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NOTE

PUBLIC RIGHT OF PASSAGE ALONG THE MASSACHUSETTS COAST: AN ARGUMENT FOR IMPLEMENTATION WITHOUT COMPENSATION*

I. INTRODUCTION

Public access to tidelands¹ has been essential throughout history for such basic daily activities as navigation, transit, sustenance, and recreation. Public rights to use tideland are protected by the public trust doctrine. In Massachusetts, public trust rights include fishing, fowling, navigation, and free passage over and through the water below the mean high water line.² The public trust doctrine protects these rights in tidelands against encroachment by private property owners.

Even with these rights to use tideland, studies indicate that Massachusetts has a deficiency of public coastal access³ and a steadily increasing demand for access as the coastal population grows.⁴ In order to meet these rising access demands, some states have modernized their public trust rights to include rec-

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¹ Broadly defined, tideland is land covered and uncovered by the daily ebb and flow of the tide. *See generally* PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, (Nat'l Public Trust Study), Nov. 1990. More specifically, in Massachusetts, tideland is the "present and former submerged lands and tidal flats lying below the mean high water mark." MASS. GEN. L. ch. 91, § 1 (1993). Within that zone, tideland is subdivided into two areas: (1) "commonwealth tidelands," tidelands held by the commonwealth in trust for the benefit of the public or held by another party by license or grant of the commonwealth subject to an express or implied condition subsequent that it be used for a public purpose; and (2) "private tidelands," tidelands held by a private party subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water. *Id.*

² The Colonial Ordinance of 1641-47 reserved these public rights. It appears as section 2 in THE BOOK OF GENERAL LAWES AND LIBERTYES (1649) at 50.

³ Dr. Dennis Ducsik, *Public Access*, (Jan. 1992) (on file with the *Boston University Public Interest Law Journal*).

⁴ By the year 2000, it is estimated that 80% of Americans will live within 50 miles of the coast. *Id.* at 28. Recent studies by the Massachusetts Office of Coastal Zone Management reveal that 70% of the Massachusetts coast is privately owned and inaccessible to the public except for fishing, fowling and navigation. *Id.* Two thirds of the remaining 30% of public shoreline has inadequate access in terms of parking availability, nonresident access, and public transportation. *Id.*

reational uses such as walking and sunbathing.⁵ The Massachusetts Legislature tried this approach in 1974 with a proposal to expand the scope of public trust rights to include a "public on-foot free right-of-passage" (hereinafter "right of passage") in the intertidal zone.⁶ The idea was to allow people to stroll along that strip of shore already impressed with public trust rights. Despite legislative support and the success of similar proposals in other states, the Massachusetts Supreme Judicial Court found the right of passage to be an unconstitutional taking of property without just compensation.⁷

Subsequent to the court's opinion, the right of passage legislation was revised to authorize acquisition of the right of passage by eminent domain.⁸ The revised legislation was enacted in 1991 but has yet to be implemented.⁹

This Note examines the right of passage legislation and maintains that compensation ought not to be required to acquire this right. The right of passage should be recognized as posing a unique takings problem: is a taking effected when government authorizes a *de minimis* physical invasion which merely alters the nature of an existing physical invasion, but is not itself a new invasion? This Note advocates judicial recognition of a narrow class of *de minimis* invasions which do not require compensation, provided they do not have a significant economic impact on private property owners. An analysis of takings law reveals that precedent does not foreclose implementation of the right of passage without compensation on such a theory.

The analysis begins with a brief background on tideland property ownership and public trust rights in Section II. Section III then discusses the history of the right of passage and the basis on which it was initially found unconstitutional. This section concludes by setting forth the revised legislation as adopted in 1991. Section IV discusses the takings aspects of the right of passage and articulates an argument that the right of passage may be implemented without compensation. This Note concludes that the right of passage, absent compensation, should be recognized as a constitutional act of the legislature.

⁵ New Jersey and California are two such states. See *infra* text at Section II.B.

⁶ The intertidal zone consists of the land between the ordinary high and low water marks over which the tide ebbs and flows.

⁷ Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974). See *infra* at Section III.B.

⁸ 1991 Mass. Acts ch. 176, § 4. Special Acts of the General Court are not codified in the Massachusetts General Laws. They typically consist of appropriations provisions.

⁹ Implementation of the right of passage is proceeding and includes studies to ascertain the value of the right to walk in the intertidal zone between dawn and dusk. Interview with Dr. Dennis Ducsik, Tidelands Policy Coordinator, Massachusetts Coastal Zone Management (Oct. 21, 1993).

II. BACKGROUND

A. *Public Trust Rights and Tidal Ownership in Massachusetts*

1. Title to tidelands

Due to their historically important public uses, tidelands occupy a unique place in property law.¹⁰ At common law, title to tidelands vested in the states as trustees. This title has two components, the *jus publicum* and the *jus privatum*.¹¹ The *jus publicum* is the dominant estate, consisting of the public's rights to use and enjoy the tidelands for fishing, fowling, navigation, and other public purposes.¹² States may alienate to private owners only the subservient *jus privatum*, the proprietary rights of use and possession below the high water mark.¹³ Grantees of the *jus privatum* may not use the tidelands to the exclusion of those public tidal uses preserved by the *jus publicum*.¹⁴

The Massachusetts Bay Colony initially retained fee simple absolute to tidelands, possessing both the *jus privatum* and the *jus publicum*. Private ownership of coastal property thus originally ended at the high water mark.¹⁵ This state of title became undesirable with the growth of commercial waterfront activity and the Bay Colony's economic dependence on shipping. Wharf construction became crucial to the continued growth and prosperity of the Bay

¹⁰ See generally PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 1, at 1. The oceans and tidelands have been regarded as a common resource since Roman times, when tidal property could not be privately owned. *Id.*

¹¹ See *Illinois R.R. v. Illinois*, 146 U.S. 387 (1892) and *Martin v. Waddell*, 41 U.S. 367 (1842). The notion of public ownership of tidelands derives from Roman culture. The concept was preserved by English common law and later adopted by the American colonies. See generally PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 1, and Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

¹² PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 1, at 7. State law defines the scope and nature of public rights within the *jus publicum*. See *Shively v. Bowlby*, 152 U.S. 1, 26 (1893) ("[E]ach State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public.").

¹³ PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 1, at 7. The *jus publicum* is an equitable title, whereas the *jus privatum* is a proprietary title. *Id.*

¹⁴ *Butler v. Attorney General*, 80 N.E. 688 (Mass. 1907).

¹⁵ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 66 (1851). The majority of states today retain this common law and private ownership terminates at the high water line. PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 1, at 59. These states are termed "high water states" for simplicity. *Id.* at 7-8. Only five Atlantic states are "low water states" and permit private ownership below the high water mark, subject to the *jus publicum*. They are: Delaware, Massachusetts, Maine, Pennsylvania, and Virginia. *Id.* at 59. See generally RICHARD R. POWELL, *POWELL ON REAL PROPERTY* ¶ 163 (1949).

Colony and was the responsibility of the Colony as owner of the *jus privatum*. Because the public treasury could ill-afford this expense, the colonial legislature sought to encourage littoral proprietors to construct wharves themselves by granting them a property interest in tideland.¹⁶ By the Colonial Ordinance of 1641-47 (hereinafter "the Ordinance"), the Colonial Legislature granted the *jus privatum* to littoral proprietors and modified English common law by extending private littoral ownership to the low water line.

Every Inhabitant who is an householder shall have free fishing and fowling . . . so farr as the Sea ebbs and flowes . . . the proprietor of the land adjoining, shall have propriety to the low-water mark . . . provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels¹⁷

The Ordinance protected the essential daily activities of fishing, fowling, and navigation from encroachment by wharf construction by retaining the *jus publicum*.¹⁸

2. Interpreting the Colonial Ordinance

Despite historic notions of the *jus publicum* as the dominant estate, Massachusetts courts have treated the *jus privatum* as the dominant interest. The leading case interpreting the Colonial Ordinance, *Commonwealth v. Alger*,¹⁹ held that, "[the Ordinance] imports not an easement, an incorporeal right, license, or privilege, but a *jus in re*, a real or proprietary title to, and interest in, the soil itself, in contradistinction to a usufruct, or an uncertain and precarious interest."²⁰ This early construction is consistent with historic conceptions

¹⁶ *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 179, 183 (1822) ("The desire and necessity of wharves, quays or piers was soon felt by individuals and the community, and the occupation of flats became indispensable. The government then, to encourage these objects, and to prevent disputes and litigations, transferred its property in the shore of all creeks, coves, and other places upon the salt water, where the sea ebbs and flows, giving to the proprietor of the land adjoining the property of the soil to low-water mark, where the sea does not ebb above one hundred rods."). See also *Dutton v. Strong*, 66 U.S. 23, 32 (1861) ("Our ancestors . . . soon found it indispensable, in order to secure [the conveniences of building wharves, quays, piers and landing places, for the loading and unloading of vessels], to sanction the appropriation of the soil between high and low-water mark to the accomplishment of these objects.").

¹⁷ The Colonial Ordinance of 1641-47 appears as section 2 in *THE BOOK OF GENERAL LAWS AND LIBERTIES* (1649) at 50.

