THE MISSING RUNG: CHALLENGING REGULATORY BARRIERS TO PROPERTY ACQUISITION

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A reliable property system, accessible to all people, is a critical precondition to a well-functioning economy and even to democracy itself. The absence of such a system can force people into informal legal relationships, largely invisible to the State and economically perilous for the participants. Hernando de Soto has explored in detail the regulatory and legal barriers in developing countries that prevent significant swaths of the population from participating in the formal property system.[1] In de Soto's telling, the problem is not the absence of law, but instead its over proliferation.[2] The result is that formal property is all but impossible to access, and those relegated to informal systems cannot climb the economic ladder. Formal property, in this view, is the missing rung in meaningful access to capital and to economic opportunity.

De Soto has devoted himself to political and regulatory reforms that create meaningful access to formal property systems.[3] Opponents of reform are those people rooted in the status quo, including lawyers who are often unwitting gatekeepers to formal property regimes.[4] It is possible, however, that the legal system itself may provide some meaningful pressure towards change if regulatory impediments to accessing formal property are viewed as infringing property rights. Conventionally, formal legal property rights are a

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1. *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2008) [hereinafter THE MYSTERY OF CAPITAL]; HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1989) [hereinafter THE OTHER PATH].

2. *See* THE MYSTERY OF CAPITAL, *supra* note 1, at 18–28 (discussing the regulatory obstacles that exist to opening legal businesses in various developing countries).

3. *See* Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59, 64–68 (2007) ("[De Soto's] theory is that property can only generate wealth efficiently if a person's rights to the property are formal, that is, . . . recognized by the state and everyone else. . . . The pragmatic aspect of de Soto's prescription is a step-by-step guide for eliminating bureaucracy and drafting laws to govern more simplified means of registration.").

4. *See* THE MYSTERY OF CAPITAL, *supra* note 1, at 198–202 (describing lawyers as prone "not to expand the rule of law but to defend it as they found it").

necessary precondition for claims that the government has infringed those rights.[5] In doctrinal terms, vested property rights are a prerequisite for legal standing to challenge a law or regulation burdening property.[6] The question addressed here is whether property is, in fact, necessary, and whether it is possible to imagine legal claims against the government—like regulatory takings claims under the Fifth Amendment of the United States Constitution—for imposing insuperable barriers to the acquisition of property in the first place. I argue that such claims are actually plausible, and I label them "impediment claims."

This is a radical suggestion, and it is offered here more as a thought experiment than as a full-throated proposal. Indeed, space constraints make it impossible to fully consider the consequences of vindicating such claims, or the ultimate plausibility of limiting principles. Nevertheless, even as a tentative proposal, it offers a new way of thinking about a legal system's obligations to provide meaningful opportunities to access formal property.

This proposal is not invented out of whole cloth. In a recent article, I argued that there are situations in which a government can violate the Fifth Amendment's Takings Clause through inaction.[7] I argued that the act/omission distinction makes little sense in certain regulatory contexts. Specifically, where the government has disabled self-help, or is so inextricably bound up with the substantive definition of property, the government should not be able to avoid liability by claiming that it has not acted.[8] The normative argument is straightforward. Takings protection creates perverse incentives if it applies only to government actions, because it allows the government to avoid liability altogether by simply ignoring a problem, even if this do-nothing response inflicts the most damage. By imposing liability for regulatory inaction as well, governments will have an incentive to choose the least costly regulatory response, instead of relying on unprincipled distinctions between regulatory acts and omissions.[9]

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5. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1245 n.113 (2009) (citing cases).

6. *Id.*

7. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346–47 (2014) [hereinafter *Passive Takings*].

8. *Id.* at 377–78.

9. *Id.* at 361–64.

I applied this argument to the problem of sea level rise. Local zoning regulations often impose strict height limits, and state and federal environmental regulations may proscribe certain forms of hard and soft armoring.[10] Assuming those regulations were constitutionally benign when adopted, they can nevertheless become unconstitutional over time in the face of ecological change. Strict height limits that made sense decades ago can now prohibit property owners from raising their houses on stilts, which may be critical as sea levels rise.[11] Similarly, regulations restricting (or permitting) various forms of armoring can suddenly impose significant new costs as storm surge and erosion become more intense.[12] In both of these examples, the underlying law has not changed since it was adopted. But legal stability coupled with changes in the world can, I argued, violate the Takings Clause.[13] In other words, the government can potentially be liable in the absence of a new regulatory action.

The argument here has a similar structure: the existence of property may not be necessary to bring claims alleging its infringement. Put differently, regulatory hurdles preventing the acquisition of property in the first place can violate property rights, if the hurdles are sufficiently high.

This argument—relying on de Soto—has important distributive consequences for my earlier article. One objection I anticipated to *Passive Takings* is that it would serve only to increase property protection for those who need it the least. It could be used by wealthy beachfront property owners to compel regulatory responses to the threat of sea level rise, or to receive compensation if government failed to act. It could, in short, redistribute scarce government resources from taxpayers to the wealthiest property owners. In contrast, impediment claims create progressive distributional pressures. They are available to the vast numbers of the poor who live and work informally, without vested property rights, in places particularly susceptible to sea level rise and other risks of global climate change.

