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## Non-Enforcement Takings

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TIMOTHY M. MULVANEY

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# NON-ENFORCEMENT TAKINGS

TIMOTHY M. MULVANEY\*

**Abstract:** The non-enforcement of existing property laws is not logically separable from the issue of unfair and unjust state deprivations of property rights at which the Constitution's Takings Clause takes aim. This Article suggests, therefore, that takings law should police allocations resulting from non-enforcement decisions on the same "fairness and justice" grounds that it polices allocations resulting from decisions to enact and enforce new regulations. Rejecting the extant majority position that state decisions not to enforce existing property laws are categorically immune from takings liability is not to advocate that persons impacted by such decisions should be automatically or even regularly entitled to the Takings Clause's constitutional remedy. Rather, it simply suggests that courts should resist the temptation to formulaically and categorically prohibit non-enforcement takings claims in favor of assessing those claims on the merits.

## INTRODUCTION

The Fifth Amendment's Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."<sup>1</sup> Though this provision originally applied only to physical appropriations resulting from governmental conduct,<sup>2</sup> courts more recently have interpreted it to constrain

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<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 792 (1995). The Supreme Court has acknowledged as much. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, . . . it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, . . . or the functional equivalent of a

certain regulatory decisions, too.<sup>3</sup> “Regulatory takings” claims, as they have come to be known, ordinarily are based on the government’s *enactment and anticipated enforcement* of a new regulatory safeguard or obligation affecting the use of the claimant’s property. Indeed, no federal or state court has found a taking based on the *non-enforcement* of an existing regulation against a third party, and most courts to have addressed such claims have rejected them summarily. Calling into question this majority view, this Article suggests that although takings claims grounded in non-enforcement, like traditional regulatory takings claims, rarely should succeed, they should be assessed on the merits to assure that the impositions resulting therefrom are fair and just absent compensation.

The argument proceeds in three major parts. Part I first outlines what might be termed a democratic understanding of regulatory takings law.<sup>4</sup> On this view, property is regarded as a socially crafted institution necessarily accountable to the values that characterize our democracy. It follows that the substance of property laws must be collectively adjusted as social, economic, and moral perspectives on the content of these values—and conceptions of what might harm these values—change over time. An expectation that the Takings Clause should significantly obstruct these adjustments seems inconsistent with the understanding that property exists in service of democratic values. Regulatory takings law, if in fits and starts, has recognized as much. At the same time, though, takings jurisprudence also reflects courts’ appreciation for the idea that property owners and non-owners alike reasonably expect that these adjustments to property laws and the allocative impositions that result from them will be made in accord with the democratic principles of fairness and justice. The meaning of these principles is determined—and evolves—through contextualized application of the considerations that the U.S. Supreme Court famously set out in its 1978 decision in *Penn Central Transportation Co. v. New York City*,<sup>5</sup> as these considerations have been illuminated by precedent.

The Part describes how courts to date ordinarily have entertained only those regulatory takings claims based on the government’s enactment and anticipated enforcement of a new regulatory safeguard or obligation affecting the use of the claimant’s property, and not those based on the non-enforce-

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‘practical ouster of [the owner’s] possession’” (citing *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

<sup>3</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131–38 (1978); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922).

<sup>4</sup> See *infra* notes 11–78 and accompanying text.

<sup>5</sup> 438 U.S. at 124–28.

ment of an existing regulation affecting the property of another.<sup>6</sup> This majority view that categorically opposes consideration of takings claims grounded in the non-enforcement of law operates on the premise that non-enforcement is not an exercise of state power that should be conceived of as capable of depriving individuals of private property.

Part II contends that much as the state makes an allocative decision when it enacts and enforces new regulatory safeguards and obligations, it also makes an allocative decision when it decides not to enforce those already existing safeguards and obligations.<sup>7</sup> In a constitutional democracy, the state must define and enforce private property rights. In doing so, it necessarily must make choices amongst competing claims to rivalrous resources. Thus, the state should be understood as exercising its power in the property sphere whether it enacts and enforces an existing law or refrains from doing so, for resolving any property dispute unavoidably involves its making an allocative choice to assign an interest to one party and not to another. Each instance of allocation, therefore, theoretically invokes the principles of fairness and justice that underlie takings law.

This assertion is not intended to suggest that broad swaths of non-enforcement decisions instantly should be deemed constitutionally problematic; indeed, the state's omnipresence in allocating property rights is reason enough why takings liability should be reserved for only especially extreme cases. The claim here is far more modest: there are very exceptional instances where the state's non-enforcement of existing regulatory safeguards and obligations rises to the level of fundamental unfairness and injustice absent compensation. Courts should leave space for open conversation and debate on the merits of individual cases to determine whether adjustments to property allocations that occur via non-enforcement are fair and just without the provision of compensation, just as they have done in cases involving adjustments to property allocations that occur via the state's enactment and anticipated enforcement of new regulations.<sup>8</sup>

Through a series of examples, Part III considers the application of regulatory takings law, as defined in Part I, to the types of allocative decisions—those grounded in the non-enforcement of existing property laws—discussed in Part II.<sup>9</sup> These examples include typical disputes involving the non-

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<sup>6</sup> See *infra* notes 11–78 and accompanying text.

<sup>7</sup> See *infra* notes 79–165 and accompanying text.

<sup>8</sup> This Article generally leaves aside as fodder for future work the prospect of applying takings law to non-enactment situations, i.e., situations in which a deprivation occurs as a result of the state's choosing not to enact a particular regulatory safeguard or obligation. For a brief discussion of the topic, see *infra* notes 146–153 and accompanying text.

<sup>9</sup> See *infra* notes 166–273 and accompanying text.

enforcement of common law trespass, roadway maintenance laws, and vehicular speed limits, in which takings liability seems quite unlikely, as well as disputes involving the non-enforcement of flood control plans, water pollution discharge permits, and rental housing codes, where the takings issue poses more challenging questions than most courts have allowed to date. Collectively, these “easier” and “harder” illustrations present a platform to explore how one might evaluate a non-enforcement decision’s alignment with the democratic norms of fairness and justice that drive regulatory takings law.

The Article concludes that considering non-enforcement takings liability reveals the possibility that takings law may assume a role that does not so much *limit* democratic lawmaking on property—as regulatory takings law is so often conceived—but, instead, one that *enhances* it by helping to assure that non-enforcement decisions, like enactment and enforcement decisions, are fair and just absent compensation.<sup>10</sup>

## I. TAKINGS AND DEMOCRACY

Property presents an inevitable tension. A number of property’s benefits stem from the ability of owners to make life decisions on the belief that the scope of their property holdings will remain relatively stable. At the same time, the citizenry surely must be able to collectively adjust the meaning of ownership as social, economic, and moral perspectives change over time. Regulatory takings law, among other doctrines, performs the difficult task of mediating this tension.

The development of regulatory takings law largely has rebuffed the assumption, at least implicitly adopted by a great number of commentators of varying ideological perspectives, that the Takings Clause should be interpreted to assure economically efficient regulation.<sup>11</sup> Instead, this body of law op-

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<sup>10</sup> See *infra* note 273 and accompanying text.

<sup>11</sup> Among the wealth of literature that understands takings law through the lens of efficiency, see, for example, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 571 (1984); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT’L REV. L. & ECON. 125, 137–38 (1992); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1022–25 (1999); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 602–06 (1986); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986); Richard Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 563–65 (1998). See generally WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995) (using different theories of economic analysis to formulate a regulatory takings doctrine). Adherents to efficiency-based takings theories must confront, among other challenges, the absence of verifiable empirical evidence determining whether it is more efficient to force the government to internalize the external costs of regulation (and thereby allow property owners to ignore the external costs of their investments), or to do just the opposite

erates on the presupposition that the Constitution does not announce any minimum standards for property.<sup>12</sup> Property laws—whether wealth-maximizing or not—are adopted through democratic means for the avowed purposes of furthering the public interest and promoting the values that characterize our system of self-governance.<sup>13</sup>

On this presupposition, takings law should not be—and generally has not been—interpreted to restrict the democratic process of definition and adjustment of property allocations. As Section A sets out, however, takings law provides some assurance that property adjustments will be fairly and justly administered so as not to produce targeted or specialized impositions that disrespect the same interests and values that the institution of property is intended to serve.<sup>14</sup> Section B explains that regulatory takings law’s “fairness and justice” analysis generally has been confined to situations in which the government has enacted and sought to enforce new regulatory safeguards or obligations on the claimant landowner, and deemed inapplicable to instances in which the government fails to enforce existing regulations against third parties.<sup>15</sup>

#### *A. A Democratic Approach to Regulatory Takings Law*

The foundations of a democratic approach to takings law can be traced, like so many insights in property and takings law, to the early writings of Professor Joseph Sax.<sup>16</sup> Ironically, the great legal realist, Justice Oliver Wendell Holmes, served as Professor Sax’s foil. Early in the twentieth century, Justice Holmes grounded takings analysis in an economic comparison of the disparity between the pre-regulation economic burden distribution and the post-regulation economic burden distribution through the claimant’s eyes to inquire whether she reaps an “average” reciprocity of economic advantage from

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(force property owners to internalize the external costs of their investments and make it more likely that the government will ignore the external costs of regulation).

<sup>12</sup> See, e.g., ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 263 (2003).

<sup>13</sup> See, e.g., Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 330 (2006); Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy: A Tribute to André van der Walt* (Harvard Pub. Law, Working Paper No. 17-40, 2017), [https://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2976009](https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2976009).

<sup>14</sup> See *infra* notes 16–52 and accompanying text.

<sup>15</sup> See *infra* notes 53–78 and accompanying text.

<sup>16</sup> See generally Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter Sax, *Police Power*]; Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

the challenged regulation.<sup>17</sup> Professor Sax countered in 1964 by describing takings compensation as an appropriate “bulwark against *unfairness*, rather than [as Holmes had insinuated] against mere value diminution” resulting from the “burdens” of regulation.<sup>18</sup> Professor Sax decried rigid definitions of property as fixed in reference to existing economic values in favor of defining property as “the value which each owner has left after the inconsistencies between . . . competing owners have been resolved.”<sup>19</sup> To Professor Sax, courts adjudicating takings claims must ask: “[A]gainst what qualitative kinds of value-diminishing acts should existing values be insulated?”<sup>20</sup>

Professor Sax’s theory quickly worked its way into takings doctrine. In 1969, the Court pointed to Professor Sax’s work, alongside that of just one other scholar—Frank Michelman, himself a monumental figure in takings law—as offering a worthy “general discussion of the purposes” of the Takings Clause.<sup>21</sup> Various justices would proceed to draw on and cite to Professor Sax’s perspective on takings law in several of the Court’s most important takings decisions in the twenty-five years that followed.<sup>22</sup>

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<sup>17</sup> See *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 539–40 (1914) (finding that a Pennsylvania statute prohibiting the extraction of coal along property boundaries did not amount to a compensable taking because all affected mine owners would be reciprocally benefitted). The result of Justice Holmes’ exposition, at least on this interpretation, is that no owner can, on net, bear a diminution—at least any sizable diminution—in one’s property value at the hands of government regulation. In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes wrote for the Court that a Pennsylvania statute requiring mine owners to keep coal in place to prevent surface subsidence did not secure the mine owners an “average reciprocity of advantage” but rather redistributed value from the mine owners to the surface owners. See 260 U.S. at 422.

<sup>18</sup> See Sax, *Police Power*, *supra* note 16, at 57 (emphasis added).

<sup>19</sup> *Id.* at 61; see also LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 150–51 (2003) (contending that a presumption exists in favor of protecting the claimed property right only where the values that the right reflects are distinct from the values reflected in the public interest opposing that right).

<sup>20</sup> Sax, *Police Power*, *supra* note 16, at 61, 63–64 (asking “to what *kind* of competition ought existing values be exposed; and, from what *kind* of competition ought existing values be protected”) (emphasis added). Professor Sax attributes nearly as much to the Supreme Court’s holding in *United States v. Causby*. See *id.* at 68 (citing *Causby*’s explanation that “it is the character of the invasion, not the amount of damage resulting from it . . . that determines the question of whether it is a taking” (quoting *United States v. Causby*, 328 U.S. 256, 266 (1946))).

<sup>21</sup> *Nat’l Bd. of YMCA v. United States*, 395 U.S. 85, 90 n.2 (1969).

<sup>22</sup> *Lucas*, 505 U.S. at 1023, 1025; *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 864 (1987) (Brennan, J., dissenting); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.20, 497 n.25 (1987); *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199 n.17 (1985); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 442 (1982) (Blackmun, J., dissenting); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 649–50 n.15 (1981); *Penn Central*, 438 U.S. at 133–34 n.30. Professor Michelman has been attributed with establishing the theoretical landscape for economic models of the takings issue and takings analyses grounded in John Rawls’ conception of fairness. See generally Gregory S. Alexander, *Michelman as Doctrinalist*, 15 WM. & MARY BILL RTS. J. 371 (2006) (referring to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Com-*



In its 1978 decision in *Penn Central*, the Court, relying heavily on the writings of Professors Sax and Michelman, identified a non-exclusive list of considerations that courts should take into account in attempting to determine in an individual case whether an imposition stemming from a new regulatory safeguard or obligation is fair and just absent compensation.<sup>23</sup> To decide when “fairness and justice require that economic injuries caused by public action be compensated by the government, rather than remain concentrated on a few persons,” the Court in *Penn Central* and its progeny counseled lower court judges to “engag[e] in . . . *ad hoc* factual inquiries” that include considering (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with the claimant’s investment-backed expectations; and (3) the “character of the governmental action.”<sup>24</sup>

The goals of “fairness and justice” and the considerations that *Penn Central* suggested to advance these goals in takings cases are of limited content in the abstract. However, the expansive body of Supreme Court and lower court takings cases has given meaning to both the *Penn Central* considera-

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*tion*” *Law*, 80 HARV. L. REV. 1165 (1967)). Professor Sax’s perspective on takings is decidedly focused on fairness, and the account I offer in this article better tracks that of Professor Sax than the principally utilitarian account set out by Professor Michelman. See Sax, *Police Power*, *supra* note 16, at 57. My account, however, bears some markings of Professor Michelman’s theory, too, including perhaps most significantly his emphasis on parties other than traditional takings plaintiffs. See, e.g., Michelman, *supra*, at 1214–16 (discussing “demoralization costs,” which he defines as the psychological impact on non-parties when a takings claimant is not afforded compensation).

<sup>23</sup> 438 U.S. at 124, 128 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)); see *Lucas*, 505 U.S. at 1019 n.8 (describing the considerations explicitly referenced in *Penn Central* as “keenly relevant”); *Loretto*, 458 U.S. at 426 (“In *Penn Central* . . . the Court surveyed *some* of the general principles governing the Takings Clause.”) (emphasis added). Various lower court opinions discuss the non-exclusivity of the considerations explicitly identified in *Penn Central* as relevant to regulatory takings claims. See, e.g., *Shaw v. County of Santa Cruz*, 88 Cal. Rptr. 3d 186, 213–14 (Cal. Ct. App. 2008); *Herzberg v. County of Plumas*, 34 Cal. Rptr. 3d 588, 597–98 (Cal. Ct. App. 2005). The *Shaw* court described the three considerations documented in *Penn Central* as the “principle guidelines” but explained how the California courts have “identified from United States Supreme Court cases . . . a number of additional, nonexclusive factors that might be relevant considerations in a particular case of an alleged *Penn Central* regulatory taking.” *Shaw*, 88 Cal. Rptr. 3d at 213–14, 214 n.38; see also Richard M. Frank, *Inverse Condemnation Litigation in the 1990s—the Uncertain Legacy of the Supreme Court’s Lucas and Yee Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 88 (1993) (arguing that the Supreme Court has not “comprehensively identified” the factors to be considered in a regulatory takings case and that the *Penn Central* decision is the closest it has come to identifying such factors). The Supreme Court’s June 2017 opinion in *Murr v. Wisconsin* includes language supportive of non-exclusivity. 137 S. Ct. 1933, 1943 (2017) (referring to “a complex of factors including” the types of considerations noted in *Penn Central* and asserting that the “central dynamic of the Court’s regulatory takings jurisprudence . . . is its flexibility”).

<sup>24</sup> See *Penn Central*, 438 U.S. at 124.

tions and the goals that they were intended to serve.<sup>25</sup> Although space constraints preclude an exhaustive account, a condensed summary of the leading interpretations of the *Penn Central* considerations' pursuit of "fairness and justice" is sufficient to set out the most prominent aspects of the doctrine.

As an initial matter, it is now evident that, outside the unique context of land use exactions,<sup>26</sup> the "situation-specific" approach of *Penn Central* is applicable to almost all regulatory takings cases.<sup>27</sup> Soon after *Penn Central*, the Court briefly attempted to identify situations in which new regulatory safeguards and obligations amount to takings *per se*. Most prominently, these situations involve regulations that result in permanent physical occupation of land by a stranger or deprive land of all economically viable uses, as set out, respectively, in *Loretto v. Teleprompter Manhattan CATV Corporation* in 1982 and *Lucas v. South Carolina Coastal Council* in 1992. However, this attempt has been exposed as a mere application of the *Penn Central* considerations in cases in which one consideration so intensely weighs in favor of the claimant that the others *may be* either largely unnecessary or unworthy to contemplate in any depth.<sup>28</sup> Despite some rhetorical dicta to the contrary,

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<sup>25</sup> See Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, 631–54 (2015) (describing how Supreme Court and lower court takings cases give meaning to the considerations identified in *Penn Central* and the goals they serve). This is not to suggest that the courts always have been as explicit as they might be in explaining the extent to which the *Penn Central* considerations shed light on the fairness and justice of the governmental decision at issue in takings cases. See Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 747–48 (2004) (arguing that although the Court consistently mentions "justice" and "fairness" as guiding principles behind the Takings Clause, it often does not sufficiently reference "justice" and "fairness" when discussing the primary issues of a takings case).

<sup>26</sup> I have written at some length in the past on the distinctive takings analysis applicable in those instances where the state attaches exactions, or certain conditions, to development permits. See generally, Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511 (2012) [hereinafter Mulvaney, *Exactions for the Future*]; Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137 (2016) [hereinafter Mulvaney, *Legislative Exactions*]; Timothy M. Mulvaney, *On Bargaining for Development*, 67 FLA. L. REV. F. 66 (2015); Timothy M. Mulvaney, *Proposed Exactions*, 26 J. LAND USE & ENVTL. L. 277 (2011); Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 ENVTL. L. & POL'Y J. 189 (2010).

<sup>27</sup> There are limited exceptions for what Professor Singer has described as "core property rights." See Singer, *supra* note 25, at 644–47 (discussing *Babbitt v. Youpee*, 519 U.S. 234 (1997) (involving the right to pass property to others upon one's death); *Hodel v. Irving*, 481 U.S. 704 (1987) (discussing the right to pass property to others upon one's death); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (holding in a narrow circumstance that the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth Amendment); *Armstrong v. United States*, 364 U.S. 40 (1960) (holding that the government's complete destruction of a materialman's lien in certain property constituted a "taking").

<sup>28</sup> See *Lucas*, 505 U.S. at 1028 (asserting that "[w]here 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved") (citation omitted); *Loretto*, 458 U.S. at 441 (declaring that "permanent occupations of land by such installations as telegraph

these “categorical rules” are anything but categorical. Numerous examples indicate that the importance of the public interest in the regulation at issue matters in applying *Loretto* and *Lucas*. For instance, public accommodations laws establish a permanent public access easement that is justified without the provision of compensation,<sup>29</sup> and depriving land of all of its economically viable uses is constitutionally unremarkable when the only viable uses of that land would produce significant public harm.<sup>30</sup>

A decade after *Lucas*, the Supreme Court expressed in no uncertain terms its disinclination toward categorical rules in the takings context. In 2001 in *Palazzolo v. Rhode Island*, the Court held that the fact that a claimant purchased property after the regulation about which she was now complaining was adopted did not preclude her takings claim *per se*; instead, the Court explained that, on remand, the state court should use the *Penn Central* factors to determine whether a taking had occurred.<sup>31</sup> Similarly, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* in 2002, the Court rejected the claimant’s position that a development moratorium automatically should be deemed a compensable deprivation of all economically viable uses regardless of any public interests served.<sup>32</sup> *Tahoe-Sierra* noted that “[t]he Takings Clause requires careful examination and weighing of all the relevant circumstances” under the *Penn Central* “guideposts.”<sup>33</sup>

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and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner’s use of the rest of his land”); see also *Okemo Mountain, Inc. v. Town of Ludlow*, 762 A.2d 1219 (Vt. 2000) (concluding that the State’s closure of a private road required takings compensation); Laura S. Underkuffler, *Takings and the Nature of Property*, 9 CAN. J.L. & JURIS. 161, 184–85 (1996) (suggesting that under an “operative” conception of property, “all property interests are not held with the same intensity and are not equally protected”).

<sup>29</sup> See 42 U.S.C. § 2000a (2012) (prohibiting discrimination and segregation in places of public accommodation against individuals on the basis of their “race, color, religion, or national origin”).

<sup>30</sup> Indeed, *Lucas* conceded as much. See 505 U.S. at 1029 (asserting that, in light of “background principles” of property law, the owner of a nuclear generating plant would “not be entitled to compensation” when it is “directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault”). On the seemingly constrictive nature of *Lucas*’ discussion of “background principles,” see Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 844–50 (2013); Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENVTL. L.J. 315, 369–71 (2009); Timothy M. Mulvaney & Brian Weeks, *Waterlocked: Public Access to New Jersey’s Coastline*, 34 ECOLOGY L.Q. 579, 596–98 (2007).

<sup>31</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001). On remand, a Rhode Island trial court judge rejected the landowner’s regulatory takings claim because it was unreasonable for one to expect to be able to fill and develop a saltwater pond and the adjacent marshlands. See *Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at \*15 (R.I. Super. Ct. July 5, 2005).

<sup>32</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 320–21 (2002).

<sup>33</sup> *Id.* at 327 n.23 (O’Connor, J., concurring) (emphasis added) (quoting *Palazzolo*, 533 U.S. at 636).

