

# Ohio Northern University Law Review

## Kormendy Lecture

### Justifying Regulatory Takings<sup>α</sup>

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*Since 1922, the Supreme Court has interpreted the U.S. Constitution to require just compensation to be paid when a regulation effects the practical equivalent of a taking of property. And since 1978, it has applied a multi-factor test to determine when a law “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Many scholars have criticized the resulting law of regulatory takings as incoherent, unpredictable, and insufficiently protective of property rights.*

*While there is much to criticize in the reasoning in some of the cases, regulatory takings law is more defensible and predictable than its critics believe. Because we live in a free and democratic society, owners are legitimately subject to regulatory laws and cannot, in general, claim a right to be paid just to comply with applicable law. Compensation is due only when the burden on an owner is rightly understood as a “public” one, and that happens when we cannot provide an adequate justification for why the owner should bear the burden of the law without compensation. That is most likely to be the case when a law effects the destruction of property, the ouster of the owner, invasion by strangers, or when a law imposes unfair surprise by interfering what are justly viewed as vested rights. Even in*

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*these cases, compensation is not due if there is an adequate public justification for imposing the uncompensated burden on the owner.*

*Regulatory takings law allows legislatures to prevent owners from harming others, to resolve conflicts among property rights, to define the environment within which property rights can be enjoyed, and to define inherent limits on property rights. Constitutional limits on regulation are reached only when a law imposes a “public burden” that an individual should not have to bear alone in a free and democratic society that treats each person with equal concern and respect.*

#### TABLE OF CONTENTS

I. Form and Substance in Regulatory Takings Law .....	612
II. Established Property Rights: For and Against.....	619
A. Why Law Can Legitimately Limit Established Property Rights.....	619
B. Why Established Property Rights Deserve Some Legal Protection	627
III. A Reconstruction of the Regulatory Takings Doctrine .....	631
A. Structure of the Doctrine .....	631
B. Character of the Government Action.....	635
1. Legitimate Regulations.....	635
2. Unfair Burdens.....	641
3. Property Immunities .....	648
C. Interference with Reasonable Investment-Backed Expectations.....	650
1. Opportunity Losses.....	650
2. Vested Rights.....	651
D. The Surprising Irrelevance of Economic Impact.....	652
IV. The Principle of Adequate Justification.....	654
A. Property Rights In a Free and Democratic Society .....	654
B. Property Rights and Public Reason .....	659
C. Hard Cases in Light of Democratic Norms .....	663
V. Justifying Property Law .....	669

*[N]o political or social relations should exist that cannot be adequately justified toward those involved.<sup>z</sup>*

Rainer Forst

*The insistence that all virtue is on one side of a given clash of principles, and all vice on the other, rarely follows from the successful framing of an issue in terms of general concepts, and abstract discourse embarrasses itself when it strikes such poses.<sup>δ</sup>*

Yoram Hazony

SCHOLARS HAVE LONG DERIDED the regulatory takings doctrine as incoherent and unpredictable.<sup>1</sup> The prevailing view seems to be that it is premised on a hodge-podge of vague factors and has resulted in a conflicting and confusing precedential thicket.<sup>2</sup> The doctrine is also thought to rest on inherently subjective and circular norms like “fairness and justice” and “reasonable expectations.”<sup>3</sup> Perhaps worst of all, it requires us to draw a line in the sand demarcating when a regulation “goes too far.”<sup>4</sup> How on earth are we supposed to do that? From time to time, various Supreme Court Justices have sought to tame the doctrine by reducing it to simple rules.<sup>5</sup> Many trees have given their lives to populate law reviews with scholarly attempts to create a regulatory takings doctrine that will be internally consistent and predictable—and hopefully fair as well. Yet time and again, the Court has reaffirmed its view that we are better off eschewing “any set formula” for defining a regulatory taking and that we should “resist the temptation to adopt *per se* rules.”<sup>6</sup>

Yet the longing for certainty never dies. Recently, a plurality of Justices suggested a new formula for thinking about regulatory takings law. Four Justices opined that a taking should be found any time a lawmaker enacts or enforces a rule that “declares that what was once an established

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<sup>z</sup> RAINER FORST, JUSTIFICATION AND CRITIQUE: TOWARDS A CRITICAL THEORY OF POLITICS 22 (Ciaran Cronin trans., Polity Press 2014) (2011).

<sup>δ</sup> YORAM HAZONY, THE PHILOSOPHY OF HEBREW SCRIPTURE 83 (2012).

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

2. *See* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).

3. *See id.*

4. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

5. *See, e.g.,* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

6. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 (2002).

right of private property no longer exists.”<sup>7</sup> Two other Justices embraced this formula under the Due Process Clause; rather than allowing such a regulation to occur with compensation, they would have the courts issue injunctions preventing such regulations from taking effect *at all*.<sup>8</sup> This means that a majority of the Supreme Court believes that there is a constitutional problem when a regulation deprives anyone of an “established right of private property.”<sup>9</sup> This idea—if it were viable—would appear to simplify the law, enhance its predictability, and bring coherence to an otherwise confusing and internally contradictory constitutional doctrine.

Be careful what you wish for. Simplicity and clarity sound good if you say them fast. And no one wants legal rules to be applied haphazardly or inconsistently; nor do we think it fair in general to tell citizens an act is lawful and then change our minds and apply a contrary rule retroactively. But human life is messy and law that does not reflect that fact either comes to be perceived as unjust or gives way in the end.<sup>10</sup> There is a consensus that the law should protect legitimate property rights. *But that presents a question rather than a solution*: in what contexts are property rights legitimate and when, if ever, are we justified in immunizing them from regulation?

The idea that “established property rights” are *completely* immune from deprivation, limitation, revision, or even regulation (with or without compensation) has alarmed many scholars as well as some of the Justices.<sup>11</sup> It places in doubt the ability of courts and legislatures to modernize the common law of property.<sup>12</sup> Would we still be plagued with fee tails, for

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7. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 715 (2010).

8. *Id.* at 733–37 (Kennedy, J., concurring in part). In truth, they express their view in less sweeping language. Justice Kennedy explains, for example, that if a judicial decision eliminates an established property right, “the judgment *could* be set aside as a deprivation of due process of law.” *Id.* at 735 (emphasis added). This suggests that it might or might not be unconstitutional. He goes on to say that it is “natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.” *Id.* at 736. The word “limiting” is different from “eliminating,” and may suggest that some changes in established property rights may be constitutional. In contrast, the wording of Justice Scalia’s plurality opinion is far more assertive, suggesting that common law property rights cannot be changed in any way since they are “rights of” private property. *See id.* at 722, 727 (Scalia, J., plurality opinion).

9. *See id.* at 715.

10. *See* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 133–34, 147–48, 179 (2002) (arguing that vagueness is a virtue rather than a vice in takings doctrine).

11. John D. Echeverria, *Green Light for Beach Renourishment, Red Light for Judicial Takings*, 62 PLAN. & ENVTL. L. 3, 3 (2010) (arguing that the case of *Stop the Beach Renourishment* “has a frightening near-miss quality to it” and almost adopted a “radical judicial takings theory, and wreaked other far-reaching damage to established takings doctrine”); *Stop the Beach Renourishment*, 560 U.S. at 742–43 (Breyer, J. concurring).

12. *Stop the Beach Renourishment*, 560 U.S. at 722, 727 (suggesting that the takings clause was adopted at a time when courts had no power to “change” the common law and that even if such changes are allowed they cannot “eliminat[e] established private property rights”).

example, if no established property rights could be modified? Would the van Rensselaer feudal estates still persist in New York State? Would we still have no implied warranties of habitability in residential leases? Should slaveholders have been compensated for the lost value of their slaves? Would we still be interpreting a conveyance from O to A “in fee simple” as a life estate because the grantor did not use the magic words “and his heirs”? Would we have to say goodbye to environmental law, zoning law, antidiscrimination law, and equitable distribution statutes? Would we be powerless to regulate subprime mortgages? Would wheelchair access to housing and public accommodations go away? If followed literally and applied to individual “rights of private property,” the “established property rights” formula would revive *Lochner v. New York*<sup>13</sup> and disable courts from using common law methods to modernize the law of property. It would also prevent legislatures from enacting reasonable regulations designed to promote the public welfare and to protect the rights of owners and non-owners alike.

As usual, both sides in this debate have something important to say, and, as usual, both are partly right and partly wrong. There is something appealing about the idea of protecting “established property rights,” but there is also something appealing about the democratic idea of allowing elected representatives to legislate and courts to adjudicate in ways that mold property law to changing conditions and values. The same is true, I want to argue, for those who seek greater clarity in regulatory takings law and those who caution against “*per se* rules.” Clarity is a useful goal but rigidity is not. Predictability is helpful and crucial to the rule of law but, despite what Justice Scalia says, the rule of law cannot be reduced to a law of rules.<sup>14</sup> Political philosopher Rainer Forst teaches us that both sides in important debates are often “held captive by particular examples that lead us to make false generalizations.”<sup>15</sup> Let us assume that both sides in the debate are making good points. If we take their fears and dreams seriously, and consider their thoughts charitably, what can we learn from listening to both sides—those who want clear rules versus those who fear them and those who embrace “established property rights” versus those who embrace “regulation?”

We learn, first, that the critics are correct that the regulatory takings doctrine is sometimes incoherent and often confusing. The factors identified by the Supreme Court to identify takings are too vague to be

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13. 198 U.S. 45 (1905).

14. Compare Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), with Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

15. FORST, *supra* note 4, at 18.

meaningful without further elaboration and too general to decide outcomes in actual cases. They also sometimes push us in opposite directions. Moreover, it is true that the case law is confusing and somewhat contradictory. It is hard for anyone to read the Supreme Court's regulatory takings cases without some bafflement.

At the same time, I want to swim against the tide by arguing that the regulatory takings doctrine, as shaped by the Supreme Court, is in reality more predictable, coherent, and normatively defensible than its critics think it to be. If we look at the results in the cases, and not just the doctrine or the rhetoric, we will find a comprehensible pattern. It turns out that it is really hard to win a regulatory takings claim. Only exceptional cases support a finding that a regulatory law cannot be constitutionally enforced without compensation.<sup>16</sup> Those exceptions include (i) certain cases of physical destruction of property or *permanent invasion* of property that has not been opened to the public and (ii) certain cases of interference with justified expectations that deprive owners of "*vested rights*" in investments made in reliance on regulatory permissions. While other circumstances sometimes support a plausible claim that the Constitution requires compensation, it is legitimately hard for owners to argue that they have no obligation to comply with an otherwise valid law unless they are compensated for doing so.

Careful analysis of the case law reveals another surprising fact. The Supreme Court has recognized the "economic impact" of a regulation as relevant to regulatory takings claims.<sup>17</sup> But it turns out that the economic impact of a regulation is only marginally relevant to the question of whether the regulation can be imposed without compensation.<sup>18</sup> Reference to economic impact suggests that what matters is the *magnitude* of the impact on market value. But that is not the core concern of the regulatory takings doctrine. What matters is not the *quantity* of the impact on the owner, but the *character* of the impact.<sup>19</sup> Even very large economic impacts can be imposed without compensation if the regulation serves a legitimate public purpose. Conversely, very small economic impacts may constitute takings if the character of the intrusion on property rights justifies that finding.

When does a limitation on property rights create a right to compensation? It does so when the burden is not one that an owner should be forced to bear for the good of society without compensation.<sup>20</sup> The question is whether the law "forc[es] some people alone to bear public

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16. See Poirier, *supra* note 10, at 177-78 (noting how case law development may render the *Penn Central* test predictable and even rule-like).

17. *Lucas*, 505 U.S. at 1015.

18. See *id.* at 1031-32.

19. See *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960).

20. See *id.* at 49.

burdens which, in all fairness and justice, should be borne by the public as a whole[?]"<sup>21</sup> That question requires an analysis of the phrase "should be borne by the public" and that depends on the *reason for the regulation*.

In the 2005 *Lingle v. Chevron U.S.A, Inc.*<sup>22</sup> decision, the Supreme Court firmly rejected the dictum in *Agins v. City of Tiburon*<sup>23</sup> that suggested that a law might constitute a taking if it did not "substantially advance legitimate government interests."<sup>24</sup> This might suggest, as Frank Michelman has argued, that the only thing that matters is the impact on the owner, not the justification for the government action.<sup>25</sup> But my observation that "economic impact" has little role to play in regulatory takings law is not inconsistent with the suggestion that what matters is the loss to the owner. What matters, according to the case law, is the *type* of impact at issue, not the *size* of the impact. Michelman had it right when he wrote that the question is whether the burden is "acute, debilitating, degrading" or "disproportionate . . . to what others bear."<sup>26</sup> We cannot tell if a burden is degrading or disproportionate without a normative judgment that the owner should not be forced to suffer that type of burden without compensation. Even great burdens may be imposed without compensation if the reason for the regulation justifies them. For example, an owner can be prohibited from building a nuclear power plant on an earthquake fault line, and that is true even if that is the only economically viable use of the land. An owner cannot legitimately complain about that burden because owners have no right to use their property in ways that put the entire community at risk. If that is so, the only way to tell if an obligation is out of line or beyond what a person in a free and democratic society should have to bear is to consider the *justification* for the regulation and to ask whether the justification is adequate to support imposition of the law without compensation.

When a regulation that limits what one can do with one's property serves legitimate public purposes, and does not amount to an outright expropriation of the property, it can ordinarily be imposed without compensation *regardless* of the economic impact on particular owners.<sup>27</sup> That is because a democracy empowers the people to adopt laws that

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21. *Id.*

22. 544 U.S. 528 (2005).

23. 447 U.S. 255 (1980).

24. *Id.* at 260 ("The application of a [regulatory law] to particular property effects a taking if the [law] does not substantially advance legitimate state interests . . .").

25. See Frank I. Michelman, *Constitutional Protection for Property Rights and the Reasons Why: Distrust Revisited*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 217, 221 (2012) ("[T]he decisive factor for picking out those regulatory losses for which the Constitution demands compensation would always have to be something about the loss itself, whether measured absolutely or relatively to the situations of others[.]").

26. *Id.*

27. See *Lucas*, 505 U.S. at 1031-32.

regulate the use of property, and regulations of use are usually not “takings” of “property.” Conversely, even small economic impacts on owners may be deemed regulatory takings if the character of the burden is not one that owners should have to bear for the good of the community.<sup>28</sup> Any “should” statement is dependent on normative reflection, argument, and justification; what matters is not just the amount of the impact, but whether the burden is one that a free and democratic society cannot justify imposing on an owner in the absence of compensation.

We normally think of regulatory takings law as a constitutional doctrine that protects property owners. In reality, the doctrine protects owners from seizure of their property, but it does not immunize owners from the rule of law or democratic governance. It protects them only when the burden is rightly viewed as a “public burden.”<sup>29</sup> That depends on consideration of what “fairness and justice” require. Since the end of the *Lochner* era, we ordinarily consider it a constitutional obligation to comply with duly-enacted laws that shape social and economic relationships.<sup>30</sup> Only when the burden is of a type that should not be borne by individuals in the absence of compensation does a constitutional right to compensation become tenable.<sup>31</sup> Because we cannot answer that question without reference to fairness and justice, what matters is whether there is any defensible *justification* that can be offered for imposing the regulation without compensation that renders the obligation fair and just, or, at the least, not unfair or unjust. Determining that requires us to consider whether we would or could accept the regulation as fair if we did not know if we were the ones burdened or benefited by it.

Both the Supreme Court and the American public seem to be rhetorically conservative, but operationally liberal. Americans profess to hate regulation but then they demand a great deal of it from their legislatures to solve social and economic problems and to create a workable legal infrastructure for a free market/private property system. Similarly, despite a strong property rights rhetoric in many Supreme Court opinions, it is extremely rare for a regulation to be struck down as an unconstitutional taking of property without just compensation.<sup>32</sup>

There is a strong presumption in favor of the constitutionality of regulatory laws and that presumption does not go away just because those regulations concern the rights of property owners.<sup>33</sup> Despite all the

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28. See *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365, 387-88 (1926).

29. *Armstrong*, 364 U.S. at 49.

