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Passive Takings: The State's Affirmative Duty to Protect Property

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PASSIVE TAKINGS: THE STATE'S AFFIRMATIVE DUTY TO PROTECT PROPERTY

Christopher Serkin*

The purpose of the Fifth Amendment's Takings Clause is to protect property owners from the most significant costs of legal transitions. Paradigmatically, a regulatory taking involves a government action that interferes with expectations about the content of property rights. Legal change has therefore always been central to regulatory takings claims. This Article argues that it does not need to be and that governments can violate the Takings Clause by failing to act in the face of a changing world. This argument represents much more than a minor refinement of takings law because recognizing governmental liability for failing to act means that, in at least some circumstances, the Constitution compels the government to protect property. Such liability runs counter to conventional understandings of constitutional law in which the Constitution primarily enshrines negative liberties. And yet this liability follows surprisingly naturally from leading takings and property theory. The Takings Clause, then, can serve as a previously unrecognized basis for affirmative governmental obligations. The Article ultimately illustrates this new category of passive takings with the example of sea-level rise, arguing that ecological threats may compel the government either to respond or pay compensation for the damages resulting from this ecological change.

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INTRODUCTION

Conventionally understood, regulatory takings doctrine protects property owners from significant, adverse changes in the law. The paradigmatic example of a regulatory taking involves a new regulation—environmental protection, zoning limit, and so forth—that interferes with owners’ settled and reasonable expectations. In formal terms, the Takings Clause¹ provides at least occasional relief from the costs and consequences of legal transitions.² But what about regulatory *inaction*? Can the government’s failure to regulate, or its failure to act to protect private property, ever amount to an unconstitutional taking? This Article argues that it can.

The claim should appear quite startling. The Constitution is typically thought to create only negative rights—rights that constrain the government from acting in certain proscribed ways.³ Takings liability for regulatory inaction—what this Article calls *passive takings*—means that property owners could be constitutionally entitled either to governmental intervention on their behalf or to compensation if the government fails to act. This Article

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

2. See Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 11 (2003) (“Regulatory takings claims are all about change. They are obviously about distribution of the costs of regulatory transitions between landowners and society.”); see also Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 33 (2003); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 532 n.61 (1986).

3. See, e.g., Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330 (1985) (arguing that constitutional rights are commonly understood “to impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another’s needs”).

ultimately illustrates the new category of passive takings through the example of sea-level rise, but the concept potentially applies to property more broadly, in settings as diverse as copyright law and financial regulation.⁴

While the idea of imposing affirmative constitutional duties on the state is unorthodox as a matter of general constitutional law, it is surprisingly consonant with underlying justifications for the Takings Clause. For example, from a consequentialist perspective focused on regulatory incentives, the Takings Clause is supposed to induce efficient regulatory activity by forcing the government to internalize the costs of its actions.⁵ But holding the government liable only for its affirmative actions can distort governmental decisionmaking. In some contexts, governmental inaction is the most costly choice of all. Where that is true, forcing the government to pay for its regulatory actions but not its omissions will have the perverse effect of deterring the government from doing anything at all, even if a regulatory response could dramatically increase overall societal well-being. Similarly, distributive theories of property concerned with the fair or just allocation of burdens and benefits in society view the Takings Clause as preventing disproportionate regulatory burdens.⁶ But burdens can be unfairly distributed in society through governmental inaction as well. Passive takings liability requires examining the extent of the government's complicity in distributional outcomes rather than focusing exclusively on the categorical but ultimately porous distinctions between regulatory acts and omissions.

Existing takings law and theory extend with surprising ease to reach previously unrecognized passive takings claims, but this new category then requires fundamentally reconceptualizing the nature of constitutional protection for private property. It means that constitutional protection is not merely negative—not merely a restriction on governmental action—but can create affirmative duties for the government to respond to changing conditions in the world. This is not freestanding liability; the government is not an insurer of last resort whenever property is threatened. But such liability does arise whenever the government is so entangled in the substantive content of property that the line between acts and omissions becomes especially blurry—for example, in cases where the government has acted to disable property owners' self-help.⁷

Indeed, there are contexts in which no principled basis exists for distinguishing between regulatory acts and omissions. In tort law, theorists have famously contrasted a passerby who fails to throw a rope to a drowning man with a driver who fails to avoid someone in the road.⁸ While both involve

4. See *infra* Section IV.C (discussing these examples).

5. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 84–85 (1993); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 73–74 (8th ed. 2011); Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 576 (2012) (describing the conventional economic account of the Takings Clause).

6. See *infra* Section II.B (discussing fairness-based conceptions of the Takings Clause).

7. See *infra* Section III.B (discussing passive takings test).

8. See, e.g., Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 253 (1980); see also *infra* text accompanying notes 130–135 (discussing this and other examples).

inaction, there is a critical difference: the driver, by getting into the car, has created the conditions giving rise to the ultimate injury. Analogously, by exerting substantial control over property, the government sometimes assumes the role of the driver who has a duty to hit the brakes when a pedestrian appears in the road. Although regulations may be perfectly constitutional when enacted, they can trigger a duty for the government to respond to changes in the world. At least when it comes to property, then, the Constitution—through the Takings Clause—will sometimes compel governmental action. What initially appears to be a small lacuna in takings doctrine therefore amounts to much more.

Sea-level rise provides an important real-world illustration of the potential payoff of this Article's central normative claim. Some governments—both state and local—are failing to take aggressive steps to address the risks of sea-level rise at least partly because they worry that regulatory responses might trigger takings liability.⁹ Establishing new setbacks from the ocean or prohibiting sea walls, for example, implicate traditional takings analysis, and the threat of takings liability may well be discouraging some governments from adopting these and other measures that could minimize the impacts of rising seas.¹⁰ But allowing governments to escape liability so easily seems strange when coastal property is already subject to comprehensive and overlapping land-use and environmental regulations. Preexisting regulatory intervention means that the government should not be able to wash its hands of responsibility now. In fact, immunizing the government from the consequences of *inaction* actually discourages action. The category of passive takings therefore creates an important counterbalance to the threat of traditional takings liability and encourages governments to reduce the overall costs of sea-level rise.

Part I describes the conventional view that takings liability applies only to moments of legal change. It then argues that such liability can also arise from changes in the world, even during times of legal stability. Part I also

9. See, e.g., N.Y.C. DEP'T OF CITY PLANNING, COASTAL CLIMATE RESILIENCE: URBAN WATERFRONT ADAPTIVE STRATEGIES 72 (2013) ("Regulations that sharply limit the economic use of properties can trigger takings challenges. Because of all these factors, strategic retreat should be pursued only as part of a well-considered plan for a community in an urban area.").

10. See, e.g., James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998) (discussing application of Takings Clause to responses to sea-level rise); see also ROBERT MELTZ, CONG. RESEARCH SERV., R42613, CLIMATE CHANGE AND EXISTING LAW: A SURVEY OF LEGAL ISSUES PAST, PRESENT, AND FUTURE (2012); Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533, 567 (2007) (discussing takings implications of rolling easements); Megan M. Herzog & Sean B. Hecht, *Combatting Sea-Level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 463, 479–82 (2013) (discussing takings impact of adaptation strategies); Travis Martay Brennan, Comment, *Redefining the American Coastline: Can the Government Withdraw Basic Services from the Coast and Avoid Takings Claims?*, 14 OCEAN & COASTAL L.J. 101 (2008) (discussing takings impact of withdrawing governmental support for coastal property owners).

discusses the conventional understanding of affirmative constitutional obligations, arguing that the status of property rights in the Constitution makes passive takings claims surprisingly feasible, both doctrinally and politically. Part II turns to underlying takings doctrine and property theory, arguing that efficiency and fairness concerns, as well as normative property theory, support extending takings liability to passive takings. Part III then sets out the proposed doctrine of passive takings in more detail, defining the specific contexts in which passive takings claims may arise and addressing several of the strongest counterarguments. Finally, Part IV puts the theory to the test, applying the category of passive takings to the problem of sea-level rise and speculating about additional contexts in which passive takings claims might arise.

I. THE TAKINGS CLAUSE AND LEGAL TRANSITIONS

Courts and commentators frequently assert—and even more frequently assume—that the Takings Clause is implicated only when the government changes the law.¹¹ The compensation requirement for regulatory takings serves to protect property owners from the effects of legal transitions by compensating them for regulatory interference with their reasonable expectations.¹² This Part explores those assumptions and then sets up the doctrinal problem of creating liability for regulatory inaction. The balance of the Article defines and defends this category of passive takings.

A. *The Takings Clause and the Protection of Expectations*

The Takings Clause protects property from regulatory burdens that “go[] too far.”¹³ The nature and extent of that protection remain fiercely contested. Difficult conceptual and doctrinal problems have bedeviled courts and commentators for decades, and the controversies need no rehearsal

11. See, e.g., MELTZ, *supra* note 10, at 23 (“Generally, failure to act cannot be the basis of a taking claim.”); J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 91 (2012) (“Government cannot take property purely by inaction.”); Doremus, *supra* note 2, at 11 (“Regulatory takings claims are all about change. They are obviously about distribution of the costs of regulatory transitions between landowners and society.”); Kaplow, *supra* note 2, at 522 (“Appeals to reliance on preexisting law and expectations concerning legal change have traditionally formed the basis for assessing the transition problem.”); see also Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451, 491 (2003) (assuming legal or regulatory change); Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 211–12 (2003) (focusing on legal change). This is distinct from the literature on eminent domain, which is not relevant to the argument in this Article.

12. Leading literature on legal transitions includes DANIEL SHAVIRO, *WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY* (2000) (discussing changes to tax rules); Kaplow, *supra* note 2; Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999); and Logue, *supra* note 11.

13. See, e.g., Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922) (setting out the “goes [-]too[-]far” test).

here.¹⁴ But the core cases and the broad outlines of regulatory takings doctrine all involve protecting property owners' expectations—expectations often reflected in existing uses of property.¹⁵

The polestar for regulatory takings liability remains *Penn Central Transportation Co. v. New York City*.¹⁶ There, the Supreme Court articulated a three-part ad hoc balancing test, focusing on the character of the regulation, the extent to which the regulation interferes with property owners' investment-backed expectations, and the resulting diminution in value.¹⁷ Together, these factors ask whether—and to what extent—a governmental action or regulation has interfered with owners' reasonable and settled expectations surrounding the use of their property.

Imagine, for example, that someone bought beachfront property expecting to build a single-family home, a permitted use at the time of the purchase. If the government subsequently changes its setback rules, making it impossible to build on the lot, the property owner may have a takings claim. The legal issues will include whether the property owner's expectations of building a single-family home were reasonable and, perhaps, whether they were sufficiently investment backed.¹⁸ If the answer to these questions is yes, the success of the takings claim will then depend on the extent of the government's interference with those expectations. A regulation that only partially interferes—that requires the owner to build a slightly smaller house, for example, or to build a house a bit farther from the water—is almost certainly not a taking. But if the interference is more substantial, it may trigger takings liability.¹⁹

Takings claims therefore fundamentally depend on the divergence between an owner's expectations and what the law will allow. If an owner

14. See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 Nw. U. L. REV. 677, 741 (2005) (“Looking for consistency in takings cases is a little bit like finding shapes in the clouds: you can see them if you look hard enough, but they say more about the observer than the clouds themselves.”).

15. See Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1229 (2009) (describing but criticizing takings protection for existing uses of property).

16. 438 U.S. 104, 124 (1978).

17. *Penn Central*, 438 U.S. at 124. For a discussion of the test and its operation, see, for example, DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 121–68 (2002) (discussing vagueness of factors) and Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307, 329–30 (2007) (discussing factors).

18. In *Penn Central*, the Court referred to “distinct investment-backed expectations.” 438 U.S. at 124. In *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), the Court restated this *Penn Central* factor as “reasonable investment[-]backed expectations.” While the Court did not acknowledge the change, it has not been lost on commentators. See Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 *U. HAW. L. REV.* 533, 560 (2002).

19. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992).

reasonably expects to put property to a use worth \$100, and a new regulation permits a use worth only \$15, the government may well have to compensate the owner or withdraw the regulation (or both).²⁰

This stylized example makes it obvious enough why the Takings Clause is traditionally thought to apply only in the face of legal change. If the setback lines were established before a buyer bought the property, or if other preexisting regulations made the parcel impossible or inordinately difficult to develop, those extant regulations at least temper the buyer's expectations.²¹ If someone buys property in a neighborhood zoned single-family residential, she cannot complain when she is prevented from developing the property as a gas station, an adult theater, an apartment building, or for another more intensive use.

Expectations inconsistent with existing law are not automatically unreasonable, however, because the relationship between an owner's expectations and the regulatory environment is complex and contested.²² Indeed, some takings claims may survive the transfer of property. If a government enacts a regulation that amounts to an unconstitutional taking but the owner sells the property before pursuing the claim, the new owner may be able to stand in the shoes of the previous owner to bring a takings claim against the government. As the Supreme Court decided in *Palazzolo v. Rhode Island*,²³ the mere fact that a regulation predates the owner's acquisition of the property does not automatically make all inconsistent expectations "unreasonable." In some circumstances, property owners may have a reasonable expectation that the applicable regulations will change, either because the possibility is already in the air or because the buyer reasonably expected to be able to

20. For a discussion of the problem of remedy and compensation in regulatory takings, see, for example, Serkin, *supra* note 14. See also John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 706–09 (1993) (discussing remedies for regulatory takings).

21. See John D. Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,471, 10,476 (2009) ("Takings claims brought by purchasers with notice continue to be rejected on a fairly routine basis."); see also Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 12 (2003) ("[C]ourts have rejected *Penn Central* takings challenges by finding that the property owner's notice of pre-existing regulations divests the owner of any reasonable investment-backed expectation to use the property in a manner prohibited by the regulation.").

22. See, e.g., J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. REV. 351, 394 (2005) ("If an owner indeed acquires the property rights of pre-regulation predecessors, then his expectations are coterminous with a pre-regulation predecessor. Since the pre-regulation owner would have a reasonable expectation of building free of the regulation, so would the newer owner."); see also R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 483–95 (2001) (discussing cases).

23. 533 U.S. 606, 626–27 (2001) (refusing to "put so potent a Hobbesian stick into the Lockean bundle" of property rights and allowing property owner to challenge preexisting wetlands regulation under *Penn Central*).

contest them successfully.²⁴ A property owner's expectations are therefore not necessarily unreasonable simply because they are inconsistent with existing regulations.

Nevertheless, takings claims have always been thought to involve some legal transition that interfered with a property owner's (or her predecessor's) settled expectations—expectations that were constituted, at least in part, by the content of background regulations and the common law of property. While the legal change may have occurred before the current owner bought the property, legal change is nevertheless at the heart of traditional takings claims.

B. *Legal Stasis and Ecological Transitions*

Governmental interference with settled expectations does not, however, depend on the government's changing the law. A stable legal rule combined with a change in the world—an “ecological change”—can interfere with owners' expectations just as much as an explicit legal transition. For purposes of this Article, ecological changes are not limited to environmental changes in the narrow sense but can refer instead to any changes in conditions in the world. Nevertheless, the pressing environmental threat of sea-level rise provides the clearest real-world example.

To foreshadow the detailed analysis in Part IV, a number of states have long-standing rules prohibiting beachfront (littoral) owners from building any impermeable barriers (e.g., breakwaters, sea walls, revetments, and so forth) to the seaward side of the vegetation line.²⁵ Those rules—some of which have been in place since at least the 1970s—were often enacted to maintain the attractiveness of the shore and public access to beaches.²⁶ The prohibition on such barriers has always subjected beachfront property owners to some risk of erosion, but the threat to property was, in general, relatively modest. In the ordinary course, these restrictions would not have had a significant impact on property values and almost certainly would not have

24. Cf. Bell, *supra* note 2, at 47 (“In every case, the likelihood of a taking enters the market at some point, and at that point, the value of the property in the market changes to reflect the new information.”); Serkin, *supra* note 15, at 1283 (discussing effect of property owners' ability to anticipate legal changes).

25. See, e.g., S.C. CODE ANN. § 48-39-290 (2008 & Supp. 2013) (prohibiting all new armoring “seaward of the baseline,” subject to minor exceptions); see also Todd T. Cardiff, Comment, *Conflict in the California Coastal Act: Sand and Seawalls*, 38 CAL. W. L. REV. 255, 256 (2001) (“In 1976, when the California legislature passed the Coastal Act, the legislature was aware of the adverse impacts of seawalls” and prohibited development that would require constructing protective devices).

26. See Cardiff, *supra* note 25, at 256 (“Shoreline armoring only benefits the incredibly small minority of the population that owns property directly on the coast, while it decreases access to the millions of people who flock to the beach every year.”); cf. JESSICA GRANNIS, ADAPTATION TOOL KIT: SEA-LEVEL RISE AND COASTAL LAND USE 38 tbl.10 (2011) (listing as a disadvantage that “[a]rmorement can also obstruct public access to the coast”); N.Y. STATE SEA LEVEL RISE TASKFORCE, REPORT TO THE LEGISLATURE 7 (2010) (“As water levels rise, sea walls, dikes and similar structures along the state's coastline may limit public access to beaches as the publicly accessible intertidal zone is eliminated.”).

risen to the level of a taking at the time they were adopted. In fact, each beachfront property owner may well have benefited from the reciprocal restrictions on every other beachfront owner, restrictions that likely kept the beach more valuable for all.

Sea-level rise threatens that calculus. What had been a relatively innocuous prohibition on sea walls suddenly imposes a very different kind of hardship. Unable to “armor” their property, beachfront owners could well lose their homes to increased storm surge and, indeed, even lose their property altogether through erosion and eventual inundation.²⁷

In this example, the law has not changed. The prohibition on physical barriers remained consistent. Ecological change, however, makes that same stable rule apply very differently, and such change indeed may threaten a total wipeout of the property.²⁸ If the government were to adopt that regulatory prohibition today—or, say, fifty years in the future, when the effects of sea-level rise are even more definite—the prohibition could very well amount to an unconstitutional taking. The fact that the law happened to have been on the books already, at a time when its impact was innocuous, does not make the application of the law to the changed conditions in the world any less burdensome.

The general phenomenon is simply this: a regulation that is not a taking when enacted begins to work a severe hardship because of changes in the world. The regulated entity or property owner comes to experience the regulatory burden as a significant impairment of expectations. Even though the regulation itself has not changed, its application to the changed conditions in the world imposes new burdens. In those situations, if the hardship is severe enough, a property owner has a doctrinally plausible takings claim despite—and indeed because of—the fact that the law has not changed.