In terms of the *Penn Central* considerations themselves, takings precedent on the “character of the governmental action” has revealed that regulatory takings claims generally succeed only when the state cannot justify an imposition that is “functionally equivalent” to the imposition sustained in an ordinary exercise of the eminent domain power without providing compensation.<sup>34</sup> It follows that claimants generally are not entitled to compensation for abiding by democratically-enacted and generally applicable regulatory safeguards and obligations that (1) advance generalized public interests;<sup>35</sup> (2) prevent owners from causing harm to others’ person or property;<sup>36</sup> (3) establish baseline standards for social and market interactions by, for instance, protecting consumers from deceptive practices;<sup>37</sup> (4) mediate unavoidable controversies;<sup>38</sup> and (5) endorse constitutional norms, such as anti-discrimination and free speech.<sup>39</sup> Regulations are more likely to require compensation when

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<sup>34</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

<sup>35</sup> *See, e.g., Gorieb v. Fox*, 274 U.S. 603, 609–10 (1927) (holding that setback requirements do not constitute a taking); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395–97 (1926) (holding that a statutory building height limit did not result in a constitutional taking); *Welch v. Swasey*, 214 U.S. 91, 107–08 (1909) (holding that a statutory building height limit did not result in a constitutional taking and that the law fell within Massachusetts’ police power).

<sup>36</sup> *See, e.g., Keystone*, 480 U.S. at 500–02 (upholding a Pennsylvania regulation that limited how much subsurface coal could be mined in order to protect surface structures); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595–96 (1962) (upholding a town regulation that prohibited excavation below the water table, which in turn rendered petitioner’s quarry effectively useless); *Walls v. Midland Carbon Co.*, 254 U.S. 300, 325 (1920) (upholding a statute conditioning the burning of natural gas); *Hadacheck v. Sebastian*, 239 U.S. 394, 409–11 (1915) (upholding a regulation that banned the operation of brick factories within Los Angeles’ city limits); *Reinman v. City of Little Rock*, 237 U.S. 171, 176–77 (1915) (upholding a regulation banning livery stables from certain areas in the community); *Mugler v. Kansas*, 123 U.S. 623, 675 (1887) (upholding a regulation that banned the production of alcohol for recreational purposes); *Powell v. Commonwealth*, 7 A. 913, 915–17 (Pa. 1887) (upholding a law that outlawed the production of oleomargarine).

<sup>37</sup> *See, e.g., Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 445–48 (1934) (upholding the constitutionality of a state mortgage moratorium law, which allowed mortgagors to extend the time period in which owners could pay their mortgages); *Block v. Hirsh*, 256 U.S. 135, 156–58 (1921) (holding that a rent control law, which regulated rent prices and allowed tenants to stay in their apartments so long as they paid on time and satisfied any other conditions of the lease, was not a taking).

<sup>38</sup> *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 529–30 (1992) (upholding a law that sets mobile home rent prices and protects tenants’ possession of mobile home pads in contravention of the landlord’s claim to possession); *Miller v. Schoene*, 276 U.S. 272, 277–81 (1928) (upholding the constitutionality of a state law that forced the destruction of petitioner’s cedar trees that, though themselves healthy, carried a fungus that would decimate nearby apple orchards).

<sup>39</sup> *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–59 (1964) (holding that a federal anti-discrimination provision within the Civil Rights Act that prohibits racial discrimination by hotels and other places of public accommodation was a valid exercise of Congress’ police power); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 350–51 (Cal. 1979) (upholding law promoting free speech on private property generally open to the public), *aff’d*, 447 U.S. 74 (1980).

they (1) unjustifiably confiscate property that does not cause harm or interfere with others' property rights;<sup>40</sup> (2) authorize third party occupation of privately owned property that is not open to the public;<sup>41</sup> (3) single out individuals among similarly situated persons to bear a wholly disproportionate weight of an imposition;<sup>42</sup> or (4) retroactively diverge from what a reasonable owner could have possibly expected when she invested in property and put that property to a legitimate use in reliance on existing law.<sup>43</sup>

As for interference with the claimant's "reasonable investment-backed expectations," precedent indicates that regulatory takings compensation usually is due only when an owner is disallowed from continuing a current use that is not causing harm or posing a risk of harm.<sup>44</sup> Takings law operates here much like state land use regulations that protect investments in prior non-conforming uses. Uncompensated changes in the applicable standards that retroactively impede existing uses—which are quite rarely enacted—are generally deemed unfair absent substantial justification, whereas the more common uncompensated changes that impact prospective uses generally are not.

Finally, with respect to the "economic impact," *Lucas* suggests that a regulation that deprives land of *all* of its economically viable uses requires takings compensation if, absent the regulation, non-harmful, legally viable uses of that land exist.<sup>45</sup> Otherwise, though, economic impact of any significance will not alone ordinarily give rise to takings liability.<sup>46</sup> Only when the economic impact is addressed in conjunction with one of the other considerations does it—at least at times—take on meaning.<sup>47</sup> Where what might be

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<sup>40</sup> See, e.g., *Causby*, 328 U.S. at 266–68 (holding that the continued low-lying air flight of United States Army bombers above the respondent's land constituted a taking); *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 182 (1871) (holding that the flooding of petitioner's land as a result of the state's decision to dam a river was a compensable taking).

<sup>41</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 177–80 (1979) (holding that government must invoke eminent domain and pay just compensation in order to turn a privately owned dredged pond into a public aquatic park).

<sup>42</sup> See, e.g., *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 37–40 (2012) (holding that the temporary nature of government-caused floods did not automatically preclude such floods from constituting a taking); *Pumpelly*, 80 U.S. at 182.

<sup>43</sup> *Kaiser Aetna*, 444 U.S. at 177–80.

<sup>44</sup> See *Penn Central*, 438 U.S. at 136.

<sup>45</sup> See *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting) (explaining that, in accord with the majority's holding, "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value").

<sup>46</sup> See, e.g., *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (deeming 46% diminution in value "insufficient to demonstrate a taking"); *Euclid*, 272 U.S. at 384 (finding 75% diminution resulting from a zoning scheme constitutionally sound); *Hadacheck*, 239 U.S. at 405 (rejecting a claim that 92.5% diminution in value resulting from a new restriction on the operation of brickyards necessitated compensation).

<sup>47</sup> See Underkuffler, *supra* note 25, at 736 ("[T]he showing of a landowner's loss—even a significant loss—[is not] sufficient, of itself, to compel compensation.").

deemed a vested right—such as one akin to a prior non-conforming use—is at stake, a substantial economic impact resulting from a new regulation could potentially be considered unfair. Merely acquiring vacant land, though, does not give rise to a vested right, such that regulatory safeguards enacted post-acquisition that prevent some land uses ordinarily are considered to result merely in a lost opportunity that is non-compensable.<sup>48</sup> In most takings cases, though, the economic impact actually is of little import. Regulations that single out specific owners might not produce a large economic impact but nonetheless amount to takings if the singling out is unjustified absent compensation. Conversely, regulations that do not single out owners might produce a large economic impact yet not raise takings concerns.<sup>49</sup>

The foregoing summary suggests that the usual driver in a modern regulatory takings suit is not, as Justice Holmes initially suggested, the “degree of diminution in value”—as calculated by accounting for the economic burdens and benefits of the alleged expropriatory act from the claimant’s perspective—or the claimant’s asserted expectation to use her land for some purpose in the future, but rather the “specificity” and the “character” of the state’s decision.<sup>50</sup> The courts repeatedly have asserted that determining whether the

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<sup>48</sup> *Penn Central*, 438 U.S. at 135–36 (stating that the regulation in question will not affect the uses to which petitioner had put its property in the sixty-five years prior to the case); *Euclid*, 272 U.S. at 384 (noting that the parcel of land in question had been vacant for years).

<sup>49</sup> See *Lingle*, 544 U.S. at 544; *Lucas*, 505 U.S. at 1067 (Stevens, J., dissenting) (noting that the “risks of . . . singling out are of central concern in takings law”); *William C. Haas & Co. v. City of San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) (rejecting a takings claim where a height restriction in San Francisco reduced the value of lots from \$2 million to \$100,000 because it applied to the entire Russian Hill neighborhood); James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 67 (2016) (demonstrating that economic diminution in value by itself is almost never enough to support a takings claim). *But see* Michael Pappas, *Singled Out*, 76 MD. L. REV. 122, 167–68 (2016) (arguing that the Supreme Court should abdicate the current takings jurisprudence that concentrates on the singling out of claimants).

<sup>50</sup> See *Lucas*, 505 U.S. at 1067, 1071 (Stevens, J., dissenting). This position, emphasized in Justice Stevens’ dissent in *Lucas*, more recently has been embodied as a principal feature of the Court’s regulatory takings jurisprudence. In *Tahoe-Sierra*, Justice Stevens himself authored an opinion for a six-Justice majority rejecting a takings claim based on a 32-month moratorium in development on Lake Tahoe’s shores on the view that a temporary—as opposed to a permanent—ban on development poses “a lesser risk that individuals will be ‘singled out’ to bear a special burden that should be shared by the public as a whole.” *Tahoe-Sierra*, 535 U.S. at 332, 336, 341 (recognizing that takings law is designed to “protect[] individual property owners from bearing public burdens ‘which, in all fairness and justice, should be borne by the public as a whole,’” and asserting that “we have eschewed ‘any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons’” (quoting *Armstrong*, 364 U.S. at 49)) (internal quotations omitted); *see also* *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 109 (Cal. 2002) (asserting that reciprocity of advantage lies “not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlock-

imposition resulting from an adjustment to a property interest is unfair and unjust without the provision of compensation cannot be accomplished through the application of a mechanical formula. Rather, this task requires contextualized value judgments on a range of issues, including when rights vest (on purchase, upon applying for or receipt of a development permit, only after substantial construction, etc.), what constitutes harm, what minimum standards are consistent with a free and fair market, and what is the content of our constitutional norms and the manner and extent to which they unify our system of common, statutory, and administrative laws.<sup>51</sup> Judgments on these types of variables serve as regulatory takings law's limiting principles. If, on these terms, the imposition associated with a state regulatory decision is unfair and unjust without compensation, it is compensable; if it is not, the imposition is more appropriately conceived as a responsibility, not a burden, of ownership.

At bottom, then, regulatory takings law offers space not to routinely provide compensation to parties economically impacted by adjustments in property laws, but, rather—sharing the words of Rainer Forst—to vindicate impacted parties' "right to justification" regarding the fairness of the responsibilities compelled by those adjustments.<sup>52</sup> On this view, takings law does not inhibit democracy by constraining those collective adjustments to property laws that produce diminutions in economic value. Instead, takings law helps to guide adjustments to property laws in ways that maintain property's character as a healthy, fair, and just democratic institution. The next section illustrates by way of example how takings law ordinarily has served in this role to date.

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ing system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good").

<sup>51</sup> The necessity of taking a normative stance in defining and enforcing property laws is clearly exemplified when one considers whether a person who murders her joint tenant holds title to the property the two had held jointly by right of survivorship. See Singer, *supra* note 25, at 657.

<sup>52</sup> See RAINER FORST, *THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE 2* (Jeffrey Flynn trans., 2012). Forst explains:

The fundamental impulse that runs counter to injustice is not primarily that of wanting to have or have more of something, but that of wanting to no longer be oppressed, harassed, or have one's claims and *basic right to justification ignored*. This right expresses the demand that there be no political or social relations of governance that cannot be adequately justified to those affected by them.

*Id.*; see also FREYFOGLE, *supra* note 12, at 265 ("Good reasoning is often stimulated when lawmakers take the time to explain why they did what they did and why they thought a decision best served the public interest.").

## B. Regulatory Takings Law in Application

### 1. Enactment and Enforcement

Most regulatory takings cases surround allocative choices made by the state through the *enactment and enforcement of a regulatory safeguard or obligation affecting the use or transfer of the claimant's land*.<sup>53</sup> In the usual case, these types of regulations easily survive application of the *Penn Central* considerations as outlined above, for the ordinary workings of democracy usually produce laws that adjust property interests in ways that do not impose especially unfair and unjust impositions. Select instances, though, pose closer calls. For a comparative example, consider two approaches to serving the public interest at issue in *Penn Central* itself: historic preservation.

Many municipalities have formally identified certain neighborhoods as composed of structures that are of architectural or other historic significance.<sup>54</sup> Structures within these districts regularly are subject to design guidelines that provide a check on construction activities to assure that they do not unduly interfere with the neighborhood's historic integrity. The guidelines, then, restrict the freedom of the owners of structures within that district to redevelop their land as they please. Governmental entities often justify this imposition without compensation on the ground that, as with traditional zoning schemes, setback requirements, and floor-area ratios, these owners are reciprocally benefitted by the district designation. Although the government certainly should foresee that its decision to designate a neighborhood as historic would present an imposition on those who own property within that district, all of those owners not only experience that imposition, but also simultaneously enjoy the aesthetic and economic fruits of knowing that their neighbors are subject to the same. Any alleged imposition is purely economic in nature and rarely of great severity, for the design restrictions allow current uses to continue and usually apply only to a structure's exterior. Indeed, according to some studies, properties may be *more* economically valuable following the designation of their neighborhood as historic than they were prior to the designation.<sup>55</sup> Moreover, the distribution of the imposition is widespread across all properties within the district. Finally, given that thousands of neighborhoods in the United States have been designated historic over the

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<sup>53</sup> See FREYFOGLE, *supra* note 12, at 15 ("In the hypothetical dispute widely viewed as the norm, an individual landowner desires to engage in a particular land use, only to be frustrated by an overbearing regulatory agency.").

<sup>54</sup> E.g., *Penn Central*, 438 U.S. at 107–08 (citing examples of historic preservation ordinances).

<sup>55</sup> See, e.g., Donovan D. Rypkema, *The (Economic) Value of National Register Listing*, CULTURAL RES. MGMT, no. 1, 2002, at 6.



past eighty years,<sup>56</sup> it would be unreasonable for an owner within a neighborhood of any vintage not to have foreseen this possibility. The mere purchase of land should not give rise to a vested immunity from any regulation at all.<sup>57</sup> For these reasons, constitutional takings challenges to historic district designations have found little success.<sup>58</sup>

Distinct from the designation of historic districts are those historic designations of a lone structure within a community, particularly where the structure was built in the same era as, and in an architectural style similar to, myriad other buildings within the community.<sup>59</sup> Perhaps, for instance, a locality wants to preserve some piece of its history while facilitating modernized construction. Seeking to preserve ties to a town's historical roots is almost universally considered a permissible public objective. However, takings law is concerned with the issue of whether a local government is justified in imposing this singular historic designation on the claimant's property without compensation.

A local government may have more difficulty justifying the imposition experienced by this single owner without compensation than it would in justifying the more generally applicable impacts of creating a historic district.<sup>60</sup> In choosing to pursue the public end of preserving some piece of its history while still facilitating modern construction in the surrounding area, the imposition on a single property owner is acutely debilitating and presents less reciprocal advantage than a historic district designation. The government is well aware that an individualized landmark designation in these circumstances can

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<sup>56</sup> *Penn Central*, 438 U.S. at 107 (noting that "all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of . . . areas with historic . . . importance").

<sup>57</sup> *See Euclid*, 272 U.S. at 396–97 (holding that the owner of a vacant parcel of land is not entitled to enjoin the local government from enforcing any part of a zoning ordinance with respect to such parcel).

<sup>58</sup> *See* J. Peter Byrne, *Regulatory Takings Challenges to Historic Preservation Laws After Penn Central*, 15 FORDHAM ENVTL. L. REV. 313, 332–34 (2004). Some jurisdictions have limited by legislation the designation of neighborhoods as historic absent the consent of the owners within those neighborhoods or the payment of compensation if such regulation creates an economic diminution of value. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1134 (2017).

<sup>59</sup> *See, e.g.*, *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 888 (1996) (finding a compensable taking where the state refused to issue a certificate of appropriateness to a monastery seeking to demolish one of its buildings).

<sup>60</sup> Indeed, debate on this point is what made the Supreme Court's seminal regulatory takings decision in *Penn Central* so contentious. *Compare Penn Central*, 438 U.S. at 132 (explaining that New York City's Landmarks Law "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city"), *with id.* at 138–39 (Rehnquist, J., dissenting) ("Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. . . . [The owner of one of these designated landmarks might find] that the landmark designation imposes upon him a substantial cost, with little or no offsetting benefit except for the honor of the designation.").

produce a negative imposition on the designation's target, and it may well be unfair to expect an owner to have anticipated that one's own building will be subject to historic design guidelines when similarly situated owners are not. At the same time, the imposition may not be particularly severe—it is likely only economic in nature,<sup>61</sup> the owner's current use may continue (such that only a potential opportunity is lost), the limitations apply only to the structure's exterior, and the land and structure remain marketable.

This discussion is not intended to suggest that historic landmark designations regularly should be deemed takings; indeed, the courts have reasonably concluded in many instances—including *Penn Central*—that they should not.<sup>62</sup> Rather, this comparative example is offered to illustrate that, compared to the case of the government's delineating an entire district historic, an isolated historic landmark designation may present a greater likelihood that the quality and concentration of the imposition stemming from that landmark designation may be unfair and unjust absent compensation.<sup>63</sup> The key point, however, is that in either instance—whether the takings claim is based on the enactment and enforcement of a generalized historic districting scheme or a more specific landmark designation—the courts will entertain and analyze on the merits whether such a *new regulatory safeguard restricting the use of the claimant's land* produces an imposition that triggers takings law's compensation remedy.<sup>64</sup> As intimated at the outset of this Article and explained in more detail in the following section, though, the same cannot be said in the context of those impositions arising from the government's *non-enforcement of an existing regulatory safeguard (or obligation) against other property owners*.

## 2. Enactment and Non-Enforcement

It is the predominant view among state and lower federal courts that non-enforcement of an existing regulation against other property owners cannot serve as the basis for a takings claim under any circumstances. The Texas

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<sup>61</sup> It is not outside the realm of possibility, however, that such a situation also might impose dignity costs, for serving as the town's sacrificial lamb may be especially humiliating.

<sup>62</sup> See Byrne, *supra* note 58, at 334.

<sup>63</sup> See, e.g., GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 180–82 (2012). For a similar analysis comparing generally applicable agricultural zoning districts to “an agricultural zoning law [that] affects only one farm in the community,” see John Echeverria, *Making Sense of Penn Central*, 39 ENVTL. L. REP. 10,471, 10,484 (2009).

<sup>64</sup> See, e.g., *Keeler*, 940 F. Supp. at 888 (finding a compensable taking where the state refused to issue a certificate of appropriateness to a monastery seeking to demolish one of its buildings, even though the state issued certificates of appropriateness to similar buildings in the area).

Supreme Court most recently asserted this majority position in the matter of *Harris County v. Kerr* in 2016.<sup>65</sup>

The dispute in *Harris County* involved more than four hundred downstream residents of Texas's Upper White Oak Bayou whose homes were constructed in the 1970s and early 1980s.<sup>66</sup> In 1984, the County adopted a fully formulated flood control plan that promised to protect against the one hundred-year flood in those already-developed areas and maintain one hundred-year flood protection in those areas anticipated for future development.<sup>67</sup> Yet the County approved a wealth of new upstream development in contravention of the mitigating conditions set out in the plan.<sup>68</sup> When the downstream lands flooded by an event much less severe than the one hundred-year flood, residents of these flooded lands filed suit alleging that the County had unconstitutionally taken their property by failing to implement its flood control plan.<sup>69</sup>

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<sup>65</sup> *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (Tex. 2016). Various other cases align with *Harris County's* rejection of takings claims grounded in government nonfeasance. See, e.g., *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (“The [government’s] failure to [enforce the regulation in question] successfully does not . . . constitute a taking under the Fifth Amendment.”); *Valles v. Pima County*, 776 F. Supp. 2d 995, 1003 (D. Ariz. 2011) (asserting that “[p]laintiffs have not cited any authority to suggest that a government’s *inaction* or *omissions* can amount to a taking, and this Court is not aware of any such case law”); *Griffin Broadband Commc’ns, Inc. v. United States*, 79 Fed. Cl. 320, 324 (2007) (“[T]he Government’s failure to prevent [an alleged injury] properly is characterized as inaction, and so cannot constitute a taking.”); *Nicholson v. United States*, 77 Fed. Cl. 605, 620 (2007) (declaring that “[i]n no case that we know of has a governmental agency’s failure to act . . . been ruled a taking[.]” and that “[u]nder the decisions controlling this Court, omissions or claims that the Government should have done more to protect the public do not form the basis of a valid takings claim”); *Woods v. Mass. Dep’t of Env’tl. Prot.*, No. BACV200700099A, 2011 WL 7788022, at \*4 (Mass. Super. Ct. Jan. 7, 2011) (dismissing a takings claim summarily where the State was apparently aware that the claimant’s neighbor violated the terms of a shoreline armoring permit, and the claimant alleged that her land was destroyed as a result of the State not moving to enforce that permit, despite contradictorily asserting that the State’s argument that “its decision not to take discretionary action as to enforcement of a condition in a license cannot form the basis of a takings action” was “unsupported by law”); *Bargmann v. State*, 600 N.W.2d 797, 805 (Neb. 1999) (rejecting takings claim where the State allowed obstructions on a highway that injured the claimant’s property on the ground that the obstructions were constructed and maintained by private third parties with “no direct involvement” by the State); *Hawkins v. City of Greenville*, 594 S.E.2d 557, 562 (S.C. Ct. App. 2004) (“To establish an inverse condemnation, a plaintiff must show . . . an affirmative, positive, aggressive act on the part of the government agency . . . .”); *Grunwald v. City of Castle Hills*, 100 S.W.3d 350, 354 (Tex. App. 2002) (rejecting the notion that non-enforcement of a condition in the claimants’ neighbor’s building permit that resulted in a marked reduction in the claimants’ use and enjoyment of their property could give rise to takings liability by asserting only that “[w]e have found no authority holding [that] . . . a failure to act results in a regulatory taking”).

<sup>66</sup> 499 S.W.3d at 795–96.

<sup>67</sup> *Id.* at 796.

<sup>68</sup> *Id.* at 796–97.

<sup>69</sup> *Id.* at 795, 797.

