# A RIGHT TO BE REGULATED?

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## INTRODUCTION

"We shouldn't have been allowed to build there in the first place."[1]

This was the assertion of local residents after a massive landslide buried an entire neighborhood in Oso, Washington, reducing the formerly picturesque valley[2] to "a muddy bombing range."[3] Despite heroic efforts of rescuers, the slide claimed the lives of 43 people,[4] prompting inquiries into the state's "apparent failure to protect residents at the base of a known landslide zone."[5]

Sadly, recent floods, hurricanes, and wildfires have also been catastrophic enough to elicit similar reactions.[6] Landowners ask how authorities

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1 Martin Kaste, *Obama to See Effects of Deadly Mudslide in Oso, Washington*, NPR (Apr. 22, 2014) http://www.npr.org/2014/04/22/305814339/obama-to-see-effects-of-deadly-mudslide-in-oso-washington.

2 *See Before and After the Washington Mudslide*, WALL ST. J. (Mar. 25, 2014), http://www.wsj.com/articles/SB10001424052702304679404579461870711140580 (offering before and after pictures).

3 Kaste, *supra* note 1.

4 *See 'So Many People Yelling for Help,'* SEATTLE TIMES (Mar. 28, 2014), http://old.seattletimes.com/flatpages/local/oso-mudslide-coverage.html; *Remembering the Victims of the Oso Mudslide*, SEATTLE TIMES (Mar. 25, 2014), http://old.seattletimes.com/flatpages/local/victimsoftheosomudslide.html.

5 John Ryan & Tony Schick, *Landslide Safety All Over the Map in Washington*, KUOW.ORG (Sept. 30, 2014), http://kuow.org/post/landslide-safety-all-over-map-washington. *See* Jessica Robertson, *Landslide in Washington State*, U.S. GEOLOGICAL SURVEY: SCIENCE FEATURES (Mar. 26, 2014), http://www.usgs.gov/blogs/features/usgs_top_story/landslide-in-washington-state/.

6 *See, e.g.*, Warren Cornwall, *Overwhelming Cause of California Wildfires: Humans*, NAT'L GEOGRAPHIC (May 17, 2014), http://news.nationalgeographic.com/news/2014/05/140517-san-marcos-wildfires-california-weather/ ("One of the thorniest issues around mitigating fires is less resolved—deciding where people should build homes."); *Sandy's Lessons Include: Put Parks, Not Houses, on the Beach*, GEOLOGICAL SOC'Y OF AM. (Oct. 27, 2013), http://www.geosociety.org/news/pr/13-67.htm (noting in the wake of Hurricane Sandy that New York and New Jersey "have a lot of coastal and wetland that never should have been built on"); David Uberti, *Is New Orleans in Danger of Turning Into a Modern-Day Atlantis?*, GUARDIAN (Aug. 24, 2015), http://www.theguardian.com/cities/2015/aug/24/new-orleans-hurricane-katrina-louisiana-wetlands-modern-atlantis ("The great debate after [Hurricane Katrina] centered on whether areas [like New Orleans] at such high risk should be redeveloped at all.").

could fail to protect (or even allow in the first place) development in such high-risk areas.[7]

This is striking not only because of the terrible circumstances but also because it sounds an unusual cry in the context of private property rights. Property owners commonly object to *too much* government interference, claiming that property interests should be less constrained by regulation.[8] However, post-catastrophe assertions of "we shouldn't have been allowed to build there" say just the opposite.[9] Property owners are suggesting that they should have been subject to *more* oversight, restriction, and regulation.

Though in extraordinarily different circumstances, owners of other types of interests may raise conceptually similar appeals for government regulatory action. A licensed taxi driver may protest competition from Uber drivers who are not subject to the same requirements.[10] An inventor may seek assurances that her patent will not be reexamined.[11] A purchaser of carbon credits may oppose changes to the cap-and-trade system in which he has invested.[12] These scenarios involve a wide variety of actors and contexts, but they share a unifying theme. Each posits a protected interest in the government imposing or continuing a regulatory scheme. Each claims a right in regulation.

Along these same lines, two recent lawsuits assert illustrative (if ambitious) theories of such rights in regulation. First, *Lester v. Snohomish County*,[13] a suit arising from the Oso mudslide, claims that residents had property-based rights to be informed, regulated, and even relocated.[14] It asserts that the county is liable for failing to perform such duties despite knowing of catastrophic landslide risks.[15] Similarly, in *Midtown TDR Ventures v.*

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7 *See* John Rudolf et al., *Hurricane Sandy Damage Amplified by Breakneck Development of Coast*, HUFFINGTON POST (Nov. 15, 2012), http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html.

8 *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 385–86 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008–09 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423–24 (1982).

9 Kaste, *supra* note 1.

10 *See infra* Part II.B.4.

11 *See infra* Part II.B.3.

12 *See infra* notes 204–211 and accompanying text.

13 Complaint, Lester v. Snohomish Cty., No. 15-2-02098-6 SEA (Wash. Super. Ct. Jan. 26, 2015) [hereinafter *Lester* Complaint]. At the time of writing, the suit was set for trial in the fall of 2016. *See* Scott North, *Some Claims Against County in Mudslide Lawsuit Dismissed*, HERALDNET (Aug. 18, 2016), http://www.heraldnet.com/news/claims-against-county-regarding-oso-mudslide-dismissed/.

14 *Lester* Complaint, *supra* note 13, at 16–20.

15 *Id.* at 18.

*New York*,[16] a developer claimed a property interest in Grand Central Terminal's transferable development rights worth $1.13 billion.[17] The complaint asserted that New York City owes compensation because of its failure to enforce zoning laws rendered those rights worthless.[18]

Like the scenarios described earlier, these suits assert property rights in government regulatory schemes. But can such claims be colorable? Property is typically described in terms of negative rights (i.e. "freedoms").[19] Can property interests ever include an affirmative right to be regulated?

This Article answers that question and constructs an overarching framework for evaluating asserted rights in regulation. It determines that courts and legislatures actually recognize some property rights in government regulatory actions. Moreover, the Article synthesizes these authorities to create administrable rules for evaluating such claims. In doing so, it also integrates and advances otherwise disparate strands of property scholarship, such as Professor Charles Reich's seminal work on the "new property,"[20] Professor Thomas Merrill's leading article on constitutional property,[21] and Professor Christopher Serkin's notable theory of "passive takings."[22] Altogether, it offers meaningful guidance for courts and scholars addressing rights in regulation.

The Article proceeds as follows: Part I establishes the context for considering rights in regulation by charting the relationship between property expectations and government actions. Part II then examines cases recognizing property rights in regulatory schemes. Part III synthesizes these cases along with relevant scholarship to build a framework for assessing rights in regulation. The framework calls for a reliance inquiry to evaluate physical regulatory interests and a legislative-intent inquiry to evaluate intangible regulatory interests. In addition to establishing this framework, Part III also applies it to analyze claims asserted in recent lawsuits. Finally, Part IV offers a critical evaluation of the framework before recommending it as the best approach for measuring rights in regulation. In doing so, it considers the framework's impacts on private incentives as well as its congruity with broader property principles and the institutional roles of courts and legislatures.

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16 Complaint, Midtown TDR Ventures LLC v. City of New York, No. 1:15-cv-07647 (S.D.N.Y. Sept. 28, 2015) [hereinafter *Midtown* Complaint]. This case was settled in August of 2016, leaving the underlying property question unresolved. *See* David M. Levitt, *SL Green Settles Lawsuit over Grand Central Terminal Air Rights*, BLOOMBERG MARKETS (Aug. 10, 2016), http://www.bloomberg.com/news/articles/2016-08-10/sl-green-settles-lawsuit-over-grand-central-terminal-air-rights.

17 *Midtown* Complaint, *supra* note 16, at 4.

18 *Id.* at 3–4.

19 *See infra* notes 29–33 and accompanying text.

20 *See infra* Part II.A.

21 *See infra* notes 276–278 and accompanying text.

22 *See infra* notes 249–252 and accompanying text.

## I. PROPERTY EXPECTATIONS AND GOVERNMENT ACTION

This Part offers background for considering rights in regulation by discussing how government action fits into property expectations. To do so, it begins with the common approach of exploring property concepts by considering particular rights and duties, which offers a useful lens for examining the link between property expectations and government action.

Both historic and more recent attempts to define the nature of property have employed at least some reference to a catalogue of particular property rights, such as the right to exclude, right to use, right to transfer, and so on.[23] In considering such concepts, some scholars take an essentialist view, suggesting that particular rights, such as the right to exclude, are at the core of property expectations.[24] Others offer non-essentialist accounts that focus not on one particular right but rather on the "bundle" of various rights that constitute property.[25] Nonetheless, either approach ultimately highlights particular rights as important defining aspects of property.

Accompanying such property rights are correlative "duties" owed to the property owner.[26] These duties are the flip side of the particular property rights, and for the rights to be meaningful, these duties must be performed. Frequently such duties constrain other private parties. For example, a property owner's right to exclude generates a duty for other parties not to enter or use the property.[27] Duties are not limited to private parties, however; government entities owe duties as well. For instance, the right to exclude also triggers a governmental duty of non-interference (though for a variety of reasons the parameters of governmental duties may differ from the duties of private parties).[28]

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23 *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 134 (Univ. of Chicago Press 1979) (1765); A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 131 (A.G. Guest ed., 1961); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 971–72 (2000).

24 *See* Merrill, *supra* note 23, at 971.

25 *See, e.g.*, Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980).

26 *See, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–33 (1913).

27 *See* J.E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1997).

28 *See* David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Rights*, 3 WASH. U. J.L. & POL'Y 39, 41–42 (2000); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 735 (1998). For example, a government actor may owe a slightly different duty in regard to the right to exclude than does a private party when police are in hot pursuit of a suspect; *see also, e.g.*, Minnesota v. Olson, 495 U.S. 91, 99–100 (1990).

The governmental duties respecting private property rights are most frequently identified as *negative*, commonly framed as limitations on government action.[29] Thus, analysis of the interplay between property rights and state duties has focused mainly on property owners' freedom from government interference.[30] This is certainly true from the libertarian perspective, which emphasizes freedom from regulation and regards state action as a threat to autonomy-grounded property rights.[31] However, this negative-duty, "freedom-from" approach is hardly limited to the libertarian context. Rather, a major and mainstream project of property law has been to define the bounds of property owners' freedom from government interference.[32] The extensive case law and scholarship on the Fifth Amendment regulatory takings doctrine exemplifies this point.[33] From all different ideological perspectives, such work focuses (and disagrees) on the point at which regulation crosses the line to impermissibly infringe on reasonable property expectations. At its core, the entire enterprise aims to demarcate individuals' property rights and the government's corresponding negative duties.

However, in some instances property rights give rise not only to negative but also to *affirmative* governmental duties. The primary example is state enforcement of private property rights.[34] Essential to any particular property right is the government's duty to enforce that right against those who would infringe upon it.[35] Without enforcement, the system of property would amount to no more than "might makes right," and conceptual property expectations in the right to exclude or the right to use would mean little without

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29 *See* Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346 (2014).

30 *See id.* at 367 ("Property—somewhat like the Constitution itself—has often been viewed as creating a sphere of negative liberty.") (footnote omitted).

31 *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 333–34 (1985); JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 176–77 (Ian Shapiro ed., Yale Univ. Press 2003) (1690); Molly L. Dillon, Comment, *Legislative Expansion of Fifth Amendment "Takings"? A Discussion of the Regulatory Takings Law and Proposed Compensation Legislation*, 15 UCLA J. ENVTL. L. & POL'Y 243, 244 (1996).

32 *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1670–71 (2003); William L. Inden, Comment, *Compensation Legislation: Private Property Rights vs. Public Benefits*, 5 DICK. J. ENVTL. L. & POL'Y 119, 122–25 (1996).

33 *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107 (1978); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–84 (1995).

34 *See* Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948) (identifying enforcement of property laws as state action).

35 *See* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 650 (1988) ("When the state enforces property rights, it enables the owner to exclude others from access to her property. When the state refuses to enforce property rights, it delegates to non-owners the power to take what they need from owners.").

at least the threat of government-enforced remedies.[36] Thus, for the very existence of a stable private property system, property rights must also correlate with affirmative government enforcement duties, and even the libertarian would likely recognize the centrality of such governmental enforcement obligations.[37]

Thus far, this account of rights and duties is unlikely to be controversial.[38] While there are certainly disputes over how much government regulation is acceptable in light of property rights, the proposition that the government owes some negative duties to property owners is widely acknowledged.[39] Similarly, as a general matter, there is little disagreement about the importance of government enforcing property rights.[40] Moreover, to identify this enforcement role as a form of government duty, correlative to individual private property rights, is not particularly provocative. In fact, much property literature proceeds on these premises, if only implicitly.[41]

However, as one considers what other affirmative duties the government owes in regard to property rights, the territory becomes less charted. This is especially true regarding the central focus of this Article: whether property interests may include legally protected expectations in the existence, execution, and/or continuation of regulatory schemes. This question essentially asks the inverse of the typical Fifth Amendment regulatory takings case. The key inquiry for regulatory takings is whether government regula-

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36 *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090–92 (1972) (noting that society must enforce the choice of property entitlements).

37 *See* TERRY L. ANDERSON & LAURA E. HUGGINS, PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM AND PROSPERITY 58 (2009). *But see* EPSTEIN, *supra* note 31, at 5–6 (explaining the libertarian argument that enforcement can exist without government). Whether that is an example of "might makes right" is up for debate.

38 *Cf.* Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 287–88 (2013) (describing recent Supreme Court cases in a similar framework).

39 *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State . . . ."); Serkin, *supra* note 29, at 356 ("Early conceptions of the Constitution interpreted the document as enshrining only negative liberties. . . . 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.") (footnote omitted).

40 Though there are claims that private enforcement can be effective, it comes at the cost of private violence. *See* Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59, 116 (2015) (discussing the violence that results from ill-defined and informal property rights).

41 *See* ANDERSON & HUGGINS, *supra* note 37, at 58; 1 JEREMY BENTHAM, THEORY OF LEGISLATION 145–46 (Charles Milner Atkinson trans., Oxford Univ. Press 1914) (1802).

tion has gone "too far" such that it interferes with a protected property interest and triggers legal protection.[42] The key question for this Article is whether the absence, curtailment, or reduction of regulation can interfere with a protected property interest such that it triggers legal protection. When, as a matter of property rights, can we say that government regulation has *not gone far enough*?