¹⁸ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 65-81 (1851) (interpreting the Colonial Ordinance to have reserved an easement for public use in the tidelands); *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 180, 184 (1822) (referring to the "qualified property" interest granted by the Ordinance to the proprietor of the flats); *Storer v. Freeman*, 6 Mass. 435, 438 (1810) (owner of upland adjoining the sea owns the flats to the low-water mark, to not more than one hundred rods from the upland).

¹⁹ 61 Mass. (7 Cush.) 53 (1851).

²⁰ *Id.* at 70.

of the *jus privatum* as coextensive and subservient to the *jus publicum*.

Subsequent decisions appear to have departed from the *Alger* interpretation and treat the *jus privatum* as the dominant interest. For example, in a 1907 description of the *jus privatum* the court stated, "[e]xcept as against public rights, which are protected for the benefit of the people, the *private ownership is made perfect* [T]he premises are held by the [littoral proprietor] in fee subject . . . to the *easement* of the public" ²¹ This judicial construction was later codified by the statutory definition of "private tidelands" under Massachusetts law. ²²

The crucial question for private landowners is the limit of the apparently subservient *jus publicum*. The Ordinance explicitly retained the most significant public uses of the tidelands as they existed in 1647, which otherwise would have been threatened by private wharf construction. ²³ Free fishing, fowling, and navigation were the only activities enumerated in the Ordinance. However, given that the legislature's purpose in passing the Ordinance was to elevate usage and customs to the force of written law to protect the public, ²⁴ it is probable that much more than merely the rights to navigate, fish, and fowl was intended to be preserved as the dominant tidal uses. ²⁵

The courts have recognized as much with respect to the scope of public trust rights in Great Ponds, ²⁶ which were also created by the Colonial Ordinance of 1641-47. Though only fishing and fowling were explicitly named, these constituted:

[T]he only use[s] which at that time would seem to have been considered of appreciable value It would scarcely be necessary to mention bathing, or the use of the water for washing, or watering cattle, preparation of flax, or other agricultural uses, to all which uses a large body of water, devoted to public enjoyment, would usually be applied. ²⁷

²¹ *Butler v. Attorney General*, 80 N.E. 688, 689 (Mass. 1907) (emphasis added).

²² MASS. GEN. L. ch. 91, § 1 (1993) (defining "private tidelands" as "tidelands held by a private party subject to an easement of the public for the purposes of navigation and free fishing and fowling and of passing freely over and through the water").

²³ David A. Rice, Special Counsel, *Final Report of the Special Commission Established to Make an Investigation and Study Relative to the Management, Operation, and Accessibility of Public Beaches Along the Seacoast and Any Other Related Matters* (Oct. 1973) (on file with Massachusetts Coastal Zone Management).

²⁴ *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 166 (1863) (discussing public trust rights in great ponds).

²⁵ See *Martin v. Waddell*, 41 U.S. 367 (1842) (discussing the hardships of survival if lands adjacent to rivers and sea were privately owned and the public had no rights of access therein) and *Conant v. Jordan*, 77 A. 938 (Me. 1910) (discussing public trust rights in great ponds and their necessity).

²⁶ Massachusetts Great Ponds are freshwater bodies over ten acres in size which were not appropriated to private uses prior to 1647, when the Colonial Ordinance declared them to be impressed with a public trust. See *Inhabitants of West Roxbury*, 89 Mass. (7 Allen) at 171.

²⁷ *Id.* at 166-67.

An identical conception of the Ordinance regarding the reserved rights in tidelands was expressed in *Commonwealth v. Charlestown*, where the court held that the Ordinance contemplated no alteration in use.²⁸ In 1871 the court described colonial tideland uses as "fishing and fowling and other uses . . . common to all."²⁹ Indeed, history informs us that colonial uses of tidelands were varied, and included cattle driving, travel, ice cutting, navigation, fishing, bathing, and fowling.³⁰ The initial interpretation of the Ordinance in *Alger* refers to fishing and fowling as the *principal* public uses preserved, not the *exclusive* ones, as subsequent caselaw assumes.³¹

The historically accepted notion of the *jus publicum* as the dominant estate over the *jus privatum* at the time the Ordinance was passed is critical to an accurate interpretation of public tidal rights.³² *Alger* gives precedence to public interests by upholding the legislature's power to limit private wharf construction in order to protect public rights of navigation, even when such limitations would effectively prevent the littoral owner from constructing any wharf.³³ Thus, the Ordinance arguably contemplated a much broader vision of public uses than contemporary interpretations will admit.

Despite the contrary argument, the 1647 Ordinance has been strictly interpreted by Massachusetts courts to limit public rights to fishing, fowling, navigation, and the natural derivatives thereof, such as shellfishing.³⁴ *Butler v. Attorney General* contains the generally accepted interpretation of the

²⁸ *Commonwealth v. Charlestown*, 18 Mass. (1 Pick.) 180, 183-84 (1822).

²⁹ *Paine v. Woods*, 108 Mass. 160, 169 (1871).

³⁰ See *Bell v. Town of Wells*, 557 A.2d 168, 180, n.1 (Me. 1989) (Wathen, J., dissenting). The Colonial Ordinance has been adopted by Maine as part of its common law. Maine has generally described the *jus publicum* in tidelands more broadly than Massachusetts; "[The public] may sail over them, may moor . . . craft upon them, may allow . . . vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water-bearing ice, may fish in the water over them, may dig shellfish in them, may take sea manure from them." *Marshall v. Walker*, 45 A. 497, 498 (Me. 1900). Note that the method of riding referred to here was most likely by horseback, iceboat, or sleigh given the date of the opinion. See generally G. Graham Waite, *Public Rights in Maine Waters*, 17 ME. L. REV. 161, 170-78 (1965).

³¹ Compare *Alger*, 61 Mass. (7 Cush.) at 65-66 (explaining the adoption of English common law by the Massachusetts Bay Colony, including the reservation of public rights in tidelands in trust for the public, "*the principal of which* were for fishing and navigation") (emphasis added) with *Butler v. Attorney General*, 80 N.E. 688, 689 (Mass. 1907) (free fishing and fowling and navigation are the only public rights reserved) and *Opinion of the Justices*, 313 N.E.2d 561, 566 (Mass. 1974) (the public reserved rights include only fishing, fowling, navigation and the natural derivatives thereof).

³² See *supra* text at Section II.A.1.

³³ *Alger*, 61 Mass. (7 Cush.) at 53.

³⁴ *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 355 (1851) (finding that the right of fishing includes the taking of clams from flats).

Ordinance:

[T]he premises are held by the [littoral owner] in fee subject, however, as to that portion between high and low water mark, to the easement of the public for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath, wherever the tide ebbs and flows.³⁵

In construing the Ordinance, the court has gone only so far as to permit those activities "reasonably related" to fishing, fowling, and navigation.³⁶ For example, *Weston v. Sampson* held that the public right to fish encompasses the taking of clams from flats.³⁷ *Barry v. Grela* found that the public had a right to walk on a littoral owner's land between the mean high water and mean low water lines for purposes of reaching a jetty from which to fish.³⁸

Arguments to expand the scope of public trust rights failed to persuade the Supreme Judicial Court. When it rendered its 1974 advisory opinion the court refused to depart from its interpretation of the Ordinance and 350 years of relatively consistent caselaw. This rejected approach has succeeded in other states, however, most notably in California and New Jersey. Understanding the success of the dynamic conception of public trust rights elsewhere helps to understand its defeat in Massachusetts.

³⁵ *Butler*, 80 N.E. at 689 (holding that no public right of bathing is reserved by the Ordinance).

We think that there is a right to swim or float in or upon public waters as well as to sail upon them. But we do not think that this includes a right to use for bathing purposes, as these words are commonly understood, that part of the beach or shore above low-water mark . . . whether covered with water or not. . . . [T]here is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the colonial ordinance.

Id.

³⁶ Opinion of the Justices, 313 N.E.2d 561, 566 (Mass. 1974).

³⁷ *Weston*, 62 Mass. (8 Cush.) at 355. *But see* *Porter v. Shehan*, 73 Mass. (7 Gray) 435, 436 (1856) (finding defendant guilty of trespassing for entering plaintiff's close and taking five cords of muscles, dead fish, and soil to use for fertilizer).

³⁸ *Barry v. Grela*, 361 N.E.2d 1251, 1252 (Mass. 1977). This right was upheld explicitly under the Colonial Ordinance's reservation of "free fishing and fowling." The court reasoned that:

[I]f there is a right to go upon flats and to disturb the soil for clams, *a fortiori* there is a right to pass over them for fishing, in the stricter sense of the word [W]e think the same principal applies to access over flats on foot to property of others, so long as the purpose is "fishing."

Id. (quoting *Packard v. Ryder*, 11 N.E. 578, 581 (Mass. 1887)) (upholding public right to land boat in intertidal zone and walk or to stand between the high and low water lines in order to fish). *But see* *Old Colony St. Ry. v. Phillips*, 93 N.E. 792, 794 (Mass. 1911) (finding no public right to pass over flats when bare except as they may be reached without trespass, and then only for a limited purpose).