In the summer of 2016, Texas's highest court dismissed, in a series of terse sentences, the prospect of any form of government non-enforcement serving as the basis for a takings claim. The court stated that “[w]e have not recognized a takings claim for nonfeasance,” “the law does not recognize takings liability for a failure to complete the [flood control plan],” and “inaction cannot give rise to a taking.”<sup>70</sup> The court’s only attempt at supporting these assertions came in the form of self-serving textualist inferences; for example, it pointed to state takings precedents referring to an “affirmative ‘act’ or ‘action,’” a “specific act,” and an “intentional act” as evidence that non-enforcement cannot give rise to takings liability.<sup>71</sup> In effect, then, the court was operating under the assumption that the state was not sufficiently involved to even consider whether it bore some responsibility for the impacts of the downstream flooding. The court only addressed the substance of the downstream owners’ claim asserting, as the court described it, that the County’s “doing nothing more than allowing [specific upstream] private parties to use their [own] properties as they wish” amounted to a taking of downstream properties, and it did not consider the extent to which the County was allowing these specific upstream parties to use *someone else’s property* by causing certain downstream properties harm.<sup>72</sup>

The court easily dismissed this claim on the ground that the County’s decision to permit private development did not make it liable for the later downstream flooding that such development caused to specific parcels that the County did not intend to inundate.<sup>73</sup> A decision to the contrary, said the court, would bring government functioning to a halt, for it would saddle the government with liability not only in those instances where it has “designs on a particular plaintiff’s property[,]” but also where it merely knows that “somewhere, someday, its routine governmental operations will likely cause damage to some as yet unidentified private property.”<sup>74</sup> According to the court, recognizing liability for the mere approval of private development would have major reverberations across all manner of government services,

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<sup>70</sup> *Id.* at 800, 805. Ironically, these statements sat alongside the court’s grand if unsupported assertions that “strong judicial protection for individual property rights is essential to ‘freedom itself,’” preserving property rights is—quoting John Locke—the “‘great and chief end’ of government,” property rights are “a foundational liberty, not a contingent privilege,” and property rights are “fundamental, natural, inherent, inalienable, . . . not derived from the legislature” and “preexist[] even constitutions.” *Id.* at 804 (footnotes omitted).

<sup>71</sup> *Id.* at 800.

<sup>72</sup> *See id.* at 804. Some have interpreted the decision in *Phillips v. King County* as holding that the state generally has no duty to insulate owners from the effects of neighboring development. *See Krier & Sterk, supra* note 49, at 72 (citing *Phillips v. King County*, 968 P.2d 871, 878 (Wash. 1998)).

<sup>73</sup> *Harris Cty.*, 499 S.W.3d at 807.

<sup>74</sup> *Id.* at 808.

from utilities to school transportation to roadway access.<sup>75</sup> The government would have to pay takings compensation every time property is damaged from a toppled electrical pole, for it knows that properties near the poles are especially vulnerable to such events.<sup>76</sup> It would have to pay takings compensation for property damage resulting from many school bus accidents, for it knows that, in operating school buses, the risk of collisions is more likely in those locations where bus traffic is concentrated.<sup>77</sup> And it would have to pay takings compensation for property damage resulting from the many other accidents that stem from approving driveway access to state roads, for it knows that increases in access density increase collision rates.<sup>78</sup> In sum, by assuming that non-enforcement of existing regulatory safeguards and obligations is not an exercise of state power that should be conceived of as capable of depriving private property, a majority of the justices on the Texas Supreme Court deemed *Harris County* a relatively uncomplicated case.

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This Part has suggested that regulatory takings law is best understood as offering some assurance that property adjustments will be fairly and justly administered so as not to produce targeted or specialized impositions that disrespect the same interests and values that the institution of property is intended to serve. However, it highlights how this assurance has been deemed relevant only in those instances where adjustments to property interests occur via the enactment and anticipated enforcement of regulatory safeguards and obligations, and not to the non-enforcement of those regulations that already exist. The following Part questions this state of affairs by suggesting that non-enforcement, like enactment and enforcement, reflects an allocative decision by the state.

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<sup>75</sup> *Id.* at 808–09. The court gave a fourth example that, even on the court’s approach to the case, seems inapposite. The court expressed concern that the government would be liable for a taking when it approved a high-rise development when it knew it did not have the equipment to put out a fire on the building’s upper floors and a fire on those upper floors ultimately damaged adjacent properties. *Id.* at 809–10. It is not evident, though, that approving a high-rise development when it knew it did not have the equipment—or, alternatively, an arrangement with a nearby town—to put out a fire on the building’s upper floors would be a reasonable decision on any plausible substantive grounds. *But see id.* at 809 (suggesting that such a decision could be reasonable “given [the government’s] tax base or funding priorities”).

<sup>76</sup> *Id.* at 808.

<sup>77</sup> *Id.* at 809.

<sup>78</sup> *Id.*

## II. CONCEIVING OF NON-ENFORCEMENT AS A TOOL TO ALLOCATE PROPERTY INTERESTS

*Harris County v. Kerr* mirrors a general judicial aversion to reviewing non-enforcement decisions in a number of other areas of law, including writs of mandamus,<sup>79</sup> criminal indictments,<sup>80</sup> and administrative law.<sup>81</sup> Perhaps most akin to *Harris County* in this regard is the U.S. Supreme Court's 1985 decision in *Heckler v. Chaney*, which interpreted the Administrative Procedure Act to include a "presumption of unreviewability" of federal agency decisions to decline enforcement action in response to citizen requests. Similar to how the *Heckler* Court rested its holding on the supposition that non-enforcement rarely leads to direct government encroachment on private property rights,<sup>82</sup> the predominant view categorically opposing non-enforcement takings liability set out in *Harris County* operates on the premise that non-enforcement of law is not an exercise of state power capable of depriving individuals of property.<sup>83</sup>

This Part advances the alternative perspective by contending that the state should be understood as exercising its power in the property sphere both when it is deciding whether to enact a regulatory safeguard or obligation and when it is deciding whether to enforce an existing one, for resolving any property dispute necessarily involves the state making an allocative choice to

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<sup>79</sup> The circumstances in which a court will order what is often referred to as the "extraordinary" writ of mandamus to compel enforcement of, for example, permitting programs and other local land use laws, are quite narrow. The writ, though, has not been abolished. Although the specific requirements vary by state, a party seeking a mandamus order generally must prove: (1) a "clearly-established legal right" to the government action requested, *see, e.g., In re T.H.T.*, 665 S.E.2d 54, 59 (N.C. 2008); (2) it "is not reasonably debatable" that the defendant has an obligation to perform the action requested; *see, e.g., Kennedy v. Bldg. Inspector of Randolph*, 222 N.E.2d 860, 862 (Mass. 1967); *In re T.H.T.*, 665 S.E.2d at 59; (3) fulfillment of this obligation is not discretionary, *see, e.g., Bois v. City of Manchester*, 177 A.2d 612, 615 (N.H. 1962); *Cooney v. Town of Wilmington Zoning Bd. of Appeals*, 33 N.Y.S.3d 547, 549 (N.Y. App. Div. 2016); (4) the defendant has refused to perform the action requested within the allowable time period, *see, e.g., Vill. on the Hill, Inc. v. Mass. Turnpike Auth.*, 202 N.E.2d 602, 611–12 (Mass. 1964); and (5) there is no alternative, adequate legal remedy available. *See, e.g., Flynn v. Town of Seekonk*, 223 N.E.2d 690, 691–92 (Mass. 1967); *In re Fairchild*, 616 A.2d 228, 231 (Vt. 1992). In some jurisdictions, though, an alternative remedy need not be pursued when it would have been futile to do so. *See, e.g., Mullen v. Ippolito Corp.*, 50 A.3d 673, 684–85 (N.J. Super. Ct. App. Div. 2012).

<sup>80</sup> Such an aversion is perhaps best illustrated by surveying the very limited types of exceptions. *See, e.g., Thigpen v. Roberts*, 468 U.S. 27, 33 (1984) (deeming retaliatory prosecutions impermissible); *Blackledge v. Perry*, 417 U.S. 21, 27–29 (1974) (holding that potentially spiteful exercises of prosecutorial discretion are reviewable for illegitimacy); *Santobello v. New York*, 404 U.S. 257, 261–63 (1971) (concluding that prosecutors cannot induce guilty pleas based on promises they do not keep).

<sup>81</sup> *See Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

<sup>82</sup> *Id.* at 831.

<sup>83</sup> *See supra* notes 65–78 and accompanying text.

assign an interest to one party and not to another. The Part surveys a range of enforcement-related decisions by which the state allocates property interests before ultimately suggesting that non-enforcement decisions, like enactment and enforcement decisions, should be subject to takings review to assure those decisions impose responsibilities that are fair and just absent compensation.

Section A contends that the state not only can allocate property interests through the direct route of deciding to adopt and enforce new regulatory safeguards and obligations, but also through the indirect route of deciding *not* to adopt those regulations, as exemplified through the lens of the well-known dispute between the owner of an apple orchard and the owner of a cedar tree farm at issue in the 1928 Supreme Court case of *Miller v. Schoene*.<sup>84</sup> Section B draws on two examples—Iowa’s “right-to-farm” statute and Oregon’s Measure 37—to illustrate that the state also can allocate property interests through the enactment of regulations but then formally decide not to enforce those regulations in certain instances.<sup>85</sup> Section C returns to and reframes the conflict in *Harris County* to illuminate the extent to which a less formalized governmental decision not to enforce an existing property regulation also serves an allocative function.<sup>86</sup> Section D synthesizes the preceding three sections to suggest that takings law should police allocations resulting from non-enforcement decisions on the same “fairness and justice” grounds that it polices allocations resulting from the enactment and enforcement of new regulations.<sup>87</sup>

### *A. Allocating Property Interests Through Decisions Not to Enact Regulations*

Though vigorous debate persists regarding the manner and extent to which the government must be involved for its conduct to be considered “state action,” the government’s involvement *in some way* is generally considered a threshold requirement for finding a constitutional violation.<sup>88</sup> Nevertheless, a number of constitutional scholars have drawn upon the “state ac-

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<sup>84</sup> See *infra* notes 88–115 and accompanying text.

<sup>85</sup> See *infra* notes 116–144 and accompanying text.

<sup>86</sup> See *infra* note 145 and accompanying text.

<sup>87</sup> See *infra* notes 146–165 and accompanying text.

<sup>88</sup> One of the Supreme Court’s more famous and expansive interpretations of the state action doctrine is set out in *Shelley v. Kraemer*, where the Court held that the decision of a state court to enforce a private agreement restricting “people of the Negro or Mongolian Race” from occupying a parcel of land amounted to state action. 334 U.S. 1, 21–23 (1948). *Shelley*, either as the subject of effusive praise or biting critique, features prominently in the scholarly dialogue on the contours of “state action.”

tion” requirement to distinguish not only governmental from non-governmental conduct, but also to differentiate between governmental *action* and governmental *inaction*. On this view, only governmental action—not governmental inaction—implicates the Constitution.

This latter interpretation of the “state action” requirement as differentiating between governmental action and governmental inaction supports the position that the Constitution provides only “negative rights.”<sup>89</sup> Understanding constitutional rights as purely negative suggests that such rights only impose on the government a duty to avoid affirmative actions that can impose certain harms (such as interfering with one’s free exercise of her religion), and not affirmative obligations to confer benefits or respond to needs (such as providing welfare assistance).<sup>90</sup> To treat *property* as a negative constitutional right

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<sup>89</sup> See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112 (1985) (contending that “[t]he sole function of the police power is to protect individual liberty and private property against all manifestations of force and fraud”). In an opinion authored by Judge Richard Posner, the Seventh Circuit Court of Appeals described the Constitution as “a charter of negative rather than positive liberties.” *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983). The court continued, “The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.” *Id.* Similarly, writing for a majority of the Supreme Court in *Deshaney v. Winnebago County Department of Social Services*, then-Justice Rehnquist asserted that the purpose of the Constitution is “to protect the people from the State, not to ensure that the State protect[s] them from each other.” 489 U.S. 189, 196 (1989) *The Deshaney* Court ultimately held that the state’s creating a system directing citizens to depend on local state agencies to protect children from abuse did not support a child’s due process claim for loss of liberty where one of those agencies failed to prevent that child’s abuse by a custodial parent. *Id.* at 201–03. Most all discussions that delineate rights requiring state action as “positive” and rights protecting individuals from state action as “negative” rest, if implicitly, on the foundation laid by Isaiah Berlin. See ISAIAH BERLIN, *Two Concepts of Liberty*, in THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 191 (Henry Hardy & Roger Hausheer eds., Farrar, Straus & Giroux 1998). The argument offered here that property is not appropriately considered a positive right such that the state action doctrine is of little meaning in the property context does not broach the overall wisdom of the state action doctrine outside this context. Nevertheless, this Article admittedly lends implicit support for the view that cases setting out broad interpretations of what constitutes “state action” for Equal Protection purposes—such as the Supreme Court’s classifying as state action the judicial enforcement of a racially restrictive covenant in *Shelley*—should be considered more important components of this area of constitutional jurisprudence than they often are. On advocating such a place for *Shelley*, see Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action and Private Property*, TEX. A&M L. REV. (forthcoming 2018) (manuscript at 3) (on file with author).

<sup>90</sup> David N. Mayer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339, 415–16 (1996) (“From a Jeffersonian perspective, the essential purpose of the Constitution is not to empower government but to restrain it . . . .”); Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 868–69 (2008) (“It is an accepted principle of constitutional law that the Federal Constitution contains only negative rights.”); Christopher Serkin, *Passive Takings: The State’s Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 359 (2014) (“[T]oday most courts and commentators agree with the descriptive claim that the federal Constitution protects only negative liberties.”); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of*



is, it seems, to support the idea that the protection of property is the “keystone” to self-governance for two principal reasons: it creates stability in material wealth to promote economic investments<sup>91</sup> and it guards individual freedoms from the tyranny of government power.<sup>92</sup> On this view, property describes what interests people have, and the Takings Clause protects the individual negative right to the government’s non-interference with those individual interests.<sup>93</sup> Certainly social and economic regulations adopted through the political process will impact property holdings to some extent, but the distinction between *protection against government interference* and *government obligations to interfere* cannot be obscured.<sup>94</sup> The former is superior to the latter in nearly all respects.

This non-interference/interference dichotomy might serve as a useful framing device in some circumstances outside the property context. Many individual constitutional rights, like free speech, can be considered public goods in the sense that, once such a good is produced, consumption by one person generally does not detract from consumption by others and no one can be easily prevented from enjoying it. Such constitutional public goods thus generally can be protected against government interference and exist independently.<sup>95</sup> As one prominent constitutional scholar describes it, “upon

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*Dependence*, 99 HARV. L. REV. 330, 330 (1985) (“In our constitutional system, rights tend to be individual, alienable, and *negative*.”) (emphasis added). Professor Serkin suggests that passive takings liability is politically plausible because, unlike positive rights that have been advocated in the past, such as welfare and abortion, employing the Takings Clause to protect property claims in creative ways has long been a “favorite of conservatives.” Serkin, *supra*, at 360. The modern conservative turn to the Takings Clause as a mechanism to protect against government action regarding the distribution of resources is generally attributed to Richard Epstein. See generally EPSTEIN, *supra* note 89. Professor Epstein asserts, for instance, that the Takings Clause should be interpreted to constrain the enactment of zoning codes, workers’ compensation laws, and progressive income taxes. See *id.* at 103, 247–51, 295–303.

<sup>91</sup> This view rests on two key, related assumptions: (1) property initially was justly distributed in accordance with values that remain and will forever remain in force, and (2) most subsequent transfers have been voluntary. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–55 (1974) (discussing the “historical principles of justice” that make holdings or distributions of holdings just).

<sup>92</sup> See JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43 (3d ed. 2008) (discussing how the framers of the Constitution “saw property ownership as a buffer protecting individuals from government coercion”); see also Carol M. Rose, *Property As The Keystone Right?*, 71 NOTRE DAME L. REV. 329, 333 (1996) (explaining that Ely and other scholars view property rights as the foundation of all other rights in society).

<sup>93</sup> See BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 97–103 (1977) (describing this view of property as the “ordinary understanding” of property).

<sup>94</sup> Laura S. Underkuffler, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1042 (1996).

<sup>95</sup> See Laura S. Underkuffler, *When Should Rights “Trump?” An Examination of Speech and Property*, 52 ME. L. REV. 311, 316–17 (2000).

granting one person the right to speak, there is no *necessary* taking of that same right from another.”<sup>96</sup>

The idea that property rights are akin to these other individual constitutional rights in providing a barrier of protection against the government’s wishes is a prominent and powerful one in the American psyche.<sup>97</sup> Nevertheless, property rights are, in actuality, distinct from all other individual constitutional rights in important respects. Unlike the subjects of these other rights—such as speech, association, religious exercise, equal protection, and due process—the resources to which property is directed are finite and, at least in some ways, cannot be shared.<sup>98</sup> If the state allocates to one party a right to control the use of land or to mine subsurface resources, it denies that right and those attendant to it to all others.

Property rights’ rivalrous nature suggests that it is *not possible* within the realm of property to distinguish between protection against government interference and government obligations to interfere.<sup>99</sup> Property is *not* a public good, at least in the terms described here. There is no right—indeed, *no way*—to be left alone when it comes to property. Unlike recognizing a person’s claim to speak freely, the state’s recognizing one person’s claim to a limited, non-shareable resource *does* necessarily detract from consumption by others. That is, although the government’s non-interference with one’s right to

<sup>96</sup> Underkuffler, *supra* note 94, at 1039.

<sup>97</sup> JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 250 (1990) (arguing that the belief that “property rights bear a special relation to liberty” is a “psychological experience”); Underkuffler, *supra* note 25, at 731 (suggesting that “all of us, on some level, believe” in the idea of “property as protection”). Kevin Gray suggests that lawmakers often perpetuate this mythical idea of “property as protection” by obscuring the reality of property’s contingent nature. Kevin Gray, *Equitable Property*, in 47 *CURRENT LEGAL PROBLEMS* 157, 159 (M.D.A. Freeman & R. Halson eds., 1994) (“[P]roperty is not theft but fraud.”).

<sup>98</sup> See, e.g., Morris Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 13 (1928); Underkuffler, *supra* note 94, at 1039; see also Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 *CAL. L. REV. CIR.* 349, 360 n.47 (2014).

<sup>99</sup> Property is, in this way, paradoxical: Many Americans have a deep personal feeling that property *should* be very strongly protected, but there is *no way that it can be*. See Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, in *PROPERTY ON THE THRESHOLD OF THE 21ST CENTURY* 417, 427 (G.E. van Maanen & AJ van der Walt eds., 1996) (“[P]roperty implicates the core issues of politics: distributive justice and the allocation of power.”); Eduardo M. Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 *FORDHAM L. REV.* 2971, 2974 (2006) (“When owners prove unwilling or unable to sort out disagreements about . . . spillover effects on their own, the state [has] to make decisions about which spillover effects owners must tolerate and which spillover-creating actions they may not take.”); Laura S. Underkuffler, *The Politics of Property and Need*, 20 *CORNELL J.L. & PUB. POL’Y* 363, 370 (2010) (“No societally recognized and enforced property right, which is ‘normatively neutral,’ actually exists.”). *But see* Eric Claeys, *Kelo, The Castle, and Natural Property Rights*, in *PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN* 47 (Robin Paul Malloy ed., 2008) (“In all but the most extreme cases, . . . the natural law refrains from picking and choosing among owners or land uses.”).

free speech generally does not implicate another's right to free speech,<sup>100</sup> the government's non-interference with one's claim to property *necessarily* interferes with another's claim to the same.<sup>101</sup>

It follows that the non-interference/interference dichotomy and the attendant vocabulary of "negative rights" thus cannot describe property protection, for such protection involves the resolution of competing claims. Indeed, it is impossible for the state to *avoid* making a deliberative choice in most any property dispute. For instance, whether the state undertakes construction of a revetment that alters the flow of water and results in the destruction of neighboring land, authorizes a private party to do the same (either via a formal permit or by choosing not to prohibit it), or fails to enforce a permit or order to a private party that putatively prohibits it, the state cannot extract itself from making an allocative choice about whether the affected neighboring landowner's interest includes security against such a substantial harm.<sup>102</sup> Undertakings, permissions, and prohibitions are answers to the question of whether the neighboring landowner's claim to security is valid; simultaneously, they are answers to the question of whether the builder's interest includes the freedom to rely on a revetment of this sort to protect her land. Undertakings, permissions, and prohibitions all produce property allocations, and they all, therefore, constitute available property laws.

It is not only the allocative nature of property that sets it apart from other constitutional rights, but also the content of what is being allocated. Property allocates to individuals interests in resources to the exclusion of others that, at a threshold level, are necessary for human existence.<sup>103</sup> Other constitutional rights are of limited import if one does not have access to the minimum

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<sup>100</sup> There surely are very important exceptions. For example, to the extent hate-speech silences its targets, the government's non-interference with one's claim to free speech—for instance, a newspaper's desire to publish hate speech—*does* interfere with another's claim to the same. *See, e.g.,* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129–30 (1987).

<sup>101</sup> *See* Eric T. Freyfogle, *Taking Property Seriously*, in PROPERTY RIGHTS AND SUSTAINABILITY 43, 50 (David Grinlinton & Prue Taylor eds., 2011) (explaining that, in such an instance, "[p]roperty rights [do] not increase overall: they [are] simply reconfigured").

<sup>102</sup> *See* Saidel-Goley & Singer, *supra* note 89 (manuscript at 72) ("Either an owner has the right to eject a homeless person from his property or the homeless person has a right to enter the property to save his life. The state cannot fail to act in cases like this; it must allocate the entitlement to someone and deny it to others; there is simply no space within which the state can be said to not be acting."). *But see* Woods v. Mass. Dep't of Env'tl. Prot., No. BACV200700099A, 2011 WL 7788022, at \*6 (Mass. Super. Ct. Jan. 7, 2011) (holding that the State's non-enforcement of conditions to permits issued to the claimants' neighbors that allow them to build revetments, which allegedly led to destructive erosion on the claimants' property, is a dispute viewed best as between two private parties rather than one that the State necessarily must resolve).

<sup>103</sup> *See, e.g.,* Underkuffler, *supra* note 94, at 1039–40.

threshold of resources to subsist.<sup>104</sup> The government must therefore inevitably not only make choices as to who gets what, but also, taken to its logical end, determine whether some will subsist and others will not.

These characteristics of property—its allocative nature and its link to human survival—put pressure on the popular “negative rights” notion that the Constitution provides expansive protection against government interference with individual property rights. In one limited sense, the exercise of all individual constitutional rights requires the creation and funding of a state infrastructure to facilitate enforcement, such that all rights, including property rights, are “positive rights.”<sup>105</sup> However, property rights are positive rights in a much larger sense. When the state chooses to protect the property claim of an individual to a resource—which, in some instances, is a resource essential for that individual to subsist—it is *necessarily* choosing to reject the property claims of other individuals to the same.

