

# DISCLAIMING PROPERTY

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*Can Congress pick and choose when it must follow the Constitution? One would expect not, and yet the Supreme Court has allowed it to do so. In multiple statutory programs, Congress has disclaimed constitutional property protections for valuable interests that otherwise serve as property. The result is billions of dollars' worth of "disclaimed property" that can be bought, sold, mortgaged, or leased, but that can also be revoked at any moment without due process or just compensation.*

*Disclaimed property already represents a great source of value, and property disclaimers are at the core of major recent policies ranging from natural resource management to intellectual property governance. As legislatures continue with market-based regulations for environmental concerns or licensing arrangements for the sharing economy, the use of disclaimed property is poised to expand even further.*

*As a relatively recent phenomenon, property disclaimers have gone largely unconsidered by courts and scholars, but their increased importance now calls for closer study. Accordingly, this Article offers a practical and theoretical analysis of disclaimed property. It begins by examining property disclaimers arising in contexts that range from natural resources to intellectual property. It then synthesizes the judicial treatment of these interests and offers a model for valuing constitutional property protections. Building upon this background, it evaluates the constitutionality of property disclaimers as well as the policy justifications for such provisions. After a doctrinal and economic analysis, it ultimately concludes that while property disclaimers raise significant political process concerns, they may be constitutional nonetheless. However, the Article also concludes that property disclaimers are apt to be ineffective in their pursuit of legislative flexibility. Thus, this Article counsels that despite the current use and likely expansion of property disclaimers, they do not represent a beneficial or desirable policy tool.*

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## INTRODUCTION

Buy it, bequeath it, borrow against it. Invest in it, use it, exclude others from it. Sell it, lease it, give it. One can do all of this with property.

Or with disclaimed property.

In fact, parties have invested nearly half a billion dollars yearly to buy and sell interests that the government has explicitly disclaimed as property rights and that may not even be entitled to Due Process protection. For example, as of 1995, private entities had invested as much as \$500 million<sup>1</sup> in federal fishing quotas that expressly disavowed creating a “right, title, or interest”; that could be “revoked, limited, or modified at any time”; and that did not “confer any right of compensation to the holder.”<sup>2</sup> Similarly, in 2002, local, regional, and national banks issued more than \$450 million in loans secured by federal graz-

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1. EUGENE H. BUCK, CONG. RESEARCH SERV., 95-849, *INDIVIDUAL TRANSFERABLE QUOTAS IN FISHERY MANAGEMENT* 4 (1995), <https://perma.cc/4DBD-Y3HH>.  
2. 16 U.S.C. § 1853a(b) (2012).

ing permits<sup>3</sup> that explicitly did “not create any right, title, interest, or estate in or to the lands”<sup>4</sup> and created “no compensable property right.”<sup>5</sup> Finally, in 2004, at the height of the Sulphur Dioxide (“SO<sub>2</sub>”) emission allowance trading market,<sup>6</sup> entities paid \$34 million in a spot auction<sup>7</sup> for SO<sub>2</sub> allowances that legally “do[ ] not constitute a property right.”<sup>8</sup> In each instance, private parties made major investments in what can be termed “disclaimed property,” that is, interests for which the government expressly disavows constitutional protections arising under the Takings<sup>9</sup> and Due Process<sup>10</sup> clauses.

It may seem perverse that a legislature might be able to disavow constitutional protections for certain interests and thereby create a category of disclaimed property. Such a practice is tantamount to a legislature picking and choosing when it is bound by constitutional provisions. However, in the limited instances where property disclaimers have been tested, the Supreme Court and lesser courts have demonstrated a willingness to honor the disclaimers, refusing to impose takings liability even in the face of substantial reliance by private

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3. Press Release, Forest Guardians, \$450 Million in Bank Loans to Public Lands Ranchers Guaranteed with National Forest Grazing Permits (June 24, 2002), <https://perma.cc/ZC42-XJSB>.
  4. 43 U.S.C. § 315b (2012).
  5. United States v. Fuller, 409 U.S. 488, 494 (1973); *see also* Hage v. United States, 51 Fed. Cl. 570, 586–87 (2002).
  6. This program is held out as a model for market-based environmental regulation and a triumphant introduction of “cap and trade” policies. *See, e.g.*, OFFICE OF AIR & RADIATION, EPA, TOOLS OF THE TRADE: A GUIDE TO DESIGNING AND OPERATING A CAP AND TRADE PROGRAM FOR POLLUTION CONTROL 1-1 (2003), <https://perma.cc/JU63-GCPV>; Michael Faure, *Effectiveness of Environmental Law: What Does the Evidence Tell Us?*, 36 WM. & MARY ENVTL. L. & POL’Y REV. 293, 315–16 (2012); Victor B. Flatt, *C(r)ap and Trade: The Brave New World of Non-Point Source Nutrient Trading and Using Lessons from Greenhouse Gas Markets to Make It Work*, 52 HOUS. L. REV. 301, 305 (2014).
  7. However, the bottom eventually fell out of the SO<sub>2</sub> allowance market. Some commentators suggest that the lack of protection for property rights explains this. *See* Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA’s Emissions Trading Program*, 6 YALE J. ON REG. 109, 116–17 (1989) (noting that uncertain property rights in emissions provide disincentives for trading); *see also* Terry Anderson & Gary Libecap, *Cap and Trade*, DAILY CALLER (May 15, 2015), <https://perma.cc/XLS9-NL84>. For an alternate account, *see* Richard Schmalensee & Robert N. Stavins, *The SO<sub>2</sub> Allowance Trading System: The Ironic History of a Grand Policy Experiment*, (Journal of Econ. Perspectives, Discussion Paper No. RFF DP 12-44, 2012) (claiming “court decisions and subsequent regulatory responses have led to the virtual collapse of the SO<sub>2</sub> market”), <https://perma.cc/JS2S-C73V>.
  8. EPA, CLEAN AIR MARKETS, 2004 SO<sub>2</sub> ALLOWANCE AUCTION, <https://perma.cc/AKR8-R48T>.
  9. 42 U.S.C. § 7651b(f) (2012).
  10. *See* U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
  11. *See* U.S. CONST. amends. V, XIV (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

parties.<sup>11</sup> As a result, a curious form of property interests has emerged. Disclaimed property is treated as ordinary private property between private individuals, but it is treated as an unprotected interest between individuals and the government. These disclaimed interests receive either property-rule or liability-rule protection as between private parties. That is, interest holders could expect either injunctive relief or damages to remedy interference by other private parties.<sup>12</sup> However, disclaimed interests receive no-liability treatment as between interest holders and the government; that is, interest holders would have no remedy against government interference.<sup>13</sup> Disclaimed property looks like property, acts like property, and appears to be property, except where the government is concerned.

Property disclaimers command attention and examination not only because grazing permits, fishing quotas, and pollution credits already constitute odd and valuable interests,<sup>14</sup> but also because they likely represent only the vanguard of an expanding legislative use of property disclaimers. As market-based regulatory mechanisms gain popularity and new regulatory schemes arise, the use of property disclaimers appears poised to grow.<sup>15</sup> Additionally, as courts and scholars recognize potential takings liabilities for regulatory inaction or inadequacy,<sup>16</sup> legislatures may employ property disclaimers in these instances as well. Policymakers have even attempted to disclaim more traditional property interests, like water rights.<sup>17</sup> To survey just a few current examples, new pollution trading schemes are planned for states surrounding the Chesapeake Bay and

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11. See, e.g., *United States v. Fuller*, 409 U.S. 488, 494 (1973); see also *Hage v. United States*, 51 Fed. Cl. 570, 586–87 (2002).
  12. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (introducing and discussing the concepts of property rules and liability rules).
  13. See Michael Pappas, *Energy Versus Property*, 41 FLA. ST. U.L. REV. 435, 451 (2014) (discussing the interplay between property rules, liability rules, and no-liability rules).
  14. Cf. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) (positing that as value increases so does the need to define the contours of property interests).
  15. Many states around the Chesapeake Bay, such as Maryland, are poised to introduce nutrient pollution trading schemes, which would likely follow the disclaimed property model of SO<sub>2</sub> allowances. See, e.g., Md. Dep't of the Env't & Md. Dep't of Agric., *Welcome to the Maryland Nutrient Trading Program*, MD. NUTRIENT TRADING, <https://perma.cc/U27M-7FAX>.
  16. See generally Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 346 (2014) (arguing that “the government’s failure to regulate, or its failure to act to protect private property, [can] amount to an unconstitutional taking”); Michael Pappas, *A Right to Be Regulated?*, 24 GEO. MASON L. REV. 99 (2016) (discussing potential property interests in affirmative rights to be regulated) [hereinafter Pappas, *Right to Be Regulated*].
  17. See discussion *infra* Section I.B.

beyond,<sup>18</sup> coastal areas are contemplating projects to deal with sea level rise and climate change,<sup>19</sup> and policymakers are contemplating licensing schemes for sharing economy platforms like Airbnb.<sup>20</sup> All of these policies will potentially use property disclaimers.

These scenarios raise interesting questions regarding the constitutionality and desirability of property disclaimers, and to date these questions have gone unaddressed. A few commentators have examined particular instances of disclaimed property, such as grazing permits, fishery quotas, or pollution credits.<sup>21</sup> However, there has been no overarching evaluation of property disclaimers as a concept. This Article provides such an analysis, offering a theoretical and practical examination of disclaimed property.

To do so, the Article proceeds as follows: Part I establishes a background understanding of property disclaimers, including examples and judicial treatments of such disclaimers. Part I also offers an estimated market valuation for constitutional property protections, and the Appendix at the close of the Article offers a full discussion of the methodologies and assumptions in this valuation. Part II then considers the constitutional issues raised by property disclaimers, including consistency with the Fifth Amendment and compensation issues. This Part concludes that while property disclaimers contravene constitutional principles and create a high potential for political abuse, courts might nonetheless find them constitutional on grounds of positivism or consistency with common law. Assuming that property disclaimers are constitutional, Part III addresses the policy justifications for property disclaimers, including their purported enhancement of legislative flexibility, as well as their social benefits and costs. Part III concludes that property disclaimers will likely prove ineffective in fostering legislative flexibility and will encourage socially wasteful rent seeking. Based on these conclusions as well as the potential for political process abuses such as expropriation of valuable interests from the politically vulnerable, the

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18. See, e.g., *Maryland Proposes Regulations for Faster, Better Chesapeake Bay Restoration*, DEP'T OF THE ENV'T, <https://perma.cc/3TJ7-8YGE> (announcing proposed regulations for nutrient trading in Maryland); *Maryland Water Quality Trading Program*, DEP'T OF THE ENV'T, <https://perma.cc/6EFU-G7KF> (Maryland's proposed trading regulation).
  19. Cf., e.g., J. Peter Byrne, *Property in the Anthropocene*, 7 BRIGHAM-KANNER PROP. RTS. CONF. J. (forthcoming) (discussing how "[g]overnment will also be threatened with liability for its intentional decisions about protection from climate effects through takings claims").
  20. See, e.g., *What Regulations Apply to my City?*, AIRBNB, <https://perma.cc/4JAM-DPUN>; *Responsible Hosting in the United States*, AIRBNB, <https://www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states> (providing links to a number of cities' regulations under the "Your City's Regulations" heading, which can be accessed by scrolling down on the page).
  21. See, e.g., Mark Fina & Tyson Kade, *Legal and Policy Implications of the Perception of Property Rights in Catch Shares*, 2 WASH. J. ENVTL. L. & POL'Y 283, 317 n.164 (2012); Danny Cullenward, *Property Rights and Transparency in California's Carbon Market* 12 (Aug. 2014) (unpublished manuscript) (on file with author).

Article ultimately recommends against the use of property disclaimers as a policy tool.

## I. PROPERTY DISCLAIMERS AND PROPERTY

### A. *What are Property Disclaimers?*

This Article considers express, legislative property disclaimers. Though one might conceive of implied legislative property disclaimers,<sup>22</sup> or even judicial property disclaimers,<sup>23</sup> the core focus of this Article is on positive disclaimers like those described in the Introduction. As those examples demonstrate, such disclaimers typically contain some version of the following provisions: that interests “do not constitute property rights”; may be “revoked or modified at any time”; and “create no right of compensation.”

Such provisions essentially seek to disclaim the constitutional property protections contained in the Due Process and Takings Clauses, as well as the closely related Contracts Clause protections.<sup>24</sup> For ordinary property interests, the relatively modest Due Process protections require at least notice and a hearing before government actors can seize or terminate interests.<sup>25</sup> The more robust Fifth Amendment takings protections require compensation in the event of government condemnation or substantial interference with property interests<sup>26</sup> (*i.e.*, government regulation going “too far”).<sup>27</sup> For all relevant purposes, Contracts Clause protections, where applicable, approximate Takings Clause protections.<sup>28</sup> Thus, the Due Process Clause offers property owners at least a procedural guarantee, and the Takings Clause and Contracts Clause (where relevant) impose liability-rule protection for private property rights.

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22. Implied disclaimers of property interests currently exist in the presumption that newly created regulatory interests will not receive property protection absent a clear statement. *See* Pappas, *Right to Be Regulated*, *supra* note 16, at 122 (“[C]ourts use a legislative intent inquiry to identify compensable intangible regulatory interests. In determining whether such property rights exist, courts look for clear legislative statements establishing irrevocable interests.”). As long as such a clear statement requirement is recognized, then the absence or omission of such a statement is the functional equivalent of an express disclaimer and can be treated similarly.
  23. Broadly conceived, any judicial ruling that Fifth Amendment protection does not extend to an interest could be thought of as a disclaimer, though such a broad category is probably not analytically useful.
  24. *See* U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (“Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.”).
  25. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970).
  26. *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).
  27. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
  28. *See supra* note 24.

Property disclaimers seek to withdraw some or all of these protections. For example, by asserting that an interest may be revoked or modified at any time, a property disclaimer attempts to withdraw the procedural guarantee of Due Process. Similarly, stipulations that interests create “no right of compensation” aim to remove Takings Clause protection, replacing the liability-rule protection with a no-liability rule. Finally, legislative statements that an interest simply is not property may try to accomplish both ends, though in a less precise and targeted way. With some property disclaimers, each of these provisions may be present, whereas other disclaimers may employ only one, for example by disclaiming takings protection but remaining silent regarding Due Process protection.<sup>29</sup> Although Due Process protections may also be applicable, this Article will focus primarily on disclaimers of Takings Clause protections since they offer the more robust property protections.

As background for understanding and analyzing property disclaimers, it is helpful to juxtapose disclaimed property with other types of interests. Thus, the remainder of this section will consider how disclaimed property compares with constitutionally protected property, common law licenses (the closest common law equivalent to disclaimed property), “new property” entitlements that receive Due Process protection, and, finally, interests that fall outside the realm of property. These comparisons will demonstrate that disclaimed property occupies a position that is distinct from any of these other categories.

To begin with the obvious, the statutory withdrawal of constitutional protection separates disclaimed property interests from constitutionally protected property interests. However, examination beyond this definitional level offers important insights. Disclaimed property differs from constitutionally protected property only regarding interactions between interest holders and the *government*. But disclaimed property is no different than constitutionally protected property regarding interactions between *private parties*. Put another way, while property disclaimers create a no-liability relationship between the government and interest holders, they do not alter the government-backed property protections (whether property rule or liability rule) between interest holders and other private actors.

The result is that disclaimed property functions like constitutionally protected property in most instances, and the government will recognize and enforce disclaimed property rights as between private individuals. For example, disclaimed property interests enjoy essentially all the rights, or “sticks in the bundle,” associated with private property, such as the rights to exclude, use, and alienate. For instance, most disclaimed property interests enjoy the vaunted

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29. For example, taxi medallions have been considered property for purposes of Due Process but not for takings protections. See, e.g., Steve Oxenhandler, Comment, *Taxicab Licenses: In Search of a Fifth Amendment, Compensable Property Interest*, 27 *TRANSP. L.J.* 113, 129 (2000); Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 *YALE J. ON REG.* 125, 127 (2013).

right to exclude (or at least to exclude all but the government), which theorists consider highly important, if not essential, to property interests.<sup>30</sup> Thus, a fishing quota holder may exclude others from catching the fish that would count toward her quota, and that quota holder can rely on government enforcement of this right. Further, no private party can unilaterally seize or revoke disclaimed property or interfere with an interest holder's right to use the disclaimed property. In the case of a fishing quota, a rival fisherman may not legally retract the quota or prevent its use, and a fishing quota holder may rely on government recourse should the rival fisherman attempt such interference. Finally, and of enormous importance among private parties, disclaimed property holders also have the right to transfer and alienate these interests.<sup>31</sup> Fishing quota holders may lease, sell, or borrow against their interests,<sup>32</sup> and no private party can prevent that. Taken together, these examples show that disclaimed property interests function like constitutionally protected property in all cases except the rare instance where government interference becomes so substantial as to raise constitutional concerns.<sup>33</sup>

Understanding disclaimed property also benefits from comparison with common law licenses, which are the closest common law analogue to disclaimed property. Common law licenses, such as permission to enter land, are typically considered something less than a property right because, by definition, they entail a "personal, revocable, and unassignable privilege . . . to do one or more acts on land without possessing any interest therein."<sup>34</sup> Disclaimed property interests, which are frequently revocable, draw upon this common law license concept, and some courts have even conceived of disclaimed property interests in terms of licenses.<sup>35</sup> However, disclaimed property interests differ from common law licenses in important ways regarding transferability and revocability. First, as discussed above, disclaimed property is frequently transferable, whereas common law licenses are typically non-transferable.<sup>36</sup> More importantly, common law licenses could be rendered irrevocable or compensable, whereas disclaimed property, by its terms, cannot (at least not absent legis-

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30. See, e.g., Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 971-72 (2000).