30. See Singer, *Rule of Reason*, *supra* note 14, at 1405.

31. *Armstrong*, 364 U.S. at 49.

32. See Singer, *Rule of Reason*, *supra* note 14 at 1405.

33. *Id.*

handwringing about the unpredictability of regulatory takings analysis, the occasions on which one can plausibly press a viable takings claim can be described with a fair amount of specificity and confidence. Scholars may be bewildered by the doctrine, but lawyers seem to be able to give advice to clients. Beyond its predictability, I will argue that the current doctrine is, in general, defensible and appropriate from a moral point of view. It promotes fairness and justice in a free and democratic society that treats each person with equal concern and respect. It does so because, at base, that is what the doctrine is about.

This does not mean that I think the law is perfect and it does not mean that the law does not have its internal tensions, nuances, subtleties, anomalies, and even contradictions. It does not mean I agree with the resolution of every regulatory takings case or every sentence in every Supreme Court opinion. Nor does it mean that we can reduce the law to a few clear rules. It means that predictability of regulatory takings law comes, not from clear, rigid, and simple rules of law, but from a combination of factors, rules, and cases.<sup>34</sup> The ordinary workings of the common law system—the legal methods known to all lawyers—provide us with the tools we need to understand existing law, to generalize about it, and to predict the outcome of future cases.

For the most part, with important exceptions, the existing doctrine also focuses our normative attention in helpful and appropriate ways. The common law method forces us to focus on concrete contexts to better understand the limits of any principles we adopt. Context also affects the normative importance of the various factors that go into the takings determination. Different social and economic settings lead to different appropriate forms of property, thereby leading us to distinguish cases, placing them on one side of the line or another. The regulatory takings doctrine gets its coherence not from a rule structure, but from normative judgments about the kinds of impacts that regulations impose on owners in different contexts that can—and cannot—be justified in a free and democratic society.

Of course, when it comes to hard cases, prediction in regulatory takings cases is not easy. And hard cases cannot be adjudicated without normative judgment. But why should hard cases in regulatory takings law be any different from hard cases in any other area of law? We do not bemoan the incoherence of the law every time we have a hard case. Hard cases are hard for a reason. In the regulatory takings area, it is constitutional law we are talking about and in that area of law we have no shortage of hard cases. But that does not mean that there are no easy cases. Nor does it mean that we

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34. *See id.* at 1402-05.

cannot better understand and be more articulate about the reasons why cases are hard. In fact, the existing doctrine and case law take us a long way to doing precisely that. In dissent from the prevailing view, I want to argue that, although it can be improved, the existing regulatory takings doctrine is more coherent, predictable, and just that most believe it to be. In any event, no “set formula” proposed by some scholar is going to magically convert hard cases into easy ones.

I have found myself ambivalent about the “established property rights” doctrine. My first reaction was to share the apprehensions of liberals who fear the negative consequences of freezing property law at whatever point in time the Justices think is appropriate for looking to state law definitions of property. Justice Scalia, for example, sometimes seems to suggest that the *laissez faire* era of the 1890s represents the place to look to find “our historical compact” regarding the meaning of “private property.”<sup>35</sup> That reference point is unfortunate because any other time in our history, such as the time of the Founding in 1789, the adoption of the fourteenth amendment in 1868, or the civil rights and environmental law revolution of the 1960s, would present a picture of property law subject to massive state intervention to modernize and improve it, as well as substantial change in the common law of property. If conservatives get to define what “established property rights” are, we are likely to enact a *laissez faire* version of property rights, and that might scuttle many regulatory laws that serve important public purposes.

At the same time, after the calm reflection that is a luxury of the life of a scholar, it has become clear to me that the majority of Justices do not in fact mean to freeze property law in a dysfunctional state. Nor do they want to dismantle all our regulatory laws or make themselves the zoning appeals board of the United States. They do not want to kill all regulatory laws. I am confident they do not want to do these things because *one of the main functions of regulatory law is to protect property rights*. When the property rights of some impinge on the property rights of others, the law settles the matter by choosing which property rights prevail and which must give way, and our views about the right way to do this have changed over time. “Regulation” is just another word for “the rule of law,” and adjudicating conflicts *among* property rights and *between* property and personal rights is one of the main functions of government.

The Justices are not experts in private property law and they do not always recognize or appreciate the extent to which its complexities demand a nuanced legal infrastructure. Nor do they sufficiently appreciate how changes in regulatory laws lead to changes in our conception of what rights

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35. See *Lucas*, 505 U.S. at 1027-28.

owners legitimately have. (Consider the effect that housing codes had on the implied warranty of habitability.) But if we look at what they do rather than what they say, it becomes clear that when the Justices talk about protecting “established rights of private property,” they mean to protect property rights *that deserve protection*. Viewing the doctrine that way makes protecting “established rights of private property” a truism rather than a battle cry. It also appropriately focuses our attention on the real issue. What property rights *deserve* constitutional protection *in which contexts*?

Regulatory takings law is confusing, but I think it need not be so. I hope to explicate it in a way that shows it in its best light rather than its worst. I will begin in Part I by considering what is at stake in debates about regulatory takings. Is the problem really that the law is incoherent and unpredictable or is it that the law fails to protect property rights adequately or protects them too much? What is the relation between form and substance in critiques of takings law?

In Part II, I will explain what is problematic about the idea of protecting “established rights of private property” and then consider what is attractive about it.

Part III will explore regulatory takings doctrine in detail. My goal is to reconstruct it in a way that restates existing law in its best light. I will use the three factors in the *Penn Central Transportation Co. v. New York City*<sup>36</sup> test to explain what current law appears to be, drawing generously on the case law developed by the Supreme Court over the course of the twentieth century, with a few nineteenth century and twenty-first century cases added in. The Supreme Court often overgeneralizes when it identifies regulations that constitute takings of property; the Justices would do better if they used the word “presumptively” more often. I will refine the doctrine to more accurately describe the results we see in the precedents.

Part IV provides an account of the norms underlying regulatory takings doctrine. I will emphasize the ways in which both conservative and liberal values help us frame regulatory takings questions. Together they lead us to the conclusion that regulatory takings law concerns the rights of individuals in a free and democratic society. Property rights are important, but they are not sacrosanct; like all other rights, they have inherent limitations. Property rights—even if they are “established”—can be limited by law with adequate justification. The *principle of adequate justification* is the best way to understand both existing regulatory takings law and its normative force. To determine what justifications are adequate in which contexts, we should

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36. 438 U.S. 104, 124 (1978).

focus on the core values property institutions promote in a free and democratic society that treats each person with equal concern and respect.

Far from incoherent, the current doctrine teaches us that we should determine what “established property rights” are immune from change without compensation by reference to “fairness and justice.” Does the law in question “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole[?]”<sup>37</sup> Answering that question requires us to understand the role that property rights play in a democracy. Conversely, *it requires us to understand the role that democracy plays in shaping property rights.*

We can learn a lot about this by remembering the contours and functions of freehold estates; they protect individual liberty, and, properly structured, ensure that the rights of each are compatible with the rights of all. Property entitlements are also subject to legitimate regulation by laws promulgated by the people and for the people in a government of the people. Property rights can be limited, modernized, and even abolished with sufficient reason. The obverse is also true: established property rights cannot be constitutionally infringed if there is no adequate justification for doing so. In certain circumstances, regulations cannot be justified in the absence of just compensation to owners adversely affected by those laws. The question of justification is at the heart of the regulatory takings doctrine and I hope to explain why that is so.

#### I. FORM AND SUBSTANCE IN REGULATORY TAKINGS LAW

Some of the discomfort with the current regulatory takings doctrine is based not on its form, but on its content. Conservatives may decry the unpredictability of the law, but at the same time, they often lament the fact that the takings doctrine fails to give adequate protection to property owners. *Well, one of those observations has to be wrong.* If the doctrine predictably fails to protect property rights, then it is not unpredictable at all; it is simply pro-“regulation.” If the doctrine is so complicated that it is unpredictable, then it cannot be that it consistently under-protects property rights. Of course, the law might *both* predictably fail to protect property owners *and* be unclear around the edges or in hard cases. This, however, would not be a major failing; nor would it drive anyone crazy the way regulatory takings law seems to do. After all, most rules of law are unclear around the edges, and hard cases are, well, hard.

One cannot help thinking that the real worry for conservatives is not the *unpredictability* of regulatory takings law or its *incoherence*, but the belief

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37. *Armstrong*, 364 U.S. at 49.

that it does not *go far enough* in protecting property rights.<sup>38</sup> Arguing that the doctrine is incoherent places attention on generating consistent rules to govern the field. Since the field we are talking about is protection for property rights, a coherent doctrine may be thought to better protect those rights from infringement by regulation.

Support for the view that property rights, rather than coherence, are the core of the conservative complaint comes from the recent decision in *Koontz v. St. Johns River Water Management District*.<sup>39</sup> In that case, a majority of Justices—including all the most conservative ones—adopted a vague standard designed to increase protection for property owners who are asked to comply with permitting conditions in order to develop their land.<sup>40</sup> In that five-four decision, it was the conservative majority on the Court that embraced a vague and value-laden standard.<sup>41</sup> After *Koontz*, permit conditions are not constitutional unless they are designed to offset harms the property development could impose and are reasonably proportional to those harms.<sup>42</sup> The Justices who adopted this vague standard did so to provide property owners with new ways to argue that regulations take their property rights.<sup>43</sup> They did so because they believed that conditions demanded by environmental and zoning officials are sometimes arbitrary and unfair and they wanted to arm property owners with constitutional arguments they can make when they refuse to comply with arguably unreasonable demands by government officials.<sup>44</sup>

The conservative Justices accomplished this goal of better protecting property rights, *not by adopting a clear rule*, but by an expanded application of the unconstitutional conditions doctrine—a doctrine that, if anything, is generally thought to be more incoherent and more incomprehensible than the regulatory takings doctrine itself. At the same time, we cannot fault the Justices for not having invented a clear rule to govern such cases. It would not have been possible to address the concerns central to the *Koontz* case without using a value-laden standard. This example may show that conservatives care more about protecting property rights than they do about erecting a clear and coherent regulatory takings doctrine. It may also teach us that, contrary to what some conservatives believe, property rights are *not*

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38. Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 *TOURO L. REV.* 265, 266 (2014) (“[A]ny system of constitutional law that paid full respect to . . . common law [property] rights would offer far greater protection to property than the current ‘ad hoc’ set of rules championed by a Supreme Court[.]”).

39. 133 S. Ct. 2586 (2013).

40. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013).

41. *See id.*

42. *Id.*

43. *Id.*

44. *See id.* at 2602-03.

always best protected by strict and rigid rules of law; rather, they are sometimes best protected by the very standards conservatives decry as incoherent and subjective. At the very least, the *Koontz* case should lead us to consider that seemingly counterintuitive proposition.<sup>45</sup>

Liberals, on the other hand, are alarmed by a doctrine that would protect “established property rights” not because it would be unpredictable, but because they fear that “established property rights” will be defined both broadly and absolutely. If property rights can never be redefined, limited, or modernized, and if individual sticks in the bundle are also immune from regulation, then lawmakers would be powerless to regulate land owners. Owners would be immune from democratic law making. They would be like lords of their own manors beyond the reach of King and Parliament alike. They would, to some extent, have seceded from the body politic—a law unto themselves.

Absolute protection for any established property right might prevent using the democratic process to pass laws designed to promote the public welfare and protect us from harm. Nor could judges modernize the common law of property in light of changing values and norms. We would still be stuck, for example, with property rights that require or allow restaurants to exclude customers because of their race. We would be powerless to enforce environmental laws that cleaned up our air and our water. We would have no ability to regulate foreclosures of subprime mortgages by inducing the parties to negotiate with each other before foreclosure. We would still allow landlords to use self-help to evict tenants by changing the locks on the door without notice. We would still allow landlords to violate housing codes with impunity and collect the full rent. We would still allow husbands to control their wives’ property.

Liberals favor regulation of property not because they are enemies of property owners and not because they do not care about property rights. Indeed, contrary to what many people believe, liberals are strong advocates for property rights; they simply understand those rights differently than conservatives do. Like conservatives, liberals do not support regulations that are arbitrary or onerous. They favor laws that ensure that property rights are exercised in ways that avoid harm to the property or personal rights of others. Zoning laws limit what owners can do with their property, but they do so to protect the rights of owners to have their property situated within a certain context or neighborhood environment. Regulations like that *protect* property rights rather than infringe on them. It is true they do this by limiting what you can do on your own land, but they do that because

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45. For a defense of the crucial role of standards in property law, see Singer, *Rule of Reason*, *supra* note 14.

limitations are the way we ensure that property can be secure from incompatible uses next door and can exist in a neighborhood environment that owners want. The same is true for reasonable real covenants and the reasonable rules promulgated by homeowners' associations. It is true that liberals and conservatives fight like mad over particular regulations, but in the end, we would all be better off if they each recognized the values they share. Conservatives want more regulations than they are willing to admit and liberals like property rights more than they are willing to let on.

Liberals also want a legal infrastructure for economic life that ensures that everyone can become an owner.<sup>46</sup> Conservatives may not realize this, but they actually agree with liberals on this point; after all, conservatives are not advocates for feudalism or slavery, but for equal opportunity. A system of private property in a free and democratic society rests on legal, political, economic, and social structures that enable property ownership to be widely distributed. While liberals and conservatives may not agree on how much inequality is a problem or how much opportunity counts as "equal," they do agree that *at some point* inequality would move us from being a democracy to being an oligarchy. If we focus on the current politics of inequality, it may appear that conservatives do not care about equality of income and wealth. That, in my view, is a serious error. Conservatives *do* care about inequality. They just view current patterns of inequality differently than liberals do. Similarly, while liberals are more likely to voice support for consumer protection laws than conservatives, it is also true that many such laws protect consumers from fraud and deception. Those are actually conservative values. Freedom of contract depends on honesty rather than fraud; conservatives and liberals agree on this point, and that is why some conservatives supported regulations designed to ensure better disclosure in mortgage transactions.

It is probably true that conservatives who want increased protection for property tend to favor clear rules to attain that end while liberals who favor greater regulation of property tend to promote flexible standards to define property rights, all the better to allow their limitation.<sup>47</sup> But this connection between property and rules, on the one hand, and regulation and standards, on the other, is a tendency only. Remember the *Koontz* decision; greater protection for property rights came there from a standard, not a rule. And it was Justice O'Connor that convinced the majority of the Supreme Court to eschew rigid tests in favor of the *ad hoc* balancing test defined in *Penn*

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46. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 160-71 (2000) (Property is about getting and not just keeping).

47. Duncan Kennedy long ago pointed out the tendency of individualists to favor rules and altruists to favor standards. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1776 (1976).

*Central*.<sup>48</sup> Rigid rules are *not* always the best way to protect property rights or to promote conservative values. Conversely, it was Justice Thurgood Marshall who wrote the decision in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>49</sup> that promulgated a clear rule against forced permanent physical invasion by a stranger.<sup>50</sup> Liberals sometimes favor clear rules to ensure protection for the values and interests they view as fundamental.

Those who seek to limit regulation of property owners often seek clear rules in the hopes that this will define protected zones immune from retroactive change without compensation. Although they are correct to value zones of safety for individuals, they are wrong to believe that human life and human values can be reduced to rigid categories. Life is more complicated than that, and like it or not, property is a part of human life. Those who favor flexible standards in constitutional law are right to question the longing for certainty voiced by conservatives and liberals alike. Even if we tried to reduce takings law to a few clear rules (like protection for “established property rights”), we would soon find ourselves using general principles and flexible standards to *interpret what those rights are*.<sup>51</sup> The clarity we would attain would be fleeting. As soon as we faced a hard case, the “set formula” we so carefully crafted would turn into smoke.

