1992 WL 12006589 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

David H. **LUCAS**, Petitioner,
v.
SOUTH CAROLINA COASTAL COUNCIL, Respondent.

No. 91-453.
October Term, 1991.
January 2, 1992.

On Writ Of Certiorari To The **South Carolina** Supreme Court

Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner

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*1 INTEREST OF THE AMICUS

This brief is submitted by the **Institute** for Justice as amicus curiae. We have secured the consent of both parties to the filing of this brief and letters of consent have been filed with the clerk. The **Institute** supports the position of the petitioner in this case and urges reversal of the decision of the **South Carolina** Supreme Court.

The **Institute** for Justice is a non-profit, public interest legal foundation litigating and educating in the areas of economic liberty, property rights, and the First Amendment. One of the pillars of the **Institute's** program is *2 securing full constitutional protection for private property rights threatened by government regulation.

The instant case could have a profound impact on the regulation of property throughout the country. Therefore, it directly implicates the **Institute's** mission. Furthermore, the **Institute** believes that the analysis of a noted authority on property and takings law contained in this brief will assist the Court in addressing the constitutional issues involved in the case.

CONDENSED STATEMENT OF FACTS AND SUMMARY OF PROCEEDINGS BELOW

The complete statement of facts and the history of this litigation have already been presented by both parties. This brief summary of them is designed to highlight those facts and legal determinations that we believe are critical to the proper understanding and disposition of the case.

The plaintiff, David H. **Lucas**, purchased two undeveloped waterfront lots, Numbers 22 and 24, in the Wild Dunes development on the Isle of the Palms in Charleston County, **South Carolina** in December, 1986, paying $455,000 for lot 22 and $500,000 for lot 24. **Lucas** borrowed $900,000 toward the purchase price from the North Carolina National Bank, secured by a mortgage on the two lots. At the time of the purchase both lots were zoned for single-family home development, and a similar home had

at that time been built on lot 23, located between the two **Lucas** lots, and on other similar lots along the beach. ***3** About eighteen months after purchase, **Lucas**' proposed development of the lots was thwarted by the Beachfront Management Act, S.C. Ann. § 49-39-10 et seq. (1988) (hereinafter BMA), passed by the **South Carolina** legislature on July 1, 1988 (Act 634), and administered by the state's **Coastal Council**. The BMA prohibited all new construction between the beach and certain setback lines. BMA § 280(A). The BMA also prohibited the reconstruction of existing houses that had been destroyed. One of the objects of the statute is to promote a "gradual retreat from the [**coastal**] system over a forty-year period." BMA § 280.

One immediate consequence of the BMA was to permanently deprive **Lucas** of the ability to use the property for its intended purpose, the construction of a single family home. **South Carolina** did not wrest from **Lucas** possession of the land; nor did it deprive him of the power to sell the land, subject of course to the restrictions imposed by the BMA. The statute also allowed **Lucas** to use his property for recreational purposes (picnics and qutings), and to pitch tents or erect other temporary structures on the land. Trial Transcript (hereinafter Tr. Trans.) at 16-25; 91-98. The BMA did not, however, relieve **Lucas** of any potential liabilities of a landowner, or of the taxes he had to pay on the land. **South Carolina** claimed that **Lucas**' two lots retained some residual value because he was allowed to make some limited use of them under the BMA. **Lucas** testified that the lots had negative value because the value of the residual uses was lower than the cost of the liability insurance, and the real estate taxes remained unabated. Tr. Trans. at 31.

***4** The trial judge found that the property had no market value after the imposition of the regulation, and that the regulation worked a "total taking of **Lucas's** two beach front lots." Order of Trial Judge at 130. He found **Lucas** is "entitled under both the State and Federal Constitutions to the payment of just compensation." *Id.* He further concluded that "since the State has totally acquired **Lucas's** property, it is entitled to a deed to the property free and clear of any encumbrances," a total condemnation of the property. *Id.* Accordingly, he ordered the state to pay: (1) compensation equal to the full market value of the lots without the restriction (which he found to be $585,000 per lot), (2) the real estate taxes paid on the property from the time the BMA went into effect, and (3) interest on the mortgage, for a total of $1,232,387.50, plus interest from the date of judgment. *Id.*

