

Whose Coast Is It Anyway? Climate Change, Shoreline Armoring, and the Public's Right to Access the California Coast

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Summary

The public trust doctrine provides that a state holds its tidelands, submerged lands, and navigable waters in trust for the benefit of the general public. California has codified the principles of this doctrine through various statutes, including the California Coastal Act of 1976. However, as climate change drives increased sea-level rise and erosion along California's coast, landowners have sought to protect their property with hard armoring structures that impede coastal access and cause the sea to swallow previously accessible public beaches. This raises the issue of who should bear the burden of the inevitable property losses resulting from sea-level rise: private landowners, or the general public. This Article explores the legal issues surrounding coastal armoring in California, including the pending case of *Lynch v. California Coastal Commission*, which could have broad implications for coastal armoring and access rights in California.

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You can travel the world, but nothing comes close to the golden coast.¹

Abutting the Pacific Ocean, California is home to some of the most beautiful beaches and coastal landscapes on earth. Some may be surprised to learn that all 1,200 miles of California's famed coastline are legally open to the public, at least in theory.² The public trust doctrine, which has its origins in Roman law and English common law, provides that the state holds its tidelands, submerged lands, and navigable waters in trust for the benefit of the general public, ensuring the public's right to access these areas.³ California legislators have embraced the public trust doctrine, affirming it through provisions in the state constitution⁴ as well as in various state statutes, most notably in the California Coastal Act of 1976.⁵

California has been a leader in developing the public trust doctrine and promoting the public's right to access the shoreline.⁶ However, the public's ability to recognize its right to access has come under threat in various ways. Legally, all land below the mean high tide line along the California coast is state land and should be easily accessible by members of the public.⁷ However, wealthy owners of beachfront property along the coast have gone to great lengths to impede public access. Landowners have been known to hire private security guards, post misleading signs, erect fences, and lobby against public transportation in order to discourage people from accessing the public tidelands adjacent to their homes.⁸ While the state's tidelands are legally open to all, many of California's most beautiful beaches and coastal habitats have been effectively closed to the public due to the efforts of beachfront property owners.

There are many challenges inherent to promoting and preserving the public's right to enjoy coastal lands, but the single greatest threat to public access may be the one posed by global warming and the resultant sea-level rise and erosion already altering the topography of the California coast.⁹ Climate change has driven an alarming increase in sea level over the course of the past century.¹⁰ Globally, the average rate of sea-level rise has been about 1-2 cen-

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1. KATY PERRY & SNOOP DOGG, CALIFORNIA GURLS (Capitol Records 2010).
 2. Robert García & Erica Flores Baltodano, *Free the Beach! Public Access, Equal Justice, and the California Coast*, 2 STAN. J. C.R. & C.L. 143, 179 (2005).
 3. *Id.*
 4. CAL. CONST. art. X, §4.
 5. CAL. CIV. CODE §670; CAL. PUB. RES. CODE §30001.5; CAL. PUB. RES. CODE §30221.
 6. García & Baltodano, *supra* note 2, at 179.
 7. CAL. CIV. CODE §670.
 8. García & Baltodano, *supra* note 2, at 164-65.
 9. Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533, 534 (2007).
 10. *Id.* at 537.

timeters per century over the past 3,000 years. However, the past century has seen a rise in sea level of 10-20 centimeters, driven by the melting of glaciers and ice sheets, as well as thermal expansion of the planet's oceans.¹¹ Sea level in California has risen by 15-20 centimeters over the last century, and while the precise degree of future sea-level rise is dependent on various factors and difficult to predict, the upward trend is almost certain to continue over the course of the next hundred years.¹² Sea-level rise has already resulted in substantial erosion and inundation along California's coast, and the projection of future increases in sea level, combined with the high likelihood of stronger storms caused by climate change, strongly indicates that coastal land will continue to be lost to the sea.¹³

Erosion and inundation resulting from sea-level rise threatens the interests of coastal property owners, whose homes could be lost if nothing is done to halt the recession of the shoreline. Many have responded to this threat by privately constructing seawalls, revetments, and other "coastal armoring" structures designed to stop the ocean's advance along significant portions of California's coast. Armoring structures now cover at least 10% of the state's coastline, including 33% of the southern California coast.¹⁴ While these armoring structures may temporarily protect property from the ocean's encroachment, they accelerate the erosion of existing beaches and destroy coastal habitats, thus infringing on the public's right to coastal access protected by the public trust doctrine and California law.¹⁵

As mentioned above, the border between private lots and public land in California is drawn at the mean high tide line.¹⁶ If the coast is not armored, and the ocean is allowed to advance naturally, that line will eventually encroach on privately held land, resulting in property loss by private landowners. If landowners are able to armor the coast, property losses will be borne by the public at large as the sea swallows previously accessible public beaches. This raises the question of who should bear the burden of the inevitable property losses resulting from sea-level rise: private landowners or the general public?

Governments can likely rely on state law's promotion of public access and codification of the public trust doctrine to justify some restrictions on coastal armoring.¹⁷ However, coastal landowners are likely to challenge armoring restrictions as unconstitutional takings without just compensation or violations of state law.¹⁸ This Article discusses the legal issues inherent in government regulation of coastal armoring, focusing primarily on challenges to armoring

restrictions grounded in California law and constitutional takings doctrine. While the weight of legal authority generally supports the state and local governments' rights to restrict armoring, the owners of oceanfront property are likely to devote considerable resources to challenging any new armoring regulation. The legality of armoring regulation often depends on specific facts and judicial interpretation, but recent developments, including a case awaiting review before the California Supreme Court,¹⁹ indicate a possible trend toward increased governmental ability to restrict the use of coastal armoring structures that impede public access to the California coast.

I. Factual Background

Coastal armoring structures fall into two general categories: hard armoring and soft armoring.²⁰ Hard armoring structures are typically either seawalls (vertical walls made of concrete, steel, or wood) or rock revetments (sloped retaining walls made of rocks).²¹ Soft armoring refers to the use of natural materials, such as sand or vegetation, to strengthen coastlines.²² While soft armoring can be expensive, it is typically much less harmful to coastal ecosystems and recreational resources than hard armoring.²³ This Article will not focus on soft armoring, and all discussion of armoring below refers to hard armoring structures.

