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Constitutional Taking Doctrine – Did *Lucas* Really Make a Difference?

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I. Introduction

In 1986, David Lucas invested in oceanfront property on the Isle of Palms at a cost of $975,000. In 1988, South Carolina enacted the Beachfront Management Act,[1] and a "baseline" erosion zone was established at the most landward points of erosion during the prior forty years. From this baseline, the council established a setback line landward of the baseline by a distance of forty times the annual erosion rate, but not less than twenty feet. The Lucas property was inside this setback line, rendering it worthless, and setting in motion his claim for just compensation for a taking under the Fifth Amendment of the U.S. Constitution.[2]

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1. *See* S.C. CODE ANN. § 48-39-360 (Law Co-op. Supp. 1989) [hereinafter South Carolina Beachfront Management Act of 1988].

2. *See States: Land Use Regulation: Compensation of Private Property Owner*, 60 U.S.L.W. 3609 (Mar. 10, 1992) [hereinafter *States: Land Use Regulation*].

David Lucas was successful in his claim, but at a cost of four years and two million dollars; $500,000 of which was in payment of attorneys' fees required to claim his victory.[3] The expense of enforcing a takings claim and the standard that "all economically beneficial use of land" must be taken from the property before compensation can be awarded suggests that the Supreme Court may have provided takings jurisprudence for only the narrowest of cases.[4]

This paper surveys the U.S. Supreme Court decision in *Lucas v. South Carolina Coastal Commission*[5] and examines the impact that this decision has had on private property rights. The paper also reviews the Supreme Court history of Commerce Clause jurisprudence and takings jurisprudence – those cases which provided precedent for the *Lucas* opinion. The paper then concludes with observations on the impact that the *Lucas* decision has had other cases and on the private lives of citizens, and whether or not the decision really had a significant impact on takings jurisprudence.

II. Commerce Clause History in the Supreme Court

The Commerce Clause is the Constitutional basis for Congressional authority over navigable waterways, such as wetlands.[6] In a landmark Supreme Court case, *Gibbons v. Ogden,*[7] Justice Marshall defined "commerce among the States" as "commerce which concerns more states than one," which includes any activities which "affect the states generally."[8] In that case, the Supreme Court held that the state could not control navigable routes of trade and commerce within its borders because the ultimate effect would be a restraint of free commerce among the states.[9] This established federal control of navigable waterways.

But this power was not unlimited. The Commerce Clause granted power to Congress, but the dormant Commerce Clause granted all powers to the states that were not specifically enumer-

3. *See* Max Kidalov, *H. 3591: Affirming Traditional Principles of Protection of Private Property and the Environment*, 6 S.C. ENVTL. L.J. 295, 296-97 (1997).

4. *See* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1015, 1018 (1992).

5. *See generally* 505 U.S. 1003 (1992).

6. *See* U.S. CONST. art. I, § 8, cl. 3.

7. *See generally* 22 U.S. 1 (1824).

8. *Id.* at 194-95.

9. *See id.* at 210-11.

ated as powers of Congress.[10] The first case to examine the dormant commerce clause is *Willson v. Black Bird Creek Marsh Co.*,[11] wherein Chief Justice Marshall held that a state has power to allow a dam to be built across a navigable creek flowing into the Delaware River, based upon its importance to flood control and public health.[12] This dormant Commerce Clause decision asserted a right that is not explicitly authorized by the Constitution. The counsel for the state, William Wirt, argued against navigability by referring to the creek as, "one of those sluggish, reptile streams that do not run but creep, and which wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes."[13] He was arguing against navigability which would make this stream subject to state control as well as arguing the public health aspect—a power of the states.[14] Although the court did find the creek navigable, the state succeeded on the public health issue, establishing a source of state power in the dormant commerce clause.[15]

In addition to the plenary power of Congress concerning commerce, the Federal Water Pollution Control Act of 1972, commonly known as the Clean Water Act (CWA), specifically states that the goal of the Act is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[16] The basis for this law is the "Commerce Clause" authority exercised by Congress.

The recent case, *United States v. Lopez,*[17] created a limitation on the plenary power of Congress through the Commerce Clause.[18] However, at a time when Congress enjoyed almost unlimited plenary power through the Commerce Clause, the reach of the CWA was extended to delegate power to the federal government "to restore and maintain the chemical, physical and biologi-

10. *See, e.g.*, Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (Brennan, J., dissenting) The Supreme Court has relied on the Commerce Clause, as supported by the Supremacy Clause, to infer the policing power of the dormant Commerce Clause. *See id. See also* U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *and* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

11. *See generally* 27 U.S. 245 (1829).