The **South Carolina** Supreme Court reversed the decision below and held that the regulations in question did not constitute a taking, even if they did wipe out the entire value of the property in question. ***Lucas*** *v.* ***South Carolina Coastal Council***, 404 S.E.2d 895, 898 (S.C. 1991). In the view of the **South Carolina** Supreme Court, the regulation in question was, as the plaintiff admitted below, a valid exercise of the police power. The Court therefore allowed the state to impose the regulation without compensation. In its view **Lucas** made a fatal concession by acknowledging that the BMA "is properly designed to preserve the extremely valuable resource which is **South Carolina's** beaches." *Id.* at 896. From this, the **South Carolina** Supreme Court held that **Lucas** conceded "the validity of the legislative declaration of its 'findings' and 'policy,' " *id.* at 896, and conceded that "discouraging ***5** new construction in close proximity to the beach/dune area is necessary to prevent great public harm." *Id.* at 898. The Court deemed itself "bound by these uncontested legislative findings." *Id.* It then rejected **Lucas**' contention that so long as the landowner has been deprived of " 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration." *Id.*

In a strong dissenting opinion, Judge Harwell refused to accept the proposition that **South Carolina** could regulate property to "oblivion" and found that while the taking was permissible for a public purpose, it was not designed to prevent any nuisance or noxious activities on the plaintiff's land, and that therefore compensation was required. *Id.* at 906.

SUMMARY OF ARGUMENT

Amicus curiae urges this Court to reverse the decision of the **South Carolina** Supreme Court and to restore the condemnation award made by the trial judge below. In our view, the case should be understood as a standard takings case in which the state has deprived its owner of one of the indispensable attributes of ownership, the ordinary use of the property so owned. In reaching this conclusion, ownership should not be understood simply as the bare possession of a physical object, but as a set of complete and well defined rights over the property. As repeated decisions of this Court have recognized, ownership includes the right to

possession, use, and disposition of the property in question, and that takings can occur ***6** even when the original owner of the property has been left, as here, in undisturbed possession of the land whose use has been regulated.

The massive restrictions on use in this case thus amount to a *prima facie* taking, which the state has to justify *or* provide compensation. In dealing with this question of justification, it is critical to distinguish, as the **South Carolina** Supreme Court did not, between two separate questions of takings jurisprudence: (1) whether the taking was for public use, and (2) whether the taking was justified under the police power. The radically different nature of these two inquiries is well revealed by the consequences that are attached to each. If the state cannot show that a taking is for public use, then it cannot proceed by the eminent domain power, but must (unless its actions be *ultra vires*) proceed by voluntary purchase. But if the public use requirement alone is satisfied, the taking can only go forward if just compensation is paid.

The police power functions in a wholly separate fashion - as a justification for taking the property, or for restricting its use *without* compensation - and can be established only by meeting requirements more stringent than those necessary to establish a public use, namely that the landowner's intended use of the property has caused, or threatens to cause, a nuisance (public or private) which is appropriately neutralized by the land use restriction. Any broader conception of the police power allows the state, as agent of its citizens, to take without compensation property that the citizens themselves would have to purchase from the landowner.

7** The decision of the **South Carolina** Supreme Court is fatally flawed because, far from observing the structural distinction between public use and police power, the Court treated the two different conceptions as identical. **South Carolina** has advanced a large number of justifications for its stringent restriction on land use; some of these go to the protection of the beach against erosion, BMA § 250 (2)-(6). These provisions prevent potential nuisances which, in principle, **South Carolina** should be able to prevent without the payment of compensation. Yet other justifications in the BMA, such as the promotion of tourism, and for the leisure of **South Carolina** citizens, BMA § 250(1)(b),(d), only identify public uses for which **Lucas**' land may be taken with just compensation. **Lucas** conceded below that the BMA amounted to a "laudable goal." ***Lucas, 404 S.E.2d at 896. The court erred by interpreting this statement to be a concession that his planned beachfront home should be treated as a nuisance or other noxious activity that **South Carolina** may restrain without compensation. This error arose from the court's failure to make the proper terminological distinctions.