Armoring structures may temporarily protect property at risk from sea-level rise, but ultimately worsen inundation and erosion. In their natural state, coastal ecosystems can survive sea-level rise by moving inland or growing vertically or laterally. Armoring structures fix the back of the beach and prevent it from moving inland. As sea level rises, the public beach in front of an armoring structure is submerged by the sea and eventually disappears completely.²⁴ Armoring structures also cause sand impoundment and the diffraction of wave impacts, exacerbating erosion at neighboring properties and increasing the need for more armoring, which disrupts coastal ecosystems and impedes public access.²⁵ For these reasons, governments may seek to place restrictions on armoring, but any such restrictions could raise a multitude of legal issues.

II. Legal Background

The public's right to access the coastline is well established in California. This right is derived from the common-law

11. *Id.*

12. *Id.*

13. *Id.* at 538.

14. MOLLY LOUGHNEY MELIUS & MARGARET R. CALDWELL, STANFORD LAW SCHOOL ENV'T & NAT. RES. LAW & POLICY PROGRAM, CALIFORNIA COASTAL ARMORING REPORT: MANAGING COASTAL ARMORING AND CLIMATE CHANGE ADAPTATION IN THE 21ST CENTURY 3 (2015).

15. *Id.*

16. CAL. CIV. CODE §670.

17. Chloe Angelis, *The Public Trust Doctrine and Sea Level Rise in California: Using the Public Trust to Restrict Coastal Armoring*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 249, 257 (2013).

18. *Id.*

19. *Lynch v. Cal. Coastal Comm'n*, 229 Cal. App. 4th 658 (Cal. 2014), *cert. granted*, 339 P.3d 328 (2014).

20. Megan M. Herzog & Sean B. Hecht, *Combating Sea Level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 463, 473 (2013).

21. MELIUS & CALDWELL, *supra* note 14, at 6 (other forms of hard armoring include: breakwaters, bulkheads, groins, cliff retaining walls, and notch and cave infills).

22. Herzog & Hecht, *supra* note 20, at 473.

23. *Id.* at 474.

24. MELIUS & CALDWELL, *supra* note 14, at 8.

25. *Id.* at 9.

public trust doctrine itself, in concert with the California Constitution and other state statutes that codify the doctrine and emphasize the importance of the public's right to access the coast.²⁶ Private-property owners who are prohibited from armoring their land and therefore face property loss due to sea-level rise are likely to challenge restrictions on armoring as unconstitutional takings without just compensation or as violations of statutory rights to armor.²⁷ As discussed below, regulation of coastal armoring is unlikely to amount to an unconstitutional taking,²⁸ but may be limited under current interpretations of state law.²⁹

A. The Public Trust Doctrine

The public trust doctrine is a common-law doctrine with origins in Roman law. It mandates that the state must hold its waterways in trust for the public benefit. Property encumbered by the public trust doctrine may only be transferred out of the trust in service of the trust's purposes.³⁰ The U.S. Supreme Court famously applied the doctrine in 1892 in the landmark case of *Illinois Central Railroad Co. v. Illinois*, where the court upheld Illinois' revocation of a grant of lakefront property to a private railroad company, holding that the state never had the authority to make the grant in the first place.³¹ The Court's opinion stated that under the public trust doctrine, "dominion and sovereignty over lands covered by tide waters . . . belong to the respective states in which they are found."³² The doctrine was held to obligate states to hold these lands "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."³³

According to the Court, the state could only abdicate control of public trust lands if doing so would promote, or not substantially impair, the public's interest in the remaining coastal lands and waters.³⁴ Even in such instances, any powers granted over public trust lands could be revoked and exercised in a more direct manner by the state at any time.³⁵ Therefore, under *Illinois Central*, private rights to coastal public trust lands are entitled to less protection than other real property rights and exist only relative to the rights of the public.³⁶ *Illinois Central* was a foundational case for the public trust doctrine in the United States, and laid the groundwork for the doctrine's application, upon which California and other states would later expand.

B. Coastal Access in California Law

In line with its obligations under the public trust doctrine, the California Legislature has placed great emphasis on the public's right to access the state's navigable waters and coastal lands. The state of California acquired title to its coastal lands and waterways upon its admission to the Union.³⁷ Since then, the legislature has expanded the scope of the public trust doctrine and has placed great emphasis on the public's right to coastal access.

I. The California Constitution and Miscellaneous State Statutes

Public trust principles and the importance placed on public access are reflected in Article X, Section 4 of the California Constitution, which states:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.³⁸

This constitutional provision promotes the public's right to access the coast and other navigable waters. As a steward of the coastline under the public trust doctrine, the legislature acted to protect or promote the public's right to access state waters in the state's foundational document. The inclusion of this provision in the state constitution indicates the paramount importance that California places on the public's right to coastal access. Under Article X's mandate, the legislature has expressed a strong commitment to protecting coastal access in no uncertain terms,³⁹ and has enacted numerous laws to maximize the public's ability to access the shoreline.

While *Illinois Central* frames the public's right to access in terms of navigation, commerce, and fishing,⁴⁰ California courts and the legislature have taken a more expansive view of the purposes for which the public has a right to access state waters. The state constitution forbids impeding access when it is required for "any public purpose."⁴¹ The California Supreme Court has expanded the purposes for which the public has a right to access the coast beyond navigation, commerce and fishing, holding that recreational use constitutes a "public purpose" for which the public must be

26. Angelis, *supra* note 17, at 251-56.

27. *Id.* at 257.

28. Caldwell & Segall, *supra* note 9, at 568.

29. Angelis, *supra* note 17, at 255.

30. *Id.* at 552.

31. 146 U.S. 387, 454 (1892).

32. *Id.* at 435.

33. *Id.* at 451.

34. *Id.*

35. *Id.* at 454.

36. Angelis, *supra* note 17, at 253.

37. Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cty., 33 Cal. 3d 419, 434, 13 ELR 20272 (Cal. 1983).

38. CAL. CONST. art. X, §4.

39. See CAL. GOV'T CODE §53035 ("It is the policy of this state to protect public access to beaches and coastal lands.")

40. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 451 (1892).

41. CAL. CONST. art. X, §4.

allowed access to the coast.⁴² The legislature has stated that access to public natural resources (such as the coastline) is essential to public health and well-being,⁴³ signaling that any purpose for coastal access could constitute a “public purpose,” further indicating the public’s right to access public trust land under state law.

