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OWNERSHIP, REGULATION AND TAKINGS ISSUES: BEACHES AND COASTAL REGIONS

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In the beginning, humanity feared the sea. The Sumerians and Akkadians in their creation epic the *Ennuma Elish* spoke of the great goddess Tiamat who threatened to engulf the new earth in water until she was dismembered by her grandson Marduk. Her name may have become the Aramaic/Hebrew word for chaos described in Genesis chapter 1 of the Old Testament. The book of Job also describes the Lord at war with the forces of darkness that come from the sea.

Also, however, access and use of the sea was crucial in the ancient world. The Greeks sailed over what Homer called the wine-dark sea to conquer Troy. The Romans were a land power until a Carthaginian ship washed up on shore and, as the great imitators they were, went on to defeat their enemy and conquer the entire Mediterranean Sea.

The Romans also had the Twelve Tables, established in about 450 B.C.E. Tables 6 and 7 helped establish the idea of private property rights. Here begins our legal analysis of coastal property law, as many modern day shore gatherers fear not the sea but still desire access to its beaches. The famous Justinian Code of the Byzantine Empire held that any seashore not appropriated for private use was open to all. This principle became the law in England as well. In part this began with the Magna Carta in 1215 C.E. where public rights of access were strengthened at the insistence of King John's nobles that fishing weirs which obstructed free navigation be removed from waterways.

Public access to the beach is in part protected under the public trust doctrine. As mentioned above, the right to public access can be traced back to the English common law and ultimately Roman law, as noted by the California Supreme Court. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515 (1980).

In 1892, the United States Supreme Court decided *Illinois Central Railroad v. Illinois*, 146 U.S. 387, which remains the principle authority on the public trust doctrine in the United States. In that case the Illinois legislature had granted an enormous portion of the Chicago harbor to the railroad. A subsequent legislature sought to revoke the grant, claiming that the original grant should not have been permitted in the first place. The court held that the common law public trust doctrine prevented the government from alienating the public right to the lands under navigable waters. According to the Court, title to tidewaters and the land below is held in trust for the people of the state so that the people can navigate the waters, conduct commerce over them, and fish in them free from obstruction and interference by private parties. Management and control over the property held by the state in trust for the people cannot be relinquished by transfer of the property. "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in lands and waters remaining."

The definition of "the public" was at issue before the Connecticut Supreme Court in *Leydon v. Town of Greenwich*, 777 A.2d 552 (2001). The court there held that a Greenwich municipal code limiting a town park and beach to town residents and their guests violated the United States Constitution's First Amendment rights of freedom of association and expression. The court determined that a beach is a traditional public forum because it has characteristics of a public park, such as shelters, open space, parking, walkways, trails, and picnic areas. Limits on

access to the beach, therefore, must be justified under the highest level of scrutiny. "The government can exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." The Court concluded that the town of Greenwich had "failed to explain why the ordinance's virtual ban on nonresidents is a reasonable time, place or manner restriction on the use of the park by nonresidents" and that the ordinance was not narrowly tailored to serve compelling state interests.

The public trust doctrine has also been used to provide public access across and use within those areas where land beneath tidally influenced waters has been filled. In some cases, the uses of that land have been limited (to transportation, for instance) and in others, there has been provision for public access across them. An example of beach fill is contained below in one of our main cases.

Apart from particular legislation or specific usage in an area, English common law held that there was no legally enforceable general right of public access to the intertidal region from the landward side; in other words, the public could only come in from the water under the public trust doctrine to use this region. The New Zealand Court of Appeal confirmed this situation in 1868 in a case about a provincially regulated landing service at the port of Timaru. In a belated response, the Foreshore and Seabed Act of 2004 vested the full legal and beneficial ownership of the public foreshore (the intertidal region) and seabed in the State as its absolute property. Public foreshore included areas owned by local authorities, but excluded an estimated 256 parcels of the foreshore and seabed in private title. The Act also provided for public rights of access in and over the public foreshore, including recreational activities such as swimming, and provided for public rights of navigation within the whole foreshore and seabed.

