WHAT DOES THE CONSTITUTIONAL PROTECTION OF PROPERTY MEAN?

LAURA S. UNDERKUFFLER*

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. THE PROBLEMS OF PROPERTY

A. The Problem of Abstract Definition

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

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

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

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

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

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

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

In the end, we must have more: we must have some underlying reason *why* we designate certain rights, privileges, powers, or immunities "property" within the guarantee of permanence that it ostensibly affords. Recognition of this need has prompted various offerings of what the goals of property regimes should be. For instance, those who believe in economic liberalism have argued that property should protect the fruits of individual labor and the operation of market systems.[10] Others have stressed broader ideas of human flourishing[11] or the development of broad human capacities of some sort.[12]

The uncertainty in the meaning of property has infected United States Supreme Court decision-making as well. In a series of cases, the Court has cited widely varying—and potentially conflicting—understandings of what constitutionally protected property should be. For instance, "property" in the takings[13] context has been defined by the Court as "bundles" of "traditionally" or "commonly" recognized rights to possess, use, transport, or exclude; or, alternatively, it has been defined as the right to the protection of "reasonable,"

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9. *See, e g.*, MUNZER, *supra* note 8, at 47 (discussing the right to transfer as determinative of the identification of property rights); LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18 (1977) (citing "ownership" rights to use, transfer, and exclude as essential property rights); A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 113 (A.G. Guest ed., 1961) (citing the right to possess, the right to use, the right to manage, the right to receive income, the right to capital, the right to security, the power of transmissibility, the absence of term, and the incident of residuarity as classic examples of property rights).

10. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32–35 (4th ed. 1992); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (PAPERS AND PROCEEDINGS) 347 (1967).

11. *See, e.g.*, Gregory S. Alexander, *Ownership and Obligation: The Human Flourishing Theory of Property*, 43 HONG KONG L.J. 451 (2013); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); MARGARET JANE RADIN, REINTERPRETING PROPERTY 6 (1993).

12. *See, e.g.*, C.B. Macpherson, *Human Rights as Property Rights*, 24 DISSENT 72, 77 (1977) (property as a means to a "full and free life," "using and developing and exerting our capabilities and energies").

13. *See* U.S. CONST. amend. V, *supra* note 2.

"investment-backed," or "historical" expectations.[14] Tests of the latter type, by their terms, turn upon the investment made by the particular owner; tests of the former type, as statements of abstract entitlements, might not.[15]

As the result of such doctrinal problems, the Court has most often and uncomfortably settled on the idea that it is "the several States, [not the United States, that are] possessed of residual authority . . . to define 'property'" for constitutional purposes.[16] However, making state definitions determinative has its own problems. First, there is the thorny issue—for federal courts—in determining whether state laws create "established rights" or only "non-established interests."[17] In addition, there is a more profound problem. If "property"—the core material of the constitutional right—is a matter of state law, a state can presumably interpret it as it sees fit. And, with federal courts bound by state determinations of state law, there is often not much left for the exercise of federal power.[18]

In short, the idea of a "simple" property-protection guarantee quickly becomes illusory when the complexities of the idea of property itself are considered. It is very difficult to have a simple, legally enforceable guarantee when articulation of its central idea is so difficult.

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14. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (right to "essential use" of land); *id.* at 1055–60 (Blackmun, J., dissenting) (discussing eighteenth-century and nineteenth-century understandings of rights incident to land ownership as determining modern property interests); Hodel v. Irving, 481 U.S. 704, 716 (1987) (citing "investment-backed expectations"); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 499 (1987) (citing "financial-backed" expectations); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("[p]roperty rights in a physical thing" include the rights to possess, use, exclude, and dispose of it); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) ("traditional" rights of possession, exclusion, and other powers of disposition are the rights of property).

15. *See, e.g.*, *Loretto*, 458 U.S. at 419 (facts that cable service installation was present when the building was purchased, and enhanced the building's value, did not preclude the building owner's claim that mandated cable service "intrusion" was a taking of her right to exclude without the payment of compensation).

16. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980). *See also* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 707 (2010); Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

17. *See Stop the Beach*, 560 U.S. at 715–18 (plurality opinion); *id.* at 732–33 (majority opinion).

18. *See, e.g.*, *id.* at 729–33 (claim by Florida landowners that the Florida Supreme Court changed the law—and eliminated their property rights—must be rejected, because that court's prior decisions did not establish the property rights that the landowners claimed in the first instance).