Today, as sea level rise impacts our coastlines, property owners can access various forms of protection, from flood insurance, to *ex*

10. *Id.* at 391–94.
11. *Id.* at 393.
12. *Id.* at 394–95.
13. *Id.* at 360.

post grants to help rebuild, and even to legal claims against the government for failing to prevent certain kinds of damage to property.[14] But these protections are not available to the propertyless, leaving them particularly susceptible to the costs of global climate change. Impediment claims push back, and provide at least some measure of legal redress for those people who have been prevented from accessing formal property regimes in the first place.

Part I of this Essay describes the conventional account of protecting private property from overly burdensome regulations as requiring both a protectable property interest and government action. Part II offers a summary of my previous argument that government action is not actually necessary to violate the Takings Clause. Part III then expands on that insight to argue that a protectable property interest may also not be necessary if the government action at issue prevents the acquisition of property in the first place.

I. GOVERNMENT ACTIONS AND VESTED PROPERTY RIGHTS

The interaction between private property rights and regulatory power is frequently contested. Most if not all government actions impose some burdens on private property. The balance between public power and private rights is therefore a zero-sum game. Strong protection for private property substantially limits regulatory authority, and vice versa.[15]

This tension implicates a number of constitutional provisions that can protect private property from public encroachment—from Equal Protection,[16] to Due Process,[17] to the Free Exercise of religion.[18] Of course, the conflict between private property and regulatory power

14. *See* St. Bernard Parish Government v. U.S., 121 Fed. Cl. 687, 746 (2015) (finding the Army Corps of Engineers' "failure to maintain" a canal caused flooding that constituted a temporary taking).

15. *See, e.g.*, Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 369–71 (1994) (discussing the ebb-and-flow relationship between private property rights and regulatory authority in the context of the Endangered Species Act). *Compare* Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2033–34 (2012) ("[T]he formalization of private property often enhances state power.").

16. U.S. CONST. amend. XIV.

17. *Id.*

18. U.S. CONST. amend. I.

plays out most clearly in the context of the Takings Clause, which explicitly prevents the government from taking private property without paying just compensation.[19]

This ubiquitous conflict is not only or even primarily constitutional. Statutory regimes at both the federal and at the state level extend property protection.[20] For example, the Uniform Relocation Assistance and Real Properties Acquisition Act[21] provides property owners with certain compensatory rights when the federal government exercises its power of eminent domain.[22] At the state level, the Bert Harris Private Property Protection Act provides heightened protection against regulations burdening property in Florida.[23] And many specific statutory regimes have detailed provisions that protect private property in myriad ways.[24]

But crucially—indeed, almost tautologically so—someone must have a property right before being entitled to any of these regimes' legal protections. In the constitutional context, the existence of a vested property right is frequently described as a prerequisite for standing to bring a claim under the Due Process or the Takings Clauses.[25] Conceptually, as well as doctrinally, property protection only applies to existing property rights, or so it would seem.

Similarly, these various protections only apply to government actions. The Takings Clause, in particular, is said to provide relief from legal transitions.[26] Legal change is therefore at the heart of

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19. U.S. CONST. amend. V.

20. Federal statutes protecting private rights include, for example, the federal relocation assistance act. *See* 42 U.S.C. §§ 4601–4655 (2012).

21. *Id.*

22. *See* Nicole Stella Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121–23 (2006) (detailing the Act).

23. FLA. STAT. § 70.001 (2016); *see also* OR. REV. STAT. § 195.305 (2015) (allowing landowners whose property value is reduced by certain land use regulations to claim compensation).

24. *See, e.g.*, DEL. CODE ANN. tit. 29, § 605 (2015) (requiring that all rules and regulations promulgated by state agencies be reviewed by the state attorney general to assess potential takings issues); Dennis L. Jones Beach and Shore Preservation Act, FLA. STAT. §§ 161.011–161.45 (2016) (providing for compensation in the event the law burdens private property); MISS. CODE ANN. §§ 49-33-7, 49-33-9 (2013) (allowing owners of agricultural and forest land to bring takings claims if state or local regulations diminish the value of their property by at least forty percent).

25. *See, e.g.*, Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986) (rejecting a takings claim after finding an absence of "property" under the Takings Clause); *see also* Serkin, *supra* note 5, at 1245–46 (describing vested rights).

26. *See* Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 11 (2003)

traditional takings claims.[27] The form of the transition can vary. Permit denials by zoning officials as well as new statutes or regulations can all effect changes in legal rights that become cognizable takings claims.[28] But some government action that interferes with a property owner's investment-backed expectations is conventionally necessary for takings liability to lie.

The ostensible reason for both requirements—a property interest and a government action—is rooted in the nature of the protection afforded by the Takings Clause. In the cryptic formulation originally adopted by the Supreme Court, the Takings Clause prohibits uncompensated regulations that "go[] too far."[29] The Supreme Court subsequently clarified this prohibition in the seminal case, *Penn Central v. New York*.[30] There, the Court articulated its admittedly ad hoc test, holding that a regulatory taking depends upon three factors: the character of the regulation, the extent to which the regulation interferes with distinct investment-backed expectations, and the resulting diminution in value.[31] Implicitly, application of these factors requires a property interest affected by some regulatory change that interferes with expectations. In fact, neither requirement is so straightforward.

II. PASSIVE TAKINGS

In an earlier article, *Passive Takings*, I argued that legal change is not actually necessary for a regulatory takings claim to lie.[32] Instead, in some circumstances, legal stability, coupled with ecological change, can give rise to a cognizable takings claim. This may

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

27. *See Passive Takings*, *supra* note 7, at 349 n.11.

