

The *Lucas* Case: The Trial Court Strategy and the Case's Effect on the Property Rights Movement

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Takings law has become a key legal consideration in the formulation of government regulations. No case is more significant to this field than the 1992 Supreme Court decision in Lucas v. South Carolina Coastal Council. It was the first regulatory takings case decided by the Court in which compensation was awarded. It gave the property rights movement its poster child to demonstrate excessive government regulation, and government officials, from local zoning boards to federal department heads, were forewarned as to the potential costs of regulation. Much ink has been spilt in legal textbooks, law reviews and the popular press on the Lucas case and the property rights movement it helped to invigorate. This article reveals, for the first time, personal insights of the trial counsel for the South Carolina Coastal Council and describes the case's connection to current property rights initiatives.

On June 29, 1992, the United States Supreme Court handed down the landmark property rights case *Lucas v. South Carolina Coastal Council*.¹ The Court's ruling required South Carolina to compensate David Lucas for his two oceanfront lots on which the state's Beachfront Management Act prohibited the construction of

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1. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

habitable structures.² It was the first time a Supreme Court decision had required payment for a “regulatory taking” and, as such, was heralded as a major victory by property rights advocates. The case instantly became a rallying symbol for the property rights movement.³ One takings law scholar stated that the *Lucas* decision is “widely considered the high water mark for the property rights movement.”⁴

More than one-hundred law review articles have been written about the *Lucas* case since the Supreme Court’s ruling in 1992. I encountered the case three-and-a-half years prior to the Supreme Court’s decision, when I was hired by the South Carolina Coastal Council to develop a strategy for defending the state’s Beachfront Management Act against numerous legal challenges.⁵ I was in private practice at the time and remained so until becoming a law professor in August of 2005. In this new capacity, I have decided to add to the *Lucas* literature by describing the strategy we developed to (1) handle legal challenges to the Beachfront Management Act and (2) allow South Carolina to avoid additional liability for hundreds of beachfront lots after the Supreme Court ruled that the Act, as applied to Lucas, represented a taking which required \$1.2 million in compensation.⁶

2. Although the Court remanded the *Lucas* case for further proceedings, it strongly indicated that the prohibition on habitable structures was a taking for which compensation must be paid. See *infra* note 6.

3. A recent law review article noted the significant motivation the *Lucas* case provided for the property rights movement. William A. Van Vactor, Jr., *The Backlash to Land Use Regulation Continues: An Analysis of Oregon’s Measure 37*, 26 J. LAND RESOURCES & ENVTL. L. 221, 223 (2005). Another commentator noted that the number of property rights bills introduced in state legislatures increased dramatically after the *Lucas* decision. MICHAEL E. KRAFT, ENVIRONMENTAL POLICY AND POLITICS, 180-81 (3d ed. 2001).

4. Richard Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 777 (2006). Professor Lazarus was referring specifically to the announcement of a per se takings test in *Lucas*.

5. Teresa Hill, *State Grants \$100,000 to Fight Beach Law Test*, ISLAND PACKET, Sept. 18, 1988, at A1 (“The council hired William Want, a Charleston attorney described as a national expert on the issue of taking of private property. Expert witnesses also will be hired with the \$100,000, said council executive director Wayne Beam.”).

6. The U.S. Supreme Court ruled that the South Carolina Beachfront Management Act was a taking for which the state owed Lucas compensation unless background principles of nuisance and property law allowed the state to impose the no-construction restriction. It strongly indicated the state had no such authority, noting for instance, “[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land. . . .” *Lucas*, 505 U.S. at 1029-31. On remand, the South Carolina Supreme Court determined that the state did not have the authority. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486

The origin of the South Carolina Beachfront Management Act was a March 1987 report of the Blue Ribbon Committee, appointed by the South Carolina State Legislature to study and make recommendations on the problem of beach erosion.⁷ The problem was that, as oceanfront property became increasingly popular and valuable, people built more homes, condominiums and hotels closer to the beach. This development was then protected from a rising ocean by sea walls and other erosion control structures which held back the water but also destroyed the beach. Commercial interests in South Carolina were concerned about the erosion problem because the state's beaches are a major tourist attraction.

The Blue Ribbon Committee report presented a cogent analysis of beach erosion and made sweeping recommendations for legislation to address the problem. In June 1988, the State Legislature enacted the Beachfront Management Act that incorporated the report's principal recommendations.⁸ Only months before, a cover article in *Time Magazine* had severely criticized South Carolina's management of beach erosion.⁹ With the passage of the Beachfront Management Act, South Carolina adopted some of the most proactive beach erosion policies in the nation.¹⁰

The Beachfront Management Act implemented three new policies to combat beach erosion. First, the law prohibited the construction of new erosion control devices or the reconstruction of substantially destroyed ones.¹¹

(S.C. 1992). Ultimately, the trial court awarded Lucas \$1.2 million in compensation for the taking. Prentiss Findlay, *Landowner Wins Beach Lawsuit*, NEWS & COURIER, Aug. 11, 1989, at A1.

7. REPORT OF THE SOUTH CAROLINA BLUE RIBBON COMMITTEE ON BEACHFRONT MANAGEMENT (March, 1987) (on file with the author).

8. Act no. 634, 1988 S.C. Acts 5130 [hereinafter Beachfront Management Act], §1 (codified as amended at S.C. CODE ANN. §§ 48-39-10, 130, 270-360 (Westlaw 2007)).

9. Michael D. Lemonick, *Shrinking Shores: Overdevelopment, Poor Planning and Nature Take Their Toll*, TIME, Aug. 10, 1987, at 38.

10. See Mary T. Schmich, *After Hugo, Residents Rebuild in Spite of Law*, CHI. TRIB., Apr. 15, 1990, at C12. See also Arthur S. Brisbane, *Lawsuits in the Wind After Hugo: Curbs on Rebuilding Frustrate Residents*, WASH. POST, Sept. 28, 1989, at A3.

11. Beachfront Management Act §3 (codified as amended at S.C. CODE ANN. § 48-39-300 (Westlaw 2007)).

Second, the law prohibited the construction of new homes and the reconstruction of existing ones in a section of the oceanfront closest to the beach.¹² The no-construction zone, also known as the dead zone, was that area from the crest of the “ideal sand dune” to a distance twenty feet landward.¹³ Under the Act, the ideal sand dune was the actual sand dune.¹⁴ If no sand dune existed due to seawalls or other artificial conditions, the ideal sand dune would be computed on the basis of sand profiles.¹⁵ Construction was already prohibited seaward of existing sand dunes.