Rules advocates are romantics rather than realists. They imagine that we have the capacity to define property rights clearly and then proceed to protect them from uncompensated change. They imagine that at some point we will know enough about property rights to know what they are; we will no longer need to think hard about them or make value judgments to determine their scope and meaning. But experience powerfully and convincingly demonstrates that private property systems are too complicated to be reduced to a system of rigid rules.<sup>52</sup> *Rules do not determine their own scope*, and property rules are not special in this regard. Even if the Supreme Court embarked on its mission of protecting any “established right of private property” from change, it would still confront the problem of defining those rights. The case law is complicated in the regulatory takings area, not because the Supreme Court has lost its collective mind, but because both the world and our moral intuitions are

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48. *Palazzolo v. R.I.*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (“The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.”). O'Connor's reasoning in her *Palazzolo* concurrence garnered a majority in the subsequent case of *Tahoe-Sierra Preservation Council*.

49. 458 U.S. 419 (1982).

50. *Loretto*, 458 U.S. at 421.

51. Singer, *Rule of Reason*, *supra* note 14, at 1405.

52. *See id.*; Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

nuanced, ambivalent, contextual, and complex. So is the common law of private property.

Consider, for example, that the Supreme Court keeps saying over and over again that a permanent physical invasion by a stranger is a categorical taking.<sup>53</sup> Yet the Fair Housing Act prohibits racial discrimination in the housing market.<sup>54</sup> If an owner refuses to sell a house to a potential buyer because of the buyer's race, what would happen? The courts could order the seller to go through with the sale. The statute provides for injunctive relief to achieve its ends.<sup>55</sup> If such a transaction were ordered by the courts, that would effectuate a permanent, forced physical invasion of property by a stranger. But no court has even entertained the argument that that would be an unconstitutional taking. The argument that the 1964 public accommodations law was a taking because it forced hotels to allow customers inside that the hotel owner wanted to exclude was derisively dismissed by the Supreme Court without analysis in a single sentence in *Heart of Atlanta Motel, Inc. v. United States*.<sup>56</sup>

While property law cannot be reduced to a set of simple rules, property rights advocates are absolutely right to be on the lookout for regulations whose impact on particular owners cannot be adequately justified unless they are compensated for suffering those burdens. Liberals who are worried about the "established property rights" formula would do well to consider what is normatively attractive about this formula. If we interpret "established property rights" charitably, rather than fearfully, we will see that this doctrine necessarily assumes that property rights have inherent limitations, as Justice Scalia recognized in *Lucas v. South Carolina Coastal Council*.<sup>57</sup> Established property rights can be limited or even abolished by law without compensation as long as a legitimate justification exists for imposing this type of uncompensated burden on owners.<sup>58</sup>

After all, it is not the intent of the Supreme Court to displace Congress, the President, and state legislatures, preventing any new legislation or

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53. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Loretto*, 458 U.S. 419.

54. See Fair Housing Act, 42 U.S.C. § 3604.

55. Recent controversy about application of state public accommodation statutes to photographers and florists who did not want to provide services at same-sex weddings suggests that new analysis of this issue may well be needed. Liz Fields, *Judge Orders Colorado Bakery to Cater for Same-Sex Weddings*, ABC NEWS (Dec. 7, 2013), <http://abcnews.go.com/US/judge-orders-colorado-bakery-cater-sex-weddings/story?id=21136505>; Adam Liptak, *Weighing Free Speech in Refusal to Photograph Lesbian Couple's Ceremony*, N.Y. TIMES (Nov. 18, 2013), [http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html?\\_r=0](http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html?_r=0).

56. 379 U.S. 241, 261 (1964).

57. 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

58. *Id.*

common law development of any kind. That may be something liberals fear when they read phrases like “established property rights,” but it cannot be what conservatives mean. At the same time, it must be said that the Justices who embraced the “established property rights” formula in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protocol*<sup>59</sup> overstated their case by failing to acknowledge forthrightly that *even “established” property rights can be limited or abolished without compensation if there is adequate reason to do so*. Property rights can be curtailed or even abolished without compensation if necessary to promote legitimate government interests or public policies.<sup>60</sup> Recall the Fair Housing Act, the abolition of the fee tail, and the abolition of the power of husbands to control their wives’ property. Consider zoning law and building and fire codes. Such regulations are indeed part and parcel of the obligations of citizenship in a free and democratic society, and no one on the Supreme Court is really in the business of trying to sweep them all away.

I want to argue that the debate between liberals and conservatives and between rules advocates and standards advocates has been overstated on all sides. Rules cannot be applied without interpretation and standards cannot be administered without the aid of exemplary case law. Hence the utility of a restatement that includes both. Property rights are neither meaningless nor absolute. It is possible to generalize about the cases likely to constitute regulatory takings without reducing those cases to rigid per se rules or absolute categories. How can we do this?

The key to understanding regulatory takings law has already been given to us by the Supreme Court. The law does protect *certain* “established property rights” from change without compensation, *but it defines those rights by reference to principles of “fairness and justice.”*<sup>61</sup> The Court has repeatedly said that the Takings Clause serves “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>62</sup> A regulation of property will therefore be deemed a taking if “fairness and justice” require a court to conclude that “the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.”<sup>63</sup> Regulations are not takings if they are “properly treated as part of the burden of common citizenship” in a free and democratic society.<sup>64</sup>

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59. 560 U.S. 702 (2010).

60. *See Lucas*, 505 U.S. at 1027.

61. *See Penn Cent.*, 438 U.S. at 124.

62. *Armstrong*, 364 U.S. at 49.

63. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

64. *Kimball Laundry Co. v. U.S.*, 338 U.S. 1 (1949).

There is a common view that fairness and justice are subjective concepts about which we can expect little or no agreement. That view also appears to assume that “established property rights” are objective and easily determined by reference to rules of law and objective assessment of prior case law. Both of these assumptions are wrong, or at least overstated. Property law is less rigid and clear than many think,<sup>65</sup> and fairness and justice are more objective and constraining than many think.<sup>66</sup> The way to determine what “established property rights” are is to ask which rights should, in all fairness and justice, be immune from revision by democratic lawmaking processes without compensation. That in turn can best be understood as a claim that property rights can be regulated or limited or even destroyed without compensation *if there is adequate justification for doing so*. Democratic law making is usually an adequate justification for requiring owners to obey the law without compensation. Democracy is not anarchy, and property cannot exist without the rule of law, and the rule of law cannot exist without government by the people. Owners, no less than non-owners, benefit from democratically-enacted regulatory laws that set minimum standards for economic and social relationships and define the contexts within which we exercise our freedoms and our property rights alike. Property is not just an individual right but a social system whose contours are structured by legislation and adjudication. If we take the best ideas of those who favor rigid rules and the best ideas of those who favor flexible standards, and if we listen to the legitimate values promoted by liberals and conservatives alike, we will discover a hidden normative logic to the regulatory takings doctrine and perhaps a path to greater agreement and understanding.

## II. ESTABLISHED PROPERTY RIGHTS: FOR AND AGAINST

### *A. Why Law Can Legitimately Limit Established Property Rights*

Be careful what you wish for because you might get it. The idea of protecting “established rights of private property” sounds good if you say it fast. The United States Constitution protects “property” from being “taken” without just compensation and it would be a sorry thing if one could achieve the same result by misdirection and subterfuge. But if we really took this idea to its limits, it would have consequences that no one—liberal or conservative—would like.

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65. See Singer, *Rule of Reason*, *supra* note 14, at 1404.

66. See Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009) (explaining the necessity for and the structure of arguments about fairness and justice).

Liberals get nervous about an “established property rights” doctrine because it seems to deny legislatures the power to regulate property at all. Nor does it empower judges to alter common law rules in ways that modernize property law in light of contemporary conditions and values. Surprisingly, perhaps, conservatives should share these liberal fears. Some of those seemingly “liberal” regulations not only promote conservative values, but also *protect property rights themselves*. Mortgage laws, for example, protect owners from unjust dislocation by banks; they do so to protect the legitimate rights of owners. A doctrine that prevents both courts and legislatures from “declar[ing] that what was once an established right of private property no longer exists”<sup>67</sup> would not only decimate regulatory laws that are highly popular, but would also contravene core conservative values, including the value of protecting property rights.

Why should conservatives, as much as liberals, be nervous about a rule that prohibits *any* infringement on an established private property right? The reasons include: (1) the existence of *inherent limitations* on property rights to protect the property and personal rights of others; (2) the *ambiguities* involved in determining when a property right is “established,” and (3) the ways in which absolute protection for property rights would compromise our *democratic system of government*.

***Inherent limitations.*** First, if we are going to protect all “established property rights,” we face the embarrassing predicament of defining what they are. But that is much, much harder than it seems. The simplest way to understand why is to recall that rules do not determine their own scope. This is an insight that all lawyers know. It is the stuff of the first class of law school. A city ordinance prohibits all “vehicles in the park.” If vehicles are prohibited in parks, does that include baby carriages? Wheelchairs? Bicycles? Food carts? Owners are allowed to exclude non-owners from their property; does that mean an owner of a public accommodation like a hotel can exclude customers because of their race? The statute of frauds requires all property transactions to be in writing; does that mean a bank that can prove by clear and convincing oral evidence that it is the intended assignee of a mortgage cannot foreclose because the original note was lost in a fire and one of the mortgage assignments had a typo in it? Owners are allowed to use their property as they see fit; does that mean that setback and height requirements in a local zoning law are unconstitutional? Owners are protected from loss of ownership against their will; does that mean that a man who murders his wife has a vested right to the right of survivorship in their joint tenancy property?

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67. *Stop the Beach Renourishment*, 560 U.S. at 715.

The day after he won the Republican primary for the Senate race in Kentucky, Rand Paul went on the Rachel Maddow Show. Among other things, he suggested that the public accommodation laws that prohibit racial discrimination in restaurants interfere with the rights of owners.<sup>68</sup> If we look to the law that existed in 1964 before the federal public accommodations law went into effect, he is absolutely right. Restaurant owners in southern states had the right to exclude customers based on race; indeed, they were often required to do so. Senator Paul did not go so far as to argue that the public accommodations statute was unconstitutional, but if the Constitution protects any “established right of private property,” then a law limiting your right to exclude strangers from your property would seem to take away an important and *very established* property right. The same can be said about the Fair Housing Act and the Americans with Disabilities Act. If a homeowner covered by the Fair Housing Act refuses to sell you a house solely because of your race, the statute empowers a judge to issue an injunction ordering him to sell it to you. This limits your freedom to choose to whom to sell your property; is that a taking of an “established property right?” Does the obligation to install a ramp if it can be done at a reasonable cost take an established property right away from a retail store? Before the Americans with Disabilities Act, owners had no such obligation; must owners be compensated when they are required to spend money to ensure that people can enter their stores in a wheelchair?

Consider building codes that require owners who engage in excavation on their property for construction purposes to ensure that their construction does not harm any neighboring structures.<sup>69</sup> The common law gave owners the power to excavate without regard to harm to neighboring structures as long as they supported the land in its natural condition and did not use negligent construction methods.<sup>70</sup> Those building codes take away an established right of private property. Of course, they do it to protect the property rights of others. Is that a deprivation of a property right or a regulation designed to protect property rights?

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68. *Rachel Maddow to Rand Paul: Yes, You Did Question the Civil Rights Act*, TPM LIVEWIRE (Apr. 11, 2013), <http://talkingpointsmemo.com/livewire/rachel-maddow-to-rand-paul-yes-you-did-question-the-civil-rights-act>; Jed Lewison, *Rand Paul says he's 'never wavered' in his support for Civil Rights Act, but . . .*, DAILY KOS (Apr. 10, 2013), <http://www.dailykos.com/story/2013/04/10/1200663/-Rand-Paul-says-he-s-never-wavered-in-his-support-for-Civil-Rights-Act-but> (Rand Paul said, “I think it’s a bad business decision to exclude anybody from your restaurant—but, at the same time, I do believe in private ownership”).

69. JOSEPH WILLIAM SINGER, PROPERTY §3.5.1, at 137 (4th ed. 2014).

70. *Id.* at 135-36; *Noone v. Price*, 298 S.E.2d 218, 219 (W. Va. 1982).

Many states have recently passed laws prohibiting private transfer fees.<sup>71</sup> Those are covenants that require owners to give a percentage of the purchase price to the original developer whenever the property is sold.<sup>72</sup> Such laws take away the rights of the developer to create and enforce transfer fee covenants, but protect the rights of current owners to be free from obligations to the original developer. Indeed, such laws were held to be illegal vestiges of feudalism by the New York courts in the nineteenth century.<sup>73</sup> Did the New York laws prohibiting feudal dues represent an unconstitutional declaration that an established right of property no longer exists? Did the laws prohibiting the fee tail take established rights of private property? Did the laws granting married women control over their own property divest their husbands of their prior rights to control it?

What about the statute passed by Congress that protects the rights of condominium owners to fly the American flag from their homes despite a covenant or homeowners association rule to the contrary?<sup>74</sup> That took away an established right of private property. But it also protected the rights of owners to fly the flag. Is compensation due to the neighbors who lost when such rules could no longer be enforced?

Before the 1960s, a landlord could use self-help to eject a tenant who was behind on her rent. Since then, the states have insisted on judicial process to dispossess a tenant from her home.<sup>75</sup> Those laws limited the owner's right to exclude by taking away the self-help remedy. Are they unconstitutional? What about the implied warranty of habitability that enabled tenants to continue living in the apartment even if they were not paying rent because the landlord violated the housing code by failing to provide heat in the winter? What about the housing code itself that required the landlord to provide working locks, unbroken windows, freedom from pests and working appliances? Are all these laws unconstitutional because no compensation was provided?

Some of the changes I have mentioned were accomplished by statute, and some by common law. In each case, lawmakers limited property rights that arguably were recognized under prior law in order to protect the public or the rights of neighbors or non-owners affected by the use of the property itself. In each case, it was necessary to determine the *scope* of the property right at issue, often defining the entitlement so that it would be compatible

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71. SINGER, PROPERTY, *supra* note 69, §6.7.2, at 284; *see, e.g.*, N.J. STAT. ANN. §§ 46:3-28 to 33 (2010).

72. *See, e.g.*, N.J. STAT. ANN. § 46:3-29.

73. *De Peyster v. Michael*, 6 N.Y. 467 (1852).

74. The Freedom to Display the American Flag Act of 2005, 4 U.S.C. § 5 Note, Sec. 3 (Pub. L. No. 109-243, 120 Stat. 572 (2006)).

75. SINGER, PROPERTY, *supra* note 69, §10.4.4.3, at 462-63.

with the rights of others. Often the law changed, depriving owners of rights they previously possessed partly because views changed about the legitimate scope of ownership rights and partly because views changed about the kinds of harms that should be recognized and regulated by society.

The upshot of all this is that a rule promoting protection for “established rights of private property” is far less predictable than one would think. It requires *interpretation* of prior case law to determine the scope of the right in question, especially in light of new facts, values, and social conditions. The fact that we have a rule does not mean it applies to a new factual situation. And rules promulgated against the background of certain social norms and expectations are changed when they come to violate evolving norms, values, expectations, and practices. Lawyers know how to distinguish cases. That is part of what we mean by the rule of law. Did we think that this does not happen in property law? Do we think it should not happen? Does that mean the Dodd-Frank law that just resulted in new regulation of subprime mortgages represents a taking of the property rights of banks? Do we think the current law of property is perfect and that no improvements, changes, or refinements should be made?

***What property rights are “established?”*** The second reason it is problematic to protect any established right of private property is the difficulty in determining when a property right is “established.” That issue has wrapped the Supreme Court up in knots. Justice Scalia would like to believe that rights can be clearly defined and that no subsequent legislation can alter those rights in any way.<sup>76</sup> Justices O’Connor and Kennedy, however, argued that it is relevant that someone invested in creating a use of property that was illegal at the time of the investment.<sup>77</sup> Assume you buy beachfront property in 2015 believing you will be able to build on it as you like. Is it really reasonable for you to ignore the fact that we have had federal and state statutory regulation of beachfront construction since the mid-twentieth century? Are property owners really entitled to put their heads in the sand, ostrich-like, and feign ignorance of laws designed to treat beachfront property differently from inland property? How long do such statutes have to be in effect for them to impinge on our expectations? If time places no limits on our expectations, does that mean the Oneida Indian Nation can eject all the non-Indians in Oneida County, New York since the State of New York illegally took title to Oneida land in the 1790s?<sup>78</sup>

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76. See *Palazzolo*, 533 U.S. at 636-37 (Scalia, J., concurring).