28. *See, e.g.*, McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1124 (Nev. 2006) (declaring a height restriction ordinance to be a per se regulatory taking); Eberle v. Dane Cty. Bd. of Adjustment, 595 N.W.2d 730, 739–40 (Wis. 1999) (finding the denial of a special exception permit to constitute a valid regulatory takings claim under Wisconsin's constitution).

29. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

30. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–38 (1978).

31. *Id.* at 124.

32. *See generally Passive Takings*, *supra* note 7.

sound like a small technical observation, but it has quite profound implications. Most broadly, it means that in some situations the government can violate the Takings Clause by failing to change the law. Or to state the same point differently: the Takings Clause can create an affirmative constitutional duty by the government to respond to ecological change. Where that is true, the government cannot avoid liability simply by failing to act.

It has been a long-standing goal of progressive constitutional law scholars to identify affirmative constitutional obligations. Starting in the 1960s, leading figures like Charles Reich and Frank Michelman argued that Due Process should compel the government to provide certain minimal levels of welfare rights to the poor.[33] Others argued that *Roe v. Wade* should be extended to compel the government to fund abortions for women who could not afford to pay for them.[34] How else, they asked, could the constitutional right to an abortion be meaningfully vindicated?

By and large, the Supreme Court has rejected these arguments, and has held repeatedly that the Constitution provides only negative rights.[35] It protects people from the government, and does not compel the government to act. In the most vivid articulation of this principle, *DeShaney v. Winnebago*,[36] the Court refused to find a Due Process violation when state social services failed to protect a child from his abusive father, despite repeated requests. The Court held that the government has an affirmative duty to act and protect only in extremely limited circumstances: for incarcerated prisoners, people involuntarily committed for psychological or medical purposes, or for people rendered especially vulnerable by the government.[37] In other

33. *See* Frank I. Michelman, *The Supreme Court, 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964).

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

35. *See, e.g.*, Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257, 258–59 (2000) ("Establishing an unassailable right to welfare was once an important goal of legal academics and activists, but is no longer. . . . The diminishing interest in this project is partly a product of the courts' decisive rejection of the notion that the federal Constitution, as currently written, requires government to reduce inequality and relieve want.").

36. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989).

37. *Id.* at 198–200.

words, "the state may have an affirmative duty to protect if it created a danger or left people more susceptible to a danger."[38]

In *Passive Takings*, I argued that property and the Takings Clause provide a better basis for establishing affirmative constitutional duties than liberty and due process rights. There are political, policy, and doctrinal reasons for this view. Politically, conservative justices have rejected the expansion of affirmative constitutional duties at least partly because of a skepticism about the underlying rights being claimed: welfare and access to abortion.[39] The politics of property are very different. Using property as the basis for state duties cuts across political lines and can generate support from the right and the left. As a policy matter, too, much of the Court's opposition to expanding constitutional duties comes from an uneasiness with invading traditional realms of prosecutorial discretion.[40] Courts by and large do not want to tell legislators what rules to enact, nor tell administrators how to balance their priorities. But the Takings Clause is importantly different. The remedy for a taking is not mandamus or an injunction, ordering the government to do something in the face of regulatory intransigence. Instead, the remedy is damages, measured by the resulting diminution in value, which falls squarely within courts' core competencies.[41] Courts are likely to feel more comfortable ordering the government to pay damages than ordering the government to undertake some particular regulatory reform. Of course, the government could choose to act in order to avoid or mitigate the payment of just compensation, but the executive and legislative branches would be back in control of that decision.

Doctrinally, too, property and the Takings Clause are surprisingly appropriate bases for affirmative constitutional obligations. In fact, the limited bases for affirmative duties the Court identified in *DeShaney* apply remarkably aptly to the property context.[42] Specifically, the act/omission distinction breaks down when the government exercises such comprehensive regulatory control that it effectively determines the distribution of burdens and benefits of property

38. *Passive Takings*, *supra* note 7, at 376.
39. *Id.* at 360.
40. *Id.* at 385–87.
41. *Id.* at 385.
42. *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

ownership, or when the government disables self-help.[43] Broadly interpreted, *DeShaney* stands for the proposition that affirmative constitutional duties will arise when the State has taken control over someone, or when it has rendered someone more susceptible to harm. Those conditions are actually quite common in property and land use law.

Passive Takings makes the argument in detail, but the intuition is easily captured. The act/omission distinction should not control when an earlier government act has rendered property especially susceptible to some subsequent harm. That earlier act is not itself the basis for the takings claim because it was constitutionally benign at the time. But it does create a kind of ongoing duty on the government to protect the property if conditions in the world change in a way that substantially alters the costs and benefits of the earlier regulation.

Comprehensive land use regulation—especially of coastal property—often specifies in tremendous detail all the rights and duties of property ownership. At its most basic, zoning can sometimes delimit a very small developable envelope, narrowly circumscribing a building's bulk by establishing strict height limits, setbacks from property boundaries, and so forth.[44] For much residential beachfront property, owners can expect to build only a one- or two-story, single-family house that covers no more than forty percent of the parcel. While reasonable minds can disagree about the appropriateness of such regulations in the abstract, it is by now well settled that such routine zoning requirements are permissible under the Takings Clause.[45] If a coastal city or town adopted such zoning decades ago, it would have been entirely permissible when enacted, and the ordinance may not have changed since.