Third, the Act established a limited construction zone where the size of a structure was limited to five thousand square feet.¹⁶ The limited construction zone was located in the area between the no-construction zone and the point landward where erosion was projected to take the crest of the ideal sand dune in forty years.¹⁷ Thus, the landward boundary for the limited construction zone was calculated by multiplying the annual erosion rate by forty. The five-thousand square foot limit allowed for the construction of homes, but effectively prohibited the construction of hotels and condominiums. The idea was that it would be more feasible to move or abandon smaller structures if rising oceans pushed the beachfront landward.

Local newspaper reports noted objections to the law by beachfront landowners.¹⁸ It did not appear, however, that these groups presented a serious threat since they had not been strong enough to prevent the law’s passage. But this was deceptive. Individual beachfront landowners were not yet effectively organized at the time of the law’s passage. More significantly, when

12. *Id.* (codified as amended at S.C. CODE ANN. §§ 48-39-290(B), 48-39-300 (Westlaw 2007)).

13. *Id.* (codified as amended at S.C. CODE ANN. § 48-39-280(B) (Westlaw 2007)).

14. Act no. 634, 1988 S.C. Acts 5130, §3 (codified as amended at S.C. CODE ANN. § 48-39-280(A)(1) (Westlaw 2007)).

15. *Id.*

16. *Id.* (codified as amended at S.C. CODE ANN. §§ 48-39-290(B), 48-39-300 (Westlaw 2007)).

17. *Id.*

18. *Beach Law Critics Say Opposition Will Grow*, NEWS & COURIER, Oct. 1, 1988, at A2.

the law was enacted, it was not known how many lots the no-construction and rebuilding provision would affect.¹⁹

It wasn't long before landowners started to bring lawsuits challenging the Beachfront Management Act. John Esposito of Hilton Head filed the first suit in federal court on August 24, 1988 on behalf of himself and thirty-seven other Hilton Head individuals owning twenty-three separate oceanfront lots.²⁰ Mr. Esposito later filed two more federal court challenges.²¹ Lucas filed his action involving two beachfront lots on the Isle of Palms in state court in early January 1989.²² Other state court lawsuits followed. As the suits mounted, I feared that the Coastal Council's two-person legal staff would be overwhelmed. I contacted Cotton Harness, the Coastal Council's General Counsel, and soon thereafter was hired to develop the overall strategy for addressing the challenges and handle the federal cases.²³ Cotton would handle the state court challenges.

A few days after I was hired, Cotton suggested I attend a conference on the new law being sponsored by real estate interests to scout out their plans. From the instant I walked into the packed auditorium at the Charleston Museum, it was clear the mood was nasty—a bit scary actually. After a number of speakers had worked the crowd into a near frenzy, someone asked the last speaker,

19. *See id.*

20. Complaint, *Esposito v. the South Carolina Coastal Council*, D:88-2055-1 (D.S.C. 1988).

21. Complaint, *Feuer v. South Carolina Coastal Council*; Complaint, D:88-3073-1 (D.S.C. 1988); Complaint, *Chavous v. South Carolina Coastal Council*, D:89-216-1 (D.S.C. 1989). These cases were consolidated with *Esposito v. the South Carolina Coastal Council*, which is reported as *Esposito v. South Carolina Coastal Council*, (1989) 20 *Envtl. L. Rep. (Envtl. Law Inst.)* 20,397 (D.S.C. Oct 13, 1989) (No. D:88-2055-1), *aff'd* 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). The court made a separate ruling on remedy in *Chavous v. South Carolina Coastal Council*, 745 F. Supp. 1168 (D.S.C. 1990); *aff'd in part and vacated in part* 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). *See Another Lawsuit to Be Filed Challenging Beachfront Law*, NEWS & COURIER, Jan. 7, 1989, at B2.

22. *See* Richard Green, *Palms Resident Files Beachfront Act Suit*, NEWS & COURIER, Jan. 12, 1989, at B4.

23. I hardly knew Cotton when I wrote him to ask to be hired to work on the challenges to the Beachfront Management Act. I figured it was a long shot that I would be hired. In my letter, I emphasized my experience with the takings issue through my work in wetlands litigation at the United States Justice Department in Washington, D.C. I also highlighted an article I had written entitled, *The Takings Defense to Wetlands Regulation* (1982) 14 *ENVTL. L. REP. (Envtl. Law Inst.)* 10,160 (April 1984). It may be hard to believe now, but at the time, regulatory takings law was not an active area, and my limited experience made me something of an expert.

Ellison Smith, how the Coastal Council could possibly defend this outrageous law. Noticing me standing in the back of the room, Ellison suggested that I could answer because I had been hired by the Coastal Council for that very purpose. I did not say anything and, fortunately, was not pressed further. Ellison, who later represented David Lucas, gave the most rousing, crowd-pleasing speech at the conference. Those oratory skills were in his gene pool, as he was the grandson of former United States Senator Ellison D. Smith, better known as Cotton Ed Smith. One newspaper article called him, "one of the most colorful senators in the Nation's history."²⁴

I had not begun my research on the Beachfront Management Act litigation before the conference, but I left eager to start and did so the next day. By this time, most of the technical work had been done to establish the location of the ideal dune line on the many portions of the coastline that did not have a natural dune. It was becoming clear that numerous lots would fall into the dead zone.²⁵

As I carefully examined the Beachfront Management Act, I could not find a way around a problem: in the no-construction zone, there would be vastly reduced value and no practical use for vacant lots. Since this essentially defines a taking, I began to realize that there was more than hot air behind the howls and catcalls at the real estate conference.

The Fifth Amendment bars the taking of property without just compensation.²⁶ For many years, this provision was thought to

24. University of South Carolina, Ellison Durant Smith Research Awards, <http://www.sc.edu/library/socar/fellows/edsmith.html> (last visited Oct. 29, 2007) (quoting an article from THE STATE).

25. We estimated there were between 75 and 200 vacant lots that could not be built upon due to the Beachfront Management Act. Memorandum entitled "Potential Liability," marked "Confidential & Privileged, Attorney Product" (undated; on file with author). Bill Eiser of the Office of Ocean & Coastal Resource Management (OCRM), the successor of the Coastal Council, estimates that OCRM has received sixty-five applications to date for variances that would allow construction of habitable structures seaward of the baseline. Telephone Interview with Bill Eiser, Oct. 23, 2007. Since the original Act prohibited construction of habitable structures seaward of the baseline and in the no-construction zone, OCRM probably would have received more than sixty-five applications if the Act had not been amended.