These types of state choices must be made, then, with social goals in mind.<sup>106</sup> In the words of one prominent property theorist, “[t]here is, in truth, no morally neutral place for [property law] to hide.”<sup>107</sup> With regard to any actual or conceived property dispute, democratic lawmakers cannot simply seek to identify the claimed entitlements or expectations of the parties. Ra-

<sup>104</sup> See, e.g., Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 676–77; Rose, *supra* note 92, at 362–63.

<sup>105</sup> See, e.g., Eugene Volokh, *Positive Rights, the Constitution, and Conservatives and Moderate Libertarians*, THE VOLOKH CONSPIRACY (May 7, 2013), <http://volokh.com/2013/05/07/positive-rights-the-constitution-and-conservatives-and-moderate-libertarians/> [https://perma.cc/QA3Q-GS5A] (stating simultaneously that “[m]y property rights in my land are a negative constitutional right against the government” and that “property consist[s] of . . . a positive right against the government to protect your property via the court system and the police”).

<sup>106</sup> See C.B. Macpherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 11–12 (C.B. Macpherson ed., 1978) (asserting that property “is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right,” such that “if it is not so justified, it does not for long remain an enforceable claim”); see also André van der Walt, *Property Theory and the Transformation of Property Law*, in MODERN STUDIES IN PROPERTY LAW 361, 376 (Elizabeth Cooke ed., 2005) (arguing that “a transformative property theory has to be a normative theory that justifies the balance between stability and change, in every individual context, on consideration of human values”); Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1519–20 (2003) (characterizing decision-making about maintaining or reforming property institutions as a normative process informed by human values); Saidel-Goley & Singer, *supra* note 89 (manuscript at 69) (explaining that property law is “replete with [equitable] doctrines that promote justice”—some based on reliance (such as easements by estoppel), others on relationships (such as equitable distribution of property upon divorce), and still others on antidiscrimination principles (for instance, laws extending access to housing without regard to race, sex, gender, sexual orientation, religion, national origin, or disability)—through a “method of balancing [that] is not neutral or disinterested”).

<sup>107</sup> See Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 84 (2010); see also Underkuffler, *supra* note 28, at 201 (arguing that “[n]o model of property avoids value choice[s]”).

ther, they must ask what values recognizing those competing claims serve and explore the reasons why our society might wish to preserve or advance—or, contrarily, renounce or suppress—those values. It is not possible to protect the claimed entitlements or expectations of everyone. Property is not impartial; instead, it necessarily is partial. In the face of an adjudication of competing claims within a particular social context, at least one side undoubtedly will be disappointed.<sup>108</sup>

The well-known case of *Miller v. Schoene* highlights the point.<sup>109</sup> *Miller* posed the question of whether the state's ordering the claimant, by statute, to destroy cedar trees on his own land to prevent them from spreading cedar rust to the detriment of apple trees on neighboring land unconstitutionally deprived the claimant of property.<sup>110</sup> The Supreme Court rejected the claim, concluding that the state “[did] not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”<sup>111</sup> The Court explained:

[T]he state was under the *necessity* of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. *It would have been none the less a choice* if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go unchecked.<sup>112</sup>

The decision in *Miller*, as exemplified in the excerpts quoted above, is at once remarkable and routine. The decision is *remarkable* to the extent the Court strongly implied that the case presented a rather unique situation in which the state was pressed to choose between conflicting interests, such that the state could not serve as a neutral guardian of property rights.<sup>113</sup> In this rare instance, insisted the Court, either “action” (enacting the statute) or “in-action” (not enacting the statute) would have profound allocational effects.<sup>114</sup> The decision is *routine* in the sense that this situation—the state's necessarily

<sup>108</sup> See Underkuffler, *supra* note 28, at 202–03 (“Property’s function, as a social and governmental institution, is the resolution of conflicting claims, visions, values, and histories. In this process, some individuals win, and others lose; the protection of some is, inevitably, sacrificed for the protection of others.”).

<sup>109</sup> See 276 U.S. 272, 277–81 (1928).

<sup>110</sup> *Id.* at 277–78.

<sup>111</sup> *Id.* at 279.

<sup>112</sup> *Id.* (emphasis added).

<sup>113</sup> See *id.* at 279–80 (“[w]hen forced to such a choice” and “here, the choice is unavoidable.”) (emphasis added).

<sup>114</sup> See *id.* at 279.

having to choose between conflicting interests—presents itself *in most every property dispute*.

*Miller* underscores the reality that the state cannot simply be a “watchman” for property rights.<sup>115</sup> Rather, by protecting property rights, the state intervenes in conflicts over resources; by intervening in conflicts over resources, the state protects property rights. The idea that the Constitution positions the state as the guardian of negative rights that all naturally enjoy in a free and democratic society is inapposite when it comes to property. Property rights necessarily are positive rights in that they exist only as a result of the state’s allocative choices, choices made with the social aspirations of a democracy grounded in dignity, equality, liberty, and the like in mind. These choices reflect our collective values regarding which claims to limited resources should be satisfied, which claims to those same resources should be denied, and what rights go along with those designated as the “owners” of such resources.

### *B. Allocating Property Interests Through Formal Decisions Not to Enforce Existing Regulations*

As *Miller* illustrates, the state can allocate property interests through the direct route of deciding to adopt and enforce new regulatory safeguards and obligations on land uses and through the indirect route of deciding *not* to adopt those regulations. The examples discussed in this section—the first surrounding Iowa’s “right-to-farm” statute, the second involving Oregon’s Measure 37—illustrate that the state *also* can allocate property interests through enacting but then deciding not to enforce regulations.

#### 1. Iowa’s Right to Farm Statute

“Right-to-farm” statutes are common across the United States.<sup>116</sup> The Iowa “right-to-farm” statute, at issue in the Iowa Supreme Court’s 1998 decision in *Bormann v. Board of Supervisors In and For Kossuth County*, authorized local governmental entities to designate “agricultural areas” where certain owners would be immunized from certain nuisance claims of their neigh-

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<sup>115</sup> See Underkuffler, *supra* note 94, at 1042.

<sup>116</sup> See Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 87 (2006); Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 289 (1984); Susanne A. Heckler, *A Right to Farm in the City: Providing a Legal Framework for Legitimizing Urban Farming in American Cities*, 47 VAL. U. L. REV. 217, 217–18 (2012); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 315–16 (2000).

bors.<sup>117</sup> The owner of 960-acres of undeveloped land, Gerald Girres, sought this designation from the Kossuth County Board of Supervisors (“County”) so that he might construct a confined animal feeding operation, or “CAFO,” on his land risk-free.<sup>118</sup> A CAFO “harbors in one place thousands or tens of thousands of animals along with their attendant odors, wastes, flies, and rodents.”<sup>119</sup> Designation as an “agricultural area” would protect Girres from the possibility that his neighbors might file a nuisance suit claiming that a new CAFO would produce an unreasonable interference with the use and enjoyment of the adjacent lands on which they had long resided.<sup>120</sup> After initially denying the designation request, the County changed course two months later and granted it by a vote of 3-2.<sup>121</sup>

Fearing that the planned CAFO would substantially disrupt their ability to reside comfortably in their home and reduce the value of their property, neighbors Clarence and Caroline Bormann challenged the County’s decision.<sup>122</sup> The Bormanns asserted that, prior to the designation, they had the right to file suit if indeed a CAFO were constructed nearby and substantially interfered with the use and enjoyment of their land, yet, after the designation, they were deprived of this right.<sup>123</sup> Deeming this right to file a nuisance suit so significant, they alleged that the statute authorizing agricultural designations amounted to an unconstitutional taking of property on its face.<sup>124</sup> Siding with the Bormanns, the Iowa Supreme Court held that by licensing Girres’

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<sup>117</sup> 584 N.W.2d 309, 311–12 (Iowa 1998).

<sup>118</sup> *Id.* at 311; FREYFOGLE, *supra* note 12, at 11.

<sup>119</sup> FREYFOGLE, *supra* note 12, at 11.

<sup>120</sup> *See id.* The right-to-farm statute at issue in *Bormann* offered immunity from certain nuisance suits to CAFOs in designated agricultural areas “regardless of the established date of operation.” IOWA CODE § 352.11(1)(a) (1999). To some commentators, the application of the law to those purchasers of lands adjacent to CAFOs already in existence arguably poses a separate question, for those purchasers made their investment with the knowledge of—and likely paid a reduced price because of—their neighbors’ ongoing activities. *See* EPSTEIN, *supra* note 89, at 154–58 (suggesting that notice of regulation should mitigate compensatory awards in some instances on an “assumption of risk” theory); Robert L. Glicksman, *Making a Nuisance of Takings Law*, 3 WASH. U. J.L. & POL’Y 149, 191 (2000) (arguing that a takings claim directed at the type of statute at issue in *Bormann* is more likely to succeed if the claimants purchased their home prior to enactment). *But see* Eric T. Freyfogle, *Regulatory Takings, Methodically*, 31 ENVTL. L. REP. 10,313, 10,318 (2001) (suggesting that when assessing whether the government’s conduct reflects a legitimate updating of the meaning of ownership, the takings analysis should concentrate on the laws in effect and rights held by the claimant on the date of the alleged taking rather than on the date of property acquisition).

<sup>121</sup> *Bormann*, 584 N.W.2d at 311–12.

<sup>122</sup> *Id.* at 312.

<sup>123</sup> *Id.* at 313.

<sup>124</sup> *Id.*

creation of a nuisance, the County effectively transferred to Girres a property interest in the form of an easement across the Bormann's land.<sup>125</sup>

The decision is considered by many to be an anomaly in takings law.<sup>126</sup> It has been critiqued on numerous grounds, most persuasively on the possibility that the court's holding could be interpreted as freezing in place a particular understanding of the common law of nuisance.<sup>127</sup> On this interpretation of the case, the legislature perpetually would be prohibited from reasonably adjusting what constitutes harm that rises to the level of a nuisance, whether it be to expand the circumstances in which a nuisance might be found or, as here, to contract them.<sup>128</sup> Doing so would "sever property's link to the culture that it serves."<sup>129</sup> From this perspective, the legislature's watering-down of the state's nuisance law reflects Iowans' coalescence on a shift from (a) an ecological, agrarian vision of property as protecting land and nurturing relationships between people and the land, to (b) a vision of property grounded in

<sup>125</sup> See *id.* at 319–22.

<sup>126</sup> See, e.g., Adam Van Buskirk, *Right-to-Farm Laws as "Takings" in Light of Bormann v. Board of Supervisors and Moon v. North Idaho Farmers Association*, 11 ALB. L. ENVTL. OUTLOOK J. 169, 189–90 (2006) (characterizing the *Bormann* decision as "deeply flawed"); L. Paul Goeringer & H.L. Goodwin, *An Overview of Arkansas' Right-to-Farm Law*, 9 J. FOOD L. & POL'Y 1, 14 (2013) ("The majority of states have reached the opposite conclusion of the Iowa courts."); Todd J. Janzen, *Indiana Court of Appeals Upholds the Right to Farm Act*, ABA AGRIC. MGMT. COMMITTEE NEWSL., Aug. 2009, at 13 (noting that the Court of Appeals of Indiana's decision in *Lindsey v. DeGroot* "puts Indiana in the column of states" that decline to follow the *Bormann* holding); Renner Kincaid Walker, *The Answer, My Friend, Is Blowin' in the Wind: Nuisance Suits and the Perplexing Future of American Wind Farms*, 16 DRAKE J. AGRIC. L. 509, 546 (2011) (discussing how the Court of Appeals of Indiana found for the respondent-farm operation, rather than the claimant, in a case similar to *Bormann* where the claimants brought a nuisance suit against a dairy farm protected by the state's right-to-farm statute (citing *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009))). But see FREYFOGLE, *supra* note 12, at 274 (supporting the result in *Bormann* in light of the questionable lawmaking procedures employed to adopt the legislation at issue).

<sup>127</sup> See JOSEPH WILLIAM SINGER, PROPERTY, ASPEN STUDENT TREATISE SERIES 105 n.17 (4th ed. 2013); Glicksman, *supra* note 120, at 190 (arguing that the *Bormann* court's decision is "a constitutional judicial overriding of the accommodation of conflicting uses reached by . . . the state legislature of Iowa"); Walker, *supra* note 126, at 547 (contending that *Bormann* "constitutionalizes the remarkably unpredictable common-law nuisance test").

<sup>128</sup> See Glicksman, *supra* note 120, at 190 (arguing that, under *Bormann*, courts must overturn statutes that take "valuable private property interests and award[] them to strangers"). Among other assertions, the court's speaking to the "elemental rights growing out of property ownership" lends some support for this interpretation. See *Bormann*, 584 N.W.2d at 320 (emphasis added).

<sup>129</sup> FREYFOGLE, *supra* note 12, at 259; see also Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 266 (2011), <https://www.yalelawjournal.org/forum/the-new-judicial-takings-construct> [<https://perma.cc/JN95-Z86J>] (concluding that the position advanced by a plurality of the Supreme Court in *Stop Beach Renourishment, Inc. v. Florida Department of Environmental Protection* would hinder property law's ability to conform with changes in economics, society, technology, and the environment).



opportunity, intensive development, and mobility.<sup>130</sup> It constitutes a substantive adjustment to property interests statewide, and takings liability is inapposite because the legislation did not unfairly concentrate the economic burdens of this change.

It is not clear, though, that *Bormann* can be so easily cast aside as aberrant. The institution of property operates on the presumption that, absent sufficient justification, the government generally will act to protect property interests where a worthy claim is pled. Governance is fair and just when property interest holders can seek explanations for the government's failure to protect property interests; otherwise, the government need not align its enforcement practices with democratic norms.<sup>131</sup> This reasoning supports the simple notion that the right to press a legitimate complaint is a crucial part of a legitimate property interest.<sup>132</sup>

Property rights work only because the state protects them via the law. The value of property interests rests on the fact that there are in place trespass laws, water quality and other environmental laws, housing and building codes, zoning restrictions, and the like *that are enforceable*. To draw on the seminal work of Professor Wesley Newcomb Hohfeld, a legal right entails a "correlative" duty to act or refrain from acting.<sup>133</sup> Professor Hohfeld's analysis pressed us to contemplate how the exercise and acknowledgement of legal rights impacts others, and, correspondingly, how others are impacted when these legal rights are *not* acknowledged.<sup>134</sup> If a "duty" cannot be enforced, it is not actually a duty, and thus there *is no corresponding legal right*.<sup>135</sup> Non-enforcement thus suggests that a person who had a duty to act or forbear, were that right enforced, actually has a privilege not to act or forbear, and the person who had the right to benefit from that act or forbearance actually has

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<sup>130</sup> See FREYFOGLE, *supra* note 12, at 37–38.

<sup>131</sup> *Id.* at 269, 273–74 ("What landowners ought to have an opportunity to complain about are curtailments of their rights that arise from government acts that are not justified as legitimate [and uncompensated] changes.").

<sup>132</sup> See, e.g., Jack Beerman, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 302 (1988) ("Property is defined by the cause of action that is available to assert the property right."); Joseph W. Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1297 (2014) ("There is no basis for saying that something wrongly impinges on others if we do not have a sense of what we have a right to be protected from.").

<sup>133</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–32 (1913).

<sup>134</sup> *Id.*

<sup>135</sup> See, e.g., Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 678 (1987).

*no right at all*. Instead, in such an instance, there exists only a mere hope that another party will voluntarily undertake that act or forbearance.<sup>136</sup>

In this vein, *Bormann* prompts us to consider not only the person whose property is being “regulated” or “deregulated,” but also the party experiencing that regulation or deregulation from the other side. To Girres, the would-be CAFO operator, the statute *removed* a substantial restriction infringing upon a use to which he *sought* to put his land; yet, to the Bormanns, the statute *imposed* a substantial restriction upon a non-harmful use to which they *already had* put their land long ago.<sup>137</sup> Depending on the extent and nature of the negative externalities stemming from the CAFO, it is possible that statutorily-mandated non-enforcement puts the Bormanns in the position where they may not be able to use and enjoy their homestead at all.<sup>138</sup> This view frames the question at issue in the following rather stark terms: Is a statute abrogating the application of nuisance law in the single context of neighbors of landowners who seek to use their land as a CAFO—which has the effect of making the CAFO’s neighbors’ existing homes unlivable—unfair and unjust to those neighbors absent compensation?

## 2. Oregon’s Measure 37

The State of Oregon’s infamous Measure 37 presents a similar story. In passing this ballot initiative, the state’s voters openly encouraged the non-enforcement of land use restrictions. The law asserted, in relevant part:

If a public entity . . . enforces [most any] land use regulation . . . that restricts the use of . . . private property . . . and has the effect of

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<sup>136</sup> Cf. THE FEDERALIST NO. 15, at 105 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.”).

<sup>137</sup> See *Bormann*, 584 N.W.2d at 311–12. Explained in these terms, the Bormanns’ claim relies in part on the theory that regulations that require owners to act in ways that prevent harm to their communities should be less likely to be deemed takings than those that require owners to act in ways that confer communal benefits. See Echeverria, *supra* note 63, at 10,485 (arguing that government intrusions on private property interests that are intended to protect the community from harm at-large are not as likely to be deemed takings as those that are intended for many other purposes); Mulvaney, *Exactions for the Future*, *supra* note 26, at 558–59 (discussing when a municipality might condition a development permit on a future interest in the permittee’s property for the protection of the whole community).

<sup>138</sup> Cf. *United States v. Causby*, 328 U.S. 256, 263–67 (1946) (declaring low-level overflights by government planes that required the surface owner to close his farm amounted to an unjustified imposition of a “servitude” on the surface owner’s land absent compensation).

reducing the fair market value of [that] property . . . the owner . . . shall be paid just compensation.<sup>139</sup>

The law operated to modify the substance of all land use restrictions subject to it by directing municipalities not to enforce those restrictions if it did not plan to pay compensation for the economic diminution in property values resulting from their enforcement.<sup>140</sup> Before voters substantially reduced the impact of the law through another ballot initiative three years later, more than seven thousand claims had been filed against municipal governments seeking a total of seventeen billion dollars in compensation.<sup>141</sup> These local governments found no viable fiscal option but to forego enforcement of regulations on zoning, subdivision, farming and forestry practices, transportation, and the like that allegedly diminished property values.<sup>142</sup> The statute made no provision for those persons whose existing, legitimate property uses would be jeopardized by the non-enforcement of the myriad rules subject to it.<sup>143</sup> From these persons' perspective, the question here is akin to that in *Bormann*: Is Measure 37's course commensurate with the principles of fairness and justice absent compensation?

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A more extensive assessment of the substantive legitimacy and takings implications of Iowa's right-to-farm legislation and Oregon's Measure 37 is not necessary to state the threshold point for which these examples are offered here: the non-enforcement of existing property laws is itself a form of state allocation that has the effect of protecting some claimed property interests while imposing real, non-trivial harms on others. Non-enforcement, of course, is rarely legislatively codified in the manner of these two statutes. The next section explains that, as in the *Harris County* dispute, non-enforcement is far more commonly the product of executive officials' decision-making.<sup>144</sup> Yet the dual nature of the government's choice of whether or not to enforce an

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<sup>139</sup> OR. REV. STAT. § 197.352(1) (2005) (emphasis added) (current version at OR. REV. STAT. § 195.305(1) (2015)).

<sup>140</sup> See Bethany R. Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 AM. U. L. REV. 1, 34 (2016).

<sup>141</sup> *Id.*

<sup>142</sup> See OR. DEP'T OF LAND AND CONSERVATION DEV., BALLOT MEASURES 37 (2004) AND 49 (2007) OUTCOMES AND EFFECTS 5 (2011), [http://www.oregon.gov/LCD/docs/publications/m49\\_2011-01-31.pdf](http://www.oregon.gov/LCD/docs/publications/m49_2011-01-31.pdf) [<https://perma.cc/Y8WA-L6E5>]. The claimants were using the market value that had been established, in part, by a system of land use rules as the baseline from which they alleged any enforcement of that system was causing their market value to decline. *Id.* at 34.

<sup>143</sup> See, e.g., Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1; Douglas Larson, *Measure 37 Puts Newberry Crater at Risk*, REGISTER-GUARD (Eugene, Or.), Sept. 11, 2006, at A11.

<sup>144</sup> See *infra* note 145 and accompanying text.

existing regulatory safeguard or obligation—the reality that it necessarily will both protect and impose on claimed property interests—is evident in both instances.

*C. Allocating Property Interests Through Informal Decisions  
Not to Enforce Existing Regulations*

The Iowa right-to-farm legislation and Oregon’s Measure 37 reflect instances in which the government legislatively codified its allocative choices via non-enforcement. Returning to and reframing the dispute in *Harris County* reveals that less formalized non-enforcement resulting from executive officials’ decision-making is, too, an exercise in state allocation. The following reframing of *Harris County* is presented not to alter the facts of the case in any material way but, rather, simply to illuminate the extent to which an informal governmental decision not to enforce an existing property regulation serves an allocative function.

*The County, in adopting its flood control plan by local ordinance, initially made a specific allocative decision to recognize and protect specific claims to property. Through this plan, the County distributed to downstream landowners—many of whom had already resided on their lands for some time—security from one hundred-year flood events by assuring that it would not approve development of upstream lands in ways that would jeopardize this security. In a technical sense, the plan distributed to the downstream owners a negative servitude on the upstream owners’ lots. At that moment, the upstream landowners maintained the ability to develop their properties, though they were limited by the flood control plan’s demanding that they do so in ways that avoided markedly increasing the likelihood of flooding their downstream neighbors. Later, without formally altering the ordinance adopting the flood control plan in any way, the County adjusted this allocative decision by choosing not to enforce the plan against certain upstream development. As a result, the County redistributed the downstream landowners’ security to these upstream landowners (i.e., it transferred the downstream owners’ negative servitude to the upstream owners), to the point where these upstream landowners could (at least with respect to downstream flooding concerns) develop their lands as they chose, even to the point of destroying existing uses downstream and eliminating or at least placing in grave risk any possible future downstream development.*<sup>145</sup>

The foregoing reiteration of the facts makes plain that the government’s decision on whether to enact and enforce a flood control plan will negatively

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<sup>145</sup> See *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 795–98 (Tex. 2016).

impact *someone's* claim to free use or security from harm. If it chooses to enact and enforce the plan, the upstream developers' claimed property interest to build on their lands as they choose will be quashed and the downstream residents' claims to security from a significant flood risk will be respected; if it instead chooses not to enact a flood control plan or not to enforce a plan that it has enacted, it is the downstream residents whose claimed property interests will suffer and the upstream developers whose property claims will be sustained. Property interests are both protected and infringed upon regardless of the government's choice.