In the United States, the law differs among the fifty states but in general limits the rights of ocean front property owners below the mean high tide line. Massachusetts and Maine (which share a common legal heritage from the latter's once-status as a colony of the former) allow private ownership as far as the mean low water line but allow for public rights to fishing, fowling and navigation (with the necessary permits). These two states are the most restrictive of public rights and represent the exception. Most states allow free access (but again, only officially from the water) to the intertidal zone for walking, swimming, sunbathing, etc. This does not usually include the right to cross private land to reach the shore but prevents private owners from excluding the public below the mean high tide line. This line is calculated as the average high tide line of a lengthy cycle, which means in practical terms that neither property owners nor the public are likely to be able to identify its precise location. The burden of proof therefore falls to the property owner, as it would be trespassing for a member of the public to willfully cross above the mean high tide line but not merely to miscalculate its location.

This paper is going to discuss, through examining a few U.S. cases in detail, first the ramifications of the state's regulation of property development on the coast, whether it is a taking that the state must pay for under the Fifth Amendment of the United States Constitution, and then the legal questions of public access to the beach after human re-nourishment of the beach and natural changes to the beach's location.

First, the paper examines the seminal land use regulation decision by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1991). This case was decided while I was in law school at the University of Texas and while I was taking a class called Supreme Court Seminar and taught by the late Charles Alan Wright, famous both as the preeminent American scholar in federal court jurisdictional issues and as the captain of the Legal Eagles, a perennial intramural American football champion consisting of the most talented sporting talent from the law school. As a class of nine where I had to take the role of arguing Justice Harry Blackmun ((in)famous from his authorship of *Roe v. Wade)*, it thus stands out in my mind.

A. *Lucas*

Even prior to 1989 and Hurricane Hugo's onslaught, the State of South Carolina was involved in regulating development activities in its coastal zone. In 1977, inspired by passage of a national Coastal Zone Management act (CZMA) by Congress five years earlier, the state enacted its own CZMA. Owners of land that included beaches and adjacent sand dunes had to obtain a permit from a state Coastal Council prior to changing the use of the land from the use in existence on the date when the CZMA was passed. The state legislature then passed the Beachfront Management Act (BMA) in 1988, two years after David Lucas bought two residential-zoned lots on the Isle of Palms near Charleston, at which time his lots were not regulated at all by the CZMA. The BMA established a baseline along the coast. Where the region was stabilized by jetties, groins, or other structures, the baseline was drawn along the crest of the dunes. If not stabilized, a region had a baseline drawn connecting the landward-most points of erosion during the past forty years. Construction of any permanent habitable structures seaward of a line drawn twenty feet landward of the baseline was banned, ruining Lucas's plans to develop his parcels for residential use, as now he could only build walkways and small wooden decks.

The state trial court found that the BMA's ban on most permanent construction on Lucas's lot deprived him of any reasonable economic use and rendered them valueless. Under the Fifth Amendment to the U.S. Constitution, applied to the states by the Fourteenth Amendment in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), such a "taking" required Lucas to be paid just compensation, which was set by the lower court at over $1 million. The South Carolina Supreme Court reversed, based upon the holding in *Mugler v. Kansas*, 123 U.S. 623 (1887) that state regulation of property meant to prevent serious public harm does not constitute a taking. A dissenting opinion concluded that the chief purpose of the BMA was the promotion of tourism, the economy, and ecological preservation, not nuisance abatement of a "noxious use" as involved in *Mugler*. The United States Supreme Court, in an opinion by Justice Scalia, reversed and found Lucas's property had been taken by South Carolina.