26. U.S. CONST. amend. V.

apply only to the situation where the government condemns property and takes full title or legal easement, or causes physical intrusion on land, such as through flooding. The Supreme Court expanded the scope of takings in 1922 in *Pennsylvania Coal Co. v. Mahon*. Justice Oliver Wendell Holmes, writing for the majority, set forth the legal principal that “if regulation goes too far, it will be recognized as a taking.”²⁷

The takings theory remained largely dormant until the late 1960s when environmental regulation began in earnest. The takings claim was raised as a defense to regulation in the first major wetlands case, *Zabel v. Tabb*, decided by the Fifth Circuit in 1970.²⁸

The next substantial Supreme Court takings case was *Penn Central Transportation Co. v. New York City*, decided in 1978.²⁹ The Court found that the City of New York’s historic preservation law, which prevented the construction of a multi-story office building above Grand Central Terminal, did not constitute a taking. The case is noteworthy for establishing new criteria for the determination of a regulatory taking. According to the Court, there is no set formula, but rather the determination must be made on an ad hoc basis focusing on the following three factors: (1) the “economic impact” of the challenged restriction, (2) the restriction’s “interference with distinct investment-backed expectations,” and (3) the “character of the government action.”³⁰

Under the *Penn Central* test, it initially seemed unlikely that the Court would find any kind of government regulation to be a taking. Then, as environmental regulation became more stringent³¹ and the Supreme Court Justice appointments more conservative under President Reagan, the chances of the Court finding a taking grew. In 1987, the Supreme Court issued two

27. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

28. *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970).

29. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

30. *Id.* at 124.

31. Initial rollbacks in environmental enforcement under the Reagan Administration were not well received by the public. As such, the heads of the Interior Department and the Environmental Protection Agency were replaced with more moderate appointees. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 98-106 (2004). Private contributions to environmental groups skyrocketed in reaction to these rollbacks, and, as a result, these organizations were able to play a bigger role in environmental protection. See *id.* at 122-3.

opinions on the takings issue favorable to landowners.³² *First English Evangelical Lutheran Church v. County of Los Angeles* was particularly significant in that it allowed the landowner to receive compensation for the time that a regulation, later determined to be a taking, was in effect.³³ In *Nollan v. California Coastal Commission*, the Court established what has come to be known as the “essential nexus” test. That is, the Court will find a taking where a condition on development is not substantially related to the state interest being pursued.³⁴ The next significant takings decision of the Supreme Court was to be the *Lucas* ruling in 1992. I did not know it at the time, but the work I was doing at the trial court level and the strategy I was developing were to be the prelude for this historic case.

As I worked on the challenges to the South Carolina Beachfront Management Act years before the Supreme Court’s decision in *Lucas*, I became convinced that the no-construction provision of the Act was a taking as applied to vacant lots. Because there were so many affected lots, I realized that the potential liability to the state of South Carolina was enormous. If liability were actually imposed, I feared the state might abandon the Beachfront Management Law altogether and be reluctant to pass and enforce other environmental laws. Although my specific job was to defend the Beachfront Management Act in court, I felt it critical to turn my attention to preparing the state for an unfavorable ruling.

I discussed my views with Cotton Harness, the Coastal Council’s General Counsel, and Wayne Bean, its Executive Director, and asked for the opportunity to present my views to the full Coastal

32. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). A third Supreme Court takings decision handed down in 1987, *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), was more favorable to the exercise of government regulatory authority.

33. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Court authorized compensation for a temporary taking, even if the government entity decided to abandon the prohibition once a court had determined it constituted a taking. Previously, the government entity could avoid paying compensation by reversing course on the prohibition once it had been determined to be a taking.

34. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

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Council Board. I was put on the agenda for the next meeting scheduled for November 18, 1988. I completed a memorandum expressing my views the day before the meeting. That memorandum stated:

Certain provisions of the Beach Protection Act, as applied to a number of lots, are almost certain to be ruled a taking of private property. The compensation that the State of South Carolina would be required to pay would be in the multi-millions. The principal problems with the law from the takings perspective are the construction and reconstruction prohibitions. Modern takings law simply requires compensation if a regulation prevents all viable economic use of the property.³⁵

Cotton and Wayne arranged for my presentation to the Board to take place in the executive session. The public was excluded to try to prevent my views from getting back to our litigation opponents. Unfortunately, one Board member had very close ties to members of the real estate community opposing the Beachfront Management Act. So I was faced with a dilemma. If I candidly told the Board about the problem I saw with the law, it could easily get back to our opposition. But the problem with the law and the solution I proposed were so significant that they had to be presented to the Board to go forward. We marked copies of my memorandum "Confidential & Privileged Attorney Product" in red, distributed them at the meeting, and instructed the Board members to return them at the meeting's conclusion.

At the meeting, I expressed the view that the no-construction provision was a taking and explained the legal basis for this conclusion. To my surprise, the Council members, who had worked so hard to develop, enact, and implement the law, accepted my position. I recommended that the law be amended to rely principally on the seawall prohibition and various other provisions of the Act. The Board agreed and authorized me to prepare a draft amendment as soon as possible.

In the rush of private conversations following the meeting, Cotton, Wayne, and I did not realize that the Board member whom we feared might leak information to our opponents had left with a copy of my memorandum. Cotton chased after him, but he was gone. Cotton did manage to get the memorandum back the next day, but we assumed copies had been made.

35. Memorandum from William L. Want to C.C. Harness III, Evaluation of Beach Protection Act for Takings Infirmities (Nov. 17, 1988) (on file with the author).

As part of my work on the amendment, I obtained copies of the beach protection laws of other states. I noticed that some of these laws had restrictions on construction near the beach but allowed variances from those restrictions. I realized that even a restriction as severe as the South Carolina construction prohibition should survive a takings challenge if the state allowed for variances. In some cases, a taking would probably be found if a variance was not allowed, but, at least, the prohibition itself would not be deemed a taking in every case. The state could decide when to reject a variance and, as a consequence, likely incur takings liability. Further, I reasoned that the variance provision could be fashioned to allow for some use, but one which minimized adverse impacts to the beach environment.

I talked with coastal engineers at the Coastal Council and reviewed literature on the subject and developed three ideas. First, I concluded that the state should grant variances where a property owner's entire lot fell within the no-construction zone. In these situations, the owner would not be able to build at all, and the value of her property would be essentially destroyed. However, if a property straddled the no-construction zone and the limited construction zone, the property owner might be able to build, even without a variance. In these cases, the state need not grant a variance.

