Shifting Sands and Shifting Doctrines: The Supreme Court’s Changing Takings Doctrine and South Carolina’s Coastal Zone Statute

Natasha Zalkin

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Shifting Sands and Shifting Doctrines: The Supreme Court's Takings Doctrine Through and South Carolina's Coastal Zone Statute

Natasha Zalkin†

This Comment uses the issues raised by South Carolina's innovative coastal zone statute, the 1988 Beachfront Management Act, to examine how the takings doctrine is shifting with the political center of the Supreme Court. The author first explores the problems raised by coastal development and discusses recent attempts at solution. The author argues that the South Carolina statute is, on balance, an excellent first step. Although a conservative doctrinal shift appears imminent on the Court, the author cautions that a restrained approach toward doctrinal change will best strike the balance between the Court's desire to tighten the doctrine and the need to preserve our diminishing environmental resources.

INTRODUCTION

THE EDGE of the sea is a strange and beautiful place. All through the long history of Earth it has been an area of unrest where waves have broken heavily against the land, where the tides have pressed forward over the continents, receded, and then returned. For no two successive days is the shore line precisely the same. . . . Always the edge of the sea remains an elusive and indefinable boundary.

—R. Carson

The seashore has been sculpted, resculpted, submerged, and exhumed by climate, geological processes, and the inexorable erosive force of the sea. The advent of property rights has done little to slow these processes. Although we may draw a line around a beach and claim it for our own, the very land itself may slip through our fingers with the

† B.A. 1987, University of California, Berkeley; J.D. candidate 1991, Boalt Hall School of Law, University of California, Berkeley. The author wishes to thank Professor John Dwyer for his insightful comments and uncompromising spirit of excellence; C.C. Harness III of the South Carolina Coastal Council for his generous help in gathering information; and Gail Engstrom, Drew Shagrin, Carolyn McNiven, and Andrew Mastin for their help in preparing this work for publication.

waning tide.²

Unlike Mother Nature, the government must pay just compensation when it acts to deprive citizens of property.³ Yet, proving to be as elusive and indefinable as the edge of the sea itself, the Supreme Court’s takings doctrine has long frustrated scholars, practitioners, and judges alike. Just as the moon’s gravitational force draws the oceans to and fro with the tides, so political forces create similar tides and eddies of constitutional law. This Comment is an attempt to chart one such constitutional tide—that of the takings clause of the fifth amendment.

Much of the doctrine’s uncertainty stems from ideological conflict within the Supreme Court itself. Conservative Justices, who view the takings clause as the last bastion of constitutional protection for private property, have sought to widen its scope. Liberal members of the Court, on the other hand, have often found that broad application of the takings clause is an unjustified impediment to effective public interest regulation.

The ideological tension within the Court has created a takings doctrine with two notable qualities, complexity and precariousness. A number of the doctrine’s many tests hinge on a fragile five/four vote. The recent replacement of Justice Brennan with the presumably more conservative Justice Souter could result in a doctrinal shift whose effects will be felt far and wide.

How far? How wide? How soon? The answer to the last question may be “sooner than you think.” One state has already dared to challenge the limits of the evolving takings doctrine. In an attempt to combat the problem of overdevelopment along its coastline, South Carolina passed a revolutionary coastal management act in 1988.⁴ The statute contains several controversial provisions, most notably, a ban on rebuilding destroyed structures within a certain distance of the sea. As if anticipating Justice Souter’s imminent appointment to the Court, a hurricane of unprecedented size swept through that state in 1989, creating a flurry of diligent litigants. Hurricane Hugo was, in fact, the “most economi-

². For a sobering example, consider the southern tip of the village of Longport on the Jersey Shore.

[T]he cross streets begin at 11th Street. South of there, where First through 10th Streets once ran, lies the blue water of Great Egg Inlet, with the Atlantic Ocean beyond.

That those 10 city blocks have disappeared from the map is a lesson that New Jersey’s Department of Environmental Protection wishes more people would remember when they seek to build houses on the seashore . . . .


³. “[P]rivate property [shall not] be taken for public use without just compensation.” U.S. CONST. amend. V.

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ally devastating hurricane in U.S. history." If the South Carolina state government, already tremendously burdened by the Hurricane Hugo disaster, should have to pay significant compensation to those who could not rebuild under the Act, it may be forced to abandon the coastal zone statute altogether. On the other hand, denying compensation to landowners who have effectively lost the use of their land would certainly work a hardship on them.

The courts face a difficult choice. Their deliberations will be further complicated by the fact that the challenged provisions of the South Carolina statute implicate several unsettled areas within the Court's already murky takings doctrine. Nevertheless, these cases and the complex issues they present provide the newly constituted Supreme Court with an ideal opportunity to reconsider and clarify the takings doctrine.

A word of caution is in order, however. It is imperative that the Court carefully consider the full range of implications before endeavoring to change the doctrine. In our modern era of increasing population, diminishing resources, and expanding environmental consciousness, the traditional understandings of private property and public interest have begun to shift. The unsettled nature of the takings doctrine, although frustrating, carries with it one important benefit: it allows the Court to remain flexible in the face of changing societal values.

A premature resolution of the relevant takings issues will have serious ramifications for the future of public interest—particularly environ-

5. Koncos, FEMA Reviews Response to Hugo, Gannett News Service, Sept. 20, 1990 (LEXIS, NEXIS library, Current file). The hurricane killed 51 people and caused a tremendous amount of property damage along the coastline. See infra note 23 and accompanying text. The South Carolina Coastal Commission indicated in an early estimate that the statute would, in some way, affect 159 of the destroyed structures. See Building Restrictions Upheld, Engineering News-Record, Nov. 2, 1989, at 14. At least ten angry hotel and condominium owners who have been forbidden from rebuilding their sea walls and swimming pools in the same locations are pursuing lawsuits. Schmich, After Hugo, Residents Rebuild in Spite of Law, Chicago Tribune, Apr. 15, 1990, § 1, at 12, col. 1.

6. Carr & May, Hugo's $3-Billion Punch Puts State Coastal Management Law to the Test, Engineering News-Record, Sept. 28, 1989, at 10 (In light of the number of affected property owners whom South Carolina may need to compensate, there is "some question whether the law may be too expensive to enforce."). This is a very real risk in light of the results of some of the early lawsuits involving the statute. Even before Hugo, at least two trial courts considered the takings issues raised by the Beachfront Management Act. One state court found a compensable taking and awarded $1.2 million to the aggrieved property owner. Id. In a second, consolidated action, a federal district judge refused to find a compensable taking in two cases where plaintiffs had difficulty selling their homes after enactment of the law. The court did, however, require compensation where the Act barred an oceanfront landowner "from building more than a small deck or walkway." Building Restrictions Upheld, supra note 5, at 13.

7. One investor's explanation sums up the frustration that property owners feel: "You can't expect a man who has a multimillion-dollar hotel to walk away from it." Dvorchak, Hugo Stirs an Environmental Storm, Chicago Tribune, Oct. 15, 1989, § 16, at 2J, col. 1, col. 2 (quoting hotel owner John Singleton).

8. See generally A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962) (advocating the "passive virtues" of deciding less rather than more law).
mental—regulation. First and foremost, a decision by the Court that this beachfront statute effects a taking would chill responsible shoreline regulation. Second, because the mechanism invoked by the South Carolina statute could be useful in other geologically hazardous or environmentally sensitive areas, land-use planning as a whole would be affected. Finally, any doctrinal tightening, which would necessarily accompany such a decision, would have broad application beyond land-use, resulting in an overall dampening of environmental regulation.

This Comment attempts a reasoned analysis of these issues. It examines the different facets of the takings doctrine as they might apply to the innovative provisions of the South Carolina statute, and locates specific points of doctrinal flexibility. Finally, it attempts to expose the full range of effects that would result from a doctrinal tightening.

Part I discusses the extent of the problem of coastal zone overdevelopment and explores the regulatory attempts of the different coastal states. It examines the gamut of possible solutions, from direct prohibitory regulation to economic disincentives, and highlights the unique approach embodied in South Carolina's 1988 Beachfront Management Act. The analysis reveals that the South Carolina statute, although treading on constitutionally questionable ground, contains a rare blend of stringency, cost effectiveness, and political acceptability.

Part II analyzes the current state of the takings doctrine and applies it to the South Carolina statute. Although the current Supreme Court would likely find some aspects of the statute to be a taking, this Part urges restraint at all levels of the judiciary. The South Carolina statute is an experiment that should be allowed to run its course. A shortsighted decision that fixes takings doctrine at an unreasonably strict position would have two detrimental effects: first, it would limit the government's ability to preserve the country's diminishing resources, and second, it would remove doctrinal flexibility that will be sorely missed by the Court when facing other difficult takings questions in the future. The Comment concludes that a restrained approach will strike the ideal balance between the property rights of our citizens, and the need for protecting the communal rights we all have in the country's resources.
I

PROBLEMS AND SOLUTIONS

A. The Problem of Shoreline Overdevelopment

1. The Lure of the Seashore

LIKE THE SEA ITSELF, the shore fascinates us who return to it, the place of our dim ancestral beginnings. In the recurrent rhythms of tides and surf and in the varied life of the tide lines there is the obvious attraction of movement and change and beauty. There is also, I am convinced, a deeper fascination born of inner meaning and significance.

—R. Carson

It has been said that all great cities of history have been built on bodies of water—Rome on the Tiber, Paris on the Seine, London on the Thames, New York on the Hudson.

—H. Gilliam

The sea has much to offer, aesthetically, recreationally, ecologically, and economically. The sea, and particularly the shoreline, provides habitats for some of the most diverse ecosystems on earth. Its untamed beauty, serenity, and wildness have enticed numerous artists to paint its portrait, poets to invoke its emotions, and authors to tell its story. Many others enjoy the sea's blessings without immortalizing its charms; surfing on its waves, sunbathing on its beaches, and building sand castles and beachfront homes on its dunes. The sea's recreational potential is one obvious force behind coastline development.

Additionally, the sea has long provided an invaluable medium for trade and transportation. Some of the most compelling evidence in support of the sea's importance is the sheer number of people who choose to live near it. Some 63 million people reside within 50 miles of the Atlantic Ocean and Gulf of Mexico. With so many desirable qualities, the sea-

9. R. CARSON, supra note 1, at vii.
11. See generally R. CARSON, supra note 1 (survey and discussion of the many forms of life found in shoreline ecosystems).
12. See, e.g., Bierstadt, Shore of the Turquoise Sea (1878); Manet, Alabama and Kearsarge (1864); Turner, Shipwreck (1805).
13. See, e.g., Coleridge, The Ancient Mariner; Emerson, Seashore; Lawrence, Whales Weep Not; Masefield, Sea-Fever.
15. Not all of the recreation-driven private shoreline development is residential, for tourism is a booming industry in many coastal states. See Dvorchak, supra note 7, at 2J, col. 1 (describing beaches as "money machines that lure sun worshippers and tourist dollars"). Consequently, shoreline development often includes hotels and other hospitality/tourism facilities.
shore has attracted substantial private ownership, including 63 percent of New York's 638 miles of saltwater shoreline, 58 percent of New Jersey's 469 mile coast, and 36 percent of North Carolina's 2,270 miles of shoreline.\(^{17}\)

Although coastal development is highly vulnerable to off-shore hurricanes, the drive to develop continues, truly a testament to the seashore's allure. This drive has proven resistant not only to risks posed by nature, but also to government regulations. For example, in an attempt to discourage development along fragile coastal areas, New Jersey passed a law subjecting all developments of twenty-five or more units to a state permitting process.\(^{18}\) The result was a proliferation of twenty-four-unit shorefront developments.\(^{19}\)

2. **Coastline Development and the Consequent Risk of Increased Storm Damage**

I with my hammer pounding evermore
The rocky coast, smite Andes into dust

—Ralph Waldo Emerson\(^ {20} \)

To man and his flimsy structures, wind-driven water is among the most dangerous of natural phenomena. Since 1900 more than 50,000 persons have been killed as the ocean has licked over the land.

—A. Beiser\(^ {21} \)

One of the most significant problems associated with uncontrolled beachfront development is heightened storm damage.\(^ {22} \) Hurricane Hugo's September 1989 attack upon South Carolina's coastline vividly

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17. Peterson, supra note 2, at 18, col. 2.
19. Peterson, supra note 2, at 18, col. 2.
20. Emerson, supra note 13.
22. Although shoreline overdevelopment causes other harmful effects, this Comment focuses on the increased risk of storm damage, as it is one of the most significant and economically detrimental effects.

However, this is not to underplay the seriousness of the other problems associated with uncontrolled shorefront development. The congressional findings listed at the beginning of the Federal Coastal Zone Management Act sum up the multitude of interests in need of protection:

The Congress finds that—

(a) There is a national interest in the effective management, beneficial use, protection, and development of the coastal zone.

(b) The coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and esthetic resources of immediate and potential value to the present and future well-being of the Nation.

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.

(d) The coastal zone, and the fish, shellfish, other living marine resources, and wildlife
illustrates this risk. In that state alone, the hurricane caused twenty-nine deaths and approximately $6 billion in property damage.23

Much of the damage was likely the result of coastal zone mismanagement. The proliferation of beachfront homes, hotels, and other structures contributed to the damage caused by Hurricane Hugo in two ways. First, their location near the sea placed the structures directly in the path of the sea-driven storm. Not only are many beachfront buildings destroyed in such a storm, but they are often driven, like battering rams, into adjacent inland houses. Second, development along barrier islands and sand dunes has had the effect of damaging and eroding the natural sand dune barriers. Although often ignored in the past by myopic legislators and single-minded developers, natural sand dunes are in fact much better storm breaks than artificial structures such as sea walls and dikes.24

In order to understand fully the nature of sand dune destruction, it is helpful to understand the dynamics of their formation. Dunes form as a result of the action of wind and waves on the sand:

Storm waves breaking in relatively deep water offshore dig a trough in the sand and cause the deposition of a low submarine bar near to the shore and parallel to it. When this continues to raise the bar above water level, a dune is formed that is immediately affected by the wind... Isolated bars emerge, then coalesce as a continuous dune. The area of water between dune and shore becomes a shallow lagoon or bay.

Ensuing dune formation then occurs on the seaward side, where another offshore submarine bar is formed which subsequently rises above the sea. The interveuing area between the two dunes is filled with sand by the wind...25

Building on or near beachfront or barrier island sand dunes risks breaching the existing dune barriers in several ways. First, when the

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23. May, Tears, Fears Linger a Year Past Hurricane Hugo Fury, L.A. Times, Sept. 21, 1990, at A1, col. 5. The hurricane killed 51 people and cost about $10 billion in the eastern United States and neighboring island countries. Gain in Disaster Response Seen Since Hugo, N.Y. Times, Sept. 22, 1990, § 1, at 7, col. 5 (51 deaths); Koncos, supra note 5, at 1 ($10 billion total cost).

24. "The dunes, stabilized with grasses, provide an even greater flexibility than dikes, accepting the waves but reducing their velocity and absorbing the muted forces. In contrast concrete walls invite the full force of the waves and finally succumb to the undercutting of the insidious sea." I. McHARG, DESIGN WITH NATURE 7 (1969).

25. Id. at 9. The dune nearest the sea is termed the "primary dune" while the older, more inland dune is termed the "secondary dune." Id.
house is built on the dune itself, the foundation will necessarily displace and destroy part of the dune. Second, beachfront development tends to lead to the destruction of the stabilizing dune vegetation\textsuperscript{26} hastening the erosion of the dunes and increasing the risk of storm flooding.\textsuperscript{27}

Development on barrier islands can also hinder the natural migration of these delicate and transitory geographic systems. Man-made structures, which remain at a fixed location, cause gaps to form in an otherwise coherent sand dune barrier by preventing parts of the dune from migrating with the rest of the barrier island system. This problem is exacerbated by the placement of tangential "erosion control" devices in regions subject to transverse or "littoral" drift of sand.\textsuperscript{28} These devices cause hastened erosion of downdrift regions by blocking their source of replenishing sand.\textsuperscript{29}

In addition to causing erosion and breaching the sand dune barriers, barrier island development can increase the risk of storm damage in other ways. For example, developers often fill, and then develop, the marshy land bordering the lagoon or bay between a barrier island and the mainland. This has the effect of "making [the bay] more shallow and reducing its storm-water capacity"—leading ultimately to "a larger area of the built-up land being inundated in any storm."\textsuperscript{30}

These risks are not merely theoretical. In 1962, a violent storm hit the northeast coast of the United States, and left, in New Jersey alone, 2,400 houses destroyed or damaged beyond repair, another 8,300 partially damaged, and many people injured or killed.\textsuperscript{31} A case study of the storm's effect on the New Jersey shore, undertaken by the Landscape

\textsuperscript{26}. See id. Dune grasses may be naturally hardy in harsh beach conditions, but they are extremely vulnerable to human trampling that necessarily accompanies beachfront construction and later use of the property. \textit{Id.} In addition, where shallow wells are used to supply fresh water, the groundwater often drops below the level necessary to sustain dune vegetation. \textit{Id.} at 11-13.