#### *D. Allocating Property Interests and Takings Law*

Reflecting on the three preceding sections, it seems that the state has three broad categories of choices in allocating property interests. Consider, for illustrative purposes (and in keeping with the theme of *Harris County*), the flood control context. The state theoretically could: (1) formally enact and enforce flood control regulations that secure downstream landowners from a significant flood risk (and thereby constrain upstream landowners' freedom to develop as they choose); (2) refrain from enacting regulations that secure downstream landowners from a significant flood risk (and thereby directly protect upstream landowners' freedom to develop); or (3) formally enact regulations that on their face secure downstream landowners from a significant flood risk but choose not to enforce those regulations (and again, if indirectly in this instance, protect upstream landowners' freedom to develop).

The *first option*—formally enacting and enforcing flood control regulations that allocate security to downstream residents against a significant flood risk and limit the freedom of upstream landowners to develop their land—mirrors the enactment and anticipated enforcement of the historic preservation laws referenced earlier. These regulations are subject to a traditional regulatory takings challenge asserting that they produce an imposition on certain users who would otherwise be free to develop without regard for flooding concerns that is unfair and unjust absent compensation.

The *second option*—refraining from enacting regulations that secure downstream landowners from a significant flood risk and thereby allocating to upstream landowners the freedom to develop as they choose—protects the claimed property interests of those who desire to develop their upstream properties without regard for, say, the extent of the development's impervious cover, but does so at the expense of imposing on those downstream neighbors an increased risk of flooding. As with the first option, claimed property interests are both protected and imposed upon. It does not appear that any scholars have advocated that the government broadly should be considered liable on takings grounds for refraining from affirmatively enacting property re-

strictions in response to public problems. (Consider, for instance, a situation in which the state, on the facts of *Miller v. Schoene*, chose *not* to preserve the region's chief crop—apples—by siding against legislatively requiring the destruction of cedar trees, or, in keeping with the example here, chose *not* to protect against significant flood risks by foregoing legislative adoption of a flood control plan.<sup>146</sup>) However, Professor Christopher Serkin recently advanced a theory of “passive takings” that would recognize the possibility of government liability in at least some such related instances.<sup>147</sup>

Professor Serkin's theory is best explained via one of his colorful illustrations: Imagine a governmental entity adopts a regulation prohibiting coastal landowners from erecting sea walls largely for aesthetic reasons.<sup>148</sup> This regulation reflects the state's decision to allocate to neighboring landowners an aesthetic easement of sorts. At the time of adoption, this regulation does not significantly endanger the value of the regulated private lands.<sup>149</sup> Nevertheless, at some later point in time, due to global ecologic changes that make sea-level rise in the region imminent, the law's application has a very different effect, perhaps to the point of threatening complete flooding of these same private lands because the owners cannot build walls to fend off the water.<sup>150</sup> Professor Serkin suggests that if the government leaves the allocation resulting from the regulatory prohibition on sea walls in place when an alternative allocation would have (a) avoided the drastic harms borne by coastal owners under the standing policy, and (b) been more socially useful, this failure to adjust the extant allocation should be constitutionally challengeable as a compensable taking under a traditional regulatory takings analysis.<sup>151</sup>

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<sup>146</sup> The prospect of mudslides presents another salient contemporary example. *See generally*, e.g., Plaintiffs' Complaint for Damages, *Lester v. Snohomish County*, No. 15-2-02098-6 SEA, 2015 WL 349084 (Wash. Super. Ct. Jan. 26, 2015) (addressing a claim by residents of property destroyed by a mudslide that asserted rights to be informed about the possibility of mudslides, regulated so as to prevent or mitigate the risks associated with mudslides, and relocated in the event a mudslide makes their property uninhabitable); *see also* Michael Pappas, *A Right to be Regulated?*, 24 GEO. MASON. L. REV. 99, 132–33 (2016).

<sup>147</sup> *See generally* Serkin, *supra* note 90.

<sup>148</sup> *Id.* at 352–53.

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 394–96.

<sup>151</sup> *Id.* at 355 (“If private property owners sue the government for application of a stable legal rule, they may be able to summon the power of the state to protect their property. And the state may be constitutionally required to act or risk takings liability.”). Inspired by Professor Serkin's work, as well as derivatives of the “deregulatory takings” movement headlined by utility companies seeking compensation for sunk costs when Congress opened up utility markets in the 1980s, Professor Michael Pappas recently advanced a “right to be regulated” theory. *See generally* Pappas, *supra* note 146. Professor Pappas's theory suggests that property owners may have a “right to be regulated” in accord with an established scheme—say, for issuing taxi medallions, copyrights,

This Article, of course, concentrates on the potential for takings liability when the government chooses to allocate by means of the *third option*, as illustrated by the state's formal enactment of regulations (which facially allocate downstream security from a significant flood risk) that it chooses not to enforce (and thereby circuitously protect upstream landowners' freedom to develop). The non-enforcement takings theory offered here might be considered the inverse of Professor Serkin's passive takings theory in the sense that passive takings claimants seek compensation for the government's *not failing* to enforce an existing law, whereas non-enforcement takings claimants seek compensation for the government's *failing* to enforce an existing law.<sup>152</sup> Focusing as it does on the third option of non-enforcement, this Article does not present an appropriate space to assess Professor Serkin's theory in the depth it deserves. Suffice it to say, though, that although any further development or application of passive takings theory must be cognizant of moral hazard and related concerns,<sup>153</sup> the theory itself illuminates the extent to which "inaction" is very much a misnomer in the realm of property, for property is based in most all instances on allocative decisions made by the state.

The third option—again, non-enforcement of existing regulations—that is the focus of this Article similarly illuminates the reality that property inter-

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or grazing permits—such that they are due compensation for the government's formally and justifiably adjusting the substance of the rights initially determined under that scheme. *See id.* at 131.

<sup>152</sup> Most of Professor Serkin's examples of what he sees as potential passive takings claims take aim at the enforcement of existing regulatory duties. Select examples, though, are based on the non-enforcement of existing regulatory duties: a sheriff's officer's refusal to enforce a court's eviction order, *see Serkin, supra* note 90, at 381; a zoning board's refusal to grant a rezoning request when the law requires it to do so when land uses around the parcel so dictate, *id.* at 382 (citing *Hemisphere Bldg. Co. v. Vill. of Richton Park*, 171 F.3d 437, 439 (7th Cir. 1999)); and a zoning board's refusal to grant a rezoning request when the law imposes upon the board "a duty . . . to relax its restrictions" when the land's "physical character" changes as the result of "natural causes," making it "no longer adaptable to the use it is zoned for." *Id.* (citing *Forde v. City of Miami Beach*, 1 So. 2d 642, 646 (Fla. 1941)). These latter examples align more than the former examples with the potential non-enforcement takings claims I discuss here.

<sup>153</sup> Passive takings liability could exacerbate the moral hazard problem that plagues federal flood insurance and disaster relief policies. Professor Serkin acknowledges this possibility, but suggests that recognizing passive takings liability would have only a minor effect on owners' investment incentives because the chances of prevailing under his passive takings theory are small just as they are in traditional regulatory takings cases. *See Serkin, supra* note 90, at 387. The slope may be more slippery than Professor Serkin allows, however. In short, existing regulations are far exceeded by the infinite number of conceivable regulations that are not in existence. As Professor Serkin concedes, "creative lawyers . . . may be able to identify relevant comparators that could make such claims successful." *Id.* at 402. In this way, the driver in crafting social and economic legislation uncomfortably shifts from the government to individual takings claimants. For a thoughtful critique of Professor Serkin's proposal that addresses not only the moral hazard question but also various others, see David Dana, *Incentivizing Municipalities to Adapt to Climate Change: Takings Liability and FEMA Reform as Possible Solutions*, 43 B.C. ENVTL. AFF. L. REV. 281, 287–89, 301 (2016).

ests are both protected and imposed upon in most every case. The two claimed interests—downstream security from a significant flood risk and upstream freedom to develop without regard for impervious coverage—cannot exist concurrently. To draw on the words of Justices William Douglas and Arthur Goldberg spoken in a similar context, “The State in one way or another puts its full force behind a policy.”<sup>154</sup> By choosing among the available allocative options—which it *must* do—the state is making property law and, in the process, it is both recognizing and rejecting claimed property rights.

In *Harris County*, the County created and adopted a flood control plan, and, in doing so, it allocated property rights.<sup>155</sup> It then chose not to enforce that flood control plan, which, if indirectly, necessarily produced an alternate allocation.<sup>156</sup> The question is not, as the Texas Supreme Court had suggested, whether “doing nothing more than allowing private parties to use their properties as they wish” can serve as the basis for a takings claim,<sup>157</sup> so the case, therefore, does not raise the parade of horrors on which the court based its decision.<sup>158</sup> The U.S. Supreme Court has stated repeatedly that the purpose of the Takings Clause is to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>159</sup> Takings law should police allocations resulting from non-enforcement decisions that allegedly force some people to alone bear public “burdens”—or, perhaps more appropriately, *responsibilities*—on the same “fairness and justice” grounds that it polices allocations resulting from decisions to enact and enforce new regulations.<sup>160</sup>

Following this course, the question in *Harris County* is whether the County’s allocation resulting from its decision not to enforce its flood control plan contravened the principles of fairness and justice, as these principles have been defined in the takings context through the long line of precedents

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<sup>154</sup> *Bell v. Maryland*, 378 U.S. 226, 257 (1964) (Douglas, J., concurring) (suggesting that the state’s arresting and prosecuting African Americans for violating the rules of common law trespass by entering a privately-owned establishment open to the public should be subject to an Equal Protection analysis).

<sup>155</sup> See *Harris Cty.*, 499 S.W.3d at 796.

<sup>156</sup> See *id.*

<sup>157</sup> *Id.* at 804.

<sup>158</sup> See *id.* at 807–10,

<sup>159</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Supreme Court has cited *Armstrong* in many of its major takings decisions. *E.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 304, 321 (2002); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978).

<sup>160</sup> As noted above, according to Professor Serkin takings law also should police allocations resulting from the state’s continuing to enforce long-existing regulations when underlying conditions have changed. See *supra* notes 147–153 and accompanying text.



contemplating the considerations discussed in *Penn Central*.<sup>161</sup> Takings law exhibits extensive deference to the state's allocative decisions when choosing among valid alternatives. But it does not, as *Harris County* suggests, provide the state with absolute immunity no matter how unfair and unjust the bases upon which its allocative decisions rest.<sup>162</sup>

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The proposition advanced in this Part—that the state allocates property rights when it chooses not to enforce existing property laws (whether formally, as in the statute at issue in *Bormann* and Oregon's Measure 37, or informally, as in *Harris County*), and that such decisions thus should be subject to takings review to assure they are fair and just absent compensation—does not automatically mean that someone impacted by such a non-enforcement decision is entitled to the Takings Clause's constitutional remedy.<sup>163</sup> Rather, it simply suggests that courts should resist the temptation to formulaically and categorically prohibit non-enforcement takings claims, as the Texas Supreme Court did in *Harris County*, in favor of assessing those claims on the merits.

<sup>161</sup> See *supra* notes 34–49 and accompanying text.

<sup>162</sup> This same reasoning lends some support to the view that the *Deshaney* line of jurisprudence exempting the state from having to offer any justification for its refusal to act in many circumstances—which includes both old landmark decisions, see, e.g., *South v. Maryland*, 59 U.S. (18 How.) 396, 402–03 (1855) (dismissing a kidnap victim's claim that the sheriff unconstitutionally refused to secure his release despite knowing that he had been kidnapped and where he was detained), and new ones, see, e.g., *Castle Rock v. Gonzales*, 545 U.S. 748, 767–69 (2005) (rejecting a claim that there exists a property right to enforcement of a restraining order under state law that can only be deprived upon the provision of fair procedures)—may be due for a fresh look. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1714–18 (2004) (advocating judicial review of agency refusals to enforce for arbitrariness); Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 285–88 (2003) (asserting that *Marbury v. Madison*'s command to “say what the law is” obliges courts to review the rationale behind agency decisions not to enforce); see also *Castle Rock*, 545 U.S. at 791–93 (Stevens, J., dissenting) (asserting that where the state undertakes an obligation and an individual “justifiably relie[s] on that undertaking,” the Due Process Clause “at the very least” demands that “the relevant state decisionmaker listen to the claimant and then apply the relevant criteria in reaching his decision”); *Deshaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 210–11 (1989) (Brennan, J., dissenting) (“[W]e do not know why [state officials] did not take steps to protect Joshua [from abuse by his custodial parent]; the Court, however, tells us that their reason is irrelevant so long as their inaction was not the product of invidious discrimination. . . . I would allow Joshua and his mother the opportunity to show that respondents' failure to help him arose, not out of the sound exercise of professional judgment . . . but from . . . arbitrariness that we have in the past condemned.”) (citations omitted). On the *Deshaney* majority more generally distinguishing between positive and negative liberties, see *supra* note 89 and accompanying text.

<sup>163</sup> See Underkuffler, *supra* note 25, at 746 (“No complex society can adhere to a rule that makes it liable for every change in circumstance, disappointment, or frustration that every individual endures at government hands.”).

The next Part considers the application of the regulatory takings principles of fairness and justice to the non-enforcement context through a series of examples. In the course thereof, it offers two conclusions. First, most non-enforcement takings claims should be rejected, just as their traditional regulatory takings counterparts so often are.<sup>164</sup> The rejection of those claims on the theory advanced here, however, is grounded not on the view that the state is somehow categorically uninvolved in such cases, but rather on the finding that the state's allocative decision via non-enforcement reflected a constitutionally fair and just choice without the need for compensation.<sup>165</sup> Second, though, as with traditional regulatory takings, some exceptional non-enforcement cases in which takings liability may be appropriate do exist. Namely, liability might attach where the state (a) unjustifiably fails to prevent confiscation or significant degradation of a legally recognized interest that is not causing harm or interfering with others' legitimate property rights; (b) unjustifiably singles out individuals among similarly situated persons to bear a wholly disproportionate weight of a non-enforcement decision instead of legitimately adjusting property allocations wholesale; or (c) retroactively and unjustifiably diverges from what a reasonable owner could have possibly expected when she invested in property and put that property to a legitimate use in reliance on existing law.

### III. APPLICATION OF REGULATORY TAKINGS PRINCIPLES TO NON-ENFORCEMENT

The foregoing pages have presented two general claims. Part I asserted that regulatory takings law generally assesses whether state decisions to enact and enforce new regulatory safeguards and obligations that reflect new allocations of property rights produce fair and just impositions absent the payment of compensation, with the meaning of fairness and justice determined through contextualized application of the types of considerations identified in *Penn Central* and elucidated by precedent.<sup>166</sup> Part II contended that, much as the state makes an allocative decision when it enacts and enforces new regulations, it also makes an allocative decision when it decides not to enforce existing regulations.<sup>167</sup> Therefore, allocations reached in this manner should be subject to takings law's fairness and justice analysis, too. Through a series of examples, this Part considers the application of regulatory takings law, as

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<sup>164</sup> See *infra* notes 170–191 and accompanying text.

<sup>165</sup> See *infra* notes 194–273 and accompanying text.

<sup>166</sup> See *supra* notes 11–78 and accompanying text.

<sup>167</sup> See *supra* notes 79–165 and accompanying text.

defined in Part I, to the types of allocative decisions—those grounded in non-enforcement of existing property laws—discussed in Part II.

Section A below briefly outlines several situations that, on the approach advanced here, should be considered “easier” non-enforcement takings cases in that they represent fair and just exercises of enforcement discretion in the face of concerns regarding rivalrous harms, competing public interests, and constantly evolving human values.<sup>168</sup> Section B works through several examples that present “harder” applications of takings law’s principles to non-enforcement decisions, including the aforementioned *Harris County v. Kerr* case.<sup>169</sup> This latter set of examples is not presented in an effort to offer a definitive result on whether a compensable non-enforcement taking occurred in any individual instance. Rather, it is presented to highlight that, despite what the many lower court cases that reject the very possibility of non-enforcement takings liability might imply, non-enforcement poses some challenging “fairness and justice” issues that are well worth consideration on the merits.

### A. Easier Cases

#### 1. Trespass—Non-Enforcement Takings Liability Likely to Lie

A landowner’s “right to exclude” is generally protected by trespass law. This right, of course, is not absolute, and there are many situations in which trespass law is inapplicable. For instance, where an owner begins to open up her property to the public or otherwise operates the property in a manner that is more appropriately understood as public than private, the strength of the owner’s exclusionary interest begins to diminish and eventually trespass law ceases to apply.<sup>170</sup> Numerous other doctrines, such as those of necessity<sup>171</sup>

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<sup>168</sup> See *infra* notes 170–191 and accompanying text.

<sup>169</sup> See *infra* notes 192–273 and accompanying text.

<sup>170</sup> *Marsh v. Alabama*, 326 U.S. 501, 508–10 (1946) (holding that a company-town cannot criminalize the distribution of religious literature within the municipality); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 346–48 (Cal. 1979) (holding that a shopping center cannot deny access to individuals because they want to circulate a petition to other shoppers), *aff’d*, 447 U.S. 74 (1980); *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 779–84 (N.J. 1994) (holding that, subject to reasonable conditions, community and regional shopping centers must allow leafleting of political and societal issues); *State v. Schmid*, 423 A.2d 615, 630–33 (N.J. 1980) (holding that a private university cannot evict an individual and secure her arrest on the basis of distributing political literature on campus); *State v. Shack*, 277 A.2d 369, 372–75 (N.J. 1971) (holding that it is not a trespass for an attorney and a medical services worker, employed by non-profit corporations, to visit a migratory farm worker who lives on the property of his employer without the employer’s supervision).

<sup>171</sup> See, e.g., *Commonwealth v. Magadini*, 52 N.E.3d 1041, 1052–54 (Mass. 2016) (holding that necessity can be a defense to trespass).

and prescription,<sup>172</sup> also limit the circumstances in which the application of trespass law is appropriate. But where these or other justifications are not at stake, there is a strong case that the state’s refusal to enforce trespass laws—say, where a non-owner occupies an owner’s home by acquiring the keys to the home via subterfuge or threat of force—amounts to a compensable taking.<sup>173</sup> Non-enforcement in this instance results in the transfer of a property interest that currently is being used as a private home to a third party stranger when that property does not bear the markers of a public space, its use is causing no harm, and the stranger has no legitimate justification for her occupation. The state’s non-enforcement is not generally applicable, creates little by way of reciprocal advantage, and is untethered from any reasonable effort to manage social and economic relationships; indeed, it works against operationalizing constitutional norms of dignity and equality.<sup>174</sup>

## 2. Roadway Maintenance—Non-Enforcement Takings Liability Not Likely to Lie

While the non-enforcement of trespass law in the aforementioned hypothetical example is a relatively easy case in which to find non-enforcement takings liability as it has been outlined in this Article, disputes akin to that in the Florida District Court of Appeals’ 2011 decision in *Jordan v. St. John’s County*<sup>175</sup> present relatively easy cases in which to *reject* liability. The dispute in *Jordan* derived from a decision by the State of Florida in 1960 to re-reroute State Highway A1A approximately eight hundred feet west of its original location immediately fronting the Atlantic Ocean.<sup>176</sup> Twenty years later, the State deeded the original roadway—which became known as the “Old A1A”—to St. John’s County.<sup>177</sup> Old A1A provided the only vehicular access to and ran the length of a 1.6-mile spit of sand between the Intracoastal Wa-

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<sup>172</sup> See, e.g., *White v. Hartigan*, 982 N.E.2d 1115, 1126 (Mass. 2013) (explaining that the lengthy use of another’s property for a specific purpose can ripen into an easement).

<sup>173</sup> Cf. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1049 (2009) (intimating that landowner A has no legal or moral right to call on the police to take down a sign on his neighbor B’s property that expresses support for a particular politician).

<sup>174</sup> See, e.g., Volokh, *supra* note 105 (contending that the government “can’t simply refuse to enforce trespass laws,” for such a “deprivation of legal protection would be close to legally destroying my property right. . . [and] probably would violate the Takings Clause”); *id.* (“Civilized life requires that the government positively protect property . . . [,] [for] while the political process must have a great deal of flexibility in deciding the scope of such protection, some amount of such protection is constitutionally required.”).

<sup>175</sup> *Jordan v. St. Johns County*, 63 So. 3d 835, 837 (Fla. Dist. Ct. App. 2011).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

terway and the ocean.<sup>178</sup> By this time, the “road” did not include a fully paved driving surface in light of erosion and frequent storm damage; indeed, the ocean actually had flowed over it on multiple occasions in the past.<sup>179</sup>

At the time the County acquired the roadway, several homes already existed along the road’s frontage.<sup>180</sup> In the intervening years, the County approved the development of additional homes, which, together with the homes that pre-dated the County’s acquisition of the road, locals referred to as the “Summer Haven subdivision.”<sup>181</sup> Old A1A, however, continued to be the subject of repeated damage from coastal storms.<sup>182</sup> The impacts stemming from these storms made it difficult for the County to maintain the road, despite the fact that, in the five years preceding the takings lawsuit, the County had spent on Old A1A “more than 25 times the County average annual maintenance cost per mile.”<sup>183</sup> Homeowners in Summer Haven found the County’s efforts insufficient, and ultimately filed suit alleging that the County’s failure to do enough to maintain uninterrupted roadway access to the barrier island amounted to a taking of their property without the payment of just compensation.<sup>184</sup>

With little explanation, a Floridian appellate panel concluded that, regardless of the circumstances, the County has an “affirmative duty to act” under state law to “provide a reasonable level of maintenance that affords meaningful access” at, presumably according to the decision, all times of every day and night.<sup>185</sup> The panel reversed the trial court’s grant of summary judgment to the County and remanded for a determination as to whether the maintenance the County had performed had been reasonable or, instead, “[s]o deficient as to constitute a de facto abandonment.”<sup>186</sup>

On the theory of non-enforcement takings advanced here, the homeowners’ takings claim on remand is not particularly persuasive. The County had provided uninterrupted roadway access to the island for a significant period of time despite the increasingly marked and, relative to other roads, disproportionate expense of doing so.<sup>187</sup> The impacts of climate change, including sea-level rise and coastal storms of greater intensity, led the County to reasonably conclude that it could no longer provide safe and meaningful access

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<sup>178</sup> *Id.*

<sup>179</sup> See Petitioner’s Brief on Jurisdiction at 1, *St. Johns County v. Jordan*, 77 So. 3d 647 (Fla. Dec. 5, 2011) (No. SC11-1294), 2011 WL 12473580, at \*1.

