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PROPERTY AS A FORM OF GOVERNANCE

October 1–2, 2015

Conference Authors

Brigham-Kanner Property Rights Prize Winners

Frank I. Michelman

Michael M. Berger

Joseph William Singer

Panelists

Jan G. Laitos

Peter S. Menell

Laura S. Underkuffler

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PROPERTY AS A FORM OF GOVERNANCE
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SHOULD WE CALL AHEAD?
PROPERTY, DEMOCRACY, & THE RULE OF LAW[†]

JOSEPH WILLIAM SINGER[*]

Some in my band are gay & we have 2 gigs in your state next month. Should we call ahead to make sure the hotel accepts us all? Or maybe I should fire my gay band members just to be on the safe side.[1]

Audra McDonald

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.[2]

Justice Arthur Goldberg

Americans hate regulation. We don't like being told what to do. We value our freedom, and regulations stop us from doing things we want to do. When you are subject to a regulation, you feel anything but free. But if we hate regulation so much, why do we have so many of them? Why don't we just get rid of them all? That is a puzzle. Maybe we don't hate regulation as much as it seems. Maybe we have regulations because we *want* them. How crazy is that? But when you

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* Bussey Professor of Law, Harvard Law School. This Article is a revised version of the Kormendy Lecture delivered on April 27, 2015 at Claude W. Pettit College of Law at Ohio Northern University. That lecture explained the path that led me to write the accompanying article that will be published in the *ONU Law Review*: Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601 (2015). I want to thank Harvard Law School for supporting the research that went into this Article. Thanks and affection go to Martha Minow, Mira Singer, and Lila Singer for their comments and suggestions and unflagging support. Finally, I want to express my deep gratitude to the William & Mary Property Rights Project for honoring me with the twelfth Brigham-Kanner Property Rights Prize and for the panel participants at the 2015 conference that commented on this Article and on my other work.

1. Michael Paulson, *Audra McDonald Takes to Twitter to Criticize Indiana Law*, N.Y. TIMES, Mar. 27, 2015, http://artsbeat.blogs.nytimes.com/2015/03/27/audra-mcdonald-takes-to-twitter-to-criticize-indiana-law/?_r=0.

2. Heart of Atlanta Motel v. United States, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring).

think about it, regulations are just laws, aren't they? Do we really hate law?

There's the rub. Americans may claim to hate regulation, but we seem to like the rule of law. But if regulation is just another word for law, then what do we want, really? Do we have some sophisticated distinction between regulation and law, or are we just really, really confused?

We are a free and democratic society that aspires to treat each person with equal concern and respect. Doing that requires us to have law. Legal rules make everyday life possible. Law is necessary to make our lives comfortable and safe. More than that, law is what allows us to exercise our liberties in a manner compatible with a like liberty for others. Regulation may limit our options, but it also enlarges them. John Locke tells that "where there is no Law, there is no Freedom."[3] Locke is a libertarian hero, but he was a big fan of law. And if regulation is just another word for law, then according to Locke, regulation is what makes us free.[4]

Here is another puzzle. Americans value free markets and private property—and I am not talking only about conservatives or libertarians. Contrary to popular belief, liberals are not enemies of free markets; we just want them to be fair. Nor are liberals enemies of private property. During the McCarthy era, liberal economist Robert Montgomery was called before the Texas legislature and asked if he favored private property. He replied, "I do—so strongly that I want everyone in Texas to have some."[5]

If Americans like both markets and private property, what does that mean for regulation? We tend to think that regulations interfere with both the free market and private property rights. But if we remember that regulations are just laws, things look a bit different. Back in 1990, after splitting from the Soviet Union, Czechoslovakia's foreign minister, Jiri Dienstbier, noted: "It was easier to make a revolution than to write 600 to 800 laws to create a market economy."[6] This

3. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 306 (Peter Laslett ed. 1988) (1689).

4. On this theme, see JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS (Yale U. Press 2015).

5. CLIFTON FADIMAN, THE LITTLE BROWN BOOK OF ANECDOTES 395 (1985) (recounted by John Kenneth Galbraith).

6. William Echikson, *Euphoria Dies down in Czechoslovakia*, WALL ST. J., Sept. 18, 1990, at A26, (quoting Jiri Dienstbier, Foreign Minister of Czechoslovakia in 1990).

is a truth that lawyers know better than anyone else. Neither the free market nor private property can exist without a legal infrastructure.

Consider the law of contracts. We are free to decide how to live our lives, and part of that freedom includes the liberty to shape the terms of our relationships with others. *But freedom of contract is not a law-free zone.* We need legal rules to determine when we have committed ourselves to a contract and what we have promised to do. We need legal rules to interpret ambiguous terms in our agreements and to protect us from fraud. We need consumer protection law to protect us from unfair or deceptive practices. Sellers are not legally free to mislead consumers or to sell us products that are not safe or effective. Consumer protection laws are regulations, but they do not interfere with freedom of contract; rather, they ensure that we get what we want when we enter the marketplace.[7] Those laws may be regulations, but they promote contractual freedom.

We need legal rules to distinguish when the courts will force us to abide by our promises and when we are free to change our minds. Sometimes the courts force us to do what we promised to do, sometimes they let us off the hook if we pay damages, and sometimes they let us break our promises because our contracting partners can obtain the same services elsewhere. The law determines when we must honor our commitments and when we are at liberty to move on.

All these rules entail choices. Think about mortgage agreements—they contain technical language no ordinary person can understand, and they are too long to read unless you are a real estate geek like myself. If a mortgage broker tells you that the interest rate is 3% but page twenty-four of the document uses nine-point font to explain that the rate rises from 3% to 9% after two years, then what amount did you agree to pay? We tend to privilege the written documents over oral communications. But why is that? Real estate law sometimes goes the other way; courts have created exceptions to the statute of frauds using doctrines of estoppel and unclean hands to enforce oral promises intended to induce others to rely on verbal

7. For explanations of this function of consumer protection laws, see Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 532–36 (2013); Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 155–60 (2012).

representations. Contract law makes choices about whose understanding of the deal should govern the arrangement when the parties have differing expectations.

Contract law seeks to promote contractual freedom, but what exactly does that mean? A year ago, one of my students tried to enter a club in downtown Boston. The bouncer refused to let him in, commenting on his Asian appearance and that of his two friends. "We don't want your kind here," he said. They were shocked. They asked to see the manager, but they found no relief there. The manager agreed with the bouncer—go someplace where they want you.

The Civil Rights Act of 1866 grants every citizen the same right to purchase property as is enjoyed by white citizens.[8] The Civil Rights Act of 1964 grants "full and equal enjoyment" to places of entertainment without regard to race.[9] Justice Potter Stewart explained the goal of these laws in 1968. They ensure that "a dollar in the hands" of an African American will "purchase the same thing as a dollar in the hands of a white [person]."[10]

The right to contract does not only mean that the courts will enforce a contract if you can find someone willing to contract with you. It means that places of entertainment cannot refuse to contract with you because of your race or national origin.[11] We all have the right to participate in the free market to get what we need to live and to thrive. But we cannot exercise our liberty to engage in market transactions if businesses are entitled to shun us because of things about ourselves we cannot change. That is why businesses have to let us in. The freedom of contract norm places obligations on businesses to ensure that we can exercise our rights to contract without discrimination. To promote freedom of contract we must limit freedom of contract.

That may seem like a paradox, but human beings are nothing if not paradoxes. Markets are complicated, and they need rules. And rules come from law. If we want freedom of contract, if we want the security

8. 42 U.S.C. § 1982.

9. 42 U.S.C. § 2000a.

10. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

11. 42 U.S.C. § 2000a. *See also* Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R.-C.L. L. REV. 91 (2011); Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. REV. 929 (2015).

that comes from enforceable promises, if we want free markets, if we want the freedom to participate in the market without being excluded because of our race or religion, then we want regulation.

Consider private property. Whether you believe in natural rights or not, Jeremy Bentham was correct when he said, "Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases."[12] This does not mean that there were no property norms prior to formal government. It means that in a complex society, legal institutions and processes are needed to settle disputes and to fix rules of the road. Predictability is important in property systems, and that comes from legal systems that combine clear rules with flexible, norm-based standards.[13] We need legal rules to allocate and define the rights of owners. We need legal rules to define the powers that owners have over their property. We need legal rules to ensure that the use of property does not unreasonably interfere with the personal or property rights of others.

Property rights are not absolute. They are not absolute, because we live in a free and democratic society. Owners are not lords with the power of life and death over those who enter their castles. Landlords have the right to receive rent, but they do not have the right to tell tenants who they can be friends with or who they can marry. Businesses have the power to build factories, but zoning law, environmental law, and workplace safety law tell them where they can do so and what safety precautions they must take to protect the property and health of others. Restaurants have the power to exclude patrons who are drunk or disorderly, but they do not have the power to exclude people because their parents were born in South Korea.

People have the power to write a will determining who owns their property after they die, but they do not have the power to create a fee tail. Downton Abbey makes great entertainment, but that is partly because it shows us a kind of society that we Americans have rejected. We don't want a lord owning and ruling a town; we don't want tenants beholden to a lord and dependent on his will. We want to be a nation of free and equal persons, not a nation of lords and servants.

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12. JEREMY BENTHAM, 1 THEORY OF LEGISLATION 139 (1840).

13. Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

We like to say that owners are lords of their own castles. But that is wrong—we have no lords in America. In a free and democratic society, property rights must be limited—they must be regulated—to make them consistent with our commitment to live in a nation of free and equal persons.

We hate regulation, but we like the rule of law, the free market, and private property. It turns out that we cannot get what we want without regulation, much as we like to hate it. Regulation may limit our freedom of action, but without it we would not have liberty.

That brings me to the topic of regulatory takings law.[14] Those who chafe under government regulation sometimes argue that regulations are fine as long as the government compensates owners when regulations interfere with property rights. Ever since 1922, the Supreme Court has interpreted the Takings Clause to require compensation when any regulation "goes too far."[15] But those who hope to find solace in regulatory takings law will find only disappointment and perplexity. For one thing, takings doctrine does not protect owners very much. In practice, it is rare for a regulation of property to be deemed an unconstitutional taking requiring compensation. The Supreme Court is very reluctant to find regulatory laws unconstitutional unless owners whose property values are affected are compensated for those losses. Regulatory takings doctrine has a reputation for being one of the most confusing, incoherent, and disordered doctrines in the legal system.[16] It is very hard to find a law review article on regulatory takings law that does not denounce it for promoting ad hoc adjudication without clear standards or guidelines.

From time to time, judges have sought to develop clear rules that define certain types of regulations as takings that cannot be enforced against owners without compensation. Justice Thurgood Marshall wrote the 1982 opinion in *Loretto* that held that a permanent physical occupation of property by a stranger is a categorical taking.[17] Ten

14. This Kormendy Lecture explains the background concerns that led me to write *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601 (2015).

15. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

16. For a recent, well-argued example, see Steven J. Eagle, *The Four Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601, 602 (2014) (arguing that the *Penn Central* doctrine "has become a compilation of moving parts that are neither individually coherent nor collectively compatible").

17. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

years later, Justice Scalia wrote the opinion in *Lucas* that held that a taking occurs when a regulation deprives an owner of any economically beneficial use of the property unless the regulation stops the owner from causing harm to others.[18]

But the effort to create rigid rules to govern regulatory takings law has failed. The rules created in *Loretto* and *Lucas* almost never apply. Justice Scalia's love of rules has lost out to Justice O'Connor's contextual, case-by-case approach.[19]

The Supreme Court has repeatedly held that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[20] Rather, the Court looks at the "particular circumstances" of each case, "engaging in . . . essentially ad hoc, factual inquiries" focusing on several relevant factors.[21] Determining whether a legal obligation placed on an owner is unfair or unjust "necessarily requires a weighing of private and public interests"[22] and a judgment about whether the burden on the owner is a "public" one that should be shared by the taxpayers.[23]

Yet the longing for certainty never dies. In 2010, in the case of *Stop the Beach Renourishment*,[24] a majority of the Justices asserted that the rights of property owners are violated whenever a regulation deprives an owner of an "established right of private property."[25] Two Justices would have considered enjoining such laws under the due process clause while four others would have required just compensation for owners affected by such deprivations. The idea that

18. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

19. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.").

20. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

21. *Id.*

22. Agins v. Tiburon, 447 U.S. 255, 261 (1980). *Accord*, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 326 (2002) ("we have 'generally eschewed' any set formula for determining" when a regulation goes "too far" and becomes a taking).

23. Armstrong v. United States, 364 U.S. 40, 49 (1960).

24. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010).

25. *Id.* at 715.

established property rights should be protected sounds good. But hold onto your hat—this idea makes sense only if you say it fast.

The idea that established property rights should be protected seems simple and clear. But human life is not simple or clear. Human life is messy, and human values are nuanced and contextual; law that does not reflect those facts comes to be perceived as unjust and gives way in the end.[26] Of course the law should protect established property rights. *But that presents a question rather than a solution.* What does it mean to say that a property right is "established"? How can we tell when property rights are established and when they are not? And how can we tell whether property has been "taken" rather than merely "regulated"?

In some cases, we can answer these questions easily. Or at least we have a fair amount of agreement on how to tell when a right is established and when it deserves constitutional protection from legal changes. For example, the law protects "vested rights" either through application of zoning-enabling statutes or through constitutional protection under the takings or due process clauses.[27] If you build a five-story apartment building that is consistent with existing zoning law and you have obtained the necessary building permits and environmental permits, the city cannot turn around after you built it, rezone the property for one-story single-family house use, and require you to tear the structure down. Every state has laws that protect your vested right in the apartment building. A law requiring you to tear down the building would be found to be a taking of an established property right that cannot be accomplished without just compensation to the owner. Conversely, if you let your building become dilapidated and a dangerous nuisance, the city can order you to fix it or tear it down. If you fail to comply, the city can demolish

26. *See* Marc Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002) (arguing that vagueness is a virtue rather than a vice in takings doctrine); Singer, *supra* note 11.

27. Note that the Takings Clause of the Fifth Amendment only applies to the United States while the Fourteenth Amendment applies to the states. There is no Takings Clause in the Fourteenth Amendment. The due process clause in the Fourteenth Amendment has been interpreted to incorporate the Takings Clause in the Fifth Amendment, making that clause applicable to the state through the Fourteenth Amendment's due process clause. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897). That means that, as applied to the state, a taking of property without just compensation is defined as a deprivation of property without due process of law.

the building without any compensation to you. No court will find this to be a taking of an established right of private property requiring compensation, because owners have no right to commit a nuisance. The deprivation is not of a private right that the state is obligated to recognize; it is not an "established property right."

But that means we must make judgments about which rights are "established" and which are not. We must also make judgments about when a right has been taken or an owner has been deprived of an entire property right versus when a property right has been merely limited or regulated. Making such judgments requires us to interpret the rights that go along with ownership of different types of property in our society. If every limitation on property use is thought to take an established use right, then no regulatory laws can be passed without compensating owners whose property values go down because of those laws. If any property right recognized by law is "established," then the law can never change unless we pay off everyone who is worse off under the new rule. Would that make life better? A couple of states have adopted legislation that provides compensation for any new laws that lower the market value of real property by even a penny. Those laws have not worked out so well.

Oregon adopted one of those laws and then substantially repealed it when people realized that regulations not only stop you from doing things on your own land, but they protect your property by stopping your neighbors from doing horrible things next door.[28] After the law was put in place, people realized that zoning law may limit what they can do with their property, but it also limits what neighbors can do with their property. Deregulating neighbors can lower your property values as easily as regulating your use of your own land. Regulations often protect owners by limiting use in ways that provide what Justice Holmes called an "average reciprocity of advantage."[29] We are entitled to the maximum liberty compatible with a like liberty for others. Similarly, we are entitled to property rights compatible with like property rights in others. Regulations are how we tell the difference.

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28. JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, PROPERTY LAW: RULES, POLICIES, & PRACTICES 1197–98 (6th ed. 2014).

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

The idea that established property rights are completely immune from deprivation, limitation, revision, or regulation with or without compensation alarmed many scholars as well as some of the Justices on the Supreme Court.[30] It placed in doubt the ability of both courts and legislatures to modernize the law of property or to regulate harmful activity on the land.[31] Consider what our world would be like if established property rights could never be regulated or abolished. Many regulatory laws we take for granted would never have been passed if they could not be enforced unless owners were compensated for any losses they entailed.

Would we still be plagued with the fee tail? Would we be beset by children stuck on the family homestead, unable to sell the land, unable to move to take a job in another state? Would the Van Rensselaer feudal estates still persist in New York State? Would our eastern states be filled with little Downton Abbeys, populated by tenant populations who cannot move and who owe inherited obligations to the lord of the land? Would the South be filled with slaves?

The laws that abrogated feudal relations, like the 1787 Statute of Tenures in New York and the Thirteenth Amendment, took away established rights of private property. They did so because the property rights in question were no longer deemed worthy of recognition in a free and democratic society that ensures the liberty of its inhabitants and their equal right to pursue happiness.

I grew up in the state of New Jersey. Beginning in the 1660s, it was owned and ruled by two lords appointed by the Duke of York under authority granted to him by his brother, King Charles II.[32] At that time, property and dominion were closely tied. The owner ruled his

30. John D. Echeverria, *Green Light for Beach Renourishment, Red Light for Judicial Takings*, 62 PLANNING & ENVT. REV. 3 (Sept. 2010) (arguing that the case of *Stop the Beach Renourishment* "has a frightening near-miss quality to it" and almost adopted a "radical judicial takings theory, and wreaked other far-reaching damage to established takings doctrine"); *Stop the Beach Renourishment*, 560 U.S. at 742 (Breyer, J. concurring).

31. *Stop the Beach Renourishment*, 560 U.S. at 715 (suggesting that the Takings Clause was adopted at a time when courts had no power to change the common law and that even if such changes are allowed they cannot "eliminat[e] established private property rights.").

32. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1309 (2014); Joseph William Singer, *Property Law as the Infrastructure of Democracy*, Fourth Wolf Lecture at the University of Florida Levin College of Law (2011), *in* 11 POWELL ON REAL PROPERTY WFL11-1 (Michael Allan Wolf ed., 2013); Singer, *supra* note 5, at 147–49. *See* BRENDAN MCCONVILLE, THESE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY 12–27 (1999).

property. If you are in my house, you follow my rules. If established property rights could never change without compensation, would New Jersey still have two lords, and would my childhood have been filled with treks to the lord's manor to tend his crops? Would I still be there because my lord refused to release me from my feudal obligations? Would East Jersey still be ruled by a descendant of Sir George Carteret or of John Berkeley rather than by Governor Chris Christie and an elected legislature?

If established property rights could never be changed without compensation, would we still have no warranties of habitability in residential leases? Would landlords still be entitled to evict tenants because they called the housing inspector to seek help getting the landlord to comply with the state housing code? Would we have to say goodbye to environmental law, zoning law, antidiscrimination law, building codes, and workplace safety regulations? Would we be powerless to regulate subprime mortgages, banking, food, and drugs? Would wheelchair access to housing and public accommodations go away?

It sounds good to say that the Constitution should protect all established property rights or that any economic losses to property owners caused by regulation should be compensated. In practice, however, that means that many laws we take for granted would not exist. The *Village of Euclid* case, for example, upheld a zoning law that lowered the owner's property value by 75%.[33] If all municipalities had had to compensate owners for all reductions in value of their property, zoning would not have gotten off the ground. Yet zoning law is immensely popular and exists throughout the United States. If property cannot be regulated and property rights can never be changed by law, then we are in big trouble. *Much of what we value in our property exists because regulation makes it so*.

If you are in the market for an incoherent idea, then protecting established property rights from regulation (or regulation without compensation) has got to be a top candidate. Regulation is just another word for law, and we have neither freedom nor democracy, nor free markets, nor private property if we don't have law. If laws that regulate property cannot be passed unless we compensate for

33. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926) (value reduced from $10,000 per acre to $2500 per acre).

every decrease in property value caused by such laws, then we will be stuck with the regulations that were in place in the eighteenth or nineteenth centuries or even the feudal regimes of the 1600s. But democracy is premised on the notion that the people govern—not the people who lived in 1664, not the people who lived in 1789, but us, the people who live here today.

Of course, democracy also entails limits on majority rule to protect fundamental rights. And when the state actually *takes* property away from an owner to build a highway or school, there is no question that it must compensate the owner. But if property owners had the right to veto any regulatory law that displeases them, then our democratic system would be a mirage. Of course, regulatory takings law does not prevent laws from being passed; it just requires compensation for regulations that amount to takings. But requiring compensation for all reduction in value would have the effect of making new regulations impossible. In the very case that created the regulatory takings doctrine in 1922, Justice Oliver Wendell Holmes conceded that "government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[34]

If you want a society where owners do as they please, without regulation, find a time travel machine and go back to the time of William the Conqueror. Witness him declare himself the owner of all England. Watch as he installs his friends and family as lords of the land, displacing the old English lords. Watch as he creates the feudal system, makes the English nobles learn French, and impresses the entire country into his personal service. The only person who truly had property rights in William's England was King William himself. The rest of the population was in service to him or to his cronies.

If established property rights were immune from regulation, revision, or regulation without compensation, we would be stuck with feudalism and slavery. We did not get from the feudalism of the eleventh century to our free and democratic society by deregulation. We got here by regulation. We got here because the state of New York passed the Statute of Tenures in 1787 abolishing all feudal property rights and all feudal relationships. We got here because the United

34. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

States Constitution abolished all titles of nobility. We got here because we redistributed property rights from lords to commoners. We got here by regulating future interests to promote the alienability of land, freedom of movement, and real estate markets.

We got to the private property system we have by laws abolishing the fee tail, by laws granting married women the right to control their own property, by laws freeing slaves and abolishing the property rights of slave owners, by laws abolishing segregation and discrimination in access to employment, housing, and public accommodations. We got here by homestead laws and mortgage insurance laws and banking laws that spread home ownership across the population. We got here by minimum wage laws and maximum hours laws. We got here by consumer protection laws and workplace safety laws.

We got here, in short, by laws setting minimum standards for market relationships and for property rights.[35] These laws—these regulations—brought us the freedoms we cherish. All too often, we take their benefits for granted. *We have abolished many established rights of private property, and we did so without compensation.* We did so because social values, conditions, and norms changed, and we used democratic means to determine the appropriate contours of property rights. We have defined and redefined what uses of property are legitimate, what contexts must be managed by reciprocal limits on use, and what obligations are reasonable to impose on owners.

Last year was the fiftieth anniversary of the Civil Rights Act of 1964. Title II of that law prohibits discrimination on the basis of race in public accommodations like restaurants, hotels, and places of entertainment.[36] It grants members of the public a right of access to someone else's property. And by ensuring "full and equal" service, it also prohibits posting a "Whites Only" sign, insulting customers, providing second-class service, or otherwise making customers feel unwelcome because of their race.

One might think therefore that the Civil Rights Act limits both property rights and free speech. Indeed, Senator Rand Paul said as much in an interview with Rachel Maddow in 2008.[37] Senator Paul

35. SINGER, *supra* note 2; Singer, *supra* note 5.

36. 42 U.S.C. § 2000a.

37. Jeff Jacoby, *Tough Stand: Freedom to Be Odious*, BOSTON GLOBE, May 25, 2010, at 15; Adam Nagourney & Carl Hulse, *Tea Party Pick Causes Uproar on Civil Rights*, N.Y. TIMES, May 20, 2010, at A1.

expressed doubts about the 1964 Civil Rights Act. As a libertarian, he was concerned that it limited an owner's right to control his property as well as the owner's free speech. He explained that he was against discrimination, but he still found the law to be a potential overreach. Later on, after widespread criticism, Senator Paul did an about-face and has voiced support for the Civil Rights Act. Should hotels and restaurants in the South have been compensated if they could show that the value of their establishments had plummeted after discrimination was outlawed?

Civil rights law teaches us something about the meaning of property rights in a free and democratic society. In one sense, Senator Paul was right that the Civil Rights Act limits the property and speech of certain owners. Although owners generally have the right to exclude nonowners from their property, public accommodation law creates an exception to that principle. In effect, it gives the public an easement of access to public accommodations; we all own the right to enter restaurants even if the owner does not consent to our entry—if the only reason for the exclusion is our race or our religion. And it is true that civil rights law limits the words one is allowed to speak in the conduct of a business open to the public.

But while it is correct to say that civil rights law regulates both property and speech, Senator Paul was wrong to suggest that it infringes on either speech or property rights. He assumed that property rights are absolute and that any limitations are infringements on them. But that is not the case. Property rights are not absolute, because we live in a free and democratic society that aspires to treat each person with equal concern and respect. Because we believe each person is free and equal, and because each person is irreplaceable, property rights that are incompatible with those commitments are banned.

The Thirteenth Amendment tells us that slavery is a form of property that cannot be recognized in a free and democratic society. We have abolished feudalism; citizens are not servants subject to the arbitrary power of others. Landlords today receive rent from tenants; they do not receive fealty or homage or service or obedience. Tenants do not "take a knee" and become the lord's man as they did in King William's time. We have abolished racial segregation in public accommodations because *the right to exclude a patron from a restaurant*

based on that person's race is no longer a right that a free and democratic society can recognize. No compensation is due for the loss of the right to discriminate on the basis of race in a hotel or restaurant or place of entertainment, because we have engaged in democratic lawmaking and decided that such a property right is not consistent with the liberties of people who are entitled to equal protection of the law.

We have recently witnessed a remarkable outcry against the Indiana Religious Freedom Restoration Act because it seemed designed to enable businesses to deny services to gay and lesbian patrons. The outcry was intense even though neither the statutory law of Indiana nor that of the United States prohibits discrimination on the basis of sexual orientation. Why was the reaction so intense? Singer Audra McDonald explained this better than anyone. "Some in my band are gay," she wrote, "and we have 2 gigs in your state next month. Should we call ahead to make sure the hotel accepts us all? Or maybe I should fire my gay band members just to be on the safe side."[38]

But what about claims of religious freedom? I realize this is a highly sensitive issue and that there are intense feelings on both sides of this issue. I also strongly support the First Amendment's guarantee of a space for exercising religious liberties. At the same time, we must remember that such liberties do not give each citizen a personal veto power over laws they find to be immoral. I also feel obligated to note that a citizen of this state (Ohio) had his case heard in the Supreme Court in 2015 in an historic argument.[39] The question of same-sex marriage demonstrates the possible tension that may exist between one person's claim of religious liberty and that of another. It also highlights the difference between being free to do something oneself and being empowered to stop others from doing likewise. The reason the clash between property and religion has come to light is because public accommodations occupy an ambiguous

38. Michael Paulson, *Audra McDonald Takes to Twitter to Criticize Indiana Law*, N.Y. TIMES, Mar. 27, 2015, http://artsbeat.blogs.nytimes.com/2015/03/27/audra-mcdonald-takes-to-twitter-to-criticize-indiana-law/?_r=0.

39. I am referring to Jim Obergefell from the state of Ohio whose case was argued in the Supreme Court of the United States the day after this lecture was delivered at the Claude W. Pettit College of Law at Ohio Northern University on April 27, 2015. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

space in the world midway between the "private" space of the home and the "public" space of the public park. We tend to think of the "market" as in the "private" sphere, but antidiscrimination law is designed to ensure that that sphere is open to all members of the "public." For that to happen private property owners must be forced to open their doors to persons they might wish to exclude. That means we have an inevitable clash between one property right (the right to exclude) and another property right (the right of reasonable access).

The florists and pizza parlor owners that want freedom from being forced to participate in same-sex weddings have sincere religious beliefs. As it happens, I am a religious person, and I also have sincere religious beliefs. Businesses that refuse service to gay and lesbian customers mistake the sale of goods with endorsement of the buyer's use of those goods. If store owners were complicit in all the wrongs committed by their customers, we would have to dramatically increase penalties for aiding and abetting wrongful acts. From a more practical side, we need to understand that if religious freedom justified exemption from public accommodation laws, then the Civil Rights Act of 1964 would have changed little or nothing in the South. Many owners at the time had strong religious views about separation of the races. If they could have simply raised religious objections to admitting African Americans to restaurants or hotels, racial segregation in public accommodations would have persisted. It might even still exist today.

Recall that the Supreme Court allowed an interracial couple to get married in the 1967 case of *Loving v. Virginia*.[40] Could a hotel owner who opposes interracial marriage for religious reasons refuse to rent the wedding suite to an interracial couple? The answer is no—public accommodation law trumps the religious beliefs of the hotel owner. Federal law prohibits discrimination on the basis of race in public accommodations,[41] and any religious objections by the hotel or restaurant owner are trumped by the compelling government interest in abolishing the "badges and incidents of slavery."[42]

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40. Loving v. Virginia, 388 U.S. 1 (1967).

41. 42 U.S.C. §§ 1981, 1982, 2000a.

42. Jones v. Alfred Mayer, 392 U.S. 409, 439 (1968) (quoting Civil Rights Cases, 109 U.S. 3, 28 (1883)).

Of course, in states like Indiana, Ohio, and Virginia, public accommodations are free to refuse service to gay customers for religious or other reasons. A federal bill designed to prohibit such discrimination has long stalled in the House of Representatives.[43] And the recently passed Utah antidiscrimination law prohibits sexual orientation discrimination in housing and employment but not in public accommodations.[44] If sexual orientation were added to a state or the federal public accommodations statute, that freedom would vanish; it would be replaced by the freedom of gay customers to obtain service without "calling ahead," as Audra McDonald put it. If the law were changed in that way, one freedom would give way to another, and one property right would give way to another. Civil rights regulations in fact require owners to suffer an invasion of their property by persons they wish to exclude.

We would then face the question whether public accommodation laws take established rights of private property and thus cannot be enforced without compensation. The Supreme Court summarily rejected that claim in a single sentence in the case of *Heart of Atlanta Motel* in 1964.[45] Here is the full extent of the Court's analysis of the question: "Neither do we find any merit in the claim that the Act is a taking of property without just compensation."[46] That's all the opinion says on the matter. Why does the Court say so little? Civil rights laws arguably infringe on property rights. They force owners to suffer physical invasions of their property by strangers. That would seem to put them squarely in the rule of law adopted in *Loretto* for categorical takings of property. I think the reason the Court dismissed the takings claim is because the change in social values represented by the Civil Rights Act of 1964 meant that property owners have no constitutionally protected right to be free from civil rights

43. The Senate passed the Employment Non-Discrimination Act in 2013. *One-Year Anniversary of Senate ENDA Passage*, HUMAN RIGHTS CAMPAIGN (Nov. 7, 2014), http://www.hrc.org/blog/entry/one-year-anniversary-of-senate-enda-passage.

44. Antidiscrimination and Religious Freedom Amendments Act, 2015 Utah Laws ch. 13 (S.B. 296) (signed by Governor on Mar. 12, 2015), http://le.utah.gov/~2015/bills/static/SB0296.html; Kelly Catalfamo & Michelle L. Price, *Utah governor signs Mormon church backed LGBT anti-discrimination bill*, LGBTQNATION, Mar. 12, 2015, http://www.lgbtqnation.com/2015/03/utah-governor-signs-mormon-church-backed-lgbt-anti-discrimination-bill/.

45. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

46. *Id.* at 261.

laws.[47] Justice Arthur Goldberg's concurring opinion in *Heart of Atlanta Motel* explains why. He wrote:

> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.[48]

Democratically enacted laws shape social relationships, and antidiscrimination laws promote access to property on an equal basis. One way we exercise freedom is by choosing how to use our own property. But another way we exercise freedom is by entering the marketplace to buy goods and services, to get a job, to open a business, to buy real estate, or to get insurance. If public accommodations had the power to exclude customers based on characteristics they cannot change, then access to the market and the property system would be based on social caste rather than individual merit.

It may seem that we exercise freedom only by individual actions. But we also exercise freedom collectively and democratically by using political means to pass laws that define the environment within which our property is situated. We adopt laws to shape the contexts within which we exercise our liberties. Zoning law, for example, ensures that we can own a house in a neighborhood of other houses. Environmental law ensures that our property is not subject to pollution coming from other owners.

But why not compensate owners harmed by changes in environmental law or zoning law or even antidiscrimination law? If people are ends in themselves, as Kant taught us, we should not use them as a means to promote public goals.[49]

The answer to this complaint is that owners are ordinarily not victims of legislation; they are part of the body politic that enacts laws. Property owners are both authors and beneficiaries of democratically enacted legislation. They are neither politically powerless nor a suspect class. More to the point, zoning and other regulatory

47. *Cf.* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (not a taking to require shopping centers to allow individuals to hand out leaflets at the shopping center because that activity does not affect the use or value of the property).

48. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 292 (1964) (Goldberg, J., concurring).

49. *See* FIRST PHILOSOPHY: FUNDAMENTAL PROBLEMS AND READINGS IN PHILOSOPHY 666 (Andrew Bailey & Robert M. Martin, eds., 2nd ed. 2011).

laws usually *help* owners by regulating what happens next door. In other words, laws may limit what you can do with your property, but they also limit your neighbors and therefore protect your property rights as much as they limit them. Property laws usually do have an average reciprocity of advantage.

Conservatives are absolutely correct that the Takings Clause provides little protection from regulation. They are wrong, however, to lament that fact. Compensation is ordinarily required when the state actually *takes* your land away from you. But when it merely *regulates* what you can do on your own land, it is a different story.[50] Legislatures are empowered to pass laws to regulate social, economic, and family life. They cannot do those things without regulating the uses of property. We grant lawmakers the power to regulate because we value government of the people, by the people, and for the people. And we (generally) have the right to expect those laws to be enforced without compensating owners for the burdens the laws impose.

But like every principle, this one has exceptions.[51] The Constitution may require compensation if a regulation destroys property, subjects the owner to physical occupation, or deprives property of all value.[52] In general, the state may not authorize strangers to invade or destroy your land. It must pay compensation if it floods your land, takes over your factory, or requires you to allow strangers into your home. Compensation is generally due if the law requires you to tear down an existing building. For example, if you build a convenience store compatible with the zoning law, and the town rezones your land for residential use, the law allows you to continue the prior nonconforming use.

But compensation is not due if there is an adequate justification for limiting the owner's property rights.[53] The government is free to

50. For a similar argument, see PETER GERHART, PROPERTY LAW AND SOCIAL MORALITY 274–90 (2013).

51. For a full treatment of these issues, see Singer, *supra* note *.

52. I say "may well" because there are well-recognized exceptions to each of these presumptive rules. As noted above, the state can demolish a dilapidated house that is a public nuisance, and it can do so without compensation; the state has the power to protect its citizens from harm, and we do not recognize a property right to commit a nuisance. Physical occupation may be a taking if it concerns a private home, but restaurants are subject to a public easement of access by persons who have a right to service without discrimination.

53. By "adequate justification" I do not mean to adopt the test under the due process clause or the equal protection clause that refers to regulations that have a rational relationship to a legitimate government interest. I mean that we must address the normative question of

demolish a dilapidated structure both to protect residents and to protect neighbors. Owners are subject to antidiscrimination laws that limit the owner's right to exclude by requiring restaurants and hotels and movie theaters to let patrons in regardless of race or religion, and perhaps their sexual orientation. Laws may protect tenants from eviction without just cause, or they may regulate rents. Such laws effect a forced occupation of property by another. Laws may regulate the foreclosure process and temporarily protect homeowners from loss of their homes. Such laws deprive mortgagees from obtaining property their contracts said they were entitled to get. We may constitutionally require landlords to evict tenants through court proceedings rather than relying on self-help. Such laws increase the time when the tenant can stay on the premises even if they are holdover tenants whose leases are over. Courts may constitutionally grant temporary restraining orders that evict individuals from their own homes if they engage in domestic violence. People in New Orleans who entered their neighbors' homes after Hurricane Katrina in order to escape rising waters were not trespassing. They had a right to enter a stranger's land in order to save their lives. Laws may stop owners from causing harm. Environmental laws are constitutional because they ensure that property is used in ways that do not harm the environment within which all of us live.

In all these cases, legally mandated occupation, destruction, or devaluation of property are justified and do not count as unconstitutional takings requiring compensation for any lost property value. In these cases, there is an adequate justification for the regulation despite the uncompensated loss of property value. Our democratic system allows elected representatives to pass laws that regulate property use, and it is not the case that every such law can be viewed as a taking of a constitutionally protected property right. While it is important that we consider the impact that laws have on owners, regulations of use ordinarily limit what *some* owners can do to protect the ability of *other* owners to do what *they* want to do. Laws adjusting the benefits and burdens of social life can be supported by

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whether the government can give an adequate justification for exemption from the presumptive obligation to pay just compensation in these cases. The burden is on the government to provide such a justification, and it may sometimes prevail, as with civil rights laws and public nuisance laws.

reasons that owners could accept as legitimate burdens for a citizen in a free and democratic society.

Regulatory takings law requires compensation in certain cases of physical occupation or destruction and when necessary to protect owners from unreasonable, retroactive deprivation of prior investments. And our constitutional principles rightly ask us if we can justify the burden of a regulatory law on particular owners as just and fair in the absence of compensation. But the Constitution generally allows new regulations to be enforced without compensation when those laws promote legitimate public interests. We the people have the power to pass laws that set ground rules for social life and minimum standards for economic activity. Democracy—government by the people—ordinarily provides an adequate justification for subjecting property owners to regulation without compensation. Only when a regulatory burden is one that an owner should not have to bear as a citizen in a democracy is compensation required. The question, according to the Supreme Court, is whether a law "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole[?]"[54] Fairness and justice require legislatures to compensate owners for undue and unjustified burdens, but they do not require compensation for most regulatory laws.

Let me end with two final examples. In the *Loretto* case in 1982, the Supreme Court held that it was a taking of property to force a landlord to allow a cable television company to install cable lines and equipment on the owner's rental property.[55] In the 1955 case of *Tee-Hit-Ton Indians v. United States*,[56] the Supreme Court held that it was not a taking of property for the United States to seize timber from land owned by a band of Tlingit Indians in Alaska. In my view, both cases were wrongly decided.

The *Loretto* case found it to be a special burden on an owner to be required to bear a forced physical invasion of property by a stranger. I would agree if the law had ousted the owner and transferred the property to someone else. I would agree if the owner were required to quarter troops in her living room. I would agree if the owner were required to participate in Airbnb.

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54. Armstrong v. United States, 364 U.S. 40, 49 (1960).
55. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
56. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

But that is *not* what the law did. The law simply required landlords to make cable television available to their tenants. It did so by giving the cable company the right to install lines rather than giving the owner the duty to call the cable company to ask it to install the lines. The cable lines and boxes did not impair the use or value of the property. Indeed, it did not even diminish the market value of the property; on the contrary, cable television access undoubtedly *increased* the market value of the property.

That means that no compensation should have been due even if there was a limitation on the right to exclude. That, after all, was the holding of the *PruneYard* decision that enabled California to require shopping centers to allow people to distribute leaflets.[57] Just compensation is measured by the harm to the land's use or value. In *Loretto*, there was neither. Moreover, the reason for the law was adequate to justify the nature of the intrusion.

It is true that the Court distinguishes between finding a taking and measuring the remedy for the taking. It is not irrational to say that *Loretto* found the law to effect a taking but that in this case, no compensation was due. But I am a legal realist, and I am of the view that rights are defined by remedies. The Constitution does not prohibit the taking of property for public use; it only provides compensation. We call it the Takings Clause, but it really is the "just compensation clause." Thus the constitutional right is a right to compensation. If no compensation is due, then no constitutional right is implicated. *Loretto* involved a forced physical invasion of property by a stranger, but there was no interference with the use or enjoyment of the property, and the regulation was designed as a consumer protection measure to make cable television access available to tenants. And it effected no reduction in the fair market value of the property. It would have made no difference to the owner if the law had required the landlord to install the cable lines rather than authorizing the cable company to do so. That suggests that no fundamental constitutional rights were at issue in the case.

The same cannot be said about the case of *Tee-Hit-Ton Indians v. United States*.[58] In 1955, the Supreme Court held that the Native Alaskan owners of Wrangell Island did not have any property rights

57. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).
58. *Tee-Hit-Ton Indians*, 348 U.S. 272 (1955).

recognized by the Constitution. They owned the island pursuant to federal common law and under tribal law, but their rights had not been recognized by the United States through treaty or statute.

Without such recognition, the Supreme Court held that their common law property rights did not constitute "property" within the meaning of the Fifth Amendment that would be protected from taking without compensation. Moreover, the Court argued, there were only sixty-five Tee-Hit-Ton Indians, and they obviously had not fully occupied the tens of thousands of acres they claimed to own. The Court argued that the United States needed their land and that the United States could not have spread west as it did if it had had to compensate Indian nations for all the land the United States took from them.

The opinion by Justice Reed was written the year after *Brown v. Bd. of Education*, and it has never been overruled. It still has the force of law, and it still shapes the rights to tribes living on reservations established by executive order, of which there are a fair number. Yet the reasoning in the case cannot withstand scrutiny. The land occupied by the Tee-Hit-Ton Indians was recognized as their property under federal common law and Tee-Hit-Ton law. Why then was it not "property"?

My property rights in my house are recognized only by common law. There is no Massachusetts statute conferring title to me. Yet I am protected by the Fifth Amendment. Nor is there any principle of U.S. law that prevents sixty-five people from owning thousands of acres of land. One of the islands in Hawaii is owned by one guy, and there are many multinational corporations that own more land than the tribe did. History teaches us that the United States claimed possession of the vast Louisiana Purchase in 1803 not by occupying it but by signing a piece of paper with France. Moreover, the idea that the tribe had not used the property intensively enough to establish property rights is too far-fetched to take seriously. All they had done was live there, hunt and fish there, establish villages there, bury their dead there, and worship the spirits there.

Nor was the Court correct that the United States could not have developed if it had compensated Indian nations for all the lands it seized from them. In fact, the United States did pay for most of the land it took from Indian nations although often with inadequate compensation. Congress recognized this in 1946. Less than ten years before the *Tee-Hit-Ton* decision, Congress passed a statute creating

an agency whose purpose was to compensate tribes for property taken in the nineteenth century without adequate compensation.[59]

The cable television law in *Loretto* was justified by the goal of ensuring that tenants could have access to cable television, and it had no impact on the use or value of the property at all. The law had an adequate justification, and the owner had no reasonable claim to compensation. But the uncompensated timber seizure in *Tee-Hit-Ton* could not be justified by adequate reasons. Indeed, the reasons given by the Supreme Court were discriminatory. If the land had been owned by a business corporation rather than by a band of Alaskan Natives, compensation would have been paid, and it would have been constitutionally owed. Nor did the special nature of Indian title or the federal policies underlying federal Indian law justify treating tribal property as subject to confiscation without compensation.

Property owners are normally subject to *regulation* without compensation. They are entitled to just compensation only when their property is *taken* for public purposes. Regulations rarely amount to unconstitutional takings. This does not mean that the Constitution does not protect property rights or that property owners are second-class citizens. It means that property owners, like everyone else, are part of "the people," and they have a duty to obey duly enacted laws promulgated by the people and for the people. Owners are obligated to respect the rights of others. Regulations of what we can do with our own land may impose duties on us, but they also protect the rights of our neighbors, as their duties protect our rights.

The rule of law is a good thing and so is democracy. The Constitution requires just compensation when the burdens that laws impose on owners cannot be adequately justified by the norms and values embraced by a free and democratic society that treats each person with equal concern and respect. Thankfully, regulations like that are unusual. Regulations ordinarily do not deprive people of property rights in a manner that requires compensation for those laws to take effect. Quite the contrary. Regulations are just laws in disguise. Laws are passed to ensure that our uses of our property are compatible with the rights of others and to ensure that we can enjoy both our freedoms and our property rights without undue interference by other owners.

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59. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.06(3), at 438–40 (Nell Newton et al. eds. 2012 ed.).

Legislatures adopt laws not because they are evil but because we the public demand that they do so. We want laws because they promote our freedom. We want laws because they protect our property rights. We want laws because they ensure our safety and our well-being. We want laws because they set minimum standards for market and social relationships in a free and democratic society that treats each person with equal concern and respect. Laws ordinarily impose legitimate obligations on citizens, and they impose legitimate obligations on property owners. That is why the Constitution rarely requires compensation when regulations affect property rights even when those laws reduce the market value of an owner's property. We have no obligation to compensate owners just to get them to obey the law.

GOOD GOVERNMENT, CORE LIBERTIES, AND CONSTITUTIONAL PROPERTY: AN ESSAY FOR JOE SINGER

FRANK I. MICHELMAN*

INTRODUCTION

Joseph Singer's recent writings on regulation and takings[1] turn my mind once again to questions I have broached previously in this *Journal* about the point of American constitutional protections for property.[2] Immediately, then, my topic has to narrow down. Some constitutions elsewhere include clauses of so-called "institutional guarantee," positively committing the state to the upkeep by its legal system of forms of institutional order we would recognize as private property, along with full and fair access by all to that order and its benefits.[3] "Elsewhere," I said, but not here.[4] By widely accepted American legal wisdom, one does not look for such material in American constitutions.[5] Rather, what we have in the property department, and all we typically have are what jurists call "negative" or "defensive" clauses, meaning protections for established asset titles against loss

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* Robert Walmsley University Professor, Emeritus, Harvard University. This Essay stems from my panel remarks on the occasion of the award of the 2015 Brigham-Kanner Property Rights Prize to Professor Joseph William Singer, Twelfth Annual Brigham-Kanner Property Rights Conference, Williamsburg, Va., Oct. 2, 2015.

1. *See* JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION (2015) [hereinafter SINGER, FREEDOM]; Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV 601 (2015) [hereinafter Singer, *Justifying*].

2. *See* Frank I. Michelman, *Constitutional Protection for Property and the Reasons Why: Distrust Revisited*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 217 (2012) [hereinafter Michelman, *Reasons Why*]; Frank I. Michelman, *The Property Clause Question*, 19 CONSTELLATIONS 152 (2012) [hereinafter Michelman, *Question*]; Frank I. Michelman, *Liberal Constitutionalism, Property Rights, and the Assault on Poverty*, 22 STELLENBOSCH L. REV. 706 (2011) [hereinafter Michelman, *Property Rights*].

3. *See* GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 99–100, 114–15, 123–24 (2006) (describing and discussing German constitutional law). *See* Singer, *Justifying*, *supra* note 1, at 615 ("A system of private property in a free and democratic society rests on legal, political, economic, and social structures that enable property ownership to be widely distributed.").

4. *See* ALEXANDER, *supra* note 3, at 99–100 (remarking on the difference in this respect between the constitutional laws of the United States and Germany).

5. *See* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory . . . ."); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) ("the Constitution is a charter of negative . . . liberties.").

to restrictions and controls imposed by legislation, legal rulings, and other state actions.[6]

Narrowing my topic still further, I deal here *not* with questions about correct applications of our constitutional defensive property clauses to doubtful or borderline cases, about which Professor Singer's work has much of importance to say. Our topic is about why the protections are—or should be there—in the Constitution at all.

Why, after all, are they needed? To be sure, lawyers across America, within and without the Brigham-Kanner circuit, disagree plenty over the extent and application of the constitutional clauses on property that in fact we have.[7] But we all know, too, that the general background institutions of private property and market economy are deeply entrenched in the life and the mind and the everyday laws of this country (and surely for the general good, most of us would freely add[8]), quite regardless of anything in our constitutions. None of us seriously thinks that a main cause or necessary condition for the persistence of private property in the United States is the presence in this country's fifty-one constitutions of their clauses on defensive property protection (any more than we conceivably could think the same for countries like Canada and Israel where no such constitutional clauses have ever been in force). But if we do *not* believe that American attachment to the general background institutions of private property flows from or depends on those constitutional clauses—as I feel quite sure Joseph Singer does not—then on what basis *do* we explain the presence of these clauses in our federal and state constitutions?