The legislature has also clearly defined the boundaries of the coastal lands it holds in trust for the public benefit. California Civil Code Section 670 marks the mean high tide line as the boundary of state-owned coastal land.⁴⁴ In general, wet sand on the beach is public land, while the dry sand above it may be privately owned, but subject to easements and other agreements that allow the public to access the beach.⁴⁵ State law prohibits local governments from selling, leasing, or transferring any land between the mean high tide line and the nearest public street or highway without reserving the public’s right of access over the property or providing some alternative route for the public to access the shore in the same immediate vicinity.⁴⁶

These state-law provisions demonstrate the importance of the public’s right to coastal access under California law. As discussed above, armoring structures directly threaten the public’s ability to access the coast. Without armoring structures, beaches move inland as sea level rises. As rising waters submerge existing beaches, new stretches of beach are formed behind the prior location of the high tide line.⁴⁷ This natural process may threaten private-property interests as the high tide line advances, turning private property into public trust land, but it preserves the amount of coastal land available for public use. Where armoring structures are allowed, they prevent the formation of new stretches of beach, and once the existing beach is fully submerged, public access is lost forever.⁴⁸ The above-mentioned provisions emphasizing the importance of public access in California law support a proposition that coastal armoring could be restricted in order to prevent the total submergence of public tidelands and preserve public access.

2. The California Coastal Act of 1976

The state laws discussed above demonstrate the degree to which the state has sought to promote public trust principles and the high importance that California places on the public’s right to coastal access. However, the most important and comprehensive piece of legislation that California has enacted to protect and promote coastal access is the California Coastal Act of 1976. The Coastal Act is one of the major vehicles through which the legislature has codified public trust principles and expanded upon the public’s rights with regard to coastal access. One of the Coastal Act’s primary purposes is the maximization of public

access to and along the coast.⁴⁹ However, the Act explicitly states that the promotion of public access must be done with respect for the constitutionally protected rights of private-property owners.⁵⁰

The Coastal Act includes many provisions protecting the public’s right to coastal access.⁵¹ The Act makes the California Coastal Commission a permanent public entity⁵² and charges it, among other things, with “maximizing public access.”⁵³ The Coastal Act tasks the Coastal Commission with regulating development in the state’s coastal zone,⁵⁴ which stretches three miles out to sea, and inland anywhere from 1,000 feet to several miles.⁵⁵

Under the Coastal Act, any local government whose jurisdiction covers any portion of the coastal zone must either prepare, or have the Coastal Commission prepare, a local coastal program that ensures maximum public access to the coast.⁵⁶ All local coastal programs must be submitted to the Coastal Commission for review.⁵⁷ Once a program has been certified, permitting authority for coastal development in the area covered by the program is delegated to local agencies. In areas without a certified program, the Coastal Commission retains this permitting authority.⁵⁸

While the Coastal Act is replete with provisions stressing the importance of public access to the shoreline, it also contains some provisions regarding the protection of private-property rights, which could be cited by coastal landowners to justify armoring. As mentioned above, the Act mandates that public access be promoted with respect for the constitutional rights of private-property owners.⁵⁹

Some provisions of the Coastal Act directly address the issue of coastal armoring. The legislature was aware of the adverse impacts of armoring when it passed the Act in 1976.⁶⁰ The Act includes a provision in §30253 that states: “New development shall . . . (b) Assure stability and structural integrity, and *neither create nor contribute significantly to erosion*, geologic instability, or destruction of the site or surrounding area *or in any way require the construction of protective devices* that would substantially alter natural

42. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 42 (Cal. 1970).

43. CAL. GOV’T CODE §66478.3.

44. CAL. CIV. CODE §670.

45. *García & Baltodano*, *supra* note 2, at 180.

46. CAL. GOV’T CODE §53036.

47. *MELIUS & CALDWELL*, *supra* note 14, at 8.

48. *Id.*

49. CAL. PUB. RES. CODE §30001.5(c).

50. *Id.*

51. *See id.* (calling for the maximization of public access to the coast); *see also id.* §30609.5 (prohibiting the sale or transfer of state-owned land between first public road and the sea without retention of a property interest sufficient to ensure public access); *id.* §30210 (calling for the provision of maximum access and the posting of signs to promote access); *id.* §30211-30212 (calling for maximum access to be maintained when development takes place in the coastal zone).

52. The Commission had previously been established as a temporary body in 1972.

53. *Angelis*, *supra* note 17, at 254. *See also* CAL. PUB. RES. CODE §30330 (giving the Coastal Commission the primary responsibility of implementing the provisions of the Coastal Act, including its provisions mandating maximum public access).

54. CAL. PUB. RES. CODE §30330.

55. *García*, *supra* note 2, at 179.

56. CAL. PUB. RES. CODE §30500.

57. *Id.* §30510.

58. *Id.* §30519.

59. *Id.* §30001.5(c).

60. Todd T. Cardiff, *Conflict in the California Coastal Act: Sand and Seawalls*, 38 CAL. W. L. REV. 255, 256 (2001).

landforms along bluffs and cliffs.⁶¹ This section has been read to require that new development have sufficient setback from bluffs or the high tide line to prevent the need for future armoring.⁶²

This provision seems to prohibit the construction of new seawalls or other armoring structures. However, a different section of the Coastal Act, §30235, also addresses coastal armoring and indicates that armoring is permitted “to protect existing structures or public beaches in danger from erosion and when designed to minimize or mitigate adverse impacts to shoreline sand supply.”⁶³

Sections 30253 and 30235 are seemingly in conflict with one another. One seems to prohibit the construction of new armoring structures and mandate that development be set back far enough from the shore to render their use unnecessary, while the other seems to allow for armoring to protect “existing structures” from erosion. Resolution of the conflict between the two sections seems to hinge on what the legislature means by “existing structure” in §30235.⁶⁴ The meaning of this term is unsettled in case law.

The Coastal Commission has historically interpreted “existing” to refer to structures in existence at the time of application to build an armoring structure. This interpretation supports the right of property owners to construct armoring structures when sea-level rise begins to threaten their property.⁶⁵ However, some contend that the legislative history and intent behind §30235, and the Coastal Act in general, indicate that the reference to “existing structures” was meant to serve as a grandfather clause, only preserving the right to armor for the owners of structures in existence at the time of the Act’s enactment in 1976.⁶⁶

Since the Coastal Commission has historically adopted the former view,⁶⁷ this Article will proceed under the assumption that “existing” as used in §30235 refers to structures existing at the time of application for a permit to armor. However, this interpretation does not necessarily grant the owners of “existing structures” an unconditional right to armor when their properties are threatened, as the Coastal Commission and local governments can and do impose various conditions on armoring permits, and the meaning of the section is currently under review in state court.⁶⁸ The public trust doctrine could also potentially be used to override any interpretation of the Coastal Act to prevent any armoring that runs counter to the public interest.⁶⁹ This idea will be discussed in greater detail below.