B. *A Dynamic Conception of Public Trust Rights*

Unlike Massachusetts, other states have adopted a dynamic notion of public trust rights and reinterpreted their historic conceptions to incorporate modern coastal uses.³⁹ California has expanded public trust rights to include recreation and ecological preservation.⁴⁰ New Jersey has also been a leader in public trust doctrine expansion by incorporating recreational uses into public trust rights in *Borough of Neptune City v. Borough of Avon-by-the-Sea*.⁴¹ New Jersey even permits public use of the foreshore above the high water mark in order to effectuate public rights below the high water mark.⁴² Ironically, the New Jersey court relied on Massachusetts precedent as authority for the dynamic nature of public trust rights.⁴³

There is an abundance of persuasive authority for a dynamic conception of public trust rights. However, the Massachusetts Supreme Judicial Court rejected this approach in its 1974 advisory opinion evaluating the original legislative proposal for a right of passage in the intertidal zone. Despite their merit, arguments for a dynamic conception will not advance implementation of the right of passage absent compensation. Instead, alternative grounds on which to establish the constitutionality of a right of passage must be found.

³⁹ For discussion of public trust rights in tidelands recognized by other states, see Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521 (1992); Margit Livingston, *Public Access to Virginia's Tidelands: A Framework for Analysis of Implied Dedications and Public Prescriptive Rights*, 24 WM. & MARY L. REV. 669 (1983); Karen Oehme, *Judicial Expansion of the Public Trust Doctrine: Creating a Right of Public Access to Florida's Beaches*, 3 J. LAND USE & ENVT. L. 75 (1987); Waite, *supra* note 30, at 170-78; Alice Gibbon Carmichael, Note, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. REV. 159 (1985); Karen Negris, Note, *Access to New Jersey Beaches, The Public Trust Doctrine*, 20 COLUM. J.L. & SOC. PROBS. 437 (1986); Erin Pitts, Comment, *The Public Trust Doctrine: A Tool For Ensuring Continued Public Use of Oregon Beaches*, 22 ENVT. L. 731 (1992).

⁴⁰ Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

⁴¹ 294 A.2d 47, 54 (N.J. 1972) (finding that the public trust doctrine "should not be considered fixed or static but should be molded and extended to meet changing conditions and needs of [the] public it was created to benefit" to include recreational uses, including bathing, swimming and other shore activities).

⁴² Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (extending *Borough of Neptune City* to permit public access to, and use of, privately owned dry sand areas as reasonably necessary). "The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed." *Id.* See Anne Conley-Pitchell, Comment, *Navigable Waters - Public Trust Doctrine - The Public May Have a Right to Use Privately Owned Beaches for Recreation but the Extent of Any Such Right Will Be Determined With a Location by Location Test*, 15 RUTGERS L.J. 813 (1984) (discussing *Matthews*).

⁴³ *Borough of Neptune City*, 294 A.2d at 55 (citing *Home for Aged Women v. Commonwealth*, 89 N.E. 124 (Mass. 1909)).

Before proceeding to these grounds, however, it is useful to examine recent developments in Massachusetts public trust law.

C. *Recent Developments in Massachusetts Public Trust Law*

Despite the refusal to expand the scope of public trust rights, recent developments in tideland law reflect a protective attitude towards public trust rights. This new attitude will likely influence how courts would approach a takings analysis of the right of passage. For this reason, it is important to recognize how and when Massachusetts courts have been more protective of public trust rights.

1. *Boston Waterfront Development Corporation*

One significant development in tideland law after 1974 occurred when the Supreme Judicial Court decided *Boston Waterfront Development Corporation v. Commonwealth*.⁴⁴ The court held Boston Waterfront's title to be "[a] fee simple . . . subject to a condition subsequent that it be used for the public purpose for which it was granted,"⁴⁵ and observed that "[a]lthough the colonial ordinance extended ownership of land in fee to [sic] low water mark, this ownership always had strings attached . . ."⁴⁶ Although Boston Waterfront's title derived from the Lewis Wharf Statutes⁴⁷ rather than from the Ordinance, and involved title to submerged land⁴⁸ rather than the intertidal zone, the opinion demonstrates the Supreme Judicial Court's willingness to protect public trust rights and recognizes that the public purpose for which title was granted places a limit on private activity.

2. Chapter 91: The Public Waterfront Act

A second significant development was the promulgation of new regulations in 1983 implementing the Public Waterfront Act⁴⁹ and the Supreme Judicial Court's 1981 approval of these proposed revisions.⁵⁰ The regulations require public access benefits as a condition to licensing projects in tidelands and institute a procedure to relinquish public trust rights in filled tidelands.⁵¹ The new

⁴⁴ 393 N.E.2d 356 (Mass. 1979).

⁴⁵ *Id.* at 367.

⁴⁶ *Id.* at 360.

⁴⁷ The Lewis Wharf Statutes were typical of several legislative acts granting private parties wharfing privileges in the Boston Harbor. *Boston Waterfront Dev. Corp.*, 393 N.E.2d at 361. See William L. Lahey, *Waterfront Development and the Public Trust Doctrine*, 70 MASS. L. REV. 55 (1985).

⁴⁸ Land below the low water line, impressed with the navigational servitude.

⁴⁹ MASS. GEN. L. ch. 91 (1993).

⁵⁰ Opinion of the Justices, 424 N.E.2d 111 (Mass. 1981).

⁵¹ The proposed amendments to Chapter 91 defined "Public Trust Rights" as including "navigation; access for water-related recreation including, but not limited to, boating, fishing and clamming, swimming, sunbathing and walking; commercial activity

regulations accord greater protection to public trust rights by requiring new waterfront projects to pass a "public purpose test." Projects must serve a proper public purpose and provide a greater public benefit than public detriment to the public rights in tidelands.⁵² These more rigid requirements evince a growing perception of the need to protect public trust rights.⁵³

3. Qualified rights in tideland

A third significant development occurred in *Wilson v. Commonwealth*,⁵⁴ where the Massachusetts Court of Appeals expressed a willingness to protect public trust rights against littoral proprietor interests. There, the court considered a claim that agency delay in approving a permit to construct a revetment effected a taking. The plaintiff argued that without the delay, storm damage to their property would have been prevented by the revetment. Without reaching a decision on the merits of the taking claim, the court observed that "the coastal areas in question are impressed with a public trust . . . [T]he [owners] from the outset, have had only *qualified rights* to their shoreland and have no reasonable investment-backed expectations under which to mount a taking challenge."⁵⁵ This recognition bodes well for any judicial consideration of whether the right of passage has a detrimental effect on the economic value of littoral property, for "[i]f applicable state law holds that earlier conveyances into private ownership pass only the *jus privatum* and are still subject to the *jus publicum*, the private owner may have only a 'naked fee' and a taking most likely will not occur."⁵⁶

Although Massachusetts courts have rejected expanding the scope of public trust rights to include new categories of uses, they have steadfastly protected

and development which enures primarily to public rather than private benefit; and conservation of resources and the natural environment." The court noted that as proposed, "the public trust rights may exceed the scope of such rights now in existence within the Commonwealth." Opinion of the Justices, 424 N.E.2d at 116 n.5.

⁵² MASS. GEN. L. ch. 91, §§ 14, 18 (1993).

⁵³ A similar recognition prompted New Jersey to expand the public trust rights in *Borough of Neptune City*: "Remaining tidal water resources still in the ownership of the State are becoming very scarce, demands upon them by reason of increased population, industrial development and their popularity for recreational uses and open space are much heavier, and their importance to the public welfare has become much more apparent." *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 53 (N.J. 1972). See generally PUTTING THE PUBLIC TRUST DOCTRINE TO WORK, *supra* note 1.

⁵⁴ 583 N.E.2d 894, 901 (Mass. App. Ct. 1992) *aff'd in part, rev'd in part*, 597 N.E.2d 43 (Mass. 1992).

⁵⁵ *Id.* (emphasis added). On appeal, the Supreme Judicial Court did not comment on this dictum.

⁵⁶ Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 654 (1989). See *People v. California Fish Co.*, 138 P. 79, 88 (Cal. 1913) ("naked title to the soil").

the rights of fishing, fowling, and navigation against private encroachment. It is against this background that the right of passage came to the court in 1974.

III. THE RIGHT OF PASSAGE LEGISLATION

A. *The Original Proposed "Public On-Foot Free Right of Passage"*

In recognition of the need to improve public recreational access to tidelands, and to preserve public uses of tidelands, the Massachusetts legislature proposed to declare a "public on-foot free right of passage" along the coast as a public trust right.

It is hereby declared and affirmed that the reserved interests of the public in the land along the coastline of the commonwealth include and protect a public on-foot free right-of-passage along the shore of the coastline between the mean high water line and the extreme low water line subject to the restrictions and limitations as contained in this section.⁵⁷

The proposed right of passage assumed only a narrow expansion of the recognized public rights to fish, fowl, and navigate. It essentially enabled people strolling in the intertidal zone to leave their fishing gear, guns, and boats at home. The proposed legislation would have imposed strict limits on the exercise of this right: passage was not permitted "later than one half hour after sunset nor earlier than sunrise," in designated areas of critical ecological significance, where state permitted improvements exist, or where agricultural livestock fences stand.⁵⁸ The proposed legislation would have protected private property owners by making violations of these conditions punishable by fine.⁵⁹ Likewise, it would have protected public rights by fining private owners who obstruct the exercise of the right of passage, as well as providing a right of action to enforce this right.⁶⁰ Compared to the Colonial Ordinance's original declaration of public rights, the proposed bill specifically described the scope of the public right created and conferred a much narrower right than the Ordinance. But these limitations were insufficient to persuade the court of its constitutionality.