12. *See id.* at 252.

13. *Id.* at 249.

14. *See id.*

15. *See id.* at 252.

16. Clean Water Act (CWA) § 101(a), 33 U.S.C. § 1251(a) (1994).

17. *See* 514 U.S. 549 (1995).

18. *See id.* at 600.

cal integrity of the Nation's waters,"[19] preempting states' control over water pollution. As the delegation of this broad power grew to include wetlands,[20] conflicts with property law, not heretofore encountered, arose.

III. History of Constitutional Taking in the Supreme Court

To understand the present takings doctrine, it is helpful to examine the case law that laid the groundwork for regulatory takings. One of the earliest cases to concern a Fifth Amendment takings claim through the implementation of an environmental statute was the 1894 decision of *Lawton v. Steele*.[21] A New York statute provided for the confiscation of "fishing nets and other paraphernalia," and further provided that the game warden should destroy the nets in order to prevent over-fishing in particular bodies of water.[22] The game warden did confiscate and destroy some nets.[23] The fishermen, finding their nets destroyed, brought a takings action against the state authority. The court held (with three justices dissenting) that "the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so; a good deal must be left to its discretion in that regard,"[24] and found no taking. Thereafter, environmental regulation, rooted in theories of nuisance, enjoyed favor, with the broadest discretion being given to the legislatures to decide what was a nuisance.

Much later, the Supreme Court, in the 1922 landmark case of *Pennsylvania Coal Co. v. Mahon,*[25] established that compensation must be provided when government regulation "goes too far," and in so doing, diminishes the value of private property.[26] Six years later, however, the Supreme Court decided in *Nectow v. City of Cambridge* that there was no taking where the regulation was reasonably necessary to the effectuation of a substantial public

19. 33 U.S.C. § 1251(a).

20. *See* 33 C.F.R. § 328.3(a)(3) (1998). The term "wetlands" is not found in the original CWA, and only through administrative rulemaking did wetlands become regulated through the CWA. The term waters of the United States is defined to include, "All other waters such as intrastate lakes, rivers, streams [including intermittent streams], mud flats, *wetlands,* sloughs, prairie potholes, wet meadows, play lakes, or natural ponds. . . ." *Id.* (emphasis added).

21. *See generally* 152 U.S. 133 (1894).

22. *Id.* at 135.

23. *See id.* at 134.

24. *See id.* at 140.

25. *See generally* 260 U.S. 393, 415 (1922).

26. *See id.* at 415.

purpose.[27] Fifty years later, the "goes too far" standard was reexamined in *Penn Central Transportation Co. v. New York City*,[28] and an additional test was developed. The Supreme Court required the application of this test to the taking in order to determine the extent to which the regulation interfered with distinct "investment-backed expectations."[29] Two years later, the Supreme Court did not apply the "investment-backed expectations" criteria established in *Penn Central* to *Agins v. City of Tiburon*.[30] Instead, the Court applied a type of corollary to *Penn Central* – that the regulation is not a taking where the governmental action "substantially advances legitimate state interests."[31] The next year, the Supreme Court applied the *Agins* test in *San Diego Gas v. City of San Diego*,[32] and the "investment-backed expectations" test was not part of the criteria. In foresight, Justice Brennan, in his dissent, argued for extending the Takings Clause to regulations that result in the "destruction of the use and enjoyment of private property."[33]

The use of "character of the government action" is a test applied to the wetlands permit denial process, suggested in the landmark case *Pennsylvania Coal* in an opinion by Justice Holmes, which made the government action prong the basis of all takings analyses, with the standard that a taking had been effected when government action "goes too far."[34] This test, first articulated in *Penn Central*, was the progenitor of the "substantially advances legitimate state interests" test articulated two years later in *Agins*.[35] The existence of these tests led to the statement by the United States Environmental Protection Agency - in a memorandum from the General Counsel to the Administrator - that the denial of a CWA Section 404 wetlands permit "is a legiti-

27. *See* 277 U.S. 183 (1928).

28. 438 U.S. 104, 130 (1978).

29. *See id.* at 138 Using these criteria, the court found there was no taking because the public purpose served was sufficient to allow the government action without compensation, and the ability of Penn Central Transportation Company to use its property to build in other ways did not create a major negative impact on the company or interfere with its "investment-backed expectations." *See generally id.*

30. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980).

31. *Id.* at 260.