This question of when property rights might include a government duty to regulate is alive and underexplored, but the lack of clarity in this area is not for lack of importance or applicability. Nor is it a purely academic consideration. These are real issues with real money at stake. Regulatory schemes invite specific investment and create substantial value. As a result, the worth of traditional forms of property, such as land, can be inextricably linked with the presence or absence of regulations. Moreover, with the increasing importance of intangible property wholly defined by regulation, such as intellectual property or pollution credits, the clarification of rights in regulation becomes even more compelling.

Given the value at stake, it is thoroughly unsurprising that claims have been made to rights in regulatory schemes.[43] Those benefitting from or relying on regulations will wish (and may even expect as a practical or political matter) for stability in the regulations.[44] Still, not all of such expectations are protected property interests.[45] Some are mere "unilateral expectations."[46] So the question remains: when, if ever, does a property interest include legitimate expectations of a right to be regulated? Part II begins to answer this question by considering cases evaluating such asserted rights.

## II. CASE STUDIES OF ASSERTED OF RIGHTS IN REGULATION

This Part examines case studies of asserted rights in regulation. Section A begins with a brief review of the "new property" scholarship and case law, which recognizes certain rights in regulation as property protected by procedural Due Process.

This Due Process analysis offers insight into rights in regulation, but it only begins the inquiry. This is because the scope of "property" protected by procedural Due Process is more expansive than the scope of "property" protected by the Takings clause.[47] This Article is centrally concerned with the more ambitious assertions that rights in regulation can constitute property

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42 *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

43 *See, e.g.*, Jordan v. St. Johns Cty., 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).

44 *See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

45 *See* Note, *Copyright Reform and the Takings Clause*, 128 HARV. L. REV. 973, 977 (2015) [hereinafter *Copyright Reform*].

46 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

47 *See* Jeremy A. Blumenthal, *Legal Claims as Private Property: Implications for Eminent Domain*, 36 HASTINGS CONST. L.Q. 373, 378 (2009); Merrill, *supra* note 23, at 955–56, 959–60.

interests protected by the Takings clause. Thus, the bulk of this Part, Section B, considers case law and scholarship testing asserted takings-protected rights in regulation.

### A. *Rights in Regulation as Property for Procedural Due Process ("The New Property")*

Foundational to the recognition of property rights in regulation is the principle that statutory or regulatory benefits can constitute protected legal rights.[48] The influential work of Charles Reich on "The New Property" introduced this concept,[49] which has since become a major facet of the Supreme Court's procedural Due Process jurisprudence.[50] The current status of the law is that statutory and regulatory entitlements are considered property rights protected by the Due Process Clause when they have been clearly established by explicit language that guarantees substantive results and limits discretion.[51] The development of this doctrine is instructive in evaluating which rights in regulation might also be seen as Fifth Amendment protected property rights.[52]

In championing entitlements as protected property rights, Reich theorized that the changing nature and needs of society created a right in provision of support, especially for the poor.[53] In Reich's words "[t]he 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."[54] As a matter of social policy, one may agree or disagree with Reich's argument that society has an obligation to provide support for individuals, but an important and durable contribution of Reich's work is that when society has chosen to provide such support, via statute or regulation, that entitlement becomes subject to protection.[55] As Reich put it, "[s]ociety today is built around entitlement . . . [and] [m]any of the most important of these entitlements now flow from

48 *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739 (1964).

49 *See id.*

50 *See Roth*, 408 U.S. at 571–72.

51 *See id.* at 577.

52 *See infra* Part II.B.

53 *See* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1245, 1255 (1965).

54 *Id.* at 1256.

55 *See* Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1684 (1993) ("The new property cases require due process where a person has a legal claim to whatever is to be taken, but the antecedent decision of whether to create such a legal claim lies wholly with the political branches.") (footnote omitted).

government. . . ."[56] As such, Reich argued that such entitlements were not merely a "gratuity" but more a form of legal right.[57]

Following Reich's approach, the Supreme Court has recognized entitlements as new forms of property protected by procedural Due Process. Seminally, in *Goldberg v. Kelly*[58] the Supreme Court recognized a protected legal right in welfare benefits, holding that Due Process required an evidentiary hearing before termination of such financial aid.[59] In reasoning that these benefits were protected as a matter of statutory entitlement, the Court relied on Reich's work, noting that "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"[60] Six years later in *Mathews v. Eldridge*,[61] the Court was even more direct in declaring that entitlements constituted property, stating that "the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment."[62] Ever since, Due Process cases have considered entitlements to be property interests protected by procedural requirements.[63]

In terms of identifying when such protected entitlements exist, the Court declared that mere reliance or "unilateral expectation" is not sufficient to create a protected entitlement interest.[64] Rather, the Court has held that a protected entitlement arises when a regulation contains "'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow."[65] Thus, the procedural Due Process jurisprudence recognizes a constitutionally protected property interest when clear statutory language creates a substantive entitlement.

### B. *Rights in Regulation as Property for Fifth Amendment Takings*

Though they take a narrower view of property than do procedural Due Process cases, takings cases have also recognized protected property rights in regulatory schemes. This subsection examines such cases in the various

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56 Reich, *supra* note 53, at 1255.

57 *See id.* at 1245, 1255–56.

58 397 U.S. 254 (1970).

59 *Id.* at 266.

60 *Id.* at 262 n.8.

61 424 U.S. 319 (1976).

62 *Id.* at 332.

63 *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985); Isaacs v. Bowen, 865 F.2d 468, 475–77 (2d Cir. 1989).

64 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

65 Ky. Dep't of Corrs. v. Thompson, 490 U.S. 454, 463 (1989) (quoting Hewitt v. Helms, 459 U.S. 460, 472 (1983)).

contexts of land, water, intellectual property, taxi medallions, regulated utilities, and grazing permits. Each is considered in turn.

### 1. Land: Disaster, Pollution, and Land Use

Natural disasters and acute pollution events have led to a number of recent claims for rights in regulation.[66] Across a variety of contexts, all essentially claim that owners of real property have protected expectations in government actions or regulations that insulate developments from environmental risks such as storms, floods, pollution, or landslides.[67]

For example, in *Jordan v. St. Johns County*[68] a Florida court held not only that the government has a duty to reasonably maintain its public roads despite recurring storm damage but also that failure to do so could constitute inverse condemnation.[69] This case arose when property owners on a barrier island alleged that the local county had taken their property by failing to maintain a public road.[70] Because the road provided the only vehicular access to the island, the plaintiffs asserted that the lack of maintenance constituted inverse condemnation.[71]

The road at issue was apparently difficult to maintain due to its vulnerable location.[72] Bordered by the Atlantic Ocean on one side and the Intracoastal Waterway on the other, it suffered frequent damage from natural forces such as storms and erosion.[73] Nonetheless, the court held that the county had a duty to reasonably maintain the road unless the county formally abandoned it as a public road.[74] Moreover, the court held that failure to perform this duty could give rise to a colorable claim for inverse condemnation by depriving the plaintiffs of access to their property without compensation.[75]

As a result, the court effectively held that the plaintiffs had a protected property interest in the government maintenance of the road. The court did not premise its conclusion on any statutory directive; rather it grounded this private right and government duty in the plaintiffs' property expectations on the island.[76] For example, the court described the government's duty as one

66 *See Lester* Complaint, *supra* note 13, at 19; Complaint for Declaratory and Injunctive Relief at 23–24, Mont. Elders for a Livable Tomorrow v. U.S. Office of Surface Mining, No. 9:15-cv-00106-DWM (D. Mont. Aug. 17, 2015), 2015 WL 4924552.

67 *See id.*

68 63 So. 3d 835 (Fla. Dist. Ct. App. 2011).

69 *Id.* at 839.

70 *Id.* at 836–37.

71 *Id.* at 839.

72 *Id.* at 837.

73 *See id.*

74 *Jordan*, 63 So. 3d at 838.

75 *Id.* at 839.

76 *See id.* at 838–39.

of "afford[ing] meaningful access."[77] Additionally, the court stressed the reliance interests of the property owners, noting that when the county took title to the road (which was deeded from the state) "there were already a few beachfront homes and several platted lots abutting the road" and that subsequently "[t]he County issued a number of building permits over the years, and several additional beachfront homes were built."[78]

Courts have found similar private rights and government duties in cases arising from flood damage. In one recent case, *St. Bernard Parish Government v. United States*,[79] the court held that the United States owed compensation to property owners because allowing foreseeable flooding following Hurricane Katrina constituted a taking of property.[80] Here the plaintiffs alleged that through the construction, operation, and neglect of the Mississippi River Gulf Outlet navigation channel ("MR-GO"), the U.S. Army Corps of Engineers ("USACE") caused "inevitably recurring" floods during major storms.[81] The plaintiffs asserted that this constituted a compensable taking, and the court agreed.[82] It held that the "construction, expansions, operation, and failure to maintain the MR-GO" ultimately caused flooding on plaintiffs' properties and thereby created a temporary taking of property.[83] The court stressed that USACE was aware that the expanded and eroded MR-GO (which the USACE had discussed closing) was a "ticking time bomb" that would cause foreseeable flooding.[84] The court also noted that the USACE's actions created a form of public assurance of safety from flooding, thereby creating reasonable investment-backed expectations for the plaintiffs even though they were in a floodplain.[85] Finally, the court stressed that the USACE took no action to update the public about known risks of increased flooding and potential catastrophe.[86]

In emphasizing that the taking arose from the USACE's lack of action to deal with the MR-GO "time bomb," the court effectively held that the government had a duty to act. Thus, by extension, the court recognized that the plaintiffs had a protected right in this government flood prevention. The court also implied that the government had a duty to warn, and thus that the property owners had a protected right to be warned. In recognizing such rights,

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77 *Id.* at 838.
78 *Id.* at 837.
79 121 Fed. Cl. 687 (Fed. Cl. 2015).
80 *Id.* at 746.
81 *Id.* at 690–91.
82 *See id.* at 746.
83 *Id.*
84 *Id.* at 747.
85 *See St. Bernard Par. Gov't*, 121 Fed. Cl. at 720.
86 *Id.*

the court did not cite any legislative language or intent to create such interests. Rather it considered these rights to government maintenance and warning to be part of the property owners' reasonable expectations in the land.[87]

Similar to *St. Bernard Parish*, a California case, *Arreola v. County of Monterey*,[88] found government actors liable for inverse condemnation as a result of flooding from a breached levee project.[89] In this case, the plaintiffs sued a variety of state and local government entities, claiming that failure to maintain a river-levee system caused flooding and thus constituted a compensable taking of property.[90] In particular, the plaintiffs asserted that the failure to clear brush and sandbars from the levee system increased the flooding risk and that this risk was known to the government entities.[91] In affirming the judgment for the plaintiffs, the court held that such government "action—or inaction—in the face of that known risk[,]" was sufficient to give rise to inverse condemnation liability.[92] Thus, *Arreola*, like *St. Bernard Parish*, essentially recognized a property right in government maintenance of a flood control project. Moreover, in reaching this holding the court relied extensively on California case law and property owners' expectations rather than on any statutorily imposed obligation.[93] Particularly, the court cited prior precedent to establish that government actors could be liable for flood control project failure because "adjoining landowners *rely* on the protection [the project] was built to provide."[94]

Finally, an ongoing Maryland case, *Litz v. Maryland Department of the Environment*,[95] recognized property rights in government pollution protection.[96] Ms. Litz asserted that governmental failure to address sewage pollution constituted inverse condemnation of her property, and the court held this allegation sufficient to state a claim.[97] The claim arose when a town's failing sewage system contaminated a lake on Ms. Litz's property, making it unsafe for its commercial use as a campground.[98] Ms. Litz claimed that this prevented her from operating her campground business and left her unable to

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87 *See id.*

88 99 Cal. App. 4th 722 (Cal. Ct. App. 2002).

89 *Id.* at 730. For a recent similar holding, see Pac. Shores Prop. Owners Ass'n v. Dep't of Fish & Wildlife, 244 Cal. App. 4th 12, 19 (Cal. Ct. App. 2016) (finding state agency liable for inverse condemnation based on a reduction in flood protection).

90 *Arreola*, 99 Cal. App. 4th at 731–32.

91 *Id.* at 734.

92 *Id.* at 744, 747.

93 *See id.* at 739–44.

94 *Id.* at 747-48 (emphasis added) (citing Belair v. Riverside Cty. Flood Control Dist., 764 P.2d 1070, 1080–81 (Cal. 1988)).

95 76 A.3d 1076 (Md. 2013), *aff'd*, 131 A.3d 923 (Md. 2016).

96 *Id.* at 1095.

97 *Id.*

98 *Id.* at 1080–81.

pay the mortgage on the property, ultimately leading to her losing the property through foreclosure.[99] As a result, Ms. Litz filed a lawsuit alleging that the government's failure to adequately address the sewage contamination constituted a taking of her property.[100]

The trial court initially dismissed the claim as time barred, but in 2013, Maryland's highest court reversed the dismissal.[101] In doing so, the court summarized Ms. Litz's takings claim as follows: "[a]s a result of the failure of the [defendants] to address severe pollution problems, Lake Bonnie is now polluted, the [c]ampground has been destroyed, and [her] property has been substantially devalued"[102] thereby "[taking] from Litz the effective and reasonable use of her property without having formally instituted condemnation proceedings . . . ."[103] By reinstating the claim and suggesting that it was colorable, the court implicitly endorsed the premise that the government owed some affirmative duty to effectively regulate pollution, and that Ms. Litz had a protected property right in the execution of that duty. The court's opinion did not ground this right and duty in any express legislative direction; rather it seemed to base it on Ms. Litz's expectation in "the effective and reasonable use of her property."[104]

In 2016, Maryland's highest court again considered Ms. Litz's case, this time directly addressing the adequacy of her complaint.[105] Consistent with its earlier indication, the court held that Ms. Litz had sufficiently stated a claim for inverse condemnation "by alleging that the failure of [the defendants] to address the pollution and sewage problems led directly to the substantial devaluing of her property and its ultimate loss."[106] Acknowledging that Ms. Litz's claim did not fit into a traditional takings framework because it was premised on government inaction rather than action, the court nonetheless held that under Maryland law a plaintiff may sufficiently plead inverse condemnation by alleging a governmental "failure to act, in the face of an affirmative duty to act."[107] The court went on to hold that Ms. Litz had sufficiently pled that the government had a duty to act "to abate a known and longstanding public health hazard" that was impacting her property.[108] Though the court cautioned that further proceedings would be necessary to resolve whether the government in fact owed such a duty, it stated that "it is not frivolous to hypothesize that state, county, and municipal agencies may have duties to step in to protect the public health."[109] All told, Maryland's

99 *Id.* at 1081.