77. See *id.* at 626; *id.* at 633-34 (O’Connor, J., concurring).

78. See *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000); *Cayuga Indian Nation of N.Y. v. Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1999); see also JOSEPH WILLIAM SINGER,

Consider the Takings Clause itself. How does it determine when and how property rights are “established” and thus immune from change? We face a major embarrassment right from the get-go: the regulatory takings doctrine is a twentieth century invention. Both the text of the Constitution and the original intent and practice failed to impose constitutional limits on the regulation of property. Even Justice Scalia recognizes this.<sup>79</sup> If we adhere to a conservative view of the Constitution and deny that it embodies a living tradition, then *there are no constitutionally-protected property rights that are immune from regulation in the absence of compensation*. Only outright seizures of property by the government could historically claim a right to compensation.

Worse still, property owners claiming that state regulations take their property without compensation are on even shakier ground. The Fifth Amendment applies only to the federal government; *there is no takings clause in the Fourteenth Amendment at all*.<sup>80</sup> There is simply no textual basis for a takings doctrine that applies to the states. Recall that the Fourteenth Amendment was written more than fifty years after the Fifth Amendment. While it repeated the Fifth Amendment’s Due Process Clause and added an Equal Protection Clause, *it pointedly omitted a takings clause*.<sup>81</sup> The Constitution was interpreted to prohibit the states from taking property without just compensation only in the late nineteenth century through a non-textual interpretation of the Fourteenth Amendment that read a *procedural* provision (“no deprivation of property without due process of law”) to include a *substantive* limit on governmental power (“no taking of property without just compensation”).<sup>82</sup> In other words, if we want to know what “property” rights were protected against regulatory takings without compensation in 1789 under the Federal Constitution, we would have to answer: “none.” This is not an answer that conservatives expect or want. And this answer is *especially* true for *state* deprivations of property since the Fourteenth Amendment *excluded* a takings clause.

Conservatives can get around all this by eschewing their commitment to textual interpretations of the Constitution and/or “original intent” interpretations on the ground that liberals are correct that the Constitution has some substantive protections for individual rights (such as privacy) that are not explicit in the constitutional text or evident in the cases interpreting

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BETHANY BERGER, NESTOR DAVIDSON, EDUARDO PEÑALVER, PROPERTY: LAWS, POLICIES, & PRACTICES 97–99 (6th ed. 2014) (discussing the *Oneida* case).

79. *Lucas*, 505 U.S. at 1014 (“Prior to Justice Holmes’s exposition in *Pennsylvania Coal* . . . it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property, . . . or the functional equivalent of a ‘practical ouster of [the owner’s] possession’ . . .”).

80. *See* U.S. CONST. amend. XIV.

81. *See id.*

82. *Chi., B & Q. R. Co. v. City of Chi.*, 166 U.S. 226 (1897).

the Constitution at the Founding. But then conservatives face a different problem. If property rights have to be “established” to be protected from deprivation by the states, what time frame are we looking at? Is it the law in 1791 when the Fifth Amendment was adopted or the law in 1868 when the Fourteenth Amendment was adopted? Or should we look to some other time?

When conservatives imagine the origins of “established” property rights, they tend to think of the *laissez-faire* era at the end of the nineteenth century and the beginning of the twentieth century. That is because that is the era when the ideology of limited government was at its fullest. They imagine this to be the view taken by the law of property at the Founding, but this is not the case.<sup>83</sup> Alternatively, conservatives imagine some case or statute that recognizes property rights of a certain kind and then those rights become *vested* when owners act to buy them or invest in them. That suggests looking to whatever statute or case establishes rights and whatever moment constitutes a “vesting” moment for an individual owner. That method, if it worked, would allow for protection of “established rights” without tying us down to a single moment in history. It would also let us get away from relying on the non-protective and pro-regulatory law that existed throughout most of the nineteenth century.

But defining when a right is “vested” has its own serious problems of definition. The owner in *Village of Euclid v. Amber Realty Co.*<sup>84</sup> bought property for industrial purposes and a later zoning law limited the property to residential uses, reducing the market value of the land by seventy-five percent.<sup>85</sup> The Court found the *right to build a factory* to be a non-vested right; merely buying the land was insufficient to create an *established property right*.<sup>86</sup> Only if the land owner had actually built the factory would the vested rights doctrine kick in.<sup>87</sup> *But why is that?* The owner bought the land for the purpose of building a factory or selling the property for that purpose.<sup>88</sup> Why were the owner’s rights not vested? What principle distinguishes *buying* land from *building* on it?<sup>89</sup> Both buying land and

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83. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT* (1998); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

84. 272 U.S. 365 (1926).

85. *Id.* at 384 (value reduced from \$10,000 per acre to \$2,500 per acre).

86. *See id.* at 396-97.

87. *Id.*

88. *Id.* at 384.

89. The Supreme Court certainly thought the buying moment to be legally significant in the *Lucas* case. *See Lucas*, 505 U.S. at 1030-32. The Supreme Court remanded to determine if a regulation “took” all economically beneficial use of the property by denying the owner the right to build on the land. *Id.* at 1030-32. At least in those circumstances, the act of buying the property seemed sufficient to

building a structure require substantial investments; both constitute investments made in reliance on existing law. Yet the Supreme Court says one expectation is reasonable, while the other is not. Why is that? Should *Euclid* be overruled? Should all zoning laws be ruled unconstitutional, along with the Clean Air Act and the Clean Water Act? Should restaurant owners have been allowed to receive compensation when they were forced to serve African Americans against their will? Why were those rights not “vested”?

**Democracy.** The third problem with protecting “established rights of private property” is the issue of democracy. While conservatives are strong advocates for the rights of property owners, they are also generally strong advocates of deference to the legislature, otherwise known as judicial restraint. They do not, in general, favor the creation of new constitutional rights generated by the structure of the Constitution or from consideration of fundamental values. Nor do they want activist judges substituting their personal views for those of elected legislatures. One has only to look at the same-sex marriage debate for evidence of conservative arguments to let this issue be handled by the legislatures or by “the people,” rather than by the courts.<sup>90</sup> Yet in the property field, perhaps understandably, conservatives do an about-face and eloquently bemoan the possibility of oppression and overreaching by legislators, bureaucrats, and judges alike.

Similarly, while conservatives often champion the ability of states to make their own laws free from too much federal oversight, a robust regulatory takings doctrine would amount to a federal takeover of state property law, and there is no guarantee the Supreme Court would choose a conservative rather than a liberal version of property. Conservatives confront contradictions within their own philosophy about the appropriate relationship between property and democracy and between state and federal power.

Conservatives are not unique in this regard. Liberals face their own contradictions. Like conservatives, liberals waffle perpetually between the

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create a vested right when a regulation passed after purchase of the land prohibited all construction. *Id.* at 1027-30.

90. See, e.g., *Obergefell v. Hodges*, No. 14-566, 2015 U.S. LEXIS 4250, at \*52 (2015) (Roberts, C.J., dissenting) (“[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.”); *id.*, 2015 U.S. LEXIS 4250, at \*95 (Scalia, J., dissenting) (“The opinion in th[is] case[] is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create ‘liberties’ that the Constitution and its Amendments neglect to mention.”); *id.*, 2015 U.S. LEXIS 4250, at \*\*140-41 (Thomas, J., dissenting) (“I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture’s conception of constitutional interpretation.”).

notion that courts should protect fundamental rights and the notion that courts should defer to the legislature to make laws promoting the public interest.

The problem is not inconsistency, either for liberals or conservatives. Democracy simply means a combination of majority rule and limits on majority rule to protect both minorities and fundamental rights. What is problematic about protection for “established rights of private property” is the harm this could pose to the democratic idea of giving sovereign power to the people. Preventing *any* change in established property rights would decimate legislative authority. It would arrogate to the Supreme Court the power to determine economic policy, environmental policy, antidiscrimination policy, labor policy, insurance policy, and marriage policy, not to mention real estate law.

Giving existing property rights absolute protection would move us a long way toward reviving *Lochner*. It would also implement Plato’s vision of government by philosopher kings in an era when we no longer believe that all smart people will converge on exactly the same vision of what property law should be. We will have rejected Lincoln’s vision of government of the people, by the people, and for the people. Democracies pass laws to promote the public welfare and *almost all those laws change established property rights to some extent*. As Justice Holmes taught us long ago, “government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>91</sup> If you are in favor of democracy, then you cannot be in favor of absolute protection for “established rights of private property” unless you have a very nuanced interpretation of what it means for a “right” to be “established.”

#### *B. Why Established Property Rights Deserve Some Legal Protection*

Given the ambiguity in the meaning of “established property rights” and the ways protection for them could turn us away from democracy as a form of government, it may be hard to recall what was attractive about the idea that courts should become judicial activists, who invalidate regulations to protect owners from loss of their established property rights unless they are compensated for complying with the law. The naysaying in the prior section arguably ignores the reasons why the Supreme Court developed the regulatory takings doctrine in the first place. The fact of the matter is that it is sometimes unfair and unjust to change property law rules in a retroactive manner without compensation.

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91. *Pa. Coal*, 260 U.S. at 413.

In some ways it is obvious why conservatives are attracted to robust takings jurisprudence. It would arguably limit the reach of “regulation” and enhance both property rights and the conservative conception of individual freedom. But liberals have as much to gain as conservatives from protecting established property rights. Recall the basic norm of takings law. The Takings Clause acts “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>92</sup> At base, the regulatory takings doctrine prohibits placing burdens on individuals that they should not have to bear for the good of others. The Takings Clause prevents public officials from enforcing regulatory laws that infringe on established property rights when the application of those laws to owners cannot be justified by legitimate public reasons in the absence of compensation. It also protects individuals from unfair surprise, operating similarly to the *Ex Post Facto* Clause. The Takings Clause prevents oppression and that is something liberals and conservatives agree should be avoided. Liberal values, as well as conservative ones, are implicated by the regulatory takings doctrine.

Consider the vested rights doctrine that is part of the zoning law of every jurisdiction. You build a multimillion dollar office building based on existing zoning laws that allow such uses. The moment your building is completed, the city completes a longstanding rezoning project that reclassifies your property for residential uses only. Can the city require you to tear down your building? The answer, in every jurisdiction, is no. Not only would this constitute an unconstitutional taking of property without just compensation, but it would violate the zoning enabling statute of every state. Now consider a law that prohibits someone from rebuilding a house on a cliff devastated by a massive hurricane on the grounds that the land beneath the house is unstable and that it is unsafe for any structures to be located there. Is compensation required? Again the universal answer is no. Saving human life justifies regulating property construction up to and including prohibiting construction entirely in certain locations.<sup>93</sup>

These contrasting cases illustrate a doctrine of law that is comprehensible and (almost?) universally supported by liberals and conservatives alike. The cases stand for a simple proposition: *owners should not be obligated to forfeit their property rights without compensation unless there is an adequate justification for imposing that burden.* Such burdens ordinarily *can* be justified because property owners, like everyone else, have an obligation to obey duly-enacted laws. At the same time, some

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92. *Armstrong*, 364 U.S. at 49.

93. *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 210 Cal. App. 3d 1353, 1370 (2d Dist. 1989).

changes in property law should not be applied retroactively without compensation. We do not, for example, require owners to tear down completed buildings without compensation unless the reasons for demanding this are very powerful—such as saving human lives.

One need not insist on constitutional protection for property rights to agree with the idea that sometimes they are inextricably linked to other human rights, such as the right to life or liberty or freedom of speech or religion, that do deserve constitutional protection. Property rights promote human values that warrant legal definition and protection. Property enables one to have a family life, to have a place to celebrate with friends, to play sports, to sit outside, to eat dinner, to practice one's religion, to watch a movie; *property lets us plan*. That is why a country like Canada that does not recognize property rights as fundamental in its Constitution nonetheless has common law and statutes that define rights that are protected from retroactive interference without compensation. And it explains why both common law and statutory law often provide far *more* protection for property rights than the Constitution requires.

The liberal fears that an established property rights doctrine would prevent legitimate regulation is a real one, but liberals should recognize that conservatives are correct to notice that there are certain rights in certain cases that liberals and conservatives alike would want to preserve from retroactive change, at least in the absence of compensation. Liberals oppose *ex post facto* laws as strongly as do conservatives. In the civil law area, we sometimes do allow retroactive changes in legal regulations to apply to existing owners, mainly to prevent them from harming others or undermining the infrastructure of our social and economic system. The formula of "protecting established property rights" may simply be shorthand for the idea that we sometimes want such rights to be protected from retroactive change without compensation unless we have adequate reasons to the contrary.

Consider homeowners associations. In recent years, many such associations have created retroactive restraints on leasing. Courts normally uphold these covenant amendments on the ground that owners agreed to be bound by decisions of the majority of owners in the association as to the various rights attached to their units. At the same time, retroactive restraints on alienation of fee simple interests in property are highly problematic. They were traditionally void *ab initio*. Only recently have we come to recognize their legitimacy in certain cases. Granting homeowners associations unfettered freedom to change the rights of owners to lease their property may protect certain interests of the majority of owners, but it subjects the minority to the whims of their neighbors and cuts deeply into the traditional property right of the power to alienate the property. The

Takings Clause is ordinarily not relevant here since any changes in covenants are made by private actors rather than by the state. Nonetheless, the potential for unfair surprise in these cases led the Florida legislature to overturn a court ruling allowing retroactive restraints on leasing of condominium units.<sup>94</sup> And the *Restatement (Third) of Property (Servitudes)* counsels against allowing majorities in homeowners associations to alter basic property rights of owners without unanimous consent.<sup>95</sup> On the other hand, the majority of courts have approved retroactive leasing restrictions imposed by homeowners associations on individual owners against their will.<sup>96</sup>

The real issue here is not whether to protect established property rights, but whether we fully recognize the difficult, value-laden processes needed to define what those rights are and the circumstances under which adequate reasons are present to allow those rights to be limited or regulated in the absence of compensation. We need a paradigm that allows us to recognize when the property rights of some are being limited in order to protect the property rights of others, as well as their fundamental freedoms. We need a way of thinking about regulatory takings that takes into account the values of democracy and the rule of law. We need a model of regulatory takings that recognizes *both* the security rights of owners and the laws needed to ensure that the *environment* within which property rights are exercised remains viable, safe, and fair.

That seems a tall order. I will argue, however, that, for the most part, we already have such a doctrine. It can be clarified and better explained, to be sure, but current law is not far from what it should be.<sup>97</sup> Surprisingly, current law can be defended by conservatives and liberals alike. Although liberals worry that regulatory takings law protects owners too much, that turns out not to be the case. Although conservatives worry that regulatory takings law does not protect owners enough, that also turns out not to be the case, especially if one takes into account restraints on retroactive legislation built into regulatory statutes themselves, as well as conservative commitments to democracy, judicial restraint, and federalism. To see why this is so, the next section reconstructs existing regulatory takings doctrine as developed by the Supreme Court. My reconstruction highlights the core

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94. *Compare* Woodside Vill. Condo. Ass'n, Inc. v. Jhren, 806 So. 2d 452 (Fla. 2002) (retroactive restraint on leasing imposed by condominium association is valid), *with* FLA. STAT. § 718.110(13) (2013) ("An amendment prohibiting unit owners from renting their units . . . applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.").

95. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.10 (2000).

96. *See, e.g.,* Apple Valley Gardens Ass'n v. MacHutta, 763 N.W.2d 126 (Wis. 2009).

97. I make an exception for the recent decision in *Koontz*, which may undermine the ordinary functioning of the zoning system in the United States if it is not interpreted narrowly.

values of takings law and explicates prime exemplars. When we do this, we will find regulatory takings law to be more coherent, predictable, and defensible than we may have thought. It is not perfect, but it is far from the disaster that many imagine it to be.