32. *See generally* San Diego Gas v. City of San Diego, 450 U.S. 621, 628 (1981).

33. *Id.* at 651-52 (Brennan, J., dissenting).

34. *Pennsylvania Coal*, 260 U.S. at 416.

35. *Agins*, 447 U.S. at 260.

mate state interest, which Congress has recognized under Section 404, and which the permit denial substantially advanced."[36]

The Supreme Court seemed ready to address the issues of regulatory takings (beyond physical takings), and in a landmark decision, only six years after *San Diego Gas*, the compensation for regulatory takings was revisited in *First Evangelical Lutheran Church v. Los Angeles*.[37] The Supreme Court recognized that even a temporary taking can be a compensable one under the Fifth Amendment. The compensation remedy was held to be fair value for the use of the property during that period.[38] Again, the movement away from physical takings was supported by the recognition that a taking could still occur without permanency. That same year, in *Nollan v. California Coastal Commission*,[39] the Supreme Court heightened the standard for governmental action in a compensable taking to include a requirement for an "essential nexus" between the legitimate state interest and the state action.[40]

Five years later, in 1992, in *Lucas v. South Carolina Coastal Commission*, the Supreme Court for the first time found that an environmental regulation had effected a compensable taking when the governmental action essentially removed all value from the property.[41] The *Lucas* decision, while applying to only a very narrow set of cases where *all* value was taken through regulation, did not itself represent a major change. However, this *Lucas* decision provided the background for takings jurisprudence which would open the door to the concept of partial takings. Prior to the *Lucas* case there had been essentially no discussion of situations where the taking action was incomplete or partial in terms of its impact on the value of the property in question.

IV. *Lucas v. South Carolina Coastal Council*

What led to the rise of *Lucas* to the U.S. Supreme Court?

In South Carolina, the issue of the 1988 Beachfront Management Act was creating both administrative and judicial problems

36. Memorandum from E. Donald Elliott, Assistant Administrator, General Counsel, to William Reilly, Administrator (November 23, 1990) (on file with author). (regarding takings issues raised by Congressional letters concerning wetlands cases).

37. *See* First Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987).

38. *See id.* at 314.

39. *See generally* 483 U.S. 825, 834 (1987).

40. *See id.* at 834.

41. *See* 505 U.S. at 1003, 1015, 1018.

for the state.[42] One property owner brought a takings action based on the denial of a permit to build a bulkhead on his beachfront property, and there was no provision for such permits under the Act.[43] In *Beard v. South Carolina Coastal Council*,[44] the court rejected the Beards' takings claim, basing its ruling on a "substantial and legitimate state interest."[45] The Beards did not appeal. In *Esposito v. South Carolina Coastal Council*,[46] the court again denied a takings claim which had been based on the denial of a permit for a bulkhead.[47] The legislature responded and amended the Act to allow a "special permit" for such applications.[48] The Supreme Court may have been influenced to take the *Lucas* case as the most egregious of the takings cases; however, the petition for *certiorari* filed on behalf of Esposito during the same session was denied.[49] Perhaps the presence of more than one takings case challenging the South Carolina law served to heighten the importance of the Court's decision regarding *Lucas*. Clearly, there was trouble with the South Carolina statute.

The *Lucas* case.

The facts in the *Lucas* case are unusual, in that after the property had been purchased by David Lucas, the South Carolina Coastal Council created a new baseline for coastal protection landward of the Lucas' properties, making construction illegal. Therefore, when David Lucas purchased his lots on the Isle of Palms, he clearly had "investment-backed expectations" and clearly intended to construct dwellings on the property.[50] There was literally nothing David Lucas could do with his property, even far short of his investment-backed expectations. The transcript shows that the evidence demonstrated there was "no value" remaining in the property.[51] When Camden Lewis, the attorney for David Lucas, was arguing the case before the Supreme Court, Jus-

42. *See* South Carolina Beachfront Management Act of 1988, *supra* note 1.

43. *See* Beard v. South Carolina Coastal Council, 403 S.E.2d 620, 621 n.1 (S.C. 1991) (the court determined that the Beards' application, based on its submission date, was governed under the 1977 Coastal Management Act, S.C. CODE ANN. § 40-39 (Law Co-op 1977)).

44. *See id.* at 622.

45. *See id.*

46. *See generally* 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992).

47. *See id.* at 168.

48. S.C. CODE ANN. § 48-39-290(D)(1) (Law Co-op, Supp. 1990).

49. *See Esposito,* 505 U.S. 1219.