What might have changed, however, is the threat of storm surge and sea level rise. Newly updated flooding projections from FEMA significantly alter development expectations on the coast. Indeed, the National Flood Insurance Program requires that property owners elevate buildings as much as two feet above base flood elevation.[46] But

43. *See Passive Takings*, *supra* note 7, at 379–80.

44. *See* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 61 (4th ed. 2013).

45. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926) (upholding a routine zoning ordinance as within the police power).

46. *See Passive Takings*, *supra* note 7, at 392 n.214 (citing, *inter alia*, FEMA, NFIP

building heights are measured from the ground, not from the ground floor. Elevating property on stilts can shrink or even eliminate an already small developable envelope. Where height limits prevent property owners from elevating buildings to protect against anticipated flooding, owners should be able to challenge the height limits on takings grounds, even if the height limits have not changed.[47]

A similar analysis applies to armoring such as sea walls. Armoring is an extremely controversial response to the threat of erosion. While a sea wall may protect a specific area of the coast, it does so at the cost of increasing erosion elsewhere.[48] Installing or allowing a sea wall therefore amounts to a very explicit allocation of the benefits and burdens of erosion.[49] However, sea level rise again threatens to dramatically alter both sides of the equation. Thus, a sea wall allowed at one time as imposing a reasonable risk of erosion nearby might impose far greater risks with rising seas. Or, conversely, a prohibition on a sea wall might have exposed property to a small risk of storm surge before, but a much greater risk today. In either case, the law may remain the same—whether prohibiting or permitting armoring—but the government should not be able to immunize itself from takings liability simply because the law has not changed.[50]

The sea wall example is particularly revealing because it is a context in which the government exercises nearly complete control over costs. Allowing a sea wall predictably protects some property owners at others' expense, and vice versa. Here, then, the legal status quo should not determine whether a takings claim can lie. That is, whether the background rule in a particular context had been to permit or to prohibit a sea wall, the fact of ecological change creates the possibility of liability as the extent and allocation of costs change.

This is not to suggest that the government is necessarily liable to one party or the other. Takings liability is sufficiently difficult to establish that the government would still have great latitude to act.

FLOODPLAIN MANAGEMENT GUIDEBOOK 5–6, 23 (5th ed. 2009), http://www.fema.gov/media-library-data/20130726-1647-20490-1041/nfipguidebook_5edition_web.pdf).

47. *See id.* at 399–400.

48. *See, e.g.*, J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 87 (2012).

49. *See Passive Takings*, *supra* note 7, at 394.

50. *See id.* ("Constitutional liability should not then depend on whether the government's decision is characterized as an act or an omission.").

Prohibiting a sea wall will rarely rise to the level of a taking for the exposed property owner, just as permitting one will rarely result in a taking of neighboring property. Nevertheless, this is a context in which the mere fact of regulatory inaction (or legal stability) should not create automatic immunity.

Normatively, the category of passive takings fills an important gap. Leading accounts of the Takings Clause view its role as incentivizing efficient regulatory regimes.[51] By forcing the government to internalize the costs of its actions, the Takings Clause is said to help prevent governments from imposing regulatory burdens on property owners that are costlier than the resulting public benefits. There are many well-known reasons to be skeptical of this kind of straight economic account.[52] But it suffers from another less familiar flaw, even viewed wholly on its own terms. At most, this economic explanation ensures only that any regulatory *action* does not create more burdens than benefits. But that is not at all the same as inducing efficient regulatory incentives because often the costliest choice the government can make is to do nothing at all.[53] If the threat of liability only attaches when governments do something—take some regulatory initiative—then the Takings Clause functions as a kind of thumb on the scale against doing anything. The category of passive takings therefore serves as an important counterweight against such costly inaction.

Stepping back from the details of the argument, *Passive Takings* sought to address a particular political malfunction: government officials ignoring the threat of sea level rise in order to avoid the risk of takings liability. The new category of passive takings was designed to create countervailing pressure; by exposing government officials to potential takings liability for either their actions or inactions, they would have a greater incentive to do something, if that would be the lower-cost alternative. And to be transparent about my

51. *See, e.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 84–85 (1993); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 73–74 (8th ed. 2011).

52. *See, e.g.*, Blume & Rubinfeld, *supra* note 26 (articulating a public choice critique); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (criticizing assumed asymmetry in governments internalizing costs and benefits); *see also* Bethany Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 AM. U. L. REV. 1 (2016).

53. *See Passive Takings*, *supra* note 7, at 348.

goals, my hope was to encourage governments to begin to respond proactively to the threat of sea level rise, and to start to adopt sensible regulatory responses instead of acting like the problem does not exist. Recognizing passive takings is admittedly an imperfect solution, but it exerts pressure in the right direction. I stand by that argument. Increasing pressure on the government to act to address sea level rise will make society better off. Forcing the government to confront the costs of inaction as well as action will generate more appropriate regulatory responses.

There is, however, a troubling distributional consequence to this argument that must be addressed. The leverage from passive takings will almost certainly be applied by beachfront property owners seeking compensation when their property is threatened by sea level rise. But this invokes an unappealing image of affluent property owners—many of whom could or should have known of increased risks from erosion—suing the government to allow an ecologically damaging sea wall, for example. And if affluent beachfront property owners invoke passive takings, it will be to reinforce their already privileged position as owners of valuable land. Therefore, while the effect of passive takings will benefit government decision-making, the distributional consequences may be quite regressive. The poor, after all, are not the most likely to bring passive takings claims.