C. Constitutional Takings Doctrine

The Fifth Amendment to the U.S. Constitution prohibits the government from “taking” private property for public use without just compensation.⁷⁰ The California Constitution contains a similar provision.⁷¹ Coastal landowners are likely to challenge government restrictions on their ability to protect their property with armoring structures as unconstitutional takings without just compensation.⁷² The constitutional prohibition on takings covers both direct appropriation of property and land use regulation that “goes too far, constituting what is known as a regulatory taking.”⁷³ The Supreme Court has not established a clear rule for when regulation “goes too far.”⁷⁴ However, principles laid out in several landmark cases are relevant to any determination of whether or not a regulation constitutes a regulatory taking.⁷⁵

Under *Loretto v. Teleprompter Manhattan*, regulation resulting in a permanent physical occupation of a landowner’s property constitutes a regulatory taking requiring just compensation.⁷⁶ In *Lucas v. South Carolina Coastal Council*, the Court held that even without a physical occupation, regulation can “go too far” and effect a regulatory taking if it denies the property owner all economically beneficial or productive use of his or her land.⁷⁷ In *Lucas*, a property owner purchased coastal land for the purpose of constructing single-family homes. Before he could begin construction, however, the state passed a law barring the construction of permanent habitable structures on his parcels.⁷⁸ In response to the landowner’s claim that the law’s impact on him amounted to an unconstitutional taking, the Supreme Court held that regulations that force a landowner to sacrifice *all* economically beneficial uses of his property in the name of the common good amount to takings.⁷⁹

However, the Court noted an exception to this rule, stating that a regulation that wipes out a property’s economic value does not amount to a taking if it simply codifies pre-existing “background principles” of law that would have applied absent the regulation.⁸⁰ This exception is especially relevant to questions regarding restrictions on armoring, as the public trust doctrine could conceivably be considered a “background principle.”

Regulations that only partially diminish a property’s economic value may also amount to takings. In such instances, courts apply a three-factor balancing test estab-

61. CAL. PUB. RES. CODE §30253 (emphasis added).

62. Cardiff, *supra* note 60, at 257.

63. CAL. PUB. RES. CODE §30235.

64. Cardiff, *supra* note 60, at 257.

65. Herzog & Hecht, *supra* note 20, at 511.

66. *Id.*; Cardiff, *supra* note 60, at 262-70.

67. Caldwell & Segall, *supra* note 28, at 559.

68. *Lynch v. Cal. Coastal Comm’n*, 229 Cal. App. 4th 658 (Cal. 2014).

69. *Id.*

70. U.S. CONST. amend. V.

71. See CAL. CONST. art. I, §19 (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.”).

72. Herzog & Hecht, *supra* note 20, at 479.

73. *Id.*

74. *Id.*

75. *Id.*

76. 458 U.S. 419, 426 (1982).

77. 505 U.S. 1003, 1015, 22 ELR 21104 (1992).

78. *Id.* at 1003.

79. *Id.* at 1019.

80. *Id.* at 1022-23.

lished in *Penn Central Transportation v. City of New York*.⁸¹ In that case, the plaintiff transportation company challenged a New York City historic preservation ordinance that prohibited it from building an office tower over Grand Central Station as a regulatory taking. The Court considered the economic impact of the regulation and the degree to which it interfered with the “distinct investment-backed expectations” of the plaintiff, along with the “character of the government action,” noting that physical invasions of property are more likely to be considered takings than adjustments of benefits and burdens aimed at promoting the public good.⁸² The Court held for the city, citing the facts that the law served the public good and that the plaintiff could continue to profit from the operation of Grand Central Station and transfer its lost air rights to other parcels throughout the city.⁸³ The public trust doctrine could also conceivably come into play under a *Penn Central* analysis, as courts may consider the doctrine relevant to what a plaintiff’s “investment-backed expectations” should be.

In addition to government regulation, permit conditions or exactions may also be challenged as unconstitutional takings. Under a test established by *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, permit conditions imposed by a permitting agency may be considered takings if they lack a nexus⁸⁴ and rough proportionality⁸⁵ to the development-related impact that the agency seeks to mitigate.⁸⁶ The “nexus” requirement was established in *Nollan*, where the Supreme Court struck down a permit exaction requiring a public easement across a beach because the condition lacked an essential nexus to the permitting agency’s reason for denying the permit, which was the project’s potential to obstruct public views.⁸⁷

The “rough proportionality” element of the test is derived from *Dolan*. In that case, the plaintiff’s application for structural expansion and parking lot pavement was made conditional on her dedication of land to be used as a public greenway and bicycle path.⁸⁸ The Court found that the condition complied with *Nollan*’s nexus requirement, as the greenway and bike path would reduce flooding and traffic, both of which would be exacerbated by the applicant’s project.⁸⁹ However, the condition was held to be a taking, as the burden it placed on the property owner was disproportionate to severity of the negative impacts that the government sought to prevent.⁹⁰ These cases establish that any armoring-related conditions imposed on permits for coastal development would have to be both related and proportional to the potential harm caused by the proposed armoring structure.

III. Legal Challenges to Coastal Armoring Regulations

As demonstrated above, the common-law public trust doctrine combines with state law and constitutional takings doctrine to form the legal framework governing the regulation of coastal armoring in California. The state and local governments may seek to curtail the use of armoring structures in various ways. Municipalities could act aggressively to impose wholesale bans on new armoring structures by enacting “no further armoring” ordinances prohibiting the erection of new armoring structures and by mandating that existing structures be removed after their permits expire.⁹¹ If implemented successfully, such a strategy could quickly curtail the use of armoring structures along the California coast. However, such an aggressive ban on armoring is likely to face substantial political and legal challenges.⁹²

Alternatively, local governments, along with the Coastal Commission, could take a more piecemeal approach to curtailing armoring by using their regulatory powers to deny permit applications for armoring structures⁹³ or using permit exactions to restrict armoring and mitigate its negative impacts where it cannot be avoided.⁹⁴ Such a strategy would likely face less opposition than a wholesale ban, but would still encounter legal hurdles. Coastal landowners are most likely to challenge armoring restrictions as unconstitutional takings or violations of state law. The public trust doctrine underlies much of the state law relating to coastal armoring,⁹⁵ and could potentially be used as a “trump card” by the government to defeat opposition to armoring restrictions grounded in the property rights of private landholders.⁹⁶ Below is a discussion of some of the legal issues likely to arise when governments attempt to place restrictions on coastal armoring.

