PROPERTY, DEMOCRACY, & THE CONSTITUTION

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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

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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).