50. *See* Lucas v. South Carolina Coastal Comm'n, 404 S.E.2d 895, 896 (S.C. 1991).

51. Lucas v. South Carolina Costal Comm'n, 404 S.E.2d 895 (S.C. 1991) (No. 89 CP 10 0066); Record at 67.

tice Blackmun asked, "Are you saying Mr. Lucas' land was 'completely worthless?'"[52] He then added, "Would you give it to me?"[53] To that, Mr. Lewis replied, "Yes, if the taxes were paid on it."[54] In contrast, *Mugler v. Kansas*[55] was distinguishable because not all uses were taken by the regulation, and the value of the property was more than zero.[56] The distinction can be made that *Lucas* applies to property which loses all value, and particularly to property which lost its value *after* purchase of the property. The universe of situations to which this would apply is, as noted above, relatively small.

What did *Lucas* add to the takings jurisprudence?

Some scholars have observed that the *Lucas* decision is "enigmatic."[57] Other writers have found *Lucas* to be "signifying nothing."[58] But *Lucas* was not "signifying nothing" as some authors have noted, although its significance may be different than expected. As a result of *Lucas*, the Federal Circuits have relied upon this precedent in the establishment of subsequent takings jurisprudence for partial takings—those cases, which do not result in a taking of all value from the land. Further, the Supreme Court has chosen not to review those cases on *certiorari*, allowing the Federal Circuit's analysis to stand, thereby leaving partial takings as a fundamental doctrine for regulators.

The doctrine of partial takings arose just two years after *Lucas* and was the precedent the U.S. Court of Appeals for the Federal Circuit needed to address the issues in *Florida Rock Industries v. United States*.[59] The issue of the denial of a CWA Section 404 permit for private property resulted in the finding of a *partial* taking. Through the application of the Takings Clause, governmental action was limited by requiring compensation for not only full takings as in *Lucas*, but also for a partial diminution of value resulting in a partial taking. The Supreme Court denied *certiorari* upholding compensation for partial takings for wetlands

52. *States: Land Use Regulation*, *supra* note 2.

53. *Id.*

54. *Id.*

55. *See generally* 123 U.S. 623 (1887).

56. *See id.*

57. Joseph Sax, Lucas and the Takings Saga in the U.S. Supreme Court, Presentation at the University of California at Los Angeles School of Public Policy and School of Law (Dec. 3, 1992).

58. Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439 (1993).

59. *See generally* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).

preservation through the CWA. *Loveladies Harbor v. United States*,[60] decided later the same year, further sharpened the test for partial takings in another Section 404 permit denial.[61]

Challenges by private property owners for a denial of a Section 404 permit have also been based on the due process clause of the Fifth Amendment of the U.S. Constitution. In *Loveladies Harbor Inc. v. Baldwin*,[62] a due process argument was made, but the court held that the administrative process in use was satisfactory.[63] The due process prong of a takings analysis is still important, but alone, it cannot result in the finding of a compensable taking. The remedy for a due process finding is invalidation of the regulation and damages; whereas the remedy for a compensable taking is compensation.[64] No due process challenges have been successful in finding that the denial of a wetlands permit was unconstitutional (without also finding a compensable taking). Applying this reasoning in *Florida Rock*, Judge Plager found that "the Supreme Court's decision in *First English Evangelical Lutheran Church v. Los Angeles*, makes clear that compensation for loss, not invalidation of an offending regulation, is the remedy for violation of the takings clause."[65]

V. Subsequent Cases and the Effect of *Lucas*

Jurisdiction for Constitutional takings cases is complex and may have limited the challenges or applications of *Lucas*. A property owner that is denied a wetlands permit under Section 404 of the CWA may seek judicial review of the permit decision in U.S. District Court. However, if that same owner wants to file a takings claim, it can be done in the U.S. Court of Federal Claims.[66] The U.S. Court of Federal Claims has exclusive jurisdiction in cases involving more than $10,000, and shares concurrent jurisdiction with U.S. District Courts for takings cases not exceeding $10,000.[67] Judicial review of a permit denial in District Court and

60. *See generally* 28 F.3d 1171 (Fed. Cir. 1994).

61. *See id.* at 1180.

62. *See generally* Loveladies Harbor Inc. v. Baldwin, Civil No. 82-1948, 1984 U.S. Dist. LEXIS 18716 (D.N.J. March 12, 1984).

63. *See id.*

64. *See, e.g.*, John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993).

65. 18 F.3d at 1570; *see also* James L. Huffman, *Judge Plager's 'Sea Change' in Regulatory Takings Law*, 6 FORDHAM ENVTL. L.J. 597 (1995).