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6. *See, e.g.*, U.S. CONST. amend. V ("No person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation.").

7. *Compare, e.g.*, Michelman, *Reasons Why*, *supra* note 2, at 220–26 (applauding the Supreme Court's decision in the *Lingle* case cited *infra* note 15 and accompanying text), *with* Richard A. Epstein, *The Property Rights Decisions of Justice Sandra Day O'Connor: When Pragmatic Balancing Is Not Enough*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 177, 208–09 (2012) (disapproving the same decision).

8. *See* SINGER, FREEDOM, *supra* note 1, at 8 ("Both liberals and conservatives believe in free markets and private property . . . ."); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD 5 (2000) ("The law should enable the free market . . . but there is no single framework for a market system."); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 204 (2000) ("The ability to control one's property can promote human dignity, individual fulfillment, and social welfare.") [hereinafter SINGER, ENTITLEMENT].

A constitution, writes William Galston—in a key that chimes nicely in my mind's ear with Joseph Singer's writings on property law—represents "a partial authoritative ordering of public values." Constitutional law, Galston says, selects and "foregrounds" a "subset" of values from the mix of ideas of the good that circulate in a free society, and those foregrounded values then become "benchmarks for shaping and assessing legislation [and] public policy."[9] For reasons to appear below, I have thought it fitting in Professor Singer's honor to think a bit, with his scholarly works in view, about how the value orderings detectible in American constitutional law would (or should) differ from what they are now if our constitutions lacked their defensive property clauses but otherwise stood just as we know them today, complete with their defensive clauses on life, liberty, equality, privacy, and due process.

You can think of my question as one about the ways in which the presence of the property clauses, in particular, is expected to contribute toward fulfillment, in theory or in practice, of a conception of good and right American government. And here permit me to say again that the question is *not* that of the good of the general system of property law we see every day at work in American life. Professor Singer has plenty to say about the moral and practical benefits that can flow from a market-based economy and the broadly speaking liberal forms of life that the system is meant to sustain and assist, and has plenty, moreover, to say—as in his contribution to this collection[10]—about choices to be made within that body of law in order to realize those benefits as fully as possible for all. Those contributions are not, however, addressed to my question about a *constitutionalization* of property law. We can have our general system of property law, fine-tuned in Professor Singer's ways or in other ways,[11] with no need whatever for constitutional property law. So why have the latter? What work does it do that we really need or want?

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9. WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM 3–4 (2005); *see* SINGER, ENTITLEMENT, *supra* note 8, at 18 ("Defining the legal structure of property requires hard choices to be made about alternative forms of social life."); SINGER, FREEDOM, *supra* note 1, at 13 ("What liberals and conservatives disagree about is how to define our core liberties; doing so requires value-laden choices about the contours of our way of life.").

10. *See* Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 5 BRIGHAM-KANNER PROP. RTS. CONF. J. 1 (2016).

11. For a comprehensive sweep of Singer's approach to issues of fine-tuning the general law of property, see generally SINGER, ENTITLEMENT, *supra* note 8.

Parallel questions, I know, can be raised about any single one of the protective clauses to be found in American constitutional bills of rights,[12] but let us focus for now on the property clauses. In prior work, I have looked into various possible lines of explanation for their presence, including two I have labeled as the lines of "collective good" and of "fundamental personal right."[13]

I. COLLECTIVE GOOD: DEFENSIVE PROPERTY CLAUSES AS ECONOMIC POLICY SCREENS

Consider a strictly policy-screening function for constitutional property clauses. By "policy screening," I mean the idea that the clauses are meant to set up a legal and judicial barrier against regulatory laws we'd be better off without, laws that are so weakly or factitiously connected to the pursuit of properly public goals or concerns as to raise suspicions of legislative incompetence, if not corruption. Owing to some incautious dicta in the Supreme Court's *Agins* decision, that idea achieved some short-term circulation in United States courts,[14] but the Supreme Court in *Lingle v. Chevron*[15] has now retired that idea from the field of American constitutional argument. The Court in *Lingle* lays it down that any general policy-screening aim in our constitutional law belongs exclusively to the due process clauses—not the Takings Clause—and furthermore is to be exercised by judges only to the extent of highly restrained, so-called "rational basis" scrutiny of the questioned state action. That is the level of judicial general policy inspection that the Court deems normal for a functioning democracy, and the bare fact that a regulatory burden falls immediately on property value or property use—as

12. *See* Michelman, *Reasons Why*, *supra* note 2, at 227–33 (showing the wider relevance of my question to other constitutional protections and surveying possible answers).

13. *See id.* at 227–28 (listing possible explanations); Michelman, *Property Rights*, *supra* note 2, at 715–16 (same).

14. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980). The Court wrote that "the application of a [regulatory law] to particular property effects a taking if the [law] does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.* at 260 (citations omitted). *See* Chevron U.S.A. v. Cayetano, 198 F. Supp. 2d 1182 (2002); Chevron U.S.A. Inc. v. Cayetano, 57 F. Supp. 2d 1003 (1998) (on the authority of *Agins*, applying the Takings Clause to require states to compensate property holders for economic losses occasioned by regulations found by courts to be economically wrongheaded).

15. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

distinct from other dimensions of liberty and flourishing such as health or education or recreation or professional fulfillment—does not change it. Economic policy choice is by and large the domain of the legislature, not the judiciary.[16]

Some may think the Court's adoption of this stance to be a very serious error. They might join Professor Epstein in the view that achievement of a truly just and productively efficient regime of law requires a much more robust sort of policy screening of the outputs from legislative majorities and, furthermore, that a strict rule of compensation for property losses suffered from state regulation would impose just the sort of discipline we need.[17] Here, we are not directly concerned with the merits of such views. It suffices for present purposes that the Supreme Court denies them recognition as American constitutional law, Professor Singer most surely concurring.

II. SYSTEMIC GENERAL FAIRNESS

Economic policy is one thing; basic fairness is another. Where policy choice might not be a primary concern or a suitable pursuit for constitutional law, fairness most certainly is both.[18] And *that*, then, is where our constitutions' defensive property clauses can very well fit in. We read them as aimed at prevention of unfair loadings of the costs and burdens of public policy pursuits onto owners whose property takes the regulatory hit but who no more *deserve* to bear these burdens than does anyone else. That indeed is what the Supreme Court over and over says the Takings Clause is for: 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."[19] Professor Singer agrees. "Constitutional limits on regulation are reached," he writes by way of summation of his view, "only

16. *Id.* at 539–43; Michelman, *Reasons Why*, *supra* note 2, at 222–23 n.16.

17. *See* Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 169–70 (1987); Epstein, *supra* note 7, at 209.

18. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1245–58 (1967) (positing fairness as a central pursuit for constitutional law and reviewing challenges thus raised for constitutional design).

19. Armstrong v. United States, 364 U.S. 40, 49 (1960). *Lingle* strongly and clearly reaffirms the message. *See* Michelman, *Reasons Why*, *supra* note 2, at 220–23 (providing the details).

when a law imposes a 'public burden'" that a person "should not have to bear alone in a free and democratic society that treats each person with equal concern and respect."[20]

My question, though, is whether we need "property" clauses to shoulder this vital constitutional work. As shown by *Willowbrook v. Olech*[21] and by concurring and dissenting opinions in *Eastern Enterprises*,[22] constitutional protection against regulations of property found seriously oppressive or unfair—as substantively or procedurally arbitrary, groundless, discriminatory, or retroactive—can apparently be handled by apt applications of the due process and equal protection guarantees without need for resort to separately dedicated clauses on takings of property. The U.S. Constitution's equal protection clause makes no mention of "property," but the Supreme Court in *Willowbrook* found no problem applying that clause to a property-regulation case. And given that every legal cutback on a property title or restriction on property use is *ipso facto* also a curb on the owner's liberty, the same should hold as well for due process clauses shorn of mentions of "property." Maybe it is equal protection we should think as the lead partner here, or maybe it is due process.[23] Either way, it seems that the two clauses between them could adequately and aptly carry the load of ensuring basic general fairness in the operations of a regulatory state.

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20. Singer, *Justifying*, *supra* note 1, at 602.

21. 528 U.S. 562, 565 (2000) (per curiam) (holding that allegations of a "wholly arbitrary and irrational" imposition of greater regulatory burdens on some landowners than on others similarly situated "state a claim for relief under traditional equal protection analysis," regardless of the regulators' "subjective motivation" and regardless also of the number of badly treated owners).

22. *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 539, 549 (1998) (separate opinion of Kennedy, J.) (finding that "the . . . remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute [and it] has a retroactive effect of unprecedented scope," and accordingly "represents one of the rare instances where [economic legislation exceeds] the limits imposed by due process."); *id.* at 553, 558 (Breyer, J., dissenting) ("To find that the Due Process Clause protects against this kind of fundamental unfairness—that it protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means—is to read the Clause in light of a basic purpose: the fair application of law . . . . It is not to resurrect long-discredited substantive notions of 'freedom of contract.'").

23. *See* Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1 (2008) (opting for due process).

III. CONSTITUTIONS AND BASIC RIGHTS

A. Core Liberties and Special Justification

This doesn't yet settle that our constitutions' defensive property clauses are pointless or redundant. As Singer points out, it is *only* the Takings Clause that authorizes a judicial order of compensation as a remedy for unacceptably unfair or oppressive regulation.[24] On a deeper level, though, consider that the point of the property-protective clauses could be to set up a class apart for cases where regulations "hit on" (so to speak) the set of advantages specifically connected to property titles—the standard package of rights and powers to use, to exclude, to control, to choose the next owner, to cash out at the market—as distinct from cases where the "hit" is on just plain liberty or freedom of action. The reason for setting up this separate class could be to demand for the "property" hits a kind or level of justification beyond the default levels demanded for incursions on just plain liberty. The comparison then would be to constitutional mentions of "freedom of speech," "free exercise of religion," "secur[ity of] persons, houses, papers, and effects" (and so on), understood to name especially valued dimensions of civil liberty, for the infringement of which we demand special kinds and levels of justification.[25]

It would not, then, be merely a lookout for basic general fairness that explains the presence of the property-protective clauses in our constitutions. We would have an additional sort of explanation, the sort I had previously labeled as a "fundamental personal right." The proposition simply would be that "property" points to an American basic personal right or—in a phrase of Professor Singer's we conveniently can use here—to an American "core liberty."[26] Our bills of constitutional rights, we might say, serve first and foremost as publicly

24. *See* Singer, *Justifying*, *supra* note 1, at 660 (observing that the Takings Clause thus is not merely "a shadow of" the equal protection clause.). *See* First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987) ("[W]here a government's activities have already worked a taking of . . . property, no subsequent action . . . can relieve it of the duty to provide compensation . . . .").

25. *See* Michelman, *Reasons Why*, *supra* note 2, at 225–26 (illustrating and discussing this possible design for the property clauses).

26. *See* SINGER, FREEDOM, *supra* note 1, at 11 (maintaining that disagreements over acceptable forms of market regulation stem from disagreements over "how to define our core liberties").

binding memorials of basic human interests and needs to which, by common consent, our governments are bound to pay full and appropriate heed. If that is a key part of what bills of rights are there to do, and if property is among those interests, then property merits inclusion. My question will be about how *in that light* we can best understand constitutional clauses on property. How—in other words—do we best understand the idea of property in relation to the idea of fundamental rights or core liberties?

Our constitutions, remember, are already replete with defensive guarantees respecting "life," "equality," "due process," and, of course, "liberty"; and "liberty," as we have come to know, includes among its components, along with items having their own "enumerations" like "speech" and "religion," others lacking them like "autonomy," "dignity," and "privacy."[27] Now, *sometimes*, as Singer reminds us, enjoyment of property is "linked to" one or more of these other core liberties.[28] When and insofar as it is, we can protect it without need for a separate constitutional clause on property.[29] Perhaps, though, what we *do* need is timely reminders of the "sometimes" connection between hits on property and hits on those other core liberties, and maybe that could be the sole and total story about why the property clauses are there.[30] If so, then the clauses would amount to calls for escalated protective responses whenever—but only when—a regulatory hit on property is found *also* to be a substantial hit on some other core liberty. That would be one way to construe the idea—familiar, I expect, to most readers of this *Journal*—of property as a "guardian of other rights."[31]

My question, though, to Professor Singer and to us all would still be the following: Is that all there is to it? Is there no *additional* human-rights contribution expected from defensive protections specifically for property titles and their attendant special benefits and

27. *See* Obergefell v. Hodges, 576 U.S. __ (2015), slip op. at 11–14; Lawrence v. Texas, 539 U.S. 558, 562, 564–65, 567, 574 (2003).

28. *See* SINGER, ENTITLEMENT, *supra* note 8, at 23 ("*Some* property uses . . . provide a setting [for the exercise of] liberties that liberals care about, such as free speech, religious activity, and private family life.") (emphasis added).

29. *See* Singer, *Justifying*, *supra* note 1, at 629.

30. *See* Michelman, *Property Rights*, *supra* note 2, at 713–14 (advancing this suggestion); Michelman, *Question*, *supra* note 2, at 157–58 (same).

31. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008).

advantages? Is there not some dimension of basic human interest or need, some core liberty, that the notion "property" distinctively injects and which those other guarantees do not fully catch? Jeremy Waldron, in a passage favored by Singer, writes that "people need private property for the development and exercise of their liberty," and "that is why it is wrong to take all of a person's property away from him . . . ."[32] Is Waldron overlooking something? Is there some other further reason of core human interest or need why it would be wrong? If so, what might be that further reason?

B. An American Basic Right to Keep?

So there we have the question: Is there some "core liberty" or comparably fundamental interest or need infringed by legal hits on property that wouldn't already be covered by the array of autonomy, privacy, dignity, expression, and religion? If so, how should we name and describe that interest and its corresponding right? To that question I can find only one sort of answer to fit the case. It seems to me, as I have written elsewhere, that it would have to be what I will here call by the name of a "right to keep."[33]

At any given time, you and I are legally recognized holders of portfolios of asset titles lawfully acquired, perhaps by our own labors or perhaps not. *Retention* of the proprietary prerogatives of command and other benefits composing an asset portfolio comprises in itself, we might think, a basic human interest meriting constitutional protection. (Does that perhaps ring bells with phrases like "investment-backed expectation"[34] and "established rights of property"?[35]) And

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32. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 329 (1988); *see* SINGER, ENTITLEMENT, *supra* note 8, at 167.

33. *See* Michelman, *Question*, *supra* note 2, at 157–60. *See also* Donald J. Kochan, *Keepings*, 53 N.Y.U. ENVTL. L.J. 355, 356, 369 (2010) (suggesting that constitutional "taking" clauses are meant to vindicate a "right to keep," corresponding to a "natural" desire and feeling of entitlement by owners to keep assets they have taken into ownership).

34. Michelman, *supra* note 18, at 1233; *but see* Margaret Jane Radin, *Government Interests and Takings: Cultural Commitments of Property and the Role of Political Theory*, *in* REINTERPRETING PROPERTY 166 (1993) (pointing out tensions between investor aims and hopes and a constant evolution in cultural standards for allowable or expected private appropriation of common goods).

35. Stop the Beach Renourishment, Inc., v. Fla. Dep't of Env. Prot., 560 U.S. 702 (2010)

then the special office of the defensive property clauses could be to give recognition and protection to that supposed core personal interest in sheer retention of lawfully gotten ownership, which "liberty" and its cognates may not quite comfortably cover. The property clauses then would give constitutional standing to the idea that a regulatory curtailment of my property is a special kind of hurt to me—which calls for special justification—in and of itself and without regard to ramification to any other core liberty.

I cannot here try to delve into philosophical pros and cons of such a view. It may, in our tradition, have some connection to a sense that intentional acquisitions and possessions are material embodiments of our very own powers and choices and thus extensions into the social world of our very selves and identities—thus making a hit on my property already a hit on *me*.[36] It's true, of course, that any proposition of that kind would be controversial within liberal political philosophy.[37] Historians and theorists might or might not finally conclude that the proposition is rightly attributed to the framers writing the Constitution.[38] Constitutional lawyers today might or might not find the Supreme Court affirmatively drawn in its direction. What would seem hard to deny, though, is that intuitions of a special immunity against invasions of proprietary entitlement do have some purchase and some following in our country's intellectual heritage and cultural drinking water.[39] I will simply ask each reader to consider

(plurality opinion). *See* Singer, *Justifying*, *supra* note 1, at 605 ("There is something appealing about the idea of protecting 'established property rights' . . . .").

36. *See, e.g.*, WALDRON, *supra* note 32, at 194–95 (setting forth a view quite plausibly ascribed to John Locke, that lawful acquirers identify with their titles in such a way that respect for the person demands respect for the entitlement); C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962) (a widely known source presenting an account of these strains from the standpoint of one who does not like them).

37. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002); Michelman, *Property Rights*, *supra* note 2, at 718–20 (examining views of John Rawls).

38. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN 9–18 (1985).

39. Singer calls such intuitions "the hidden work of the property idea" in American legal argument. SINGER, ENTITLEMENT, *supra* note 8, at 83. A case in point would be Singer's supposed Texas judge for whom "infringements on property rights are as oppressive as infringements on liberty interests such as free speech or privacy." SINGER, ENTITLEMENT, *supra* note 8, at 20. Professor Singer wasn't saying such judges are American freaks but rather that they represent a widespread strain in American popular philosophy that deserves to be reckoned with by makers and critics of our laws.

whether it makes up a part of your own sense of the matter and point of our constitutional protections for property or your sense of the senses of others. If so, then some further questions should follow for Professor Singer, as I explain soon below.

Of course the right to keep might not in anyone's view be an *absolute* right, any more than freedom of speech is or others protected by our constitutional bills of rights are. The retention right would logically have to yield something to laws protective of the parallel rights of others, such as laws against trespassory force, fraud, and breach of contract or trust.[40] It could yield to other regulatory restrictions for which "implicit in-kind compensation" can convincingly be claimed.[41] It might even yield to equitably apportioned taxation for a limited set of public purposes, perhaps even including relief of destitution in our midst.[42] But still the point would be that decisions about the permissibility of uncompensated incursions on values and prerogatives of lawfully established asset titles are to reflect a special moral priority we assign to a person's interest, just as such, in retaining all lawfully gotten asset titles with attendant benefits and advantages. A new or revised law's effect of withdrawing asset-related advantages previously lawfully held would serve—just in and of itself and without regard to any further impacts on liberty, dignity, or privacy—as the basis of a demand for inspection of that law—for procedural regularity, for an equitable distribution of burdens and benefits, and for substantive justification including a due regard for legal stability—all at escalated levels of rigor over what we accept in other cases where people are subjected to laws restricting freedom in ways that are quite unequally burdensome or disruptive of prior pursuits.

C. What Does Singer Say?

What does Professor Singer say in response to the proposition of proprietary keeping as a core liberty? Nothing quite direct that I have so far been able to find.

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40. *See* EPSTEIN, *supra* note 38, at 111.

41. *Id.* at 195.

42. *See* Pennell v. San Jose, 485 U.S. 1, 21–22 (1985) (Scalia, J., dissenting) (affirming that such taxes are permitted by the Takings Clause).

I can imagine my friend Joe feeling real surprise when I say that. Does not his work drive home over and over the lesson that ownership and regulation cannot be intelligibly positioned as opposites or adversaries—first because ownership is from the start a creature of a private-property system that is itself through and through a contrivance of regulation[43] but then also because that system cannot coherently, much less with any pretense to a liberal-democratic political morality, envisage ownership as "absolute"?[44] Well, yes, the work to its everlasting honor and credit does most trenchantly, astutely, and unforgettably drive home those lessons. Those lessons do not, however, quite meet the point at issue.

Their powerful payload for current debates is the following: banish the thought of a general systemic hostility to regulation. Without the least misunderstanding or rejection of that lesson, we can still—and Singer would—demand especially persuasive showings of public need for regulatory infringements on core liberties. We do not thus display hostility to regulation; we simply pay due respect to all of the values at stake in the case. Now, if that holds, say, for freedom of speech, then it holds no less for the right to keep, *if* that is indeed a core liberty. The issue then is not attitude toward regulation. It is rather the level of persuasiveness or proof of regulatory need we ought to be demanding in the case before us.

But doesn't Singer at any rate answer by pleas of impatience with the idea that anyone in a democracy should need or deserve to be paid for complying with duly enacted laws?[45] Again those pleas only beg the question of keeping as a core liberty. Suppose the case truly were that keeping *is* a core liberty, or at any rate must be allowed to count as such in American constitutional law. Then citizens for whom compliance with certain new or changed regulations would amount to a negation of asset retention *would* "deserve" either to be paid for that compliance (so as to reverse at least in part the negation) or else to

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43. *See, e.g.*, SINGER, ENTITLEMENT, *supra* note 8, at 61 ("[M]ost of law of property could be alternatively characterized as regulatory or deregulatory, depending on how we look at it."); *id.* at 72 ("property may be threatened by regulation, but it also seems to require it.").

44. *See, e.g.*, *id.* at 86 (pointing out how perfect stability for ownership rights renders core liberties of others insecure and dependent on the grace of owners).

45. *See, e.g.*, Singer, *Justifying*, *supra* note 1, at 601.

be presented with a sufficiently compelling justification for why they should in this exceptional instance be made to suffer the negation.

D. Justifying Regulatory Takings

These points can be generalized to Singer's great work of redemption for our much-maligned constitutional-legal doctrine of "taking by regulation."[46] Singer's redemptive model for a regulatory-taking doctrinal framework is all and only a model of justification.[47] Justification here means proportionality. Every regulatory law (that is not strictly redundant of law already in force) imposes some "burden"[48] on some class of persons affected by it. That imposition of burden is what has to be justified by reasons deemed "adequate"[49] or "sufficient."[50] But burdens are not all of equal moral or constitutional concern, and so the measures of adequacy or sufficiency of reasons must vary by case or class of case.[51] In what we may call the general class, where the regulatory hit is not on ownership and does not infringe on any (other) core liberty, a strong presumption for democracy prevails, and the test is the "low" one of the regulation's bearing "some relationship to a legitimate governmental objective."[52] A finding of infringement on a core liberty begets intensified scrutiny in search of some special or "overriding" public interest to justify the infringement.[53]

But suppose the hit is on ownership. If it also reaches through to some other recognized core liberty (say, a tax on newsprint[54] or an exclusion of "adult" bookstores and cinemas from desirable urban

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46. *See* Singer, *Justifying*, *supra* note 1.

47. *See, e.g.*, *id.* at 611 ("The *principle of adequate justification* is the best way to understand both taking law and its normative force.") (emphasis in original), 634 ("The central question is one of justification.").

48. *E.g.*, *id.* at 606–07, 634.

49. *See id.* at 611.

50. *See id.* at 634.

51. *Id.* at 612 ("To determine what justifications are adequate in which contexts, we should focus on the core values property institutions promote in a free and democratic society that treats each person with equal concern and respect.").

52. Singer, *Justifying*, *supra* note 1, at 659. *See id.* at 660 ("The principle of democracy . . . is usually a sufficient justification for subjecting property owners to regulatory laws without compensation.").

53. Singer, *Justifying*, *supra* note 1, at 633.

54. *See* Minneapolis Star Tribune v. Comm'r of Rev., 460 U.S. 575 (1983).

locations[55]), then of course we get heightened scrutiny. But what if it does not? If keeping is a core human interest, then the test for whether the regulation may justifiably be enforced without buying out the owner's adversely impacted entitlement must be elevated beyond rational basis. What does Singer say?

I have thus worked into a somewhat convoluted form my question to Singer and to all of us about "property keeping" as a core liberty. I have had a purpose in doing so, and that is to let you see at last how Singer's texts do indeed convey his answer to my question. A basic premise for Singer is that "democratic law making is usually an adequate justification for requiring owners to obey the law without compensation."[56] That amounts to a negation of any general claim for special justification of regulatory hits on property, beyond what's required for regulatory hits on general freedom of action. And that, in turn, amounts to a rejection of any thought that keeping could be on its own a core liberty, because every regulatory hit on property is *ipso facto* a hit on asset retention and every hit on a core liberty requires special justification. The same chain of inference flows from Singer's flat-out rejection of any idea that "regulations necessarily impair the rights of owners."[57]

So, there, I have had to do some work of logical inference in order to extract from Singer's texts his rejection of property keeping as a core liberty. But the labor was not really very taxing, and it did not take long to complete. So why make such a fuss about it all as I have been making? I have two reasons for doing so, with which I will draw this Essay to a close.

E. Security, Stability, and the Return to Fairness

Both my answers start from the point that, while Singer does convey his rejection of retention as a core liberty, he does so only inferentially, not frontally and expressly. He implies this rejection, but he does not state grounds for it. I don't mean thus to suggest that good grounds might be hard to come by, only that knowing *Singer's*

55. *See* Young v. American Mini Theatres, 427 U.S. 50 (1976).
56. Singer, *Justifying*, *supra* note 1, at 619.
57. SINGER, FREEDOM, *supra* note 1, at 6.

grounds would help us to draw the maximum wisdom from his (to me) very attractive pictures of property law and related constitutional law at their best.

I will start this again with a question. Singer repeatedly pays his respects to property law's contribution toward the important ends of stability and security in social life.[58] Indeed we can fairly say he regards the provision of security and stability as core expectations we hold for the performances of our governments. But then why *isn't* property keeping a core liberty?

Here is what we can tell from Singer's texts. The relevant, "central normative goal" for property law is not stability at any cost; it is the protection of "justified expectations."[59] An expectation by property investors of perfect stability in the law could not be justified or even reasonable,[60] because every reasonable member of a democratic society knows that property law undergoes change in response to developments in a democratic society's prevailing views about "the legitimate scope of ownership rights" and about "the kinds of harms that should be recognized and regulated in society."[61]

"Stability above all" cannot therefore be our watchword. Rather we must say that "sometimes" it is wrong to subject owners to the burdens of legal change without compensation.[62] A keyword then is "retroactive." "We do not think it fair in general to tell citizens an act is lawful and then change our minds and apply a rule retroactively."[63] Compensation, then, is required in special cases of "unfair surprise,"[64] typified by cases of frustration of "investments made in reliance on [site-specific] regulatory permissions."[65] And then finally the clincher: constitutional protection against this kind of injustice is not special to regulatory hits on *property*, and the demand for it is not special to property-rights enthusiasts. "Liberals oppose ex post facto laws as

58. *See, e.g.*, SINGER, ENTITLEMENT, *supra* note 8, at 85–86; SINGER, FREEDOM, *supra* note 1, at 107–08; Singer, *Justifying*, *supra* note 1, at 630, 658.

59. Singer, *Justifying*, *supra* note 1, at 211.

60. *See* SINGER, ENTITLEMENT, *supra* note 8, at 46 ("reasonable expectations").

61. *Id.* at 623.

62. *Id.* at 627.

63. *Id.* at 604.

64. *Id.* at 630, 637–38, 650–51.

65. *Id.* at 630, 637–38, 650–55, 654 (referring to "an owner who has been led to believe that his development would be allowed"), 661.

strongly as conservatives."[66] In sum, when the dust has settled, the "core liberty" in such cases, for which we demand a "sufficiently strong" justification,[67] is not anything like a property owner's core personal right to keep. It is the general right to fair treatment and to equal concern and respect enjoyed by citizens in a democratic state. It is, in other words, the interest protected by the general systemic guarantees of equal protection and due process.[68]

Bravo! says I; with none of this have I any quarrel. I only make the following two observations. *First*, while Singer's discussions provide illustrations and examples of what he wishes us to understand by "justified" or "reasonable" expectation, those terms—and along with them terms like "unfair surprise" and "retroactive"—inevitably retain some aura of cloudiness. *Second*, the whole discussion starts from *the premise, the supposition*, that perfect stability of property does not, within the American constitutional value ordering, enjoy the status of a preferred value[69]—or, in other words, that property keeping is not an American core liberty. I daresay some Americans today sincerely disagree and accordingly would find that every failure of perfect stability of property is a disappointment of a justified norm or hope for American government—some of these disappointments being perhaps justifiable in the circumstance but all of them always demanding a special justification. According to my own beliefs, Singer would have good grounds for rejecting that view. If we could *hear* those grounds, we might gain some corresponding clarification on how to draw the line between expectations that are justified and those that are not.

F. Liberals and Conservatives

I, too, have had my premise. Starting above at Part III.B, it has been that some part—certainly not all, but some part—of the conservative-side demand for stronger protections for property stems from a deep and sincere conviction that property keeping *is* a core

66. *Id.* at 629.
67. *Id.* at 634, 652.
68. *See supra* Part II.
69. *See supra* note 9 and accompanying text.

liberty and that therefore every single substantial, noncompensated, regulatory hit on property requires special justification. Singer's rejection of this view is clearly extractable from his arguments, but it is not explained by him in terms that address directly the intuition apparently held by some American conservatives, of a deep human interest suffering some measure of special hurt from every intentional incursion on a property portfolio. Could not that topic, too, become a part of the conciliatory conversation Singer wants to instigate between the liberal and conservative sides in current American political divisions over property law?[70] Even if the result might be a disclosure that the project of closing the gap must inevitably fall short, at least as to some fraction of the conservative side? (And no doubt some fraction of the "liberal," too, which I will leave for some other pundit to notice.)

70. *See* SINGER, FREEDOM, *supra* note 1, at 8–9, 11, 14.

PROPERTY, DEMOCRACY, & THE CONSTITUTION

MICHAEL M. BERGER*

Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. . . . [But t]he sky did not fall . . . .[1]

Justice Ruth Bader Ginsburg

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.[2]

Justice William J. Brennan, Jr.

INTRODUCTION

For the past half century, the country has been in a turmoil over what increasing numbers of Americans perceive as excessive government intrusion into the private sphere, notably with regard to the use of eminent domain and severe land use regulations. Many defenders of such government intrusions embrace noble motivations, such as being "for the environment" (if not the entire planet) and therefore favor severe land use regulations. Sometimes this takes the form of outright selfishness—for example, in the teeth of state

* Partner, Manatt, Phelps & Phillips, LLP; co-chair of the firm's Appellate Practice Group; 2014 recipient of the Brigham-Kanner Prize. I have spent nearly a half century defending the rights of private property owners in court, including arguing four takings cases in the United States Supreme Court and participating as amicus curiae in many of the other important takings cases in that Court. I have also taught takings law at the University of Miami, Washington University in St. Louis, and the University of Southern California. My thanks to Professors Gideon Kanner, David Callies, and Janet Madden for their helpful comments on this Article as it was being written.

1. Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 521 (2012).

2. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting but expressing the substantive view of five Justices. *See* 450 U.S. at 633–34; Rehnquist, J., concurring but noting that he would agree with Justice Brennan's substantive views if he thought the case were ripe). Note that Justice Brennan was not urging the use of regulations for this purpose but the provision of compensation when they were imposed on property owners.

and federal legislation favoring low-cost housing, localities do what they can to "keep 'em out."[3]

On the eminent domain side of the ledger, the Supreme Court's 5-4 *Kelo* decision[4] approved the taking and razing of an unoffending lower-middle-class neighborhood to replace it with a (hoped-for) development that would stimulate higher taxes and (perhaps not coincidentally) enhance the living standard of well-paid employees of a nearby high-tech pharmaceutical company. That stimulated a bipartisan furor among members of the American public. To the astonishment of professional poll-takers, public opinion has run around 90% against the Court's decision.[5] Currently, the opposition to taking pipeline easements (the *bête noir du jour*) has reached a fever pitch among the populace. One could thus say with confidence that a large percentage of the American people disapproves of promiscuous use of government power to wrest private property from its lawful owners. As Justice Stevens, the author of the *Kelo* majority, confessed in print, he has (from the day *Kelo* was published) been approached by friends and strangers alike who express their disapproval of his handiwork.[6]

Yet, defying this unprecedented display of popular disapproval of the Court's disregard for constitutionally protected property rights, Professor Joseph Singer thinks that property rights are somehow unworthy of full-fledged constitutional protection and should be, to borrow Chief Justice Rehnquist's term, deemed to be the law's "poor relation."[7] By his lights, any "good reason" articulated by government functionaries—even by local amateur zoning officials dabbling

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3. *E.g.*, Avenue 6E Investments, LLC et al. v. City of Yuma, 2016 WL 1169080 (9th Cir. 2016) (use of racial "code words"); Ybarra v. Town of Los Altos Hills, 370 F. Supp. 742 (N.D. Cal. 1973) (one-acre lots kept out low-cost housing); Dews v. City of Sunnyvale, 109 F. Supp. 2d 526, 533 (N.D. Tex. 2000) (one-acre zoning designed to keep "niggers out of Sunnyvale").

4. Kelo v. City of New London, 545 U.S. 469 (2005). *See generally* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN (2015).

5. A compilation of the polling data appears at *The Polls Are In*, CASTLE COALITION, http://castlecoalition.org/the-polls-are-in.

6. John Paul Stevens, Kelo*, Popularity, and Substantive Due Process*, 63 ALA. L. REV. 941 (2012). Indeed, shortly after the decision was published, Justice Stevens spoke to the Clark County Nev. Bar Association, thanking the group for giving him a "mulligan" on several recent opinions (including *Kelo*). John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1 (2005). If you don't know what a "mulligan" is, ask one of your golfing buddies.

7. Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

in land use governance on a part-time basis[8]—is deemed "well-nigh conclusive"[9] and thus provides an "adequate justification"[10] for reducing the ostensible constitutional protection for those "rights" to unenforceable "hortatory fluff," as Justice O'Connor put it in her *Kelo* dissent.[11]

But making sense of the takings issue is not as simple as finding a "justification" for government action. There are standards that must be met, including the prime directive that *any* exercise of the eminent domain power *must* be done for a "good reason" and with "adequate justification."[12] Fundamentally, we are governed by a Constitution which is "the Supreme law of the land." The Constitution not only declares itself to be binding on the states, but its power is emphasized by the provision that it trumps "*anything* in the state Constitutions and laws to the contrary . . . ."[13] It was adopted in 1787 and amended sparingly thereafter. The first ten amendments, adopted as a group to correct what the founders viewed as obvious omissions from the original constitutional text, are referred to collectively as the Bill of Rights. The Bill of Rights was adopted to protect individuals against the government, the few against the many—not the other way round.[14] As Justice William O. Douglas put it, "The Constitution and the Bill of Rights were designed to get Government off the backs of the people . . . ."[15]

This year's Brigham-Kanner Property Rights Conference honoree has, in the fashion of academics, produced a prodigious body of work dealing with property in general and takings law in particular. While there is much that is useful in his analysis, I believe that some of its core tenets are mistaken and lead to erroneous conclusions about

8. *See generally* RICHARD F. BABCOCK, THE ZONING GAME (1966); BERNARD J. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979).

9. Berman v. Parker, 348 U.S. 26, 32 (1954).

10. Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601, *passim* (2015) [hereinafter Singer, *Justifying*].

11. Kelo v. City of New London, 545 U.S. 469, 497 (2005) (O'Connor, J, dissenting).

12. U.S. CONST. amend. V; *see* Lingle v. Chevron USA, Inc., 544 U.S. 528, 543 (2005) ("the Takings Clause presupposes that the government has acted pursuant to a valid public purpose.").

13. U.S. CONST., art. VI, cl. 2 (emphasis added).

14. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 4 (3d ed. 2008) (Fifth Amendment "designed to limit the scope of majority rule . . . .").

15. *Quoted in* NAT HENTOFF, LIVING THE BILL OF RIGHTS 2 (1998).

takings law's function and direction. Moreover, and without explanation, Professor Singer's analysis ignores virtually all of the Supreme Court's pertinent decisions since 2010, comprising at least half a dozen important takings opinions.

Although I have taught takings law at several law schools for many years, my life has primarily been spent as a practicing lawyer, rather than as an academic. More than that, I have spent the better part of half a century defending the rights of private property owners in takings litigation—both direct and inverse—in appellate courts. Hence, while I recognize the value of theoretical analysis, I primarily view the law as a box of tools with which to protect my clients' interests—usually against governmental incursions. Such incursions are sometimes inspired by popular clamor and, at other times, by the demands of politically motivated and result-oriented officials who, lest we forget, sometimes pursue the demands of influential private interests, not necessarily the public good—a situation that has become all too common.[16]

Cutting to the chase, I am troubled by Professor Singer's view of takings law. He writes well and in a breezy style, so he is able to make it sound as though he is simply laying out a rational summary of takings law as it has been developed. But I don't think so. I think that Professor Singer would like to wipe the slate pretty clean and start anew, establishing what he views as property "norms" that would retroactively substitute his progressive notions for traditional property law concepts.[17] Rather than accept his thesis at face value, I suggest we deconstruct and analyze it to see how it actually comports with the property and liberty norms that a free society and the Supreme Court have already written on this constitutional slate. Those are the norms that have been deemed essential for a minimal degree of stability in a society that is governed by persuasion rather than by governmental fiat. What is essential in our system of private property, free enterprise, and constitutional protection of individuals is that people be able to know what their rights and liabilities are without years (or even decades, as too many of the regulatory

16. *See generally* BABCOCK, *supra* note 8; FRIEDEN, *supra* note 8.

17. *See, e.g.*, Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287 (2014) [hereinafter Singer, *Democracy*]; Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

takings cases illustrate) of litigation. Given a choice between making the existing system work as designed or shifting to Professor Singer's progressive norms, I have no problem opting for the former.

I. SO WHAT'S WRONG WITH PROFESSOR SINGER'S DEMOCRACY IDEA?

The fundamental problem with Professor Singer's concept of "property as the law of democracy"[18] is that it seeks to overwrite the slate on which our Constitution is already written. In doing so, he overlooks the reality that societies that have evolved reliable property rules, protected by the rule of law, are the ones that also enjoy a high degree of personal and political freedom (while others do not).[19]

Three prefatory notes. *First*, I do not think it is correct to speak of Professor Singer's theory as "property as the law of democracy" but, rather, "democracy as the law of property." The way that Professor Singer views, describes, and delineates property always has his view of democracy as the controlling factor—not the other way round. Thus, democracy—not property—is "the law." Note, for example, the number of times that he says that his concept of property is based on a "society that treats each person with equal concern and respect."[20] That description may have something to do with democracy, but it has little to do with property, i.e., the idea that it is possible for each of us to "own" something and to have that ownership interest protected by law from invasion by others. Aside from some parts of academia, that is the interest most people think of as "property."[21] Concern for those on the lower rungs of the socio-economic ladder is commendable, but it ignores the fact that, in actual operation,

18. Singer, *Democracy*, *supra* note 17.

19. ELY, *supra* note 14, at 174–75; Tom Bethel, *The Mother of All Rights*, REASON, Apr. 1994, at 41 (persuasively demonstrating that the lack of freedom and the violence pervasive in the Middle East are causally connected to an absence of reliably enforced property rules); Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to Fulfill Their Unique Role?*, 31 U. HAW. L. REV. 423, 434 n.4 (2009).

20. *E.g.,* Singer, *Democracy*, *supra* note 17, at 1287, 1291 (twice), 1299, 1301 (twice), 1302 (twice), 1319, 1328, 1334 (twice); *See* Singer, *Democracy*, *supra* note 17, at 1325, 1326; *See also* Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 5 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 1, 2, 14, 24, 25 (2016) [hereinafter Singer, *Call Ahead?*].

21. Even state politicians understand this when defining property by statute. *See, e.g.*, CAL. CIV. CODE § 654: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property."

today's land use/eminent domain regime frequently abuses the have-nots while lavishing high economic benefit on the haves.[22] That property consists of many things[23] (or sticks in the property rights bundle[24]) does not detract from the bedrock concept that those sticks are "owned" by someone (sometimes by different someones) who has the primary right to keep, use, and alienate them and who is entitled to the law's protection in doing so.

Second, contrary to Professor Singer's assumption that this country was founded on democratic precepts, the truth undoubtedly lies elsewhere. A recent examination of correspondence among the country's founders at the time the Constitution was being drafted and adopted shows that one of the motivating factors behind the calling of the Constitutional Convention was a concern about the impact of democracy (as practiced in some of the states—particularly Pennsylvania) on the rights of our property-owning forbears. Thus, much of the work of establishing this republic[25] was geared toward curbing what the founders saw as the dangers posed by a pure Athenian-style democracy,[26] particularly to the rights of property owners.[27] This is

22. *See, e.g.*, Sonya Bekoff Molho & Gideon Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich*, 8 PAC. L.J. 627 (1977); George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HAST. L.J. 991 (2001).

23. Singer, *Democracy*, *supra* note 17, at 1288–90; Singer, *Justifying*, *supra* note 10, at 655.

24. The Supreme Court seems incapable of writing a property opinion without referring to the "bundle of sticks" analogy, even though some contemporary scholars find it passé. *See, e.g.*, each of the following opinions referred to in this Article: Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); Dolan v. City of Tigard, 512 U.S. 374, 393 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); Horne v. United States Dep't of Agric., 135 S. Ct. 2419, 2428 (2015); Tahoe-Sierra Pres. Council v. Tahoe Reg. Plan. Agency, 535 U.S. 302, 327 (2002); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979). This is a long-standing practice, as described in BENJAMIN CARDOZO, PARADOXES OF LEGAL SCIENCE 129 (1928); *see* United States v. Craft, 535 U.S. 274, 278 (2002).

25. Professor Singer acknowledges that the United States is a republic. *See* Singer, *Justifying*, *supra* note 10, at 659; Joseph William Singer, *Property Law as the Infrastructure of Democracy*, *in* POWELL ON REAL PROPERTY (Lexis 2011).

26. All clauses of the Fifth Amendment were designed to "limit the power of government, and particularly the power of majorities." Tonja Jacobi, Sonia Mittal & Barry R. Weingast, *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 NW. U. L. REV. 601, 616 (2015).

27. *See generally* EDWARD J. LARSON, THE RETURN OF GEORGE WASHINGTON (2014), in which the Pulitzer Prize–winning historian examines the period between Washington's resignation of his commission at the end of the war through his first inauguration. The concerns expressed by Washington and his contemporaries about squatters and other threats to property rights, along with the excesses of some of the more radical democracies established in

undoubtedly what Professor Singer had in mind a number of years ago when he described the United States as "a nation dedicated to the protection of property . . . ."[28]

Third, in order to conceptualize his theory, Professor Singer has to redefine the concept of "constitutional" to mean something other than what lawyers have traditionally meant by the term. To fit his theory, he says:

> By *constitutional* I do not mean to refer only to constitutional law, but to the fact that property institutions are fundamental to social life, moral norms, political power, and the rule of law.[29]

Those things may all be relevant subjects for a social or political science seminar, but it transforms (indeed, adulterates) the concept of a "constitutional" right to have it blended with social, moral, and political issues that inherently vary from time to time and from person to person, rather than being rooted in our founding document. While each has an important role in American society, individual notions of creative professors do not describe other people's "property." Nor are they part of legal "constitutional" analysis. The reason they are not is that the terms are so malleable that they can mean virtually anything the speaker wants them to mean. When Keats wrote, "beauty is truth, truth beauty . . . ,"[30] it was a lyrical use of language but not very explanatory, as each term is too pliant to pin down. The same can be said of the Singer thesis.

As if to illustrate the pliability problem, Professor Singer notes that "liberals are not enemies of free markets; we just want them to be fair."[31] Or, stated otherwise, "[t]he central question of takings law is whether the obligations imposed on an owner by a property law are

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some of the states, surely propelled the adoption of the system of government established by the Constitution. For example, Professor Singer's concern that the problem with protecting "established rights in property" "is the harm this could pose to the democratic idea of giving sovereign power to the people" (Singer, *Justifying*, *supra* note 10, at 627) seems exactly what the framers intended.

28. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 3 (1991).

29. Singer, *Democracy*, *supra* note 17, at 1299 (emphasis original). Compare the dictum of Humpty Dumpty, who explained that "a word means just what I choose it to mean . . . ." LEWIS CARROLL, THROUGH THE LOOKING GLASS (1872).

30. John Keats, *Ode on a Grecian Urn*, POETRY FOUNDATION, http://www.poetryfoundation.org/poem/173742.

31. Singer, *Call Ahead?*, *supra* note 20, at 2.

just and fair."[32] "Fair" too is a pliable concept. As citizens confronted by government regulatory demands often learn to their dismay, "fair" may have different meanings for regulators and the regulated. Some will consider it "fair" to preclude development of land they believe to be necessary habitat for an endangered species of rat, even if it threatens the land's owner with bankruptcy or foreclosure.[33] For example, the Supreme Court (through Justice Stevens) invoked the fairness principle in *Tahoe-Sierra*,[34] holding that "the Takings Clause was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[35] And I am sure that Justice Stevens and the five others who signed his opinion believed that they were acting out of fairness when they approved regulations that had precluded any development of the plaintiffs' land for twenty years by the time of oral argument (with no end in sight) in order to further environmental preservation goals advanced by others.[36] The property owners, I daresay, would not agree. Concepts like "fairness" are not absolute; they depend on perspective, but, even so, there are some modes of government behavior that violate the constitutional norms of fairness and, as such, must be limited.[37]

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32. Joseph William Singer, *The Ownership Society and Taking of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 338 (2006).

33. Gideon Kanner, *California Rat Killer Gets Off*, WALL ST. J. (May 24, 1995). *See also* cases collected in Michael M. Berger & Gideon Kanner, *Thoughts on* The White River Junction Manifesto*: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A. L. REV. 685, 741 n.255 (1986) [hereinafter Berger & Kanner, *Thoughts*].

34. Tahoe-Sierra Pres. Council v. Tahoe Reg. Plan. Agency, 535 U.S. 302 (2002).

35. *Id.* at 333 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

36. Takings litigation consumes vast quantities of time and takes a toll on the participants. Of the 700 plaintiffs who initiated the *Tahoe-Sierra* suit, fifty-five died before the Supreme Court argument. Others simply became exhausted after a decades-long battle and dropped out, leaving 449 hardy souls at the end. *See* Petition for Certiorari at 3 n.4, Tahoe-Sierra (No. 00-1167).

37. In what I (concededly an interested participant) can only describe as either bizarre or cruel, the *Tahoe-Sierra* opinion goes on for pages—*after* ruling against the property owners—about alternative fairness considerations. *See* 535 U.S. at 333 *et seq*. The discussion begins "Considerations of 'fairness and justice' (note how the concept is set off by scare quotes, as though they are strange words, new to American law) arguably could support the conclusion that TRPA's moratoria were takings of petitioners' property based on any of *seven different theories*." *Id.* (emphasis added). The Court then set up seven different straw arguments which it "might" have adopted and used in the owners' favor (including one that actually had been presented in the Petition for Certiorari but which the Court declined to have briefed and argued) only to discard each of them.

Professor Singer has an interesting theory. But it is written on a different slate than American Constitutional exegesis. Professor Singer has acknowledged the difference.[38] To analyze his concept of property, he has staked out an analytical spectrum ranging from the four Supreme Court Justices who are on record as believing that the rights of private property owners are violated when a regulation deprives them of an "established right of private property"[39] to certain "types of property rights that democracies *should no longer recognize*."[40] The former seems a rather settled way of examining rights guaranteed by our Constitution, while the latter shows a desire to erase the slate and start anew. He seems to prefer the latter, while I opt for the former. Hence, my respectful disagreement.