Indeed, there are many ways in which the poor and the propertyless are most likely to bear the brunt of climate change. Poor communities tend to be less resilient and more vulnerable to flooding and other consequences of climate change.[54] But they are less protected economically because they are more likely to be renters than owners, if they have a recognized property right at all. Especially internationally, the global poor tend to have informal possessory interests instead of formal property rights.[55] They are therefore unlikely to have insurance, and have few good ways of protecting

54. *See, e.g.*, Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT'L L. 309, 331–36 (2012) ("[P]oor persons already living at the margins of survival will likely suffer disproportionate impacts of climate change . . . ."). *See generally* STEPHANE HALLEGATTE ET AL., SHOCK WAVES: MANAGING THE IMPACTS OF CLIMATE CHANGE ON POVERTY (2015) (discussing at length the relationship between poverty and climate change effects).

55. *See* THE MYSTERY OF CAPITAL, *supra* note 1, at 5–7 (comparing the often informal property systems of the Third World with the formal property systems of Western capitalist nations).

the value of their possessory interests *ex ante,* or recovering their value *ex post*.

In general, these consequences are largely a function of poverty itself. People do not own property because they cannot afford it; they do not insure what they have because it is too expensive. And social responses must therefore be addressed to the problem of poverty. But at least sometimes, the absence of property may be a function of rules and regulations, and not simply the absence of money. Where that is true—where there is some regulatory barrier to property acquisition that then renders the poor especially vulnerable—then perhaps that barrier is itself illegal. The next Part explores precisely that possibility.

III. IMPEDIMENT CLAIMS

Where the government is responsible for the absence of a vested property interest, perhaps even the propertyless should be able to pursue property protection, whether through the Takings Clause or some other source. The doctrinal and normative bases for this suggestion are examined below, as are the conceptual problems with such claims. But first, there is an important antecedent inquiry: what would it mean for the government to be responsible for the absence of a vested property interest? Hernando de Soto's work provides the outlines of an answer.

In his book, *The Other Path*, de Soto identifies a remarkably complex, even byzantine warren of overlapping regulations that make formal property rights inaccessible to most Peruvians.[56] In his detailed account, a central impediment to economic progress in Peru and in developing nations around the world comes from the inaccessibility of formal property rights to the world's poor.[57] Regulatory barriers to entry, like insuperable hurdles to obtaining a business license, relegate the poor to a kind of informal property regime where most rights are merely possessory. Informal property does not receive legal protection, and it cannot easily be used as collateral for loans

56. *See, e.g.*, THE OTHER PATH, *supra* note 1, at 133–35 (detailing a study's findings that setting up a small garment factory in Peru entails 289 days' worth of procedural requirements).

57. For the generalization of his argument to the rest of the world, see THE MYSTERY OF CAPITAL, *supra* note 1, at 18–28.

or easily be transferred to others.[58] As a result, "owners" of such thin possessory rights must expend an enormous amount of effort in maintaining those rights through self-help.[59]

De Soto explores these dynamics in three different types of property: businesses, residential, and transportation. In each of these areas, regulatory barriers all but prohibit entire segments of the population from obtaining formal property interests. For example, when de Soto and his researchers sought to start a small business in order to learn what would be involved, his team had to stand in lines for more than eighteen hundred hours.[60] That is almost one year of standing in line, eight hours per day, five days per week. That is not merely a long time; it is an impossibly long time for any realistic opportunity to obtain formal rights to open a business. As a result, an enormous amount of economic activity in Peru takes place through informal businesses, like street vendors who operate without state recognition and who therefore rely on norms to create entitlements to particular locations.[61] Likewise, prohibitions on land subdivisions and development mean that people engage in a form of collective invasion of public property to establish a beachhead of possessory rights, thereafter relying on political pressure to remain.[62] But these, too, are not full-blown property interests. Possession of a plot of land, even with a dwelling, does not generate recordable title or a protectable property interest. There is not enough space here to describe in detail de Soto's fascinating and granular account of these informal regimes. But just these few examples at least gesture to a core insight: in some legal regimes, like Peru's, regulatory barriers to the acquisition of property can be so onerous that the State itself should bear some responsibility for the lack of vested property rights.

This idea has some intuitive appeal. But the doctrinal basis for liability is complicated. In the strongest form, the regulatory regime

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58. THE OTHER PATH, *supra* note 1, at 158–63 (discussing the "costs" of lacking formal property rights).

59. *See id.* at 160–61 ("[I]nformals incur substantial costs in defending their possessions . . . by establishing and operating thousands of different organizations.").

60. THE MYSTERY OF CAPITAL, *supra* note 1, at 190.

61. *See* THE OTHER PATH, *supra* note 1, at 66–69 (analyzing Peruvian street vendors' "special rights of ownership" of fixed locations on public roads).

62. *See id.* at 19–22, 38–42 (describing this process of informal property acquisition).

itself could be challenged as an impermissible burden on property under the Takings Clause. Admittedly, regulatory takings doctrine does not have a lot of analogues outside the United States.[63] However, bilateral investment treaties and international human rights laws may provide a source for such claims where foreign law does not.[64] Whatever the doctrinal hook, regulatory burdens that make it all but impossible to acquire any kind of new business license, as in Peru, would give rise to a cognizable impediment claim under this theory. Even a moment's reflection raises some difficult questions, however.

