

William & Mary Environmental Law and Policy Review

Volume 47 (2022-2023)
Issue 2

Article 4

1-2023

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Alex Boone, *The Tide's Coming In: A New Case for Beachfront Property Rights in South Carolina*, 47 Wm. & Mary Env't L. & Pol'y Rev. 383 (2023), <https://scholarship.law.wm.edu/wmelpr/vol47/iss2/4>

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THE TIDE'S COMING IN: A NEW CASE FOR BEACHFRONT PROPERTY RIGHTS IN SOUTH CAROLINA

ALEX BOONE*

INTRODUCTION

Although South Carolina is admired for its coastal resources and attractions, state law curiously introduces an intriguing yet critical dilemma for thousands of homeowners, businesses, banks, and many others who rely on coastal properties for not only their homes, but also for their investment-backed expectations. As of the time of this writing, a regulatory scheme is in effect in South Carolina that forces beachfront property owners to essentially leave the future security of their properties to the fate of the tides and a destabilizing climate situation. With the imminence of rising sea levels becoming more apparent and severe weather events continuing to cause significant casualties, property damage, and financial loss, the state's exercise of police powers handcuffs thousands of its citizens by eliminating the availability of hard erosion control devices as useful tools in coastal resiliency. As a result of this, not only will inaction lead to devastating consequences for citizens, but the state is exposed to liability for indirectly condemning these properties through its regulatory framework.

The Coastal Tidelands and Wetlands Act ("CTWA") is the regulatory scheme by which South Carolina governs its beachfront ecosystem.¹ The CTWA establishes procedures by which certain boundaries are drawn in order to effectively manage the state's beaches.² The law further defines

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¹ *Beachfront Management*, S.C. DEPT OF HEALTH & ENV'T CONTROL, <https://scdhec.gov/environment/your-water-coast/ocean-coastal-resource-management/beach-management/beachfront> [<https://perma.cc/6BFJ-9ENL>] (last visited Jan. 16, 2023).

² *State Beachfront Jurisdictional Lines*, S.C. DEPT OF HEALTH & ENV'T CONTROL, <https://scdhec.gov/environment/your-water-coast/ocean-coastal-resource-management-ocrm/beach-management/state-beachfront> [<https://perma.cc/LZ5K-AB42>] (last visited Jan. 16, 2023).

the state's interests and policy goals in implementing these regulations and, in part, dictates what structures may exist within certain boundaries on the beach.³ Section 48-39-290(B)(2)(a) bans the construction and, in certain situations, the repair of seawalls, bulkheads, and revetments on a beachfront landowner's parcel.⁴ This prohibition of hard erosion control devices leaves beachfront homes and other parcels susceptible to the impending consequences of climate change and, because of this, the CTWA may constitute a regulatory taking when analyzed by a South Carolina court under a climate-conscious lens. Without amending Section 48-39-290(B)(2)(a) and in the absence of any other policy initiatives designed to protect these properties, South Carolina beachfront property owners are left immensely disadvantaged by the CTWA's regulatory scheme.

Part I of this Note explores the scientific data as it relates to the impending consequences of climate change on South Carolina's coast and will introduce the disastrous scenarios that are predicted to arise as a result of rising sea levels and the accelerating strength and severity of extreme weather events.⁵ Part II compares the effectiveness of various coastal resiliency tools and highlights the regulatory framework that prohibits their use by beachfront property owners.⁶ Part III explores the topic of regulatory takings and their indirect prophylactic nature of protecting citizens from regulatory overreach and offers a case for a South Carolina court to find that the state's regulations create an unconstitutional taking of private property without just compensation.⁷ Lastly, Part IV recommends a policy change designed to mitigate the consequences of the CTWA on South Carolinians in the absence of a judicial finding that the CTWA constitutes a regulatory taking.⁸

I. CLIMATE CHANGE AFFECTS EVERYONE, BUT SOUTH CAROLINIANS ARE PARTICULARLY VULNERABLE TO RISING SEA LEVELS AND WORSENING WEATHER EVENTS

The dangers posed by climate change are universal; however, these risks are more immediate to coastal residents.⁹ When seawater swells

³ *Beachfront Management*, *supra* note 1.

⁴ S.C. CODE ANN. § 48-39-290(B)(2) (2022).

⁵ *See infra* Part I.

⁶ *See infra* Part II.

⁷ *See infra* Part III.

⁸ *See infra* Part IV.

⁹ *See* David Introcaso, *Climate Change Is the Greatest Threat to Human Health in History*, HEALTH AFF. (Dec. 19, 2018), <https://www.healthaffairs.org/doi/10.1377/forefront.20181218.278288/full/> [<https://perma.cc/TX4N-HLHA>].

into homes, streets, and businesses in a community, it not only affects those properties, but can also hamper essential services like the operation of schools and the availability of police, fire, and rescue services.¹⁰ In terms of future projections, economists have found that coastal flooding, accelerated by climate change, will cause a significant global shift in population and economic activity from coastal areas to more inland areas.¹¹ This restructuring will cause a significant decline in coastal gross domestic product (“GDP”), as well as effectuate the displacement of coastal residents around the world.¹² When coastal residents face barriers to inland relocation, the economic loss from flooding worsens and presents even more dire consequences for the global economy.¹³

A. *South Carolina Is Home to a Significant and Growing Low-Lying Population*

As one of the premier destinations for beachfront property ownership, South Carolina is home to a significant low-lying population.¹⁴ According to a 2012 study, there exists approximately 42,610 housing units situated less than one meter above sea level.¹⁵ This figure ranks South Carolina seventh in the nation when it comes to this measure.¹⁶ Moreover, South Carolina ranks seventh in the nation for approximate population living less than one meter above the sea level.¹⁷ In total, the South Carolina coast makes up around 165 miles of linear beaches across the state’s major coastal regions: the Grand Strand region in the northern section of the coastline, the Berkley-Charleston-Dorchester region in the middle section of the coastline, and the Lowcountry region at the southern end of the

¹⁰ Rebecca Hersher, *There’s Not a Cloud in the Sky, but Your House Could Still Be Underwater*, NPR (July 15, 2021, 1:00 PM), <https://www.npr.org/2021/07/15/1015977873/theres-not-a-cloud-in-the-sky-but-your-house-could-still-be-underwater> [<https://perma.cc/2U44-EDGB>].

¹¹ Klaus Desmet, Robert E. Kopp, Scott A. Kulp, Dávid Krisztián Nagy, Michael Oppenheimer, Esteban Rossi-Hansberg & Benjamin H. Strauss, *Evaluating the Economic Cost of Coastal Flooding*, 13 AM. ECON. J.: MACROECONOMICS 444, 469 (2021).