One final introductory note: perhaps we should all set aside the panoramic language of Justice Holmes in *Pennsylvania Coal*,[41] an opinion whose text can (and is) read as meaning all things to all people. That opinion is known for its global theory that regulations that go "too far" will be recognized as takings.[42] That much is accepted by all. But once you get past that, Justice Holmes and the Court provided fodder for both sides. As Professor Singer aptly stresses, the opinion notes (Singer says "concedes"[43]) that "government could hardly go on if *to some extent* values incident to property could not be diminished without paying for every such change in the general

38. *E.g.,* Singer, *Democracy*, *supra* note 17, at 1330, 1331. Compare Joseph William Singer, *Re-Reading Property*, 26 NEW ENG. L. REV. 711, 720 (1992) ("Compensation is required if a property right has been invaded, period") (contrasting Supreme Court treatment of Indians and non-Indians on property rights).

39. A proposition from which he recoils in horror. Singer, *Call Ahead?*, *supra* note 20, at 9; *see also id.* at 11 ("If you are in the market for an incoherent idea, then protecting established property rights from regulation . . . has got to be a top candidate") referring to Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 715 (2010) (plurality opinion). I am not aware of any intellectually respectable person who, speaking within the context of American constitutional law, has argued that property (like other constitutionally protected rights) should be "protected from regulation." When ostensible "regulations" go so far as to strip the land's owner of essential attributes of property, notably of most value or reasonable use, they do cross the line, and the owner is left with nothing of value, thus suffering a taking of the land. *See* City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999). Then, the just compensation clause calls for just compensation, because that is no different than a physical taking. *See supra* note 2 and accompanying text.

40. Singer, *Democracy*, *supra* note 17, at 1330 (emphasis added). *See also* Singer, *Justifying*, *supra* note 10, at 640.

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

42. *Id.* at 415.

43. Singer, *Call Ahead?*, *supra* note 20, at 14.

law."[44] Setting aside for now that few people (not even I) would urge the generality that no regulation could ever have any impact on value without requiring compensation, it is so broad as to have little meaning. Moreover, it was swiftly followed in the opinion by this virtually polar opposite postulate (which Professor Singer ignores in all his writings): "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[45] And it cannot be overlooked that in this battle of aphorisms, the latter prevailed and the statute in question was found to be an illegal taking. Thus, frankly, *Pennsylvania Coal* adds little to this discussion beyond its conclusion that there are limits to everything and that "too far" is too far to be constitutional. I suggest we agree simply to set it aside as being unhelpful to real judges and lawyers trying to decide real cases.

II. A TROUBLING BEGINNING: THE SINGER THESIS IS BUILT ON THE BACKS OF STRAW MEN

There are a number of straw men at the heart of Professor Singer's thesis, and we should unpack them before proceeding further because they color the way that his thesis is constructed.

—*Straw Man #1*: It is difficult *to recover compensation* for a taking *because* the Supreme Court is reluctant *to enjoin regulations*. In his words:

> It is extremely rare for a regulation to be *struck down* as an unconstitutional taking of property without compensation.[46]

Stop right there. Although the conclusion may be right (i.e., the Court rarely *strikes down* laws that result in regulatory takings), the analysis is all wrong. Perhaps this is one of those ideas that "makes sense only if you say it fast."[47] As a matter of long-standing

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44. 260 U.S. at 413 (emphasis added). As Justice Holmes explained in his contemporaneous extrajudicial correspondence, he drew a distinction between such minor incursions—that he called "the petty larceny of the police power"—and grander larceny that calls for different treatment. *See* 1 HOLMES-LASKI LETTERS 457 (Mark De Wolfe Howe ed., 1953).

45. 260 U.S. at 416.

46. Singer, *Justifying*, *supra* note 10, at 608 (emphasis added).

47. Singer, *Call Ahead?*, *supra* note 20, at 8.

Supreme Court jurisprudence, the remedy for a taking has generally not been to strike down the law but to provide just compensation. Why? The reason is evident in the words of the Fifth Amendment. It is not the *taking* that offends the Constitution but the taking *without compensation*.[48] Taking is an inherent power of the sovereign[49] that exists independent of the Constitution. The latter only places conditions (public use (or what is left of it) and just compensation) on its exercise.[50] The latter is supposed to return the property owner to "as good a position pecuniarily as if the property had not been taken."[51]

I find it fascinating that Professor Singer has written so many pages about takings and the remedies therefor without once citing the Supreme Court's consistent line of remedies cases going back to the landmark 1932 decision in *Hurley v. Kincaid*.[52] The problem there was that a proposed federal flood control work would flood Kincaid's land. Kincaid sought to enjoin the taking that was certain to occur. Justice Brandeis, one of the Court's ranking liberals, wrote for a unanimous Court that the remedy in governmental taking cases is not an injunction but compensation after the taking occurs.[53] That remains the law today: "[G]overnmental action that works a taking of property rights *necessarily* implicates the constitutional obligation to pay just compensation."[54] Indeed, the Court recently reaffirmed that the kind of flooding present in *Hurley* results in a compensable taking.[55]

Interestingly, in every case in the *Hurley* line, the government argued against specific relief and urged that compensation was the proper, indeed sole, remedy. There is a reason for that. In the Court's view—and in the federal government's—it would be improvident as a

48. *See* Williamson Cnty. Reg. Plan. Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (The Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation"); First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 316 (1987) ("the Court has frequently repeated the view that, in the event of a taking, *the compensation remedy is required* by the Constitution." (citing Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 6 (1984)) (emphasis added)).

49. Kohl v. United States, 91 U.S. 367 (1875).

50. Mississippi & Rum River Boom Co. v. Paterson, 98 U.S. 403, 406 (1878).

51. Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 306 (1923).

52. 285 U.S. 95 (1932). Forgive me if I missed one. I read a lot of his articles but saw no reference.

53. *Id.* at 103.

54. *First English*, 482 U.S. at 315 (quoting with approval; emphasis added; citation omitted).

55. Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012).

matter of policy to require courts, *as a constitutional imperative*, to strike down well-thought-out governmental schemes merely because they impact one property owner, depriving him of a single—albeit personally important—"stick" in the property rights bundle. There are many illustrations. Take the *Regional Rail Reorganization Act Cases*.[56] Had the injunction remedy been applied there (as it had been by the trial court, only to be reversed on appeal), the upshot would have been destruction by the stroke of a judicial pen of a comprehensive, urgently needed congressional plan. It would have left the most densely populated regions of the country without a rail transportation system, with eight major railroads in fragmented, individual bankruptcy proceedings, and without a coherent system whereby to consolidate and make optimally useful all of their combined resources still needed to maintain an indispensable national rail transportation system. Instead, the Court ordered that compensation be paid to the aggrieved parties, thereby preserving the congressionally created scheme to preserve railroad operations. In other words:

> Equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.[57]

In a similar vein are cases like *Preseault*,[58] *Ruckelshaus*,[59] and *Dames & Moore*.[60] In each of them, the Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property without just compensation. The governmental goal in each was plainly valid and appropriate (respectively, the creation

56. 419 U.S. 102 (1974).

57. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984).

58. Preseault v. ICC, 494 U.S. 1 (1990). Interestingly, to me fell the task of trying to persuade the court in *Preseault* to invalidate the Rails-to-Trails Act as a taking, a scant three years after I had convinced them to rule in *First English* that the remedy for a regulatory taking was compensation rather than invalidation. The Court was unmoved and told the plaintiffs to file suit in the Court of Federal Claims. Justice O'Connor wrote a strong concurring opinion explaining how *First English* controlled (even though she had dissented in that case). The Claims Court eventually awarded substantial compensation. *See* Preseault v. United States, 52 Fed. Cl. 667 (2002).

59. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

60. Dames & Moore v. Regan, 453 U.S. 654 (1981).

of recreational hiking and biking trails over abandoned railroad right-of-way easements, obtaining expert input prior to licensing pesticides, and dealing with the issue of confiscation in the aftermath of the Carter-era Iranian hostage crisis[61]). In none did the Court allow injunctive relief to trump Congress's ability to legislate in the public interest, even when private property rights were adversely impacted. Rather, the constitutional remedy was that compensation must be paid for private property taken in the process. In each case, the Court directed the property owners to the Court of Federal Claims to determine whether those exercises of legislative power, though substantively legitimate, nonetheless required compensation to pass constitutional muster.[62]

Professor Singer is correct that regulatory takings cases can be hard for property owners to win, but it is *not* because the Supreme Court is reluctant to strike down regulatory takings laws. The Court regularly strikes down all sorts of regulations, including land use regulations, in situations *other than* takings claims. If there is a problem in providing compensation, it is because of a reluctance on the part of a number of lower courts, including the two largest state court systems, to implement settled law for clearly demonstrated takings.[63]

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61. Governmental gears grind slowly, but compensation for the surviving hostages (or their estates) is now being arranged. *See* David M. Herszenhorn, *Americans Held Hostage in Iran Win Compensation 36 Years Later*, N.Y. TIMES, Dec. 24, 2015.

62. To this end, the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action of taking without paying. City of Monterey v. Del Monte Dunes, 526 U.S. 687, 714–15 (1999); United States v. Clarke, 445 U.S. 253, 257 (1980); United States v. Riverside Bayview Homes, 106 S. Ct. 455, 459–60 (1985). If compensation is provided by the courts, whether at the government's or the owner's behest, the flaw in the governmental action is cured, and there is no illegality.

63. An acquaintance of mine, a long-time eminent domain lawyer from Detroit, once observed that the problems faced by property owners in takings cases stem from the fact that liberal judges don't believe in private property rights, and conservative judges don't believe in making the government pay. There is at least a grain of truth in that sardonic comment. On a less anecdotal level, it is common for lower federal courts to openly express a distaste for dealing with land use regulations, claiming to abhor having to act as "zoning muftis." *E.g.*, Carpinteria Valley Farms, Ltd. v. Cnty. of Santa Barbara, 344 F.3d 822, 826 (9th Cir. 2003); *see* Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1 (2014). Why being a "zoning mufti" in the context of a First Amendment–based land use regulation claim by proprietors of an "adult entertainment" establishment is OK, but acting similarly on a constitutional claim of confiscatory regulation that impedes construction of housing that is both badly needed and congressionally endorsed by housing statutes is not OK has never, to the best of my knowledge, been judicially explained.

California notoriously refused to acknowledge even the possibility of compensation for a regulatory taking, at least from its 1979 decision in *Agins v. City of Tiburon*[64] until the U.S. Supreme Court's overruling of that decision in 1987's *First English*. New York took a different tack, but one that led to the same result. New York pretended that, when the U.S. Supreme Court said in *Pennsylvania Coal* that a regulation could be a taking if it went "too far," the Court was speaking metaphorically rather than actually.[65]

Thus, it is only when courts become complicit in ignoring the words of the Fifth Amendment and the intent of the Bill of Rights that "takings doctrine does not protect owners very much."[66] Takings doctrine is fine. Its application sometimes leaves something to be desired.

Two notes from the world of legal practice:

First, it is not true, as Professor Singer asserts, that "[l]egitimate regulatory takings claims are truly exceptional,"[67] although there is an element of truth in his statement that "it is really hard to win a regulatory takings claim."[68] Although not easy, significant recoveries have been made in regulatory taking cases.[69] I include here cases in which substantial compensation was awarded[70] and those in which various appellate courts remanded cases for trial on the amount of compensation due.[71] In all of these cases (and there are others that

64. Agins v. City of Tiburon, 24 Cal. 3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980), *overruled* in *First English*.

65. *See* Fred F. French Investing Co v. City of New York, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385 (1976). For further discussion, see Michael M. Berger, *The Year of the Taking Issue*, 1 BYU J. PUB. L. 261, 265–66 (1987); Berger & Kanner, *Thoughts*, *supra* note 33, at 726–27.

66. Singer, *Call Ahead?*, *supra* note 20, at 6.

67. Singer, *Justifying*, *supra* note 10, at 634.

68. *Id.* at 606.

69. Moreover, the law is settled that difficulty in ascertaining the quantum of damages provides no basis for denying them altogether. Eastman Kodak v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927); DeVries v. Starr, 393 F.2d 9, 16–19 (10th Cir. 1968) (collecting numerous cases).

70. *E.g.,* Yamagiwa v. City of Half Moon Bay, 523 F. Supp. 2d 1036 (N.D. Cal. 2007) ($36,795,000 (plus interest and attorneys' fees)); State v. Basford, 119 So. 3d 478 (Fla. App. 2013) ($505,000 plus interest); Arkansas Game & Fish Comm'n v. U.S., 133 S. Ct. 511 (2012) ($5,778,757.90); Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) ($376,000); City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) ($1,450,000); Lockaway Storage v. Cnty. of Alameda, 216 Cal. App. 4th 161 (2013) ($989,640.96 plus $728,015.50 for attorney's fees).

71. *E.g.,* Avenida San Juan Partnership v. City of San Clemente, 201 Cal. App. 4th 1256 (2012); Galleon Bay Corp. v. Bd. Of Cnty. Comm'rs, 105 So. 3d 555 (Fla. App. 2012); Bowman

a little research will unearth for you without taking up excess space here) government agencies were compelled to pay compensation for the impact of their regulations.

Second, since 1987, when the Court began taking regulatory takings law seriously and deciding cases in the property owner's favor,[72] many cases that might have been filed are, instead, either settled or otherwise negotiated so that owners are able to make productive use of land. With the bargaining table being continuously leveled, there is less need for actual or protracted litigation. With the most recent Supreme Court insights into the land use process,[73] more resolutions without litigation can be expected. In short, regulatory takings law is not only about winning cases that are filed but about pretermitting cases that need never be.[74]

—*Straw Man #2*: If the Constitution provided protection to all "established property rights," says Professor Singer, we would be stuck with feudalism or worse. The old English land tenure systems of entailment would still rule the country. Women would have no right to own property. New Jersey might still be owned by the male descendants of the two noble English families that received title to large swaths of the new world from the English king.[75]

Not really. The repetitive use of fanciful and hyperbolic prose[76] cannot gainsay that we fought a bloody revolution to resolve those issues. The point of that revolution was to throw off the English yoke, along with any of its appurtenances that were found offensive. That revolution separated us from as much of the English detritus as we

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v. California Coastal Comm'n, 230 Cal. App. 4th 1146 (2014); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Preseault v. ICC, 494 U.S. 1 (1990); Dolan v. City of Tigard, 512 U.S. 374 (1994); Healing v. California Coastal Comm'n, 22 Cal. App. 4th 1158 (1994); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Whitney Benefits v. United States, 926 F.2d 1169 (Fed. Cir. 1991) (settled for $200 million after remand); Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997) (settled for $600,000 after remand).

72. *See* Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URBAN LAW. 735 (1988).

73. *Infra* notes 278–306 and accompanying text.

74. For example, once a trial court denies a motion to dismiss or a motion for summary judgment, smart government lawyers settle, if nothing else to avoid the sort of embarrassment that befell the defendants, noted *supra* note 70 and accompanying text, and having to pay attorneys' fees on top of it. Smarter ones settle without the need to go to court at all.

75. Singer, *Call Ahead?*, *supra* note 20, at 10–11.

76. *Compare* Justice Ginsburg's comment, *supra* note 1 and accompanying text.

chose to leave behind. Thus, in addition to taxes on tea, we did away with nobility and its trappings.[77] No one "lords" it over others (in New Jersey or anywhere else)—at least, not as a matter of hereditary right.[78] No William the Conqueror. No Charles II. No Downton Abbey. Nor are estates "entailed" or otherwise encumbered by law, thus inhibiting alienation. We fought a war to rid ourselves of that stuff, and thus to say that we need "laws" or "regulations" to accomplish that is to ignore the blood that was spilled to establish this country.[79] Besides, when actually asked the question, the Supreme Court held that it was proper to break up large estates in Hawaii so that individual homeowners could actually own the lots on which their homes were built.[80]

—*Straw Man #3*: If the Constitution provided protection to all "established property rights," we would be stuck with the idea that certain individuals could be owned by others and constituted mere items of property.[81]

No. We fought another war. One of the central foci of that war was the relationship between former masters and slaves, blacks and

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77. U.S. CONST., art. I, § 9, cl. 8. Professor Singer once called this "the most important provision in the Constitution." Joseph William Singer, *Property Law as the Infrastructure of Democracy*, *in* POWELL ON REAL PROPERTY (2011).

78. When Americans say they are "lords of their own castles" (Singer, *Call Ahead?*, *supra* note 20, at 6), they mean it primarily as metaphor, not something to be taken literally—except in the criminal law context, where the Fourth Amendment grants well-nigh "lordly" power to homeowners. *E.g.,* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) ("the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); Trent v. Wade, 776 F.3d 368, 381 (5th Cir. 2015) (one's "home" is a "castle of defense and asylum"); Alexander v. Cahill, 598 F.3d 79, 101 (2d Cir. 2010) ("the ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . . ."). Nor need the "castle" be of substantial construction to invoke the metaphor. In words attributed by Justice Brennan to William Pitt:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Miller v. United States, 357 U.S. 301, 307 (1958). *See also* Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL L. REV. 309 (2006).

79. If New York chose initially to clutter its statute books and clog its commerce with variants of fee tail titles (*see* Singer, *Call Ahead?*, *supra* note 20, at 10–11), that was its choice. The revolution, however, gave it the absolute right to choose otherwise, which apparently it did at about the same time the country adopted the Constitution. (*See id.* at 11.).

80. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).

81. Singer, *Call Ahead?*, *supra* note 20, at 12.

whites, and the possibility that human beings could be "property." The "people as property" side lost. Whatever property rights existed between the races before 1865 were ended when that war ended and were capped off by the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. Again, we do not need "laws" or "regulations" to establish that whites and blacks have the same rights; we have a Constitution that says so. It is not the various Civil Rights Acts that established those things. To the extent we have laws or regulations to carry out the intentions of the Constitution, they are simply implementing the Constitution itself[82] and securing the fruits of the war that preceded those Amendments.[83]

—*Straw Man #4*: Professor Singer assumes that property owners are politically powerful.[84] I am not convinced by the assertion. Some are, but that fact simply disregards the numbers and the growing power of the ballot box,[85] not to mention the instantaneous organizational power of social media.[86] To the extent it once was true that property owners and land developers had substantial political power (particularly at county and municipal levels), it is no longer true.[87] Concededly, there may have been a time when some government entities catered to the political clout of land developers and enacted

82. *See* U.S. CONST., amend. 13, § 2; amend. 14, § 5; amend. 15, § 2.

83. See *infra* notes 133–51 and accompanying text for a discussion of how the police power—the basis for Professor Singer's reliance on "good reasons" as determined by a democratic majority (Singer, *Justifying*, *supra* note 10, at 646)—became the basis for the perpetuation of Jim Crow laws.

84. Singer, *Call Ahead?*, *supra* note 20, at 18–19.

85. Santa Monica, California, for example, has a very stringent rent control law, and the city's dominant political force is an organization called Santa Monicans for Renters' Rights (SMRR). Regardless of the city's general affluence, it turns out that some 80% of its populace is tenants. Once that was discovered, SMRR was organized across economic and political lines and around this sole common issue. Soon, rent control was enacted by initiative, and SMRR remains more politically important in that city than any recognized political party. Individual apartment building owners were simply not "part of the body politic" that enacted that law. Singer, *Call Ahead?*, *supra* note 20, at 18. Compare Kavanau v. Santa Monica Rent Control Bd., 16 Cal. 4th 761 (1997).

86. Remember how the "Arab Spring" (not to mention our domestic "Occupy" movements) was said to have been powered by social media? *See, e.g.*, PAOLO GARBAUDO, TWEETS AND THE STREETS: SOCIAL MEDIA AND CONTEMPORARY ACTIVISM (2012); Jeffrey S. Juris, *Reflections on #Occupy Everywhere: Social Media, public space, and emerging logics of aggregation*, 39 AMERICAN ETHNOLOGIST 259 (2012); Sasha Costanza-Chock, *Media Cultures and the Occupy Movement*, 11 SOCIAL MOVEMENT STUDIES 375 (2012).

87. *See* BABCOCK, *supra* note 8.

measures over the objections of the citizenry or in tension with sound planning precepts. Those days are generally gone. Today, developers may still have the money, but the NIMBYs have the votes. Thus, politicians are faced with highly organized interest groups that are able to turn out substantial numbers in support of targeted issues.[88] You haven't lived until you have seen a city council chamber packed with placard-waving citizens demanding that some development project be rejected.[89] Governing boards quickly recognize that there is a mother lode of votes either to be mined at pleasure or ignored at peril. In the words of one of the grand masters of municipal law, "It is a rare municipal legislature that will reject what it believes to be the wishes of the neighbors."[90]

Aside from openly agreeing with project opponents, local legislative bodies have become expert at taking action that kicks the can down the road a bit and slows the process.[91] In addition to simply putting sand in the development gears, such slowdowns allow municipalities to make full use of the abomination that has become known as the "ripeness" doctrine, something applied in takings cases in ways far more vicious than in any other field of the law.[92] In short, the

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88. *See* William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood"*, 7 GEO. MASON L. REV. 881, 881–83, 888 (1999).

89. I was once involved in a case in northern California where project opponents rented buses and brought people from assisted living facilities on "outings" to have snacks, to wear antidevelopment badges, and to swell the population in the hearing chamber. For similar illustrations *see, e.g.*, Jack McGrath, *Should a Studio City carwash be preserved as a cultural monument?*, L.A. TIMES, June 25, 1989 (residents rally to preserve a thirty-five-year-old carwash); Tracey Kaplan, *Is Site Historic or Just a Bum Steer?*, L.A. TIMES, Feb. 6, 1993 (more residents rally to prevent development of site where Sugwas Feudal, a prime breeding bull, improved the stock of area cattle).

90. BABCOCK, *supra* note 8, at 141.

91. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655–56 (1981) (Brennan, J., dissenting); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation*, 48 NOTRE DAME LAW. 765, 767–70 (1973); Berger & Kanner, *Thoughts*, *supra* note 33, at 731–33.

92. *See, e.g.*, Michael M. Berger, *Anarchy Reigns Supreme*, 1985 J. URB. & CONTEMP. L. 39, 54–55; Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000); Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 TOURO L. REV. 297 (2014); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Regulatory Taking Cases at Long Last Reaches the Self-Parody Stage*, 36 URB. LAW. 671, 702–04 (2004) [hereinafter Berger & Kanner, *Shell Game!*] (collecting scholarly invective heaped upon the present state of ripeness law, from both sides of the ideological spectrum and from the courts).

irresistible political impulse is for government to make highly visible and popular regulatory decisions. After all, when an entity tells an individual property owner that she must leave her land vacant for public recreation or view or buffer or whatever, it does not take a computer to calculate where the greater number of votes lies. In short, individual developers can sometimes be viewed as being able to buy local regulators' votes; but, more often than not, they can be overwhelmed by the local populace wielding influence over local government or by courts that overturn local regulatory decisions favoring development.[93]

—*Straw Man #5*: The wordplay that either equates or differentiates "law" and "regulation" is a phony construct. Of course, they are the same. Thus, to say that Americans love "law" but hate "regulation"[94] is meaningless, other than to set up a supposed pedagogical contrast.

III. DEMOCRACY? DESPOTISM? YOU DECIDE

We should deal early with Professor Singer's end point, i.e., his bold conclusion that "[w]e have no obligation to compensate owners just to get them to obey the law."[95] Wow. The expansiveness of that formulation is mind-numbing. Perhaps this is another idea that "makes sense only if you say it fast."[96] Yet it is the sort of thing that liberals tend to say with a straight face.[97] This "parade of horribles" argument was in fashion in the 1990s,[98] but eventually the Supreme Court grew tired of it.[99] The kind of "law" Professor Singer is talking about is the sort of majoritarian bravado that the Bill of Rights was designed to

93. The California Supreme Court did this recently in *Center for Biological Diversity v. Calif. Dep't of Fish & Wildlife*, 62 Cal. 4th 204 (2015). *See generally* Joseph F. DiMento et al., *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 UCLA L. REV. 859 (1980).

94. Singer, *Call Ahead?*, *supra* note 20, at 1–2.

95. *Id.* at 22; Singer, *Justifying*, *supra* note 10, at 670. A bit long for a bumper sticker, perhaps, but a great sound bite.

96. Singer, *Call Ahead?*, *supra* note 20, at 8.

97. No slur intended. Professor Singer self-identifies as a liberal. *Id.* at 2.

98. *See* Gideon Kanner, Lucas *and the Press: How to be Politically Correct on the Taking Issue*, *in* AFTER *LUCAS*: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 82 (David Callies ed. ABA 1993).

99. *Supra* note 1 and accompanying text.

curtail. Compare, for example, the following comments by Professor Singer (on the left) and the Supreme Court (on the right):

Democracy—government by the people—ordinarily provides an adequate justification for subjecting property owners to regulation without compensation.[100]	It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, *and the property* of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism.[101]

The "despotism of the many" is, in fact, central to Professor Singer's democracy concept. That is why he is concerned that a strong judicial approach to compensating property owners for regulatory takings would "decimate regulatory laws that are highly popular . . ."[102] or eliminate environmental laws that have been around for "more than fifty years . . ."[103] or do away with "immensely popular" zoning laws[104]—laws, in his view, that "have been in effect long enough now

100. Singer, *Justifying*, *supra* note 10, at 660.

101. Loan Ass'n v. Topeka, 87 U.S. 655, 662 (1874) (emphasis added).

102. Singer, *Justifying*, *supra* note 10, at 620.

103. *Id.* at 641, 665.

104. Singer, *Call Ahead?*, *supra* note 20, at 11. One needs to ask what makes zoning laws so "popular"? Is it possibly their exclusionary impact? What Professor Singer sees as merely "stopping . . . neighbors from doing horrible things next door" (Singer, *Call Ahead?*, *supra* note 20, at 9) could be no more than building housing for the wrong kind of people. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917); Ybarra v. Town of Los Altos Hills, 370 F. Supp. 742 (N.D. Cal. 1973); Richard Florida, *How Zoning Restrictions Made Segregation Worse*, CITY LAB (Jan. 4, 2016), http://citylab.com/housing/2016/01/how-zoning-restrictions-made-segregation-worse/422352/.

that viable takings claims should be few and far between."[105] Overlooked in the Singer format, however, is *Palazzolo*,[106] where the Court bluntly declared that adopting the State's similar position—conferring constitutional immunity on regulations—would be untenable:

> A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[107]

Calling something "democracy" is simply not the final answer to anything.[108] Nor is continuing reference to "our democracy" as requiring the limitation of property rights as part of our "commitment to live in a nation of free and equal persons."[109] It sounds nice in theory, but it isn't real. Each of us is simply not the equivalent of each of the others any more than the occupant of an endowed chair at the Harvard Law School is the "equal" of any other professor of anything anywhere else.

My favorite discussion of treating all people as "equals" appears in a charming Kurt Vonnegut story that revolved around a government official known as "the United States Handicapper General."[110] The Handicapper General's job was to make sure that "everybody was finally equal." This goal was accomplished by blurring the vision of those with good eyesight, interfering with the thought patterns of those who were smart, placing heavy weights on those who were swift or agile, and—well, you get the picture. Vonnegut, of course, was tugging on our collective legs to make the point that we are *not* all equal and that to pretend that we are is madness (much less to design a governmental system around that proposition). Professor Singer, however, seems serious.

In our constitutional system, we are concerned as much (and sometimes more) about means as we are about ends. The attempt by government to achieve righteous ends still requires compensation

105. Singer, *Justifying*, *supra* note 10, at 666.

106. Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

107. *Id.* at 627.

108. No slur intended here either, but I cannot fail to note that some of the most oppressive, autocratic regimes on earth often have called themselves "democratic republics."

109. Singer, *Call Ahead?*, *supra* note 20, at 6.

110. Kurt Vonnegut, *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE (1988).

in order to satisfy the Constitution.[111] That is the whole point of the Fifth Amendment, even if it sometimes impinges on the overwhelming democratic power of the populace. As the Court expressed it when it finally[112] reiterated as a modern concept that (1) the proper remedy for regulatory takings is compensation and (2) that rule applies to all takings, even to temporary ones:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; *many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them*.[113]

Nor does the enforcement of constitutional guarantees necessarily imply any criticism of the regulators:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.[114]

That is why, in one of its seminal property cases,[115] the Supreme Court declared that the rights of property owners need to be

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111. *E.g.,* First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987); Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2428 (2015) ("The Government has broad powers, but the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'") (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).).

112. Having ducked the issue in serial fashion in *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson Cnty. Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); and *MacDonald, Sommer & Frates v. Cnty. of Yolo*, 106 S. Ct. 2561 (1986), the Court returned to the sensible rule that, when the Constitution prescribes just compensation for takings of property, it means it. *See* Berger, *supra* note 72.

113. *First English*, 482 U.S. at 321 (emphasis added).

114. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

115. 1987 was a watershed year for takings law, with the Supreme Court deciding six cases raising various takings issues. *See* Michael M. Berger, *The Year of the Taking Issue*, 1 BYU J. PUB. L. 261 (1987).

protected by the judiciary against the "cleverness and imagination" of governmental word games.[116]

IV. CAN IT BE TRUE THAT A "GOOD REASON" IS ALL THE GOVERNMENT NEEDS TO JUSTIFY TAKING SOMEONE'S PROPERTY WITHOUT PAYING FOR IT?

The core of Professor Singer's thesis is that compensation is not due if there is a "good reason" for the regulation.[117] He uses several apparently interchangeable terms to describe this baseline: "sufficient reason,"[118] "adequate reason,"[119] "legitimate justification,"[120] and "adequate justification."[121] The thesis is laid out at length in *Justifying Regulatory Takings*, a title which I believe is really shorthand for "Finding Reasons to Rationalize Not Paying For Regulatory Takings." It boils down to this: "property rights can be regulated or limited or even destroyed without compensation *if there is* ***adequate justification*** *for doing so*."[122] Yet, despite the length of his explication, no authority is cited to establish the idea that the antidote for a regulatory taking case is a good reason or adequate justification. None exists. If it came from someone else, you might dismiss the idea as silly. But Professor Singer is not just "someone else," so his ideas must be dealt with seriously.[123] The first question that leaps from this formulation is "what is 'a good reason' or 'an adequate justification?'" The second—and, perhaps, more important—question is "who decides" whether the stated justification is a "good" one? Are we back to that democratic majority again—the "despotism of the many," as the Court called it? Sorry. Would that it were otherwise, but this emperor wears no clothes.

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116. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987).

117. Singer, *Justifying*, *supra* note 10, at 646.

118. *Id.* at 612.

119. *Id.* at 618, 629, 630, 634, 642.

120. *Id.* at 617.

121. *Id.* at 612, 619, 628, 662.

122. *Id.* at 619 (italics in original; bold type added).

123. On the other hand, as Justice Sotomayor said recently, sometimes it doesn't really matter whether governmental action "is a good idea now [or] whether it was ever a good idea . . . . The Order may well be . . . downright silly . . . ." Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2438 (2015) (Sotomayor, J., dissenting and—alone—trying to demonstrate the legality of property confiscation even if it had no valid basis whatsoever, just because the government said so).

Professor Singer simply assumes that rationales presented by government fit his template *ipso facto*. In his words:

> *We start with a **presumption** that **lawful** obligations are both legitimate and reasonable as well as fair and just*.[124]

That is an awful lot of presuming to stuff into one little sentence, encompassing "lawful," "legitimate," "reasonable," "fair," and "just." In fact, starting with that presumption also presumes what the answer will be. Professor Singer continues:

> A property right is not 'established' if it is *legitimately* subject to regulation to promote public welfare.[125]
> . . . .
> . . . owners are . . . subject to *duly-enacted* laws . . . .[126]
> . . . .
> . . . property owners, like everyone else, have a duty to obey *duly-enacted* laws promulgated by the people and for the people.[127]

The practical problem with Singer's formulations is that in *every* eminent domain case—direct or inverse—there must be a "good reason" (i.e., public use or purpose and, in most jurisdictions, public necessity) for the taking. Thus, by Singer's light, the public use clause of the Fifth Amendment would swallow its just compensation provision.

Each of Professor Singer's formulations begs the question whether the action is constitutional by simply *assuming* its legality and/or propriety. But that is not a determination for either a legislative body or a law professor. It is for the courts. In the classic words of the Pennsylvania Supreme Court (noting that even "our democracy" has limits):

> The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review.[128]

As the U.S. Supreme Court put it, "it always is open to interested parties to contend that the legislature has gone beyond its

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124. Singer, *Justifying*, *supra* note 10, at 659 (italics original; bold added).
125. *Id.* at 660 (emphasis added).
126. *Id.* at 661 (emphasis added).
127. *Id.* at 670 (emphasis added).
128. Winger v. Aires, 89 A.2d 521, 522 (Pa. 1952).

constitutional power."[129] Specific applications of governmental power have always been subject to judicial review.[130] Indeed, in reviewing land use regulations, the Supreme Court has made clear that land planners and regulators are not an aristocracy. They are subject to constitutional limitations and judicial examination. As Justice Brennan pungently noted, "After all, if a policeman must know the Constitution, then why not a planner?"[131] Moreover, the Court has acknowledged that its review of governmental action was constitutionally designed to limit the flexibility and freedom of government authorities.[132]

Beyond that, the concept of "good reason" (or its alter ego, "adequate justification") is too elastic to serve as the basis for confiscation. How elastic? Let's return to a dark chapter in American jurisprudence and open the Supreme Court Reports to *Plessy*.[133] We needn't dwell on the facts of the case, because what is important is its *ratio decidendi*: the Court held plainly that the State's exercise of its police power to enact the regulation in question was not only valid but solid. In upholding the racial separation law at issue, the Court concluded that "every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good . . . ."[134] Under this standard, the Court noted that racial separation laws were legitimate, including laws calling for separate schools,[135] laws forbidding racial intermarriage, as well as those establishing physical separation in theaters and railway carriages.

The not-so-tacit assumption of Professor Singer's formulation is that the public good implicit in land use regulation is achievable—as the inimitable Richard Babcock put it—by "a bunch of happy, well-informed people with a social I.Q. of 150 [who] sit around making decisions in complete freedom from outside pressure . . . ."[136] The

129. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

130. *E.g.,* Nectow v. City of Cambridge, 277 U.S. 183 (1928).

131. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 (1981) (Brennan, J., dissenting but apparently expressing the views of five Justices (*see supra* note 2 and accompanying text).).

132. First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304, 321 (1987).

133. Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

134. *Id.* at 550.

135. Even, the Court noted, in abolitionist states like Massachusetts. *Id.* at 544.

136. BABCOCK, *supra* note 8, at 19.

reality, of course, is far different, as the remainder of Babcock's work demonstrates. Twenty years after writing *The Zoning Game*, he updated it,[137] concluding:

> much of what was wrong with land use policy in 1966 is still wrong today. New zoning techniques flourish, but localisms, fiscal appetites, and xenophobia remain pervasive.[138]

The reality of today's planning and zoning is neither pure, nor necessarily public-spirited, nor related to professorial theorizing that can be untethered to reality.

In short, the police power standard is very forgiving of government abuses. That is why the Court insisted on a stricter standard than "reasonableness" when clarifying its rules for determining unconstitutional conditions in *Dolan*. The Court said it wanted more than a "minimal level of scrutiny . . . ."[139] How forgiving is the reasonableness standard? Here is how a "reasonableness" standard works in practice:

> [T]he case reduces itself to the question whether the statute of Louisiana is a *reasonable* regulation, and with respect to this there must necessarily be a *large discretion* on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established *usages, customs, and traditions of the people*, and with a view to the promotion of *their comfort*, and the preservation of the public peace and good order.[140]

So saying, the Court held that the racial separation statute at issue there had been enacted in good faith and was reasonable and therefore was constitutional. In a word, the "standard" is so loose as to barely be called a "standard" at all. It can be used to justify any majoritarian excesses.

Thus, if actions of a democratically elected government are to be the baseline for determining "adequate justification," that only demonstrates why we need the Bill of Rights—perhaps now more than

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137. RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED (Lincoln Institute of Land Policy 1985).

138. *Id.* at 1.

139. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

140. *Plessy*, 163 U.S. at 550 (emphasis added).

ever. Remember that in *Korematsu*[141] the Supreme Court unleashed government power to imprison without due process of law thousands of innocent American citizens on the flimsy basis that a general[142] thought there was a "good reason" for that.[143] And, by the way, history demonstrated that the "justification" relied on there was phony. Congress apologized and granted reparations.[144] Eventually, Korematsu's own conviction was set aside because the government suppressed evidence.[145] And, yet, for the justification thought to underlie the decision, more than 100,000 American citizens were denied their constitutional rights.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, *and property*, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[146]

The "good reason/adequate justification" idea has no place in takings law, at least not in the sense that a "good reason" can do away with the Constitution's explicitly laid down requirement that compensation be paid for takings. The reason is that the Fifth Amendment's requirement for compensation deals with—indeed, is based on—*proper* governmental actions, i.e., those done for "good reasons" or "legitimate justifications" and for a public use or purpose. They nonetheless require compensation. To put it another way, the

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141. Korematsu v. United States, 323 U.S. 214 (1945).

142. The general who provided the justification for the order later testified before Congress that "A Jap's a Jap. It makes no difference whether he is an American citizen or not." *Wartime and the Bill of Rights*, CONSTITUTIONAL RIGHTS FOUNDATION, http://www.crf-usa.org/america-responds-to-terrorism/wartime-and-the-bill-of-rights.html.

143. Some of the double-talk in justification of the "good reason" is priceless, e.g.: "Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire . . . ." *Korematsu*, 323 U.S. at 223.

144. Civil Liberties Act of 1988, 50a U.S.C. § 1989b *et seq*.

145. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (petition for coram nobis granted and conviction vacated).

146. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added). *See* James W. Ely, Jr., *Property Rights and Judicial Activism*, GEORGETOWN J. L. & PUB. POL. 125, 126 (Inaugural issue 2002) ("The entire Bill of Rights seeks to protect individual liberty by restraining governmental power.").

taking need not be improper to require compensation. The Fifth Amendment is not a precept of tort law but a requirement of compensation when property is taken to benefit the public. The presence of any public benefit is simply not a defense to the compensation requirement; rather, it is the *raison d'être* of the taking for which compensation must be paid. That is why, in reaffirming that compensation is the standard remedy for any sort of taking, the Court concluded that the Fifth Amendment was designed "to secure compensation in the event of *otherwise proper interference* amounting to a taking."[147]

In other words, the Fifth Amendment presupposes that government has an "adequate justification" for its actions, because without one as the basis, the action is not legitimate at all. Indeed, absent adequate justification for the government's action, the action is *ultra vires* and void.[148] As the Court recently put it, "the Takings Clause presupposes that the government has acted pursuant to a valid public purpose."[149]

I understand that Professor Singer has recently said that his thesis is not based on the test used in due process and equal protection for analyzing "rational relationship[s]."[150] But somehow the explanation rings both hollow and circular. Here are his words: "By 'adequate justification' . . . I mean that we must address the normative question of whether the government can give an adequate justification for exemption from the presumptive obligation to pay just compensation in these cases."[151]

Interestingly, that lone footnote is the only place I have seen in Professor Singer's regulatory takings writings where he concludes that there is a "*presumptive obligation* to pay just compensation" in regulatory taking cases. It appears, for example, nowhere in the just-published opus, *Justifying Regulatory Takings*, in which he sought to lay out the theory of regulatory takings. If such a "presumptive obligation" is at the heart of takings law—a concept with which I

147. *First English*, 482 U.S. at 315 (emphasis added).

148. *Compare* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (unlawful wartime steel mill seizure voided) *with* United States v. Peewee Coal Co., 341 U.S. 114 (1951) (compensation mandatory after lawful wartime seizure).

149. Lingle v. Chevron USA, Inc., 544 U.S. 528, 543 (2005).

150. Singer, *Call Ahead?*, *supra* note 20, at 19 n.53.

151. *Id.*

wholly agree—its explicit statement appears nowhere else that I have been able to locate in Professor Singer's writings. If he meant it, one would think it ought to have been included.

In any event, saying that the meaning of "adequate justification" is whether one can deduce an "adequate justification" is a circularity that explains nothing.

Moreover, in Professor Singer's view of the Constitution, the Fifth Amendment is severely restricted:

> The Constitution may[152] require compensation if a regulation *destroys* property, subjects the owner to *physical occupation*, or *deprives it of all value*.[153]

Apparently, the founders might as well not have bothered. Restricting the protection of the Fifth Amendment to total destruction, or complete physical occupation, or utter devaluation provides little that even the most flint-eyed government functionary would try to evade. The problems arise when we move beyond the painfully obvious and ask such questions as the following: What if a regulation leaves property with *some* value or use but not enough to be economically beneficial? Or useful? Or sensible? What if the property retains some theoretical value because an appraiser would testify that it has value as an ecological preserve, even if the owner has no interest in maintaining such a preserve? Or no ability to do so? What if government action merely damages (albeit severely) the economic value of the property but does not completely "destroy" it?[154] As Professor Singer notes, the real problems arise in the "hard" cases.[155]

In cases that do not pass the total destruction test, it appears that the Singer thesis lets government off the hook if it has a "good reason/adequate justification" for what it does. In his words, if government actions are "justified [they] do not count as unconstitutional

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152. Note that even this "rule" is grudgingly stated in the subjunctive mode. Professor Singer says that is because there are exceptions even in the case of total destruction. (Singer, *Call Ahead?*, *supra* note 20, at 19.) His exceptions, however, swallow the rule, leaving it barren.

153. Singer, *Call Ahead?*, *supra* note 20, at 19 (emphasis added).

154. And while you ponder this hypothetical, remember that many state constitutions contain provisions protecting against "taking *or damaging*" private property. *See* 2A NICHOLS ON EMINENT DOMAIN § 6.01[12][b].

155. Singer, *Justifying*, *supra* note 10, at 658, 663.

takings."[156] In his world, all that matters is whether there is an "adequate justification" for the regulation.[157]

Sorry. That perspective wipes too much from the constitutional slate and removes almost all protection of private property owners from ham-fisted (even if well-intentioned) government regulators. Professor Singer's thesis deals only with extremes. Either a regulation is so awful and destructive that it must be paid for (and everything else is done without financial consequence to the regulator) or we will have a situation where "no regulatory laws can be passed . . . ."[158] But extremes are not the only way to view the world. Perhaps because some of us have spent our careers trying to resolve problems for real people, rather than spinning academic theories, we can see ways to deal with issues that fall between the extremes. Regulation is like fire; no civilized society can live without it, but a society that leaves it without carefully crafted restraints is crazy. What no rational society can afford is to have virtually unrestrained regulation.[159] The Fifth Amendment was designed as that foundational restraint. To trust everything to the "good reasons" of the government, like Blanche DuBois relying on the kindness of strangers, may be asking too much.

Aside from that, the Singer thesis doesn't wash. If it held true, one would expect that the cases in which takings were found had no adequate justification at their core. But they often do. In *Nollan*, for example, the Court found no flaw in California's idea of having a public beach from Mexico to Oregon. It simply said that, if created, such a beach would have to be paid for.[160] In *Lucas*, the Court did not argue with South Carolina's desire to protect its beaches from erosion. It merely found a need to compensate.[161] In *Security National Bank*

156. Singer, *Call Ahead?*, *supra* note 20, at 20. But note that a taking is only "unconstitutional" if done without payment. So long as payment is provided (and some public benefit is involved (however minor or tangential)), the taking is constitutional. As noted earlier, the Fifth Amendment is not a tort precept but a quid pro quo requirement of replacement of property with compensation of equivalent value.

157. *Id.*; Singer, *Justifying*, *supra* note 10, at 622.

158. Singer, *Call Ahead?*, *supra* note 20, at 9.

159. For a contemporary illustration, see a recent news article whose title says it all: David W. Chan, *Hurricane Sandy's Red Tape Makes a Veteran Say, 'I'd Rather Go Back to Falluja*,' N.Y. TIMES, Aug. 19, 2015, at p. A1.

160. 483 U.S. at 841–42.

161. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Indeed, Mr. Lucas conceded that the regulation was legitimate (except for the non-payment).

and the *Regional Rail Reorganization Act Cases*, the Court approved the exercise of the bankruptcy power but required compensation.[162] In *Ruckelshaus*, the Court found the government's release of confidential intellectual property appropriate but sent the case down for a determination of compensation.[163] And so on. That being so, and that takings were nonetheless found, shows that the "justification" theme is not at the heart of takings law.

Too many Supreme Court opinions have been based on the proposition that *all* government action must be based on adequate justification to transmogrify that concept into a "rule" that validates confiscation. Indeed, the government cannot act except for good and valid reasons. It follows from that and from the Fifth Amendment that property can never be taken without adequate justification—and that when it is taken for a good and valid reason, compensation is mandatory. Period. To ignore those cases is to revert to the kind of argument the Court rejected two centuries ago when agents of the federal government argued in a case involving occupation of property that the word "below" in a treaty describing property location really meant "above."[164]

V. COMPLYING WITH THE JUST COMPENSATION GUARANTEE CREATES NO "VETO POWER" IN PROPERTY OWNERS

Compelling government to pay compensation does not give property owners a "veto" power over legislation.[165] It just puts a price tag on severe government action that deprives owners of the ability to use lawfully held property so we all can confront the cost of any desired action. It asks government (which is to say—us) to consider how much it really wants to either demand a specific land use or to preclude all land use on a particular parcel—and how that fits into the overall budget.[166] It asks those in charge of the government, "Do you want

162. United States v. Security National Bank, 459 U.S. 70 (1982); Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

163. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

164. Meigs v. M'Clung's Lessee, 9 Cr. (13 U.S.) 11, 18 (1815).

165. Singer, *Call Ahead?*, *supra* note 20, at 12.

166. *See* ELY, *supra* note 14, at 55 (just compensation guarantee protects property owners by "imposing a practical cost limitation" on the amount of property acquisition government can do); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985).

this badly enough to pay for it? Is this game really worth the candle?" Because there is always a price. The only question is, who pays?[167] We must ask this question because, in the Supreme Court's words, "The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice."[168]

Take a hypothetical (concededly extreme, but hypotheticals usually are extreme in order to illustrate a point): a government agency decides that society would be better off if all existing undeveloped land is preserved in its pristine natural state. To accomplish that, a law (or regulation, if you prefer) is passed that prohibits anyone from altering the natural state of any undeveloped property (which the Brits actually tried, by the way, with disastrous results).[169] That is all well and good with respect to public property, but some of the affected property is privately owned. Those who have been told that they have suddenly become the involuntary custodians of a public trust, which they must preserve but not disturb, would just as soon decline the honor.[170]

Enter the just compensation clause. The Fifth Amendment's draftsmen provided a great leveler by guaranteeing that property can be taken from private individuals for public benefit[171] only

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167. *Compare* the recent decision in *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699 (2015), in which the Court concluded that EPA erred by refusing to consider the fact that proposed power plant regulations would cost the operators nearly $10 billion each year.

168. United States v. Cors, 337 U.S. 325, 332 (1949).

169. *See* ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 54–57 (1987); Arthur Shenfield, *The Mirage of Social Land Value: Lessons from the British Experience*, APPRAISAL J. 523 (Oct. 1976).