Most obviously, this kind of impediment claim appears to run counter to the plain text of the Takings Clause, which prohibits the government from taking property. The grammar strongly implies a kind of active expropriation of pre-existing property. The government cannot take from you something that you never had. However, this grammatical argument should not necessarily control. Purely textual interpretations of the Constitution are rarely dispositive, even where the text is plain.[65] And the meaning of the Takings Clause is particularly contested. One must then look to normative and consequentialist arguments instead.

According to James Ely, property is central to protecting independence; it carves out a sphere of "ordered liberty" that is immune from governmental intrusion, and is therefore—in his words—the "guardian of every other right."[66] But property cannot perform this essential function, nor can it act as a democratizing force, if it is not widely available.[67]

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63. GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE xxxiii–xxxiv (2006) (discussing doctrinal differences between American regulatory takings law and that of other countries).

64. *See* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 32–34 (2003) (describing the proliferation of takings—like provisions in bilateral and multilateral investment agreements); Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 496–501 (2008) (examining regulatory takings claims in the European Court of Human Rights).

65. Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 713–14 (2016) (noting that plain constitutional text is often not controlling).

66. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26, 81, 172 (3rd ed. 2003).

67. *Cf.* Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 277–80 (2015) (discussing the Jeffersonian

Consequentially, too, conventional accounts of property and the Takings Clause view property protection as essential to induce efficient investments.[68] People will underinvest in property that is not sufficiently stable or protected. That is, in fact, precisely what de Soto observes in Peru and in other developing countries. People with mere possessory interests, and not full-blown property rights, tend to underdevelop their land, and overinvest in protecting what improvements they do make.[69] Arguments about investment incentives, then, apply equally to regulatory burdens of existing property rights and to regulatory burdens that prohibit people from acquiring formal property rights in the first place. In fact, most of the normative justifications for protecting property against regulatory interference apply as well to regulatory prohibitions on the acquisition of property because none of property's benefits can accrue in the absence of property.[70]

There are important distributive justifications for these kinds of claims as well. Traditional property protection is inherently conservative because it protects the existing allocation of property. While contemporary theorists have developed a sophisticated communitarian vision of property as including obligations to society, most conventional accounts implicitly view property protection as inherently anti-redistributive.[71] Protecting the right to acquire property,

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view that abolishment of the fee tail promoted egalitarianism by allowing "more property . . . to be acquired according to 'virtue and talent' . . . rather than by hereditary privilege").

68. *See* George Y. Gonzalez, *An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 305, 315–16 (1993) ("Increased foreign investment is a primary goal of the domestic industrial property protection laws."); *see generally* Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007) (proposing a more localized conception of private property protection as a means of attracting investment).

69. *See* THE OTHER PATH, *supra* note 1, at 158–61 ("[I]nformals do not use or preserve the resources available to them as efficiently as they might if they were sure of their rights.").

70. The one obvious exception concerns normative accounts that focus on the endowment effect, or the psychological attachment that people have for things they own. Property as personhood, for example, depends upon pre-existing property and may not justify rules protecting the acquisition of property.

71. *Compare* Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES IN L. 127, 138–45 (2009) (outlining a property theory based on "[d]ependence and [o]bligation" to communities), *and* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 760–62 (2009) (developing further this "Aristotelian" communitarian view of property), *with* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 911–12 (2000) ("The 'hallmark' of constitutional

instead of just the existing allocation, changes the valence of property protection.

Accordingly, allowing the propertyless to pursue property protection can be progressive and redistributive. Depending on how such claims arise, they may be available only to the very poor—people without meaningful access to property at all. At the very least, such claims would allow people without property some measure of protection from government interference—protection that they do not now receive.

There are, however, additional conceptual problems that impediment claims must overcome. For one, must a plaintiff show that she could not obtain access to formal property herself, or rather must she show that no one could? Even (or especially) in Peru, the regulatory regime described by de Soto is simultaneously exclusionary and protectionist. Some people do have business licenses, recordable title in their homes, and so forth. The problem is the inaccessibility of such recognition to many people; it is meaningfully available only to the affluent and politically connected.[72] But should someone be able to object to a regime that deprives her of access to property, even if it poses little or no hurdle to others? How many people must be excluded for the regulatory regime to be subject to this kind of challenge?

To illustrate the problem—with an example that does not implicate wealth or class—imagine a property regime that requires recordation or some form of registration, but the paperwork must be filed in person at a single location in Washington, D.C. For people in Virginia or Delaware, that may not be so burdensome. But as the distance grows, so too does the height of the regulatory hurdle. Contrast this, then, with the same rule but where paperwork can be filed in every county in every state. That is considerably less burdensome to most people, but for some much smaller subset it might still be too much—people who cannot drive, expats living overseas, and the like. The regulation is more problematic the more people it excludes from meaningful access to property. But that does not provide much guidance about how broad the exclusion must be before it creates the kinds of problems de Soto identifies.

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property is the right to exclude others."), *and* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319–21 (1987) ("[W]e primarily understand property in its constitutional sense as an antiredistributive principle . . . .").

72. *See* THE OTHER PATH, *supra* note 1, at 189–99 ("[In Peru,] wealth is not so much the result of labor as of political wheeling and dealing.").