### III. A RECONSTRUCTION OF THE REGULATORY TAKINGS DOCTRINE

#### A. Structure of the Doctrine

The regulatory takings doctrine revolves around (1) relevant *factors*, (2) formative *cases*, and (3) an ultimate *test* of “fairness and justice.” This approach is called the *Penn Central* test or the *ad hoc* test.<sup>98</sup> To determine when a regulation effects an unconstitutional taking of property without just compensation, the Supreme Court considers: (a) the “character of the government action;” (b) the protection of “reasonable, investment-backed expectations;” and (c) the “economic impact” of the regulation on the particular owner.<sup>99</sup> These factors are not elements of a claim; they represent considerations relevant to determining whether a law “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>100</sup>

The Supreme Court has repeatedly said that it “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”<sup>101</sup> Rather, the Court generally looks at the “particular circumstances” of each case, “engaging in . . . essentially *ad hoc*, factual inquiries” focusing on the relevant factors.<sup>102</sup> Determining whether a legal obligation on an owner is unfair or unjust “necessarily requires a weighing of private and public interests.”<sup>103</sup>

While the Court normally applies this *ad hoc*, multifactor test to determine when a regulation becomes a taking, it has also repeatedly flirted with the attempt to develop a number of *per se* tests to identify types of regulations that constitute categorical takings for which compensation is required regardless of how important the public interest is in the regulation.<sup>104</sup> The number of situations that represent *per se* takings has

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98. Singer, *Rule of Reason*, *supra* note 14 at 1402-03.

99. *Penn Central*, 438 U.S. at 124.

100. *Armstrong*, 364 U.S. at 49.

101. *Penn Central*, 438 U.S. at 124.

102. *Id.*

103. *Agins*, 447 U.S. at 261; *accord*, *Tahoe-Sierra Pres. Council*, 535 U.S. at 326 (“[W]e have ‘generally eschewed’ any set formula for determining [when a regulation goes] too far [and becomes a taking].”).

104. Singer, *Rule of Reason*, *supra* note 14, at 1403.

fluctuated over time. For a while, the Court appeared to be intent on identifying more *per se* takings.<sup>105</sup> However, it signaled a retreat from this effort in important cases decided in 2001 and 2002, in which it emphasized the wisdom of avoiding *per se* rules and instead required lower courts to undertake a “careful examination and weighing of all the relevant circumstances.”<sup>106</sup>

Starting in 2005, the Supreme Court ruled that there are only “two categories of regulatory action that generally will be deemed *per se* takings.”<sup>107</sup> Those include (i) government-mandated “permanent physical invasions of property,”<sup>108</sup> and (ii) regulations that “completely deprive an owner of all economically viable use of her property [unless] background principles of nuisance and property law independently restrict the owner’s intended use of the property.”<sup>109</sup> It is important to note that these cases will only “generally” be deemed *per se* takings and that they apply in “relatively narrow” circumstances.<sup>110</sup> Few regulations deprive owners of all use of their property and even permanent physical invasions may be justified without compensation if the public interest is strong enough, as it is in the case of the Fair Housing Act, for example.<sup>111</sup>

Because almost all cases will be analyzed under the *ad hoc* test, one can understand why there might be a longing for a more administrable doctrine. Stated baldly, as I have done, the doctrine tells us little or nothing. Not only is it unclear what the “character of the government action” even means, but one confronts an uncharted sea in determining what to do with the three factors. And while “fairness and justice” are admirable goals and certainly mean *something*, they represent essentially-contested concepts and certainly cannot constrain decision making by themselves without significant elaboration.

Luckily, we have a rich source that illuminates both the factors and the test of fairness and justice, i.e., *the case law*. Those who bemoan the uncertainty of the *Penn Central* test appear to ignore the ways in which the precedents give shape and substance to it and provide essential guidance. *The doctrine simply cannot be understood in isolation from its historical applications*. If we look to the cases applying the test, we find enlightenment about what the doctrine means and how it applies. We will see how it has changed over time as our conceptions of property rights have

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105. *See id.*

106. *Tahoe-Sierra Pres. Council*, 535 U.S. at 335 (quoting *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring)).

107. *Lingle*, 544 U.S. at 538.

108. *Id.*; *see Loretto*, 458 U.S. at 421.

109. *Lingle*, 544 U.S. at 538 (emphasis in original); *see Lucas*, 505 U.S. at 1015.

110. *Lingle*, 544 U.S. at 538.

111. *See Singer, Rule of Reason*, *supra* note 14 at 1404-05.

changed. We will also discover that the doctrine is far more comprehensible and predictable than it appears at first glance.

To bemoan the uncertainty of the regulatory takings doctrine without considering its application in case law is equivalent to despairing about the negligence standard that governs our conduct every day. How, one might ask, are we to figure out what it means to take “reasonable” precautions to prevent significant harm to others? The negligence/reasonableness standard seems so formless; we might be liable for anything we do! Best to stay home then and keep out of trouble. But this would be absurd. No one is deterred from engaging in daily life just because *every minute of the day* we are obligated to act “reasonably” to avoid “foreseeable harm” to others. Negligence law gets a large decree of predictability from a combination of normative framing and identification of key exemplars of “negligent” conduct. We know it is (generally) not negligent to play music on the radio when one is driving, but it is (generally) negligent to drive at one hundred miles per hour. Standards are not as unpredictable as we may think, and the regulatory takings doctrine is no different in this regard.

One thing we do discover is that the so-called categorical or *per se* takings are merely applications of the three factors. They represent, not an entirely different set of rules, but simply *extreme cases of one or more of the relevant factors*. The *Loretto* rule against forced permanent physical occupation is simply a key instance of a type of government action that is highly likely to be ruled a taking unless certain types of overriding public interests are at stake.<sup>112</sup> The *Lucas* rule against deprivation of all economically viable use is simply an extreme application of the economic impact factor.<sup>113</sup> The exception for regulations of nuisances and other inherent limitations on property rights represents an application of the “character of the government action” factor because limits on property designed to protect the property or personal rights of others or to set fair ground rules for social and economic life do not constitute deprivations of core property rights in any event.

A second thing we discover when we look at the case law is that the Supreme Court’s notion that only two types of regulations constitute *per se* takings is wrong. It has, in fact, identified several other cases that are categorical takings.<sup>114</sup> In addition to permanent physical invasions and deprivation of all economically viable use, a taking will generally be found, regardless of the importance of government interests, when owners are

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112. *Loretto*, 458 U.S. at 421.

113. *Lucas*, 505 U.S. at 1016.

114. See, e.g., *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Hodel v. Irving*, 481 U.S. 704 (1987); *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979).

deprived of certain *core property rights* or estates in land,<sup>115</sup> and when regulations retroactively deprive owners of *vested rights* created by substantial investment in reasonable reliance on a prior regulatory authorization.<sup>116</sup> And again, each of these categories represents a taking only in the absence of sufficiently strong public interests that override the claimed property rights of the owner.

A third insight from the case law is that owners are generally subject to valid regulatory laws. Because we live in a democracy and not in anarchy, we cannot claim a right to be compensated just to follow the law. Owners have property rights, but they do not have anarchy rights. *Democratic law making is presumptively valid even when property rights are at stake.* The case law demonstrates that there is a strong presumption that owners have the duty to obey the law, and that they generally do not have a legitimate claim to compensation when the law limits what they can do with their property.<sup>117</sup> Legitimate regulatory takings claims are truly exceptional.

The key to understanding the regulatory takings doctrine is to consider how the courts have interpreted and applied the basic factors in exemplary cases. When we do that we will find that the key to regulatory takings law is not, as Justice Holmes suggested, determining when a regulation “goes too far.” Rather, a regulatory taking is found only when a law has a *qualitative impact* on an owner that *cannot be justified with adequate reasons* unless compensation is paid. The question is not one of quantity (how far can a law go in limiting a property right?), nor is it simply a matter of quality (what kinds of impositions on owners constitute takings?). The central question is one of *justification*. What reasons can be given to justify imposing the burden on the owner? Should a property owner in a free and democratic society accept those as legitimate reasons for obeying that law without compensation despite their impact on the owner’s property rights? Or, on the contrary, is it fair and just to exempt the owner from application of the law unless compensated for complying with it? That is the heart of the regulatory takings doctrine.

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115. *Babbitt*, 519 U.S. 234; *Hodel*, 481 U.S. 704.

116. *Kaiser Aetna*, 444 U.S. at 179-80. I am setting aside the special considerations applicable to unconstitutional conditions doctrine, often called the *Nollan/Dolan* test. A taking may be found when required dedications of property are imposed as conditions on land use development permits when those “exactions [do not] substantially advance[] the same interests that land-use authorities asserted would allow them to deny the permit altogether.” *Lingle*, 544 U.S. at 547; see *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). The recent *Koontz* decision extended this doctrine to any permitting conditions, not just required dedications of land or access easements. See *Koontz*, 133 S. Ct. at 2603.

117. See Singer, *Rule of Reason*, *supra* note 14, at 1405.

### *B. Character of the Government Action*

At first glance, it is entirely unclear what the “character of the government action” is supposed to tell us. The answer is that the Supreme Court wants us to hold two contrasting thoughts in our heads. On one hand, we live in a democracy that empowers legislatures to pass laws to promote the public health, welfare, and safety. Ever since the New Deal, courts have deferred to legislatures when they pass socio-economic legislation on the ground that such policy should, in general, not be made by nine unelected philosopher-kings who are immune from electoral accountability. The basic principle is one of judicial restraint in the face of government by the people. Laws are presumptively constitutional, and that applies to laws that limit the powers of owners.

Conversely, it is clear that an outright “taking” of property cannot ordinarily happen without just compensation. There is a chance that, sometime in the next one hundred years, my house will be taken to widen the road in front of it since that road is a neighborhood connector between two highways and is a major traffic route from the west into downtown Boston. When the road is widened and my house and land are taken, I or my successor in interest will receive compensation. There is no dispute about this.

The regulatory takings doctrine applies when these two principles clash. The Supreme Court tells us that a taking happens when a regulatory law effects the “practical equivalent” of a seizure of the property and an ouster of the owner.<sup>118</sup> When we look at the cases that define what deprivations of property rights are “practically” the same as outright takings, it becomes clear that we cannot identify such cases without normative analysis of *what rights owners should have*. That means the real test for finding a taking is that a law affects the *moral equivalence* of an ouster from a legitimate property right. We do not think owners should be forced to donate their property even to useful public projects without compensation. At the same time, we accept the fact that owners are subject to reasonable regulations designed to promote desirable public purposes. The question for us is how to tell when regulations impose *unwarranted* obligations on an owner.

#### *1. Legitimate Regulations*

What types of laws constitute legitimate regulations of owners and thus do not constitute unconstitutional takings of property? Case law tells us that legitimate regulations are of various kinds, but they include: (a) those that

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118. *Lucas*, 505 U.S. at 1019 (noting “the practical equivalence in this setting of negative regulation and appropriation”).

promote the *general welfare*; (b) those that prevent owners from *causing harm* they are not entitled to cause; (c) those that resolve *inevitable conflicts* among property owners in a reasonable manner; (d) laws that *protect consumers* from deception or that ensure that they get what they pay for; and (e) those that constitute *inherent limitations* on the property rights that can legitimately be recognized in a free and democratic society that treats each person with equal concern and respect.<sup>119</sup> These categories overlap, but nonetheless provide a useful guide to the case law. In general, laws with these purposes are constitutional *regardless of their impact on owners*, unless they fit into a narrow set of exceptions described below.

**General welfare laws.** The Supreme Court has upheld laws that promote the general welfare.<sup>120</sup> It has sometimes explained that such laws create an “average reciprocity of advantage” because everyone benefits from laws that set appropriate ground rules for social and economic life.<sup>121</sup> Any impact on property rights is therefore compensated by the benefits of living in a society with the rule of law. This means that laws that are plausibly related to the public health, welfare, and safety will be upheld, despite any limitations they impose on the rights of owners.<sup>122</sup> In other words, the rights of owners are legitimately limited by democratic legislation and common law rulemaking designed to create a legal infrastructure for property and other economic relationships.

Regulatory laws are valid without compensation, even if only a few owners are affected, as long as those laws do not unfairly single out individual owners to bear “public” burdens that individuals should not have to bear in the absence of compensation.<sup>123</sup> Key examples of laws that promote the public welfare are zoning and environmental laws and consumer protection laws such as building codes. The Supreme Court has upheld against takings challenges laws that impose height limits<sup>124</sup> and setback requirements,<sup>125</sup> as well as zoning laws that segregate residential, commercial, farming, institutional, and industrial uses.<sup>126</sup> The Court has upheld public accommodation laws<sup>127</sup> and implicitly approved fair housing and employment discrimination laws. It has allowed minimum wage and maximum hours laws and workplace safety laws to operate without

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119. See *Lucas*, 505 U.S. at 1023-26; *Penn Central*, 438 U.S. at 124-27.

120. See *Lucas*, 505 U.S. at 1023-26; *Penn Central*, 438 U.S. at 124-27.

121. Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 23-24 (2008).

122. *Id.*

123. *Armstrong*, 364 U.S. at 49.

124. *Welch v. Swasey*, 214 U.S. 91 (1909).

125. *Gorieb v. Fox*, 274 U.S. 603 (1927).

126. *Vill. of Euclid*, 272 U.S. 365.

127. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241.

challenge. What all these laws have in common is that they limit property rights in order to achieve legitimate government purposes, such as protecting people from harm, ensuring that property rights are exercised in ways that protect the property and personal rights of others, setting rules of the road to enable the liberty of each to be compatible with the liberty of all, and creating a context for the exercise of property rights that enables them to operate in a fair and efficient manner.

John Locke taught us that there is no liberty without law.<sup>128</sup> “Government could hardly go on,” Justice Holmes noted, “if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>129</sup> The general principle is that legislatures are entitled to pass laws to regulate social, economic, and family life, and property owners are not exempt from the body politic. Ownership of land does not create autonomous zones and owners are not lords that exercise sovereignty over their domains. Property owners, like all other persons, are subject to the rule of law and to democratically enacted legislation.

**Harm prevention laws.** The Supreme Court has repeatedly approved laws that prevent owners from causing a nuisance or otherwise harming the property or personal rights of others. In such cases, the Court almost always defers to legislative judgments that such harms are cognizable and deserving of legal protection. Examples include prohibition of production of alcohol<sup>130</sup> and oleomargarine,<sup>131</sup> as well as harmful drugs such as cocaine and heroin, restrictions on sale of endangered species,<sup>132</sup> restrictions on property uses that are incompatible with neighboring residential use such as a brick factory<sup>133</sup> or a quarry.<sup>134</sup> The Court has also approved laws that require mining to be done in a manner that preserves the surface from subsidence<sup>135</sup> and that requires the destruction of trees that destroy valuable apple orchards.<sup>136</sup>

**Conflicting property rights.** Laws that adjudicate conflicts among property owners in a way that defines their relative rights constitute legitimate regulations as long as they constitute accommodations of conflicting property rights and do not unfairly surprise owners by

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128. “Where there is no Law, there is no Freedom.” JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶ 57, at 306 (Peter Laslett ed. 1988, Cambridge Univ. Press 2009 reprint.) (1690).

129. *Pa. Coal*, 260 U.S. at 413.

130. *Mugler v. Kansas*, 123 U.S. 623 (1887).

131. *Powell v. Pa.*, 127 U.S. 678 (1888).

132. *Andrus v. Allard*, 444 U.S. 51 (1979).

133. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

134. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

135. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

136. *Miller v. Schoene*, 276 U.S. 272 (1928).

retroactively shifting rights to others without adequate justification.<sup>137</sup> Thus, zoning laws that separate residential and industrial uses<sup>138</sup> and setback and height limits<sup>139</sup> ensure that property uses do not conflict with the rights of neighboring owners. Even laws that require the destruction of property may be legitimate if one species of property cannot exist if another survives.<sup>140</sup> The same principle may apply to environmental laws that require the clean-up of toxic waste sites to protect neighboring property from contamination.