¹² *Id.*

¹³ *Id.*

¹⁴ Benjamin H. Strauss, Remik Ziemlinski, Jeremy L. Weiss & Johnathan T. Overpeck, *Tidally Adjusted Estimates of Topographic Vulnerability to Sea Level Rise and Flooding for the Contiguous United States*, ENV’T RSCH. LETTERS, Jan. 2012, at 1, 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* South Carolina’s estimated population living less than one meter above sea level is 60,614 people. *Id.*

coastline.¹⁸ In addition to the twenty million tourists who are estimated to visit these regions every year, the latest coastal population estimates indicate an expected increase of two million people by 2025.¹⁹

B. Coastal Residents Are Not Strangers to the Incoming Effects of Rising Sea Levels

A thorough examination of the consequences of climate change leads to sobering forecasts for communities around the world, and coastal South Carolina is no exception.²⁰ There is no doubt the ramifications from flooding and climate events are felt today.²¹ Recently, on the nearby Outer Banks of North Carolina, rising seas devoured several beachfront homes which led to helpless homeowners and millions of online viewers alike to simply watch as houses were quickly carried away by the tide.²² Future prospects only paint a grimmer picture of what is to come.²³ South Carolina real estate has been identified as among the most vulnerable property in the country when it comes to dealing with rising sea levels.²⁴ Given that sea levels are predicted to rise by anywhere from two feet to seven feet within the next century, it comes as no surprise that this leads to alarming ramifications.²⁵ In a fact sheet published by the Union of Concerned Scientists (“UCS”), the expectations in this century alone for chronic

¹⁸ *About Coastal South Carolina*, S.C. SEA GRANT CONSORTIUM, <https://www.scseagrants.org/south-carolina-coast/> [<https://perma.cc/P5AE-TQ39>] (last visited Jan. 16, 2023).

¹⁹ *Id.*

²⁰ *South Carolina Faces Chronic Inundation*, UNION OF CONCERNED SCIENTISTS (July 2017), <https://www.ucsusa.org/sites/default/files/attach/2017/07/when-rising-seas-hit-home-southcarolina-fact-sheet.pdf> [<https://perma.cc/XLZ4-T8K3>].

²¹ See Matthew Cappucci, *The Week Started with Major Coastal Flooding in Charleston. The Weather Was Beautiful.*, WASH. POST (Sept. 22, 2020, 5:20 PM), <https://www.washingtonpost.com/weather/2020/09/22/charleston-flooding-king-tide/> [<https://perma.cc/UVM4-Q5BH>].

²² Richard Fausset, *Beach Houses on the Outer Banks Are Being Swallowed by the Sea*, N.Y. TIMES (May 14, 2022), <https://www.nytimes.com/2022/05/14/us/outer-banks-beach-houses-collapse.html> [<https://perma.cc/XY6W-CJ8U>].

²³ *South Carolina Faces Chronic Inundation*, *supra* note 20.

²⁴ *New Study Finds 116,000 South Carolina Homes Worth \$53 Billion Will Be at Risk from Tidal Flooding*, UNION OF CONCERNED SCIENTISTS (June 18, 2018) [hereinafter *New Study Finds 116,000 South Carolina Homes*], <https://www.ucsusa.org/about/news/116000-south-carolina-homes-risk-tidal-flooding> [<https://perma.cc/2NP7-DBHJ>] (“South Carolina is fifth in the nation for most homes at risk in both 2045 and by the end of the century.”).

²⁵ *Id.* (“This scenario projects an average of 2 feet of sea level rise for South Carolina in 2045 and 7.2 feet in 2100.”); Strauss et al., *supra* note 14 (“[S]ea level could rise 1 m[eter] or more during the next century . . .”).

flooding along the South Carolina coast are staggering.²⁶ The fact sheet proposes three scenarios for predicting chronically inundated flooding.²⁷ In the most severe scenario, the Charleston and Lowcountry regions will experience chronic inundation by 2060.²⁸ The same scenario predicts that by the end of this century, twenty-two Charlestonian communities will suffer from chronic inundation.²⁹ Notably, none of these studies account for severe weather events or annual king tides, both of which cause significant flooding on their own.³⁰

With chronic inundation comes massive financial instability. Coastal South Carolina employs roughly 571,000 people, which equates to about \$62.8 billion of the GDP.³¹ Specifically, tourism on the coast amounts to a \$23.8 billion industry and provides \$1.8 billion in state and local tax revenue.³² In addition to the risks associated with losses in the tourism industry, home values are also vulnerable to the effects of climate change.³³ In a later UCS study, estimates showed that South Carolina coastal home values of around \$8.6 billion are susceptible to chronic flooding in the next thirty years.³⁴ By the end of the century, the homes at risk of chronic inundation along the South Carolina coast are estimated to be worth a combined total of \$53 billion.³⁵ One study has found that coastal property values in South Carolina are already suffering from the looming climate repercussions.³⁶ Not only should these figures concern property owners along the coast, but increasing losses of these homes could

²⁶ *South Carolina Faces Chronic Inundation*, *supra* note 20.

²⁷ *Id.* (Chronic inundation is defined as “when high tide floods 10 percent or more of [a community’s] usable, non-wetland area at least 26 times per year or, on average, every other week.”).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *King Tides and Climate Change*, EPA (Feb. 4, 2022), <https://www.epa.gov/cre/king-tides-and-climate-change> [<https://perma.cc/9H2B-YADK>].

³¹ *South Carolina*, NOAA OFF. FOR COASTAL MGMT. (July 8, 2022), <https://coast.noaa.gov/states/south-carolina.html> [<https://perma.cc/QR3A-3PLB>].

³² *South Carolina Tourism Reports Record Year*, S.C. DEP’T. OF PARKS, RECREATION & TOURISM (Feb. 17, 2020), <https://www.scprt.com/articles/south-carolina-tourism-reports-record-year> [<https://perma.cc/U8TN-SJ3T>].

³³ See *New Study Finds 116,000 South Carolina Homes*, *supra* note 24.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See John Tibbetts & Chris Mooney, *Sea Level Rise Is Eroding Home Value, and Owners Might Not Even Know It*, WASH. POST (Aug. 20, 2018, 6:04 PM), https://www.washingtonpost.com/national/health-science/sea-level-rise-is-eroding-home-value-and-owners-might-not-even-know-it/2018/08/20/ff63fa8c-a0d5-11e8-93e3-24d1703d2a7a_story.html [<https://perma.cc/GD55-KK47>].

also lead to dire economic consequences for insurance companies and mortgagors.³⁷ While the federal government has been attempting to mitigate these losses to insurance companies by buying out flood-prone properties, this practice is unsustainable.³⁸ Policy analyst Rob Moore suggests that “as climate change drives more extreme coastal storms and precipitation events, the [flood buyout] system must undergo a drastic overhaul or risk stranding millions in flood-prone homes.”³⁹ Rising sea levels clearly pose a critical difficulty for the residential and subsequent economic stability of thousands of coastal communities.

C. *In Addition to Rising Sea Levels, the Acceleration in Strength and Severity of Extreme Weather Events Create Additional Concerns for Coastal Residents*

Rising sea levels are not the only risk associated with climate change for coastal property owners. Given its position on the southern Atlantic seaboard, South Carolina is generally at risk from the dangers posed by hurricanes and other tropical weather events.⁴⁰ The most destructive of these in South Carolina’s recent history, Hurricane Hugo, made landfall in 1989 as a Category Four hurricane at Sullivan’s Island in Charleston County.⁴¹ Hugo brought sustained winds at around 140 miles per hour and caused widespread damage up and down the South Carolina coast.⁴² The storm surge from Hugo ranged from five to seventeen feet and battered coastal communities.⁴³ At the time, Hurricane Hugo produced the highest storm surge levels ever recorded on the East Coast of the United States.⁴⁴ Based on the state’s understanding of Hugo’s

³⁷ See *The Insurance Industry’s Climate Risk*, GLOB. CURRENT (Sept. 3, 2020), <https://www.theglobalcurrent.com/home/insurance-climate-risk> [<https://perma.cc/FNE5-Y7NN>].