Second, I thought that, even if the state did grant a variance, it should constrain the size of the structure to limit the environmental impact. Without the variance, all the vacant lot owners would sue and win; with the variance, some lot owners who only were allowed to build a 5,000 square foot house might sue, but they would lose because the regulation allowed for some viable economic use.

Third, drawing on several cases from North Carolina, I decided that the variance provision should require the landowner to move the structure landward once the beach had eroded to the point that the structure was on the beach. This provision would discourage homeowners from building too close to the beach since it would force them to consider the costs of erosion up-front. Also, it would rid the beach of structures that would otherwise interfere with the public's use of the beach.

I presented my draft bill, incorporating these features and the reasoning behind them, to Cotton and Wayne. They liked my proposal and decided that we should brief the Governor and the powerful state Budget and Control Committee and try to gain their support. The Governor is Chairman of the Committee and the other members are the State Treasurer, State Controller, Chairman of the Senate Finance Committee and Chairman of the House Ways and Means Committee. Wayne got me on the agenda of the next Budget and Control Committee meeting, which was scheduled for December 13, 1988. Things were moving fast.

Cotton thought the best strategy would be for me to present a short version of the talk I had given to the Coastal Council Board. He said that once I had made it clear that the state would very likely lose the takings challenges and incur enormous liability, they would be clamoring for a solution. I could then present my proposed amendment, which would avoid the liabilities and they would gratefully accept it. His prediction proved to be exactly right.

Senator Hayes, the Chairman of the Coastal Council Board, became the amendment's sponsor, and the proposal became known as the Hayes Amendment.³⁶ We first sought the support of the environmental community, which had been adamantly opposed to any changes in the law. I knew it would be a hard sell because they were quite satisfied with the law. They thought the howls that it resulted in a taking were just overblown rhetoric, which they had come to expect from the development community.

I first talked with Dana Beach, Director of the South Carolina Coastal Conservation League, and then the two of us explained the situation to other environmental organizations. Fortunately, they generally accepted my analysis of the legal problems we faced. Nevertheless, they remained reluctant to seek an amendment to the Beachfront Management Act because they feared this would

36. A Charleston newspaper reported on Senator Hayes' efforts, stating: "A proposal Hayes has been circulating in Columbia would amend the bill to eliminate the so-called dead zone where no new structures may be built or rebuilt. It would also give Coastal Council authority to allow construction or reconstruction of buildings not to exceed 5,000 square feet anywhere along the beach." *Lawmakers Urged to Use Caution in Changing Beach Management Law*, NEWS & COURIER, Feb. 11, 1989, at B4.

open up the process to amendments by developers seeking to gut the law. We finally reached an agreement that, while they would not support the Hayes Amendment, they also would not oppose it.³⁷

Senator Hayes then began seeking support for the amendment from other legislators. I was asked to go to the state legislature and explain the need for the amendment to some key legislators. My first meeting was with Bob Sheheen, the Speaker of the House. After shaking hands and sitting down in a comfortable upholstered chair in his spacious, high-ceiling office, I was about to launch into my now familiar speech on the Hayes Amendment, when he told me he knew why I was there. He said he agreed that the law was a taking and that my amendment would resolve the problem. Nonetheless, he would not mobilize his troops to support the Hayes Amendment because he feared the public would disapprove.³⁸

He was correct in observing that there could be a potential political price to pay for weakening the Beachfront Management Act. The Act had received a great deal of positive publicity, particularly because of the litigation, and had become popular with the public. In fact, a poll taken in late 1989, after the Hayes Amendment had passed in the Senate and was being considered in the House, showed that more than half of South Carolina voters thought the law should either be strengthened or left alone.³⁹ Only eighteen percent thought it should be weakened, which was what the Hayes Amendment appeared to do.

As I talked with other legislators, it became clear that the real estate lobbyists had preceded me. They were seeking to block the

37. After the introduction of a bill that would have essentially gutted the Beachfront Management Act, the environmentalists supported the Hayes Amendment. Linda Rackley, Coastal Issues Coordinator for the S.C. Sierra Club, *S.C.'s Beachfront Management Law: Should We Change It?*, S.C. FORUM, Mar., 1989, at 3 ("Senator John Hayes (D-York) has introduced an amendment that incorporates this approach to solving the potential 'taking' problem. In stark contrast to the equity and simplicity of the Hayes' bill, Senator James Waddell (D-Beaufort) has introduced an amendment that essentially revokes the 1988 law in total, allowing new buildings and seawalls anywhere on the beach."); see also Cindi Ross, *Waddell Seeking Beach Act Reversal*, THE STATE, Feb. 17, 1989, at 1A; Editorial, *Waddell Beats Hasty Retreat on Beach Bill*, THE STATE, Feb. 23, 1989, at A14.

38. A Charleston newspaper quoted a state senator as stating: "The Speaker of the House. . . said he is not in favor of any changes in the legislation." *Panel Approves Amendments to Beachfront Act*, POST-COURIER, Apr. 7, 1989, at B6.

39. Cindi Ross Scoppe, *Voters Want Beach Laws*, THE STATE, Dec. 31, 1989, at B1 (stating that a third of voters wanted greater limits on beach construction, another third said it should be left alone, while eighteen percent wanted the law weakened).

Hayes Amendment unless, as the environmentalists feared, other amendments essentially gutting the law were included. Dwight Drake was the chief lobbyist for the entities seeking to weaken the Beachfront Management Act.⁴⁰ Dwight is quite a colorful and clever character. I first met him at the real estate conference on the Beachfront Management Act a few months earlier. After I hastily left the conference and was heading to my car, Dwight caught up to me and introduced himself. He was wearing a dark, expensive-looking suit, but he was distinguished from the typical South Carolina corporate lawyer by the long, unkempt black hair that sprouted with abandon from his head before abruptly falling to his shoulders. I was surprised by how friendly he was given the fact we were on opposite sides of such an emotionally charged issue. I had never encountered a business lobbyist in my work, and Dwight was perhaps the most preeminent in South Carolina.⁴¹