\textsuperscript{27}. \textit{Id.} at 7. Other countries have long recognized the utility and vulnerability of dune grasses. For example, "[i]n the Netherlands, the vulnerability of dune grasses to trampling is so well understood, that dunes are denied to public access; only licensed naturalists are permitted to walk on them." \textit{Id.} at 9.

Although initially slow to react, this country is developing an increasing awareness of the importance of dune grasses. In 1969, McHarg chided this country's neglect: "Indeed nowhere along our entire eastern seaboard are [dune grasses] even recognized as valuable!" \textit{Id.} Since then, several states, including South Carolina, have passed protective measures. \textit{See, e.g.}, S.C. CODE ANN. § 48-39-310 (Law. Co-op. Supp. 1989) (prohibiting the destruction, absent any feasible alternative, of "any beach or dune vegetation" in a defined critical area).

\textsuperscript{28}. When "[w]aves . . . approach the beach from an angle, the water runs over the sand and recedes at right angles to the shore. As a result the sand carried by the receding wave is transported downdrift of its origin. This is described as \textit{littoral drift} . . . ." I. \textsc{McHarg}, \textit{supra} note 24, at 9 (emphasis in original).

\textsuperscript{29}. \textit{Id.} at 13.

\textsuperscript{30}. \textit{Id.} It is not only the fill itself but also its effects on the lagoon's ecosystem that can reduce the size of the lagoon. \textit{Id.}

\textsuperscript{31}. \textit{Id.} at 16.
Architecture Department of the University of Pennsylvania, concluded that “all of this disaster was caused by man through sins of commission and omission.” The study attributed the bulk of the disaster to construction on the barrier island sand dunes themselves. Houses situated behind stable, unbreached dunes “endured, suffering only broken windows and lost shingles.”

The cost of damage attributable to careless development is borne by all sectors of society. The first victims are clearly the occupants of the beachfront houses themselves—their lives are in danger when a major sea-driven storm hits. Indeed, despite state-of-the-art hurricane preparedness, thirty-three people died along the United States coastline in Hurricane Hugo. The other primary victims are the owners of beachfront property, for they may suffer tremendous financial loss when their property is destroyed or damaged by a hurricane.

The American taxpayers also bear a significant portion of the cost. One source of taxpayer expense is the federally subsidized flood insurance that covers many Atlantic beachfront homeowners. When these houses are destroyed or damaged by storm flooding, much of the insurance proceeds comes from tax revenue. Hurricane Hugo, for example, cost the federal government about $300 million in flood insurance claims in the four states that suffered most of the damage.

The federal government pays a further price in the form of disaster assistance relief. As of September 21, 1990, the Federal Emergency Management Agency (FEMA) had already paid $1.024 billion in aid to South Carolina, and was expected to spend up to a total of $2.7 billion for Hugo’s damage in the continental United States and Puerto Rico. Again, this cost is borne by the federal taxpayers.

State and local governments, as well as public and private utilities, contribute additional resources to repair damaged infrastructure after a storm. When these entities repair damaged telephone wires, electrical

32. Id.
33. Id.
34. Id. at 17.
35. Robert Sheets, director of the National Hurricane Center, expressed this worry: “‘Our concern is about the potential loss of life. . . . We need to restrict the type of development we’re seeing.’” Dvorchak, supra note 7, at 23, col. 2. Danger to life exists not only for beachfront residents, but also for inland residents whose property is vulnerable to storm surges because they are situated behind dunes that have been breached by careless beachfront development.
37. Hurricane Hugo, for example, caused an estimated $10 billion in property damage in the United States. See supra note 23.
38. Peterson, supra note 2, at 1, col. 2 (citing the “security of subsidized Federal flood insurance” as one of the factors that has led to overdevelopment along the Atlantic coast).
lines, gas lines, and water mains, and remove sand and debris from public roads and sewers, the public ultimately pays for these remedial activities through increased taxes and utility bills. Beachfront development increases these costs in two ways. First, it brings infrastructure into close proximity to the sea, rendering it especially vulnerable to storms. Second, development-induced breaching of the dune barriers renders inland roads, sewers, and utilities more vulnerable.

Other victims of careless beachfront development include banks, mortgage guaranty insurers, and federal agencies that absorb the cost of defaulted mortgages, and property and casualty insurers that bear the cost of destruction suffered by their insureds. These costs are similarly borne by the public in the form of increased insurance rates, higher transaction costs passed on by banks, and further expenditure of tax money to bail out failing banks and insurance companies.

B. Solutions

1. The Statutory Backdrop

Because of the serious problems associated with shoreline development, Congress passed the Federal Coastal Zone Management Act in 1972. This legislation authorized the Secretary of Commerce to grant federal funds to states that develop and implement a coastal management program satisfying the statutory requirements. Among the federal requirements was that each state develop a “planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.”

Since the passage of the federal act, every coastal state has attempted to protect its coastline from overdevelopment. Virtually all

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41. Peterson, supra note 2, at 1, col. 4. “[P]ublic resources are invariably called on to rescue private property when the coast is scoured by a serious storm, and taxpayers are asked to help pay for new roads, sewers, electric utilities and other services for some of the wealthiest people in the state.” Id.

42. The American Insurance Services Group estimated that Hurricane Hugo caused $2.55 billion in insured damage in South Carolina and about $4 billion overall. Applebome, supra note 16, at 4, col. 4.


44. 16 U.S.C. § 1454(a) (1988) (development grants); id. § 1455(a) (administrative grants).

45. Id. § 1454(b)(9).

these state statutes utilize some type of permit system geared toward restricting further development in fragile coastal regions.\textsuperscript{47} However, the

\textsuperscript{47} See ALA. CODE § 9-7-20(b) (1987) (requiring permits for any activity in a coastal area to ensure consistency with the coastal area management program); ALASKA STAT. § 46.40.100(c) (1987) (districts must have permitted and restricted activities with a procedure for variances); id. § 46.40.100(d) (state agencies are in compliance with the legislation if permits are issued consistent with "district coastal management programs" to be developed pursuant to the legislation); CAL. PUB. RES. CODE §§ 30600-30613 (West 1986) (requiring developers to obtain a coastal development permit before constructing, inter alia, any structure less than 300 feet inland from the mean high tide line or between the sea and the nearest public road); CONN. GEN. STAT. ANN. § 22a-98 (West 1985) (requiring Commissioner of Environmental Protection to ensure that regulatory programs issue permits consistently with Coastal Management Act); id. § 22a-109(h) (West 1985 & Supp. 1990) (requiring certification in compliance with act before building permit can issue); DEL. CODE ANN. tit. 7, § 7004 (1990) (establishing permit system for industrial development); FLA. STAT. ANN. § 380.23 (West 1988) (state permitting requirements to be coextensive with requirements of the Federal Coastal Zone Management Act of 1972); GA. CODE ANN. § 43-2405 (Harrison 1986) (prohibiting any alteration in marshlands before Coastal Marshlands Protection Committee issues permit); HAW. REV. STAT. § 205A-28 (1988) (prohibiting development in coastal zone without permit issued in accordance with coastal zone management program); L.A. REV. STAT. ANN. § 49:214.30 (West Supp. 1990) (requiring coastal use permits before commencing any use that would directly and significantly affect coastal waters); ME. REV. STAT. ANN. tit. 38, § 480C (1989 & Supp. 1990) (requiring permit from Board of Environmental Protection for specified activities within or adjacent to coastal waters); id. § 484 (prohibiting board from issuing permit if activity will, inter alia, unreasonably interfere with sand dune system); MD. NAT. RES. CODE ANN. § 9-104 (1990) (requiring permit before commencing any use of wetlands not specifically authorized by regulations issued pursuant to legislation); MISS. CODE ANN. § 49-27-9 (1990) (requiring permit from Commission on Wildlife Conservation for any regulated activity affecting coastal wetlands); N.J. STAT. ANN. § 482-A:3 (Supp. 1990) (requiring approval of wetlands board in order to construct any structure or perform other activities near any state waters); N.H. STAT. ANN. § 13:9A-4 (West 1979 & Supp. 1990) (requiring permit to conduct regulated activities
different statutes vary considerably in stringency, focus, and clarity.

Many of the statutes are relatively vague, giving a few general guidelines, but in fact delegating most of the authority to an agency to research and develop a plan to protect coastal resources. Although this type of open-ended authority can be effective if an agency independently assumes a strong stance, a lack of statutory guidance often conveys the message that the state does not particularly care about the problem. Furthermore, unless a specific focus is provided in the statute, an agency may not necessarily choose the best priorities toward which to apply its limited resources.

Some states have sought to avoid these problems by setting forth explicit requirements, such as requiring a permit for certain designated activities, or for all activities within a designated coastal region, with

on any coastal wetlands; id. § 13:19-5 (West 1979) (prohibiting construction of "facilities" in a coastal area without permit from State Commissioner of Environmental Protection); N.Y. ENVTL. CONSERV. LAW §§ 34-0108 to 34-0109 (McKinney 1984) (requiring regulation, including a permitting process, of activities and development within erosion hazard areas); N.C. GEN. STAT. § 113A-111 (1989) (requiring permit consistent with county land-use plan); id. § 113A-118 (requiring permit for development in any area of environmental concern); OR. REV. STAT. § 196.682 (1989) (requiring permit consistent with county land-use plan); id. § 196.810 (requiring permit from state agency to remove material from beds or banks or fill waters); R.I. GEN. LAWS § 46-23-18 (1988) (requiring commission's permission before dredging or constructing near a shellfish management area); S.C. CODE ANN. § 48-39-130 (Law. Co-op. 1987 & Supp. 1990) (permit required for development within designated coastal zone); TEX. NAT. RES. CODE ANN. §§ 33.119 to 33.130 (Vernon 1978) (governing permits on coastal public land); id. § 33.103 (Vernon 1978 & Supp. 1991) (allowing School Land Board to issue permits authorizing limited continued use of certain previously unauthorized structures on coastal public land); VA. CODE ANN. §§ 62.1-13.21, 62.1-13.26 (1987 & Supp. 1990) (requiring permit under local wetlands zoning ordinance, under local coastal primary sand dune ordinance, or from Virginia Marine Resources Commission).

48. See, e.g., ALA. CODE § 9-7-15 (1987) (delegating authority to Coastal Area Board to research and develop a "comprehensive coastal area management program"); ALASKA STAT. §§ 46.40.010-46.40.040 (1987) (delegating authority to Alaska Coastal Policy Council to establish the Alaska coastal management program and to ensure the implementation of local plans); FLA. STAT. ANN. § 380.22 (West 1988) (directing Department of Environmental Regulation to comply with requirements of Federal Coastal Zone Management Act in order to be eligible to receive federal funds); id. § 380.24 (allowing, but not requiring, local governments to develop individual coastal protection programs); MASS. GEN. LAWS ANN. ch. 21A, § 4A (West Supp. 1990) (directing coastal zone management office to comply with the Federal Coastal Zone Management Act in order to secure benefits thereunder for the state); R.I. GEN. LAWS §§ 46-23-2, 46-23-6, 46-23-18 (1988 & Supp. 1990) (giving coastal resources management council broad powers to regulate activities associated with coastal region, but only requiring regulation in narrow cases involving dredging or marina construction near a shellfish management area); TEX. NAT. RES. CODE ANN. § 33.056 (Vernon 1978) (broadly empowering the School Land Board to regulate "placement, length, design, and the manner of construction, maintenance, and the use of all structures which are built so that they extend on coastal public land").

49. This is particularly obvious in cases like the Massachusetts statute, whose only stated purpose is to secure the benefit of federal funds. See, e.g., MASS. GEN. LAWS ANN. ch. 21A, § 4A (West Supp. 1990).

50. See, e.g., R.I. GEN. LAWS § 46-23-18 (1988) (requiring Commission's permission before dredging or constructing a marina near a shellfish management area).

51. For example, the California statute requires developers to obtain a coastal development
certain exceptions. Others have quite detailed provisions to conserve specific resources such as fragile ecosystems or public beach access. At least five states have passed measures specifically addressing the problem of beach/dune erosion, and three states have gone so far as to designate "setback" zones in which all new construction is prohibited.

All these statutes, however, have stopped short of requiring the removal of existing development situated in sensitive erosion-prone areas. An outright condemnation provision would surely be considered a taking. Thus, the onslaught of development has become a one-way ratchet—these laws can prevent further harm, but they are powerless to undo harm that has already occurred. In a daring attempt to skirt the

permit from the appropriate local government agency before constructing any structure seaward of the nearest public road, or less than 300 feet inland from the mean high tide line. CAL. PUB. RES. CODE §§ 30600-30604 (West 1986).

52. For example, the California statute provides an exception for the repair or replacement of damaged structures. Id. § 30610. However, the pressure to develop the shoreline has tended to turn exceptions into loopholes. Recall how New Jersey's permit exemption for developments of less than 25 units resulted only in a proliferation of 24-unit developments. See supra text accompanying notes 18-19.

53. See, e.g., CAL. PUB. RES. CODE § 30107.5 (West 1986) (defining "environmentally sensitive area"); id. § 30240 (mandating special protection for such areas); LA. REV. STAT. ANN. § 214.29 (West Supp. 1990) (requiring special management procedures for areas with "unique, scarce, fragile, vulnerable, highly productive or essential habitat for living resources"); N.C. GEN. STAT. §§ 113A-113 to 113A-115 (1989) (regarding designation of areas of environmental concern); id. § 113A-118 (requiring permit for any development in an area of environmental concern).

54. See, e.g., CAL. PUB. RES. CODE §§ 30210-30214 (West 1986) (providing for maximum beach access and recreational opportunities); N.C. GEN. STAT. §§ 113A-134.1 to 113A-134.3 (1989) (creating a program for the acquisition, improvement, and maintenance of a system of public beach access).

55. See N.H. REV. STAT. ANN. §§ 215-A:5-a, 482-A:3, VII-VIII (Supp. 1990) (protecting sand dunes from harm caused by construction, alteration, or sand removal, and specifically forbidding operation of motor vehicles on sand dunes); N.Y. ENVT'L. CONSERV. LAW § 34-0108(3)(a) (McKinney 1984) (requiring Commissioner to establish minimum setback requirements for structures, taking erosion rates into account); id. § 34-0108(3)(b) (broadly empowering the Commissioner to regulate "activities or development, including placement of erosion protection structures . . . so there will be no measurable increase in erosion"); N.C. GEN. STAT. §§ 113A-113(b)(6)(a), 113A-120(a)(6) (1989) (Coastal Commission to designate areas of environmental concern, including natural-hazard areas such as "sand dunes along the Outer Bank," and to deny permits in such areas where development would "unreasonably endanger life or property"); S.C. STAT. ANN. §§ 48-39-280 to 48-39-300 (Law. Co-op. Supp. 1989) (mandating erosion rate study, setback goals, and regulation of harmful erosion control structures); VA. CODE ANN. § 62.1-13.25 (1987 & Supp. 1990) (authorizing local governments to adopt a standard ordinance including a section requiring a permit before performing any activity that has the potential to disrupt sand dunes).

56. See HAW. REV. STAT. §§ 205A-41 to 205A-49 (1988 & Supp. 1990) (shoreline setback policy established to prevent future construction within the "shoreline setback zone," set between 20 and 40 feet inland from the mean high tide line, although preexisting structures may not be condemned and may be rebuilt or replaced so long as they remain the same size); N.Y. ENVT'L. CONSERV. LAW § 34-0108(3)(a) (McKinney 1984) (Commissioner must establish minimum setback requirement for structures); S.C. STAT. ANN. § 48-39-290 (Law. Co-op. Supp. 1990) (no new structures may be constructed in defined coastal zones subject to certain exceptions).
takings clause, South Carolina has enacted several controversial measures in its 1988 Beachfront Management Act. It is to this statute that we now turn.

2. The South Carolina Experiment: The 1988 Beachfront Management Act

Like many other coastal states in the 1970s, South Carolina passed its first coastal protection statute in the wake of the Federal Coastal Zone Management Act. The South Carolina Coastal Zone Act of 1977 (1977 Act) created a “Coastal Council” whose purpose was to develop a “comprehensive coastal management program” in combination with affected local governments and with the South Carolina State Ports Authority.

The 1977 Act adopted a relatively conventional approach toward regulating beachfront development. Like many other state statutes, it set forth certain “critical areas,” defined as “coastal waters,” “tidelands,” “beaches,” and “primary ocean front sand dunes,” and required individuals to obtain a permit from the Council before developing property or engaging in a new use of property within a “critical area.” The Act also regulated so-called “erosion control devices.” Once thought valuable in preventing harmful erosion, certain of these devices, including sea wall, bulkheads, and rip-rap, actually increase the risk of erosion. Thus, the 1977 Act gave the Council “authority to remove all erosion control structures which have an adverse effect on the public interest.”