³⁸ Rob Moore, *As Climate Risks Worsen, U.S. Flood Buyouts Fail To Meet the Need*, YALE ENV’T 360 (Jan. 23, 2020), <https://e360.yale.edu/features/as-climate-risks-worsen-u.s.-flood-buyouts-fail-to-meet-the-need> [<https://perma.cc/79A5-N5FV>].

³⁹ *Id.*

⁴⁰ See *Hurricanes*, S.C. EMERGENCYMGMT. DIV., <https://www.scemd.org/prepare/types-of-disasters/hurricanes/> [<https://perma.cc/MMA5-F8L7>] (last visited Jan. 16, 2023).

⁴¹ Hurricane Hugo made landfall on September 21, 1989. *Tropical Cyclone History for the Southeast South Carolina and Northern Portions of Southeast Georgia*, NAT’L WEATHER SERV. (July 9, 2022), <https://www.weather.gov/chs/TChistory> [<https://perma.cc/93ZQ-ZDTA>].

⁴² *Id.*

⁴³ Laura Parker & William Booth, *Hurricane Hugo Rips Through South Carolina*, WASH. POST (Sept. 22, 1989), <https://www.washingtonpost.com/wp-srv/weather/hurricane/post-stories/hugo-sc.htm> [<https://perma.cc/Q8UJ-5JCU>].

⁴⁴ *Hurricane Hugo—September 21–22, 1989*, NAT’L WEATHER SERV., <https://www.weather.gov/chs/HurricaneHugo-Sep1989> [<https://perma.cc/E9FC-3XML>] (last visited Jan. 16, 2023).

impacts, state officials estimate another hurricane of similar strength and track would destroy around 21,000 homes and cost \$8 billion in damages.⁴⁵ While South Carolina has not yet suffered from another devastating storm equivalent to Hugo, hurricanes are becoming increasingly more severe.⁴⁶

Across the globe, all types of extreme weather scenarios have become more frequent and more severe.⁴⁷ Among increases in the frequency and severity of wildfires, flooding, and droughts, the Environmental Protection Agency has noted that tropical cyclone activity has increased in the last two decades.⁴⁸ Not only are hurricanes becoming more frequent, but studies and analytical observations of recent tropical activity indicates that hurricanes are also becoming more severe.⁴⁹ Climate scientist James Kossin of the National Oceanic and Atmospheric Administration (“NOAA”) concludes that warming surface temperatures are strengthening modern tropical cyclones.⁵⁰ This results in higher winds, more rain, slower-moving storm systems, and wider-ranging storms—all leading to increased volatility.⁵¹ In a separate publication, Kossin cites global warming as a contributing factor to decreased vertical wind shear along the Atlantic seaboard, leading to an increased likelihood of tropical cyclones making landfall on the East Coast.⁵² Vertical wind shear is the upper level atmospheric change in the speed and direction of wind that can influence the strength of a cyclone and manipulate the direction in which a cyclone travels.⁵³ “When strong vertical wind shear is present, the top of a tropical storm or hurricane can be blown hundreds of miles downstream.”⁵⁴

⁴⁵ *Id.*

⁴⁶ See, e.g., Henry Fountain, *Climate Change Is Making Hurricanes Stronger, Researchers Find*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2020/05/18/climate/climate-changes-hurricane-intensity.html> [<https://perma.cc/LUX3-4CYW>].

⁴⁷ *Climate Change Indicators: Weather and Climate*, EPA (Aug. 1, 2022), <https://www.epa.gov/climate-indicators/weather-climate> [<https://perma.cc/KK5X-V2BZ>].

⁴⁸ *Id.*

⁴⁹ Veronica Penney, *What We Know About Climate Change and Hurricanes*, N.Y. TIMES (Aug. 21, 2021), <https://www.nytimes.com/2021/08/29/climate/climate-change-hurricanes.html> [<https://perma.cc/3YDW-G2EC>].

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Nicole Deroberts, *Climate Change Is Destroying a Barrier that Protects the U.S. Coast from Hurricanes*, STATE OF THE PLANET (May 24, 2019), <https://news.climate.columbia.edu/2019/05/24/wind-shear-hurricanes-east-coast/> [<https://perma.cc/QX6G-URSQ>].

⁵³ Alex Sosnowski, *What Is Wind Shear and How Does It Impact Hurricanes, Other Tropical Cyclones?*, ACCUWEATHER, <https://www.accuweather.com/en/weather-news/what-is-wind-shear-and-how-does-it-impact-hurricanes-other-tropical-cyclones/330987> [<https://perma.cc/37SL-RXNJ>] (last visited Jan. 16, 2023).

⁵⁴ *Id.*

Without the natural barrier provided by a strong vertical wind shear and in conjunction with strengthening hurricanes, states up and down the Atlantic Coast are becoming increasingly susceptible to the devastating effects of hurricanes in the coming decades.⁵⁵ This may inevitably lead to a catastrophic situation where every other hurricane that strikes the South Carolina coast could be termed “the most destructive hurricane in recent history.” Without adequate storm surge protection, beachfront property owners are left with few tools to mitigate the damage to their homes and properties that is caused by rising waters—and they are ultimately left defenseless in the face of nature’s most devastating tidal events.

II. SEAWALLS, BULKHEADS, AND REVETMENTS ARE INDEFINITELY BANNED BY THE CTWA

In 1988, the South Carolina General Assembly passed the Beachfront Management Act, known today as the CTWA.⁵⁶ In the passage of the CTWA, the General Assembly defined specific state policies to be pursued involving the protection of natural resources, such as the state’s beaches and sand dunes.⁵⁷ Before overviewing the pertinent CTWA regulation, some key definitions must be explained. Erosion control devices, as defined by the legislature, include seawalls, bulkheads, and revetments.⁵⁸ Seawalls and bulkheads are defined similarly; the only difference being that seawalls are primarily designed to withstand wave forces while bulkheads serve more as a retaining wall to protect earth or sand from sloping into water.⁵⁹ Revetments are sloped structures that serve a dual purpose—to reduce wave energy and retain whatever material lays landward.⁶⁰ The CTWA also provides the framework for the drawing

⁵⁵ Deroberts, *supra* note 52.

⁵⁶ *Beachfront Management*, *supra* note 1.

⁵⁷ See S.C. CODE ANN. § 48-39-30(B)(4) (2019) (“Specific state policies to be followed in the implementation of this chapter are: To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes.”).

⁵⁸ S.C. CODE ANN. § 48-39-270(1)(a)–(c) (2013).

⁵⁹ See *id.* § 48-39-270(1)(a)–(b); see also *Seawalls & Bulkheads*, MARINE CONSTR. MAG. (Aug. 2, 2019), <https://marineconstructionmagazine.com/blog/seawalls-bulkheads/> [<https://perma.cc/A8JH-ADWA>] (“A bulkhead is primarily intended to retain or prevent sliding of the land; while protecting the upland area against wave action is of secondary importance. Seawalls, on the other hand, are more massive structures whose primary purpose is interception of waves.”).