31. Cf. Dean Lueck & Thomas J. Micelli, *Property Law*, in 1 HANDBOOK OF LAW AND ECONOMICS 183, 189 (A. Mitchell Polinsky & Steven Shavell eds., 2007) ("In addition to [being enforced by] law . . . [.] property rights may be enforced by custom and norms . . . and by markets through repeated transactions.").

32. This must be consistent with the terms of the interests. Some fishing quotas, for example, have limitations on what percentage may be leased or sold. See, e.g., BUCK, *supra* note 1, at 4.

33. See discussion *infra* Section II.E.1.

34. See Annotation, *Right of Licensee for Use of Real Property to Compensation for Expenditures upon Revocation of License*, 120 A.L.R. 549 (1939).

35. See, e.g., *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 371 (2004) (discussing disclaimed property interests in terms of licenses).

36. See Annotation, *supra* note 34 (noting that licenses are unassignable).



lative amendment). For example, at common law, investments and expenditures made in reliance on a license could render the license irrevocable.<sup>37</sup> Alternately, even when a common law license was validly revoked, the license holders would be “entitled to compensation or reimbursement for expenditures made . . . on the faith of the license.”<sup>38</sup> Essentially, reliance could alter the nature of a common law license, making it irrevocable or at least compensable. This is contrary to the entire object of disclaimed property because property disclaimers seek to create revocable and non-compensable interests regardless of investment or reliance. As a result, disclaimed property differs from common law licenses both in terms of transferability and in terms of the impact of reliance on revocability and compensability.

Disclaimed property also differs from so called “new property” interests,<sup>39</sup> which typically involve government programs, entitlements, or benefits protected by Due Process (but not by the Takings Clause).<sup>40</sup> The classic examples of such new property are government benefits, such as welfare financial aid<sup>41</sup> or social security disability payments.<sup>42</sup> One major difference between new property interests and disclaimed property is that new property interests almost entirely involve relationships between interest holders and government; new property does not involve substantial interface between private parties. Conversely, disclaimed property involves many opportunities for private interaction, as discussed above. Thus, one might identify the core of new property as occurring between government and interest holder, whereas the core of disclaimed property appears to center on market interaction between private parties over interests created by government. This manifests in related abstract and practical distinctions between new property and disclaimed property. More abstractly, new property interests, such as welfare benefits, are non-transferable, whereas disclaimed property is typically transferable. This means that there is an important difference in sticks between the respective bundles of rights of new property and disclaimed property. Practically speaking, this also means that new property does not take on the function of property in everyday relationships and commerce in the same way that disclaimed property does. Thus, the common perception of new property may differ greatly from the common perception of disclaimed property.

Finally, it is useful to distinguish disclaimed property from other sources of value that exist outside the legal realm of property, as recognized and enforced by the state. For example, black markets, such as those for human traf-

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37. *Id.*

38. *Id.*

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

40. *See* Bd. of Regents v. Roth, 408 U.S. 564, 571–72 (1972); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985).

41. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

42. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

ficking or illegal drugs, are full of interests that are transferred between private parties for value. But the government does not recognize or protect these interests as property, and the government will not enforce rights to exclude, use, or transfer such interests, even as between private individuals. With disclaimed property, the government offers no constitutional protections, but, as discussed previously, it will recognize and enforce rights like exclusion, use, and transfer, and will enforce these rights between private individuals.

Thus, disclaimed property occupies a unique position. It does not fit the mold of any of its comparator interests, whether constitutionally protected property, common law licenses, new property, or unrecognized interests. It has fewer sticks in the bundle than some, and more sticks than others. Property disclaimers, by their terms, create these curious interests, and the following section considers practical examples as well as courts' reactions to these disclaimed interests.

### B. *Types of Property Disclaimers and Their Judicial Treatment*

As discussed in the previous section, disclaimed property interests share common features that distinguish them from other types of interests. However, within the category of disclaimed property there are also some important variations to consider. In particular, analyzing property disclaimers along two dimensions may help clarify this analysis. First, disclaimers can be prospective or retrospective, meaning that they can either apply only to newly created interests or to both new and preexisting interests. Second, disclaimers might apply to either nontraditional, intangible interests or to traditional, tangible interests. One can conceive of traditional, tangible interests as those that correspond to some physical thing and might have been recognized at common law. Alternately, nontraditional, intangible interests are less tethered to physical things and are creations of positive legislative or regulatory schemes.

As between this set of dimensions, the more important appears to be prospective versus retrospective because this impacts the formation of reasonable expectations in the interest. The distinction between the nontraditional and traditional interests may be less important conceptually; however, it is worth examining because it may have practical implications. For example, in relevant cases, few though they may be, courts appear to treat disclaimed nontraditional property differently than disclaimed traditional property.<sup>43</sup> Moreover, interest holders, particularly the "everyday person" or nonspecialists,<sup>44</sup> may form different sets of expectations for traditional versus nontraditional interests based on

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43. See discussion *infra* Sections I.B.1–I.B.2.

44. Cf. Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980) (referring to the nonspecialist view of property).

norms, customs, or daily experience. Particularly with more traditional interests, interest holders may import expectations from other traditional property contexts even in the face of specific legislative disclaimers of property protection. This appears true as a descriptive matter, regardless of whether it is advisable as a normative matter. Thus, it is initially useful to distinguish between disclaimed traditional and disclaimed nontraditional interests, even if this distinction may not be as important as the prospective versus retrospective distinction.

These dimensions can be combined to present four types of property disclaimers: 1) prospective disclaimers of nontraditional property, 2) prospective disclaimers of traditional property, 3) retrospective disclaimers of nontraditional property, and 4) retrospective disclaimers of traditional property. The following figure offers a tabular representation of these combinations along with examples to be discussed below.

TABLE 1. FOUR TYPES OF PROPERTY DISCLAIMERS

	NONTRADITIONAL	TRADITIONAL
PROSPECTIVE	Grazing Permits and Bayh-Dole Patents (Prospective disclaimers of nontraditional interests)	Some Water Delivery Contracts (Prospective disclaimers of traditional interests)
RETROSPECTIVE	Disclaimed Patents (Retrospective disclaimers of nontraditional interests)	FCA Floodwaters and Other Water Delivery Contracts (Retrospective disclaimers of traditional interests)

The subsequent subsections examine each of these categories in turn, considering actual and hypothetical examples of such interests along with relevant judicial treatment of these categories of disclaimed property.

### 1. *Prospective Disclaimers of Nontraditional Interests*

Prospective disclaimers of nontraditional interests represent the most common form of disclaimed property. For example, the fishing quotas, grazing permits, and pollution credits discussed above all fall within this category, as could certain taxi medallions, liquor licenses, or other similar interests.<sup>45</sup> Each of these

45. Depending on the relevant jurisdiction, these interests might involve express property disclaimers, but often they are subject only to implied property disclaimers. For discussion of these types of interests, see Tom W. Bell, *Copyright Porn Trolls, Wasting Taxi Medallions, and the Propriety of "Property,"* 18 CHAP. L. REV. 799, 803 (2015), Oxenhandler, *supra* note 29, at 129, and Wyman, *supra* note 29, at 127. See also *United States v. Locke*, 471 U.S. 84, 104–05 (1985) (discussing mining claims); *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 216 (Fed. Cir. 1993) (discussing licenses to deal in assault weapons); *Leafer v. State*, 104 So. 2d 350, 351 (Fla. 1958) (discussing liquor licenses).

is an interest created wholly by a legislative or regulatory scheme that sets a cap on capacity (whether for fishing, grazing, polluting, taxi driving, or selling liquor) and then allocates interests under that capped capacity (*i.e.*, fishing quotas, grazing permits, pollution credits, taxi medallions, or liquor licenses). Such interests can be considered nontraditional because they arise not out of a physical thing or a common law recognition but rather out of a positive regulatory regime. Moreover, these interests all involve prospective provisions that disclaim property protection from the very outset. Each of these interests came to be via a statute that simultaneously created the interest and disclaimed any property protections for it.

The Bayh-Dole Act's treatment of federally funded patents offers another example of a prospective disclaimer of nontraditional interests. Prior to the Bayh-Dole Act, any patents arising from federally funded research were retained by the federal funding agency.<sup>46</sup> The Bayh-Dole Act changed this by allowing certain entities, such as universities or non-profits, to retain private title to patents arising from federally funded research.<sup>47</sup> However, these newly available private patent rights are subject to government "march-in" rights, which essentially allow the government to seize the private patents and license them out without compensating the patent holder.<sup>48</sup> Thus, the march-in provision effectively disclaims takings protections for these patents, but it does so prospectively because such patents were not available to private entities until the Bayh-Dole Act, which simultaneously made such patents available and subjected them to these march-in rights.

Of course, even though these property disclaimers explicitly caution against expecting constitutional protections, interest holders may still form such expectations. Similarly, even though these property disclaimers explicitly seek to remove constitutional protections, it does not follow that the judiciary will necessarily uphold and impose such provisions. And indeed, challenges have arisen, as holders of these disclaimed properties have pursued lawsuits seeking Takings Clause and Due Process protection.

The case law in this regard is limited, but thus far, the Supreme Court and lower courts have enforced these property disclaimers. The most developed case law comes from the context of federal grazing permits. In these cases, courts have consistently held that the property disclaimers are valid and that grazing permits create no compensable property interest because of "congressional in-

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46. See 35 U.S.C. §§ 200–212 (1994) (Patent and Trademark Act Amendments of 1980, also known as the Bayh-Dole Act); Mary Eberle, Comment, *March-In Rights Under the Bayh-Dole Act: Public Access to Federally Funded Research*, 3 MARQ. INTELL. PROP. L. REV. 155, 155 (1999).

47. See 35 U.S.C. § 202(a) (2012).

48. See *id.* § 203(a)(1).

tent that no compensable property right be created . . . .”<sup>49</sup> Thus, grazing permits can be revoked or modified without compensation. Courts have reached similar results with the few other property disclaimers that have been challenged, and commentators predict the same outcome for interests like fisheries quotas and pollution credits.<sup>50</sup>

## 2. *Prospective Disclaimers of Traditional Interests*

Legislatures can also prospectively disclaim protection for more tangible interests that resemble common law property. But to be truly prospective, such disclaimers must apply at the genesis of a new interest.

One example of such disclaimers arises in the context of irrigation water provided through federal water projects. In these water projects, the federal government typically finances, constructs, and operates water storage and irrigation structures (often dams and distribution canals).<sup>51</sup> By increasing water quantity, availability, and regularity, these projects make irrigation possible in locations where it would otherwise be unfeasible. These projects then serve water users, whether individuals or irrigation districts, who receive water rights via long term contracts.<sup>52</sup>

Though generally “[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment,”<sup>53</sup> these water delivery contracts often appear to disclaim takings protections for the contractual water rights. For example, these contracts typically contain provisions disclaiming liability for the failure to deliver water “arising from a shortage on account of errors in operation, drought, or any other causes.”<sup>54</sup>

It is worth noting that it is the “or any other causes” language that truly makes this a disclaimer of a property interest because it purports to excuse virtually any contractual non-performance. Such general, sweeping language essentially makes any contractual guarantee revocable at the government’s will. This differs from the more specific contractual language, that limits liability for drought, for example. The more specific provisions merely allocate liability for

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

50. See Pappas, *Right to Be Regulated*, *supra* note 16, at 116–18, 120–22 (discussing examples).

51. See, e.g., *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 507 (2005), *vacated*, 635 F.3d 505 (Fed. Cir. 2011).

52. *Id.* at 508.

53. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

54. See *O’Neill v. United States*, 50 F.3d 677, 682 n.2 (9th Cir. 1995) (emphasis added); see also *Klamath*, 67 Fed. Cl. at 511 (noting common water contract provisions “holding the United States harmless for ‘any damage, direct or indirect,’ resulting ‘[o]n account of drought or other causes’ of ‘a shortage in the quantity of water available’ from Project sources”). See generally A. Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731, 748–53 (2012).

particular risks (e.g., droughts) but do not excuse all contractual non-performance. In contrast, the more general language creates a no-liability rule for the government's overall contractual performance in a situation where it would otherwise face takings liability.<sup>55</sup> That is why it constitutes a property disclaimer.

Just like grazing permits, these water contracts that establish water rights then disavow liability for "any other causes" represent prospective disclaimers. They concurrently create an interest and limit constitutional protection for it.<sup>56</sup> However, unlike the grazing permits, these contracts deal with more traditional, physical interests.

Such water disclaimers also appear enforceable in court. Most challenges to these water contract disclaimers have arisen in instances where the government has not delivered water due to a combination of drought and endangered species protection.<sup>57</sup> In these situations, the Ninth Circuit has treated the water contracts like grazing permits, upholding the water disclaimers on the ground that the "liability limitation is unambiguous."<sup>58</sup> The Federal Circuit has been more hesitant, however. In an ongoing, sixteen-year saga known as the Klamath litigation, the Federal Circuit has examined whether, despite the clear disclaimers, continued reliance on and use of water could create an equitable property interest, and it has certified these questions to the Oregon Supreme Court.<sup>59</sup> Though the most recent trial court ruling in the Klamath litigation has upheld certain disclaimers<sup>60</sup> (and, as discussed in Section I.B.3, arguably has cast them as retrospective disclaimers<sup>61</sup>), that appears to be only the latest installment and is currently pending appeal.

55. Indeed, at least one court has discussed this crucial difference between the specific disclaimers for drought risk and the general disclaimers for "any other causes." See *Baley v. United States*, 134 Fed. Cl. 619, 657–59 (2017) (considering the contractual provisions "other causes" dispositive for purposes of immunizing the United States from a takings claim).

56. Not all water delivery contracts establish or create water rights; some modify existing water rights, and accordingly, those are more accurately treated as retrospective disclaimers. See discussion *infra* Section I.B.3.

57. See, e.g., *O'Neill*, 50 F.3d at 682 n.2; see also *Klamath*, 67 Fed. Cl. at 507.

58. *O'Neill*, 50 F.3d at 684.

59. The Federal Circuit has certified questions to the Oregon Supreme Court and remanded a case on this theory. See *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 522 (Fed. Cir. 2011); *Klamath Irrigation Dist. v. United States*, 227 P.3d 1145, 1160 (Or. 2010) (en banc). This particular issue is central to the ongoing Klamath litigation, which has dragged out over many years. See Tarlock, *supra* note 54, at 749 n.108.

It is worth noting that prior to certification to the Oregon Supreme Court, a panel of the Federal Circuit did seem willing to enforce the disclaimer. See *Klamath*, 67 Fed. Cl. at 540.

60. See *Baley*, 134 Fed. Cl. at 657–59.

61. This involves an important factual distinction. In the Ninth Circuit case, no water delivery or water right predated the contract at issue; rather the contract appears to have been entered into prior to construction of the project that would deliver the water at issue. See *O'Neill*, 50 F.3d at 680–81 ("In 1963, the United States entered into a long-term water service contract with Westlands Water District pursuant to federal reclamation statutes. Under this contract,

The fact that the Klamath litigation has already spanned a decade, while courts have easily upheld prospective disclaimers in grazing cases, suggests that courts may more readily accept disclaimers for nontraditional interests than for traditional interests. Though, there is still a relatively small sampling of cases from which this pattern may be drawn.<sup>62</sup>

### 3. Retrospective Disclaimers

Along with prospective property disclaimers, retrospective disclaimers are also possible for nontraditional or traditional interests. For example, the legislature could amend patent protections and declare that all patents, including those already in effect, do not constitute protected property interests.<sup>63</sup> Since the Supreme Court has already declared that patents are protected by the Takings Clause,<sup>64</sup> such an amendment would retrospectively disclaim property pro-

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the United States *agreed to construct* the San Luis Unit of the Federal Central Valley Project (“CVP”) in part to furnish water to the Westlands Water District.”) (emphasis added). Thus, the contract at issue was the basis for the underlying water rights, and the disclaimer in the contract was purely prospective.

However, in the latest installment of the Klamath litigation, the court, relying on the Oregon Supreme Court’s ruling on a certified question about Oregon water law, held that the relevant water rights predated the relevant contractual provisions and that the contracts could amend those rights but not create them. *See Baley*, 134 Fed. Cl. at 653 (“Initially, the court notes that, throughout its post-trial brief, defendant alleges that the contracts governing the delivery of water from the Klamath Project ‘created’ any property rights in the Klamath Project water plaintiffs may have held. As a matter of law, this is incorrect. Although it is unclear precisely what defendant means by this statement, the Oregon Supreme Court explained in its March 11, 2010 decision that, ‘[u]nder Oregon law, the water right became appurtenant to the land once the persons taking the water from the Klamath Project applied it to their land and put it to beneficial use.’ *Klamath Irr. Dist. v. United States*, 227 P.3d at 1163. The Oregon Supreme Court went on to note that any contractual agreements between plaintiffs and the United States could have ‘clarified, redefined, or even altered’ the relationship between the United States and the plaintiffs on whose behalf the United States originally appropriated the waters of the Klamath Project.”).