Similarly, must the regulatory burdens effectively eliminate all access to formal property, or only access to some distinct and desirable property? People denied a business license, for example, might well have access to other formal property rights. Indeed, many regulations prevent many people from getting exactly what they want, but that cannot be grounds for objecting. As an extreme example, regulatory requirements mean that only the most sophisticated companies can obtain a license to operate a nuclear power plant.[73] Clearly, I should not be able to complain because I cannot obtain such a license. The regulatory barriers are insuperable to me, and that is entirely appropriate. I have plenty of access to other forms of property, and so should have no grounds to complain. Even the very poor in de Soto's Peru have access to some property—the clothes on their backs, if nothing else—and so even that regulatory environment does not effect a total prohibition on property acquisition. Here, too, there is a spectrum. The most problematic regulatory regimes deny formal property recognition for the most important assets; the least problematic put only some specific and less central assets out of reach.

And finally, some assets are deliberately not treated as property at all. Most famously, corpses and organs defy characterization as property. This rule has both common law and statutory bases. In *Moore v. Regents of the University of California*,[74] the plaintiff sued for conversion after doctors had harvested cells from his spleen to develop a cure for a particular kind of cancer. The California Supreme Court looked at strict statutory provisions limiting the disposal of body parts to conclude that the plaintiff did not have a property interest in his organs.[75] Could that give rise to an impediment claim? Could the plaintiff have challenged those underlying regulations on grounds that they denied him property in his own organs? That seems wrongheaded, but is at least superficially difficult to distinguish from the examples above. At the very least, some assets—bodies, people, navigable waters, submerged lands, and so forth—can be removed entirely from a property regime for normative reasons. But the broader the category of assets excluded from property, the more problematic the regime.

73. *See generally* 10 C.F.R. pt. 52 (2016) (establishing nuclear licensing requirements).
74. 793 P.2d 479, 480–83 (1990).
75. *Id.* at 491–97.

These various problems may prove insoluble. Impediment claims become untenable in the absence of principled limits. Otherwise, they would become a generalized challenge to any grievance that property is inaccessible. Nevertheless, such claims are at least plausible in the most extreme cases, where regulatory barriers to property acquisition exclude whole swaths of the population from formal ownership of core assets. It is therefore worth considering what form such protection might take and how these claims might work in practice.

Consider exclusionary zoning, a conceptually obvious source of impediment claims. Some municipalities today exercise their land use authority for exclusionary purposes. Familiar forms of exclusionary zoning include imposing large minimum lot sizes, prohibiting multifamily housing, placing large amounts of land in undevelopable "holding zones," and other techniques that radically reduce supply.[76] Depending on local housing markets, such approaches can dramatically increase property values, placing the municipality effectively out of reach for all but the affluent.

Most commentators agree that exclusionary zoning practices are objectionable, especially in their strongest forms. But there are significant legal barriers to challenging such provisions. The real harms of exclusionary zoning are visited upon the diffuse class of potential residents who are excluded from the municipality. But they do not even self-identify as a class of people, let alone have standing to sue.[77] Instead, challenges are generally brought by developers objecting to regulations that prohibit or limit their building plans. While developers sometimes suffer a real economic harm from overly restrictive zoning, and happen to represent the end consumers of their intended developments by proxy,[78] this is an imperfect enforcement strategy. Many times, developers simply use

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76. *See* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1667, 1689 (2013) (describing traditional methods of exclusionary zoning).

77. For a narrow exception, see *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263–64 (1977) (granting standing based upon showing that plaintiff would have been eligible for, and would likely have moved in to, excluded subsidized housing).

78. *See, e.g.*, *id.* at 261–63 (finding developer standing to challenge an exclusionary zoning measure).

the mantle of exclusionary zoning to force municipalities to the bargaining table to allow new high-end building.[79]

An impediment takings claim would offer a more direct approach for challenging exclusionary zoning. Strong exclusionary zoning amounts to a significant regulatory burden on many people's ability to acquire property in the municipality. A takings claim would seek compensation for that burden. A very similar analysis would apply to regulations that make credit inaccessible to swaths of potential homeowners—like FHA practices prior to the 1970s that made credit largely unavailable for minority neighborhoods.[80]

While exclusionary zoning is perhaps the most intuitive context for imagining impediment takings claims, it may not be the most likely because it still presents a number of the problems identified above. For one, who can sue? Anyone without a lot of money, anywhere in the country, could claim to have been denied the right to acquire property in the municipality. Millions of people could object to the zoning practices in Mt. Laurel, New Jersey, for example, even though the most permissive zoning regime imaginable would have resulted in only modest growth. It would be necessary to find some way of limiting recovery; otherwise the entire universe of potentially aggrieved propertyless plaintiffs could all sue Mt. Laurel and every other municipality engaged in exclusionary zoning.

Furthermore, measuring compensation under impediment takings claims for the impact of exclusionary zoning on any individual is conceptually problematic. Imagine that exclusionary zoning practices increase the median price per square foot of residential housing by, on average, fifty percent. Any individual's "harm" will depend upon the house that she would have bought but for the exclusionary zoning. Needless to say, attempting such a hypothetical calculation seems extremely speculative.

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79. *See* Toll Bros., Inc. v. Twp. of West Windsor, 803 A.2d 53, 93 (N.J. 2002) (Stein, J., concurring in part and dissenting in part) (noting the small percentage of low income housing built after New Jersey's *Mount Laurel II* decision); Andrew Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 28, 47 (1996) (describing developers' use of challenges to exclusionary zoning to construct more profitable housing); Diane Mastrull & Evan Halper, *Land-Use Battles Frustrate Pa. Towns*, PHILA. INQUIRER, Mar. 12, 2000, at A1 (reporting on developers' manipulative use of Pennsylvania's affordable housing law to build upscale housing).

80. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 52–57 (1993) (chronicling the FHA's redlining policies).

