrine of custom, define that bundle of rights as absent the right to exclude the public from Oregon's ocean shore. The *Stevens* decision therefore, seems to fall directly within the exception the Supreme Court carved out of *Lucas*.

The question remains, however, whether the adoption of this doctrine as "recently" as 1969,[69] could be viewed by the Supreme Court as a "newly decreed" change in Oregon property law. Part of the Supreme Court's concern in *Lucas* appears to be that South Carolina tried to change longstanding property law in the face of "changing

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66. *Id.* at 2900.

67. *Id.* at 2901 (citations omitted).

68. Joseph L. Sax, *Rights that "Inhere in the Title Itself": The Impact of the* Lucas *Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 944 (1993), quoting Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2889. Professor Sax's article, while reviewing the impact of the "property" portion of the *Lucas* holding on water rights of western states, offers a thoughtful analysis of Justice Scalia's use of property principles as a basis for the decision in that case.

69. Most of Oregon's beachfront properties were originally sold under patents which gave the grantees a fee simple estate in the upland property. In Shively v. Bowlby, 152 U.S. 1 (1894), the Supreme Court held that landowners claiming under federal patents owned seaward to the high water line, then thought of to be the vegetation line. That definition was later clarified in Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 26 (1935), to extent the upland owner's property rights to the mean high tide line. The *Thornton* court, when addressing this apparent inconsistency, stated "the *Borax* decision had no discernible effect on the actual practices of Oregon beachgoers and upland property owners," and dismissed its impact on the right of the public to enjoy the dry sand areas because no question about the upland owner's rights had been before the court. State *ex rel.* Thornton v. Hay, 462 P.2d at 674. In addition, the court found that "the custom ... to use the dry sand as a public recreation area [is] so notorious that notice of the custom ... must be presumed." *Id.* at 678.

conditions," without regard to the owner's rights in the property.[70] As demonstrated in *Lucas*, legislation which by itself tries to redefine such rights, cannot withstand constitutional scrutiny.[71] Is judicial adoption of a doctrine which defines ocean shore property as having customarily been absent an "important stick out of the bundle,"[72] the right to exclude the public, sufficient to protect the state from a takings claim?[73]

At first blush, it appears that Oregon has taken all the necessary steps to meet the constitutional requirements of *Lucas*, and can avoid compensating landowners when it declares a public easement in Oregon's ocean shores. The State has not claimed public rights in its beaches simply by legislating for the public interest or public "good", but has in fact found a basis in its property law from which to make the determination that the public has always had a right to use the beaches.

This basis, the "background" of Oregon law, is the common law doctrine of custom. The use of custom as a method for claiming an easement, while relatively new in this country, has been a part of the background of law for hundreds of years. In Oregon, the public has freely exercised the right to use the dry sand "according to an unbroken custom running back in time as long as the land has been inhabited."[74] Thus, the method of declaring that the public has an easement in the ocean shores of Oregon through the doctrine of custom should meet *Lucas* requirements. Under the principle of that doctrine, the State can

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70. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2902 (Kennedy, J., concurring).

71. Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all) (Stewart, J., concurring).

72. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 433.

73. Justice Scalia finds that the Stevens' claim for violation of their due process rights is a "serious" one because they owned their property prior to the decision in *Thornton*. Stevens v. City of Cannon Beach, No. 93-496, 1994 U.S. LEXIS 2238, at *14 (Scalia, J., dissenting). The due process claim is out of place, however, so long as the doctrine of custom is considered part of the background principles of Oregon property law. A finding that the doctrine applies would indicate that the property owner never had the right to exclude the public from the ocean shores, and, therefore, that nothing has been taken which would require consideration of due process rights. Unless the Supreme Court invalidates Oregon's use of the doctrine of custom, or finds that its application requires an element-specific review, the Stevens' due process claim can have no merit.

74. State *ex rel* Thornton v. Hay, 462 P.2d at 677.

legitimately claim that the right to exclude the public from Oregon's ocean shores never "inhered in the title to begin with."[75]

In addition, the Oregon court's willingness to define and delimit the scope of the easement, sometimes to the detriment of the public, should lend additional credence to the doctrine as a legitimate state property concept.[76] The Oregon court has not arbitrarily determined that all of Oregon's beaches are encompassed under the doctrine. In fact, after the *McDonald* decision, one commentator expressed concern that the viability of the doctrine as a means to public rights in the ocean shore had been severely curtailed.[77] By clearly limiting the scope of the easement to include only those ocean shores which definitively meet the requirements of custom, the court has developed a state property law doctrine which should withstand constitutional scrutiny.

V. CONCLUSION

The Oregon court was correct in stating that the *Stevens* decision complies with the requirements of *Lucas*. To ensure protection against constitutional attack, however, Oregon should specifically acknowledge the custom doctrine in its state statutes.[78] Currently, Oregon statutes recognize that easements for public use can arise by "dedication,

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75. Lucas v. So. Carolina Coastal Council, 112 S.Ct. at 2900. *See supra* note 7 and accompanying text.

76. *See supra* notes 48-52 and accompanying text. Justice Scalia interprets these limitations as "vacillations on the scope of the doctrine of custom [that] make it difficult to say how much of [Oregon's] coast is covered." Stevens v. City of Cannon Beach, No. 93-496, 1994 U.S. LEXIS 2238, at *11 n.4 (Scalia, J., dissenting). To the contrary, the Oregon court's rulings in *McDonald* and *Stevens* demonstrate clearly the limits of the public's rights to use the ocean shores; the doctrine of custom applies when the land "abuts the Pacific Ocean" and when the land is "similarly situated." A holding by the Oregon court that the public had acquired an easement in all beaches along the Oregon coast, without such limitations, would appear much more deserving of Justice Scalia's criticism. The *McDonald* court explicitly stated that it "did not retreat from anything [it] said in [State *ex rel.* Thornton v.] *Hay*." McDonald v. Halvorson, 780 P.2d at 724.

77. Erin Pitts, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 ENVTL. L. 731, 738 (1992) ("taken as a whole, the [*McDonald*] opinion leaves the continued exercise of customary rights open to question").

78. One State, Texas, has already done so. *See, e.g.*, 2 TEX. REV. CIV. STAT. ANN. § 61.024 (West 1978) ("none of the provisions of this subchapter [Access to Public Beaches, § 61.011] shall reduce, limit, construct, or vitiate the definition of public beaches which has been defined from time immemorial in law and custom").

prescription, grant ... or otherwise."[79] While the term "otherwise" would encompass an easement by custom, it does not readily convey the strong acceptance of that doctrine that exists in the State. In light of the Supreme Court's current attitude towards takings, the acknowledgment seems notably absent.

79. OR. REV. STAT. 390.610(2) (1993 Supp.).