Similarly, rules that regulate borders are legitimate to adjudicate conflicts that arise from gradual (accretive) and sudden (avulsive) changes in borders.<sup>141</sup> Such rules will be illegitimate only if they unfairly surprise owners.<sup>142</sup> Leasehold, mortgage, and marriage regulations shape the fair contours of important, ongoing relationships involving property rights in light of changing social values and conditions. Thus, tenants may be protected from eviction by landlords;<sup>143</sup> borrowers may be protected from foreclosure by lenders;<sup>144</sup> and the rights of husbands in marital property may be curtailed to promote gender equality. Owners of landlocked parcels may be granted a right to access their property by easements of necessity over remaining land of the grantor. In all these cases, reasonable regulations “draw a line” between competing property rights in a manner that gives each their due and shapes relationships in a manner consistent with norms of fair treatment. New obligations are justified by reference to contemporary values and norms, or because they protect reasonable expectations.

**Consumer protection laws.** Landlords can be subjected to housing codes and prevented from evicting tenants if they violate those codes. Borrowers can be protected from unfair and deceptive business practices in the sale of mortgages, and banks can be prohibited from granting subprime mortgages that borrowers cannot afford to pay back.<sup>145</sup> Businesses can be subject to “lemon laws” that require them to take back cars that require too many repairs over too short a time. Homeowners can be protected from false advertising by subdivision developers and have a right to hear about latent defects in homes that sellers know about. Homeowners are protected

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137. See, e.g., *Vill. of Euclid*, 272 U.S. 365; *Gorieb*, 274 U.S. 603; *Welch*, 214 U.S. 91.

138. *Vill. of Euclid*, 272 U.S. 365.

139. *Gorieb*, 274 U.S. 603; *Welch*, 214 U.S. 91.

140. *Miller*, 276 U.S. 272.

141. *Stop the Beach Renourishment*, 560 U.S. 702.

142. See *infra* notes 235-39 and accompanying text (discussing the vested rights doctrine).

143. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Block v. Hirsh*, 256 U.S. 135 (1921).

144. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

145. 15 U.S.C. §§ 1602, 1631 (2012).

by licensing laws that regulate building construction by limiting it to licensed, competent contractors.

Laws that protect the legitimate expectations of consumers establish minimum standards for market relationships consistent with individual dignity.<sup>146</sup> This principle applies to regulation of landlord/tenant relationships, employer/employee relationships, retail store/customer relationships, bank/borrower relationships, and seller/buyer relationships in the housing market. The Supreme Court has also approved laws that regulate ongoing contractual relationships such as leaseholds and mortgages.<sup>147</sup> Housing codes, the warranty of habitability, the prohibition on self-help evictions, and mortgage regulation and foreclosure laws all are constitutional. Even anti-eviction and rent control laws have been repeatedly upheld,<sup>148</sup> as have mortgage moratoria.<sup>149</sup>

It is crucial to recognize that even permanent physical invasions of property may be constitutional when they protect the rights of the public to obtain access to property without invidious discrimination. These public accommodation laws enable everyone to enter stores and other establishments to acquire property just as the fair housing laws ensure access to housing, without regard to race or other invidious discrimination.<sup>150</sup> Although the Supreme Court has tried to explain such laws as “temporary” rather than “permanent” invasions, this distinction is inconsistent with other cases that the Supreme Court has no intention of overruling.<sup>151</sup>

What really justifies public accommodation laws is not the fact that they authorize temporary invasions, but that they ensure that anyone can obtain property without invidious discrimination and that there is no reasonable argument that they interfere with the use or enjoyment of the property. What matters is not the type of intrusion on property but the justification for the legally authorized intrusion. Owners of private homes should not have to open their backyards to the general public,<sup>152</sup> but owners of public accommodations cannot legitimately resist obligations to serve the public without discrimination.<sup>153</sup> The type of property at issue and the social

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146. See Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 535-36 (2013).

147. *Yee*, 503 U.S. 519; *Blaisdell*, 290 U.S. 398; *Block*, 256 U.S. 135.

148. *Yee*, 503 U.S. 519; *Block*, 256 U.S. 135.

149. *Blaisdell*, 290 U.S. 398.

150. See *Heart of Atlanta Motel*, 379 U.S. 241.

151. The Court found potential takings in both *Dolan* and *Nollan* because they coerced owners into giving easements of access to the general public. *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825. Access to hotels without regard to race constitute public easements of the same kind. *Heart of Atlanta Motel*, 379 U.S. 241.

152. *Dolan*, 512 U.S. 374.

153. *Heart of Atlanta Motel*, 379 U.S. 241.

context it implicates determine whether the public justification for the physical invasion is sufficient to allow the intrusion without compensation.

***Inherent limitations.*** Some laws define the types of property rights that cannot or should not be recognized in a free and democratic society that treats each person with equal concern and respect. Some of these regulations protect equality rights, such as public accommodations laws<sup>154</sup> and the Fair Housing Act.<sup>155</sup> Others promote democratic freedoms, such as freedom of religion or freedom of movement. Why are these laws constitutional despite their impact on property owners?

Antidiscrimination laws promote equal access to economic life without regard to invidious discrimination, segregation, or exclusion. They are premised on the notion that democracies eschew social and racial caste.<sup>156</sup> Senator Rand Paul's worry that the public accommodation laws interfere with the rights of property owners was completely misplaced, at least if he wants to live in a free and democratic society rather than one characterized by a racial caste system.<sup>157</sup> The right to exclude someone from a restaurant on the basis of race is not a property right that a democracy should recognize, any more than it should recognize feudal property or slavery. While that may not have been evident in 1868, it should be "self-evident" now.

Laws that allow free speech on private property are also not takings of property, at least when the property is generally open to the public.<sup>158</sup> Similarly, rules designed to ensure the freedoms of owners and the right to travel, such as the prohibition of fee tails, do not constitute takings of property because they ensure that property is held in a freehold manner, free of onerous obligations that deprive individuals of legitimate liberties.<sup>159</sup> The same principle should apply to laws that prohibit private transfer fees or prevent owners from enforcing covenants that unreasonably restrain competition.

Laws that regulate environmentally sensitive lands also fit in this category. That includes wetlands, coastal and riparian property, and areas critical to endangered species. While owners routinely decry limitations on their freedom to develop such properties, it is no longer reasonable to pretend that we have not had more than fifty years of laws designed to protect the environment so that we and future generations can be healthy

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154. *Heart of Atlanta Motel*, 379 U.S. 241.

155. 42 U.S.C. §§ 3601-3631.

156. Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L. L. REV. 91 (2011).

157. *Id.*

158. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

159. *De Peyster*, 6 N.Y. 467.

and enjoy our property in the future. The recent poisoning of drinking water in West Virginia is a vivid reminder of what is at stake.<sup>160</sup> Science has advanced and can tell us what types of lands need to be preserved in order to ensure that we have a planet to enjoy in future generations. No one can have a vested property right to engage in activity that individually, or in concert with similar development on other lands, would undermine the existence of property and personal freedoms in the future.

Coastal properties are subject to the public trust doctrine that allows the public to have recreational access to tidelands, and riparian owners are subject to the navigational servitude.<sup>161</sup> Citizens are not immune from reasonable searches and seizures by police designed to enforce criminal laws and to protect the public from criminals.<sup>162</sup> Owners have general freedoms to use their property as they wish, but those rights do not include the right to act in a way that undermines the environment within which property attains its value or the normative context that preserves our individual rights and liberties.

All these laws are constitutional despite their significant limitations on the powers of “owners” to use their property as they see fit. They do not constitute takings because they serve legitimate public interests, they represent democratically-enacted and reasonable means to set minimum standards for economic and social life, they resolve inevitable conflicts among owners and between owners and non-owners, and they do not unfairly surprise owners. Owners who claim a right to be free from such laws unless they are compensated cannot demonstrate a sufficiently strong reason why they should be exempt from them or entitled to a reward for obeying the law. The impacts such laws have on owners have an adequate justification.

## 2. *Unfair Burdens*

Laws that promote the general welfare are ordinarily constitutional without regard to their effect on property owners. Only a few types of laws have been held to violate the Takings Clause because they impose the moral equivalent of ouster and thus cannot be enforced without compensation. There are four types of regulations that *may* be treated as the moral equivalent of exercising the eminent domain power. In such cases, the

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160. Drew Griffin, David Fitzpatrick & Patricia DiCario, *Federal grand jury investigates West Virginia chemical spill*, CNN (Feb. 4, 2014), <http://www.cnn.com/2014/02/04/justice/west-virginia-chemical-spill-grand-jury/>.

161. *Stop the Beach Renourishment*, 560 U.S. at 707 (discussing the public trust doctrine); *Kaiser Aetna*, 444 U.S. at 174-77 (discussing the navigational servitude).

162. *Sullivant v. Okla. City*, 940 P.2d 220, 222 (Okla. 1997) (no taking of property without just compensation when police damage doors in executing a valid search warrant).

regulations may be implemented only if owners receive “just compensation.” These regulations include: (a) uncompensated *destruction* or *occupation* of property without adequate reason; (b) uncompensated, unjustified permanent *physical invasions*; (c) uncompensated deprivation of certain *core property rights* without sufficient cause; and (d) laws that impose *unfair burdens* on owners that should, in fairness and justice, be shared by the public as a whole.

***Destruction or occupation without adequate reason.*** In general, the government may not occupy or destroy private property without a public justification and compensation. Property taken to build roads or public buildings must be compensated.<sup>163</sup> Private property confiscated to be used for war purposes must be compensated.<sup>164</sup> Property that is intentionally flooded must be compensated.<sup>165</sup> Property is “taken” if it is rendered unusable because of low flying planes.<sup>166</sup>

It is essential to recognize that property *can* be destroyed or occupied without compensation if the government has *adequate reason to do so*.<sup>167</sup> For example, governments impose building codes to ensure that property is safe to occupants and to neighbors. If an owner fails to fix up her own dilapidated building and it poses a danger to those within or without, the government is justified in condemning it and tearing it down. Similarly, an owner can be prohibited from building on her own land if this is necessary to protect human life.<sup>168</sup> Thus, a law can prevent construction on a floodplain<sup>169</sup> or construction of a nuclear power plant on an earthquake fault.<sup>170</sup> At the same time, the government generally cannot act to flood, occupy, or destroy property without compensation unless its actions prevent the property itself from causing harm to others.

***Unjustified physical invasions.*** The Supreme Court held in *Loretto* that any forced permanent physical invasion by a stranger constitutes a categorical taking.<sup>171</sup> In that case, a mandate that an owner suffer occupation of part of her property by cable television boxes and wires was held to constitute a categorical taking.<sup>172</sup> However, the holding in that case

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163. *De Witt Cnty. v. Greene*, 151 N.E. 372 (Ill. 1926) (state law gives the department of public works the power to take property with compensation for highway purposes); *Perry v. Keene*, 56 N.H. 514 (1876) (private property can be taken for railroad purposes with just compensation).

164. *Kimball Laundry*, 338 U.S. 1.

165. *Ark. Game & Fish Comm'n v. U.S.*, 133 S. Ct. 511 (2012); *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

166. *U.S. v. Causby*, 328 U.S. 256 (1946).

167. See *Lucas*, 505 U.S. at 1029-30; *First English Evangelical*, 210 Cal. App. 3d 1353.

168. See *Lucas*, 505 U.S. at 1029-30; *First English Evangelical*, 210 Cal. App. 3d 1353.

169. *First English Evangelical*, 210 Cal. App. 3d 1353.

170. *Lucas*, 505 U.S. at 1029-30.

171. *Loretto*, 458 U.S. 419.

172. *Id.* at 421.

was extremely limited. It did not prevent landlord-tenant law from requiring an owner to pay for the infrastructure that would allow access to cable television any more than it would prevent a regulation that requires landlords to provide heat and electricity.<sup>173</sup> And since the remedy for an unconstitutional taking is “just compensation,” all the owner can recover is the reduction in the fair market value of the property because of the intrusion.<sup>174</sup> How much do the cable wires and boxes reduce the value of the property? Paradoxically, they likely *increase* its value. That is why, on remand, Loretto obtained only nominal damages of one dollar.<sup>175</sup> *It is not even clear she was entitled to that.*

While the Supreme Court held Interest on Lawyer Trust Account (“IOLTA”) statutes to be takings of the client’s property in the interest earned on their money in lawyers’ trust accounts, it also held that no compensation was due because no interest would have been earned absent the IOLTA program.<sup>176</sup> If the cable boxes did not reduce the fair market value of the property in *Loretto*, then no compensation should be due. The Takings Clause does not prevent takings for public use; it only requires compensation when that happens.<sup>177</sup> No compensation owed, no “taking.” That suggests that, despite its iconic position in regulatory takings law, *there actually was no unconstitutional taking in Loretto.*

The other main case cited for the proposition that permanent physical invasions constitute categorical takings is *Kaiser Aetna v. United States*.<sup>178</sup> In that case the Army Corps of Engineers required a private lake accessible only by fee-paying club members to be opened to the general public when the owner invested in connecting the lake to navigable ocean waters.<sup>179</sup> The Court found a deprivation of the right to exclude because, unlike the shopping center in *PruneYard Shopping Center v. Robins*<sup>180</sup> that was required to allow leaf letters to hand out their material, the marina was not open to the general public.<sup>181</sup>

The holding of *Kaiser Aetna* is that the law cannot require free public access to a fee-paying private club without compensation.<sup>182</sup> Of course,

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173. *Id.* at 441.

174. *Id.*

175. Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 366 (2012); *Loretto v. Group W. Cable*, 135 A.D.2d 444, 448 (N.Y. App. Div. 1987).

176. *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

177. U.S. CONST. amend. V.

178. *Kaiser Aetna*, 444 U.S. 164.

179. *Id.* at 167.

180. 447 U.S. 74 (1980).

181. *Kaiser Aetna*, 444 U.S. at 164.

182. *Id.* at 180.

public accommodations laws mandate public access without regard to race and they do *not* constitute takings. Similarly, *Nollan v. California Coastal Commission*<sup>183</sup> and *Dolan v. City of Tigard*<sup>184</sup> involved potentially unconstitutional conditions because they allowed owners to obtain building permits only if they granted public easements for recreational purposes across their lands.<sup>185</sup> Because neither property was open to the general public for recreational purposes and neither was subject to a public trust recreational servitude, they were treated similarly to the *Kaiser Aetna* case and differently from *PruneYard*, where the Court had found that access to shopping centers to hand out leaflets *did not* interfere with the use or value of the property.<sup>186</sup>

***Deprivation of core property rights without sufficient cause.*** Although the Supreme Court has not identified this category as one that deserves categorical protection, it has interpreted the “character of the government action” to include situations that deprive owners of core property rights without adequate justification. Two major examples include the *Hodel v. Irving*<sup>187</sup> and *Babbitt v. Youpee*<sup>188</sup> line of cases, and the *Armstrong v. United States*<sup>189</sup> and *Webb’s Famous Pharmacies, Inc. v. Beckwith*<sup>190</sup> line of cases.

The *Hodel/Babbitt* line of cases holds that it is usually unconstitutional to destroy an estate in land or transfer it from one owner to another without compensation.<sup>191</sup> For example, it would generally constitute a taking of property to convert an inheritable fee simple into a life estate. That is essentially what happened in both *Hodel* and *Babbitt*.<sup>192</sup> Those cases involved federal statutes that attempted to remedy fractionated allotments on Indian reservations.<sup>193</sup> Such properties were expensive to administer, and the federal statutes at issue in those cases attempted to consolidate property rights upon the death of the owner of a small fractional interest in the allotment or to arrange its escheat to the tribe.<sup>194</sup> Despite the legitimate public goal of making the property administrable and profitable, the

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183. 483 U.S. 825 (1987).

184. 512 U.S. 374 (1994).

185. See *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

186. See *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374.

187. 481 U.S. 704 (1987).

188. 519 U.S. 234 (1997).

189. 364 U.S. 40 (1960).

190. 449 U.S. 155 (1980).

191. *Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

192. I say “essentially” because the property interests in those cases were *not* fee simple interests but individual trust allotments that are ordinarily subject to different property rules (such as a restraint on alienation) because they are regulated by statutes, treaties, and common law doctrines that define the unique property rights of Indian nations and tribal citizens. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 16.01-16.05, at 1067-1104 (Nell Jessup Newton et al. eds., 2012 ed.)