100 *See id.*

101 *Litz*, 76 A.3d at 1095–96.

102 *Id.* at 1081.

103 *Id.* at 1095.

104 *Id.*

105 Litz v. Md. Dep't of the Env't, 131 A.3d 923, 928–29 (Md. 2016), *aff'g* 76 A.3d 1076 (Md. 2013).

106 *Id.* at 929.

107 *Id.* at 931.

108 *Id.* at 934.

109 *Id.*

highest court twice approved a claim that ownership of real property also included an interest in government pollution regulation and that failure to execute such pollution control could constitute a compensable taking of property.

2. Water Regime Continuity

Cases over changes to state water laws have also recognized rights in the continuation of regulatory schemes. Specifically, in some instances where states have altered their water rights laws, courts have recognized protected property interests in the continuing structure of the state water law regime itself, apart from any quantifiable interest in the actual water.[110] For example, when the Oklahoma legislature attempted to change its water law system, the Oklahoma Supreme Court recognized a protected interest in the preexisting system.[111]

To understand the Oklahoma case requires delving briefly into the state's water law history. Oklahoma's water law system began in 1890 when Oklahoma's territorial legislature statutorily adopted the common-law riparian rights doctrine.[112] Under the common-law riparian regime, the owner of land bordering a watercourse (i.e., a "riparian" tract) held, as part of the right in land, the right to make reasonable use of water, regardless of whether that use was recent or longstanding.[113] Such a riparian right created a usufructuary interest in the reasonable use of water, but all other riparians also had the same interest.[114] Thus, any water use was subject to other riparian owners' reasonable uses, making the water right neither exclusive, constant, nor quantifiable.[115]

110 *See* 1 JOSEPH W. DELLAPENNA, WATERS AND WATER RIGHTS § 8.03(a) (Robert E. Beck, ed., 2001). There are also instances in which states have changed their water law regimes and courts have found no protected interest in the former regime. *See id.* § 8.03(b)(1)–(3); *cf.* Joseph W. Dellapenna, *Riparian Rights in the West*, 43 OKLA. L. REV. 51, 53–60 (1990) (discussing the adoption of riparian rights by state courts over the prior appropriation doctrine).

111 Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 570–71 (Okla. 1990). The Oklahoma Court's treatment stands as a particularly notable example, but other jurisdictions have also protected riparian rights from legislative attempts to extinguish them. *See* Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 989 (Cal. 1935) (holding unconstitutional under the California state constitution legislation deeming certain unused riparian rights to be abandoned and thereby extinguished provided for their complete extinction). *But see In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656, 669 (Cal. 1979) (holding that state could limit unused riparian rights to promote the reasonable and beneficial use of state waters).

112 *Franco-Am. Charolaise*, 855 P.2d at 572.

113 *Id.*

114 *Id.* at 573.

115 *Id.*

In 1897 the Oklahoma legislature complicated matters by adopting the prior appropriation doctrine as an additional component of its water law.[116] In contrast with the riparian doctrine, under the prior appropriation doctrine the right to use water is not attached to land ownership but rather arises from the diversion and beneficial use of water.[117] Moreover, older ("senior") appropriations have priority over newer ("junior") ones.[118] As a result, Oklahoma law embraced two seemingly inharmonious water doctrines, and the legislature finally attempted to reconcile the issue in 1963 by amending the riparian doctrine.[119]

The 1963 amendment protected pre-existing riparian and prior appropriation uses, but it imposed some limitations on future riparian uses.[120] Specifically, future riparian uses were entitled to extensive "domestic uses,"[121] but beyond that, riparian owners would have no particular rights.[122] Rather, like all other would-be water users, they would be required to obtain an appropriation.[123]

This amendment had little practical effect on actual water use. The pre-amendment common-law riparian right did not guarantee any set amount of water; it promised only a reasonable amount, typically favoring domestic uses in times of shortage.[124] After the amendment, domestic uses would still have been protected, and all other existing uses were still protected.[125] Thus, the only change was to potential, unexercised riparian rights that went beyond domestic use. As such, the only water impacted was the hypothetical, as-of-yet-unused, non-domestic riparian uses (which would still be potentially limited by other riparians' reasonable uses).

Nonetheless, the amendment was the basis for a successful claim that changing the riparian doctrine without compensating riparian owners violated the Oklahoma constitution.[126] Specifically, in *Franco-American Charolaise v. Oklahoma Water Resources Board*,[127] the Oklahoma Supreme Court held that as a matter of Oklahoma law "the Oklahoma riparian owner enjoys a vested common-law right to the reasonable use of the stream. This right is a valuable part of the property owner's 'bundle of sticks' and may not be

116 *Id.* at 572.

117 *Id.* at 585.

118 *Franco-Am. Charolaise*, 855 P.2d at 580–81, 585.

119 *Id.* at 572–73.

120 *See id.* at 573.

121 *Id.* These domestic uses included "household purposes, . . . watering of domestic animals up to the land's grazing capacity, . . . the irrigation of land up to a total of three acres[,]" as well as storage of a two-year water supply for these uses. *Id.* (footnote omitted).

122 *Id.*

123 *Id.*

124 *See Franco-Am. Charolaise*, 855 P.2d at 572.

125 *See id.* at 573.

126 *Id.* at 571.

127 855 P.2d 568 (Okla. 1990).

taken for public use without compensation."[128] In reaching this holding, the court conceded the inchoate nature of future riparian rights as unquantifiable, nonexclusive, and merely usufructuary.[129] Nonetheless, the court considered these riparian rights a protected property interest under Oklahoma law.[130]

By protecting a conceptual right so detached from the physical water at issue, the Oklahoma court essentially recognized a protected right in the water regime. It found a protected property interest in the riparian water law structure itself, rather than in any particular quantity of water.

In reaching this conclusion, the court's reasoning stressed reliance, expectation, and value as the important factors for defining property.[131] For example, the court emphasized that the riparian doctrine constituted a "*vested* common-law right,"[132] as well as a "*valuable* part of the . . . bundle of sticks."[133] Moreover, the Oklahoma court noted that protected property included "every *valuable* interest which can be *enjoyed* and *recognized* as property."[134] In this analysis, the court never examined legislative intent nor did it look for clear language creating or amending rights. Rather it reached its decision based on the vested expectations in the riparian regime.[135]

### 3. Patents and Copyrights

Patents and copyrights, which are exclusive interests created entirely by federal statutes, may represent the most established (and the most valuable) example of rights in regulation.[136] However, their status as compensable property rights was unsettled for some time.[137] Recently, though, the Supreme

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128 *Id.* at 571 (footnote omitted).

129 *Id.* at 573. As the dissent puts it, "[the majority] wholly ignores the virtually admitted fact that neither riparians or appropriators *own* the water they are being allowed to use." *Id.* at 583 (Lavender, J., concurring in part, dissenting in part).

130 *Id.* at 576. Oklahoma law at the time included as protected property "easements, personal property, and every valuable interest which can be enjoyed and recognized as property." *Id.* (emphasis omitted) (quoting Graham v. City of Duncan, 354 P.2d 458, 461 (Okla. 1960)).

131 *See id.* at 577–78.

132 *Id.* at 571 (emphasis added).

133 *Franco-Am. Charolaise*, 855 P.2d at 571 (internal quotations omitted) (emphasis added).

134 *Id.* at 576 (emphasis added) (quoting *Graham*, 354 P.2d at 461).

135 *See id.* at 576–78.

136 *See* McClurg v. Kingsland, 42 U.S. 202, 206 (1843); *Copyright Reform*, *supra* note 45, at 983.

137 *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 233 (2002) (stating that "[t]he application of the Takings Clause to intellectual property—trademarks, copyrights and patents—has not yet been seriously tested in the courts"); Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 529 (1998) ("[T]he law of takings with regard to *intellectual* property can only be characterized as a muddle . . . ."); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 690 (2007) ("Modern takings and intellectual property scholarship concludes that this question

Court has clarified the protected status of patents, and that reasoning likely extends to copyrights as well.[138] In both instances, the legislative intent in creating the interest appears to be the determinative factor for takings protections.[139]

For example, in *Horne v. Department of Agriculture*,[140] the Supreme Court seems to have settled that patents are protected property under the Takings Clause.[141] Though the case concerned an alleged taking of raisins rather than patents, the Court endorsed the protected status of patents as part of its reasoning that personal property enjoys the same takings protections as real property.[142] Specifically, the Court quoted its 1882 decision in *James v. Campbell*,[143] for the following proposition: "[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser."[144]

This reasoning premises the protection of patents on the nature of the interest *conveyed* rather than on the reliance upon that interest. By equating the title conferred in an intellectual-property patent with the title conferred in a land patent, it suggests that intellectual-property patents are protected because they reflect legislative grants of the same *irrevocable* exclusive rights that accompany title to land.[145] Thus, by premising protection on the nature of the right conveyed, the Court implicitly premises protection on the statutory language defining the right conveyed. Legislative intent (via legislative definition of the interest) is the ultimate touchstone for finding the protected interest. The statutory language declares, "patents shall have the attributes of personal property,"[146] and this grant of an irrevocable interest forms the ultimate basis of patents' protected status.[147]

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[of whether patents are constitutional private property] is novel, and its answer uncertain.") (footnote omitted).

138 *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427 (2015).

139 *Id.* at 2426–27.

140 135 S. Ct. 2419 (2015).

141 *See id.* at 2427.

142 *Id.*

143 104 U.S. 356 (1882).

144 *Horne*, 135 S. Ct. at 2427 (internal quotations omitted) (quoting *James*, 104 U.S. at 358).

145 *See Horne*, 135 S. Ct. at 2427. After all, "patents" broadly defined are merely a form of legislative grants of title. *See James*, 104 U.S. at 357–58.

146 35 U.S.C. § 261 (2012). *See also* John C. O'Quinn, *Protecting Private Intellectual Property from Government Intrusion: Revisiting* Smithkline *and the Case for Just Compensation*, 29 PEPP. L. REV. 435, 501–02 (2002) (discussing how patents display the attributes of personal property, including the important right to exclude).

147 O'Quinn, *supra* note 146, at 503. Since patents are protected property interests, they can be subject to takings claims alleging that regulation creates a regulatory taking by going "too far" in infringing upon these rights. For examples of scholarship essentially asking whether changes to particular details of patent regulations go "too far," *see generally id.* at 513–15 (arguing that though the 1984 Hatch-Waxman

Though no case has expressly addressed the status of copyrights, the same reasoning (and the bulk of scholarly opinion) suggests that they are protected as well.[148] The Copyright Act expressly precludes government action to "seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright."[149] Thus, the act confers an interest and expressly limits the government's ability to revoke it without compensation.[150] This is the very definition of takings-protected property.

#### 4. Taxi Medallions

Another commonly asserted right in regulation is in taxicab medallions.[151] Many cities control the number of taxis that may operate by requiring all taxis to have a particular license, commonly termed a "taxi medallion."[152] Due to the limited supply, these medallions can become quite valuable, sometimes selling for more than a million dollars each.[153] Given the value involved, the protection of taxicab medallions has received a fair bit of attention,[154] and the emergence of competition through ride services such as Uber and Lyft has rekindled controversies over medallions as property.[155]

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Act modified some aspects of patent holders' rights to exclude others and impacted patents' values, this did not sufficiently interfere with the right to create a compensable taking); Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 WASH. & LEE. L. REV. 719, 721 (2016) (arguing that the America Invents Act effects a taking by altering regulatory procedures for assessing the validity of patents and thereby reducing patents' value).

148 *See Copyright Reform*, *supra* note 45, at 982 (summarizing authority).

149 17 U.S.C. § 201(e) (2012).

150 *See Copyright Reform*, *supra* note 45, at 986-91 (2015) (arguing that while Congress has unlimited power to prospectively alter copyright protections, nevertheless a retroactive shortening of the term of copyright protections might raise constitutional takings issues for older copyrights that would immediately lose substantial value); Serkin, *supra* note 29, at 402 ("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.").

151 *See* Tom W. Bell, *Copyright Porn Trolls, Wasting Taxi Medallions, and the Propriety of "Property"*, 18 CHAP. L. REV. 799, 803 (2015). The same reasoning that applies to taxi medallions can also be applied to other valuable licenses. *See also* United States v. Locke, 471 U.S. 84, 104–05 (1985) (concerning certain mining claims); Mitchell Arms, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993) (concerning licenses to deal in assault weapons); Leafer v. State, 104 So. 2d 350, 351 (Fla. 1958) (concerning liquor licenses).

152 *See, e.g.*, Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 127 (2013).

153 *See id.*

154 For examples of relatively recent papers on the issue, *see generally* Bell, *supra* note 151; Steve Oxenhandler, Comment, *Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest*, 27 TRANSP. L.J. 113 (2000); Wyman, *supra* note 152 .

155 *See* Bos. Taxi Owners Ass'n, Inc. v. City of Bos., 84 F. Supp. 3d 72, 75 (D. Mass. 2015).

As courts and commentators have observed, the protected status of medallions depends on the exact contours of a particular jurisdiction's taxicab regulations.[156] Legislative intent is the crucial factor for determining whether medallions constitute protected property, with courts uniformly rejecting medallion holders' reliance expectations as a measure for establishing compensable rights.[157] In fact, most courts have indicated that protected property interests exist only if clear legislative language establishes irrevocable rights in the medallions.[158] Some commentators have suggested that implied legislative intent might also suffice,[159] but recent cases have rejected claims based on anything less than expressly unalterable rights.[160] Given this exacting standard, most cities' taxi medallions are not considered protected property interests.[161]

For instance, *Joe Sanfelippo Cabs Inc. v. City of Milwaukee*[162] recently concluded that Milwaukee taxi medallions are not protected property.[163] In this case, Milwaukee removed its cap on the number of taxis operating in the city, and medallion holders alleged that this destroyed the value of their medallions.[164] Thus, they claimed a Fifth Amendment taking of property.[165] In support of this claim, the plaintiffs attempted to show implied intent to create property rights.[166] They pled that "the City guaranteed that the cap . . . would never be removed," that the relevant ordinance stated "no new passenger vehicle permits for taxicabs may be issued," that local aldermen had avowed that "the ordinance was intended to create 'a property right in a public sense,'" and that "City employees[] represent[ed] that the City would no longer issue permits."[167]

Despite these claims, the court concluded that the plaintiffs had no property interest in the medallions.[168] The court reasoned, "because the City has always maintained control over the permits, plaintiffs at best had a unilateral

156 *See* Oxenhandler, *supra* note 154, at 132; Wyman, *supra* note 152, at 136–37. For an interesting discussion of whether taxi medallions are considered property of the issuing city and thus can support an indictment for main fraud in misappropriating medallions, see United States v. Turoff, 701 F. Supp. 981, 985 (E.D.N.Y. 1988).