170. *Compare* Suitum v. Tahoe Reg. Plan. Agency, 520 U.S. 725 (1997). (No building allowed in "stream environment zone"; lottery for future development compensation was essentially eyewash and of no utility). The agency settled with Mrs. Suitum for $600,000, rather than face trial on remand, although I understand the agency continues to enforce the same regulation against others (*see, e.g.*, Avila-Burns v. Tahoe Reg. Plan. Agency, no. cv-02558-KMJ-CKD [ND. CA. filed 12/10/15]). *Compare* the discussion, *infra* notes 225–33 and accompanying text for the governmental m.o. of continuing to act contrary to Supreme Court decisions.

171. Remember that public "use" really means something much broader now, like "purpose" or "benefit." Kelo v. City of New London, 545 U.S. 469, 480 (2005). Following *Kelo*, property may be condemned "on the slightest of public purpose pretexts." David Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 67 (2014). *Kelo* had been foreseen nearly a decade earlier in a sarcastic commentary in *Time Magazine* concluding that "eminent domain" is "a legal term meaning 'we can do anything we want.'" Steve Lopez, *In the Name of Her Father*, TIME, July 14, 1997, at p. 4. Or, to put it in Valley Girl argot, the answer to the question "what is a public use?" is now apparently "what . . . ever."

when the owner is paid. It is an attention-getter, a thought provoker. Regulatory taking cases are almost always zero-sum games. It almost never happens that one comes across a regulation provoking any controversy in this field in which everybody "wins." In virtually all situations, every gain produces a loss. In our hypothetical, while society as a whole may have gained by preserving all undeveloped areas for posterity (a postulate put forth *arguendo* only), the owners of that land have assuredly lost. What they could have used productively the day before the law was enacted, they must leave fallow forever.[172]

So, what does the just compensation clause do? It puts the question squarely to the regulators: in the calculus that results in your annual budget, are there other things that rank lower on your scale of needs than stultifying the use of this property so that you can eliminate their funding to preserve this land inviolate?[173]

Professor Singer should agree, because this is really a very democratic concept. Calmly and dispassionately invoked, it calls upon the majority to recognize that there is a cost attached to the desired end and to exercise the political fortitude to pay that bill from the public purse rather than compelling selected members of the minority to do so.[174] However, reality often intervenes. Given the way our majoritarian form of governance works, democracy fails without the intervention of the judiciary to provide what former California Chief Justice Donald Wright called "institutionalized self-control."[175]

The necessity of maintaining a judicial brake on the exercise of governmental power over individuals has been a part of the fabric of this country from its inception.[176] The Constitution's framers did

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172. *Compare* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (all building prohibited; no procedure for variance or excuse).

173. *See* Michael M. Berger, *To Regulate or Not To Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A. L. REV. 253, 294–99 (1975) (discussing the concept of compensated zoning); *see also* City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969).

174. In this context, "minority" includes both political and racial minorities. Justice Thomas's discussion of early urban renewal did us a favor by recalling that its announced goal of "urban renewal" was often mocked as "Negro removal." Kelo v. City of New London, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting). Not only were they "removed," many have never been accounted for. *See* Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25, 62–64 (1967).

175. Donald Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262, 1266 (1972).

176. See LARSON, *supra* note 27, for a discussion of the concerns about too much democratic control that led to the Constitution's system of checks and balances.

an admirable job of interweaving two disparate threads in creating a model form of government copied by state and local entities at all levels: a strong central government that could create one from the multitudes and a limitation on the ability of that central government to act precipitously. The one overriding memory burned into the consciousness of those who toiled over our Constitution and its Bill of Rights was of an overbearing governmental executive whose will was carried out without restraint.[177]

Enter the judiciary. For the checks and balances system to function, the judiciary must intervene when government regulators (or the democratic majority, if you will) overlook or ignore their obligations to pay for what they want. It may aid the discussion if you can personalize the concept of a governmental taking. It need not be physical in nature. If you picture, for example, that your parents had purchased some vacant land years ago with the intent of eventually building their retirement home there or eventually selling it as their retirement nest egg, you may be able to get a better view of our not-so-hypothetical hypothetical example when their plans are dashed and the investment rendered worthless by a post-acquisition regulation. Contrary to Professor Singer's theory, such regulatory stultification *after* purchase can be overcome by the Fifth Amendment's just compensation guarantee.[178]

Absent judicial enforcement, the protection sought to be afforded by the just compensation guarantee—as well as other Bill of Rights provisions—becomes worthless. It will be no more than nice words on parchment, sealed under glass in a museum case, for high school civics students to look at when they tour the nation's capital.

Three fine academic minds addressed the cost question in slightly different manners. Professor Arvo Van Alstyne:

> The fundamental question that should be faced, and which deserves a rationally developed legislative response, is not *whether* these costs will be paid; it is *who* will pay them, in accordance with *what* substantive and procedural criteria, and through *which* institutional arrangements.[179]

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177. *See* Jacobi et al., *supra* note 26, at 616.

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

179. Arvo Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modification in California*, 16 UCLA L. REV. 491, 543–44 (1969) (emphasis in original).

Professor Frank Michelman:

> [There is a] need for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain 'unsocialized,' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.[180]

One of the namesakes of the Brigham-Kanner Property Rights Conference, in typical fashion, put it bluntly: "There is no such thing as a free lunch."[181]

One of the historic responsibilities of the judiciary has been to protect "established rights in property." The reported decisions are legion. Almost any real property case that is litigated involves one or the other party's (if not both's) rights in property that are claimed to be well established. The one who does a better job of establishing that right generally wins. So why did Professor Singer get so riled up about the *Stop the Beach Renourishment* case?[182] Remember, he denigrated the plurality opinion to the degree of calling it a "top candidate" for "an incoherent idea" and said that it "alarmed many scholars" (though he cited only one) as well as some of the Supreme Court Justices.[183] What did the Court do? Well, technically, nothing. No member of the Court voted to reverse the Florida Supreme Court, so the underlying opinion remained valid. The problem, apparently, was that the conservative four concluded that, as the law had always protected "established rights," the Constitution could do so as well, and that the judiciary—as much an arm of the state as its coequal branches—was capable of taking property by its actions.[184] But even they did not believe that the Florida Supreme Court had gone too far. They were simply willing to consider the idea. The

180. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1181 (1967).

181. Professor Gideon Kanner, Address at Victor Gruen Foundation for Environmental Planning Symposium, *Property Rights v. Public Need: There Is No Such Thing as a Free Lunch* (Sept. 18, 1973).

182. Singer, *Call Ahead?*, *supra* note 20, at 7–10.

183. *Id.* at 9, 10.

184. *See* Hughes v. Washington, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring).

intriguing thing is that the others did not disagree (much less demonstrate "alarm"). They simply did not want to reach the merits of the issue.[185] Justice Stevens recused himself (presumably because his wife owned property in Florida that could have been affected by the decision).[186] The other four signed one of two concurring opinions. Justice Kennedy, joined by Justice Sotomayor, said, as he often does in takings cases, that he would prefer a due process analysis.[187] Justice Breyer, joined by Justice Ginsburg, neither agreed nor disagreed with the plurality: "I do not claim that all of these conclusions are unsound. I do not know."[188] Instead he was concerned that adoption of the judicial takings doctrine would involve federal judges in playing "a major role in the shaping of a matter of significant state interest—state property law."[189] Sorry, it is hard to get too worked up about that at this late date. Haven't the federal courts played a significant role in shaping numerous matters of significant state law involving—for example—law enforcement,[190] schools,[191] sexually oriented businesses,[192] religion,[193] local budgets,[194] and more?[195] Federal courts are already hip deep in state property law and many other issues of intense state interest.[196]

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185. This happens now and then. At oral argument in *Agins*, for example, Justice White smiled while telling Professor Kanner (representing Dr. and Mrs. Agins): "You can't cram issues down our throats that we don't need to decide." Gideon Kanner, *"[W]e Don't Have to Listen . . ."*, GIDEON'S TRUMPET (Feb. 27, 2014), http://gideonstrumpet.info/2014/02/we-don't-have-to-listen. Or the Court simply dismisses an entire case "as improvidently granted" when it cannot (or chooses not to) reach a merits determination. *See, e.g.*, PFZ Properties, Inc. v. Rodriguez, 503 U.S. 257 (1992).

186. *See* John Paul Stevens, *The Ninth Vote in the "Stop the Beach" Case*, 88 CHI-KENT. L. REV. 553, 556 (2013). After the fact, Justice Stevens says he would have voted to dismiss the petition as improvidently granted. *Id.*

187. 560 U.S. at 735–37.

188. *Id.* at 743.

189. *Id.*

190. Turner v. Upton Cnty., 915 F.2d 133 (5th Cir. 1990); Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996).

191. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

192. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

193. City of Boerne v. Flores, 521 U.S. 507 (1997).

194. Berkley v. Common Council, 63 F.3d 295 (4th Cir. 1995) (en banc).

195. *See* additional cases collected at Berger & Kanner, *Shell Game!*, *supra* note 92, at 691–92.

196. *See generally* Cnty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 192 (1959), where the Court refused to abstain in an eminent domain action because of a claimed interference with state interests. In the Court's words, "eminent domain is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue certain bonds without a referendum,

Nor am I convinced by Professor Singer's feigned inability to "tell when property rights are established and when they are not. . . ."[197] In the *Beach Renourishment* case, as in myriad others, the parties relied on established case law to make their pitch. To me, it seemed pretty clear that the Florida Supreme Court made a substantial sea change in the law. The question is whether that created a Fifth Amendment violation. I think the case presented a fascinating question that deserved an answer. Unlike Professor Echeverria, I was not "alarmed"[198] at this prospect.

Distinguishing between the concepts "mine" and "not mine" is something that is supposed to occur in the preschool years. Sometimes some of us forget those early playground lessons. The concept is easy: if it is "mine," I get to play with it and you don't, unless I approve. If you insist on taking it from me, then you need to pay me.[199] When that concept gets tangled up with emotional issues like endangered species or climate change, however, some people's vision tends to glaze over. They wrap themselves in global homilies and talk as though what is "mine" is actually not.[200] And they don't realize (or admit) they are speaking revolutionary thoughts. Our constitutional system is based in significant part on the idea that property can be privately owned—and can be used by its owners. But it seems hard for some people to remain clear about it or content with it, at least as long as the property in question belongs to somebody else.[201]

Nor does it aid either legal or economic theory to trot out Holmes's old "average reciprocity of advantage" saw,[202] a line from *Pennsylvania*

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its power to license motor vehicles, and a host of other governmental activities . . . ." (internal citations omitted.).

197. Singer, *Call Ahead?*, *supra* note 20, at 8. Rights are "established" when they have "the law back . . . them" and courts enforce that law. *E.g.,* Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979) (quoting with approval United States v. Willow River Power Co., 324 U.S. 499, 502 (1945)).

198. *See* Singer, *Call Ahead?*, *supra* note 20, at 10.

199. Kaiser Aetna v. United States 444 U.S. 164, 180 (1979).

200. Ironically, people who do so are usually wealthy and tend to scream bloody murder were someone to interfere with their ample assets. *Compare* FRIEDEN, *supra* note 8; William Tucker, *Environmentalism and the Leisure Class*, HARPER'S, Dec. 1977, at p. 49.

201. Actually, Professor Singer recognizes what he calls the "layperson's" understanding of property but insists that lawyers have complicated matters. Singer, *Justifying*, *supra* note 10, at 655.

202. Singer, *Call Ahead?*, *supra* note 20, at 9 (*quoted from* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

Coal that was actually used in an entirely different context. The Court used it there to explain why it was *not* applying an earlier case that let the defendant off the hook, because in that earlier case, there *was* a substantial trade-off (i.e., reciprocity of advantage); there, the regulated mine owner got to continue operations, and his workers were protected against drowning and being crushed by cave-ins in adjacent mines.[203] But the analysis (that is properly applied in party wall cases) was of no use in *Pennsylvania Coal*, and it is not something that Holmes "taught" should be broadly applied. This "reciprocity" idea has been misapplied and said to be bestowed on all members of the regulated community by allocation of permitted land uses. Professor Singer uses it to equate the property rights of various landowners.[204] Others have similarly bloated it beyond what the Court either said or intended. For, whatever merit may be found in that concept is limited chiefly to those situations where the zoning or other land regulations are stable and result in a pattern of reliable and economically rational land uses by all regulated parties (typically, but not always, in an established, built-out community). Where the burdens are borne equally by all, there can be said to be some reciprocity. But that reciprocity concept has little or no applicability to imposition of new confiscatory regulations on some in order to benefit others. These include situations that shift or impose new land use regulations that stultify desirable land use for the aesthetic pleasure of neighbors with clout. Owners of land whose reasonable use has been precluded for the benefit of others receive no "reciprocity of advantage." Indeed, they receive no "advantage" whatsoever.[205]

All of this may explain why we need some ground rules in this area. Professor Singer apparently feels that the law is better off simply winging it intuitively rather than having more settled guideposts.[206] He goes so far as to tweak Justice Scalia for not being able to convince a majority of the Court to join him in establishing some rules to clarify this field and then praises the Court for opting instead for

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203. For expanded discussion see WILLIAM A. FISCHEL, REGULATORY TAKINGS 19–22 (1995).

204. Singer, *Call Ahead?*, *supra* note 20, at 9.

205. *See* Gideon Kanner, *The Lie That the Regulated Benefit*, 18 NATIONAL L.J. 2 (Apr. 29, 1996).

206. Although Professor Singer says that "we need legal rules," it is apparent that the rules he wants impinge on the rights of property owners rather than protect them. Singer, *Call Ahead?*, *supra* note 20, at 5.

Justice O'Connor's "contextual, case-by-case approach."[207] A contrary (and better) view was articulated by Justice Frankfurter when he referred to such an uncertain legal regime as the law of a Kadi dispensing justice by the seat of his pantaloons.[208] I agree with Professor Singer that that is where we are. The Court repeatedly says that the *Penn Central* multifactor approach is its "polestar,"[209] even though scholars from both ends of the political spectrum have questioned its vitality.[210] But I have to wonder how Justice O'Connor felt when the carefully nuanced approach that she thought she had taught to the rest of the Court came back to bite her in *Kelo* when the majority made her eat her words.[211]

VI. REGULATION DID NOT END FEUDALISM AND SLAVERY—WAR DID

I have to quote this one; I did not make it up:

> We did not get from the feudalism [and slavery] of the eleventh century to our free and democratic society by deregulation. We got here by regulation.[212]

I hate to burst any rhetorical bubbles, but we got from feudalism and slavery to our current society not "by regulation" but by war.[213]

The Magna Carta was signed not as an act of "regulation" but rather as a royal response to the threat made by the English Barons to depose King John by force if he failed to grant the rights enumerated in it, which included the right of a British freeman not to be

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207. *Id.* at 7.

208. Terminiello v. Chicago, 337 U.S. 1, 11 (1949).

209. Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

210. John D. Echeverria, *Is the* Penn Central *Three Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZON. DIG. 3 (2000); Brief for Institute for Justice as Amici Curiae Supporting Petitioners, Tahoe-Sierra Pres. Council v. Tahoe Reg. Plan. Agency, 535 U.S. 302 (2002) (No. 00-1167) (written by Richard Epstein). Professor Singer himself says that *Penn Central* presents "as far from a clear rule as one can get." Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1402 (2013). For questions as to *Penn Central*'s provenance, see Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679 (2005).

211. *See* 545 U.S. at 481–82, 484–85, 486 n.16.

212. Singer, *Call Ahead?*, *supra* note 20, at 12.

213. As Professor Singer has recognized, the law of conquest provides certain benefits to the victors. Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763 (2011). *See* Johnson v. M'Intosh, 21 U.S. 543 (1823).

disseized of his "free tenements" save only "by lawful judgment of his peers or by the law of the land."[214] And when we finally had enough of English feudalism on this side of the Atlantic, we staged a revolution of our own—by force of arms. Royal government regulation in these cases was the *cause*, not the amelioration, of public uprisings.

As for slavery, it was first driven from the high seas by the might of the Royal Navy, and we Americans had to fight another war nearly a century after our revolution to rid ourselves of it. It is thus overly simplistic to say that we eliminated discrimination in places of business in the South by "engag[ing] in democratic lawmaking . . . ."[215] Having prevailed on the field of battle, the victorious Union adopted three constitutional amendments that radically changed race relations, among other things. The civil rights acts that followed were the result of the war and these post-war actions. Regulation of property had nothing to do with either. Regulation, as noted earlier, perpetuated the kind of Jim Crow laws that Professor Singer abhors.

But regulations can certainly protect property owners, just as regulations protect other citizens. The Civil Rights Act[216] applies to all.[217] In the Supreme Court's words, "rights in property are basic civil rights" that are constitutionally protected.[218] That comes as a surprise to some. I once appeared in court in a Civil Rights Act claim on behalf of a land developer. At one point, the judge interrupted and asked me, "So which of your clients is black?"[219]

VII. WHY ARE "REGULATORY TAKINGS" AN ISSUE?

The idea of a regulatory taking did not arise until the actions of the regulatory state made it necessary. The combination of a felt need by the democratic majority to either increase public ownership (by directly acquiring property interests) or decrease private ownership

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214. Magna Carta § 29.

215. Singer, *Call Ahead?*, *supra* note 20, at 15.

216. 42 U.S.C. § 1983.

217. *E.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). Judge Learned Hand had little patience for those who would distinguish "personal" rights from "property" rights. *See* Learned Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698 (1946): "Just why property itself [is] not a 'personal right' nobody took the time to explain."

218. Lynch v. Household Fin. Co., 405 U.S. 538, 552 (1972).

219. Griffin Homes, Inc. v. City of Simi Valley, Ventura Cnty. Case No. 107352 (1991).

(by enacting restraints on the exercise of property ownership) resulted in government actions that brought constitutional compensation issues to the fore. The impetus to obtain something for nothing by the mere passage of a regulation (or law) that automatically transferred control from private to public hands caused property owners alarm and brought cases to court.[220]

In Professor Singer's law/democracy theory, such regulations can almost always be "justified"—that is, they can be rationalized as not requiring compensation to constitutionally validate them.[221] However, as the Supreme Court trenchantly put it, any legislative body that cannot come up with a properly worded justification for its action has "a stupid staff."[222] And there's the rub. At the risk of repetition, in every eminent domain case—whether direct or inverse—government *must* act in pursuit of a public use or purpose, i.e., it must have a valid justification to support the taking, which would otherwise be a tort. Professor Singer's discovery that takings are based on adequate justification is like discovering that water is wet. Of course it is. If there is no justification, there is no valid governmental action.

Government agencies have for years been in the something-for-nothing business when it comes to property acquisitions. The regulatory cases fit squarely into this preconceived mold—and called for a response from responsible judges and legislators.

How bad was the problem? Illustrative is a chart showing offers, trial evidence, and jury verdicts in a range of direct condemnation cases (in which liability was conceded) that was presented at the third annual iteration of this conference by Professor Kanner. These were all cases in which government initiated the action, i.e., it wanted to buy the property, and to that degree was willing to pay. Yet, these numbers still show government offers many times lower than eventual jury verdicts (and sometimes many times lower than the same agency's own trial testimony)—often involving many multiples and millions of dollars.[223]

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220. *See* Michael M. Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A. L. REV. 253 (1975).

221. *See generally*, Singer, *Justifying*, *supra* note 10 (passim).

222. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12 (1992).

223. *See* Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065 app. at

Moreover, when it suits them, federal land acquisition officials have been known to delay acquisition for years in a sometimes openly brazen effort to wear down property owners and to acquire their land for "thirty cents on the dollar," as one Park Service functionary put it.[224]

The number of inverse condemnation cases alone attests to the fact that government does not pay willingly.[225] If it did, there would be no need for property owners to file suit. And they do file suit—in droves—because government routinely seeks to obtain something for nothing.

Even when confronted by Supreme Court opinions plainly establishing specific action as being covered by the Fifth Amendment, government agencies routinely sit back and wait to be sued—and then contest *both* liability and (when they lose) the amount of compensation. The airport noise cases, whose underlying legal precepts the Supreme Court essentially laid to rest in *Causby*[226] and *Griggs*,[227]

1146 (2007). *Compare* JACQUES GELIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN 47–97 (1982). The primary author (Mr. Gelin) was a long-time Department of Justice lawyer who wrote briefs for federal government agencies. The book devotes an entire chapter of fifty pages to the subject of "Property Devaluations for Which the Fifth Amendment Requires No Compensation," which is essentially a book of guidance to younger government lawyers of how to evade the compensation requirement.

224. *See* United States v. 341.45 Acres, 751 F.2d 924, 927 (8th Cir. 1984); Drakes Bay Land Co. v. United States, 459 F.2d 504 (Ct. Cl. 1972). Even scholars and commentators who (at least in the past) have expressed the belief that government should not compensate for confiscatory regulation have had to acknowledge that, in practice, the land use approval process is too often characterized by "one might almost say, the art, of delay, delay, equivocation and never-ending 'negotiation' . . . . These actions are ubiquitous, vicious, and devoid of any resemblance of procedural due process. . . . Moreover, many local governments seem to relish prolonged administrative turmoil before reaching a decision from which judicial relief may be sought." Norman Williams, R. Marlin Smith, Charles Siemon, Daniel R. Mandelker & Richard F. Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 242–43 (1984).

225. Indeed, it has been accepted federal practice for the government to seize property and say to the owner, "sue me." Stringer v. United States, 471 F.2d 381, 384 (5th Cir. 1973); United States v. Herrero, 416 F.2d 945, 947 (9th Cir. 1969). Note that this is one of those areas (*see supra* note 78 and accompanying text) where the Fourth Amendment provides protection unknown to the Fifth. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 46 (1993) (Fourth Amendment requires notice and hearing before seizure of property even though property was involved in criminal activity and thus statutorily subject to seizure). Why a duly convicted criminal is entitled to the full due process panoply of rights while a law abiding property owner is not has not been explained.

226. United States v. Causby, 328 U.S. 256 (1946).

227. Griggs v. Allegheny Cnty., 369 U.S. 84 (1962).

lingered for years as both state and federal agencies continued to deny liability.[228] In the early years of my practice, after winning the *Nestle* case,[229] which established airport operator nuisance liability toward neighbors, I actually had the head of the legal team for Los Angeles International Airport tell me that he would not acknowledge that state Supreme Court precedent until the same state Supreme Court so held in a case involving his own airport.[230]

The same sort of thing has happened in litigation involving the federal Rails-to-Trails Act.[231] In a nutshell, when railroads were being laid across the country in the nineteenth century, right-of-way agents fanned out and acquired property interests on which to lay the tracks. While they sometimes acquired fee simple interests, most of the rights-of-way were acquired as easements to remain in existence so long as the property was used for railroad purposes. Fast forward to the twentieth century, when railroads were being replaced as transport modalities and were abandoning rights-of-way wholesale. Congress passed a statute enabling their transfer to trail groups, notwithstanding contrary state property law that returned full, unencumbered use to the underlying owner upon abandonment of rail use. The Federal Act interdicted the owners' rights as established

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228. *E.g.,* Argent v. United States, 124 F.3d 1277 (Fed. Cir. 1997); Brown v. United States, 73 F.3d 1100 (Fed. Cir. 1996). I discussed this at last year's conference. *See* Michael M. Berger, *Strong and Informed Advocacy Can Shape the Law: A Personal Journey*, 4 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 1 (2015). For a somewhat earlier view, see Michael M. Berger, *Airport Noise in the 1980s: Its Time for Airport Operators To Acknowledge the Injury They Inflict on Neighbors*, INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN, ch. 10 (Sw. Legal Found. 1987).

229. Nestle v. City of Santa Monica, 6 Cal. 3d 920 (1972).

230. For extended discussion of Los Angeles's shenanigans both in court and in the press following this California Supreme Court decision in another city's case, see Michael M. Berger, *The California Supreme Court—A Shield Against Governmental Overreaching:* Nestle v. City of Santa Monica, 9 CAL. WEST. L. REV. 199, 244–52 (1973). That article includes a discussion of Los Angeles's "threat" to "shut down" LAX in thirty days unless the California Supreme Court rescinded its opinion in *Nestle*. Spoiler alert: that effort to buffalo the Supreme Court fell flat. Notwithstanding the "leak" of a "confidential attorney-client" memo so advising that resulted (for those who remember how important print media used to be) in an eight-column, double-banner headline in an "Extra" edition of the old *Los Angeles Herald-Examiner* (reproduced at 9 CAL. WEST. L. REV. at 245), the threat was not serious.

231. 16 U.S.C. § 1247(d). *See* Michael M. Berger, *Rails-to-Trails Conversions: Has Congress Effected a Definitional Taking?*, 1990 INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN, ch. 8 (Sw. Legal Foundation); Michael M. Berger, *Not So Fast: "Rail-to-Trail" Conversions Could Be More Costly Than They Appear*, 37 RIGHT OF WAY, (Oct. 1990) no. 5, p. 4.

by state law.[232] After the Supreme Court held that the Act could result in federal liability and directed the parties to the Court of Federal Claims, the federal government kept routinely denying claims, forcing property owners to continuously file suits.[233]

On a more general note, Congress responded to this governmental abuse of power with the Uniform Relocation Assistance and Real Property Acquisition Policies Act?[234] That statute proclaims (*inter alia*):

> The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.
> . . . .
> If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.[235]

Virtually all states later adopted versions of the same law. The Act and its state counterparts were inspired by testimony at Congressional hearings which demonstrated the prevalence of widespread undercompensation and procedural abuse.[236]

When the government does pay (and certainly there is generally some payment made in the standard eminent domain case), numerous

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232. In its own way, this brings us back to the question of whether the Fifth Amendment protects "established rights of private property," as the plurality in *Stop the Beach Renourishment* believe and Professor Singer decries. *See* Singer, *Call Ahead?*, *supra* note 20, at 8, 10. In *Preseault*, the underlying land owners possessed "established rights of private property" and the Court held that compensation was due for taking them. Preseault v. ICC, 494 U.S. 1 (1990). *See* subsequent opinion, 52 Fed. Cl. 667 (2002).

233. *E.g.,* Preseault v. United States, 100 F.3d. 1525 (Fed. Cir. 1996); Toews v. United States, 376 F.3d 1371, 1376 (Fed. Cir. 2004); Farmers Cooperative Co. v. United States, 98 Fed. Cl. 797 (2011); Biery v. United States, 99 Fed. Cl. 565 (2011); Capreal, Inc. v. United States, 99 Fed. Cl. 133 (2011); Rogers v. United States, 90 Fed. Cl. 418, 432 (2009); Ybanez v. United States, 98 Fed. Cl. 659, 668 (2011); Anna F. Nordhus Trust v. United States, 98 Fed. Cl. 331, 338 (2011); Macy Elevator v. United States, 97 Fed. Cl. 708 (2011).

234. 42 U.S.C. § 4651.

235. *Id.* at (1), (8).

236. *See, e.g.*, Hearings on H.R. 386 Before the H. Comm. on Public Works, 90th Cong. (1968); Real Property Acquisitions Practices and Federal and Federally Assisted Programs: Hearings Before the H. Select Subcomm. on Real Property Acquisitions of the Comm. on Public Works, 88th Cong. (1963).

studies have shown that the compensation never actually accounts for the owners' losses.[237] Or, as Professor Thomas Merrill aptly summarized it, "The most striking feature of American compensation law—even in the context of formal condemnation or expropriation—is that just compensation means incomplete compensation."[238] Indeed, a prominent federal appellate judge has publicly acknowledged "[t]he fact that 'just compensation' tends systematically to undercompensate the owners of property taken by eminent domain."[239]

In this context, some response seemed in order from Professor Singer beyond the curt conclusion that "legitimate regulatory takings claims are truly exceptional."[240]

VIII. COLLAPSING TAKINGS CONCEPTS ONLY ADDS CONFUSION

Professor Singer glosses over the distinction between a finding of legal liability and a finding of the amount of compensation due. These are entirely separate questions. This is no more evident than in his discussion of *Loretto*.[241] He argues that *Loretto* was wrongly decided because, even though there was a clear (and permanent) physical occupation, there was—in his view—no damage. Thus, no compensation should be due. Thus, because no compensation was due, there was no taking. While his conclusion about compensation in that case may be correct, the analysis that no taking occurred is a little too glib. There are actually two fundamental questions in any takings case. First, has there been a taking? As a pure matter of liability, there was a taking in *Loretto*—the New York Legislature authorized permanent physical occupation of private property by a stranger. It is important to maintain this clear delineation between liability and compensation. As long as regulators are able to blur the line between

237. *See* Kanner, *[Un]equal Justice*, 40 LOY. L.A. L. REV. at 1108 n.162; Gideon Kanner, *"Fairness and Equity," or Judicial Bait-and-Switch? It's Time to Reform the Law of "Just" Compensation*, 4 ALB. GOV'T L. REV. 38 (2011).

238. Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002). *See also id.* at 116 ("the concept of fair market value is essentially a fiction in the context of takings of property"). As that wise old Detroit condemnation lawyer remarked, "If condemnors were reasonable, condemnees' lawyers would starve."

239. United States v. Norwood, 602 F.3d 830, 834 (7th Cir 2010) (Posner, J.).

240. Singer, *Justifying*, *supra* note 10, at 634. Compare cases awarding compensation cited *supra* notes 70–71 and accompanying text.

241. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *See* Singer, *Call Ahead?*, *supra* note 20, at 21–22.

what is and is not a taking, it will remain easier to assume that some desired action can be accomplished by ukase rather than by due process. It was thus wholly appropriate for the Supreme Court to lay down a rule that such a permanent physical invasion is a *per se* taking.[242] Once having decided that, however, we reach the second question, i.e., what, if any, compensation is due? As the Court expressed it:

> The Court of Appeals determined that § 828 serves the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,' and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid*.[243]

The New York Legislature concluded that presumptive compensation was $1. And after remand from the Supreme Court, that is all that was awarded.[244] But the fact that no compensation was due does not detract from the fact that the government had compelled the property owner to submit to a permanent occupation. Whether I or Professor Singer—or anyone else—believes that it caused any measurable harm is a different issue.[245] That is why we have juries.[246] A jury could find that this kind of coerced occupation required compensation, regardless of whether Professor Singer or anyone else

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242. *Loretto* was reaffirmed in 2015 when the Supreme Court held that a taking can occur "without regard to the claimed public benefit or the economic impact on the owner." Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2427.

243. *Loretto*, 458 U.S. at 425 (emphasis added; citations omitted). *See also* Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979); United States v. Security Industrial Bank, 459 U.S. 70, 74–75 (1982) ("however 'rational' [this] exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment"). As noted earlier (*supra* notes 111–16 and accompanying text), the compensation issue only arises upon passage of a *valid* regulation.

244. Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428 (N.Y. 1983).

245. Justice Breyer, at least, may be in sync with this part of the Singer thesis. See his questions during the oral argument of *Horne II*, where he asked—essentially—if there is no damage, how can there be a taking? By the time the opinion was filed, he retreated and signed the part that found a taking, dissenting only from the refusal to remand for a compensation evaluation. 135 S. Ct. at 2433.

246. My old Contracts professor (a crusty old Missouri judge) used to preach that whenever there is a contested question the jury will always know the answer.

believed that the government's action did not actually harm the owner. The property owner ought to be allowed to present his case, given that a full blown physical taking had actually occurred. That others might disagree with his position only reinforces the need for trial to sort out the difference.

Most recently, in a highly publicized case, the Court of Federal Claims held that the U.S. government took the stock of AIG when it "bailed out" that company *but* that no compensation was due for the taking, because the stock was worthless at the time it was taken.[247] In other words, takings liability and the amount of compensation due are separate questions.[248]

IX. WORD GAMES DON'T RESOLVE ANYTHING

Unfortunately, when push comes to shove, Professor Singer retreats to wordplay. He concludes that compensation is "ordinarily required" when the state "takes" "an entire property right" but not when the right is "merely limited or regulated."[249] That formulation, of course, resolves nothing. It simply raises other questions. *First*, one must always be wary of the use of the word "mere." It is a signal that the author has already concluded that nothing noteworthy has happened.[250] *Second*, Singer's formulation provides no guidance, stating the obvious—that compensation is due when government action "takes" property. Of course compensation is due then. Plain English and the Fifth Amendment tell us that. Explicitly. But it evades the harder question of what kind of regulations go beyond the "mere" stage to the "actual" acquisitive stage. As noted earlier, Justice Brennan effectively demonstrated that land use regulations can be just as effective at taking property as physical invasions.[251]

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247. Starr International Co., Inc. v. United States, 121 Fed. Cl. 428, 475 (2015) ("the Court concludes that the Credit Agreement Shareholder Class shall *prevail on liability* due to the Government's illegal exaction, *but shall recover zero damages* . . . ." (emphasis added)).

248. It is rare, but not unheard of, that even a conceded taking may cause no damage. For that reason, no compensation is due. Redevelopment Agency v. Tobriner, 215 Cal. App. 3d 1087 (1989). Still, the fact that a taking causes no economic damage does not make it any less a taking—*injuria absque damno* and all that.

249. Singer, *Call Ahead?*, *supra* note 20, at 9.

250. For commentary on imaginative judicial uses of the belittling adjective "mere," see Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765, 797 n.169 (1973).

251. *Supra* note 2 and accompanying text.

Third, to restrict the constitutional protection to the taking of only "an *entire* property right" unduly restricts the inquiry. The Supreme Court has held that the protection applies to all takings, whether permanent or temporary, total or partial.[252] As even the California Supreme Court recognized:

> The constitutional guarantee of compensation extends to both types of cases and not merely where the taking is cheap or easy; indeed the need for compensation is greatest where the loss is greatest.[253]

Professor Singer understands the impropriety of defining words out of existence as a way of ending an argument. See his critical discussion of *Tee-Hit-Ton*.[254] There, he rightly excoriates the Court for its refusal to order the government to compensate Native Americans for confiscating timber on an island they owned. The Court played the label game of saying that the island may have been "property" as a matter of common law and tribal law but not under U.S. Constitutional law. Plainly, the Court was wrong.[255] But Professor Singer is no more right by using the same sort of definitional sleight of hand toward property owners in general in the regulatory context.[256]

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252. *E.g.*, First English Evangelical Lutheran Church v. Cnty. of Los Angeles, 482 U.S. 304 (1987).

253. Klopping v. City of Whittier, 8 Cal. 3d 39, 43 (1972).

254. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); *see* Singer, *Call Ahead?*, *supra* note 20, at 22–23.

255. While we are talking about Native Americans and governmental foot-dragging, I must tip my hat to my cousin, Thomas Tureen, who, as a young legal aid lawyer, successfully represented the Passamaquoddy and Penobscot tribes against the United States and the State of Maine and obtained a judgment essentially establishing title for his clients to the greater part of the state. The matter eventually settled for $81.5 million but not until after contentious litigation. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). For further discussion see PAUL BRODEUR, RESTITUTION: THE LAND CLAIMS OF THE MASHPEE, PASSAMAQUODDY AND PENOBSCOT INDIANS OF NEW ENGLAND (with Afterword by Thomas N. Tureen) (1985). An excellent discussion of the Nonintercourse Act at the heart of that litigation is in Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

256. To Professor Singer's query "Why then was it not property?" Singer, *Call Ahead?*, *supra* note 20, at 23, I can do no better than refer him to Gideon Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation For Loss of Goodwill in Eminent Domain*, 6 CAL. WEST. L. REV. 57 (1969), in which the author makes the same query about a stick from the property rights bundle that had been treated as "property" for all purposes except for compensation when taken in eminent domain. *See also* Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW.

Part of the problem is Professor Singer's insistence that "[p]roperty owners are *normally* subject to regulation without compensation."[257] No, they are not—not when the regulation is so intrusive or far-reaching that it seriously impairs or eliminates customary rights and prerogatives of property ownership, leaving the owner with little or nothing save only the obligation to pay taxes and bear other burdens of property ownership.[258] As liberal a Justice as Thurgood Marshall had no trouble penning these words—with the agreement of all members of the Court:

> We have *frequently recognized* that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.[259]

And speaking of word games, one is almost at a loss for words at the acceptance—even hearty approval—by a respected scholar of the so-called analysis of the Supreme Court in a case for which neither he nor the Court obviously had any sympathy: *Heart of Atlanta Motel, Inc. v. United States*.[260] I have no quarrel with the Court's decision to uphold a statute requiring equal access to public accommodations.[261] What concerns me is the back-of-the-hand administered by the Court and the evident approval of that treatment by Professor Singer. To refresh you, the *entirety* of the Court's takings analysis was this: "Neither do we find any merit in the claim that the Act is a taking of property without just compensation."[262] Sorry, but with all the respect

765, 771 (1973) ("concepts and notions of what constitutes 'property' in other areas of the law are of little assistance when dealing with definitions of 'property' in eminent domain law"). Apparently that dissonance applies to Indians as well as the rest of us.

257. Singer, *Call Ahead?*, *supra* note 20, at 24 (emphasis added); *see also* Singer, *Justifying*, *supra* note 10, at 670.

258. *See* Arverne Bay Constr. Co. v. Thatcher, 15 N.E.2d 587, 592 (N.Y. 1938).

259. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 14 (1984) (emphasis added).

260. 379 U.S. 241 (1964). *See* Singer, *Call Ahead?*, *supra* note 20, at 17–18; Singer, *Justifying*, *supra* note 10, at 617.

261. Although I disagree that the statute created some sort of easement of access in the general public (*see* Singer, *Call Ahead?*, *supra* note 20, at 14, 19 n.52); rather, it appears to be more of an equal protection determination, providing equal access to all of what is afforded to any.

262. 379 U.S. at 261.

one can muster, that is not appropriate analysis from the Supreme Court. Indeed, calling it "analysis" is an affront to the language. The argument was not so far afield that it was not entitled to the same respect given to miscellaneous Eighth Amendment claims or many other claims that some people might not find meritorious. And it is hardly appropriate for a scholar to applaud. Would the applause have been as enthusiastic had the Court held "Neither do we find any merit in the claim that the right of access to public accommodations cannot prevail over private property rights"? Wouldn't Professor Singer have demanded to know more about the "why"? As a practicing lawyer who has toiled years to get cases into the Supreme Court,[263] I find it offensive to have the arguments brushed aside like so much lint. All of us should.

In the end, Professor Singer's thesis boils down to tautology and circularity. In describing what he sees as the law governing regulations, Singer concludes:

> Only when a regulatory burden is one that an owner should not have to bear as a citizen in a democracy is compensation required.[264]

> A regulatory taking exists only when a regulatory law imposes an uncompensated burden on an owner that cannot be justified as legitimate in a free and democratic society that treats each person with equal concern and respect.[265]

This is a persistent theme in Professor Singer's works.[266] I would like to believe that those words mean something and that they actually convey some sort of standard or rule or template by which government and governed can order their lives and conduct. I may be missing something, but I do not see how those generalities aid the process. The paean to democracy and equal treatment and respect

263. The Court now decides about seventy cases on the merits—from the entire country, with all its state and federal jurisdictions—each year. Odds of being one of the seventy are pretty slim.

264. Singer, *Call Ahead?*, *supra* note 20, at 21. Who decides what they "should not have to bear"?

265. Singer, *Justifying*, *supra* note 10, at 661.

266. *E.g.*, Singer, *Justifying*, *supra* note 10, at 662, 670; Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORN. L. REV. 1009 (2009).

may feel good, but it contains nothing solid to which legal rights can be attached.

But Professor Singer has another approach, viewing matters from the property owner's vantage point. That may help. In his words:

> When a law *cannot be justified to those harmed by it*, we have reached the limits of democratic decision making.[267]
> . . . .
> And even severe decreases in the value of property are justified if the reasons for the regulations are *ones that owners should accept*.[268]
> . . . .
> [L]aws *do* violate constitutional property norms when they impose burdens that should be shared by all taxpayers because *we cannot adequately explain to owners why they alone should bear those costs.*[269]

Having dealt with regulated property owners for many years (including some who ended up in cases cited either here or in Professor Singer's articles), I can assure you that none of them understood, let alone accepted, the idea that they ought to be required to bear the costs of the regulation so that the greater populace could benefit from stultifying the use of their land. Were this seriously put forth as a standard of some sort, it would not "justify" any of the regulations that have been litigated. Take this to the bank: no severely regulated property owner will accept that he has been justly singled out to bear a public burden for the benefit of his neighbors. So, if the test is whether those who are harmed by regulations can accept that they should be, then no regulation will meet the Singer "justification" test.

But perhaps Professor Singer has not actually been looking for answers in all of his research into the depths of takings law. Toward the end of *Justifying Regulatory Takings*, he reveals this simple conclusion:

> What matters is not what the right answer is but that we understand *why the cases are hard*.[270]

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267. *Id.* at 659 (emphasis in original).
268. *Id.* at 622 (emphasis added). Who gets to say what they "should" accept?
269. *Id.* at 663 (emphasis in original).
270. Singer, *Justifying*, *supra* note 10, at 663 (emphasis in original).

That formulation rang a bell. It took me back in time to the musings of another Harvard professor, this one from the mathematics department, who was ruminating on a mathematical construct (with which I, along with many others, was afflicted in my youth) called "new math." In an effort to clarify the concepts, Professor Lehrer explained:

> But in the new approach, as you know, the important thing is to understand what you're doing, rather than to get the right answer.[271]

I am not sure whether that helps us to understand either Professor Singer or regulatory takings, but it seems that this is a touchstone of the idea that the "right answer" is not important.[272] That is a prescription for a society in which neither its plumbing nor its ideas hold water.

X. WHAT HAPPENED TO THE LAST FIVE YEARS OF SUPREME COURT JURISPRUDENCE?

Reading Professor Singer's output, one might get the impression that the Supreme Court stopped deciding takings cases five years ago. The most recent case Professor Singer discusses[273] was decided in 2010,[274] and the one before that was in 2005.[275] The intriguing thing about the cases since 2010 is that the property owners won all of them—by large votes, which always included some (and sometimes all) of the liberal Justices. They are worth some analysis as showing that all, and particularly current, Supreme Court jurisprudence cannot easily be squeezed into the box of noncompensatory action. Indeed, I believe that this group of cases shows that the Supreme Court has become tired of listening to the same old government doomsday pap and has begun to enforce the Fifth Amendment.[276]

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271. Tom Lehrer, "New Math" (1990).

272. As Professor Henry Higgins noted when discussing the French in *My Fair Lady*: "the French don't care what they do actually as long as they pronounce it properly."

273. Except for *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013), which he dislikes—very much.

274. Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702 (1910).

275. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

276. I understand Professor Singer's point that the Fifth Amendment doesn't really apply to state and local government. (Singer, *Call Ahead?*, *supra* note 20, at 8 n.27.) But, as we

Perhaps more important from the viewpoint of the Brigham-Kanner Property Rights Conference, we should ask: "How do these cases impact Professor Singer's democracy theory, or his justification idea for regulatory takings?" How, indeed. To begin with the punch line, I don't think they fit those concepts at all. The representatives of the majoritarian side not only lost each case, they even lost the votes of the liberal Justices more often than not.[277] Moreover, many of their arguments were not merely rejected; they were scoffed at. We should take a closer look at these cases to gain some insight into where the Court may be headed and what contemporary takings law looks like.

My surmise is that the Court at first cut the regulators some (largely procedural) slack, in the hope that they would at least realize that they were dealing with a serious constitutional issue and would try to mend their ways. Instead, the regulators grew bolder, to the point of openly cynical abuse of property owners,[278] in the evident hope that the Court would continue to turn a blind eye toward their excesses.

—*Item*: *Lozman*[279] was not technically a takings case, but bear with me. I think it was a warning shot across the governmental bow. Mr. Lozman has his counterparts in many cities. He is the kind of guy who drives city council members nuts. He appears at most city council meetings and asks to be heard during the open discussion period. Then he takes off on his pet peeve of the day. This particular guy's problem got compounded because the city council was not only tired of listening to him, the city was also his landlord. He had a floating home in its harbor, but do not call it a "houseboat." There is a photo of Mr. Lozman's home attached to the Court's opinion. Take a look; it doesn't look like any "boat" you've ever seen. First, it is a boxy affair that actually looks like a house, rather than a boat, with picture

agree that the guarantees of the Fifth Amendment are applied to state and local government through the due process guarantee of the Fourteenth Amendment (Chicago B&Q R. Co. v. Chicago, 166 U.S. 226, 241 (1897); *see* Singer, *Call Ahead?*, *supra* note 20, at 8 n.27), the difference is of purely academic interest, as due process under the Fourteenth Amendment requires just compensation under the Fifth Amendment.

277. In the six cases, the four liberals cast twenty-three votes: seventeen were cast in favor of the property owner and against the government (plus four more on one of the issues in *Koontz*). Justice Kagan recused herself in *Arkansas Game & Fish*. If you are counting, the remaining three votes were all cast by Justice Sotomayor—one in each of the three cases. So, to the extent the liberals voted as a bloc, the bloc stood firmly in these cases in defense of individuals and against the collective might of the State.

278. *See* Michael M. Berger, *Municipal Myopia Run Rampant*, 31 URBAN LAW. 363 (1999).

279. Lozman v. City of Riviera Beach, 133 S. Ct. 735 (2013).

windows and French doors instead of portholes. It has no raked (pointed) bow (to ease its way through the water if one wanted it to move), no engine, no bilge pumps, no navigation gear and more (or less, actually). When he got behind in his rent, some bright folks at city hall decided it would be a good idea to evict him (and possibly get rid of him for good?). They took him to state court via an unlawful detainer action—and lost when the jury concluded that the city was engaging in improper retaliation rather than a legitimate landlord/tenant dispute. Stung by its loss, the city got even craftier, deciding that, because the home was floating in its harbor, the case actually involved a "vessel" and could be brought in Federal Admiralty Court.

They thus invoked the federal admiralty jurisdiction which is in rem (i.e., the property, not the property owner, is the named defendant). The court had the defendant (i.e., the floating home) "arrested" and towed. It took three U.S. marshals to arrest the structure and tow it away. They towed this unseaworthy structure to Miami—eighty miles away—losing pieces of it along the way. Judgment eventually was entered for the city, which bought the defendant at an execution sale. And then destroyed it. That is why I class this as a "takings" case, even though it will go down in history as an admiralty case. The lower courts held that this intentionally unseaworthy floating home was a "vessel" and ruled for the city.[280]

Long story short, the Supreme Court saw through the city's ploy, decided it did not want to open this can of worms for future exploitation and held that there was no admiralty jurisdiction. (The opinion makes for interesting reading, as the Court struggles to explain why it is rejecting admiralty jurisdiction here. Among other things, it reverted to nursery rhymes to demonstrate the absurdity of expanding admiralty jurisdiction. Remember "rub-a-dub-dub, three men in a tub?" The Court did, wanting no part of such a journey.)[281]

So, how does *Lozman* fit here? It was a warning by the Court—a warning that the Court was getting tired of government gamesmanship that treated property owners without respect while clogging the

280. Bearing witness to the truism that some courts will buy any argument proffered by the government. *See* City of Riviera Beach v. That Certain Unnamed Gray, Two-Story Vessel Approximately Fifty-Seven Feet in Length, 649 F.3d 1259 (11th Cir. 2011).

281. Had the city's ingenuous theory survived judicial scrutiny, every houseboat in the land would become subject to regulation and inspection by the U.S. Coast Guard. Just what the Coast Guard and the judiciary needed!

courts in the process. The conservative Justices were joined by Justices Ginsburg, Breyer, and Kagan. I think the opinion contained a message that needs to be heeded. Now read about the other cases. They are less humorous but much more substantively on point.