⁶⁰ See S.C. CODE ANN. § 48-39-270(1)(c); see also Jessica Wiggins, *Coastal Management with Revetments: What You Need To Know*, ABBOTT CONSTR. (Sept. 10, 2018), <https://www.abbottconstruction.com/coastal-management-with-revetments-what-you-need-to-know/>

of important boundary lines on the beach system, including the baseline and setback line.⁶¹ It is within this setback zone—between the baseline and setback line—that the CTWA prohibits landowners from fortifying their properties.⁶²

A. *Seawalls, Bulkheads, and Revetments Are Useful Tools for Beachfront Property Owners*

The use of seawalls and other hard structures along the coast generally falls under the definition of “hard erosion control devices” or “shoreline armoring.”⁶³ Coastal communities employ a number of strategies to combat tidal flooding, including the implementation of shoreline armoring.⁶⁴ Hard erosion control devices not only provide an option for a cost-effective technique of coastal resiliency, but they have been found to be a favorable option for saving property values in many areas.⁶⁵

While hard coastal armoring devices are useful tools for coastal resiliency, they are not the only tool.⁶⁶ “Living” shorelines are touted by many as another, more ecologically friendly device in holding back tidal water.⁶⁷ A living shoreline will primarily consist of natural materials such as sand, grass, rocks, and plants.⁶⁸ Despite these site-specific benefits,

[<https://perma.cc/X38C-E25Uc>] (“Revetments are concrete structures made by organizing stones on a prepared slope. The barrier absorbs wave energy and minimizes beach or lakeshore [erosion].”).

⁶¹ See S.C. CODE ANN. § 48-39-280 (2012); see also *State Beachfront Jurisdictional Lines*, S.C. DEP’T OF HEALTH & ENV’T CONTROL, <https://scdhec.gov/environment/your-water-coast/ocean-coastal-resource-management-ocrm/beach-management/state-beachfront> [<https://perma.cc/W9Z4-YD6C>] (last visited Jan. 16, 2023) (“The baseline is the more seaward (towards the ocean) of the two jurisdictional lines, while the setback line is the landward (towards the land) line.”).

⁶² See S.C. CODE ANN. § 48-39-290(B)(2) (2013).

⁶³ See *What Is Shoreline Armoring?*, NAT’L OCEANIC SERV., <https://oceanservice.noaa.gov/facts/shoreline-armoring.html> [<https://perma.cc/BXE3-ZWEN>] (last visited Jan. 16, 2023); S.C. CODE ANN. § 48-39-270(1)(a)–(c) (2013).

⁶⁴ James F. O’Connell, *Shoreline Armoring Impacts and Management Along the Shores of Massachusetts and Kauai, Hawaii*, in PUGET SOUND SHORELINES AND THE IMPACTS OF ARMORING PROCEEDINGS OF A STATE OF THE SCIENCE WORKSHOP, MAY 2009, at 70 (2010), https://pubs.usgs.gov/sir/2010/5254/pdf/sir20105254_chap7.pdf [<https://perma.cc/XS7J-FAT2>].

⁶⁵ See *id.*

⁶⁶ See, e.g., *Living Shorelines*, VIMS, https://www.vims.edu/ccrm/outreach/living_shorelines/index.php [<https://perma.cc/5E2V-CA8T>] (last visited Jan. 16, 2023).

⁶⁷ *Understanding Living Shorelines*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-living-shorelines> [<https://perma.cc/SA5C-HFJX>] (last visited Jan. 16, 2023).

⁶⁸ *Id.*

living shorelines are not a universally effective tool for holding back the tide.⁶⁹ A Japanese study published in 2016 found larger seawalls are more successful in preventing death and destruction caused by extreme climate events.⁷⁰ Nevertheless, some states still favor the ecological benefits of a living shoreline as opposed to protecting homes and other material resources.⁷¹

In some areas, however, coastal armoring is still the preferred method.⁷² The Charleston Peninsula is fortified by battery seawalls around the southern tip of the city, an area otherwise colloquially referred to as “The Battery.”⁷³ In 2020, the U.S. Army Corps of Engineers proposed a sizeable expansion of the Charleston peninsula seawall due to significant risks to critical healthcare infrastructure and historic districts, among other vulnerable sites.⁷⁴ In 2019, the South Carolina General Assembly passed legislation exempting certain beachfront property owners in Georgetown County from the ban on reconstructing certain seawalls.⁷⁵ Concerned with the prospect of their homes “. . . float[ing] out into the water and down into North Inlet,” supporters of the bill were disappointed when Governor Henry McMaster vetoed the legislation.⁷⁶

⁶⁹ *Living Shorelines*, *supra* note 66 (“In some cases, nature-based approaches are not feasible or the risk level is too high for living shoreline solutions to adequately address.”).

⁷⁰ Roshanak Nateghi, Jeremy D. Bricker, Seth D. Guikema & Akane Besso, *Statistical Analysis of the Effectiveness of Seawalls and Coastal Forests Mitigating Tsunami Impacts in Iwate and Miyagi Prefectures*, NAT'L CTR. FOR BIOTECH. INFO. (Aug. 10, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4980023/> [<https://perma.cc/TH45-WGN2>] (“[T]he historical data used in the present work clearly show the effect of seawalls themselves, and can be used to end the debate on whether these walls reduced or exacerbated mortality and damage.”).

⁷¹ See Eric Moorman, Norman Carlin, Ashleigh Acevedo & Kevin Ashe, *Insight: States Shift from Seawalls to Living Shorelines*, BLOOMBERG L. (July 10, 2019, 5:31 AM), <https://news.bloomberglaw.com/environment-and-energy/insight-states-shift-from-seawalls-to-living-shorelines> [<https://perma.cc/AQU5-PX6Z>].

⁷² See, e.g., *\$119 Billion Sea Wall Being Considered To Protect New York, New Jersey from Storm Surges*, CBS NEWS (Jan. 21, 2020, 7:45 PM), <https://www.cbsnews.com/newyork/news/new-york-119-billion-sea-wall-proposal/> [<https://perma.cc/6PDW-KCB4>].

⁷³ See Drew Tripp, *Billion-Dollar Seawall Around Charleston Proposed To Battle Future Hurricane Storm Surge*, ABC NEWS 4 (Apr. 21, 2020), <https://abcnews4.com/news/local/billion-dollar-seawall-around-charleston-proposed-to-battle-future-hurricane-storm-surge> [<https://perma.cc/V9FG-MP39>].

⁷⁴ *Id.*

⁷⁵ *House Upholds SC Governor's Veto of Seawall Construction*, AP NEWS (May 20, 2019), <https://apnews.com/article/53676e7235a34e5f8ed9fc2d6a0cde17> [<https://perma.cc/3BGL-DZFM>].