B. *The 1974 Opinion of the Justices*

In 1974 the Massachusetts House of Representatives requested an advisory opinion from the Supreme Judicial Court as to whether the proposed right of passage along the coast would constitute a taking of private property without just compensation under the federal and state constitutions.⁶¹

⁵⁷ Opinion of the Justices, 313 N.E.2d 561, 563 n.1 (Mass. 1974) (quoting proposed bill H. 481 (1974)).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* The original bill included fines of \$20 to \$50 for violating the right of passage.

⁶¹ "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. "[N]or shall any state deprive any person of life, liberty, or

1. The scope of existing public trust rights

The court first examined whether the proposed right was within the public rights in the foreshore reserved by the Colonial Ordinance and held that only if the right could be deemed a "natural derivative" of the rights preserved by the Colonial Ordinance would the declaration be constitutional absent compensation.⁶² The court noted that past cases permitted interference with private property rights only "for purposes reasonably related to the protection or promotion of fishing or navigation," when involving the use of boats or other vessels.⁶³ While digging for clams fell within the scope of the reserved rights,⁶⁴ the right to use private beaches for bathing,⁶⁵ or to remove "five cords of muscle mud 'consisting of living and dead shellfish . . . and the soil or clay in which they were found' " did not.⁶⁶ Even though walking might be necessary to fishing, fowling, or navigating, it is not incident to these activities, and in the court's opinion, did not fall within the *jus publicum*.⁶⁷

2. Police power

The court next inquired whether the right of passage was a proper exercise of state police power and thereby valid without compensation to private property owners, even though the right was not within the scope of public trust rights.⁶⁸ The court held that though "the creation of the proposed right of passage would serve the recognized public interest in the providing of recreational facilities . . . there is considerable question, however, whether the bill . . . makes adequate provision for the constitutional requirement of fair compensation."⁶⁹ The court arrived at this conclusion after giving great weight to the perceived "permanent physical intrusion" into private property caused by the bill.⁷⁰ Additionally, the court found that the proposed right contemplated more than a mere prohibition of public nuisance, but rather involved a "wholesale denial of an owner's right to exclude the public."⁷¹ In the court's opinion, the legislative declaration effectively appropriated private property for public

property, without due process of law." U.S. CONST. amend. XIV, § 1. "[N]o part of the property of an individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." MASS. CONST. pt. 1, art. X.

⁶² Opinion of the Justices, 313 N.E.2d at 566.

⁶³ *Id.*

⁶⁴ *Id.* at 567.

⁶⁵ *Id.* (citing *Butler v. Attorney General*, 80 N.E. 688 (Mass. 1907)).

⁶⁶ *Id.*

⁶⁷ *Id.* ("We are unable to find any authority that the rights of the public include a right to walk on the beach.").

⁶⁸ *Id.* at 567-68 (citing *Massachusetts Comm'n Against Discrimination v. Colangelo*, 182 N.E.2d 595 (Mass. 1962)).

⁶⁹ *Id.* at 568.

⁷⁰ *Id.*

⁷¹ *Id.*

use without compensation in violation of federal and state constitutional guarantees.⁷²

C. *The Right of Passage as Enacted*

Pursuant to the 1974 *Opinion of the Justices*, the proposed bill was modified to eliminate the takings problem by authorizing eminent domain proceedings to acquire the right along selected sections of the coast.⁷³ The bill passed as a Special Act in 1991 with only a few other minor changes to the original language. The adopted bill reads:

It is hereby declared and affirmed that the reserved interests of the public in the land along the coastline of the commonwealth require a public on-foot free right-of-passage along the shore of the coastline between the mean high water line and the extreme low water line subject to the restrictions and limitations as contained in this section and said right is hereby secured.⁷⁴

As of December 1993, the right of passage had not been implemented or further subjected to judicial scrutiny.

This Note maintains that the 1974 *Opinion of the Justices* does not foreclose reconsideration of the constitutionality of the right of passage absent compensation.⁷⁵ It is unlikely that such reconsideration would involve an expansion of public trust rights, as this argument previously failed. This Note advocates an alternative basis on which to justify the right of passage absent compensation: recognition that such a narrowly defined right, which merely

⁷² See generally Note, *Who Owns the Beach: Massachusetts Refuses to Join the Trend of Increasing Public Access*, 11 URB. L. ANN. 283 (1976) (discussing the 1974 *Opinion of the Justices*).

⁷³ "The public on-foot free right-of-passage secured by the provisions of this section shall not become effective with respect to any particular parcel of private property until such time as the commissioner of the department of environmental management has filed an order of taking" 1991 Mass. Acts ch. 176, § 4. The right of passage provision was passed as a section of the 1991 appropriations bill and not as an independent resolution.

⁷⁴ 1991 Mass. Acts ch. 176, § 4.

⁷⁵ Note that advisory opinions are not binding adjudications of the court and fall outside the doctrine of *stare decisis*.

When called upon, as we are now sitting as a court, to deal again with questions once considered in our advisory capacity, we regard it as our duty to consider the issue anew and to guard against any influence which might arise from the prior advisory consideration of the same questions [A]dvisory opinions . . . are 'open to reconsideration and revision' . . . particularly when . . . the legislative proposals . . . have been subsequently modified and clarified.

Massachusetts Taxpayers Found. v. Secretary of Admin., 494 N.E.2d 1311, 1314 (Mass. 1986) (quoting *Massachusetts Hous. Fin. Agency v. New England Merchants Nat'l Bank*, 249 N.E.2d 599 (Mass. 1969)). *Accord Perkins v. Westwood*, 115 N.E. 411 (Mass. 1917).

alters the nature of an existing physical invasion, and has a negligible economic impact on the property, does not constitute a compensable taking of property. To arrive at this conclusion, courts must be willing to regard the right of passage as an alteration of a prior physical invasion, rather than a new physical invasion, and look beyond the mere fact of invasion to other factors to determine whether compensation is constitutionally required.

IV. THE RIGHT OF PASSAGE IS NOT A TAKING WITHOUT JUST COMPENSATION

A. *The Takings Inquiry: An Overview*

The Fifth Amendment provides, "[N]or shall private property be taken for public use, without just compensation."⁷⁶ There are generally two ways in which government may effect a taking of private property: (1) by authorizing a physical occupation of private property, or (2) by regulating use of private property in a manner which unfairly singles out the owner to bear a burden which ought to be borne by the public as a whole.⁷⁷ The former is referred to as a "physical taking" and the latter a "regulatory taking."⁷⁸

In the case of physical takings, courts apply a relatively clear rule that a physical invasion or occupation, however minute, requires compensation.⁷⁹ This rule was reaffirmed by the Supreme Court in its 1992 decision of *Lucas v. South Carolina Coastal Council*⁸⁰ in which physical invasions were categorized as one type of per se taking.⁸¹ In some physical invasion cases, however, the courts have looked beyond the mere fact of invasion in determining whether compensation is due and have considered other factors such as economic impact.⁸²

The rule for regulatory takings is not as well defined. In fact, courts have "generally eschewed any 'set formula' for determining [when government has gone] too far, preferring to engage in 'essentially ad hoc, factual inquiries.'"⁸³ Whether a regulation of property use rises to the level of a taking is determined with regard to "the character of the action and . . . the nature and

⁷⁶ U.S. CONST. amend. V.

⁷⁷ *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (example of a physical taking); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (example of a regulatory taking)).

⁷⁸ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). *Pennsylvania Coal* was the first case to require just compensation for a government regulation which did not extinguish a property right.

⁷⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

⁸⁰ 112 S. Ct. 2886 (1992).

⁸¹ *Id.* at 2893-94.

⁸² See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

⁸³ *Lucas*, 112 S. Ct. at 2893 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978)).

extent of the interference [both physical and economic] with rights in the parcel as a whole."⁸⁴

Courts typically perform a balancing test and consider five factors: whether the regulation (1) substantially advances a legitimate state interest; (2) causes a permanent physical invasion or appropriation of property; (3) prevents or confers a public harm or benefit; (4) decreases the economic value of the property; or (5) imposes an unfair burden on the owner.⁸⁵ In determining the economic impact of a regulation, courts look to how the economic value of the parcel as a whole is affected, and whether the regulation has caused a diminution in value or has interfered with the owner's investment-backed expectations.

Application of this takings inquiry to the right of passage begins with the physical invasion test. The analysis reveals that the right of passage is a physical invasion, but not a new one. Rather, the right of passage is an alteration of a previously existing invasion, better understood as an added limitation on the right to exclude. This Note maintains that this distinction makes it inappropriate to place the right of passage into the *per se* takings category of physical invasions. That, however, was the approach of the Supreme Judicial Court in its 1974 advisory opinion requiring compensation.⁸⁶ This Note advocates an alternative approach: using the multi-factored balancing test, or a new rule altogether, to identify *de minimis* invasions and ascertain whether their economic impact requires compensation.

B. *The Physical Invasion Inquiry*

1. New physical invasions

Generally speaking, any permanent physical invasion is regarded as a taking, no matter how minute, regardless of the importance of the public purpose it serves.⁸⁷ The most notable case awarding compensation for a minuscule invasion is *Loretto v. Teleprompter Manhattan CATV Corp.*⁸⁸ In *Loretto*, the Court considered whether a city ordinance requiring landlords to allow cable companies to install cable TV wires in their buildings, and denying them more than nominal compensation, created a compensable taking. Even though the cables would occupy only 1.5 cubic feet of building space, two factors persuaded the Court to find a taking: (1) the necessity of permanent occupation of space, and (2) the compelled appropriation of building space and the

⁸⁴ Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978); Loeterman v. Town of Brookline, 524 F. Supp. 1325, 1329 (D. Mass. 1981); Fragooulos v. Rent Control Bd. of Cambridge, 557 N.E.2d 1153, 1156-57 (Mass. 1990).