Once the relevant distinctions become clear, the decision of the **South Carolina** Supreme Court should be reversed, but on a theory that is different from that on which the plaintiff requests relief. In his petition for certiorari, the plaintiff inexplicably disclaims the theory on which the trial judge entered a decision in his favor by insisting: "This petition does not concern the exercise of eminent domain. Petitioner concedes that no permanent physical occupation occurred here." Petition for Certiorari at 5. The absence of the physical occupation only shows that the case raises the issue of a regulatory, or ***8** partial taking, not that takings issues are absent. The massive restriction on land use, whether or not total, amounts to a taking of the property for which compensation is required in the absence of justification. **South Carolina** here has not offered *any* justification to show how the elimination of the construction on this property advances its legitimate end of controlling the erosion of the beachfront, which rests in public hands. **South Carolina** has been prepared to appropriate $10,000,000 to the maintenance of the public beaches. Tr. Trans. at 69. If it wishes to expand the area of undeveloped land, it is free to do so, as long as it pays the owner the market value of the property. It is not sufficient to allow **South Carolina** to regulate because it wants to do so. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon Co.*, 260 U.S. 393, 416 (1922) (per Holmes, J.), quoted by the dissent in ***Lucas***, 404 S.E.2d, at 903.

ARGUMENT

I. ANY RESTRICTION ON THE ORDINARY USE OF PROPERTY IMPOSED BY THE STATE IS A PARTIAL REGULATORY TAKING FOR WHICH COMPENSATION IS REQUIRED UNLESS A POLICE POWER JUSTIFICATION IS ESTABLISHED.

It is well recognized that property constitutes more than permanent physical objects that are the subject of external sensation. Instead private property refers to the complex of rights over a particular thing that the owner of that property enjoys against the entire world. The ***9** ordinary conception of property thus embraces far more than the right to naked possession of real property, and the associated right to exclude all other persons. It embraces the right to make ordinary use of the property in question, and to dispose of it by sale, lease, mortgage or other forms of voluntary exchange. Definitions of this sort have been recognized from every source. The standard dictionary definitions all embrace the three elements of possession, use, and disposition; [1] the definition is part and parcel of the accounts of property that are used by common lawyers [2] and political philosophers [3] and, most critical in the evaluation of takings cases, under the takings clause itself. Thus this Court has written in *United States v. General Motors* as follows:

The critical terms [of the takings clause] are "property," "taken" and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by the law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point ***10** of fact, the construction given the phrase has been the latter. [4]

Under this definition it is clear that there cannot be a watertight line drawn between those actions of the state that allow it to enter into possession, and those which regulate the way in which it is used by its private owner. The imposition of any restriction upon use, above and beyond those inherent in the law of nuisance, can ordinarily be done by private parties only if they purchase a restrictive covenant over the land in question. There is no reason in law or principle why the same individuals who in their private capacity are required to purchase this interest in land are in their public capacity allowed to take it by majority vote *for nothing.* The restrictions imposed upon **Lucas**' use of land under the BMA should be understood as a covenant in gross (that is, a covenant unattached to any dominant tenement) that is held by the public at large. It is quite sufficient for the protection of all public interests to allow the state to do what no private owner could do: compel the surrender of the covenant against the will of the person who owns the land. It is wholly unnecessary, and ultimately mischievous, to give any state the additional power to compel the surrender of the covenant without payment of any compensation for the loss in value, great or small, that is brought about by the restriction in question.

***11** In his arguments throughout the case, **Lucas** has avoided one implicit consequence of this argument. **Lucas** takes the position that the regulation automatically requires full compensation where the restriction on use results in a total loss of value, but acknowledges that **South Carolina** is free to impose substantial restrictions on use where there is some residual use in question. In essence, **Lucas** has sought to develop a *per se* rule that deals with a wipe-out case but does not extend his theory to any case of partial restrictions. This approach is condeptually inadequate because it creates a gratuitous and unprincipled conceptual gulf between total restriction on use and massive partial restrictions.