—*Item*: Another warning came in a case that one might call the real estate equivalent of the fanciful "one bite" rule in tort law. You know, the "rule" that says that a dog owner cannot be held liable for her dog's nasty temper until after the first bite because, until the dog actually bites someone, the owner doesn't know the dog is vicious. Not sure if that makes sense with dogs; it never made sense to me for flood control projects.

And yet that was the law. Federal courts had held that government-induced flooding cannot be a taking unless it is absolutely, positively, and irrevocably permanent—and it must happen more than once to demonstrate permanence. The Federal Circuit Court of Appeals applied that rule and reversed a judgment for compensation, saying that the situation "at most created tort liability."[282]

The property taken was bottomland timber. The taking was done by six consecutive years of flooding (protested by the owner) during the growing season.[283] The Supreme Court decided to address the presumed rule that repeated, temporary flooding is merely a tort and never a taking.

Changes in the law should have eased the Court's task. After *First English*,[284] where the Court held that the Fifth Amendment protects

282. Arkansas Game & Fish Comm'n v. U.S., 637 F.3d 1366 (Fed. Cir. 2011). Is anyone else getting tired of modern-day courts pulling out the hoary old "sorry, you sued out the wrong writ" dodge? Can't they just look at the facts, determine whether they state a legitimate claim, and get on with life? *Cf.* Thomas W. Merrill, *Anticipatory Remedies For Takings*, 128 HARV. L. REV. 1630 (2015).

283. Note that the property owner was an agency of the State of Arkansas. (Yes, the Fifth Amendment protects government-owned property but only against depredation by a government agency of a higher class. *See* City of Inglewood v. Unnamed Citizens, Residents & Property Owners, 508 F.2d 1283 (9th Cir. 1974) (Inglewood could not state a federal takings claim against Los Angeles, as both were cities)). Even government agencies get peeved when other agencies take their property without compensating. And speaking of governmental focus on the money, recall what happened in the *Lucas* case. There, South Carolina fought strenuously to keep Mr. Lucas from doing anything on his lots in order to "protect" the shoreline. When, under the prod of a U.S. Supreme Court opinion, the State Supreme Court remanded the matter for determination of just compensation, the State bought the property. Did the State keep it vacant? No. The State sold it to another private individual for the very development it had earlier denied Mr. Lucas, so it could recoup its purchase price. *See* Gideon Kanner, *Not with a Bang, but a Giggle: The Settlement of the* Lucas *Case*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS*, ch. 15 (D. Callies ed. 1996).

284. 482 U.S. 304 (1987).

against temporary—as well as permanent—takings, the issue should have been closed, because as a matter of constitutional law, it no longer mattered whether the flooding was permanent or temporary.[285] Since then, the Federal Circuit dealt with the concept of "permanence" (albeit in a nonflooding context) and concluded that if the action happens for as long as the government wants it to, it is permanent—even though the government may stop at any time.[286] Moreover, that same court held that the destruction of timber (which apparently happened six times in this case) requires compensation.[287]

The Claims Court had determined that the flooding was both substantial and predictable and awarded $5.7 million in damages for lost trees and reclamation costs. The Federal Circuit reversed. Acknowledging the temporary taking rule of *First English*, the Circuit decided to ignore the rule because "cases involving flooding and flowage easements are different."[288] The "flooding cases are different" rationale was expressly rejected by the Supreme Court. "No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case."[289]

The highlight of the opinion was the Court's response to the Feds' argument that imposing liability "would unduly impede the government's ability to act in the public interest." That canard is routinely raised by many governmental defendants. At the Federal level, it is almost a truism that there will be a section in the government's brief making that argument (almost as though federal computers have a macro that automatically inserts the argument with a single keystroke). "Time and again in Takings Clause cases," according to the Supreme Court's accounting, the government has made this assertion. "The sky did not fall" after the argument was rejected before.[290] So it was rejected again. Forcefully. In a unanimous opinion. By Justice Ginsburg. Perhaps government lawyers will finally stop dragging out this shopworn argument.

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285. Professor Tribe had endorsed the compensation for a temporary taking concept even before *First English*. *See* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 385–86 n.23 (1985).

286. Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991).

287. Cooper v. United States, 827 F.2d 762 (Fed. Cir. 1987).

288. 637 F.3d 1366, 1374 (Fed. Cir. 2011) (relying on pre-*First English* decisions).

289. 133 S. Ct. at 519. Professor Singer notes the decision in this case but nothing about its significance other than that flooding can be a taking. Singer, *Justifying*, *supra* note 10, at 642 n.165.

290. 133 S. Ct. at 521.

It may be worth noting that the decision did not criticize the reason for the governmental decision to flood this land repeatedly in order to provide flood control benefits elsewhere. It simply required compensation for the harm inflicted regardless of the justification for the action. That the justification may have been good did not negate the harm. "The question is what has the owner lost, not what has the taker gained."[291]

—*Item*: *Koontz*[292] was perhaps the most eye opening of the recent decisions. It not only built on the Court's earlier jurisprudence that unconstitutional conditions can constitute unlawful takings,[293] it expressed some strong displeasure with the government and some understanding of the shabby way that government agencies have treated property owners doing no more than seeking permits to use their own land. The earlier cases dealt with conditions attached to permits that had been granted. But what if the regulator proposes conditions during the administrative process, the owner refuses to be intimidated, and the permit is then denied? Do the *Nollan/Dolan* rules apply? Should it matter, in other words, whether the regulating agency imposed a condition precedent or a condition subsequent? Does it matter that the proposed conditions would have required work to be done or money to be spent on unrelated and distant land?

The trial court found a taking. The District then changed its mind and issued the permits. Compensation of some $376,000 was awarded for a temporary taking. The Court of Appeals affirmed, but the Florida Supreme Court reversed. It held that the *Nollan/Dolan* rules do not apply (1) to money or (2) to where the permit is denied because the owner will not accept the conditions.

The U.S. Supreme Court reversed on both issues. The bottom-line vote was 5-4, but as to the latter point, the Court was unanimous. All of the Justices recognized the word game that the government was playing and would have none of it. Indeed, probably the most refreshing thing about the majority opinion was that those of us who have toiled for years on the property owners' side of these cases seem finally to have made some headway showing the Court what actually occurs during municipal land use permit hearings. Four times.

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291. United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

292. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013).

293. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

Count 'em—four times (five, if you count the one quote from *Nollan*), the Court used some form of the word "extortion" to describe the imposition of such conditions. Elsewhere, the Court also seemed to grasp the unfair attempts that many municipalities make to "leverage" their power:

> [L]and use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take . . . . So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable.[294]

"Extortion"? "Coercion"? "Leverage"? I'd say the Court is beginning to understand the unequal bargaining power enjoyed by government agencies in land regulation matters.[295] But none of that fits with Professor Singer's theories about either "democracy" or "justification" for government action. Rather, Professor Singer's sharp criticism of *Koontz* is that it will make "negotiation" between government and property owners more difficult.[296] As the Court used language appropriate to Mafioso "negotiations" to describe the governmental conduct, I suspect that the Court intended to eliminate that type of dealing.

—*Item*: Rails-to-Trails returns to the Supreme Court. I feel confident that, twenty-five years ago, the Court thought it had resolved the question of whether transfer of an abandoned railroad right-of-way easement pursuant to federal statute could be a taking that required compensation. I feel that way because, although it refused to strike down the statute, it undid a Second Circuit decision holding that the statute could never, at any time or under any circumstances, be a taking and said the Claims Court could decide the issue as in other routine cases against the Feds.[297] However, the Feds never took that seriously and have been forcing property owners to litigate their

294. *Koontz*, 133 S. Ct. at 2594.

295. *Compare supra* notes 84–93 and accompanying text.

296. Singer, *Justifying*, *supra* note 10, at 669 n.304.

297. Preseault v. ICC, 494 U.S. 1 (1990). See *supra* notes 46–66 and accompanying text for a discussion of the use of compensation as the remedy for regulatory takings, rather than invalidation.

cases for years while awaiting either death or the final conclusion of their Claims Court suits.[298]

In *Brandt*[299] the Feds decided to take the initiative, presumably tiring of constantly defending against—and losing to—property owner suits based on defunct and abandoned rail lines being converted into public hiking trails. They filed a quiet title action, claiming that the railroad easement involved there was not really a traditional easement and that abandonment of rail usage meant that the United States regained control of the property. Presumably the plan was to get a favorable decision that could then be used offensively against other property owners to cut off further litigation.

The Feds won in the District Court and the Tenth Circuit. They lost where it counted—with only Justice Sotomayor dissenting. And they got bench-slapped in the process:

> The Government does not dispute that easements normally work this way [i.e., abandonment restores full use and ownership to the underlying fee owner], but maintains that the 1875 Act granted the railroads something more than an easement, reserving an implied reversionary interest in that something more to the United States. *The Government loses that argument today*, in large part *because it won when it argued the opposite* before this Court more than 70 years ago . . . .[300]

The case was actually pretty simple. One wonders why the lower courts allowed themselves to be led astray on so elementary a point of law. The property owner was the patentee of an eighty-three-acre parcel of land in Wyoming. It was subject to a railroad right-of-way easement covering nearly ten acres. The government settled with all other property owners on this rail line—as the Court explained, their interests were "much smaller" than Brandt's and less worth litigating. The opinion explains the basic law of easements and shows how that law means the government loses. More than that, it analyzes the federal statutes dealing with railroad rights-of-way, demonstrating that grants made after 1871—like this one—were merely garden variety easements.

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298. *See supra* note 233 and accompanying text.
299. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).
300. *Id.* at 1264 (emphasis added).

The Court's displeasure with the government's position was manifest. In addition to the material quoted above, the Court said, inter alia, that the government tried to tell it that an earlier opinion "did not really mean what it said"; that the federal statute does not support "such an improbable (and self-serving) reading"; and, in short, that "[w]e decline to endorse such a stark change in position."[301]

This reaction seems part of a pattern in the recent decisions where the Court not only rules against the government's position but does so in an opinion that is highly critical of either the underlying government action or the arguments in the government's briefs, or both.

As far as democracy and the will of the majority go, the Rails-to-Trails Act was passed for the greater good—not to mention physical fitness—of the American public to convert existing linear rights-of-way from rail traffic to exercise trails without the expense and effort of creating them from scratch. From that standpoint, the general public gained while the underlying property owners had not had use of the land for a century or so anyway. But democracy lost to the constitutional imperative. And the conservatives were joined by Justices Ginsburg, Breyer, and Kagan.

—*Item*: *Horne* was actually two of the recent Supreme Court decisions. The Ninth Circuit was reversed twice—first on procedure and then on the merits.

The case[302] involved a marketing order that is a relic from a bygone era, enacted in 1937 as a direct descendant of one of President Roosevelt's "New Deal" programs, created in reaction to market turmoil out of a desire to recreate an agricultural market that was apparently viewed as the golden age of American agriculture, i.e., between 1910 and 1914. The order allowed a federally created body to commandeer a percentage of the raisin crop each year, thus reducing the size of the market and (presumably) making life better for all. Mr. and Mrs. Horne, tired of turning over raisins to the government, when asked for 47% of their crop one year, refused. In a letter to the Secretary of Agriculture, they invoked their right against involuntary servitude under the Thirteenth Amendment.[303]

Horne I was a procedural case because the government insisted, and the Ninth Circuit agreed, that as a precondition to defending

301. *Id.* at 1266, 1268.

302. Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013) (Horne I).

303. Alas, the Thirteenth Amendment issue never made it into the litigation.

against the enforcement order brought with regard to that 47% crop forfeiture, the Hornes would have to pay the fine the government levied against them—$483,843.53 for the value of the raisins they did not surrender and another $202,600 as a fine for not turning over the raisins, plus interest. A pretty hefty ticket of admission to court. The Supreme Court unanimously said the ruling was nonsense and reversed for a merits determination. Two interesting comments came from the liberal side of the Court during oral argument. First, Justice Kagan suggested that they remand to the Ninth Circuit to determine whether the program constituted an unconstitutional taking of private property or "was the world's most out-dated law."[304] Then Justice Ginsburg recalled that the Ninth Circuit initially decided the case on the merits (in the government's favor) before deciding that the procedural ploy was the easier way out. She mused as follows about what she called "one mysterious thing": "[t]he first time around, the Ninth Circuit decided this case on the merits. So if you're right, I take it, we remand and then they adjudicate the merits of the takings claim. But they already did that."[305]

The Court remanded, and the Ninth Circuit swiftly turned it around, ruling—as predicted—for the government and setting up the second round in the Supreme Court in two years. Recalling Professor Singer's comment about liberals not being the "enemies of free markets,"[306] it was interesting to see the government argue that the Hornes' financial predicament was their own fault because all the government had done was to place a tariff on the Hornes' voluntary choice to enter the stream of commerce. And if they didn't like it, they could sell their grapes for something else, like wine, or grow some other crop. The Court made short work of that. Even Justices Ginsburg, Breyer, and Kagan joined the part of the opinion finding a taking, concluding that the government may not "hold [property] hostage, to be ransomed by the waiver of constitutional protection."[307] Nor would that majority swallow the Marie Antoinette-like conclusion that, if they did not like the tariff on raisins, let them make wine.

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304. Transcript of Oral Argument at 49, Horne v. Dep't of Agric. 133 S. Ct. 2053 (2013) (No. 12-123).

305. *Id.* at 26.

306. Singer, *Call Ahead?*, *supra* note 20, at 2.

307. Horne v. Dep't of Agric., 135 S. Ct. 2419, 2431 (2015) (Horne II).

CONCLUSION

Professor Singer is obviously a gifted theoretician. But he has allowed his theories to run away with him. His fervent belief in democracy, for example, is admirable but cannot provide an answer for everything. This country's founders understood both the strengths and weaknesses of democracy. That is why we have a Bill of Rights that is designed entirely—and solely—to restrain the power of the democratic majority. I am certain that Professor Singer would take umbrage were the government to apply his reasoning to other civil rights protected by the Constitution. We simply cannot have the kind of society we all want to have if the vote of the majority can control property ownership and use, any more than we can allow that vote to control speech, religion, voting, reproductive rights, desegregation, marriage (in any of its permutations), gender discrimination (in any of its permutations), or any of the other major constitutional issues of the day. Majority rule is wonderful in theory but often messy and unprincipled in practice.[308]

That is why the Bill of Rights is controlled by an independent judiciary.[309] While Professor Singer is correct that we all want a rule of "law," part of the "law" that we want is the tempering influence of judges who have to swear obedience to the Constitution before mounting the woolsack.

It would be nice to live in Lake Wobegon, where all the women are strong, all the men are good-looking, all the children are above average, and all government functionaries pursue the "public good," untainted by the influence of special interests, whether public or private.[310] However, in the land of reality, where we actually live, the majority needs some restraint—particularly when dealing with other people's resources. As Justice Brandeis put it, "The goose that lays golden eggs has been considered a most valuable possession. But

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308. *See, e.g.*, the inspiration for the title of Professor Singer's paper for this conference, "Should we call ahead?". Singer, *Call Ahead?*, *supra* note 20, at 15.

309. *See* Michael M. Berger & Richard D. Norton, *An Independent Judiciary: Society's Bulwark*, VERDICT, 2nd Quarter 1998, at 18.

310. *Compare* BABCOCK, *supra* note 8. It may be worth noting, in this context, that Professor James Buchanan received the Nobel Prize in Economics for demonstrating that, for all the familiar platitudes about public interest, government officials act in pursuit of their own self-interest, the same as private parties. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

even more profitable is the privilege of taking the golden eggs laid by somebody else's goose."[311] The Constitution provides the balance to ensure that eggs stay in the proper baskets and that when regulations take significant sticks from one's bundle of property rights—if you will allow me to shift metaphors in mid-sentence—their rightful owners are compensated. Doing so isn't "compensat[ing] owners just to get them to obey the law";[312] it is providing the proper check on the majority, just as the Constitution mandates, while at the same time providing compensation for the sacrifice wrung out of the owner for the "public good" *du jour*.

Throughout the last century, the Supreme Court has consistently acknowledged the power of the majority (exercised through its officials) to pursue its vision as long as it is coupled with the necessary balance provided by the Fifth Amendment.

> [T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domains. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. *It might have to pay individuals before it could utter that word,* but with it remains the final power.[313]

> [The California] Coastal Commission [has a] belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea . . . . California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; *but if it wants an easement across the Nollans' property, it must pay for it*.[314]

In our democracy, majority power and constitutional restraint are inseparable, and the way to ensure their enforcement and coexistence is through the courts. As Dean Erwin Chemerinsky (a scholar whose liberal credentials cannot be questioned) put it in his recent book, "The primary reason for having a Supreme Court then, is to enforce the Constitution against the will of the majority."[315]

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311. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 12 (1914).

312. Singer, *Call Ahead?*, *supra* note 20, at 25; Singer, *Justifying*, *supra* note 10, at 670.

313. Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (Holmes, J.) (emphasis added).

314. Nollan v. California Coastal Comm'n, 483 U.S. 825, 841–42 (1987) (emphasis added).

315. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 9 (2014).

WHAT DOES THE CONSTITUTIONAL PROTECTION OF PROPERTY MEAN?

LAURA S. UNDERKUFFLER*

INTRODUCTION

It is a great pleasure to honor Professor Joe Singer's work today. His work has illuminated the deep structures and questions that the idea of property presents, in a way matched by few others. Scholars in the United States and elsewhere are profoundly indebted to his work.

The core of Professor Singer's work can be captured by these seemingly simple questions: "What *is* property? How can we explain its protection, and nonprotection, in society and law?" Although philosophers had long debated such questions, Professor Singer was one of the first American legal scholars to place this essential question in the cross-hairs of probing legal analysis.

Although questions about the nature of property might have seemed of largely academic interest in the late 1980s when Professor Singer began his work, this quickly changed with world events. The sudden need to sort out conflicting property claims in the wake of radical regime change in Africa, Eastern Europe, the former Soviet Union, and elsewhere, the emergence of "new" property claims as the result of rapid advances in the fields of biotechnology and computerized information gathering, the expanded regulatory powers asserted by governments to address worsening global environmental problems, and other events, all worked to bring fundamental questions about the nature of property and its protection to the forefront of popular and legal consciousness.

In the United States, the most important prism through which these questions have been viewed is the constitutional protection of property. Although debates about property certainly occur in other contexts, it is the idea of constitutional protection that has for decades captured American popular and legal imagination. In the property field, it has been the center of attention for academic commentators, the popular media, property-rights protesters, and

* J. DuPratt White Professor of Law, Cornell Law School.

ordinary citizens alike. Somehow it seems to capture popular angst about rights, powers, and change more than any other legal or cultural idea.

Because of the importance of Professor Singer's work in this field, the constitutional protection of property has been an important theme for this conference. The question seems to boil down to this: What does the constitutional protection of property promise? *What can* it promise?

The protection of property, by constitutional guarantee or otherwise, is an emotionally charged issue. It always has been, and it always will be. From the earliest moments of childhood, humans feel the need to assert themselves through the language of possession. As Kevin Gray has written, "we are not far removed from the primitive, instinctual cries [of identification] which resound in the playgroup or playground: 'That's not yours—it's *mine*.'"[1]

This instinctive sense of acquisition is well founded. Property—in the sense of material things—is necessary for the sheer survival of each of us. That might not have the immediate resonance for most of us, in our rich country, that it has for those in other parts of the world. But even in our country, there is acute public awareness that individual security, options in life, a sense of achievement, and power are deeply rooted in the protection of property.

What, then, does the Constitution provide? The simple answer would be that it protects property like it protects other rights. The Constitution's Fifth Amendment states, "nor shall private property be taken for public use without just compensation."[2] As Richard Epstein and other contemporary commentators have argued, this must mean that property is as protected as other rights. In this view, freedom of speech, freedom of religion, due process of law, and the protection of property are all enumerated rights under the Constitution. All are of equal stature. There is no basis for protecting the first three, for instance, and leaving the fourth to the whims of politics and the "democratic process."[3]

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1. Kevin Gray, *Equitable Property*, 47 CURRENT LEGAL PROBS. 157, 159 (1994).

2. *See* U.S. CONST. amend. V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.").

3. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI.

That view of rights is simple and—I believe—is our intuitive one. Rights have power. That is why they are "rights." In particular, they have power against competing public interests. Public interests might be desirable, for some reason, but they do not have the power to defeat rights. At least, they do not have that power absent extraordinarily compelling circumstances.[4]

The assumption that legal rights (particularly constitutional rights) function to protect individual interests from public demands is deeply ingrained in Anglo-American jurisprudence. Freedom of speech, freedom of religion, due process of law, and so on involve values that we particularly prize in our society and are, accordingly, interests to which we grant special legal protection. The same, one could argue, is true of property.

However, the simple addition of property to the list of unquestionably protected constitutional rights raises an oddly perplexing question. If the ownership of property is a constitutional right like any other right, why are property rights *so often not* given the presumptive power to which they are entitled?

In fact, we find that in practice, courts and legislatures often seem to disregard what appear to be clearly established, pre-existing property rights in favor of what are simply "desirable" public interests. For instance, few courts have privileged property-rights claims over environmental regulations, even though owners have demanded it. As one property-rights advocate has observed, "courts have withdrawn from protection of property [in these cases], except for occasional unpredictable intervention in some of the most egregious situations."[5] A similar observation could be made about zoning regulations, endangered species laws, historic-preservation statutes, cultural-property laws, and other restrictions upon or deprivation of claimed property rights in general service of the public interest.

We certainly would not say that law exhibits such a "casual" approach toward rights of speech, religious exercise, or other enumerated constitutional rights. Why is it the case with property?

L. REV. 41 (1992); BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION (1997).

4. *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 65–69 (2003).

5. JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT—AND WHY YOU SHOULD CARE 88 (1997).

We could, for instance, come up with a constitutionally mandated rule that would unequivocally protect property—for instance: "[a]ll existing property rights are protected. Period." Is it simply that the courts (for instance) lack the backbone to protect property rights? Or is it something more complex?

I. THE PROBLEMS OF PROPERTY

A. The Problem of Abstract Definition

We must admit at the outset that even if we adopted such an unequivocally protective rule, there would be some definitional difficulties. For instance, what would "property" be? After much thought, theorists have offered definitions such as "property is . . . *rights*, . . . rights in or to things,"[6] or, more narrowly, property is "legal relations between people with respect to . . . thing[s]."[7] The question immediately arises, of course: *what* rights and involving *what* things? Most theorists, when faced with this question, opt for an all-inclusive understanding. For instance, one has offered this:

> The idea of property—or, if you prefer, the sophisticated or legal conception of property—involves a constellation of Hohfeldian elements, correlatives, and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalog of 'things' (tangible and intangible) that are the subjects of these incidents.[8]

This gets us farther—but not much farther. We still need to know which Hohfeldian elements (rights, privileges, powers, and immunities), regarding which catalogued things, are included. To answer this question, recourse to some other external idea is needed. Frequently offered possibilities include "commonly recognized" incidents of ownership (e.g., the rights to use, transfer, exclude, and otherwise control) regarding "commonly recognized" things (e.g., land, chattels,

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6. C.B. Macpherson, *The Meaning of Property*, *in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 1, 2 (C.B. Macpherson ed., 1978) (emphasis in original).

7. AMERICAN LAW INSTITUTE, A CONCISE RESTATEMENT OF PROPERTY 1 (2001).

8. STEPHEN R. MUNZER, A THEORY OF PROPERTY 23 (1990) (emphasis deleted). *Cf.* AMERICAN LAW INSTITUTE, *supra* note 7, at 2 ("property" encompasses legal relations "designated by the words 'right,' 'privilege,' 'power,' and 'immunity'").

wealth-creating intangibles, and other sources of material security).[9] However, attempted applications of such understandings immediately exposes their inadequacies. Are all conceivable sources of personal wealth or security included? Are all legal rights that affect such sources, and affect our control of them, a part of "property" understandings?

In the end, we must have more: we must have some underlying reason *why* we designate certain rights, privileges, powers, or immunities "property" within the guarantee of permanence that it ostensibly affords. Recognition of this need has prompted various offerings of what the goals of property regimes should be. For instance, those who believe in economic liberalism have argued that property should protect the fruits of individual labor and the operation of market systems.[10] Others have stressed broader ideas of human flourishing[11] or the development of broad human capacities of some sort.[12]

The uncertainty in the meaning of property has infected United States Supreme Court decision-making as well. In a series of cases, the Court has cited widely varying—and potentially conflicting—understandings of what constitutionally protected property should be. For instance, "property" in the takings[13] context has been defined by the Court as "bundles" of "traditionally" or "commonly" recognized rights to possess, use, transport, or exclude; or, alternatively, it has been defined as the right to the protection of "reasonable,"

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9. *See, e g.*, MUNZER, *supra* note 8, at 47 (discussing the right to transfer as determinative of the identification of property rights); LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18 (1977) (citing "ownership" rights to use, transfer, and exclude as essential property rights); A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 113 (A.G. Guest ed., 1961) (citing the right to possess, the right to use, the right to manage, the right to receive income, the right to capital, the right to security, the power of transmissibility, the absence of term, and the incident of residuarity as classic examples of property rights).

10. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32–35 (4th ed. 1992); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS AND PROCEEDINGS) 347 (1967).

11. *See, e.g.*, Gregory S. Alexander, *Ownership and Obligation: The Human Flourishing Theory of Property*, 43 HONG KONG L.J. 451 (2013); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); MARGARET JANE RADIN, REINTERPRETING PROPERTY 6 (1993).

12. *See, e.g.*, C.B. Macpherson, *Human Rights as Property Rights*, 24 DISSENT 72, 77 (1977) (property as a means to a "full and free life," "using and developing and exerting our capabilities and energies").

13. *See* U.S. CONST. amend. V, *supra* note 2.

"investment-backed," or "historical" expectations.[14] Tests of the latter type, by their terms, turn upon the investment made by the particular owner; tests of the former type, as statements of abstract entitlements, might not.[15]

As the result of such doctrinal problems, the Court has most often and uncomfortably settled on the idea that it is "the several States, [not the United States, that are] possessed of residual authority . . . to define 'property'" for constitutional purposes.[16] However, making state definitions determinative has its own problems. First, there is the thorny issue—for federal courts—in determining whether state laws create "established rights" or only "non-established interests."[17] In addition, there is a more profound problem. If "property"—the core material of the constitutional right—is a matter of state law, a state can presumably interpret it as it sees fit. And, with federal courts bound by state determinations of state law, there is often not much left for the exercise of federal power.[18]

In short, the idea of a "simple" property-protection guarantee quickly becomes illusory when the complexities of the idea of property itself are considered. It is very difficult to have a simple, legally enforceable guarantee when articulation of its central idea is so difficult.

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14. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (right to "essential use" of land); *id.* at 1055–60 (Blackmun, J., dissenting) (discussing eighteenth-century and nineteenth-century understandings of rights incident to land ownership as determining modern property interests); Hodel v. Irving, 481 U.S. 704, 716 (1987) (citing "investment-backed expectations"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 499 (1987) (citing "financial-backed" expectations); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("[p]roperty rights in a physical thing" include the rights to possess, use, exclude, and dispose of it); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) ("traditional" rights of possession, exclusion, and other powers of disposition are the rights of property).

15. *See, e.g.*, *Loretto*, 458 U.S. at 419 (facts that cable service installation was present when the building was purchased, and enhanced the building's value, did not preclude the building owner's claim that mandated cable service "intrusion" was a taking of her right to exclude without the payment of compensation).

16. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980). *See also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 707 (2010); Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

17. *See Stop the Beach*, 560 U.S. at 715–18 (plurality opinion); *id.* at 732–33 (majority opinion).

18. *See, e.g.*, *id.* at 729–33 (claim by Florida landowners that the Florida Supreme Court changed the law—and eliminated their property rights—must be rejected, because that court's prior decisions did not establish the property rights that the landowners claimed in the first instance).

B. The Problem of Reciprocal Rights and Powers

Let us assume, however, that the definitional problem somehow vanishes—or, more accurately, that there is a consensus that the rights claimed by the complaining party in a particular case are unequivocally part of constitutionally recognized "property". For instance, imagine a case in which a landowner claims the right to build a house on a shorefront lot that is flanked by similar lots with single-family structures. Or imagine a case in which a landowner claims the right to fill a marsh in order to develop his land—a course of action previously taken by countless others. In these cases, at least, it should be an easy judicial task to unequivocally and constitutionally protect the owners' claimed property rights—correct?

At this point, we stumble upon the next problem. Claimed property rights—because of the nature of the resources that they concern—*are often inextricably and unalterably interdependent.* The right to use one's land, once accepted, might appear to be a right that we can unilaterally enforce. But the situation with land is rarely that simple. What one person does in the name of ownership rights in land is almost certain to affect the property rights and interests of others.

In other words, because of the physical interconnectedness of land, wildlife, and human habitation, the claimed rights and actions of an owner of land cannot be viewed in isolation. It is not a situation in which I—as a landowner—can say, "this is my land, so I will do what I want, and to heck with the rest of you." It is a situation in which—whether we like it or not—our actions and fates are inextricably intertwined.

Consider, for instance, the first hypothetical situation posed above: a landowner's claim of right to build on a shorefront lot in the face of newly imposed environmental restrictions. This, of course, is the famous *Lucas*[19] case. Lucas demanded that he be permitted to develop his two ocean-front lots on the Isle of Palms in a way that was permissible when the land was purchased. The State of South Carolina claimed that environmental damage that unregulated building had caused—such as the acceleration of erosion, the jeopardizing of the beach/dune system, and the endangerment of adjacent properties—justified a facial ban on building.[20]

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

20. *See* S.C. CODE § 48-39-259(4) (2003); *Lucas*, 505 U.S. at 1008–09. I use the term "facial" deliberately, as the law provided landowners an opportunity to challenge the way in which

Protection of the ability to build or to otherwise use one's land is something that we generally associate with property rights and thus—it could be argued—is something that should be protected under a rule of unequivocal property protection. However, if we afford Lucas such a right to build, what do we do with the damage that his actions will cause to public property and to the private property rights and interests of others?

This dilemma is replicated in other land-use cases in which the landowners' proposed actions, claimed as property rights, would severely and directly affect the use or enjoyment of land or its resources that are claimed as protected by others. Consider, for instance, the second hypothetical situation posed above: a landowner's claim of right to eliminate wetlands, with fill, an action that has been pursued by landowners for centuries.[21] Opposing this action is more recent scientific understanding of the physical and biological interdependence of wetlands with groundwater, other shoreline lands, and the bodies of water that border them. Thus, on the one hand, there is the claim of the landowner to engage in an ancient practice; on the other hand, there is knowledge that the filling and pollution of wetlands will cause damage to other land and bodies of water in ways that transcend the boundaries of the claiming landowner's parcel. Again, we are faced with an activity (filling and building) that would appear, on its own, to be included within an unequivocal (constitutional) property-protection rule. But what do we do with the damage to the rights and interests of others?

It is cases such as these—and a myriad of others—that illustrate why an unequivocal rule of protected, "traditional," or "expected" property rights cannot be undertaken by courts. The physical interdependence of property rights claimed by owners and the property rights of others makes such an absolute rule impossible.

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baseline and setback lines had been drawn by the State. This was a path that other landowners had taken; however, Lucas spurned this alternative. *See* Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, *in* PROPERTY STORIES 221, 231 (Gerald Korngold & Andrew P. Morriss eds., 2004). Furthermore, after the *Lucas* trial concluded, the law was explicitly amended to allow owners to build modified structures under a special permit procedure. Of the twelve lots on the Isle of Palms that were restricted under the law, the owners of ten—all but Lucas—sought such permission and obtained it. *See id.* at 246.

21. *See, e.g.*, *Palazzolo*, 533 U.S. at 606.

There are two responses that simple-protection-rule advocates might advance. First, there is the argument that recognition of physical and biological interdependencies involving land will erode land-use rights too far—that if these are recognized any use now protected might be prohibited.[22] However, even those advocates admit that our recognition of natural dependencies in law is "more pervasive today than before, not because the world has changed but because our perception of the world has changed."[23] Our perception of the world has changed, and our perception of the world will continue to change with advances in scientific knowledge. As a result, activities that were once thought to be harmless to the property rights and interests of others are often now clearly seen as not. Law—as the set of enforceable societal rules—must grapple with these realities. Pretending that the world is not what it is will not help to solve interdependent problems.

The bottom line is that any property right, previously conferred, is at most a statement of the way that conflicting interests have been resolved at one particular moment. As understandings of consequences change, "rights" will change. There is no way to avoid that reality.

There is, however, a final objection that simple-protection-rule advocates might raise. It is not our position, they might argue, that the Constitution prohibits all changes in rights; we acknowledge that reality. When it comes to property, the Constitution is not a guarantee against change; rather, it is a guarantee of *indemnification*. South Carolina can institute prohibitions against the development of ocean-front lots; Rhode Island can prohibit the filling of wetlands; but there is a price for these changes. When landowners' established rights are abolished, those who want those changes must pay for them.

The core of this argument is that compensation, in such cases, is owed as a matter of justice. If someone is hurt, the wrongdoer must pay; and when rights are taken, that party is the government. Although this argument has a certain surface appeal, how justice actually compels this result is difficult to articulate. That is because justice, in any situation, is an *inherently relational* inquiry. "When we decide whether a law or its operation is 'just,' this is an inquiry about the advantages and disadvantages that 'X' derives from the operation of that law, or its absence—and the advantages and disadvantages

22. Richard A. Epstein, *Life in No Trump: Property and Speech Under the Constitution*, 53 MAINE L. REV. 23, 26–27 (2001).

23. *See id.*

that are suffered by 'Y'."[24] In short, it is impossible to evaluate either party's claim without reference to the claim of the other. Yet that is what the simple-protection rule requires: that the injury to one party should be compensated, without fail, with no consideration of the injury to the other.

Even aside from problems with the justice of this rule, there is—even more fatally—another. Could the public—that is, the taxpayers—*afford to pay* all of the claims that a simple-compensation rule would generate if such a rule were implemented?

In fact, there were reasons why the attempted per sé compensatory rule that was adopted in the *Lucas* case quickly faded into irrelevance. In that and later cases, the Supreme Court held that a landowner can always recover his loss if a regulation deprives him of "all" or "practically all" of his land's economic value.[25] In Lucas's case, that meant recovery of more than $1.2 million for two small lots;[26] for Palazzolo, a claimant in a later case, it would have meant recovery of $3.1 million in "development value" of wetlands.[27] It does not take a sophisticated mind to appreciate that those values, multiplied by millions upon millions of environmentally restricted shoreline and wetlands parcels in the United States, is not something that "government"—state and local taxpayers—can afford to pay. Aware of this, courts have simply held that true "*Lucas*" wipe-outs of all value are exceedingly rare, or that the land that is the subject of the claim is part of a larger, more valuable parcel.[28]

An important attempt to implement a simple-compensation rule was recently tried in the State of Oregon. In 2004, Oregon voters enacted a law that came to be known as "Measure 37." This law required

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24. Laura S. Underkuffler, Tahoe*'s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENTARY 727, 749 (2004).

25. *See* Lucas v. S.C. Coastal Council, 505 U.S. at 1019 (1992) (compensation is required, under a per sé test, when a regulation deprives an owner of "all economically beneficial uses" of his land and the land is "worthless"); *Palazzolo*, 533 U.S. at 631 (*Lucas* rule applies when "the landowner is left with a token interest"). *Accord*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (repeating *Lucas* test). The only exception, as articulated in the *Lucas* case, is when the restriction is a "background principle[ ] of the [s]tate's law of property and nuisance" in place when the property was acquired. *Lucas*, 505 at 1029. This would preclude (among other actions) all subsequent legislative enactments.

26. *See Lucas*, 505 U.S. at 1009.

27. *See Palazzolo*, 533 U.S. at 616.

28. For instance, this was the approach taken by the Court in *Palazzolo*. *See Palazzolo*, 533 U.S. at 630–32.

that if any state, city, county, or metropolitan government enacted or enforced any kind of land-use regulation that restricted the use of private real property or any interest in it, after the owner of that property or any family member acquired it, that government was required to pay the owner the reduction in the fair market value of the affected property or forego enforcement.[29] "Land use regulations" included environmental laws, state and local land conservation laws, local government comprehensive plans, zoning ordinances, land division ordinances, transportation ordinances, rules regulating farming and forest practices, and any other statute or local ordinance "regulating the use of land or any interest therein."[30]

The impact of this law was immediate. Within two years of enactment 2446 claims had been filed, which would have cost more than $5.7 billion to reimburse.[31] By the time of its effective repeal, more than 7000 Measure 37 claims for compensation had been filed, with a total amount exceeding $17 billion.[32] One orchard owner filed a claim for $57 million, based on what his land would be worth if divided into nearly 800 housing units.[33] Claims ranged from the subdivision of residential lots, to the development of restricted green space, to the right to conduct an open-pit mining operation.[34]

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29. *See* OR. REV. STAT. §§ 197.352(1), (2), (3)E (2005). The relevant portions of the statute read as follows:

> (1) If any public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of real private property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.
>
> (2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation. . . .

Excepted were "public nuisances under common law," restrictions "for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations," and restrictions prohibiting the "selling [of] pornography or [the] perform[ance of] nude dancing." *Id.* §§ 197.352 (3)(A), (B), (D).

30. *See id.* § 197.352 (11)(B).

31. *See* Ben Arnoldy, *Topping 2006 Ballots: Eminent Domain*, CHRISTIAN SCIENCE MONITOR (Boston) Oct. 5, 2006, at 1.

32. *See* OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, BALLOT MEASURES 37 (2004) AND 49 (2007): OUTCOMES AND EFFECTS (2011), at 3, 5.

33. Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1.

34. *See* Jeff Barnard, *Growing Number of Counties Approving Property Rights Claims*, ALBANY DEMOCRAT-HERALD, Feb. 11, 2005, at A6.

Faced with claims that they never could pay, counties and local governments simply waived the challenged regulations.[35] As restrictions were waived, neighbor was pitted against neighbor as landowners who relied on restrictions to create value for their property now saw those restrictions crumbling.[36]

Public outrage at these results led to the enactment of "Measure 49" three years later, also by popular referendum. This new law, passed overwhelmingly by voters, effectively reinstated prior land-use laws and cut far back on rights to compensation.[37]

The lesson here is that the interconnectedness of property rights and property interests means that an owner's actions cannot be viewed in isolation. Actions by one property owner *will affect* the rights and interests of others, and no legal scheme can ignore that reality. A simple-compensation-rule approach to constitutional or statutory guarantees might seem appealing as an abstract idea, but it will fail as a matter of practical implementation. Neither unvarying waiver of "offending" rules nor unvarying payment to claimants is a viable alternative. A rigid rule that compensation will be paid whenever pre-existing rights are changed ignores too much to be workable.

C. The Foundational Problem of Allocation

Recognition of the frequently reciprocal nature of property interests and rights—such as those in land—is, in truth, only one manifestation of a deeper and more ubiquitous problem. Property rights in physical, finite, nonsharable resources are different from all other fundamental (constitutional) rights. This is because—unlike other rights—property rights of this kind *are necessarily allocated* by government.

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35. *See* William Yardley, *Anger Drives Property Rights Measures: Support Is Strong for Measures Limiting Governments' Power*, N.Y. TIMES, Oct. 8, 2006, at 34 ("'Not a penny' has been paid to property owners . . . . Local governments, lacking money to pay, have simply waived the zoning rules."). In only one claim out of the 7000 filed was compensation paid to the takings claimant. In all other cases, governments waived the regulation. *See* Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 FORDHAM L. REV. 1281, 2384 (2009).

36. *See* Harden, *supra* note 33; Barnard, *supra* note 34; Douglas Larson, *Measure 37 Puts Newberry Crater at Risk*, REGISTER-GUARD (Eugene, Ore.), Sept. 11, 2006, at A11.

37. *See* Todd Murphy, *Oregon Voters Overwhelmingly Back Measure 49*, PORTLAND TRIB., Nov. 6, 2007; OREGON DEPT. OF LAND CONSERVATION AND DEVELOPMENT, *supra* note 32. For the text of Measure 49, see http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_041.html.

Consider, for instance, familiar constitutional rights such as freedom of speech, freedom of religion, due process of law, and others. The enjoyment of these rights by one person does not affect their enjoyment by others, except in very extreme cases. Although it is possible (at the margins) that my exercise of free speech might shout you down, there is nothing about the *intrinsic nature* of this right that mandates its allocation (by government) to only one person. By contrast, if we recognize and protect my claim to property rights in land, chattels, or other physical, finite, and nonsharable goods, we must deny your claim to the same. In other words, property is a zero-sum game. The granting of property rights to one person necessarily and inevitably precludes the granting of the same right to others.

When one deals with a governmentally enforced allocation scheme of this type, a simple statement that "rights are rights" or "once a right, always a right" is not enough to answer the allocation question. We do not often think about this aspect of property and its rights, although it lurks behind all decisions by government. One need only think of current desperate struggles over water in the American West or over the patenting of human genes, to immediately grasp the nature of the problem. The fact that prior allocative decisions about property rights in water or biological materials might have been made does not necessarily foreclose questions about current, critical impacts on others. We—as a society—must be aware of allocative issues and must be free to re-evaluate previous allocations in the light of urgent conditions. In short, although there is an ostensible "certainty" about property rights, their allocation is necessarily and fundamentally contingent.

II. IF NOT A SIMPLE RULE, THEN WHAT?

Professor Singer's work, which we honor today, has been both incisive and eloquent in pointing out the deeper nature of property and its rights. In particular, what we see as desirable and acceptable property rights is profoundly contextual. Under what circumstances are development projects environmentally damaging? Under what circumstances are investment expectations reasonable? It is extraordinarily difficult to answer such questions with any blanket rule or

absolute guarantee. As Professor Singer has observed in this symposium, such decisions—by their nature—must be "essentially ad hoc."[38]

If that is indeed the case, then an important question confronts us. If there can be no broad and implemented guarantee in this area, does the constitutional protection of property have any meaning?

We have a situation in which the constitutional protection of property is unavoidably complex, contingent, and often denied—far more so than is true of other enumerated rights. If the protection of property is always going to be a case-by-case determination in which we must determine the values that we have and how conflicting rights and interests reflect those values, then does the "special protection" for property matter? Is the constitutional protection of property anything more than a textual relic with no practical meaning?

The constitutional protection of property is certainly not necessary for the existence and stability of a private property regime. Indeed, private property flourishes in many nations—such as England, Canada, New Zealand, India, and others—with no supermajoritarian or constitutional guarantee. I have previously written:

> The constitutionalization of property rights is certainly not necessary to entrench ideas of the sanctity of property rights or the division between public and private spheres. . . . These ideas are rooted in the fundamental tension between individual security and collective control, a tension which runs far deeper than the constitutionalization question.[39]

The conviction that government should forbear from the change of existing property rights is a ubiquitous assumption in our culture, as it is in others. Property rights, as we have already acknowledged, are of unparalleled importance to individuals in the conduct of their lives. The fact that property rights in physical, finite, nonsharable resources are, in fact, a complicated and zero-sum game does not change their importance to the contestants involved.

In our society, and others like it, the importance of individual property is reflected in legal guarantees. These legal guarantees

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38. *See, e.g.*, Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 5 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 1, 7 (2016).

39. *See* UNDERKUFFLER, *supra* note 4, at 160.

might in fact be more necessarily contingent than their simple statement indicates, but this does not mean that those guarantees have no meaning.

The meaning of property in American culture is more than what a court might decree it to be in a particular case. It is a societal attitude—a societal presumption, if you will—that property is important to the individuals who hold it.

The constitutional protection of property has a unique place in American law and a very real function. The constitutional protection of property—with its legal, emotional, and rhetorical power—means that the protection of property is something that we value and that must be seriously considered in every case. It means that claims of property protection will receive an extra layer of review, whether by direct "democratic" actors—such as legislatures and town halls—or by democratically anointed actors, such as administrators and courts. It means that in particular cases, and under particular circumstances, such claims will be honored even when there are serious interests asserted by others. However, it does not mean, and cannot mean, that this most contested, intertwined, and important of all rights is—upon someone's claim—automatically exempt from the broader societal interests and values that form our social fabric. It does not mean, and cannot mean, that the claim of a historical right will necessarily trump the property claims of the rest of us.

THE STRANGE CAREER OF PRIVATE TAKINGS OF PRIVATE PROPERTY FOR PRIVATE USE

JAN G. LAITOS*

Throughout the Intermountain West, an interesting and disconcerting trend is occurring in resort communities that are also world-class skiing meccas, such as Breckenridge, Aspen, Telluride in Colorado or Summit County in Utah. Wealthy second-home buyers, dubbed "amenity migrants," have driven up prices so much in these communities that virtually no one else can afford to either buy or rent homes there. Those who actually work in these resort communities—the police, firefighters, cooks, ski-lift operators, waitstaff and housekeepers—cannot afford to live there and instead must commute from more affordable locations, often hours away.[1]

In order to provide close-in housing for those who actually work in these communities, many of the resort areas have contemplated ways of providing affordable "workforce housing." Some local governments have adopted inclusionary housing ordinances, which require developers to make affordable a certain portion of new development. Other local governments have town or city housing authorities build their own affordable housing.[2] But would it be possible for state legislatures in states experiencing the amenity migrant phenomenon to instead delegate to a *private* housing developer the power to exercise eminent domain? Would a *private* developer constitutionally be able to condemn private land for the purpose of building *private* workforce housing? Would not such a delegation to a private party be contrary to the essential law of eminent domain, which seems to require that (1) only the sovereign—only a government—exercise that power,[3] and (2) private property may *not* be taken from one

* University of Denver Sturm College of Law, Professor of Law and John A. Carver, Jr. Chair in Natural Resources and Environmental Law.

1. Jan G. Laitos & Heidi Ruckriegle, *The Problem of Amenity Migrants in North America and Europe*, 45 URB. LAW. 849 (2013).

2. Jonathan Thompson, *When Living Where You Work Is out of Reach*, THE DENVER POST (May 23, 2015, 5:00 PM), http://www.denverpost.com/perspective/ci_28170119.

3. The Fifth Amendment to the U.S. Constitution states in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

private party for the sole purpose of transferring it to another private party?[4]

With respect to the first question, *state* constitutions and legislative enactments in the Intermountain West have traditionally granted authority to private parties to exercise the power of eminent domain. This broad power has been delegated either to promote private development and use of coal, oil, gas, timber, water, and other natural resources[5] or to acquire land so private entities, as "common carriers," could build private pipelines, transmission lines, or railroads.[6] With respect to the second question, the United States Supreme Court has decided in several cases that if eminent domain has been exercised to take private property for the public purpose of private economic development, then the "public use" requirement of the Fifth Amendment is satisfied.[7] The transfer of property from one private party to another is constitutionally acceptable—even if the property will not be put into use by the public—if the transfer is for a "public purpose," such as promoting a community's economy.[8]

When a state or local government initiates eminent domain to take from A to give to B in order to support an area's economic growth, the public is implicated in this transaction because a government body is behind the condemnation.[9] But when a private natural resources company, or a private common carrier, has the power to take

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Although this Takings Clause is written in the passive voice, it is generally understood that it was added to the Bill of Rights to impose a federal constitutional limit on the new federal government's exercise of eminent domain.

4. *See generally* Kelo v. City of New London, 545 U.S. 469, 477 (2005).

5. Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. ECON. HISTORY 232, 244–45 (1973); Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651 (2008). Several states in the West have constitutions that permit private takings for private use in order to ensure that private parcels surrounded by other land are not landlocked and to allow diversion canals and ditches to be constructed across private land to perfect a water appropriation. *See, e.g.*, COLO. CONST., Art. II, § 14.

6. 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.05[3][a] (3d ed. 2007).

7. *Kelo*, 545 U.S. 469; Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

8. *Id.* at 479, 484.

9. Robert Dreher & John Echeverria, Kelo*'s Unanswered Questions: The Policy Debate over the Use of Eminent Domain for Economic Development*, GEORGETOWN ENVTL. L. AND POL'Y INST. REPORT (2006), http://www.gelpi.org/gelpi/current_research/documents/GELPIReport_Kelo.pdf; Klass, *supra* note 5, at 653.

property from a private party in order to secure a private economic gain, then the exercise of eminent domain power has become a "private taking of private property for private use." What follows below is a discussion and critique of this little-known, but commonly accepted, class of *private* taking.

Part I summarizes the two private entities that traditionally have been conferred the power to take private property for their own private use: (1) natural resource developers and (2) common carriers involved in, and responsible for, our country's transportation, storage, and distribution (TS&D) system for energy infrastructure—pipelines, electrical transmission lines, and rail lines. Part II considers the traditional rationale for those private takings, which typically relies on some version of the notion that the public at large may, or will, eventually benefit from this private exercise of eminent domain. Part III explores the four central problems associated with these kinds of private takings: (1) the potential for inefficiencies and abuses when state laws distrust normal private market allocations of resources and instead rely on private party condemnation decisions to create a public benefit; (2) the typical absence of meaningful judicial review; (3) the failure to take into account countervailing interests when authorizing private parties to determine the best use of another's private property; and (4) the inability of traditional calculations of "just compensation" to truly compensate a private party whose property has been taken by another private party. Part IV offers suggestions on how to reform this particular class of private takings.

I. Examples of Constitutionally Acceptable Private Takings

In two settings, the significant power of eminent domain is used as a tool by private industry to promote private interests by taking land and property from other private parties—(1) when state constitutions and statutes give condemnation power to private *natural resource* developers, and (2) when statutes grant condemnation authority to so-called "common carriers," such as private power companies, pipelines, or railroads. In the former case, the private taking may at best produce a public use by contributing to the growth of the larger community economy. In the latter case, for common carriers

such as power utilities or railroads, the eventual transmission line or railroad freight car will eventually be for "use by the public," and should in theory provide services to the entire community. Also, common carriers are often subject to rate regulation by a public utility commission.[10]

Historically, it was quite common for states in the Intermountain West to have both state constitutions and statutory enactments that gave broad authority to private developers of natural resources to exercise the power of eminent domain to promote use of coal, oil, gas, hard rock mining, timber, and water. These provisions permitted private resource companies to file condemnation actions in state court to take existing private property in order to extract valuable mineral wealth; to produce energy from coal, oil, or gas; to engage in timber harvesting; and to build irrigation ditches to appropriate water. Some western states, such as Wyoming, grounded the right to condemn in the state constitution, in which case the private condemnor was not even required to show "public interest or necessity" when there was a private condemnation.[11] This extraordinary use of the eminent domain power for immediate private use was justified as a way for these states to develop their economies, which were, in the West, built largely on natural resources.[12]

The other way for private parties to exercise eminent domain is when a private entity is deemed a common carrier by state law. The condemnation rights of certain common carriers, such as petroleum pipeline companies, may be even greater than those of the gas and electric utilities, which are subject to regulation by the Public Service Commission.[13] To become a common carrier, a private company must show that it will deploy the eminent domain power and then use the

10. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1884 (2007).

11. ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION 67 (1993); Matt Micheli & Mike Smith, *The More Things Change, the More Things Stay the Same: A Practitioner's Guide to Recent Changes to Wyoming's Eminent Domain Act*, 8 WYO. L. REV. 1 (2008).

12. ERIC T. FREYFOGLE, NATURAL RESOURCES LAW: PRIVATE RIGHTS AND COLLECTIVE GOVERNANCE 583 (West 2007); Klass, *supra* note 5, at 661.

13. Julie A. Beberman, *Exercise of Power of Eminent Domain for Special Purposes: Provide Restrictions on Use of Eminent Domain Power by Petroleum Pipeline Companies*, 12 GA. ST. U. L. REV. 184, 186 (1995).

"taken" private land for a public use or public purpose.[14] In many states, common carrier status is conferred on pipeline companies, transmission lines, and railroads if the condemnation serves the "public interest and necessity."[15] States vary with respect to whether the common carrier seeking to condemn has the burden of demonstrating need and public use[16] or whether it is legislatively presumed that the exercise of eminent domain automatically serves the public interest.[17]

Pipelines are a particularly common and powerful type of common carrier that exercise eminent domain. This eminent domain power permits the private pipeline company to condemn land, rights-of-way, easements, and virtually any property from private parties.[18] Natural gas companies may also obtain a certificate of public convenience and necessity under the federal Natural Gas Act and thereby acquire private rights of eminent domain pursuant to that federal certificate.[19]

II. HOW CAN A PRIVATE TAKING BECOME A "PUBLIC USE"?

The text of the Fifth Amendment to the United States Constitution seems to declare that governments, particularly the federal

14. Cyrus Zarraby, *Regulating Carbon Capture and Sequestration: A Federal Regulatory Regime to Promote the Construction of a National Carbon Dioxide Pipeline Network*, 80 GEO. WASH. L. REV. 950, 967 (2012); Holly Bannerman, *Fracking, Eminent Domain, and the Need for Legal Reform in North Carolina: The Gap Left by the Clean Energy and Economic Security Act*, 14 N.C. J.L. & TECH. ONLINE 35, 55 (2012).

15. *See, e.g.*, Bridle Bit Ranch Co. v. Basin Elec. Power Coop., 118 P. 3d 996, 1014 (Wyo. 2005).

16. Brandon Gerstle, *Giving Landowners the Power: A Democratic Approach for Assembling Transmission Corridors*, 29 J. ENVTL. L. & LITIG. 535, 544 (2014); Gregory S. Ramirez, Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*: A Probability of Future Use by the Public as a Key to Exercising Eminent Domain*, 46 CREIGHTON L. REV. 89, 92 (2012).

17. Micheli & Smith, *supra* note 11, at 4; John Allen Chalk, Sr. & Sadie Harrison-Fincher, *Eminent Domain Power Granted to Private Pipeline Companies Meets with Greater Resistance from Property Owners in Urban Rather than Rural Areas*, 16 TEXAS WESLEYAN L. REV. 17, 18 (2009).

18. Laura A. Hanley, *Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, but by How Much*, 37 HOUS. L. REV. 125, 136 (2000); Amanda Niles, *Eminent Domain and Pipeline in Texas: It's as Easy as 1, 2, 3—Common Carriers, Gas Utilities, and Gas Corporations*, 16 TEXAS WESLEYAN L. REV. 271, 280–81 (2010).

19. Jim Behnke & Harold Dondis, *The* Sage *Approach to Immediate Entry by Private Entities Exercising Federal Eminent Domain Authority Under the Natural Gas Act and the Federal Power Act*, 27 ENERGY L. J. 499, 501–07 (2006).

government, may "take" private property so long as two conditions are met. First, the taking must be for a public use, and second, just compensation must be paid to the private property owner for the property that has been taken.[20] Most state constitutions contain a similar requirement that the taking be for a public use.[21] The question that arises is how this exacting constitutional standard for a *public* use is satisfied when the taking by a private entity seems to be for a *private* party, either a private natural resource developer or a private common carrier.

A. Public Use Satisfied When the Taking Is by a Private Resource Developer or Energy Company

In the nineteenth century, legislatures in Midwestern and Intermountain West states delegated eminent domain authority to private resource developers, energy providers, and transportation companies in order to help these states create their economies.[22] Since private economic development was seen as the primary driver of community or statewide economic growth, private company use of eminent domain power for resource, energy, or transportation development was thought to bring about a larger public benefit rather than a private purpose.[23] When these delegations of eminent domain power to private parties were challenged in court, they were upheld on the grounds that since the needs of communities were furthered by economic growth, private company takings that furthered economic expansion were for a public goal and therefore a public use.[24]

Several other rationales have been used to convert what appears to be private takings of private property for private benefit into private takings of private property that work, in effect, as a public use.

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20. *See supra* note 3 and accompanying text.

21. *See, e.g.*, VA. CONST. art. I (Bill of Rights), § II: "No private property shall be . . . taken for public use without just compensation to the owner thereof." *Compare* COLO. CONST., art. II (Bill of Rights), § 15: "private property shall not be taken . . . for public or private use, without just compensation."

22. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 259–62 (1977); Klass, *supra* note 5, at 655, 657.

23. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Klass, *supra* note 5, at 675.

24. Potlatch Lumber Co. v. Peterson, 88 P. 426 (Idaho 1906); Hand Gold Mining Co. v. Parker, 59 Ga. 419 (1877).

In the case of a power line constructed to serve a private company, the private power company's exercise of eminent domain has been justified as a public use because other members of the public would have the same right to use the new line as the private company.[25] Some state legislatures have permitted private entities to exercise eminent domain authority for *either* the "public use" *or* the much broader "public benefit."[26] Private takings which result in some general benefit or advantage to the public then may satisfy the public use requirement. But the most important development involving public use has been the gradual judicial acceptance of the *broad definition* of the phrase that encompasses public advantage, public utility, or general (and often amorphous) "public purpose." The United States Supreme Court's 2005 decision in *Kelo v. City of New London*[27] signaled that the Fifth Amendment's public use requirement was largely coterminous with public purpose even when eminent domain ultimately benefits private entities.[28]

B. Public Use Satisfied When Private Condemnor Is a Common Carrier

It has long been assumed that the nation's important TS&D system for energy infrastructure—pipelines, power lines, and railroad lines—would require private energy service providers to exercise eminent domain. Indeed, as hydrofracturing increases domestic oil and gas supplies and makes the United States more energy independent, demand is growing for transportation, storage, and distribution systems; pipelines, power lines, and rail lines are needed to move, store, and deliver both clean energy fuel (e.g., oil and gas) and electricity from even cleaner energy sources (e.g., from wind, solar, and hydro).[29]

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25. Pub. Serv. Co. v. Shaklee, 784 P.2d 314 (Colo. 1989); Montana Power Co. v. Bokma, 457 P.2d 769 (Mont. 1969).

26. *See* Bannerman, *supra* note 14, at 54–56.

27. Kelo v. City of New London, 545 U.S. 469 (2005).

28. *See, e.g.*, *id.* at 479–80; Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

29. Rob Garver, *Review Finds US Energy Infrastructure in Desperate Shape*, FISCAL TIMES (Apr. 21, 2015), http://www.msn.com/en-us/money/markets/review-finds-us-energy-infrastructure-in-desperate-shape/ar-AAbsrsE; Jeremy Miller, *Trains Carrying Oil Raise Tough Questions*

The private companies that typically provide these TS&D services, especially for energy infrastructure, are often conferred special status by state law—the status of being a common carrier.

When a private entity is designated as a common carrier, it may enter on and condemn the land, rights-of-way, easements and property of private parties.[30] A private company, such as a pipeline company or a company that owns a power line, may become a common carrier if it qualifies under various conditions set forth in state law.[31] Often, state law establishes that the private common carrier is authorized to condemn property but only if the condemnation either serves "the public interest and necessity"[32] or if the taking is for a public use.[33]

In states where common carriers can exercise eminent domain when the condemnation serves the public interest and necessity, the private condemnor need only show a reasonable necessity for the project, which often means "reasonably convenient or useful to the public."[34] In other states, the common carrier's decision that a public need exists is conclusive and not subject to review.[35] More commonly, statutes across America granting condemnation power to common carriers presume that the project that is the reason for the exercise of eminent domain will be destined for eventual use by the public, thereby satisfying the public use requirement.[36] Or, states may convey eminent domain authority to private common carriers by simply statutorily defining pipelines, transmission lines, and rail lines as a public use under state law.[37] In all of these states, public use does

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in Northwest, HIGH COUNTRY NEWS, Nov. 24, 2014, at 5, *available at* http://www.hcn.org/issues/46.20/trains-carrying-oil-raise-tough-questions-in-pacific-northwest.

30. Hanley, *supra* note 18, at 134–36; TEXAS NAT. RES. CODE ANN. § 111.019 (granting common carriers the right of eminent domain).

31. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 111.002 ("a person is a common carrier if it . . . owns or manages a pipeline for the transportation of crude petroleum").

32. *See, e.g.*, WYO. STAT. ANN. § 1-26-801-815.

33. Daniel B. Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499 (1966).

34. Bd. of Cnty. Comm'rs of Johnson Cnty. v. Atter, 734 P. 2d 549, 553 (Wyo. 1987).

35. Saunders v. Titus Cnty. Fresh Water Supply Dist. No. 1, 847 S.W.2d 424, 427 (Tex. App. 1993); *but see* Texas Rice Land Partners v. Denbury Green Pipeline-Texas, 363 S.W.3d 192 (Tex. 2012) (merely registering as a common carrier does not bar property owners contesting in court whether a planned exercise of eminent domain meets statutory requirements for a common carrier).

36. Kelo v. City of New London, 545 U.S. 469 (2005); Klass, *supra* note 5, at 659.

37. Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 983 (2015).

not mean that the public must have the right to actually *use* the property that is taken.[38]

III. THE PROBLEM WITH PRIVATE TAKINGS

The legitimacy of private takings was threatened in the wake of the *Kelo* case, when nearly half of the states adopted statutory or constitutional restrictions on the use of eminent domain to transfer land to private developers.[39] Although much of this post-*Kelo* legislation was "largely symbolic in nature,"[40] what was perhaps most notable about this flurry of legislation is that it did not put restrictions on the private exercise of eminent domain authority for private projects associated with electric transmission lines, oil and gas pipelines, and the development of natural resources.[41] Nor did any of this post-*Kelo* legislation alter the states' tradition of giving eminent domain power to private entities deemed to be common carriers.[42] The power of private entities to exercise the power of eminent domain for private ends is still largely intact. What problems arise when eminent domain is used by private parties to reallocate private property?

A. Inefficiencies and the Potential for Abuse

A truly private taking—when a private party "takes" the private property of another for some private use that theoretically has some public purpose—is an acknowledgment by the state that is authorizing the taking that the private party vested with eminent domain authority is better able than the original owner to decide the use of the land being taken. The state has in effect preferred A's use of the land (where A is granted eminent domain) over B's use, where B is the owner of the land being taken by A. The state's distrust of the private market as an allocative mechanism may be warranted when there

38. Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co., 35 So.3d 192, 198–99 (La. 2010).

39. KATHLEEN SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 579 (18th ed. Foundation Press 2013).

40. Marc Mihaly & Turner Smith, Kelo*'s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 708 (2011).

41. Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1094 (2013); Micheli & Smith, *supra* note 11, at 4–5.

42. Klass & Meinhardt, *supra* note 37, at 983–84.

is market failure or private holdouts preventing coherent, benign development patterns.[43] On the other hand, expropriating property from "unoffending" private owners and transferring their land to more "favored" developers (i.e., those authorized to exercise eminent domain) has been likened by some commentators as a form of "reverse Robin Hoodery."[44]

Indeed, in many ways a private taking has all the characteristics of a classic lose-lose situation. From the perspective of A, the private party conferred the power of eminent domain, the projected public benefits may be speculative and subject to unfounded exaggeration compared to the magnitude of purely private benefits enjoyed by A.[45] From the perspective of B, the private party whose land is taken, there follows a loss of individual autonomy that results when there is unwilling property dispossession.[46] And there is always the risk that those dispossessed by eminent domain will be unfairly undercompensated for their loss.

If state agencies overseeing the private takings are deferential, and if there is little effective judicial review, then the rationale for private takings—to achieve some larger public purpose—may be seriously undermined.[47] It is difficult to determine whether a transfer from A to B is more private than public.[48] Nor does a public purpose test give guidance on how much "public" is necessary for a purely private transfer of private property to become a public use. Moreover, state laws authorizing private takings do not necessarily require a plan as a precondition to A taking B's property; nor do these laws usually explicitly require of A, or impose an obligation on A, to accomplish some specific social welfare goal.[49] As a result, a private

43. George Lefcoe, *Redevelopment Takings After* Kelo*: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 805 (2008).

44. Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About That, Justice Stevens*, 39 URB. LAW. 529, 531 (2007).

45. Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 183 (2009).

46. Jeffrey Kleeger, Kelo*'s Influence on Keystone Pipeline Asks "Where's the Public Purpose?"*, 44 URB. LAW. 719, 720 (2012).

47. Kelo v. City of New London, 545 U.S. 469, 485 (2005) (private economic development is a public use because it should, or may, bring about the legitimate public purpose of economic growth).

48. Lefcoe, *supra* note 43, at 851.

49. Kleeger, *supra* note 46, at 721–23.

taking not only legitimizes private expropriation of private property, it also may cloak ulterior motives such as rent-seeking.[50]

B. The Absence of Meaningful Judicial Review

When state legislatures and constitutions delegate eminent domain authority to private natural resource development interests, or private energy TS&D entities, the operating premise for this extraordinary grant of condemnation power is that the private party granted the power will exercise it for a public use. If an owner's property was being taken by another private party pursuant to these state laws, the challenge was usually based on the claim that the property taken would not in fact be for a public use but rather for a private gain. However, reviewing courts rarely disturbed the private taking on those grounds. These courts developed several theories that permitted them to defer to the private taking and to conclude that the taking was indeed for a public use.

For transmission lines and pipelines, where after the eminent domain power had been exercised property ownership would reside in a private party, courts still could find a public use if the public had the ability to use the private electrical lines or gas/oil that flowed in the private pipeline.[51] Many state courts broadened the "public use" definition to require only that the taking yield some public benefit or advantage, a view which equated public use with "public interest" or even "public purpose."[52] The United States Supreme Court eventually adopted a construction of public use that defined the phrase as furthering public advantage or public utility.[53] The *Kelo* case rejected an interpretation of public use that meant the property would actually be used by the public.[54] *Kelo* held that public use was coterminous with public purpose, where courts should defer to legislative determinations as to what constituted a public purpose.[55]

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50. Kelly, *supra* note 45, at 176.

51. Pub. Serv. Co. v. Shaklee, 784 P.2d 314, 318–19 (Colo. 1989); Montana Power Co. v. Bokma, 457 P.2d 769, 772–73 (Mont. 1969).

52. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 196 (2002).

53. Berman v. Parker, 348 U.S. 26 (1954).

54. Kelo v. City of New London, 545 U.S. 469, 479–80 (2005).

55. *Id.* at 488–89; City of Norwood v. Horney, 853 N.E.2d 1115, 1132–33 (Ohio 2006).

Lack of meaningful judicial review means that states are defaulting to those private parties that have been delegated the eminent domain power. One court found that a pipeline company's decision that a public need existed is conclusive and not subject to review.[56] A state legislator concluded that a petroleum pipeline company enjoyed an "unfettered" power of eminent domain.[57] When private parties not only have eminent domain power but the ability to wield this power without a meaningful judicial check, the potential exists for private takings to have far more private than public benefit.

When statutes confer common carrier status on private parties, courts are even more deferential when it comes to these parties exercising eminent domain. Challenges based on a taking being for an unconstitutional "private" use are typically rejected when a common carrier is doing the taking.[58] Commentators have concluded that the standard for courts to overturn a company's designation as a common carrier exercising eminent domain is "almost insurmountable and essentially unreviewable."[59] A similar, largely unreviewable situation arises when a gas utility or gas pipeline exercises eminent domain in states whose legislatures grant the power of condemnation to private gas TS&D companies.[60]

C. Failure to Broaden the Limited Scope of Public Use

One persistent issue with private entities deploying eminent domain is a stubborn insistence on the part of courts to assume that public use and public purpose may be satisfied only if narrowly defined *economic* benefits might result. Courts reviewing private takings have been content to sustain private exercises of eminent domain as constitutional public uses so long as the public experiences some plausible

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56. Saunders v. Titus Cnty. Fresh Water Supply Dist. No. 1, 847 S.W.2d 424, 427 (Tex. App. 1993).

57. *Lawmakers '95* (GPTV broadcast, Jan. 24, 1995) (remarks by Senator Hooks, Senate Dist. No. 14, cosponsor of SB 24).

58. Linder v. Ark. Midstream Gas Servs. Corp., 362 S.W.3d 889 (Ark. 2010); Smith v. Ark. Midstream Gas Servs. Corp., 377 S.W.3d 199 (Ark. 2010). *See also* MONT. CODE ANN. §§ 70-30-103; 69-13-104.

59. Niles, *supra* note 18, at 292.

60. Thatcher v. Tenn. Gas Transmission Co., 180 F.2d 644, 648 (5th Cir. 1950); Valero Eastex Pipeline Co. v. Jarvis, 990 S.W.2d 852, 856 (Tex. App. 1999); *id.* at 284–85.

traditional economic gain. Courts will rarely, if ever, consider whether any countervailing non-traditional economic benefits, or the achievement of non-economic values, might be a better "use" of the power of eminent domain.[61]

Prior to the *Kelo* case, the United States Supreme Court had decided only two public use cases in the previous forty years—*Berman v. Parker* (1954)[62] and *Hawaii Housing Authority v. Midkiff* (1984).[63] *Berman* upheld as a public use the taking of private property for the purpose of redeveloping blighted urban neighborhoods, and *Midkiff* sustained the use of eminent domain to solve the problem of concentrated land ownership. Both cases rejected the argument that private property taken outright by eminent domain is a private purpose when the property is transferred to private beneficiaries. Rather, since urban blight (*Berman*) and land oligopoly (*Midkiff*) were economic problems involving land ownership in the land market, it would be a legitimate public use for eminent domain to be exercised to solve these economic problems.

The *Kelo* case built upon the *Berman-Midkiff* rule by declaring that "[p]romoting economic development is a traditional and long accepted function of government."[64] Indeed, *Kelo* explicitly recognized that economic development takings were a traditional and acceptable public use, as were private takings related to natural resources and energy development.[65] But *Kelo* did not discuss or consider whether there might be other economic drivers besides the extraction of natural resources, the development of energy resources, or the removal of urban blight and excessive concentrated land ownership.

By the twenty-first century, land development other than natural resources and mineral development, and land uses quite different than urban renewal and the construction of shopping malls, are increasingly important to the economies of states and local communities. Particularly in the Intermountain West, recreation, tourism, hunting,

61. Klass, *supra* note 5, at 666.

62. 348 U.S. 26 (1954).

63. 467 U.S. 229 (1984).

64. Kelo v. City of New London, 545 U.S. 469, 484 (2005).

65. *Id.* (*Kelo* acknowledged the "importance of [natural resources] industries to the [economic welfare of the states] . . . .").

and fishing have become the foundations for the economy.[66] In these states, the best public use of private property targeted for a private taking might not be for natural resource extraction or for urban renewal but instead for uses involving recreation or tourism.[67] However, these more modern uses of natural resources have historically not yet been granted "public use" designation by legislatures or courts. A public use typically requires there to be a traditional land transfer from one private party to another private party who will mine or reconfigure the land for standard economic growth purposes.[68]

The public use designation required for acceptable private takings is almost always locked into some type of economic use or benefit. In other words, acceptable public uses have entailed that the private condemnor not only "take" the private property of another but also *use* that property somehow for some economic purpose enjoyed by the public. However, there is another value inherent in land and property that should be able to compete with private land transfers that only entail *use*. And that is the value that follows when land and property are preserved and *not used*. Eminent domain use should be able to be exercised by private parties where the end use is, in fact, no use. Open space, wilderness, and land trusts for preservationist non-use purposes should be considered as a countervailing, equally valuable public use.[69]

D. An Unjust Measure of Just Compensation

When private takings occur, it is generally a formidable uphill battle for the party whose property is being taken to argue that the private party doing the taking will violate the constitutional public use requirement. As noted above, most state courts have concluded that natural resource-related takings benefit the public, and state

66. *See generally* THOMAS MICHAEL POWER & RICHARD N. BARRETT, POST-COWBOY ECONOMICS: PAY AND PROSPERITY IN THE NEW AMERICAN WEST (2001).

67. Jan G. Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENVTL. L. 1091 (2004); Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140 (1999).

68. Klass, *supra* note 5, at 677–80.

69. Jan G. Laitos & Catherine M. H. Keske, *The Right of Nonuse*, 25 J. ENVTL. L. & LITIG. 303 (2010); *see generally* JAN G. LAITOS, THE RIGHT OF NONUSE (Oxford Univ. Press 2012).

statutes and constitutions often expressly provide that private TS&D entities exercising eminent domain for energy infrastructure are a per se public use. The only remaining argument then is that the landowner may not be receiving a fair measure of constitutionally required "just compensation."

Although the definition of just compensation varies between states,[70] most courts generally rely on the property's "fair market value" to determine the actual calculation of what is just.[71] This fair market value standard is intended to replicate the price that would otherwise be reached in a normal arm's-length market transaction between a willing, but unobligated, buyer and seller.[72] Two common considerations, or formulae, are used when deriving fair market value in condemnation situations. "Highest and best use" not only considers the property's value in its present use but also its value in a reasonably probable use that results in the highest economic value.[73] The "before and after" test is used when the condemning party, such as a TS&D energy company building a pipeline, takes only a portion of the landowner's parcel. This test ascertains the difference between the fair market value of the entire parcel and the fair market value of what remains after the condemnation.[74]

Increasingly, scholars and commentators have criticized these taking valuations, especially when the taking is a private taking.[75] The concern is that the standard just compensation model tends to *undercompensate* landowners.[76] There are several reasons why the use of fair market value results in an undue share of condemnation costs borne by the landowner whose property is being taken by another private party. Perhaps the most important failure of the fair

70. JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS, Ch. 17 (Aspen 2014).

71. Douglas Ayer, *Allocating the Costs of Determining "Just Compensation"*, 21 STAN. L. REV. 693, 696 (1969).

72. Boyce v. Soundview Tech. Group, Inc., 464 F.3d 376, 3876 (2d Cir. 2006).

73. Baston v. Cnty. of Kenton ex rel Kenton Cnty. Airport Bd., 319 S.W.3d 401, 406 (Ky. 2010).

74. Hanley, *supra* note 18, at 160.

75. Kelianne Chamberlain, *Unjust Compensation: Allowing a Revenue-Based Approach to Pipeline Takings*, 14 WYO. L. REV. 77, 87–90 (2014); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 767 (1973).

76. Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593 (2013); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1479–80 (2008).

market value test is that it denies compensation for what has been termed "real but subjective values."[77] One must remember that the owner of property in a private taking has not *voluntarily* chosen to sell it to the private party taking it. It follows then that the landowner values the land at a price *higher than* its fair market value, because otherwise the owner would have accepted this market price and sold the land.[78]

There are two other reasons why the standard just compensation model tends to undercompensate landowners experiencing a private taking. First, most states do not permit the value of the project for which the property is being taken (e.g., a pipeline, or transmission line) to affect the fair market value of the property.[79] If the land after the private taking will enhance the value, that positive change in value cannot be included in the just compensation calculation.[80] Second, fair market value usually fails to consider what have been termed "dignitary harms," which is the perception of being unfairly targeted for condemnation.[81] Such resentment can be very real, especially if, as noted in Part III.A above, the private taking becomes a form of "reverse Robin Hoodery" where politically powerful private parties can condemn private land regardless of the landowner's wishes.[82]

IV. AN AGENDA FOR REFORMING PRIVATE TAKINGS

In light of the many issues and problems that have arisen due to private takings of private property, it would seem that states should consider how they might change the laws that presently allow

77. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 183 (1985); Yun-Chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?*, 20 SUP. CT. ECON. REV. 35, 36–37 (2012).

78. THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN: PRIVATE PROPERTY, PUBLIC USE 153 (2011), Chamberlain, *supra* note 75, at 94–95; Gerstle, *supra* note 16, at 541 ("the just compensation model tends to undercompensate landowners because it ignores individuals' anthropocentric valuation").

79. State Dept. of Health v. The Mill, 887 P.2d 993, 1003 (Colo. 1994).

80. Matthew C. Williams, *Restitution, Eminent Domain, and Economic Development: Moving to a Gains-Based Conception of the Takings Clause*, 41 URB. LAW. 183, 190 (2009).

81. Chamberlain, *supra* note 75, at 95.

82. *See* Kanner, *supra* note 44; Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. OF EMPIRICAL LEGAL STUD. 13, 721–22 (2008).

a private party to condemn private land for private gain. Any such "reform" legislation should track the deficiencies in current "economic development takings law" that have been summarized in Part III above. Three structural changes seem necessary: (1) improved procedures to govern interactions between the private party exercising eminent domain and the party whose land is being taken; (2) meaningful judicial review; and (3) adequate and realistic just compensation.

A. Procedural Reforms

New and more informative protocols should be established between condemning parties and landowners. Initially, companies and entities should notify landowners of their rights prior to initiating the eminent domain process.[83] This type of provision could protect landowners who may not have any knowledge of their legal rights prior to or during the condemnation process.[84] These legal rights derive from both constitutional and statutory law.

Next, the condemnor should be expected to make reasonable efforts to acquire the property by purchasing it after good faith negotiation. This negotiation should entail at least one bona fide offer by the condemning authority. A bona fide offer requirement shifts some of the power away from the condemning authority and towards the landowner.[85] Some states, like Texas, require the condemnor to make at least two separate offers before resorting to eminent domain.[86]

But the most important procedural change would be some constitutional or statutory obligation to create an administrative record that allows for meaningful judicial review of whether the private taking is really for a public use. This "record" should entail a written account of a process—a public process—where the merits of the taking have been considered and perhaps even debated.[87] The condemnor

83. Beberman, *supra* note 13, at 192–94.

84. Malcolm Means, *Private Pipeline, Public Use?:* Linder v. Arkansas Midstream Gas Services Corp., Smith v. Arkansas Midstream Gas Services Corp.*, and Arkansas's Eminent Domain Jurisprudence*, 64 ARK. L. REV. 809, 835–37 (2011).

85. Micheli & Smith, *supra* note 11, at 8–9.

86. *Compare* State v. Dowd, 867 S.W.2d 781 (Texas 1993) (only one offer needed), *with* TEX. UTIL. CODE ANN. § 21.0113 (b)(1)–(2) (two written offers needed).

87. Klass, *supra* note 5, at 695.

should have the burden of making a case to some administrative body that the private taking will result in a truly *public* use. The individual landowners affected, along with other environmental or public interests, should be afforded the opportunity to argue that the taking will be for some private benefit. If the relevant administrative authority concurs that the taking, albeit by a private party, is for public use, that determination can be the basis for some future judicial appeal.

The Texas Supreme Court has seemed to acknowledge the need to affirmatively demonstrate the presence of a public use when there are private takings by common carriers and other TS&D entities. In *Texas Rice Land Partners* v. *Denbury Green Pipeline-Texas* (2012),[88] the Court found that "[m]erely registering as a common carrier does not . . . ban [landowners] from contesting in court whether a planned pipeline meets the statutory requirements [for a public use]. Nothing . . . leaves landowners so vulnerable to unconstitutional private takings."[89] The Court thereby rejected the otherwise irrefutable presumption that simply proclaiming that one is a common carrier is sufficient to confer the power of eminent domain.[90]

While the *Denbury* case is limited to Texas law and common carriers there, some of its central holdings have instructive potential regarding other examples of private takings elsewhere. First, the private condemnor should have to demonstrate a reasonable probability that members of the public other than the condemnor (or its customers) would experience some benefit after the private exercise of eminent domain.[91] Second, there is no presumption that the private taking will yield a public use; the burden of demonstrating public use is on the private entity seeking to use eminent domain.[92] These two changes help level the playing field between the private condemnor and the landowner.

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88. 363 S.W.3d 192 (Tex. 2012).

89. *Id.* at 195.

90. Megan James, *Checking the Box Is Not Enough: The Impact of* Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC *and Texas's Eminent Domain Reforms on the Common Carrier Application Process*, 45 TEX. TECH. L. REV. 959, 987–89 (2013); John Gray, *The Door Opens to Challenge Some Pipeline Claims of Eminent Domain*, 50 HOUSTON LAW. 43 (2012).

91. Ramirez, *supra* note 16, at 90–92.

92. 362 S.W.3d at 202 (mere fiats by the Legislature do not make a private use a public one).

B. The Opportunity for Meaningful Judicial Review

As noted above in Part III, the absence of "meaningful" judicial review is one of the primary reasons private takings have been so dominated by the private condemnor, whose power to assume ownership of private property has seemed limitless. The reason why this power has been exercised so brutally is because there has been no effective check on whether the condemnation has been for a truly *public* use or whether the condemnation's end use is preferable to other competing uses of the land. The former issue goes to the question of whether the taking yields a private or public benefit. The latter issue assumes that some public benefit will ensue but asks whether the taken land might be put to some *better* public use.

The most frequently debated and litigated question addresses whether the private taking of private land will actually result in some larger public good instead of simply enhancing the economic wealth of the condemnor.[93] Most courts have taken their lead from the United States Supreme Court and simply assumed that if private economic development will result from the private taking, this economic end use satisfies the public use requirement.[94] Private economic development seems to be an acceptable end use and public purpose if the private taking also yields land reform,[95] economic growth,[96] or natural resources development.[97]

But meaningful judicial review will not occur until courts have the ability to review a record that reveals whether competing environmental or preservationist interests might, or should, be preferred to standard, traditional interests involving economic growth or development. As noted above in Part III.C, land uses for recreation, tourism, and even nonuse preservationist purposes are increasingly becoming more important than shopping malls and gas pipelines to local communities.[98] Courts should be able to hear evidence about, and to decide, whether private takings for natural resource development or TS&D energy systems are as conducive to achieving a public

93. *See* James and Gray, *supra* note 90; *Denbury*, 363 S.W.3d 192 (Tex. 2012).
94. Kelo v. City of New London, 545 U.S. 469 (2005).
95. *See supra* note 63 and accompanying text.
96. *Kelo*, 545 U.S. 469 (2005).
97. Klass, *supra* note 5, at 655–66.
98. *See* Laitos & Carr, *supra* note 67; Laitos, *supra* note 69.

use as some recreational or nonuse purpose. Even a private taking that protects natural capital or ecosystem services should be able to be considered by reviewing courts to be a countervailing acceptable (and perhaps preferred) public use of private land.[99]

C. Making Compensation More Just

When there is a private taking, there is little the landowner can do other than to argue that the taking is for a private use or that the compensation is unjust. Reviewing courts either presume that a private energy or natural resources-related taking is a public use because of the economic benefit accruing to the public or uphold statutory declarations that takings by TS&D common carriers are an acceptable categorical taking. Therefore, the only real battle to be waged involves how much the landowner will receive in compensation for the private taking.

Commentators, and landowners, increasingly argue that current compensation valuation methodologies for private taking fail to fully compensate unwilling landowners and are therefore unjust.[100] Scholars have suggested various reforms. If fair market value continues as the standard, then rural landowners should be able to use comparable sales of easements and other property interests to define this value.[101] The idea of fair market value should perhaps also include the worth of the use to which the private condemnor is planning to put the property.[102] Such a "project influence rule" would permit the value of the extracted natural resource, or TS&D facility, to influence the value of the landowner's property.[103]

Other commentators have suggested that the value for just compensation, to be just, should attempt to capture the landowner's subjective values for the land, which otherwise remain private.[104] Each

99. *See generally* DIETER HELM, NATURAL CAPITAL: VALUING THE PLANET (2015); J.B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, THE LAW AND POLICY OF ECOSYSTEM SERVICES (2007).

100. Douglas Ayer, *Allocating the Costs of Determining "Just Compensation"*, 21 STAN. L. REV. 693, 714 (1969); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721 (1993); Lee, *supra* note 76.

101. Klass, *supra* note 5, at 683.

102. Williams, *supra* note 80, at 192.

103. Most states disallow use of the project influence rule. *See* State Dept. of Health v. The Mill, 887 P.2d 993, 1003 (Colo. 1994); ALA. CODE § 18-1A-173(a). Micheli & Smith, *supra* note 11, at 18–19.

104. Gerstle, *supra* note 16, at 550.

landowner whose property is about to be taken by a private party holds a subjective land valuation for the land, which is unique to that landowner. To assess this valuation, the just compensation calculation should consider how the affected landowner may perceive the property differently than a hypothetical seller. Relevant inquiries would involve ascertaining the factors that are subjective—duration of land occupancy, nature of use by that landowner, future plans for the land by that landowner, method by which the landowner came to own the property (for example, by inheritance).[105]

Another model for just compensation largely abandons the fair market value standard because it tends to undercompensate landowners whose property is being condemned against their will[106] and instead embraces a system which better compensates landowners by (1) permitting them to share in the value their land contributes to the eventual end use, (2) approximating the benefits of in-kind redress, and (3) accounting for landowners' lost opportunities regarding their condemned land.[107] Two related just compensation calculations that accomplish these three goals are a "revenue-based approach"[108] and a "rental formula."[109]

A revenue-based payment for private takings would ensure that the just compensation valuation would not undervalue the actual cost of the taking, which tends to subsidize private development and over-incentivize such takings by private companies.[110] Revenue-based payments also provide more efficient use of land by fixing a price for the taking of the land that will affect the private demand for the taking.[111] Similarly, a rental formula reflects the fact that most private takings for natural resource development or TS&D facilities will generate a private profit for the private condemnor.[112] The measure of damages should therefore be a measurement of periodic rent. A

105. Nadler & Seidman, *supra* note 82, at 713.

106. Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post*-Kelo, 41 WAKE FOREST L. REV. 237, 292 (2006).

107. MICELI, *supra* note 78, at 71; Williams, *supra* note 80, at 184; *id.* at 292.

108. Chamberlain, *supra* note 75, at 77.

109. David A. Domina, *Eminent Domain & For-Profit Energy Companies: Avoiding Unrest with Landowners*, THE NEBRASKA LAWYER 19 (Jan/Feb. 2015).

110. Miceli, *supra* note 78, at 69, 71.

111. Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999); Chamberlain, *supra* note 75, at 99.

112. Domina, *supra* note 109, at 20.

rental formula may thereby leave the property owner "subjectively indifferent to the taking."[113]

Consider the case of a private power company's transmission line, or a private gas company's pipeline, that needs to stretch across rural countryside that is privately owned farmland. Both of these private parties (two TS&D entities) wish to exercise eminent domain across private farms for the transmission lines or pipeline. Since the electricity and gas will surely be perceived as an eventual public use, the only question for the farmers is the measure of just compensation due for the private taking. If the private condemnor is taking an easement across private property, this private taking will interfere with yearly agricultural use. The appropriate calculation of damages, which is an alternative measure to fair market value, could be either a revenue-based compensation[114] or a rental calculation.[115] Either method seems more "just" than a simple fair market value calculation.

113. Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 259 (2007).

114. Revenue-based payments approximate the landowners' lost opportunity costs. Chamberlain, *supra* note 75, at 103.

115. Rental payments allow a jury to set, as compensation, annual rent payments for the use of the property. Domina, *supra* note 109, at 21.

PROPERTY, INTELLECTUAL PROPERTY, AND SOCIAL JUSTICE: MAPPING THE NEXT FRONTIER

PETER S. MENELL*

ABSTRACT

Professor Joseph Singer's property scholarship explores the human, cultural, social, and distributive dimensions of property law. Using his body of work as a springboard, this Article explores the crosscurrents flowing between intellectual property and social justice. Part I examines the limitations of tangible property theory as a frame for understanding intellectual property policy. Part II distinguishes between the internal, largely utilitarian analysis of particular modes of intellectual property protection and the external interplay of intellectual property systems and broader social justice concerns. Part III explores the macro interplay of intellectual property and inequality, gender and racial inclusion, and global justice challenges, highlighting complexities, tensions, and paradoxes.

* Koret Professor of Law and Director, Berkeley Center for Law & Technology, University of California at Berkeley School of Law. I thank Molly Van Houweling for comments on an earlier draft.

INTRODUCTION: PROPERTY, INTELLECTUAL PROPERTY, AND SOCIAL JUSTICE—MAPPING THE NEXT FRONTIER

It is a great honor to participate in this conference celebrating Professor Joseph Singer's wide-ranging contributions to property law and policy.[1] And it is fitting that the Brigham-Kanner Property Rights Conference, now in its twelfth year, has chosen to bring intellectual property within its renowned property tent. Although Professor Singer's scholarship is firmly rooted in tangible resources, his focus on the human, cultural, social, and distributive dimensions of property law provides a springboard for thinking broadly and deeply about the interplay of intellectual property and social justice.

For a growing portion of our society, and especially younger generations, life increasingly revolves around intellectual creativity, entrepreneurship, and the digital domain. General Motors and other manufacturing companies are no longer the largest and most significant economic enterprises. Digital Age start-ups, such as Apple,

1. Representative scholarship includes: Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U. L. REV. 601 (2015); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287 (2014); Joseph William Singer, *Property Law Conflicts*, 54 WASHBURN L.J. 129 (2014); Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R.-C.L. L. REV. 91, 109 (2011); Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, *in* PROPERTY AND COMMUNITY (Gregory S. Alexander & Eduardo Peñalver eds., 2009); Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Joseph William Singer, *After the Flood: Property and Equality in Property Regimes*, 52 LOY. L. REV. 243 (2006); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2000); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996); Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990).

Google, Facebook, Amazon, and Netflix, provide the social and commerce platforms of daily life. They dominate the business news. Tesla is revitalizing the American automobile industry and revolutionizing automobile transportation. The balance sheets of these companies are not based on tangible resources but rather intangibles—intellectual property rights, information, and human capital. As President Obama emphasized in his final State of the Union Address,[2] technological innovation provides the greatest hope for addressing the most pressing human challenges—climate change, public health, food and fresh water supply, and world peace. Social interaction occurs more and more in cyberspace, a seemingly infinite, borderless "place." And a growing proportion of the most salient "property" rights issues that concern netizens and the U.S. judiciary relate to information resources and digital technology.

The ascendency of intangible resources profoundly affects social justice—from access to life-saving genetic information to the control of knowledge dissemination, creative freedom, group identity, and, increasingly, the distribution of wealth. Even the first-year property course is shifting increasingly to intangible resources. At law schools throughout the nation, and especially in California, intellectual property has become a *de facto* core subject. And many more of our graduates find law careers in the realm of intangible resources rather than land and other tangible resources.

While use of the term "property" to characterize rights in intangible resources traces back centuries,[3] the digital revolution of the past few decades has elevated intellectual property rights and issues to a new and more prominent economic, social, and political pedestal. Policymakers increasingly discuss the importance of reforming education to better prepare new generations for the information age and bridging the digital divide.[4] From grade schools to universities,

2. *See* President Barack Obama, State of the Union (Jan. 12, 2016), https://www.whitehouse.gov/sotu.

3. *See generally* Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993 (2006).

4. *See* Richard Pérez-Peña, *Facebook Founder to Donate $100 Million to Help Remake Newark's Schools*, N.Y. TIMES, Sept. 23, 2010, at A27; DALE RUSSAKOFF, THE PRIZE: WHO'S IN CHARGE OF AMERICA'S SCHOOLS? (2015); Lyndsey Layton, *How Bill Gates Pulled off the Swift Common Core Revolution*, WASH. POST (June 7, 2014), https://www.washingtonpost.com/politics/how-bill-gates-pulled-off-the-swift-common-core-revolution/2014/06/07/a830e32e-ec34-11e3-9f5c-9075d5508f0a_story.html.

administrators and educators are striving to harness digital technology to improve and remake education.[5]

In expanding its tent to embrace intellectual property, the Brigham-Kanner Property Rights Conference can look to one of the greatest graduates of the College of William & Mary for inspiration. Thomas Jefferson took a deep interest in the contours of intellectual property rights and the development of intellectual property institutions in the early American republic.[6] Jefferson had an insatiable appetite for knowledge, which extended to architecture, civil engineering, geography, mathematics, ethnology, anthropology, mechanics, and the sciences.[7] He was a successful inventor.[8] And among his responsibilities as the nation's first Secretary of State was the duty to serve—with the Secretary of the Department of War and the Attorney General—the nation's first patent institution ("Commissioners for the Promotion of Useful Arts").[9] His words still resonate in modern intellectual property philosophy, policy, and jurisprudence.[10]

Another great Virginian, George Washington, viewed intellectual property as a vital institution for a great nation. In advocating enactment of the nation's first intellectual property laws during

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5. *See, e.g.*, *Kahn Academy*, WIKIPEDIA (Feb. 27, 2016, 4:43 PM), https://en.wikipedia.org/wiki/Khan_Academy (describing a free online academy comprising microlectures across a broad range of subjects).

6. *See* Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953 (2007); Hughes, *supra* note 3, at 998–99, 1026–33.

7. *See Jefferson's College Life*, WILLIAM & MARY, http://www.wm.edu/about/history/tjcollege/tjcollegelife/.

8. *See* Graham v. John Deere Co., 383 U.S. 1, 7 (1966) (noting that "Jefferson was himself an inventor of great note. His unpatented improvements on plows, to mention but one line of his inventions, won acclaim and recognition on both sides of the Atlantic.").

9. *See* Act of Apr. 10, 1790, ch. 7, 1 Stat. 109; Pasquale Joseph (P.J.) Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC'Y 237, 238 (1936) (characterizing Jefferson as the moving spirit of the patent board who might well be called "the first administrator of [the U.S.] patent system"); Edward C. Walterscheid, *The* Hotchkiss *Unobviousness Standard: Early Judicial Activism in the Patent Law*, 13 J. INTELL. PROP. L. 103, 107–08 (2005); Steve Mirsky, *Founding Father of Invention*, SCI. AM. 104 (Oct. 2000).

10. *See* Mossoff, *supra* note 6; Hughes, *supra* note 3; *Graham*, 383 U.S. 1, 7–11 (1966) (quoting Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334–35 (Andrew A. Lipscomb ed., 1903)); *see also* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 147 (1989); Diamond v. Chakrabarty, 447 U.S. 303, 308–09 (1980).

the very first State of the Union Address,[11] President Washington presciently declared:

> The advancement of agriculture, commerce, and manufactures by all proper means will not, I trust, need recommendation; but I can not forbear intimating to you the expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad as to the exertions of skill and genius in producing them at home . . . .
>
> Nor am I less persuaded that you will agree with me in opinion that there is nothing which can better deserve your patronage than the promotion of science and literature. Knowledge is, in every country, the surest basis of public happiness. In one in which the measures of government receive their impression so immediately from the sense of the community as in ours, it is proportionably essential.[12]

Adapting intellectual property laws in response to changing technological, social, and economic conditions remains an ongoing challenge. It has taken on greater moment as advances in digital technology have remade so much of modern life.

Professor Singer's contributions to property law invite broad thinking about the interplay of intellectual property and social justice. This Essay offers my own preliminary thoughts on framing this important scholarly frontier.[13] I have realized that much of my earlier

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11. *See* Laura Clark, *The First State of the Union Address: Way Shorter, Way Less Clapping*, SMITHSONIAN (Jan. 20, 2015), http://www.smithsonianmag.com/smart-news/first-state-union-address-way-shorter-less-clapping-180953954/ (explaining how President Washington outlined the nation's most pressing needs).