A. Takings Issues

Government restrictions on coastal armoring, whether imposed by ordinance or through permit denials and exactions, are likely to be challenged as unconstitutional takings.⁹⁷ The outcome of litigation surrounding armoring restrictions depends on a number of factors, including the nature of the restriction and the degree to which it diminishes the value of the private property that it impacts.⁹⁸ While in theory, the public trust doctrine could be used to justify any armoring restriction made in furtherance of the public interest,⁹⁹ judges are unlikely to uphold regulation against takings challenges on the basis of the doctrine alone, considering the other factors that must be

81. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 8 ELR 20528 (1978). Herzog & Hecht, *supra* note 20, at 481.

82. *Penn Cent.*, 438 U.S. at 124.

83. *Id.* at 138.

84. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837, 17 ELR 20918 (1987).

85. *Dolan v. City of Tigard*, 512 U.S. 374, 391, 24 ELR 21083 (1994).

86. Herzog & Hecht, *supra* note 20, at 481.

87. *Nollan*, 483 U.S. at 828.

88. *Dolan*, 512 U.S. at 374.

89. *Id.* at 387.

90. *Id.* at 396.

91. Herzog & Hecht, *supra* note 20, at 512.

92. *Id.*

93. *Id.* at 518.

94. *Id.* at 504.

95. Angelis, *supra* note 17, at 253.

96. J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 79 (2012).

97. Angelis, *supra* note 17, at 257.

98. Herzog & Hecht, *supra* note 20, at 479.

99. Angelis, *supra* note 17, at 272.

weighed under most analyses.¹⁰⁰ However, when asserted in conjunction with relevant takings case law, the doctrine can help justify governmental restrictions on armoring. If armoring restrictions can be shown to wipe out a property's entire economic value, they are susceptible to challenges under *Lucas*.¹⁰¹ However, regulation that might otherwise effect a taking may be upheld if it is held to codify existing background principles of law.¹⁰²

Since regulations that codify background principles do not effect a taking under *Lucas*, even where they completely destroy a property's economic value, local governments could ward off takings challenges to armoring bans by presenting these bans as codifications of "background" public trust principles. A regulation that codifies a background principle of law cannot be a taking, as any claimed property right "taken" by the regulation never existed to begin with, considering the relevant preexisting principle.¹⁰³ If landowners claim only a partial diminution of property value and challenge armoring restrictions under *Penn Central*, governments could again assert the public trust doctrine as a factor relevant to plaintiffs' investment-backed expectations.¹⁰⁴

The investment-backed expectations that are weighed as a factor under the *Penn Central* test must be reasonable.¹⁰⁵ If a court finds that a plaintiff should have but did not consider the public trust doctrine in formulating his investment-backed expectations for a property, it could conclude that the stated expectations were not reasonable, which would likely resolve the factor in the government's favor. Finally, if cities or the state are inclined to permit some armoring in exchange for exactions that mitigate its adverse impacts, such exactions must meet *Nollan* and *Dolan's* nexus and rough proportionality requirements to withstand takings challenges.¹⁰⁶

I. Bans on Armoring

Local governments seeking to curtail coastal armoring could implement municipal zoning ordinances that ban the installation of new armoring structures and require the eventual removal of existing armor.¹⁰⁷ Aside from challenges grounded in state law, which will be discussed further below, such ordinances would likely be challenged on takings grounds.¹⁰⁸ The way courts evaluate such challenges would depend, in part, on the degree of loss that property owners suffer as a result of the regulation.

Outside of the recent case *Lynch v. California Coastal Commission*,¹⁰⁹ which will be discussed below, the gen-

eral right to shoreline armoring has never been litigated in California. Armoring has thus far been regulated primarily through permit exactions and conditions.¹¹⁰ However, in the event that a California municipality enacts a wholesale armoring ban, and the ban is challenged on takings grounds, courts could look to persuasive authority from other states. Such authority indicates that courts are likely to uphold armoring restrictions that can be seen as affirmative of the public trust doctrine or similar common-law principles.

Courts in multiple states have affirmed the public trust doctrine itself as a "background principle" of law for the purposes of *Lucas's* takings analysis.¹¹¹ In *Esplanade Properties, LLC v. City of Seattle*, a coastal landowner asserted that a city denial of his application to develop shoreline property caused a complete wipeout of the property's economic value, amounting to a taking under *Lucas*.¹¹² The property that the plaintiff sought to develop was classified as "first class tideland," and was submerged completely during high tide.¹¹³

The U.S. Court of Appeals for the Ninth Circuit struck down the plaintiff's takings claim, stating that the denial amounted to an assertion of the public trust doctrine, which it deemed a "background principle" of Washington State law. Therefore, even if the denial caused a complete wipeout in the property's economic value, it could not amount to a taking under *Lucas*.¹¹⁴ Like California, Washington has codified public trust principles in its state law.¹¹⁵ The Court in *Esplanade Properties* held that considering this codification, and the fact that the proposed development clearly interfered with public uses protected by the doctrine, the plaintiff had never possessed a right to develop the site, and therefore did not suffer a taking.¹¹⁶

A similar argument could justify an armoring ban in California. The public trust doctrine is well known and codified in California law. Armoring clearly interferes with the public access rights protected by the doctrine. Therefore, a denial of the right to armor could easily be considered a codification of background principles of state law, immune to takings challenges under *Lucas*.

The public trust doctrine has also been acknowledged as a "background principle" in the specific context of shoreline armoring. In the South Carolina case of *McQueen v. South Carolina Coastal Council*, the owner of lots on man-made saltwater canals challenged the denial of his application to construct bulkheads (a form of armoring) as a taking under *Lucas*.¹¹⁷ The lots had reverted to tidelands or saltwater wetlands and could not be developed without

100. Caldwell & Segall, *supra* note 28, at 567.

101. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 22 ELR 21104 (1992).

102. *Id.* at 1022-23.

103. Herzog & Hecht, *supra* note 20, at 514.

104. Angelis, *supra* note 17, at 272.

105. *Kaiser Aetna v. United States*, 444 U.S. 164, 174, 10 ELR 20042 (1979).

106. Herzog & Hecht, *supra* note 20, at 481.

107. *Id.* at 512.

108. *Id.* at 513.

109. 229 Cal. App. 4th 658 (Cal. 2014).

110. Cardiff, *supra* note 60, at 273.

111. *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985, 33 ELR 20056 (9th Cir. 2002); *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149 (S.C. 2003).