The statute provided little guidance, however, as to what would justify the denial of a permit or the removal of an erosion control structure. It listed only “general considerations,” and instructed the Council to issue a permit if it found “that the application is not contrary to the policies specified in this chapter.” Additionally, although the 1977 Act gave the Council power to halt development on the dunes themselves, it

60. Id. § 48-39-100.
61. Id. § 48-39-110.
66. Id. § 48-39-150(A).
67. Id. § 48-39-150(B).
did not allow the Council to prevent building directly behind the dunes. Nor did the Act enable the Council to push existing development landward, ahead of encroaching erosion, by forbidding rebuilding of destroyed structures.

The South Carolina General Assembly, recognizing the shortcomings of the initial statute, amended it in 1988 with the Beachfront Management Act. The amendments provided a detailed set of restrictions that would, over a period of years, push back the line of development a distance of forty times the annual erosion rate and eliminate all harmful erosion control devices. The statute was again amended in the wake of Hurricane Hugo to reduce some of the hardship imposed on affected property owners, however, it has retained most of its controversial provisions. The following Subsections describe the current statute and, where relevant, include a description of how the post-Hugo amendments changed the previous law.

a. Detailed Study of Coastline Topography and Erosion Rates

To provide a firm foundation for the regulatory action, the statute mandates an extensive research program that would use “the best available scientific and historical data” to map and ascertain the various rates of erosion along the coast.

68. The council only had jurisdiction over “critical areas,” which did not include the area behind primary sand dunes. See supra notes 62-63 and accompanying text. This broader jurisdiction is important in high erosion areas where the primary oceanfront sand dune is migrating inland. In such areas, construction immediately behind a dune will prevent this natural migration and result in erosion of the dune barrier. See supra text accompanying note 28.

69. One of the primary legislative findings of the Assembly was that the 1977 Act “does not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system.” 1988 S.C. Acts 634 §§ 1-2, reprinted in S.C. STAT 5130, 5130-34 (1988).


73. Id. § 48-39-280(A)(1). Where the shoreline has been altered by erosion control devices or other man-made devices, the baseline should instead approximate “where the crest of the primary oceanfront sand dunes . . . would be located if the shoreline had not been altered.” Id.
"setback line" located a certain distance behind the baseline—the greater of forty times the annual erosion rate or twenty feet.\textsuperscript{74} The Beachfront Management Act simultaneously expands the Council’s jurisdiction by redefining “critical area” to include any “beach/dune system which is the area from the mean high-water mark to the setback line.”\textsuperscript{75}

b. Regulation of Shoreline Development

Based on each region’s baseline and setback line, the Beachfront Management Act sets forth explicit requirements for the construction, repair, and reconstruction of “habitable structures.”\textsuperscript{76} Under these requirements, property owners generally may not construct habitable structures seaward of the baseline.\textsuperscript{77} Within the area between the baseline and the setback line, only limited construction is permissible. The statute allows construction of houses smaller than 5,000 square feet partly or wholly within this area, if no part is constructed on the primary oceanfront sand dune and the house is otherwise moved as far landward as possible.\textsuperscript{78}

Normal repairs may be conducted without notice to the Council,\textsuperscript{79} but a structure that is completely destroyed may only be replaced if it is moved as far landward as possible, and is not larger, longer along the coastline, or closer to the sea than the original structure.\textsuperscript{80} Finally, and most controversial, habitable structures generally may not be replaced

\textsuperscript{74} Id. § 48-39-280(B).

\textsuperscript{75} Id. § 48-39-10(J)(4) (Law. Co-op. Supp. 1990). Recall that one of the inadequacies of the 1977 Act was its failure to include the land immediately behind the primary dune as part of the “critical area.” See supra notes 68-69 and accompanying text.

\textsuperscript{76} The term “habitable structure” means “a structure suitable for human habitation including, but not limited to, single or multifamily residences, hotels, condominium buildings, and buildings for commercial purposes. . . . Additionally, a habitable structure includes porches, gazebos, and other attached improvements.” S.C. CODE ANN. § 48-39-270(2) (Law. Co-op. Supp. 1990).

\textsuperscript{77} Id. § 48-39-290(A). The statute permits limited exceptions for wooden walkways and, where a permit is obtained, for small wooden decks, fishing piers, golf courses, normal landscaping, certain other structures not built on sand dunes or eroding beaches, and pools, if landward of a functional erosion control device. Id. §§ 48-39-290(A)(1) to 48-39-290(A)(7), 48-39-290(D).

The original statute was somewhat more strict, forbidding construction seaward of the setback line, 1988 S.C. Acts 634, § 3 (codified as amended at S.C. CODE ANN. § 48-39-300 (Law. Co-op. Supp. 1990)), with certain “grandfather” exceptions for projects in progress as of the effective date of the statute: (1) habitable structures smaller than a total of 5000 square feet may be constructed on lots platted as of the effective date of the Beachfront Management Act (but in no case may construction proceed seaward of a boundary 20 feet landward of the baseline); and (2) habitable structures of any size may be constructed without regard to location if the developer “legally has begun a use” by the effective date of the legislation, for example, by having been issued all necessary building permits as of four months before the effective date of the legislation. Id.


\textsuperscript{79} Id. § 48-39-290(B)(1)(b)(i).

\textsuperscript{80} Id. § 48-39-290(B)(1)(b)(iv).
seaward of the baseline.\textsuperscript{81} Apparently anticipating potential takings problems, the legislature provided for state circuit court adjudication of any takings disputes that may arise from the action of the statute.\textsuperscript{82}

c. **Gradual Elimination of Erosion Control Devices**

The current version of the statute provides strict guidelines for the gradual elimination of harmful erosion control devices.\textsuperscript{83} Under these guidelines, if over 80\% of the "above-grade" portion of an erosion control device is destroyed, it may not be replaced, and must be removed at the owner's expense.\textsuperscript{84} That percentage drops to 67\% in the year 1995\textsuperscript{85} and 50\% in 2005.\textsuperscript{86}

d. **Beach Renourishment**

Under the original Beachfront Management Act, if any habitable structure or erosion device\textsuperscript{87} was replaced under the statute, the property owner was required to renourish the beach in front of her property on a yearly basis with at least one and one-half times the yearly volume of sand lost due to erosion.\textsuperscript{88} These provisions were later repealed by the post-Hugo amendment in favor of delegating the renourishment issue to local governments.\textsuperscript{89} These provisions are nonetheless relevant because they could be considered by other states planning their own coastal management schemes, and because they present some interesting theoretical questions.\textsuperscript{90} Thus, although the South Carolina Legislature repealed these provisions, their takings implications are included in Part II of this Comment.\textsuperscript{91}

\textsuperscript{81} \textit{Id.} § 48-39-290(B)(1)(b)(iv)d.
\textsuperscript{82} \textit{Id.} § 48-39-305.
\textsuperscript{83} \textit{Id.} § 48-39-290(B)(2).
\textsuperscript{85} \textit{Id.} § 48-39-290(B)(2)(b)(ii).
\textsuperscript{86} \textit{Id.} § 48-39-290(B)(2)(b)(iii).
\textsuperscript{87} Although the current version of the statute only allows repair of erosion control structures, \textit{id.} § 48-39-290 (B)(2)(b)(vi), the original Beachfront Management Act allowed a property owner to replace an erosion control device if it was more than 50\% damaged and if the new structure conformed to specific engineering guidelines. 1988 S.C. Acts 634, § 3 (codified as amended at S.C. CODE ANN. § 48-39-290(C) (Law. Co-op. Supp. 1990)).
\textsuperscript{90} See \textit{infra} text accompanying notes 177-80.
\textsuperscript{91} Other interesting theoretical questions are posed by the land accretion provisions, which remain unchanged from the original 1977 Act. Section 48-39-120(B) claims all new land that may accrete between the property's original boundary line and the new mean high tide line as state property, to be held for the public trust, free from development: "[N]o property rebuilt or accreted as a result of natural forces or as a result of a permitted structure shall exceed the original property line or boundary." S.C. CODE ANN. § 48-39-120(B) (Law. Co-op. 1987). Although not clearly stated, this phrase seems to mean that the individual will not be allowed to artificially fill submerged
3. Alternative Solutions

Before we examine the takings issues, the following Sections briefly canvass a few alternative solutions, some of which have been implemented in other states. The purpose of this analysis is not to ascertain conclusively all the implications that flow from the different approaches, but rather to paint a more complete picture. Although it is easy to criticize South Carolina’s approach in a vacuum, a close analysis of the alternatives demonstrates that none of them is trouble free. In fact, the South Carolina statute appears to be one of the most balanced approaches to this difficult issue.

a. A Less Stringent Regulatory Solution

One obvious alternative approach is the implementation of a less drastic regulatory scheme. Presumably, the next most stringent alternative would be simply to forbid future development within a certain distance from the shoreline.92 Perhaps setback zones alone would suffice in areas that have not yet been significantly developed; in heavily developed regions like the South Carolina coastline, however, this simply may not be enough.

In such regions, existing development must be removed in order to restore the benefits of a coherent dune barrier system. Although these regions are periodically swept clean of development by hurricanes, past experience, as well as the pending lawsuits against South Carolina’s current law, demonstrates that storm destruction alone will never effectively clear the shoreline of development. Time and time again, homeowners have proven tenacious in their desire to rebuild their homes in the same location.93

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land seaward of his original boundary line, and any new land that naturally accretes will belong to the state.

The statute further provides that
no person or governmental agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the State held in trust for the people of the State.

Id.

The statute thus runs counter to the common law on land accretion, which provides that accreted land generally belongs to the owner of the land bordering the body of water. Although it is possible that this statutory alteration of a common law property right could be considered a compensable taking, the provision has not yet been challenged. It thus provides a useful, and seemingly uncontroversial mechanism for preserving accreted land, free of development.

92. This more limited approach is currently utilized by at least three states. See sources cited supra note 56.

93. See Schmich, supra note 5, at 12, col. 1 (“From the densely populated barrier islands next to Charleston, up to Myrtle Beach 100 miles north, the beachfront buildings Hugo destroyed are being replaced just as fast as they can be, their fresh, yellow timber a vivid contrast to the weathered, gray wood of the old homes.”).
Setback provisions may be especially ineffective in regions subject to rapid erosion due to low ground elevation extending inland because in such regions, the rate of erosion can be unpredictably high. But no regulation, short of evacuating the coastal regions and condemning all existing structures, can eliminate the danger to life and property posed by erosion and future storms. Nonetheless, South Carolina's approach is a compromise measure that enables the state to prevent repetition of such harm.

b. Insurance Incentives and Disincentives

The availability of inexpensive federally subsidized flood insurance has been cited as one of the factors responsible for the large amount of coastal development. Not only does its availability encourage development in hazardous regions, but also its prevalence results in great expenditures by the federal government when these houses are destroyed by storms and floods.

As an intuitive matter, denying subsidized insurance for homes in dangerous areas would seem to discourage development. But insurance may not be such a decisive factor, as one spokesperson for FEMA stated: "The availability of flood insurance may be a factor but it's a very small factor. . . . People don't build on the coast because they can get flood insurance; they build there because they like the beach . . . . I like to point out that Miami Beach, which is on a barrier island, was a very popular building site long before Federal flood insurance came into being."

Furthermore, although it is easy to theorize, one must consider such a solution in the context of political reality. Federal flood insurance is out of the states' control; they cannot simply order its elimination by fiat. Although the federal government shows some signs of concern, there is no guarantee that an acceptable federal solution will be adopted any time soon. Thus, if a state wants to address its problems now, cancelling federal flood insurance is not an available option.

Additionally, a federally coordinated solution based on flood insurance will have high administrative costs. The states are all different—they each have different shorelines, composed of different regions, each with varying rates of erosion—consequently, they all have differing levels

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94. In low-lying coastal lands, as little as a one-foot rise in the ocean level may cause the sea to encroach many yards inland, causing property damage, hastening erosion, and increasing vulnerability to storms.
95. The average annual premium is $275. Peterson, supra note 2, at 18, col. 1.
96. Id.
97. From January 1978 to May 1989, the insurance division of FEMA paid $106.3 million for 41,300 flood claims in New York state, and $112.4 million for 25,000 claims in New Jersey. Id.
98. Id. (quoting FEMA spokesman David Cobb).
of vulnerability to storms. It simply may not be logistically feasible (or politically desirable) for the federal government to establish and administer the detailed and costly program that would be necessary to take all these variations into account.

One possible alternative is to have such a program administered through the states. Admittedly, it is unlikely that any state would voluntarily implement such a program. For example, if the federal government gave the states the power to declare certain regions ineligible for federal flood insurance, states would not likely choose to forgo federal benefits for any of its citizens. It would be much more palatable, politically, for a state to allow homeowners to receive federally subsidized flood insurance and to collect payments after a storm, and then force those citizens to apply that money toward a new home in a different location.

Even if the federal government were to discontinue subsidization of flood insurance entirely, it would still incur significant costs after a serious storm.\(^99\) In the absence of insurance, those whose homes were destroyed would nonetheless be eligible for disaster relief in the form of grants or reduced rate loans from FEMA to rebuild their homes.\(^100\) The thought that poor planning caused the harm would not likely diminish the emotion of the moment and subsequent public and political pressure to help those struck by disaster.\(^101\) Despite these continuing problems, the denial of flood insurance would shift some of the financial risk from the government to the individual homeowners.

As an alternative to outright denial, the federal government has successfully used the threat of insurance denial to induce local governing bodies to pass tighter restrictions on beachfront development. For example, in the Spring of 1989, FEMA “threatened to put Long Beach on probation, disqualifying it for Federal flood insurance, for permitting construction too close to the water.”\(^102\) Long Beach corrected the “faults” in time to avoid probation.\(^103\)

In 1988, Congress incorporated a different type of incentive scheme into the Federal Flood Insurance Act.\(^104\) Under these amendments, the agency will pay up to 40% of the insured value of the house to move it to a site away from a flood hazard area. Alternatively, it will pay up to

\(^99\) See supra notes 40-42 (describing these associated costs).

\(^100\) See supra text accompanying note 40.

\(^101\) The massive effort to help those devastated by Hurricane Hugo amply demonstrates this tendency. See Kadane, supra note 40 (citing an anticipated expenditure by FEMA of $2.7 billion in the wake of Hurricane Hugo).

\(^102\) Peterson, supra note 2, at 18, col. 1.

\(^103\) Id.

110% of the value of the policy to owners who raze their houses entirely and restore the beach.\textsuperscript{105}

Although this approach seems quite expensive, it may be economical in the long run: if these structures are truly within flood hazard areas, it is likely that the government would have to pay the full insured value if and when the house is destroyed by a storm. South Carolina, and other similarly situated states, might consider implementing a similar scheme to induce owners of homes built on dunes to relocate to safer inland areas.

However, such a scheme, while helping to some extent, is unlikely to be a satisfactory solution in the long run. The proliferation of developments on Miami Beach before the advent of federal flood insurance indicates that there will always be some who will continue to live on the beach despite financial disincentives.\textsuperscript{106}

c. Infrastructure Repair Incentives

i. Refusing to Pay for Repair of Damaged Infrastructure

Another potential regulatory mechanism would implicate the source of funding for infrastructure repair. Since the state pays the extra cost of repairing the community’s infrastructure after a storm, it could conceivably shift the expense to the affected property owners by refusing to finance repairs. The added expense might discourage extensive redevelopment of beachfront areas. Massachusetts has already adopted such a policy. An executive order, issued by former Governor Edward J. King after the blizzard of 1978, prohibits the expenditure of public funds to construct or rebuild roads, sewer lines, sea walls, and other public works on the state’s barrier beaches.\textsuperscript{107} Florida has taken similar measures in enacting a provision that forbids the use of state funds for construction or improvement of bridges or causeways to barrier islands.\textsuperscript{108}

But this type of approach might not, itself, be free from constitutional challenge. Most states and districts have a preexisting statutory obligation to keep existing infrastructure in good repair.\textsuperscript{109} A change in

\textsuperscript{106} See supra note 98.
\textsuperscript{108} FLA. STAT. ANN. § 380.27 (West 1988). These measures, however, seem aimed at discouraging additional development. It is uncertain whether repair or replacement after a storm would be considered “construction” or “improvement” within the meaning of the statute.
\textsuperscript{109} See, e.g., Union Drainage Dist. No. 6 v. Manteno Limestone Co., 341 Ill. App. 353, 364, 93 N.E.2d 500, 505 (1950) (commissioners of a drainage district have an enforceable statutory duty “to enlarge the drains to provide proper drainage for the district”); City of Ludlow v. Commonwealth, 147 Ky. 706, 145 S.W. 406 (1912) (city found liable for maintaining a statutory public nuisance by allowing a public road to fall into disrepair); People ex rel. Keene v. Board of Supervisors, 142 N.Y. 271, 36 N.E. 1062 (1894) (enforceable duty to maintain and repair bridges).
the law altering this obligation could be considered an unconstitutional taking. Courts have often required compensation when the government makes an affirmative representation to a property owner and later revokes it.\textsuperscript{110}

Despite this general trend, it is not clear that refusing to repair damaged infrastructure would be a taking. Most cases in which the courts have found a taking based on a prior government representation have involved a scenario where the government has revoked a prior assurance that it would \textit{not} interfere.\textsuperscript{111} In contrast, the infrastructure maintenance statutes are assurances of future \textit{affirmative} government action. Although the outcome of such a case is unclear, certainly this approach will not be free of constitutional challenge.