⁸⁵ See Finnell, *supra* note 56, at 654-55 and cases cited therein.

⁸⁶ Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974). See *supra* text accompanying notes 62-71.

⁸⁷ *Lucas*, 112 S. Ct. at 2893.

⁸⁸ 458 U.S. 419 (1982).

owner's general lack of control or ability to exclude the cable.⁸⁹ Justice Marshall, writing for the majority, explained:

[A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property [S]uch an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.⁹⁰

Although together *Loretto* and *Lucas* announce a rigid per se rule for permanent physical invasions, both cases are distinguishable from the right of passage situation and do not dispose of the takings question it raises. *Lucas* is limited by its facts to apply when government actions effect a "total taking," that is, where no economic value remains in the parcel after the government action.⁹¹ The Court did not define the proper inquiry for partial taking cases, but stated that in such cases the traditional ad hoc balancing approach should be used.⁹² Thus, because the right of passage does not destroy the entire economic value of the affected parcels, *Lucas* does not control.

Loretto is also distinguishable on its facts from the situation posed by the right of passage. Unlike the cable TV wires at issue in *Loretto*, the right of passage is not a new invasion of a previously unoccupied space. The Court identified three disturbing implications of permanent physical invasions in *Loretto*: (1) the owner's lack of right to possess the occupied space himself/herself, or ability to exclude the occupier; (2) the owner's inability to control the use of the property; and (3) the loss of property value and preclusion of effective exercise of the owner's right to sell or transfer the property.⁹³ Even assuming that the right of passage is a "permanent physical invasion,"⁹⁴ it still does not raise these three policy concerns because it merely alters a pre-existing invasion, and thus merits a different inquiry than the simplistic per se rule.

First, the physical space "permanently occupied" by the right of passage is already "permanently occupied" by the *jus publicum*, the public trust rights to fish, fowl, and navigate. In *Loretto*, the New York legislature authorized a new occupation of space by the cable company. In contrast, the right of pas-

⁸⁹ *Id.* at 436.

⁹⁰ *Id.* (emphasis omitted).

⁹¹ The trial court in *Lucas* found that a total deprivation of economic value occurred when the South Carolina Beachfront Management Act prohibited development of the plaintiff's barrier island property. *Lucas*, 112 S. Ct. at 2886.

⁹² *Lucas*, 112 S. Ct. at 2895 n.8. See, e.g., *Formanek v. United States*, 26 Cl. Ct. 332, 335 (1992); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986); *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992).

⁹³ *Loretto*, 458 U.S. at 435-36.

⁹⁴ Opinion of the Justices, 313 N.E.2d 561, 568 (Mass. 1974).

sage merely changes the nature of a previously-authorized invasion. The right of passage authorizes the public to traverse the same narrow band of shorefront it may already use for fishing, fowling, and navigation. In practical effect, the right of passage merely allows people to leave their fishing gear, guns, and vessels behind while strolling the shoreline. It would prevent private property owners from excluding pedestrians without fishing gear, guns, or vessels during daylight hours.

Second, unlike *Loretto*, there is no lack of control over the "timing, extent, and nature"⁹⁵ of the invasion permitted by the right of passage. The public's right of passage is restricted by statute to daylight hours, certain sections of the coast, and to foot travel only.⁹⁶ Practically speaking, the tide also helps control use of the right of passage by defining its boundary and by restricting its hours of use because it is submerged as high tide approaches. Furthermore, administrative penalties available to private property owners ensure that exercise of the right of passage conforms to the limited hours and areas permitted by statute.

Third, the right of passage is not likely to impede the exercise of the owner's ability to sell the property any more than the existence of the *jus publicum* does. Preliminary valuation studies indicate that the inability to exclude pedestrians from the intertidal zone during daylight hours is not reflected in raw land values.⁹⁷ Of course, whether and to what extent an individual parcel's value is affected requires a case-by-case analysis. One can envision, for example, scenarios where a parcel adjacent to a public beach, or perhaps between public beaches, would experience a high volume of pedestrian traffic in the intertidal zone, and find this reflected in its market price. However, even in these situations, it is uncertain whether the right of passage would add to the pre-existing impact on value by the rights of fishing, fowling, and navigation.

In *Loretto* the Court emphasized that the cable statute was a permanent physical occupation rather than a temporary restriction on the right to exclude.⁹⁸ This distinction was critical to finding a taking because under the Court's analysis, it determines whether the per se rule applies. According to the Court, the "permanence" and "absolute exclusivity" of permanent occupations means that they are "unquestionably a taking."⁹⁹ Because it is less certain whether temporary restrictions require compensation, the Court deemed it appropriate to evaluate them according to an ad hoc balancing test.

Rights of access have been held to constitute permanent physical invasions.

⁹⁵ *Loretto*, 458 U.S. at 435-36.

⁹⁶ See *supra* Section III. Practically speaking, the right is really only valuable when the tide approaches its lowest point, because the intertidal zone is submerged when high tide approaches.

⁹⁷ Interview with Dr. Dennis Ducsik, Tidelands Policy Coordinator, Massachusetts Coastal Zone Management Office (Nov. 8, 1993).

⁹⁸ *Loretto*, 458 U.S. at 435 n.12.

⁹⁹ *Id.*

In *Nollan v. California Coastal Commission*,¹⁰⁰ the Court held that a permanent physical invasion was created by the acquisition of an easement for public access parallel to the beach and running along a private owners' seawall.¹⁰¹ The same permanent occupation of space is created by the right of passage. However, there is a crucial distinction between the right of passage and the easement in *Nollan*: the easement acquired by the Coastal Commission was *above* the high water mark on private property where no prior public rights existed.¹⁰² Thus, even though *Nollan* supports the idea of a right of passage as a permanent physical invasion, it is distinguishable on the same basis as *Loretto*: the invasion authorized was an entirely new invasion of private property, and not merely a change in nature of an existing invasion.¹⁰³

"Not every physical invasion is a taking."¹⁰⁴ The critical distinction as to whether a physical invasion gives rise to a taking is whether it is a permanent invasion or a temporary restriction on the right to exclude. Although these categories may be separated by no more than a hair's width, they are treated differently by the Court. On the one hand, there is a presumption of a taking for new permanent physical invasions. On the other hand, in cases where some degree of prior use existed, the fact of physical invasion is not determinative of whether a taking occurred, and courts invoke the ad hoc balancing test.

The ad hoc balancing test is better suited to evaluate whether the right of passage requires compensation. Where the invasion authorized is not new and merely alters the nature of an existing invasion, it is less clear that compensation is constitutionally required, and the mere fact of invasion should not be the sole consideration. For example, if in *Loretto* the city ordinance had called for the replacement of existing cable boxes with newer slightly larger ones, would compensation be required for the additional volume of space occupied? Or, what if the city ordinance had required replacement of technologically outdated cable boxes with new ones; would compensation be required? Under the *Loretto* analysis, would these constitute new physical occupations or merely changes in the nature or degree of use?

Although it is certainly not a stretch to include the right of passage within the category of permanent physical invasions based on precedent, it is far from a satisfactory fit. Making the physical invasion dispositive ignores the prior access rights which distinguish this situation from a *Loretto* or *Nollan* situation. It also fails to consider the restrictions on public use mandated by statute

¹⁰⁰ 483 U.S. 825 (1987).

¹⁰¹ The taking was effected when the California Coastal Commission conditionally approved a construction permit upon provision of the public easement. The Court concluded that, "'a permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832.

¹⁰² The easement was across the *jus privatum*. See *supra* text at Section II.A.1.

¹⁰³ *Loretto*, 458 U.S. at 419.

¹⁰⁴ *Id.* at 435 n.12 (emphasis omitted).

and enforced by administrative penalty. And most importantly, it fails to consider the actual impact on the property owner.

A more satisfactory evaluation of the right of passage is achieved by conceptualizing it as a further limitation of the right to exclude the public from the intertidal zone. This analysis considers more than just the physical invasion to ascertain whether compensation is required.

2. Restricting the right to exclude

Restrictions on the right to exclude the public have been upheld without compensation. In *Pruneyard Shopping Center v. Robins*,¹⁰⁶ the Supreme Court held that compensation was not constitutionally required where a law prevented shopping centers from excluding protesters from their premises. The Court recognized that the right to exclude others is an essential stick in the bundle of property rights, but looked beyond the mere fact of "physical invasion" because the shopping center had opened its doors to the public. The prior public use, or "invasion," of the shopping center prevented the protesters' temporary and limited physical invasion of the shopping center from being determinative of the takings issue.¹⁰⁸

In addition the Court considered the other factors of the ad hoc balancing inquiry.¹⁰⁷ The Court concluded that no compensation was due because the prior public use indicated that the right to exclude others was not essential to the use or economic value of the property.¹⁰⁸ However, a shopping center is free to impose time, place, and manner restrictions on the protesters in order to "minimize any interference with its commercial functions."¹⁰⁹ In this sense, the owners maintain some degree of control over the "invaders," and the concerns of the *Loretto* Court are not present.