I met with Dwight and a few others in a private room in the legislature after a day of talking with state legislators. Dwight did most of the talking. He showed me various amendments to the Act which had been proposed by his clients. I reviewed them and quickly realized they were less friendly than their author. Indeed, they would have essentially revoked the law. I explored modifications that might make some of his changes palatable to us. Dwight came up with modifications to those modifications which, again, would have left little of substance in the Act. He knew that we needed the Hayes Amendment, and he and the interests he represented were going to block it unless we agreed to a substantial rollback of the law. A few weeks earlier he had written a letter to Senator Hayes, stating:

Some in our group have voiced the opinion that chances for revising the Beachfront Management Act will be greater after money damages have been rendered against the state. I believe,

40. State Senator James Waddell introduced a bill that would have gutted the Beachfront Management Act. In response to questions about why Dwight Drake answered questions about the bill at subcommittee hearings, Senator Waddell stated, "Dwight was one of the principle [sic] framers of it . . ." *Panel Approves Amendments to Beachfront Act*, THE EVENING POST, Apr. 7, 1989, at B6. Dwight was described in the article as "a lobbyist for the S.C. Tourism Council, a loosely defined group that includes, among others, developers and real estate organizations." *Id.*

41. Dwight had a liberal Democratic pedigree, as Richard Riley's rather long-shot campaign for Governor launched his rise to power. Dwight played a key role in the victory and was a top operative in the Riley Administration during Riley's eight-year tenure. Riley went on to serve as Secretary of Education in the Clinton Administration.

and the group has decided, that we can best protect our vital coastal resources, resolve outstanding questions and remove clouds from the state's credit rating by working together to amend the existing Act this session.⁴²

We ended the meeting cordially and agreed to consider meeting again in the future. Those meetings never took place, although we did talk a few times by telephone. I decided, as a result of the meeting, that our best strategy would be to win the initial lawsuits first. Then we could deal with the Hayes Amendment from a position of strength. The real estate community had to believe that the Hayes Amendment, with its small gains for them, was better than nothing. Senator Hayes accepted this view and did not push his amendment for the time being.⁴³

This strategy of obtaining a victory in the litigation might seem to contradict my analysis of the weakness of our case. Our case was weak, however, only with respect to the construction ban on vacant lots, which was likely to be ruled a taking. The other takings claims in the federal cases were not nearly as strong. They challenged the prohibitions on new seawalls and reconstructing houses in the dead zone, and the limitation on the size of structures in the forty-year erosion area. The *Lucas* case only made the takings claim as to the two vacant lots and therefore did not present us with any takings claims we were likely to win. Additionally, we had the advantage in the federal cases of being able to argue that the Eleventh Amendment prevented the federal court from awarding damages as a remedy in actions against states.

I moved the federal court cases along quickly in a variety of ways, principally by stipulating to all the important facts. I even agreed to the value of the Chavous property, the only vacant lot in question in the federal cases. While my appraiser thought it was

42. Letter from Dwight Drake to John Hayes (Feb. 7, 1989) (on file with author).

43. Dwight Drake and his allies continued to push for Senator Waddell's bill. A Senate subcommittee adopted his bill on April 8, 1989. The sole member of the subcommittee voting against bill, Senator Ernie Passailaigue, stated that with the Waddell bill, "you're talking about gutting the entire act." *Panel Approves Amendments to Beachfront Act*, THE EVENING POST, April 7, 1989, at B6.

worth somewhat more than their appraiser, I was not going to waste time bickering over a few thousand dollars in property value. After stipulating to the facts, I moved for summary judgment, arguing that a trial was unnecessary since the case could be decided on the stipulated facts. After the plaintiffs' attorneys had filed a reply brief, the cases were ready for argument.

The toughest aspect of the brief in the federal case was deciding how to deal with the construction prohibition for the Chavous lot. I anticipated losing this argument and did not want to press so hard on it that I lost credibility as to other issues that I thought we could win. With this in mind, I argued that the Act was not a taking as to the vacant lot since it did not totally deprive the land of economic value. The owners could still build a deck or walkway on the property and use it for beach access, picnicking or camping. In our brief, I cited a Maine Supreme Court case in which the court determined that a beachfront construction prohibition was not a taking because the property could be used seasonally as a mobile home.⁴⁴ Also, I cited a Federal Circuit Court of Appeals decision in which the court ruled that, even though the denial of a wetlands permit appeared to prevent any current use, it was not a taking if the property had current value based on real estate speculation.⁴⁵ Finally, I cited a United States Supreme Court case which held that it would not be a taking where, despite loss of economic value and use, the regulation in question prevented a public nuisance.⁴⁶

I could have made a number of other takings arguments with regard to the construction prohibition, including (1) that the land was not suitable for homes in its natural state due to its proximity to the ocean; (2) that property rights did not include the right to protect against beach erosion; and (3) that if the court struck down this provision, it would destroy the state's ability to effectively deal with the beach erosion problem. I also avoided common legal superlatives, such as describing my takings arguments as "absolutely clear" or "irrefutable," or referring to my opponents' arguments as "wholly without merit," or "totally lacking in legal

44. Hall v. Bd. of Envtl. Prot., 528 A.2d 453, 454-56 (Me. 1987). Lucas, however, would not have been allowed to place a mobile home on his property because of zoning restrictions at the Isle of Palms.

45. Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 905 (Fed. Cir. 1986).

46. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 n.22 (1987).

support.” I only used the best takings arguments and, although they were not great, I did not dress them up with emphatic phrases that did not fit.

I pressed harder in arguing that other provisions of the Act were not takings: the seawall prohibition, the restriction on size of construction in the setback area and the prohibition on rebuilding existing homes in the dead zone. Those issues, which I thought we could win, needed to be distinguished from the home construction prohibition on vacant lots which I thought we would ultimately lose.

Even on the issue of the vacant lots, I could avoid calamity by employing the Eleventh Amendment, which prohibits citizens from suing states in federal court, unless the state consents to the suit.⁴⁷ Courts interpret this to mean that citizens cannot obtain money damages from states in federal court suits, but they can obtain injunctions against state officials.⁴⁸ In other words, if Judge Hawkins, the judge in the federal cases, determined the Beachfront Management Act to be a taking as to the construction ban in the dead zone, he could not order compensation. Rather, he could only require that state officials grant some type of permit. This was just the kind of remedy that I wanted through the legislative fix—a special permit containing restrictions on size and requiring removal when the house was on the beach.