\textit{ii. Heavier Assessments on Certain Property Owners}

An alternative to simply refusing to repair damaged infrastructure would be to assess property owners located in certain areas for the cost of infrastructure repair. A decision to increase the amount of assessments for an entire district would seem an overly broad way to discourage beachfront development. However, singling out specific individuals within a district to bear higher assessments might violate the equal protection clause of the Constitution. A close examination of one type of infrastructure—drains and sewers (which often become clogged with debris after a large storm)\textsuperscript{112}—reveals how an equal protection claim might arise.

Funding for construction and maintenance of sewer and drain systems comes from assessments, general public funds, or a combination of the two.\textsuperscript{113} Generally, when a state repairs a public sewer system, it splits the costs among residents of a common district, who all enjoy the benefits of the system.\textsuperscript{114} The state cannot single out one party in a district to bear a greater proportion of the cost unless there is a close rela-

\textsuperscript{110} See \textit{infra} text accompanying notes 243-53.


\textsuperscript{112} See \textit{supra} note 41 and accompanying text.

\textsuperscript{113} See Breiholz v. Board of Supervisors, 257 U.S. 118 (1921) (board of supervisors may assess community for costs of improving ditch system); Reclamation Bd. v. Chambers, 46 Cal. App. 476, 189 P. 479 (1920) (appropriation for benefit of drainage district not an illegitimate gift of public money to individuals or corporations).

\textsuperscript{114} See \textit{In re Drainage Dist. No. 100}, 161 Neb. 758, 766, 74 N.W.2d 528, 534 (1956) ("['T]he law does not require that special assessments correspond exactly to the benefits received; on the contrary, it is a matter of common knowledge that absolute equality cannot be attained, and so long as a fair and reasonable method of spreading the assessment is followed, the courts will not intervene for minor inequalities. But when it clearly appears that an assessment is arbitrary and unreasonable, the courts will accord protection.'" (quoting 17 AM. JUR. Drains \& Sewers § 74, at 823 (1940)).
tionship between the assessment and the benefits to that person. For example, in *In re Hurd-Marvin Drain*, the Supreme Court of Michigan held that an assessment against a railroad for the cost of material in a new culvert under its embankment (which was part of the public drain system) violated equal protection of the laws, in view of the "disparity between the assessments on the various properties in the [drainage] district."

Of importance in this decision is the concept that benefits to the district as a whole often cannot be separated from benefits to a particular party. In such instances, it would appear that a pro-rata assessment over a broader portion of the district is warranted. It is exactly this issue that becomes troublesome in any attempt to allocate assessment costs to deter beachfront development. The amount of an assessment must be tied specifically to benefits received; it may not be based on other factors, such as a public policy in favor of clearing the shoreline. It is doubtful that a higher assessment levied upon beachfront residents for work on the *communal* drain system (defined broadly to include all drains and sewers that could collect runoff from other areas) would survive an equal protection challenge. Thus, we are caught between applying an overly broad penalty on the entire drainage district, and singling out particular parties and running the risk of an equal protection challenge.

This line-drawing problem between individual and public benefits is not limited to drains and sewers, but applies equally to assessments for other types of infrastructure. For example, roads and bridges do not just benefit the individuals whose houses happen to border them, but, in fact, carry a flow of public traffic. Similarly, electric and telephone lines to individuals on the shoreline benefit other members of the district as well.

One way to sidestep the line-drawing problem would be to limit the assessments to infrastructure repairs that *do* specifically benefit beachfront residents: for example, the cost of reconnecting a homeowner's personal telephone and electric lines, or cleaning up his or her privately owned part of the drain or sewer system. However, these charges may not prove significant enough to have any real deterrent value. Further, a district might have to justify, from an equal protection standpoint, its selection of certain members of a district to pay their own costs while

115. See *In re Hurd-Marvin Drain*, 331 Mich. 504, 50 N.W.2d 143 (1951) (levying higher costs on one party found illegitimate where that party did not receive some special benefit from the work to be done); Petitions of Dudek, 224 Minn. 532, 539, 70 N.W.2d 329, 334 (1955) (the land assessed must benefit from the work to be done).
117. Id. at 517, 50 N.W.2d at 149.
118. Id. at 512-13, 50 N.W.2d at 147.
119. Id. at 517, 50 N.W.2d at 149.
using state funds for the benefit of others whose infrastructure was damaged in the same storm.

In addition to the legal obstacles, there are significant practical issues involved in implementing such a cost-based approach to coastline overdevelopment. A comprehensive version of these measures would be required for complete internalization of costs. This would have to include a coordinated effort among both state and private infrastructure companies, as well as an implementation mechanism to be developed within each of the state's many overlapping districts responsible for the different regional road, sewer, drain, and electrical systems. From a practical standpoint, this would involve an extremely complex administrative and regulatory scheme, with significant transactional costs.

d. *Imposition of a Tax to Cover Anticipated Damage*

Along the same lines as the above infrastructure solution is the possibility of levying a heavy tax upon beachfront residents, based on the amortized annual expense to the government caused by beachfront development. This assessment could not be a property tax, which must be proportional to the value of the subject property, but would rather be a kind of mandatory governmental insurance scheme.

One problem with such a measure is that it is entirely unprecedented—it would not bear a close resemblance to either a property tax or social security. Questions would arise as to the basis of the tax and who should have to pay. Would it be a simple pro-rata amount for homes located within a given zone? How large should this zone be? Would it include inland as well as beachfront properties? Would uneven application of the tax within a particular district provoke equal protection challenges? Should those who own more expensive properties pay more? Should those who are more likely to breach sand dunes pay more?

Actuarial uncertainty creates additional questions. If only beachfront property owners are to be taxed, how could one ever ascertain the amount of increased future storm damage that can be specifically linked to their presence? This would be an extremely difficult calculation even if storms of regular size occurred at predictable intervals. It is made immeasurably more difficult since large storms occur relatively infrequently and vary widely in intensity and damages. For example, had such a scheme been implemented prior to Hurricane Hugo, it is unlikely that predictions of damage would have been high enough to generate the

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120. The tax would be based upon the average amount of money spent on beachfront residents per year through all sources, including anticipated FEMA expenditures, other federal disaster relief expenditures, and expenditures to repair infrastructure.

121. It would not be proportional to the value of the subject property, as is a property tax. Likewise, it would not be based on income, as is social security.
necessary revenue. On the other hand, a high actuarial prediction may yield a tax that is so large as to seem draconian when imposed on a small minority of citizens. Moreover, this tax might seem especially harsh since its imposition would be sudden and would apply to people who were already living along the beach. It is one thing to impose such a tax on people who move into this region in the future with knowledge of the consequences; it is entirely another matter to suddenly impose such a burden, without warning, upon those who already live in the area. There would be no easy way for these people to avoid hardship—perhaps many would have to sell their homes, most likely at a loss. Although this solution may have the desired effect of clearing the shoreline, it appears even more extreme than South Carolina’s solution.

e. Creation of a Nuisance Cause of Action for Destroying Dunes

Another option is for South Carolina to create a statutory public nuisance cause of action against owners of structures that cause or exacerbate erosion of sand dunes. Under this approach, the state’s coastal policy would be enforced by agency suits against particular landowners for fines or perhaps injunctive relief.

However, this mechanism, too, would have many downfalls. First, logistically, it is more difficult for an agency to enforce a policy through litigation than through direct regulation. Enforcing a statute on a case-by-case basis in the courts is inefficient; someone must bring a suit for each instance of misconduct, and common law standards for behavior may take years to develop. It is much easier for an agency to regulate specific behavior pursuant to statute and place the burden on each affected citizen to claim damages in court.

Secondly, there is no guarantee that an agency would be successful in its public nuisance litigation. Although the statute may characterize an action as a nuisance, the ultimate decision in each case is left to the court. Since the harm will occur indirectly at some time in the future (after a significant storm), courts may be reluctant to designate beachfront development as a nuisance. Finally, because litigation is so costly, the agency may be reluctant to expend significant resources on such an uncertain enterprise.

C. The Practical and Political Necessity for South Carolina’s Approach

As the above discussion indicates, there are, in theory, a number of approaches to the problem of coastal zone overdevelopment. But they each have complications of their own. Setback provisions may prove inadequate in light of the tenacity of beachfront property owners and the threat of encroaching erosion, whereas a statutory nuisance provision may be impractical to enforce. The political, legal, and logistical
problems with one or a combination of financially based incentives—such as the denial of subsidized flood insurance in combination with a refusal to expend government funds to reconstruct devastated infrastructure, or a mandatory taxation/insurance scheme—would seem to render such a solution less practical than the South Carolina approach. Furthermore, even a comprehensive financially based solution would not entirely internalize the costs because it would not account for the costs imposed on more inland property owners who suffer because coastal development has breached the dune barriers.

This Comment does not purport to describe all the available solutions, or to resolve conclusively all the practical and constitutional issues accompanying the hypothetical measures it has set forth. This circumscribed examination of alternatives does demonstrate, however, that some of the most obvious alternative measures are neither easily implemented nor free from constitutional challenge.

In sum, the South Carolina solution seems to strike an optimal balance between the interests of the property owner in enjoying his or her property, and the interests of the state in avoiding the costs of coastal overdevelopment. However, practicality does not necessarily equal constitutionality. Thus, we now turn to an analysis of the constitutional questions raised by the South Carolina statute.

Because the takings doctrine is currently undergoing a dramatic shift, some interesting developments may be observed upon a close analysis. Part II explores the various and shifting tests of the takings doctrine, demonstrating in the process how these tests would apply to the relevant sections of the South Carolina statute. It is the goal of this Part to highlight the important aspects of the changing takings doctrine in the context of this statute, as well as to analyze the interesting aspects of the statute in the context of a constitutional inquiry. Through such an analysis, we can see the importance of this statute not only for land use regulation but also for its potential effect on the constitutional doctrine itself.

II
Takings Analysis of South Carolina's Beachfront Management Act

A. The New Supreme Court and Its Evolving Takings Doctrine

The takings doctrine is unclear today, and, if the literature is to be believed, it has never been clear in the entire course of recorded history.
Numerous scholars and even Supreme Court Justices have bemoaned the lack of a “set formula” or consistent rationale underlying the Court’s takings doctrine. In the absence of such a unifying theory, the Court has applied a case-by-case approach.

I. The Political Division Within the Court

Most scholars who have written on the takings clause criticize the Supreme Court's approach, and suggest alternatives that would lead to a consistent doctrine. However, the disagreement among scholars as to which “consistent” alternative should be adopted serves only to highlight the difficulties involved in this area of the law. One reason this area is so troubling is that the political ideology of the individual judge seems to play a particularly large role in the decisionmaking process. In any given case, equally rational minds with differing political ideals may disagree.

122. See, e.g., Peterson, The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine, 77 CALIF. L. REV. 1299, 1304 (1989) (“[T]his is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.”); Sax, Takings and the Police Power, 74 YALE L.J. 36, 46 (1964) (noting that the Supreme Court “has settled upon no satisfactory rationale for [takings] cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem”).

123. See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government . . . .”); Nollan v. California Coastal Comm’n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting) (“Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court’s takings jurisprudence.”).

124. As the Court has said, “whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely upon the particular circumstances [of the case].” Penn Central, 438 U.S. at 124 (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).

125. See, e.g., R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) (comprehensive takings rationale based on the political and normative underpinnings of government); Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. REV. 465 (1983) (model focusing on whether the burden placed on the property owner is more than his “just share” for living in society); Humbach, A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use, 34 RUTGERS L. REV. 243 (1982) (suggesting that two conceptions of property interests, namely, rights and freedoms, can serve as a unifying basis for takings law; the taking of a “riglit” to be free from intrusion must be compensated, but the taking of a “freedoun” to make use of one’s land need not be compensated); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 HARV. L. REV. 1165 (1967) (proposing to unify takings jurisprudence under a utilitarian rationale); Peterson, The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property Without Moral Justification, 78 CALIF. L. REV. 55 (1990) (proposing a unifying theory based on whether the government restrictions prevent behavior that is considered by society to be “morally wrong”); Sax, supra note 122, at 46 (claiming that takings theory should be unified by asking whether the government is enhancing its own resources (taking) or whether it is, in effect, arbitrating a property dispute between private citizens (no taking)); Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149 (1971) (using the concept of diffusely held “public rights” to provide a framework for the takings clause designed to maximize total “net benefits” for society).
on the outcome. For example, a judge who puts a high premium on environmental protection may be less inclined to strike down wetlands preservation legislation than a judge who finds more value in freedom from governmental interference.

Such a politically based difference of opinion is evident in the recent takings opinions of the Supreme Court. Since the landmark case of Penn Central Transportation Co. v. New York City, Justices on the Court have been engaged in a heated battle over interpretation of the takings clause. Although the opinions often appear inconsistent, more often than not this reflects conflicting dicta rather than inconsistent holdings. That the inconsistencies are merely in dicta is of little consolation, however, because this dicta is slowly becoming law as the Supreme Court's confusion reverberates throughout the rest of the judicial system.

126. 438 U.S. 104 (1978) (finding no taking where New York City barred development of a skyscraper in the air space over landmark Grand Central Terminal).

127. Because Justices tend to fight with words rather than arms, the heat of battle is limited to rhetoric. For example, then-Justice Rehnquist argued in Penn Central that the majority had short-changed the Constitution: "Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were 'in danger of forgetting that 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.' The Court's opinion in this case demonstrates that the danger thus foreseen has not abated." 438 U.S. at 152 (Rehnquist, J., dissenting) (citation omitted) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)). Objecting a few years later to the majority's adoption of a per se finding of a taking for permanent physical occupations of property, Justice Blackmun complained in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), that "the Court erects a strained and untenable distinction between 'temporary physical invasions'... and 'permanent physical occupations'.... In my view, the Court's approach 'reduces the constitutional issue to a formalistic quibble' over whether property has been 'permanently occupied' or 'temporarily invaded.'" Id. at 442 (Blackmun, J., dissenting) (quoting Sax, supra note 122, at 37). More recently, Chief Justice Rehnquist exhibited apparent shock at the Court's discounting of the Pennsylvania Coal case, which "has for 65 years been the foundation of our 'regulatory takings' jurisprudence." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting). Three months later, in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), Justice Brennan described Justice Scalia's nexus test as "unreasonably demanding," and asserted that the majority's analysis, even under its own test, was "simply wrong." Id. at 848-53 (Brennan, J., dissenting). Justice Scalia shot back by chiding Justice Brennan's insinuation that the government could easily circumvent the nexus test: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." Id. at 841.

128. For example, in Keystone, the Court held that no taking had occurred. Although the Court gave several rationales, the basis of the holding was unclear, as was the question of how much of the opinion was merely dicta. See infra text accompanying notes 195-98. Additionally, in Nollan, although the holding was based on the so-called "nexus test," Justice Scalia also included a significant amount of dicta to the effect that an easement is actually a permanent physical occupation and thus a per se taking.

129. See, e.g., National Wildlife Fed'n v. Interstate Commerce Comm'n, 850 F.2d 694, 706 (D.C. Cir. 1988). The National Wildlife opinion relies on Justice Scalia's dicta in Nollan that an easement is to be considered a permanent physical occupation and thus a per se taking under the Loretto test, although the dicta in Nollan runs counter to the analysis in Loretto itself. See infra note 236.
long as the Court remains politically divided, it is unlikely to establish a clear doctrine.

President Reagan's first two appointees did not decisively shift the Court's ideological balance, but only rendered it somewhat more precarious. At that point, four Justices—Powell, Rehnquist, O'Connor, and Scalia—tended to find compensable takings more frequently than did the rest of the Court. Although the shortcomings of blanket generalizations are many, for purposes of clarity, this Comment refers to these Justices as the "conservative" group. On the other hand, four other Justices—Brennan, Marshall, Blackmun, and Stevens—have generally found compensable takings less frequently. Again, with apologies for the generalization, this Comment refers to these Justices as the "liberal" group. This polarization, reflected in my labeling, left Justice White as the swing vote.

It should be stressed that this rough characterization of Justices as "liberal" and "conservative" belies the complexity of the thought processes of the various Justices. There are certainly takings cases where a liberal Justice has joined with the conservative group to support a particular holding, and vice versa. As a general rule, however, when divisions in the Court occur over the takings clause, they tend to occur along the political lines delineated above.

