SUPREME COURT OF THE UNITED STATES

No. 91–453

DAVID H. LUCAS, PETITIONER *v.* SOUTH CAROLINA COASTAL COUNCIL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

[June 29, 1992]

Statement of JUSTICE SOUTER.

I would dismiss the writ of certiorari in this case as having been granted improvidently. After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests.

The petition for review was granted on the assumption that the state by regulation had deprived the owner of his entire economic interest in the subject property. Such was the state trial court's conclusion, which the state supreme court did not review. It is apparent now that in light of our prior cases, see, *e.g.*, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 493–502 (1987); *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979); *Penn Central Transportation Corp.* v. *New York City*, 438 U. S. 104, 130–131 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45–50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept

which the Court describes, see *ante*, at 11 n. 6, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts §821B (1979) (public nuisance); *id.*, §822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §90 (5th ed. 1984) (public nuisances usually remedied by criminal prosecution or abatement), *id.*, §89 (private nuisances usually remedied by damages, injunction or abatement); see also, *e.g.*, *Mugler* v. *Kansas*, 123 U. S. 623, 668–669 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests"); *Hadacheck* v.

Sebastian, 239 U. S. 394, 412 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to create a nuisance, such that its sole economic value must presuppose the right to occupy it for such seriously noxious activity.

The upshot is that the issue of what constitutes a total deprivation is being addressed by indirection, and with uncertain results, in the Court's treatment of defenses to compensation claims. While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference. See, *e.g.*, *Welsh* v. *Wisconsin*, 466 U. S. 740,
755 (1984) (Burger, C.J.); *United States* v. *Shannon*, 342 U. S. 288, 294 (1952) (Frankfurter, J.).