112. *Esplanade Properties*, 307 F.3d at 980.

113. *Id.*

114. *Id.* at 985.

115. *Id.* at 986.

116. *Id.* at 987.

117. *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 147 (S.C. 2003).

the use of bulkheads.¹¹⁸ The court denied the plaintiff's takings claim, holding that the public trust doctrine was a background principle of South Carolina law.¹¹⁹ Since the land that the plaintiff sought to develop was below the high water mark, the court held that it was public trust land, development of which could impede public access. Therefore, the court held that the plaintiff had never possessed a right to develop, and the denial of permits to do so was not a regulatory taking.¹²⁰ This case demonstrates that the public trust doctrine can be asserted as a background principle of law to defeat takings challenges stemming from the denial of a right to armor. Therefore, the doctrine could potentially be used to support a ban on shoreline armoring.

Even where the public trust doctrine itself is not specifically acknowledged as a "background principle of law," armoring restrictions have been upheld against takings challenges as affirmative of other, similar principles. The North Carolina case of *Shell Island Homeowners Association v. Tomlinson* directly upheld a state ban on armoring structures as constitutional, holding that it did not effect a regulatory taking on plaintiff condominium owners.¹²¹ The court in *Shell Island* did not explicitly rule on the question of whether the armoring ban caused a complete loss of the relevant property's economically valuable or productive use.¹²² However, the court did deny the existence of a constitutional right to armor, indicating that the ban was merely an articulation of the established principle that property loss to sea-level rise is a risk inherent to coastal land ownership.¹²³ The court quoted another North Carolina case stating that the owner of coastal land loses title to property encroached upon by erosion.¹²⁴ This language indicates that armoring bans that inflict private-property loss may fit into *Lucas*' exception for regulations that codify "background principles of law." In California, a ban similar to the one upheld in *Shell Island* could be defended as a codification of the right to coastal access protected by the public trust doctrine.

In the Oregon case of *Stevens v. City of Cannon Beach*, coastal property owners challenged the application of a state law to deny their permit to build a seawall as an uncompensated taking.¹²⁵ The plaintiffs, who sought to build a hotel on their land, claimed that the regulation deprived them of "all economically viable use of their property," and therefore amounted to a taking under *Lucas*.¹²⁶ The Supreme Court of Oregon disagreed, ruling that the challenged regulation did not destroy all of the property's economically viable uses and was not a taking.¹²⁷

While the court did not invoke the public trust doctrine specifically, its opinion did refer to the Oregon common-law right of the public to access dry sand on the beach. This "background principle" of Oregon law was invoked to show that the plaintiffs should have known that they would not have the exclusive right to this sand when they purchased their property. Under this principle, the plaintiffs were held to have never possessed the property interests that they claimed were "taken" by the regulation. Even if the regulation had destroyed their property's economic usefulness, it would not have amounted to a taking.¹²⁸

This reasoning could potentially be adapted to the public trust doctrine to dispute takings challenges to armoring bans under *Lucas*. Since the public trust doctrine is well known and codified in California law, property owners should be on notice that they have no right to build structures that impede coastal access. Just as the restriction in *Stevens* was held to codify Oregon's existing law regarding dry sand, an armoring ban in California could be presented as a codification of background principles established by the public trust doctrine, making it permissible under *Lucas* despite any impact it may have on a property's economic usefulness.¹²⁹

Where armoring bans do not result in the total wipe-out in economic usefulness necessary to constitute a per se taking under *Lucas*, landowners may claim a partial diminution of property value, triggering review under *Penn Central*'s three-part balancing test. As discussed above, in applying this test, courts consider the economic impact of the regulation in question and the degree to which it interferes with the plaintiff's "distinct investment-backed expectations," along with the "character of the government action."¹³⁰ Coastal landowners are likely to claim that any municipal ban on armoring diminishes the value of their property and interferes with their investment-backed expectations regarding its potential uses and useful life to a degree that outweighs any public purpose it may serve.

Appropriate responses to such arguments would depend largely on case-specific facts and calculations. However, a local government could always invoke the public trust doctrine in arguing that *Penn Central*'s investment-backed expectations prong should be resolved in its favor. Since the public trust doctrine is well known, there is a strong argument that landowners should never expect to use their property in a way that abridges the public's right to coastal access (as coastal armoring does). Therefore, a right to armor should not figure into their reasonable investment-backed expectations. This argument would be especially persuasive in cases involving property purchased after California's 1976 codification of public trust principles in the Coastal Act.¹³¹

118. *Id.*

119. *Id.* at 149.

120. *Id.*

121. 134 N.C. App. 217, 230, 517 S.E.2d 406, 415 (N.C. 1999).

122. *Id.*

123. *Id.* at 228.

124. *Id.* (citing *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 304, 177 S.E.2d 513, 517, 1 ELR 20081 (N.C. 1970)).

125. 317 Or. 131, 854 P.2d 449, 24 ELR 20913 (Or. 1993).

126. *Id.* at 147.

127. *Id.* at 150.

128. *Id.* at 143.

129. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-23, 22 ELR 21104 (1992).

130. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 8 ELR 20528 (1978).

131. Herzog & Hecht, *supra* note 20, at 516.

The argument that landowners should consider the public trust doctrine in formulating their investment-backed expectations for a property does not appear to have been mounted in California courts. However, such an argument was recently discussed under North Carolina law in *Sansotta v. Town of Nags Head*.¹³² In that case, the owners of storm-damaged oceanfront cottages challenged a town's action to condemn the cottages as a public nuisance. The municipal nuisance ordinance under which the cottages were condemned invoked the public trust doctrine, stating that "[a]ny structure . . . located in whole or in part in a public trust area or on public land" could be condemned as a public nuisance.¹³³ The cottages were condemned after erosion altered the shoreline, causing them to be located in what the town considered to be a public trust area.¹³⁴ The property owners alleged, among other things, that by condemning the cottages under the ordinance, the town had deprived them of the ability to use or rent out their property, effecting a taking under *Penn Central*.¹³⁵

The town responded to this taking claim with an argument that the property owners should have recognized the public trust doctrine as a "background principle of North Carolina property law" limiting how they could use their property. However, the U.S. district court applied North Carolina law to reject this argument because in North Carolina, only the state can enforce the public trust doctrine.¹³⁶ The court also discussed the public trust doctrine in relation to the owners' reasonable investment-backed expectations, but held that while these expectations should have accounted for potential losses due to erosion, there was no reason for the owners to expect the town to improperly assert the public trust doctrine when it had no legal right to do so. Since the state had not intervened in the case, the town was not authorized to assert the doctrine through its nuisance ordinance or as a factor in considering the condemnation's impact on the owners' investment-backed expectations.¹³⁷