B. The Problem of Reciprocal Rights and Powers

Let us assume, however, that the definitional problem somehow vanishes—or, more accurately, that there is a consensus that the rights claimed by the complaining party in a particular case are unequivocally part of constitutionally recognized "property". For instance, imagine a case in which a landowner claims the right to build a house on a shorefront lot that is flanked by similar lots with single-family structures. Or imagine a case in which a landowner claims the right to fill a marsh in order to develop his land—a course of action previously taken by countless others. In these cases, at least, it should be an easy judicial task to unequivocally and constitutionally protect the owners' claimed property rights—correct?

At this point, we stumble upon the next problem. Claimed property rights—because of the nature of the resources that they concern—*are often inextricably and unalterably interdependent.* The right to use one's land, once accepted, might appear to be a right that we can unilaterally enforce. But the situation with land is rarely that simple. What one person does in the name of ownership rights in land is almost certain to affect the property rights and interests of others.

In other words, because of the physical interconnectedness of land, wildlife, and human habitation, the claimed rights and actions of an owner of land cannot be viewed in isolation. It is not a situation in which I—as a landowner—can say, "this is my land, so I will do what I want, and to heck with the rest of you." It is a situation in which—whether we like it or not—our actions and fates are inextricably intertwined.

Consider, for instance, the first hypothetical situation posed above: a landowner's claim of right to build on a shorefront lot in the face of newly imposed environmental restrictions. This, of course, is the famous *Lucas*[19] case. Lucas demanded that he be permitted to develop his two ocean-front lots on the Isle of Palms in a way that was permissible when the land was purchased. The State of South Carolina claimed that environmental damage that unregulated building had caused—such as the acceleration of erosion, the jeopardizing of the beach/dune system, and the endangerment of adjacent properties—justified a facial ban on building.[20]

19. *See* Lucas v. S.C. Coastal Council, 505 U.S. at 1003 (1992).

20. *See* S.C. CODE § 48-39-259(4) (2003); *Lucas*, 505 U.S. at 1008–09. I use the term "facial" deliberately, as the law provided landowners an opportunity to challenge the way in which

Protection of the ability to build or to otherwise use one's land is something that we generally associate with property rights and thus—it could be argued—is something that should be protected under a rule of unequivocal property protection. However, if we afford Lucas such a right to build, what do we do with the damage that his actions will cause to public property and to the private property rights and interests of others?

This dilemma is replicated in other land-use cases in which the landowners' proposed actions, claimed as property rights, would severely and directly affect the use or enjoyment of land or its resources that are claimed as protected by others. Consider, for instance, the second hypothetical situation posed above: a landowner's claim of right to eliminate wetlands, with fill, an action that has been pursued by landowners for centuries.[21] Opposing this action is more recent scientific understanding of the physical and biological interdependence of wetlands with groundwater, other shoreline lands, and the bodies of water that border them. Thus, on the one hand, there is the claim of the landowner to engage in an ancient practice; on the other hand, there is knowledge that the filling and pollution of wetlands will cause damage to other land and bodies of water in ways that transcend the boundaries of the claiming landowner's parcel. Again, we are faced with an activity (filling and building) that would appear, on its own, to be included within an unequivocal (constitutional) property-protection rule. But what do we do with the damage to the rights and interests of others?

It is cases such as these—and a myriad of others—that illustrate why an unequivocal rule of protected, "traditional," or "expected" property rights cannot be undertaken by courts. The physical interdependence of property rights claimed by owners and the property rights of others makes such an absolute rule impossible.

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baseline and setback lines had been drawn by the State. This was a path that other landowners had taken; however, Lucas spurned this alternative. *See* Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, *in* PROPERTY STORIES 221, 231 (Gerald Korngold & Andrew P. Morriss eds., 2004). Furthermore, after the *Lucas* trial concluded, the law was explicitly amended to allow owners to build modified structures under a special permit procedure. Of the twelve lots on the Isle of Palms that were restricted under the law, the owners of ten—all but Lucas—sought such permission and obtained it. *See id.* at 246.

21. *See, e.g.*, *Palazzolo*, 533 U.S. at 606.