66. *See* 28 U.S.C. § 1491 (1994).

67. *See id.* § 1346.

a takings claim in the Federal Circuit are permissible at the same time.[68] However, if this procedure is followed, the Federal Circuit will likely stay the action pending the resolution of the challenge to the permit denial.[69]

One writer examined the impact of *Lucas* on state courts' decisions through a LEXIS search from the time of the decision, 1992, to January 15, 1995.[70] The result demonstrated that surprisingly few decisions even mentioned the *Lucas* case. For all states, eighty cases referred to the *Lucas* decision. Of those, fifty-seven cases discussed the *Lucas* case, as opposed to merely citing the case without discussing it. In all eighty cases, only three relied on *Lucas* in finding a regulatory taking.[71] However, upon review of these cases, one of them was reversed by the Colorado Supreme Court.[72] A review of all state cases citing *Lucas* through June 12, 2000, totaled 335. Since 1995, the impact of *Lucas* in state courts has increased slightly, being cited 177 times from 1996 through June 12, 2000, with fifty of those cases citing *Lucas* as a distinguishing case or in the dissent.

Lucas has also been mentioned in other novel applications because of the regulatory takings theory represented. The variety of cases have included rent control, quarry regulation, permit denials for small lots, sea wall construction, wetland and floodplain building, and conditional use permit cases. Some state courts do not give *Lucas* any effect, finding that a state law applies or that the case fits under Justice Scalia's exceptions for nuisance.[73]

Another decision came before the Federal Circuit, which considered the taking of a reversionary interest in property through the "rails-to-trails" program, which sought to preserve otherwise abandoned railroad easements for development into trails by tech-

68. *See* Loveladies Harbor, Inc. v. United States, 27 F.3d 1545; *see also* Gunn v. United States Dep't of Agric., 118 F.3d 1233 (8th Cir. 1997).

69. *See* Creppel v. United States, 41 F.3d 627, 633 (Fed. Cir. 1994).

70. *See* Ronald H. Rosenberg, *The Non-Impact of The United States Supreme Court Regulatory Takings Cases on the State Courts: Does The Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L. J. 523, 537-541 (1995).

71. *See, e.g.,* Moroney v. Mayor & City Council, 633 A.2d 1045 (N.J. Super. Ct. App. Div. 1993); People *ex rel.* Dep't of Transp. v. Diversified Props. Co. III, 17 Cal. Rptr. 2d 676 (Cal. Ct. App. 1993); The Mill v. State Dep't of Health, 868 P.2d 1099 (Colo. Ct. App. 1993).

72. *See* State Dep't of Health v. The Mill, 887 P.2d 993 (Colo. 1994).

73. *See, e.g.,* Stevens v. City of Cannon Beach, 835 P.2d 940 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (customary beach rights were at issue where the city denied the owner permission to build a sea wall because the public beach access existed before he bought the property).

nically suspending the reversionary interest of the property owner.[74] In *Presault v. United* States[75] the court vacated an earlier decision and found in favor of the government in the "rails-to-trails" program. Thereafter, the U.S. Court of Appeals for the Federal Circuit reversed the summary judgment against the Presaults and remanded.[76] *Lucas* was cited in the concurrence for the proposition that state law must be examined because it is the state law "to which the Fifth Amendment rights attach."[77]

Lucas has often been distinguished on the basis of the total diminution in value which occurred in the taking of all use of the coastal lots. It was thought that the rare occasion for a total diminution would render *Lucas* fairly inconsequential. Yet in a recent case, *Palm Beach Isle Assoc. v. United* States,[78] a total diminution in value was found where the subject parcels lost all value as a result of the denial of a CWA Section 404 permit.[79] In fact, the analysis of the taking was clarified where the court opined that the investment-backed expectation was irrelevant when the denial had resulted in this total diminution.[80]

What has happened to David Lucas?

David Lucas received compensation of $850,000 for the two lots plus $725,000 in interest, attorney's fees, and costs totaling $1.575 million. South Carolina then resold the lots to a construction company for $785,000.[81]

David Lucas founded the Council on Property Rights, an organization with the goal of promoting the Florida Property Rights Act, a state law which protects private property rights,[82] and the passage of a South Carolina property rights bill.[83] His objective was to make the compensation process more accessible to any citi-

74. *See* National Trails System Act Amendments of 1983, 16 U.S.C. § 1247(a) (1994).