While the court in *Sansotta* held that the town could not assert the public trust doctrine to define what the owners' reasonable investment-backed expectations should have been for purposes of the *Penn Central* test,¹³⁸ such an argument would be more likely to succeed in defense of a California municipal armoring ban. In *Sansotta*, the assertion was precluded due to a particular feature of North Carolina state law that forbids municipalities from asserting the public trust doctrine.¹³⁹ No such restriction exists in California, where local governments are responsible for implementing the provisions of the Coastal Act, including its numerous codifications of public trust principles.¹⁴⁰ In

the absence of a ban on local enforcement of the public trust doctrine, an argument that the doctrine should figure into landowners' investment-backed expectations for purposes of the *Penn Central* balancing test could potentially be used to help defeat takings-based challenges to municipal armoring restrictions.

2. Mitigating Exactions and Conditions

Currently, coastal armoring in California is limited primarily through the imposition of permit conditions and exactions designed to stem the proliferation of armoring and mitigate its negative impacts where it is deemed unavoidable.¹⁴¹ Coastal development permits are reviewed either by the local government with jurisdiction over the property or by the Coastal Commission.¹⁴² Permit exactions can be an effective tool for limiting armoring and mitigating its negative impacts, but exactions may be susceptible to takings challenges if they do not meet the *Nollan/Dolan* requirements of a logical nexus and rough proportionality to the harm they aim to mitigate.¹⁴³

Local governments or the Coastal Commission may impose armoring-related mitigation conditions on development permits, such as rebuilding restrictions, setback buffers, easement dedication requirements, "no further armoring" conditions, and structure removal requirements, to help lessen the impact that armoring has on public access.¹⁴⁴ While these conditions could potentially be challenged as unconstitutional takings, they are likely to withstand judicial scrutiny under the *Nollan/Dolan* standard.¹⁴⁵ California courts have consistently recognized the government's right to require dedications that promote public access as a condition of permit approval.¹⁴⁶

Limiting conditions on permit approvals generally relate to armoring's harmful impacts, satisfying *Nollan*'s nexus requirement. Some landowners may find conditions onerous and challenge them as disproportionate to armoring's impacts under *Dolan*. However, given California law's strong emphasis on coastal access and the substantial economic activity generated by public beachgoing, such arguments are unlikely to succeed.¹⁴⁷ Additionally, it is difficult for landowners to argue that exactions decrease the value of their properties, as compliance with conditions allows them to armor their property and prevent the more substantial losses that could result from sea-level rise and erosion.¹⁴⁸

141. Cardiff, *supra* note 60, at 273.

142. Herzog & Hecht, *supra* note 20, at 521.

143. *Id.* at 481.

144. *Id.* at 504.

145. *Id.*

146. *Whaler's Vill. Club v. Cal. Coastal Comm'n*, 173 Cal. App. 3d 240, 256 (Ct. App. 1985).

147. *See Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215, 237, 38 ELR 20128 (Cal. 2008) (holding that Coastal Commission's imposition of a \$5.3 million mitigation fee on homeowners association as condition of armoring permit was roughly proportional to the loss of recreational use that the armoring would cause, given estimations of the beach's recreational value).

148. *Whaler's Vill. Club*, 173 Cal. App. 3d at 258.

132. 97 F. Supp. 3d 713 (E.D.N.C. 2014).

133. *Id.* at 720.

134. *Id.* at 730.

135. *Id.* at 733.

136. *Id.* at 734.

137. *Id.*

138. *Id.*

139. *Id.*

140. Herzog & Hecht, *supra* note 20, at 483.

While mitigating conditions on coastal development permits may not be as effective at curtailing the use of armoring as municipal or state armoring bans could be, they are far less controversial and do substantially lessen armoring's impact on public access. Such conditions are generally immune from takings challenges but may be challenged under state law, as discussed below.

B. State-Law Issues

While California law codifies the public trust doctrine and is strongly protective of the public's right to coastal access, it also includes some protection for the rights of private-property owners.¹⁴⁹ In addition to takings challenges, coastal landowners may cite these provisions in challenging any restriction imposed on armoring or conditions placed on development permits by local governments or the Coastal Commission.

I. Construction of the Coastal Act

Of particular relevance to questions of coastal armoring and public access is the Coastal Act's §30235. As mentioned above, this section states that coastal armoring shall be permitted when required "to protect existing structures or public beaches in danger from erosion and when designed to minimize or mitigate adverse impacts to shoreline sand supply."¹⁵⁰ Landowners have used this section in challenges to restrictions on armoring, citing it as a statutory right to build armoring structures.¹⁵¹ As stated, this provision is seemingly in conflict with Coastal Act §30253, which seems to prohibit the construction of new armoring.¹⁵² It is also seemingly in less direct conflict with other provisions of the Coastal Act and statutory law that mandate the maximization of public access to the coast, which armoring structures undoubtedly inhibit.

Advocates of coastal access have posited that the key to resolving this conflict is clarification of the meaning of "existing structure," which has so far been interpreted to mean existing *at the time of application*. If this term were held to refer only to structures in existence at the time of the Coastal Act's passage in 1976, it would give governments broad discretion to prevent, and not just impose restrictions, on new coastal armoring.¹⁵³ However, there has been no indication that judges, legislators, or state permitting agencies intend to change the way in which the term has traditionally been interpreted: as applying to structures existing at the time of application.