⁷⁶ Sammy Fretwell, *Where's the Beach? McMaster Vetoes Plan To Help Wealthy SC Property Owners Build Seawall*, GREENVILLE NEWS (May 16, 2019, 11:15 AM), <https://www.green>

B. Section 48-39-290(B)(2) of the CTWA Indefinitely Prohibits Landowners from Constructing New or Repairing Certain Existing Seawalls, Bulkheads, or Revetments

The legislation passed by the South Carolina General Assembly in 2019 would have exempted a certain Georgetown County neighborhood from the burdensome beachfront management regulations promulgated by the CTWA.⁷⁷ Section 48-39-290(B)(2) of the CTWA indefinitely prohibits landowners from constructing, reconstructing, or altering erosion control devices between the setback line and baseline.⁷⁸ Existing erosion control devices that presently experience damage by more than 50% of their original structure must not be repaired or replaced and must be removed at the expense of the homeowner.⁷⁹ Certain exceptions do exist for the construction, reconstruction, or alterations of pools, habitable structures, and erosion control devices that protect public highways.⁸⁰ In the event a beachfront landowner wants to build a pool or expand their home into the setback area, this may be permissible.⁸¹ Therefore, beachfront landowners today are directly barred from fortifying their homes and properties from the incoming effects of rising sea levels and storm surges. The CTWA forces beachfront landowners wishing to replace, rebuild, or even strengthen their existing erosion control devices to remove certain protections they were once afforded when the effects of climate change were far less pressing.⁸²

III. SOUTH CAROLINA SHOULD AMEND THE CTWA SO AS TO AVOID THE POSSIBILITY OF COMPENSATING BEACHFRONT LANDOWNERS AS THE RESULT OF A TAKINGS CLAIM

Generally, a regulatory taking occurs when the government, through an overburdensome regulation, has indefinitely restricted the landowner's vested property interests in such a way as to act as the functional equivalent of a physical seizure of land—all without just compensation.⁸³

villeonline.com/story/news/2019/05/16/mcmaster-vetoes-plan-help-wealthy-sc-property-owners-build-seawall/3692528002/ [https://perma.cc/3XYC-FFZJ].

⁷⁷ *Id.*

⁷⁸ S.C. CODE ANN. § 48-39-290(B)(2) (2013).

⁷⁹ *Id.* § 48-39-290(B)(2)(b)–(c).

⁸⁰ *Id.* § 48-39-290(B)(2)(a), § 48-39-290(B)(1), (3).

⁸¹ *Id.*

⁸² *See, e.g.,* Fretwell, *supra* note 76.

⁸³ *See Takings*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/takings> [https://perma.cc/28XQ-66DC] (last visited Jan. 16, 2023).

The CTWA's absolute prohibition of hard erosion control devices on a beachfront parcel comparatively acts as a physical seizure of private property because the regulation will inevitably lead to diminished use and loss of economic value once the imminent effects of climate change become irreversible. In light of this, and without just compensation to landowners as required by the Fifth Amendment, the state is engaging in an unconstitutional taking. Even if courts do not find this argument persuasive, the mere threat of a takings claim should invoke the prophylactic nature of the takings clause and the state should be incentivized to change course.

A. *The Expansion of Takings Claims from Physical Seizures to Something More*

The Fifth Amendment explicitly prohibits federal and state governments from physically seizing private property without paying the landowner a fair reimbursement.⁸⁴ As the common law has evolved, courts have expanded the interpretation of the Takings Clause and applied it in situations where the government has not necessarily physically seized private property, but has, through regulation, indirectly seized property through the enforcement of such regulations.⁸⁵ In *Pennsylvania Coal v. Mahon*, Justice Holmes expanded the traditional inquiry of whether there was an unconstitutional taking of property to include whether the government has effectively appropriated private property through some means other than physical seizure.⁸⁶ In the famous case *Loretto v. Teleprompter Manhattan C.A.T.V. Corp.*, the Supreme Court recognized that a regulation may function as a taking where the regulation creates a mandated invasive and indefinite physical trespass of private property by third parties.⁸⁷ The Supreme Court, in *Agins v. Tiburon*, expanded the takings analysis even further by ruling that a land use regulation functions as an unconstitutional taking where the regulation does not substantially advance state interests or denies the private property owner all economic use of their land.⁸⁸ Coincidentally, a provision within the CTWA set the stage for arguably the most famous regulatory takings

⁸⁴ “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

⁸⁵ *Takings*, *supra* note 83.

⁸⁶ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922).

⁸⁷ *See Loretto v. Teleprompter Manhattan C.A.T.V. Corp.*, 458 U.S. 419, 438 (1982).

⁸⁸ *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

controversy thus far litigated before the U.S. Supreme Court—*Lucas v. South Carolina Coastal Council*.⁸⁹

In 1986, David Lucas purchased two valuable beachfront lots on the pristine Isle of Palms near Charleston, South Carolina, with the intent of constructing multiple homes.⁹⁰ However, a regulation within the CTWA framework directly barred Mr. Lucas from building homes on his two lots.⁹¹ The case was litigated all the way to the Supreme Court, which ruled in favor of Mr. Lucas because the Court determined the CTWA regulation effectively reduced the value of Mr. Lucas's property to zero.⁹²

In the majority opinion, Justice Scalia commented on the justification for a more nuanced understanding of government takings that goes beyond whether there was a physical seizure. Justice Scalia opined, "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits."⁹³ The Supreme Court held in this case that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."⁹⁴

In finding for Lucas, the Supreme Court considered whether the state's challenged actions would fall under the nuisance exception for regulatory takings. The exception would apply where a landowner's use of the land would be restricted both by the state and the adjacent property owners to the extent that the landowner's use creates a nuisance.⁹⁵ An owner of private property cannot take actions, even on their own land, that harm neighboring property owners.⁹⁶ Justice Scalia wrote, "[s]uch regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles."⁹⁷ In a controversy where a regulation denies all economic use

⁸⁹ See 505 U.S. 1003, 1007 (1992).

⁹⁰ *Id.* at 1006–07.

⁹¹ *Id.* at 1007.

⁹² *Id.* at 1019–20.

⁹³ *Id.* at 1014 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922)).

⁹⁴ *Id.* at 1019.

⁹⁵ *Lucas*, 505 U.S. at 1028–29 ("On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land.").

⁹⁶ Nathan Jacobsen, *Sand or Concrete at the Beach? Private Property Rights on Eroding Oceanfront Land*, 31 U.C. DAVIS L. REV. 217, 232 (2008).

⁹⁷ *Lucas*, 505 U.S. at 1029–30.

of the land, Justice Scalia went on to prescribe further inquiry into whether the landowner's desired activities harm public lands or adjacent properties, the social value of the desired activities, and the ease with which the alleged harm by the landowner can be avoided by the actions of the landowner, the government, and the adjacent property owner.⁹⁸

Since writing the majority opinion in *Lucas*, Justice Scalia again opined on regulatory takings and the "all economic use" rule.⁹⁹ In *Suitum v. Tahoe Regional Planning Agency*, he wrote that "a regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value."¹⁰⁰ While the primary issue of that case was whether a takings claim was ripe for review, the implication of that statement is that a regulatory taking could occur without a property losing "all economic value" as described in *Lucas*.¹⁰¹ Professor Melvyn Durchslag took note of Justice Scalia's concurring opinion in *Suitum* and similarly proposed the possibility of an even lower threshold for a court to find a regulatory taking.¹⁰² In fact, the lowering of the "all economic value" standard would squarely fall within Professor Richard Epstein's view that takings include "any action which diminishes the value of private property . . ."¹⁰³

With respect to takings claims involving recurrent flooding, the Supreme Court held in *Arkansas Game & Fish Commission v. United States* that the recurrent flooding of property, even temporarily, is not exempt from Takings Clause protections.¹⁰⁴ "Because government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, our precedent indicates that government-induced flooding of limited duration may be compensable."¹⁰⁵ In essence, the Supreme Court held the Takings Clause is applicable where physical property may not be directly seized by the government, or even permanently seized, but compensation is mandated where a governmental action, either permanent or temporary, interferes with a property owner's interests to such a substantial degree.