The potential danger of **Lucas**' position is further revealed by a close examination of the underlying facts of the instant case. **South Carolina** introduced evidence that the value of the property was positive because the plaintiff, in addition to retaining the rights of possession and disposition, also retained the rights to use the land for recreation and for temporary structures. Tr. Trans. 56. The trial judge rejected that evidence because he believed that the market value of the property in question was zero. But suppose he believed that the value of these residual uses increased the value of the land to $9,000 or one percent of its original cost, and a slightly smaller fraction of its present market value. Suppose also that the trial judge found that the residual tort liability and real estate taxes were tantamount to a lien of $8,000 on the land, leaving the property with a net valuation of $1,000. Under these circumstances, the proper approach is to hold that the plaintiff is entitled to the market value of ***12** the property [5] *less* the residual value of the property in private use. [6]

Under the plaintiff's faulty approach, the restriction on use would not, or at least might not, amount to a taking. In such a case, compensation, if owed at all, would be payable under some fluid and unprincipled balancing test. Yet if the value of the accumulated liens were $10,000 (and thus exceeded the residual value in use) the plaintiff would be entitled to full compensation of the property in question. A shift of $2,000 in the relative value of the residual uses and the ongoing tax and tort liabilities should alter the level of compensation only by the same $2,000. It should not precipitate a huge ***13** swing in the recoverability of millions of dollars in compensation.

The proper rule is thus one of strict proportion: the greater the taking, the greater the restriction, then the greater the compensation that must be paid. The just compensation clause should induce the state to act responsibly in dealing with its citizens. It should not spur irresponsible brinkmanship by public officials, whereby small differences in valuation generate enormous differences in outcome.

II. THE MARKET VALUE OF THE PROPERTY IN QUESTION AFFORDS THE PROPER MEASURE OF COMPENSATION FOR THE LOSS IN QUESTION.

In the course of its argument at trial, the **Coastal Council** adopted an alternative approach which is likely to be repeated on appeal. It urged that the property in question was subject to a serious erosion risk, and in fact had been underwater for a substantial period of time during the past 40 years. Tr. Trans. at 36-39. Its argument in effect, although not reached by the **South Carolina** Supreme Court, was that, even if the total restriction on use amounted to a taking, no compensation was owed because the property was valueless for its intended use. No prudent person would build in light of the unstable conditions on the **South Carolina coast**.

The chief mistake in this argument is that it eliminates the market value test of eminent domain and substitutes a bureaucratic determination of value that reflects the self-serving desire of public officials to create the ***14** impression that environmental regulation causes no serious private harm. But the **Coastal Council's** argument overlooks the fact that the dangers to **Lucas**' plot were evident to all persons who bought and sold property on the island (**Lucas** himself was a native islander and a real estate broker who had bought and sold between 1000 and 1500 properties on the island since he arrived on Palm Island in 1978-1979. Tr. Trans. at 32-35). The erosion and hurricane risks were well known to all persons who lived on the island.

The market valuations reflected the erosion risk. If that risk were zero, then the value of the property would doubtless have been far higher than it was. Indeed some portion of the high appreciation - by one estimate, at 56 percent per annum average over a 7 year period between 1979-1986, Tr. Trans. at 44-45 - was attributable to the perception that the island was "accreting" so that the risk of destruction by hurricane or weather was reduced as the size of the island expanded. Indeed, at trial the beach was a "football field away from the property line," which might be regarded as "ocean view" and perhaps not as "ocean front" property. Tr. Trans. 36, 38.

Just because members of the **Coastal** Commission would not invest their own money on the island does not mean that other people are foolish or imprudent to do so. The market allocates resources to those persons who value a given asset the most, not those who value it least. That true market value, and not the arbitrary value assigned to it by government bureaucrats, is the proper measure of compensation.

***15 III. THE SOUTH CAROLINA SUPREME COURT DID NOT RECOGNIZE THE DISTINCTION BETWEEN THE PUBLIC USE AND POLICE POWER REQUIREMENTS UNDER THE JUST COMPENSATION CLAUSE.**

A. The South Carolina Supreme Court mistakenly used the generous standards of the public use requirement to bypass the more stringent standards under the police power.

The text of the just compensation clause contains an explicit reference to the public use requirement, but no reference at all to the police power. The cardinal mistake made by **South Carolina** has been to analyze the case as though there were no distinction between the public use and the police power requirements under the clause. Yet it is imperative to make some distinction between the two. Thus suppose that **South Carolina** chooses to condemn the **Lucas**' property, and then to resell it at the same cost to **Lucas**' neighbor on plot 23. The police power justification is negated by the payment of compensation, so that the only unresolved issue is whether the taking for resale is a taking for a public use under the rules developed in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

Even if this broad account of public use correctly identifies the occasions where state coercive power may be directed against individual citizens, it surely says nothing about whether compensation is owing when the state seeks to take or to regulate. When the state takes land for use as a highway or a post office, the presence of an unquestionable public use does not excuse it from its duty to pay compensation to the landowner. Or suppose, ***16** as was the case in the nineteenth century, that the state wishes to authorize a private party to flood the land of a neighbor in order to form a reservoir sufficient to operate a mill. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885). Even though this Court held this taking was for a public purpose, the private party responsible for the flooding had to pay for the damage caused on land that was not occupied. Compensation and public use are determined by radically different tests.