157 *See Bos. Taxi Owners Ass'n*, 84 F. Supp. 3d at 79.

158 *See* Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 148 F. Supp. 3d 808, 811-14 (E.D. Wis. 2015); Oxenhandler, *supra* note 154, at 116–17.

159 *See, e.g.*, Oxenhandler, *supra* note 154, at 152; Wyman, *supra* note 152, at 128-29.

160 *See Joe Sanfelippo Cabs*, 148 F. Supp. 3d at 811–14.

161 Oxenhandler, *supra* note 154, at 132.

162 148 F. Supp. 3d 808 (E.D. Wis. 2015).

163 *Id.* at 814.

164 *Id.* at 810–11.

165 *Id.* at 811.

166 *Id.* at 812.

167 *Id.*

168 *Joe Sanfelippo Cabs*, 148 F. Supp. at 812.

expectation that the City would not diminish the market value of the permits."[169] Additionally, the court specifically rejected the plaintiffs' argument regarding the City's implied intent to treat the medallions as property, instead stressing that no clear language limited the legislature's flexibility to amend the statutes and modify rights.[170]

Another recent case, *Boston Taxi Owners Association, Inc. v. City of Boston*,[171] reached a similar result.[172] The case arose when Boston taxicab medallion owners sued the city, alleging that Boston's failure to enforce taxi regulations against Uber and Lyft constituted a taking of property.[173] The court reasoned that since no legislative language limited the government's ability to alter the medallions, they could not be considered protected property.[174] Moreover, the court emphasized that medallion holders' reasonable investment-backed expectations were insufficient to create "an unalterable monopoly" or to guarantee that regulations would not change.[175]

### 5. Regulated Utilities and Deregulatory Takings

Regulated utilities' assertion of "deregulatory takings" liability offers another instance of a property right claimed in regulation.[176] The background for the deregulatory takings theory comes from the regulatory schemes governing "network industries" such as electrical generation and transmission utilities, natural gas pipelines, or land-line telephone utilities.[177] Because of the high cost of entry into these infrastructure-heavy industries, they were

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169 *Id.*

170 The court reasoned as follows:

> The argument that the language of the ordinance together with selected statements of City representatives amounted to an irrevocable promise that the City would never issue another taxicab permit or amend its transportation regulations so as to devalue taxicab permits in the commercial market is without merit. A statute is not a commitment by the legislature never to repeal the statute. . . . To treat statutes as contracts would enormously curtail the operation of democratic government. Statutes would be ratchets, creating rights that could never be retracted or modified without buying off the groups upon which these rights had been conferred.

*Id.* at 812–13 (internal citations and quotations omitted).

171 84 F. Supp. 3d 72 (D. Mass. 2015).

172 *Id.* at 79–80.

173 *Id.* at 77.

174 *Id.* (citing Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis, 572 F.3d 502, 509 (8th Cir. 2009)). *See also* Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 273–74 (5th Cir. 2012).

175 *Boston Taxi Owners Ass'n*, 84 F. Supp. 3d at 80 (quoting *Minneapolis Taxi Owners Coal*, 572 F.3d at 508). The court also cited precedent that a lack of enforcement or inaction could not constitute a taking. *Id.*

176 *See* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 855 (1996).

177 *See id.* at 857–58.

considered natural monopolies and thus subject to price-control regulations.[178] Under these regulatory schemes, the "regulated utilities" were forced to bear certain burdens. For example, they were subject to rate setting that limited their earnings and were obligated to serve all customers in a defined area.[179] In return they received benefits, primarily in the form of protection from competition via regulatory restrictions on entry into the market.[180] Proponents of the deregulatory takings theory term this arrangement the "regulatory contract."[181]

The deregulatory takings claims arise from regulatory changes that allegedly break this regulatory contract, typically by allowing competition to enter the markets.[182] The assertion is that such deregulatory changes strip the regulated utilities of value and thereby effectuate a taking.[183] The utilities argue that because they have made regulation-specific investments in reliance on a regulatory structure and suffer harm from the deregulation, the government should compensate them for the costs associated with transitioning from the regulated monopoly to the more competitive market.[184]

In making this argument for compensation, the deregulatory takings theory essentially asserts a right in regulation. It posits that regulated utilities have some compensable property interest in their particular regulatory structures. The deregulatory takings theory also identifies the origins of this right, arguing that the key components for establishing a protected property interest are 1) the existence of a regulatory contract and 2) investment-backed reliance on the regulatory scheme.[185] In terms of the first component, the existence of a regulatory contract, the initial proponents of deregulatory takings theory suggest that it can be implied.[186] However, subsequent commentators,

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178 *See id.* at 857.

179 *Id.* at 857, 909–13.

180 *Id.* at 857–58, 907–09.

181 *Id.* at 857.

182 *See* Sidak & Spulber, *supra* note 176, at 858.

183 *See id.*

184 *See id.* at 861–62.

185 *See id.* at 995–97 ("Four conditions appear to be both necessary and sufficient for a deregulatory taking: the existence of a regulatory contract, evidence of investment-backed expectations, the elimination of franchise protections, and a decline in expected revenues."). For purposes of this discussion, I focus my analysis on the first two conditions because they most diretly concern whether a regulated utility can establish a protected property interest in a regulatory contract. I do not address the third and fourth conditions because they focus on the subsequent questions of whether, assuming that there is a protected property interests, there has there been a government action ("elimination of franchise protection") that interferes with the interest substantially enough to eliminate significant value and create a taking ("decline in expected revenues").

186 *See id.* at 888.

such as Baumol and Merrill[187] and Rossi,[188] have convincingly marshaled Supreme Court precedent indicating that creation of any such protected expectation requires an "unmistakable" clear statement by the legislature.[189] Such precedent indicates that protected property interests in regulatory contracts are premised on legislative language rather than on reliance and, therefore, are less extensive than its champions claim.[190] Nonetheless, even critics of the deregulatory takings theory acknowledge that there is some support for a claim when there exists unmistakable legislative intent to create a compensable interest in a regulatory scheme.[191]

#### 6. Grazing Permits, Fisheries Catch Shares and Pollution Trading Programs

Finally, grazing permits, fisheries catch shares, and pollution trading programs all illustrate instances where, despite the trappings of property and heavy reliance interests, asserted rights in regulation do not arise to protected property rights because of legislative disclaimers.

The federal grazing permit program offers a well-developed and well-studied example. Under the program, ranchers may pay a fee and obtain permits to graze their livestock on federal public lands.[192] The expectation and reliance interests in these permits are of the level associated with private property. For example, though the permits are of limited duration, they "have been and are renewed so reliably that banks customarily capitalize the permits' value into the ranches to which they are adjacent."[193] Moreover, even though federal officials can reduce grazing allotments when necessary,[194] conservation efforts have used permit buyback systems instead of regulatory changes to reduce grazing intensity.[195] Thus, as Bruce Huber has observed, such permits "are treated more or less as though they were protectable property interests."[196]

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187 William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037, 1045 n.30 (1997).

188 Jim Rossi, *The Irony of Deregulatory Takings*, 77 TEX. L. REV. 297, 309 (1998) (reviewing J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States (1997)).

189 *See* Baumol & Merrill, *supra* note 187, at 1045–47; Rossi, *supra* note 188, at 309.

190 *See* Baumol & Merrill, *supra* note 187, at 1045–46; Rossi, *supra* note 188, at 309–10.

191 *See* Baumol & Merrill, *supra* note 187, at 1047; Rossi, *supra* note 188, at 304–06, 309–11.

192 43 U.S.C. § 1752(a) (2012).

193 Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1005 (2014) (footnote omitted).

194 43 U.S.C. §§ 1732(c), 1752(a) (2012).

195 Mark Fina & Tyson Kade, *Legal and Policy Implications of the Perception of Property Rights in Catch Shares*, 2 WASH. J. ENVTL. L. & POL'Y 283, 317 n.164 (2012).

196 Huber, *supra* note 193, at 1001.

Nonetheless, federal law explicitly disclaims property rights in grazing permits, stating "the creation of a grazing district or the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands."[197] Moreover, courts have repeatedly held that grazing permits are not protected property interests, rejecting reliance-based arguments and citing "congressional intent that no compensable property right be created . . . ."[198] Courts have noted that "[a]lthough the permit may have value to plaintiffs . . . value itself does not create a compensable property right, no matter how seemingly unjust the consequences to the plaintiffs."[199]

Fisheries catch shares offer another example of interests in regulatory schemes that legislatures have explicitly disclaimed as protected property rights. Catch share programs are created by fisheries regulations that establish total catch limits for fish stocks and then allocate shares of the catch limit to individuals or groups of fishermen.[200] Such catch shares have many of the attributes of property: they convey an exclusive right, they exist for defined terms, they are purchased at auction, they are transferable, and they can serve as collateral for federal loans.[201] However, the Magnuson-Stevens Act explicitly disclaims any compensable property rights in these catch shares, declaring that they "may be revoked, limited, or modified at any time" and "shall not confer a right of compensation."[202] Though no court has yet addressed the issue, this disclaimer makes it highly unlikely that they would receive takings protection.[203]

Finally, pollution-trading programs also create valuable regulatory interests but specifically disclaim the creation of any property rights.[204] These pollution-trading (or "emissions-trading") programs operate as follows:

> First, the government establishes a liability regime that requires regulated parties to hold emissions permits. Second, the government creates a limited or otherwise fixed supply of tradable emissions permits. Third, the government freely allocates or auctions these permits to private parties.[205]

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197 43 U.S.C. § 315b (2012).

198 United States v. Fuller, 409 U.S. 488, 494 (1973); Hage v. United States, 51 Fed Cl. 570, 586–87 (Fed. Cl. 2002) (discussing relevant precedents).

199 *Hage*, 51 Fed Cl. at 587 (quoting Hage v. United States, 35 Fed. Cl. 147, 169 (Fed. Cl. 1996)).

200 *See* Northwest Fisheries Science Center, *Catch Shares*, https://www.nwfsc.noaa.gov/research/hottopics/catchshares.cfm (last visited Sept. 21, 2016).

201 *See* Fina & Kade, *supra* note 195, at 314–18.

202 Magnuson-Stevens Act, Pub. L. No. 94-265, 90 STAT. 331 (1976) (codified as amended at 16 U.S.C. § 1853a(b)(2)–(3) (2012)).

203 *See* Fina & Kade, *supra* note 195, at 314.

204 *See* U.S. ENVTL. PROT. AGENCY OFFICE OF AIR AND RADIATION, EPA430-B-03-002, TOOLS OF THE TRADE: A GUIDE TO DESIGNING AND OPERATING A CAP AND TRADE PROGRAM FOR POLLUTION CONTROL 3-23 (2003), https://www.epa.gov/sites/production/files/2015-06/documents/tools.pdf.

205 Danny Cullenward, Property Rights and Transparency in California's Carbon Market 12 (Aug., 2014) (manuscript on file with author).

These permits ("pollution credits") convey interests such as rights to exclude, possess, and transfer,[206] and commentators have argued that they have all the elements of property.[207] Nonetheless, legislatures have disclaimed any protected property rights in these programs.[208] As energy economist and attorney Danny Cullenward has observed, "[a]ll significant emissions trading programs in the United States specif[y] that the emissions permits they create are not property rights as a legal matter."[209]

Again this express disavowal of property protection appears at odds with reliance interests,[210] and it has drawn criticism for lowering the value of emissions rights, undermining the effectiveness of these markets, and reducing investment in pollution reduction.[211] Nonetheless, the legislative intent appears clear, and if the treatment of similar language in the grazing permit context is any indication, the legislative intent will preclude courts from recognizing compensable rights in pollution credits.

## III. BUILDING A FRAMEWORK FOR EVALUATING RIGHTS IN REGULATION

The cases discussed above offer important insights into how courts evaluate asserted property interests in regulatory schemes. First, the cases demonstrate that courts do, in some instances, recognize such interests as compensable property rights. Second, the cases reveal that courts do not evaluate all claims for rights in regulation by the same standards. Rather, they use two different inquiries. Some cases exclusively consider reliance whereas others turn on legislative intent.

This Part formulates a bifurcated framework to explain when courts employ the respective reliance and legislative-intent inquiries. It finds that the

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206 *See* Daniel H. Cole, *Clearing the Air: Four Propositions About Property Rights and Environmental Protection*, 10 DUKE ENVTL. L. & POL'Y F. 103, 114 (1999); Cullenward, *supra* note 205, at 13.

207 Cole, *supra* note 206, at 115 ("To claim that emission allowances are not property rights simply because they are neither absolute nor perpetual would be tantamount to claiming that fee simple is the only legitimate estate in land.").

208 *See* JOHN PALMISANO, ARE EMISSION REDUCTIONS PROPERTY? (May 23, 2001), http://jweinsteinlaw.com/pdfs/EvoBrief%20May%2023,%202001.pdf.

209 Cullenward, *supra* note 205, at 13. The language used in the Clean Air Act's sulphur dioxide emissions trading program is representative. 42 U.S.C. § 7651b(f) (2012). It provides that "[a]n allowance allocated under this subchapter is a limited authorization to emit sulfur dioxide in accordance with the provisions of this subchapter. Such allowance does not constitute a property right." *Id.*

210 *See* Huber, *supra* note 193, at 1042 ("Lawmakers generally try to stipulate that emissions credits or allowances do not constitute a property right, but it is far from clear that recipients see it the same way.") (footnotes omitted).

211 *See* Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109, 116–17 (1989) (noting that uncertain property rights in emissions provide disincentives for trading); Terry Anderson & Gary Libecap, *Cap and Take*, THE DAILY CALLER (May 15, 2015), http://dailycaller.com/2012/05/15/cap-and-take/.

key variable is the physical nature of the right asserted. Though no case explicitly says so, the courts' analyses divide asserted rights in regulation into two categories: 1) rights in regulation connected to traditional, physical property interests ("physical regulatory interests"), and 2) rights in regulatory schemes that themselves create non-traditional, intangible interests ("intangible regulatory interests"). The cases show that compensable property interests can arise in both contexts, but the necessary elements for establishing these rights are different. When parties assert physical regulatory interests, courts examine the property owners' reliance to assess whether a compensable right exists. However, when parties claim intangible regulatory interests, courts eschew reliance inquiries and instead focus on legislative intent to create such rights. Thus, the physical nature of the asserted right shapes the method of inquiry.