Viewed in these general terms, this phenomenon could manifest itself in any number of scenarios in which a regulation was benign at the time it was adopted but comes to impose a significant, unexpected, and constitutionally problematic burden because of technological or ecological changes. Imagine, for example, land zoned exclusively for single-family use that becomes environmentally contaminated and therefore suitable only for industrial use. Or

27. Cf. J.B. Ruhl, *Climate Adaptation Law*, in *GLOBAL CLIMATE CHANGE AND U.S. LAW* 677, 696 (Michael B. Gerrard & Jody Freeman eds., 2d ed. 2014) (“Littoral property owners have been battling the oceans with seawalls, riprap, and bulkheads for centuries, and there is no reason to think they won’t give sea-level rise a fight as well.”). See generally MATTHEW HEBERGER ET AL., *THE IMPACTS OF SEA-LEVEL RISE ON THE CALIFORNIA COAST* (2009) (describing effects of sea-level rise).

28. Cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–31 (1992) (discussing the standard for a “total taking” when setback requirements prevented any development on beachfront lots). For an insightful treatment of the dynamic changes triggered by climate change specifically, see J.B. Ruhl & James Salzman, *Climate Change Meets the Law of the Horse*, 62 *DUKE L.J.* 975, 975–81, 991 (2013) (“[The] idea that natural systems fluctuate within an unchanging envelope of variability’ is known in the resource- and infrastructure-management disciplines as the ‘stationarity assumption.’” (quoting P.C.D. Milly et al., *Stationary Is Dead: Whither Water Management?*, 319 *SCIENCE* 573, 573 (2008))).

imagine a fifty-foot setback requirement that makes it impossible to build on a property after the path of a river changes.

While this observation may seem entirely straightforward, it actually suggests something quite profound. It means that, in some circumstances, the government's failure to change the law could trigger takings liability. Or, to put it even more dramatically, the government can violate the Constitution by failing to take affirmative steps to change preexisting law or by failing to protect property from the application of preexisting law. And that is precisely what the balance of this Article argues: the government's relationship to property sometimes creates affirmative duties, and property owners are entitled either to summon the regulatory power of the state to act on their behalf or alternatively to receive compensation for the government's failure to act or protect their property.

Some might object to this doctrinal setup, however. First, they might argue that it is the change in the world, *not* the government's regulation, that is interfering with property owners' expectations. Under this view, the various changes should not create cognizable takings claims at all. Property owners, not the government, should bear the risk of ecological change. In this account, the government is responsible only for establishing the background rules. Any bets that property owners decide to make—whether sea walls will remain unnecessary, for example—should not trigger liability for the government.²⁹

While the government should not usually bear the risks of ecological changes, preexisting regulations do not entirely determine owners' reasonable expectations. The argument is closely analogous to the Supreme Court's reasoning in *Palazzolo*. As the Court famously ruled in that case, "Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title."³⁰ Of course, the Court there was referring to regulations that were unreasonable when enacted and that did not subsequently become reasonable over time. But the same basic principle applies here. Expectations are informed by positive law, but regulations that apply unreasonably to property rights are not immune from constitutional challenge simply because they predate the acquisition of property or the owner's formation of his expectations.³¹ Ultimately, the persuasiveness of this response depends on deeper normative claims about the state's obligations—claims explored later in this Article.³² For now it suffices to recognize

29. Another formulation of this concern is that the government should not become the insurer of last resort against changes in the world. The doctrinal limits of passive takings liability minimize this overarching concern. See *infra* Section III.B (discussing the outlines of passive takings claims).

30. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

31. For a further discussion, see *supra* note 22.

32. See *infra* Section I.C, Part II, Section IV.B.

that long-standing legal rules can suddenly interfere with property rights in unexpected ways when conditions in the world change.

Some might also raise the opposite argument: there is nothing surprising or unusual here at all. In this account, there is nothing “passive” about the government’s role in these examples. The government did act, and did change the law, when it originally implemented its beachfront regulations and its zoning ordinance. While the ecological change affects the accrual date for any takings claims based on the original regulation, the claims still constitute challenges to governmental regulations that interfere with property rights.³³

This objection undersells the substance and importance of passive takings claims. Their distinguishing feature is that the original regulation was not a taking when enacted. It was, and remains, constitutional. And yet the preexisting regulation can interact with a change in the world in a way that eventually threatens property. This interaction then triggers an affirmative duty on the government either to change its rule or to compensate for the harm that results from its failure to adapt to the new set of conditions. The regulation has not changed since it was adopted, but its continued application obligates the government to respond to an ecological change.

The theory of passive takings has implications beyond generating modest doctrinal confusion over accrual dates. Indeed, the existence of passive takings claims challenges the conventional understanding of constitutional protections for private property and of the relationship between private property and governmental power.³⁴ If private property owners sue the government for application of a stable legal rule, they may be able to summon the power of the state to protect their property. And the state may be constitutionally required to act or risk takings liability.

The boldest version of this claim appears to diverge quite dramatically from conventional constitutional doctrine.

C. *The Constitution and Affirmative Rights*

In the usual course, constitutional claims involve complaints about governmental actions: statutory enactments, agency determinations, officials’ conduct, and the like. Opportunities for bringing constitutional claims for

33. Even on its own terms, this objection would reveal something peculiar about the application of the statute of limitations in these kinds of cases. One court recently concluded as follows when surveying the general limits of regulatory takings claims:

A takings claim predicated upon an act of Congress accrues on the date of the legislative enactment because “it is fundamental jurisprudence that the act’s objective meaning and effect were fixed when the act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect.”

Love Terminal Partners v. United States, 97 Fed. Cl. 355, 377 (2011) (alterations omitted) (citation omitted) (quoting *Barlow & Haun, Inc., v. United States*, 87 Fed. Cl. 428, 435 (2009), and *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993)).

34. See *infra* Section I.C.

governmental *inaction* are thought to be vanishingly small because the Constitution primarily grants negative liberties—rights to be free from governmental intrusions—rather than affirmative liberties.³⁵

In fact, however, the possibility of affirmative constitutional duties has a long and surprisingly conflicted history. The creation of such duties appeared most promising in the context of welfare rights but ultimately proved unsuccessful in the courts. A similar story played out in abortion funding. That history offers important lessons for passive takings, lessons that are both positive and cautionary.

Early conceptions of the Constitution interpreted the document as enshrining only negative liberties. The Framers intended to protect people—and the states—from the encroachment of federal power.³⁶ At a fundamental level, the Constitution was designed to protect against the potentially coercive power of the state, *not* to obligate the state to act.³⁷

The threat of coercion has changed dramatically since the founding era, however. From the Industrial Revolution through the Great Depression, it became increasingly apparent that the state does not have a monopoly on coercive power and that private rights can also be exercised coercively.³⁸ The English philosopher T.H. Green wrote: “The individual is not in fact free

35. See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 203 (1989) (rejecting due process claim for inaction); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“The Fourteenth Amendment . . . sought to protect Americans from oppression by state government, not to secure them basic governmental services.”); *infra* text accompanying notes 138–144; see also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–66 (1986) (discussing positive and negative constitutional rights); Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199, 199 (“The law as created by the Supreme Court has been nay-saying in fact and in effect, stating in specific instances a series of ‘thou shalt not.’”); Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 868–69 (2008) (“It is an accepted principle of constitutional law that the Federal Constitution contains only negative rights.”).

36. See *Jackson*, 715 F.2d at 1203 (“The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”); see also William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 762 (1961) (“So widespread was the fear that the national government might encroach upon the sovereignty of the states, and the sovereign rights of the peoples of the several states, that a number of states were reluctant to ratify the new Constitution without an express limitation on the authority of the national government to exercise certain powers.”); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 770 (1995); David N. Mayer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 415–16 (1996) (“From a Jeffersonian perspective, the essential purpose of the Constitution is not to empower government but to restrain it . . .”).

37. See Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1899 (2008).

38. See generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998) (discussing Robert Hale’s Progressive-Era view of coercion); Adolph A. Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1 (1965); Eduardo M. Peñalver, *Property and Protection* (unpublished manuscript) (on file with author).

from coercion merely because the state has not coerced him. On the contrary he is under pressure of some sort in respect to every act he performs.”³⁹ As one commentator observed, “An illiterate and impoverished peasant could not be master of himself and his destiny, however jealously his legal rights to unconstrained action might be protected.”⁴⁰

With a changing economy and evolving social conditions, the federal government and the states began in the late nineteenth and early twentieth centuries to assume an increasingly expansive role in protecting private parties from the vicissitudes of modern life. The New Deal was the most dramatic moment in this evolution, and it highlighted a profound reconfiguration in the relationship between the federal government and its citizens.⁴¹ With the development of widespread government entitlements, from retirement and unemployment benefits to medical services for the poor and the elderly, the federal government took a more active role in promoting society’s well-being instead of merely protecting private rights. At the time, the constitutionality of this expanded role was deeply fraught and highly contested—a history that is well known to all students of American history and constitutional law.⁴² Within just a few decades, however, the constitutional question shifted from the federal government’s authority to implement widespread social-welfare programs to its *obligation* to implement these programs.⁴³

In several important articles from the 1960s and 1970s, Professors Michelman and Reich argued that the poor and elderly were entitled to constitutional protection for their public benefits.⁴⁴ As an initial step, this meant

39. Harry Holloway, *Mill and Green on the Modern Welfare State*, 13 W. POL. Q. 389, 397 (1960) (quoting George H. Sabine, *Bosanquet’s Theory of the Real Will*, 32 PHIL. REV. 633, 650 (1923)) (internal quotation marks omitted); see also Currie, *supra* note 35, at 868 (attributing to Green the view that “affirmative government aid might be essential to liberty”).

40. Holloway, *supra* note 39, at 397 (interpreting Green).

41. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 422–23 & n.1 (1987) (describing the New Deal and pointing out that it marked an evolutionary not revolutionary change); see also ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 15–16 (1995).

42. See MARK J. STERN & JUNE AXINN, *SOCIAL WELFARE: A HISTORY OF THE AMERICAN RESPONSE TO NEED* 168–97 (8th ed. 2012); see also MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE* (2013); Michelle L. VanWiggeren, Comment, *Experimenting with Block Grants and Temporary Assistance: The Attempt to Transform Welfare by Altering Federal-State Relations and Recipients’ Due Process Rights*, 46 EMORY L.J. 1327, 1331–34 (1997) (providing a succinct historical overview of the federal government’s involvement in welfare). But see WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900*, at 2 (1982) (arguing that the changes described in this account were presaged much earlier); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1–2 (1996) (similarly describing pre–New Deal regulations).

43. For a modern form of this argument, see Peñalver, *supra* note 38.

44. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (arguing that wealth inequality violates constitutional principles); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964) (arguing that government benefits can be vested entitlements that receive

that the state had to comply with the requirements of procedural due process and equal protection before denying government benefits.⁴⁵ But Michelman, Reich, and other advocates pushed the argument further, ultimately making an explicit case for affirmative duties to provide welfare for the poor. Or, to put it more bluntly, they argued that the government is obligated to continue programs of public assistance.⁴⁶ As Reich ultimately concluded, “The idea of entitlement is simply that when individuals have insufficient resources to live under conditions of health and decency, society has obligations to provide support, and the individual is entitled to that support as of right.”⁴⁷

For a time, these arguments seemed to gain traction in the courts. Most famously, in *Goldberg v. Kelly*, the Supreme Court recognized that eligible recipients of certain welfare benefits were entitled to due process protections before those benefits could be denied.⁴⁸ This expansion of rights did not continue, however. Instead, over a series of decisions, the Court whittled away the protections it had extended in *Goldberg*.⁴⁹ While this broad notion of rights survives in the scholarly literature, courts have continued to rebuff any efforts to expand affirmative federal constitutional obligations to provide welfare rights, limiting protections to procedural due process when rights are withdrawn.⁵⁰ While some state constitutions take a

constitutional protection). See generally Arthur S. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962) (arguing for affirmative duties of the state).

45. See Reich, *supra* note 44, at 785 (“If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate.”); see also Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154–55 (1958) (“Even more important than the regulatory aspect of the welfare state is its office as the source of new rights—for example, the expectations created by a comprehensive system of social insurance.”).

46. See Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 522 & n.13 (1996) (reviewing literature).

47. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965); see also Peñalver, *supra* note 38 (discussing Reich).

48. 397 U.S. 254, 264 (1970) (requiring procedural due process protections).

49. See William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 550 (1998) (“*Goldberg* represented the high-water mark for entitlement theory, however; the Borkian view that there was no positive federal right to welfare was to ultimately prevail.”); see also Kindred, *supra* note 46, at 522–23 (“The Supreme Court has adhered to the negative rights philosophy and, thus, has rejected arguments asserting an affirmative governmental obligation under the federal Constitution to expend funds to provide resources for the poor.”).

50. See, e.g., Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257, 258–59 (2000) (“Establishing an unassailable right to welfare was once an important goal of legal academics and activists, but is no longer. . . . The diminishing interest in this project is partly a product of the courts’ decisive rejection of the notion that the federal Constitution, as currently written, requires government to reduce inequality and relieve want.”). But see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2312–13 (1990) (arguing for an expanded recognition of affirmative obligations based on the Due Process Clause and an illusory distinction between acts and omissions).

different approach, the federal constitution's limited scope appears well settled.⁵¹

Abortion rights followed a similar trajectory. After the Supreme Court ruled in *Roe v. Wade*⁵² that the state could not unduly interfere with a woman's right to an abortion, some scholars and litigators sought to expand that negative liberty into a positive one that would obligate the state to fund abortion services for women who could not afford them.⁵³ After a flurry of scholarly attention, the Supreme Court definitively ruled that substantive due process only prohibits the government from interfering with a woman's right to an abortion; it does not obligate the government to make abortions available to women who cannot afford them.⁵⁴

Despite some important exceptions considered later—limited contexts where courts have acknowledged the state's obligation to act after rendering people more susceptible to harm⁵⁵—today most courts and commentators agree with the descriptive claim that the federal Constitution protects only negative liberties. As a constitutional matter, then, it seems particularly unlikely that the state should have an obligation to protect property.

It is possible, however, that courts' refusal to extend affirmative constitutional duties for welfare and abortions may be more the result of judicial skepticism about the reach of those rights than reluctance to create affirmative obligations.⁵⁶ Where the stakes of a constitutional case implicate expanding contested rights—like the right to abortion—it is perhaps

51. For a review of state constitutional doctrines, see Pascal, *supra* note 35, at 869–70 (“According to one study, twenty-three state constitutions implicitly or explicitly establish protections for the poor. These constitutional provisions range from categorical statements of an affirmative obligation on the state to care for the needy, to permissive grants of power to the state to provide such care, to the creation of public agencies to address the needs of the poor without any specific constitutional obligations.” (citation omitted)), and Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

52. 410 U.S. 113 (1973).

53. See, e.g., Laurence H. Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331–33 (1985); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1392–93 (1984).

54. *Harris v. McRae*, 448 U.S. 297, 316 (1980) (“[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.”); see also Currie, *supra* note 35, at 866 (attributing to Judge Posner the view, based on the abortion cases, that “the due process clauses confer rights of protection from rather than by the government”).

55. See *infra* text accompanying notes 138–145 (discussing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

56. As an aside, the state-action doctrine does not explain this historical reluctance. That doctrine is fundamentally about distinguishing between public and private actions and remains inapposite to the issue of state inaction. E.g., Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819, 825–26 (2004) (rejecting the view that state-action doctrine requires action instead of inaction); see also Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1382 (2006); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 435 (2002).

regrettable but not terribly surprising that courts have been hesitant to expand protections. But courts may prove more willing to expand protection for rights that are uncontroversial and well established and that cut across the political spectrum.

This Article thus scrambles the political valence of property rights. In general, arguments for affirmative governmental obligations have been associated with progressive positions—for example, whether to provide welfare or funding for abortions.⁵⁷ These arguments have traditionally been motivated by normative commitments to redistribute money and resources to the most vulnerable segments of society. The Takings Clause, in contrast, is a favorite of conservatives.⁵⁸ In recent decades, it has been held out as one of the principal bulwarks against redistribution, requiring—according to conservative courts and commentators—compensation when the government adopts redistributive policies.⁵⁹ Passive takings, though, create affirmative obligations through the Takings Clause, leveraging the protected category of private property to compel governmental action. From a political standpoint, this combination makes the category of passive takings unusually plausible. And as the next Part demonstrates, passive takings are also consistent with existing takings doctrine and theory.

II. TAKINGS THEORY AND AFFIRMATIVE OBLIGATIONS

Stable legal rules coupled with ecological change can interfere with property owners' expectations. But should this be cognizable as a taking? The answer depends on the operation and purpose of the Takings Clause and on the nature of property itself. This Part argues that passive takings are entirely consistent with existing takings and property theory. It first examines a strictly utilitarian account focusing on efficient regulatory incentives and then provides an overview of a fairness-based account attuned to distributional consequences. The Part concludes by exploring broader themes from property theory.

It is important to highlight the stakes of the following discussion for the Article's central argument. This Part's ultimate purpose is to demonstrate that three of the leading theories animating traditional takings jurisprudence also support passive takings. The goal here is not to defend any of these particular approaches, nor is it to argue that any particular theory of the Takings Clause is persuasive. The central claim is modest: that passive takings follow naturally from each of these arguments when they are considered

57. See, e.g., Bandes, *supra* note 50, at 2343–44 (rejecting baseline of minimalist state); Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 966–67 (2011) (describing political history of contracting federal rights).

58. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992) (Justice Scalia expanding takings protection to cover regulations that effect a total wipeout of all economically valuable uses of property).

59. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 314–24 (1985).

on their own terms. For that reason, this Part does not set out to canvass all of property and takings theory but confines itself to the most prominent approaches. The same treatment could undoubtedly be applied to other takings theories with similar effect.⁶⁰

A. *Utilitarian Takings Theory*

According to a now-standard economic argument, the purpose of the Takings Clause is to force the government to internalize the costs of its actions.⁶¹ Compensation prevents the government from ignoring the costs of its regulatory burdens and ensures that it acts only where a regulation's benefits are greater than the costs it imposes.

Public-choice theorists have roundly and quite convincingly criticized this account's simplest form by problematizing how governments internalize costs.⁶² This well-worn debate can be avoided here, however. For purposes of the present discussion, the question is simply whether the standard economic account—whatever its merits—applies differently to governmental inaction than to governmental action. The answer is decisively no. If anything, the asymmetry between liability for action and inaction creates its own perverse regulatory incentives.

Compensation under the Takings Clause traditionally operates in only one direction. It forces the government to internalize the costs of its *actions* but not the costs of failing to act. In cases where governmental inaction is the most costly choice for society, forcing the government to pay only when it acts will discourage efficient decisionmaking. This ostensibly straightforward observation goes to the heart of the law-and-economics analysis of regulatory takings and is worth pausing to consider in some detail.

In the traditional economic account of the Takings Clause, the compensation requirement has the salutary effect of inducing efficient regulatory incentives.⁶³ Some property-rights theorists—most notably Professor Epstein—therefore argue that takings liability should be extended to require compensation for any regulatory burdens not offset by reciprocal benefits (and not justified on common law nuisance grounds).⁶⁴ The purpose, in

60. Most notably, a public-choice account, focused on the politics of takings liability, should apply similarly to passive and active takings, because interest-group politics would seem to line up in the same way around action and inaction. *See infra* note 62 (discussing public-choice theory).