⁹⁸ *Id.* at 1030–31.

⁹⁹ Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 476 (2000).

¹⁰⁰ 520 U.S. 725, 748 (1997) (Scalia, J., concurring) (emphasis in original).

¹⁰¹ Durchslag, *supra* note 99, at 476.

¹⁰² *Id.* ("That [the 'all economic value' standard] can be read in the future to expand the category of per se takings to include regulations that reduce land values substantially cannot, however, be dismissed out of hand.")

¹⁰³ Edward Foster, *Takings*, 4 CONST. COMMENT. 443, 445 (1987) (reviewing RICHARD A. EPSTEIN, *TAKINGS* (1985)).

¹⁰⁴ 568 U.S. 23, 27 (2012).

¹⁰⁵ *Id.* at 34.

B. *Exploring the Relationship Between Climate Change, Future Harms, and Judicial Decision-Making*

In light of the current understanding of the imminence of coastal areas experiencing significant impacts from climate change, the practice of deciding takings claims without considering the impending climate crisis is flawed, impractical, and ignorant of the issues facing many South Carolinians. Since governments have failed to properly address the incoming impact of climate change, some foreign courts have combined this fact with a developed understanding of what communities will soon be facing due to the effects of climate change.¹⁰⁶ Generally, federal courts have refused to decide controversies based on the political decisions of the executive and legislative branches of government.¹⁰⁷ However, with a matured understanding of climate change, there is presently not as much debate on the existence of climate change and imminence of its impacts as there was in the past.¹⁰⁸ In deciding takings cases that invoke the incoming effects of climate change as an evidentiary basis to help establish the claim, courts should comparatively evolve their understanding of climate change. As one article suggests, “[t]he world has never faced a threat like global warming, and courts should recognize that they will need a specialized approach to respond appropriately.”¹⁰⁹

Courts could look to future projections of climate science in considering whether a law acts as a regulatory taking. In 2016, the Ninth Circuit considered whether future projections of climate change are sufficient evidence to support a finding of the National Marine Fisheries Service that certain presently unendangered wildlife *will be* endangered species.¹¹⁰ In that case, the court considered scientific projections that concluded by 2095, the unavailability of shallow water sea ice would be

¹⁰⁶ Quirin Schiermeier, *Climate Science Is Supporting Lawsuits that Could Help Save the World*, NATURE (Sept. 8, 2021), <https://www.nature.com/articles/d41586-021-02424-7> [<https://perma.cc/LLX2-V8DY>].

¹⁰⁷ See, e.g., *Baker v. Carr*, 369 U.S. 186, 210–11 (1962).

¹⁰⁸ Lawrence Keating, *Lost in Translation: An Argument for Following International Jurisprudence on Climate Change, and Its Projected Impact on U.S. Law*, A.B.A. (Dec. 13, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/ierl/20211213-lost-in-translation/ [<https://perma.cc/S3ED-WVY5>] (“Where there was once room to argue about the existence of climate change, there is now an overwhelming scientific consensus. A ruling on climate change is not about vindicating the views of a political party; it is about respecting scientifically determined minimum countermeasures to avoid irreparable damage.”).

¹⁰⁹ *Id.*

¹¹⁰ *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 674 (9th Cir. 2016).

detrimental to the survival of a subspecies of seals, even though seals were not presently endangered.¹¹¹ In applying a climate-conscious lens to its judicial analysis, the Ninth Circuit relied on sufficient climate projections to uphold the administrative finding of a *future* danger.¹¹²

Outside the context of climate change, plaintiffs may generally seek to recover “stigma damages” when their property values are going to be significantly diminished *in the future* by some action—usually contamination.¹¹³ Broadly speaking, plaintiffs may recover future damages in many instances.¹¹⁴ Altogether, these concepts offer useful examples of courts providing remedies for future injuries caused by another. In the context of a regulatory taking, these examples provide an analogous pathway for courts weighing whether a government regulation could lead to a future taking in the context of climate change.

C. *South Carolina Runs the Risk of Effectuating Regulatory Takings Through the Implementation of the CTWA*

In employing the above-described climate-conscious analysis that is gaining traction in courts across the globe, a court could find a regulatory taking through the ban on hard erosion control devices in the setback area of South Carolina beaches. In reviewing the evidence discussed in Part I, a South Carolina beachfront property owner is left defenseless from these destructive forces absent the coastal resiliency tools outlined in the CTWA’s indefinite ban.¹¹⁵ Society’s understanding of climate change and the dangers faced by beachfront residents goes beyond mere speculation and now falls into a state of anticipation.¹¹⁶ While a beachfront property owner has not lost all current economic viability in her affected parcel, the expected diminution of her property value over the next few decades leaves her in a precarious position. Should she have to wait until her property is chronically flooded to bring a takings claim?

¹¹¹ *Id.* at 677.

¹¹² *Id.* at 683–84.

¹¹³ See SUSAN M. COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION* § 17.04(1)(a) (2022), LexisNexis.

¹¹⁴ Stephen Michael Sheppard, *Future Damages*, in *BOUVIER LAW DICTIONARY: DESK EDITION* (2012).

¹¹⁵ *Supra* Part I. Climate evidence indicates rising sea levels, strengthening hurricanes, and the increasing propensity for inundating flooding events will impact the South Carolina coast.

¹¹⁶ Keating, *supra* note 108.

The pertinent scientific evidence of future projections, as employed in *Pritzker*, may suggest that a property owner could point to the future harms caused by the CTWA.¹¹⁷ In applying this analysis to a takings claim based on the CTWA and future effects of climate change, a court may look to the significant evidence and projections of chronic inundating flooding, storm surge, and sea level rise in coastal South Carolina. To supplement this analysis, a court could view this evidence in light of the vast flood-vulnerable population and economic resources located along the coast.¹¹⁸

Moreover, in this realm, the state would be unable to defend regulatory takings claims on the nuisance exception. *Lucas* provides an exception to a finding of a regulatory taking if the property owner's intended uses of the affected property "were not part of his title to begin with"—thus, a common law nuisance.¹¹⁹ In *Brost v. City of Santa Barbara*, the court considered the application of the nuisance defense to a regulatory takings claim involving indefinite construction prohibitions on parcels of land.¹²⁰ In that case, plaintiffs brought a takings claim against the city for its prohibition on the ability of plaintiffs to reconstruct their homes after they were destroyed by a wildfire.¹²¹ The moratorium was imposed because the properties at issue were located in an active landslide zone.¹²² The trial court held this indefinite construction moratorium constituted a regulatory taking.¹²³ On appeal, the city argued the moratorium was justified under principles of nuisance law.¹²⁴ The California Court of Appeals upheld the finding of a regulatory taking and, in rejecting the city's

¹¹⁷ *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 677 (9th Cir. 2016).