This division can be seen most strikingly in two of the most important recent takings cases: Nollan v. California Coastal Commission and Keystone Bituminous Coal Association v. DeBenedictis. In each case, the two factions divided as described above, leaving Justice White to cast the deciding vote; once to find a taking (Nollan), and once to find no taking (Keystone).

Recent events may herald an end to this uneasy balance. Although the appointment of Justice Kennedy in place of Justice Powell had little effect on the takings doctrine, Justice Brennan's resignation in July 1990 may be the final push needed to tip the balance firmly to the conservative side.

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130. See, e.g., Loretto, 458 U.S. 419 (Marshall, J., joined by Burger, C.J., and Powell, Rehnquist, Stevens, and O'Connor, JJ., setting forth a per se takings rule in cases of "permanent physical occupations" of property).
131. See, e.g., Agins v. City of Tiburon, 447 U.S. 255 (1980) ("conservative" faction joins "liberal" faction in unanimous opinion finding no compensable taking where city zoned appellants' five-acre parcel to allow construction of a maximum of five single-family residences).
132. For a broader and more colorful survey of how some of the individual Justices come out on these issues, see the fiery quotes cited supra note 127.
135. Justice Powell is generally conservative with respect to takings issues.
136. It is important to note, however, that the views of Justices Kennedy and Souter, with respect to the takings doctrine, are presently uncertain because neither has participated in a
2. A Structural Overview of the Supreme Court's Reasoning Process

Before we undertake an analysis of the takings doctrine's many shifting tests, a general road map is essential. Surprisingly, although members of the Court strongly disagree as to specific application of doctrine to facts, they all seem to agree on a basic doctrinal structure. The following discussion is a stylized description of the Supreme Court's reasoning process.\(^{137}\) Figure 1 is a graphic representation of this reasoning process.

The Court's first step is to ascertain whether the statute is facially valid. If it is not, further inquiry is unnecessary, as the statute will be struck down as unconstitutional. Very few statutes, however, fail this basic test—it can be almost entirely circumvented by a statement providing for compensation if specific applications effect a taking. As a result, the analysis generally proceeds on a case-by-case basis.

The next step is to ascertain whether there is a sufficient "nexus" between the regulation and a substantial public purpose.\(^{138}\) If not, the Court will find a taking. If so, the Court proceeds to the next stage in the analysis.

At this point, the Court tries to ascertain whether the regulation in question has any of four special features that specifically indicate whether or not a taking should be found. A regulation will generally not be considered a taking if it is (1) regulating behavior tantamount to a public nuisance,\(^{139}\) or (2) a uniform zoning ordinance with average reciprocity of benefits and burdens.\(^{140}\) On the other hand, a regulation generally will be considered a taking if (1) it has an especially restrictive "character," as would, for example, a physical invasion of property or perhaps the imposition of affirmative duties,\(^{141}\) or (2) it interferes with a property owner's reasonable investment-backed expectations.\(^{142}\) Unfortunately

\(^{137}\) Although not set forth as such in any of the Court's opinions (the opinions generally focus on only one or two issues), this general doctrinal skeleton emerges from a review of many such opinions.

\(^{138}\) See Nollan, 483 U.S. at 837 (requiring dedication of a lateral public easement found not rationally related to the claimed public purpose of assuring that people passing on the street would be aware of the nearby beach); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (government appropriation of interest derived from interpleader funds placed in court registry found not rationally related to the claimed public purpose of reimbursing administrative costs, because the state had already charged an administrative fee).

\(^{139}\) See infra notes 188-213 and accompanying text.

\(^{140}\) See infra notes 214-25 and accompanying text.

\(^{141}\) See infra notes 226-38 and accompanying text.

\(^{142}\) See infra notes 243-53 and accompanying text.
for doctrinal clarity, the Justices have disagreed on where to draw the lines for virtually all these tests.

If none of these special features is present, or if they are present to some extent but are not determinative, the Court will base its decision on whether there is any remaining economically viable use for the property.¹４³ This final catch-all category has been the deciding factor more

¹４３. See infra notes 254-85 and accompanying text.
often than not in the Court's takings jurisprudence. The "remaining economically viable use" test's lack of standards has provided courts with much needed flexibility in this area, at the expense of much desired predictability.

B. Takings Analysis of the South Carolina Statute

The discussion below analyzes the South Carolina regulatory scheme for beachfront development in light of the reasoning process outlined above. This Section attempts not only to provide a snapshot of the doctrine as it exists now, but also to point out some apparent trends in the Court's thinking that are beginning to alter certain aspects of the doctrine.

Supreme Court review of South Carolina's regulatory scheme would clearly affect future coastal (and other environmentally sensitive) land-use policy. Additionally, because the South Carolina statute falls in the midst of several doctrinally unsettled areas, it could also clarify some of the confusion. Doctrinal clarity, however, will not be a welcome arrival if it hampers the government's ability to manage this country's diminishing natural resources effectively.

I. Facial Validity

If a statute or regulation is found facially invalid, the Court will not require compensation, but, instead, it will simply strike the statute or regulation down. A statute can be facially invalid if the Court finds it was not enacted for a viable "public use" or if its "mere enactment" constitutes a taking and no compensatory channel is available. Despite disagreeing on most other aspects of the takings doctrine, all members of the Court are, on the whole, hesitant to strike down a statute or regulation on the basis of facial invalidity.

a. "Public Use" and the Police Power

The takings clause of the fifth amendment states that "private property [shall not] be taken for public use without just compensation." In rare cases, the Court has found statutes invalid because of the absence of a public purpose. Such state action is illegitimate whether or not the

144. See id.
145. See infra notes 146-60 and accompanying text.
146. U.S. CONST. amend. V.
147. See, e.g., Cincinnati v. Vester, 281 U.S. 439, 447 (1930) (government attempt to take land beyond amount needed to widen a street found unconstitutional because of absence of legitimate public purpose); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 416-17 (1896) (government order taking property from one railroad company for another company's private use found unconstitutional because of the absence of legitimate public purpose). See generally Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962
state provides just compensation.\textsuperscript{148}

The public purpose doctrine has withered away, however, as the courts have recognized a strong presumption favoring public purpose in government action.\textsuperscript{149} As the Supreme Court stated in \textit{Hawaii Housing Authority v. Midkiff},\textsuperscript{150} "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers . . . [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."\textsuperscript{151}

Because this standard is so easily satisfied, the South Carolina statute will almost certainly survive scrutiny on this issue. After finding that "[i]mportant ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development,"\textsuperscript{152} the South Carolina Legislature passed the coastal zone statute "to promote the economic and social improvement of the coastal zone."\textsuperscript{153} A court would assuredly find limiting development along the coastline sufficiently "rationally related" to the stated purpose to fall within the state's police power, and consequently, within the public use requirement.

\textbf{b. "Mere Enactment"}

Similarly, the "mere enactment" of a statute seldom effects a taking. Since most statutes provide procedures for obtaining a permit or variance, courts will only consider the takings question ripe for review where such mitigating measures are unavailable. As stated in \textit{United States v. Riverside Bayview Homes},\textsuperscript{154} "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property . . . . Only when a permit is denied and [the Court finds that the denial fails to satisfy its takings tests] can it be said that a

\textsuperscript{148} \textit{Vester}, 281 U.S. at 441, 447 (state action found illegitimate even though compensation was to be paid in eminent domain proceeding).
\textsuperscript{149} \textit{See Dunham, supra} note 147, at 65-71 (decline of public purpose doctrine); Note, \textit{supra} note 147, at 599 (same).
\textsuperscript{150} \textit{Id.} at 240-41 (finding public purpose under the fifth amendment in state-compelled transfer of title in real property from lessors to lessees, where transfer was designed to reduce the concentration of real property ownership). The Court said that it would "not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" \textit{Id.} at 241 (quoting United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896)).
\textsuperscript{152} \textit{Id.} § 48-39-30(A).
\textsuperscript{153} 474 U.S. 121 (1985).
taking has occurred.”

Thus, as the South Carolina statute simply imposes a permit program, its mere enactment does not present a ripe takings question, and the statute is therefore facially valid under the fifth amendment.

Even if the statute’s “mere enactment” harmed individual property owners, a legislature could shore up the statute by providing for compensation in cases that rise to the level of a taking. The framers of the Beachfront Management Act, apparently anticipating potential takings problems, provided for the availability of compensation where the statute risks effecting a taking.

The Beachfront Management Act has already withstood facial challenge in federal district court. In one consolidated action, a district judge found the statute facially valid, but reserved the right to consider individual challenges to its application. This decision is soundly supported by case law and will most likely be upheld on appeal. As a result, the courts will analyze the statute primarily from an “as applied” standpoint, deciding on a case-by-case basis whether compensation is required.

155. Id. at 127.
156. “[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional.” Id. at 128. All federal statutes carry with them the availability of compensation, because “the Tucker Act . . . presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute.” Id. State statutes, however, do not enjoy the benefits of the Tucker Act, and thus they must contain specific provisions authorizing compensation.

A person having a recorded interest or interest by operation of law in or having registered claim to land seaward of the baseline or setback line which is affected by the prohibition of construction or reconstruction may petition the circuit court to determine whether . . . the prohibition so restricts the use of the property as to deprive the owner of the practical uses of it and is an unreasonable exercise of police power and constitutes a taking without compensation.

. . . If the judgment is in favor of the petitioner, the [judicial] order must require the State either to issue the necessary permits for construction or reconstruction of a structure, order that the prohibition does not apply to the property, or provide reasonable compensation for the loss of the use of the land . . . .

Id.
158. See Building Restrictions Upheld, supra note 5, at 13.
159. Judge Falcon B. Hawkins of the District of South Carolina found no taking in two inverse condemnation cases, and required compensation in a third case where a permit was denied. Id. The court found that the Beachfront Management Act was “substantially related to the important goal of preserving South Carolina’s beaches” and thus was facially valid, but that the state would have to compensate individual property owners if, in the course of the statute’s implementation, it effected a taking of an individual’s property. Id.
160. See supra notes 155-57 and accompanying text.
2. The "Reasonably Necessary" Test: The Legacy of the Nollan "Nexus"

One of the clearest examples of the Court's division over the takings clause involves the practical scrutiny the Court employs when it evaluates, in a threshold inquiry, whether government action is "reasonably necessary to the effectuation of a substantial public purpose."161 Until the 1987 case of Nollan v. California Coastal Commission,162 the Court was much more deferential to the government's position.163 The Nollan majority164 altered this inquiry, however, by explicitly requiring a demonstrable "nexus" between the specific government restriction and the ostensible government purpose.165

A brief look at the facts of Nollan demonstrates the scope of the new test. The Nollans owned a parcel of beachfront property improved with a small bungalow and an eight-foot sea wall located ten feet landward of the mean high-tide line (the property line).166 Desiring to replace the bungalow with a larger house, the Nollans applied for a coastal permit from the California Coastal Commission.167 However, the Commission required, as a condition to building the house, that the Nollans allow the public to walk between the mean high-tide line and the sea wall.168 The Nollans, dissatisfied with this arrangement, sued the Coastal Commission claiming that the easement requirement was an unconstitutional taking in the absence of just compensation.169

The ostensible "purpose" of the government action in Nollan was to prevent the public from being psychologically closed off from the beach

161. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (citing Nectow v. Cambridge, 277 U.S. 183 (1928)) (formulation of test supported by a clear majority of the Court). The "reasonably necessary" test used to decide when compensation is required should not be confused with the much more lax "rationally related" test employed for "public use" validity purposes. See supra notes 146-51 and accompanying text.


163. See id. at 842 (Brennan, J., dissenting) (Criticizing the nexus test as inconsistent with past doctrine, Justice Brennan wrote that "the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century.").

164. Justice Scalia delivered the opinion, joined by Chief Justice Rehnquist and Justices White, Powell, and O'Connor. Id. at 826.

165. In the Court's words, a deprivation of property will be considered a taking unless the condition is "reasonably related to the public need or burden" created by the regulated activity. Id. at 838. The Nollan Court's shift from the term "reasonably necessary" to the term "reasonably related" ironically appears to suggest a less, not more, vigorous standard of scrutiny. However, the Nollan Court's shift in emphasis to the nexus—between the deprivation of property on the one hand, and the burden or need that the government is addressing on the other—makes the new formulation indeed a more vigorous standard.

166. Id. at 827.

167. Id. at 828.

168. Id.

169. Id. at 829.
by a row of houses. The majority found it "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." Thus, the Court found no reasonable nexus between the public purpose and the lateral public access requirement, and consequently found the government action to be a taking.

Two of the Nollan dissenters displeased with the majority's strengthening of the "reasonably necessary" standard, stated that "the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development." The dissent further found that if a nexus test were to be applied, it should be applied much more loosely than the majority construed it: "The Court is . . . simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development."

Clearly, there is strong disagreement within the Court as to how restrictively the "nexus" requirement should be applied, or even, in some cases, whether it should be applied at all. However, the Nollan majority—the conservatives—favored strict application of the test. Further, because the two most recent appointees to the Court since Nollan (Justices Kennedy and Souter) appear to identify more closely with the conservatives who made up the Nollan majority, the Court will likely favor strict application of the "nexus" test for some time.

In light of this, let us consider how the Justices might treat the

170. Id. at 835. The government action was for the purpose of "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." Id.

171. The majority was composed of conservative Justices Rehnquist, Powell, O'Connor, and Scalia, and Justice White—often the swing vote. Id. at 826.

172. Id. at 838. The Court continued: "It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house." Id. at 838-39 (emphasis added).

173. Id.

174. Justice Brennan filed a dissent, joined by Justice Marshall. Id. at 842 (Brennan, J., dissenting). In a separate dissent, Justice Stevens, joined by Justice Blackmun, functionally joined Justice Brennan's dissent. Id. at 866, 867 (Stevens, J., dissenting) ("I am persuaded that [Justice Brennan] has the better of the legal arguments here."). Finally, Justice Blackmun filed a separate dissent. Id. at 865 (Blackmun, J., dissenting).

175. Id. at 863 (Brennan, J., dissenting) (footnote omitted). Justice Brennan would not require the exactitude the majority supported, preferring a deferential standard of scrutiny comparable to that employed in the rational basis test used in due process and equal protection cases. Id. at 842-48 (Brennan, J., dissenting).

176. Id. at 853 (Brennan, J., dissenting).
South Carolina statute. Two of its provisions present interesting questions with respect to the future application of the Nollan "nexus" test: (1) the beach renourishment requirement of the original Beachfront Management Act, and (2) the forty-year erosion zone setback policy. Although the original renourishment requirements have since been repealed, the novelty of the takings issue, combined with the possibility that other states could seek to invoke such provisions, justifies including them in our examination of the statute under the nexus test.

a. Beach Renourishment

As a condition to rebuilding any house or erosion control device seaward of the setback line, the original 1988 Beachfront Management Act required a property owner to "renourish the beach in front of the property on a yearly basis with an amount and type of sand to be approved by the council, but which is not less than one and one-half times the yearly volume of sand lost due to erosion." Where a replaced erosion control structure acts to increase the rate of erosion of the beach immediately in front of it, the renourishment requirement would appear to be justified under Nollan because there is a direct "nexus" between the harm caused by the landowner (erosion) and the government requirement (renourishment). However, the relationship is not so clear in the case of tangential erosion control devices, which are constructed perpendicular to the shore so as to arrest "littoral drift" of sand. Such devices do not cause erosion of the beach where they are located, but rather cause erosion to downdrift dunes and beaches by blocking their source of replenishing sand.

A landowner's ability to cause erosion of downdrift beaches illustrates why the renourishment requirements may fail the nexus test. Requiring a landowner to replenish the sand in front of his own house


178. The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves, while contributing to the deterioration and loss of the dry sand beach . . . . 1988 S.C. Acts 634 § 1, reprinted in S.C. Stat. 5130, 5131-32 (1988) (emphasis added).

179. See supra note 28 and accompanying text.

180. See I. McHARG, supra note 24, at 13; see also Peterson, supra note 2, at 18, cols. 4-5 (New York state and federal governments' construction of tangential groins—rigid structures built out from shore to protect the shore from erosion—is believed to have caused the undermining and imminent destruction of 225 houses located downdrift of the groins).
does not mitigate the harm caused to downdrift beaches by his tangential device. Moreover, requiring downdrift landowners to replenish the sand denied to their beaches by updrift erosion control devices certainly has no relationship to any harm the downdrift landowners themselves may have caused.

The nexus is also questionable where renourishment is required after a person simply rebuilds her house within the setback zone, yet sufficiently far from the beach/dune system to cause no increased erosion. Considering the restrictive stance demonstrated in *Nollan*, the Court would likely find the renourishment requirement to be a taking in these cases. Perhaps a combination of constitutional and practical difficulties is what prompted the South Carolina legislature to repeal these provisions and delegate the renourishment responsibility to local governments.

b. *Forty-Year Erosion Zone Setback Policy*

The Beachfront Management Act forbids all new construction of houses and erosion control devices between the baseline and the sea, and limits construction between the baseline and the setback line to relatively small houses. The setback line is defined as the forty-year estimated erosion zone behind the primary dune. The primary purpose of the setback line policy is to “protect the integrity of the beach/dune system” from accelerated erosion and consequent endangerment of adjacent property.