62. Such a distinction would be consistent with other instances of courts’ disparate treatment of property protections for traditional versus nontraditional interests. *See Pappas, Right to Be Regulated*, *supra* note 16, at 122–31 (suggesting that courts examine legislative intent to define property rights in nontraditional regulatory interests, whereas they look to reliance rather than legislative language when determining property rights in regulatory interests tied to traditional property). In the *Klamath* litigation, the Federal Circuit’s reticence to embrace the apparent intent of the water delivery contracts demonstrates consistency with that observation.
63. Though such legislation is unlikely, Congress has enacted more modest retrospective amendments to patent protections. *See, e.g., Gregory Dolin & Irina D. Manta, Taking Patents*, 73 WASH. & LEE L. REV. 719, 770–80 (2016) (describing revisions to patent protections and arguing that they represent takings).
64. *See Home v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427 (2015).

tection for patents. Alternatively, if more fancifully, the legislature might also declare that rights in land no longer constitute compensable property interests.

These hypothetical disclaimers may seem extreme and outlandish, but there do appear to be more modest examples of such retrospective disclaimers. For instance, the Flood Control Act of 1928 (“FCA”) can be seen as a retrospective disclaimer of takings protection for flooding of land. The federal government enacted the FCA as a broad disclaimer of liability for the federal flood control operations that followed the 1927 Mississippi River flood. The FCA states, “[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place.”<sup>65</sup> The Supreme Court has noted the expansiveness of this disclaimer, emphasizing that “[i]t is difficult to imagine broader language[,]”<sup>66</sup> and that “Congress’ choice of the language ‘any damage’ and ‘liability of any kind’ [ ] undercuts a narrow construction” of the FCA’s liability waiver.<sup>67</sup> Thus, the language in the FCA appears intended to disclaim all liability, even Fifth Amendment takings liability, for flooding events.<sup>68</sup>

As such, the FCA represents an apparent disclaimer of constitutional property protection, and it is retrospective. Though the FCA may seem prospective because it disclaimed liability for flood control structures before the structures were even built,<sup>69</sup> it is actually retrospective because it disclaims pre-existing takings protections. Lands subject to the FCA had been in private hands before the FCA’s enactment, and well before the FCA, the Supreme Court had held that government-caused flooding could constitute a taking of property.<sup>70</sup> Thus, by asserting government immunity from any flooding liability, the FCA renounced established takings liability, thereby retrospectively disclaiming constitutional protections for a traditional property interest.

Possibly because of this retrospectivity, courts have not applied the FCA as a valid disclaimer of takings protection, despite the FCA’s broad disclaimer of liability. Rather, courts have interpreted the FCA to create immunity only from tort suits and not from takings claims.<sup>71</sup> Though research has revealed no definitive discussion of the issue, this interpretation is apparently based on the theory

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65. 33 U.S.C. § 702c (2012).

66. *United States v. James*, 478 U.S. 597, 604 (1986).

67. *Id.* at 605; *see also* Sandra B. Zellmer, *Takings, Torts, and Background Principles*, 52 WAKE FOREST L. REV. 193, 202 (2017) (noting congressional intent to disclaim liability).

68. John Echeverria has offered a cogent argument in this regard. *See* John Echeverria, *The Muddy Arkansas Game and Fish Commission Case*, CTR. FOR PROGRESSIVE REFORM BLOG, <https://perma.cc/Z6KV-6JBC>.

69. *See, e.g.*, Robert Haskell Abrams & Jacqueline Bertelsen, *Downstream Inundations Caused by Federal Flood Control Dam Operations in a Changing Climate: Getting the Proper Mix of Takings, Tort, and Compensation*, 19 U. DENV. WATER L. REV. 1, 7 (2015).

70. *See, e.g.*, *United States v. Cress*, 243 U.S. 316, 324 (1917).

71. *See generally* Zellmer, *supra* note 67, at 201.



that a statute cannot displace the Fifth Amendment's constitutional requirement of just compensation for takings.<sup>72</sup> Though courts have not been forthcoming in terms of reasoning, the result is clear enough. Courts have not treated the FCA as forestalling takings liability, regularly hearing takings claims and even finding takings liability in instances where the FCA would appear to apply.<sup>73</sup>

Interpretations of the FCA evidence a discomfort and disregard for retrospective disclaimers, and the hypothetical retrospective disclaimers for patents or land would probably evoke a similar apprehension. However, at least one district court has upheld arguably retrospective disclaimers in the context of water delivery contracts.

As discussed above, the long-lasting Klamath litigation involves water delivery contracts containing disclaimers that were recently held enforceable.<sup>74</sup> However, the contracts in the Klamath litigation did not create the water rights at issue; rather, they modified pre-existing water rights.<sup>75</sup> Thus, these contract provisions may actually represent retrospective disclaimers of preexisting water rights.<sup>76</sup>

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72. See, e.g., *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081, 1088 (6th Cir. 1978) (stating that because takings claims derive from the Constitution, “a remedy for a violation of this provision arguably does not require a waiver of sovereign immunity”); see also Kent. C. Hofmann, *An Enduring Anachronism: Arguments for Repeal of the 702c Immunity Provision of the Flood Control Act of 1928*, 79 TEX. L. REV. 791, 805 (2001); Echeverria, *supra* note 68 (articulating the theory that “the Takings Clause, of its own force, abrogates sovereign immunity”). See generally Michael Pappas, *Sovereign Immunity and Takings* (2019) (on file with author) (providing a fuller discussion of the interaction between the takings clause and sovereign immunity).

73. See, e.g., *Zellmer*, *supra* note 67, at 201.

74. See *Baley v. United States*, 134 Fed. Cl. 619, 657–59 (2017), *appeal filed*.

75. See discussion *supra* note 61.

76. Whether these Klamath water contracts should represent prospective or retrospective disclaimers is a more difficult question than it may first appear, and it likely turns on one's view of how much choice was afforded the recipients of these water contracts. The “Warren Act contracts” provide a concrete context for examining the matter. See *Baley*, 134 Fed. Cl. 619 at 630–31 (“The Warren Act authorizes the Secretary of the Interior ‘to cooperate with irrigation districts, water-users’ associations, corporations, entrymen, or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water-users associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes.”). A number of water users in the Klamath litigation held Warren Act contracts, but the nature of their entry into those contracts is unclear. See *id.* at 631. If the contracts were truly freely and voluntarily entered by all parties in “cooperation” with the federal government, then they may be considered prospective even if the water rights existed beforehand. This is because the contracting parties effectively traded old water rights for prospective, newly created contractual rights. However, if the contracts were essentially forced upon the parties, such as if the “cooperation” with the federal government were effectively imposed or no other option existed, then the disclaimers may be seen as retrospective. In such a scenario, preexisting,

If the Klamath disclaimers are properly considered retrospective, then the enforceability of these retrospective provisions appears to be a mixed bag. Even if the Klamath disclaimers are not considered to be retrospective, treatment of other retrospective disclaimers still highlights fundamental questions that surround property disclaimers of all forms. If retrospective disclaimers are objectionable, should the same be true of prospective disclaimers? Might these provisions indicate that, ironically, the government should pay takings compensation for withdrawing takings protection? Subsequent parts of this Article examine these questions.

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In summary, property disclaimers can be divided in terms of whether they impact nontraditional or traditional interests as well as whether they are prospective or retrospective. Though few cases address these issues, current judicial treatment of such disclaimers varies. The following figures summarize the sections above. The first constructs a table of examples of disclaimed property (actual or hypothetical), and the second constructs a table of judicial treatment of these types of interests.

TABLE 2. EXAMPLES OF DISCLAIMED PROPERTY

	NONTRADITIONAL	TRADITIONAL
<b>PROSPECTIVE</b>	Grazing Permits and Bayh-Dole Patents	Some Water Delivery Contracts
<b>RETROSPECTIVE</b>	Disclaimed Patents (hypothetical)	FCA Floodwaters And Other Water Delivery Contracts

TABLE 3. JUDICIAL TREATMENT OF DISCLAIMED PROPERTY INTERESTS

	NONTRADITIONAL	TRADITIONAL
<b>PROSPECTIVE</b>	Enforce	Enforce (with some hesitation)
<b>RETROSPECTIVE</b>	(Unknown)	Split (ignore and enforce)

These tables contain the descriptive information that will serve as a basis for subsequent parts that consider the constitutionality and policy considerations for such disclaimers. However, before moving to those analyses, the next section considers the market value of the constitutional protections that property disclaimers seek to remove.

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protected water rights would essentially have been forced into a no-liability framework, which is similar to the situation the FCA created with land. Uncovering the history of these contracts is beyond the scope of this article, so it offers the analysis of these contracts both as prospective and retrospective disclaimers.

C. *What is Constitutional Property Protection Worth?*

To evaluate the constitutionality and desirability of property disclaimers, it would be useful to know what constitutional property protection is worth. Such a valuation helps in weighing the benefits, costs, and stakes of property disclaimers. Moreover, a rough valuation is necessary to evaluate whether some property disclaimers (particularly retrospective ones) may themselves constitute Fifth Amendment takings.

One would imagine that disclaimed property interests are less valuable than constitutionally protected property interests, but a crucial question is how much less valuable. Does a property disclaimer reduce value a great deal or only a small amount? As evident from the market for disclaimed property interests, such interests are far from valueless,<sup>77</sup> and if the value reduction for disclaimed property turns out to be only a small percentage of market price, that may make property disclaimers a more attractive policy tool.

This section offers an expected value estimate to determine how much of the market value of property is tied to its constitutional protections, particularly in terms of how much the risk of an uncompensated taking diminishes the value of an interest. The conclusion is that constitutional property protections represent only a small (likely negligible) percentage of market value.

The details of the expected value estimate appear in the Appendix at the close of this Article, and the Appendix contains a full discussion of methodologies and underlying assumptions for the valuation. However, it is worth noting the general framing of the model here, before moving to consider the results and implications of the expected value estimate.

First, by its nature the expected valuation model relies on a number of contestable assumptions, and changing these assumptions necessarily changes the results of the model. To make these choices transparent, the Appendix discusses each assumption. Additionally, at each step the model intentionally adopts highly generous assumptions meant to overvalue takings protections. As a result, the value is likely *overestimated by multiple orders of magnitude*.

Regarding the substance of the estimate, in constructing this expected value model and conceiving of the market value of takings protection, there appear to be two primary sources of value to consider: 1) the general deterrence of government interference with property rights, and 2) the specific compensation for extensive government interference with property rights (i.e. the compensation paid for government actions found to constitute a Fifth Amendment taking).

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77. See discussion *supra* Introduction (noting the many millions spent on disclaimed property interests such as federal fishing quotas, federal grazing permits, and SO<sub>2</sub> emission allowances).

In terms of general deterrence, takings protection will discourage marginal government actions (e.g., some instances of regulation and some exercises of eminent domain) because the compensation requirement adds to the costs of these actions. Indeed, some commentators have suggested that absent takings protections, the government would engage in excessive regulatory action at the expense of property values.<sup>78</sup> This argument makes sense in theory, but this Article suggests that practically speaking the marginal impact of takings protection on general deterrence is low. As discussed in more detail in Section III.A., takings protection will likely have a relatively small impact on legislative flexibility (i.e. on the amount of regulatory action).<sup>79</sup> Nonetheless, the expected value model incorporates a generous assumption of general deterrence.<sup>80</sup>

Along with the expected value of general deterrence, the expected value of specific compensation also contributes to the market value of takings protection. In the event that a government action arises to the level of a Fifth Amendment taking, the property owner will receive specific compensation for that taking. In this way, specific compensation operates like an insurance policy against extensive government interference with property rights. To estimate a generalized expected value of specific compensation for takings protection requires taking an *ex ante* perspective<sup>81</sup> by considering the likelihood of a claim arising, the likelihood of winning the claim, the likely award, and the likely litigation costs involved.<sup>82</sup> In estimating these likelihoods, the model again makes liberal assumptions designed to overstate the expected value of specific compensation.

Accounting for the value of both general deterrence and specific compensation, the upshot of the expected value model is that even an intentionally gross overestimate, which likely overvalues constitutional property protections by orders of magnitude, still finds that protections are worth only 0.5–1.2% of property value, minus the costs of litigating a claim.

To appreciate this valuation concretely, it is worth considering two examples: a property worth \$300,000 and a property worth \$1 million. For the \$300,000 property, the grossly overestimated value of takings protection is

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78. See, e.g., C. Ford Runge, *Economic Implications of Wider Compensation for "Takings" or, What if Agricultural Policies Ruled the World?*, 17 VT. L. REV. 723, 733–37 (1993) (discussing scholarly arguments over whether compensation will deter overregulation by government actors). See generally, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (discussing how agencies respond to incentives by overregulating when regulation is too cheap and by falling subject to capture or influence by powerful factions).

79. In fact, legislative flexibility, as discussed *infra* in Section III.A, is basically inversely proportional to general deterrence. The greater the deterrent effects, the higher the cost of legislative flexibility.

80. See *infra* Appendix C.1 (discussing the probability of a claim).

81. See *infra* Appendix C.2 (discussing the *ex ante* perspective).

82. See generally *infra* Appendix.

\$1,210–\$2,420.<sup>83</sup> For the \$1 million property, the grossly overestimated value of takings protection would still only represent a value of \$5,200–\$10,400, depending on assumptions about the probability of a colorable claim arising.<sup>84</sup> This means that in the case of a \$1 million property, takings protection is worth no more (and likely much less) than 0.52–1.04 cents on the dollar.

Finally, we can also estimate the property value below which takings protection is valueless *ex ante* (i.e., where the expected value of the protection does not exceed the expected value of an estimated \$50,000 litigation cost). We can term this the “threshold value.” Under the model’s most generous overestimate, takings protection is valueless under the threshold amount of \$87,719.30. For more expensive properties, the value of takings protection rises, but even then it represents no more than 0.5–1.2% of property value.

It is worth reinforcing that this estimates only the *ex ante* market value of constitutional property protection. Thus, this estimate does not offer an *ex post* valuation, such as the expected value of a takings claim in light of a particular regulation. Nor does this estimate account for subjective values in such protections. Subjective values, such as the feeling of security associated with takings protection, or the feelings of demoralization<sup>85</sup> or the endowment losses<sup>86</sup> associated with a lack of protection, may be important as well. Subsequent parts will consider how both the expected market value of takings protections and these subjective values may factor into the constitutionality and desirability of property disclaimers.

83. For details on the methodology, see the Appendix. The mathematical calculations operate as follows: if the probability of a claim is 1%, then the value is \$1,210 because 0.57% of \$300,000 = \$1,710 less \$500 (1% of \$50,000) expected value of litigation cost = \$1,210.

If the probability of a claim is 2%, then the value is \$2,420 because 1.14% of \$300,000 = \$3,420, less \$1000 (2% of \$50,000) expected value of litigation costs = \$2,420.

This assumes that individuals will be paying for their own litigation.

84. For details on the methodology, see the Appendix. The mathematical calculations are as follows: if the probability of a claim is 1%, then the value is \$5,200 because 0.57% of \$1,000,000 = \$5,700 less \$500 (1% of \$50,000) expected value of litigation cost = \$5,200.

If the probability of a claim is 2%, then the value is \$10,400 because 1.14% of \$1,000,000 = \$11,400, less the \$1,000 (2% of \$50,000) expected value of litigation cost = \$10,400.

This assumes that individuals will be paying for their own litigation.

85. See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1215–16 (1967) (suggesting that those suffering uncompensated takings experience “demoralization costs” from those takings).

86. The endowment effect describes the phenomena of individuals ascribing a greater value to something they already have than they would be willing to pay for the same item. This effect leads to the experience of loss at losing an interest outstripping the market value of purchasing that interest. Cf. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 582 (1984) (arguing that because people are risk averse they suffer disutility from the prospect of uncompensated losses).

## II. CONSTITUTIONAL CONSIDERATIONS FOR PROPERTY DISCLAIMERS

The core constitutional provision implicated by property disclaimers is the Fifth Amendment Takings Clause, and the key question is whether the legislature, by its own fiat, can sidestep the protections of this provision. The few cases to address property disclaimers have not thoroughly considered the constitutional issue and have delivered potentially conflicting results. Cases recognizing and enforcing property disclaimers for grazing permits implicitly suggest that the legislature can choose to circumvent the Takings Clause. Meanwhile, cases addressing water delivery contracts or the FCA, along with additional cases stating that legislatures cannot “*ipse dixit*” deny or eliminate property rights, suggest that legislatures cannot disclaim takings protections. Thus, disclaimers have been met with divergent outcomes, and courts have offered little justification to explain why they have decided one way or another. This section more fully examines the constitutionality of property disclaimers.<sup>87</sup>

### A. Fifth Amendment Takings Protections as Political Process Guarantees

The Fifth Amendment Takings Clause directs that “private property [shall not] be taken for public use, without just compensation.”<sup>88</sup> The Supreme Court has frequently and unanimously articulated the purpose of this provision as follows: the “Fifth Amendment’s guarantee . . . was designed 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>89</sup>

Though the concepts of fairness and justice may be somewhat indeterminate, in the context of the Takings Clause jurisprudence they manifest primarily as protections against redistribution.<sup>90</sup> Historically, the primary concern may have been over populist majorities expropriating property from the wealthy,<sup>91</sup> but takings protections also prevent majorities or factions from taking advantage of the politically disenfranchised.<sup>92</sup> Either way, the Takings Clause stands against redistribution.

Read this way, the Fifth Amendment guarantees political process rights through the lens of property. It ultimately seeks to prevent majoritarian or fac-

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87. This Article does not extend the analysis to include implications of property disclaimers on the exactions jurisprudence or the unconstitutional conditions doctrine, but that would make for an interesting future project.