61. *See, e.g.,* EPSTEIN, *supra* note 5, at 84–85; POSNER, *supra* note 5, at 73–74; William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269, 269–70 (1988).

62. Public-choice theorists argue that governmental actors seek to maximize their political power and not the government's wealth. *See, e.g.,* Blume & Rubinfeld, *supra* note 2, at 620–23; Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). *But see* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1637 (2006) (translating fiscal into political costs in small local governments).

63. *See supra* note 61 and accompanying text.

64. EPSTEIN, *supra* note 59, at 199–204.

Epstein's view, is to ensure that governmental actions generate net benefits. If the government must always pay, it will act only when doing so comes with more benefits than costs.

Imagine a stylized example where a governmental agency is considering whether to require factories to install scrubbers to minimize air pollution. From Epstein's perspective, if those scrubbers will cost affected industries \$1 million, the government should have to pay; otherwise, there is no way to test whether the regulatory benefit of cleaner air is actually worth the \$1 million. Requiring the government to compensate tests the government's decision and ensures that the regulation is generating more benefits for the public than harm to property owners.⁶⁵

Even on its own terms, however, that traditional analysis misses half of the equation. There are also costs associated with governmental inaction: continued air pollution, in this example.⁶⁶ Allowing the government to avoid internalizing those costs will systematically favor inaction over action. If the goal is to ensure maximally efficient regulatory regimes, the government should have to pay the costs of both its actions and *forgone* actions. Only then would the government internalize the full impact of its decisions, including its decisions *not* to regulate.

The traditional economic account of the Takings Clause, even in its most extreme form, fails to ensure efficient levels of regulatory activity. At best, it ensures only that specific regulations do not generate more harm than gain. It provides no protection for property owners who would have substantially benefited from a regulation that the government failed to adopt, even if the forgone benefits—or harms from inaction—dwarf the costs of any governmental action. If the goal is not simply to constrain government but also to ensure efficient decisionmaking, the government should be liable for regulatory inaction as well.⁶⁷

This insight has an additional payoff. Takings theorists have long puzzled over how the compensation requirement relates to regulatory benefits.⁶⁸

65. See, e.g., Levinson, *supra* note 62, at 366 (“Intuitively, a takings system that demands compensation for *any* net loser from a given regulation . . . will effectively prevent any regulation that does not create social benefits at least sufficient to cover its own costs.”). Professor Levinson ultimately criticizes this view, but his articulation neatly captures the underlying intuition.

66. Cf. *id.* (arguing that economic accounts of the Takings Clause provide no explanation for how governments internalize regulatory benefits).

67. Cf. Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295 (2003) (proposing offsetting value of governmental benefits from public land acquisition of coastal property); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 590–608 (2001) (proposing a mechanism for the government to collect the benefits its regulations confer on property owners).

68. See, e.g., Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 96–100 (2003) (discussing asymmetry in internalization of costs and benefits); Levinson, *supra* note 62, at 350 (“If government does not fully internalize the costs of takings unless it must spend its revenues to pay compensation, then why should we expect government to fully internalize the benefits of takings when it does not receive them in

The Constitution, after all, contains no “Givings Clause.”⁶⁹ While the government must sometimes pay when it imposes too great a regulatory burden, it has no easy way to capture the benefits of regulatory largesse. This situation produces a perplexing asymmetry: if the government downzones property, it may have to pay for the regulatory burdens it imposes; but if it upzones property, it has no obvious mechanism for capturing the substantial benefits such upzoning creates.⁷⁰

In response, scholars have proposed creative if highly theoretical responses. Professors Bell and Parchomovsky argue for a formal “Givings Clause” to counterbalance the Takings Clause.⁷¹ Levinson uses the asymmetry to argue against mandatory compensation, even for takings.⁷² But such radical solutions are not actually required. Passive takings can serve this same function, albeit from a different direction.

If the government can avoid passive takings liability by acting, it will internalize the benefits of those actions.⁷³ This is so because avoiding liability is—aside from the baseline—conceptually indistinguishable from receiving payment. Forcing the government to pay for forgone benefits when it fails to act (i.e., passive takings liability) therefore amounts to allowing the government to recover payment for the benefits of its actions. A stylized example is illustrative. Imagine that upzoning property would increase its value from \$10 to \$100. A simplified givings regime would allow the government to collect that \$90 surplus for upzoning the property. Passive takings, by contrast, could make the government liable for failing to upzone the property. By not acting, the government would have to pay \$90. Alternatively, the government can avoid that \$90 passive takings liability by upzoning the property. By acting, then, the government is \$90 richer (in compensation avoided instead of in givings recaptured), but the result is the same. Passive takings can therefore provide the symmetry missing from the traditional takings equation.

Admittedly, passive takings liability does not fill this role perfectly. It would allow the government to internalize only the benefits that, if forgone, would constitute a passive taking. In the zoning context, for example, such a situation would occur only if the government would have been liable under

the form of revenues?”); sources cited *supra* note 67; see also Kaplow, *supra* note 2, at 567–68 (pointing out the asymmetry).

69. See Bell & Parchomovsky, *supra* note 67, at 551 (“The Fifth Amendment bars only uncompensated takings; there is no ‘Givings Clause.’” (citation omitted)).

70. See sources cited *supra* note 68.

71. Bell & Parchomovsky, *supra* note 67, at 618.

72. Levinson, *supra* note 62, at 415 (“The picture that emerges . . . should inspire skepticism about the desirability of mandatory compensation for takings and constitutional torts.”).

73. Environmental review provides an interesting analogy. According to the regulations implementing the National Environmental Policy Act, an agency evaluating environmental harms must consider a “no-action” alternative. See 40 C.F.R. §§ 1502.14(d), 1508.25(b)(1) (2013). Before rejecting (or adopting) an alternative, the lead agency is therefore required to consider the environmental harm of doing nothing. Passive takings exert an economic force similar to the informational pressure of the no-action alternative.

the Takings Clause for failing to upzone land. Under the test articulated in Part III, passive takings liability in such a case would be rare.⁷⁴ Nevertheless, even if it is not a perfect substitute for a regime of givings recapture, passive takings exerts a modest force in the same direction, and in this sense it at least partially fills a critical hole in the economic account of the Takings Clause. What it lacks in perfection, moreover, it makes up in plausibility. It does not require a radical change in the law—only a natural extension of existing takings law.⁷⁵

A utilitarian account of the Takings Clause, focusing as it does on creating efficient regulatory incentives, should require compensation for both regulatory action *and* inaction. Indeed, the economic logic of the Takings Clause applies equally to governmental inaction.

B. *Fairness-Based Takings Theory*

The category of passive takings is consistent not only with a utilitarian account of the Takings Clause but with a fairness-based one as well. According to the Supreme Court in *Armstrong v. United States*, the purpose of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁷⁶ This principle has defied easy application. But under any interpretation, it applies to regulatory inaction just as plausibly as it does to regulatory action.

At the highest level of generality, a number of important takings theories all advance the same overarching principle: the purpose of the Takings Clause is to prevent the government from singling people out for disproportionate regulatory burdens.⁷⁷ The nature of this concern varies, however. According to Professor Fischel, for example, takings protection should be at its strongest when political protection is at its weakest—specifically in cases where owners of undeveloped land confront regulatory burdens imposed by

74. See *infra* Section III.B. Passive takings liability is not a freestanding obligation on government to maximize the value of all property; it is considerably narrower in scope.

75. Professor Been and Joel Beauvais offer a similar response when they focus on property taxes as an imperfect but nevertheless important mechanism by which governments internalize regulatory benefits. See Been & Beauvais, *supra* note 68, at 97–100. These arguments are complementary and are not mutually exclusive.

76. 364 U.S. 40, 49 (1960). For an exploration of this principle, see generally William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997).

77. See WILLIAM A. FISCHEL, REGULATORY TAKINGS 139 (1995); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 300–03 (1992); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1004 (2003); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1338 (1991); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 866–72 (1995) (reviewing literature). But see Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 37–52 (2008) (arguing against an equality-based conception of takings liability).

small homeowner-dominated local governments.⁷⁸ Professor Dagan argues, in contrast, that takings protection should be explicitly progressive, safeguarding the poor over the wealthy in order to offset the natural political pressures in the other direction.⁷⁹ Similar themes abound in the literature.⁸⁰

Whatever the source of the singling-out concern, the government can disproportionately harm individuals or groups either by imposing regulatory burdens or by withholding regulatory assistance.⁸¹ A government that extends regulatory benefits—whether through land-use controls, infrastructure, or public services—to most but not all of its citizens imposes a kind of regulatory harm on the excluded group. If benefits are sufficiently available such that they effectively define the baseline of expectations, failing to provide the minimum to everyone produces unfair regulatory distributions that are indistinguishable from the “affirmative” imposition of harm.⁸² Alternatively, treating unequal people similarly can produce results that are just as unfair as treating similar people unequally.⁸³ Fairness in the context of takings law centers on the ultimate distribution of burdens and benefits, and withholding benefits can affect that distribution as much as affirmative action can. From the perspective of promoting a fair distribution of burdens and benefits in society, takings liability should be available both for governmental action and inaction.

A more formal distributional account of the Takings Clause comes from Michelman’s seminal article in the field.⁸⁴ Michelman recognizes that there are costs—real costs—associated both with compensating and with failing to compensate for regulatory burdens under the Takings Clause, and he argues that the goal should be to avoid whichever one is greater. According to Michelman, then, the government should pay compensation when demoralization costs (i.e., the costs of not paying compensation) outweigh settlement costs (i.e., the costs of paying compensation).⁸⁵

78. See FISCHER, *supra* note 77, at 139; see also Serkin, *supra* note 15, at 1279 n.264 (interpreting Fischer).

79. See Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999).

80. See, e.g., Farber, *supra* note 77, at 306 (“[B]ecause the legislature will usually offer compensation voluntarily, the takings clause can be defended as a prophylactic barrier against a serious form of discrimination against politically disfavored groups.”); Levmore, *supra* note 77, at 1348 (“Compensation for a governmental intervention will be required when a politically unprotected loser is singled out and when there is a close substitute in the form of a private purchase.”).

81. See, e.g., Bell & Parchomovsky, *supra* note 67, at 554 (“[I]t is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole. In a giving, a small group is able to force the public as a whole to subsidize the group’s preferential treatment.”).

82. See, e.g., Bandes, *supra* note 50, at 2283–84.

83. See, e.g., Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1173–75 (1983) (describing principles of equality as applied to “unequals”).

84. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

85. *Id.* at 1215. Demoralization costs include the psychological costs associated with unfair burdens as well as the resulting forgone investments for fear of being targeted next. *Id.* at

This argument also applies to passive takings because demoralization costs arise from governmental inaction as well. Professor Davidson discusses this possibility from a different perspective, insightfully exploring what he terms a “morale benefit” that people receive from governmental responsiveness.⁸⁶ He states: “[T]he up-front understanding that the rules can adjust under the right circumstances and will do so fairly and inclusively may be the inducement needed for someone to work, invest, create, attach, join, or do any of the other things traditionally associated with the signal of legal stability.”⁸⁷ Or, to reframe his point from a different baseline, the government’s failure to adjust rules in this way can undermine people’s incentives to work, invest, and the like. Governmental inaction can be demoralizing, too.

This is only half of the equation, however, because there are settlement costs associated with passive takings claims as well. In Michelman’s terms, settlement costs are the costs of identifying affected property owners, valuing their claims, and actually effectuating compensation.⁸⁸ Such costs are likely to be impossibly high in most cases of regulatory inaction. The government, after all, is constantly *not acting*. And just as government “hardly could go on” if it had to pay for every regulatory burden it imposed, it would surely collapse if it had to pay for every regulatory benefit it failed to provide.⁸⁹ The latter would be truly unlimited.

As Michelman demonstrated for affirmative regulations, however, it is sometimes possible to identify the general contexts that are likely to produce particularly high demoralization costs coupled with low settlement costs. Where that combination exists, the government should pay compensation. In Michelman’s view, the combination is most likely when the government interferes with existing uses of property, significantly decreases the value of property, or permanently occupies property.⁹⁰ In each of those cases, the universe of affected property owners is reasonably small, and the demoralization resulting from the governmental action is extremely high. Liability for

1214. See generally William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774, 1778 (1988) (discussing scholarly treatment of demoralization and settlement costs).

86. Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437 (2011).

87. *Id.* at 470.

88. Michelman, *supra* note 84, at 1214. Settlement costs do not include the compensation itself; those costs are factored into the efficiency gains of a regulation. See Fisher, *supra* note 85, at 1777 n.18.

89. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

90. Michelman, *supra* note 84, at 1236–44. This became the *Penn Central* test. Serkin, *supra* note 15, at 1255 n.162 (citing sources).

passive takings can arise under just the same conditions (and Part IV provides examples).⁹¹ At least in this theoretical account, then, there is no reason to limit Michelman's "felicific" calculus to action alone.⁹²

C. Property Theory

On a broader level, the operation of the Takings Clause fundamentally depends on the content of property rights. There can be no taking if property law does not confer the burdened right.⁹³ As a result, some of the recent leading scholarship on the Takings Clause really consists of general property theory. This scholarship also implicitly supports the existence of passive takings claims.

Property—somewhat like the Constitution itself—has often been viewed as creating a sphere of negative liberty.⁹⁴ According to Blackstone's early definition, property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."⁹⁵ Property, in this view, is a right to be free from interference by others. And yet this conception ignores the inherently social nature of property.

Important modern theorists have pushed back against the centrality of exclusion and argue that property's value, significance, and meaning come only in relation to other people.⁹⁶ As Professor Demsetz pithily recognized, "[i]n the world of Robinson Crusoe property rights play no role."⁹⁷ Most

91. See *infra* Section III.B (defining the test for passive takings); *infra* Section IV.B (justifying application of passive takings to sea-level rise).

92. Michelman's approach does not apply identically to passive and active takings. His takings analysis assumes that the governmental regulation is efficient and that the goal is therefore to minimize the social costs of beneficial regulations. Michelman, *supra* note 84, at 1196. Applied to passive takings, Michelman's compensation formula should be triggered only in the context of efficient governmental *inaction*—that is, where governmental inaction will generate a net social benefit. But the definition of "efficient governmental inaction" is not at all obvious. A lot depends on crafting principled limits so that the government is not made liable for the infinite variety of actions it does not take. See *infra* Section III.B (setting out the passive takings test).

93. *E.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) ("[The state] may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.>").

94. See, *e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734–35 (1998); see also JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008) (taking a historical look at constitutional prohibitions on property regulation); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997) (positing that property rights are entirely about the right of exclusive use and possession).

95. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2.

96. See, *e.g.*, Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 135 (2009).

97. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

legal initiates today view property not merely as some abstract right of exclusion that property owners enjoy but instead as a bundle of rights that owners possess against other people vis-à-vis a resource in the world—rights that can be reconfigured without eliminating the category of “property.”⁹⁸ This relational aspect of property means that expanding one person’s rights necessarily restricts another person’s rights. Expanding the right to exclude, for example, restricts others’ right to access a resource.⁹⁹ This exclusion, in turn, has led to increased attention to the rights of nonowners and specifically to property owners’ obligations to them.¹⁰⁰

This insight is not new. Traditional nuisance law, governed by its Latin maxim *sic utere tuo ut alienum non laedas*, barred people from using their property in a way that interfered with others’ use of their own property.¹⁰¹ But instead of defining the outer boundaries of ownership, the interests and claims of nonowners today are increasingly viewed as central to private property.¹⁰² Whether considering the ubiquity of zoning ordinances, environmental controls, or simply the broad swath of regulations governing

98. See, e.g., STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 57–58 (2011) (discussing the history of the bundle-of-rights metaphor). *But see* Merrill, *supra* note 94, at 753–55 (arguing against the bundle theory); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1700 (2012) (criticizing bundle theories).

99. Professors Merrill and Smith, leading opponents of the legal-realist conception of property as a bundle of rights, still accept that exclusion rights can vary depending on the strength of the claims of the person or group being excluded. See, e.g., Merrill, *supra* note 94, at 753 (acknowledging occasional limits on the right to exclude); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 971 (2009) (same).

100. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Alexander & Peñalver, *supra* note 96; Hanoch Dagan, Essay, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255 (2007). For a review of the leading literature on this issue, see Christopher Serkin, *Affirmative Constitutional Commitments: The State’s Obligations to Property Owners*, 2 BRIGHAM-KANNER PROP. RTS. CONF. J. 109 (2013).

101. See Alexander, *supra* note 100, at 746–47 (identifying the nuisance maxim as an “obvious example” of the limit on property owners’ rights). The Latin phrase translates roughly as “use thine own so that thou doest no harm to another.” William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 418 n.151 (1942).

102. See Alexander, *supra* note 100, at 746 (“[T]he core function of private property, at least according to conventional lore, is to insulate individuals from the demands of society both in its organized political form and its non-political collective form.”); see also HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 41 (2011) (“[S]haring and cooperation in [property] doctrines are not the choice of a person who already enjoys sole and despotic dominion, but rather a constitutive feature of the property institution, which defines the content of that person’s property right.”); J. Peter Byrne, *The Public Nature of Property Rights and the Property Nature of Public Law*, in *THE PUBLIC NATURE OF PRIVATE PROPERTY* 1, 4 (Robin Paul Malloy & Michael Diamond eds., 2011) (“[L]egislation and administrative oversight create new opportunities to recognize a variety of rights and duties, none of which should be considered ‘outside’ property law.”). *But see* Smith, *supra* note 99, at 971 (characterizing such limits as peripheral); James E. Krier & Christopher Serkin, *The Possession Heuristic*, in *THE LAW AND ECONOMICS OF POSSESSION* (Yung-Chien Chang ed.) (forthcoming) (manuscript at 28) (on file with author) (describing core–periphery debate).

many aspects of our lives, the claims and demands of other people are fully embedded in the core of property.

This socially driven view of property necessitates substantial limits on the right to exclude. Exclusion, and property more generally, cannot be used in ways that place too great a burden on the community. But there is an even more striking consequence. Property does not have to consist exclusively of negative rights—that is, rights to be free from intrusion by others—but can also contain affirmative obligations to the rest of the community.¹⁰³ And if property includes obligations to the community, then—according to some theorists—the state can recognize those obligations and make substantial demands of property owners without invading property rights.¹⁰⁴ Not only must property owners allow access and entry to those in need,¹⁰⁵ but owners can also be called upon to use their property to benefit society more generally, by preserving historic or environmental resources on their land, by maintaining a certain amount of open space, and so forth.¹⁰⁶ Property owners therefore have state-recognized obligations to use—or forgo using—their property in specific ways to advance the well-being of society as a whole.