193. *Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

194. *Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

complete deprivation of the right to determine who owned the property on death or to pass it on to family members through intestacy laws was determined to be illegitimate without compensation.<sup>195</sup> In effect, the right to pass on property on death was identified as such a core property right associated with inheritable property rights that it could not be destroyed without compensation. The Supreme Court treated these cases as if they were land reform statutes that forced a transfer of property rights from landlords to tenants.<sup>196</sup> Such cases generally require compensation, as was given in the case of *Hawaii Housing Authority v. Midkiff*.<sup>197</sup>

It is important to understand the limits to this principle. Equitable distribution and statutory share laws have required property acquired during marriage to be shared between the spouses on divorce or death. Those laws redistribute property rights without compensation and have not been ruled takings of property. Consider a married couple that involved a husband whose name was the only one on the deed, the car, and the bank account, and the only one earning an income outside the home. In separate property states, all that property belongs to him. Until the 1960s, all his wife would get on divorce was alimony. The equitable distribution laws passed in the 1960s gave the wife the right to a fair share (generally fifty percent for a long-term marriage) of the property acquired in the husband's name during marriage.<sup>198</sup> In addition, statutory share statutes ensure that the surviving spouse inherits one-third to one-half of the property owned by the decedent at the time of death. Those laws very substantially limit the power to pass on property at death, including property held in fee simple. The right to pass on property at death can be regulated without compensation in other ways as well. Wills can be denied force if they do not have signatures by the right number of witnesses.

While the Supreme Court has held that certain core property rights cannot be changed without compensation, estates in land may be limited by regulatory laws designed to accommodate the legitimate interests of the parties to an ongoing relationship, such as spouses. Similarly, landlords may be prevented from evicting tenants because of the implied warranty of

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195. *Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

196. *See Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

197. 467 U.S. 229 (1984).

198. It was unclear why this principle did not apply to the interests at stake in *Hodel* and *Babbitt*. Those interests, after all, were *not* fee simple interests; they were Indian allotments held in trust by the government for the benefit of tribal citizens and their descendants. Such interests have been subject to management by the federal government as long as that management is rationally related to the United States obligations to Indian nations and citizens. The decisions in *Hodel* and *Babbitt* failed to take sufficient note of the federal Indian law context in which the property rights had been created and were defined under federal law.

habitability, rent control or anti-eviction laws.<sup>199</sup> Banks may be denied the power to foreclose on property if they cannot prove ownership of the mortgage.<sup>200</sup>

And what was once seen as a core property right can change. The support right that Justice Holmes thought was a valuable estate in land in the 1922 case of *Pennsylvania Coal Co. v. Mahon*<sup>201</sup> was redefined in the 1987 case of *Keystone Bituminous Coal Association v. DeBenedictis*<sup>202</sup> (and by the Pennsylvania Supreme Court in a later case in 2002<sup>203</sup>) not to constitute a distinct property right protected by the Takings Clause.<sup>204</sup> Similarly, the right to exclude based on race can be denied without compensation because of changes in norms of racial equality. The freedom to exclude someone with a disability can be taken away without compensation by equal access laws. The right to sell personal property may be limited when a substance is determined to be a dangerous drug.

The principle that protects owners from being deprived of core property rights applies only when the justification for the deprivation is insufficient to warrant a taking without compensation. In the *Babbitt* and *Hodel* cases, there was a presentable argument that the government had a really good reason for consolidating fractionated property rights and that those who otherwise would have inherited those rights did not themselves have any protected property claims.<sup>205</sup> Our system protects the right of an owner to leave property at death; unlike much of the rest of the world, we do not (except in the case of spouses) protect the right to inherit property. On the other hand, there was a meaningful argument that the fractionation problem was created by the U.S. government itself through the way it regulated Indian allotments.<sup>206</sup> That suggested that it was unclear why individual owners should bear the burden of fixing the problem rather than taxpayers as a whole. If individual owners were being asked to sacrifice core property rights (such as the right to pass on property at death) in order to solve a structural problem about the property system, they were arguably being asked to bear what should have been a public burden. After all, the structural problem was created by the government's allotment policy, not the wrongful acts of those whose rights are being limited to solve the problem.

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199. *Yee*, 503 U.S. 519; *Block*, 256 U.S. 135.

200. *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E.2d 40 (Mass. 2011).

201. 260 U.S. 393 (1922).

202. 480 U.S. 470 (1987).

203. *Machipongo Land & Coal Co., Inc. v. Pa.*, 799 A.2d 751, 768 (Pa. 2002).

204. *Keystone Bituminous*, 480 U.S. 498-99.

205. *See Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

206. *See Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

Core property rights also cannot be considered in isolation from the other property rights they normally accompany. Although air rights are valuable property interests and can be bought and sold on their own, height restrictions in zoning laws are *not* takings because courts look at the value of the “property as a whole.”<sup>207</sup> Nor are setback limitations takings, even though they prevent construction on a substantial portion of the property. As noted above, although the Supreme Court found surface support rights to be “property” that cannot be taken without compensation in 1922 in *Pennsylvania Coal*, it effectively reversed that ruling in the *Keystone* decision in 1987 on the ground that the right of support is not a separate property right for takings purposes.<sup>208</sup> A law that regulates mining owners by requiring them to provide support for the surface leaves them with economically beneficial use of the subsurface while protecting the property of surface owners.<sup>209</sup> Adverse possession law does not constitute a taking of property because owners are subject to the obligation to sue to eject an adverse possessor or to grant permission within applicable time limits.

The second line of cases supporting the idea that the state cannot take core property rights without compensation is the *Armstrong/Webb’s* line of cases. The *Armstrong* Court held that a lien is a property right within the meaning of the U.S. Constitution and retains as much constitutional protection as a lease or a mortgage.<sup>210</sup> In *Webb’s Fabulous Pharmacies* and *Brown v. Legal Foundation of Washington*,<sup>211</sup> the Supreme Court held that interest earned on an account belongs to the owner of the principal.<sup>212</sup> Those cases stand for the proposition that an “established right of private property” cannot be seized by the state unless the owner is misusing the right, it was never part of the owner’s title to begin with, or the right is inconsistent with a reasonable set of rules establishing the legal infrastructure for property.<sup>213</sup> While the state may prevent a landlord from evicting a tenant for nonpayment of rent when the landlord has failed to comply with the housing code, the state may not force the tenant to leave the apartment in the middle of the lease term unless the tenant is violating the lease or the law.<sup>214</sup>

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207. *Penn Central*, 438 U.S. at 130-31 (“[T]his Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole . . .”).

208. *Pa. Coal*, 260 U.S. at 416; *Keystone Bituminous*, 480 U.S. at 506.

209. *Keystone Bituminous*, 480 U.S. 470.

210. *Armstrong*, 364 U.S. at 49.

211. 538 U.S. 216 (2003).

212. *Webb’s Fabulous Pharmacies, Inc. v Beckwith*, 449 U.S. 155, 164-65 (1980); *Brown*, 538 U.S. at 240-41.

213. *Webb’s Fabulous Pharmacies*, 449 U.S. at 164-65; *Brown*, 538 U.S. at 240-41.

214. It is one of the anomalies of regulatory takings law that the Justices who seized on the idea of protecting “established rights of private property” failed to recognize that they themselves have created a line of cases that embodies this very principle. The only case cited for this proposition in *Stop the Beach*

**Unfair burdens.** Laws that single out particular owners may be held to constitute takings of property when they impose burdens that owners should not have to bear for the good of the community in the absence of compensation.<sup>215</sup> If an owner is not causing harm to others, then severe restrictions on her ability to enjoy her property are hard to justify in the absence of compensation even if the regulation benefits the entire community. The riparian owners in *Pumpelly v. Green Bay Co.*<sup>216</sup> and *Arkansas Game & Fish Commission v. United States*<sup>217</sup> should not have to suffer the flooding of their property without compensation, even if the ability to flood their land is crucial to river management, any more than owners should be forced to contribute their homes to the state for highway construction. The argument that the flooding is necessary does not mean it must be accomplished without compensation. Owners of property near airports should not have to suffer their property to be made unlivable (with no compensation for the loss) because of the noise of aviation.<sup>218</sup> Owners should not have to suffer the complete loss of any economically beneficial use of their property unless the regulatory law is preventing them from doing something they were never entitled to do with their property to begin with or because public interests are sufficiently powerful (such as prevention of racial discrimination or protection of human life and safety).<sup>219</sup> And owners should not suffer from retroactive deprivation of property rights when they have reasonably invested in reliance on existing regulatory law,<sup>220</sup> unless public interests in restricting those uses are sufficiently compelling.

### 3. Property Immunities

The key question for regulatory takings law is how to define property rights that should be immune from change by the state without

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*Renourishment* was the *Webb's/Brown* rule that interest follows the principal. See *Stop the Beach Renourishment*, 560 U.S. at 715 (quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 162). We might also include *Buchanan v. Warley*, the case that struck down a local zoning law that segregated owners by race, which was premised on the idea that owners had a fundamental constitutional right to determine to whom they want to sell their property. *Buchanan v. Warley*, 245 U.S. 60 (1917). As I have explained, the core property rights idea is also embodied in the *Hodel/Babbitt* rule that one cannot deprive a fee simple owner of the right to pass on property at death, see *Hodel*, 481 U.S. at 716-18; *Babbitt*, 519 U.S. at 243-45, and the *Armstrong* rule that interests less than a fee simple (such as liens, leases, mortgages, or easements) may constitute "property" for takings purposes. See *Armstrong*, 364 U.S. at 49. The Justices sometimes pay insufficient attention to their own precedents even when those precedents would help them make their case.

215. See *Pumpelly*, 80 U.S. 166; *Ark. Game & Fish*, 133 S. Ct. 511.

216. 80 U.S. 166 (1871).

217. 133 S. Ct. 511 (2012).

218. *Causby*, 328 U.S. 256.

219. *Lucas*, 505 U.S. 1003; *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

220. *Kaiser Aetna*, 444 U.S. 164.

compensation. Wesley Newcomb Hohfeld called such entitlements “immunities.”<sup>221</sup> The Supreme Court has defined those immunities partly by defining two types of categorical takings: permanent physical occupation and complete deprivation of legitimate economically beneficial use.<sup>222</sup> However, the case law reveals that the Court has *also* found takings when certain core property rights are abolished or transferred from one owner to another without adequate justification.<sup>223</sup> The Justices who want protection for “established rights of private property” are getting at this idea of rights that should be immune from revision in the absence of compensation.

It is crucial to recognize that none of the so-called categorical takings identified by the Supreme Court are as categorical as the Justices suggest they are. Courts routinely distinguish cases and all legal rules have their limits. Despite the *Hodel/Babbitt* limitation on altering inheritance rights to property, it is not a taking to disregard a will when the beneficiary murders the testator.<sup>224</sup> Despite the *Loretto* prohibition on permanent physical invasion of property, restaurants are legitimately subject to a permanent public easement of access that protects the public from exclusion for racially discriminatory reasons.<sup>225</sup> Nor does the right to exclude prevent police from entering property with a valid warrant or even, in some cases, without a warrant. Nor does it prevent housing testers from walking up your steps to see if you are choosing your tenants on the basis of race. Despite the temporary attractions of *per se* rules, the Supreme Court has repeatedly run away from the idea that core property rights receive automatic protection, instead usually asking whether the laws have any impact on the use or value of the property, and, if so, whether the public justification for the law is sufficient for enforcement without compensation.<sup>226</sup>

What is clear from the case law is that physical destruction, occupation, or invasion of property requires adequate justification, as do laws that deprive owners of what might be thought to be core private property rights, when the regulations are not preventing the owner from causing harm or interfering with legitimate property or personal rights of others. While it is

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221. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913); See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986.

222. Singer, *Rule of Reason*, *supra* note 14, at 1403-04.

223. *See id.*

224. *Riggs v. Palmer*, 115 N.Y. 506 (1889).

225. 42 U.S.C. § 2000a; *Heart of Atlanta Motel*, 379 U.S. at 261 (the Court does not “find any merit in the claim that the Act is a taking of property without just compensation.”).

226. This is the reasoning in *PruneYard*. *See PruneYard*, 447 U.S. at 83 (“There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.”).

true that applying these principles requires nuanced and value-laden judgments to identify those core property rights and the circumstances in which they cannot be retroactively limited without compensation, we get guidance from allocating burdens of proof. We are not treating property rights as having lower constitutional status than rights to free speech and religious liberty when we presume that regulatory laws that impinge on property rights are presumptively justified. The Constitution does not allow property to be “taken” without just compensation, but regulations are almost never the moral or practical equivalent of “takings.”<sup>227</sup> Property is legitimately subject to regulation because we live in a democracy and because *reasonable regulation is what makes property valuable*. No regulation, no property.

It is also clear that *context matters*. While the Supreme Court felt that the right to pass on property at death was a core property right in *Hodel* and *Babbitt*, it did not mean to disable legislatures from requiring equitable distribution of property or statutory share laws that regulate marital relationships.<sup>228</sup> Nor did the Court mean to overrule the cases that have upheld anti-eviction laws and mortgage foreclosure moratoria, thereby subjecting owners to occupation of their land by another.<sup>229</sup> And as we have seen, law may legitimately impose access to land of another in a variety of contexts such as adverse possession, easements by implication or necessity, and public accommodation and fair housing laws. *Context* determines the justifiability of laws that touch on “core” property rights. In general, regulatory laws are valid even if they limit property rights, no matter how established they are and no matter how important they are to the owner. They amount to regulatory takings only if they cause unfair surprise or impose burdens that cannot be adequately justified as burdens an individual should have to bear in a free and democratic society without compensation.<sup>230</sup>

### *C. Interference with Reasonable Investment-Backed Expectations*

#### *1. Opportunity Losses*

The Supreme Court has repeatedly held that no taking occurs when a law merely deprives owners of opportunities, rather than interfering with established, economically beneficial uses.<sup>231</sup> Thus, zoning laws that restrict vacant land to residential uses can be enforced even though they reduce the

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227. Singer, *Rule of Reason*, *supra* note 14, at 1403-04.

228. See *Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

229. See *Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

230. *Armstrong*, 364 U.S. at 49.

231. See, e.g., *Vill. of Euclid*, 272 U.S. 365; *Welch*, 214 U.S. 91; *Penn Central*, 438 U.S. 104.

market value of land by seventy-five percent and even though the land was purchased for the purpose of building a factory.<sup>232</sup> Nor do height limits constitute takings before a building is built.<sup>233</sup> As long as owners are allowed to continue the current uses of the property, no taking can be found if those uses provide economic benefits.<sup>234</sup>

## 2. *Vested Rights*

On the other hand, a law that requires an owner to demolish an existing structure cannot be enforced without compensation unless the structure is dangerous or other sufficient reason for the demolition exists. When the building or the use is not inherently harmful or otherwise unlawful, a retroactive prohibition on the use cannot be enforced without compensation unless some other adequate justification exists for the regulation.<sup>235</sup> Owners who invest in reliance on an existing regulatory scheme are granted permission to continue operating because they have a vested right, or because they have a prior nonconforming use under state zoning law.<sup>236</sup> At the same time, existing structures can be condemned and destroyed by the municipality if they are blighted or dangerous and the owner fails to abate the nuisance.<sup>237</sup> Retroactive prohibitions are also valid without compensation if they are needed to protect human life.<sup>238</sup> And in most states, police need not compensate those injured through police chases.<sup>239</sup>

*Vested rights* are protected to avoid *unfair surprise*. While many laws regulate existing property, and do so retroactively, some change the rules midstream in a manner that strikes most of us as unfair, at least when there is no strong, overriding public interest at stake. Such regulations are akin to *ex post facto* laws. At the same time, all property is held subject to the

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232. *Vill. of Euclid*, 272 U.S. 365.

233. *Welch*, 214 U.S. 91.

234. *Penn Central*, 438 U.S. 104.

235. *Dobbins v. City of L.A.*, 195 U.S. 223 (1904).

236. *Penn Central*, 438 U.S. 104; *Kaiser Aetna*, 444 U.S. 164.