The test for a public use today is any form of public benefit from the government action undertaken. But what about the police power? Here the traditional conception of the police power was tied to the commission of a common law nuisance, a point conceded by the **South Carolina** Supreme Court in ***Lucas*** itself. ***Lucas***, 404 S.E.2d at 899. It might seem odd at first blush that the limits of state power to regulate could be determined, even in part, by the common law conceptions of nuisance that have been developed over the centuries in such radically different contexts. But the intimate historical connection between the law of nuisance and the proper scope of the police power remains in principle as vital and important today as it has ever been. In the private context, the defendant who creates a nuisance can be shut down without compensation, and without the need to purchase a restrictive covenant. Instead the owner of the private property must purchase the easement to cause damages. Nuisance law thus determines when one neighbor must compensate another for the restrictions imposed on the use of property. That is precisely the same question that is ***17** asked when "the community" (a group of many neighbors) seeks to impose restrictions on some of its members.

The tests to determine what constitutes a nuisance at common law are often complex. *See Restatement (Second) of Torts* § 825ff. Thus normally a physical invasion is required, be it of smells, fluids, dust, gasses and the like. *See, e.g., Bamford v. Turnley*, 3 B & S. 67, 83, 122 Eng. Rep. 27, 32-3 (Ex. 1862) (Bramwell, B.). Yet in some instances low level nuisances are not regarded as actionable under the "live and let live" rule. In other circumstances, non-invasive conduct is regarded as a nuisance, as with the obligations of lateral support. See, *e.g., Corporation of Birmingham v. Allen*, L.R. 6 Ch. D. 284 (C.A. 1877) for an exceptionally clear statement of the relevant rules. In each of these cases the objective of the law is to resolve conflicts in ways that maximize the joint value of all resources owned by the parties to the dispute. And the rules of common law nuisance do that better than any alternative set of rules. Would neighboring landowners really prefer to be in an initial position in which *none* could develop property without the consent of all neighbors? Would they prefer to be in a position in which all are required to pay compensation for the trivial and repetitive nuisances that each inflicts on the other? Would they prefer to allow each to dig to the boundary of the land even though the land, natural growth, and houses on the adjacent plot may be damaged? In each case the set of mutual restrictions works to the benefit of both parties subject to the regulation.

When these rules are carried over to the law of eminent domain, their force cannot be gutted simply by a ***18** legislative determination that certain conduct is a nuisance, without any proof thereof. The entire structure of the just compensation clause would be frittered away if the state could take what it pleases when it pleases simply by declaring the prohibited use a "nuisance." This Court has never tolerated so casual and slippery a conception of nuisance in the first amendment area. Unsupported legislative declarations that certain forms of conduct are a nuisance are without constitutional weight. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). The state must show, in accordance with traditional common law rules, that the noise and inconveniences caused by certain activities do rise to the level of common law public nuisance. *See Kovacs v. Cooper*, 336 U.S.

77 (1949). Certainly the legislature could not get around the prohibitions against taking by declaring X to be Y's debtor, and then allowing Y to collect the sum in question by an ordinary common law action. At every point the manipulation of common law categories must meet the tests of judicial scrutiny.

The legislature cannot evade its constitutional obligations by resorting to creative redefinitions. This single, but vital limitation on legislative power explains why the common law nuisance is an indispensable ingredient of the law of takings. The great difficulties with takings arise when individuals abandon the private remedies that they have against their neighbor and seek to obtain redress through the political process. In any constitutional system, the critical element is to make sure that political opportunism is not the reason for the resort to the political process. Thus if A and B by agreement between themselves could not condemn the property of C ***19** for their own use, then what additional powers should they obtain by appealing (in a three person society) to a 2 to 1 vote in the political arena? The use of the nuisance requirement means that the majority of two cannot convert a private loss into a public victory. It prevents, therefore, an illicit shift to the public sector that might overwhelm the system of property rights that establishes the relation of person to person.

