

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

FRANK I. MICHELMAN*

INTRODUCTION

Joseph Singer's recent writings on regulation and takings¹ 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

* 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 add⁸), 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?

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 detectable 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 collection¹⁰—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?

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.

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

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: HOBBS 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.

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 regulation⁴³ 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

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 newsprint⁵⁴ or an exclusion of "adult" bookstores and cinemas from desirable urban

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).

locations⁵⁵), 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 value⁶⁹—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.