There are two responses that simple-protection-rule advocates might advance. First, there is the argument that recognition of physical and biological interdependencies involving land will erode land-use rights too far—that if these are recognized any use now protected might be prohibited.[22] However, even those advocates admit that our recognition of natural dependencies in law is "more pervasive today than before, not because the world has changed but because our perception of the world has changed."[23] Our perception of the world has changed, and our perception of the world will continue to change with advances in scientific knowledge. As a result, activities that were once thought to be harmless to the property rights and interests of others are often now clearly seen as not. Law—as the set of enforceable societal rules—must grapple with these realities. Pretending that the world is not what it is will not help to solve interdependent problems.

The bottom line is that any property right, previously conferred, is at most a statement of the way that conflicting interests have been resolved at one particular moment. As understandings of consequences change, "rights" will change. There is no way to avoid that reality.

There is, however, a final objection that simple-protection-rule advocates might raise. It is not our position, they might argue, that the Constitution prohibits all changes in rights; we acknowledge that reality. When it comes to property, the Constitution is not a guarantee against change; rather, it is a guarantee of *indemnification*. South Carolina can institute prohibitions against the development of ocean-front lots; Rhode Island can prohibit the filling of wetlands; but there is a price for these changes. When landowners' established rights are abolished, those who want those changes must pay for them.

The core of this argument is that compensation, in such cases, is owed as a matter of justice. If someone is hurt, the wrongdoer must pay; and when rights are taken, that party is the government. Although this argument has a certain surface appeal, how justice actually compels this result is difficult to articulate. That is because justice, in any situation, is an *inherently relational* inquiry. "When we decide whether a law or its operation is 'just,' this is an inquiry about the advantages and disadvantages that 'X' derives from the operation of that law, or its absence—and the advantages and disadvantages

22. Richard A. Epstein, *Life in No Trump: Property and Speech Under the Constitution*, 53 MAINE L. REV. 23, 26–27 (2001).

23. *See id.*

that are suffered by 'Y'."[24] In short, it is impossible to evaluate either party's claim without reference to the claim of the other. Yet that is what the simple-protection rule requires: that the injury to one party should be compensated, without fail, with no consideration of the injury to the other.

Even aside from problems with the justice of this rule, there is—even more fatally—another. Could the public—that is, the taxpayers—*afford to pay* all of the claims that a simple-compensation rule would generate if such a rule were implemented?

In fact, there were reasons why the attempted per sé compensatory rule that was adopted in the *Lucas* case quickly faded into irrelevance. In that and later cases, the Supreme Court held that a landowner can always recover his loss if a regulation deprives him of "all" or "practically all" of his land's economic value.[25] In Lucas's case, that meant recovery of more than $1.2 million for two small lots;[26] for Palazzolo, a claimant in a later case, it would have meant recovery of $3.1 million in "development value" of wetlands.[27] It does not take a sophisticated mind to appreciate that those values, multiplied by millions upon millions of environmentally restricted shoreline and wetlands parcels in the United States, is not something that "government"—state and local taxpayers—can afford to pay. Aware of this, courts have simply held that true "*Lucas*" wipe-outs of all value are exceedingly rare, or that the land that is the subject of the claim is part of a larger, more valuable parcel.[28]

An important attempt to implement a simple-compensation rule was recently tried in the State of Oregon. In 2004, Oregon voters enacted a law that came to be known as "Measure 37." This law required

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24. Laura S. Underkuffler, Tahoe*'s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENTARY 727, 749 (2004).

25. *See* Lucas v. S.C. Coastal Council, 505 U.S. at 1019 (1992) (compensation is required, under a per sé test, when a regulation deprives an owner of "all economically beneficial uses" of his land and the land is "worthless"); *Palazzolo*, 533 U.S. at 631 (*Lucas* rule applies when "the landowner is left with a token interest"). *Accord*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (repeating *Lucas* test). The only exception, as articulated in the *Lucas* case, is when the restriction is a "background principle[ ] of the [s]tate's law of property and nuisance" in place when the property was acquired. *Lucas*, 505 at 1029. This would preclude (among other actions) all subsequent legislative enactments.

26. *See Lucas*, 505 U.S. at 1009.

27. *See Palazzolo*, 533 U.S. at 616.