The relationship between the restriction and the public purpose seems especially close for the sea wall/erosion control device prohibitions, as those structures have been found, ironically, to result in increased erosion. However, the original 1988 provisions, relating to the construction and reconstruction of houses, seem not to have the same close relationship to a public purpose. Under the 1988 provisions, no one could build a habitable structure seaward of a boundary twenty feet landward of the baseline. A landowner affected by that rigid requirement could perhaps argue that there was no nexus because his particular construction did not encroach upon the dune barrier. As if in response to this concern, the South Carolina Legislature, in the post-Hugo amendments, tailored this restriction more closely to the statutory purpose by permitting construction in the area between the baseline and setback line so long as “[n]o part of the building is . . . constructed on the primary

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181. See *supra* notes 77-78 and accompanying text.
182. See *supra* note 74 and accompanying text.
184. See *supra* note 178.
185. See *supra* note 77.
Thus, the new provisions more clearly tied the restriction to a public purpose, dispelling any lingering nexus worries.

A second nexus problem for the setback policy concerns the possibility that the statute is insufficient to accomplish its purpose. Assuming that habitable structures—houses, condominium buildings, hotels, and the like—generally last over forty years, the forty-year erosion zone setback policy merely delays the problems that it purports to eliminate. Forty years from now, after heavy development along the setback line, the habitable structures will be in the middle of the area to which the dune barrier should have migrated. However, the existence of those structures will prevent the reformation of the sand dunes that would ordinarily occur in the course of natural erosion/dune migration. As a result, the construction, in conjunction with the erosion process, will destroy the dune barrier. The statute will only delay the harm for forty years or so. If the statute will ultimately fail to accomplish its stated public purpose, the nexus between the restrictions and the public purpose may be insufficient.

This argument, however, is unlikely to be persuasive. Most courts probably would not want to be seen as usurping the legislature's role in making land-use policy decisions. At the least, the setback policy could be considered a step in the right direction. Furthermore, the delay of harm for forty years is, in itself, a legitimate public purpose. Since the harm occurs when a large storm hits the shoreline, if such a storm were to hit within forty years, the statute would have met the public purpose.

In conclusion, it appears that the current version of the statute would easily meet the nexus requirements.

3. Specific Features of the Regulation

If a governmental action survives the Nollan nexus test, the Court then ascertains whether the action has any of four specific features that would indicate either a taking ("inclusion" to the takings clause) or no taking ("exclusion" from the takings clause). Although these four tests are framed by the Court as simple per se tests, the outcomes of the cases suggest that the Court simultaneously uses a balancing test between the severity of the restriction and the magnitude of the resulting public benefit. As a further complication, the Court's two factions refuse to

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187. Cf. Kratovil & Harrison, Eminent Domain—Policy and Concept, 42 CALIF. L. REV. 596, 609-10 (1954) (describing the interests to be balanced as inherently difficult to measure); Michelman, supra note 123, at 1193-96 (discussing and criticizing balancing of interests as one of four rules of decision in takings cases); id. at 1234-35 (concluding that a balancing of interests in takings cases can never yield a determination of the fairness of an uncompensated deprivation of property).
acknowledge their use of balancing tests—each purporting to apply different “bright line” tests.

The four features the Court examines are: (1) whether the conduct being prevented is similar to a public nuisance; (2) whether there is “average reciprocity of burdens and benefits” distributed by the government action; (3) whether the “character” of the regulation is particularly invasive of the property owner’s rights (such as a “physical invasion” of the property, or perhaps the imposition of affirmative duties); and (4) to what extent the government action has harmed reasonable investment-backed expectations. The following Sections describe these factors and analyze the South Carolina statute where each factor is applicable.

a. Nuisance-Like Conduct

The so-called “nuisance-like conduct” or “noxious use” doctrine defines certain conduct as outside the reach of the takings clause. This doctrine allows the government to deprive an individual of property without providing compensation if the government action prohibits “nuisance-like conduct.”\(^{188}\) Although all members of the Court acknowledge the validity of this doctrine, they construe its breadth very differently, radically disagreeing over the definition of “nuisance-like conduct.”

The conflicting standards are evident in the recent case, *Keystone Bituminous Coal Association v. DeBenedictis*,\(^ {189}\) where the state of Pennsylvania prohibited mining that was expected to cause subsidence damage to specified classes of structures.\(^ {190}\) The *Keystone* majority, made up primarily of the liberal Justices,\(^ {191}\) concluded that the mining prohibition did not effect a taking as its purpose was to prevent an activity “similar to public nuisances.”\(^ {192}\) On the other hand, Chief Justice Rehnquist, in dissent,\(^ {193}\) found mining activity to be insufficiently nuisance-like. He reasoned that “[t]he strong public interest in the stability of streets and cities . . . was insufficient to warrant achieving the desire by a shorter cut than the constitutional way of paying for the

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188. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (government order to destroy diseased cedar trees not a taking where intended to prevent spread of disease to nearby apple trees); *Mugler v. Kansas*, 123 U.S. 623 (1887) (government prohibition of use of brewery for making alcohol not a taking where valid legislation declared such use to be injurious to the health, morals, or safety of the community).


190. *Id.* at 475-77.

191. Justice Stevens delivered the opinion of the Court, joined by Justices Brennan, White, Marshall, and Blackmun. *Id.* at 472.

192. *Id.* at 492.

193. Chief Justice Rehnquist wrote the dissent, in which Justices Powell, O’Connor, and Scalia joined. *Id.* at 472.
change.'

For two reasons, it is uncertain whether the Court today would find regulated activity like the mining in *Keystone* to be sufficiently nuisance-like to satisfy the doctrine. First, there is ambiguity even within the *Keystone* majority opinion as to how to apply the test. After nine pages describing how the government could prevent nuisance-like conduct without paying compensation, and after concluding that Pennsylvania's mining prohibition sought to prevent activities similar to public nuisances, the majority shifted gears. As if to deemphasize the importance of the nuisance-like conduct analysis, the Court said: "Nonetheless, we need not rest our decision on this factor alone, because petitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases." The opinion thus leaves unclear whether the nuisance-like conduct discussion is dicta or an alternative holding. Indeed, there is a third possibility: that the nuisance-like conduct test acts in concert with the "remaining economically viable use test." A second reason to question the *Keystone* formulation of the nuisance-like conduct doctrine is that the composition of liberal Justices that formed the *Keystone* majority no longer exists. Recall that the *Keystone* opinion commanded a majority of five. If newly appointed Justice Souter joins the conservative *Keystone* dissenters in future cases—as seems possible—then the Court may begin to read this exception very strictly, finding only in the very clearest of cases that regulated activity is sufficiently nuisance-like to obviate the need for compensation.

The political shift on the Court and the borderline nature of the South Carolina statute with respect to the nuisance-like conduct doctrine make this application particularly intriguing. South Carolina's law is effectively the legislature's attempt to mitigate one type of nuisance: that caused by development near South Carolina's beachfront and barrier island sand dunes. As discussed in Section I(A), the proliferation of beachfront development, and the concomitant destruction of the sand

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194. *Id.* at 510 (Rehnquist, C.J., dissenting) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).
195. *Id.* at 485-93.
196. *Id.* at 492.
197. *Id.* at 492-93.
198. For a discussion of the "no remaining economically viable use test," see infra notes 254-85.
199. As a result of the loss of Justice Brennan's *Keystone* majority vote, Justice White's swing vote in support of *Keystone* will be less important in the future.
200. *See supra* notes 124-36 and accompanying text.
201. "Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage." *BLACK'S LAW DICTIONARY* 1065 (6th ed. 1990).
dune barriers, results in increased risk of storm damage—the cost of which must be borne by many sectors of the community.\footnote{202} Despite this apparent nuisance-abating purpose, the Beachfront Management Act is so different from statutes which have been considered in other “nuisance-like conduct” cases\footnote{203} that existing case law offers little predictive assistance.

Conceptually, development in risky areas does not seem to be nuisance-like conduct. At first glance, the only people who appear harmed by the conduct are the owners and occupants of the buildings that are damaged or destroyed by a storm.\footnote{204} The other costs borne by the public appear “voluntary”—that is, the government could stop offering subsidized flood insurance or could refuse to repair damaged infrastructure.\footnote{205} However, neighboring inland properties may also suffer when a development-induced breach of the dune barrier permits the passage of a storm surge.\footnote{206} Moreover, the costs borne by the public are not voluntary in any meaningful sense, and therefore the infringement on public rights is not avoidable.\footnote{207}

In sum, although the conduct at first glance does not appear to be nuisance-like conduct, a closer examination reveals a true conflict of claimed rights, which the South Carolina statutory scheme seeks to resolve. The rights in conflict are: (1) the right of a beachfront landowner to build on privately owned land; (2) the right of the public not to bear the costs incurred as a result of private beachfront development; and (3) the right of inland landowners to be protected by the sand dune barriers that are threatened by beachfront development. The only aspect of this situation which differs from a conventional nuisance case is that the public rights are more diffusely held and thus are often not perceived as rights at all. Professor Sax has eloquently described the problem of interrelated interests and diffusely held rights:

Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries . . . . Frequently,

\footnote{202}{See supra notes 18-42 and accompanying text.}
\footnote{203}{See, e.g., Keystone, 480 U.S. 470 (prohibiting mining that might cause subsidence); James Everard's Breweries v. Day, 265 U.S. 545 (1924) (prohibiting sale of malt liquors even for medicinal purposes); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (prohibiting brickyards in residential area).}
\footnote{204}{This would clearly not give rise to a public nuisance, since the harm caused by the development is visited only upon those interested in the development.}
\footnote{205}{See supra text accompanying notes 95-108.}
\footnote{206}{In this respect, South Carolina's statutory scheme is similar to standard flood plain law. Under flood plain law, a person who purchases hilly land that naturally channels flood waters away from a nearby community generally cannot flatten the hill and render the downhill community vulnerable to floods.}
\footnote{207}{See supra notes 38-42 and accompanying text.}
Recognizing that private conflicts over land use arise continually and that the government is constantly called in to settle the conflict, Professor Sax would extend the nuisance-like conduct exception to those situations where the government is essentially "refereeing" a conflict between multiple private parties. Further, under his view, the courts should not discount certain rights simply because they are held diffusely. Compensation would be required under this theory only when the government restricts uses that have no adverse "spillover" effects to others, be they neighboring property owners or the general public.

The relatively conservative Justices who are likely to form the Court's majority in future decisions are unlikely to adopt this progressive view. In *Keystone*, the conservative dissent found a mining regulation intended to prevent subsidence damage did not fall under the nuisance-like conduct doctrine. Since the alleged nuisance in *Keystone* seems to be much more severe than the relatively speculative nuisance created by coastal development, the conservatives who now comprise a majority of the Court are unlikely to find that the South Carolina statute falls within the nuisance-like conduct exception.

Even if the Court finds that the Beachfront Management Act does not fall within the nuisance-like conduct exception, the statute's significant public purpose will no doubt influence the Court's analysis. Further, although being characterized as designed to prevent "nuisance-like conduct" will render the statute constitutionally sound, a failure to be so characterized will not automatically lead to a finding of a taking. Thus,

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208. Sax, *supra* note 125, at 152. For example, "the homeowner demanding quiet imposes on the noise-making airport just as much as the airport users' demand to conduct noise-producing activity impinges on the homeowner." *Id.* at 154.

209. "Requiring the public to pay for the costs generated by every situation of conflicting uses between property owners would wildly expand the reach of the compensation provision of the Constitution . . . ." *Id.* at 153. He continues:

It hardly seems appropriate, when the government intercedes to settle the conflict, to find that a 'taking' has occurred simply because the uses one owner was formerly able to make within his boundaries have been curtailed. The restriction may instead represent a resolution of conflicting demands so as to protect and maintain the uses of other parcels of property within their boundaries. The point is that the ecological facts of life demonstrate a powerful inextricability in the utilization of natural resources. If we wish to cope intelligently with the use of resources, we must focus attention on the nature and degree to which the consequences of any use are disseminated across property, state, and even national boundaries. The law relating to property rights and takings of property ought to begin to reflect this knowledge.

*Id.* at 154-55 (emphasis in original).

210. *Id.* at 155-61.

211. *Id.* at 162.


213. *Id.* at 512 (Rehnquist, C.J., dissenting).
determining whether the case falls within the ambit of "nuisance-like conduct" is only the first step.

b. Reciprocity of Burdens and Benefits

The Court has generally upheld zoning-type restrictions when it has found an "average reciprocity of advantage" among those affected by the restriction.\(^{214}\) Thus, no taking occurs if the regulation-induced detriment suffered by a particular individual is offset by the advantage that accrues to him by subjecting others to the same regulation.\(^{215}\) This test is most often applied to justify uniform zoning ordinances.\(^ {216}\)

Although reciprocity of burdens and benefits will justify upholding a restriction, the Court appears to be split over whether the lack of such reciprocity will, in itself, justify a finding of a taking. The case of \textit{Penn Central Transportation Co. v. New York City}\(^ {217}\) illustrates this divergence of opinion among the Justices. \textit{Penn Central} involved a New York City landmark preservation law that required owners of designated buildings of historical significance to maintain those buildings in good repair.\(^ {218}\) In certain situations, the law effectively forbade further development of historically significant property.\(^ {219}\)

The liberal Justices who formed the \textit{Penn Central} majority\(^ {220}\) found that the landmark preservation law did not effect a taking despite the fact that it had "a more severe impact on some landowners than on others."\(^ {221}\) The dissent\(^ {222}\) disagreed, arguing that "[i]t is exactly this imposition of general costs on a few individuals at which the ‘taking’ protection is directed."\(^ {223}\) Under the conservative view, then, a regulation that offers no reciprocity of benefits is considered a taking unless it falls under the narrow nuisance-like conduct exception to the takings clause. Were the \textit{Penn Central} case to come up for review today, the result would likely have been different. The current majority of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Souter

\(^{214}\) Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
\(^{218}\) Id. at 111-12.
\(^{219}\) Id. at 112 (describing process by which further development could be approved); id. at 115-19 (describing how plaintiff, owner of Grand Central Terminal, was forbidden under landmark law from building a skyscraper in air space above the landmark train station).
\(^{220}\) Justice Brennan delivered the opinion of the Court, joined by Justices Stewart, White, Marshall, Blackmun, and Powell. Id. at 106.
\(^{221}\) Id. at 133.
\(^{222}\) Justice Rehnquist filed a dissenting opinion, joined by Chief Justice Burger and, surprisingly, Justice Stevens. Id. at 106
\(^{223}\) Id. at 147 (Rehnquist, J., dissenting).
are more closely identified with the conservative *Penn Central* dissent and thus probably would have found the application of the law to Grand Central Terminal a discriminatory imposition of cost for the benefit of the public at large—invalid unless accompanied by just compensation.

Unlike the regulations at issue in *Penn Central* and similar cases, the South Carolina statutory scheme is quite different from a classic zoning ordinance. Only certain landowners (those along the beachfront) are burdened, with the resultant benefit accruing to the public at large in the form of decreased costs after a storm.\[^{224}\] Thus, any benefit to a restricted landowner accrues indirectly by virtue of his being a member of the general public. In contrast, typical zoning ordinances usually provide direct reciprocal benefits.\[^{225}\]

Despite the lack of direct reciprocal benefit, the fate of the South Carolina statute is not a foregone conclusion: the current conservative majority might not consider the nonreciprocal nature of the statute, in itself, sufficient to render it a taking. Under one analytical framework, the statute seems to impose unjust costs on the few, in the form of diminished property values, for the benefit of the many. But this is not the only possible analysis. Indeed, one alternative would focus on where the burdens *should* rightly lie, rather than simply on where they *do* lie, and consequently would lead to the opposite conclusion. Before the enactment of the statute, beachfront property owners could be seen as unjustly benefiting from public subsidization. The statute, therefore, could be viewed as a legitimate and appropriate reallocation of benefits and burdens. Under this analysis, South Carolina’s regulations do not confer unfair benefits on the public at the expense of the few (as in *Penn Central*), but rather they relieve the public of an unjust burden. As a consequence, the reciprocity of burdens and benefits test, under this broader analysis, would not lead to a finding of a taking.