The restriction on the right to exclude in *Pruneyard* is more analogous to the right of passage than the invasion in *Loretto*. In both the *Pruneyard* and right of passage situations, the owner's right to exclude is not complete because some public rights to "invade" already existed. In addition, time, place, and manner restrictions on a permitted "invasion" give property owners some degree of control in both cases. Finally, both invasions are narrow *de minimis* rights valid for only specified purposes during certain predictable hours.

Though closely analogous, the right of passage is different from the *Pruneyard* situation in two important respects. First, *Pruneyard* involved commercial real estate covering several city blocks which was quasi-public property by nature. In contrast, the right of passage involves prime coastal real estate, typically the most exclusive real estate. Second, in *Pruneyard*, the own-

¹⁰⁶ 447 U.S. 74 (1980).

¹⁰⁸ *Pruneyard*, 447 U.S. at 83-84.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 83.

ers invited the public onto the property themselves by opening their doors for business, whereas the right of passage is imposed by legislative act. These differences should be weighed against the benefit the right of passage confers on coastal property owners: the right to traverse the intertidal zone beyond their own property lines. These considerations are further justification for the court to invoke the ad hoc balancing test to evaluate whether the right of passage constitutes a taking.

3. *De minimis* invasions

The right of passage thus presents a factual scenario distinct from a permanent physical invasion and a temporary limitation on the right to exclude. It is an invasion of a *de minimis* nature. It is not a new invasion but alters the character of a prior invasion; its timing, extent, and nature are controlled; and it is not likely to substantially diminish the economic value of the underlying parcel. The Massachusetts Supreme Judicial Court appears to have recognized one such *de minimis* invasion in drawing a distinction between an authorized invasion where no prior access existed and an authorized invasion where the ability to invade did already exist. In *Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*¹¹⁰ the court considered a challenge to a statute authorizing Russell Management to install underground utility lines below the surface of land owned by the Nantucket Conservation Foundation. Russell possessed an easement for ingress and egress along a fifty foot right of way across land owned by the Foundation. The court rejected the Foundation's assertion that the statute amounted to a taking because it authorized a permanent physical invasion of its property.

The court referred to the right of passage as an example of a permanent physical invasion and attempted to distinguish it from the invasion at issue.¹¹¹ The court emphasized that Russell Management enjoyed an "extensive ability to 'invade'" Foundation lands prior to enactment of the statute.¹¹² By deed alone, Russell was entitled to traverse the right of way, to use the right of way as an access for heavy construction equipment, and to make physical changes to the way to accommodate these uses (such as laying down gravel on the way).¹¹³ The court did not regard the invasion as a "new" invasion as it had the right of passage.¹¹⁴ Prior access, along with a "rule of reasonableness" imposed by the statute on the use of the way for utility lines, convinced the court that compensation was not required.

¹¹⁰ 402 N.E.2d 501 (Mass. 1980).

¹¹¹ *Nantucket Conservation Found. Inc. v. Russell Management, Inc.*, 402 N.E.2d 501, 505 (Mass. 1980) (citing Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974)).

¹¹² *Nantucket Conservation Found. Inc.*, 402 N.E.2d at 505.

¹¹³ *Id.*

¹¹⁴ The right of passage was treated as a new invasion because it was not found to be within the scope of public trust rights preserved by the Colonial Ordinance. Opinion of the Justices, 313 N.E.2d 561 (Mass. 1974). See *supra* text accompanying notes 68-72.

Despite the court's attempt to distinguish *Nantucket* from the right of passage, and its blanket assertion that the case is "radically different,"¹¹⁵ the cases appear closely analogous and it is not altogether clear why the court reached opposite results. In both cases, substantial rights of access existed prior to enactment of the statute. And in both cases, the new access at issue is slightly different from the prior access. In *Nantucket* the prior access did not entitle Russell to disturb the right of way, except insofar as to make surficial changes to enhance its use as an ingress and egress. Neither did the prior access entitle Russell to dig up the right of way and alter the topography, as would the statute. The differences in the "old" and "new" invasions in *Nantucket* are comparable to those between the "old" public access rights and the "new" ones contemplated by the right of passage. The rules of *Nantucket* and the *Opinion of the Justices* are thus inconsistent on the question of what is "new" access.

The right of passage and *Nantucket* situations are also similar in that statutes in both imposed "rules of reasonableness" on exercise of the "new" access rights. The statute in *Nantucket* provided that the utilities must be installed so as not to obstruct the way or be inconsistent with others' use of the way.¹¹⁶ Likewise, the right of way legislation imposes time limits, geographical limits, and conduct limits on users.

Perhaps one reason for the different treatment of these cases is that the prior access authorized in *Nantucket* was a deeded right, while the access authorization for coastal access comes from the largely judge-made public trust doctrine. A second is that the easement in *Nantucket* permitted only one third party to "invade," while the right of passage permits the public to "invade." Third, the actual installation of underground cables may cause a more temporary disturbance than would use of the right of passage, though the invasion of the cables themselves is permanent once they are buried. But these differences in authority and intensity of use fall short of explaining how the right of passage is a "radically different" invasion from that in *Nantucket*. *Nantucket* illustrates the difficulty of adhering to a rigid permanent physical invasion rule where a *de minimis* invasion merely alters the nature of a prior invasion. The Supreme Judicial Court apparently experienced this difficulty with *Nantucket* and attempted to distinguish it by the prior access rights in order to avoid finding a taking under the same analysis used in its 1974 *Opinion of the Justices*.¹¹⁷

The *Nantucket* analysis furnishes a good middle ground between permanent physical invasions and temporary limitations on the right to exclude by which to analyze the right of passage. Under the *Nantucket* analysis, it is not necessary to find the right of passage within the scope of reserved public trust rights, but only to recognize it as a *de minimis* change in the prior ability to invade. The same need for the common law to evolve to meet the changing

¹¹⁵ *Nantucket Conservation Found. Inc.*, 402 N.E.2d at 505.

¹¹⁶ *Id.* (citing MASS. GEN. L. ch. 187, § 5 (1992)).

¹¹⁷ 313 N.E.2d 561 (Mass. 1974).

needs of society that was recognized in *Nantucket* to justify the greater invasion¹¹⁸ also holds true for public trust rights. Moreover, the *Nantucket* analysis looks beyond the nature of the invasion to consider the ad hoc balancing factors.

C. *The Ad Hoc Factual Inquiry*

As discussed, the ad hoc factual inquiry examines the nature and character of the government action and the physical and economic impact of a regulation on the property to determine whether compensation is due.¹¹⁹ The balancing test considers whether the regulation: (1) substantially advances a legitimate state interest; (2) causes a permanent physical invasion or appropriation of property; (3) prevents or confers a public harm or benefit; (4) decreases the economic value of the property; or (5) imposes an unfair burden on the owner.¹²⁰ Each will be examined in turn, though only two are particularly relevant to the right of passage inquiry.

1. Substantial advancement of a legitimate state interest

The rule that land use regulations must substantially advance a legitimate state interest was reaffirmed and slightly modified by the recent case of *Nollan v. California Coastal Commission*.¹²¹ *Nollan* considered the limit of state legislative authority to impose conditions on private property to preserve public trust rights in the shore.¹²² The Coastal Commission refused to grant a construction permit because the proposed building would impair public visual access of the coast. The Commission agreed, however, to approve the permit if the littoral proprietors would grant an easement parallel to the beach along their seawall for public access. Even though the state had a legitimate interest in preserving the visual access and aesthetic quality of the beach, the Court considered this conditional approval a taking because the required easement was not sufficiently related to either enhancing visual access or improving aesthetic qualities of the beach.¹²³ The means chosen to achieve a legitimate objective must be sufficiently connected to this end. If the means are sufficiently related to achieving a permissible objective, then absent a negative impact on the property's economic viability or the owners' reasonable investment backed expectations, the regulation does not require compensation.¹²⁴

¹¹⁸ *Id.*

¹¹⁹ See *Lucas v. South Carolina Coastal Comm'n*, 112 S. Ct. 2886 (1992) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

¹²⁰ See *id.* at 2895.

¹²¹ 483 U.S. 825 (1992).

¹²² *Id.* at 832.

¹²³ *Id.*

¹²⁴ In *Nollan* the Court employed a higher degree of scrutiny than the traditionally required rational relation to a legitimate state purpose. For a discussion of the heightened scrutiny aspect of *Nollan*, see Finnell, *supra* note 56, at 658-59.

Applying the nexus requirement to the right of passage involves two questions: (1) whether the legislative objective is legitimate, and (2) whether the means chosen to advance it are sufficiently related.

a. The legislative objective

As trustee of public lands, legislative authority to manage tidelands for the public is well established in Massachusetts.¹²⁵ This fiduciary duty to preserve the reserved public rights must be accorded great weight when evaluating the legitimacy of a legislative declaration of a right of passage. In *Commonwealth v. Alger*, the Supreme Judicial Court recognized the nature of state authority over tidelands as a fiduciary duty.¹²⁶ The court has also asserted that "[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."¹²⁷ In addition, our caselaw has long recognized that states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.¹²⁸ Thus, the authority of the legislature to create a right of passage is legitimate.

b. Relation of means to achieving legitimate objective

The right of passage is sufficiently related to preservation of public trust rights to satisfy the nexus requirement. Studies have shown that public coastal access is deficient.¹²⁹ The legislature has determined that a deficiency of public use exists and has chosen to enhance recreational access under public trust

Massachusetts courts applied the *Nollan* nexus standard in *Fragopoulos v. Rent Control Board of Cambridge*, 557 N.E.2d 1153 (Mass. 1990). There, the Board's decision to grant a removal permit was deemed to be within its discretion under city ordinances, and the decision was held to bear a sufficient nexus to the original lawful purposes of the removal ordinance. *Id.* at 1156.