<sup>180</sup> *Jordan*, 63 So. 3d at 837.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See Petitioner’s Brief on Jurisdiction, *supra* note 179, at \*2.

<sup>184</sup> See *Jordan*, 63 So. 3d at 837.

<sup>185</sup> *Id.* at 838–39.

<sup>186</sup> *Id.* at 839.

<sup>187</sup> *Id.* at 837.

during all flooding events.<sup>188</sup> Limiting roadway access to the homeowners in Summer Haven without compensation is justified on the view that these owners purchased land in a dangerous coastal zone that had been highly regulated for more than 50 years, such that they should have anticipated the possibility of the government's interrupting convenient access periodically in the face of ecological developments. The type of interest imposed upon—a home interest—is a pressing one,<sup>189</sup> though, in terms of the severity of the impact here, the County's decision did not produce an imposition akin to ouster.<sup>190</sup> The homes in Summer Haven have not been deemed uninhabitable and, at least until nature suggests otherwise, the owners can continue to access their homes by car when the roadway is not flooded (which, for now, is most of the time) and at least theoretically can consider other forms of access—either by air or water—when it is.<sup>191</sup>

### 3. Vehicular Speed Limits—Non-Enforcement Takings Liability Not Likely to Lie

For a perhaps simpler, more systemic example of a situation in which non-enforcement takings liability is unlikely, consider the non-enforcement of posted vehicular speed limits. It is now well established that speeding plays a significant role in accident causation. Imagine one's formerly quiet residential street is increasingly used as a cut-through for commuters to get to the on-ramp for a major thoroughfare in light of new, higher density development patterns in surrounding neighborhoods. The street's posted speed limit remains at a safe twenty-five miles per hour, but drivers now regularly exceed that number by ten to twenty miles per hour during peak commuting times and only a small percentage are ticketed. Many residents of the street have young children who routinely play in their front yards. These residents plead with the city to increase its enforcement of the speed limit, but to no avail. They thereafter consider the prospect of filing a takings suit alleging that the city's non-enforcement of its speed limit is substantially interfering with the use and enjoyment of their land and negatively affecting their lands' market value.

Though these residents' plight deservedly will engender sympathy, the non-enforcement takings claims here, like those in *Jordan*, are rather uncon-

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<sup>188</sup> See *id.*

<sup>189</sup> See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1007 (1982).

<sup>190</sup> Even if the County's decision *did* result in a constructive eviction, it may be deemed non-compensable where the decision sought to protect against significant harm to persons and property. See *supra* note 36 and accompanying text.

<sup>191</sup> See *Jordan*, 63 So. 3d at 837.

vincing. Further factual development of course would be necessary in an actual case, but there generally seems plausible ground in this context to argue that the city is doing the best it can in the face of resource limitations, and the residents and prospective purchasers likely have low-cost options to avoid the alleged harm to their use and enjoyment (fencing, resorting to alternative play areas at rush hour, etc.). Furthermore, any imposition is dispersed city-wide (provided the city has not selectively identified this particular section of this particular road as an area where speeding will not be enforced regardless of resource availability), and, though the city could anticipate that not all residents will be pleased with all of its enforcement and budgetary choices, these residents could not reasonably have expected absolute enforcement of the city's speeding laws.

### B. Harder Cases

The prior section briefly outlined three prototypical non-enforcement situations that should be considered "easier" non-enforcement takings cases. The first situation (involving the non-enforcement of trespass law against a deceitful intruder) does not represent an exercise of enforcement decision-making discretion that aligns with the principles of fairness and justice absent compensation as those principles have been illuminated through takings jurisprudence's interpretation of the considerations discussed in *Penn Central*.<sup>192</sup> The latter two situations (involving the non-enforcement of roadway maintenance and vehicular speeding laws, respectively) *do* represent such an exercise of enforcement decision-making discretion.<sup>193</sup> Varying these latter two fact patterns, however, can make the non-enforcement takings question in these situations more challenging. Imagine, for instance, that a county approved the construction of the first homes on a barrier island and enacted legislation providing for roadway, emergency, and other services to the island, only to decide without justification not to spend any of the funds dedicated to those services immediately after the home construction was completed. Or envision drivers regularly exceeding the twenty-five miles-per-hour speed limit by *fifty to sixty* miles per hour, to the point where residents of homes fronting the road cannot safely enter and exit their driveways even at off-peak hours. These hypothetical variations illustrate that takings cases involve a matter of degree, and thereby reinforce the notion that normative judgment is required to assess the character of the imposition resulting from the government's decision not to enforce. This section explores the competing arguments in three actual examples that, on the non-enforcement takings theory

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<sup>192</sup> See *supra* notes 170–174 and accompanying text.

<sup>193</sup> See *supra* notes 175–191 and accompanying text.

advanced here, present especially hard cases. For each of these challenging case examples, the section walks through potential arguments on the state's behalf before setting out the claimants' potential counter-positions.

### 1. Non-Enforcement of a Flood Control Plan: *Harris County v. Kerr*

The matter at hand in *Harris County v. Kerr* has been well-documented above, such that only the briefest refresher of the facts is in order: *The County adopted a flood control plan by local ordinance that allocated to downstream landowners security from one hundred-year flood events by assuring that it would not approve development of upstream lands in ways that would jeopardize this security. This allocation took the form of conferring on downstream landowners a negative covenant of sorts that entitled them to partial property rights in upstream lots. Later, without altering the ordinance adopting the flood control plan, the County adjusted this allocative decision by choosing not to enforce the plan against certain upstream development, thereby effectively dissolving the covenant held by downstream residents.*<sup>194</sup>

County Positions: Faced with justifying this allocative decision as fair and just absent the payment of compensation, the County might contend—much like the government entities in the road maintenance and vehicular speeding examples—that its decision not to enforce its flood control plan against these specific upstream developers was an unintentional but nonetheless reasonable one made in the face of budgetary and personnel constraints.<sup>195</sup> There commonly is a wide disjunction between (a) a government entity's jurisdiction to enforce its regulations, and (b) the resources dedicated to do so; in this way, non-enforcement of the sort at issue here is implicitly ingrained within the regulatory structure.<sup>196</sup> A high-level County official

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<sup>194</sup> Harris Cty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 795–98 (Tex. 2016).

<sup>195</sup> See *supra* notes 175–191 and accompanying text. Relatedly, though unlikely directly relevant in *Harris County*, non-enforcement might result from enforcement officials' lack of familiarity with complex new rules, as seems conceivable and arguably understandable—at least during some very limited transitional period—with respect to regulations that focus on highly technical processes, such as those surrounding the extraction of subsurface resources. See, e.g., David L. Callies, *Regulation of Hydraulic Fracturing*, 49 J. MARSHALL L. REV. 271, 273, 278–313 (2015) (explaining the “complex interplay of regulations” regarding hydraulic fracturing). In others, even relatively simple technological innovations may adjust the playing field so rapidly and markedly that the law will be particularly slow to catch up or fill in, such as Uber's break-neck entry into the field of rides-for-hire.

<sup>196</sup> Indeed, some expansive laws explicitly incorporate versions of non-enforcement in multiple ways. For one example, many zoning schemes specifically build in formal measures not to enforce, including variances and other exceptions that are relevant to properties possessing identified, generally applicable characteristics such as topography that would make development of land in strict compliance with the zoning scheme impracticable. At least in the basic terms described



spoke to this point at trial, testifying that “[a]lthough White Oak Bayou was always a high priority, with limited . . . funding the [County] also had to consider other high priority projects . . . .”<sup>197</sup> Perhaps the County did not have the funding to support permitting officials’ conducting detailed reviews of every upstream development application to assure the developers-applicants were adequately mitigating downstream flooding concerns in accord with the County ordinance delineating its flood control plan. This reality does not detract from the flood control plan’s promoting the general welfare. Indeed, its non-enforcement does not stem from designs on any particular properties and, assessed over time and considered in conjunction with the County’s other land use controls, roughly assures reciprocal advantages for the impacted populace as a whole.

Alternatively, the County might concede that it had intentionally made some decisions to deviate from the flood control plan that were unrelated to resource and personnel constraints, but instead were made upon determinations that assumptions on which the plan originally was based had become outdated.<sup>198</sup> On this alternative contention, enforcement officials might simply be responding to anticipated legislative action in service of the public interest by deciding not to enforce a law that it appears will soon be formally overridden or repealed.

Either way, the County’s exercise of its enforcement power under these conditions demands that its enforcement officials use their discretion in making value judgments and establishing priorities.<sup>199</sup> In the federal administra-

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here, these efforts are assumed to mirror Oregon’s Measure 37 in the sense that they are generally applicable.

<sup>197</sup> *Harris Cty.*, 499 S.W.3d at 805; *see also id.* (testifying that the White Oak Bayou received its “appropriate share” of funding given the available resources). In some instances, non-enforcement might result from political unwillingness to dedicate resources to more complete enforcement. In other instances, there may be rising public opinion that the wisdom of *any enforcement at all* is up for debate. *See, e.g.,* Tiago Pappas, *Providing Property Owners Increased Certainty in the Conflicting Medical Marijuana Landscape*, 39 REAL EST. L.J. 249, 267–80 (2010) (discussing debate surrounding the use of land to grow small amounts of marijuana for personal medicinal purposes); Peter C. Yeager, *Crime and Inequality in the Regulatory State*, in CRIME AND INEQUALITY 250–54 (1995) (discussing the moral challenges to enforcing “white-collar” regulation “in the face of economic stagnation and decline”).

<sup>198</sup> *See Harris Cty.*, 499 S.W.3d at 798. Such a decision might be conceived of as an effort to counter a potential “passive” takings claim, as such claims have been defined by Professor Serkin. *See supra* notes 147–153 and accompanying text.

<sup>199</sup> *See Harris Cty.*, 499 S.W.3d at 798. In some instances, enforcement priorities are explicit, such as the federal government’s immigration policy under President Barack Obama of deferring action for childhood arrivals. In others, they are implicit or even haphazard. Explicit prioritizing might be seen as overriding legislative authority to set policy, a traditional separation-of-powers concern; however, it might also serve important separation-of-powers principles, such as transparency and consistency. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 208–13 (2015).

tive law context, the Supreme Court has deemed enforcement agencies' discretionary decisions not to enforce *presumptively un-reviewable* under the Administrative Procedure Act,<sup>200</sup> and local government law is only slightly more generous in cases involving claimants seeking writs of mandamus to compel enforcement of permitting programs and other local land use laws.<sup>201</sup> Much the same could be said of criminal prosecutorial discretion. Non-enforcement takings law should not divert markedly from this well-established course of affording enforcement agencies and officials flexibility, even if the remedy generally is not injunctive relief but compensation. Were it to do so, in the immortal words of Justice Oliver Wendell Holmes, the government "hardly could go on."<sup>202</sup>

To further press the point, the County might allege that, outside of extreme circumstances not present here, non-enforcement is best conceived of as a risk to which citizens are exposed. Were it not, government incentives might be inverted *against* the public interest. The prospect of traditional regulatory takings liability already chills the government's adoption of environmental protection and safety measures that impacted landowners might challenge as too stringent. Indeed, full enforcement here could prompt legitimate takings claims *from the upstream owners*. Recognizing liability for the non-enforcement of existing rules would serve to exacerbate this chilling effect. The government constantly would be looking over both shoulders—one for those asserting takings claims that the government is enforcing regulations that are too restrictive, the other for those claiming that the government is enforcing regulations in a way that is too permissive. It might choose, then, to avoid moving forward with most any studies and contemplated regulation dictated by them, on the view that a governmental entity cannot be challenged for enforcing or failing to enforce a regulation that does not exist.<sup>203</sup> The County's flood control plan was enacted to *protect* the County's residents, not to reassign from developers to the County the burden of liability stemming from development that proves harmful.<sup>204</sup> As it endeavors to implement this

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<sup>200</sup> See *Heckler v. Chaney*, 470 U.S. 821, 837–38 (1985).

<sup>201</sup> The circumstances in which a court will order what is often referred to as the "extraordinary" writ of mandamus are quite narrow. See *supra* note 79 and accompanying text (explaining the general requirements for a court to issue a writ of mandamus).

<sup>202</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>203</sup> See *Harris Cty.*, 499 S.W.3d at 810 ("If the County had undertaken no efforts to control flooding, the homeowners could not assert the failure to complete [the adopted flood control plan] as a basis for liability."). For a brief discussion on the prospect of the government's being considered liable on takings grounds for refraining from enacting regulations to counter public problems, i.e., "non-enactment" takings, see *supra* notes 147–153 and accompanying text.

<sup>204</sup> See, e.g., *City of Keller v. Wilson*, 168 S.W.3d 802, 833 (Tex. 2005) (O'Neill, J., concurring) ("[W]hen a private development floods neighboring land, the owner of the damaged property will ordinarily have recourse against the private parties causing the damage.").

general plan enacted with the protection of the public in mind, the County should not be charged with having to forecast specific impositions that might result from the conduct of private parties who undertake activities in contravention of the flood control plan that allegedly cause the harms complained of here. Any remedy to which the claimants may be entitled—perhaps, for instance, on common law nuisance grounds—must come from the upstream developers themselves, not the County.

The County might offer yet another reason why the takings claim (and perhaps a private nuisance claim, as well) should fail: the downstream residents—by constructing or purchasing their homes in a floodplain—*put themselves in this situation* where they would be prone to injury even from the benign conduct of their neighbors building their own homes. Simply because these downstream residents or their forbearers were the first in time to develop in this area should not automatically concretize as reasonable their alleged expectation that, unless compensated, they have ultimate say in how their community develops and evolves around them.

Claimant Positions: Conversely, the downstream residents might argue that the County knew or should have known that its electing this course in defiance of its adopted flood control plan would come at the sacrifice of longstanding residences in the downstream claimants' neighborhood. On this view, the County deliberately chose not to enforce its flood control plan to, perhaps, serve the public interest of facilitating upstream development to expand its tax base and promote economic development. It might have chosen to facilitate upstream development by amending the generally applicable flood plan without implicating takings protections, for the responsibilities stemming from that amendment presumably would be fairly and broadly dispersed. Instead, though, the County vastly increased the likelihood of downstream flooding in the claimants' specific neighborhood as a targeted sacrifice to promote these public interests. Concentrated non-enforcement at the expense of existing property rights of this sort, if uncompensated, can have a corrosive effect on citizens' belief in and respect for the law and, in turn, lead to demoralization in affected communities, heightening these communities' members' suspicions that the legal system will protect them from others' dangerous and injurious acts.<sup>205</sup> Perhaps non-enforcement can be undertaken in the concentrated manner in which Harris County chose to expand the County's tax base and pursue economic development in the same way that these goals are considered allowable public uses of the outright exercise of the gov-

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<sup>205</sup> See Michelman, *supra* note 22, at 1214–16 (defining “demoralization costs” as constituting the psychological impact on non-parties when a takings claimant is not afforded compensation).

ernment's eminent domain power,<sup>206</sup> however, where this course is chosen, takings compensation should be due.

What, though, if the County's decision not to enforce its ordinance delineating its flood control plan is *not* justified as serving a public use? Imagine that, in accord with *Kelo v. City of New London*, the state's offering economic development as its public aim of non-enforcement is mere "pretext" for conferring private benefits on select upstream landowners.<sup>207</sup> Or, even if the state's decision can surmount *Kelo's* pretext inquiry for federal constitutional purposes, it may not be sufficient to meet the narrower understanding of "public uses" for which the eminent domain power can be employed in many states.<sup>208</sup> In this instance, the County's decision ideally should be enjoined and the property interest restored to its owners downstream.

The scenario offered in the preceding paragraph raises the sticky question of whether takings compensation is appropriate when *it is not possible* to restore the property to its owner. Here, the County cannot undo the destruction of the claimants' homes.<sup>209</sup> To some analysts, an inability to restore a claimant's interest is of no matter to a takings case when the state's decision that led to that interest's destruction did not serve a public use. For instance, according to Professor John Echeverria, the Takings Clause assumes the government has the power to condemn property outright for lawful purposes and merely places a condition—the payment of compensation—on the exercise of that power.<sup>210</sup> Just compensation is thus constitutionally authorized only where it funds an appropriation that serves a legitimate public purpose. Where a state decision is not oriented toward a legitimate public end, the uncompromising remedy of enjoining the deprivation and restoring the property to its owner is more appropriate than the compromising remedy of allowing the deprivation upon the payment of takings compensation.<sup>211</sup> It is fair to say,

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<sup>206</sup> See *Kelo v. City of New London*, 545 U.S. 469, 483–87 (2005) (concluding that the condemnation of non-blighted residential properties for purposes of creating jobs and improving the local tax base promoted a "public use," as required by the Federal Constitution's Takings Clause, despite the fact that some of the condemned properties would be leased to for-profit corporations for the construction of private mixed-use development).

<sup>207</sup> See *id.* at 477–78 (stating that a municipality cannot "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit").

<sup>208</sup> Post-*Kelo*, more than 40 states—including Texas, the site of *Harris County*—amended their laws in a purported effort to limit the extent to which the government could exercise its power of eminent domain exclusively for economic development purposes. See, e.g., TEX. GOV'T CODE ANN. § 2206.001 (West 2005) (amended 2011).

<sup>209</sup> *Harris Cty.*, 499 S.W.3d at 813–14 (Lehrman, J., concurring).

<sup>210</sup> See John Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1055 (2000).

<sup>211</sup> See, e.g., *Maheer v. Lasater*, 354 S.W.2d 923, 925–26 (Tex. 1962) (declaring void a local government's decision to condemn a private lane solely to allow a neighbor access to a public road in addition to the one to which he already had access, for such a condemnation did not serve a public purpose).

therefore, that takings law ordinarily rears its head only in those instances where an “*otherwise proper*” state decision to adjust a property law causes particular owners to shoulder particular types of responsibilities that are unfair and unjust for the state to impose without compensation.<sup>212</sup>

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<sup>212</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)). The chemistry between the Takings Clause, the Due Process Clause, and the Equal Protection Clause has been the subject of extensive debate. Perspectives on the matter, even among proponents of similar conceptions of property, are not uniform, at least on a granular level. Two prominent examples will suffice to illustrate the point. Professor Nestor Davidson has raised concerns that focusing on equality norms in takings cases somewhat ironically may provide more protections to those holding large shares of property than to those holding small shares, which he deems untoward because the former hold far more sway in the political process than the latter. See Nestor Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 41–44 (2008). In his view, without a realistic possibility that those holding small shares (or even no share at all) will have a meaningful place at the regulatory takings table, Professor Davidson exhibits a preference for courts’ examining the distributive character of regulatory impositions strictly under the confines of Equal Protection jurisprudence. *Id.* at 44–49, 48 n.270. Alternatively, Professor Peter Gerhart has suggested that any regulation that unfairly singles out owners to bear the burdens of regulatory adjustments is illegitimate under what he describes as an “equality principle,” and any such “individualized burden” and “unequal reduction in property values” must be enjoined on procedural due process grounds. See PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 266–67, 274–75, 290, 305 (2014). These leading works, among others, raise important questions about leaning heavily on takings remedies to combat distributive injustices. Professor Davidson’s and Professor Gerhart’s theories, however, would largely resign the Takings Clause to applying only in those instances where governmental conduct results in a physical appropriation of property. Though others have joined them in offering arguments worthy of consideration on this point, see, e.g., J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 114–15 (1995) (arguing that the regulatory takings doctrine should be abandoned because “it deprives the state of its basic power to define property rights”); William Michael Treanor, *Keynote Address: 14th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations*, 36 *VT. L. REV.* 503, 503–15 (2012) (arguing that the regulatory takings doctrine misconstrues the original intent of the Takings Clause and should be interpreted to cover only physical takings of property), no Supreme Court Justice in the past century has displayed any appetite for considering the wholesale abolition of regulatory takings law. Moreover, perhaps the existence of *some* regulatory takings doctrine is for the better, in the sense that takings analysis—at least as advanced here—may root out and provide compensation for select instances of rather extreme unfair and unjust treatment in the realm of property law that currently are not meaningfully enjoin-able under Equal Protection and Due Process jurisprudence. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–66 (1977) (finding that the Equal Protection Clause is implicated only in those instances of clear, intentional discriminatory treatment by the government, without which even tremendous disparate impacts on traditionally marginalized classes—let alone the poor, whom the Court has never deemed such a class—are of no matter). Indeed, were regulatory takings analysis to be abolished, there would be no need for the principle recognized in some form in a great number of municipalities that, although governmental entities need and have great latitude to update their zoning plans periodically, existing structures that do not conform with an updated plan need not be demolished immediately when they are not posing significant harm to neighbors or the community more generally. See, e.g., *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 959 P.2d 1024, 1027 (Wash. 1998).

Yet it is not obvious that the “public use” clause should be interpreted in the formal terms advocated by Professor Echeverria to bar a claimant’s recovery of compensation for property that the state has *irretrievably* appropriated when that appropriation is later deemed not to serve a legitimate public purpose. To Professor Echeverria, takings compensation should not be due in an instance where the state illegally occupies private property with floodwaters for an extended period of time and it is “impossible to restore the status *quo ante*.”<sup>213</sup> He intimates that this conduct bears the markings of a tort, and Congress has waived sovereign immunity for takings, not torts.<sup>214</sup> Therefore, expanding the situations in which takings liability is available cuts against—through the backdoor—the many justifications for immunity in the tort context.<sup>215</sup> One concern with this interpretation is that it could perversely incentivize the state to defend takings suits where property restoration is unavailable by asserting that, in hindsight, its decision did not actually serve a public purpose. Yes, takings law *ordinarily* rears its head only in those instances where an “otherwise proper” state decision to adjust a property law causes particular owners to shoulder particular types of responsibilities that are unfair and unjust for the state to delineate without compensation. But, in the words of one federal judge, it would be “bizarre” to “allow the government to profit from its own error” of unfairly and unjustly depriving individuals of property that cannot be restored by immunizing it from takings liability.<sup>216</sup>

The County might note that causes of action alternative to takings claims may be available. It seems at least important to consider, however, the great likelihood that the doctrine of sovereign immunity would bar any tort claim. Courts also rarely award civil rights damages for substantive due process or equal protection violations,<sup>217</sup> which raises the real possibility that an owner in this position may have no recourse against the state. Moreover, it is not evident that the possibility of pursuing a remedy against the state on tort or civil rights grounds or against those private parties who conducted the upstream development should foreclose consideration of a constitutional claim against the County under the Takings Clause where, *but for* the County’s approval of development inconsistent with its existing flood control plan, the flooding would not have occurred and the downstream homes would not have

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<sup>213</sup> Echeverria, *supra* note 210, at 1091.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1092–93.