88. U.S. CONST. amend. V.

89. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); see also Michael Pappas, *Singled Out*, 76 MD. L. REV. 122, 126 (2016) [hereinafter Pappas, *Singled Out*].

90. See Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1286 (2000).

91. See *id.* at 1288.

92. See *id.*

tional political abuses that manifest in the expropriation of valuable property. The requirement to pay compensation is designed to prevent such redistribution, and Due Process protection can be seen as a similar protection against arbitrary and unfounded government action.<sup>93</sup>

While this protection is framed in terms of the expropriation of property and compensation, the Fifth Amendment protection is not just a protection of value in and of itself. It is a protection against abusive political processes that significantly impacts value.<sup>94</sup> Takings protection uses value as a marker for when political process malfunctions create sufficient impact to require correction.<sup>95</sup> Thus, takings protection only addresses instances of political process failure that result in relatively high value expropriations.<sup>96</sup> But value is not the sole object, and the Fifth Amendment does not protect against all losses of value (for example, losing money on the stock market). Rather, the Fifth Amendment protects against political abuses leading to significant losses.

Under this reading that the Takings Clause guards against political abuses that manifest in the expropriation of property, the key questions for consistency with the Fifth Amendment are 1) what constitutes political abuse that manifests in appropriation (i.e., what is a taking) and 2) what constitutes property. Most of the regulatory takings literature and jurisprudence concentrates on the first question: when has government action gone too far and arisen to a taking. Property disclaimers primarily raise the second question: what constitutes property, and, relatedly, which institution has the power to say so. However, neither question can be considered in isolation. Rather, both must be considered in service of the overall goal of guarding against majoritarian or factional tyranny. Thus, in considering the constitutionality of property disclaimers, the relevant question is whether such definitions (or disclaimers) of property contravene the Fifth Amendment's guarantee against political process abuses.

### B. *Constitutionality of Prospective Disclaimers for Nontraditional Interests*

Among property disclaimers, prospective disclaimers of nontraditional interests should provide the easiest case for constitutionality. If any property disclaimers are valid, these should be. And yet even these interests raise significant concerns about consistency with the political process guarantees of the Takings Clause. Ultimately, the constitutionality of these provisions should rest on the Court's relative comfort or discomfort with the risk of political process abuse.

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93. See Pappas, *Singled Out*, *supra* note 89, at 132.

94. *Id.* at 136, 140–45.

95. *Id.* at 140–45.

96. *Id.* at 142, 148 (discussing how a “magnitude-of-burden” inquiry is both central to the practical resolution of takings cases and aligns with the political process concerns underscoring takings protections).

Though courts have not engaged in any meaningful analysis of the constitutionality of property disclaimers, the best arguments for their constitutionality are rooted in common law property concepts as well as in principles of positivism and notice.

### 1. *Common Law Concepts*

A first argument for the constitutionality of property disclaimers relies on an amalgam of pre-constitutional common law property concepts. The concept most evident from the case law is that disclaimed property's constitutionality is tied to its close resemblance to licenses, a property arrangement that existed at common law well before the founding of the United States or the ratification of the Constitution.<sup>97</sup> Because of property disclaimers' resemblance to licenses, the few courts to address them have treated them as licenses and implicitly relied on this concept for their validity. However, this analysis is far from thorough or precise. As discussed above, there are material differences between common law licenses and disclaimed property in terms of transferability and revocability. Most importantly, common law licenses can become irrevocable based on reliance, whereas disclaimed property purports to reject such irrevocability.

Nonetheless, the analogy to licenses may be bolstered by other pre-constitutional common law concepts related to government-held resources, particularly in the context of adverse possession and the public trust doctrine. For example, a long-held component of the adverse possession doctrine is the principle that "no time runs against the king," which dictates that one cannot acquire adverse possession rights against the government.<sup>98</sup> Taken more generally, this principle suggests that government title and government management of resources is immune to alteration by private use or reliance, even in instances where use and reliance would be sufficient to assert adverse possession over private resources. By extension, one might apply this same principle to argue that government licenses too should be reliance-proof, even if private licenses may become irrevocable in the face of reliance.

Similarly, the public trust doctrine also suggests a governmental power (and even obligation) to preserve public ownership of certain resources by limiting private rights in the resources, regardless of private reliance. A key component of the public trust is the idea that the government may not completely alienate some resources, meaning that rights granted in those resources must be

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97. See, e.g., *Wood v. Leadbitter* (1845), 13 M. & W. 838 (U.K.).

98. See, e.g., *State v. Lake Winnepesaukee Resort*, 977 A.2d 472 (N.H. 2009). However, courts have held that this principle does not apply to situations where the government holds property in its proprietary capacity. See, e.g., *Kesinger v. Logan*, 756 P.2d 752 (Wash. Ct. App. 1988), *aff'd*, 779 P.2d 263 (Wash. 1989); *La. Highway Comm'n v. Raxsdale*, 12 So. 2d 631 (La. Ct. App. 1943).



limited or revocable.<sup>99</sup> The same government power to create such limited or revocable rights in public trust resources may also be used to justify property disclaimers.<sup>100</sup>

Taken together, these common law concepts can be marshalled as conceptual precedents for property disclaimers. Moreover, since the common law principles predated the Fifth Amendment, one might argue that they form background property understandings and do not run afoul of takings protections. For example, commentators have argued that public trust limitations inhere in property title and thus are sufficient to prevent takings claims.<sup>101</sup> However, the inverse argument is also possible, and one might assert that the express Fifth Amendment protections supersede vague common law traditions by creating political process protections that were not necessarily guaranteed before constitutional ratification. Indeed, there are precedents that indicate common law concepts like public trust limitations will not preclude takings liability.<sup>102</sup> Additionally, the analogies between these common law concepts and property disclaimers are far from perfect, and there are numerous other grounds on which to distinguish the two.<sup>103</sup>

## 2. *Positivism*

In addition to common law justifications, the constitutional case for property disclaimers is built on concepts of positivism and notice. The positivist idea is that legislatures, as duly elected representatives of the people, have the power to define or disclaim property interests through positive legislative enactment, rather than according to common law, natural law, societal understandings, or some other legitimating tradition. Such positivism draws its legitimacy from the authority of politically accountable legislatures (and, thus, presumes legislatures are operating with constitutional validity). The notice concept then builds

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99. See, e.g., *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453–54 (1892).

100. Indeed, some states have expanded the scope of their public trust doctrines through a combination of judicial decisions, statutes, and regulations, see, e.g., Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 734–46 (2006), and such expansion might be viewed as quite similar to a retrospective disclaimer of property interests.

101. See, e.g., John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 945–46 (2012); Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the “Takings” Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81, 107–08 (1995).

102. See, e.g., Echeverria, *supra* note 101, at 956–63; cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 165 (1979) (suggesting that navigational servitudes that may be inherent in title will not prevent a successful takings claim).

103. For example, public trust resources are aspects of state law, and it is questionable whether there is a federal public trust doctrine. Additionally, public trust protections are traditionally limited to certain resources and thus would not necessarily inhere in title to other resources.

on positivism, suggesting that as long as these positivist property disclaimers are known in advance, then parties can manage expectations accordingly and capitalize risk, meaning that they should not be unduly prejudiced by any subsequent changes to their interests. The notice concept also serves the general principle of fairness; in fact, one might colloquially say that these disclaimers provide “fair notice.”

Of all potential property disclaimers, prospective disclaimers of nontraditional interests offer the easiest cases for positivism and notice. Because these nontraditional interests are legislatively created, one might consider them positivist by definition. As such, they create little potential conflict with other authorities (such as common law) that might define the nature of these interests, and there is a smaller likelihood of latent background expectations. Moreover, because these disclaimers are prospective, they offer maximum notice in shaping expectations. These interests do not exist except in their disclaimed form. Finally, another justification for the enforceability of these property disclaimers comes from considering what the alternative option would be. If courts did not recognize such disclaimers, would these interests be inviolable, or would their status turn on a question of reasonable reliance? The former option seems inconsistent with both legislative intent and common law, which recognizes the existence of revocable interests in the form of licenses. The latter simply reframes the positivism and notice argument since those concepts would form the basis of any reasonable reliance in these interests.

The cases enforcing property disclaimers offer little discussion of their reasoning, but they implicitly rely on positivism and notice concepts. For example, courts, including the Supreme Court, have upheld grazing permit disclaimers based on the positivist notion of “congressional intent.”<sup>104</sup> However, no court has offered a full or satisfactory examination of the constitutional interests at play.

Upon further reflection, it seems that neither positivism nor notice answers the core concern of the Fifth Amendment takings protection. In fact, both can allow and even invite exactly the sort of political process abuses that the Takings Clause guards against.

For example, positivism raises the worry of “positivist-trap” majoritarian abuses, a variation of the same concerns against which the Fifth Amendment seeks to protect. Fifth Amendment takings protection is an intentional check on democratic power, and it is motivated by a concern that powerful majorities or factions could expropriate property from disfavored groups.<sup>105</sup> Positivism can run counter to this protection by empowering majorities to define property interests. The “trap” of positivism arises from the risk that legislatures, free to

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

105. *See Pappas, Singled Out*, *supra* note 89.

define or disclaim property as they see fit, may define property strategically to benefit certain groups.<sup>106</sup> Thus, a legislature with the freedom to define or disclaim property could advantage in-groups and disadvantage out-groups, protecting the interests of those they like and disclaiming the rights of those they do not.<sup>107</sup>

This same concern can be restated in institutional terms. Property disclaimers alter the institutional balance between courts and legislatures, thereby preventing courts from performing the institutional function of checking legislatures. One role of courts is to serve as an intentionally anti-majoritarian branch that can guard against the potential majoritarian or factional abuses of legislative actions. When property disclaimers install the legislature rather than courts as the institution that defines property, this eliminates the court's ability to offer an anti-majoritarian check on potential abuse.

While these positivist concerns may lurk in the background of all legislatively created interests, property disclaimers thrust them into the fore. If the advantage of property disclaimers is that they remove barriers to democratic responsiveness, the corresponding disadvantage is that when these barriers are removed, the only checks on abusive property disclaimers are political checks. And political checks are no use against political abuses. By sidestepping the constitutional, jurisprudential, and institutional structures that protect against majoritarian or factional tyranny, property disclaimers present the opportunity for the powerful to appropriate value from disfavored or less powerful groups.

Moreover, it does not take a great feat of obvious animosity, exploitation, or discrimination to result in such expropriation of value from less powerful groups. When property disclaimers are in place, ordinary politics should be enough. Because the stability of disclaimed property is subject to political forces, any popular support for altering these interests risks jeopardizing them. Groups with the resources and power to secure their disclaimed interests should be able to do so, and those without such resources and power will not.

This concern is not just theoretical; rather, there is also empirical reason to believe that disclaimed property systems will result in concentrated burdens on less powerful constituencies. Juxtaposing the treatment of grazing permit holders and taxi medallion holders offers an example.

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106. See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 922–23 (2000) (discussing the positivist trap); Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 842 (2013) (same).

107. As the case has been made in the context of procedural Due Process protections, “if we look to positive law to define the ‘property’ and ‘liberty’ to which the due process guarantee attaches, the state may avoid the constitutional command of fair adjudicative process by simply defining away the triggering ‘right.’” Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1694 (1993) (quoting Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 813 (1990)).

As discussed, federal grazing permits are explicitly disclaimed property. These permits are heavily subsidized, and while the federal government collects roughly \$21 million per year in grazing revenues, that is less than one-sixth the cost of managing the grazing program.<sup>108</sup> As a result, this grazing permit program has drawn criticism as a waste of federal resources, poor economic policy, and poor environmental practice.<sup>109</sup> There is substantial support for amending the entire permit program.<sup>110</sup> Nonetheless, there has been no serious effort to alter or revoke the permits themselves. Instead, even though these permits are revocable and create no compensable right, the only serious policy consideration for amending the permit system has been through buyback programs. The formidable political clout associated with these grazing permits has made them essentially stable interests that will likely receive compensation (through a politically extracted buyback program rather than through constitutional protections) if they are altered.

Taxi medallions are another example of disclaimed property, but they have been treated quite differently than have grazing permits. These medallions give license to operate a taxi in a given city, and because the number of these medallions is limited, they can be quite valuable. Medallions often cost substantial sums, sometimes over \$1 million per medallion.<sup>111</sup> However, as rideshare services, such as Uber and Lyft, became available, political pressure mounted to effectively remove the limits imposed by taxi medallion systems and to allow a broader array of taxi-like options. In response to widespread consumer preference, as well as powerful lobbying by ride service companies, a number of cities lifted taxi medallion limits or stopped enforcing them, destroying the value of taxi medallions without compensation. Taxi medallion holders had no legal right to compensation, and they also apparently lacked the political might to retain their interests or extract compensation.

While taxi medallion holders are not necessarily a politically downtrodden group, and taxi medallion systems are not without their faults, this treatment illustrates how holders of disclaimed properties are at the mercy of the majority

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108. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-869, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED 30 (2005), <https://perma.cc/Q4CL-VR9V>.

109. See, e.g., CHRISTINE GLASER ET. AL., COSTS AND CONSEQUENCES: THE REAL PRICE OF LIVESTOCK GRAZING ON AMERICA'S PUBLIC LANDS, CTR. FOR BIOLOGICAL DIVERSITY (2015); KARL HESS & JERRY L. HOLECHEK, CATO INST., POLICY ANALYSIS NO. 234: BEYOND THE GRAZING FEE: AN AGENDA FOR RANGELAND REFORM (1995); Joe Feller, *CPR Perspective: The Trade-off Myth of Livestock Grazing on Public Lands*, CTR. FOR PROGRESSIVE REFORM, <https://perma.cc/M8Z2-A8HG>; *Grazing on Public Lands*, SIERRA CLUB, <https://perma.cc/CQ3L-B5ZP>.

110. Calls for reform have come from across the ideological spectrum. See, e.g., Robert H. Nelson, *How to Reform Grazing Policy*, COMPETITIVE ENTER. INST., <https://perma.cc/6GEZ-5HWT>; Feller, *supra* note 109; GLASER, *supra* note 109; HESS, *supra* note 109.

111. See, e.g., Wyman, *supra* note 29, at 127.

(or powerful factions who can afford effective lobbying) unless they themselves can wield political influence. This treatment challenges the basic notions of fairness at the core of the Takings Clause. Grazing permit holders had the influence to secure their disclaimed property; taxi medallion holders did not.

The point here is not that taxi medallion holders should be compensated or that grazing permits should be amended without compensation. Instead, these examples simply show that property disclaimers create the likelihood that interest holders will be treated differently based on their political sway. Powerful constituencies will retain their interests or receive compensation in the face of pressure, and less powerful ones will not. Certainly, takings protection does not do an ideal job of protecting those with lesser political power, and scholarship has noted how takings protection will typically favor powerful interests.<sup>112</sup> However, at least takings protection potentially insulates interest holders against raw political power. With disclaimed property, political might makes right, and democratic responsiveness means that interest holders are simply in the hands of whichever group that can most effectively influence the legislature.

In sum, a positivist justification for property disclaimers essentially amounts to an assertion that a majoritarian political decision is sufficient to remove constitutional protections against majoritarian political decisions. Ironic, yes; satisfying, no.

This is not a problem with positivism *per se*. Nontraditional interests are positivist by their nature, and the same result would be achievable through common law licenses, which are revocable and would not create any compensable right. However, even if there were no positivist trap concern or political abuses in the *creation* of disclaimed property, the very nature of the disclaimed property interest raises concerns about *subsequent* political abuses. Since the only protections for disclaimed property are political protections, the potential for political abuse is ever present with the interest. As noted above, majoritarian expropriation appears not just possible but likely, and this outcome is difficult to square with the Fifth Amendment.

### 3. Notice

The concept of notice can be linked with positivism and used to bolster the potential legitimacy of disclaimed property. However, notice too appears insufficient to address concerns about potential political process abuses. It is hard to fathom that a majoritarian political decision can validly remove constitutional protection against majoritarian political decisions just because it is stated in advance. Additionally, our legal tradition frequently rejects notice as sufficient to disclaim rights or liabilities, particularly when there is concern over

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112. See, e.g., Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U.L. REV. 1, 37–42 (2008); Pappas, *Singled Out*, *supra* note 89.

power imbalances or coercion. For example, at the common law intersection of tort, contract, and property, courts will refuse to enforce exculpatory clauses and liability waivers<sup>113</sup> or will impose inalienability rules<sup>114</sup> when they suspect power imbalances. The common thread in these cases is a reluctance to let powerful actors strip less powerful entities of certain rights, and that same concern animates the Takings Clause protection against powerful interests expropriating value from the less powerful.

In the regulatory takings context, the Supreme Court has also indicated skepticism that positivism or notice could alter the Fifth Amendment's takings protections. For example, in an apparent distrust of positivism, the Court has repeatedly held that a legislature may not "*ipse dixit*" remove a property right.<sup>115</sup> This admonition originated in *Webb's Fabulous Pharmacies v. Beckwith*,<sup>116</sup> where the Court held that a state statute could not simply declare private funds held by the court as temporarily "public money" and thereby retain the interest earned on these funds.<sup>117</sup> The statute at issue in *Webb's Fabulous Pharmacies* actually presents a retrospective (and temporary) disclaimer of previously recognized private property. Nonetheless, the Court's subsequent generalized and repeated warnings against "*ipse dixit*" recharacterization of property evidence a basic suspicion of positivism as an evasion of Fifth Amendment takings protections.<sup>118</sup> In another turn of phrase showing a similar distrust of positivism, the Court has also noted that "[i]f Congress can 'pre-empt' state property law . . . then the Taking Clause has lost all vitality."<sup>119</sup>

Additionally, in *Palazzolo v. Rhode Island*,<sup>120</sup> the Court acknowledged and rejected a positivism-and-notice argument in the course of holding that a landowner could still pursue a takings claim even when he knowingly purchased property subject to a preexisting regulation.<sup>121</sup> The Court reasoned as follows:

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argu-

113. See, e.g., *Seigneur v. Nat'l Fitness*, 752 A.2d 631, 638 (Md. Ct. Spec. App. 2000); *Gross v. Sweet*, 400 N.E.2d 306, 310 (N.Y. 1979).

114. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

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

116. *Id.*

117. See *id.* at 164.

118. See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010); *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 23 (1990); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984).

119. *Ruckelshaus*, 467 U.S. at 1012.

120. 533 U.S. 606 (2001).

121. *Id.* at 626.

ment goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle. . . . Were we to accept the State's rule, the post-enactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable.<sup>122</sup>

Thus, the Court appears dubious of positivism and notice as a means of sidestepping the Fifth Amendment. While the *Palazzolo* opinion frames its argument around the temporal aspect of whether compensation is available, and thus can be criticized for failing to appreciate capitalization of regulatory limitations resulting in a lower purchase price, it is ultimately consistent with the arguments above regarding political process protections. It supports the idea that positivism and notice cannot circumvent constitutional protections against political abuse.

Ultimately, property disclaimers raise the constitutional issue of whether positivism can circumvent the Fifth Amendment and, by extension, the Supremacy Clause. The Supremacy Clause sets the Constitution as superior to statutes, so statutes cannot validly contravene the Constitution or strip individuals of constitutional protections. The Fifth Amendment guarantees political process protections through the lens of property, guarding against political process abuses that manifest in the expropriation of significant value. The guarantee is one of non-abuse as much as (or more so than) it is one of stable property value.<sup>123</sup> To allow a positivist legislative definition of property to defeat a constitutional protection against non-abuse would be to allow a statutory evasion of the Supremacy Clause. Such an evasion cannot be justified simply because it is done by the legislature (i.e., by positivism or in allegiance to congressional intent) nor can it be justified by being done in advance (i.e., with notice).

At root, then, the constitutionality of property disclaimers should turn on how much risk of majoritarian or factional abuse the Fifth Amendment will tolerate. As a later Part discusses, it is likely that most of the time the political process will not lead to abuses against disclaimed property holders because of the political costs involved.<sup>124</sup> However, the existence of disclaimed property

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122. *Id.* at 626–27.

123. Even if one disagrees with such a framing of the Fifth Amendment and views the Takings Clause as more of a guarantee of value than as a protection against political abuse, the political process concern still looms. If the Fifth Amendment is only a protector of value, then positivism is subject to majoritarian or factional abuses that can redistribute or expropriate value. Thus, the concern ultimately comes down to a political process protection.

124. See discussion *infra* Section III.A.

always leaves the opportunity for abusive political expropriation should the political tides move in that direction, either because of a strong political will to expropriate value or because of a loss in political power among the disclaimed property holders. Moreover, this risk will be most acute for the most vulnerable in society. Through the course of ordinary political operation, property disclaimers will disadvantage the less powerful and likely result in expropriation in the event of any significant competing political pressure. Finally, because political power frequently tracks wealth, expropriation will predictably fall upon poorer groups who are least able to absorb such loss, potentially leading to ruinous outcomes. While the poor and less powerful are always at a disadvantage, even with constitutionally protected property,<sup>125</sup> the Takings Clause at least serves as some check on everyday expropriation. Property disclaimers remove even that slim check.

Such expropriation will not happen every day, but disclaimed property creates the risk that it could happen any day. Moreover, while the probability of expropriation may be low, the stakes are likely quite high, at least for the impacted individuals. So, again, the question comes down to the risk tolerance of the Fifth Amendment. If the Fifth Amendment is interpreted to protect only against frequent, high-probability abuses, then property disclaimers may not present a problem. But if the Takings Clause is interpreted to protect against the risk of possible abuses, or against potentially ruinous, regressive abuses, then property disclaimers present a considerable ongoing concern.

One's view of the constitutionality of disclaiming takings protection likely turns on one's optimism or pessimism about how the political process will treat the vulnerable. This will likely be the same as one's overall view of positivism as either desirable popular governance or potential strategic exploitation. As many constitutional protections rest on a basis of guarding against the worst impulses of the majority, there is reason to believe that the more pessimistic approach is warranted and that even prospective disclaimers of nontraditional interests raise significant concerns about consistency with Fifth Amendment guarantees.

However, the Supreme Court seems to have adopted more of the optimistic view, given that it has enforced property disclaimers in the context of grazing permits (albeit without significant discussion). This trend could result from the Court's belief that there will be few actual instances of abusive expropriation<sup>126</sup> or because the court believe that disclaimers will result in net benefits to interest holders because the reciprocity of advantage outweighs the risk-associated costs.<sup>127</sup> Alternately, it could be that the Court sees no good alternative to enforcing property disclaimers, or no way of rejecting property disclaimers

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125. See Davidson, *supra* note 112, at 37–42; Pappas, *Singled Out*, *supra* note 89, at 143–46.

126. See discussion of legislative flexibility *infra* Section III.A.

127. For a discussion of reciprocity of advantage, see Pappas, *Singled Out*, *supra* note 89, at 163–64.



without rejecting positivism outright. The Court might even accept these disclaimers based on the premise that one could achieve similar results through common law licenses.<sup>128</sup> Whatever the reasoning, the result is that such prospective disclaimers of nontraditional property are apparently constitutional and enforceable. Accordingly, the remainder of this Part will operate on that assumption and consider if either prospective disclaimers of traditional interests or retrospective disclaimers would warrant similar treatment.

C. *Should Traditional Versus Nontraditional Matter?*

While courts have enforced prospective disclaimers for *nontraditional* interests, they have not as readily accepted the constitutionality of prospective disclaimers for *traditional* interests. This is evidenced by the conflicting interpretations of water delivery contracts. Though no case has analyzed this dichotomy, one possibility is that it rests on some meaningful distinction between disclaimers of traditional interests as opposed to nontraditional interests. This section attempts to identify whether traditional interests manifest some meaningful difference that would justify this divergent treatment. It proposes that courts may be more reticent to enforce prospective disclaimers of traditional interests because the traditional nature of these interests somehow undercuts the notions of positivism and notice that would justify enforcing these disclaimers.

However, the distinction between nontraditional and traditional interests may be more important for other instrumental reasons. In particular, enforcing prospective property disclaimers for traditional property would open the door for retrospective disclaimers on all property interests. This raises the stakes of the decision. The Article takes the position that this is not a problem and ultimately argues that prospective disclaimers of traditional interests should be treated the same as prospective disclaimers of nontraditional interests.

Courts may not be as accepting of positivism and notice with traditional interests because such interests may involve some pre-formed set of expectations or reliance based on prior experience with traditional property. For example, courts might not trust disclaimers of contractual water rights because the traditional interest in water rights may involve expectations of takings protections. Thus, courts may be wary of positivism in this context because there is a competing common law tradition of property rights that would rival this positivist construction. If nontraditional interests are essentially positivist by definition, then, by definition, traditional interests are non-positivist. As a result, any

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128. These results could be similar, though not necessarily the same, given that licenses appear subject to reliance interests. See discussion *supra* Section I.A.

positivist disclaimer of a traditional interest may more closely approximate the form of *ipse dixit* revisionism that courts have warned against.<sup>129</sup>

While this may be the case, it does not seem to justify differential treatment in terms of enforceability. To the extent that a disclaimer provision is truly prospective (e.g., it disclaims liability for a water right that would not otherwise exist), then the positivism in this instance seems just as acceptable as the positivism in the case of prospective disclaimers for nontraditional property interests. In both cases, the relevant interests are defined at the inception of the interest. That is, a truly prospective disclaimer essentially converts a formerly traditional, non-positivist interest into a positivist interest because it sets the terms of that interest at its genesis. If one views positivism as justifiable and non-abusive in the case of nontraditional interests, there does not appear a compelling reason to mistrust it when it comes to traditional interests.

Moreover, prospective disclaimers for traditional interests are not functionally different than the government selling a traditional interest but reserving certain rights in that transaction. For example, if the government owned a tract of land, it could grant a revocable license for the use of that tract in all ways consistent with fee simple ownership except that the interest would be revocable at will. That license would not be subject to takings protection. Alternatively, if the government granted ownership in land subject to a prospective property disclaimer, that would accomplish a similar end. In both cases, the government has granted an interest but reserved a right. In both cases the reservations offer prospective, positive provisions that limit the reasonable expectations in the interest.<sup>130</sup> On these grounds there does not appear to be a convincing reason to distinguish between prospective disclaimers of traditional and nontraditional interests.

However, the stakes of this determination are higher for an additional reason. If prospective disclaimers of traditional property are enforceable, then that effectively means all retrospective disclaimers of property are enforceable as well. This is not just a matter of a slippery slope argument. Rather, as discussed in a later section, if prospective disclaimers for traditional property are enforceable, then the government could exercise eminent domain over any property and then resell it with a prospective disclaimer.

Though this Article does not find this eminent domain potential to be a reason to disqualify prospective disclaimers of traditional property, it is an important consideration for the decision.

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

130. One might consider a similar example with flood control. The government might sell a tract of land but reserved for itself a flowage easement to foreclose flooding liability. This would be enforceable. If the government undertakes a new flood control project that will prevent inundation in certain areas but disclaims liability for any flooding that the project fails to prevent, the functional arrangement of rights is similar.

#### D. *Should Prospective Versus Retrospective Matter?*

If *prospective* disclaimers are constitutional, should the same be true of *retrospective* disclaimers? The main difference that distinguishes retrospective disclaimers from prospective ones is that retrospective disclaimers would alter expectations in preexisting interests upon which reliance has been built. While such alteration may be grounds for compensation, as will be discussed in the next section, it does not appear to be grounds for constitutional invalidity.

Potential objections could track the positivist criticism applied to prospective disclaimers of tangible property. In the case of retrospective disclaimers, the disclaimer would certainly represent an *ipse dixit* alteration of rights, and there may well be substantial reliance on the rights that existed before the alteration. Additionally, one might also worry that a greater risk of political abuse arises in the case of retrospective disclaimers. In the case of such disclaimers, the interests preexist the disclaimer and are known, so the interest holders might be known as well. Thus, it may be easier for legislatures to target specific winners and losers, raising the risk of majoritarian or factional abuse.

While these objections are meaningful and create an argument for compensation, they do not seem to raise additional validity issues not present with prospective disclaimers. After all, if the main objection to retrospective disclaimers is that they would interfere with reliance interests, then compensation should remedy that interference. Moreover, if one does not find the risk of political abuse sufficient to invalidate prospective disclaimers, then the marginal increase in potential abuse with retrospective disclaimers probably does not tip the balance, particularly because compensation would address concerns over unfair expropriation.

Given that compensation may be the key to the constitutionality of retrospective property disclaimers, the next section addresses compensation issues.

#### E. *Compensating for Property Disclaimers*

If property disclaimers are constitutional, do they constitute takings of property interests? Alternatively, should property owners be able to alienate their interests in constitutional protections?

##### 1. *Property Disclaimers as Takings of Property?*

Assuming that property disclaimers are constitutional, would curtailment of takings protection constitute a sufficient interference with property rights to constitute a compensable regulatory taking? The answer must be yes, at least in cases of retrospective disclaimers, or else the Takings Clause is a nullity. However, that result is difficult to square with the current takings doctrines. This section applies the takings doctrines to demonstrate how they apparently fail to

cover such a situation before proposing an extension of the reasoning from the canonical takings case *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>131</sup> to demonstrate how a right to compensation can be found.

To begin, assume the unlikely counterfactual that no property disclaimers would arise to compensable Fifth Amendment takings. Under this assumption, the Fifth Amendment Takings Clause is a dead letter. This is because the legislature could declare, prospectively and retrospectively, that all property will no longer be subject to constitutional protection. If such a disclaimer is constitutional and enforceable, which the previous sections suggest it could be, then the Takings Clause would still be part of the Constitution but would apply to nothing.

It would be absurd if the Takings Clause could be so easily nullified. However, if 1) property disclaimers are enforceable and 2) they do not rise to compensable takings, then the result is the elimination of all takings protection. Thus, to avoid this absurd result, either 1) or 2) must not be true. It appears that 1) is true; as the previous sections discussed at length, property disclaimers appear enforceable. Accordingly, 2) must not be true. If property disclaimers are enforceable, then they must constitute compensable Fifth Amendment takings, at least for retrospective disclaimers.

That much seems apparent, but the argument for why property disclaimers would arise to Fifth Amendment takings is more difficult than one might expect. None of the takings doctrines would obviously find such disclaimers to be compensable takings. Since property disclaimers are not explicit exercises of eminent domain,<sup>132</sup> to be compensable they would have to constitute regulatory takings. Among the doctrines for finding regulatory takings are 1) the *Loretto* doctrine, which identifies a per se taking based on permanent physical occupation by a third party,<sup>133</sup> 2) the *Lucas* doctrine, which identifies a per se taking based on elimination of all economic value,<sup>134</sup> and 3) the *Penn Central* doctrine, which identifies a taking based on a three-part balancing test.<sup>135</sup> Additionally, courts may potentially use a catchall provision to find a taking when the government has “forc[ed] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>136</sup> Property disclaimers do not clearly result in takings under any of these doctrines.

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131. 458 U.S. 419 (1982).

132. On the other hand, property disclaimers could involve explicit exercises of eminent domain, as discussed in the following section.

133. *Loretto*, 458 U.S. at 434–35.

134. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

135. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

136. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); see also *Pappas, Singled Out*, *supra* note 89, at 126.

First, because they involve no physical invasion of property, property disclaimers do not satisfy the *Loretto* criteria.<sup>137</sup> Second, because property disclaimers, even retrospective ones, do not eliminate all economic value in an interest, they do not satisfy the *Lucas* test.<sup>138</sup> Third, property disclaimers do not likely constitute takings under *Penn Central*. The *Penn Central* test inquires into 1) the diminution of economic interest, 2) the interference with reasonable investment-backed expectations, and 3) the nature of the government action.<sup>139</sup> Property disclaimers, even retrospective ones, do not likely create a great economic diminution. In fact, based on the estimates in an earlier Part, they likely reduce property values by no more than 0.5–1.2% (minus expected litigation costs). Typically to find a taking under *Penn Central*, courts require a diminution of nearly 95%.<sup>140</sup> Moreover, property disclaimers do not create a great interference with investment-backed expectations. Disclaimed property retains all the expectations associated with protected property except for the expectation of compensation for government interference.<sup>141</sup> One can still exclude others, sell, or make use of disclaimed property. Lastly, the character of the government action with a property disclaimer is not like a physical invasion.<sup>142</sup> Thus, property disclaimers are unlikely to constitute a taking under *Penn Central*.

Finally, to the extent that courts will engage in a general fairness inquiry and examine whether government has “forc[ed] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,”<sup>143</sup> that still does not provide a reliable avenue for finding property disclaimers to be takings. First, despite announcing this fairness inquiry, courts have not actually resolved takings cases based on that inquiry.<sup>144</sup> Second, courts may decide that the notice provided by property disclaimers is sufficient to satisfy indeterminate concepts of fairness and justice.<sup>145</sup> Indeed, some courts have relied on similar reasoning to dismiss takings claims on the grounds that dis-

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137. One might argue that a disclaimer for flooding is similar to inverse condemnation of a flowage easement and thus resembles a physical taking. However, that provides only one particular—fact specific argument for compensation. This section seeks to find a broader theory of compensation for property disclaimers.

138. See *Lucas*, 505 U.S. at 1004.

139. *Penn Cent.*, 438 U.S. at 130–31.

140. See James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 67 (2016); John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 209 (2005).

141. Cf. *Penn Cent.*, 438 U.S. at 124 (finding little interference with expectations because Grand Central Terminal could still be used as a railroad station).

142. See *id.*

143. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); see also Pappas, *Singled Out*, *supra* note 89, at 107.

144. See Michael Pappas, *The Armstrong Evolution*, 76 MD. L. REV. ENDNOTES 35, 41–42, n.42–44 (2016) [hereinafter Pappas, *The Armstrong Evolution*].

145. See *id.* at 44 (criticizing the “fairness and justice” formulation for its indeterminate nature).

claimed property should lead to no fair expectation of takings protection.<sup>146</sup> Finally, though property disclaimers may impact identifiable groups, courts may find that the burdens still are not sufficiently concentrated to occasion takings liability.<sup>147</sup>

This is a faithful application of all the takings tests, and none would clearly find a property disclaimer to be a taking. However, there must be some theory for finding a taking, else property disclaimers could not possibly be constitutional.

A possible resolution comes from the reasoning employed in *Loretto*.<sup>148</sup> There the Court held that the physical invasion caused by a small cable constituted a taking despite its small economic impact because by violating the owner's right to exclude, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."<sup>149</sup> Though courts have not applied this analysis more broadly, it appears applicable to retrospective property disclaimers. Though these disclaimers cause little economic harm in terms of expected value, such disclaimers cut through the entire bundle of property rights by eliminating constitutional protections. Once constitutional protection is disclaimed, the government could authorize violations of the right to exclude or appropriate all economic value of an interest without compensation. Thus, every stick in the bundle is *potentially* but not actually impacted by a retrospective property disclaimer.