¹²⁵ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 83 (1851). See also *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846) (upholding prohibition on the removal of sand or gravel from the shore by littoral owners and the public). *Tewksbury* demonstrates that the legislature may limit a littoral owner's rights without compensation when necessary to protect or enhance a public right.

¹²⁶ *Alger*, 61 Mass. (7 Cush.) at 53. The Supreme Judicial Court has also recognized the legislature's "perfect right of control in the interest of the public" with respect to land below the low water line, and that this right is "paramount to all private rights, and subject only to the power of the United States government to act in the interest of interstate or foreign commerce." *Home for Aged Women v. Commonwealth*, 89 N.E. 124, 125 (Mass. 1909). See also *Michaelson v. Silver Beach Improvement Ass'n, Inc.*, 173 N.E.2d 273, 276 (Mass. 1961).

¹²⁷ *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 366 (Mass. 1979) (quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453 (1892)).

¹²⁸ *Shivley v. Bowlby*, 152 U.S. 1, 26 (1894).

¹²⁹ See *supra* notes 3-4 and accompanying text.

rights as a means of improving it. Walking the intertidal zone between dawn and dusk is directly related to improving public coastal access.

2. Permanent physical invasion

The analysis of physical invasions under the ad hoc inquiry is identical to that above,¹³⁰ except that no per se rule applies and this factor alone is not determinative. In sum, the right of passage does authorize a permanent physical invasion,¹³¹ but not a new invasion. This factor should recognize the existence of a prior "invasion" and evaluate how the right of passage alters the nature of that invasion.

3. Public harm or benefit

Government may prohibit a use of property which is harmful to the public without compensating the private owner. Nuisance is generally the focus of this inquiry, though recently the Supreme Court appears to have rejected this factor.¹³² Because nuisance is not relevant to the right of passage inquiry, this factor will not be discussed in depth.¹³³

4. Economic impact of the government action

a. Economic value of the parcel as a whole

Once the nature and character of a government action is examined, the extent of economic interference with the parcel as a whole must be evaluated. Economic impact became a crucial element of takings analysis after the Supreme Court's 1978 decision in *Penn Central Transportation v. City of New York*.¹³⁴ *Penn Central* added economic impact to the ad hoc inquiry by asking whether the regulation interferes with the owner's "distinct investment-backed expectations."¹³⁵ More recently, the Federal Claims Court has focused on a second economic inquiry; whether the regulation diminishes the property's value. The key factor for both the expectations and diminution in value inquiries is how the court defines the property interest allegedly taken.

The characterization of the property interest at issue influences the determination of whether a taking has occurred, particularly with respect to evalua-

¹³⁰ See *supra* text at Section IV.B.

¹³¹ *Nollan*, 483 U.S. 825, 831-32 (1987).

¹³² See *Lucas v. California Coastal Comm'n*, 112 S. Ct. 2886, 2895 (1992).

¹³³ The interested reader is referred to the following cases discussing the nuisance factor: *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹³⁴ 438 U.S. 104 (1978). See Daniel R. Mandelker, *Investment-Backed Expectation: Is There a Taking?*, 31 J. URB. & CONTEMP. L. 3 (1987) (discussing the investment-backed expectations factor in takings analysis).

¹³⁵ *Penn Central Transp. Co.*, 438 U.S. at 124.

tion of the owner's expectations and the economic impact.¹³⁶ Before a court can determine whether a taking has occurred, it must define the property interest at issue. As the Federal Claims Court recently observed in *Ciampitti v. United States*:¹³⁷

The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.¹³⁸

One commentator suggests that a taking occurs whenever a regulation deprives an owner of just one "discrete twig" out of the bundle of sticks.¹³⁹ This theory, termed "conceptual severance," is generally argued by private property advocates seeking relief from the limits environmental protection regulations have placed on development.¹⁴⁰ A court applying conceptual severance would recognize any separable property interest and compensate landowners whenever a regulation prevented a specific use of property.¹⁴¹

Critics of conceptual severance fault the theory for finding takings too often, because property interests may be described as "consisting of just what the government action has removed from the owner."¹⁴² A sounder approach evaluates the aggregate impact of a regulation on the entire bundle of sticks. Writing for the majority in *Penn Central*, Justice Brennan rejected conceptual severance as the proper perspective:

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated . . . [but] focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole¹⁴³

Notwithstanding *Penn Central's* apparent rejection and criticism of conceptual severance, the Supreme Court has recognized several narrow property interests

¹³⁶ See generally R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 Sw. U. L. REV. 1019 (1992).

¹³⁷ *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991).

¹³⁸ *Id.* at 318-19. *Ciampitti* held that the "parcel as a whole" included both the wetland and upland sections of a parcel. In reaching this conclusion, the Claims Court relied on evidence that the owner treated the wetland and upland portions as one parcel for purposes of purchase and financing.

¹³⁹ See generally Frank I. Michelman, *Takings 1987*, 88 COLUM. L. REV. 1600 (1988).

¹⁴⁰ Douglas T. Kendall, *The Limits to Growth and the Limits to the Takings Clause*, 11 VA. L. REV. 547, 549 (1992).

¹⁴¹ *Id.*

¹⁴² Margaret J. Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1674-78 (1988).

¹⁴³ *Penn Central Transp. Co.*, 438 U.S. at 130-31; *Moskow v. Comm'r of Env'tl. Management*, 427 N.E.2d 750, 753 (Mass. 1981).

deserving compensation, including the right to exclude the general public.¹⁴⁴

Courts' willingness to narrowly define property interests presents the greatest hurdle to the conclusion that the right of passage does not effect a taking. With respect to the right of passage, the proper definition of the property to be valued includes both the upland littoral estate and the *jus privatum*.¹⁴⁵ Once the relevant property interest is defined, the courts inquire whether there has been a diminution in its value or an interference with the owner's investment-backed expectations for the property.

b. Diminution in value

A regulation has denied an owner economically viable use of property if it causes more than a mere diminution in value. However, a substantial reduction in value alone may not compel a court to find a taking.¹⁴⁶ Even where there has been a substantial diminution, if the property retains a "solid and adequate fair market value" after application of the regulation, the property has sufficient remaining use to forestall a determination that a taking has occurred.¹⁴⁷ In *Penn Central*, the Court rejected the argument that a partial diminution in value effected an unconstitutional taking where the property could continue to be used as it had been for the past sixty-five years.¹⁴⁸ Generally, a partial diminution in value will not compel a court to find a taking unless accompanied by a questionable state interest, a physical invasion, or an interference with the property owners' expectations.¹⁴⁹

Implementation of the right of passage will necessitate a determination of whether the littoral property value is affected. The Federal Claims Court recently formulated a test for this purpose in *Formanek v. United States*:

[T]he court first has to compare the value of the property before the regulation with the value remaining after the regulation [I]f there is found to exist a solid and adequate fair market value . . . which [plaintiffs] could have obtained for that property, that would be a sufficient remaining use of the property to forestall a determination that a taking had occurred¹⁵⁰

¹⁴⁴ See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposition of navigational servitude on manmade marina requires just compensation).

¹⁴⁵ See *Ciampitti*, 22 Cl. Ct. 310 (1991) (holding that the proper definition of a parcel containing wetlands includes both the wetland and upland sections).

¹⁴⁶ *Id.*

¹⁴⁷ *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987).

¹⁴⁸ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978).

¹⁴⁹ See *Loeterman v. Town of Brookline*, 524 F. Supp. 1325, 1329 (D. Mass. 1981) (where owners had no legitimate expectation of excluding a tenant, no taking occurred despite impact of town bylaw amendment on property value because bylaw served a legitimate public purpose and alternative economically viable use of the property remained).

¹⁵⁰ *Formanek v. United States*, 26 Cl. Ct. 332, 335 (1992) (quoting *Formanek v.*

Formanek held that denial of a construction permit necessary to develop a parcel containing wetlands constituted a taking due to the severe economic impact. The court compared the fair market value¹⁵¹ of the parcel as a multi-lot industrial development prior to the denial with the fair market value of an industrial lot surrounded by undevelopable land after the denial and found more than a "mere diminution in value."¹⁵² The denial rendered the property "all but worthless," because the owners had no competitive market for their property without the possibility of a multi-lot industrial development.¹⁵³

The right of passage is unlikely to substantially diminish or to destroy the solid and adequate fair market value of the littoral estate.¹⁵⁴ The critical finding is the highest price a hypothetical buyer would pay to acquire the right to walk between the high and low water marks between dawn and dusk.¹⁵⁵ This is an extremely limited right. The impact on property value of the right of passage would likely differ from one parcel to another, depending on factors such as the topography of the coastline, the proximity of the intertidal zone to a residence, or the intensity of use. For example, we might expect the impact to be greater on a parcel where the patio of a residence is ten feet away from the mean high water line, than it would on an undeveloped parcel. The impact

United States, 18 Cl. Ct. 785, 798 (1989) and *Florida Rock Indus. Inc., v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987)). See also *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 155-61 (1990) (finding a taking when court found no economically viable use exists without a permit to fill wetland and awarding \$2.6 million damages).