28. For instance, this was the approach taken by the Court in *Palazzolo*. *See Palazzolo*, 533 U.S. at 630–32.

that if any state, city, county, or metropolitan government enacted or enforced any kind of land-use regulation that restricted the use of private real property or any interest in it, after the owner of that property or any family member acquired it, that government was required to pay the owner the reduction in the fair market value of the affected property or forego enforcement.[29] "Land use regulations" included environmental laws, state and local land conservation laws, local government comprehensive plans, zoning ordinances, land division ordinances, transportation ordinances, rules regulating farming and forest practices, and any other statute or local ordinance "regulating the use of land or any interest therein."[30]

The impact of this law was immediate. Within two years of enactment 2446 claims had been filed, which would have cost more than $5.7 billion to reimburse.[31] By the time of its effective repeal, more than 7000 Measure 37 claims for compensation had been filed, with a total amount exceeding $17 billion.[32] One orchard owner filed a claim for $57 million, based on what his land would be worth if divided into nearly 800 housing units.[33] Claims ranged from the subdivision of residential lots, to the development of restricted green space, to the right to conduct an open-pit mining operation.[34]

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29. *See* OR. REV. STAT. §§ 197.352(1), (2), (3)E (2005). The relevant portions of the statute read as follows:

> (1) If any public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of real private property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.
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> (2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation. . . .

Excepted were "public nuisances under common law," restrictions "for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations," and restrictions prohibiting the "selling [of] pornography or [the] perform[ance of] nude dancing." *Id.* §§ 197.352 (3)(A), (B), (D).

30. *See id.* § 197.352 (11)(B).

31. *See* Ben Arnoldy, *Topping 2006 Ballots: Eminent Domain*, CHRISTIAN SCIENCE MONITOR (Boston) Oct. 5, 2006, at 1.

32. *See* OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, BALLOT MEASURES 37 (2004) AND 49 (2007): OUTCOMES AND EFFECTS (2011), at 3, 5.

33. Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1.

34. *See* Jeff Barnard, *Growing Number of Counties Approving Property Rights Claims*, ALBANY DEMOCRAT-HERALD, Feb. 11, 2005, at A6.

Faced with claims that they never could pay, counties and local governments simply waived the challenged regulations.[35] As restrictions were waived, neighbor was pitted against neighbor as landowners who relied on restrictions to create value for their property now saw those restrictions crumbling.[36]

Public outrage at these results led to the enactment of "Measure 49" three years later, also by popular referendum. This new law, passed overwhelmingly by voters, effectively reinstated prior land-use laws and cut far back on rights to compensation.[37]

The lesson here is that the interconnectedness of property rights and property interests means that an owner's actions cannot be viewed in isolation. Actions by one property owner *will affect* the rights and interests of others, and no legal scheme can ignore that reality. A simple-compensation-rule approach to constitutional or statutory guarantees might seem appealing as an abstract idea, but it will fail as a matter of practical implementation. Neither unvarying waiver of "offending" rules nor unvarying payment to claimants is a viable alternative. A rigid rule that compensation will be paid whenever pre-existing rights are changed ignores too much to be workable.

C. The Foundational Problem of Allocation

Recognition of the frequently reciprocal nature of property interests and rights—such as those in land—is, in truth, only one manifestation of a deeper and more ubiquitous problem. Property rights in physical, finite, nonsharable resources are different from all other fundamental (constitutional) rights. This is because—unlike other rights—property rights of this kind *are necessarily allocated* by government.

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35. *See* William Yardley, *Anger Drives Property Rights Measures: Support Is Strong for Measures Limiting Governments' Power*, N.Y. TIMES, Oct. 8, 2006, at 34 ("'Not a penny' has been paid to property owners . . . . Local governments, lacking money to pay, have simply waived the zoning rules."). In only one claim out of the 7000 filed was compensation paid to the takings claimant. In all other cases, governments waived the regulation. *See* Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 FORDHAM L. REV. 1281, 2384 (2009).

36. *See* Harden, *supra* note 33; Barnard, *supra* note 34; Douglas Larson, *Measure 37 Puts Newberry Crater at Risk*, REGISTER-GUARD (Eugene, Ore.), Sept. 11, 2006, at A11.

37. *See* Todd Murphy, *Oregon Voters Overwhelmingly Back Measure 49*, PORTLAND TRIB., Nov. 6, 2007; OREGON DEPT. OF LAND CONSERVATION AND DEVELOPMENT, *supra* note 32. For the text of Measure 49, see http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_041.html.