12. George Washington, First Annual Message to Congress on the State of the Union (Jan. 8, 1790), http://www.presidency.ucsb.edu/ws/?pid=29431; THORVALD SOLBERG, LIBRARY OF CONG., COPYRIGHT IN CONGRESS 1789–1904, at 115 (Greenwood Press 1976) (1905).

13. I am certainly not the first to venture into this "critical"—in multiple senses of the word—terrain. I am fortunate to stand on the shoulders of other scholars. Of particular note, Professors Anupam Chander and Madhavi Sunder convened a path-breaking conference at UC Davis's King School of Law in 2006. *See* Rex R. Perschbacher, *Welcoming Remarks: Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 559 (2007); Anupam Chander & Madhavi Sunder, *Foreword: Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563 (2007). The wide-ranging papers from that conference are collected in an impressive conference volume. *See Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. No. 3 (Mar. 2007). I also note the contributions of Professor Amy Kapczynski

work touched on these issues.[14] Part I constructs a philosophical framework for thinking about the many crosscurrents between intellectual property and social justice. Part II uses this framework to explore a range of social justice questions that arise within particular modes of intellectual property protection. Part III examines the macro interplay of intellectual property and social justice, focusing on inequality, gender and racial inclusion, and global justice challenges.

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to framing the interplay of IP, political mobilization, and inequality. *See* Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970 (2012) [hereinafter Kapczynski, *The Cost of Price*]; Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008) [hereinafter Kapczynski, *New Politics of IP*]. At an institutional level, Professors Lateef Mtima and Steven Jamar have shone a spotlight on the intersection of intellectual property and social justice. *See* Steven D. Jamar & Lateef Mtima, *The Centrality of Social Justice for an Academic Intellectual Property Institute*, 64 SMU L. REV. 1127 (2011); *see also* LATEEF MTIMA (ED.), INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES (2015).

I have also benefitted from the work of and discussions with my colleagues. *See, e.g.*, Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606 (2014); Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900 (2013); David R. Hansen, Kathryn Hashimoto, Gwen Hinze, Pamela Samuelson & Jennifer M. Urban, *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1 (2013); ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY (2011); Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005); William W. Fisher & Talha Syed, *Global Justice in Healthcare: Developing Drugs for the Developing World*, 40 U.C. DAVIS L. REV. 581 (2007); SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES (2004); ERIC RAKOWKSI, EQUAL JUSTICE (1991).

14. We each bring our own perspective to the enterprise. I was trained in science, technology, economics, and law and have enjoyed a front row seat to the digital revolution. I pursued a Ph.D. in economics at Stanford University and a J.D. at Harvard Law School just as the digital revolution was fomenting, which inspired my early work on the economics of legal protection for computer software. *See, e.g.*, Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329 (1987) [hereinafter Menell, *Tailoring Software Protection*]. I had the opportunity to work with Professor Paul Goldstein on one coast and Judge—now Justice—Stephen Breyer on the other. I also had direct exposure to the emerging microcomputer/software marketplace and the path-breaking network economics scholarship of Joe Farrell, Michael Katz, Garth Saloner, Carl Shapiro, and Hal Varian. Soon after joining the UC–Berkeley faculty in 1990, I laid the groundwork for the Berkeley Center for Law & Technology (BCLT), which launched in 1995. Over the past two decades, my colleagues and I have conducted a wide range of research, hosted numerous conferences, organized IP education programs for the Federal Judicial Center, and worked closely with federal agencies, much of the time focusing on the digital/information revolution. I have also had extensive experience advising Congress, government agencies, individuals, and technology and entertainment companies about intellectual property, antitrust, and technology policy issues over the past nearly three decades.

I. FRAMING IP/SOCIAL JUSTICE ANALYSIS

At a basic level, it is difficult to doubt President Washington's declaration that the promotion of science and literature serves human and social flourishing. Yet the use of exclusive rights to inventions and writings introduces significant complications for a free and just society. Such protections can hinder competition, constrain cumulative innovation, and interfere with free expression. They reinforce market-based institutions, influence the development of culture, affect the allocation of resources and distribution of wealth, and privilege particular individuals and enterprises. Thus, the interplay of intellectual property and social justice depends on many premises and factors.

In view of the property basis for this conference, it is useful to start the inquiry from a tangible property foundation. Yet intellectual resources differ fundamentally from tangible resources in character and governance principles. The United States grounds patent and copyright protection in largely utilitarian purposes, as opposed to natural rights. Section A explores the carryover of tangible property concepts to the analysis of intellectual property rights. Building on the utilitarian grounding of intellectual property rights, Section B distinguishes between two levels of social justice ramifications—those internal to utilitarian purposes and those external to those purposes.

A. Property and Intellectual Property: Questioning the Carryover Hypothesis

It is tempting to view intellectual property through a tangible property lens.[15] After all, intellectual property draws on tangible property concepts of first in time, exclusivity, and transferability, and scholars have explored the philosophy of tangible property rules and institutions for centuries. Yet as a young property law professor whose principal areas of interest were intangible resources—intellectual property and environmental protection—I quickly came to see that

15. *See* Richard Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455 (2010); *cf.* Molly Van Houweling, *Intellectual Property as Property*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (Peter S. Menell & Ben Depoorter eds., forthcoming 2016); MERGES, *supra* note 13, at 4–5, 237–69, 289–311.

Blackstonian conceptions of land and other tangible resources missed a lot of the most important economic and social concerns. Both the positive and normative analysis of resource governance depend on the characteristics of the resources, the characteristics of the communities in which the resources are situated, and the available governance institutions.[16]

Although intellectual property draws upon certain characteristics from the law relating to real and other tangible "property"—most notably, the concept of exclusive rights—and many parallels can be readily identified, the differences between tangible forms of "property" and "intellectual property" are profound and numerous. To take a few prominent examples—whereas the traditional bundle of rights associated with real and other tangible property involve perpetual ownership (the classic "fee simple absolute" of real property law)—two of the most prominent forms of intellectual property, patents and copyrights, protect rights for limited durations (although in the case of copyrights, the term is very long). Furthermore, exclusivity in the field of "intellectual property" is far less inviolate than it is in the traditional property domains. Intellectual property law comprises a system of policy levers that legislatures tailor and courts interpret to promote innovation and protect the integrity of markets.[17]

Patent protection, copyright protection, and the law of trade secrets are principally based on the utilitarian goal of promoting innovation and creativity. Trade secrecy law also brings in notions of commercial morality.[18] Trademark protection, by contrast, focuses on safeguarding the integrity of markets.[19] It is more of a consumer-protection regime. But by lowering consumer search costs, it also serves a commercial purpose and indirectly promotes investment in creating quality brands.

The very notion of exclusive rights over knowledge and commerce conflicts with one of America's founding principles: freedom. The American Revolution was sparked by the Boston Tea Party, a citizen

16. *See* Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599 (2002); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE (1998).

17. *See* Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1474 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

18. *See* ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE ch. 1 (6th ed. 2012).

19. *See* Menell & Scotchmer, *supra* note 17, at 1536–37.

revolt against government-imposed monopolization of the tea trade. Yet the founders of the nation recognized the need to provide time-limited intellectual property to promote technological progress and expressive creativity. President Abraham Lincoln, an inventor himself,[20] eloquently and concisely captured the power of intellectual property protection: "the patent system . . . added the fuel of interest to the fire of genius, in the discovery and production of new and useful things."[21] The potential for exclusive rights attracts investors ("the fuel of interest") and inventors ("the fire of genius"). As Justice Brennan noted, "[t]he patent laws attempt to reconcile th[e] Nation's deep-seated antipathy to monopolies with the need to encourage progress."[22]

The contingent character of intellectual property protection contrasts with the default principle of private ordering of most tangible resources. While some tangible resources, such as water and air, reflect a mix of governance regimes, most land and other tangible resources fit relatively comfortably within a private-ownership framework. Standard economic models view comprehensive resource ownership in conjunction with freedom of contract to be an efficient and just resource allocation system.[23] It bears mentioning, however, the extensive scholarship identifying limits to this default.[24] Nonetheless, absolute, exclusive ownership in perpetuity subject to free transferability is a widely accepted starting point for land and tangible resource analysis.

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20. *See* U.S. Patent No. 6,469 (Buoying Vessels Over Shoals); Owen Edwards, *Abraham Lincoln: The Ingenious Inventor*, SMITHSONIAN MAGAZINE (Oct. 2006), http://www.smithsonianmag.com/history/inventive-abe-131184751/.

21. *See* 3 R. BASLER, THE COLLECTED WORKS OF ABRAHAM LINCOLN 361 (1953) (President Lincoln made these remarks in a speech delivered at Jacksonville College on February 11, 1859). This quotation is engraved over the northwest entrance to the U.S. Department of Commerce at 15th and E Streets, N.W., Washington, D.C., which housed the Patent Office for many years.

22. *See* Diamond v. Chakrabarty, 447 U.S. 303, 319 (1980) (Brennan, J., dissenting).

23. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10–13 (1973); Garrett Hardin, *The Tragedy of the Commons*, 102 SCI. 1243 (1968).

24. *See* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013); ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005); Peter S. Menell, *Institutional Fantasylands: From Scientific Management to Free Market Environmentalism*, 15 HARV. J.L. & PUB. POL'Y 489 (1992); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); *cf.* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004) (emphasizing property doctrines that diverge from the Blackstonian conception).

By contrast, intellectual property emerges as a limited exception to the free competition default. It is justified as bait to attract invention and creativity, with the recognition that overprotection of information resources or removal of knowledge from the public domain limits dissemination of knowledge and undermines the follow-on innovation and creativity that is critical to progress.[25] Standard economic analysis limits the scope and duration of such rights so as to reduce the deadweight loss of monopoly exploitation[26] and to encourage cumulative creativity.[27] A robust public domain helps to disseminate knowledge and fuel intellectual creativity.[28]

Intellectual property seeks to balance the motivational pull of property rights with broad dissemination of knowledge and the cumulative creative push of building on the ideas and expression of others. The U.S. Supreme Court explained:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward and to allow the public access to the products of their genius after the limited period of exclusive control has expired.
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> The copyright law, like the patent statute, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 [1932], Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. (*United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)).[29]

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25. *See* Menell & Scotchmer, *supra* note 17, at 1476–78.

26. *See* WILLIAM D. NORDHAUS, INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE (1969).

27. *See* Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSP. 29 (1991).

28. *See* ERIC VON HIPPEL, DEMOCRATIZING INNOVATION (2005).

29. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

Thus, tangible property and intellectual property begin from very different locations on the ownership spectrum. Tangible resources begin with a capacious default, viewing ownership as discouraging resource-use conflict and viewing contractual freedom as promoting efficient development. Intangible resources start with a parsimonious default—only so much as is necessary to bring about desired innovation and creativity.[30]

This divergence in perspective derives from fundamental differences in the character of tangible and intangible resources. Tangible resources are, by the laws of physics, inherently rivalrous and excludable. They occupy physical space, and human rivalry for control of these resources undermines stability and progress. My enjoyment of an ice cream cone necessarily depletes the amount of ice cream for others.

This is not to say that such resources cannot be shared in constructive ways. Societies have long developed a wide range of strategies to share rivalrous tangible resources—from land and air to beachfront and roadways—in creative and just ways. Zoning, the public trust doctrine, and various other regimes seek to promote balanced resource use. Such rules and institutions are central to human civilization.

Information resources begin at the other end of the rivalry spectrum. They can inherently be enjoyed by everyone without rivalry or depletion. Thomas Jefferson eloquently captured this distinction:

> Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one

30. *See* Alan Devlin, *Patent Law's Parsimony Principle*, 25 BERKELEY TECH. L.J. 1693 (2010).

> to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.[31]

Jefferson ultimately came to see the need for the granting of limited exclusive rights to encourage inventions,[32] but his parsimonious instinct proved prescient. Intangible resources significantly differ from tangible resources and merit distinctive treatment. Intellectual property rules create artificial scarcity as a means to encourage the development of inventions and creative expression.

When the nonrivalrous characteristic of information resources is combined with the economic feedback effects of network markets—such as telecommunications and computer software—the policy ramifications become more complex.[33] In conventional markets, consumers' utility functions are largely independent. My enjoyment of a good does not depend on others' enjoyment of that good. In network markets, by contrast, the demand functions (and hence, welfare) of consumers are interdependent. For example, the value of a telecommunications network depends critically on the number of other consumers that are part of that network because each person's utility depends on the number of other people with whom they can communicate. Such network externalities affect a variety of important information technology markets.[34] The design of intellectual property regimes for such technologies must consider the dynamics of these markets. Interoperability and compatibility of products take on great importance.

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31. *See* VI WRITINGS OF THOMAS JEFFERSON 180–81 (Washington ed.).

32. *See* Hughes, *supra* note 3, at 1004–05, 1031–33.

33. *See* Menell, *Tailoring Software Protection*, *supra* note 14.

34. *See generally* CARL SHAPIRO & HAL VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (1998).

The difficulties of delineating the boundaries of intangible rights further complicate the puzzle. Tangible resources occupy physical space and hence can be observed and measured.[35] Land resources can typically be represented in two-dimensional grids. The boundaries of tangible resources are typically directly observable. Fugitive and subsurface resources, such as wild animals, oil, natural gas, and water, are more complex to map but nonetheless have definable boundaries when captured.

By contrast, information resources are often difficult to delineate.[36] Inventors claim their advances using words, which introduce interpretive challenges.[37] More significantly, inventors typically seek to claim the full range of embodiments that flow from an inventive concept. Patent specifications typically contain prophetic examples to illustrate the inventive concept, but the claims often go further. The law seeks to balance protecting inventors' supported claims with providing the public, including competitors and follow-on inventors, fair notice of the boundaries of the intellectual property rights.[38] This often results in unclear boundaries, which has ramifications for the optimal design of defenses, remedies, and other aspects of intellectual property rules and institutions.[39] We also see in the intangible realm much greater opportunism in claiming resources.[40]

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35. *See* Gary D. Libecap & Dean Lueck, *Land Demarcation Systems*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 257 (Kenneth Ayotte & Henry E. Smith eds. 2011).

36. *See* Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEG. ANAL. 1 (2013).

37. *See* Nautilus, Inc. v. Biosig Instruments, 134 S. Ct. 2120, 2128–29 (2014) (noting that the disclosure requirements of the Patent Act entail a "delicate balance" "tak[ing] into account the inherent limitations of language. Some modicum of uncertainty . . .'price of ensuring the appropriate incentives for innovation'"; "At the same time, a patent must be precise enough to afford clear notice of what is claimed, thereby 'appris[ing] the public of what is still open to them.'" (citations omitted)).

38. *See id.*; Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 608 (1950) (explaining that the doctrine of equivalents allows a patentee to proceed against the producer of a device that does not literally infringe a patent claim "if it performs substantially the same function in substantially the same way to obtain the same result" (citation omitted)).

39. *See* Menell & Meurer, *supra* note 36.

40. *See, e.g.*, JEFFREY G. SHELDON, HOW TO WRITE A PATENT APPLICATION § 6.5.19, at 6–114 (2005) (including a section entitled "Include Ambiguous Claims," which offers numerous "strategies" for "intentionally writ[ing] ambiguous claims"); ROBERT D. FISH, STRATEGIC PATENTING 7–35 (2007) (advising drafters to "[a]void . . . like the plague" claim language that clearly identifies the "gist of the invention" or the "factor" that makes it "unique").

Copyright protection introduces other notice challenges. Unlike land, the boundaries of expressive works cannot be mapped onto two-dimensional grids.[41] Authors, artists, and musicians draw upon the works of others as well as unprotectable ideas and the public domain to create new works. Thus, their claim to copyright protection is less—and often, far less—than all of the elements (and the compilations of elements) that appear in their work.[42] Furthermore, the fair use doctrine[43] and other limiting doctrines, such as the idea/expression dichotomy that channels protection for useful articles and functional aspects of works between the patent and copyright realms,[44] greatly complicate the notice of copyright boundaries.[45] And given the long duration of copyright, the problems posed by difficult-to-trace and true orphan works plague artistic creativity.[46]

As a result of these fundamental differences between tangible and intangible resources, we must be especially cautious in extrapolating positive and normative precepts and ramifications from the realm of tangible resources to the analysis of intangible resources. Simple rules, such as full ownership and automatic injunctions, do not presumptively "carryover" to intangible resources.[47] Policy analysis must address the protection of intangible resources based upon the underlying economic, social, and human effects. More complex tangible property rules—such as nuisance, servitudes, and trespass to chattels—provide some useful models for intellectual property regimes. Conventional property rules and institutions provide insight and useful metaphors, but they cannot substitute for detailed analysis of the particular characteristics of the resources; the human, cultural,

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41. *See* Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 BOSTON UNIV. L. REV. (forthcoming 2016).

42. I refer to this as the "Swiss cheese" character of copyrights. Copyright registration has never required anywhere near full specification of what is excluded from the copyright claim—i.e., the Swiss cheese holes—and the costs of doing so fall well below any realizable benefit. *See id.*

43. *See* 17 U.S.C. § 107.

44. *See* 17 U.S.C. § 102(b).

45. *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092–120 (2007).

46. *See* Pamela Samuelson, *Notice Failures Arising from Copyright Duration Rules*, 96 BOSTON UNIV. L. REV. (forthcoming 2016); Maria A. Pallante, *Orphan Works & Mass Digitization: Obstacles & Opportunities*, 27 BERKELEY TECH. L.J. 1251 (2012); U.S. Copyright Office, REPORT ON ORPHAN WORKS (Jan. 2006), http://www.copyright.gov/orphan/orphan-report.pdf.

47. These issues sparked a contentious dialogue with a prior Brigham-Kanner honoree. *See* Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523 (2011); Epstein, *supra* note 15.

social, technological, and historical dimensions of the communities in which the resources are situated; and the attributes and limitations of the full range of available institutions.

B. Framing the IP/Social Justice Interface: Internal Legitimacy and External Effects

The utilitarian purposes undergirding intellectual property protection directly address multiple social justice goals. To the extent that intellectual property protections function effectively, they serve a variety of economic, human, cultural, and social goals. Advances in technological knowledge increase productivity, enhance the quality and reduce the costs of goods, and improve standards of living. Technological innovation can also address climate change, cure disease, and expand what societies can accomplish with limited resources. With regard to expressive creativity, well-functioning intellectual property systems can spur investment into the production of knowledge and can entertain and inspire.

Note, however, that these inferences are based on a critical assumption: "if" intellectual property regimes function effectively. They also presume that intellectual property protection is the most effective means of promoting innovation and creativity. Yet, intellectual property is but one of many approaches to promoting innovation and creativity. Direct procurement, prizes, secrecy, and various forms of indirect appropriation might be better or at least complementary mechanisms for addressing the appropriability problem that justifies intellectual property protection on utilitarian grounds.[48] Relatedly, the negative impacts of the granting of intellectual property rights might be weighed in the balance.[49] Thus, a critical primary question in assessing the interplay of intellectual property protection and social justice must focus on *internal legitimacy*: are intellectual property regimes the optimal mechanism for prompting innovation and creativity, and are they functioning effectively in pursuing their purported utilitarian mission?

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48. *See* Jonathan H. Adler, *Eyes on a Climate Prize: Rewarding Energy Innovation to Achieve Climate Stabilization*, 35 HARV. ENVTL. L. REV. 1 (2011); Michael Abramowicz, *Perfecting Patent Prizes*, 56 VANDERBILT L. REV. 115 (2003); Brian D. Wright, *The Economics of Invention Incentives: Patents, Prizes, and Research Contracts*, 73 AMER. ECON. REV. 691 (1983).

49. *See* Kapczynski, *The Cost of the Price*, *supra* note 13.

When the policy landscape extends beyond promoting innovation and creativity within a conventional, capitalist economic setting, the challenges expand significantly. The cultural setting greatly complicates the design and functioning of both tangible and intangible resource regimes. As William Cronon discovered in his seminal study of ecology in pre-colonial and colonial New England,[50] different cultures can produce different, yet effective, resource governance regimes. The effects of those regimes on economic development and natural resource sustainability can vary widely.

Thus, the treatment of indigenous peoples and their traditional knowledge and folklore does not easily translate into conventional economic calculus. Furthermore, human and civil rights can be difficult to reconcile with economic/utilitarian goals as well as among themselves. In analyzing the interplay of intellectual property regimes and social justice, therefore, it is also critical to assess the *external effects* of utilitarian intellectual property regimes as well as interactions—conflicts and complementaries—among the array of social justice considerations: human rights, civil rights, cultural interests, and distributive justice.[51]

II. MODE-SPECIFIC ANALYSIS

Intellectual property and social justice interact on multiple levels. This section analyzes this interplay within patent, trade secret, copyright, and trademark law. It summarizes the principal trade-offs and tensions within the traditional utilitarian framing and then traces some of the larger external social conflicts. Part III then turns to macro aspects of the IP/social justice relationship.

A. Patent Protection

1. Internal Validity

The patent system is built upon a core economic premise that capital and talent will gravitate toward the highest bidder. In competitive markets, profits will be driven to zero, not accounting for

50. *See* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983).

51. *See* Kapczynski, *The Cost of the Price*, *supra* note 13, (emphasizing the internal/external dichotomy).

sunk costs such as research and development (R&D).[52] From an ex ante perspective, most firms would not invest in developing new technologies if rivals could free-ride on their R&D, enter the market, and dissipate the inventors' profits. This produces a suboptimal level of investment in R&D, which reduces dynamic competition and innovation. The provision of time-limited exclusive rights to control a patented invention provides a mechanism for appropriating a return to R&D and commercialization.[53]

Within the internal utilitarian frame, patent protection has two principal defects. First, it creates exclusive rights, which can raise prices above marginal cost, thereby resulting in deadweight loss to consumers.[54] Second, it can inhibit cumulative creativity to the extent that follow-on inventors face the risk of infringement (due, for example, to notice problems[55]) as well as transaction costs from negotiating with blocking patent holders.

But intellectual property also has virtues. Every invention funded with intellectual property creates a Pareto improvement[56] relative to a baseline competitive market.[57] No one is taxed more than her willingness to pay for any unit she buys; otherwise she would not buy it. In contrast, funding out of general revenue runs the risk of imposing burdens on individual taxpayers greater than the benefits they receive.

A second virtue is decentralization. Probably the most important obstacle to effective public procurement is in finding the ideas for invention that are widely distributed among firms and inventors. The lure of intellectual property protection does that automatically.

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52. *See* Menell & Scotchmer, *supra* note 17, at 1476–78.

53. *See* NORDHAUS, *supra* note 26.

54. The early, primitive economic models of patent protection vary the duration of patent protection so as to balance incentives to invent and deadweight loss. *See* NORDHAUS, *supra* note 26. This analysis, however, overlooks the complexities of cumulative innovation and the potential benefits of licensing markets. *See* Menell & Scotchmer, *supra* note 17; Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839 (1990).

55. *See* Menell & Meurer, *supra* note 36.

56. The Pareto standard, named for the Italian engineer, social scientist, and philosopher Vilfredo Pareto, judges social welfare based on whether it is possible to make any one individual better off without making at least one individual worse off. *See generally* VILFREDO PARETO, MANUAL OF POLITICAL ECONOMY: A CRITICAL AND VARIORUM EDITION (Aldo Montesano, Alberto Zanni, Luigino Bruni, John S. Chipman & Michael McLure eds., 2014).

57. This proposition overlooks, however, the potential of other tools, such as prizes and government procurement. *See supra* note 48 and accompanying text.

Decentralization is especially important if private inventors are more likely than public sponsors to think of good ideas for innovations.

A third virtue is that intellectual property is an effective screening device.[58] Since the private value of the invention at least partially reflects social value, inventors should be willing to bear higher costs for inventions of higher value. The intellectual property mechanism encourages investors and inventors to weed out ideas for which the private costs exceed the private benefits.

These considerations, however, bear on only a subset of the institutions for promoting innovation. Public procurement, regulatory mandates (e.g., such as best available technology requirements for reducing pollution and targets for zero-emission vehicles), prize systems, trade secrecy, and ancillary means of appropriating a return on R&D can encourage innovation without deadweight loss.

Each of these other institutions, however, have limitations. As noted above, public procurement and centralized decision-making cannot easily prioritize projects and identify the best contractors. For example, in 1990, California mandated automakers to bring a specified percentage of zero-emission vehicles into their fleets,[59] yet little resulted.[60] It was the entrepreneurial efforts of the private sector, with government subsidies, that ultimately produced the major breakthroughs.[61] Now many of the major automobile manufacturers are feverishly competing to advance electric and other alternative energy vehicle technologies.[62]

The financial payoff of patent protection encourages the risk-taking that can surmount major technological challenges. While centrally planned economies, such as the former Soviet Union, were able to achieve some impressive large-scale innovation goals (such as space exploration) through direct procurement, they failed miserably at

58. *See* Clarisa Long, *Patent Signals*, 69 U. CHI. L. REV. 625 (2002).

59. *See* Leslie Harrison Reed, Jr., *California Low-Emission Vehicle Program: Forcing Technology and Dealing Effectively with the Uncertainties*, 24 B.C. ENVTL. AFF. L. REV. 695, 708–09 (1997).

60. *See* Gary E. Marchant, *Sustainable Energy Technologies: Ten Lessons from the History of Technology Regulation*, 18 WIDENER L.J. 831, 836–38 (2009).

61. *See* Bradley W. Lane, Natalie Messer-Betts, Devin Hartmann, Sanya Carley, Rachel M. Krause & John D. Graham, *Government Promotion of the Electric Car: Risk Management or Industrial Policy?*, 4 EUR. J. RISK REG. 227, 230–31 (2013).

62. *See* Agence France-Presse, *BMW, VW, Audi, Daimler Take on Tesla in Race of Electric Cars*, INDUSTRYWEEK (Sept. 15, 2015), http://www.industryweek.com/technology/bmw-vw-audi-daimler-take-tesla-race-electric-cars.

promoting the broad range of innovations that proliferate in capitalist nations with robust patent systems. Patent systems identify, nurture, and cultivate needles in the technological haystack that central planners fumble to find and develop.

But even in the United States, the patent system works in conjunction with other institutions. Military, space, biomedical, and basic research procurement, philanthropy, and prizes complement the patent system. The patent system plays a significant role in commercializing scientific advances. Trade secrecy can inhibit cumulative creativity by keeping unobservable knowledge from public view. Patent protection brings that unobservable knowledge into the open, even if its use is subject to time-limited exclusive rights.

In the end, the internal validity of the patent system can be assessed only through a comparative institutional lens. The patent system's efficacy depends in substantial part on a broad range of doctrinal and policy levers. The limitations of bureaucracies and discretion inevitably lead to excessive uniformity.[63] Furthermore, innovation systems can be complementary.

Nonetheless the parsimonious baseline remains useful in thinking about patent protection.[64] The patent system produces the highest social return in those areas of innovation requiring high capital cost and involving high technological risk—such as pharmaceutical research.[65] In areas such as business methods and software, the availability of alternative appropriation mechanisms—such as first mover advantage, trademark protection, copyright, trade secrecy, and ancillary means of appropriation (e.g., advertising)—suggests that we ought to be especially cautious about affording strong patent-type protection for such forms of innovation.[66]

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63. *See* Carroll, *supra* note 45; Menell, *Tailoring Software Protection*, *supra* note 14.

64. *See* Devlin, *supra* note 30.

65. *See* JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK (2008); Peter S. Menell, *A Method for Reforming the Patent System*, 13 MICH. TELECOMM. & TECH. L. REV. 487, 493–501 (2007) [hereinafter Menell, *Reforming*]; Robert P. Merges, *Uncertainty and the Standard of Patentability*, 7 HIGH TECH. L.J. 1 (1992).

66. *See* Menell, *Reforming*, *supra* note 65; Peter S. Menell & Michael J. Meurer, *Nonpatentability of Business Methods: Legal and Economic Analysis* (Brief Amici Curiae of Professors Peter S. Menell & Michael J. Meurer in Support of Respondent at 30–32, 36–38, Bilski v. Kappos, 130 S. Ct. 3218 (2010) (No. 08-964)), UC Berkeley Public Law Research Paper No. 1482022, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1482022.

2. External Perspectives

Although the complexities of understanding and assessing the internal validity of the patent system have dominated academic discourse relating to the patent system, the search for the utilitarian holy grail tends to crowd out other important social justice considerations.

Some of the most important of such considerations relate to access to medicine.[67] The patent system is built upon the granting of exclusive rights. To the extent patent law achieves its utilitarian ends, it means that patent-induced technological advances—such as faster semiconductor chips and treatments for life-threatening diseases—will be available to those capable of paying and willing to pay the patent owner's market price during the life of the patent and will be available to all capable of paying and willing to pay marginal cost upon expiration of the patent. While this system may be justifiable to a strict utilitarian, it raises serious questions for those who use a broader justice framework.

Even if one is not troubled by the use of prices to ration access to faster computers, the rationing of access to treatments for life-threatening diseases amounts to a death sentence to those who cannot afford the patented treatment. The discoveries of such life-saving treatments might not have come about absent the patent incentive, but such a utilitarian position must be considered in conjunction with other important justice considerations. Other philosophical perspectives recognize an inalienable set of rights or entitlements for all citizens.[68]

The answer to this philosophical bind is not necessarily binary—i.e., to reject the patent system or to emphasize the lives saved. Rather, this dilemma highlights the opportunity to recognize that other rules and institutions can potentially improve upon rigid exclusive rights. Just as governments can establish patent protection,

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67. *See* Kapczynski, *New Politics of IP*, *supra* note 13; Fisher & Syed, *supra* note 13; MERGES, *supra* note 13, at 270–87.

68. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971) (postulating distribution of "primary goods"—"things which a rational man wants whatever else he wants"—such that they are of the greatest benefit to the least-advantaged members of society); Eleanor Kinney, *Recognition of the International Human Right to Health and Health Care in the United States*, 60 RUTGERS L. REV. 335 (2008); Universal Declaration of Human Rights, G.A. Res. 217(III) A, art. 25, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services").

they can also provide health-care policies and remedial limits on rationing of life-saving technologies that avoid such stark choices. Thus, it is critical to think of the patent system within a broader frame of public health policy. The internal utilitarian frame lacks the breadth to address the full social justice ramifications of granting time-limited exclusive rights for biomedical discoveries.

Beyond the concern over access to life-saving treatments, the contemporary U.S. patent system has largely pushed moral and ethical questions aside.[69] Whereas absolute freedom of expression may well be good social policy for a host of political, pragmatic, and institutional reasons, it is not obvious that the patent system should lack any moral compass. After all, the government is needed to evaluate and enforce patent rights. The choice to limit patent protection to "technological" innovations—i.e., "useful Arts"—is one form of policy lever, although it is typically justified on internal validity (utilitarian) grounds.[70]

Patent systems can integrate moral considerations. In an earlier era, the U.S. Patent Office screened out inventions relating to gambling technologies and deception on the ground that such devices were immoral.[71] European nations today bar patents on "inventions the publication or exploitation of which would be contrary to *ordre public* or morality."[72] The America Invents Act of 2011, for the first time, expressly excludes patents on tax strategies and human organisms.[73]

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69. *See* Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364 (Fed. Cir. 1999); *Ex parte* Murphy, 200 U.S.P.Q. (BNA) 801, 803 (Bd. Pat. App. & Int. 1977) (upholding claim for "one-armed bandit"); *cf. In re* Watson, 517 F.2d 465, 474–76, 186 U.S.P.Q. 11, 19 (CCPA 1975) (stating that it is not the province of the Patent Office to determine, under section 101, whether drugs are safe).

70. *See* Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land:* Bilski*'s Superficial Textualism and the Missed Opportunity to Return Patent Law to Its Technology Mooring*, 63 STAN. L. REV. 1289, 1292–95 (2011).

71. *See* Schultz v. Holtz, 82 F. 448 (N.D. Cal. 1897); Meyer v. Buckley Mfg. Co., 15 F. Supp. 640, 641 (N.D. Ill. 1936).

72. *See* Convention on the Grant of European Patents, Oct. 5, 1973, 13 I.L.M. 268, art. 53(a); Laura A. Keay, *Morality's Move Within U.S. Patent Law: From Moral Utility to Subject Matter*, 40 AIPLA Q.J. 409 (2012); Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469 (2003); Thomas A. Magnani, *The Patentability of Human-Animal Chimeras*, 14 BERKELEY TECH. L.J. 443 (1999); Benjamin D. Enerson, *Protecting Society from Patently Offensive Inventions: The Risk of the Moral Utility Doctrine*, 89 CORNELL L. REV. 685 (2004); Cynthia M. Ho, *Splicing Morality and Patent Law: Issues Arising from Mixing Mice and Men*, 2 WASH. U. J.L. & POL'Y 247 (2000).

73. *See* Pub. L. 112-29, §§ 14, 33, 125 Stat. 284 (2011).

Even if the U.S. patent system does not engage these issues, other societal institutions should.[74] These issues can, however, be extremely divisive, as reflected in debates over stem cell research,[75] emergency contraception technologies,[76] genetically modified seeds,[77] and animal rights.[78]

The patent system also interacts with other market failures with broader social justice ramifications, such as climate change.[79] While motivating the development of better environmental technologies, the patent system potentially constrains the diffusion of technological advances that seek to ameliorate environmental harms.[80] Energy technologies involve substantial infrastructure investments. Even if advances in wind turbine and solar technologies dramatically lowered the cost of producing electricity, distributing that energy to consumers depends critically upon a grid infrastructure that can move decentralized sources of electricity to market. Moreover, such energy must compete with harmful alternatives. Without fees to internalize those harmful effects, renewable sources of energy face a competitive disadvantage. Thus, government policies and industry coordination play critical roles in the development and diffusion of renewable energy technologies. Prizes, subsidies, and externality-internalizing fees on fossil fuels offer complementary tools for balancing the R&D appropriability problem, the environmental externalities of fossil fuel consumption, and the geopolitical distortions of reliance on oil.[81]

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74. *See* Webber v. Virginia, 103 U.S. (13 Otto) 344, 347–48 (1880) ("Congress never intended that the patent laws should displace the police powers of the States, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted.").

75. *See* Edward A. Fallone, *Funding Stem Cell Research: The Convergence of Science, Religion & Politics in the Formation of Public Health Policy*, 12 MARQ. ELDER'S ADVISOR 247 (2011).

76. *See* HEATHER MUNRO PRESCOTT, THE MORNING AFTER: A HISTORY OF EMERGENCY CONTRACEPTION IN THE UNITED STATES (2011).

77. *See* Gary Gregory, *What's Immoral About Monsanto: Strengthening the Roots of the Moral Utility Requirement by Amending the Patent Act*, 21 CARDOZO J. INT'L & COMP. L. 759 (2013).

78. *See Biotechnology in European Patents—Threat or Promise?*, EUROPEAN PATENT OFFICE, http://legaltexts.arcdev.hu/news-issues/issues/biotechnology.html; Deborah MacKenzie, *Activists Join Forces Against the Onco-Mouse*, NEWSCIENTIST (Jan. 16, 1993), https://www.newscientist.com/article/mg13718560-900-activists-join-forces-against-the-onco-mouse/.

79. *See* PETER S. MENELL & SARAH M. TRAN, INTELLECTUAL PROPERTY, INNOVATION AND THE ENVIRONMENT (2014).

80. *See* Peter S. Menell, *Sarah Tran's Inspiring Optimism*, 67 SMU L. REV. 473, 476 (2014).

81. *See* THOMAS FRIEDMAN, HOT, FLAT AND CROWDED (2008).

Other important social justice ramifications of the patent system arise in global trade and economic development.[82]

B. Trade Secret Protection

1. Internal Validity

Trade secret law also aims to promote innovation, although it accomplishes this objective in a very different manner than patent protection.[83] Notwithstanding the advantages of obtaining a patent—which secures the exclusive right to practice an invention for a designated period of time while disclosing technology to the public—many innovators prefer to protect their innovation through secrecy.[84] They may believe that the cost and delay of seeking a patent are too great or that secrecy better protects their investment and increases their profit. They might also believe that the invention can best be exploited over a longer period of time than a patent would allow. Without any special legal protection for trade secrets, however, the secretive inventor risks that an employee or contractor will disclose the proprietary information. Once the idea is released, it will be "free as the air" under the background norms of a free market economy.[85] Such a predicament would lead any inventor seeking to rely upon secrecy to spend an inordinate amount of resources building high and impervious fences around their research facilities and greatly limiting the number of people with access to the proprietary information.[86]

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82. *See infra* Part III.C.

83. *See* Menell & Scotchmer, *supra* note 17, at 1479.

84. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 482 (1974) (emphasizing "the importance of trade secret protection to the subsidization of research and development and to increased economic efficiency within large companies through the dispersion of responsibilities for creative developments").

85. *See* JAMES POOLEY, TRADE SECRETS § 3.04[3] (2008) (noting that "the law relating to trade secrets reflects a balance of public and private interests in the encouragement of innovation, the preservation of ethics and the maintenance of a free marketplace of ideas and movement of labor"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt a. (1993) (observing that "[t]he freedom to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system. Competition in the marketing of goods and services creates incentives to offer quality products at reasonable prices and fosters the general welfare by promoting the efficient allocation of economic resources.").

86. *See* David D. Friedman, William M. Landes & Richard A. Posner, *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61 (1991).

Under trade secret law, an inventor who takes reasonable steps to maintain secrecy obtains potentially strong remedies against individuals within the enterprise and individuals subject to contractual limitations who misappropriate proprietary information.[87] Although trade secret law does not limit the use of ideas once they have become publicly known,[88] it reduces the costs of protecting trade secrets.[89]

Trade secrets are the most pervasive form of intellectual property in the modern economy.[90] Nearly every enterprise—whether for-profit or not—seeks to protect information about its operations, strategy, technology, funding, personnel, and customers. Employers of all types routinely require their employees and contractors to sign restrictive non-disclosure agreements (NDAs) and return confidential information upon their departure or completion of services. Without such restrictions, these enterprises would jeopardize trade secret protection and risk violating privacy and other laws.

Although early courts routinely characterized trade secrets as "property,"[91] trade secret law, unlike patent protection, never conferred exclusive rights against the public-at-large.[92] Rather, it

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87. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW, UNIFORM TRADE SECRETS ACT §§ 2–3 (1985) (as amended).

88. *See id.* § 1(2) ("misappropriation" of a "trade secret" limited to acquisition by improper means and breach of confidence); Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?*, 50 BOSTON COLLEGE L. REV. 1425 (2009); Religious Technology Center v. Lerma, 897 F. Supp. 260 (E.D. Va. 1995) (finding public disclosure notwithstanding extraordinary efforts to maintain secrecy).

89. *See* Friedman, Landes & Posner, *supra* note 86.

90. *See* James Pooley, *Trade Secrets: The Other IP Right*, WIPO MAGAZINE 2 (Issue 3, June 2013), http://www.wipo.int/wipo_magazine/en/2013/03/article_0001.html.

91. *See, e.g.*, Tabor v. Hoffman, 118 N.Y. 30, 23 N.E. 12 (1889) (holding that "independent of copyright or letters patent, an inventor or author has, by the common law, an exclusive property in his invention or composition, until by publication it becomes the property of the general public"); Peabody v. Norfolk, 98 Mass. 452, 458 (1868) (recognizing a "property right" in a trade secret).

92. *See* Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 251–60 (1998); RESTATEMENT OF TORTS § 757, cmt. a (reporting that the property conception "has been frequently advanced and rejected," concluding that the prevailing theory of liability rests on "a general duty of good faith"); E.I. DuPont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917) (Holmes, J.) ("[t]he word 'property' as applied to . . . trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith. Whether the plaintiffs have any valuable secret or not, the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot

constrains disclosure of information by contract and confidential relationship. For that reason, competitors may practice inventions that they independently develop or learn through reverse engineering or other legal means.

The internal validity of trade secret protection has long been widely accepted.[93] In any case, it would be difficult to override contractual arrangements to protect technological secrets without undermining general contractual freedom.

2. External Perspectives

Notwithstanding that trade secrets work relatively well as a means of promoting technological innovation, the widespread use of routine blanket non-disclosure agreements to cover *all* proprietary information within an enterprise—including information that goes beyond the competitive sphere—raises serious social justice concerns. For example, the tobacco industry's effort to prevent Dr. Jeffrey Wigand from disclosing the industry's deception about the dangers of its products illustrates the societal risks of overbroad protection for corporate secrets.[94] Dr. Wigand's employer, Brown & Williamson Tobacco Corporation, persuaded a Kentucky court to issue a temporary restraining order barring Dr. Wigand from disclosing any information relating to his work at Brown & Williamson in tort litigation. Although the restraining order was eventually lifted as part of a landmark national tobacco settlement, Dr. Wigand risked tremendous liability for reporting a serious public health threat. His courage led to much-needed, far-reaching changes in public health policy and compensation to states for tobacco-related health-care costs.

But for Dr. Wigand's coming forward, the grave dangers posed by the tobacco industry's machinations would have remained under wraps.[95] We now know that asbestos manufacturers knew the causal link between asbestos and lung disease well before the public, and

be. Therefore, the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs.").

93. *See* Pooley, *supra* note 90.

94. *See* Marie Brenner, *The Man Who Knew Too Much*, VANITY FAIR, May 1996, at 170, 176.

95. In fact, Dr. Wigand was reluctant to come forward, and the unraveling of the tobacco industry deception may have been delayed many more years if not decades without the persistence of Lowell Bergman, the *60 Minutes* producer who recognized the importance of bringing Wigand's story to light. *See id.*

regulatory officials became aware of the serious health risk.[96] Just last year, evidence emerged that Volkswagen had programmed software in its vehicles to mask pollution violations.[97] And the *New York Times* recently reported a massive environmental and public health threat associated with the manufacturing of Teflon® products that DuPont Corporation officials knew about for decades.[98]

While robust trade secret protection makes economic sense in a contemporary business environment marked by high employee mobility, cybercrime, and international espionage, uncritical protection of all secret business information conflicts with effective law enforcement and protection of public health, safety, and welfare. Many companies use trade secrecy as a blanket tool for hiding illegal activity—from violations of civil rights, public health and workplace safety protections, securities markets regulations, and tax reporting to defrauding the government. Employees and contractors are often in the best position to know of illegal activity, yet typical NDAs and corporate onboarding practices[99] discourage activities that might be seen to subtract from the company's bottom-line. This concern has taken on greater significance as companies accused of illegal conduct have filed lawsuits against whistleblowers and their counsel.[100]

The American civil and criminal justice systems rely on discovery and evidence-gathering models consistent with Fourth Amendment

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96. *See* Morris Greenberg, *Knowledge of the Health Hazard of Asbestos Prior to the Merewether and Price Report of 1930*, 7 SOC. HIST. OF MED. 493, 501 (1994); Alan F. Westin, *Introduction* to WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION 1, 11–12 (Alan F. Westin et al. eds., 1981).

97. *See Volkswagen Emissions Scandal*, WIKIPEDIA (Feb. 23, 2016, 4:39 AM), https://en.wikipedia.org/wiki/Volkswagen_emissions_scandal.

98. *See* Nathaniel Rich, *Poisoned Ground*, N.Y. TIMES MAGAZINE, Jan. 10, 2016, at 36, 41–42 (reporting about the widespread release of the toxic chemical PFOA into drinking water).

99. *See* Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CAL. L. REV. (forthcoming 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686565 [hereinafter Menell, *Trade Secret Public Policy Exception*].

100. *See, e.g.*, J-M Manufacturing Co. v. Phillips & Cohen, LLP, and John Hendrix, Docket No. A-5867-13T2 N.J. App. Div. (affirming dismissal of trade secret complaint against whistleblower and its counsel on grounds that company should have pursued this matter in the pending California whistleblower qui tam proceeding); Walsh et al. v. Amerisource Bergen Corp., 2014 WL 2738215 (E.D. Pa. June 17, 2014) (denying relator motion to dismiss counterclaim for breach of confidentiality agreement); *see also* Carlton Fields, *Employers Fight Back Against Whistleblowers*, LEXOLOGY (July 2, 2014) (noting that "[e]mployers may even have options against employees who have been successful in [false claims cases], but who have breached their employment agreements or who have stolen documents").

protections against unreasonable searches and seizures. Without reporting of illegal activity and access to documentary evidence supporting investigation, the government and the courts are severely hampered in their ability to enforce the law and pursue the public good.[101]

C. Copyright Protection

1. Internal Validity

U.S. copyright protection derives from the same core economic premise and constitutional authorization as patent protection—to promote progress. The difference is that copyright protection focuses on expressive creativity. Although expressive works differ significantly from technology, they share a common economic problem: both can require significant up-front effort that competitors can easily copy or imitate. The Constitution authorizes Congress to address this market failure by "securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."[102]

At the nation's founding, the printing press served as the primary means of disseminating expressive works, and hence the Copyright Act of 1790 protected books, maps, and charts (nautical maps). Like England's Statute of Anne,[103] the term of protection was relatively "limited": fourteen years, plus an additional fourteen years if the author was still alive.[104]

In contrast to patent protection, copyright protection does not confer monopoly power over ideas; rather it protects only the expression of ideas.[105] Patent law enables inventors to protect applications of inventive ideas. When an inventor applies laws of nature to improve

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101. *See* Menell, *Trade Secret Public Policy Exception*, *supra* note 99 (proposing a sealed disclosure/trusted intermediary exception to trade secret protection that would safeguard trade secrets while promoting effective law enforcement); *see also* Peter S. Menell, *Deterring Corporate Fraud from the Inside: Encouraging Whistleblowing Without Jeopardizing Trade Secrecy*, THE CLS BLUE SKY BLOG (Jan. 12, 2016), http://clsbluesky.law.columbia.edu/2016/01/12/deterring-corporate-fraud-from-the-inside-encouraging-whistleblowing-without-jeopardizing-trade-secrecy/.

102. *See* U.S. CONST., art. I, § 8, cl. 8.

103. *See* Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19 (1710).

104. *See* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1790).

105. *See* 17 U.S.C. § 102(b).

the functioning of a water pump, others may not practice that invention for the life of the patent. But when an author scripts a drama featuring young wizards, explores stories of intergalactic adventure, or develops a police drama series with multi-episode story arcs, others may write their own tales of wizardry,[106] produce their own space adventures,[107] or create their own television crime franchises.[108] As Professor Paul Goldstein has eloquently captured:

> Science and technology are centripetal, conducing toward a single optimal result. One water pump can be better than another water pump, and the role of patent and trade secret law is to direct investment toward such improvements. Literature and the arts are centrifugal, aiming at a wide variety of audiences with different tastes. We cannot say that one novel treating the theme, say, of man's continuing struggle with nature is in any ultimate sense 'better' than another novel—or musical composition or painting—on the same subject. The aim of copyright is to direct investment toward abundant rather than efficient expression. Bradley Efron, of Stanford's Statistics Department, captured this difference wonderfully when he observed that, 'If Shakespeare had died as a child we should never have had *Hamlet*, but if Newton had died as a child we should certainly have calculus today. Of course, that is also the great advantage of science. Having seen the calculus, one can improve on it, but it is hard to imagine an improved *Hamlet*.'[109]

By excluding ideas from the scope of protection, copyright permits other creators to learn from and build on both the ideas and the

106. *See* Amy Sachs, *10 Books for Adults That Are Just As Magical As the Harry Potter Series*, BUSTLE (Oct. 19, 2015), http://www.bustle.com/articles/117092-10-books-for-adults-that-are-just-as-magical-as-the-harry-potter-series; *62 Books to Read if You Love Harry Potter Books* (July 4, 2013), http://literatureyoungadultfiction.com/books-to-read-if-you-love-harry-potter/; *cf.* Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17 (2006) (exploring the scope of the derivative work right).