¹⁵¹ Fair market value reflects the highest and best use of the land. *Loveladies Harbor*, 21 Cl. Ct. at 156.

¹⁵² *Id.* at 160.

¹⁵³ *Formanek*, 26 Cl. Ct. at 340. The court found a diminution in value from \$933,921 to plaintiff's estimate of \$112,000, even though as conservation land the value was estimated at \$490,000. Plaintiffs were awarded \$933,921 damages plus interest. The Claims Court decision in *Ciampitti* stands in contrast to *Formanek*. In *Ciampitti*, the court considered the fair market value of a parcel containing wetlands subsequent to a permit denial and found a residual value of \$14 million, marking a 25% diminution in value. *Ciampitti*, 22 Cl. Ct. at 320 n.5. This remaining value, coupled with the owner's knowledge of the wetlands prior to purchasing the parcel, was sufficient to prevent the finding of a taking. The different results may be explained by the more substantial diminution in value in *Formanek* and the owner's lack of knowledge that regulated wetlands were present at the time of purchase. *Formanek*, 26 Cl. Ct. at 333.

¹⁵⁴ But see *Michelson v. Silver Beach Improvement Assoc., Inc.*, 173 N.E.2d 273 (Mass. 1961). *Michelson* held that a littoral owner acquires an interest in beaches built by the Commonwealth for public bathing purposes and is thereby entitled to compensation if such beaches are used by the public for bathing. In finding a taking, the court found it persuasive that the littoral owner's exclusive access to the sea was "cut off," because, "[t]he littoral or riparian nature of property is often a substantial, if not the greatest, element of its value." *Id.* at 277. *Michelson* involved a much more intense and unlimited use than contemplated by those who advocate a right of passage.

¹⁵⁵ *Newton Girl Scout Council v. Mass. Turnpike Auth.*, 138 N.E.2d 769, 773 (Mass. 1956).

on property value should also reflect the benefit conferred by the right of passage. Littoral owners are perhaps the most direct beneficiaries of the right of passage because they already possess lateral access to the intertidal zone and would be permitted to stroll the shore beyond their own property lines once the right of passage was implemented.

c. Investment-backed expectations

In tandem with the diminution in value inquiry, courts examine whether a regulation negatively impacts some "distinctly perceived, sharply crystallized, investment-backed expectation" of the owner.¹⁵⁶ To be distinct, an expectation must have some concrete meaning.¹⁵⁷ *Pruneyard Shopping Center v. Robins* held that these expectations must also be reasonable.¹⁵⁸ Whether an expectation is reasonable depends on whether the owner had advance notice of the regulation or government action. In *Ciampitti*, for example, knowledge of the difficulty in developing wetlands and the possible presence of federally regulated wetlands on the parcel were sufficient to make the owner's expectations appear unreasonable.¹⁵⁹

A good illustration of an interference with investment-backed expectations giving rise to a taking is *Kaiser Aetna v. United States*.¹⁶⁰ In *Kaiser Aetna* a private marina owner connected his private pond to a bay impressed with public trust rights in order to construct a private marina. The owner had a distinct investment-backed expectation of being able to exclude the public from his private marina and charge admission to use his water. This expectation prevented the government from extending the navigational servitude from the bay to the pond and requiring public access without paying just compensation.¹⁶¹

Although *Kaiser* recognizes the right to exclude the public as a compensable property right, it is readily distinguishable from the right of passage situation. The navigational servitude was imposed on land where no prior public right to invade existed. The servitude was a "new" invasion, whereas the right of passage is simply a change in the nature of the existing public trust invasion. The marina business depended exclusively on the ability to exclude all but fee-paying members from the premises. In contrast, existing public trust rights prevent littoral owners from claiming that economic value requires exclusion

¹⁵⁶ Radford, *supra* note 136, at 1069 (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1223 (1967)). See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

¹⁵⁷ Mandelker, *supra* note 134, at 14.

¹⁵⁸ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). See also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984).

¹⁵⁹ *Ciampitti*, 22 Cl. Ct. at 320-21. Likewise, a lack of knowledge of regulated wetlands supports the reasonableness of the owner's expectations to develop a parcel. See *Formanek v. United States*, 26 Cl. Ct. 332 (1992).

¹⁶⁰ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

¹⁶¹ *Id.*

of the public. From the time of purchase, a coastal owner expects the public to fish, fowl, and navigate in the tidelands and understands that such activity typically involves walking. There is no significant investment-backed expectation grounded in the owner's ability to exclude the public from using the intertidal zone.

The right to exclude the public also played a significant role in the takings analysis in *Pruneyard Shopping Center v. Robins*.¹⁶² Recall that in *Pruneyard*, the Court declined to find a taking in the state's prohibition of shopping centers from excluding people engaged in disruptive speech, because the owners failed to demonstrate that their ability to exclude such individuals contributed to the economic value of their property.¹⁶³ "[P]hysical access to private property in itself creates no takings problem if it does not 'unreasonably impair the value or use of [the] property.'" ¹⁶⁴ The Court recognized that "one of the essential sticks in the bundle of property rights is the right to exclude others,"¹⁶⁵ but accorded great weight to the finding that the investment-backed expectations and economic value of the property were not always effected when the asserted right was denied.¹⁶⁶

In summary, the right of passage would have a significant economic impact if it were found to destroy the solid and adequate fair market value of a parcel, or to interfere with reasonable investment-backed expectations.

5. Imposition of an unfair burden

The right of passage does not single out a few "people alone to bear public burdens" but impacts owners along the entire Massachusetts coast.¹⁶⁷ "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable."¹⁶⁸ This factor does not appear to raise significant fairness concerns mandating compensation.

6. Striking a balance

The ultimate result of the balancing test requires a careful weighing of the public and private interests involved. A substantial public interest may offset the destruction of economic value to a private owner without a requirement of just compensation.¹⁶⁹

¹⁶² *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

¹⁶³ *Id.*

¹⁶⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 855 (1987) (Brennan, J., dissenting) (quoting *Pruneyard*, 447 U.S. at 83).

¹⁶⁵ *Pruneyard*, 447 U.S. at 82 (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 83.

¹⁶⁸ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 102 (1851).

¹⁶⁹ See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (compensation not required for

The most important factors to the right of passage inquiry are legitimate state interest, physical invasion, and economic impact. In sum, the state interest in enhancing coastal access appears to be legitimate and the right of passage is substantially related to achieving it. The right of passage authorizes a *de minimis* physical invasion, best conceived as an alteration of a prior authorized invasion. The economic impact as reflected by diminution in value and investment-backed expectations will require a case-by-case determination, taking into consideration the unique characteristics of each parcel. Thus, this Note maintains that the right of passage ought to be understood as a *de minimis* invasion and evaluated under the balancing test to determine whether compensation is due.

V. CONCLUSION

This Note advocates implementation of the right of passage without compensation to private property owners. Recognizing the right of passage as a *de minimis* invasion which merely alters an existing authorized invasion is the first step to achieving this end. Because the right of passage is distinguishable from the permanent physical invasion line of cases, it is inappropriate to rely on that inquiry as the sole basis for determining whether a compensable taking has occurred. Instead, courts should recognize that the right of passage presents a scenario which cannot be analyzed only by recognizing a physical invasion, but that examination of the ad hoc balancing test factors is necessary. Of these factors, the most significant will be the extent of the economic impact on the particular parcel. Unless the right of passage is found to have destroyed the solid and adequate fair market value of a parcel, or to interfere with reasonable investment-backed expectations, then implementation does not require compensation.

It is not too late for courts to reconsider the constitutionality of the right of passage absent compensation. Implementation of the right of passage is only in its initial stages within the state administrative agencies. Implementation will not be simple: sections of the coast need to be identified for acquisition of the right of passage, valuation studies must be conducted, eminent domain proceedings commenced, funds for acquisition obtained, and regulatory enforcement mechanisms instituted. In all, the state faces a considerable administrative overhead to acquire a limited right which may in itself have negligible economic value to private owners, if not enhance their property value by giving them a right of passage beyond their property lines. Although courts are loathe to allow the legislature to achieve through regulation what it cannot through acquisition, the right of passage presents a sympathetic case for minimizing acquisition expenses and channeling public funds to the regulatory mechanisms for private owner protection mandated by the legislature.

The original impetus for extending littoral ownership by the Colonial Ordi-

destruction of cedar trees carried out to prevent a tree disease from spreading to nearby orchards).

nance involved a combination of financial and public improvement concerns. Identical concerns are present today and provide a sound basis for redefining public and private tideland rights. Budget constraints not only prevent the state from purchasing coastal lands to provide needed recreational facilities, just as they prohibited the Massachusetts Bay Colony from funding wharf construction, but also justify modernizing historic public property interests to meet contemporary needs.

Judicial protection of public rights in tidelands allows the *jus publicum* to retain its significance. Carried to its extreme, the logical outcome of the Supreme Judicial Court's stoic public trust interpretation and rigid application of the permanent physical invasion rule dooms the *jus publicum* to extinction once fishing, fowling, and navigation cease to be popular public activities. Given the impressive history and long-standing tradition of public tideland ownership, this seems an unintended, unnecessary, and indeed unfortunate result.

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