Compensation under the Fifth Amendment had originally been limited to the government's direct appropriation of property, usually through the use of eminent domain, but then in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) the Court held in an opinion by Justice Oliver Wendell Holmes that regulation of property that goes too far will be recognized as a taking. Analysis of how a regulation goes too far is complicated, especially in the normal context when the property's value is diminished but not extinguished. *Penn Central Transp. Co.*

v. New York City, 438 U.S. 104 (1978) is the seminal case establishing a difficult balancing test involving the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations. In *Lucas,* however, the trial court's finding that the property was now valueless allowed the Supreme Court to avoid the use of this balancing test. In part, the opinion of the Court analogized economic devaluation to physical appropriation. The opinion also, however, indicated a real unwillingness to equate conservation regulations with those involving mitigation of serious public harm. It champions the ability to develop private land as well as exclude strangers from it.

The South Carolina Supreme Court had compared the BMA to regulations upheld in other U.S. Supreme Court cases involving the exercise of the "police powers" of the state. In *Mugler*, the state was allowed to prohibit the manufacture of alcohol; in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the operation of a brick mill in residential areas; in *Miller v. Schoene*, 276 U.S. 272 (1928), the order of destruction of diseased trees to prevent spread of the disease. The BMA contained findings to support its regulations, including the protection of life and property by a dune barrier; protection of habitats for endangered species; maintenance of the healthiness of its citizens; protection against erosion; support of an industry that generated two-thirds of the state's tourism revenue, as well as promoting increased public access to the beaches.

The majority opinion stated that *Mugler*'s upholding of laws prohibiting harmful or noxious uses was the source of the more contemporary standard allowing land use regulations that substantially advanced legitimate state interests. It then questioned whether the landowner's right to develop and exclude were any less important than the state's purported interests, mentioning the regulation of wetlands, marshland, and coastal habitats without apparently focusing on the findings about protection of life and property. It discussed the "benefit-conferring" findings, in its own words, as being unlike the "harm-preventing" regulations upheld in the past cases, even though all of them were argued by the state to advance certain public interests. In a footnote the court appears to believe the protection of life and property was a sham finding undermined by the grandfathering of existing structures within the regulated zone and the subsequent amendment of the BMA in 1990 that authorized exceptions for certain new structures in the zone. Scalia complained about "artful harm-preventing characterizations" and denounced the "test of whether the legislature has a stupid staff."

After all of this discussion and review by the Court of what are truly important state interests, the opinion comes back to point out that all of the previous cases denying compensation after elimination of harmful uses did not in fact involve wholesale elimination of the property's economic value. The state can only do this and avoid paying compensation where the use was not contemplated as part of the original title to the land by the background common law, thus creating a public nuisance. The Court mentions state regulation of riparian water rights to protect its navigational easements on the waters as one example. Ironically, it includes the need to protect the lives and property of others in this category. As hinted above, it appears the Court is convinced there is a difference between a use that actively causes damage, such as land-filling that causes flooding to adjacent property, and the assistance in passive, gradual destruction caused by coastal development, although even this distinction might be argued to disappear briefly when the Court wrote approvingly of regulations such as the prohibition of a nuclear plant stride an earthquake fault line. There is a danger that the definition of what are

public nuisances may indeed be what a particular legislature or court decides them to be. The dissent by Justice Blackmun points out that this term might be manipulated in the same manner as harm-prevention (the majority responded that courts can be trusted more than legislatures not to manipulate).

State and local governments may be leery of the court's suggestion that long-accepted practices cannot be regulated without the payment of compensation, such as here when persons have been allowed to build on the coast. They might argue that the catastrophic effect of such development may only become apparent over time. In this view, the common law should evolve with changes in scientific understanding, such as the increased recognition of erosion dangers.