Though this framework arises from a small set of cases, including trial-court opinions that may be appealed[212] and outlier decisions,[213] it turns out to be consistent with broader property concepts as well as leading scholarship on the recognition of property rights. As a result, this trend in oddball cases actually yields a fairly robust doctrinal and theoretical approach to evaluating asserted rights in regulation. Moreover, the framework serves as an administrable and satisfying vehicle for assessing new claims.

Discussing the matter in more detail, Section A develops the framework by synthesizing the case studies and contextualizing them in property scholarship. Section B then applies the framework to the recent cases discussed in the introduction.

### A. *Developing the Framework*

Courts have inquired either into reliance or legislative intent when evaluating asserted rights in regulation, and the physical nature of the asserted right is the key variable for determining which inquiry applies.[214] The reliance test arises when courts assess physical regulatory interests.[215] They use this reliance inquiry both to define whether protected property rights exist and to identify when government entities owe property owners a duty to act.[216] The core question for the later issue is whether landowners have sufficiently relied on government action such that a failure to act interferes with a common-law property right.[217]

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212 *See* Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 148 F. Supp. 3d 808 (E.D. Wis. 2015).

213 *See* Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568 (Okla. 1990).

214 *See Joe Sanfelippo Cabs*, 148 F. Supp. 3d at 814; Jordan v. St. Johns Cty., 60 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011).

215 *Jordan*, 60 So. 3d at 839.

216 *Id.*

217 *See id.*

Alternatively, courts employ a legislative-intent test when evaluating intangible regulatory interests.[218] In considering such claims, courts look for clear statutory language creating irrevocable rights.[219]

### 1. Reliance and Physical Regulatory Interests

In *St. Bernard Parish, Arreola, Jordan, Litz*, and *Franco-American*, the courts employed reliance inquiries to evaluate the asserted rights in regulation.[220] For example, the opinion in *Jordan* highlighted the plaintiffs' reliance as a basis for the government's duty to maintain an access road, noting that beachfront homes were present before the county took title to the road and that the county had subsequently granted building permits on the island after assuming title to the road.[221] The court in *St. Bernard Parish* similarly stressed that because USACE had induced investment-backed expectations by projecting public assurances of safety from flooding, its failure to maintain MRGO constituted a taking.[222] Likewise, in *Arreola* the court also premised the government's liability on "landowners *rely[ing]* on the protection [the flood control project] was built to provide."[223] *Litz* too focused on Ms. Litz's expectation that the government would "abate a known and longstanding public health hazard"[224] to guarantee her "the effective and reasonable use of her property."[225] Finally, *Franco-American* reasoned that the water rights regime at issue constituted a protected property interest because of landowners' "vested," "valuable," and "recognized" interests.[226] Each of these cases ultimately recognized a protected right in regulation (or at least a colorable pleading of one) based on these reliance interests, while none considered legislative intent in their analyses.[227]

The key commonality among these cases is that they all asserted a physical regulatory interest.[228] In fact, each claim was ultimately tied to rights in

218 *See Joe Sanfelippo Cabs*, 148 F. Supp. 3d at 814.

219 *Id.* at 812–13.

220 *See* St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 747 (Fed. Cl. 2015); Arreola v. Cty. of Monterey, 99 Cal. App. 4th 722, 765–66 (Cal. Ct. App. 2002); *Jordan*, 60 So. 3d at 839; Litz v. Md. Dep't of the Env't (*Litz I*), 76 A.3d 1076, 1095 (Md. 2013), *aff'd*, Litz v. Md. Dep't of the Env't (*Litz II*), 131 A.3d 923, 934 (Md. 2016); Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd., 855 P.2d 568, 582 (Okla. 1990).

221 *Jordan*, 60 So. 3d at 837.

222 *St. Bernard Par. Gov't*, 121 Fed. Cl. at 746–47.

223 *Arreola*, 99 Cal. App. 4th at 747–48 (emphasis added).

224 *Litz II*, 131 A.3d at 934.

225 *Litz I*, 76 A.3d at 1095.

226 *Franco-Am. Charolaise*, 855 P.2d at 576.

227 *St. Bernard Par. Gov't*, 121 Fed. Cl. at 747; *Arreola*, 99 Cal. App. 4th at 765–66; *Jordan*, 60 So. 3d at 839; *Litz II*, 131 A.3d at 933–34; *Litz I*, 76 A.3d at 1095; *Franco-Am. Charolaise*, 855 P.2d at 582.

228 *See supra* notes 221–226 and accompanying text. Such claims to rights in regulation pertaining to traditional, physical property could be conceived of as claims to "regulations appurtenant." Borrowing

land.[229] *Jordan* asserted a right in maintenance of an access road, *St. Bernard Parish* and *Arreola* both asserted rights in maintenance of flood protection, and *Litz* asserted a right in enforcement of pollution control.[230] Even in *Franco-American*, which asserted a right in the riparian water law regime, the riparian rights at issue were attached to the land.[231]

This trend across the cases offers insight into *when* courts apply this reliance inquiry, showing that reliance, rather than legislative intent, is the method for assessing physical regulatory interests. However, the cases also offer insight into *how* the courts use this reliance inquiry in the context of these rights-in-regulation takings claims.

As with any Fifth Amendment takings claim, courts assessing rights-in-regulation claims must make an ordered series of determinations.[232] As a threshold matter, the court must determine whether a protected property interest exists ("the property question"). If such a right exists, then the court must determine whether the government has taken that right ("the taking question"). The property question is a predicate for the taking question because there can be no taking of property unless property exists.

*Franco-American* used the reliance inquiry to answer the first question (the property question).[233] However, the remainder of these cases focused on the second question (the taking question), using the reliance inquiry to determine when government entities owed property owners an affirmative duty to act (and, accordingly, when inaction constituted interference with a property right).[234]

*Franco-American* centered on the property question, considering whether a protected property right existed in the riparian water rights scheme.[235] The court reasoned that it did this because the riparian right was

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from the concept of an easement appurtenant, this would describe a regulation attached to a dominant tract of physical property, most likely land. *Cf.* Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 4 (2003) (noting that an "interest displays the salient features of an easement appurtenant—it is a nonpossessory interest that attaches to particular parcels and runs with the land."). Alternatively, such claimed rights in regulation could be considered "incident of property," as Merrill has used the terminology in a related sense. *See* Merrill, *supra* note 23, at 974.

229 *See supra* notes 221–226 and accompanying text.

230 *Id.*

231 *See Franco-Am. Charolaise*, 855 P.2d at 582.

232 *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000–01 (1984) (explaining that a takings claim requires a court to resolve (1) whether plaintiff has a property interest protected by the Fifth Amendment, (2) whether the government effectuated a taking of that interest, (3) if there was a taking, whether it was for public use, and (4) whether the government provided just compensation).

233 *See Franco-Am. Charolaise*, 855 P.3d at 582.

234 *See* St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 746 (Fed. Cl. 2015); Arreola v. Cty. of Monterey, 99 Cal. App. 4th 722, 765–66 (Cal. Ct. App. 2015); Jordan v. St. Johns Cty., 60 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011); Litz v. Md. Dep't of the Env't (*Litz I*), 76 A.3d 1076, 1095 (Md. 2013), *aff'd*, Litz v. Md. Dep't of the Env't (*Litz II*), 131 A.3d 923, 934 (Md. 2016).

235 *Franco-Am. Charolaise*, 855 P.3d at 582.

considered part of the common-law interest in riparian land.[236] According to the court, this common-law pedigree established vested and relied-upon interests sufficient to constitute a protected property right.[237] After answering this property question, the court could easily resolve the taking question by reasoning that that government action (a change in the law) deprived landowners of this protected riparian property right.[238]

Unlike *Franco-American*, the other cases focused their reliance inquiries on the taking question, ultimately finding takings based on the typically unsuccessful theory that government *inaction* interfered with property rights.[239] All of these cases presented the same general claim: that government inaction (i.e., failure of a duty) led to a physical interference with a traditional right in land.[240] The plaintiffs in *St. Bernard Parish*, *Arreola*, and *Litz* all essentially claimed the government should have acted to prevent a substance (floodwater and sewage, respectively) from physically entering their land and interfering with their common law rights to exclude and to use.[241] Relatedly, the plaintiffs in *Jordan* alleged that the government should have acted to prevent physical interference (severance through erosive forces on a connecting road) with the common law rights to access and to use their property.[242] In all cases there was physical interference with a common law right.[243]

In addressing these claims, none of the courts were troubled by the property question. They offered it sparse treatment, often implicitly finding a protected property interest based on expectations and common-law rights in land.[244] The identification of such rights revolved around reliance concepts, but the articulation of these inquiries was laconic at best.

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236 *Id.* at 577.

237 *Id.*

238 *Id.* at 580.

239 *See supra* notes 220–225 and accompanying text. Courts have been unreceptive to such claims that inaction can constitute a taking. *See* Valles v. Pima Cty., 776 F. Supp. 2d 995, 1003 (D. Ariz. 2011) (discussing plaintiffs' failure to cite to any case law supporting the proposition that government inaction can amount to a taking); Nicholson v. United States, 77 Fed. Cl. 605, 620 (Fed. Cl. 2007) ("The Court [of Federal Claims] has consistently required that an affirmative action on the part of the [g]overnment form the basis of the alleged taking.") (citations omitted).

240 *See* St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 690–91 (Fed. Cl. 2015); Arreola v. Cty. of Monterey, 99 Cal. App. 4th 722, 754–56 (Cal. Ct. App. 2002); Jordan v. St. Johns Cty., 63 So. 3d 835, 836–37 (Fla. Dist. Ct. App. 2011); Litz v. Md. Dep't of the Env't (*Litz I*), 76 A.3d 1076, 1095 (Md. 2013).

241 *See St. Bernard Par. Gov't*, 121 Fed. Cl. at 690–91; *Arreola*, 99 Cal. App. 4th at 754–56; *Litz I*, 76 A.3d at 1095.

242 *Jordan*, 63 So. 3d at 836–37.

243 *See St. Bernard Par. Gov't*, 121 Fed. Cl. at 690–91, 723; *Arreola*, 99 Cal. App. 4th at 754–56; *Jordan*, 63 So. 3d at 836–37; *Litz I*, 76 A.3d at 1095.

244 *See St. Bernard Par. Gov't*, 121 Fed. Cl. at 719–20 (referring to "fee ownership"); *Jordan*, 63 So. 3d at 839 (referring generally to "property" in reference to land).

Rather, the courts focused primarily on the taking question, seeking to resolve whether government *inaction* could constitute a taking.[245] This is where they deployed the deeper reliance inquiry, using it to determine whether landowners had sufficiently relied on government action such that the failure to act interfered with a common-law property right.[246] Thus, the reliance questions that were implicit in identifying the corpus of a property right became explicit in defining the government duty necessary to avoid infringing on that right. In each case, the court found that landowners' reliance on implicit assurances of government action (to maintain access, control flooding, or prevent pollution) meant that failure to perform these actions interfered with a common law right.[247] Thus, the reliance test became a measure for when governments owed a duty to act, and courts found such a duty when property owners had relied so extensively on government action that a lapse would infringe on traditional property rights.[248]

Such an approach resonates deeply with the theory Christopher Serkin forwards in his thoughtful article "Passive Takings: The State's Affirmative Duty To Protect Property."[249] Serkin's argues that "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."[250] Moreover, Serkin does not root this concept in particular legislative intent or language but rather conceives of it as part of property owners' preexisting expectations.[251] This line of cases rests on that same concept, using a reliance test to establish when governments owe such an affirmative duty.[252]

In sum, courts apply the reliance inquiry to assess physical regulatory interests. One use of the inquiry is to define whether a property right exists; another is to define when government inaction constitutes a taking of property. In addressing such inaction claims, courts use the reliance test to determine whether governments owe a duty to act, finding such a duty when property owners had relied so extensively on government action that a lapse would infringe on common-law property rights.

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245 *See St. Bernard Par. Gov't*, 121 Fed. Cl. at 718–23; *Arreola*, 99 Cal. App. 4th at 737–39, 742–44; *Jordan*, 63 So. 3d at 837–38; *Litz I*, 76 A.3d at 1093–94.

246 *See St. Bernard Par. Gov't*, 121 Fed. Cl. at 719–20; *Arreola*, 99 Cal. App. 4th 737–39, 742–44, 746; *Jordan*, 63 So. 3d at 837–39; *Litz I*, 76 A.3d at 1093–95.

247 *See id.*

248 *See id.*

249 Serkin, *supra* note 29, at 354.

250 *Id.*

251 *See id.* at 354–55.

252 Serkin asserts that, at minimum, such passive takings claims should exist 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 [such as by disabling self help]." *Id.* at 378, 382. *Cf.* Singer, *supra* note 35, at 658, 661.

### 2. Legislative Intent and Intangible Regulatory Interests

Eschewing a reliance inquiry, the case studies regarding deregulatory takings, taxi medallions, patents, and grazing permits all have focused on legislative intent to evaluate asserted rights in regulation. For example, Supreme Court precedent indicates that a successful deregulatory takings claim will require an unmistakable legislative statement establishing protected rights in a regulatory scheme.[253] Moreover, the property status of taxi medallions turns on whether there is legislative intent to create protected rights.[254] The Supreme Court also premised patent protection on legislative intent in creating the interest conveyed.[255] Finally, grazing permit cases forcefully display the primacy of the legislative intent inquiry, with courts holding that such interests are not protected by the takings clause because legislative language has specifically disclaimed creating property rights.[256]

The common thread among these cases is that none asserts a physical regulatory interest; rather they allege intangible regulatory interests. Though they involve some related physical property (e.g., utility infrastructure, a taxicab, or grazing land), the cases all claim property interests not in these physical items but rather in regulatory structures that themselves create valuable interests. In fact, these disparate regulations are all similar in that they create value by providing some measure of exclusivity—limiting access and thereby limiting competition. This is certainly true of regulated industries and taxi medallions; both schemes literally exclude competitors from entering certain markets. Moreover, intellectual property rights limit competition by providing owners with exclusive control over patented or copyrighted material. Finally, grazing permits and similar interests limit access (whether to grazing land, a share of fish caught, or discharge of pollution), again limiting competition. In each of these cases, parties assert a protected property interest in the valuable exclusivity provided by these regulatory schemes.