Which analysis the Court will apply remains an open issue. One would hope that the Court will recognize that not all seemingly discriminatory regulations are in fact unjust, and that a regulation which merely reallocates burdens appropriately will survive as an exception to the strict application of the “reciprocity of benefits and burdens” test.

c. “Character” of the Regulation

The Supreme Court has coined the term “character” in reference to

\[^{224}\] See supra text accompanying notes 35-42.

\[^{225}\] Consider, for example, the mutually increased property value that results from a zoning ordinance restricting development to single family dwellings. Such an ordinance causes the value of all affected properties to increase, because multiple dwelling complexes or commercial developments traditionally lower the value of neighboring properties.
the classification of particular regulations.\textsuperscript{226} For example, a restriction on the use of one’s property is considered to be of a less serious character than a physical invasion of property by the government.\textsuperscript{227} Most of the case law that invokes the character of a regulation addresses whether the government has “physically invaded” the owner’s property. In such cases, a court is more likely to find a taking.\textsuperscript{228}

Even some of the liberal Justices have recognized the physical invasion doctrine to some extent.\textsuperscript{229} In \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{230} the conservative members of the Court exploited this accord to create a sub-branch of this doctrine. The \textit{Loretto} majority\textsuperscript{231} held that when the government engages in, authorizes, or orders a “permanent physical occupation” of property,\textsuperscript{232} “the character of the government action” is determinative and a taking will be found irrespective of any other factors.\textsuperscript{233}

Predictably, in light of the Court’s ideological division, the dissent\textsuperscript{234} considered the majority’s per se rule illogical and arbitrary, stating that “the relevant question cannot be solely whether the State has interfered in some minimal way with an owner’s use of space on her building. Any intelligible takings inquiry must also ask whether the extent of the State’s interference is so severe as to constitute a compensable taking . . . .”\textsuperscript{235}

Despite this disagreement, the per se rule for permanent physical

\textsuperscript{226} See, e.g., \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 426 (1982) (noting that “the character of the government action” is important in determining whether a taking has occurred).

\textsuperscript{227} Id.

\textsuperscript{228} As the Court has stated, “one of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others.” \textit{Kaiser Aetna v. United States}, 444 U.S. 164, 176 (1979) (compensation required where government created a right of access to privately owned pond made navigable by plaintiff’s dredging and development); \textit{accord Loretto}, 458 U.S. at 435 (compensation required where government forced plaintiff to permit a cable television company to install cable facilities on a five-story apartment building); \textit{Nollan v. California Coastal Comm’n}, 483 U.S. 825, 831 (1987) (compensation required where government conditioned a beachfront development permit on dedication of a public easement unrelated to any problem caused by the development). The Court has characterized physical invasion as “qualitatively more severe than a regulation of the \textit{use} of property . . . since the owner may have no control over the timing, extent, or nature of the invasion.” \textit{Loretto}, 458 U.S. at 436 (emphasis in original).

\textsuperscript{229} See \textit{Loretto}, 458 U.S. at 436 (Justices Marshall and Stevens were among the majority in the creation of the \textit{Loretto} per se test).

\textsuperscript{230} 458 U.S. 419 (1982).

\textsuperscript{231} Justice Marshall delivered the majority opinion, joined by Chief Justice Burger and Justices Powell, Rehnquist, Stevens, and O’Connor. \textit{Id.} at 420.

\textsuperscript{232} Requiring a landlord to permit the “permanent” attachment of cable wires to an apartment building was found to be such an occupation in \textit{Loretto}. \textit{Id.} at 426.

\textsuperscript{233} \textit{Id.}

\textsuperscript{234} Justice Blackmun filed a dissenting opinion, joined by Justices Brennan and White. \textit{Id.} at 442 (Blackmun, J., dissenting).

\textsuperscript{235} \textit{Id.} at 453 (Blackmun, J., dissenting) (emphasis in original).
occupation is currently good law. Moreover, it has proved to be a valuable tool for conservative members of the Court who are seeking to expand the reach of the takings clause. They have attempted to broaden the "permanent physical occupation" concept to cover two sets of cases: (1) those previously considered to involve mere "physical invasions," and (2) those where the regulation is so severe that the effect is as though a permanent physical occupation has occurred.

Although the Court's recent analysis of the "character" of the government action has focused on whether the government has authorized, ordered, or engaged in a "physical invasion" of private property, the action's "character" could be significant in other areas as well. In particular, the Loretto Court appeared to consider regulations that impose affirmative duties to be almost as serious as permanent physical occupations. This comparison could herald a new per se doctrine for regulations that impose affirmative duties. Given the conservatives' current dominance on the Supreme Court and their desire to expand the reach of the takings clause, such doctrinal evolution seems likely.

No aspect of the current Beachfront Management Act appears likely to invoke application of the physical invasion or permanent physical occupation tests. However, the beach renourishment provisions in the original Beachfront Management Act, had they remained in the stat-

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236. In Nollan v. California Coastal Commission, 483 U.S. 825 (1987), where the government had conditioned a beachfront development permit on the dedication of a public easement, Justice Scalia (joined by four others) stated that "a 'permanent physical occupation' has occurred, for purposes of [the Loretto] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Id. at 832 (footnote omitted). This conclusion is in direct conflict with Loretto's explicit distinction between a "permanent physical occupation" and a mere "temporary" and shifting "physical invasion" like an easement. Loretto, 458 U.S. at 430-33. However, the Court in Nollan did not base its decision on the permanent physical occupation analysis, instead basing its holding on the lack of a nexus between the legitimate governmental purpose and the specific condition imposed on the property owner. Nollan, 483 U.S. at 837.

237. In Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), the dissent indicated that it would apply a per se rule to regulatory takings cases where a regulation denies all use of a part of a person's property. Id. at 516-18 (Rehnquist, C.J., dissenting, joined by Powell, O'Connor, and Scalia, JJ.). The dissent considered a regulation requiring that coal be left in the ground to have "destroyed [ownership of the property] every bit as much as if the government had proceeded to mine the coal for its own use." Id. at 518. The "part property" takings theory, discussed at infra notes 258-85 and accompanying text, is a manifestation of the conservative Justices' attempt to broaden the "permanent physical occupation" test.

238. The Court stated obliquely that a permanent physical "occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner." Loretto, 458 U.S. at 436 (emphasis omitted and added). By expressly considering a regulation that imposes affirmative duties on a property owner to be qualitatively more severe than other land-use regulations, the Court implicitly suggested that the imposition of affirmative duties was almost as severe as a permanent physical occupation.

239. This duty to renourish is described at infra text accompanying notes 87-90. Although these provisions were later repealed, the fact that the legislature passed them once suggests that
ute, could have triggered the test and supplied a further twist to the takings analysis. Compared to this affirmative requirement, the conduct in *Nollan*—allowing people to pass across one’s property—appears a relatively passive concession. The old affirmative beach renourishment provision was similar to the requirement in *Penn Central* that the owner of an historical landmark maintain the exterior in “good repair.” The *Penn Central* majority did not consider this “affirmative duty” characterization relevant, but then-Justice Rehnquist in his dissent found it an important consideration: “[A]ppellees’ actions do not merely prohibit Penn Central from using its property in a narrow set of noxious ways. Instead, appellees have placed an affirmative duty on Penn Central to maintain the Terminal in its present state and in ‘good repair.’”

Although the Court has had little opportunity to consider whether the affirmative duty characterization is an important takings factor, it is likely to pay more attention to this characterization in future cases in light of the influence wielded by the conservative members of the Court—some of whom comprised the *Penn Central* dissent. The Court may find that government-imposed affirmative duties, analogous to South Carolina’s original beach renourishment provisions, raise significant takings questions.

d. Reasonable Investment-Backed Expectations

A taking will often be found if a government action denies a property owner his reasonable investment-backed expectations in the property. The Court has applied this test relatively narrowly in two circumstances: (1) where the government action causes the loss of very certain profits, and (2) where the state regulates so as to diminish future (including more speculative) profits, after having previously

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241. *Id.* at 146 (Rehnquist, J., dissenting) (emphasis in original).
242. In fact, an exhaustive search of federal district and appellate court opinions did not reveal a single case in which affirmative duties were considered and found important in a takings inquiry.
244. The loss of “speculative” future profits will not count. *See* Andrus v. Allard, 444 U.S. 51, 66 (1979) (“[P]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.”); *Penn Central*, 438 U.S. at 130 (“[T]he submission that appellants may establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.”); *Id.* at 136 (reasoning that forbidding an office tower above Grand Central Terminal “does not interfere with” train station operations, which “must be regarded as Penn Central’s primary expectation concerning the use of the parcel”).
assured the property holder that the government would not interfere. In the latter case, courts generally have been persuaded that there has been a taking when the property owner has taken action in reliance on the governmental assurance.

Justice O'Connor has diverged slightly from the other Justices as to what constitutes sufficient "governmental assurance" for purposes of the reasonable investment-backed expectations test. However, the Court does not otherwise seem strongly divided—perhaps because it has not yet considered any of the proverbial "hard cases." The South Carolina Beachfront Management Act could provide such an opportunity.

One component of the "investment-backed expectations" test is whether the regulation causes the loss of certain profits under the first branch of the test. Historically, the usual scenario has been the loss of the current use of the property. Therefore, a loss such as that suffered by a recent purchaser of real property with future development in mind would probably be discounted under this prong of the takings analysis. Moreover, the Beachfront Management Act's prohibition on rebuilding is prospective from the time of destruction and as such does not forbid any use of property until it is destroyed by a storm.

The statute may, however, pose a difficulty under the "previous assurances" prong of the test. The courts take the "reasonable investment-backed expectations" criterion very seriously where the government has given a positive assurance of a certain right. For example, courts are likely to be tougher if the government revokes a development permit after a developer has expended considerable investment preparing to develop the property.

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245. One example is when the government issues a permit for construction of a certain type of structure.

246. For example, in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), a statute gave companies submitting data to the EPA the option of designating such data as trade secrets. The Court considered this an affirmative assurance of confidentiality upon which the plaintiff relied in deciding whether to submit data. Thus, the Court considered the EPA's later public disclosure of this data to be an interference with the plaintiff's reasonable investment-backed expectations in those trade secrets. Id. at 1010-14.

247. Id. at 1021-24 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor argued that express statutory assurance of confidentiality should not be necessary:

The Court's tacit analysis seems to be this: an expectation of confidentiality can be grounded only on a statutory nondisclosure provision situated in close physical proximity, in the pages of the United States Code, to the provisions pursuant to which information is submitted to the Government. For my part, I see no reason why Congress should not be able to give effective protection to all trade secrets submitted to the Federal Government by means of a single, overarching, trade secrets provision.

Id. at 1023. Justice O'Connor believed that the extent of expectations was "a heavily factual question." Id. at 1024.

The South Carolina statute would not necessarily take unfair advantage of developers' reliance on outstanding permits and approvals. Indeed, it provides an exemption for development that has sufficiently advanced by the time of the effective date of the law. However, should a court find the issuance of the initial building permit to be an implied assurance that a structure as specified in the permit application could be built "now and forever," the court could find that the statute's rebuilding prohibition clearly violates that assurance. Justice O'Connor seems to apply the strictest reading of this doctrine, and would probably find that the South Carolina statute violated such an assurance. But because few cases have been decided on this ground, the positions of the other Justices are unclear. Consequently, it is difficult to predict whether the Court would find the initial issuance of a permit to be a government assurance of perpetual development rights.

The "affirmative assurance" standard is most persuasive if the property owner relied upon it to his detriment. For example, a person could claim detrimental reliance simply in having purchased a developed property—the purchase price would take into account an implicit right to rebuild should the structure be destroyed. The key issue is thus whether the Court would perceive the existing permit as implicitly guaranteeing a perpetual right to rebuild. It is unclear how the Court would resolve this question. Again, this is an example of how the South Carolina statute falls in the middle of unsettled doctrine.

The Court should carefully consider the policy implications of finding such an assurance of a perpetual right. Although a takings finding would not necessarily result in an outright ban of the regulatory mechanism, it would render compensation necessary in every instance that the statute was applied. Thus, rebuilding restrictions would become as expensive to enforce as simple condemnation proceedings. Furthermore, since the statute only affects property that is destroyed, the bulk of the expense due to a takings finding would occur in the wake of a devastating storm, when the state could ill afford such additional expense. A requirement of compensation may thus have the effect of rendering this rebuilding prohibition mechanism void for all practical purposes. Such a ruling would have broad-ranging repercussions for a variety of regulatory scenarios. First, other states contemplating similar measures to control their own problems of coastal zone overdevelopment would be dissuaded from using this mechanism. This result would be unfortunate since, as

250. See supra note 247.
251. Note that often the developer may obtain a permit in advance of a purchase of land; thus, the perceived affirmative assurance of a perpetual right to build would play a significant part in inducing reliance.
Section I(B) indicated, the rebuilding provisions seem to be an ideal middle-ground solution to this serious problem. In their absence, the costs of storm damage inflicted by the few must be borne by the public at large. Furthermore, the only alternative solutions are either out of the state’s control (as in the case of federal flood insurance incentives) or are much more draconian (such as imposing a huge tax on beachfront residents to pay for the harm they are causing).

The rebuilding restriction mechanism could also be positively applied in other environmentally or geologically sensitive regions. Its application has been considered for areas at risk to landslides, earthquakes, volcanoes, floods, and now, hurricanes. If the Court recognized an implied right to rebuild in perpetuity, it would no longer be able to consider these issues on a case-by-case basis. Moreover, such a finding would deny legislatures and agencies significant flexibility in dealing with these difficult problems. Overall, it would freeze the doctrine prematurely, at a time when it is not yet known how important these and other similar environmental regulations may be in the future.

4. No Remaining Economically Viable Use Test

The Court’s focus on specific features of regulation has made the exceptions and inclusions described above relatively narrow. In fact, many government regulations have characteristics calling for application of two or more of the above-described tests, and thus do not fall clearly within a particular exception or inclusion. For example, the rebuilding prohibitions of the South Carolina statute have some characteristics of a statute preventing nuisance-like conduct (suggesting no taking), yet they also may be found to interfere with reasonable investment-backed expectations (suggesting a taking). Furthermore, the conduct sought to be prevented—beachfront construction—does not conform completely to the classic example of nuisance-like conduct: rebuilding a house is simply not the same as operating a loud, dusty cement factory in the middle of a residential neighborhood. Moreover, as Keystone illustrated, the Supreme Court has been hesitant to decide cases based solely on the nuisance-like conduct exclusion.

To sidestep this dilemma, the liberal members of the Court created a catch-all test, the “no remaining economically viable use” test, for those cases that did not clearly fall into either of the two specified exceptions

252. See supra text accompanying notes 76-82.
255. For example, the conduct sought to be prohibited in Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987), had nuisance-like characteristics, but the Court did not base its holding solely on this factor. See supra text accompanying notes 195-98.
("nuisance-like conduct" and "reciprocity of burdens and benefits"). The test accords significant deference to lawmakers by presuming that no taking has occurred unless the property owner demonstrates that there is no remaining "economically viable use" for the regulated property. This seemingly "bright line" test appears insensitive to variations in the magnitude of public purpose and individual harm, but in practice it has been applied as a balancing test.

Rather than flatly rejecting this test, the conservative Justices have attempted to define its requirements out of existence. Conflict has arisen over the definition of "the property." The Court's liberal members and Justice White have held that the property to be evaluated for remaining economically viable use is the property as a whole. In contrast, the conservative faction has argued that the property to be evaluated is any discrete part of the regulated property.

Despite this difference, most Justices have argued that where no economically viable use remains for the property as a whole, there has been a taking. However, certain Justices seem willing to recognize an exception to this general rule. Justice Stevens' dissent in First English Evangelical Lutheran Church v. County of Los Angeles, joined by Justices Blackmun and O'Connor, argues that when a regulation prohibits nuisance-like building in a critical area, such as a flood zone, no compensation should be required. Since a ban on nuisance-like

256. See Keystone, 480 U.S. at 502 n.29 (no taking where, on the record before it, the Court could not determine whether the prohibition on mining that might cause subsidence denied petitioners "the economically viable use of the support estate"); Agins v. City of Tiburon, 447 U.S. 255, 262 (1980) (limited density zoning ordinances do not effect a taking as they "neither prevent the best use of appellants' land . . . nor extinguish a fundamental attribute of ownership") (citations omitted); Andrus v. Allard, 444 U.S. 51, 66 (1979) (no taking where the most profitable use of the property was prevented, because some potential use remained); Penn Cent. Transp. Co., v. New York City, 438 U.S. 104, 138 n.36 (1978) ("We emphasize that our holding [that no taking has occurred] is . . . based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion.").

257. In nuisance-like conduct cases, the courts have upheld very large diminutions in value that probably would not have been upheld had a less critical public value been involved. See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (67-75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (92.5% diminution in value caused by prohibition on making bricks).

258. Keystone, 480 U.S. at 497-502 (property evaluated was parcel of land as a whole and not merely seams of coal that the owner could not mine).

259. For example, the dissent in Keystone concluded that the seams of coal ordered left in the ground constituted the relevant property to be evaluated. Because under this definition the mining regulation denied "all beneficial use of petitioners' property," the dissent considered it a taking. 480 U.S. at 514 (Rehnquist, C.J., dissenting, joined by Powell, O'Connor, and Scalia, JJ.) (emphasis in original).