The concurring opinion by Justice Anthony Kennedy mentions that the finding below that the property had no market value or resale potential was curious, although the higher court had to accept the lower court's factual ruling due to appellate review standards. He stated correctly that a court is normally expected to make a finding of whether a taking has occurred after examining the property owner's reasonable, investment-backed expectations, in affect applying the usual *Penn Central* test. He appears to recognize yet accept some circularity in the majority opinion as the usual course of affairs in constitutional interpretation, analogizing takings analysis to discussions of Fourth Amendment privacy expectations. But he does reject reading a narrowness into the common law of nuisance to confine regulatory power in the modern age. Specifically, he believes that coastal property presents unique concerns since it is a fragile land system. As in many areas of the law, one of Kennedy's opinions has had tremendous influence in the aftermath of *Lucas*. Few courts if any have found a total economic taking by any governmental regulation since 1992, and beach and coastal regulations have not been adversely affected, for the most part.

The dissent by Justice Blackmun detailed the growing awareness of coastal change and the need to help preserve and protect persons and property. The 1977 regulations did not help much with beach erosion, found a 1987 report by the South Carolina Coastal Council set up by the legislation. The 1988 regulations used the best available scientific and historical data to denote wider critical erosion zones. At the same time, sudden destruction by Hurricane Hugo caused 29 deaths and $6 billion in property damage in September 1989. Blackmun believed that the majority opinion mischaracterized prior cases as containing a blanket rule that total economic deprivation by regulation requires compensation, when in fact every case required balancing of public and private interest. In his judgment, common-law public nuisance must evolve and change, as that is what the common law is at its essence. He wonders why the public's elected legislature may not also define the term and why judges should be considered the only capable decider in a situation requiring application of a balancing test.

The dissent by Justice Stevens adds a final observation. The BMA prohibits not only new construction but also rebuilding structures destroyed by natural causes such as hurricanes. Thus, if an existing home next to Lucas's lots had been blown away by Hurricane Hugo, the owners could not rebuild and would not be assured recovery of their losses, but Lucas, who has never yet risked anything or been displaced or personally endangered by a storm, laughs his way to the bank. Stevens also theorizes Lucas could make good money by using his property for fishing and camping purposes for tourists, and thus, his property is not valueless.

If the majority opinion had become widely applicable, local governments wonder if traditional zoning would still be allowed if it prohibited or even affected new development. They also might fear how nonconforming uses of property such as residential structures near a landfill or heavy industrial park could be phased out through amortization under the Court's reasoning that, as Stevens puts it, "freezes the common law."

Let us leave the strange and largely unexplored world of *Lucas*.

B. *Stop the Beach Re-nourishment*

Stop the Beach Re-nourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S.Ct. 2592 (2010) is a case about the unexpected consequences of active means to protect the public and also help beach tourism. As already noted, most states in the U.S. hold title to the foreshore, the intertidal region, in trust for the public, and Florida follows the majority rule. However, private owners in this state whose property abuts the foreshore have special rights (for a fancy term, littoral rights), including accessing the water, using the water for certain purposes, and viewing the water without visual obstruction. One more special right is at issue in the case. When sand, sediments, or other materials are gradually added to land, a process known as accretion, the property owner obtains title to this new land under Florida law. However, sudden addition (or loss) of these same materials, known as avulsion, does not follow the same rule. The boundary between public and private land will not change; the state owns up to the line that was the mean high-water line before the event that caused the sudden changes.

In 1961, the Florida Legislature passed the Beach and Shore Preservation Act. This set aside funds for beach re-nourishment, which is adding sand and maintaining the added material in order to expand the beach. A new "erosion control line" may be set by the state board that holds title to public coastal land. This usually is set at the pre-existing mean high-water line (if set above this, the Court notes that private property would have been taken). This erosion control line replaces the new mean high-water line after the accreted sand is added as the property line under the Act, thus changing the prior common law rule that would have moved the property line seaward.

Property owners within a county that had applied for state re-nourishment funds sued the State of Florida, claiming their common law rights would be taken if the project proceeded. Namely, they would not receive title to accretions to their property and their property would not have special contact with the water. In essence, their property would no longer be oceanfront property.