Importantly, however, community needs can change. The substantive content of property rights can therefore also change.¹⁰⁷ The state can thus impose new obligations on owners as society's needs evolve.¹⁰⁸ Environmental regulations, for example, become justifiable as the nature of—and our understanding of—the threats of environmental damage advances.¹⁰⁹ And a

103. See Alexander, *supra* note 100; Alexander & Peñalver, *supra* note 96.

104. See sources cited *supra* note 103; see also DAGAN, *supra* note 102, at 41. In one modern formulation, property as an institution is really just the delegation by the state of decision-making authority vis-à-vis a particular resource in the world. See Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2046 (2012) (“[A] state delegates ownership authority in the form of a grant, to which it then attaches terms and conditions, just as a private property owner might.”).

105. *E.g.*, *Ploof v. Putnam*, 71 A. 188 (Vt. 1908); *cf.* *State v. Shack*, 277 A.2d 369 (N.J. 1971) (holding that it was not trespass for a service worker and an attorney to enter the land of another without his permission in order to aid a migrant laborer working on the land).

106. See Alexander, *supra* note 100, at 791–810 (discussing contexts where private property rights are restricted for various public goods needed to promote “human flourishing”); Smith, *supra* note 99, at 961 (critiquing Alexander and providing an alternative account for the interaction of private property rights and “human flourishing”).

107. See Serkin, *supra* note 100, at 131 (“For community-minded theorists, unlike libertarians, property is a dynamic institution that evolves as the world and the community changes.”).

108. See, *e.g.*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926) (upholding zoning in light of social changes).

109. See, *e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Mugler v. Kansas*, 123 U.S. 623, 661–62 (1887). *But see* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (linking harm-prevention to common law nuisance). As Justice Blackmun wrote in his *Lucas* dissent, however, “There is nothing magical in the reasoning of judges long dead. . . . If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?” *Id.* at 1055 (Blackmun, J., dissenting).

zoning regulation that might not have been permissible in an agrarian society becomes entirely consistent with limits on owners' property rights in the context of urbanization.¹¹⁰ Therefore, the same regulation that might have been a taking at one time might not be later as conditions in the world change. So far, this is a relatively conventional description of an emerging strand of property scholarship.

Less conventional, and indeed generally unnoticed, is that the change can happen in the opposite direction as well: preexisting obligations can become *unjustifiable* as conditions in the world change. Community-imposed obligations can thus become two-way streets, and property owners can then make demands of the state. How and when this occurs varies depending on the underlying account of the relationship between property and community. Dagan, for example, emphasizes the implicit promise that regulatory burdens will be offset by reciprocal benefits, and so he calls for takings liability only where that is not the case (on average and over the long term).¹¹¹ But as I have previously pointed out, "That implicit promise creates an ongoing obligation on the state until the benefits are, in fact, repaid."¹¹² The promise of future benefits may not actually materialize, and indeed changes in the world may undermine the average reciprocity that property owners were to receive. When that happens, the justification for the government's regulatory burden disappears, and the government has failed to live up to its side of the bargain.¹¹³

Professors Alexander and Peñalver argue for a more general source of social obligations based on notions of human flourishing.¹¹⁴ They contend that, because we are inherently social beings, valuing human flourishing requires valuing it *in others* as well as in ourselves.¹¹⁵ But Alexander and Peñalver concede a limit, defined at least partly by owners' own capacity to flourish. Where regulatory burdens go so far as to implicate owners' flourishing—as they use the term—or where the burdens do not produce genuine benefits to the community, they too can become unjustifiable over time.¹¹⁶

110. See, e.g., *Euclid*, 272 U.S. at 386–87, 392 (upholding zoning based on new urban pressures).

111. Dagan, *supra* note 79, at 769–70; see also Alexander, *supra* note 100, at 758–60 (discussing Dagan).

112. Serkin, *supra* note 100, at 125.

113. *Id.* at 125–26 (examining the implication of Dagan's theory for affirmative obligations on the state).

114. Gregory S. Alexander & Eduardo M. Peñalver, *Introduction*, in *PROPERTY AND COMMUNITY* (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010); Gregory S. Alexander, *Pluralism and Property*, 80 *FORDHAM L. REV.* 1017, 1045–47 (2011); Alexander, *supra* note 100, at 760–73; Alexander & Peñalver, *supra* note 96.

115. Alexander & Peñalver, *supra* note 96, at 134–36 (citing, *inter alia*, AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) and MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2000)). Alexander actually offers three different possible justifications for this argument, one Aristotelian, one based on long-term individual self-interest, and one based on Kant's categorical imperative. Alexander, *supra* note 100, at 768–69.

116. See Serkin, *supra* note 100, at 128–29 (discussing human flourishing).

Both of these theories are nuanced and produce different limits for takings liability, but they share a fundamental insight: the substantive content of property is constrained by—if not defined by—obligations to the community.¹¹⁷ As the community's needs change, so too do the demands it can make of property owners.¹¹⁸ The role of the state, then, is to act as a kind of mediator between property owners and the community in which the property is located.¹¹⁹ But because those community needs are dynamic, the state's role in constituting property rights must also be dynamic. Regulations and obligations that were not justifiable before may become so over time—a central point in the work of Alexander and Peñalver. Conversely, though, regulations and obligations that were justifiable when enacted may become unjustifiable through the very same mechanisms.

Unlike a libertarian state, whose role is limited primarily to defending private rights of exclusion, a communitarian state cannot simply set the rules and then sit on the sidelines while private parties fight it out. Because the state is intimately bound up with the creation of rights based on the ever-changing needs of society, the state can be compelled to act when the content of those rights is no longer justified by conditions in the world.¹²⁰ The substantive content of property can indeed support passive takings claims.

The argument up to this point has admittedly been broad and abstract. Nothing so far has suggested when, or how, the government is required affirmatively to protect property. It is certainly not the case that the government has a generalized obligation to protect all property from all intrusions. Much of the rest of this Article is devoted to exploring these complicated questions and limitations. But it is nevertheless important to pause here and highlight the central claim in this Part: traditional property and takings theories support recognizing affirmative rights against the government—rights that require the government to undertake affirmative actions to avoid violating the Constitution.

117. For a more detailed exploration of these competing visions, see *id.* at 117–32.

118. *Id.* at 129 (“As communities change, and as the conditions of property owners change, burdens that once were innocuous can implicate owners’ capacity for flourishing or outlive their usefulness. In either situation, the once-appropriate regulatory burden can become unjustifiable at least on grounds of promoting human flourishing.”).

119. Cf. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 50 (1977) (“[Joseph] Sax urges us to recognize that the modern welfare state seeks to discharge governmental functions far more ambitious than those attempted by the watchman state of classic laissez-faire theory. No longer do officials content themselves with mediating conflicts that private parties are unable or unwilling to resolve by other means” (citing Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964))).

120. See Serkin, *supra* note 100, at 131.

III. PASSIVE TAKINGS

The Article so far has made a theoretical case for the plausibility of passive takings claims—that is, takings claims against the government for failing to act—but it has not yet attempted to specify when such claims actually arise. It is one thing to argue for a state's duty to act based on relatively abstract moral commitments and theoretical conceptions of efficiency and the nature of property, but it is another entirely to identify the conditions under which the Takings Clause imposes an affirmative obligation on the state. As it turns out, the possibility of passive takings claims is not only theoretically sound but also doctrinally plausible and normatively desirable.

The fundamental insight in this Part is that the problem of distinguishing between acts and omissions—well-known in other contexts—applies also to the Takings Clause. Inaction can result in legally cognizable harms in administrative law, torts, and criminal law, and analogous situations in property can generate passive takings. By and large, omissions liability results when the distinction between acts and omissions breaks down. The work of this Part is to generalize, from these other doctrinal fields, when that distinction loses its salience. To be clear, there may be other bases for passive takings liability as well, but the goal of this Part, and of the Article more broadly, is simply to demonstrate that the category exists. Therefore, the focus here is on the places where such liability is the most likely.

This Part begins by explicating the distinction between acts and omissions in these other areas of law and then applies those insights to illuminate the doctrinal outlines of passive takings claims. The Part concludes by addressing some of the most persuasive counterarguments against extending takings liability to governmental inaction.

A. *The Act/Omission Distinction*

In many areas of law, liability for inaction is hardly a novel concept. In fact, the Administrative Procedure Act (“APA”) explicitly provides for judicial review of agency inaction.¹²¹ While the contours of that judicial review remain limited and sharply contested, that an agency can violate federal law through failing to act is reasonably well established.¹²² As Justice Marshall explained, “[O]ne of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect on life, liberty, and the pursuit of happiness as coercive

121. 5 U.S.C. § 706(1) (2012); see also Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 464–67 (2008) (describing the APA); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1664–75 (2004) (same).

122. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); see also Biber, *supra* note 121, at 462 (“[E]ven within administrative law, judicial review of agency inaction stands out for the confusion it causes.”); cf. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 319 (1930) (extending review to agency inaction).

governmental action.”¹²³ He should have added property to that mix of interests at stake. The harm resulting from inaction can be just as damaging as the harm resulting from overt action.¹²⁴

Sometimes the distinction between action and inaction entirely breaks down. As Professor Biber notes, “[A]n agency’s decision not to release information pursuant to the Freedom of Information Act . . . could be treated either as an agency action (decision not to release), or a failure to act (failure to comply with the statute’s requirements that information must be released).”¹²⁵ The problem was on stark display in *Minnesota Pesticide Information & Education, Inc. v. Espy*.¹²⁶ In that case, the plaintiffs sued following the U.S. Forest Service’s failure to prepare an environmental impact statement for its decision *not* to use a particular herbicide to control vegetation.¹²⁷ The Supreme Court reasoned that the Forest Service had “effectively elected a course of temporary inaction” for which review was unavailable, even though the decision amounted to adopting an alternative strategy of vegetation control.¹²⁸ The distinction between action and inaction becomes especially blurry in instances where the government has exercised substantial control over an area. Then, its decision not to act allocates harm as surely as a decision to act—whether it is the Forest Service’s choice not to use pesticides or a town’s choice not to permit sea walls. Of course, there are many situations in which the difference between action and inaction is clear, but, when it is not, the different legal consequences that traditionally follow become difficult to justify.¹²⁹

123. *Heckler v. Chaney*, 470 U.S. 821, 851 (1985) (Marshall, J., concurring).

124. This does not make passive takings for agencies redundant, because the APA does not create a freestanding obligation on agencies to act. *See* 5 U.S.C. § 706(1) (2012). Instead, the statute merely recognizes that federal law can require agencies to act and therefore provides for judicial review of inaction in that context. *Cf.* Bressman, *supra* note 121, at 1664 (discussing agency inaction and focusing on the instances “in which an agency refuses to enforce statutory or regulatory requirements or prohibitions against known or suspected violators”).

125. Biber, *supra* note 121, at 466. Biber asserts that “there are many examples of courts in administrative law having difficulty drawing the dividing line” between agency action and inaction. *Id.*; *see also* Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 11–13 (2008) (describing difficulty in distinguishing between agency action and inaction).

126. 29 F.3d 442, 443–44 (8th Cir. 1994).

127. *Espy*, 29 F.3d 442. The National Environmental Policy Act of 1969 requires an agency to prepare an environmental impact statement for every “major Federal action[] significantly affecting the quality of the human environment.” National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332(C) (2012).

128. *Espy*, 29 F.3d at 443.

129. At the end of the day, this is the central insight reflected in administrative law and, more specifically, in scholarship advocating for symmetrical treatment of agency action and inaction. *See, e.g.*, Biber, *supra* note 121, at 463–64, 469–70; Bressman, *supra* note 121, at 1686–96.

Broader theories of liability reflect this same impulse, whether they originate in tort or criminal law.¹³⁰ Failing to throw a rope to a drowning swimmer is one thing; failing to hit the brakes to avoid a pedestrian while driving is something else altogether.¹³¹ Both can be characterized as omissions (or inaction), but there is a critical difference between the two examples. In the latter, the driver “played a part in the creation of the very danger that he subsequently failed to abate.”¹³² As Professor Weinrib cogently explains, there is a difference between “real nonfeasance” and “pseudo-nonfeasance,” which is characterized by a complicity in creating the underlying risk.¹³³ Setting in motion events that expose someone to injury or harm can create an affirmative duty to act in order to address that harm.

Indeed, focusing too narrowly on an affirmative-act requirement can obscure the imposition of real and cognizable harm. One traditional view holds that a physical act, involving some volitional movement, is necessary for criminal liability.¹³⁴ But what of a parent who fails to feed an infant and so starves her to death?¹³⁵ This is criminally culpable, and for the same reason discussed above: the infant and her welfare are entirely within the control of her parent. Professor Husak aptly terms this the *control principle*,

130. See, e.g., Weinrib, *supra* note 8, at 256–57. Biber also recognizes the applicability of the tort literature to the administrative-law context, although he chooses not to explore it. Biber, *supra* note 121, at 466 (“One need not resort to the large body of literature in torts about the difficulties of distinguishing between the two fields to understand the problem here . . .”).

131. Weinrib, *supra* note 8, at 253–54; see also Harold F. McNiece & John V. Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1272–73 (1949) (relying on a version of the failure-to-brake example). But see John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 878 (“Two fundamental problems plague the distinction between misfeasance and nonfeasance: (1) in many cases it is impossible to distinguish the two; and, (2) in cases where intuitively there is a clear distinction, that distinction does not always coincide with generally accepted notions about whether liability should attach.”).

132. See Weinrib, *supra* note 8, at 253–54; see also McNiece & Thornton, *supra* note 131, at 1273 (“There is no pure nonfeasance [in this failure-to-brake example] because the defendant has acted.”).

133. See Weinrib, *supra* note 8, at 253–56 (“Participation by the defendant in the creation of the risk, even if such participation is innocent, is thus the crucial factor in distinguishing misfeasance from nonfeasance.”); cf. Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547, 558 (1988) (identifying “creation of peril” as a basis for liability but acknowledging that “[t]he cases are split on whether a duty to rescue arises if someone innocently or accidentally imperils another”).

134. See, e.g., MICHAEL S. MOORE, *ACT AND CRIME* 46–59 (1993); see also Francisco Muñoz-Conde & Luis Ernesto Chiesa, *The Act Requirement as a Basic Concept of Criminal Law*, 28 CARDOZO L. REV. 2461, 2470–71 (2007) (criticizing Moore’s theory of action); Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529, 1529 n.1 (1994) (identifying the voluntary act requirement’s defenders). According to Professor Moore, criminal liability for failing to act unduly burdens people’s liberty. See Muñoz-Conde & Chiesa, *supra*, at 2473 (“For Moore, punishing omissions is problematic because doing so diminishes our liberty to act much more than criminalizing actions.”).

135. See, e.g., Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1220 (2009) (discussing omissions liability and possession crimes); Francis Barry McCarthy, *Crimes of*

which can serve as a basis for liability even in the absence of an obvious volitional act.¹³⁶

The overarching intuition about the hazy boundary between acts and omissions is that liability should depend on the extent of the defendant's entanglement with the conditions giving rise to the injury.¹³⁷ That entanglement can occur at some earlier point in time—as when the driver gets in a car—or through sufficient ongoing control over the relevant conditions. In other words, liability does not necessarily depend on some specific and decontextualized act.

This intuition is consistent with one of the narrow contexts in which the Supreme Court has actually recognized the state's affirmative constitutional obligation: to protect people in state custody. While the cases establishing this obligation all involve liberty interests and are rooted in substantive due process, their reasoning extends naturally and even more broadly to property.

The leading case to wrestle with the state's duty to protect is *DeShaney v. Winnebago County Department of Social Services*.¹³⁸ There, the Supreme Court rejected a due process challenge based upon Wisconsin's failure to protect a child from his abusive father.¹³⁹ The facts of the case are horrifying, but the Court's reasoning is illuminating. Joshua DeShaney, four years old, was in his father's custody. Several people, including physicians and state workers, suspected that Joshua's father was abusing him. The state did not intervene to remove Joshua from his father's custody, and Joshua's father eventually beat him so badly that he caused permanent brain damage resulting in lifetime institutionalization. Joshua and his mother sued the state and various state employees under 42 U.S.C. § 1983, alleging that they had deprived Joshua of his liberty without due process of law. The Supreme Court rejected the challenge, holding that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal

Omission in Pennsylvania, 68 TEMP. L. REV. 633, 639 (1995) (examining failure to feed); Muñoz-Conde & Chiesa, *supra* note 134, at 2471 ("The mother who contributes to her newborn child's death by intentionally refusing to feed her is as deserving of blame as the mother who contributes to her baby's death by feeding her food that makes her sick."); *see also* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 672–75 (1984) (discussing omission offenses).

136. DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 97–100 (1987). These are contexts in which society understands the defendant to have acted, even in the absence of a specific volitional physical movement. Some commentators, therefore, have focused on the communicative aspect of the defendant's behavior as a basis for liability. *See* 1 GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW* 281–85 (2007); *see also* Muñoz-Conde & Chiesa, *supra* note 134, at 2464–65.

137. *Cf.* Leavens, *supra* note 133, at 557–59 (summarizing bases for duties). From Professor Leavens's list, the source of duties most relevant here is the "[d]uty arising from the creation of peril" and the "[d]uty arising from voluntary assumption of care." *Id.* at 558–59.

138. 489 U.S. 189 (1989).

139. *DeShaney*, 489 U.S. at 203.

levels of safety and security.”¹⁴⁰ This opinion, of course, represents an entirely orthodox view of the Constitution as enshrining exclusively negative liberties.¹⁴¹

While the Court in *DeShaney* rejected the plaintiffs’ due process claims for the state’s failure to act, it did so only after identifying and distinguishing cases in which the state was held to have ongoing affirmative obligations; namely, when the state incarcerates someone or involuntarily commits someone for psychological or medical purposes. In other words, the state *is* obligated to act when it has taken control of someone and has rendered that person especially vulnerable to a subsequent harm.¹⁴² As the Court explained, “While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.”¹⁴³ Indeed, “[the State] placed [plaintiff] in no worse position than that in which he would have been had it not acted at all.”¹⁴⁴ The inference, though, is that the state may have an affirmative duty to protect if it created a danger or left people more susceptible to a danger.¹⁴⁵

This same inference has a direct application to the Takings Clause.¹⁴⁶ Certain strands of takings cases have, in fact, implicitly rejected a firm line between governmental action and inaction, although in ways that have largely gone unnoticed. In the zoning context, in particular, a planning commission’s rejection of a request for a rezoning is conventionally cognizable as a taking and is treated by courts as conceptually indistinguishable from a zoning change.¹⁴⁷ By and large, these courts have ignored the act/omission

140. *Id.* at 195; *see also* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”).

141. *See supra* notes 35–36 and accompanying text.

142. The Court characterized this as an affirmative duty to protect, one that arises from “the limitation which [the State] has imposed on [an individual’s] freedom to act on his own behalf.” *DeShaney*, 489 U.S. at 200. “The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” *Id.*

143. *Id.* at 201; *see also* Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and its Aftermath*, 66 WASH. L. REV. 107, 114 (1991).

144. *DeShaney*, 489 U.S. at 201.