My argument that the South Carolina Beachfront Management Act did not violate the Due Process Clause was straight forward. While erosion was a natural and expected phenomenon, it was threatening valuable beachfront properties because structures had been located too close to the beach. I argued that there were three potential ways to deal with the problem of erosion: (1) shoreline stabilization, (2) beach renourishment, and (3) construction restrictions. Analyzing these, I stated in the brief:

Shoreline stabilization, like the use of seawalls, can protect a building for a time, but at the tremendous cost of destroying the beach in front of the device and accelerating erosion in front of it and on adjacent unprotected areas. Beach renourishment is costly and frequently does not work. . .

Shoreline stabilization and beach renourishment are illustrated by efforts undertaken at Miami Beach, America’s most famous

47. U.S. CONST. amend. XI.

48. *E.g.*, Fla. Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1981).

beach resort. The seawalls and groins protecting the hotels contributed to the destruction of the beach. The city of Miami Beach undertook a major replenishment project that restored 10 miles of beach with a width of 300 feet. The price however was \$65 million dollars [and periodic renourishment is required]. . .

The most effective long-term solution for reducing loss of life and property in coastal locations is through land use management measures. Numerous states have adopted setback requirements.⁴⁹

Judge Hawkins issued his ruling on October 13, 1989.⁵⁰ He upheld the Beachfront Management Act as a valid law against the due process challenge, stating:

The beaches are a valuable resource providing both recreational opportunities and tourist revenue to the state. The thrust of the plaintiffs' claim is that the statutes at issue are not substantially related to the attainment of this end; however, that contention is not supported by the record. Essentially, the statutes purport to preserve the beaches by restoring the beach/dune system to its natural equilibrium. Further, the legislature decided that the best method of rejuvenating the beach/dune system is by preventing all new construction and/or reconstruction in that area. The internal logic of this scheme is apparent, and thus the court concludes that the statutory restrictions are substantially related to the important goal of preserving South Carolina's beaches.⁵¹

Judge Hawkins concluded that those with existing homes in the dead zone were not deprived of economically viable use of their real estate.⁵² However, he ruled that there was a taking with respect to Chavous, the single landowner among the plaintiffs who had a vacant lot in the dead zone and wished to build a house.⁵³ He

49. Coastal Council's Trial Memorandum at 8-9, *Esposito v. South Carolina Coastal Council*, D: 88-2055-1 (D.S.C. 1989).

50. *Esposito v. South Carolina Coastal Council*, (1990) 20 *Envtl. L. Rep.* (Envtl. Law Inst.) 20,397 (D.S.C. Oct. 13, 1989), *aff'd* 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992).

51. *Id.*

52. *Id.*

53. *Chavous v. South Carolina Coastal Council*, 745 F. Supp. 1168, 1169 (D.S.C. 1990), *aff'd in part and vacated in part*, 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992).

stated that, under the Act, the landowner could only build a walkway or a deck and clearly this is not a viable economic use of this otherwise valuable real estate. He stated he would determine compensation in the remedy phase of the proceeding.⁵⁴ While the press interpreted Judge Hawkins' decision as a victory for the Coastal Council, it would soon devolve into a calamitous loss if he carried through with his view that compensation must be paid. I had my work cut out for me.

My brief on the question of remedy argued that the Eleventh Amendment prevented the award of compensation.⁵⁵ I pressed the position hard at the court hearing, arguing that the landowner could construct his dream home, if the Judge, consistent with the Eleventh Amendment, enjoined the enforcement of the no-construction provision rather than awarding damages. On March 27, 1990, Judge Hawkins ruled that "the defendants are immune from an award of money damages by virtue of the Eleventh Amendment, and that the plaintiff's sole remedy is prospective injunctive relief against the individual defendants acting in their official capacity."⁵⁶ He then ordered that John Hayes and Wayne Bean be enjoined from enforcing the construction prohibition as to Chavous' vacant lot.⁵⁷

As reported in a Charleston newspaper, both John Esposito and I declared victory. I said the decision meant that Council was not liable for more than \$100 million for beachfront property rendered useless by the Act. I also noted, "It gives the state and the environmentalists a lot more clout in holding on to the law."⁵⁸

Indeed, after Judge Hawkins' rulings, the real estate interests were willing to accept the modest change of the Hayes Amendment which passed on June 19, 1990.⁵⁹ The front page headline in the Charleston paper read, "Beach bill zips through

54. *Id.*

55. Armond Derfner, a civil rights attorney in Charleston, apprised me of the Eleventh Amendment argument. In a casual conversation I had with him about the case, he said I should use the Eleventh Amendment which had been used so often against him. He said he would like nothing more than to see it finally put to good use. Hopefully, if I had not had that conversation with Armond, I would have come up with the Eleventh Amendment argument myself.

56. *Chavous*, 745 F. Supp. at 1172.

57. *Id.*

58. Prentiss Findlay, *Both Sides Claim Victory in Beach Building Lawsuit*, POST-COURIER, Mar. 29, 1990, at A1.

59. S.C. COD ANN. § 48-39-250 (Westlaw 2007); Andy Brack & Schuyler Kropf, *Beach Bill Zips Through Legislature*, NEWS & COURIER, Jun. 20, 1990, at A1.

Legislature.”⁶⁰ The article reported: “A major change is elimination of the dead zone, the controversial area that spurred lawsuits questioning whether the state could take 20 feet of private beachfront property.” One House member was quoted as saying: “We have simplified [the Act], made it practical and saved the taxpayers’ money.” The headline of the lead editorial that same day was “A happier legislative ending.”⁶¹

In the meantime, the *Lucas* case had been decided in state court. This was the tough case. The lawyers for Lucas were Ellison Smith, who wrote the brief, and Gedney Howe, who would argue the case in court. Ellison had a strong background in environmental and condemnation law and Gedney was perhaps Charleston’s best known trial attorney, with numerous multi-million dollar verdicts to his credit. He was politically powerful to boot. Gedney and Ellison adopted a very simple and effective strategy. They claimed that the law itself was valid, but that it was also a taking for which the state must pay just compensation. Lucas had bought his two beachfront lots on the Isle of Palms near Charleston for \$975,000. Under the Beachfront Management Act, absent the Hayes Amendment, he could only build a small deck or walkway.

Cotton handled the *Lucas* case. My job had been to develop the overall strategy and handle the federal challenges. I discussed the *Lucas* case with Cotton before he argued it and urged him to pursue the theory I had developed that the Coastal Management Act itself, of which the Beachfront Management Act was an amendment, should be construed to limit the court to enjoining a taking, not compensating for it.⁶² Cotton included the argument

60. Brack & Kropf, *supra* note 59.

61. *A Happier Legislative Ending*, NEWS & COURIER, June 20, 1990, at A8.