But it may be protested that ours is not a society of small numbers but of millions. And so it is. Yet it is precisely for that reason that there is greater necessity today to enforce the limitations that the just compensation clause imposes on the political process. The basic inquiry has two parts. First, there is the question of why political majorities should be able to condemn *with compensation.* When we deal not with a majority of 2, but of 2,000 or 2,000,000 persons, it is not possible for them by unanimous voluntary agreement to coordinate their efforts to purchase needed property from the class of persons in the position of C. The temptation of individual citizens to free ride on their neighbors is too great.[7] Eminent domain allows the state to use its power of taxation and deliberation to organize the coalition that purchases property with tax revenues. Yet at the same time the just compensation clause prevents politics from allowing an end run around the compensation requirements normally applicable in private disputes. That additional restriction on government should not be imposed where the private parties can on their own initiative ***20** restrict land use without compensation. But it is required where private actors could not restrict as of right. The nuisance law determines that boundary in the private sphere, and to maintain the parity between the two systems, it must do so in the public sphere as well. A group that is not prepared to pay $1,000 to purchase a restrictive covenant should not be allowed to get that self-same interest by spending $500 in the political arena.

Private parties cannot restrict ordinary activities of landowners without compensating them; the state under the takings clause is subject to that same restriction. Private parties can enjoin a nuisance without compensation; the state as their representative has the same power.[8] Quite simply, no other test is available to determine when state action requires compensation and when it does not, as this Court itself has acknowledged. *See Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978). Indeed, any test, however delicately phrased, which seeks to answer the police power question by asking whether the restriction in question serves some legitimate state interest collapses the fundamental distinction between public use and police power that organizes this entire branch of law.

***21 B. The anti-nuisance approach to the police power allows for a coherent analysis of the BMA that supports the anti-erosion provisions of the statute but invalidates the building prohibition.**

The power of this general approach is revealed by a closer analysis of the BMA. First, the BMA prevents any landowner along the beach from "armoring" the beachfront property. BMA § 250(5). That restriction should be sustained, and indeed is not challenged here. The normal ebb and flow of the tides are allowed to do their work. The beach will sometimes expand, at other times it will contract. But the construction of massive bulwarks on the beach will starve it of new sand and cause material physical damages to the beach and its long term health. In this limited respect, therefore, the BMA enjoins a nuisance that private landowners could commit against their neighbors, and, more importantly, against the public at large.[9] The prohibition of this kind of activity is appropriate by a simple test: the state is allowed to enjoin the activities that, should they result in harm, would entitle it ***22** to compensation as owner of the beach after the harm is done.

South Carolina in this case wishes to go further, and to prevent the construction of any ordinary single family dwelling on the property in question. But although the **South Carolina** Supreme Court speaks of the object of the statute as the prevention of "serious public harm," ***Lucas***, 404 S.E.2d, at 898, the phrase is simply conclusory. The total ban on real estate development cannot be sustained by the arguments that justify the anti-armoring provisions. There is no showing that the construction of a house on a beachfront lot will increase the level of erosion of the beach, or that it will effect the stability of the land on which neighbors have constructed their own houses. At most **South Carolina** shows that it wants to restrain the construction on that property very much. The rest that allows compensation above fails here, for if this were a private beach, its landowner could not stop construction unrelated to the erosion risk.

South Carolina's own stated purposes are vintage public use arguments, wholly irrelevant to the more difficult task of regulation *without* compensation. Thus if the state wished to take land for a highway on the ground that it would benefit tourism and the leisure of its own citizenry, certainly it would have to pay compensation. If it wanted to take the soil from an adjacent landowner to nourish the beach for the benefit of tourism and the leisure of its own citizenry, it would still have to pay compensation. If it wants to obtain a restrictive covenant over private land for the benefit of tourism and its own citizenry it again has to pay. There is no enormous gulf between the justifications that are required of the state ***23** when it occupies property and that are required of it when it restricts, in whole or in part, the use of that property by a private landowner. Tourism and local leisure, which fail in the former case, also fail in the latter.