<sup>216</sup> *Osprey Pac. Corp. v. United States*, 41 Fed. Cl. 150, 157 (1998).

<sup>217</sup> *See, e.g., Ivan E. Bodensteiner, Congress Needs to Repair the Court’s Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 32 (2010) (outlining what the author sees as the “limited . . . effectiveness of § 1983 in serving as the vehicle for private litigation designed to enforce federal constitutional and statutory rights”).

been damaged. To at least some claimants, the flooding damage proved so extensive that they could no longer live on the land, and it is not clear that any viable non-residential uses remain.

Seen from this angle, the County's position takes on a peculiar character: The County effectively suggests that it holds the unfettered ability to displace—i.e., to constructively evict via a physical invasion of flood waters without providing compensation—even longstanding residents whose uses the County concedes are causing others no harm, nor exposing others to systemic risk of harm, through its decision not to enforce a law specifically enacted to protect these residents' lands and prevent their displacement. The County cannot justify such authority.

And, from the downstream landowners' perspective, the County's concern that full enforcement of its flood control plan would result in takings liability to the upstream developers is unfounded. First, the flood control plan allows a myriad of economic uses to proceed upstream; under the plan, development simply must account for and mitigate serious downstream flooding impacts. Furthermore, the County can prohibit *all* development when there is an adequate basis for doing so—such as, at the very least, when any development would put human life in jeopardy—without providing compensation.<sup>218</sup>

The County's objection that recognizing takings liability for the non-enforcement of its flood control plan will stymie harm-preventing regulation is more formidable, though overstated. Yes, there is a tension between the view that we want flood control and other laws to be enforced and the consequentialist problem of what liability for non-enforcement would do for regulation more generally. But simply identifying a cost—or, perhaps as here, adding a new cost in terms of liability risk—does not inevitably dictate that the state will stop worrying about protecting people and their property from the risks of flooding. *Every* regulation come with costs. These costs stand as reasons against the allocation stemming from a given regulation. However, what determines the advisability of such a regulation's allocative impact is whether the reasons *for* it dwarf those reasons *against* it.<sup>219</sup> And, all things

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<sup>218</sup> See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rptr. 893, 906–07 (Cal. Ct. App. 1989) (holding, on remand from the Supreme Court, that the ordinance in question that denied the claimants' all use of their property was not a taking because it sought to protect people and property from severe floods); cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 n.16 (1992) (deeming takings liability inapposite when the government's decision seeks "to forestall . . . grave threats to the lives and property of others").

<sup>219</sup> The contention that imposing non-enforcement takings liability in this context will actually produce the opposite of its intended effect—protecting those vulnerable to flooding—is a species of what Professor Duncan Kennedy referred to as the "landlord will raise the rent" argument. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special*

considered, it seems unlikely that governmental entities would decide en masse not to conduct flood control studies because the results of those studies might lead them to adopt new regulations, which their enforcement arms might later choose not to enforce in a way that unfairly and unjustly singles out individuals or small groups to bear the negative brunt of those decisions.<sup>220</sup> More likely, the prospect of non-enforcement takings liability will not discourage the vast majority of governmental entities from conducting studies and enacting regulations that prevent harmful land uses or impose generalized obligations of citizenship on landowners to benefit these owners' communities. Rather, these are the very types of regulations that, in the past, governmental entities have consistently enforced in accord with the democratic norms of fairness and justice. For those governmental entities that have not always heeded these norms, takings liability may well convince them to change their approach to enforcement rather than incentivize avoidance of regulation altogether.

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The parties' competing positions on the recast version of *Harris County* can be summarized as follows. The County might defend the non-enforcement takings claim by pointing to (1) the reciprocal advantages both in enacting a flood control plan and in recognizing broad enforcement discretion in the face of finite resources (or, alternatively, the lack of a "public use" when the government engages in enforcement conduct that is illegitimate, for no amount of compensation can justify it); (2) the prospect of depriving the upstream landowners of all or a significant amount of economically viable uses of their land if the flood control plan is fully enforced; (3) the down-

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*Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 604 (1982). Professor Kennedy ascribed this label in the context of considering the extent to which landlords will pass along increased responsibilities (such as maintaining rented properties in habitable condition) to their tenants in the form of increased rent. *Id.* As Professor Jeremy Paul has noted, however, the basic debate plays out in a great many circumstances. See Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1821–22 (1991) (arguing that Professor Kennedy's argument applies in almost any case "where the state is considering a modification of existing economic arrangements that does not disrupt the basic entitlement structure giving economic power to one party . . . over another"). For insightful analysis on the topic, see, for example, Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1244–46 (1991) (responding to the argument, based on the "landlord will raise the rent" concept, that requiring compensation for displaced employees will hurt instead of help these employees); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 720–23 (1988) (discussing and critiquing the "landlord will raise the rent" argument).

<sup>220</sup> Cf. Singer, *supra* note 25, at 633 (deeming "absurd" the argument that people are "deterred from engaging in daily life just because every minute of the day [they] are obligated to act 'reasonably' to avoid 'foreseeable harm' to others" under tort law's negligence standard) (emphasis omitted).



stream landowners' putting themselves in this flood-risk situation; (4) the likelihood that imposing liability in this instance will hurt the very people the imposition of liability is intended to protect—downstream landowners—because governmental entities will cease adopting flood control plans; and (5) the availability of potential alternative claims against both the state and the upstream developers. The downstream residents, on the other hand, might contend that (1) the County's approach to enforcement unjustifiably singled them out to bear the burdens of the public purpose of economic development and expansion of the County's tax base (or, alternatively, the County's alleged public use is pretext but does not negate takings law's compensation remedy when the property cannot be restored); (2) enforcement of the flood control plan is unlikely to fuel a successful takings claim by the upstream landowners because such a prospective regulation merely would prevent upstream landowners from imposing significant harms on other people and their property, and thereby allow a myriad of uses; (3) the potentiality of alternative claims should not abrogate a legitimate constitutional claim; and (4) the consequential impact of imposing liability is both less one-sided and more uncertain than the County contends.

The competing positions outlined here do not dictate a particular result, but instead merely serve to highlight that non-enforcement takings cases like *Harris County* present more challenging issues than most courts have attributed to them to date. Many of the arguments raised in this discussion of *Harris County* are relevant to the additional case examples addressed below, and those arguments need not be rearticulated in any detail. Nevertheless, these additional cases also present possibilities for new lines of contention, possibilities on which the discussion that follows will focus.

## 2. Non-Enforcement of a Pollution Discharge Permit: *Swartz v. Beach*

In *Swartz v. Beach*, a 2002 case decided by the U.S. District Court for the District of Wyoming, an upstream coal company allegedly discharged more pollutants into a Wyoming river than its state-administered Clean Water Act (CWA) permit allowed.<sup>221</sup> A downstream rancher, Swartz, contended that, as a result of the creek's contaminated quality stemming from the company's discharges, he could no longer water his hay meadows and his soil sustained

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<sup>221</sup> 229 F. Supp. 2d 1239, 1247–49 (D. Wyo. 2002). The company's permits required the discharge water salinity's level not to exceed an electricity conductivity ("EC") measurement of two thousand. *Id.* at 1249. The plaintiff alleges that water samples revealed EC levels above 2000 and that a state investigator "determined that [the coal company] was in violation of its permits." *Id.* Nonetheless, according to the plaintiff, the state did not take any enforcement action. *Id.*

permanent damage.<sup>222</sup> In addition to seeking prospective enforcement of the permit through the CWA's citizen suit provision, Swartz filed a takings claim against the state for the impositions he bore to date.<sup>223</sup>

Diverging from the majority view espoused in *Harris County*, the federal district court denied the State's motion for summary judgment on the takings claim.<sup>224</sup> Nonetheless, the court did not engage in a detailed analysis on the takings issue; instead, it merely explained that Swartz had stated a claim that the State's failure to enforce an issued permit that results in the destruction of property does not "substantially advance a legitimate government interest" and thus amounts to a compensable taking.<sup>225</sup>

The "substantially advance" language stems from the U.S. Supreme Court's 1980 decision in *Agins v. City of Tiburon*.<sup>226</sup> Twenty-five years after *Agins* and three years after *Swartz*, the Supreme Court in *Lingle v. Chevron U.S.A., Inc.* disavowed the "substantially advance" test as singlehandedly determinative of a regulatory taking.<sup>227</sup> The Supreme Court held that this test authorized a substantive review of the relationship between a regulation's design and the public goals in adopting it, a traditional due process question, only more probing.<sup>228</sup> *Lingle's* abandonment of the "substantially advance" test as singularly determinative of a taking does not suggest, however, that the

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<sup>222</sup> *Id.* at 1248.

<sup>223</sup> *Id.* at 1249.

<sup>224</sup> *Id.* at 1267. In doing so, the court addressed and rejected the claim that the CWA's remedial scheme precludes a § 1983 suit under the *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n* doctrine. *Id.* at 1257–58. *National Sea Clammers* held that plaintiffs cannot bypass the remedial scheme of a federal statute to assert an alleged violation of that statute under § 1983. See 453 U.S. 1, 20 (1981). Here, the state argued that the plaintiff could have sued the EPA administrator under the CWA to compel state officials in Wyoming to enforce the permit. *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1257 (D. Wyo. 2002). The plaintiffs countered, successfully in the federal district court, that regardless of whether there was a viable suit under the CWA's remedial scheme, they had an independent constitutional claim. *Id.* This Article proceeds on the assumption, without reaching a conclusion on the matter, that the court correctly decided this procedural issue.

<sup>225</sup> *Swartz*, 229 F. Supp. 2d at 1262.

<sup>226</sup> *Id.* (quoting *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1576 (10th Cir. 1995) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))).

<sup>227</sup> *Lingle*, 544 U.S. at 548.

<sup>228</sup> Mulvaney, *Legislative Exactions*, *supra* note 26, at 139. Since its release, *Agins'* reference to the "substantially advance" test had fallen under the weight of significant criticism for its mixing due process and takings analyses. See, e.g., John Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L.J. 853, 857–58 (1999); Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 713 (2002); Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1605–14 (1988); Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 351–52 (1989). The U.S. Supreme Court admitted its error in 2005. See *Lingle*, 544 U.S. at 548 (abrogating the "substantially advance" test).

federal district court judge who decided *Swartz* necessarily would now reverse course and grant the State's motion for summary judgment on the takings issue. The *Swartz* court interpreted the "substantially advance" test as requiring an application of the "fact specific inquiry" set out in *Penn Central* into "all of the relevant circumstances" to determine whether a regulatory taking occurred, and simply held that it did not need to conduct such an inquiry at this preliminary stage of the litigation to determine that *Swartz* had sufficiently alleged a takings claim under the then-standing precedent of *Agins*.<sup>229</sup>

As with *Harris County*, and particularly unsurprisingly given the *Swartz* court's cursory and now outdated takings analysis, reciting the facts from a new angle brings the contextual non-enforcement takings question into greater light. Consider the following recitation:

*In accord with federal and state legislation on water quality, the State of Wyoming initially made an allocative decision by issuing and setting the terms of an upstream coal company's permit to discharge coal bed methane wastewater into Wildcat Creek. Swartz, who owned land downstream of the coal company, held an adjudicated water right. The coal company's permit provided security to Swartz against the possibility that the company's pollution upstream would disrupt his exercise of this water right. For the moment, the coal company maintained the ability to develop its property, though it was limited by its permit demanding that it do so in ways that avoided marked interference with the water usage of its downstream neighbor. Although neither the federal nor state governments formally altered their water quality laws in any way material to the coal company's discharges of its wastewater, the state, according to Swartz, adjusted its allocative decision informally by choosing not to enforce the terms of the permit it had issued to the coal company, despite Swartz's numerous requests. As a result, the state allegedly redistributed Swartz's security to the upstream coal company, to the point where the coal company could discharge wastewater so "toxic" that Swartz contended that he could no longer exercise his water right and his soil had been permanently damaged.*<sup>230</sup>

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<sup>229</sup> See *Swartz*, 229 F. Supp. 2d at 1262 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002)). Language in the *Swartz* opinion—such as the court's assertion that a viable taking based on "a public official's failure to perform [her] statutory and regulatory duties [that] results in the destruction of private property to the point it is no longer 'financially viable'"—suggests that, had the *Swartz* court conducted a *Penn Central* analysis, the rancher's claim would have been deemed at least sufficient to survive summary judgment. See *id.* at 1263.

<sup>230</sup> See *id.* at 1247–49. On this framing, *Swartz* mirrors in many ways the dispute in *Litz v. Maryland Dep't of the Env't*. See 131 A.3d 923, 925–27 (Md. 2016). In the *Litz* case, the owner of a private lake in Maryland, Gail Litz, contended that, as a result of the state government's failure

This reframing helps identify the relevant question as whether the County allocated property rights in contravention of the principles of fairness and justice absent compensation. How might the parties respond to this question?

State Positions: The State might contend that it actually *was* enforcing the coal company's permit, if admittedly not in the manner Swartz preferred. It had investigated complaints of permit violations on multiple occasions and, upon identifying areas of concern, informally requested that the coal company remedy the problems moving forward. Eschewing the official sanctions Swartz desired in favor of more informal measures—such as phone calls, emails, and warning letters—is both a less expensive tactic and often all that is needed to prompt compliance. Regularly and immediately resorting to the most stringent available enforcement mechanisms can prompt regulated parties to be less cooperative in the future on the view that enforcement officials did not act sensibly or treat them with respect.<sup>231</sup> Perhaps non-enforcement takings liability should be reserved for instances in which the State's decision not to enforce borders on bad faith or reflects a complete and utter failure to implement a legitimate standing law. To the extent the coal company's discharge negatively affects Swartz outside of these rare circumstances, he should direct his ire and litigation strategy at the company itself.

Alternatively, the State might assert that it made the conscious decision to risk the viability of Swartz's field by not enforcing the coal company's permit for what it deemed the greater common good of developing coal bed methane at the lowermost cost in the midst of an energy crisis.<sup>232</sup> Such a decision is by no means clear-cut, but it is one the State's enforcement arm should have space to make without the constant threat of a takings claim for an alleged injury, not to something as intimate as Swartz's home, but rather to his ranching business. That Swartz was "first" to the river's water relative to the coal company does not give him absolute, vested immunity from important obligations of citizenship that—much like changing conceptions of what constitutes, for instance, a nuisance—might be recognized in the future.

Claimant Positions: The downstream water user, Swartz, might counter that although the State's decision to avoid meaningful enforcement of the company's discharge permit is one approach to fulfilling the goal of developing coal bed methane at the lowermost cost, concentrating this type of re-

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to enforce a state-town consent order in which a town promised to address leaks from nearby private septic tanks, her lake became polluted and she could no longer operate her campground business on the site, such that the state must pay her takings compensation. *Id.*

<sup>231</sup> See Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1751 (2006) (suggesting that enforcement officials' beginning with less stringent, informal approaches can "strengthen[] trust between individuals and the state").

<sup>232</sup> *Swartz*, 229 F. Supp. 2d at 1262.

sponsibility on Swartz requires compensation. There is no semblance of reciprocal advantage stemming from the state's approach to enforcement here. That remedies may be available against the coal company (which is no surety under federal and state law)<sup>233</sup> should not negate the prospect of one's ability to proceed on a constitutional claim against the State where, *but for* the State's decision not to enforce the coal company's permit, Swartz's family ranching operation would not have suffered the tremendous damage—indeed, *destruction*—that it did. The state did not change the contours of nuisance law, yet it effectively authorized the upstream company to conduct its activities in a manner that limits the meaningfulness of Swartz's ability to seek redress for nuisance-like harms. And Swartz's use of the land was not particularly sensitive but instead rather routine. According to Swartz, the land's soil had long served as the basis of Swartz's and his ancestors' livelihood. That soil is now so poisoned that it is not only unusable at the moment, but it will never recover to its once remarkably fertile condition.

Contemplating state liability when the coal company may bear some or even most of the blameworthiness is not a matter of seeking deep pockets. Instead, the key is whether the state owes some duty that it breached here, such that it is morally and legally responsible for the harm caused to the plaintiff's property rights. Swartz may well have been hurt by two parties rather than one.

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The foregoing discussion suggests that *Swartz*, like *Harris County*, is a challenging case when conceived in terms of whether informal adjustments to property allocations accomplished via non-enforcement are fair and just absent compensation.<sup>234</sup> The case highlights the reality that whether non-enforcement has occurred is itself a source of great debate and demonstrates the complexity of determining the extent to which competing public interests contribute to non-resource-driven non-enforcement. The below discussion on the final example, *Alger v. Department of Labor & Industry*, touches on these same matters, though it also prompts one to contemplate the extent to which traditionally vulnerable parties might suffer the effects of inequitable, even if subconscious, patterns of non-enforcement.<sup>235</sup>

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<sup>233</sup> The coal company asserted that Swartz could not avail himself of the CWA's citizen suit provision because the state water quality standards that Swartz sought to enforce were more stringent than the federal standards and therefore unenforceable under the CWA. *Id.* at 1268–69. Support for the company's position on this point is available in *Atlantic States Legal Foundation v. Eastman Kodak Co.* See 12 F.3d 353, 358–59 (2d Cir. 1993). Moreover, even if Swartz were to find some relief under state administrative law, it is possible that this relief would take only a prospective form, not reimburse him for the injuries he already has sustained.

<sup>234</sup> See *supra* notes 221–233 and accompanying text.

<sup>235</sup> See *infra* notes 236–270 and accompanying text.

### 3. Non-Enforcement of a Housing Code: *Alger v. Department of Labor & Industry*

*Alger* involved the alleged non-enforcement of Vermont's housing code.<sup>236</sup> According to numerous tenants, the state agency charged with implementing the State's housing code occasionally issued orders requesting compliance from certain landlords, yet for years effectively allowed these landlords to ignore order after order regarding the same violations because it failed to utilize the code's enforcement powers to pursue injunctive relief, impose administrative penalties, assess fines, or seek prosecution.<sup>237</sup> Only when it realized these violations had created a collection of such precarious conditions (such as no working heat, electricity, smoke detectors, plumbing, and leaking gas)<sup>238</sup> did the agency act: it ordered the buildings immediately vacated.<sup>239</sup> The tenants contended that this pattern of non-enforcement took their property by converting (a) their right to occupy their leased units into (b) "an illusory right to remain in imminently hazardous" conditions until they ultimately were forced to vacate, such that they were due compensation from the state for, at minimum, their relocation costs.<sup>240</sup>

The Vermont Supreme Court's decision comes closer than those in *Harris County*, *Swartz*, or any other reported opinions addressing alleged non-enforcement takings in tracking the understanding of property and takings law advanced in this Article. According to the court, the tenants were not seeking compensation based on the government's decision to order their buildings vacated when a nuisance—such as the fire hazards associated with the electrical deficiencies—threatened the surrounding community.<sup>241</sup> Rather, the court interpreted the tenants' claims as seeking compensation for the foreseeable results of the government's "allowing the nuisance to continue unabated for so long."<sup>242</sup> The court held that, to avoid takings liability for failing

<sup>236</sup> *Alger v. Dep't of Labor & Indus.*, 917 A.2d 508, 511 (Vt. 2006).

<sup>237</sup> *Id.* at 511–13.

<sup>238</sup> *Id.* at 511–14, 518.

<sup>239</sup> *Id.* at 511 (recounting the state's requiring vacation within ten days).

<sup>240</sup> *Id.* at 521. Like the fee interest in *Harris County* and the adjudicated water right in *Swartz*, leaseholds have been deemed property for purposes of takings review. *See, e.g.*, *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976) ("It has long been established that the holder of an unexpired leasehold interest in land is entitled . . . to just compensation . . . when [that interest] is taken upon condemnation by the United States.") (citations omitted); *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 150–52 (1924) (holding that a leasehold is a property interest requiring compensation if taken by the government).

<sup>241</sup> *Id.* at 520–21; *see also* *Eno v. City of Burlington*, 209 A.2d 499, 504 (Vt. 1965) (finding that "[a] fire hazard is a nuisance and the abatement of such a nuisance is not the taking of property . . . for which compensation must be made").

<sup>242</sup> *Alger*, 917 A.2d at 521.

to abate this nuisance, the government must “lack responsibility for the exigency.”<sup>243</sup>

Still, a clearer formulation of the State’s alleged non-enforcement of its housing code as an adjustment to the State’s allocation of property interests can help illuminate the competing perspectives on the non-enforcement takings question as it has been articulated in this Article. One might reframe the case as follows:

*In adopting its housing code, the State of Vermont made an allocative decision in setting minimum standards for the creation of residential leasehold estates. The housing code distributed security to all tenants from their landlords’ interference with their use and occupancy of their rented units in myriad ways.<sup>244</sup> For the moment, landowners obviously maintained the ability to rent their properties for residential purposes, though they were limited by the code’s requirement that they provide and maintain boilers,<sup>245</sup> fire safety measures,<sup>246</sup> electrical installations,<sup>247</sup> plumbing,<sup>248</sup> insect- and rodent-free quarters,<sup>249</sup> and the like in all leased premises. Although the state did not formally alter the housing code, it allegedly adjusted its original allocative decision by choosing not to draw on the code’s enforcement provisions—including its powers to pursue injunctive relief, impose administrative penalties, assess fines, and seek prosecution—despite numerous requests by tenants that it do so. As a result, according to the tenants, the state redistributed the tenants’ security interest to their landlords, to the point where these landlords could wholly disregard the housing code until, if ever, the state ordered these buildings vacated.*

Mirroring *Harris County* and *Swartz*, the question on this reframing of *Alger* is whether the State’s adjustment to property law through its approach to enforcement of its housing code contravenes fairness and justice norms to

<sup>243</sup> *Id.* The State had argued that it “owe[d] no duty to tenants.” Brief of Defendants/Appellees at 7, *Alger v. Dep’t of Labor & Indus.*, 917 A.2d 508 (2006) (No. 05-001), 2005 WL 1464527, at \*7.