The Florida Supreme Court overturned a lower court's ruling in favor of the property owners, finding no taking under the Florida state constitution (a provision similar to the takings clause in the U.S. Constitution). It concluded the beach re-nourishment fit under the doctrine of avulsion, which kept property title with the state. The property owners' right of accretion thus did not apply on these facts, and their special right of contact was nothing more than a right of access, which they now shared with all members of the public, in a sense.

The U.S. Supreme Court produced a divided opinion on the issue for which this case is often cited, namely, can the *judiciary* be the instrument by which a taking of private property by the state occurs. In the end, this did not make a difference. First, the Act probably would have constituted a taking by the state legislature anyway, although the plaintiffs did not make this their primary argument. More importantly, the Court unanimously found that the Florida court had not changed state law in any meaningful way to constitute a judicial taking even if a majority had recognized that this type of taking existed. The State of Florida as property owner had the right to fill in submerged land and retain title, as previous cases involving the draining of water from a lakebed had held. The right of accretion did not apply when an avulsion had occurred, even if the sudden change was the underlying property owner's (the State's) own positive action. Thus, the Florida Supreme Court's decision passed muster under the *Lucas* standard of background property law.

In this decision, then, the state and public maintained ownership of the beach (newly created) when sudden change, purposeful or otherwise, occurred. Under the public trust doctrine, it arguably had title regardless of the facts put forth above. A different result has arisen recently in Texas with regard to the "dry beach."

C. *Severance*

Spanish law until 1821 and Mexican law until 1836 governed land use issues on the Texas coast, banning private development of the beaches without permission from the state and also recognizing the public trust doctrine. *See National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 434 n.15 (1983). However, in 1840 the Republic of Texas (a country, get it? Prior to statehood in 1845) granted to private property owners large sections of the coast without reserving the public's right to use or access the beach across these properties. Nonetheless, Texas cases have discussed the proof provided that actual public use and enjoyment of beaches has occurred since the 19th century, creating an easement by use in such areas. In 1959, the Open Beaches Act created by statute a broad public right of access and use. This put Texas in the small class of states that clearly (we thought) confer such rights, along with Florida, Oregon, North Carolina, New Jersey, and Hawaii.

The Act defines a public beach as "extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained since time immemorial, as recognized in law and custom." A division now occurs that is different from the law in states already discussed: the "wet beach" is the intertidal region and the "dry beach" is the area from mean high tide to the vegetation line, which is the extreme seaward boundary of natural vegetation which spreads continuously inward. The state owns the wet beach, while the dry beach is usually privately owned through the chain of title dating back to the Republic. The location of the dry and wet beaches, of course, changes both through slow, accretive change and swift, avulsive change due primarily to hurricane-induced tides on the Texas coast.

Actual hurricane-caused avulsion resulted in litigation when Ms. Severance's house was moved from behind the vegetation line to the midst of the dry beach. The state agency tasked

with managing public lands sent notices to the plaintiff, among other affected homeowners, that their homes now obstructed the public's right to access the beach and must be taken down (although there have been government funds set aside to help mitigate this cost; in a side development, the entitlement of these funds to Severance has been contested in this case, although this issue lies outside the scope of this paper).

The Texas Supreme Court unsettled what was commonly considered settled case law when it held in *Severance v. Patterson*, 2010 WL 4371438 (Tex.), 54 Tex. Sup. Ct. J. 172, *rehearing granted*, that while property owners whose homes ended up on the wet beach were out of luck and had their title divested to the state, the analysis was not the same for those owners now living on the dry beach. As actual use of the easement by the public had to be established by proof under either the common law or the Act, of course there was no established public use of the **new** dry beach. The court does not clearly explain the difference in approaches to the two kinds of beach. It notes that in several states, the title (although perhaps not the right to exclude the public) to the wet beach remains with the property owner after its submergence by the ocean. Such a holding would at least be more internally consistent.