62. The South Carolina Coastal Management Act provided that any applicant whose permit application had been denied could file a lawsuit to determine whether the permit denial was a taking, and if so, the court could require either that the permit be issued or the Council pay compensation. S.C. CODE ANN. § 48-39-180 (Westlaw 2007). The Beachfront Management Act was an amendment to the Coastal Management Act. My theory was that the no-construction provision of the Beachfront Management Act amounted to a permit denial and, as such, the court could order a remedy of issuance of the permit rather than compensation and that this was the preferable remedy. I set forth this argument in the Coastal Council’s Memorandum on Remedy, *Chavous v. South Carolina Coastal Council*, C.A. D:89-0216-1 (D.S.C. Nov. 8, 1989).

in the brief, but it did not come up at oral argument, which was consumed with the questions of whether the construction prohibition was a taking as well as questions about the value of the property.

I was not surprised when, on August 10, 1989, the state judge ruled that the construction prohibition was a taking and awarded \$1.2 million in compensation to Lucas.⁶³ The next step was an appeal to the South Carolina Supreme Court where Cotton thought he had a fair chance of winning. I felt strongly that the *Lucas* case presented a terrible set of facts that cried out for a ruling of taking and hoped to avoid a higher court ruling. I suggested to Cotton that the brief emphasize that the takings question presented in *Lucas* was now moot with the passage of the Hayes Amendment. I even suggested that the Coastal Council write a letter to Lucas inviting him to apply for the variance and indicating the Coastal Council would grant it. If that did not work, I said the Coastal Council should just send him the variance approval in the mail.

Cotton included the mootness argument in the brief to the South Carolina Supreme Court, but the arguments at the hearing, not unexpectedly, focused on the merits of the takings claim. Cotton proved to be right about the prospects of winning in the South Carolina Supreme Court. He prevailed in a dramatic three to two decision issued on February 11, 1991.⁶⁴ Lucas appealed to the United States Supreme Court, as expected. The big question was whether the Court would grant cert. When it did, on November 18, 1991,⁶⁵ my heart fell to my feet. I saw what would happen, as clearly as if it had already occurred.

It was clear to me that the case would attract national attention and become a lightning rod for the property rights movement.⁶⁶ Environmental groups would play into the debacle by rallying to

63. Prentiss Findlay, *Ruling Revives Dead Zone*, NEWS & COURIER, Feb. 12, 1991, at A1; Prentiss Findlay, *Landowner Wins Beach Lawsuit*, NEWS & COURIER, Aug. 11, 1989, at A1.

64. *Lucas v. South Carolina Coastal Council*, 304 S.C. 376 (S.C. 1991).

65. *Lucas v. South Carolina Coastal Council*, 502 U.S. 966 (1991).

66. The Washington Post reported: "The Lucas case was the most celebrated recent legal test of a broad-based movement to add to the scope of the Fifth Amendment's prohibition against the taking of private property by government without just compensation a wide range of government actions affecting the value of property." Tom Kenworthy & Kirstin Downey, *South Carolina May Have to Pay Compensation in Property Case*, WASH. POST, June 30, 1992, at A10.

the defense of the South Carolina Coastal Council in amici briefs, eloquently arguing that the law was not a taking. Due to the stark facts of the case, the public would empathize with Lucas, who stood to suffer significant financial loss. The Supreme Court would, for the first time find a regulatory taking that would result in the award of compensation.⁶⁷ Environmentalists would then try to minimize the impact of the decision by arguing that it applied to a very limited and unusual set of facts.⁶⁸ Nonetheless, developers and landowners would be emboldened to raise takings claims against future municipal, state and federal environmental and land-use regulations. Additionally, governments, particularly municipal governments, would become more circumspect about enacting such laws. The property rights groups would be encouraged by their victory and Lucas himself would become their folk hero. The vision and my helplessness to prevent it were overwhelming.

Nonetheless I went through the motions, calling some of the environmental groups who would be filing amici briefs, and urging them to emphasize the argument that there was not a taking because Lucas had not pursued the variance made available to him by the Hayes Amendment. Some made the argument, but most emphasized the substantive question about the public right to use the beach versus private property rights. Everyone I talked with clung to the hope of a substantive victory if the Court ruled on the merits.

67. Until the 1987 case *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the remedy for a taking had been for the court to invalidate the law or regulation in question, rather than award compensation. Even in those instances where the court determined that compensation would be required, the government entity could avoid such payment simply by abandoning the prohibition upon the court's determination of a taking. The government entity's ability to avoid compensation, however, changed after the Supreme Court's decision in *First English*, where the Court determined that the government entity would owe compensation for a temporary taking during the time the law or regulation constituting the taking was in effect. The Supreme Court's ruling in *First English* that the remedy for a taking would require compensation was not actually applied until the *Lucas* case because the Court never reached the takings question in *First English*.

68. In his dissent, Justice Blackmun stated that, the Court made "sweeping and, in my view, misguided and unsupported changes in our taking doctrine." *Lucas*, 505 U.S. at 1061. A Washington Post article noted: "Environmental groups – which had feared that the case would establish a legal beachhead for wide-ranging restrictions on the government's ability to pass laws and regulate health, safety and the environment – generally did not share Blackmun's alarm." Kenworthy & Downey, *supra* note 66.

On June 29, 1992, in a six to three decision, the United States Supreme Court ruled in favor of Lucas.⁶⁹ The majority opinion began by addressing the question of whether the case was moot in view of the variance amendment to the law. While three of the Justices said that it was,⁷⁰ the majority disagreed. On the merits, the majority ruled there was a taking for which compensation must be paid, unless building a home on the Lucas lots was prohibited by background principles of nuisance or property law. The majority opinion also used the bad facts of this case to make takings law less favorable to environmental interests. It created a categorical, or per se, taking for those situations where the regulation denied all viable economic use.⁷¹ The Court rejected the proposition that preventing a public harm was an exception to a taking as it had so indicated in a prior case.⁷² Further, the Court cast some doubt on the validity of its prior ruling in *Penn Central* that, in evaluating a takings claim, the court must look to the “property as a whole,” rather than the part most restricted by the regulation.⁷³

The Supreme Court decision did, however, vindicate my strategy of amending the Beachfront Management Act to include the variance provision. South Carolina was liable to Lucas for over a million dollars. Without the variance provision, the state would have been liable to many more landowners for many more millions of dollars. It could have been a disaster of such proportions that the state legislature would have eliminated the entire Beachfront Management Act and been reluctant to enact future environmental laws.