In terms of the compensation owed for such disclaimers, it appears that for retrospective disclaimers the expected value of takings protection would be a logical amount. Further, as discussed in the next section, the government could work around any higher level of compensation by using eminent domain. Additionally, while this analysis has focused centrally on retrospective disclaimers, prospective disclaimers also arguably impact all the sticks in a property bundle. However, since prospective disclaimers set expectations rather than redefine them, they do not appear to diminish any reasonably expected value, therefore requiring no compensation.

## 2. Eminent Domain for Retrospective Disclaimers

Rather than imposing retrospective property disclaimers and then paying compensation, the government could also exercise eminent domain over constitutional property protections. As noted above,<sup>150</sup> this is actually just the logical

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146. See, e.g., Pappas, *Right to be Regulated*, *supra* note 16, at 116–17 (discussing taxi medallion cases).

147. See Pappas, *The Armstrong Evolution*, *supra* note 144, at 44 (discussing the problem of identifying comparators to assess the concentration of a burden).

148. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

149. *Id.* at 435.

150. See discussion *supra* Sections II.C–II.D.

extension of prospective disclaimers for traditional interests. For example, the government could exercise eminent domain over fee simple ownership of a property and then immediately resell that property with all attributes of fee simple ownership except with a prospective disclaimer of takings protection. The difference in price should be the expected value of the takings protection (about 0.5–1.2%). This would be the equivalent of simply exercising eminent domain over only the takings protection and paying compensation in the amount of the expected value of the takings protection.

### 3. *Voluntary Sale of Takings Protection*

At this point, there is little reason to doubt that a party could also voluntarily sell takings protection to the government. While one might conceive of arguments against alienating constitutional rights, those seem inapplicable in the case of property interests where a sale can be forced for just compensation. Additionally, since a property owner could voluntarily alienate such rights through common law means, such as by relinquishing takings protection for flooding by selling a flowage easement to the government,<sup>151</sup> there is little reason to prevent voluntary alienation of takings protection.

## III. POLICY CONSIDERATIONS FOR PROPERTY DISCLAIMERS

Assuming property disclaimers are constitutional and enforceable, the question remains whether they are a good idea. This Part considers the policy arguments in favor of and against property disclaimers. It ultimately concludes that generalized property disclaimers are ineffectual and undesirable, and that alternate arrangements, such as leases or targeted contract measures, can be at least as effective without creating the same political process risks.

### A. *Legislative Flexibility, or Not*

One of the primary potential benefits that property disclaimers provide is legislative flexibility—the flexibility to alter disclaimed property interests or to experiment with new forms of disclaimed interests. However, closer examination suggests that these flexibility gains are likely to be small and likely inconsequential.

Protected property rights create stable expectations, and while such stability can be a major benefit, stability also entrenches programs and policies, thereby constraining future legislatures.<sup>152</sup> Overcoming this entrenching effect comes at a price; to substantially alter protected property rights, legislatures face

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151. See generally *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012).

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

the monetary cost of Fifth Amendment takings compensation in eminent domain proceedings<sup>153</sup> as well as the political cost of altering expectations. Thus, protected property makes legislative flexibility costly.

Disclaiming property protections lowers the cost of legislative flexibility. If enforced, property disclaimers remove constitutional protections, eliminating the monetary cost of Fifth Amendment compensation.<sup>154</sup> Moreover, property disclaimers can shape expectations and potentially decrease the political cost of altering interests, though this decrease may be relatively small.<sup>155</sup>

In theory, this lower price of legislative flexibility will allow legislatures to be more active in updating policies or adapting to changing conditions. Additionally, the lower cost of flexibility could aid legislatures in experimenting or innovating with new policies, confident that the cost of abandoning the experiment would not be high. As a result, legislatures might use property disclaimers to introduce more pollution trading schemes, flood control projects, or other programs, all without the worry of creating future takings liability. With cheap flexibility, legislatures might be more inclined to try new things. Finally, this cheap flexibility may allow for greater democratic responsiveness because legislatures can more easily implement the wishes of their constituents and be free from the entrenchments created by past legislatures.<sup>156</sup>

However, in considering the flexibility benefits of property disclaimers, it is important to bear in mind that such disclaimers do not create legislative flexibility when none previously existed. Rather, they simply lower the cost of flexibility. So, to appreciate the true flexibility gains from property disclaimers, one must consider the marginal difference in flexibility likely to result from this lower cost. This raises a couple of important follow-up questions. First, how much do property disclaimers reduce the cost of flexibility, both in terms of monetary cost and political cost? And second, how price-sensitive are legislators when it comes to policymaking, or, put another way, what is the elasticity of supply for legislative action? Moreover, in considering this legislative price sensitivity, it also bears considering price sensitivity in terms of monetary costs of takings compensation versus political costs of altering interests. The following subsections will address these questions and ultimately conclude that property disclaimers are unlikely to result in meaningful legislative flexibility gains.

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153. *Id.* at 917–19.

154. As discussed *supra* in Section II, retrospective disclaimers may require compensation for the disclaimer itself, but once the property is disclaimed, subsequent alterations should generate no takings liability.

155. See discussion *infra* Section III.A.1.

156. See, e.g., Serkin, *supra* note 152.



1. *How Much Do Property Disclaimers Reduce the Cost of Flexibility?*

In terms of monetary costs, property disclaimers mean that the monetary cost of compensation liability falls to zero.<sup>157</sup> But in terms of the impact on legislative flexibility (meaning relevant legislative flexibility that would be impacted by the disclaimer), one must ask what the previous cost was. Was this fall to zero a great change from the previous cost or a relatively small one? The change in monetary cost (the marginal difference) is likely more important than the absolute cost for assessing the impact on legislative flexibility.

To assess the amount that property disclaimers change the cost of relevant legislative flexibility, we must estimate the expected monetary cost of compensation (i.e., the expected cost before the disclaimer). Fortunately, the estimate of the market value of takings protections can also offer insight into the legislature's expected cost of compensation. As discussed in Part I, an intentionally overestimated value for takings protection is roughly 0.5–1.2% of property value less costs.<sup>158</sup> This expected value to the interest holder correlates with the expected cost to the government because this is an expected value of what the government would be liable to pay.<sup>159</sup> Accordingly, the expected cost to the government can be estimated (overestimated, actually) at 0.5–1.2% of the relevant property value *plus* any difference in associated administrative or litigation costs.<sup>160</sup> Thus, property disclaimers likely reduce the monetary cost of legislative flexibility by no more than (and probably much less than) 0.5–1.2% plus any difference in associated administrative or litigation costs.

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157. See discussion *supra* note 154.

158. See *supra* Section I.C.

159. One might object to this estimated figure because it is based on an assumption of 10–20% probability of a claim arising, and, one might argue, since the legislature knows it will be taking action that might lead to a takings claim that probability should increase. See Appendix, *infra*. However, it does not seem outlandish to retain this probability, which implies that either one in ten (10% probability) or one in five (20% probability) legislative actions will lead to a colorable takings claim (overestimated as one with a 60% chance of success). While this calculation may not be as much of an overestimate from the legislature's point of view as from the interest holder's point of view, it still retains a generous margin for erring on the high side.

160. The Article does not attempt to estimate these costs but does offer a few notes to consider. First, even when property is disclaimed, the relevant costs would not go down to zero and probably would not go down substantially since some claims would likely have to be defended and there would be administrative work involved. Thus, the relevant difference in costs would mainly represent the amount of avoided litigation cost. Additionally, even with full takings protection in place, there is reason to believe that the government's realized costs of defending a takings claim will be lower than an interest holder's costs in pursuing the claim because governments may have full-time attorneys who would be salaried regardless of the claim and who, as repeat players, may be more efficient in addressing these claims. Cf. Krier & Sterk, *supra* note 140, at 64–65 (hypothesizing about the impacts of attorneys working by the hour and repeat government litigators).

In addition to the decrease in monetary costs, property disclaimers may also lower political costs associated with legislative flexibility. However, the difference, if there is any, may be quite small. In theory, property disclaimers will influence parties' expectations in their disclaimed property interests, leading them to appreciate the risk that rights may be altered or destroyed and to capitalize that risk into their decisions. This might make one think that holders of disclaimed property, such as federal grazing permits, would be prepared for the possibility that these rights could be altered and would seek less of a political price for the alteration, but both economic theory and actual behavior suggest the contrary.

Holders of disclaimed property interests have incentives to impose high political costs for altering their interest. For example, public choice analysis suggests that parties with uncertain (i.e., unprotected) valuable interests will invest up to the value of the interests to secure them.<sup>161</sup> As a result, we can expect substantial resources to be deployed toward lobbying or other political efforts to secure and hold onto disclaimed property interests,<sup>162</sup> thereby raising the political cost (or at least raising the perceived political cost) of altering the interests. Moreover, property disclaimers do not seem to temper reliance on these interests, and parties invest substantially in interests that are specifically disclaimed as property.<sup>163</sup> Even with property disclaimers, when such interests are altered or revoked their holders are likely to experience demoralization costs<sup>164</sup> and endowment effect losses.<sup>165</sup> Regardless of property disclaimers, those suffering these costs and receiving no compensation are likely to express dissatisfaction at the ballot box and impose political costs on their legislators.

Consistent with these theories, holders of disclaimed property have indicated that any alteration of these interests will come at political cost. For example, parties holding federal grazing permits have engaged in extensive lobbying efforts to make those interests more durable<sup>166</sup> and have made clear that there would be a political price to pay for altering these interests. One suspects that political costs also explain why patent march-in rights under the Bayh-Dole act

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161. See Gordon Tullock, *The Welfare Cost of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 226, 232 (1967).

162. See *id.*

163. See discussion *supra* Introduction.

164. See Michelman, *supra* note 85.

165. See Blume & Rubinfeld, *supra* note 86.

166. See Debra L. Donahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 762 (2005); Mark Fina & Tyson Kade, *Legal and Policy Implications of the Perception of Property Rights in Catch Shares*, 2 WASH. J. ENVTL. L. & POL'Y 283, 317 n.164 (2012) (noting that due to the political clout of grazing interests, conservation efforts have used permit buyback systems instead of regulatory changes to reduce grazing intensity); Dale A. Oesterle, *Public Land: How Much Is Enough?*, 23 ECOLOGY L.Q. 521, 527 (1996) (discussing the extensive lobbying efforts surrounding public land uses).

have never been used,<sup>167</sup> and why the federal government has prospectively compensated rather than restricted disclaimed water rights.<sup>168</sup> Moreover, throughout American history since the New Deal, there are very few examples of drastic alteration or revocation of any entitlement interests, even if only protected by Due Process.<sup>169</sup> Taken together, these examples show that even in the absence of takings protections, political forces make it uncommon for legislatures to substantially alter valuable interests. As a result, the political costs of flexibility for disclaimed property rights might be just as high as those for protected property rights.

In sum, it appears that property disclaimers may have a relatively small impact on the price of legislative flexibility, reducing monetary cost by 1.2% or less and not appreciably reducing political cost.

## 2. *How Price-Sensitive Are Legislatures?*

Even if property disclaimers do not reduce the cost of legislative flexibility greatly, that reduction may still impact behavior. Or it may not. It depends on how responsive legislators are to cost changes. Moreover, legislators may respond differently to changes in monetary costs versus political costs. This section offers some thoughts about legislative sensitivity to the monetary and political cost changes brought about by property disclaimers. In the end, property disclaimers may well have only a small impact on legislative flexibility because we might expect most legislators to be relatively inelastic, and the changes in monetary and political cost are relatively small.

At the outset, there is reason to expect that the supply of legislative action is relatively inelastic. Many factors other than price (such as party platforms—particularly ones premised on smaller government or a lack of action, competing priorities, legislative session limits, election years, or procedural rules) will influence the output of legislative action. Moreover, legislatures are in a non-competitive market for legislative action, and price inelasticity can be common in non-competitive markets. Finally, the political costs of action are likely higher than the costs of inaction,<sup>170</sup> which means a reduction in cost is still unlikely to drive more action. The same observations would apply to individual

167. See, e.g., John M. Clerici & Phillip Bradley, *Federal Gov't Won't March in When It Comes to Drug Prices*, LAW360, <https://perma.cc/Z592-RUV8> (noting that “at no time since the enactment of the Bayh-Dole Act has the [National Institute of Health] exercised its march-in rights”); Eberle, *supra* note 46.

168. See Pappas, *Singled Out*, *supra* note 89, at 139.

169. Exceptions may include the changes to the food stamps program under President Clinton and, potentially, the alteration of the Affordable Care Act under President Trump.

170. Cf. MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 358 (2009) (“Economists have predicted that the incentive structure faced by bureaucrats will lead to unduly risk-averse decision-making . . .”).

legislators, as opposed to the legislature as a whole. Individual legislators are also likely to be relatively price inelastic because they face competition only during election years, and they may have the advantage of “safe seats” wherein they face little challenge.

In terms of monetary costs, legislatures and individual legislators are likely to be relatively insensitive to prices (and thus the supply of legislative action will be inelastic) because legislators do not bear those costs directly.<sup>171</sup> Thus, the costs may not have the same incentive effect.<sup>172</sup> It is worth recognizing that sensitivity to monetary cost may vary based on the particular government entity at issue. For example, smaller municipalities are likely more sensitive to monetary costs than are larger municipalities, states, or the federal legislature because small municipalities cannot as easily distribute monetary costs across their tax bases.<sup>173</sup> Nonetheless, it appears likely that in most cases the supply of legislative action is inelastic. Thus, property disclaimers, which likely reduce the monetary cost of legislative flexibility by less than 0.5–1.2%, would not have a great impact on the level of government action.

It is also likely that property disclaimers will not have a sufficient impact on political costs to motivate greater use of legislative flexibility. Legislatures may ultimately be more sensitive to political costs than monetary costs,<sup>174</sup> but as discussed in the previous section, it does not appear that property disclaimers will appreciably reduce political costs.

Accordingly, the legislative flexibility benefits promised by property disclaimers may be illusory. While property disclaimers may reduce the price of legislative flexibility by a small amount, this change in price is unlikely to result in much (if any) actual change in legislative behavior.

### B. *Social Benefits and Social Costs*

Another key consideration for the desirability of property disclaimers is how their social benefits compare with their social costs. This section identifies relevant benefits and costs, and while it does not attempt to quantify or balance them, it does note that the potential benefits of property disclaimers appear generally speculative, whereas the costs are more certain to arise.

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171. For arguments that political actors may respond to political capital more so than monetary liability incentives, see Blume & Rubinfeld, *supra* note 86, at 620–22 (discussing various “fiscal illusion” problems that may lead decision-makers to favor costly projects that create immediate political benefits, particularly if the costs are dispersed or delayed); see also Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

172. See Blume & Rubinfeld, *supra* note 86, at 620–22; Levinson, *supra* note 171, at 346.

173. See, e.g., Christopher Serkin, *Insuring Takings Claims*, 111 Nw. U.L. REV. 75, 79 (2016).

174. See Blume & Rubinfeld, *supra* note 86, at 620–22; Levinson, *supra* note 171, at 346.

A major potential benefit of property disclaimers is that they convey information cheaply, and this potentially makes disclaimed property interests more affordable. The lower cost of information and market entry could generate the general social benefits associated with less expensive goods, and property disclaimers could even lead to more cost-effective investments in property. Additionally, there is a remote possibility that property disclaimers could even yield some distributive social justice benefits. However, as a counterbalance to these conceivable gains, property disclaimers almost certainly invite recurrent socially wasteful rent seeking.

As a potential benefit to individuals, property disclaimers provide clear notice and cheap information about the unprotected status of disclaimed property. Explicit disclaimers set expectations about constitutional property protections (or lack thereof) more clearly and predictably than does the murky, fact-specific takings jurisprudence.<sup>175</sup> Moreover, disclaimers convey this information relatively cheaply. Explicit disclaimers and clear precedent about their enforceability will likely reduce litigation costs as compared to the pursuit of individual takings cases. Thus, property disclaimers allow buyers to identify, price, and capitalize the risk of government interference more easily. This is most obviously true for prospective disclaimers, which offer notice from the inception of the interest, but retrospective disclaimers too can convey information cheaply and lead to capitalization of risk. Such retrospective disclaimers may generate a loss in value for the immediate holder of an interest, though that will not necessarily be the case if property value is below the threshold necessary for takings protection to create any expected value.<sup>176</sup> Beyond that, once a retrospective disclaimer is made, the risk of government interference can be priced and capitalized.

This low information cost and certainty may also help lead to better investment decisions for property. In an influential article, Blume, Rubinfeld, and Shapiro argue the counterintuitive proposition that a lack of takings compensation would actually lead to more cost-effective investments in property.<sup>177</sup> They reason that the prospect of compensation for takings can create a moral hazard in the same way that insurance can create a moral hazard by providing incentives to overinvest without taking appropriate consideration of potential

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175. The takings jurisprudence is, famously, a muddle. See, e.g., Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

176. See *supra* Section I.C (estimating that a property must be worth at least \$87,719.30 before the expected value of takings protection is greater than \$0).

177. See Lawrence Blume, Daniel L. Rubinfeld & Perry Shapiro, *The Taking of Land: When Should Compensation be Paid?*, 99 Q.J. ECON. 71 (1984).

losses.<sup>178</sup> This assertion is certainly contested and has spurred a large response in academic literature.<sup>179</sup>

However, if Blume, Rubinfeld, and Shapiro are correct, then property disclaimers would provide a platform for putting their theory into practice. By providing clear, prospective information about the lack of available compensation, property disclaimers would nullify the potential moral hazard effect of takings protections and would remove the incentive for overinvestment in property.