The court also distinguishes between sudden avulsive changes to the dry beach, where the public's right to access the beach is now extinguished, and slow erosive changes, which in Texas causes at least six feet of beach to disappear annually. In this latter instance, the public's rights of access and use remain valid over the slightly changed dry beach area (and of course the state still has title to the new wet beach).

Here is the heart of the property rights/takings/boundaries questions we have been exploring. Where do we draw the line, why do we do so, after what natural or manmade event do we have a particular rule of law? Ms. Severance in this case made the convincing (to the court) argument that six-feet annual erosion was one sort of change to her property and the court recognized that proof of a public easement and annual litigation of its extent is impractical. On the other hand, a single event that reduced the dry beach by 150 feet unfairly, in her opinion, cut her property by that amount and put her house in, literally, no-man's land. One might feel sympathetic and rule for her based upon the seeming inequity and unfairness she claimed had occurred.

The court's opinion clearly states the State must prove an easement by the public's prior use of the newly created dry beach, which would appear ordinarily to be an impossible task and would endanger public rights regarding new manmade beaches due to re-nourishment; in fact, the state agency in charge of public lands halted a planned re-nourishment project due to start shortly after the court's original opinion was issued. Here, unlike in the Florida case, the property owners do retain the right to have oceanfront property even when sudden avulsion occurs.

The property owners including Ms. Severance had taken ownership of their parcels with prior notice from the state land office about the danger that changes to the vegetation line, either through sudden or gradual causes, could have on their property value and shape. At the time at least four different Texas courts of appeal had clearly recognized that public easements would in fact "roll" with any type of change to the dry beach. The owners, at least at this point, appeared to hit the jackpot and retained the right to exclude the public from the dry beach despite the prior

case law and notice. But a big caveat is in order—the court has withdrawn its original opinion on the State's motion for rehearing and held oral argument last year

In its last footnote, the court states that "we have not addressed in this opinion state police power, nuisance or other remedies that may authorize the government to act in the interests of the health, safety and welfare of the public." Thus, if the holding survives the motion for rehearing, we may still have *Lucas*-derived arguments coming to support the state's attempt to prevent and remove structures from the land in front of the vegetation line.

The dissent in *Severance* points out the century-long use of the beach, the entire beach from the water to the vegetation line, as the only "road" for the public to traverse the western half of Galveston Island in order to reach the ferry across San Luis Pass to the Texas mainland from 1836 until 1956 when a road was built further inland. The dissent questions how the court can acknowledge easements defined by natural boundaries are dynamic yet not let them "roll." It questions how erosion and storm-related changes can be distinguished in a meaningful way. It points out the vegetation line, although changeable, is far more determinable than the mean low tide and high tide line (the latter of which can further be subdivided if using just one or both of the daily high tides). It questions how one can freeze the easement to use the beach when one can't freeze the beach. Easements, especially those along waterways, must shift to maintain the essence of their existence, otherwise they would be useless (as indeed the easement here to use the beach has become to be). Even boundaries between different states, even if that be the mighty Mississippi River, are subject to change in accordance with natural shifts of the river. *See Louisiana v. Mississippi*, 516 U.S. 22 (1995). A public easement on a beach cannot be fixed and definite, by definition.

The dissent sums up the obstacles Severance faces in convincing the court to rule for her. Prior notice that she faced rolling easements; unchallenged case law supporting rolling easements that was clearly background common law (of the favored judicial type!) allowed by *Lucas* as an exception to regulatory taking; existence of a structure on the beach as a nuisance, again as allowed by *Lucas*; and actual, continuous use by the public up to the vegetation line. Finally, the dissent points out the unique nature of the ocean and the beaches fronting it, affected as they are so dramatically by hurricanes and tropical storms (Galveston Island's coast has been hit 75 times at a minimum since 1850). When these occur, it is certainly not the state acting to take private property, and if it was, why doesn't submergence of a house by the surf itself constitute a taking? Unlike the case of rivers, where a new definable watercourse exists between obvious banks after a course change, on the coast the old beach is gone forever, so perhaps avulsion rules must be specially crafted for the oceanfront.