The arguments just advanced differ in important ways from those put forward by **Lucas**. **Lucas** argues that as long as the taking is total, the question of justification need not be considered at all. Yet no balanced theory of takings could be that protective of private property against the legitimate claims of the state. If the sole use of the landowner's property is as a brickyard, as was the case in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), it seems odd to say that the question of whether the state must compensate in order to enjoin a nuisance depends on whether the landowner can salvage some small value from the alternative use of his own land. As long as there is no overbreadth in the regulation, as long as some less restrictive alternative is not available to the state, then the total wipe-out is fully justified *but only in a nuisance case*, just as if the private neighbors had been able to obtain an ordinary injunction to the same effect, without the payment of compensation.

The proper analysis of the justification question thus mirrors that of the initial takings question. There is no magic in a total (as opposed to a partial) restriction on use; if the anti-nuisance justification supports the injunction, then so be it. If it does not, then the state must pay for what it takes. The reason why **Lucas** is entitled to the compensation awarded by the trial judge is simple. The state did not remotely offer any anti-nuisance justification for prohibiting the construction of the ordinary single family home.

***24 IV. THE REQUIREMENT THAT SOUTH CAROLINA PAY JUST COMPENSATION IN THIS CASE FURTHERS AND DOES NOT RETARD INSTITUTIONS OF SOUND GOVERNANCE.**

The restoration of the trial court's award of full compensation to **Lucas** will continue the reversal in the law of takings that was begun in *Nollan v. California* ***Coastal*** *Commission*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Yet there is every reason to welcome the shift, not because it protects the provincial interests of property owners against the welfare of the public at large, but because the protection of property against depredations from the state is the surest way to advance the general public welfare.

In order to see why, it is important to remember a truth that has been evident from Blackstone's day, namely, "the public good is in nothing more essentially interested, than in the protection of every individual's private rights ..." 1 W. Blackstone, *Commentaries* 139 (1765). Within that calculus the welfare of *all* citizens of the state has to be taken into account, not merely of those who benefit from the restriction. Whether the land use restrictions of **South Carolina** wipe out Mr. **Lucas** and people similarly situated, or cause them substantial financial loss, or merely cause them smaller inconvenience, those losses, great or small, count as much in the social calculus as the gain to any other person. That each person counts for one and only one is

a cardinal principle of political philosophy and constitutional interpretation, and the claims of landowners cannot simply be brushed ***25** aside in some headlong rush to satisfy majority will no matter how worthy the cause.

But how are these interests to be taken into account? In effect, **South Carolina** claims that it has considered all the interests, public and private, when it has passed legislation, and that deference is afforded its considered judgment. But if **Lucas** is in the minority, what guarantee is there that the majority has considered his interest on a par with its own? And what possibility does this Court have of superintending the legislative process to determine whether his interest has been given its full deserved weight in the social process? The very reason why we have a constitution, why we have a takings clause, is because we know from history that legislative majorities, unless constrained by judicial power, can and will misbehave by favoring those who have political power over those who do not. This Court cannot be a constant **council** of revision to pass on the soundness of each and every piece of legislation by examining it afresh on its merits. But where property has been taken for public use, it can require that the state pay full compensation so that it is assured that individual interests sacrificed receive their full measure of protection.

Over and over again this Court has recognized that where statutes disproportionately affect on a select group, they are constitutionally suspect because they require private parties to bear in full the costs that should in justice be borne by society as a whole. *See, e.g., United States v. Armstrong,* 364 U.S. 40, 49 (1960). The concern here is not only with equity, but also with the preservation of the overall productive capacities of society as a ***26** whole. If the **South Carolina** legislature need not compensate **Lucas** and others similarly situated for their losses, then it will ignore these costs in making the social calculus. The implicit subsidy that this Court will confer on state legislatures will have the same deleterious social consequences in this context that other subsidies have in other contexts. It will lead to excessive levels of the subsidized activity, in this instance too much government, for too little gain. The functional purpose of the takings clause is to eliminate any potential divergence between private and social costs, to knock out the subsidy that induces the state to undertake projects that impoverish the citizenry as a whole while benefitting some select fraction of it.