These claims also present consistent takings theories. Nearly all assert that a government action altering a regulatory program gives rise to a taking. This is true of deregulatory takings claims (alleging a taking based on government action deregulating markets and allowing competition), intellectual property claims (alleging a taking based on government action changing specific regulations), and grazing permits (alleging a taking based on government action suspending and cancelling permits).[257] Some of the taxi medal-

253 *See supra* notes 218–219 and accompanying text.

254 *See supra* Part II.B.4.

255 *See* Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427 (2015).

256 *See supra* notes 192–199 and accompanying text.

257 *See supra* Parts II.B.3, 5, 6.

lion cases are consistent with this trend (alleging a taking based on the government's action of repealing the limit on taxicabs),[258] but others assert an alternate takings theory based on government inaction (alleging a taking based on government refusing to apply the regulations against competitors such as Uber and Lyft).[259]

To the extent that courts have resolved these takings claims, they have primarily addressed the initial property question, typically not reaching the taking question.[260] In doing so, they determine whether property rights exist by examining legislative language for clear intent to create protected interests.[261] Moreover, this legislative intent inquiry focuses centrally on the certainty, revocability, or malleability of the interest created, with courts finding protected rights in regulation only when legislative language clearly conveys interests that cannot be revoked or altered.[262]

For example, in the deregulatory takings context, case law indicates that a protected property interest exists only if legislative language unmistakably limits the government from *altering* the regulatory schemes.[263] The grazing permit cases employ similar reasoning to find no compensable property interests.[264] Courts have stressed that statutory and regulatory language has "consistently reserved the authority to *cancel* or *modify* grazing permits."[265] Finally, the taxi medallion cases reflect a similar emphasis on clear language regarding certainty, revocability, and malleability.[266] Courts have declined to find protected interests in taxi medallions because authorities have "broad

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258 *See, e.g.*, Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 148 F. Supp. 3d 808, 810–11 (E.D. Wis. 2015).

259 *See, e.g.*, Bos. Taxi Owners Ass'n, Inc. v. City of Bos., 84 F. Supp. 3d 72, 80 (D. Mass. 2015).

260 *See supra* notes 233–238 and accompanying text. Some of the taxi cases have looked at the taking question in the alternative. *See Joe Sanfelippo Cabs*, 148 F. Supp. 3d at 812 (holding in the alternative that plaintiffs did not succeed in showing a regulatory taking); *Bos. Taxi Owners Ass'n*, 84 F. Supp. 3d at 80 (holding, as an alternative matter, that plaintiffs' takings claim cannot succeed through allegations of government inaction).

261 *See supra* notes 233–238 and accompanying text.

262 *Cf.* Merrill, *supra* note 23, at 978 ("Basically, takings property must be irrevocable for a predetermined period of time, and there must be no understanding, explicit or implicit, that the legislature has reserved the right to terminate the interest before this period of time elapses.").

263 *See* Baumol & Merrill, *supra* note 187, at 1045–46 (discussing United States v. Winstar Corp., 518 U.S. 839 (1996)).

264 *See supra* Part II.B.6.

265 Pub. Lands Council v. Babbitt, 529 U.S. 728, 743 (2000) (emphasis added). *See also* Hage v. United States, 51 Fed. Cl. 570, 586–87 (Fed. Cl. 2002) (citing *Pub. Lands Council*, 529 U.S. at 743).

266 *See supra* Part II.B.4.

discretion to *alter* or *extinguish*"[267] the rights, because medallions do not create "an *unalterable* monopoly,"[268] and because regulators have "broad discretion to *control* and even *extinguish* that interest, . . . including the discretion to *change the regulatory framework*."[269] Moreover, the recent holding in *Joe Sanfelippo* offers an emphatic example of how courts search for clear legislative intent regarding revocability.[270] There, though plaintiffs pled that they had received assurances that their taxi medallions could not be altered or revoked,[271] the court nonetheless rejected the claim that the medallions were compensable property interests because "the ordinance did not state that the City could never *modify* or *repeal* [the taxi medallion system], . . ."[272]

This focus on certainty, revocability, and malleability demonstrates that though the right to exclude is a core aspect of property,[273] legislative language granting exclusivity is not alone sufficient to create protected property rights in regulation. All of the case studies demonstrated aspects of exclusivity, but not all yielded compensable property interests. As demonstrated by the taxi medallion and grazing permit cases, if these exclusivity interests are not coupled with language insulating them from revocation or amendment, they are unlikely to be compensable property.[274]

This focus on revocability and malleability demonstrates a conceptual link between takings-protected rights in regulation and Due-Process-protected "new property." Both protections inquire into how interests may be altered, and the difference in the level of protection is linked to the amount of discretion regulators have. As the Supreme Court has recognized, "[t]he hallmark of property [at least for procedural due process purposes] . . . is an

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267 Bos. Taxi Owners Ass'n, Inc. v. City of Bos., 84 F. Supp. 3d 72, 79 (D. Mass. 2015) (emphasis added) (quoting Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 274 (5th Cir. 2012)).

268 *Id.* at 80 (quoting Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis, 572 F.3d 502, 508 (8th Cir. 2009)).

269 Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 148 F. Supp. 3d 808, 812 (E.D.Wis. 2015).

270 *See id.* at 812–13.

271 Plaintiffs pled that "the City guaranteed that the cap . . . would never be removed," the relevant ordinance stated "no new passenger vehicle permits for taxicabs may be issued," local aldermen acknowledged that "the ordinance was intended to create 'a property right in a public sense,' and City employees' represent[ed] that the City would no longer issue permits." *Id.* at 812.

272 *Id.* at 813 (emphasis added).

273 *See* Merrill, *supra* note 23, at 971–72 ("The consensus view of scholars that the right to exclude is an essential feature of common-law property has been reached largely through a process of induction by considering the sorts of interests that are regarded as property in developed legal systems.") (footnote omitted).

274 Revocability and exclusivity can intertwine; as one court noted regarding a taxi medallion, "the government's ability to regulate in the area means an individual cannot be said to possess the right to exclude." Bos. Taxi Owners Ass'n, Inc. v. City of Bos., 84 F. Supp. 3d 72, 79 (D. Mass. 2015) (quoting Dennis Melancon, Inc. v. City of New Orleans, 703 F.3d 262, 272 (5th Cir. 2012)).

individual entitlement grounded in state law, which cannot be removed except *'for cause.'*"[275] Thus, procedural Due Process protection is based on statutory language *limiting* regulators' discretion to alter an interest. The cases above demonstrate that takings-protected property must involve an entitlement which cannot be removed (revoked or altered) *at all.* Thus, takings protection is based on *eliminating* regulators' ability to alter interests. Both focus on revocability; there is simply a more rigorous standard for takings protection.

Ultimately, this approach finds support not only in the cases discussed but also in the leading scholarship on the subject. Particularly, this test is consistent with Thomas Merrill's proposed framework for evaluating takings-protected property.[276] Merrill posits that takings-protected property should be defined as an irrevocable right to exclude others from a discrete asset.[277] The cases discussed above effectively employ this inquiry; they all consider whether legislative language has created irrevocable rights in particular exclusivity interests.[278]

In conclusion, courts use a legislative intent inquiry to identify compensable intangible regulatory interests. In determining whether such property rights exist, courts look for clear legislative statements establishing irrevocable interests.

Though the case studies may initially appear to be a collection of oddities, novelties, and curiosities, they actually synthesize into two distinct patterns of evaluation. Courts use a reliance inquiry to evaluate physical regulatory interests, and they apply this inquiry both in defining whether a property rights exists and in determining whether a government entity has a duty to act. Alternatively, courts employ a legislative-intent test when evaluating intangible regulatory interests. In considering such claims, courts look for clear statutory language creating irrevocable rights. These two lines of inquiry are consistent with leading scholarship on the recognition of property rights, and together they create a comprehensive bifurcated framework for analyzing asserted rights in regulation.

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275 Merrill, *supra* note 23, at 960 (emphasis added) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1970)).

276 *See id.* at 969.

277 *Id.*

278 In fact, Merrill specifically addresses how his framework would apply to a deregulatory takings argument, reflecting an application nearly identical to that synthesized from the cases above. *See id.* at 994–95.

## B. *Application to Recent Cases*

This section tests the administrability of this bifurcated framework by using it to evaluate two recent cases asserting compensable rights in regulation. First, it considers *Lester v. Snohomish County*, the suit arising from the Oso mudslide.[279] It concludes that if the court is willing to entertain a takings claim based on government inaction, then the reliance inquiry is the appropriate method for assessing the government duties alleged. Under this standard, the claims of a duty to warn may be colorable, the claim of a duty to regulate seems less likely to succeed, and the claim of a duty to buyout properties appears destined to fail.

Second, it evaluates *Midtown TDR Ventures v. New York*, the suit alleging a taking of Grand Central Terminal's transferable development rights ("TDRs").[280] Here the legislative-intent inquiry is the proper method for determining whether the TDRs constitute a protected property interest. Under this standard, it appears that the TDRs are not protected property because the legislative language leaves regulators substantial discretion for altering or denying the TDRs.

### 1. The Oso Case: *Lester v. Snohomish County*

The complaint in *Lester v. Snohomish County* alleges that state and county entities were aware of catastrophic landslide danger but did not comply with a duty to regulate development or warn residents of the risk.[281] Particularly, it asserts that the state and county are liable based on their failure to 1) "inform[], educate[], or warn[] residents," 2) undertake "regulatory duties," or 3) "purchas[e] homes and relocat[e] families."[282]

As a takings claim,[283] this advances the same general theory presented in *Jordan*, *St. Bernard*, *Arreola*, and *Litz*: that government inaction (i.e., failure of a duty) led to a physical interference with a traditional right in land.[284] In particular, *Lester* asserts that the government failed in a series of duties

279 *See Lester* Complaint, *supra* note 13, at 3–4.

280 *Midtown* Complaint, *supra* note 16, at 28.

281 *See Lester* Complaint, *supra* note 13, at 18.

282 *Id.* at 14, 16, 19.

283 The complaint specifically pleads negligence and wrongful death claims but also "seek[s] all other rights and remedies available under the law." *Id.* at 20. Plaintiffs would likely pursue a takings theory only as a supplement to the primary tort causes of action, but for obvious reasons this Article will focus on the takings angle, which at the very least provides an interesting thought experiment.

284 *See* St. Bernard Par. Gov't v. United States, 121 Fed. Cl. 687, 690–91 (Fed. Cl. 2015); Arreola v. Cty. of Monterey, 99 Cal. App. 4th 722, 730–731 (Cal. Ct. App. 2002); Jordan v. St. Johns Cty., 63 So. 3d 835, 837 (Fla. Dist. Ct. App. 2011); Litz v. Md. Dep't of Env't (*Litz I*), 76 A.3d 1076, 1095 (Md. 2013).

and as a result a mudslide physically invaded plaintiffs' land.[285] Thus, since it asserts a physical regulatory interest, a reliance inquiry ought to apply.[286]

In assessing the claim, the property question should be straightforward. The court should have no trouble finding a protected property right in land. The taking question is more difficult, but the reliance inquiry offers guidance. In determining whether the government had a duty to act, the key question should be whether property owners relied so extensively on a government action that a lapse would infringe on a traditional property right.

Under this standard, the three different asserted duties have different likelihoods of success. The alleged duty to warn about the elevated landslide hazard seems potentially colorable; the alleged duty to regulate seems difficult to establish, and the alleged duty to buyout seems bound to fail. First, if the plaintiffs can make showings similar to those in *St. Bernard Parish* and *Litz* and convince the court that the government's actions in undertaking landslide stabilization measures projected some form of public assurance that induced development, then the court could find a duty to warn. Second, the general duty to regulate is farther fetched because its generality makes the reliance showing more difficult. Plaintiffs would have to demonstrate that some comprehensive system of regulation offered sufficient assurances of safety to induce investment. Unlike a particular flood control or stabilization project, which may offer definable public assurances of safety from a certain risk, it will be difficult to establish specific reliance on any generalized assurances that might come from overall land use regulation. Thus, absent some particular regulatory protection or express governmental claim that the overall regulatory scheme will make plaintiffs safe, it is difficult to see how plaintiffs could make a sufficient showing of reliance. The claim is not impossible, but the difficulty of making such a showing is substantial. Finally, the alleged duty to "purchas[e] homes and relocat[e] families,"[287] is almost certain to fail. Again, absent any express assurance that government would relocate homes located in harm's way, it is difficult to see how plaintiffs could establish sufficient reliance.

### 2. The Grand Central Terminal Case: *Midtown TDR Ventures v. New York*

In *Midtown TDR Ventures v. New York* the complaint alleges that New York City's failure to enforce zoning regulations rendered Grand Central

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285 *See Lester* Complaint, *supra* note 13, at 18.

286 This assumes that the court is willing to entertain a takings claim based on government inaction. As discussed earlier, many courts have rejected such claims outright. *See supra* note 239.

287 *Lester* Complaint, *supra* note 13, at 16.

Terminal's TDRs worthless, thereby taking Grand Central Terminal's property without just compensation.[288] The suit arises out of the same historical landmark and zoning scheme (and even the same building) that was at issue in the canonical Fifth Amendment takings case *Penn Central Transportation Co. v. New York City*.[289] The relevant regulations limit Grand Central Terminal from expanding upward, but in exchange they grant it TDRs, which can be sold to other properties that seek to exceed zoning height limits.[290] An investor purchased Grand Central Terminal with the plan of selling these TDRs and began negotiations with a neighboring property.[291] However, the parties could not strike a deal.[292] According to the lawsuit, the City of New York then granted the neighboring property permission to exceeding zoning height restrictions, even without the purchase of TDRs.[293] This gave rise to the takings claim.

In evaluating this claim, the first question is whether Grand Central Terminal has a protected property interest in its TDRs. This framework helps identify the relevant (and irrelevant) factors for this analysis. Though the complaint asserts a property interest based on the plaintiff's investment-backed reliance,[294] the framework suggests that a legislative-intent inquiry is more appropriate because the TDRs represent an intangible regulatory interest. Accordingly, the TDRs will not qualify as protected property because no clear legislative language establishes them as irrevocable interests.