¹¹⁸ *Strauss et al.*, *supra* note 14.

¹¹⁹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). The South Carolina Court of Appeals has noted a public nuisance exists where "acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights." *Overcash v. S.C. Elec. & Gas Co.*, 588 S.E. 2d 116, 121 (S.C. Ct. App. 2003) (quoting *State v. Turner*, 198 S.C. 487, 495 (S.C. 1942)). A private nuisance is found where there "is an interference with the use and enjoyment of land. The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON TORTS* § 87 at 619 (5th ed. 1984) (footnote omitted).

¹²⁰ *Brost v. City of Santa Barbara*, No. B246153, 2015 Cal. App. LEXIS 2112, at *30–31 (Cal. Ct. App. Mar. 25, 2015).

¹²¹ *Id.* at *6–7.

¹²² *Id.* at *3–5.

¹²³ *Id.* at *1–2.

¹²⁴ *Id.* at *2–3.

nuisance argument, noted the city's argument was undermined by the fact that other homes in the landslide zone were allowed to remain occupied and repaired damages.¹²⁵

An analogous rebuttal of the state's nuisance defense would apply as it relates to the CTWA. Since the CTWA does not permit the construction or repair of the defined hard erosion control devices in the setback zone while exempting the erection of pools and other structures in the same zone, the state's goal of beach preservation is not met, and a nuisance defense would be similarly undercut.¹²⁶ The state would be unable to defend a regulatory takings claim on this ground. With respect to takings claims made against the state through its implementation of the CTWA, a court may intervene since the government is not only failing to facilitate property saving measures from the effects of climate change but specifically the state government's regulations handcuff the ability of property owners to protect their investment-backed expectations.

D. Because the Takings Clause Reasonably Operates as a Barrier to Government Overreach, South Carolina Should Be Incentivized to Amend the CTWA and Allow Beachfront Property Owners to Fortify Their Homes

In viewing the plain language of the Takings Clause of the Fifth Amendment, it is easy to come to a quick conclusion about the Clause's scope; it is merely a compensatory remedy for the state's physical seizure of private property.¹²⁷ While this view is legitimate, such a compressed understanding of the Takings Clause discounts the overall objective of the Bill of Rights.¹²⁸ Everything considered, the Takings Clause also fulfills the purpose of protecting citizens from the liberal use of eminent domain. As Professor Matthew Harrington notes, including the Takings Clause in the Bill of Rights served to dispel anti-Federalist fears that a centralized federal government would threaten property rights in the newly formed United States.¹²⁹ Harrington mentions that, in conjunction with the other liberties guaranteed to citizens in the Bill of Rights,

¹²⁵ *Id.* at *31–32.

¹²⁶ See S.C. CODE ANN. § 48-39-290(B)(2)(a), (B)(1), (B)(3) (2013).

¹²⁷ See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 837 (1995).

¹²⁸ See David A. Strauss, *The Role of a Bill of Rights*, 59 CHI. L. REV. 539, 548, 550–52 (1992).

¹²⁹ Matthew P. Harrington, *Regulatory Takings and the Original Understanding of the Takings Clause*, 45 WM. & MARY L. REV. 2053, 2074 (2004).

“Madison sought to supplement the institutional protections already afforded property in the Constitution” in proposing the Takings Clause.¹³⁰

The exact barrier erected by the Takings Clause exists in its requirement of “just compensation” in the event a taking has occurred. Professor Melvyn Durchslag notes that in the event the Supreme Court expands the “all economic use” rule in *Lucas* to a lower standard, governments will be hamstrung in the exercise of eminent domain due to the high costs associated with its exercise.¹³¹ The prophylactic nature of the takings clause should force governments to consider the breadth of land use regulations at their passage and during their implementation. Under a quasi-Lockean theory of consent as guiding the relationships between the government and governed, a body politic mandated through the consent of the governed is both an optimum barrier to government overreach and the prime method for achieving societal advancement.¹³² Professor Epstein, however, rejects a solution to government overreach involving considerations of consent, “for fear that it may permit a voracious government to take more than the governed wish to provide, for purposes that they do not approve.”¹³³ Instead, Epstein proposes “that relations between the government and the governed be based on ‘an explicit and rigorous theory of forced exchanges’ in which the owner must receive as compensation for any taking of property by the state”¹³⁴ In this governmental relationship, the state should naturally, by way of its part of the forced exchange explained by Epstein, be wary of engaging in actions that result in forced exchanges. All in all, the nature of government takings is designed to prevent overreach, and in the face of potential takings liability, a state should be incentivized to alter course and provide an environmental regulatory framework that meets the state’s goals without engaging in such actions that even *may* constitute a taking.

In the case of South Carolina and its implementation of the CTWA, the state should be so incentivized to amend the CTWA to end the indefinite prohibition on the repair and construction of hard erosion control devices within the setback zone. Considering the high costs of exercising regulatory takings, South Carolina should preemptively avoid these costs altogether. Even amending the CTWA to provide certain exceptions, such

¹³⁰ *Id.* at 2077.

¹³¹ Durchslag, *supra* note 99, at 476–77.

¹³² JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 66–72 (John W. Gough ed., Oxford: Basil Blackwell 1946) (1689).

¹³³ Foster, *supra* note 103, at 444.

¹³⁴ *Id.*

as in the case of the vetoed bill to exempt a Georgetown County community from the CTWA's prohibitions, would reduce the state's liability exposure and afford protection for at least one community from rising sea levels and other effects of climate change.¹³⁵

IV. POLICY RECOMMENDATION MOVING FORWARD: SOUTH CAROLINA SHOULD PASS A REFORMED VERSION OF THE PRIVATE PROPERTY RIGHTS PROTECTION ACT

As a threshold matter, regulatory takings claims are statistically futile. One review conducted in 2016 found that out of 1,600 regulatory takings claims filed in state and federal courts after *Lucas*, only twenty-seven were successfully litigated.¹³⁶ While the result of this review does not detract from the potential success of a regulatory takings claim as it relates to the CTWA, the odds taken as a whole simply favor the state.¹³⁷ Apart from amending the CTWA so as to end the indefinite ban on hard erosion control devices in the setback zone, South Carolina can implement a policy change in order to provide beachfront landowners a path to redress the instances where the CTWA is overly burdensome.¹³⁸ Specifically, South Carolina should reconsider, and adopt, a long-forgotten proposed bill that would establish a private cause of action for landowners affected by a land use regulation they can prove is too restrictive.¹³⁹

A. *The Private Property Rights Protection Act*

Following the Supreme Court's landmark decision in *Lucas*, lawmakers in South Carolina identified a particular need among landowners

¹³⁵ Fretwell, *supra* note 76.

¹³⁶ Carol Necole Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 101, 103 (2016).

¹³⁷ *Id.* The math here works out to courts finding a regulatory taking in just 1.6% of cases.

¹³⁸ South Carolina recently addressed the need for a statewide coastal resiliency program in so far as the General Assembly passed, and Governor McMaster signed into law, the South Carolina Disaster Relief and Resilience Act. This established the Office of Resilience and mandated the agency create and maintain a resiliency plan as well as two funds dedicated to flood mitigation, prevention, and coastal resiliency. *Welcome to the South Carolina Office of Resilience*, S.C. OFF. OF RESILIENCE, <https://scor.sc.gov> [<https://perma.cc/ZN7V-QS3A>] (last visited Jan. 16, 2023). See Yaron Miller, *New South Carolina Law Aims To Boost Flood Resiliency and Mitigation*, PEW (Oct. 21, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/10/21/new-south-carolina-law-aims-to-boost-flood-resiliency-and-mitigation> [<https://perma.cc/Z349-58VY>].