2. *Lynch v. California Coastal Commission* and Judicial Interpretation of the Right to Armor

In light of recent case law, there is perhaps a more interesting question, the resolution of which could help determine the extent to which §30235 grants coastal landowners a statutory "right to armor." Section 30235 states that armoring *shall* be permitted when required to protect existing structures.¹⁵⁴ The legislature's use of "shall" instead of "may" suggests that the section's protection of armoring rights is mandatory and not permissive. This is likely why local governments and the Coastal Commission have been reluctant to enact wholesale armoring bans or deny armoring permits for at-risk properties, instead seeking to mitigate the impacts of coastal armoring through permit exactions. However, the assumption that §30235's provisions are mandatory has come into question, and was recently challenged in a case awaiting review by the California Supreme Court.¹⁵⁵

In *Lynch v. California Coastal Commission*, seaside landowners challenged a condition that the Coastal Commission attached to their permit to rebuild a damaged seawall, limiting the permit's duration to 20 years.¹⁵⁶ The plaintiffs challenged this condition, arguing that it amounted to a violation of their right to armor under §30235. However, the court upheld the condition, noting the Commission's broad discretion to impose mitigating conditions on seawall permits.¹⁵⁷ In reference to §30235, the *Lynch* majority, citing an earlier armoring exactions case from 2008, stated that the armoring provisions of §30235 were permissive and not mandatory. In the court's opinion, permitting agencies could, but were not required, to grant armoring permits under the conditions described in the section if granting such permits would be contrary to other provisions of the Coastal Act.¹⁵⁸ Further, the majority held that even if §30235 were mandatory, it should be rejected as contrary to the legislature's command that the Coastal Act be "liberally construed to accomplish its purposes and objectives."¹⁵⁹

The dissent in *Lynch* strongly disagreed with the majority's holding on the 20-year expiration condition. The dissenting justice referenced §30235's use of "shall" to support the traditional view that the section is mandatory and not permissive, guaranteeing a conditional right to armor where property is threatened by sea-level rise or erosion.¹⁶⁰ The dissent also posited that the expiration condition was not a mitigating condition at all, in that it gave the Commission the right to deny the permit outright in 20 years.¹⁶¹

149. CAL. PUB. RES. CODE §30001.5(c); CAL. PUB. RES. CODE §30235.

150. CAL. PUB. RES. CODE §30235.

151. *Ocean Harbor House Homeowners Ass'n*, 163 Cal. App. 4th at 240; *Lynch v. Cal. Coastal Comm'n*, 229 Cal. App. 4th 658, 673 (Cal. 2014).

152. CAL. PUB. RES. CODE §30253.

153. Cardiff, *supra* note 60, at 262; Caldwell & Segall, *supra* note 28, at 562; Herzog & Hecht, *supra* note 20, at 511.

154. CAL. PUB. RES. CODE §30235.

155. *Lynch*, 229 Cal. App. 4th at 670.

156. *Id.* at 658.

157. *Id.* at 662.

158. *Id.* (citing *Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215, 242, 38 ELR 20128 (Cal. 2008)).

159. *Id.*

160. *Id.* at 672.

161. *Id.*

The *Lynch* decision was appealed, and the California Supreme Court has granted review. The Supreme Court's decision in the appeal will have broad implications for coastal armoring and access rights in California. If the court takes the dissent's view that §30235 is mandatory, little will change, and governments will continue to be limited in the ways in which they can contain the expansion of coastal armoring.

However, if the decision is affirmed, it could lead to a precipitous decline in armoring along the California coast and would be a major victory for advocates of coastal access. Under the majority's view, municipalities and the Commission would be able to slowly de-arm the coast by imposing conditions that limit how long armoring may remain in place under a permit. If the court adopts the majority's view that §30235 is void under the legislative command that the Coastal Act be "liberally construed to accomplish its purposes and objectives," it could open the door for the Commission and local governments to begin denying armoring permits outright and implementing wholesale armoring bans.

3. Other Limits on Armoring

While the California Supreme Court's affirmation of *Lynch* would be a boon to armoring opponents and advocates of coastal access, there are other ways in which governments could push back against §30235's apparent guarantee of armoring rights. New armoring can be restricted at sites where armoring structures already exist through "no further armoring" conditions in development permits. The Coastal Commission has been including such provisions in development permits for new structures, additions, and remodeling in the coastal zone since the 1990s.¹⁶² These conditions prohibit new armoring, or expansion of existing armoring, so they may be helpful in preventing the further loss of public access, as landowners eager to build or remodel improvements are likely to acquiesce in order to get projects approved.¹⁶³

Additionally, governments could challenge §30235 as illegal under the public trust doctrine.¹⁶⁴ There is a strong argument that any right granted by §30235 is subordinate to the public trust doctrine, and the section's provisions are clearly contrary to public trust principles. Section 30235 could also potentially be challenged as a violation of the California Constitution's codification of public trust principles and the right to public access.¹⁶⁵ While there are strong legal arguments that the public trust doctrine should

invalidate the armoring rights granted by Section 30235, armoring proponents can cite §30235's protection of the right to armor as a valid exercise of the legislature's discretionary balancing power under the Coastal Act. Additionally, judges would likely be reluctant to allow structures built under one understanding of the law to be lost to sea-level rise or erosion, even if the law might seem to require this result.¹⁶⁶ However, as the oceans continue to rise and more miles of beach are replaced by unsightly armoring structures, invalidation of the Coastal Act's armoring rights under the public trust doctrine could become a more realistic possibility.

IV. Conclusion

Even under the most optimistic admissions trajectories, climate change-induced sea-level rise will continue over the course of the next century.¹⁶⁷ This means that private property along the California coast will continue to be threatened by submersion and erosion, prompting property owners to erect coastal armoring structures that restrict public access to state tidelands. While private-property rights are entitled to substantial protection under both federal and California law, these rights are subordinate to the public's right to coastal access. The right to coastal access is an ancient feature of our common law and a foundational element of California law.¹⁶⁸ Local governments and the Coastal Commission must do all they can to maximize public access to the coastline while respecting the protected rights of private landowners.

While landowners may challenge potential bans on coastal armoring as unconstitutional takings, relevant authority suggests that such bans would be constitutionally permissible as codifications of background principles of law, specifically the public trust doctrine.¹⁶⁹ Despite its conflict with numerous state statutes and common-law doctrine, the Coastal Act's apparent protection of the right to armor has limited the ability of local governments to restrict the spread of coastal armoring.¹⁷⁰ However, the outcome of ongoing litigation could potentially have a profound impact on state and local policy, allowing governments in California to regulate coastal armoring more effectively.¹⁷¹ If the law remains unchanged, advocates of coastal access will eventually have to turn to ambitious, but legally credible, assertions of public trust principles in an effort to overcome the legal hurdles that threaten the public's right to access the coast.

162. Herzog & Hecht, *supra* note 20, at 511.

163. *Id.*

164. *Id.*

165. CAL. CONST. art. X, §4.

166. Caldwell & Segall, *supra* note 28, at 567.

167. *Id.* at 537.

168. CAL. CONST. art. X, §4.

169. Angelis, *supra* note 17, at 257.

170. CAL. PUB. RES. CODE §30235.

171. *Lynch v. Cal. Coastal Comm'n*, 229 Cal. App. 4th 658, 670 (Cal. 2014).