145. The same impulse was at work in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (“The purpose of the [Nonintercourse] Act [is to] guarantee the Indian tribes’ right of occupancy and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances.” (citation omitted)). I thank Joe Singer for drawing this case and issue to my attention.

146. Of course, takings—and constitutional deprivations of property—are not torts. Analogizing torts to takings law is intended only for illustrative purposes. *But see* Eric Kades, *Avoiding Takings “Accidents”: A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235 (1994) (arguing for a tort-based conception of takings law); Levmore, *supra* note 77, at 1335–40 (examining takings from a torts perspective).

147. *See, e.g.*, Exec. 100, Inc. v. Martin Cnty., 922 F.2d 1536, 1540 (11th Cir. 1991) (“A plaintiff seeking to challenge a local government’s refusal to rezone his property may bring four different causes of action,” including a takings claim); Jack v. City of Olathe, 781 P.2d

distinction and have simply assumed that denying a zoning change is a governmental act subject to traditional takings analysis.

That result, however, should be surprising. Refusing to change the law does not usually trigger takings liability. Imagine, for example, that someone petitions Congress to compel banks to write down the principal on underwater mortgages. If Congress rejects the request—either by refusing to take up the matter or by voting it down—this conduct will not give rise to a takings claim. Under a traditional takings analysis, enacting legislation and failing to enact legislation are not equivalent. As a structural matter, though, Congress's decision in this example appears indistinguishable from zoning officials' decision not to rezone property.

The discussion of the act/omission distinction suggests the contours of an explanation. The central differences between these two examples are the extent to which the state is responsible for creating the underlying conditions and also the extent of ongoing control. By adopting comprehensive zoning, a local government is like the driver of a car who sets it in motion down a hill. Where such conduct creates conditions that expose property to a sufficient risk of loss, a subsequent failure to act actually amounts, in Weinrib's formulation, to pseudo-nonfeasance.¹⁴⁸

Admittedly, this analogy assumes a number of important complications. When is the government like the driver instead of like the car manufacturer, which (generally) bears no liability when a driver fails to brake?¹⁴⁹ Why doesn't the existence of banking regulations compel the same analysis when Congress refuses to write down underwater mortgages? These examples are not fundamentally different, however. Instead, they occupy different places on a spectrum that is defined by the nature and extent of the government's involvement in establishing the conditions that result in the subsequent loss of property. Once the government is sufficiently involved, it assumes an obligation to act when conditions in the world change.

B. *Passive Takings Defined*

Passive takings should arise when property is subject to such regulatory control that the government is understood to be responsible for the resulting harm, whether it acts or not. Or, to put it in affirmative terms, the government should have a constitutional duty to act when it is complicit in creating the conditions that are responsible for harm to property. Passive takings liability will therefore attach to property that the government substantially

1069 (Kan. 1989) (evaluating a claim based on failure to rezone through traditional regulatory takings analysis); *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994) (same); *cf.* *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 569–70 (6th Cir. 2008) (subjecting denial of rezoning to *Williamson County* ripeness analysis).

148. See *supra* note 133 and accompanying text.

149. Sometimes issues of fact can implicate the manufacturer. See, e.g., Hiroko Tabuchi, *1.5 Million Toyotas Recalled for Brake and Fuel Pump Problems*, N.Y. TIMES, Oct. 22, 2010, at B3, available at http://www.nytimes.com/2010/10/22/business/global/22toyota.html?_r=0 (discussing allegations of manufacturing defects that led to braking problems in Toyota cars).

regulates and has consequently rendered especially vulnerable to a change in the world.

If the government were also responsible for the underlying threat to property rights—if the government, for example, were responsible for global warming—then the duty to act would be stronger still. Nevertheless, even in the absence of that level of responsibility, where the content of state-defined rights and obligations exposes property to harm, the government should not necessarily be able to avoid liability by claiming inaction. By defining the content of property, the government is analogous to the driver who sets the car in motion. The government cannot later claim that it did not act when that definition of property comes crashing into some new reality.

There is, of course, a sense in which the government is always entangled with property, the substantive content of which comes largely, if not entirely, from positive law.¹⁵⁰ If that level of entanglement were all that is necessary to create liability, then passive takings claims would be ubiquitous. The purpose of this Part, however, is not to find the outer bounds of passive takings liability but instead to identify the core. After all, this Article's fundamental goal is simply to prove the existence of passive takings claims. Future scholarship can push the limits. At a minimum, then, passive takings claims should arise when:

1. The state has effective control over the injury-causing condition; or
2. The state has rendered the property especially susceptible to adverse changes in the world.

Consider these in turn.

As an initial matter, one thing is clear: control must mean something more than the theoretical ability to have prevented a particular harm. Passive takings claims do not arise simply because some action was available to the state that would have minimized or eliminated the loss.¹⁵¹ If your house burns down, you do not have a passive takings claim because the government could have located a fire house closer to your neighborhood. Control, instead, means that the state has effectively determined the allocation of costs. This definition is closely analogous to Husak's control principle as a basis for criminal liability.¹⁵² The intuition, again, is that sufficient control over a situation can substitute for an explicit act; control imposes an affirmative duty to act.

If this seems too abstract, a stark example comes from the facts of *Arkansas Game & Fish Commission v. United States*.¹⁵³ There, the U.S. Army

150. For a discussion of the sources of property law, see, for example, Bloom & Serkin, *supra* note 5, at 572–73.

151. See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 203–04 (1989) (rejecting claim that government has general obligation to act); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764 (2005) (finding no property interest in temporary restraining order).

152. See *supra* note 136 and accompanying text.

153. 133 S. Ct. 511 (2012).

Corps of Engineers managed a dam on the Black River in Arkansas.¹⁵⁴ Several decades ago, the Army Corps adopted a plan (in the form of a “manual”) for regular releases of water that caused predictable downstream flooding in short bursts.¹⁵⁵ Farmers in recent years objected to those releases and asked instead for temporary deviations from the manual in order to produce more sustained and less intense releases.¹⁵⁶ The Army Corps agreed and “released water from the Dam at a slower rate than before, providing downstream farmers with a longer harvest time.”¹⁵⁷ The releases, however, damaged timber belonging to the Arkansas Game & Fish Commission, which sued alleging that the deviations from the manual caused a taking of its property.¹⁵⁸ The Supreme Court held that temporary flooding could give rise to a takings claim and remanded the case for further proceedings.¹⁵⁹

For present purposes, the important feature of this case is that the government almost completely controlled the allocation of costs from flooding—imposing costs either on the farmers if it released the water more quickly over a shorter duration or on the timber owners if it released the water more slowly over a longer period.¹⁶⁰ Presumably, the Army Corps could have chosen not to release water at all, but such a decision would have eventually led to a catastrophic breach of the dam and much more damage for everyone downstream. The Army Corps had the capacity to choose between each of these three options, and each choice predictably determined who would bear the burden of the releases. That degree of control renders nonsensical any attempt to distinguish between acts and omissions in each of these scenarios.¹⁶¹ Such a level of control is sufficient to create a passive takings claim.

The other doctrinal hook for passive takings liability exists when the government has made a piece of property more vulnerable to subsequent

154. *Arkansas Game & Fish*, 133 S. Ct. at 515–16.

155. *Id.* at 516.

156. *Id.* at 516–17.

157. *Id.* at 516.

158. *Id.* at 515.

159. *Id.* at 522–23.

160. This resembles the famous case *Miller v. Schoene*, 276 U.S. 272 (1928). There, some cedar trees carried a “red cedar rust” fungus that was harmless to the cedar trees but deadly to apple trees. *Miller*, 276 U.S. at 277–78. Faced with the two conflicting uses, the state legislature defined fungus-carrying cedar trees as a public nuisance, thereby protecting apple trees and allocating the harm from the fungus to one group of property owners over another. *Id.* For a fascinating treatment of the case, see Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1635–36 (2003).

161. To the contrary, Professor Byrne argues that, as a doctrinal matter, “when government must choose which entities will suffer an unavoidable loss from a natural calamity, it does not incur takings liability to the loser.” Byrne, *supra* note 11, at 92. Whether or not this claim is normatively appealing—discussed *infra* Part IV—Byrne’s doctrinal case remains unpersuasive. For support he cites only *Miller v. Schoene*, 276 U.S. 272 (1928), but that case stands for the very different proposition that government does not violate the Due Process Clause in such a situation. In other words, the government is empowered to act in order to allocate loss. But that says nothing about the possibility of takings liability.

changes in the world. In the quintessential case, this occurs when the government disables self-help. By removing property owners' ability to protect themselves, the government incurs a special obligation to provide protection, and its failure to do so can trigger passive takings liability.¹⁶²

One good example is Right-to-Farm legislation. A typical Right-to-Farm statute immunizes agricultural uses from nuisance lawsuits.¹⁶³ This amounts to a kind of disabling protection for affected neighbors, eliminating the central private mechanism for neighbors to protect themselves. But the state should then be subject to some duty to defend the neighbors' property because it has eliminated their ability to defend it themselves. Failure to defend should expose the state to takings liability.

Neighbors have successfully challenged Right-to-Farm statutes on traditional takings grounds.¹⁶⁴ These suits have always involved legislation that, when enacted, effected a taking. But passive takings recognize the government's ongoing duty to neighbors if conditions in the world change. Imagine, for example, that a state enacts a Right-to-Farm law at a time when a particular nearby farm is not actually creating a nuisance for its neighbors. Any immediate harm to the neighbors appears fairly slight—presumably, the discounted present value of the ability to bring a nuisance action sometime in the future. The harm almost certainly would not rise to the level of a taking. But if farming practices or environmental conditions somehow change in a way that creates a nuisance in the future, the Right-to-Farm statute's impact changes dramatically. At that point, the neighbors—or at least those who were there already when the statute was enacted—should be able to sue. By disabling private remedies, the state has taken upon itself a duty to defend neighbors' property. But that duty is implicated only when the neighbors' property requires defending, which may not occur until

162. I thank Lee Fennell for suggesting this precise formulation. Not all courts agree, however. Most notably, in *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), the plaintiffs were farmers whose sheep were being killed by grizzly bears. The Endangered Species Act prevented the plaintiffs from killing the bears, effectively disabling at least one form of self-help. Nevertheless, the U.S. Court of Appeals for the Ninth Circuit rejected a takings claim, holding that the regulations did not burden the plaintiffs. *Id.* at 1335. The *Christy* court did not formulate the issue as involving takings through inaction, however, and at least one leading commentator has written that the case is about causation, not inaction. See Meltz, *supra* note 17, at 321 n.95.

163. See, e.g., N.C. GEN. STAT. ANN. § 106-701(a) (2013) (“No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year . . .”). Note that the “changed conditions” anticipated by the statute amounts to a codification of the “coming to the nuisance defense”; once a nonagricultural use is in place, it cannot become a nuisance if people subsequently build homes nearby. See Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 119–22. This is different from a change in the impact from the agricultural use itself.

164. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998); see also Tiffany Dowell, *Understanding and Interpreting Right to Farm Laws*, NAT. RESOURCES & ENV'T, Summer 2011, at 39; Lynda J. Oswald, *At the Intersection of Environmental Law and Nuisance Law: Do Right-to-Farm Statutes Result in Regulatory Takings?*, 30 REAL EST. L.J. 69 (2001).

sometime in the future. The state's failure to defend after disabling self-help, not the original enactment of the statute itself, triggers takings liability.¹⁶⁵

A similar analysis applies to landlords' remedies for tenants in breach. Most states today prohibit landlords from using self-help when their tenants illegally remain in possession of property.¹⁶⁶ Landlords are not allowed to lock their tenants out but must instead rely on eviction procedures culminating in public enforcement by a law-enforcement officer.¹⁶⁷ If a landlord secures a judgment of eviction and the relevant law-enforcement authority fails to enforce it, the landlord should be able to sue for a taking of property. In this scenario, the state is tacitly allowing the holdover tenant to stay.¹⁶⁸

This claim is both straightforward and surprising. As *DeShaney* makes clear, the police are not generally obligated to protect people or their property.¹⁶⁹ A bank or bodega owner cannot recover from the police for a burglary that the police failed to stop. In general, a person cannot sue the police for failing to stop trespassers.¹⁷⁰ But a different situation suddenly arises once the state has disabled self-help. The state has thereby assumed a duty to protect, and the Takings Clause may then obligate the government to act.

Comprehensive land-use controls provide another example when they render property especially susceptible to subsequent harm and prevent owners from adjusting to ecological changes. Zoning regulations typically limit the size, shape, and use of property.¹⁷¹ While some of these restrictions may occasionally go too far, most survive constitutional scrutiny.¹⁷² But they may also render property especially susceptible to subsequent harm if changed conditions alter the land-use controls' impact. Imagine, for example, that

165. This does not eliminate traditional nuisance factors, like "coming to the nuisance." The neighbor must have had a colorable (valuable) nuisance claim that the Right-to-Farm legislation prevented. In the absence of such a claim, there could be no taking. This reality forestalls the objection that neighboring property owners could suddenly ignore the existence of a nearby farm in making their investment decisions. For a more general discussion of this issue, see *infra* Section III.C.2 (discussing moral hazard).

166. See, e.g., *Berg v. Wiley*, 264 N.W.2d 145 (Minn. 1978).

167. See, e.g., *id.*

168. This could be a *Loretto*-style taking, through a permanent physical occupation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Of course, the landlord may also have a nonconstitutional mandamus action, but the two are not mutually exclusive. Courts have not been particularly receptive to the background notion that tenant-protecting statutes can give rise to takings claims. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519 (1992). Rent regulation is different, however, from a sheriff's refusing to enforce an eviction order.

169. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

170. Cf. Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 457 (2008) ("Nor does the fact that an individual police officer is not under a constitutional duty to help a property owner eject a trespasser from her land mean that having a legal system of property protection is discretionary.").

171. New York City's zoning code is famously complex, with height-based limits, setbacks, floor-area ratios, sky-plan exposures, and well over 150 different use districts. See, e.g., ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS* 61 (4th ed. 2013).

172. See, e.g., *Gove v. Zoning Bd. of Appeals*, 831 N.E.2d 865 (Mass. 2005); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998); *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587 (Tex. App. 2007).

someone owns property zoned exclusively for residential use. That property is located near a small airport. If an airport expansion dramatically increases noise, rendering the property unsuitable for homes, passive takings might force the government to change the zoning designation or pay compensation. In this example, the preexisting single-family zoning designation rendered the property especially susceptible to the subsequent harm by constraining the use and form that the development could take. And, indeed, some courts have recognized property owners' entitlement to a zoning change in that kind of situation.¹⁷³ Although not generally viewed as an example of omissions liability, zoning law in some states includes a "changed-conditions" doctrine, which obligates a local government to alter zoning limits if changes in local conditions render the limits obsolete.¹⁷⁴

To summarize, passive takings impose a basis for liability where the state controls the allocation of costs and benefits and therefore controls the imposition of harm, or where the government has rendered property especially vulnerable to changes in the world (for example, by disabling self-help). These conditions often overlap, of course.

Even where one of the conditions for passive takings exists, the impact of the government's failure to act must still rise to the level of a taking under traditional takings tests before the government is actually liable. Applying *Penn Central*, for example, the governmental inaction must result in a significant diminution in the value of the property and substantially interfere with the owner's investment-backed expectations.¹⁷⁵ Conventionally, the *Penn Central* inquiry requires comparing the pre- and postregulation value of the property to determine a regulation's effect on the property's fair-market value. The same basic approach applies to passive takings as well, where the extent of a state's failure to act can be assessed by comparing the current value of the property with the value it would have had if the state had acted.

Applying *Penn Central* in this way generates an immediate and important limit on passive takings liability: to be liable for a passive taking, the government must have had the ability to protect the property at issue. Otherwise, there is no diminution in value resulting from the government's inaction. Even if the other conditions for passive takings liability are met, no

173. See, e.g., *Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437, 439 (7th Cir. 1999) ("Under Illinois law, a change in the nature of the surrounding land uses may *compel* a municipality to grant an application for rezoning or a special use permit."); *Burritt v. Harris*, 172 So. 2d 820 (Fla. 1965).

174. See, e.g., *Forde v. City of Miami Beach*, 1 So. 2d 642, 646 (Fla. 1941) ("[W]hen property, restricted to a defined use by a zoning ordinance, changes its physical character from natural causes to the extent that it is no longer adaptable to the use it is zoned for, then it becomes the duty of the zoning board to relax its restrictions to prevent confiscation just as much so as in the case where the regulation was invalid in the first instance."); sources cited *supra* note 173.

175. See *Pa. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); see also Meltz, *supra* note 17 (describing the application of the test).

harm exists unless the government could have protected the property at issue, and there is no liability unless the extent of the harm violates *Penn Central* (or one of the Takings Clause's per-se rules).¹⁷⁶

Consider—as a stylized example—a house destroyed by a fire that spread from an abutting national park. To establish a passive takings claim, based perhaps on the forestry service's failure to promote controlled burns in the area, the property owner would have to show that a different forestry strategy would have substantially reduced the expected value of her loss. The difference in the risk of loss due to fire under the two approaches would have to rise to the level of a taking. In other words, the fact that different forestry practices might have reduced the expected loss to some extent does not suffice to establish passive takings liability; that difference still must rise to the level of a taking under traditional takings jurisprudence.¹⁷⁷

This example's analysis glosses over an additional complexity, however. It assumes that the forestry service was choosing between two distinct forestry practices. In fact, the range of options that the forestry service did *not* adopt is infinite. Fortunately, the range of relevant counterfactuals for passive takings analysis is not. The relevant omissions for purposes of evaluating passive takings include only those forgone actions that would have been consistent with other constitutional limitations. For example, the forestry service could not have acted in ways that violated due process, equal protection, or any other constitutional limit.¹⁷⁸ The government cannot be liable under the Takings Clause for failing to do what it is not empowered or able to do.¹⁷⁹

The due process limit, in particular, serves a central role in delimiting a principled and workable sphere for passive takings liability. Broadly speaking, the Due Process Clause prevents the government from acting in ways that are arbitrary or irrational, which fundamentally means acting in ways that do more harm than good.¹⁸⁰ The government cannot act—and so cannot reasonably be expected to act—in ways that are socially harmful. This fact is inherent in the nature of governmental power. To return to the forest-fire hypothetical, the homeowner cannot claim that the forestry service took her property because it failed to clearcut the forest to prevent fires from starting in the first place. She must show that the comparator—the action that the government could have taken but did not—would have been within the range of appropriate governmental actions and specifically that it would

176. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (describing bases for takings liability).

177. This argument remains agnostic about the substantive content of takings liability. The point is simply that such liability applies symmetrically to active and passive takings.

178. Notably, a federal agency could not, of course, exceed its authority under the Commerce Clause.

179. This bears a close relationship to Michelman's insight that takings analysis only proceeds in the face of an otherwise permissible governmental action. See *supra* text accompanying notes 84–91 (discussing Michelman).