75. 66 F.3d 1167 (Fed. Cir. 1995), *vacated on reh'g en banc*, 100 F.3d 1525 (Fed. Cir. 1996).

76. The majority opinion was written by Judge S. Jay Plager, joined by Judges Rich, Newman and Mayer; with a concurring opinion by Judge Rader joined by Judge Lourie; and a dissenting opinion by Judge Clevenger, joined by Judges Michel and Schall. *See generally id.*

77. 100 F.3d at 1556.

78. 208 F.3d 1374 (Fed. Cir. 2000).

79. *See id.* at 1378-79.

80. *See id.* at 1381.

81. *See* Rosenberg, *supra* note 70, at 545 n.112.

82. *See* Kidalov, *supra* note 3, at 296.

83. *See* H.R. 3591, 112th Leg., 1st Sess. (S.C. 1997). The bill passed by a roll call vote of seventy-eight yeas to thirty-five nays. FINAL DIGEST OF SENATE AND HOUSE BILLS AND RESOLUTION, 112th Leg., 1st Sess., at 64 (1997).

zen, not just those who were wealthy enough to fund a war chest adequately large enough to assert their property rights. Mr. Lucas has expressed the opinion that states will ignore the Supreme Court ruling of his case without corresponding state property rights legislation.[84]

In 1994, the National Wildlife Federation sponsored a survey of national registered voters who voted in Congressional elections.[85] In that survey 1,201 respondents were asked whether property owners should be compensated for takings resulting from environmental regulations. Although the question was styled in a way most favorable to the policy position of the sponsor of the survey,[86] thirty-four percent thought that property owners should be compensated, while fifty-six percent thought that property owners should *not* be compensated.[87]

VI. Conclusion

Perhaps the *Lucas* case was heard by the U.S. Supreme Court because it appeared that the regulatory takings actions were so egregious with this particular South Carolina statute (because it provided for no exceptions or a permitting system) that the resulting controversy had to be resolved. The impact of the case has resulted in the basis for a constitutional takings doctrine that provides the needed Supreme Court guidance on the issue. The hopes of opponents of the *Lucas* decision that it would apply only to the narrowest of cases where all value was taken by the regulation, while true in a direct sense, did not account for the profound indirect impacts of *Lucas*. The reliance upon *Lucas* for the establishment of partial takings in opinions by the Federal Circuit, and the

84. *See* David H. Lucas, South Carolina Policy Council Capital Comment No. 46, *It Could Happen to You* (Sept. 1994).

85. *See* Peter D. Hart, A Post Election Voter Survey (Dec. 1-4, 1994) (unpublished research prepared for the Nat'l Wildlife Fed'n, on file with author).

86. *See id.* The question was read on the telephone as follows:

> Here is the final pair of statements. Please tell me which one comes closer to your own opinion. Statement A: Some people say that the government and taxpayers should pay financial compensation to property owners – including developers and homeowners – if environmental laws restrict their constitutional right to do anything they want with their land. Statement B: Other people say that the government and taxpayers should not pay financial compensation to property owners – including developers and homeowners – if environmental laws restrict what they do with their land, because people should not be paid to obey laws that are designed to protect everyone's health and neighborhoods.

Id.

87. *See id.*

apparent subsequent reluctance by the Supreme Court to review the Federal Circuit decisions, or the reluctance of litigants to seek adjudication beyond the Federal Circuit, suggests that the Federal Circuit may be the *ipso facto* court of last resort for takings – at least for now.

Legislation has been proposed in Congress to address compensation to landowners whose land values have been diminished by regulation. In March 1995, the U.S. House of Representatives voted 277 to 148 on H.R. 9, a bill requiring compensation for landowners where property values were reduced by twenty percent or more. Other proposals required as much as a forty percent reduction in value to gain compensation, but all proposals ultimately failed to pass the Congress. No legislation introduced since 1996 achieved the momentum as did that of H.R. 9. Several states did consider takings legislation and three states - Florida, Louisiana and Texas - have enacted such legislation. Other states have considered takings issues by voter referenda, but so far such efforts have failed.[88] Given the narrow holding in *Lucas*, the effects on policy and legislation at the state level are nonetheless significant. Since *Lucas*, the state must consider the ultimate cost of denying a landowner a CWA permit. In addition, the development of partial takings doctrines, as well as those based on reversionary interest takings, clearly relies on a *Lucas* analysis. The Federal Circuit's role as the court of last resort for federal takings actions has been an outgrowth of the *Lucas* decision, and it will determine which cases are heard in the foreseeable future.

88. Arizona (1994) and Washington (1995).