260. See supra text accompanying note 256.


262. Id. at 325 (Stevens, J., dissenting) ("No matter whether the regulation is treated as one that deprives appellant of its property on a permanent or temporary basis, this Court's precedents
construction in critical areas would seem to leave no economically viable use remaining for the property, the First English dissenters seem willing to carve exceptions to the no economically viable use rule.

The arguments of the First English dissent can be interpreted in several ways, however. First, building on a flood plain might not be considered an economically viable use. If the flood plain land intrinsically had no viable use, then there could be no causal relationship between the government's action and the lack of viable uses. Alternatively, the First English dissenters might have believed that there still remained economically viable use after the construction ban. For example, even such a non-lucrative use as renting the undeveloped land out as a campsite could be considered economically viable. Andrus v. Allard provides some support for this position. In Andrus, a statute prohibited the sale of the feathers of endangered birds, even if the feathers had been legally obtained prior to the statute's enactment. The Court found that an economically viable use remained despite the ban on sale: the owners could charge admission to view a display of artifacts containing the feathers.

Another possible interpretation is that the First English dissenters view the "no economically viable use" test as part of a balancing test—when the public interest is strong, the government may inhibit all economically viable uses without providing compensation, and when the public interest is weak, the government cannot deprive even some of a person's use of his or her property without compensation. However, this position is unlikely to gain much support. Four Justices rejected this view in Keystone, stating that the Court has "never applied the nuisance exception to allow complete extinction of the value of a parcel of property." Although the Court's words may suggest otherwise, the outcomes of the cases suggest that some remaining "economically viable use" is not entirely determinative. In place of a strict test, the Court appears to recognize a shifting scale: as the government regulates for increasingly stronger public interests, the Court appears to lower its threshold of what constitutes no remaining economically viable use for the purposes of the

demonstrate that the type of regulatory program at issue here cannot constitute a taking.

Focusing on the temporary nature of the building restriction, Justice Stevens alone went on to say that "just because a plaintiff can prove that a land-use restriction would constitute a taking if allowed to remain in effect permanently does not mean that he or she can also prove that its temporary application rose to the level of a constitutional taking." Id. at 335.

264. Id. at 66.
test. For example, in *Andrus v. Allard*, the necessity to restrict the sale of endangered bird feathers was considered crucial for effective enforcement of the Migratory Bird Treaty Act. The remaining uses for the bird feathers in *Andrus* (setting up a “museum” and charging admission) arguably would not be considered sufficiently economically viable if the public purpose were less important.

Were the Court to hear a challenge to the South Carolina statute, it might use the opportunity to clarify the application of the no remaining economically viable use test. Although the Court has adjudicated zoning limitations before, it has not considered anything approaching the character of the South Carolina statute. In each recent case in which the Supreme Court had an opportunity to adjudicate a very strict building restriction, it backed away on a technicality. Therefore, prior cases provide little guidance as to how the Court would apply the test if it chose to examine the building restrictions head on.

The following discussion analyzes the “economically viable use” test in the context of two applications of the statute: (1) where a property owner is entirely forbidden from building on his unimproved property, and (2) where a property owner is forbidden from building on part of the property but can nonetheless rebuild farther inland.

a. Ban on All Construction

The first scenario, in its simplest form, occurs in the case of an individual who owns a medium-sized plot of unimproved land entirely seaward of the baseline. The law would bar this individual from developing her land altogether, and the value of the land would presumably diminish from what may be a relatively high value to almost worthless. While


267. *Id.* at 64 n.20 (the dangers posed by commercial exploitation justified the heightened restrictions).


269. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (avoiding takings issue posed by Clean Water Act’s requirement of a permit to discharge dredged or fill materials into “navigable waters” by finding a landowner’s property to be outside the statute’s definitional scope); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (ruling that the Court lacked jurisdiction because the state court’s decision was not final in case involving strict re-zoning that prevented construction of nuclear power plant).

270. For purposes of the “no remaining economically viable use” analysis, this Comment will not consider the situation where the owner is forbidden from rebuilding her structure after it is destroyed. The additional issues presented by that situation have little relevance under a “no remaining economically viable use” analysis, because this test focuses on the currently remaining uses of the property independent of any former uses. The rebuilding issue is considered under the discussion of “reasonable investment-backed expectations,” where it does become relevant. *See supra* notes 243-51 and accompanying text.

271. Few people are in the market for land that cannot be developed. If it is a large parcel, it
this clearly diminishes the value of the property, recall that the Court looks not at diminution of value but rather at remaining economically viable use. Would forbidding construction entirely be considered a denial of all economically viable use? The Court’s opinions in Andrus v. Allard and later in Hodel v. Irving demonstrate a trend toward tighter construction of this test. Andrus involved a regulation that left very little economic use for the property. In that case, the Court found that the Migratory Bird Treaty Act did not effect a taking by forbidding the sale of endangered bird feathers because some economically viable use remained—the feathers could be exhibited in a museum. In Hodel v. Irving, several members of the Court explicitly stated that Andrus should be limited to its facts. The Hodel v. Irving Court adopted a part-property takings analysis, finding a taking after a statute “effectively abolish[ed] both descent and devise of [certain] property interests.” The majority opinion separated out these strands of “descent” and “devise” from the general bundle of property rights associated with land, and found a taking because they were completely abrogated. Under the Irving analysis, then, the newly constituted Court could choose to view “the right to build” on one’s land as a discrete property right and find a taking in those cases where that right is completely abrogated.

On the other hand, if the behavior of building on the beachfront is considered to have some “nuisance” character, then the Court might apply a more extreme version of “remaining viable economic use” test. Although Justices Rehnquist, O’Connor, and Scalia probably would find a taking under their Keystone rationale, they might not be able to gain enough agreement from the other Justices to form a majority. It is possible that the three liberal Justices, following the Andrus rationale, would

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272. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978) (notwithstanding diminution in value from the bar on an office tower above Grand Central Terminal, the air rights still had value because they were transferable and because the Landmark Commission had not rejected any proposal for a smaller building).
275. See supra text accompanying notes 267-68.
276. Justice Scalia, joined by Chief Justice Rehnquist, stated that Andrus was strictly limited to its facts. Hodel v. Irving, 481 U.S. at 719 (Scalia, J., concurring). However, Justices Brennan, Marshall, and Blackmun found nothing in Irving that limited Andrus to its facts, id. at 718 (Brennan, J., concurring), and Justices White, Stevens, and O’Connor voiced no opinion in Irving as to whether Andrus was limited to its facts. Justices Kennedy and Souter were not yet on the Court. If, as is quite possible, Justices White, O’Connor, Kennedy, and Souter side with Justice Scalia and Chief Justice Rehnquist on this issue, then Andrus’ precedential value will be severely limited.
277. Id. at 716.
278. Id. at 716-17.
reach the opposite result. It is uncertain how the remaining three Justices would decide, although certainly Andrus and the dissent in First English would be persuasive. The undecided Justices could conceivably distinguish the South Carolina restrictions from those in Keystone because, unlike in Keystone, here almost no economic use remains—even for a part of the property.

Obviously, predictions of the Court's decision are at best uncertain. Turning from what the Court might do to what the Court should do, this Comment suggests that the Court should consider the role of market imperfections when applying the "remaining economically viable use" test. In the South Carolina example, the land may have had a high market value before the enactment of the statute; however, that value may have been based on false assumptions. For example, the value probably does not take into account the rate of erosion. Prospective purchasers might lower their estimated value of the land if they had access to information suggesting that the land was likely to erode away in forty years, or that it was likely to be washed into the sea after the next major storm. Thus, it is possible that the apparent diminution in value after passage of the Beachfront Management Act was in fact merely a product of market inefficiencies.

If the diminution in value is a result of uncovering deceptively inflated land values rather than a result of the restriction itself, it makes little sense to attribute the change in value to the state action. The courts should thus consider each instance of the statute's application in order to disentangle the diminishment due to the statute itself from that due to market misconceptions. The Court's analysis would likely vary with the particular property, the likelihood of erosion, and vulnerability to storms. Although this places a considerable investigatory burden on the courts, such a case-by-case analysis is mandated by the refusal of the Supreme Court to draw any bright lines in takings jurisprudence at the statutory level.

b. Ban on Construction for Part of the Property

The analysis is somewhat different if development is barred on only part of the plot of land. For example, consider the case where a landowner can only build a small house because much of his lot lies seaward of the baseline. In such a case, some economically viable use clearly remains for the property (if defined to mean the parcel as a whole): the

279. Although the decision not to find a taking in the rebuilding prohibition would strain the "economically viable use" concept, it would not be unjustified in light of the other considerations placed in the balance. These considerations include the magnitude of the public purpose being served, the lack of harm to investment-backed expectations, and the noninvasive character of the regulation.
property owner can build a house landward of the baseline. This situation is somewhat analogous to that in *Agins v. City of Tiburon*, where a zoning ordinance permitted the construction of, at maximum, one house per acre. Although the limitation was quite severe, the Court unanimously found no taking.

On the other hand, if the relevant property being evaluated for remaining economically viable use is the “part” seaward of the baseline, the outcome may be different. In *Keystone*, the conservative dissent expressed a desire to treat an individual “part” of a parcel of property as the relevant unit in determining whether a taking has occurred. Because this faction of the Court may now be in the majority, the “part” taking view may soon become the rule of law. This position would presumably be applied across the board in the absence of an exception justifying the opposite finding. In *Agins*, the fact that the regulation was a uniform zoning ordinance provided the necessary exception from the “part” takings analysis. The Beachfront Management Act’s restriction on building, however, does not involve a uniform zoning ordinance; therefore, it would likely not be excepted from the “part property” analysis.

A challenge to the South Carolina statute could conceivably provide the conservative majority of the Court with an opportunity to establish the “part” taking viewpoint as the governing doctrine. The Court could hold that the statute effectively denied all economically viable use for the “part” of the property inside the dead zone, and order compensation to be paid for the resultant diminution in value. Before it proceeds on this tack, the Court should carefully consider the implications of such a doctrinal shift. The “no remaining economically viable use” test, as applied in the past, has played a significant role in maintaining the separation of powers between the judicial and legislative branches. The courts have used the doctrine to give legislatures a certain amount of slack in passing inventive regulations. If the Court were to adopt the “part property” theory, then virtually every regulation could be found to have effected a taking of “part” of the subject property.

To understand the magnitude of this doctrinal shift, consider its effect if applied to a few of the recent takings decisions. Building restrictions that permit only construction of one house per acre, such as those involved in the *Agins* case, would effectively “take” the portion of that acre that could not be developed. Restrictions such as those in *Keystone*, which prohibit coal mining under structures where subsidence damage

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281. *Id.*
282. *See supra* note 259 and accompanying text.
would result, would effectively "take" the minerals located under such structures. A prohibition on the sale of endangered bird feathers like the regulation in *Andrus* would "take" the right to sell, if it were considered an independent "part" of the property. And finally, a landmark preservation law that prevented building above a declared landmark, recall *Penn Central*, would "take" the air rights above the property.

These examples demonstrate the radical effect that the "part property" theory would have on previously settled doctrine. Certainly, the Court might choose to apply the exceptions—the "nuisance-like conduct" and "reciprocity of burdens and benefits" tests—more broadly to mitigate some of the effects of any new "part" taking rule. However, carving out broader exceptions to a stricter rule could not occur without the expense of further muddying an already unclear doctrine. Furthermore, the process would give the Court considerable discretionary power over virtually every regulatory action.\(^{284}\) As described above, almost every regulation "takes" at least some part of the subject property. Thus a regulation would be valid without compensation only if the government could show that it had met one of the Court's exceptions. Further, as this Comment has demonstrated, each of these exceptions is subject to a wide range of interpretations, and thus the Court could effectively decide at will whether or not to strike any government regulation.\(^{285}\) Majority adoption of the "part property" analysis would delegate significant power, of questionable legitimacy, to the Court.

There are a few examples of Supreme Court decisions that have resulted in radical doctrinal shifts.\(^{286}\) As a general rule, however, the Court gains much of its legitimacy through careful and incremental progress. In order to protect its legitimacy, therefore, the Court should consider a less drastic mechanism than the "part property" takings test to move toward greater protection of private property rights.

**CONCLUSION**

We are reaching a new era of health and environmental consciousness. These concerns are becoming both more pressing and more widely recognized. This growing concern is apparent in the willingness of Americans to pass restrictive health-based regulations, such as the prohibition of smoking on domestic airplane flights and higher taxes on ciga-

\(^{284}\) For example, the Court could use its discretion to apply a narrow "nuisance-like conduct" exception, a "reciprocal benefit" exception, or perhaps a "reasonable investment-backed expectations" exception.

\(^{285}\) Although the Court currently has some discretion by virtue of its many imprecise tests, the "no remaining economically viable use" test has consistently curtailed the Court's power. Modifying this test by adopting the "part property" theory would entirely remove this safeguard.

\(^{286}\) See, e.g., *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (nullifying a huge body of federal common law).
rettes and alcohol, as well as in the flood of new innovations in environmental regulation, such as California's technology-forcing clean air regulation, and South Carolina's path-breaking rebuilding restrictions in vulnerable overdeveloped areas.

Now, we find ourselves at an interesting juncture. Just as this country is reaching a new level of environmental sensitivity, the Supreme Court appears on the verge of dramatically restricting the takings doctrine. This Comment is a plea for moderation. It has focused on the South Carolina statute for two reasons. First, the problem of controlling coastal zone overdevelopment, in itself, is extremely important. In addition, the statute's various provisions present a rare opportunity for the courts to reflect on the different aspects of the constitutional takings doctrine. As the discussion in Part II suggests, the courts would likely permit some applications of the statute without requiring compensation. With respect to the more controversial provisions, however, the courts should consider the many relevant factors involved.

A finding that the rebuilding provisions unequivocally effect a taking would cause detrimental effects on three levels. First there are the direct effects: such a finding would effectively strike down the key provisions of the South Carolina statute. Although South Carolina may be able to achieve its goals using other methods, as discussed in Section I(C), its setback provisions and rebuilding restrictions present a uniquely balanced and effective approach to the problem of coastal zone overdevelopment. This mechanism is certainly less drastic than a denial of subsidized flood insurance, an outright ban on infrastructure repair in these areas, or imposition of a large and inequitable tax. Additionally, this mechanism takes effect at relatively appropriate times: it only affects those landowners who have not yet obtained a building permit or those who have just had their houses entirely destroyed. As a result, the statute minimizes the detriment to investment-backed expectations.

If anything, the statute may be too lenient. Although its forty-year erosion estimate seems sufficiently long, the statute will not prevent harm in cases where a building has a lifetime greater than forty years. Further, as this estimate is based on prior measurements of erosion, it may not predict future erosion accurately. These worries have been voiced by Orrin Pilkey, Director of the Program for the Study of Developed Shorelines at Duke University. In his view, "[e]ven the setback require-

287. See supra text accompanying notes 145-286.
288. After a state court awarded one affected landowner $1.2 million in damages, "[s]ome question[ed] whether the law may be too expensive to enforce." Carr & May, supra note 6, at 10. The statute's actual cost will depend on a number of variables, including the eventual number of affected people, the number of individuals who bring suits, the extent to which lower courts apply a conservative interpretation of the takings doctrine, and the size of damage awards.
289. See supra text accompanying notes 120-22.
ments ‘only put off for a few years’ the destruction of the front line of houses along the shore . . . . Erosion rates are worsening because of rising sea levels.”

If predictions that the sea level is rising due to the greenhouse effect come true, much more stringent requirements may be necessary to push development back from the shore.

Second, coastal regulation in other states will be affected. South Carolina is taking the initial stand in what may become a heated battle to clear the coast in the face of receding shorelines. A negative holding by the Court would, in addition to negating the South Carolina statute, chill similar attempts by other states. For example, although not set forth explicitly in a statute, regulations that recently issued from New York’s Division of Coastal Erosion Management in its Department of Environmental Conservation resemble those in South Carolina. Attesting to the potential chilling effect, William Daley, Chief of that Division, admitted: “We are all watching what happens in South Carolina.”

Finally, a restrictive holding by the Court would have other more diffuse and wide-ranging reverberations. Such a holding would foreclose the use of South Carolina’s unique mechanism for any number of other applications, such as earthquake, landslide, or flood plain risks. And ultimately, such a holding would require a resolution of constitutional doctrine that would long outlive this particular application, and would stand as a heightened restriction to future governmental regulation overall.

It is a simple matter to write an opinion declaring that South Carolina’s rebuilding provisions effect a taking. But the issues involved are not simple or straightforward—they invoke the tension between the judicial and legislative branches of government, as well as the conflict between public and private rights. One would hope that the courts will consider all the relevant considerations when they approach the task of adjudicating these difficult issues.

290. Carr & May, supra note 6, at 10 (quoting Orrin Pilkey).
291. Peterson, supra note 2, at 1, col. 3 (quoting William Daley).