180. See *Nectow v. City of Cambridge*, 277 U.S. 183, 188–89 (1928); see also *ELICKSON ET AL.*, *supra* note 171, at 102–04 (describing due process review).

have been socially beneficial. As with traditional due process analysis, the government should be entitled to substantial deference in delimiting forgone actions that would have been arbitrary or irrational. Because of that deference, a court is not deciding in the abstract whether clearcutting a forest—in the example above—is or is not net beneficial. Instead, a court must simply decide whether the government's judgment on the question satisfies the relevant standard of review.

This limitation makes for an interesting symmetry in litigation. Typically, the government argues that its actions are rational and nonarbitrary.¹⁸¹ For passive takings, by contrast, it is the property owner arguing that forgone governmental actions would have also been net beneficial, while the government claims that the actions would not have been. And just as the government receives tremendous deference in weighing the costs and benefits of its actions, that deference is appropriate here. But such deference does not amount to abdication of oversight in the context of either action or inaction. Despite the considerable deference under rational basis review, courts do, in fact, invalidate governmental actions that they find produce more harm than benefits.¹⁸² This analysis is familiar to courts and commentators and extends beyond the passive takings context.

To summarize, then, a passive takings claim requires the property owner first to show that the government had a duty to act based on the state's control over the property or based on its role in rendering the property more susceptible to harm. The property owner must then identify actions that the government could have taken that both would have been within the universe of appropriate governmental actions and would have substantially protected the property rights at issue. The government deserves substantial deference in determining that certain forgone actions would have been impermissible and therefore should not serve as a basis of comparison for passive takings purposes. Finally, the property owner must show that the effect of the government's inaction rose to the level of a taking. Or, to put it differently, the owner must show that the forgone action would have protected the property to such an extent that the resulting difference in value between the action and inaction satisfies the standard for takings liability (whether under *Penn Central* or one of the per-se rules). Specifying plaintiffs' burdens in this way demonstrates that passive takings are a heavy lift, but not an impossible one. This formulation also provides some reassurance that passive takings liability will not bankrupt the state treasury.

181. See, e.g., *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988) (upholding zoning ordinance as rational); *Cormier v. Cnty. of San Luis Obispo*, 207 Cal. Rptr. 880 (Ct. App. 1984) (same); see also Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, a Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301 (1996) (reviewing due process analysis).

182. See, e.g., *Twigg v. Cnty. of Will*, 627 N.E.2d 742 (Ill. App. Ct. 1994) (invalidating application of zoning ordinance).

C. Limitations and Counterarguments

Having set out the normative justifications and doctrinal bases for passive takings, some objections come immediately to mind. From the most specific to the most general, the objections include: (1) concern about invading a protected space for governmental decisionmaking; (2) the possibility that passive takings liability will lead to moral hazard in property owners' investment decisions; and (3) the effect on governments' willingness to regulate in the first place. These are considered in order.

1. Infringing Authority over Priorities—Invading “Prosecutorial Discretion”

A general concern related to passive takings liability is that it will give courts an inappropriate role in setting governmental policies and priorities. Holding a government liable for actions that it did not take resembles a usurpation of legislative or executive authority. In the administrative context, the Supreme Court famously viewed this concern through the lens of prosecutorial discretion.¹⁸³ Despite occasional APA review of regulatory inaction, courts have largely resisted compelling governmental action, worrying, for example, that reviewing inaction “would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.”¹⁸⁴ The Supreme Court has therefore confined judicial review of agency inaction to the very narrow claim in which the “plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.”¹⁸⁵

Passive takings are critically different from the APA's judicial review of agency inaction for two reasons, however. First, the presumptive remedy for passive takings is damages instead of mandamus or injunctive relief.¹⁸⁶ As a result, courts will not be forcing the government to act but only to compensate for the consequences of its inaction. The ultimate decision whether to

183. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); see also Bressman, *supra* note 121, at 1694 (describing the connection between administrative review and prosecutorial discretion).

184. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66–67 (2004). *But see supra* notes 121–129 and accompanying text (discussing limited judicial review of agency inaction under the APA).

185. *Norton*, 542 U.S. at 64 (emphasis in original); see also Biber, *supra* note 125, at 8–9 (“Case law has generally only allowed private parties to force agencies to act where the agency has some sort of ‘clear’ or ‘nondiscretionary’ duty to do so. In contrast, judicial review of an agency action is possible even where an agency has broad discretion in how or whether to act”) (citation omitted).

186. See, e.g., *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 321–22 (1987). *But see Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2607 (2010) (“[Compensation] is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking.”).

act remains squarely with the relevant governmental decisionmakers. This should make passive takings much more palatable to courts, both because courts would be infringing less on other branches' autonomy and because assessing liability and damages falls firmly within their core competencies. True, courts would still be allocating the state's scarce financial resources—or at least giving the state the choice between acting and paying—but courts routinely play this role.¹⁸⁷ Indeed, there are many contexts—both constitutional and otherwise—in which courts already compel the state to allocate resources in particular ways.¹⁸⁸

Passive takings are also different from APA review of agency inaction because they squarely pit two constitutional principles against each other. In their APA review, courts often highlight the conflict between the APA's statutory authorization for review of agency inaction on the one hand and the constitutional principle of prosecutorial discretion on the other.¹⁸⁹ In that context, the constitutional principle, which is based on constitutional structure, necessarily trumps. The result is extremely deferential—if not anemic—judicial review. Passive takings, by contrast, introduce a constitutional principle on the other side of the equation, and the Fifth Amendment's protection of private property serves as a hefty counterweight to structural separation-of-powers concerns and prosecutorial discretion.¹⁹⁰

Moreover, related concerns about omissions liability in the private sphere do not apply where the defendant is the state. One of the central objections to imposing a duty to act—a duty to rescue in tort law, for example—involves concerns about the putative duty holder's liberty.¹⁹¹ The government's liberty, however, does not need protecting—at least not in the same way. To be sure, if the Takings Clause imposes affirmative obligations, individual state actors may be compelled to assume certain responsibilities that they might prefer not to have. But such a result is not morally objectionable. Indeed, state actors—whether police officers or public-utility workers—already operate under specific duties to act where the underlying harm falls within the ambit of their responsibilities.¹⁹² One of the central

187. See Bloom & Serkin, *supra* note 5, at 589 (“In educational reform litigation, tort claims against government actors, and even traditional regulatory takings litigation, state court rulings already impose significant financial liability on the government.”).

188. See *id.*

189. See, e.g., *Heckler v. Chaney*, 470 U.S. 821 (1985); see also Biber, *supra* note 121, at 485–86 (discussing *Heckler*); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 710–13 (1990) (same).

190. I thank Lisa Bressman for suggesting this point.

191. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 198 (1973); Weinrib, *supra* note 8, at 268–69; see also Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 606 (2001) (“The main argument in defense of the traditional view . . . has been that positive legal duties threaten the common law's traditional deference to individual liberty.”). Professor Murphy ultimately rejects this view.

192. See, e.g., *Williams v. Carolina & Nw. R.R. Co.*, 57 S.E. 216 (N.C. 1907); *O'Rourke v. Schact*, [1976] 1 S.C.R. 53 (Can. 1974).

moral objections to omissions liability therefore does not apply in the takings context.

2. Moral Hazard

A more persuasive counterargument is the worry that passive takings liability will create a moral-hazard problem. Such liability seems to make the government the insurer of last resort when the world changes in unexpected ways. Individuals who might naturally be wary of buying beachfront property, for example, may become more willing to do so if they can expect the government to cover some of the costs associated with sea-level rise. Passive takings liability might therefore encourage overinvesting in private property that is most susceptible to ecological change.

This amounts to a serious objection, to be sure, but it is not unique to passive takings. A sophisticated objection to traditional affirmative takings—including eminent domain—is that property owners will ignore regulatory risks that they should, in fact, internalize.¹⁹³ Here, the objection is parallel: people will inefficiently ignore the risks of regulatory *inaction*. At a fundamental level, the moral-hazard concern is not conceptually distinct for passive and active takings.

In addition, because passive takings are defined narrowly, they do not offer the possibility of compensation for all or even most ecological harms. Most importantly, passive takings do not allow property owners to ignore freestanding risks of ecological change. Passive takings claims arise only when the government has incurred some duty to act—a duty based on its preexisting involvement with the property. In that context, the moral-hazard problem still exists, but it actually applies narrowly. The Takings Clause will not offer compensation for floods or fires unless the state had a duty to act because of its prior regulatory intervention. And where the state does, in fact, have such a duty, it is reasonable and appropriate for property owners to make their investment decisions with an expectation of that action.¹⁹⁴

It is true that the possibility of compensation may, on the margins, induce risk-neutral property owners to overinvest in property subject to some risk of regulatory action or inaction. But just as the moral-hazard phenomenon has not led to a broad disavowal of affirmative takings liability, it does not undermine the possibility of passive takings either. The marginal effect of such liability on property owners' investment incentives appears minor indeed: its magnitude is defined by the expected value of a passive takings claim, which will usually be quite small because of the challenges of bringing a successful claim. And at the very least, there is no reason for the moral-

193. See, e.g., Blume & Rubinfeld, *supra* note 2, at 618; Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1836–37 (1985); Kaplow, *supra* note 2, at 531.

194. Cf. Leavens, *supra* note 133, at 573 (“Once we realize that a particular undesirable state of affairs can be avoided by taking certain precautions, we usually incorporate these precautions into what we see as the normal or at rest state of affairs. A failure to engage in the preventive conduct in these cases can thus be seen as an intervention that disturbs the status quo.”).

hazard objection to apply with more force to passive takings than for traditional ones.

3. Inducing Inaction

A final concern lies in the long-term effects of passive takings liability on governments' regulatory incentives. As defined in this Part, passive takings liability involves inaction following some earlier action. It does not create freestanding liability for changes in the world but requires a prior governmental entanglement with the harm-generating ecological change. The problem, then, is that this new threat of liability might induce governments to avoid acting in the first place in order to forestall the passive takings claims that could follow.

Conceptually, this is a compelling worry. But in fact it has little real-world bite. First, and most practically, the pervasiveness of extant regulation means that inaction at this point is simply not an option. With a blank slate and no history of governmental activity, this might be a more serious concern. But considering the world as it exists today, the government cannot extricate itself from its comprehensive regulatory control over so many forms of private property.

This response is not a complete answer, however, because the concern remains that the threat of passive takings will induce relatively less regulatory activity *going forward* (bearing in mind, of course, that some people will consider this a feature and not a bug of the proposal). It is a real stretch to think that governmental actors today will be motivated to avoid enacting regulations that might give rise to passive takings claims in the event of some future ecological change. As a practical matter, it is difficult to imagine this concern affecting regulatory incentives in any meaningful way. Governmental decisions are the product of so many immediate pressures that the abstract fear of creating the conditions for passive takings liability in the distant future is unlikely to deter the government from regulating.¹⁹⁵ Moving away from abstract theory and examining how a passive takings claim might look in the real world drives this point home.

IV. EXAMPLES OF PASSIVE TAKINGS

The first three Parts of this Article have set out the normative and doctrinal case for passive takings. But what would such claims look like in the real world? Outside the realm of abstract property theory, how would passive takings claims actually work? Sea-level rise provides an ideal illustration. This Part therefore begins by identifying some possible passive takings claims resulting from sea-level rise. It then provides a normative defense of extending passive takings liability in these specific contexts. Finally, the Part concludes by speculating about some other examples.

195. See *supra* note 62 (citing public-choice literature).

A. *Passive Takings from Sea-Level Rise*

The climate is changing. Seas are rising, and coastal storm surge is an increasingly serious threat.¹⁹⁶ Measuring and predicting the extent of sea-level rise in any specific location remain enormously complex. Scientists continue to evaluate the macro systems involved, which contain many variables, from thermal expansion and glacial melt to the rate of future carbon emissions.¹⁹⁷ Mainstream acceptance of the phenomenon is very recent, and scientific predictions are being rapidly updated as the science evolves.¹⁹⁸

The scientific community continues to revise upward its estimates of sea-level rise. Credible models predict an increase in mean sea levels between approximately two and five feet (or higher) by the year 2100.¹⁹⁹ The actual impacts of sea-level rise will vary tremendously by location, however.²⁰⁰ For example, a two-foot increase in median sea level—the low end of current estimates over the next century—will likely leave significant portions of Florida and the Gulf Coast underwater.²⁰¹ The increase in mean sea level will

196. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION 178 (2012) [hereinafter IPCC MANAGING RISKS OF EXTREME EVENTS], available at http://ipcc-wg2.gov/SREX/images/uploads/SREX-All_FINAL.pdf.

197. See, e.g., *id.* at 179 (“[An earlier report] projected sea level rise for 2090–2099 relative to 1980–1999 due to ocean thermal expansion, glaciers and ice caps, and modeled ice sheet contributions of 18 to 59 cm, which incorporates a 90% uncertainty range across all scenarios. An additional contribution to the sea level rise projections was taken into account for a possible rapid dynamic response of the Greenland and West Antarctic ice sheets, which could result in an accelerating contribution to sea level rise.” (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, FOURTH ASSESSMENT REPORT (2007) [hereinafter AR4], available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm)).

198. See, e.g., Jeremy L. Weiss et al., Letter, *Implications of Recent Sea Level Rise Science for Low-Elevation Areas in Coastal Cities of the Coterminous U.S.A.*, 105 CLIMATIC CHANGE 635, 636 (2011).

199. See Herzog & Hecht, *supra* note 10, at 464 (“Research projects sea levels on the Southern California coast will rise five to twenty-four inches above 2000 levels by 2050.”). Compare AR4, *supra* note 197, at 8, with IPCC MANAGING RISKS OF EXTREME EVENTS, *supra* note 196, at 179 (citing recent studies).

200. IPCC MANAGING RISKS OF EXTREME EVENTS, *supra* note 196, at 183 (“The susceptibility of coastal regions to erosion and inundation is related to various physical (e.g., shoreline slope), and geomorphological and ecosystem attributes . . .”). For interactive maps demonstrating this variation, see *Sea Level Trends*, NOAA TIDES & CURRENTS, <http://tidesandcurrents.noaa.gov/sltrends/index.shtml> (last visited Aug. 18, 2014). See also Caldwell & Segall, *supra* note 10, at 537 (describing variables impacting local effects of sea-level rise).

201. See Weiss et al., *supra* note 198, at 639–41; see also Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, 54 (2011) (reporting that one meter of sea-level rise will “lead to the loss of up to 10,000 square miles of coastal land in the United States”); Titus, *supra* note 10, at 1284–85 (reporting that a four-foot rise “would inundate 7000 square miles of dry land in the contiguous United States—an area the size of Massachusetts”). For interactive maps, see *Sea Level Impact Map*, DSEGL: CLIMATEGEM, <http://climategem.geo.arizona.edu/slr/us48prvi/index.html> (last visited Aug. 18, 2014).

also exacerbate the impact of storm surge, leading to flooding and inundation.²⁰² Hurricane Sandy vividly demonstrated the potential dangers of increased storm surge when it devastated New York City in 2012.

The purpose of this argument, however, is neither to review the scientific evidence supporting sea-level rise nor to make informed predictions about its likely consequences. This discussion therefore assumes that sea levels are indeed rising. Further, it assumes that sea-level rise increases coastal erosion and flooding, both of which will detrimentally impact some formerly developed (or developable) property. Such erosion and flooding might give rise to a variety of passive takings claims.

Under the test set out in Part III, a passive takings claim requires a property owner to show first that the government is complicit in creating the conditions that are responsible for the harm. Second, the property owner must prove that the inaction violated the *Penn Central* test (or some other basis for traditional takings liability), which requires identifying permissible actions that the government could have taken to avoid the harm.

How, then, might the government be complicit in creating the harm resulting from sea-level rise?²⁰³ Recall from Part III that passive takings liability depends on the extent of the government's responsibility for the conditions that expose property owners to harm. As a general matter, few geographical areas are subject to as many regulations as coastal property. Overlapping federal, state, and local land-use and environmental regulations, which are overseen and enforced by diverse agencies and legislative bodies, embed coastal property in a complex and detailed web of governmental control. A brief overview makes the point clear.

The federal Coastal Zone Management Act ("CZMA")²⁰⁴ provides grants to states to develop and administer coastal-management plans that satisfy federal requirements.²⁰⁵ States that accept the grants must adopt state

202. See, e.g., Caldwell & Segall, *supra* note 10, at 538 ("Because the nearshore wave height varies directly with water depth and wave energy varies with the square of wave height, accelerating sea level rise will strongly increase the force of breaking waves in newly deepened nearshore waters . . .").

203. Of course, the government may be complicit because it contributes to carbon emissions, in part by adopting a permissive regulatory stance. See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 17–19, 27–29 (2013), available at http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf (concluding that human activity has been the dominant cause of global warming since the mid-twentieth century and explaining that global mean surface temperature increases as a function of global carbon emissions); J. Imbers et al., *Testing the Robustness of the Anthropogenic Climate Change Detection Statements Using Different Empirical Models*, 118 J. GEOPHYSICAL RES.: ATMOSPHERES 3192, 3198 (2013) (validating the detection and attribution of human contributions to climate change). That overarching claim implicates questions of proof and causation that go beyond the scope and purpose of this Article.

204. 16 U.S.C. §§ 1451–66 (2012). For a discussion of the Act, see generally Robert G. Healy & Jeffrey A. Zinn, *Environment and Development Conflicts in Coastal Zone Management*, 51 J. AM. PLAN. ASS'N 299, 300 (1985).

205. 16 U.S.C. § 1455. Each state's coastal-management plan must, at a minimum, identify coastal boundaries, define the permissible land and water uses that impact coastal waters, designate areas of significant concern, identify the legal authority to exert control over coastal

laws that, in turn, direct counties or local governments to develop their own coastal-management plans in compliance with both state and federal law (or demonstrate that local plans already meet the federal requirements).²⁰⁶ County and municipal plans are typically codified in a comprehensive plan that makes specific provisions for coastal property.²⁰⁷ In addition, local building codes typically include design requirements for coastal property, sometimes requiring property to be elevated on piles or stilts or mandating that building systems be placed on the top—rather than the bottom—of buildings.²⁰⁸ As these examples demonstrate, the restrictions on coastal property are detailed indeed.²⁰⁹

Many of these regulations are designed to protect public resources and to minimize the risk of damage from storms and erosion. Nevertheless, this comprehensive regulation of coastal property makes it difficult, in general, for a government—whether federal, state, or local—to claim “inaction” when ecological change threatens property in ways that the regulations exacerbate, even if the regulatory environment is static. This is most obvious in two specific contexts: zoning height limits and restrictions on beachfront armoring, although it is true in other regulatory settings as well. The doctrinal bases for these two claims appear below, followed, in Section IV.B, by an evaluation of the desirability of extending liability in this way.