Coming full circle, the dissent points out that South Carolina stopped using a fixed line and instituted rolling easements in order to avoid takings claims after *Lucas*! The reach of *Lucas* has never extended far because of the unique devaluation finding in that case that has not reoccurred very often. *Severance* presents a case whose holding has already done damage to beach preservation efforts and whose reach could be broad indeed in years to come.

Beach law over the World

A recent study comparing American takings law with other countries noted the wide range of protection, or non-protection, of property owners' rights against government regulation. *See Takings International: A Comparative Perspective on Land Use Regulations* by Rachelle Alterman. Traditionally, European states have seen property regulation as a right by the state *imperium*, something to be shared by the citizens of each nation as a communal responsibility; furthermore, the European Union has excepted property law from most of its existing or proposed constitutions as a strictly national issue. Nonetheless, there are property rights' groups gaining ground and influence, for example in France (perhaps in response to the expropriation of coastal private property through the Barnier Law enacted in 1995), and they may look to their American counterparts for guidance in the future. Furthermore, some countries with coastal regions such as Poland, Germany, Sweden, and the Netherlands, as well as Israel outside the continent, are fairly generous with extending protections to property owners. Canada, Australia, the UK, France, or Greece do not extend the same rights, but even there, aggressive regulation to protect the coasts may run up against the same issues discussed in this paper earlier, if in different legal terms particular to those jurisprudential systems.

In *Living with coastal erosion in Europe*, published in 2004 by the Directorate General Environment of the European Commission, several strategies to prevent this harm were mentioned, one of which may involve *Stop the* Beach-type legal challenges, namely, moving the existing lines of coastal defense seaward, which must involve significant land reclamation. This strategy was implemented in Koge Bay, Denmark, where however the private property owners are responsible for erosion of their parcels (beach re-nourishment was also performed in Chatelaillon, France). In fact, the paper points out government strategies of defense may differ depending upon the locus of responsibility for protection, with Germany, Poland, and to a more limited degree the Baltic states having the government responsible and several Scandinavian countries where that is not the case. Perhaps the issue of ownership of the re-nourished beach, dunes, and other installed vegetation will come into play.

In the Netherlands, the "move seaward" approach has been used to protect Rotterdam Harbor. The paper lauds Holland as the world leader in integrated coastal management policies (in fact, a Dutch company was approached to help protect the Galveston, Texas coast in the past few years). The Dutch defenses are, according to the paper, virtually indestructible. The same cannot be said for English coastal defenses, where often a retreat of the defenses landward has been implemented. The *Severance* issues may arise in these situations.

Both drought and flooding may occur more frequently in the future due to climate change, which may bring great changes to properties bordering the sea and institute legal challenges such as the ones described in this paper. In the Caribbean, continued avulsive changes to the beaches through hurricane damage also provides a future of possible litigation.

Conclusion

Lucas has been limited in its scope over the last 20 years, but some attempted to broaden the application of its essence when regulations purportedly affected property values by **less** than 100 percent. Since the Supreme Court decision was an interpretation of the federal constitutional ceiling imposed on the states, individual state legislatures were free to pass more restrictive laws. Most efforts were defeated; however, in Oregon and Arizona, initiatives were passed by the voters that enacted tough takings restrictions generally requiring compensation or invalidation of many regulations. The effect in Oregon was so overwhelming that after only three years a new initiative effectively gutted most of the original initiative's provisions, eliminating entirely nonresidential claims for compensation.

Stop the Beach delved into the exciting field of judicial takings but otherwise was a mundane example of background state law allowing regulation of ownership consistent with it. (Nonetheless, it was the first takings case in the U.S. Supreme Court in 5 years at the time.)

Severance lives on, Texans waiting with baited breaths. The sands of Galveston Island were my haunt as a young boy. The dramatic damage and destruction wrought by gradual and sudden change is close to my heart. For much of the world, their hearts may not be so different.