107. *See* Litchfield v. Spielberg, 736 F.2d 1352 (9th Cir. 1984) (rejecting claim that the movie *E.T.* infringed a music play entitled *Lokey from Maldemar*); Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983) (analyzing differences between *Star Wars* and *Battlestar: Galactica* to identify plot similarities).

108. Steven Bochco's success with police dramas (*Hill Street Blues*, *NYPD Blue*) spawned others, such as Dick Wolf (*Law and Order*) and Jerry Bruckheimer (*C.S.I.*), to develop their own successful crime investigation television series.

109. Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1123 (1986) (citing Stan. U. Campus Rep., May 2, 1984, at 5–6).

market response to works of authorship. As a result, copyright protection has been less controversial than patent protection over the centuries.[110]

There are important limits, however, to building on the works of copyright owners. The right to prepare derivative works enables copyright owners to control their particularized expression. This even extends to characters.[111] Thus, other authors may not develop sequels to the *Rocky* motion picture series or stories involving graphic characters, such as Spiderman or Mickey Mouse, during the life span of copyright protection without authorization. The fair use doctrine, however, provides leeway for parodies and commentary.

Notwithstanding these fundamental limits on copyright protection, a confluence of factors have tarnished copyright's internal validity, especially since the digital revolution. Advances in technology have vastly expanded the potential for cumulative creativity, from documentary projects to music mash-ups. Yet the extension of copyright duration (to life of the author plus seventy years) in conjunction with the dismantling of formalities makes the determination of copyright subsistence and tracing of ownership difficult.[112] The enlargement of copyrightable subject matter to all forms of expressive works, including architecture and computer programs, has strained the idea/expression doctrine.[113] Further, the strengthening of infringement remedies to address concerns about Internet piracy[114]

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110. *See* B. Zorina Khan, *Trolls and Other Patent Inventions: Economic History and the Patent Controversy in the Twenty-First Century*, 21 GEO. MASON L. REV. 825, 844–50 (2014) (discussing periods of patent abolition in Holland and Switzerland in the late nineteenth century and early twentieth century).

111. *See* Anderson v. Stallone, 11 U.S.P.Q.2d (BNA) 1161 (C.D. Cal. 1989).

112. *See* Peter S. Menell, *Economic Analysis of Copyright Notice: Tracing and Scope in the Digital Age*, 96 BOSTON UNIV. L. REV. (forthcoming 2016); Samuelson, *supra* note 46; Pallante, *supra* note 46; U.S. Copyright Office, REPORT ON ORPHAN WORKS (Jan. 2006), http://www.copyright.gov/orphan/orphan-report.pdf.

113. Courts have done a relatively good job of cabining copyright protection for computer software; *see* Peter S. Menell, *An Epitaph for Traditional Copyright Protection of Network Features of Computer Software*, 43 ANTITRUST BULL. 651 (1998); although concerns remain, see David W. Hansen, Stuart D. Levi, James F. Brelsford, Jose A. Esteves & Anthony J. Dreyer, *Federal Circuit Overturns* Oracle v. Google *and Potentially Widens Debate over Copyright Protections*, 9 INTELL. PROP. & TECH. L.J. 13 (2014).

114. *See* Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (raising the upper boundary for statutory damages to $150,000 per work for willful infringement).

has instilled fear of crushing liability in technology developers, cumulative creators, and fans.[115]

As technology for reproducing, remixing, and disseminating expressive works has advanced, the tension between strong copyright protection to encourage creative expression on the one hand and technological progress, the ability to build cumulatively, and the free flow of information though digital social networks on the other, has mounted. New generations of creators find the traditional, permission-based system stifling. Thanks to the Internet, artists no longer need traditional publishers and media outlets, which has led to both a creativity explosion and consternation among traditional copyright owners about piracy and unauthorized derivative works.[116] Compliance with copyright law has increasingly become optional. Unlike earlier eras, in which intermediary gatekeepers—book stores, movie theaters, television broadcasters, and record stores—were the only access points for copyrighted works, the Internet provides alternative means of gaining access, some legal and some not. Many netizens, especially younger generations, gain access to copyrighted works through torrent sites and other unauthorized channels, which has escalated enforcement efforts and created a vicious cycle that has undermined copyright law's public approval.

These forces have complicated the internal validity of the copyright system. Traditional media companies have increasingly looked to alternative revenue streams, such as embedded advertising, to appropriate a return on their investment. Scholars, policymakers, traditional content companies, technology companies, creative artists, consumer organizations, and civil libertarian groups see the need to reform copyright protection for the Internet age but are deeply divided on how to get there.[117]

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115. *See* INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES: COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 70–81 (Jan. 2016) [hereinafter DEPARTMENT OF COMMERCE WHITE PAPER]; Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC'Y U.S.A. 235, 250–52 (2014) [hereinafter Menell, *This American Copyright Life*].

116. *See* Menell, *This American Copyright Life*, *supra* note 115, at 271–98.

117. *See* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013); DEPARTMENT OF COMMERCE WHITE PAPER, *supra* note 115; INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013); Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 162–97 (2002–2003) (discussing the political economy of copyright reform).

2. External Perspectives

Adding to the growing dissatisfaction with copyright protection, various non-utilitarian perspectives further cloud the path forward. The rights and interests of authors and audiences clash in multiple non-utilitarian dimensions.

In Europe and other parts of the world, copyright protection is seen as a natural right of authors. This moral rights tradition traces back to Jean Le Chapelier, a member of the French National Convention and the reporter of the French Copyright Law of 1793, who proclaimed "fruit of a writer's thoughts" to be "the most sacred, the most legitimate, the most unassailable, and . . . the most personal of all forms of all properties."[118] Yet even this tradition recognizes that ideas, as opposed to their expression, must not be private property.[119]

The protection of authors' moral rights—encompassing dignitary interests and the integrity of works of authorship—conflicts with a broad conception of freedom of expression.[120] The United States, which belatedly acceded to the Berne Convention for the Protection of Literary and Artistic Works, has used the fair use doctrine to accommodate freedom of expression. This same freedom opens governmental protection for all manner of speech, including offensive and disparaging speech.[121] Freedom of speech arguably extends beyond existing

118. *See* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991, 1007 (1990). The great French author (*Les Miserables*) and human rights activist Victor Hugo took up the cause of authors' rights and their relationship with the public domain, founding the Association littéraire internationale (ALI) in 1878. *See* Daniel Gervais, *The 1909 Copyright Act in International Context*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 185, 187–88 (2010); Max M. Kampelman, *The United States and International Copyright*, 41 AM. J. INT'L L. 406, 410–11 (1947).

119. At ALI's founding congress, Hugo proclaimed that while a book belongs to its author, ideas expressed in the book belong to humankind. *See* VICTOR HUGO, DISCOURS D'OUVERTURE DU CONGRÈS LITTÉRAIRE INTERNATIONAL DE 1878 (1878). The ALI was later renamed the Association littéraire et artistique internationale (ALAI) and played a key role in the establishment of the Berne Convention. *See* RICHARD R. BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 314 (1914).

120. *See* ROBERTA KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (2009); Geri J. Yonover, *The Precarious Balance: Moral Rights, Parody, and Fair Use*, 14 CARDOZO ARTS & ENT. L.J. 79 (1996); *cf.* Alexandra Couto, *Copyright and Freedom of Expression: A Philosophical Map*, *in* INTELLECTUAL PROPERTY AND THEORIES OF JUSTICE (Axel Gosseries, Alain Marciano & Alain Strowel eds., 2008); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

121. *See* Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002); Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright*

fair use boundaries.[122] The integrity and availability of works of authorship also implicates important public and cultural interests.[123]

Copyright protection also affects distributive values, ranging from providing economic security for authors and their descendants to promoting education, access to knowledge, and career opportunities for the public-at-large and new generations of creators. The modern U.S. Copyright Act seeks to blunt the bargaining power of publishers by affording authors an inalienable right to terminate transfers of copyright interests thirty-five years after assignments.[124] This parentalistic limitation of freedom of contract aims to enable authors, their spouses, and their children to derive a larger return on works that retain their value.

As emphasized by President Washington, the promotion and diffusion of knowledge were recognized as essential to the American republic.[125] The Massachusetts Constitution stressed the importance of education, access to knowledge, and encouragement of literature and science as cornerstones for a democratic society and for social harmony:

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in

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Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation, 42 B.C. L. REV. 1 (2000).

122. *See* Rebecca Tushnet, *Copy This Essay: How the Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (criticizing existing fair use doctrine for failing to recognize important self-expression, persuasion, and affirmation interests in unauthorized nontransformative reproduction of copyrighted works).

123. *See* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999) (questioning the authority of private owners of great works of art or cultural treasures, such as historic papers, to destroy these works or to deny public access to them).

124. *See* Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 804–08 (2010) (tracing the history of copyright's recapture provisions).

125. *See supra* note 12.

> the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.[126]

Thus, American copyright policy has long sought to promote access to knowledge and preserve cultural heritage.[127] The emergence and development of public libraries—through both philanthropy and copyright policy—have played a key role in educating the public and providing public access to knowledge repositories.[128]

We can also see distributive values in the broadening of expressive opportunities for authors and artists.[129] Since expression often builds on and reacts to prior expressive works, such distributive values can run counter to the provision of exclusive rights. Limiting doctrines and the fair use privilege implicitly cross-subsidizes cumulative creators.[130] Such freedom to build on the work of others can, however, adversely affect authors' moral and dignitary interests.[131]

Copyright protection also promotes human flourishing as well as cross-cultural understanding, both of which are vital to a free, inclusive, respectful, harmonious, and democratic society. I have come to see these virtues as possibly the most important purposes served by a well-functioning copyright system. When I reflect on my own life, it is difficult to imagine becoming the person I am today without the creative and cultural influences of my formative years. I still vividly remember seeing my first episode of the original *Star Trek* series

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126. *See* MASS. CONST. art. III, § 2.

127. *See* Peter S. Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1022–40 (2007) (tracing the development of access and preservation policies).

128. *See* ABIGAIL A. VAN SLYCK, FREE TO ALL: CARNEGIE LIBRARIES & AMERICAN CULTURE, 1890–1920 (1995); JESSE HAUK SHERA, FOUNDATIONS OF THE PUBLIC LIBRARY: THE ORIGINS OF THE PUBLIC LIBRARY MOVEMENT IN NEW ENGLAND, 1629–1885 (1965); SIDNEY HERBERT DITZION, ARSENALS OF A DEMOCRATIC CULTURE: A SOCIAL HISTORY OF THE AMERICAN PUBLIC LIBRARY MOVEMENT IN NEW ENGLAND AND THE MIDDLE STATES FROM 1850 TO 1900 (1947).

129. *See* Van Houweling, *supra* note 13; Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441 (2016) [hereinafter Menell, *Adapting Copyright for the Mashup Generation*].

130. *See* Van Houweling, *supra* note 13, at 1540.

131. *See* Menell, *Adapting Copyright for the Mashup Generation*, *supra* note 129, at 506–10.

while at a sleep-over with my older cousins. Gene Roddenberry's extraordinary voyages of the Starship Enterprise—"to boldly go where no man [or woman] has gone before"—had a profound influence on my social values and interest in technology.[132] Rebellious rock 'n roll and Bob Dylan's forthright poetry spoke to "My Generation"[133]—fueling our innate adolescent desire to question authority and think independently.

The importance of adequately funded and well-produced film, art, music, and literature is inestimable. As much as lawyers emphasize the role of legal advocacy in shifting the law, the television series *Will and Grace* likely had more influence in shifting the nation's and Supreme Court's views on gay marriage than anything that lawyers argued. Similarly, works such as *To Kill a Mockingbird* and *The Help* powerfully communicated the indignity of the Jim Crow South. The public's gradual embrace of R&B, jazz, and gospel—what was once referred to as "race music"—played a critical role in building a more cohesive and inclusive nation.[134]

But just as copyrighted works can educate and inspire, they can also inflame and provoke violence and subjugation of women. Copyright protects pornography,[135] violent video games,[136] and hate

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132. I was not alone. Martin Luther King, Jr., was himself a Trekkie, and he approved of his daughters watching the show because of its diverse cast and harmonious portrayal of race and geopolitical relations. When Dr. King became aware that Nichelle Nichols, the African-American actress who played the third in command on the USS *Enterprise*, was leaving the show, he implored her to remain:

> I am the biggest Trekkie on the planet, and I am Lieutenant Uhura's most ardent fan. . . . Do you not understand what God has given you? . . . You have the first important non-traditional role, non-stereotypical role. . . . You cannot abdicate your position. You are changing the minds of people across the world, because for the first time, through you, we see ourselves and what can be.

See Nichelle Nichols, *Pioneers of Television*, PBS KQED, http://www.pbs.org/wnet/pioneers-of-television/pioneering-people/nichelle-nichols/; *see also* Abby Ohlheiser, *How Martin Luther King Jr. Convinced 'Star Trek's' Lt. Uhura to Stay on the Show*, WASH. POST (July 31, 2015), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/07/31/how-martin-luther-king-jr-convinced-star-treks-uhura-to-stay-on-the-show/.

133. *See My Generation*, WIKIPEDIA, http://en.wikipedia.org/wiki/My_Generation (referring to *The Who*'s iconic song about finding one's place in society).

134. This is not to say that the process has been fair to African-American artists. *See* K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1193 (2008) ("The fleecing of Black artists was the basis of the success of the American music industry.").

135. *See* Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1 (2012).

136. *See* Ned Snow, *The Regressing Progress Clause: Rethinking Constitutional Indifference to Harmful Content in Copyright*, 47 U.C. DAVIS L. REV. 1 (2013); Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153 (2005).

speech.[137] First Amendment values obviously complicate these issues. As with the role of morality concerns in assessing patentability, the question arises whether these issues are best addressed within copyright law or through other public policies. As with patent protection, the government's imprimatur on these works through the granting of protection at least indirectly encourages such works. But drawing First Amendment distinctions between art and pornography or incitement of violence is especially challenging.[138]

The economic models supporting content creation and dissemination also have important social justice ramifications. For a variety of technological and economic reasons, many content industries came to rely on indirect forms of appropriability to support artistic creativity.[139] As one economist cynically remarked, "[p]rograms are scheduled interruptions of marketing bulletins."[140] Thus, major media channels and content producers worked symbiotically. But such a business model comes at a cost. Those who pay for the content shape its message. While consumer demand obviously drives content protection, advertising patrons influence artistic creativity. Glamorizing smoking cigarettes or drinking alcohol, both addictive products, generated high returns. Public officials eventually came to see the

137. *See* LaShel Shaw, *Hate Speech in Cyberspace: Bitterness Without Boundaries*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 279 (2011); *cf.* Lieutenant Colonel Eric M. Johnson, *Examining Blasphemy: International Law, National Security and the U.S. Foreign Policy Regarding Free Speech*, 71 A.F. L. REV. 25 (2014).

138. *See* Lindsay E. Wuller, *Losing the Game: An Analysis of the* Brown v. Entertainment Merchants Association *Decision and Its Ramifications in the Area of "Interactive" Video Games*, 57 ST. LOUIS U. L.J. 457 (2013) (discussing *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011), which struck down a California law regulating the sale of violent video games to minors as violative of the First Amendment); Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169 (2012); Ned Snow, *The Meaning of Science in the Copyright Clause*, 2013 BYU L. REV. 259, 263 (contending that the original meaning of "Science" in the Intellectual Property Clause of the Constitution is "a system of knowledge comprising distinct branches of study" that limits legislative power to grant copyright protection); Bartow, *supra* note 135 (arguing that pornography lies "beyond the scope of the Intellectual Property Clause" on the grounds that pornography is "non-progressive and non-useful"); *cf.* Ned Snow, *Content-Based Copyright Denial*, 90 IND. L.J. 1473 (2015) (contending that Congress could exclude some content areas from copyright protection without running afoul of the First Amendment).

139. Early broadcasting technology had no direct way of charging those who received radio and television signals. Advertising emerged as an indirect way of supporting these distribution outlets and those who produced the content.

140. *See* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 229 (6th ed. 2004).

adverse social effects of such advertising and regulated it.[141] But the phenomenon remains. The advertising that supports content creation and dissemination had doubtlessly fueled rising obesity rates.[142]

Technological advances have altered the influence of advertising in content markets in complex ways.[143] With the advent of digital video recording technology and commercial skipping, advertising has been integrated within the content we view. This is far more insidious than "scheduled interruptions of marketing bulletins." The growing integration of advertising into mass media and Internet services in the Digital Age represents a subtle but real and present threat to expressive freedom, free will, and public well-being. What began as a largely innocuous means of subsidizing print media and a solution to funding broadcast media has increasingly distorted the integrity of news reporting and creative expression. We see similar phenomena in the social media space.[144] What we perceive as "free" comes at a significant human, cultural, public health and welfare cost.

D. Trademark Protection

1. Internal Validity

Trademark protection, like copyright, influences the flow of information to the public. In contrast to patent, trade secret, and copyright

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141. *See* Sandra J. Teel, Jesse E. Teel & William O. Bearden, *Lessons Learned from the Broadcast Cigarette Advertising Ban*, 43 J. MARKETING 45, 45–46 (1979) (describing how the Public Health Cigarette Smoking Act of 1969 established a federal program dealing with cigarette package labeling and advertising); *but see* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 n.12 (1996) (striking down a regulation prohibiting advertisement of alcohol prices on First Amendment grounds, in part because "[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance," including taxation, direct regulation establishing minimum prices or maximum per capita purchases, or education).

142. *See Product Placements Market Unhealthy Food to Children*, YALE NEWS (Aug. 2, 2011), http://news.yale.edu/2011/08/02/product-placements-market-unhealthy-food-children-0 ("[T]he majority of exposure was for regular soft drinks from just one company, Coca-Cola, which accounted for 71% of product-placement appearances viewed by children and approximately 60% of adult and adolescent exposure."); Mike Adams, *Soft Drink Company Marketing Tactics: The Experts Sound Off*, NATURAL NEWS (Jan. 8, 2005), http://www.naturalnews.com/003914_soft_drinks&uscore;food_politics.html (showing that Coca-Cola spent $1.6 billion in the late 1990s for advertising purposes).

143. *See* Peter S. Menell, *2014: Brand Totalitarianism*, 47 U.C. DAVIS L. REV. 787 (2014).

144. *See* Hoofnagle & Whittington, *supra* note 13.

protection, which aim principally to promote innovation and creativity, trademark law seeks primarily to safeguard the integrity of the marketplace.[145] Trademark law prohibits activities that create a likelihood of confusion as to the source of goods and services. In so doing, it reduces consumer confusion and enhances incentives for firms to invest in activities (including R&D) that improve brand reputation.

The efficiency of the marketplace depends critically upon the quality of information available to consumers. Proliferation of unreliable information in the marketplace increases consumers' costs of search and distorts the provision of goods. Consumers will have to spend more time and effort inspecting goods, researching the product market, and actually testing products. Manufacturers will have less incentive to produce quality goods because others will be able to free-ride on such reputations. Like patent and copyright law, trademark law operates by protecting information—words, symbols, or other source-identifying indicia. Through such protection, product manufacturers, service providers, and collective and certification organizations can more easily police information in the marketplace. By supporting the reliability of source-identifying symbols, trademark protection is closely intertwined with marketing and advertising.

These functions are part of a larger framework of laws and institutions that regulate the quality of information in the marketplace. Just as institutions and policies other than patent and copyright law promote innovation and creativity, a variety of mechanisms in addition to trademark protection are available to provide and regulate market information: (1) common law causes of action protecting against deceit and fraud and consumer protection statutes; (2) public regulation and public enforcement of unfair competition laws; (3) false advertising and deceptive practices/unfair competition laws; (4) industry self-regulation and certification organizations; and (5) consumer information institutions. These alternative policies work in conjunction with trademark protection to facilitate and improve consumer decision-making.

At the level of internal validity, it is difficult to quarrel with trademark law's basic design and functioning. Unlike patent protection,

145. *See supra* note 19 and accompanying text.

it does not confer market power over products and services.[146] Like copyright protection, trademarks pose some risk of monopolizing communication, but various doctrines bar trademark protection for generic terms[147] and limit protection for descriptive terms.[148] The expansion of trademark law for famous marks beyond source identification—what is referred to as dilution protection[149]—risks undue power of symbols,[150] but these areas of law have been significantly circumscribed.[151]

2. External Perspectives

Notwithstanding trademark law's general desirability, such protection can conflict with other social justice concerns. As with copyright law, trademark law can interfere with freedom of expression.[152] Similarly, trademark protection can undermine moral, dignitary, and group interests. Creative artists, professional entertainers, and athletes can have service marks associated with their works and performances. Members of religious, ethnic, racial, and other communities

146. *See* TrafFix Devices, Inc. v. Mktg. Displays, Inc., 532 U.S. 23 (2001) (limiting trademark protection in a product's trade dress to the non-functional elements).

147. *See* A.J. Canfield Co. v. Honickman, 808 F.2d 291, 304 (3d Cir. 1986) ("Underlying the genericness doctrine is the principle that some terms so directly signify the nature of the product that interests of competition demand that other producers be able to use them even if terms have or might become identified with a source and so acquire 'de facto' secondary meaning."); Am. Cyanamid Corp. v. Connaught Labs., Inc., 800 F.2d 306, 308 (2d Cir. 1986) ("Consumers will not benefit . . . if trademark law prevents competitors from using generic or descriptive terms to inform the public of the nature of their product.").

148. *See* KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (2004) (discussing the descriptiveness doctrine).

149. *See* Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813 (1927) (articulating dilution of a well-known mark as a form of trademark harm); *see also* Jonathan Moskin, *Dilution or Delusion: The Rational Limits of Trademark Protection*, 83 TRADEMARK REP. 122 (1993).

150. *See* Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789 (1997).

151. *See* David S. Welkowitz, *Famous Marks Under TDRA*, 99 TRADEMARK REP. 983 (2009); Barton Beebe, *The Continuing Debacle of U.S. Antidilution Law: Evidence from the First Year of Trademark Dilution Revision Act Case Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 449 (2007–2008); Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006).

152. *See* Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979 (2004).

have dignitary interests in words and symbols associated with their faith, race, origin, and community.[153]

Several recent controversies highlight inherent tensions between trademark protection, individual and group identity, and freedom of expression.[154] In contrast to patent[155] and copyright law,[156] federal trademark law bars registration of marks that consist of or comprise "immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[157] In a long-running dispute, Native Americans have sought to cancel registration of the National Football League's "Washington Redskins" trademark on the ground that it is an offensive and disparaging slur.[158] That decision is currently being appealed, with the American Civil Liberties Union—among others—raising First Amendment concerns.

In another recent decision, the TTAB denied registration of the mark "The Slants" by an Asian-American rock band.[159] The Federal Circuit overturned the TTAB's decision on First Amendment grounds, invalidating the Lanham Act's Section 2(a) disparagement provision as unconstitutional.[160] Applying strict scrutiny, the court rejected the statute's regulation of important legal rights to private speech based on disapproval of the message content as violative of the First Amendment.[161]

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153. *See* Jon Keith Parsley, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487 (1993).

154. *See* Rita Heimes, *Trademarks, Identity, and Justice*, 11 J. MARSHALL REV. INTELL. PROP. L. 133, 158–65 (2011); K.J. Greene, *Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship*, 58 SYRACUSE L. REV. 431, 436, 444 (2008) (discussing the role of trademarks in reinforcing racial stereotyping (noting the "Aunt Jemima" logo) and pointing out how what is considered offensive and disparaging shifts over time).

155. *See supra* notes 69–78 and accompanying text.

156. *See supra* notes 134–36 and accompanying text.

157. *See* 15 U.S.C. § 1052(a); Lanham Act, § 2(a).

158. *See* Pro-Football, Inc. v. Blackhorse, 112 F. Supp.3d 439 (E.D. Va. 2015) (upholding cancellation of trademark); Pro Football, Inc. v. Harjo, 565 F.3d 880 (D.C. Cir. 2009) (ultimately dismissing challenge based on laches).

159. *See In re* Simon Shiao Tam, 108 U.S.P.Q.2d 1305 (Trademark Tr. & App. Bd.).

160. *See In re* Tam, 808 F.3d 1321 (Fed. Cir. 2015). The court noted that the PTO has also denied registration under Section 2(a) to "Stop the Islamisation of America," "The Christian Prostitute," "Mormon Whiskey," "Have You Heard that Satan Is a Republican?," "Ride Hard Retard," "Abort the Republicans," "Marriage is for Fags," and "Squaw Valley," among many others. *See id.* at 1330.

161. *See id.* at 1334–55. The court did not, however, resolve the constitutionality of the "immorality" and "scandalous" bars to registration. *See id.* at 1330 n.1.

Trademarks also have important cultural and geographic significance.[162] European nations and particular wine and food-producing regions have long advocated protection of geographic designations as both an authentic indicator of source and of product quality as well as a form of regional identity.

Trademark law has taken on far greater significance in the Digital/Internet Age where trademarks serve as keyword triggers for advertising. Such advertising has enabled Google, Facebook, and other Internet companies to establish robust multi-sided markets. These portals provide "free" services, such as search, email, and social networking to consumers while auctioning advertising slots, based on consumer search terms and other communications. As noted earlier,[163] however, such services come at a real human cost. Advertisers, search engines, and other ad-driven services are seeking to influence and shape their audience. As political activist Eli Pariser recognized, "If you are not paying for the product, you are the product."[164]

III. THE MACRO SOCIAL JUSTICE PERSPECTIVE

As reflected in the prior discussion, much IP scholarship and policy focuses on the efficacy of particular IP modalities. Such modal analysis is unquestionably important to better understand the particularized operation of the different regimes. Expanding that analysis to incorporate the broad range of social justice concerns is increasingly important as intellectual property plays a growing role in the Digital Age. But even this broader, bi-focal frame misses important macro cross-modal issues, ranging from IP, poverty, and inequality to gender and racial inclusion and larger global justice issues.

A. IP, Poverty, and Inequality

As a result of the digital revolution, information resources now drive economic growth more than at any time in human history. Increasing the size of the economic pie, however, is only a part of social justice. As reflected in the scholarship of Professors Emmanuel

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162. *See* Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299 (2006).

163. *See* Part II.C.2.

164. See ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011).

Saez[165] and Thomas Piketty,[166] as well as in mounting political mobilization questioning economic inequality in the United States and other developed nations,[167] there are, however, much larger societal interests at stake.[168]

The burgeoning economic literature on income equality reveals significant tilting of income distribution toward the wealthy during the past several decades. Many of the newest billionaires come from the technology sector. Network economics partially explains the tremendous wealth generated by a relatively few information industry enterprises.[169] And many of the wealthiest people in the world are technology entrepreneurs.[170] Bill Gates (Microsoft) still leads the way, with his colleagues Paul Allen and Steven Ballmer among the upper echelon. Others come from Oracle (Larry Ellison), Google (Sergey Brin, Larry Page, and Eric Schmidt), Facebook (Mark Zuckerberg), Apple (Laurene Powell Jobs), and Amazon (Jeff Bezos). The sports and entertainment professions, which depend critically upon copyright, trademark, and publicity right protections, also contribute to high wealth for a relatively small "superstar" class.[171]

The interplay among IP, poverty, and inequality more generally is beginning to emerge as IP theory advances and the digital revolution matures. At a basic level, the technological advance produces higher standards of living. It enables society to accomplish more with fewer resources and therefore increases productivity. Whether intellectual

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165. *See* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, QUARTERLY J. ECON. (forthcoming 2016); Facundo Alvaredo, Tony Atkinson, Thomas Piketty & Emmanuel Saez, *The Top 1 Percent in International and Historical Perspective*, 27(3) J. ECON. PERSP. 3 (2013); Tony Atkinson, Thomas Piketty & Emmanuel Saez, *Top Incomes in the Long Run of History*, 49 J. ECON. LIT. 3 (2011).

166. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2013); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 QUARTERLY J. ECON. 1 (2003).

167. *See Bernie Sanders on Economic Inequality*, FEELTHEBERN.ORG, http://feelthebern.org/bernie-sanders-on-economic-inequality/.

168. *See* Joseph E. Stiglitz, *How Intellectual Property Reinforces Inequality*, N.Y. TIMES, July 14, 2013.

169. *See* Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994) (discussing the economics of network effects); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985) (describing economic circumstances leading to increasing return to the scale of demand).

170. *See The World's Billionaires*, FORBES (2015), http://www.forbes.com/billionaires/list/.

171. *See* Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981).

property optimally promotes innovation and creativity is a more difficult question as addressed in the internal analysis of IP modes.[172] But to the extent that it does, it is Pareto-improving[173] in at least a limited sense. No one is required to purchase IP-protected goods. Therefore, in an exchange economy, only those who value such goods more than their cost will purchase the goods. Furthermore, patent and copyright protection eventually expire (this framing, however, affords little solace to those who can't afford to purchase patented, life-saving medicines). At a coarse level of granularity, modern societies have the benefit of all manner of innovation and creativity—from sanitation technologies that support safe drinking water to telecommunications and modern medicines. As such, innovation tends to reduce poverty and raise standards of living in an absolute sense over the long run (but as John Maynard Keynes famously observed, "In the long run we are all dead"[174]).

The digital revolution has provided especially rapid advance due to the scalability of information technologies. Fifty years ago, Intel co-founder Gordon Moore predicted that the number of transistors in an integrated circuit would double approximately every two years due to advances in semiconductor and related technologies.[175] This projection—which has come to be known as Moore's Law[176]—has proven remarkably prescient and helps to explain important aspects of the digital revolution. Given the high cost and risk of semiconductor research, patents undoubtedly played a significant role in this remarkable trajectory. As a result, computer technology is now available to much of the population at relatively low and declining cost.

In some respects, patent and copyright protection parallel the Jubilee, an Old Testament commandment that Professor Singer uses to inject a broader conception of social justice into modern property theory.[177] According to the book of Leviticus, landowners are to keep the land fallow in the seventh year—a sabbatical year to revive

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172. *See supra* Part II.

173. *See supra* note 56 (describing the Pareto standard).

174. *See* ROBERT SKIDELSKY, JOHN MAYNARD KEYNES: THE ECONOMIST AS SAVIOR, 1920–1937 62 (1992).

175. *See* Gordon W. Moore, *Cramming More Components onto Integrated Circuits*, ELECTRONICS 114 (2015).

176. *See Moore's Law*, WIKIPEDIA (Feb. 23, 2016, 4:50 PM), https://en.wikipedia.org/wiki/Moore%27s_law.

177. *See* JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 50–51 (2000).

the land's productivity. The Jubilee year occurs following seven cycles; it is the Sabbath's Sabbath. The Jubilee "fiftieth year is sacred; it is a time of freedom and of celebration when everyone will receive back their original property, and slaves will return home to their families."[178] Debts are forgiven, and society is returned to the pre-debt state.

Similarly, the limited duration of patent and copyright serves as a form of *tzedakah* (justice or righteousness) in sharing the bounty of intellectual creativity. One can question whether the duration of either regime is optimal,[179] but the major modes of intellectual property liberate the informational bounty at fixed intervals.

Focusing on the consumption side of social welfare only partially addresses poverty and inequality concerns. There is reason to worry that the growing importance of information resources in the economy adversely affects the distribution of income and wealth. Moreover, even as the total social pie expands, shifts in the sources of economic activity and employment patterns may well be worsening the plight of the least well-off in absolute as well as relative terms.

We are far from a complete understanding of these phenomena and patterns, but there are some telltale signs. As MIT Professor Erik Brynjolfsson and research center director Andrew McAfee have reported, we are in the midst of an unprecedented economic transformation in which productivity increases while wage rates stagnate.[180] According to their research, advances in artificial intelligence (AI) are profoundly restructuring the economy in ways that benefit a small inventive and creative class to the relative, and possibly absolute, detriment of the working class. Although the effects are complex and sectoral,[181] there is good reason to believe that the digital

178. See Leviticus 25:10; *cf.* Michael Hudson, *"Proclaim liberty throughout the land": The Economic Roots of the Jubilee*, 15 BIBLE REVIEW 26 (1999); MICHAEL HUDSON, THE LOST TRADITION OF BIBLICAL DEBT CANCELLATIONS 28 (1993) (noting that the Rosetta Stone commemorated a debt cancellation).

179. *See, e.g.*, Menell, *Tailoring Software Protection*, *supra* note 14, at 1354–67, 1371–72 (recommending a short duration for software protection, far less than the life of patents or copyrights); *see also* Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 12, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618).

180. *See* ERIK BRYNJOLFSSON & ANDREW MCAFEE, RACE AGAINST THE MACHINE: HOW THE DIGITAL REVOLUTION IS ACCELERATING INNOVATION, DRIVING PRODUCTIVITY, AND IRREVERSIBLY TRANSFORMING EMPLOYMENT AND THE ECONOMY (2011); Steve Lohr, *More Jobs Predicted for Machines, Not People*, N.Y. TIMES (Oct. 23, 2011), http://www.nytimes.com/2011/10/24/technology/economists-see-more-jobs-for-machines-not-people.html.

181. *See* Timothy Aeppel, *Be Calm, Robots Aren't About to Take Your Job, MIT Economist*

revolution is increasingly decoupling productivity and employment.[182] One only needs to look at automotive manufacturing or travel agencies to see stark shifts since the late 1990s. As Professor David Autor, who is more sanguine about the effects of AI than his MIT colleagues, notes, "[i]f we automate all the jobs, we'll be rich—which means we'll have a distribution problem, not an income problem,"[183]—which is precisely the point. And given Moore's Law, the effects can be rapid and intensify over time.

There may be some countervailing forces on the concentration of wealth among Information Age industrialists. The same competitive spirit that has driven Digital Age wealth has produced a new competitive philanthropic age.[184] Notwithstanding the benefits that can flow from such philanthropy, we increasingly live in a new Gilded Age in which a new breed of Information Age titans direct social policy[185] and distort the political process.

These profound societal changes open up a new set of policy challenges. Progressive taxation alone might not provide the best antidote against structural sources of poverty and inequality in the Information Age. More direct engagement with intellectual property and other substantive policy interventions might be advisable. Nonetheless, the need for rapid innovation to stem climate change and public health threats grows ever more apparent, creating a tradeoff for compromising IP policy. On the bright side, the increasing availability of widely accessible information platforms, tools, and training promise to expand opportunity. Yet the forces of wealth concentration—from network effects to advances in machine learning—raise concerns for the plight of future generations.

B. Gender and Racial Inequality

The concentration of wealth and economic leverage that intellectual property produces places vast power in the hands of a relatively

Says, WALL ST. J. (Feb. 25, 2015), http://blogs.wsj.com/economics/2015/02/25/be-calm-robots-arent-about-to-take-your-job-mit-economist-says/?mod=ST1.

182. *See* David Rotman, *How Technology Is Destroying Jobs*, TECH REVIEW (June 12, 2013), http://www.technologyreview.com/featuredstory/515926/how-technology-is-destroying-jobs/.

183. *See* Aeppel, *supra* note 181.

184. See Fred Barbash, *Zuckerberg, Gates, Buffett and the Triumph of Competitive Philanthropy*, WASH. POST (Dec. 2, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2015/12/02/mark-zuckerberg-bill-gates-warren-buffett-and-triumph-of-competitive-philanthropy/.

185. *See* RUSSAKOFF, *supra* note 4 (presenting a cautionary tale about the squandering of Mark Zuckerberg's $100 million gift to transform failing Newark public schools).

small group of entrepreneurs and their representatives. The class of venture capitalists, corporate titans, Hollywood moguls, and technology and entertainment lawyers reflect historical gender and race biases. These patterns persist in the Information Age.

To some extent, these issues reflect long-standing problems in the workplace, such as gender/race discrimination and the difficulties of achieving work/family balance.[186] While cultural familiarity can promote teamwork and productivity, it also reinforces bias and limits access by under-represented groups.[187] These problems are compounded in the technology sector, where the "STEM" fields of science, technology, engineering, and mathematics have long been dominated by white males.[188] The so-called "brogrammer" culture in Silicon Valley discourages greater integration across gender and racial lines.[189] The issue is gaining salience,[190] but progress has been slow. Similar patterns in the business and legal professions reinforce these patterns.[191]

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186. *See* ANNE-MARIE SLAUGHTER, UNFINISHED BUSINESS: WOMEN MEN WORK FAMILY (2015); JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW (2014); JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2001).

187. *See* Bonnie Marcus, *The Lack Of Diversity In Tech Is A Cultural Issue*, FORBES (Aug. 12, 2015), http://www.forbes.com/sites/bonniemarcus/2015/08/12/the-lack-of-diversity-in-tech-is-a-cultural-issue/#429274483577 (citing a study reporting that top universities graduate black and Hispanic computer science and computer engineering students at twice the rate that leading technology companies hire them, indicating that the talent pool is not the primary problem).

188. *See* JOAN C. WILLIAMS, KATHERINE W. PHILLIPS & ERIKA V. HALL, DOUBLE JEOPARDY? GENDER BIAS AGAINST WOMEN OF COLOR IN SCIENCE (2014), http://www.uchastings.edu/news/articles/2015/01/double-jeopardy-report.pdf; Jordan Weissmann, *The Brogrammer Effect: Women Are a Small (and Shrinking) Share of Computer Workers*, THE ATLANTIC (Sept. 12, 2013), http://www.theatlantic.com/business/archive/2013/09/the-brogrammer-effect-women-are-a-small-and-shrinking-share-of-computer-workers/279611/.

189. *See* Kieran Snyder, *Why Women Leave Tech: It's the Culture, Not Because 'Math Is Hard'*, FORTUNE (Oct. 2, 2014), http://fortune.com/2014/10/02/women-leave-tech-culture/ (reporting on a survey of 716 women who left technology positions; finding that 27% of women cited workplace culture as a reason for leaving jobs in the technology industry, whereas 68% cited motherhood as a reason); Weissmann, *supra* note 188.

190. *See* Joan C. Williams, *Hacking Tech's Diversity Problem*, HARV. BUS. REV. (Oct. 2014), https://hbr.org/2014/10/hacking-techs-diversity-problem; SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

191. *See* Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That. Lawyers Are Leading the Push for Equality. But They Need to Focus on Their Own Profession.*, WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/; DEBORAH L. RHODE, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION (2001), http://womenlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf.

Inequality and under-representation can distort scientific research and public health policy.[192]

Hollywood has long been prone to gender and racial bias as reflected in its products,[193] employment practices,[194] and awards.[195] Beyond the injustice of biased employment practices, these patterns have far-reaching effects on cultural diversity and freedom of expression.

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192. *See* Anita Holdcroft, *Gender Bias in Research: How Does It Affect Evidence Based Medicine?*, 100 J. ROYAL SOC. MED. 2 (Jan. 2007); NIH Guidelines on the Inclusion of Women and Minorities as Subjects in Clinical Research 59 FED. REG. 14508-14513 (1994).

193. On bias in music, see REEBEE GAROFALO & STEVE WAKSMAN, ROCKIN' OUT: POPULAR MUSIC IN THE U.S.A. (6th ed. 2013) (tracing the history of music and social history); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER, SOC. POL'Y & L. 365 (2008); Greene, *supra* note 134; SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 117–48 (2001) (tracing the appropriation of blues by rock 'n roll artists over time); K.J. Greene, *Copyright Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999); On bias in film, see BRIAN LOCKE, RACIAL STIGMA ON THE HOLLYWOOD SCREEN: THE ORIENTALIST BUDDY FILM (2009); DANIEL BERNARDI (ED.), THE PERSISTENCE OF WHITENESS: RACE AND CONTEMPORARY HOLLYWOOD CINEMA (2007); VINCENT F. ROCCHIO, REEL RACISM: CONFRONTING HOLLYWOOD'S CONSTRUCTION OF AFRO-AMERICAN CULTURE (2000); CLINT C. WILSON II, FELIX GUTIERREZ & LENA CHAO, RACISM, SEXISM, AND THE MEDIA: THE RISE OF CLASS COMMUNICATION IN MULTICULTURAL AMERICA (3rd ed. 2003); Denise B. Bielby & William T. Bielby, *Women and Men in Film: Gender Equality Among Writers in a Culture Industry*, 10 GENDER & SOCIETY 248 (1996); EDWARD GUERRERO, FRAMING BLACKNESS: THE AFRICAN AMERICAN IMAGE IN FILM (1993).

194. *See* Rebecca Keegan, *The Hollywood Gender Discrimination Investigation Is On: EEOC Contacts Women Directors*, L.A. TIMES (Oct. 2, 2015), http://www.latimes.com/entertainment/movies/moviesnow/la-et-mn-women-directors-discrimination-investigation-20151002-story.html (citing a USC study finding that only 1.9% of directors of the top-grossing 100 films of 2013 and 2014 were women and a Directors Guild of America study finding that women represented just 14% of television directors in 2013 and 2014); Eithne Quinn, *Closing Doors: Hollywood, Affirmative Action, and the Revitalization of Conservative Racial Politics*, 99 J. AM. HIST. 466 (2012).

195. *See* Tim Gray, *Academy Nominates All White Actors for Second Year in Row*, VARIETY (Jan. 14, 2016), http://variety.com/2016/biz/news/oscar-nominations-2016-diversity-white-1201674903/; Michael Cieply & Brooks Barnes, *Diversifying Film Academy Is a Tall Order*, N.Y. TIMES, Feb. 5, 2016, at A1 (reporting that the Academy of Motion Picture Arts, which picks the Oscar nominees and winners, is 87% white and 58% male; and two-thirds of the members are at least sixty years old). The numbers were more skewed just a few years earlier. *See* John Horn, Nicole Sperling & Doug Smith, *Unmasking Oscar: Academy Voters Are Overwhelmingly White and Male*, L.A. TIMES (Feb. 19, 2012), http://www.latimes.com/entertainment/envelope/oscars/la-et-unmasking-oscar-academy-project-20120219-story.html (reporting that the members of the Academy of Motion Picture Arts and Sciences are 94% white, 2% African American, and less than 2% Latino; and 77% male); Esther Breger, *The "Hollywood Blackout" at the 1996 Academy Awards*, NEW REPUBLIC (Jan. 26, 2016), https://newrepublic.com/article/128584/hollywood-blackout-1996-academy-awards (reporting that when *People* magazine took aim at the lack of diversity among the nominees, celebrities were unwilling to join the protest).

Creative industries play a vital role in human development, cultural understanding, and democracy.[196]

C. Global IP Justice

With the rise of information resources and global trade, intellectual property has emerged as a central battleground in trade policy. The current controversy over intellectual property rights unfolding in the Trans-Pacific Partnership process[197] is the latest in a struggle dating back well over a century.[198] With advances in global transportation infrastructure, policymakers and trade negotiators increasingly focus on the protection of intangible resources.[199] The Internet has opened up a vast new frontier in information data flows and services. Intellectual property is a growing part of the larger international development picture.

Multi-national corporations promote strengthening IP rights in the developing world as a means for encouraging foreign direct investment. They advocate such development as essential to developing new local industries that can lift these nations out of poverty and nurture the creative arts.[200] Skeptics see sweatshops, strip-mining,

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196. *See supra* Part II.C.2.

197. *See* Sean M. Flynn, Brook Baker, Margot Kaminski & Jimmy Koo, *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105 (2012).

198. *See* Marshall Leaffer, *International Copyright from an American Perspective*, 43 ARK. L. REV. 373, 383 n. 49 (1990); Gerhard Joseph, *Charles Dickens, International Copyright, and the Discretionary Silence of* Martin Chuzzlewit, 10 CARDOZO ARTS & ENT. L.J. 523 (1992); Edward G. Hudon, *Literary Piracy, Charles Dickens and the American Copyright Law*, 50 AM. BAR. ASS'N J. 1157 (1964). At the time that the Berne Convention was being established, the United States imported far more books than it exported. *See* The Manufacturing Clause, 4 (Study No. 35), *reprinted in* 2A OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 2001). Leading American publishers favored retention of high tariffs on imports. *See id.* at 5. Thus, the motivation for such protectionism was not merely to disadvantage foreign authors.

199. *See generally* MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY (1998) (chronicling and analyzing how the information revolution intensified efforts by multi-national corporations and developed nations to establish stronger international IP protection).

200. *See* Keith E. Maskus, *Economic Development and Intellectual Property Rights: Key Analytical Results from Economics*, *in* THE ECONOMICS OF INTELLECTUAL PROPERTY LAW: VOLUME II ANALYTICAL METHODS (Peter S. Menell & David Schwartz eds., forthcoming 2016); Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM.-VLA J. L. & ARTS 277 (2004); Keith E. Maskus,

deforestation, pollution, threats to indigenous peoples, child labor, and political corruption. They also see liberalization of trade with nations lacking safe working conditions, environmental standards, and fair wages as a threat to wage and employment levels in the developed nations. Like advances in AI and robotics, globalization has contributed to stagnant wages in industrialized economies through the loss of manufacturing jobs.

There is little question that shoring up of IP rights and trade liberalization affects human and cultural rights, economic inequality, labor conditions, environmental protection, and a host of other critical issues. The issues range from providing life-saving drugs to the poorest people in the world to addressing environmental degradation, protecting the global environment, combating unsafe working conditions, and eradicating abusive child labor practices. As with the interplay of IP and inequality more generally, the policy matrix is replete with paradoxes and inherent conflicts. Innovation and expressive creativity promise to help developing nations to address the often dire plight of their citizens. Yet this vision conflicts with various non-utilitarian perspectives as well as the distorting influences of corporate interests and geopolitics.

CONCLUSION

Professor Singer's scholarship emphasizes the need to view property and property institutions through a broader lens that integrates social justice dimensions. Given the growing importance of intangible resources in the economic, the social, and the political spheres, intellectual property scholars must widen our lens as well. Several IP scholars have pointed the way.[201] This Article has sought to sketch a more capacious framework.

Within each mode of intellectual property protection, we need to use a bi-focal lens. In addition to the conventional issues involved

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Intellectual Property Challenges for Developing Countries: An Economic Perspective, 2001 U. ILL. L. REV. 457; Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. U. INT'L L. REV. 223 (2012); *see also* Laura Bradford, *A Closer Look at the Public Domain*, 13 GREEN BAG 2d 343, 344–45 (2010) (reporting that despite Ghana's vibrant musical tradition, many of the country's artists operate from outside the country due to the lack of enforceable copyright protections, and indigenous music is being displaced by non-native, principally American, pop music).

201. *See supra* note 13 and accompanying text.

in assessing the internal validity of intellectual property regimes (for example, does patent law, trade secret law, and copyright promote progress as judged by the conventional utilitarian lens? Does trademark law effectively safeguard the integrity of the consumer marketplace?), scholars must also explore the broader range of social justice concerns bearing on the particular intellectual property modality: human rights, moral rights, cultural and group interests, indigenous people's rights, distributive concerns, and other externalities, such as environmental degradation and climate change.

Beyond this dual mode-specific focus, intellectual property has important ramifications for larger questions of income, wealth, power, race, and gender inequality as well as global justice. Any legal and policy regime that concentrates economic power and wealth to the extent that intellectual property protection does has far-reaching effects on economic and social justice. The technology and culture industries, grounded in intellectual property, are especially important in driving economic growth, providing telecommunication infrastructure and filling the airwaves, influencing the functioning of political institutions, educating future generations, and addressing public health, food supply, and climate-change challenges on a global scale.