1. Height Limits on Beachfront Property

Zoning routinely imposes strict building-height limits. Beachfront property is no exception. The actual height limits of course vary between states, between municipalities within a state, and between zoning districts within a municipality. In some places, single-family zones on the coast may have

land and water uses, create broad guidelines to prioritize coastal land uses, describe the organizational structure to be used to implement the state plan, define a planning process to protect public beaches and access to same, create a planning process for siting energy facilities in coastal areas, and design a planning process for studying and controlling shoreline erosion.

206. See, e.g., Coastal Area Management Act of 1974, N.C. GEN. STAT. ANN. § 113A-108 (2013) (requiring that “[a]ll local land-use plans adopted pursuant to this Article within the coastal area . . . be consistent with the State guidelines”). For purposes of this discussion, examples of state and local laws are randomly drawn from the town of Beaufort, North Carolina, simply to illustrate how the regulations overlap.

207. The resulting plans are often detailed and technical documents, specifying appropriate development given different properties’ soil conditions and environmental sensitivities. See, e.g., TOWN OF BEAUFORT, N.C., CORE LAND USE PLAN (2006), available at http://portal.ncdenr.org/c/document_library/get_file?uuid=1b2ac524-be18-4c8b-967b-57a5328a2ead&groupId=38319; Herzog & Hecht, *supra* note 10, at 501 (describing local coastal program of Carlsbad, California).

208. See, e.g., INT’L RESIDENTIAL CODE § R322.1.6 (2012).

209. Federal and state environmental regulations also often apply, requiring owners of coastal property to seek state permits for any development that may have an impact on coastal lands, water, or resources. Furthermore, the Clean Water Act prohibits the discharge of dredged or fill material into U.S. waters. See 33 U.S.C. § 1344 (2012). And other regulatory regimes—like historic preservation or the Endangered Species Act—may also impact coastal property.

height limits of thirty or thirty-five feet—enough for a three-story house—while others may have limits that are much lower, even as low as eighteen feet—enough to permit only a one- or one-and-a-half-story cottage.²¹⁰ The purposes of these limits, especially the low limits, are to preserve neighborhood character and ocean views.²¹¹ And, when enacted, such height limits are usually unremarkable and constitutionally unproblematic. Zoning restrictions like these are routinely upheld either because of their modest impact on property rights or under a theory of “average reciprocity of advantage.”²¹² Yes, the zoning ordinance limits buildable height on someone’s property, but it also limits buildable height on her neighbors’ property, which confers an offsetting benefit. The resulting net impact therefore rarely rises to the level of a taking.

Sea-level rise, however, changes the effect of the height limits. The threats of increased storm surge and sea-level rise have increasingly led beachfront property owners to elevate their homes on piles or stilts in order to lift their homes above the level of likely floodwaters.²¹³ Unfortunately for these owners, height limits are measured from the ground, not from the lowest livable ground floor. If a property owner must raise her house seven or ten or even fifteen feet off the ground to avoid flooding and increased storm surge, there may not be enough height left in the zoning ordinance to permit *any* building, much less a building consistent with the owner’s investment-backed expectations.²¹⁴

210. Compare Beaufort, N.C., Land Development Ordinance § 7(D)(3) (Nov. 4, 2013) (permitting 35’ height), with SEATTLE, WASH., MUNICIPAL CODE, ch. 23.45, § 514 (2014) (imposing 18’ height limits for lowrise developments), and SEATTLE, WASH., MUNICIPAL CODE Zoning Map 218 (2005) (showing lowrise designation for certain oceanfront property).

211. One blog, seeking to raise political opposition in 2010 to relaxed height restrictions, characterized the successful height limits in place since 1989 as follows: “By preventing new buildings from towering over their neighbors, these limits also preserved sunlight, tree canopies, green space, and most importantly, neighborhood character.” *The Petition to Save Our Neighborhoods*, SEATTLE SPEAKS UP, <http://seattlespeaksup.wordpress.com/the-petition/> (last visited Aug. 18, 2014).

212. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); see also Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851 (Cal. 1997); K & K Constr., Inc. v. Dep’t of Env’tl. Quality, 705 N.W.2d 365 (Mich. Ct. App. 2005).

213. Candace Jackson, *Built on Stilts: Homes Reach New Heights to Defy High Wind and Waves*, WALL ST. J., Oct. 25, 2013, at M1.

214. This dynamic is reinforced by the National Flood Insurance Program (“NFIP”). In areas designated Zone V (for risk of high-velocity wave action), the NFIP’s standards require the ground floor of buildings to be elevated at, or in some cases two feet above, the Base Flood Elevation (“BFE”), which is the anticipated level of a 100-year flood. See FEMA, NFIP FLOODPLAIN MANAGEMENT GUIDEBOOK 5–6, 23 (5th ed. 2009), available at http://www.fema.gov/media-library-data/20130726-1647-20490-1041/nfipguidebook_5edition_web.pdf. See generally FEMA, TECHNICAL FACT SHEET NO. 1.6, DESIGNING FOR FLOOD LEVELS ABOVE THE BFE (2010), available at http://www.fema.gov/media-library-data/20130726-1537-20490-8057/fema_499_1_6_rev.pdf (recommending design methods to avoid flooding). The Biggert-Waters Flood Insurance Reform Act of 2012 authorized the Federal Emergency Management Agency to incorporate projections of future sea-level rise into its rate maps. Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, § 100215, 126 Stat. 916, 926 (codified at 42 U.S.C. § 4101a(d)(1)–(2) (2012)). For further discussion of the statutory change, see J.

Notice the dynamic at work. The law in this situation has not changed. The height limits in any particular jurisdiction may have been in place for half a century or longer. But sea-level rise has made flooding more likely. Elevating structures above the anticipated flood levels may be necessary to make the property developable (the abandonment option is considered below).²¹⁵ At least where there are no other available responses to sea-level rise because of the conditions on a specific lot, static height limits can function as a kind of prohibition on self-help (in the form of elevating the building) and could therefore create a passive takings claim.

This does not mean, however, that the government is necessarily liable. An individual property owner must still demonstrate, under *Penn Central*, that permissible actions available to the government would have protected her property and that the resulting difference in value rises to the level of a taking.²¹⁶ Here, there are two challenges facing property owners.

First, it must be the case that the property would have remained developable in the absence of the background regulations. If the risk of flooding and inundation threatens all buildings of any height, the height limit will impose little harm; the property would not have been developable regardless of the height limits. Or, more formally, the difference between the value of the property with and without the height limit does not rise to the level of a taking.

Second—and relatedly—the effect of the government’s refusal to relax height limits must constitute a taking. Where a zoning ordinance imposes a height limit of thirty-five feet and six-foot stilts are all that is needed to avoid flooding, there may be no taking at all. True, the property owner now cannot build the three-story house she intended, but she can still probably fit two stories into the remaining twenty-nine feet of buildable height. Although the reduction from a three-story to a two-story building may diminish value and interfere with expectations, it is unlikely to violate the Takings Clause.²¹⁷ But if height limits had been set lower or if the elevation requirements were much higher, the impact on a site’s development potential might be much more dramatic, and it might indeed rise to the level of a taking.

Peter Byrne & Jessica Grannis, *Coastal Retreat Measures*, in *THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS* 267, 292 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

215. See *infra* text accompanying note 241.

216. See *supra* notes 175–176 and accompanying text.

217. See, e.g., *Allegretti & Co. v. Cnty. of Imperial*, 42 Cal. Rptr. 3d 122, 135 (Ct. App. 2006) (“Like most land use regulations, the ordinance may have ‘the inevitable effect of reducing the value of regulated properties,’ but even a ‘significant diminution in value is insufficient to establish a confiscatory taking.’” (quoting *Terminal Plaza Corp. v. City & Cnty. of S.F.*, 223 Cal. Rptr. 379, 391 (Ct. App. 1986)) (internal quotation marks omitted)).

2. Armoring

Another way in which sea-level rise may generate passive takings claims involves armoring. “Armoring” refers to erecting hard barriers like bulkheads, sea walls, and revetments to provide structural protection against waves and storm surge.²¹⁸ These forms of hard armoring—as distinguished from soft armoring like increasing vegetation or wetlands—are controversial. First, they can clutter a beach or oceanfront area, restricting public access and interfering with the scenic beauty of a beach or coastal location.²¹⁹ Hard armoring is also controversial because the protection it affords to the landward property owner typically comes with costs: increased erosion to adjacent property and other ecological damage.²²⁰ For these reasons, some state and local governments have long prohibited sea walls and other impermeable barriers on parts of the coast.²²¹ Other times, however, the government encourages sea walls and even builds them itself.²²²

Either choice potentially implicates passive takings liability. A ban on hard armoring looks like a prohibition on self-help. But more generally, choosing whether to armor or prohibit armoring is closely analogous to the situation in *Arkansas Game & Fish Commission v. United States*, where the allocation of costs is entirely within the government’s control.²²³ The harm from sea-level rise will occur, and the only question is who will bear it. Constitutional liability should not then depend on whether the government’s decision is characterized as an act or an omission.²²⁴ Whether the government prohibits or builds sea walls, its near-total control over the allocation of the inevitable harm serves as a doctrinal hook for passive takings liability.

218. See, e.g., GRANNIS, *supra* note 26, at 36 (describing hard armoring); Byrne, *supra* note 11, at 86–93 (same).

219. See, e.g., Caldwell & Segall, *supra* note 10, at 540 (describing costs).

220. As Byrne explains, armoring “often increases erosion of neighboring properties by increasing current and wave action laterally against unprotected shorelines.” Byrne, *supra* note 11, at 87; see also Caldwell & Segall, *supra* note 10, at 534 (“[Sea walls] will have significant social and ecological costs. Beaches below the walls may be eroded away, or the thin ribbon of sand remaining will be blocked from the public by massive shoreline protection structures. Where estuarine marshes . . . are threatened . . . coastal armoring will prevent marsh migration, leading to the eventual loss of ecosystem function.”); Herzog & Hecht, *supra* note 10, at 473–75 (discussing armoring strategies and costs). For a terrific exploration of the land-use consequences of such erosion and accretion, see Joseph D. Kearney & Thomas W. Merrill, *Contested Shore: Property Rights in Reclaimed Land and the Battle for Streeterville*, 107 Nw. U. L. REV. 1057 (2013).

221. See sources cited *supra* note 25; see also Herzog & Hecht, *supra* note 10, at 9, 38–42 (listing Maine, Massachusetts, North Carolina, Oregon, Rhode Island, South Carolina, and Texas as states that have banned or severely restricted hard armoring and discussing the political and legal dynamics of prohibiting armoring).

222. See *infra* text accompanying notes 232–235.

223. See *supra* text accompanying notes 153–160.

224. Byrne implicitly disagrees. See Byrne, *supra* note 11, at 101 (arguing that prohibitions on armoring are unlikely to affect takings because “future losses to the owner will be accomplished by nature, not by government”).

The effect of the government's decision, however, must still rise to the level of a taking under *Penn Central*, and meeting that threshold proves complicated in both contexts.²²⁵ Consider, first, a prohibition on hard armoring. While in some circumstances a sea wall might provide the strongest protection against storm surge and tides, there may well be practical and effective alternatives like soft armoring that would also protect the property. Where those options are available, a ban on hard armoring has not actually disabled self-help or determined the allocation of costs. It has, at most, limited the forms of self-help available. And whether that rises to the level of a taking depends on the efficacy and cost associated with the alternatives. For example, a developer prohibited from erecting a sea wall might nevertheless be able to build a new house elevated on stilts, although presumably at greater cost or lesser benefit.²²⁶ In this way, it is the extent of the difference in value between the prohibited favored approach (the sea wall) and the still-available second-best approach (stilts) that serves as the basis for the takings analysis. If the second-best option represents an adequate alternative—if it neither reduces the value of property too much nor interferes too intrusively with the property owner's expectations—then there will be no taking.²²⁷

Moreover, if sea-level rise would have overcome even the strongest hard armoring, then there is no taking. But the property owner must show more than that some theoretical engineering marvel could have saved her property. She must show that the particular alternative would have been financially plausible considering the property. A property owner cannot complain about a prohibition on hard armoring if the least expensive option would have cost \$5 million to protect a \$100,000 bungalow. To put it more formally, the impact of the governmental regulation does not rise to the level of a taking if it prohibits an activity or use of the property that would not, in fact, fall within reasonable expectations. This is not to deny the possibility that someone, for idiosyncratic reasons, might be willing to invest millions of dollars to save a structure worth only a fraction of that amount. But the Takings Clause, even in its traditional form, does not protect expectations that are objectively unreasonable.²²⁸ The rule for passive takings should not be any different.

225. Some courts have indeed rejected traditional takings challenges to newly enacted prohibitions on hard armoring. See, e.g., *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009). The passive takings analysis, by contrast, imagines that the prohibitions have been in place for some time.

226. There are of course many potential options for developers, including greater setbacks and different building designs. To violate the Takings Clause, the difference between the prohibited activity and the second-best alternative must rise to the level of a taking. For a discussion of armoring's impact on property values, see Warren Kriesel & Robert Friedman, *Coping With Coastal Erosion: Evidence for Community-Wide Impacts*, SHORE & BEACH, July 2003, at 19, 21 (finding that a threat of erosion reduces values by 25% and that armoring restores this value).

227. This is an application of the *Penn Central* ad hoc balancing test, discussed *supra* text accompanying note 17.

228. See Serkin, *supra* note 15, at 1251 (discussing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)); see also Eagle, *supra* note 18, at 560 (discussing same); cf. Brian Angelo Lee,

A government may also have another defense. In some settings, sea walls and other forms of armoring might be a nuisance, either private or public.²²⁹ Where that is true, eliminating hard armoring would then fall within the nuisance exception to takings liability as articulated in *Lucas v. South Carolina Coastal Council*.²³⁰ There, the Supreme Court held that a regulation that would otherwise constitute a per-se taking of property would not violate the Takings Clause if it were consistent with “background principles of nuisance and property law.”²³¹ Since a property owner has no right to create a nuisance, the law can prohibit a nuisance without effectuating a taking.²³² This has the potential to be an important defense in the particular context of hard armoring, but it also demonstrates a crucial broader point: traditional takings defenses are also available for passive takings claims.

Alternatively, consider the passive takings claim that might arise from the continued presence of sea walls. Just as a prohibition on sea walls can threaten littoral property, the presence of sea walls can threaten neighboring property, and sea-level rise can again dramatically transform that risk. What may have been minor erosion can become an existential threat, even though the sea wall itself has not changed.

The most straightforward passive takings claims arise when the government itself has constructed the hard armoring.²³³ This is commonplace. The Army Corps of Engineers has armored significant stretches of the nation’s

Just Undercompensation: The Idiosyncratic Premium in Eminent Domain, 113 COLUM. L. REV. 593 (2013) (defending focus on objective fair-market-value standard for valuing takings claims).

229. See *Lummis v. Lilly*, 429 N.E.2d 1146, 1149 (Mass. 1982) (“There is no sound reason for imposing the obligation of reasonable use on riparian owners, while permitting littoral owners to use their property without any limitations.”); *Grundy v. Thurston Cnty.*, 117 P.3d 1089, 1094 (Wash. 2005) (rejecting “common enemy doctrine” as applied to sea water and allowing nuisance claim to proceed); see also Caldwell & Segall, *supra* note 10, at 558 (discussing nuisance).

230. 505 U.S. 1003, 1029–30 (1992).

231. *Lucas*, 505 U.S. at 1029–30.

232. See Peloso & Caldwell, *supra* note 201, at 63 (speculating that the *Lucas* exception might apply to prohibitions on armoring); see also Titus, *supra* note 10, at 1373–74 (same).

233. It is possible to imagine a passive takings claim challenging a broad regulatory scheme that permits hard armoring by private property owners. See, e.g., Titus, *supra* note 10, at 1302 (“Currently, Maryland recognizes a statutory right to hold back the sea, and fifteen to twenty-five miles per year have been armored over the last two decades.” (footnote omitted)). In this case, creating an as-of-right entitlement to armor could result in private sea walls that destroy or significantly impact neighboring property. But this more remote challenge faces an additional conceptual hurdle, because the most obvious remedy is a private nuisance suit directly against the neighbor. How a regulatory takings claim interacts with the existence of a private remedy is undeveloped in the law, untheorized in the literature, and raises issues that therefore go beyond the scope of this Article.

coastline.²³⁴ That armoring has, in a very literal sense, created conditions that can lead to increased harm.²³⁵

As before, however, the fact of the government's entanglement is just the beginning of the analysis. It must also be the case that the absence of the sea wall—in other words, its removal—would result in substantially less erosion to neighboring property owners. A taking could occur, for example, where the presence of the sea wall results in such substantial erosion that it actually destroys the neighboring lot or renders it entirely unsuitable for development.²³⁶

Importantly, however, the relevant inquiry is not what would have happened if the sea wall had never been constructed in the first place. The premise of the passive takings claim is that the original construction of the sea wall was constitutionally permissible. Therefore, the difference between the damage to neighboring property with the sea wall in place and the damage with the sea wall removed must rise to the level of a taking.

Sea-level rise has the potential to reconfigure coastal property rights in profound ways. Undoubtedly, governmental responses—or the lack thereof—have the potential to affect both the extent and allocation of costs associated with rising seas. Enterprising littoral owners and their attorneys will be able to identify any number of passive takings claims arising out of this significant ecological change. This Section has set out two of them. But are passive takings claims in this context actually desirable?

B. *Evaluating Passive Takings in the Context of Sea-Level Rise*

A growing consensus exists about the range of regulatory responses that might reduce the costs associated with sea-level rise. But there is also an increasing awareness that many of these responses implicate property rights. Substantial scholarly and professional attention has already been devoted to addressing takings claims arising out of regulatory responses to sea-level rise.²³⁷ These issues are complex and important, but all of the attention creates a different hazard: the threat of traditional takings liability may deter

234. It is difficult to find a comprehensive list of Army Corps projects armoring the coast, but studies of individual projects are legion. See, e.g., Robert A. Morton, *Interactions of Storms, Seawalls, and Beaches of the Texas Coast*, 4 J. COASTAL RES. (SPECIAL ISSUE No. 4) 113, 115 (1988) (describing sea walls along the Texas coast).

235. See Susan Essoyan, *Sand Is Vanishing Where Life's a Beach: The Land That Defines Hawaii Is Being Washed Away Due to Sea Walls*, L.A. TIMES, May 23, 1996, at A5, available at http://articles.latimes.com/1996-05-23/news/mn-7442_1_sea-wall-application (describing blame for erosion relating to Army Corps sea walls constructed in the 1970s).

236. Cf. *Lucas*, 505 U.S. at 1029 (announcing total wipeout rule).

237. See, e.g., Byrne, *supra* note 11; Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENVTL. L. 395 (2011); Peloso & Caldwell, *supra* note 201; Thomas Ruppert, *Reasonable Investment-Backed Expectations: Should Notice of Rising Seas Lead to Falling Expectations for Coastal Property Purchasers?*, 26 J. LAND USE & ENVTL. L. 239 (2011); Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools "Takings-Proof"*, 28 J. LAND USE & ENVTL. L. 157 (2013); see also Ruhl, *supra* note 27, at 698.

governments at various levels from acting at all in order to avoid the risk of takings liability.²³⁸ A legal regime that incentivizes inaction in the face of a potential ecological calamity is perverse indeed.