Consider, for instance, familiar constitutional rights such as freedom of speech, freedom of religion, due process of law, and others. The enjoyment of these rights by one person does not affect their enjoyment by others, except in very extreme cases. Although it is possible (at the margins) that my exercise of free speech might shout you down, there is nothing about the *intrinsic nature* of this right that mandates its allocation (by government) to only one person. By contrast, if we recognize and protect my claim to property rights in land, chattels, or other physical, finite, and nonsharable goods, we must deny your claim to the same. In other words, property is a zero-sum game. The granting of property rights to one person necessarily and inevitably precludes the granting of the same right to others.

When one deals with a governmentally enforced allocation scheme of this type, a simple statement that "rights are rights" or "once a right, always a right" is not enough to answer the allocation question. We do not often think about this aspect of property and its rights, although it lurks behind all decisions by government. One need only think of current desperate struggles over water in the American West or over the patenting of human genes, to immediately grasp the nature of the problem. The fact that prior allocative decisions about property rights in water or biological materials might have been made does not necessarily foreclose questions about current, critical impacts on others. We—as a society—must be aware of allocative issues and must be free to re-evaluate previous allocations in the light of urgent conditions. In short, although there is an ostensible "certainty" about property rights, their allocation is necessarily and fundamentally contingent.

II. IF NOT A SIMPLE RULE, THEN WHAT?

Professor Singer's work, which we honor today, has been both incisive and eloquent in pointing out the deeper nature of property and its rights. In particular, what we see as desirable and acceptable property rights is profoundly contextual. Under what circumstances are development projects environmentally damaging? Under what circumstances are investment expectations reasonable? It is extraordinarily difficult to answer such questions with any blanket rule or

absolute guarantee. As Professor Singer has observed in this symposium, such decisions—by their nature—must be "essentially ad hoc."[38]

If that is indeed the case, then an important question confronts us. If there can be no broad and implemented guarantee in this area, does the constitutional protection of property have any meaning?

We have a situation in which the constitutional protection of property is unavoidably complex, contingent, and often denied—far more so than is true of other enumerated rights. If the protection of property is always going to be a case-by-case determination in which we must determine the values that we have and how conflicting rights and interests reflect those values, then does the "special protection" for property matter? Is the constitutional protection of property anything more than a textual relic with no practical meaning?

The constitutional protection of property is certainly not necessary for the existence and stability of a private property regime. Indeed, private property flourishes in many nations—such as England, Canada, New Zealand, India, and others—with no supermajoritarian or constitutional guarantee. I have previously written:

> The constitutionalization of property rights is certainly not necessary to entrench ideas of the sanctity of property rights or the division between public and private spheres. . . . These ideas are rooted in the fundamental tension between individual security and collective control, a tension which runs far deeper than the constitutionalization question.[39]

The conviction that government should forbear from the change of existing property rights is a ubiquitous assumption in our culture, as it is in others. Property rights, as we have already acknowledged, are of unparalleled importance to individuals in the conduct of their lives. The fact that property rights in physical, finite, nonsharable resources are, in fact, a complicated and zero-sum game does not change their importance to the contestants involved.

In our society, and others like it, the importance of individual property is reflected in legal guarantees. These legal guarantees

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38. *See, e.g.*, Joseph William Singer, *Should We Call Ahead? Property, Democracy, & the Rule of Law*, 5 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 1, 7 (2016).

39. *See* UNDERKUFFLER, *supra* note 4, at 160.

might in fact be more necessarily contingent than their simple statement indicates, but this does not mean that those guarantees have no meaning.

The meaning of property in American culture is more than what a court might decree it to be in a particular case. It is a societal attitude—a societal presumption, if you will—that property is important to the individuals who hold it.

The constitutional protection of property has a unique place in American law and a very real function. The constitutional protection of property—with its legal, emotional, and rhetorical power—means that the protection of property is something that we value and that must be seriously considered in every case. It means that claims of property protection will receive an extra layer of review, whether by direct "democratic" actors—such as legislatures and town halls—or by democratically anointed actors, such as administrators and courts. It means that in particular cases, and under particular circumstances, such claims will be honored even when there are serious interests asserted by others. However, it does not mean, and cannot mean, that this most contested, intertwined, and important of all rights is—upon someone's claim—automatically exempt from the broader societal interests and values that form our social fabric. It does not mean, and cannot mean, that the claim of a historical right will necessarily trump the property claims of the rest of us.