<sup>244</sup> VT. STAT. ANN. tit. 9, § 4457 (West 1985) (“In any residential rental agreement, the landlord shall be deemed to covenant and warrant to deliver over and maintain, throughout the period of the tenancy, premises that are safe, clean, and fit for human habitation and which comply with the requirements of applicable building, housing, and health regulations.”); Rental Housing Health Code, 13-140-031 Code Vt. R. § 2.0 (1974) (amended 2006) (“The purpose of this code is to protect the health, safety and well-being of the occupants of rental housing. This code establishes minimum health and habitability standards that all residential rental housing in Vermont must conform to.”).

<sup>245</sup> See tit. 20, § 2881; 13-140-031 Code Vt. R. § 7.0.

<sup>246</sup> See tit. 20, § 2681(a).

<sup>247</sup> See tit. 26, § 881; 13-140-031 Code Vt. R. § 9.0.

<sup>248</sup> See tit. 26, § 2198.

<sup>249</sup> See 13-140-031 Code Vt. R. § 6.0.

the point where it rises to the level of a compensable taking. Once more, we can contemplate the parties' competing positions, concentrating not on those arguments that already have been articulated in the course of discussing the prior examples but instead on additional lines of argument specifically implicated by *Alger's* context.

State Positions: The State of Vermont might argue that it justifiably chose what it deemed to be the most effective approach to enforcement of the State's housing code in light of its resource constraints. Although the decision not to enforce in *Swartz* may have been targeted against a specific kind of regulated entity (coal bed methane producers), the Vermont agency's decisions regarding enforcement are generally applicable in the following way: the agency indiscriminately inspects alleged violations as it is able, issues notices of code violations, and orders the closure of dangerous housing when those code violations go uncorrected. Tenants may not like the choices the agency has made regarding the manner of and pace with which it is enforcing its housing code. It is far from clear, however, that they hold a constitutionally protected property right in their leases as defined by their preferred method of enforcement. Whether such a property right exists is particularly unclear absent evidence that obstinate landlords would be more likely to comply if the state were to rely more heavily on, say, imposing monetary penalties and seeking injunctive relief than they are under the current policy.

Claimant Positions: The tenants must concede that resource constraints often are a primary and understandable reason underlying the reality that all arguable violations of all laws cannot possibly be pursued. In some instances, despite diligent efforts, an agency's limited number of enforcement officials simply may not yet have gotten to the file that is pertinent to the takings claimant's case.<sup>250</sup> Some offenses, such as housing code violations, occur so frequently that avoiding non-enforcement would be a wholly impractical goal. That the law's expansiveness outpaces its conceivable enforcement does not necessarily raise concerns regarding the State's accountability. Nevertheless, the tenants might inquire whether there is *some juncture* at which the government's pointing to a lack of resources loses its potency. Should a lack of resources be a perpetually *failsafe* defense for a state agency's non-enforcement when it comes to, for example, a landlord's ruining tenants' units by failing to fix gas leaks that both the landlord and the agency have known about for some time? Is there *any limit*—even if only the functional equivalent of confiscation—to which select tenants should bear the full brunt of re-

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<sup>250</sup> Such instances potentially implicate the ripeness requirements necessary to proceed on a takings claim. For a particularly thorough and insightful look at ripeness doctrine in the regulatory takings context, see Gregory M. Stein, *Regulatory Takings and Ripeness in Federal Courts*, 48 VAND. L. REV. 1 (1995).



source-constrained enforcement decisions? Is there any room outside the ordinary and expansive space where the state can maneuver in enforcing law? It is not immediately obvious that pointing to a lack of resources is a sufficient justification for non-enforcement when the state has come up with the money to fund a court system by which landlords can evict tenants.<sup>251</sup> Why should landlords' property rights to eviction be protected but tenants' property rights to habitable housing should not?<sup>252</sup>

In certain situations where offenses are frequent—such as temporary trespasses to avoid puddles or to collect personal items such as a child's wayward ball—marked non-enforcement may be desirable. Indeed, where the offending conduct is widespread and perceived as only marginally harmful, non-enforcement might mirror social consensus that full enforcement is actually not only undesirable but *perverse*.<sup>253</sup> In others, though, the stakes are far

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<sup>251</sup> On this view, *Alger* bears some loose similarities to the Supreme Court's decision in *Logan v. Zimmerman Brush Co.* Cf. 455 U.S. 422, 435–39 (1982). In *Logan*, the state established a property right to file a timely charge of unlawful termination from employment and created a system by which to protect and enforce that property right. *Id.* at 424. Under this system, when the state held timely conferences, the claimant's case would be heard in full on the merits, but where the state missed the deadline by which it was required to hold such a conference, the claimant's case—however meritorious—would be dismissed with prejudice. *Id.* at 425–27. The Court found this system could serve as the basis for a due process claim and deemed the system unconstitutionally irrational on due process grounds. *Id.* at 432 (“[A]ny other conclusion would allow the State to destroy at will virtually any state-created property interest.”). In *Alger*, the state similarly established a property right (in habitable rental housing) and created a system by which to protect and enforce that property right. 917 A.2d at 511. In implementing this system, the state did not draw on its statutory powers to enforce the tenants' property rights until conditions became so precarious that it ordered the non-compliant buildings vacated. *Id.* at 511–12. The Vermont Supreme Court found the state's approach to—its *system* of—enforcement not as a mere instance of governmental misconduct but rather one that could serve as the basis of a claim that the state unfairly and unjustly took the tenants' property rights without compensation. *Id.* at 521–22. The same could be said of *Harris County*: Instead of the court *irrefutably presuming* that a lack of resources is a perpetual and failsafe state defense to a claim of non-enforcement, the impacted parties—the downstream residents who have lost their homes to flooding due to upstream development approved in contravention of an existing flood control plan—are merely asking the court to *assess* whether the state's pointing to a lack of resources is a sufficient justification for non-enforcement absent compensation when the state has come up with the money to fund a permitting system and infrastructure expansion by which other parties—here, the upstream developers—can use their properties to produce these foreseeable impacts.

<sup>252</sup> Cf. Underkuffler, *supra* note 25, at 752 (asserting that “[i]t is difficult to see why the property interests of some should be *exalted*, and the same interests of others *ignored*, in a searching assessment of ‘justice’”). This choice is especially problematic when it renders people homeless in those places where other rules of law make it illegal for homeless people to exist anywhere at all. See Mulvaney & Singer, *supra* note 13, at 1 (“When cities prohibit sleeping on sidewalks and in parks, those homeless persons whom the police ask to ‘move along’ from these public spaces have begun to respond with a simple question: ‘Move along to *where*?’”).

<sup>253</sup> See, e.g., Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1400 nn.16–18 (2002) (discussing this possibility in the context of enforcing underage drinking in college towns).

higher, such as the ability to reasonably conduct one's longstanding family business (as in *Swartz*),<sup>254</sup> or, even more importantly, as here, to occupy the home one has lived in for some time and planned to remain in for the considerable future given its proximity to, say, the occupants' employment and their children's schools.<sup>255</sup>

The tenants are not baldly claiming that they have been deprived of a right to the State's enforcing the law. Rather, they are asserting that the State has deprived them of a right to continue occupying the premises they rented, and that non-enforcement of the housing code is the mechanism for the deprivation. The housing code creates property rights in tenants to habitable housing that only exist or vest if the conduct of other property owners—their landlords—is regulated and the interests of these other owners are subjected to a covenant of sorts. The State's non-enforcement of this covenant has produced not the constructive, moral *equivalent* of divestment and eviction here, but *divestment and eviction itself*. The State's allowing, in the Vermont Supreme Court's words, "the nuisance to continue unabated for so long"<sup>256</sup> resulted in the tenants being unable to use their residences at all. Is eviction in these circumstances to be treated merely "as part of the burden of common citizenship,"<sup>257</sup> such that it is justified even without compensation for the tenants' cost of finding alternative housing?<sup>258</sup> Does a leasehold estate include any protection at all against the state's unfairly and unjustifiably putting a tenant out on the street without compensation?

The tenants might concede that there is no direct evidence that the State's non-enforcement of the housing code is the product of intentional hostility toward certain individuals or groups, which might result from an official discriminatory policy or stem from individual executive officers' biases through which certain tenants' complaints constantly find their way to the

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<sup>254</sup> See *supra* notes 221–233 and accompanying text (discussing the *Swartz* case).

<sup>255</sup> See *supra* notes 194–220 and accompanying text (discussing *Harris County*).

<sup>256</sup> *Alger*, 917 A.2d at 521.

<sup>257</sup> *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

<sup>258</sup> The precise measure of compensation for a non-enforcement taking is fodder for future work. Takings compensation generally is measured by what the government gets, not what the tenant lost. On the facts of *Alger*, the government could be understood to have reaped the market value of refusing to enforce the housing code to the point where that decision resulted in the deprivation of the tenants' right to continue occupying their leased premises. See 917 A.2d at 511–14. Somewhat peculiarly, it is also doctrinally possible that a court could find a taking occurred but no compensation is due. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013) (explaining that compensation may not be available for "unconstitutional conditions claims predicated on the Takings Clause"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428, 434–35 (N.Y. 1983) (holding, on remand following the Supreme Court's conclusion that a regulation authorizing cable wiring on the claimant's building constituted a taking, that nominal compensation of one dollar was due).

bottom of the government's priority list. But if not overtly intentional, non-enforcement nonetheless can result from the reactionary tendency to steer the benefits of enforcement against the politically powerless.<sup>259</sup> These tenants may be unable to summon their political representatives and institutions to respond to their rights and needs. In this context, political powerlessness and need may present an especially dangerous combination: the poorest areas need the most enforcement of statewide housing codes, yet wealthy communities with minimal housing code issues may be loath to support the direction of their tax monies to this purpose.<sup>260</sup> The general applicability of the state's approach to enforcement is, on this view, *not* a positive characteristic here, but instead reflects this approach's unreserved failure to account for the needs of its most vulnerable citizens—the very low-income tenants housing codes are most prominently enacted to protect.<sup>261</sup>

It bears keeping in mind, though, that although traditionally vulnerable persons and groups often shoulder the negative impacts of non-enforcement, decisions not to enforce also can assist and even empower these same vulnerable individuals and groups. In their characteristically imaginative way, Professors Eduardo Peñalver and Sonia Katyal have explained that employing a machine that could identify and enjoin every violation of an existing property law would disregard two important precepts advanced by those “outlaws” who engage in such facially proscribed acts.<sup>262</sup> First, some violations of property rights can lead to democratic action that furthers a more just distribution.<sup>263</sup> For example, Native Americans' occupation of Alcatraz Island led to policy changes supporting tribes.<sup>264</sup> Second, violations of property rights can provide information that disproves widespread understandings and thereby shed light on the injustices of existing laws.<sup>265</sup> *Some laws, that is, do need to be called into question.* For instance, lunch counter sit-ins disproved the prevailing view among many southern whites that blacks liked the segregation of Jim Crow.<sup>266</sup> From a functional perspective, violating existing property laws

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<sup>259</sup> In turn, *Swartz* raises the possibility of the inverse phenomenon: steering the benefits of enforcement toward the politically powerful. See *supra* notes 221–233 and accompanying text.

<sup>260</sup> See generally Natapoff, *supra* note 231 (making a similar point in the context enforcing criminal laws).

<sup>261</sup> Cf. *Dukes v. Durante*, 471 A.2d 1368, 1376 (Conn. 1984) (“[C]ommon sense and reason compel the conclusion that the [state] defendants cannot act under the housing code, which is to protect the health and safety of the occupants, and then abandon the displacees.”).

<sup>262</sup> EDUARDO M. PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 143–65 (2010).

<sup>263</sup> *Id.* at 143–58.

<sup>264</sup> *Id.* at vii–viii.

<sup>265</sup> *Id.* at 159–65.

<sup>266</sup> *Id.* at 64–70. Professor Alexandra Natapoff argues that, in the context of civil disobedience, “underenforcement is a sign of truly responsive government, one that recognizes that not all

is one of the few tools available for those who have been marginalized by the current delineation and allocation of property interests to express concerns about distributive justice.<sup>267</sup>

In addition to those precepts noted by Professors Peñalver and Katyal, there are also some instances where an accounting of the human stories behind the particular lawbreaker and that lawbreaker's objectors might counsel in favor of non-enforcement.<sup>268</sup> For one prominent example, a federal district court concluded that the City of Miami could not arrest homeless people for urinating in public when the city did not offer enough beds in city shelters to accommodate its homeless population,<sup>269</sup> though the court's decision did not impede continued enforcement of the city's prohibition on public urination against members of less vulnerable populations, including, as it were, professional football players.<sup>270</sup>

The Alcatraz occupation, lunch counter sit-in, and public urination examples illustrate the possibility that non-enforcement can serve to vindicate interests that sit in competition with those that underlie the law that the state is choosing not to enforce. Determining whether and in what precise circumstances it would be fair to deem the interests served by non-enforcement superior to those served by enforcement without affording compensation to those negatively impacted parties poses marked challenges. However, that these examples exist at all reveals non-enforcement's role as a mechanism by which property allocations can be adjusted in the face of changing social and economic conditions and evolving moral positions on the values that we most cherish. Though an admittedly weighty task, perhaps takings law can, in cases such as *Alger*, play a role in enhancing our democracy by ensuring that uncompensated adjustments made via non-enforcement occur in a fair and just manner.

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laws deserve to be enforced all of the time and that principles of democratic accountability sometimes require law enforcement to make room for public deviance." See Natapoff, *supra* note 231, at 1743.

<sup>267</sup> See PEÑALVER & KATYAL, *supra* note 262, at 14.

<sup>268</sup> See, e.g., Mulvaney, *Legislative Exactions*, *supra* note 26, at 164–65 (suggesting that the identity of the parties involved in property disputes should be considered at times); Underkuffler, *supra* note 99, at 363–66 (discussing PEÑALVER & KATYAL, *supra* note 262, and noting the importance of the identities of both lawbreakers and their objectors in certain cases).

<sup>269</sup> *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1582–85 (S.D. Fla. 1992); see also *Magadini*, 52 N.E.3d at 1051 (“[T]he necessity defense allows a jury to consider the plight of a homeless person against any harms caused by a trespass before determining criminal responsibility.”).

<sup>270</sup> See, e.g., Kyle Munzenrieder, *Former Dolphin Tyrell Johnson Arrested for Peeing in Public on Miami Beach*, MIAMI NEW TIMES (Sept. 23, 2013), <http://www.miaminewtimes.com/news/former-dolphin-tyrell-johnson-arrested-for-peeing-in-public-on-miami-beach-6527133> [https://perma.cc/2YK8-G54U]; see also Mulvaney, *Legislative Exactions*, *supra* note 26, at 167–68.

Like *Harris County* and *Swartz*, *Alger* presents a challenging case when conceived in terms of whether adjustments to property allocations accomplished via non-enforcement align with the principles of fairness and justice absent compensation. Among other issues, the case reiterates, and in some ways strengthens, the importance of deferring to state decisions to establish priorities in the face of resource constraints. At the same time, though, it brings into view the distinct possibility that traditionally vulnerable parties might suffer the effects of imbalanced dedications of enforcement resources, which, here, may well have produced the devastating effect of exacerbating homelessness.

### C. Summary—Non-Enforcement Takings

The preceding sections illustrate through several contemporary examples how one might evaluate a non-enforcement decision's alignment with fairness and justice as those principles have been illuminated through regulatory takings precedent explicitly or implicitly interpreting the considerations discussed as relevant in *Penn Central*. Some examples—including those involving the non-enforcement of trespass laws, roadway maintenance provisions, and vehicular speed limits—present relatively non-controversial takings issues.<sup>271</sup> The non-enforcement of a flood control plan, a water pollution discharge permit, and a housing code, however, are more challenging on these terms in light of the context within which they arose in *Harris County*, *Swartz*, and *Alger*, respectively.<sup>272</sup> In short, the claimants in these cases suggest that they are unfairly and unjustly tasked with shouldering, via non-enforcement, a burden of a type and severity that is not borne by similarly situated parties and that they should not have been saddled with anticipating. Meanwhile, the government entities contend that these impositions do not amount to compensable burdens, but instead should be considered broadly reciprocated obligations of ownership in service of the public interest that are fair and just without compensation. In sum, the discussion in this Part suggests that the government's decision not to enforce an existing property regulation can, albeit in very rare instances, present a situation in which takings liability should be considered a viable option.<sup>273</sup>

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<sup>271</sup> See *supra* notes 170–191 and accompanying text.

<sup>272</sup> See *supra* notes 192–270 and accompanying text.

<sup>273</sup> Although the concentration here is on takings law, it bears mentioning that there may well be alternative, non-constitutional mechanisms that present a course to provide at least partial protections for those unfairly bearing the weight of non-enforcement decisions, such as the flood-prone homeowners in *Harris County*, the downstream rancher unable to water his crops in *Swartz*, and the displaced tenants in *Alger*. For one example, courts might prompt legislatures to allocate enforcement funding in a more just manner, as exhibited in some school funding jurisprudence.

## CONCLUSION

This Article makes three preliminary claims on which its theory of non-enforcement takings liability rests. First, whatever the value of describing certain constitutional rights as “negative” in the sense that they afford protection against government interference, this vocabulary is not adequate to explain the institution of property. Although the government’s non-interference with one’s constitutional right to, say, association or free speech generally does not implicate others’ rights to associate or speak freely, the government’s “non-interference” with one’s claim to property necessarily interferes with others’ claims to the same. Second, a system of private property in a constitutional democracy demands that the state make allocative choices through the definition and enforcement of property rights. Therefore, the usefulness of distinguishing between state “action” and state “inaction” in the property sphere is not evident, for both “action” (say, enacting and enforcing a statute) and “inaction” (not enforcing an enacted statute or not enacting the statute at all) are decisions that have profound allocational effects. The state unavoidably has to choose between conflicting interests in most every property dispute. Third, these allocative choices must be made with reference to social goals; therefore, the same normative judgments that underlie the enactment and enforcement of new laws underlie the non-enforcement of existing ones.

From these preliminary claims, the following thesis emerges: The non-enforcement of existing property laws is not logically separable from the issue of unfair and unjust state deprivations of property rights at which the Constitution’s Takings Clause takes aim. This Article suggests that takings law should police allocations resulting from non-enforcement decisions on the same “fairness and justice” grounds that it polices allocations resulting from decisions to enact and enforce new regulations. Rejecting the extant majority position that state decisions not to enforce existing property laws are

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*See, e.g.,* *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997) (holding that the state of Vermont’s public school funding program “violates the right to equal educational opportunities under . . . the Vermont Constitution). Another example of such jurisprudence is the New Jersey Supreme Court’s innovative decisions regarding the provision of affordable housing. *See, e.g.,* *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 456 A.2d 390, 490 (N.J. 1983) (holding that the township must provide “a realistic opportunity for [affordable] housing” to the economically disadvantaged). For a third example, perhaps the legislature might impose on itself, local governments, and those administrative agencies with the power to enact regulations a requirement to outline in more detail than they often do the methods by which new laws and regulations should be enforced, particularly in the face of resource and personnel constraints. Where enforcement officials diverge from these methods, the burden of persuasion might shift to the government to justify this divergence or offer some form of transition relief. New applications of existing common or statutory laws and proposed adjustments to these non-constitutional bodies of law on behalf of those impacted by non-enforcement can serve as fodder for future work.

categorically immune from takings liability is not to advocate that persons impacted by such decisions should be automatically or even regularly entitled to the Takings Clause's constitutional remedy. Rather, it simply suggests that courts should resist the temptation to formulaically and categorically prohibit non-enforcement takings claims in favor of assessing those claims on the merits.

What might such a merits-based assessment entail? Regulatory takings law, if imperfectly, recognizes that the socially-crafted nature of the institution of property makes property rights accountable to the values that characterize our democracy, such that the substance of property laws must be collectively adjusted as social, economic, and moral perspectives on the content of these values—and conceptions of what might harm these values—change over time. At the same time, though, this body of law reflects the judiciary's appreciation for the idea that property owners and non-owners alike expect that these adjustments to property laws will be made in accord with the democratic principles of "fairness and justice," the meaning of which are to be determined through contextualized application of the types of considerations set out in *Penn Central* and elaborated by precedent.

Non-enforcement takings law generally should track this same course. Takings claims grounded in non-enforcement should be as unlikely to succeed as traditional regulatory takings claims in light of the broad deference afforded to state officials tasked with implementing democratically-enacted regulatory safeguards and obligations in the face of resource and personnel constraints, concerns regarding rivalrous harms, competing public interests, and constantly evolving human values. Nevertheless, there are some extreme cases in which it is not fair or just for the state to decline to enforce existing law without adequate justification for its refusal to provide compensation. Although there are no rigid lines, non-enforcement takings claims, as in the regulatory takings context, should be more likely to trigger takings liability when the state's decision (1) unjustifiably fails to prevent confiscation or significant degradation of a legally recognized interest (such as a covenant or nuisance-like property right) that is not causing harm or interfering with others' legitimate property rights; (2) unjustifiably authorizes third party occupation of privately owned property that is not open to the public; (3) unjustifiably singles out individuals among similarly situated persons to bear a wholly disproportionate weight of a non-enforcement decision instead of legitimately adjusting property allocations wholesale; or (4) retroactively and unjustifiably diverges from what a reasonable owner could have possibly expected when she invested in property and put that property to a legitimate and continuing non-harmful use in reliance on existing law.

Failing to acknowledge property's allocative nature and the inherent unconstructiveness of distinguishing between action and inaction in the property

sphere runs the risk of concealing the full impact of collective choices at the expense of the principles of fairness and justice upon which takings law rests. Recognizing non-enforcement takings claims on the terms outlined here presents the Takings Clause not as a regularly-available tool to limit democratic decisions that serve to define and allocate property interests in the face of changing conditions, or, alternatively, as categorically inapplicable to a certain class of such decisions. Instead, it conceives of the Takings Clause as a tool that might be drawn upon in narrow circumstances to enhance such democratic decision making by assuring that non-enforcement decisions, like decisions to enact and enforce new regulations, are made with the fairness and justice of the responsibilities those decisions impose in mind.