In the abstract, the best option may be to remove the threat of traditional takings liability in the context of sea-level rise. Governments could then enact the regulations that are the most socially beneficial without facing liability. Of course, there is no mechanism for eliminating takings liability *ex ante*, absent a ruling from the Supreme Court or a constitutional amendment (and, perhaps, changes to the protection of property within every single state). And so long as any prospect of liability remains, the mere risk of litigation can have an outsize impact on governmental decisionmaking.²³⁹

Given the persistent threat of traditional takings liability, passive takings liability serves as a beneficial corrective for regulatory incentives. It creates financial pressure to adopt—or maintain—the regulatory regime that will minimize overall costs, whether or not it changes the law.²⁴⁰ In some specific instances, it may well be that doing nothing is less expensive than acting in anticipation of sea-level rise. But at least in some situations, aggressive regulatory action will minimize the overall costs of rising seas.

The interaction between flooding and building-height limits demonstrates this point clearly. Relaxing height limits is by no means free. It will allow development that clashes with current planning policy and may interfere with others' views of the ocean. But it is important to realize that retaining existing height limits is also not free, and indeed the relative costs can change over time—sometimes drastically. One response to static height limits may be that property owners will choose not to build if they cannot build consistently with sound engineering practices for floodplain development. This outcome may frequently be appropriate from a policy perspective but not necessarily in all cases. Some beachfront development remains extremely valuable, even in the face of sea-level rise. If elevating structures can in fact avoid most of the risks of flooding, then easing height limits on beachfront property to permit such development could unlock significant value. That

238. See, e.g., Byrne, *supra* note 11, at 97 (“Threats of takings liability will influence legislative decisions.”); see also JESSICA GRANNIS, GEORGETOWN CLIMATE CTR., ZONING FOR SEA-LEVEL RISE: A MODEL SEA-LEVEL RISE ORDINANCE AND CASE STUDY OF IMPLEMENTATION BARRIERS IN MARYLAND 6 (2012), available at <http://www.georgetownclimate.org/sites/default/files/Zoning%20for%20Sea-Level%20Rise%20Executive%20Summary%20Final.pdf> (“The primary concern that most local governments have when enacting new regulations is that they will be sued for violating constitutional protections of property rights.”).

239. See Serkin, *supra* note 62, at 1637 (arguing that local governments are likely to be risk averse when it comes to takings liability).

240. See Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation*, 64 FLA. L. REV. 269, 290–91 (2012) (exploring distributive consequences of leaving outdated laws and regulations in place in the face of sea-level rise). See generally Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 GEO. MASON L. REV. 775 (2013) (arguing for a tort-based duty on municipalities to respond to climate change).

value might exceed the value of the height limits to the public. Passive takings liability provides a mechanism for ensuring that the government considers those costs as well.

Beachfront property owners often have a more troubling alternative: continue to build without elevating the structures, despite the risk of flooding.²⁴¹ Adopting this alternative is not as unlikely a decision as it might seem because, if a flood occurs, property owners will not internalize the full costs of flood damage. The National Flood Insurance Program, coupled with the almost inevitable infusion of public money following a significant flood, means that property owners can expect to be protected from at least some of the risks of sea-level rise.²⁴² And a decision to build anyway may impose substantial costs on everyone. Buildings that are not elevated can function as miniature sea walls in a flood and thereby increase the damage to surrounding property.²⁴³ If the building itself is destroyed, the resulting debris can also damage remaining structures and increase cleanup costs.²⁴⁴ Of course, if the government expects to be obligated to pay those cleanup costs, it may have an incentive to adopt sensible regulations *ex ante*, even in the absence of passive takings liability. But there are likely to be intergovernmental externalities as well. Zoning decisions are primarily local, and cleanup costs are likely to be borne primarily by states and the federal government.

Passive takings would encourage the government to adopt a regulatory strategy that will minimize overall costs. Sometimes that may mean leaving

241. This may not be possible where FEMA has updated its NFIP maps, pursuant to the Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L. No. 112-141, § 100216, 126 Stat. 916, 927–30 (codified at 42 U.S.C. § 4101b (2012)) (authorizing continuing studies of flood hazards in order to provide for a constant reappraisal of the flood insurance program). But that change threatens traditional “active” takings liability. The availability of passive takings liability in areas where the maps have not been updated to reflect the new reality of rising seas simply adds a measure of symmetry. For a discussion of the NFIP, see *supra* note 214.

242. See, e.g., Zygmunt J.B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201, 210–11 (1974) (“[F]loodplain occupants can expect massive federal, state, and local efforts to rescue them and their property To be sure, each individual owner risks injury, disease, or death, and his property may be soaked, crushed, buried in mud, or floated away. When he weighs the dangers and odds of developing on the floodplain against its various attractions, however, the individual can discount many of his own potential costs thanks to insurance or relief, and he can completely ignore almost all damages imposed upon the public at large.” (footnote omitted)); Matthew P. Weaver, Comment, *Fear and Loathing in Post-Katrina Emergency Debris Management: According to Whom, Pursuant to What, and You Want to Dump That Where?*, 20 TUL. ENVTL. L.J. 429, 434–37 (2007).

243. See, e.g., ANNE SIDERS, *MANAGED COASTAL RETREAT: A LEGAL HANDBOOK ON SHIFTING DEVELOPMENT AWAY FROM VULNERABLE AREAS* 95 (2013), available at https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/ManagedCoastalRetreat_FINAL_Oct%2030.pdf (citing Mississippi flooding ordinance); Plater, *supra* note 242, at 211–12 (“Physical obstructions of the floodway can severely interfere with local flow characteristics by catching debris and causing upstream ponding, deflections, and scouring.”).

244. See, e.g., ROBERT ESWORTHY ET AL., CONG. RESEARCH SERV., RL 33115, *CLEANUP AFTER HURRICANE KATRINA: ENVIRONMENTAL CONSIDERATIONS* 7 (2006) (“Disaster debris is a highly visible reminder of the scope of a disaster, and debris management accounts for as much as 40% of all disaster-related costs.”).

the height limits in place, sometimes it will mean relaxing the limits to permit elevated buildings, and other times it may mean enacting an outright ban on new development instead of relying on the somewhat ad hoc effects of zoning. The availability of passive takings will not predetermine either the imposition of liability or the government's response to liability. But it does add to the calculation a beneficial symmetry between governmental action and inaction.

A pervasive distributional worry lurks behind this analysis, however. Forcing the government to pay when zoning height limits interact with sea-level rise can effectuate an unappealing transfer of wealth from taxpayers to a small group of beachfront property owners who are probably already well-to-do.²⁴⁵ This is a regressive compensation regime. A more just allocation of burdens and benefits would let the costs of sea-level rise fall on the people who have chosen to—and who can afford to—live directly on the coast.²⁴⁶

The concern can be generalized. The motivation for recognizing passive takings liability is that, when confronted with the costs of inaction, the government will be more likely to act in ways that minimize the overall costs from ecological changes. But there is another possible outcome: the government will continue doing nothing but will also have to pay compensation to discrete groups of property owners sophisticated enough to pursue their claims. The government will then have even less money to address regulatory challenges after paying off the people affected by inaction. Worse still, the compensated property owners may not be appealing beneficiaries of this compensation regime, either because they are likely to be adequately protected in the political process or because they were initially better positioned to avoid the costs of ecological change.²⁴⁷

That is certainly a real concern. But of course, traditional takings liability has exactly the same effect when governments affirmatively regulate to deal with the risk of climate change. Takings liability for rolling easements or other mechanisms for coastal retreat also amounts to a wealth transfer from the public to beachfront property owners. While that reality may well be a policy reason not to offer compensation for regulatory responses to sea-level rise, the Takings Clause nevertheless sometimes compels it. And the point here is simply that no reason exists to treat inaction any differently.

Furthermore, *not* responding to the risk of sea-level rise is also likely to effectuate wealth transfers, but it will simply do so in a more haphazard way. If the risk of traditional takings liability discourages governments from acting at all, then the costs of sea-level rise are likely to be greater in absolute terms and are also likely to be distributed unfairly. Sea-level rise will create relative winners and losers, and no one should pretend that the distribution

245. Of course, not all coastal property owners are well-to-do. Historically, coastal property was less desirable, and in many cities vulnerable populations remain housed on the water.

246. For an argument that the Takings Clause should reflect progressive values and the mechanics of such an interpretation, see Dagan, *supra* note 79.

247. For more on the resulting moral-hazard problem, see *supra* Section III.C.2.

of benefits and burdens resulting from inaction will be any fairer.²⁴⁸ Already, there are myriad examples of inaction burdening the most vulnerable members of society.²⁴⁹

C. Other Contexts for Passive Takings

Once the dynamic at play in passive takings has been identified, it is easy to recognize in other regulatory contexts as well. The purpose in this Section is not to provide a comprehensive treatment of these other claims but instead to suggest the form that they might take in order to demonstrate the potential breadth of passive takings claims. Each particular claim faces complicated problems of proof and is animated by different normative intuitions. Nevertheless, passive takings may arise in many different situations.

Consider, first, intellectual property protection and copyright law in particular. Congress has provided relatively comprehensive protection for fixed works that reflects a general balancing of creators' right to control their works and the public's ultimate interest in gaining access to those works.²⁵⁰ While the statutory regime is hardly static, the form of that compromise has proven remarkably enduring. Creators are given a set amount of time to control their works, subject to exceptions like fair use and satire and subject also to judicially created exceptions.²⁵¹ Taken together, the time limits and exceptions to copyright protection ensure that creators have the opportunity to benefit from their works while providing the public with access to the works (although on limited terms and only after a significant period of time).

As technology speeds ahead, however, copyright law feels increasingly antiquated. The capacity to create and distribute digital copies has made it much more difficult, if not impossible, for creators to preserve their exclusive rights to their works. At the same time, rules that treat loading data into RAM as copies under the Copyright Act dramatically limit purchasers' traditional rights to consume or transfer works in digital formats.²⁵² The result is a largely inadvertent recalibration of the rights of creators and the rights of the public in a system that seems almost anachronistic.

248. E.g., Jeremy Martinich et al., *Risks of Sea Level Rise to Disadvantaged Communities in the United States*, 18 MITIGATION & ADAPTATION STRATEGIES FOR GLOBAL CHANGE 169, 182 (2013) ("The results of this analysis indicate that many socially disadvantaged Americans living in coastal areas are very likely to be disproportionately affected by [sea-level rise]."); cf. J.B. Ruhl, *The Political Economy of Climate Change Winners*, 97 MINN. L. REV. 206 (2012).

249. See, e.g., *Talk of the Nation: Sandy Especially Tough on Vulnerable Populations*, NAT'L PUB. RADIO (Nov. 1, 2012), available at <http://www.npr.org/2012/11/01/164113455/sandy-especially-tough-on-vulnerable-populations> (describing burdens of Hurricane Sandy).

250. See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

251. One exception, for example, is time-shifting television broadcasts that allow people to record shows and watch them later. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 421 (1984) (recognizing time shifting).

252. See, e.g., Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 WM. & MARY L. REV. 1245, 1256 (2001).

In the face of legal inadequacy, creators and their intermediaries have turned to technological and contractual responses to retain control over works.²⁵³ And users have adopted increasingly sophisticated forms of copying—for example, piracy—to skirt those limits. Congress has intervened but only in limited and controversial ways.²⁵⁴ It is possible, however, to imagine that the Takings Clause might require Congress to act. In this quickly changing world, the relatively stable legal regime may result in a fundamental reconfiguration of rights in ways that might generate passive takings claims. Consider the elements of a passive takings claim in turn.

When it comes to copyright, the government is unquestionably complicit in creating the conditions that now threaten property rights. The Copyright Act all but occupies the field, and through it Congress has defined both the reach and limits of protection for creative works.²⁵⁵ If Congress were (improbably) to reduce or eliminate copyright protection for some works, such a move could trigger a takings claim, depending on the nature and extent of the impact on existing rights.²⁵⁶ Under the reasoning of passive takings, there is no reason the government should be immune from liability for a similar impact on existing rights resulting instead from a change in the world.

Failure to adjust copyright does not necessarily constitute a taking, however. The creators—or the public, depending on the claim being pursued—would still have to demonstrate that a permissible governmental response exists that would actually protect their rights and that the difference between that regulatory regime and the current state of affairs rises to the level of a taking. This is no easy feat. For example, current forms of piracy may have become so complex and sophisticated that no regulatory regime is likely to stop the practice. In the absence of a meaningful and impactful regulatory response, there would be no passive taking. But creative lawyers—or subsequent scholarly work—may be able to identify relevant comparators that could make such claims successful.

A similar analysis applies to financial regulations. The two best examples include both a counterfactual historical example and a contemporary one.

For the first—and more intuitive—example, consider the history of Regulation Q.²⁵⁷ Adopted in the 1930s, Regulation Q limited the amount of

253. I thank Daniel Gervaise for formulating the problem in these terms.

254. See The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 103, 112 Stat. 2860, 2863–76 (codified as amended at 17 U.S.C. §§ 1201–05 (2012)).

255. See, e.g., Arthur R. Miller, *Common Law Protection for Products of the Mind: An “Idea” Whose Time Has Come*, 119 HARV. L. REV. 705, 747–49 (2006).

256. Cf. Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 627 (2006); John C. O’Quinn, *Protecting Private Intellectual Property from Government Intrusion: Revisiting Smithkline and the Case for Just Compensation*, 29 PEPP. L. REV. 435, 530 (2002).

257. See Regulation Q, 12 C.F.R. § 217 (2011).

interest that banks were allowed to pay on demand deposits.²⁵⁸ This limit protected banks from competition in the interest rates they were paying and effectively guaranteed them profits on the interest-rate spread that existed for decades.²⁵⁹ That model came under serious pressure, however, when the interest-rate environment changed. With the emergence of new forms of savings accounts, banks lost the ability to compete for depositors, threatening the traditional banking sector.²⁶⁰ In response, Congress began to phase out interest-rate caps and make other savings products available to banks.²⁶¹ Suppose, however, that Congress had not amended Regulation Q. Suddenly, a regulation that had helped banks for decades might have ruined their business. After all, traditional banking relies on the spread between the interest rates of assets and liabilities; with liabilities capped at below-market rates, there would have been no money to be made. This result might have given rise to a passive takings claim.

For a current, if less accessible, example, consider recent regulatory moves that require derivatives to be traded through financial clearinghouses.²⁶² Promoted for the safety and security of the financial system, the regulations put clearinghouses at some risk. But that change, by itself, does not rise to the level of a taking, and indeed the regulations have not yet—and may never—impose a substantial burden. But they might. In fact, Professor Yadav recently warned that derivatives and other hard-to-value securities expose clearinghouses to massive and even devastating losses without providing any real regulatory protection.²⁶³ Clearinghouses are actually the counterparty for each trade, and they are therefore exposed to significant, if generally underappreciated, risks when the trades involve risks in the underlying assets.²⁶⁴ Should those risks materialize, they could threaten either the system of clearinghouses or derivative markets more generally (or both). While initially benign, and perhaps even beneficial, these regulations might eventually result in a taking if there are adverse changes in the financial markets.

258. For a discussion, see, for example, R. Alton Gilbert, *Requiem for Regulation Q: What It Did and Why It Passed Away*, FED. RES. BANK ST. LOUIS REV., Feb. 1986, at 28 (describing the history of Regulation Q). Thanks to Morgan Ricks for suggesting this example.

259. See, e.g., Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. BANKING INST. 221, 238 (2000) (“Because of Regulation Q, banking was not viewed to be a very complicated business in the 1950s. It was claimed that bankers operated on a ‘3-6-3’ rule. This meant that the bankers borrowed money at the Regulation Q interest rate of three percent and loaned the money at six percent. The bankers were then free to play golf by three o’clock, since there was nothing else to do.”).

260. See *id.* at 240–44.

261. *Id.* at 245 n.148.

262. Yesha Yadav, *The Problematic Case of Clearinghouses in Complex Markets*, 101 GEO. L.J. 387, 389 n.2 (2013).

263. *Id.* at 432 (“[C]onfidence in the clearinghouse’s ability correctly to determine the amount of collateral it needs assumes that the clearinghouse can correctly understand the risks it faces and, furthermore, is able to internalize its costs. These assumptions rest on shaky ground.”).

264. See *id.* at 391–93.

Other claims are also easy to imagine. The federal government's complicity in the mortgage markets—with its role in supporting Fannie Mae and Freddy Mac, its comprehensive regulation of federally chartered banks, and its general policies promoting homeownership—might also expose it to passive takings liability for failing to deal adequately with the foreclosure crisis.²⁶⁵ The government's failure to regulate dangerous chemicals, modernize aviation regulation and oversight, or streamline the patent process may all have similar implications.

Again, none of these examples necessarily constitutes a taking. In fact, most probably do not. But Congress and other governmental actors and agencies should not be able to avoid takings liability by relying on artificial distinctions between acts and omissions. If the government's dramatic interventions into financial markets and other areas can trigger takings claims—and they can²⁶⁶—then some failures to intervene should as well.

CONCLUSION

Courts and scholars have long believed that the Takings Clause is implicated only in moments of legal transition. A theory of passive takings—takings that result from legal stability but ecological change—demonstrates that legal change is not necessary to create takings liability. But more than that, passive takings demonstrate that, where property rights are at stake, the Takings Clause may compel the government to protect private property. When the government is sufficiently entangled with the substantive content of property rights, it may be obligated to act. The state's failure to modify its regulatory scheme in the face of harmful ecological change can therefore trigger passive takings liability. Not only is this claim doctrinally plausible but it is normatively desirable. Passive takings can provide an important counterbalance to the threat of traditional takings liability, one that actually encourages efficient decisionmaking and promotes the just distribution of regulatory burdens and benefits.

Sea-level rise provides a compelling example, but now that the category of passive takings has been identified, enterprising scholars and attorneys will no doubt find other places to push the doctrine. Making the government liable for those burdens—at least where all the conditions for passive takings have been satisfied—will encourage the government to act and therefore will create an important counterweight to regulatory intransigence. Property rights—long seen as a bulwark against redistribution and state action—may ultimately provide the strongest doctrinal and normative support for compelling governmental action.

265. See, e.g., David Reiss, *Fannie Mae and Freddie Mac and the Future of Federal Housing Finance Policy: A Study of Regulatory Privilege*, 61 ALA. L. REV. 907 (2010).

266. See David Voreacos, *Greenberg's AIG Bailout Suits Pursue Unique Theories*, BLOOMBERG (Dec. 1, 2011, 7:05 PM), <http://www.bloomberg.com/news/2011-12-01/greenberg-s-audacious-aig-bailout-suits-pursue-unique-theories.html>.