In addition to these informational benefits, property disclaimers may also make some interests cheaper, thereby making them more accessible to marginal would-be purchasers. However, the threshold value means that disclaimed property should not be discounted for a lack of takings protection until the parcel price reaches the minimum value necessary to benefit from takings protection.<sup>180</sup> Until then, the expected value of takings protection is \$0, so there should be no discount for a lack of such protection. Nonetheless, within this higher price range there would likely be marginal investors for whom the potential disclaimed property discount (0.5–1.2% of property value less costs) makes the interest more accessible.

A corollary potential benefit, and one that could possibly reach more impoverished socioeconomic groups and thus contribute to distributive social justice, is that the lower cost of disclaimed property interest could be passed along to consumers. For example, this could be the case for a firm that purchases pollution credits to manufacture consumer products, a taxi medallion investor who leases out the medallion to drivers, or a fisheries quota purchaser who leases shares to fishermen.<sup>181</sup> In each of these instances, any cost savings for the buyer could potentially be passed through to the consumer or lessee, depending on the elasticity of demand for the product and the amount of competition in the market. Though this is highly speculative, if such savings are passed on to consumers, they may particularly benefit those with less wealth because the marginal cost difference will be more meaningful there.

Another potential distributional benefit of disclaimed property is that it may provide both private incentives and public enforcement mechanisms to prevent over-consolidation or monopoly in certain sectors. For example, in the

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178. *See id.*

179. *See* THOMAS J. MICELI, *THE ECONOMIC THEORY OF EMINENT DOMAIN* 33, 85–112 (2011) (providing an overview of the large literature that has arisen in response to Blume et al., *supra* note 177).

180. *See supra* Section I.C (estimating that a property must be worth at least \$87,719.30 before the expected value of takings protection is greater than \$0).

181. Incidentally, this could also be a situation where the ultimate lessee might protect against the risk of expropriation. For example, a fisherman could, instead of buying a quota, lease a quota from another private entity and pay a premium to include in the lease a guarantee of compensation from the private party if the underlying quota is revoked.

case of fishing quotas, fishing communities and consumers have expressed concerns that large corporations will buy up all or most of the quotas for some fisheries, thereby driving smaller fishermen out of the market and exercising monopolistic price control over the products from that fishery.<sup>182</sup> Property disclaimers might help alleviate these concerns. For example, since disclaimed property rights are unstable and subject to political redistribution, would-be consolidators or monopolists may hesitate to invest heavily enough to consolidate such unstable interests because this would also consolidate their risk. Such a monopolist would be heavily exposed to the risk of expropriation. Thus, property disclaimers may provide the opportunity for rational, risk-discounted investment while also creating the private incentives to diversify investment rather than monopolize risky assets. Additionally, even if such private incentives did not prevent politically unpopular consolidation or monopolization, the property disclaimers would allow a political check on the monopoly and would obviate the need to pay compensation for redistributing interests. This combination of private incentives and political checks could potentially serve a distributive function by allowing small business to stay in the market and preventing monopoly pricing.

However, this also comes with the flip side risk. With disclaimed property, a sophisticated consolidator could incorporate the takings risk into asset prices and potentially buy out smaller operations who are less able to assess and bear the risk. For example, a hypothetical small operator, whose livelihood is based on a single fishing quota,<sup>183</sup> will have nearly 100% of her assets at risk of expropriation. Alternatively, a hypothetical large consolidator could buy up all of the relevant fishing quotas and still have that fishing-quota portfolio represent only 25% (or less) of the assets of the consolidating entity. Under such a scenario the relative levels of risk exposure differ, and here the large consolidator could likely weather an expropriation, whereas the small operator likely could not.

Moreover, a sophisticated consolidator might be better positioned politically to defend disclaimed property interests, thereby reducing the expropriation risk altogether and counteracting any potential political check on over-consolidation. Similarly, smaller operations might be less able to politically defend their entitlements and risk expropriation and redistribution to consolidated interests. As a result, even given the same disclaimed property interest (e.g., the same fishing quota), a large consolidator may experience a lower expropriation risk than does a small operator.

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182. For a short summary of related concerns, see BUCK, *supra* note 1.

183. Note that the small operator's asset, here the single fishing quota, would have to be sufficiently valuable (estimated as at least \$87,719.30) for the ex ante expected value of takings protection to be greater than \$0. See *supra* Section I.C. However, ex post (e.g., after a regulation is imposed or an expropriation occurs) the value of takings protection rises (and, thus, the threshold value drops) because the Probability of a Claim has increased. See *infra* Appendix C.5.

Given the uncertainties involved, it is impossible to say, *ex ante*, that disclaimed property necessarily has any social justice benefit. In fact, it also leaves the potential for regressive effects. However, in the right situations of elastic demand, competitive markets, and political opposition to consolidation, property disclaimers demonstrate some potential for marginal distributive social justice gains.

For all these uncertain potential benefits, property disclaimers also come with a predictable social cost: wasteful rent seeking. As noted above, public choice theory predicts that when an individual seeks to secure an uncertain interest, incentives can lead her to invest up to the value of that interest to secure it.<sup>184</sup> Such expenditures are termed “rent dissipation” because the efforts to secure an interest will dissipate its value.<sup>185</sup> Rent dissipative expenditures are considered nonproductive and wasteful because instead of enhancing social welfare through improvements, advances, or increased production, they dedicate resources to capturing, protecting, or prolonging existing entitlements.<sup>186</sup>

“Rent seeking” is often used to describe a specific type of rent dissipative activity wherein one seeks to secure benefits through the political arena and property disclaimers particularly invite such rent seeking. Because disclaimed property interests are uncertain—secured or altered only through political action—interest holders who wish to retain them will wastefully invest in doing so through lobbying, litigation, or both.<sup>187</sup> This is proven out by the examples discussed earlier. Grazing permit holders have engaged in rent seeking and successfully secured their interests, whereas taxi medallion holders have engaged in rent seeking but failed to secure their interests. In both cases, there was socially wasteful rent dissipative behavior.

No doubt property disclaimers will encourage rent dissipation. Moreover, they will continually encourage such behavior because disclaimed property, by its nature, will continually be subject to political forces. Thus, even if interests are secured in one round of rent seeking, a whole new round of such rent dissi-

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184. Joseph M. Jadow, *Monopoly Rent Seeking under Conditions of Uncertainty*, 45 PUB. CHOICE, 73, 88 (1985) (surveying economic scholarship on the likely expenditures and amount of waste involved in monopoly rent seeking, and concluding that while the dissipative expenditures on rent seeking likely depend on institutional conditions and number of rent seekers).

185. *See id.*

186. *See id.* at 434; James M. Buchanan, *Rent Seeking and Profit Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 3 (James M. Buchanan, Robert D. Tollison & Gordon Tullock eds., 1980).

187. Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1442 (2010). Law and economics scholar Todd Zywicki has suggested a similar theory, casting takings protection (and “just compensation” in particular) as a measure to avoid rent dissipation by reducing incentives to defend property rights through expenditures on litigation, public relations, and political activity. *See Q&A with Todd Zywicki on Takings Law and Public Choice*, PROP. & ENV'T RESEARCH CTR.: THE PERCOLATOR BLOG, <https://perma.cc/9K89-7VGU>.



pative behavior will be necessary when the next political challenge arises. Disclaimed property is never secure, so it presents a constant incentive for rent seeking. For example, while grazing permit holders have thus far successfully mobilized political force to retain their interests, they cannot rest. Rather, they must continue rent seeking because their interests are no more permanent than they were previously. The interests are still disclaimed and still open to political expropriation, so grazing permit holders will have to expend resources in political battle for as long as they perceive challenges to these interests. Thus, the rent-dissipative costs of property disclaimers are predictable and recurring social costs.

The important follow-up question is whether property disclaimers will induce more rent dissipative behavior than would otherwise occur. Constitutionally protected property too can induce rent dissipative behavior, both through the litigation of takings claims<sup>188</sup> and through prospective lobbying efforts to forestall potential regulations on property. This Article cannot definitively assert that property disclaimers would lead to a net increase in rent dissipation, but continual rent seeking is almost certain to accompany property disclaimers, and the recurring nature of these costs may well cause a net increase.

### *C. Retention of Public Resources*

A final argument for property disclaimers is that they are desirable for the retention of public resources. Often disclaimed property involves either public resources (such as public lands or fisheries) or some government regulatory scheme (such as taxi medallions). While the government may wish to encourage productive use of these resources, it may not want to fully alienate them or engage in a “giving” by conferring public assets into private hands.

Such an inclination for retention of public resources may be well founded. It certainly relates to the concept of the public trust, and it may even serve political process ends by ensuring that public resources are not alienated to enrich the politically powerful. However, property disclaimers are not the only, or even necessarily the most effective, vehicle for accomplishing such retention of public resources.

For example, public resources could be retained via forms of constitutionally protected property that have limited duration, such as leases or present possessory interests. Such leases could be for fixed terms (a tenancy for years) or presumptively renewable but terminable upon notice (a periodic tenancy). Alternately, the government could grant present possessory interests in resources (such as life estates or defeasible fees) while retaining the future interests. Under any of these forms the government could retain public resources as effec-

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188. Not all claims may be purely wasteful. Some may create the public benefit of creating precedent that guides future behavior.

tively without courting constitutional baggage, potential political process abuses, and perverse incentives.

*D. The Desirability of Property Disclaimers*

Based on the foregoing analysis, this section concludes that property disclaimers are generally ineffective and ultimately undesirable as a policy tool. It appears that property disclaimers are likely to have little positive effect, and they create a risk of crippling losses for particularly vulnerable groups. This leaves property disclaimers with little to recommend them.

As the previous sections have detailed, property disclaimers are unlikely to appreciably deliver on their supposed benefits. Their impact on legislative flexibility will likely be negligible since the disclaimers should do little in reducing monetary cost and even less in reducing political costs. Additionally, even if property disclaimers could provide some speculative marginal social benefits, these will be accompanied (and potentially outweighed) by recurring wasteful rent seeking. Finally, leases or other property forms can accomplish similar ends without the same problems.

Moreover, property disclaimers invite the risk of political process abuses that compromise constitutional and societal principles of fairness and that could be particularly ruinous to disadvantaged groups. While takings protection may not have a high market value from an *ex ante* perspective, it does impose judicial checks on expropriation, and such protection is valuable indeed for interest holders who find themselves in the political minority.

Ultimately, property disclaimers are a risk allocation device. They shift risk of changed situations from the government (who might have to pay compensation for altering property interests) to the disclaimed-property holder (who would bear the cost of a change that revokes her interest). However, it is worth examining what types of risk are acceptable to shift. There is no particular concern with provisions shifting risks related to uncontrollable natural conditions. Thus, a lease or water delivery contract that shifts the risk of drought, for example, seems perfectly consistent with the Fifth Amendment. Some such provisions were at issue in the Klamath litigation, where contracts specifically shifted drought risk to the contract holder. This does not appear to raise significant Fifth Amendment concerns. After all, the Fifth Amendment does not require the government to be a general insurer against risk. However, general property disclaimers shift the risk of political expropriation from the government to interest-holders. This risk of political expropriation is exactly what the Fifth Amendment was meant to guard against, and even if such shifting of political risk is constitutional, it appears undesirable.

## CONCLUSION

Property disclaimers remove judicial protections against governmental expropriation of valuable interests, substituting political checks as the sole barrier against political abuses. In doing so, such disclaimers sidestep the Fifth Amendment's protections and contravene its basic purpose. This raises significant political process concerns over majoritarian or factional tyranny, but the Supreme Court has implied that such disclaimers are nonetheless enforceable. This result may represent a compromise of Fifth Amendment principles to accommodate positivism or a recognition that somewhat similar results could be achieved through common law licenses. The exact justification is unknown, but under current precedent such disclaimers are apparently constitutional. If retroactive, however, property disclaimers must require payment of compensation.

Given that property disclaimers are likely enforceable, the remaining question is whether they are an advisable and effective policy tool. It seems that they are not. While they may not greatly diminish the value of disclaimed interests, they appear not to deliver much actual legislative flexibility either. Moreover, while they might potentially deliver some marginal social benefits, they also carry substantial social costs in the form of recurrent rent seeking. Finally, protected property forms can accomplish the same results as property disclaimers without compromising Fifth Amendment principles. As a result, this Article concludes that property disclaimers are an undesirable and ineffective policy tool, particularly in light of the great risk of political abuse that they create.

APPENDIX: ESTIMATING THE MARKET VALUE OF CONSTITUTIONAL  
PROPERTY PROTECTION

This Appendix discusses the methodologies and underlying assumptions for the overestimated valuation of takings protection as worth 0.5–1.2% of property value less expected litigation costs.

*A. Approaches and Assumptions*

For this value estimate, it is necessary to establish baseline approaches and assumptions. First, this estimate will focus on the value of Takings Clause protection, with the assumption that the more robust Takings Clause protection will also capture most of the market value of the Due Process protections.<sup>189</sup>

Second, this Part will estimate the *market value* of constitutional property protection rather than subjective values in such protections. Thus, it will attempt to estimate how much the market price of an interest decreases when property disclaimers are in place. This approach essentially treats constitutional property protections as equivalent to an insurance policy that protects against the risk of a government action that substantially interferes with or revokes a property interest. It will estimate the difference in market value between property protected by this constitutional insurance policy versus property with no insurance.<sup>190</sup> This difference should yield the cost of the risk, which should be the same as the market value of the constitutional protection.

There are a few reasons for this focus on market value. First, this approach is consistent with the valuation implicit in constitutional property protections because takings compensation is itself tied to market value and does not include subjective value. Second, estimating subjective value is nearly impossible. That said, this estimate does not assert that subjective value is unimportant to the analysis of property disclaimers, and the body of the Article considers important subjective values.

*B. Natural Experiment*

To find the market value of constitutional property protections, ideally one would look to actual market prices. For example, if one could compare the market prices of similar interests that could be purchased either as protected property or disclaimed property, then one could isolate the value of the property protections. Fortunately, there are examples of such interests in the form of grazing rights, which can be purchased from private parties (as protected property) or from the federal government (as disclaimed property). However, this

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189. One might conceive of values in due process independent of the Takings Clause protections, such as market or subjective values in the procedural rights themselves.

190. Cf. Serkin, *supra* note 16, at 393.

does not provide an informative natural experiment because too many other variables impact the price of different grazing rights to allow for meaningful conclusions about the market value of the constitutional property protections.<sup>191</sup>

For example, the market prices of private grazing arrangements, which presumably enjoy constitutional property protection, are themselves highly variable, ranging from \$8–\$23 per unit based on factors like location and quality.<sup>192</sup> This variability alone makes any comparison challenging, but a greater impediment comes from the fact that 98% of federal grazing lands (the comparable disclaimed property) are priced not according to market value but rather by a formula dictated through executive order.<sup>193</sup> This order intentionally prices federal grazing access well below market value as a means of supporting the livestock industry,<sup>194</sup> holding the price of these interests at \$1.43 per unit.<sup>195</sup> While a small percentage of federal grazing land is governed by market price, this too provides little opportunity to isolate the value of constitutional property protections. For this federal grazing land, the price differs widely based on other factors such as “location, range condition, and accompanying in-kind services,” ranging from \$0.29–\$112.50 per unit.<sup>196</sup> In fact, for much of this federal land, the price per unit actually exceeds the average price per unit for grazing on private land.<sup>197</sup> Obviously, this is attributable to factors other than constitutional property protection, since it is difficult to imagine that a lack of constitutional protection would increase the market value of grazing interests. Thus, while comparing grazing interests might initially appear to provide a useful natural experiment, it ultimately offers no meaningful insight regarding the market value of constitutional property protections.

### C. *Expected Value*

As a second-best alternative to a natural experiment, one might try to estimate the expected value of takings protection using an approach similar to assessing the expected value of a lawsuit. This approach appears applicable here because the market value of takings protection is largely based on the expected value of a takings lawsuit.

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191. That is at least the case for this author, who lacks the skill set to collect and analyze data in any way more sophisticated than that presented here.

192. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 108, at 40. The average price was \$13.40 per unit, *id.*, but that is not necessarily a helpful number to compare either.

193. *See id.* at 2, 38–40.

194. *Id.* at 38–39.

195. *Id.* at 6–7.

196. *Id.* at 42.

197. *Compare id.* at 40 (noting, in table, that the average price per unit for grazing rights on private ranches in 17 states is \$13.40) *with id.* at 39 (listing, in table, the average price per unit for grazing rights under various federal programs, many of which exceed \$13.40 per unit).

A common methodology for assessing the expected value of a lawsuit is to take the probability of the plaintiff winning the claim ( $P_W$ ) times the expected damages judgment ( $J$ ) less the cost of the lawsuit ( $C$ ).<sup>198</sup> This yields the following formula:

$$\text{Expected Value of Lawsuit} = P_W * J - C$$

Thus, if a plaintiff has a 60% chance of winning a lawsuit ( $P_W = 0.6$ ), the expected damage judgment ( $J$ ) is \$100,000, and the litigation cost ( $C$ ) is \$10,000, then the expected value of the lawsuit is \$50,000. The calculation goes:

$$\text{Expected Value of Lawsuit} = P_W * J - C$$

$$\text{Expected Value of Lawsuit} = 0.6 * \$100,000 - \$10,000 = \$50,000$$

The basic insights of this formula can yield an estimate of the expected value for constitutional takings protection over a given period. The remainder of this section will address the necessary details and considerations for each element of this estimate, but at the broadest level, the key addition to the formula above is the probability of a takings claim arising in a given period ("Probability of a Claim" or " $P_C$ "). By adding this consideration to the formula, one can find the expected value of takings protection over that period ( $V_{\text{period}}$ ) by multiplying the Probability of a Claim ( $P_C$ ) times the Probability of Winning ( $P_W$ ) times the likely awarded Judgment ( $J$ ) less Costs ( $C$ ) times the Probability of a Claim ( $P_C$ ). The resulting formula reads:

$$V_{\text{period}} = P_C * P_W * J - P_C * C^{199}$$

The result will offer an expected value for constitutional protection over that period.<sup>200</sup> The following subsections discuss each element in the formula and then apply the formula.

198. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067 (1989); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971).

199. The equation could also be expressed as  $V_{\text{period}} = P_C (P_W * J - C)$ ; the text uses the expression above because it allows for slightly easier illustration of the calculation.

200. Arguably, this value over the period should be reduced to present value. However, in keeping with the spirit of overestimating takings protections, the estimate will not apply a present value discount.

### 1. Probability of a Claim ( $P_C$ )

This first element of the formula recognizes that the value of takings protection is linked to the likelihood of evoking such protection. Thus, estimating the value of constitutional property protection requires estimating  $P_C$ , the probability of government action that would give rise to a colorable takings claim. This  $P_C$  estimate involves uncertainty over *if* government action will give rise to a claim as well as *when* such a claim might arise. To account for both of these uncertainties, one must conceive of  $P_C$  as the likelihood of a claim arising within a given time period. Here we will use 100 years as the relevant period, but one could certainly use other periods.

This probability estimate is, unavoidably, an estimate. Thus, its precision is subject to limitations, and it represents a highly contestable value. One could approach the estimate based on the number of takings claims filed over a given time period. For example, James Krier and Stewart Sterk recently conducted an empirical study that counted 2,020 takings claims, not including eminent domain cases, from 1979 to 2012.<sup>201</sup> This is an average of 61 cases per year across the entire United States. This gives some information for estimating the probability of a claim arising, though the proper denominator for this figure is unclear. (The total number of property parcels? The total number of property regulations?) Assuming that the total number of property parcels is relevant, the total number of property parcels in the twenty most populous cities in the United States is over 7 million.<sup>202</sup> The total takings claims considered by Krier and Sterk (2,020) over the parcels in the twenty most populous cities (7 million) yields a probability of claim of 0.028% over thirty-three years. Given that some sources have counted over 137 million total parcels in the United States,<sup>203</sup> the decision to calculate the probability of a claim based on only 7 million parcels results in an intentionally enormous overestimation of the probability of a claim.

To add further complication, the probability of a claim is likely linked to the existence of takings protection, at least to some degree. For example, scholars have repeatedly asserted that takings protection marginally diminishes governmental interference with property rights (and thus marginally lowers  $P_C$ ) by raising the monetary and political cost of such interference.<sup>204</sup> As discussed in Part I.C, this can be considered part of the general deterrence value of takings

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201. See Krier & Sterk, *supra* note 140, at 51–53.

202. See *Property Tax Exemption Data for U.S. Cities*, GOVERNING: THE STATES AND LOCALITIES, <https://perma.cc/2LYW-LA7V> (adding the totals from “taxable parcels” and “fully exempt parcels” columns on the left table to derive this figure).

203. See, e.g., Mapping Every Parcel on the Planet, LOVELAND, <https://perma.cc/A25W-MUZP> (aggregating land ownership information and asserting that it has so far assembled over 137 million parcels).

204. See *supra* note 78.

protection. Assuming that takings protection has some general deterrent effect on government interference with property rights, then the absence of takings protection would marginally increase government interference (and thus marginally raise  $P_C$ ). Thus, to estimate the difference in market value between constitutionally protected property and disclaimed property one must estimate  $P_C$  under the condition of no takings protection. That is,  $P_C$  must assume conditions of no takings liability and estimate, under those conditions, the probability of government action that would have given rise to a colorable takings claim if there were takings liability. This marginally raises  $P_C$ , but the question is by how much.

As discussed in the body of the Article,  $P_C$  likely will not change radically even in the absence of takings protection because it will likely not impact government activity levels greatly.<sup>205</sup> This is premised on the reasoning that a similar political price will attach to interference with disclaimed property, such as federal grazing permits, as it would to interference with protected property. Whether legally protected or not, these interests command a political price for alteration or interference. The political prices may not be equal, but the marginal difference may not be great.

Finally,  $P_C$  for different types of property may be different. The  $P_C$  for a standard urban lot may be relatively low compared to the  $P_C$  for a large rural landholding. However, for purposes of this estimate, a generalized  $P_C$  will be used to try to capture an average probability value.

All said,  $P_C$  remains impressionistic and arguable. It provides a theoretically sound approach to valuing takings protection, but practically it relies on a data point that is difficult to discern. Nonetheless, it at least opens the discussion about valuation. Moreover, it need not be precise to offer some insights. For example, one could build in a margin for error by grossly overestimating the probability of a claim arising and choosing a  $P_C$  that nearly all would agree is too high. If the overall estimated value of takings protection remains relatively low despite an unrealistically high  $P_C$ , then the lack of precision in  $P_C$  does not diminish the lessons that can be learned from the valuation exercise.

This Article takes such an approach and assumes a  $P_C$  of 1% over a period of 100 years. This estimate suggests that over 100 years, 1 in 100 properties will have a colorable takings claim arise. Given the number of takings claims to date, this estimate appears outrageously high, even off by multiple orders of magnitude. This is intentionally so to avoid quibbling over the figure. However, out of an abundance of caution, the Article will also consider a  $P_C$  of 2% over 100 years, suggesting that over 100 years, one in fifty properties will have a colorable takings claim.

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205. See discussion of legislative flexibility, *supra* Section III.A.



## 2. Probability of Winning ( $P_W$ )

Though this  $P_W$  element is the same as in the basic formula for expected value of a lawsuit, it is necessary to modify this consideration from the probability of winning a particular lawsuit to the generalized probability of winning some hypothetical takings claim. In an individual case,  $P_W$ , while subjective, is based on analysis of the particular facts of that lawsuit. However, in a generalized ex ante context there are no particular facts from which to estimate the probability of winning. Rather, one must rely on other information, like the overall success rate of similar suits, to assess the probability of winning.

This generalized  $P_W$  will not necessarily correlate to the probability of winning any individual case. It will probably reflect an overly optimistic  $P_W$  for relatively weak cases and an overly pessimistic  $P_W$  for relatively strong cases. However, in the context of valuing takings protection generally, this generalized  $P_W$  is probably more desirable than using the  $P_W$  for any individual case. This is because estimating the market value of takings protection must assume an ex ante perspective, valuing the protection before any particular set of facts emerges. After all, when one considers buying property, one does not know what regulations may occur in the future. Thus, the generalized  $P_W$ , by its nature, considers the uncertain likelihood of a relatively strong or relatively weak case arising.

Finally, one must note that  $P_W$  bears some relationship to  $P_C$ . In fact, they are inversely proportional. The more inclusive  $P_C$  is in counting colorable takings claims, the lower  $P_W$  should be. That is, if  $P_C$  is relatively high because it includes even claims with a relatively low probability of winning, then  $P_W$  will go down because of the increased number of relatively weak cases.

Despite this inversely proportional relationship between  $P_W$  and  $P_C$ , this Article assumes both an unlikely high  $P_C$  and an unlikely high  $P_W$ . It assumes that even with a  $P_C$  of 1% or 2%,  $P_W$  remains 60%, suggesting that plaintiffs will win six out of ten takings claims. Again, this is likely a gross overestimation. In Krier and Sterk's extensive empirical study, they found that success rates for different categories of takings claims varied from 9.9% to 44.1%,<sup>206</sup> and taking these together the average success rate of takings claims overall was 18.53%.<sup>207</sup> This Article applies a 60% success rate (over triple the average, and 15.9% higher than the highest rate observed by Krier and Sterk) as an intentional overestimate to provide for a margin of error.

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206. Krier & Sterk, *supra* note 140, at 59.

207. Relying on Krier and Sterk's table and following their methodology, this average is calculated by dividing the number of claims resulting in "takings" decisions (321) by the sum of all claims resulting in "takings" (321), "no takings" (1131), and "ripeness" (280) decisions (totaling 1732). *See id.*

### 3. Amount of Judgment ( $J$ )

Regarding  $J$ , the only modification to the basic expected value model is how to express this element, whether as an absolute dollar value or as a relative percentage of property value. For purposes of expected takings valuation, it must be as a relative percentage of property value.

In the basic model for valuing a lawsuit,  $J$  represents an absolute dollar value (e.g., \$100,000). However, in the case of valuing takings protection overall, offering an absolute value for  $J$  is both impractical and uninformative. This is because the judgment amount in any successful takings case will vary depending on the total value of the property, the nature of the interest taken, and on what is adjudged to be just compensation. Given all those variables, attempting to conceive of any meaningful, generalizable absolute dollar amount for  $J$  is simply not possible.

However, one can derive a useful, generalizable  $J$  by expressing it in terms of percentage of property value. This makes  $J$  a relative rather than absolute value, thus allowing for generalization across properties. Expressing  $J$  as a percentage of property value provides a common valuation that can be applied to disparate property interests, from fee simple ownership to leases and from land to personal property.

It is possible, and in fact simple, to conceive of  $J$  as a percentage of property value because the most commonly employed takings doctrine, the *Penn Central* test, operates in such terms. The *Penn Central* balancing test considers three factors in determining whether government action arises to a compensable taking: 1) the extent of economic diminution, 2) interference with reasonable investment-backed expectations, and 3) the character of the government action.<sup>208</sup> Case law reveals that economic diminution of 85–95% of the property value may be required to succeed under the *Penn Central* inquiry.<sup>209</sup> Thus, the likely judgment in a successful takings case, which seeks to compensate this loss, should be in the range of 85–95% of the underlying property value. To the extent that this 85–95% is inaccurate, it errs on the high side because lesser judgments will only drag the percentage down. Thus, this Article assumes that  $J = 95\% \text{ of } V_p$ , where  $V_p$  represents the value of the property affected by the taking.

### 4. Cost ( $C$ )

Unlike  $J$ , which is calculated as a relative percentage of property value,  $C$  must be expressed in absolute dollar amount. This is because the cost of a claim

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208. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

209. See Echeverria, *supra* note 140, at 180; Krier & Sterk, *supra* note 140, at 67 n.126 (noting cases finding takings based on high percentages of diminution in value).

will not necessarily vary as a percentage of property value. In fact,  $C$  is probably fairly constant regardless of the underlying property at issue in a takings claim.

Unfortunately, this creates a problem of conflicting units because one part of the formula is expressed in terms of a percentage of property value while another is in terms of an absolute dollar amount. Thus, when applying the formula, this Article expresses some conclusions simply as a percentage of value less costs. This should not damage the underlying insight.

In terms of estimating costs,  $C$  may be higher in takings claims than other contexts because of the costs in time and administrative process involved in the ripening of a takings claim.<sup>210</sup> Moreover, there is no federal requirement to reimburse these costs as part of just compensation.<sup>211</sup> Nonetheless, this Article errs on the side of underestimating costs, and thereby overestimating the value of takings protection. Given that the median cost of civil litigation over real property is \$66,000,<sup>212</sup> we adopt \$50,000 as a cost assumption and hold it constant, despite the likelihood that costs will vary even among takings claims<sup>213</sup> and will rise with inflation.

Finally, it is worth noting that the costs of bringing a takings claim will only come up when such a claim arises. Thus, the formula discounts Costs by the Probability of a Claim ( $P_C * C$ ). This yields the ex ante expected value of

210. See Krier & Sterk, *supra* note 140, at 50 (discussing ripeness and preclusion doctrines applicable to takings claims).

211. See, e.g., AM. BAR ASS'N, CORE KNOWLEDGE: CONDEMNATION, ZONING AND LAND USE 4 (2016), <https://perma.cc/J85P-RUPY>.

212. See Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 COURT STAT. PROJECT 1, 7 (2013), <https://perma.cc/NL5M-243W>.

213. Even though costs will vary among takings claims, in the regulatory takings context it is difficult to envision a route to compensation that does not involve incurring at least some litigation costs. To vindicate a successful regulatory takings claim requires winning a legal proceeding, which requires expenditure of litigation costs. To reprise the insurance metaphor, takings protection is essentially an insurance policy with a litigation-cost deductible (estimated here as \$50,000).

One might argue that in the context of eminent domain a property owner might receive compensation at no litigation cost or at a cost consistently lower than \$50,000. If one were concerned about how this might impact the expected value model, it is possible to model the expected value of such low-litigation-cost eminent domain claims separately from the general expected value model. The basic formula would be the same, but there would be different assumed values for each variable. The Probability of Winning would be effectively 1, and the Cost would be effectively 0. Thus, the expected value of takings protection against such an instance is the Probability of a Claim (here the probability of an unchallenged eminent domain action arising) times the Judgment (here 100% of the fair market value of the property). This means that the expected value would simply be the probability of an unchallenged eminent domain action, expressed as a percentage of the property value. However, given the remote probability, ex ante, of an unchallenged eminent domain action arising, the expected value attributable to this would be low indeed. The model has omitted this as likely negligible and otherwise sufficiently accounted for in the other overestimates of value.

costs, which the model deducts from the ex ante expected value of the judgment.

### 5. *Applying the Expected Value Formula*

This Section applies the elements discussed above to the expected value formula. As noted in the previous sections, the values for these elements involve contestable assumptions. However all have been substantially overestimated to err on the side of a higher value for takings protection. The formula considers two different values, 1% and 2% for Probability of a Claim ( $P_C = 0.01$  and  $P_C = 0.02$ ), and otherwise assumes the Probability of Winning is 60% ( $P_W = 0.6$ ), Judgement will be 95% of property value ( $J = 0.95 * V_P$ ) where  $V_P$  represents the value of the property affected by the taking, and Costs will be \$50,000 ( $C = \$50,000$ ). Applying the values, the formulas yield the following results:

$$V_{100} = P_C * P_W * J - P_C * C$$

For 1% Probability of a Claim ( $P_C = 0.01$ ):

$$V_{100} = 0.01 * 0.6 * 0.95 * V_P - 0.01 * \$50,000$$

$$V_{100} = 0.0057 * V_P - \$500$$

$$V_{100} = 0.57\% V_P - \$500$$

For 2% Probability of a Claim ( $P_C = 0.02$ ):

$$V_{100} = 0.02 * 0.6 * 0.95 * V_P - 0.02 * \$50,000$$

$$V_{100} = 0.0114 * V_P - \$1,000$$

$$V_{100} = 1.14\% V_P - \$1,000$$

This demonstrates that even with assumptions geared toward substantially overestimating the value of takings protection, the protection over a 100-year period is still only worth 0.5–1.2% of property value, less litigation costs.

As noted in the body of the Article, with this formula one can estimate the threshold property value below which takings protection is valueless ex ante (i.e., where the expected value of the claim does not exceed the expected value of the estimated \$50,000 litigation cost). Assuming either a 1% Probability of a Claim ( $P_C = 0.01$ ) or a 2% Probability of a Claim ( $P_C = 0.02$ ), then takings protection is valueless unless a property meets a threshold value of

\$87,719.30.<sup>214</sup> Importantly, this is the threshold value from an ex ante perspective and considering only the expected value of takings protection. When the facts of a particular takings case arise, the expected value of that particular case may differ and thus would present a different threshold value for pursuing a claim in that particular case.<sup>215</sup>

While one could change the assumption about litigation cost ( $C$ ) (or, for that matter, change any other assumption about any other element in the formula) and reach a different threshold value, the general insight remains. Though the assumptions in this valuation have gone to great lengths to avoid quibbling over contestable figures and to grossly overestimate the value of takings protection, for most properties the value of takings protection is so low that it is negligible. For more expensive properties, the value of takings protection rises, but even then it represents no more than 0.5–1.2% of property value, less costs.

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214. To determine the minimum threshold property value at which the expected value of takings protection is greater than zero, we solve the inequality  $0 < P_C * P_W * J - P_C * C$ . Expanding the terms, we get  $0 < 0.01 * 0.6 * 0.95 * V_p - 0.01 * \$50,000$ . Solving the inequality for  $V_p$  yields  $V_p > \$87,719.298$ .

215. For example, though the model suggests that the ex ante expected value of takings protection is \$0 for a parcel worth \$87,000, after a particular regulation is imposed, the ex post value of takings protection may be positive and even substantial for such a parcel. Consider a hypothetical parcel worth \$87,000 that becomes subject to a regulation that would decrease its value by \$80,000. In such a case, if the probability of winning a takings claim also increases to 80%, then the same expected value model shows the claim has positive value. As demonstrated below, this is because ex post (in light of the imposed regulation) the Probability of a Claim has gone to 100% and the Judgment has gone to \$80,000, and the Probability of Winning has gone to 80%. The calculation is as follows:

$$V = P_C * P_W * J - C * P_C$$

$$V = 1 * 0.6 * \$80,000 - \$50,000 * 1 = \$64,000 - \$50,000 = \$14,000$$

Importantly, however, this ex post expected value of \$14,000 now no longer describes the value of takings protection in general but rather describes only the expected value of a particular takings claim for a particular property subject to a particular regulation. As noted *supra* in Appendix B.2, to derive a generally applicable expected value estimate of takings protection requires the ex ante perspective.