The biggest loss in the *Lucas* case, I thought, was not the legal precedent it established,⁷⁴ but rather the fodder the case provided

69. *Lucas*, 505 U.S. at 1003.

70. Justices Blackmun, Souter and Stevens.

71. *Lucas*, 505 U.S. at 1015-1017.

72. The Court had indicated there was a public harm exception to takings in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 & n.16, 492 & nn.20 & 22, and 506 (1987). The exception the Court fashioned in *Lucas* of prohibited by background principles of nuisance or private property law was much more narrow.

73. *Lucas*, 505 U.S. at 1016, n.7.

74. Richard Lazarus, an environmental law scholar, argues that while the *Lucas* case was perceived as a pro-landowner decision on the takings question, it has actually made it less likely that courts will rule that a particular regulatory action is a taking. Richard Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 804 (2006). *Lucas*

for the property rights movement. From the time the Supreme Court accepted review of the case until the decision and its aftermath, the case received tremendous national attention.⁷⁵ Property rights advocates used it as the poster child of what their movement was all about—fighting government regulation that deprives citizens of all property value. Environmentalists mounted an impassioned defense of the South Carolina Beachfront Management Act in the popular press, alienating a large segment of the public which could not go along with what South Carolina had done to Lucas.

Environmentalists tried to neutralize the impact of *Lucas* by arguing that the case showed that property owners had recourse when the government went too far. However, property rights advocates effectively argued that, even if there was recourse through the courts, few citizens could afford to bring legal challenges. As such, they argued, strong laws were needed to protect private property rights from government regulation.

Takings legislative proposals were introduced in more than forty state legislatures and Congress after the *Lucas* decision. Most of them were “assessment” type bills that required states to analyze regulations before enactment to determine whether they affected a taking.⁷⁶ Many of these laws required government to incur enormous administrative expenses, which, ironically, the property rights movement claimed to want to reduce.⁷⁷ Some of the takings laws were “compensation” type bills which required the government to reimburse landowners if a regulation lessened the value of the land by a certain amount. In 1995, eleven states passed

established a *per se* category of takings for the exceptional case where the regulation is so extreme that it practically denies all use of the property. Subsequent court rulings on the takings question have focused on this more stringent criterion rather than the general criteria of *Penn Central* that do not require such an extreme impact for a taking. *Id.*

75. Kirstin Downey, *A Conservative Supreme Court Addresses Property Rights: Environmentalists Worry About the Outcome of Three Test Cases, While Landowners are Heartened by Justices Now on the Bench*, WASH. POST, Feb. 16, 1992, at H1; Kenneth R. Harney, *Property Owners' Rights Cases Up Before the Supreme Court*, WASH. POST, Dec. 14, 1991, at E1; Tom Kenworthy & Kirstin Downey, *South Carolina May Have to Pay Compensation in Property Case*, WASH. POST, June 30, 1992, at A10; Editorial, *When Government 'Goes Too Far'*, WASH. POST, July 1, 1992, at A22; Keith Schneider, *Families See Park Plan As Threat to the Land*, N.Y. TIMES, Aug. 2, 1992, at A22; Keith Schneider, *Environment Laws Face A Stiff Test From Landowners*, N.Y. TIMES, Jan. 20, 1992, at A1; George F. Will, Editorial, *Property: American as Apple Pie*, WASH. POST, July 5, 1992, at C7.

76. Van Vactor, *supra* note 3, at 223.

77. Nancie G. Marzulla, *State Private Property Rights Initiatives*, 46 S.C. L. REV. 613, 635-6 (1995).

property rights bills relating to just compensation for takings.⁷⁸

After the *Lucas* decision and then the election of an anti-regulation House of Representatives under the banner of the Contract for America in 1994, property rights advocates came perilously close to dismantling much environmental law and regulation and undermining local zoning activities.⁷⁹ A coalition of local governments, environmental groups, and others managed to slow the momentum of the property rights movement in Congress and state and local legislatures by defeating or substantially weakening takings legislation.⁸⁰ The battle was rekindled by the Supreme Court decision in *Kelo v. City of New London*⁸¹ in 2005, where the Court ruled that an economically depressed city could condemn private property for a private developer to implement a plan that the city had determined would revive its economic fortunes. Most of the homes that the city planned to condemn were owner-occupied and one plaintiff had resided in her home for eighty-seven years. The property rights movement mounted a major media campaign to portray the city's purpose to be transferring the property of these sympathetic plaintiffs to businesses for more profitable use. The popular disapproval of the Court's decision proved to be palpable.

Kelo has been featured in numerous state legislative proposals introduced to prevent condemnations for economic development. In many instances, the property rights advocates, under cover of *Kelo*, proposed "takings bills" as well, which would require governments to pay landowners for any reduction in property value caused by government regulation. In November 2006, referenda on takings initiatives appeared on the ballot in thirteen states.⁸² More takings bills are expected to be introduced in state legislatures in the future. The effect of these takings initiatives, if passed, would be to limit governments' ability to regulate.⁸³

78. Van Vactor, *supra* note 3, at 223.

79. For instance, in 1995, a bill passed by the House of Representatives would have required the federal government to compensate landowners for takings related to wetland conservation. *Id.*

80. See generally Van Vactor, *supra* note 3.

81. *Kelo v. City of New London*, 545 U.S. 469 (2005).

82. See National Conference of State Legislatures, *Property Rights Issues on the 2006 Ballot*, http://www.ncsl.org/statevote/prop_rights_06.htm (noting that Arizona, California, Florida, Georgia, Idaho, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, South Carolina, and Washington all had some form of property rights questions on their respective ballots in November 2006).

83. William L. Want, Editorial, "Takings Bill" Would Take Away Vital Zoning

It was clear to me from the day I began my analysis of the challenges to the South Carolina Beachfront Management Act that they presented a terrible set of facts that could lead to an expansion of the scope of the takings doctrine. My solution was a legislative fix that employed a variance provision to eliminate the takings. It worked for South Carolina, relieving it of liability for all beachfront property in the dead zone, with the exception of the two Lucas properties. It failed, however, in preventing the United States Supreme Court from handing down a strongly pro-property rights decision in *Lucas* and providing the movement a poster-child example of government abuse. The *Lucas* case provided grist for the property rights' mill as has the recent *Kelo* case. The debate will undoubtedly continue as to where the line should be drawn between private property rights and the rights of the public, and the *Lucas* case will continue to be used in that debate.