The TDRs are intangible regulatory interests. Though they correspond to a particular physical property (Grand Central Terminal), the existence and value of the TDRs rests entirely on New York's zoning regulatory structure, which effectively creates a cap-and-trade system. The zoning laws cap total development (by restricting building heights) and create TDRs that may be traded from designated landmarks (which cannot build to their full height allotment due to landmark regulations) to other developments (which seek to exceed their height allotments).[295] These characteristics make TDRs analogous to other non-traditional, intangible interests created by regulation, such as taxi medallions or pollution credits. Each involves a regulatory limit (on urban development, number of taxis, or pollution discharge) and a transferable entitlement for operating within that limit (a TDR, taxi medallion, or pollution credit). Thus, TDRs represent intangible interests created by regulation.

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288 *See Midtown* Complaint, *supra* note 16, at 4.

289 438 U.S. 104, 115 (1978).

290 *See Midtown* Complaint, *supra* note 16, at 1.

291 *Id.* at 15.

292 *See id.* at 16–17.

293 *Id.* at 18–20.

294 *Id.* at 2.

295 *See* JAMES A. COON, TRANSFER OF DEVELOPMENT RIGHTS 1 (2015); Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post Zoning"?*, 78 BROOK. L. REV. 435, 436–37 (2013).

Accordingly, the court should use a legislative-intent test to determine if the TDRs qualify as compensable property, and this inquiry should turn on whether the law creating the TDR includes is a clear statement making them certain, irrevocable, and un-alterable. By this standard, the TDR is unlikely to be considered a protected property interest because there is no clear legislative language insulating it from revocation or alteration. First, the New York City zoning regulations that establish TDRs contain no clear statement guaranteeing a certain, irrevocable property right in the TDR.[296] In fact, the interest in the TDRs appears entirely uncertain and discretionary. According to the regulation establishing the relevant TDR program,[297] "the City Planning Commission *may* permit development rights to be transferred."[298] Landmarks wishing to transfer TDRs must apply for a special permit to transfer such rights, which must include a proposed plan and an accompanying report from the Landmarks Preservation Commission.[299] Moreover, to approve a transfer of TDRs, the City Planning Commission must make a series of subjective findings and balance competing values.[300] These regulations retain an enormous amount of discretion for regulators and evidence no clear promise of irrevocability. In fact, not only is there no guarantee that regulators will not revoke or limit TDRs, there is no guarantee that they will even allow them in the first place.

In fact, TDRs appear even less certain than taxi medallions or grazing permits, which, though amendable and revocable, at least convey a definite, presently exercisable interest. A TDR appears, at best, a potential interest, subject to numerous contingencies and discretionary approvals. Thus, the TDRs do not manifest a certain and irrevocable legislative grant of property interests and are unlikely to be considered takings-protected property, proving fatal to the takings allegation.

These applications show that the bifurcated framework offers an administrable approach for assessing rights in regulation. It creates a meaningful structure that delineates relevant inquiries and considerations.

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296 The only mention of irrevocability in the regulations is used to describe restrictions imposed on the designated landmark only once a TDR has been transferred:

> In any and all districts, the transfer once completed shall *irrevocably* reduce the amount of floor area that can be utilized upon the lot occupied by a landmark by the amount of floor area transferred. In the event that the landmark's designation is removed or if the landmark building is destroyed, or if for any reason the landmark building is enlarged or the landmark lot is re-developed, the lot occupied by a landmark can only be developed or enlarged up to the amount of permitted floor area as reduced by the transfer.

CITY OF NEW YORK, ZONING RESOLUTION § 74-792(d) (2014) (emphasis added) [hereinafter NYC ZONING RESOLUTION].

297 *Id.* § 74-79. *See also Midtown* Complaint, *supra* note 16, at 9 (identifying NYC ZONING RESOLUTION § 74-79 as the relevant TDR provision).

298 NYC ZONING RESOLUTION § 74-79 (emphasis added).

299 *Id.* § 74-791.

300 *See id.* § 74-792(e).

## IV. NORMATIVE ASSESSMENT OF THE FRAMEWORK

This Part makes the normative argument that the bifurcated framework offers a workable, practical, and even desirable approach for assessing rights in regulation. First, Section A considers potential criticisms that the framework might create perverse incentives for private parties. In light of these concerns, it examines how the framework might impact private party incentives for desirable investment and undesirable rent dissipation. It concludes that because the framework will not appreciably influence private party behavior in these areas, these incentive concerns do not diminish its appeal. Next, Section B considers whether the framework is normatively desirable in light of broader property principles and values. It finds that the framework integrates well into the system of property laws by contextually stressing stability and flexibility and by effectively balancing judicial and legislative roles. Based on these analyses, this Part ultimately recommends the framework as a model for evaluating rights in regulation.

### A. *Private Party Incentives*

Based on arguments presented in the case studies, one might worry that the bifurcated framework encourages various undesirable private party behaviors. For example, arguments in the deregulatory takings and pollution credit contexts suggest that the legislative intent inquiry undermines market value and create incentives for undesirable underinvestment.[301] One might also argue that a legislative-intent approach will encourages parties to wastefully spend resources by lobbying legislatures to protect their interests. Alternatively, in the context of flood control or landslide protection, one might criticize the reliance-based inquiry as creating undesirable incentives to overinvest in high-risk areas.[302]

Sensitive to such concerns, this Section considers how the proposed bifurcated framework might impact private party behavior. Specifically, it examines whether parties might behave differently based on 1) whether the test for takings protection is reliance-based or legislative-intent-based, and 2) whether an interest ultimately receives takings protection. A standard account of incentive structures suggests two hypotheses: 1) that these variables will influence investment in these interests and 2) that these variables will influence rent-dissipating behavior (such as lobbying to preserve these interests). However, this section argues that there is unlikely to be an appreciable impact in either regard. Though empirical work is needed to test the assertion,

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[301] *See* Sidak & Spulber, *supra* note 176, at 868–69, 880–81 (discussing incentives for future utilities investments); *see also supra* notes 204–209 and accompanying text.

[302] Serkin, *supra* note 29, at 387 (discussing moral hazard argument).

this analysis suggests that, while incentives matter, this particular set of incentives will be too small to impact private party behavior. Thus, it asserts that these incentive concerns should not militate against adoption of the framework.

1. Investment Incentives

A goal of property law is to encourage cost-effective investment because such investment leads to welfare enhancing improvements and advances.[303] Pursuit of this goal counsels adopting an approach to rights in regulation that best encourages (or at least does not discourage) cost-effective investment. Thus, one might examine how the different approaches shape parties' investment decisions, either through the methods used to identify compensable property interests (reliance or legislative intent) or through the ultimate conclusion about the protected nature of the interest (protected or not). However, this subsection concludes that such examination is unnecessary. It argues that the marginal incentive differences will likely be too small to practically impact investment in regulation-based interests. Thus, it suggests that approaches to rights in regulation should be evaluated by criteria other than investment incentives.

A standard hypothesis is that protection of property rights motivates investment, and consequently if interests are not protected from takings, then parties will under-invest in them.[304] The reasoning is that a lack of takings protection creates a risk of losing one's property interest and receiving no compensation, thereby decreasing property value and discouraging investment.[305] Applying this reasoning to intangible regulatory interests like patents and pollution credits, commentators have worried that a lack of takings protection will greatly reduce values[306] and may lead to a market collapse.[307] Thus, some have suggested that pollution trading programs would be less volatile, more attractive to investment, and ultimately more effective if pollution credits were protected property interests.[308]

Extending this reasoning, the methods courts use to evaluate protected interests may also impact investment incentives. One might surmise that reliance-based measures would strongly encourage investment, particularly because the investment itself would constitute reliance and thus earn takings protection. In fact, based on cases like *St. Bernard Parish* and *Arreola*, one

303 *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. WESTERN L. REV. 239, 274 (1992).

304 *See* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 748–51 (1999) (discussing the scholarship on investment incentives and takings).

305 *Id.* at 748–50.

306 *See* Dolin & Manta, *supra* note 147, at 795 (arguing that regulatory change substantially reduced patent values and that takings protection would insulate against this change).

307 *See supra* note 211 and accompanying text.

308 *Id.*

might worry that such an approach encourages overinvestment, particularly in high-risk areas like floodplains or landslide zones. One could also posit that under a legislative intent test, the clarity of legislative language should impact investment, driving investment when language plainly recognizes property rights and chilling investment in all other cases. Based on such reasoning, one might argue that courts should adopt the method of analysis that appears to maximize worthwhile investment.

However, regardless of whether these suppositions about investment incentives bear out, this investment-incentive inquiry likely does not offer a meaningful criterion for preferring either the reliance or legislative-intent approach to evaluate rights in regulation. This is because the marginal value at stake is unlikely to practically impact investment decisions.[309] The marginal difference appears too small to make a difference.

Rather, a number of other factors may make investment in these interests worthwhile and rational regardless of whether a protected property interest is at stake. In particular, irrespective of whether these interests are considered protected property, there is a low absolute risk of them being curtailed, and that risk can be discounted to present value and capitalized into the price of the interest. Moreover, even with the risk of curtailment, the regulation-based interest may be the only available option, or it might still represent the best deal among other options. All said, the marginal investment incentives associated with takings protection for rights in regulation are unlikely to be large enough to actually influence behavior.

First, the absolute risk of a governmental action (or inaction) that would qualify as a taking is small. While the factual scenarios in takings cases may be vivid and memorable, they are ultimately outliers. The vast majority of interests (protected or not) will never see government interference anywhere near what is necessary to create a taking.[310] Moreover, even for interests subject to (or based on) extensive regulation, for which government involvement is foreseeable,[311] the instances of actions that would arise to taking are still low. Major regulatory upheavals (such as deregulation of utilities sectors or responses to disruptive technologies like Uber and Lyft) are rare events.[312]

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309 *Cf.* Uri Gneezy, et al., *When and Why Incentives (Don't) Work to Modify Behavior,* 25 J. OF ECON. PERSP. 191, 204–06 (2011) (discussing instances where an incentive may be too small to motivate behavior).

310 The government action (or inaction) would have to deprive of an enormous amount of value—if not all—or would have to physically interfere with the property. *See* John D. Echeverria, *Making Sense of* Penn Central, 23 J. ENVTL. L. 171, 209 (2005).

311 *See, e.g.*, Goodpaster v. City of Indianapolis, 736 F.3d 1060, 1074 (7th Cir. 2013) (stating that those involved in regulated businesses should not be surprised when ordinances change and negatively affect their business).

312 *See, e.g.,* W.M. WARWICK, A PRIMER ON ELECTRIC UTILITIES, DEREGULATION, AND RESTRUCTURING OF U.S. ELECTRICITY MARKETS 1.1 (2002); Rudy Takala, *What's the Government's Role in Regulating Uber and Lyft?*, WASH. EXAMINER (May 16, 2016), washingtonexaminer.com/whats-the-governments-role-in-regulating-uber-and-lyft/article/2590939.

Political forces also tend to prevent extensive government interference with valuable interests, whether they are protected property or not. Grazing permits illustrates as much. Despite clear legislative disclaimers of property rights and repeated cases declining takings protections, grazing permits are still stable enough interests to serve as collateral for loans.[313] In fact, the political (if not legal) insulation of these interests is so great that efforts to reduce grazing intensity have relied on buybacks instead of regulation.[314] This demonstrates that there is simply a low risk of government curtailment of valuable interests. Moreover, since the chance of curtailment in any particular year is even lower, interest holders can discount this risk over a number of years, making it even less of a factor in investment.

Finally, this small risk presents a minimal impact on investment because it can be capitalized into the asset itself. Once the risk is known, it is simply priced into the interest, diminishing the price but offering no long-term disincentive to invest. This explains the continuing active market for taxi medallions, fisheries catch shares, or pollution credits even despite cases and statutes denying them takings protections. Protected status, non-protected status, or uncertainty about status can all be priced into an interest once they are known. They impact price but not necessarily investment.

Second, in addition to the low likelihood of property being taken, unrelated factors can spur investment into unprotected interests. For example, when a regulatory program occupies a field and limits other options, then the regulatory interest is essentially the "only game in town." In such cases, as with patents, taxi medallions, pollution trading programs, and fisheries catch shares, private parties have no option but to buy into the regulatory interest or get out of the business. Then investment is likely premised on the overall costs and benefits of market participation, of which takings issues are likely only a small fraction.

Relatedly, even if a regulatory program does not completely occupy a field, a regulatory interest may still present the best deal, even after pricing in the takings risk. This appears to be the case with federal grazing permits, which are much cheaper than the equivalent grazing rights on private land.[315] The grazing permits seemingly represent a good deal, even without takings protection.

All of these factors help explain why takings issues are unlikely to appreciably shape prospective investment decisions in regulatory interests. Incentives matter; they just appear too small to drive investment behavior here. Thus, providing takings protection alone is unlikely to spur investment or

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313 *See* Huber, *supra* note 193, at 1005.

314 *See* Fina & Kade, *supra* note 195, at 317 n.164.

315 Bruce R. Huber, *The Fair Market Value of Public Resources*, 103 CAL. L. REV. 1515, 1541–42 (2015) ("[S]tatutory grazing fees on public lands are a fraction of those charged for their equivalent on private land.") (footnote omitted). *See also* Dale A. Oesterle, *Public Land: How Much Is Enough?*, 23 ECOLOGY L.Q. 521, 527 (1996) (discussing under-market rates for federal permits).

stabilize markets, as has been suggested for pollution trading schemes.[316] Moreover, this insight applies equally to efforts to discourage investment. For example, if one is concerned about potential overinvestment in high-risk areas, such as floodplains and landslide zones, then simply removing takings protections is unlikely to be an effective solution. Property owners may not find the decreased takings protection sufficiently important to influence their investment decision when other considerations, such as subjective value or the price of other land, will likely heavily outweigh the takings risk. Arrays of market forces influence investment decisions, and takings protections may be just too small to compete.

### 2. Rent Dissipation Incentives

The previous section discussed incentives for private investment in asserted *property* interests; this section discusses incentives for private investment in *policy* interests. Accompanying the traditional economic theory that predicts stable property rights will encourage desirable investment in property, public choice theory predicts that *uncertain* property rights will lead to undesirable investment in efforts to secure interests. Such nonproductive expenditures are termed "rent dissipation," and they can arise when ill-defined property rights encourage would-be beneficiaries to compete to secure those rights.[317] Each party competing will invest up to the value of the benefit, thereby dissipating its value and wasting resources. Such investments are considered wasteful because instead of enhancing social welfare through improvements, advances, or increased production, they dedicate resources to capturing, protecting, or prolonging existing entitlements.[318] These disfavored expenditures take resources that could contribute to growth and divert them to maintaining the status quo.[319] Thus, from the standpoint of economic efficiency and social welfare, rent dissipation is undesirable.