¹³⁹ See S. 528, 114th Sess. (S.C. 2001).

in the state by introducing legislation to address eminent domain and alleged takings in the state.¹⁴⁰ The proposed legislation eventually died and similar subsequent bills were introduced a number of times before the Private Property Rights Protection Act was introduced in 2001.¹⁴¹

According to the legislative findings laid out in South Carolina's 2001 Senate Bill 528 ("S. 528"), certain state laws unreasonably restrict and burden the private property rights of the citizenry and then—and now current—procedures for challenging these laws were—and currently are—not conducive to functional relief.¹⁴² The proposed bill would ease the burden on plaintiffs by providing relief for challenged government regulations that merely created an "unnecessary hardship"—a much lower threshold than proving an unconstitutional taking.¹⁴³ Procedurally, S. 528 would provide a path to settlement by first requiring a property owner to file a claim for relief directly with the entity implementing the challenged regulation.¹⁴⁴ If a settlement offer is rejected, a landowner may later file suit under a direct cause of action against the state for the state's "unnecessary hardship" on a landowner's property rights.¹⁴⁵ At the time of its consideration, some environmental groups were opposed to S. 528 on the grounds that developers would be compensated by the state for otherwise simply abiding by environmental and land use regulations.¹⁴⁶ However, protecting the environment and private property rights are not mutually exclusive.

B. *Oregon Ballot Measure 37*

The State of Oregon is touted as one of the most environmentally friendly states in the country when it comes to environmental quality and "eco-friendly behaviors."¹⁴⁷ Nevertheless, Oregonian voters overwhelmingly adopted Ballot Measure 37 in November 2004, which provides a pathway to just compensation for landowners where a government

¹⁴⁰ See S. 839, 111th Sess. (S.C. 1995).

¹⁴¹ See S. 686, 112th Sess. (S.C. 1997–98); Miller, *supra* note 138.

¹⁴² S. 528, 114th Sess. § 28-4-20(A), (C) (S.C. 2001).

¹⁴³ *Id.* § 28-4-40(A).

¹⁴⁴ *Id.* § 28-4-50(A), (C).

¹⁴⁵ *Id.* § 28-4-60(B).

¹⁴⁶ Courtney P. Stevens, *Another Try at Taking Legislation in South Carolina: An Analysis of South Carolina Senate Bill 528 and the Fight for Property Rights*, 54 S.C. L. REV. 241, 257 (2002).

¹⁴⁷ John S. Kiernan, *Greenest States*, WALLETHUB (Apr. 13, 2021), <https://wallethub.com/edu/greenest-states/11987> [<https://perma.cc/UY3M-7NX8>].

regulation in any way reduces land value.¹⁴⁸ In this scheme, landowners were entitled to compensation for an overly burdensome regulation unless state or local governments waived the regulation or challenged whether the landowner was entitled to relief under the law.¹⁴⁹ While the execution of this new law presented quite the administrative challenge, the state, as of January 2011, has been able to review 7,000 claims for relief within the 180-day deadline without incurring liability.¹⁵⁰

Specifically addressing concerns surrounding environmental protection, Measure 37 provides a direct exception for challenges to land use regulations designed to protect the health and safety of the community.¹⁵¹ Examples of health and safety regulations include laws related to pollution, sanitation, and waste regulation.¹⁵² In line with the Supreme Court's decision in *Lucas*, Measure 37 also provides an exception for land use regulations surrounding prohibitions of activities designated as common law nuisances.¹⁵³ Other exceptions are carved into Measure 37, but altogether these provide a well-conceived balance between environmental protections and private property rights.¹⁵⁴

C. *South Carolina Should Adopt a Private Cause of Action for Challenging Land Use Regulations Where a Takings Claim Would Otherwise Be Made*

By providing landowners with a private cause of action for challenges to overburdensome and overly restrictive land use regulations, beachfront property owners detrimentally affected by the CTWA's prohibitions may have better access for either compensation or variances for the construction or repair of hard erosion control devices in the setback zone. Compensation for successful challenges would be designed to offset significant losses in property value caused in the anticipation of inundating flooding.¹⁵⁵ In addressing the concerns raised by environmental groups in 2001, the state should import the exceptions noted in Measure 37 that

¹⁴⁸ Michael C. Blumm & Erik Grafe, *Enacting Libertarian Property: Oregon's Measure 37 and Its Implications*, 85 DENV. L. REV. 279, 281, 319 (2007).

¹⁴⁹ OR. DEP'T OF LAND CONSERVATION & DEV., BALLOT MEASURES 37 (2004) AND 49 (2007) OUTCOMES AND EFFECTS 34 (2011).

¹⁵⁰ *Id.*

¹⁵¹ Blumm & Grafe, *supra* note 148, at 337.

¹⁵² *Id.* at 337–38.

¹⁵³ *Id.* at 330.

¹⁵⁴ *See id.* at 340–49.

¹⁵⁵ *New Study Finds 116,000 South Carolina Homes*, *supra* note 24.

do not provide for compensation or relief from land use regulations designed to prevent common law nuisances or control pollution.¹⁵⁶ In implementing this policy recommendation, the state will be able to strike a fair balance between respecting the property rights of beachfront landowners—and allowing them to fortify their properties in light of the imminent effects of climate change—and concerns raised by environmentalists.

CONCLUSION

South Carolina is notable not only for its pristine beaches and upscale beachfront properties but also for the fact that it provided the initial forum for one of the most consequential Supreme Court decisions as it relates to land use and takings law. Perhaps ironically, though, state law greatly restricts the ability of beachfront property owners to fortify their homes from the imminent effects of climate change, to wit, rising sea levels and strengthening severe weather events, both of which will lead to inundating flooding. With no other adequate protections available and with governments taking little action on human contributions to climate change, the indefinite ban on constructing and repairing seawalls, bulkheads, and revetments within the setback zone significantly compounds the loss of value in these properties as they relate to the landowners' investment-backed expectations. Since this prohibition may constitute an unconstitutional taking, and since the underlying purpose of the Takings Clause is to prevent this very type of governmental overreach,¹⁵⁷ South Carolina should be incentivized to end this indefinite prohibition. With the understanding that takings cases are rarely successful for plaintiffs, the state should adopt a private cause of action to allow challenges to unnecessarily burdensome land use regulations that may otherwise not quite amount to an unconstitutional taking but that still cause significant loss of value to a landowner's property. Respecting private property rights and protecting the environment are not mutually exclusive and it is the environmental reality of climate change that should lead South Carolina to re-evaluate the state's policy of handcuffing beachfront communities from useful tools in coastal resiliency.

¹⁵⁶ See Stevens, *supra* note 146, at 257; Blumm & Grafe, *supra* note 148, at 337, 340, 344, 347.

¹⁵⁷ See Harrington, *supra* note 129, at 2053; Foster, *supra* note 103, at 445.