Maybe the Takings Clause is the wrong doctrinal hook, and compensation the wrong remedy. A substantive due process claim challenging the rationality of regulatory barriers to property acquisition might better fill the gap identified in this Essay. It has the twin virtues of being more deferential to the government and providing injunctive relief instead of damages. The former helps to constrain impediment claims and prevent them from swallowing up all regulations. The latter resolves the complex compensation question, and effectively allows any individual to challenge the very existence of the burdensome regulations.

Ultimately, however, the appeal of any of these claims—whether under the Takings or Due Process Clauses—turns on the ability to identify limiting principles. If impediment claims are limited to the most egregious examples of exclusion—to total prohibitions on new building or to Peru-style limits on business licenses—then they will be very rare. They will also be important to remedy when they do arise. But if they expand to include more innocuous hurdles to the acquisition of discrete assets and specific forms of property, then these kinds of claims become a broad opportunity for anyone to challenge any regulatory regime. Even rational zoning, after all, creates a barrier for some property owners to have precisely the use they want in the location they want. Safety regulations make some property unaffordable to some people.[81] The federal Resource Conservation and Recovery Act makes it impossible to have certain kinds of hazardous waste.[82] Without identifying principled limits, impediment claims are non-starters out of the gate.[83]

A more plausible impediment claim, then, might take a narrower and more technical form. Instead of direct challenges to the regulatory barriers to property acquisition, perhaps those barriers simply satisfy the standing requirement to challenge other regulations that are

81. *See, e.g.*, Werner Z. Hirsh et al., *Regression Analysis of the Effects of Habitability Laws upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 113–32 (1975) (finding a positive relationship between the implied warranty of habitability and higher rental rates).

82. *See* 42 U.S.C. §§ 6921–6926 (2012) (specifying requirements for hazardous waste generation, transportation, and storage).

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

independently burdensome. In other words, the substantive challenge would not be to the impediments to property acquisition themselves; instead, those impediments, if sufficiently onerous, would substitute for the normal requirement of a vested property right to challenge some government action burdening property on other grounds.

In general, as described above, vested property rights are a prerequisite for any kind of takings claim or other form of property protection.[84] And of course that makes sense. No matter the form, a government action that disrupts a mere possessory interest—whether a squatter, or an illegal business—will not give rise to a takings claim. But what if the government itself is responsible for the lack of a vested property interest? In that case, perhaps, there is a kind of derivative taking: the regulatory barriers to acquiring property rights in the first place could create standing to challenge a government action, even in the absence of vested property rights.[85]

This is not such a radical suggestion, because it is not fundamentally different from allowing public interest–impact litigation to challenge exclusionary zoning. In fact, the leading exclusionary zoning case is *NAACP v. Mt. Laurel*.[86] The state supreme court largely avoided the issue of the NAACP's standing by finding that the plaintiffs included "present residents . . . residing in dilapidated or substandard housing."[87] It therefore held that it did not have to rule on others' standing, which had gone unchallenged.[88] But in other cases, standing could prove a substantial hurdle. The availability of an alternative basis for standing—based on the regulatory barriers to property acquisition—could eliminate some of the judicial contortions in existing doctrine.

However, even this may be too great an expansion of standing rules. Potentially, anyone priced out of a jurisdiction by exclusionary zoning practices could sue. It also potentially conflates the standing inquiry with the merits of the underlying claim. After all,

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84. *See supra* note 25 and accompanying text.

85. Note that this kind of claim is entirely consistent with the text of the Takings Clause. Such claims only arise when the government is taking property without just compensation. The property happens to not belong to the plaintiff, but nothing in the text of the Takings Clause limits who can seek to vindicate such claims.

86. So. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975).

87. *Id.* at 717 n.3.

88. *Id.*

exclusionary zoning practices are, by definition, impediments to property acquisition. The standing requirement effectively disappears if the allegation of exclusionary zoning is enough, by itself, to establish standing. Anyone seeking to challenge zoning practices as exclusionary could find any person priced out of the local jurisdiction to serve as a plaintiff. It is one thing to open the courthouse doors to such challenges; it is another to remove the doors entirely.

Nevertheless, the work of the impediment claim here is simply to establish standing, and so a plaintiff would have to allege some independent violation of law. While equal protection and due process claims are possible, they are by no means easy to win. Quite the contrary. Establishing standing has essentially no relationship to the likelihood of success. Using an impediment claim simply to establish standing is actually quite narrow and therefore surprisingly plausible. In fact, if anything, it is so narrow that it may not be worth the candle.

These problems may ultimately render impediment claims untenable, either because they are too broad to be constrained, or too narrow to be useful. But they have the potential to provide the propertyless with a mechanism for objecting to burdensome government actions. And so they hold some promise for marshalling the protection of property rights in the service of those without property.

CONCLUSION

Allowing people without property to bring what amounts to property claims—whether under the Takings Clause, or some other legal mechanism—might seem fantastical. After all, the existence of a property right is a kind of definitional prerequisite to property protection. Focusing, however, on regulatory burdens inhibiting the right to acquire property in the first place offers a new avenue for invoking the power of property for redistributive instead of just conservative ends. Such a refocusing may thus provide a means of addressing the missing rung of formal property so critically diagnosed by Hernando de Soto. While the kinds of impediment claims identified in this Essay may ultimately fail doctrinally and conceptually, they nevertheless invite more work exploring how property can serve the interests of the propertyless.