No one, least of all **Lucas** who lives along the beach and understands its fragile nature, disputes that there should be public expenditures for the maintenance of valuable and irreplaceable resources that are now in public hands. Indeed **South Carolina** has already appropriated by general bond issue $10,000,000 for the maintenance and nourishment of the beach. Yet there is no reason to believe that the draconian sanctions at work on **Lucas** provide a public benefit remotely equivalent in value to the loss that it causes. All environmental causes are not of equal importance and of equal dignity. The one way **South Carolina** could prove the importance that it attaches to adding a restrictive covenant over the **Lucas** land to its chain of beachfront properties is to pay for it. That is what this Court should do by reversing the order of the **South Carolina** Supreme Court and restoring the judgment of the trial court below.

***27 V. THE REMEDY AWARDED BY THE DISTRICT COURT IS INCORRECT BECAUSE IT DENIES THE STATE THE OPTION OF REPEALING THE RESTRICTIONS IN QUESTION UPON PAYMENT OF INTERIM DAMAGES UNDER THE *FIRST ENGLISH* OPTION.**

At the conclusion of the hearing, the trial judge, having properly adjudged that the BMA worked a taking of **Lucas**' property, ordered the state to pay full compensation in exchange for a fee interest in the property. This rule is in error because it forces **South Carolina** to make enormous expenditures for interests in real property which it may not wish to acquire once its constitutional obligations are clear. Nor should this Court believe that once it declares the restrictions in issue a taking that **South Carolina** is committed to acquiring title to all of the unbuilt **coast**. Quite the contrary, once it has become clear that **South Carolina** has taken **Lucas**' property, it should be left the option to return it to him, paying him only the damages for the *interim* taking under the *First English* doctrine. At that point the state can reconsider whether it wishes to go through with the taking contemplated under the original BMA once its obligation to compensate has been established. The solution proposed here surely benefits both parties, for **Lucas** now enjoys the return of his land, while **South Carolina** regains control over its budget.

*28 VI. CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed. Judgment should be entered that the BMA works a taking of Lucas' land, and the state should have the option of either keeping the land and paying full market value, or of removing the regulation and compensating Lucas for his loss of interim use.

Footnotes

* Counsel of Record

1 "Property: 2. Ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing; a valuable legal right or interest in or to particular things." Funk & Wagnalls, *New Comprehensive International Dictionary of the English Language* 1011 (1982).

2 *See* A.M. Honore, "Ownership," in *Oxford Essays in Jurisprudence* 107 (1961).

3 *See* J. Tully, *A Discourse on Property: John Locke and His Adversaries* (1980).

4 *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). South Carolina law contains an identical account of ownership. *See Gasque v. The Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940).

5 The reference to the market value reflects the current state of the Supreme Court law, *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (compensation only for the market value of the property taken); *United States v. Bodcaw Co.*, 440 U.S. 202 (1979), and ignores the important issue of compensation for the loss of subjective value in excess of market value.

6 Note that if the state leaves the individual owner with net liabilities, then it should pay compensation in excess of the fair market value. The right formula in all cases is the fair market value of the property taken, less value of property retained. If the value of the property equals zero, then the compensation is equal to its market value. But if the value of the property is negative, then the compensation owed equals the market value of the property taken *plus* the residual liabilities retained by the landowner. In the case at hand the trial judge avoided these valuation difficulties by ordering Lucas to deliver deed of title to South Carolina, thereby wiping out any residual liabilities. For the weaknesses of his approach, see Section V, *infra.*

7 *See* Cohen, *Holdouts and Free Riders*, 20 Legal Studies 351 (1991); M. Olson, *The Logic of Collective Action* (1965).

8 For one illustration of the point, see *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), where the Court allowed the state to enjoin the operation of a brickyard even though the neighbors game to the nuisance only after its operation was established. That is the identical result reached in the coming to the nuisance cases in the private law, where the injunction is similarly allowed. *See, e.g., Sturges v. Bridgman*, 11 Ch. D 852 (1878); *Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948); *Restatement (Second) of Torts*, § 840 C, D.

9 It is this test which explains the weakness of this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1985). There the Court did not recognize that the police power limitation, associated as it is with the law of nuisance, protects only *strangers* to the transaction. Since the landowners in *Keystone* sought to recover the support easement that they conveyed away, they should have been required to pay compensation to repurchase the same interest that they released. If private parties are not bound by their own consent, then the system of private property is always subject to destruction at the whim of the state.