A specific type of such nonproductive behavior is "rent-seeking," which describes efforts to seek benefits through the political arena, and asserted rights in regulation are particularly hospitable to rent-seeking and rent dissipation because they involve politically conferred benefits with potentially ill-

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316 *See* U.S. ENVTL. PROT. AGENCY OFFICE OF AIR AND RADIATION, EPA430-B-03-002, TOOLS OF THE TRADE: A GUIDE TO DESIGNING AND OPERATING A CAP AND TRADE PROGRAM FOR POLLUTION CONTROL 1-4 (2003), https://www.epa.gov/sites/production/files/2015-06/documents/tools.pdf.

317 Marilyn R. Flowers, *Rent Seeking and Rent Dissipation: A Critical View*, 7 CATO J. 431, 431, 436 (1987).

318 *See id.* at 434.

319 *See id.* at 436.

defined property rights.[320] Individuals who wish to gain or retain such benefits will wastefully invest in doing so through lobbying, litigation, or both.[321] Thus, one might expect less clearly defined property rights, such as reliance-based rights in regulations, to promote rent-seeking. However, one would also suppose that well-defined property rights in regulatory interests would forestall rent dissipation. Thus, protected intangible regulatory interests should foster relatively little rent-seeking because clear legislative language should predictably delineate protected property rights. Finally, in the case of interests that are clearly disclaimed as protected property rights, the implications are more complex. On the one hand, legislative language should provide certainty of non-protected status, thereby diminishing expenditures on litigation. On the other hand, one might expect increased lobbying to stabilize the unprotected interests.

However, it is not apparent that a reliance or legislative-intent inquiry necessarily impacts rent-seeking and rent dissipating behavior. Rather for all types of rights in regulation, the decision to engage in potentially rent-dissipating activities appears bound up in a series of other factors that outweigh takings concerns.[322] For reliance-based interests, where rights are arguably less well defined, property owners may lobby for land use and environmental protection laws or may litigate takings cases, but these expenditures are not necessarily rent dissipating. For example, land use and environmental laws may advance productive interests, and even takings litigation has a value in establishing precedent and guiding future behavior. Alternatively, even where legislatures clearly delineate property rights, there appears to be rent-dissipative behavior. It is unsurprising that with expressly disclaimed property interests (such as grazing permits) parties engage in lobbying efforts to make those interests more durable,[323] but expressly protected interests (such as intellectual property) are also the subject of extensive lobbying and litigation to defend or expand protected rights.[324] This once again suggests that the

320 *See id.* at 432–33.

321 Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1442 (2010). Law and economics scholar Todd Zywicki has suggested a similar theory, casting takings protection (and "just compensation" in particular) as a measure to avoid rent dissipation by reducing incentives to defend property rights through expenditures on litigation, public relations, and political activity. *See Q&A with Todd Zywicki on Takings Law and Public Choice*, PROP. & ENV'T RESEARCH CTR.: THE PERCOLATOR BLOG, http://www.perc.org/blog/qa-todd-zywicki-takings-law-and-public-choice#sthash.wrIu1Zi2.dpuf (last visited Sept. 23, 2016).

322 *See* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 117 (1987).

323 *See* Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 762 (2005); *cf.* Oesterle, *supra* note 315, at 567 (discussing the extensive lobbying efforts surrounding public land uses).

324 *See, e.g.*, Jonathan Zittrain, *What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication*, 52 STAN. L. REV. 1201, 1208–09 (2000) (describing the music publishing industry's response to the threat of internet piracy by lobbying for, and obtaining, stronger legal protections of copyrighted material).

takings protection represents a relatively small percentage of the value of rights in regulation, with the motivation to engage in litigation and lobbying efforts being bound up in other elements.

This analysis suggests that the framework for recognizing rights in regulation makes little difference to private party behavior regarding investment or rent dissipation. If this theory holds, then it suggests that incentive-based criticisms are de minimis and the proposed framework at least does no harm in this regard.[325]

### B. *Broader Property Principles and Institutional Roles*

By using reliance and legislative-intent standards, the bifurcated framework vests principle power to define protected property interests in two different institutions. The reliance-based standard leaves power to define property rights primarily with the courts, whereas the legislative-intent-based standard gives power to define property mainly to the legislature.[326]

This section critically examines how this framework fits within broader property principles as well as with institutional roles of courts and legislatures. It concludes that the bifurcated approach arises as a logical response to the different situations of physical and intangible regulatory interests. In particular, it suggests that because physical regulatory interests are closely connected to interests in land, the reliance inquiry provides a consistent approach for the two and advances the value of stability in property rights. However, for intangible regulatory interests, the legislative-intent inquiry sacrifices stability to provide flexibility for legislatures. As a result, the framework attends to both competing values and different branches of government.

In a broad sense, the bifurcated framework arises in response to two major contested commitments in property law (as well as law in general): stability and flexibility.[327] The stability principle seeks to protect the continuity of expectations.[328] It preserves value, motivates investment, promotes gains from trade, and ultimately leads to welfare-enhancing efficient uses.[329]

325 Moreover, this may also invite questions over how greatly takings protections actually influence private party behavior regarding more traditional property interests.

326 Though the court ultimately exercises judicial review, the standard as described is highly deferential to legislative intent. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 271–72 (1994).

327 *Cf.* Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 455, 461 (2011). For a discussion of the stability versus flexibility tradeoff in the context of stare decisis, see Colin Starger, *The Dialectic of Stare Decisis Doctrine*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 19, 44–45 (C.J. Peters, ed., 2013) ("It seems unfair (if not absurd) to expect any jurist to universally commit ahead of time to always supporting doctrinal change or always supporting doctrinal stability. Sometimes change is good. Sometimes stability is. Context matters immensely.").

328 *See* Davidson, *supra* note 327, at 439.

329 *See id.*; Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 2 (2000).

Relatedly, the stability value can also reflect concepts of fairness,[330] traditionalism,[331] societal security,[332] and even natural law. A reliance inquiry comports strongly with this stability value because it focuses on continuity of investment-backed expectations.[333]

Alternatively, the flexibility value calls for sacrificing some degree of stability in favor of adaptability.[334] Planning and management concerns are at the core of this approach, which allows for quicker, orchestrated responses to changed conditions or emergent circumstances.[335] Prioritizing legislative intent over reliance aligns more closely with the flexibility value because it preserves legislative options to limit expectations and alter interests.[336] Such alterations may serve societal interests, but they come at the expense of potentially undermining the stable, predictable value of private property.

Judicial conceptions of property frequently prioritize stability over flexibility and thus employ reliance measures.[337] In particular, standards for recognizing protected rights in land are reliance-based, focusing on stability and continuity of expectations *even in spite of* contrary legislative intent.[338] Indeed, much of the Supreme Court's takings jurisprudence is premised on the notion that reliance interests form settled property expectations that must be guarded from legislative disturbance.[339] Thus, the Court has stressed that state property law is defined by established "background principles" that draw legitimacy from their long tenure in the common law.[340] Moreover, the Court has treated state *court* opinions as definitive authority on state property law, especially in determining whether state *legislative* actions have interfered with settled property rights.[341] Finally, the Court has repeatedly admonished

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330 *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536–37 (2005) (asserting that "fairness and justice" are at the heart of the takings doctrine (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

331 *See* Michael Pappas, *Anti-Waste*, 56 ARIZ. L. REV. 741, 765 (2014).

332 *See id.* at 764; *see also* Michael Pappas, *Singled Out*, 76 MD L. REV. ___ (forthcoming 2016).

333 *See supra* notes 327–329 and accompanying text. For similar stability reasons, Chief Justice Rehnquist asserted that "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved." Payne v. Tennessee, 501 U.S. 808, 828 (1991) (citations omitted).

334 *See* Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 148 F. Supp. 3d 808, 812–13 (E.D. Wis. 2015) (discussing the importance of legislative flexibility).

335 *See* Rose, *supra* note 329, at 5.

336 *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 898–900 (2011).

337 *See id.* at 899.

338 *See* Alison L. Lacroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1340–41 (2010).

339 *Id. See also* Fletcher v. Peck, 10 U.S. 87, 130, 133–35 (1810).

340 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992).

341 *See id.* (remanding to South Carolina Supreme Court to identify state law "background principles of nuisance and property law" and noting that "to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*.").

legislatures that the Fifth Amendment bars "ipse dixit" elimination of reliance-based property rights without compensation.[342]

The reliance-based measure for evaluating physical regulatory interests reflects a similar commitment to stability, and this approach makes sense given the connection between physical regulatory interests and traditional land interests. As described above, physical regulatory interests can be seen as extensions of common law rights in land.[343] Thus, the reliance inquiry for such interests shows consistency with the normative commitments that motivate the treatment of land.

However, the legislative-intent-based inquiry for evaluating intangible regulatory interests departs from the typical emphasis on stability. By requiring unmistakable language to establish a protected right, the legislative-intent test sets unprotected status as the default and turns a blind eye to parties' reliance.[344] Moreover, it honors legislative disclaimers, allowing for ipse dixit repudiation of property rights in interests such as taxi medallions, catch shares, or pollution credits.[345] The legislative-intent approach compromises stability in favor of flexibility.

This departure from the stability-minded reliance inquiry stems from both the nature of the underlying interests and the role of the legislature in creating them. For example, with intangible rights in regulation, the subject matter of regulation may require relatively more flexibility. The regulations at stake may deal with changing technologies (like intellectual property), emerging industries (like Uber as competition for taxis), or evolving information (like overgrazing or pollution levels), all of which tend to require more adaptive response than do interests in land.[346] Also, as a matter of po-

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*See also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 731 (2010) (relying on Florida cases to determine that a "Florida Supreme Court decision . . . is consistent with these background principles of state property law").

342 *See, e.g.*, Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163–64 (1980).

343 *See supra* Part II.B.1.

344 This higher threshold seems to come with the benefit of *per se* takings protection. Since the exacting legislative-intent standard requires express language creating protected rights that cannot be subsequently limited or revoked, then any limitation or revocation would necessarily constitute a taking. Thus, a *Penn Central* balancing test to evaluate whether a taking has occurred would be unnecessary.

345 *See supra* notes 145–147, 156–161, 187–191 and accompanying text. This raises concern over the "positivist trap" that arises from allowing legislatures to define or disclaim property as they see fit. The worry is that it may lead to results at odds with common law conceptions of property. *See generally* Merrill, *supra* note 23, at 922–23 (discussing the positivist trap); Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 842 (2013) (footnote omitted) (same).

346 *See supra* Part II.B; Serkin, *supra* note 336, at 900 ("[B]y encouraging the creation of property rights in the [taxi] medallions, the government may have entrenched a regulatory approach to an entire industry.").

litical function, the legislative-intent approach allows legislatures the flexibility to repeal laws, amend statutes, or adjust programs without the hurdle of compensation.[347]

Additionally, the cost of flexibility might be lower for intangible regulatory interests than for physical interests. Legislatures do not create land, and land comes with baggage. The land already exists, it probably has an owner, and she probably has made investments based on some sense of its value. If a new regulation suddenly makes her rights uncertain (i.e., sacrifices stability for flexibility), then that comes at a cost. Even though future purchasers or investors can capitalize the uncertainty into the price of the land, the current owner cannot and will suffer an immediate loss in value. Not only does this do economic harm, but it may also raise concerns about fairness and notice. Alternatively, intangible regulatory interests are created by legislatures and do not have as much baggage.[348] They are born as part of a regulatory structure, with their uncertainties apparent at their genesis. Thus, uncertainty can be capitalized into the interest from the very beginning, and no preexisting owner suffers a loss. Moreover, this notice also alleviates fairness concerns, and a clear-statement requirement for establishing protected status can serve as a bright-line rule, giving low-cost information that makes it easier to appreciate and capitalize risk. Thus, the legislative role and the nature of the interests at stake can justify a bifurcated framework that treats intangible regulatory interests differently than physical ones.

Finally, this bifurcated framework appears less disruptive of broader property principles and judicial and legislative roles than do alternative approaches. For example, if courts inquired into legislative-intent for all asserted rights in regulation, such an inquiry would divorce the analysis of physical regulatory interests from the treatment of the land to which they attach. Moreover, courts have demonstrated an unwillingness to completely entrust the definition of property to legislatures, particularly in regard to areas, like land, in which there are strong social expectations about property rights.[349] Alternatively, courts could consider reliance in all cases of asserted rights in regulation. However, this would mean disregarding clear legislative directives, entrenching regulatory structures contrary to legislative will, and asserting sole judicial control over the definition of property. Such would involve a significant departure from a number of current doctrines and prin-

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[347] *See* Joe Sanfelippo Cabs Inc. v. City of Milwaukee, 148 F. Supp. 3d 808, 812–13 (E.D. Wis. 2015).

[348] It may have some baggage, but it is likely smaller. For example, when a municipality adopts a taxi medallion system, those who already own taxis are faced with the prospect of buying a license. Their expectation in the taxi is altered. However, that is a lower-cost asset than land, and at least they have the option of purchasing a license based on a price that includes a risk discount.

[349] *See* Merrill, *supra* note 23, at 939–40 (describing the Supreme Court's "Houdini-like moves" to escape deferring to legislative definitions of property rights that depart from the judicial sense of what entails property); Mulvaney, *supra* note 345, at 843–44 (summarizing criticism of federal courts asserting control over the definition of property despite stating that they look to state legislative sources).

ciples. Accordingly, either alternative approach would entail substantial disturbance of broader property principles as well as the respective roles of courts and legislatures.

In conclusion, the bifurcated framework logically stresses different values (stability or flexibility) in different contexts (physical or intangible regulatory interests). It also takes advantage of different institutional capacities (courts or legislatures) to further the application of these values. The framework treats physical regulatory interests as an extension of traditional property, utilizing a judicially-centered reliance inquiry to favor stability (with the government funding that stability by bearing the cost of regulatory change). Conversely, by relying on a legislative-intent inquiry for intangible regulatory interests, it prioritizes legislative flexibility to address changing circumstances (with investors funding that flexibility by bearing the risk of regulatory change). Ultimately this framework balances not only the competing concerns of stability and flexibility but also the tension between positive law as defined by legislatures and reliance-based expectations as identified by courts.

## CONCLUSION

Based on case law and scholarship, this Article constructs a bifurcated framework for courts to use in evaluating asserted rights in regulation. The framework calls for a reliance inquiry for assertions of physical regulatory interests and a legislative-intent inquiry for assertions of intangible regulatory interests. This framework presents an administrable approach that squares with broader property principles as well as with the institutional roles of courts and legislatures.