237. *Blanchard v. City of Ralston*, 549 N.W.2d 652, 658 (Neb. Ct. App. 1996) (city has constitutional authority to remove or destroy a dangerous building after giving the owner a chance to fix the property); *Theilan v. Porter*, 82 Tenn. 622, 627 (1885) (“[T]he summary abatement of a nuisance is not in violation of the Constitution, as taking private property for public use without compensation . . .”).

238. *First English Evangelical*, 210 Cal. App. 3d 1353.

239. See *Eggleston v. Pierce Cnty.*, 64 P.3d 618 (Wash. 2003); accord *Kam-Almaz v. United States*, 682 F.3d 1364, 1371-72 (Fed. Cir. 2012) (finding no taking from seizure and examination of laptop at an airport immigration and customs station resulting in damage to the hard drive and the loss of irretrievable business records); *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011) (destruction of a concrete garage floor with a jackhammer during a murder investigation was not a taking). But see *Steele v. City of Houston*, 603 S.W.2d 786, 790-92 (Tex. 1980) (finding a taking when police had burned down an innocent person’s home to eject suspects); accord *Wegner v. Milwaukee Mutual Ins. Co.*, 479 N.W.2d 38 (Minn. 1991).

possibility that regulations may be enacted that change the value of the property or its allowable uses. No compensation is due if a law requires landlords to install adequate fire alarms or to remove lead paint that can be harmful to children. No compensation is due if a landlord is prohibited from discriminating on the basis of sexual orientation and thus cannot object when a male tenant marries a man rather than a woman. Unfair surprise only comes when a regulatory law does not have a sufficiently strong justification to require the owner to sacrifice a prior investment without compensation. Thus, while it may be sensible to redo the city zoning plan from time to time, we do not require existing structures to be demolished unless they pose significant risk to the community or neighboring structures; they are allowed to continue as prior nonconforming uses. Here again, the fact that distinguishes unfair surprise from fair retroactive laws is the presence or absence of an adequate justification for prohibiting what had been a lawful use.

*D. The Surprising Irrelevance of Economic Impact*

Regulations do not constitute takings if they leave owners economically beneficial use of their property,<sup>240</sup> but they *may* constitute takings if they deprive the owner of *any* economically beneficial use.<sup>241</sup> At the same time, regulations may apply without compensation and deprive owners of all economically beneficial use if they prevent conduct harmful to the property, lives, or personal rights of others,<sup>242</sup> or if they prohibit rights that never went along with ownership in the first place.<sup>243</sup>

The Supreme Court likes to cite Justice Holmes's aphorism in *Pennsylvania Coal* that a law may effect a taking if it "goes too far" in impinging on property rights.<sup>244</sup> The economic impact factor adopted in *Penn Central* tries to capture this idea. The "goes too far" idea is also the origin of the "no economically beneficial use" criterion adopted in *Lucas*.<sup>245</sup> While it may seem that deprivation of all economically beneficial use would be the equivalent of an ouster from possession or a destruction of property rights, it is important to understand that few laws will be found to be takings *merely* because of their economic impact on the owner, *no matter how severe that impact is*. In reality, and contrary to what most scholars assume,

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240. *Penn Central*, 438 U.S. 104.

241. *Lucas*, 505 U.S. 1003; *Causby*, 328 U.S. 256; *Nectow*, 277 U.S. 183; *Pumpelly*, 80 U.S. 166.

242. *Keystone Bituminous*, 480 U.S. 470; *Goldblatt*, 369 U.S. 590; *Hadacheck*, 239 U.S. 394; *Mugler*, 123 U.S. 623.

243. *Lucas*, 505 U.S. 1003.

244. *Lingle*, 544 U.S. 528, 537.

245. *Lucas*, 505 U.S. 1003, 1019.

the economic impact of legislation or common law rules on property rights is *almost irrelevant* to the taking inquiry.<sup>246</sup> This is so for several reasons.

First, *Lucas* held that a law *may* constitute a taking if it leaves the owner with *no* economically beneficial use.<sup>247</sup> In reality, few if any laws leave the owner with zero uses of the land. Indeed, the idea that the beachfront property in *Lucas* had no economic value if the owner could not build on it is laughable. Beachfront property is highly valuable to neighbors who want extra land or a buffer between themselves and their neighbors. It is also highly valuable to anyone who wants to own a beach where they can sit and swim.

Second, laws often destroy economic value by changing the rules of the game. Property is subject to the same changes in value that other spheres of economic life experience. Such is the case with housing codes, antidiscrimination laws, and environmental laws.

Third, the economic impact factor must be understood in conjunction with the vested rights doctrine (the protection of reasonable, investment-backed expectations). In *Lucas*, the owner had purchased the beachfront property *but not yet built on it*.<sup>248</sup> Under the logic of *Euclid*, *Kaiser Aetna*, and *Penn Central*, a prohibition on *future* construction would effectuate an opportunity loss only and not an interference with a vested right.<sup>249</sup> That would suggest that Lucas cannot complain that he bought the property seeking one kind of use and was stopped by a subsequent regulatory law. If Lucas has a viable claim, then *Euclid* would arguably have to be overruled, and the purchase of vacant land would be enough to create a vested right to whatever uses the zoning and environmental law allowed at the time of purchase.<sup>250</sup>

*Lucas* posed a difficult normative question because so much of the coast had already been built up by the time Lucas purchased his lots.<sup>251</sup> What was problematic about the regulation in *Lucas* was not its economic impact, but the fact that the coast had been substantially built up and Lucas's two lots

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246. The one scholar I know who emphasizes this point is Peter Gerhart. See PETER GERHART, PROPERTY LAW AND SOCIAL MORALITY §11.2.2, at 269 (2014) (arguing that takings claims rest, not on a law's impact on property value, but "the way the legislature has assigned the loss to them and not to others.").

247. *Lucas*, 505 U.S. at 1019.

248. See *Lucas*, 505 U.S. 1003.

249. See *Vill. of Euclid*, 272 U.S. 365; *Kaiser Aetna*, 444 U.S. 164; *Penn Central*, 438 U.S. 104.

250. See *Lucas*, 505 U.S. 1003; *Vill. of Euclid*, 272 U.S. 365.

251. Of course, the Justices that decided *Lucas* based their reasoning on the implausible assumption that the property had no economic value, i.e., that it was the equivalent of the land that was flooded in *Pumpelly*, or the property that was rendered unlivable by its location near an airport in *Causby*. The argument in the text takes this implausible fact off the table and considers whether there might be other reasons to find a taking in the *Lucas* case.

were the only two left undeveloped.<sup>252</sup> The normative problem in *Lucas* was the fact that he seemed to be singled out for different treatment.<sup>253</sup> He had waited too long to build and was prevented from doing what every one of his neighbors had done.<sup>254</sup> Their development of the land gave him the impression that his development would be allowed.<sup>255</sup> That may mean that his expectations were stronger than those of the property owner in *Euclid*. *In that context*, was there adequate reason not to let him build as all his neighbors had done?

Environmentalists would likely say yes, although one can imagine them recognizing the marginal harm to the coast from Lucas's development to be small. Property owners who invest in reliance on a neighborhood scheme are likely to say no. In either case, the real question was whether the restriction on new construction on the coast was sufficiently important to impose on an owner who had been led to believe that his development would be allowed. At the same time, Lucas should have been aware of governmental regulation of the coast, understood that coastal land is subject to heavier regulation than other types of land, and followed the regulatory developments that included consideration of new limitations on coastal development.

The appropriate focus of a constitutional takings doctrine is not on the economic impact of laws, but on the *adequacy of the justification for imposing the regulation without compensation*. The disparate impact of allowing most to do what a few are disabled from doing may give us pause and strike us as relevant to the takings determination. But that means our real focus is not on the economic impact of the regulation, but on our belief that the owner reasonably invested in reliance on a favorable regulatory scheme and that prohibiting the construction would be the moral equivalent of an unfair *ex post facto* law. In such cases, what matters is the adequacy of the justification for surprising the owner, not the extent of the economic impact or the fact that the regulation "goes too far."

#### IV. THE PRINCIPLE OF ADEQUATE JUSTIFICATION

##### *A. Property Rights In a Free and Democratic Society*

The idea that the Constitution protects any "established right of private property" from being "taken" faces two serious challenges. The first is *conceptual* and second is *structural*. The conceptual problem comes from

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252. See *Lucas*, 505 U.S. 1003.

253. See *id.*

254. See *id.*

255. See *id.*

the difficulty of defining property rights; the structural problem comes from the difficulty of distinguishing between an unconstitutional “taking” and constitutional “regulation.”

Let’s first address the conceptual challenge. To the layperson, nothing could be simpler than identifying property rights. This is my house; this is my car. I am free to use them as I wish and to prevent you from taking or harming them. Any law that limits one of those rights is arguably a “taking” of my “established right” in my property. The problem with this is that lawyers—especially real estate lawyers—understand that defining what property rights are and who owns them is a much trickier business than non-lawyers imagine.

Anyone who has taken the introductory course in property law should recognize this. If property rights were easy to identify and define, we would not have to teach about adverse possession, easements, covenants, future interests, leaseholds, marital rights, inheritance, nuisance, mortgages and other liens, joint tenancies, homeowners associations, public accommodations, fair housing laws, or recording statutes. Nor would we need to teach about partnerships, corporations, nonprofit organizations, secured transactions, bankruptcy, copyright, trademark, patents, or publicity rights.

Even when we identify different *types* of property rights that can be created, we face difficulties defining them and the rights that accompany them. Property law creates a framework for control of valued resources and requires a detailed structure to shape social relationships with regard to those resources. We regulate the types of rights that can be created (e.g., no fee tails, no feudal rents, no racial discrimination in housing). We adjudicate conflicts among property rights (e.g., nuisance, homeowners association relations with unit owners, landlord/tenant relations, husband/wife relations, easement/servient estate relations, etc.). We apply equitable principles to limit property rights (e.g., estoppel, acquiescence, laches, unjust enrichment, constructive trusts, *cy pres*, changed conditions, relative hardship). We set the minimum standards for property rights (e.g., building codes, zoning laws, consumer protection laws, implied warranty of habitability). We ensure that people can obtain property without unjust discrimination (e.g., public accommodation laws, fair housing laws, employment discrimination laws). And each one of these areas of law contains its own complexities, nuances, anomalies, conflicts and areas in need of interpretation.

Added onto all this complexity is that fact that property rights change over time. For example, many states have recently abolished or substantially changed the rule against perpetuities. These laws are generally applied prospectively only, but that does not mean they have no retroactive

effect. They empower owners to create future interests that limit the power of grantees who, under prior law, would have been immune from those restrictions. They therefore limit the rights that potential purchasers can acquire.

Similarly, many courts have moved from rigid rules to flexible standards in various areas of property law.<sup>256</sup> We have moved, for example from a rule providing that “restraints on alienation are repugnant to the fee” to a rule that invalidates “unreasonable restraints on alienation.” We have moved from the common enemy rule and the natural flow rule for surface flooding to a reasonable use test. We have created an implied warranty of habitability and protection against retaliatory eviction. We have imposed a duty to mitigate damages in residential leaseholds. We have expanded the definition of “public accommodation” in our antidiscrimination laws from inns and common carriers to all businesses open to the public. We have denied husbands the power to control the property of their wives and redistributed their property through equitable distribution laws. We have subjected real covenants to tests of reasonableness and invalidated them when they contravene public policy. We have subjected condominium and homeowners association rules to reasonableness requirements. Some states have added good faith requirements to adverse possession law.

Of course, one might suggest that none of this is problematic as long as changes in the law are applied prospectively only. Taking “vested rights” arguably interferes with “established property rights,” while preventing a right from being established does not. The problem is that we cannot easily distinguish what is and is not a vested right. As I noted, changes in the rule against perpetuities take rights away from property buyers. Why is the right to buy property free from certain encumbrances not an “established right of private property?”

The Supreme Court held in *Euclid* that buying land is not enough to acquire a vested right; after purchase, the state can take away the right to build a factory.<sup>257</sup> But why is that? Why isn’t the purchase of the land enough? One might argue that it is too hard to determine the potential plans of buyers or that it would be too expensive to compensate every owner when a regulatory law limits land use. But that itself is a normative claim, and some states (such as Oregon and Arizona) have passed laws trying to prevent any new restrictions on land use absent compensation.

Any limitation on newly created rights affects the current owners of property by depriving them of the ability to use their existing property to create those now-outlawed rights. To see why that is a problem, remember

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256. Singer, *Rule of Reason*, *supra* note 14.

257. *Vill. of Euclid*, 272 U.S. 365.

the *Hodel* and *Babbitt* cases that held it to be a taking of property to deny an owner the right to determine who owns her property after her death.<sup>258</sup> The deprivation of a right to create rights in the future arguably constitutes a taking of a vested right, not of the owner who established the right in the past, but of the owner who wants to create it in the future. That is the case if we determine that the prior owner *had* an established right to create that right, which has now been taken away. This problem suggests that *all* property rights are arguably vested and *any* changes will interfere with rights “established” in the past. It is not clear that we have a useful conceptual distinction between vested and non-vested rights that is not itself based on a value judgment about what expectations are reasonable.

Worse still, even if we can distinguish reasonable and unreasonable investment-backed expectations as a general matter, we cannot identify vested rights without first determining whether a particular property law rule applies in a given fact situation. Recall the decision in *Friendswood Development Co. v. Smith-Southwest Industries, Inc.*<sup>259</sup> in Texas that addressed the question of whether an owner could withdraw groundwater when this caused neighboring land to sink into the earth.<sup>260</sup> The majority and dissenting opinions differed wildly on the scope of the prior rules in place, with the majority arguing that the free use rule that enabled owners to withdraw water without liability was an absolute rule, and the dissenting judge arguing that the free use rule determined how to allocate ownership of water, but had no bearing whatsoever on the question of whether water could be withdrawn in a manner that undermined the surface of neighboring land.<sup>261</sup> Defining “established property rights” requires a decision about whether, and when, to distinguish prior cases. Consider a husband who murders his wife. Can he get her property through a right of survivorship?<sup>262</sup> Courts routinely limit the scope of prior rules of law when new cases arise that demonstrate the moral limits of the principle underlying the prior case.<sup>263</sup>

Property is not such an easy thing to define. And the more you know about it, the more complicated it gets. This does not mean that there are no easy cases. And it does not mean that we do not have an established property law system that can be described and communicated to citizens and law students alike. What it does mean is that, *when a case is hard*, defining what is and what is not an “established property right” is something that

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258. See *Hodel*, 481 U.S. 704; *Babbitt*, 519 U.S. 234.

259. 576 S.W.2d 21 (Tex. 1978).

260. *Id.* at 21.

261. See *id.* at 21-35.

262. *Lee v. Snell*, 25 Mass. Law. Wkly. 1210 (Mass. Prob. Ct. Feb. 10, 1997).

263. See Singer, *Rule of Reason*, *supra* note 14, at 1404-05.

requires value judgments and reasoned argument. And because we are discussing regulatory takings doctrine, we must realize that we only have an issue to discuss if the case is hard.

In cases that present plausible regulatory takings claims, reference to established rights of private property *states the question rather than answering it*. If the scope of property rights were clear, we would not have a hard case in the first place. Once we have a hard case, we lack exactly what the “established property rights” mantra wants us to have, i.e., a clear, objective and incontrovertible answer to the scope of our prior rights. The seeming objectivity of “established rights of private property” is lost just when we need it most. In such cases, we must make judgments about what rights are and are not “established.” And because we are asking this to answer a constitutional question, we have no choice but to address our ultimate values. Is the property right in question one that the owner can reasonably claim deserves protection from change in the absence of compensation in the face of a regulatory law that is designed to achieve certain public purposes? Rather than settling the constitutional question, the “established property right” formula merely restates the question.

This insight is even clearer when we turn to the *structural* challenge to defining “established rights of private property.” That structural issue rests on our commitment to democracy as a form of government. One of the ways we define property rights is by electing representatives who pass laws that adjudicate conflicts among property rights, that define their legitimate contours, that identify property rights that are incompatible with democratic norms, and that regulate the distribution and use of property to create an environment in which we can acquire and enjoy property on equal and fair terms.

Law not only limits property rights; it *defines them and enables them to exist*. A zoning law limiting property to residential use may prevent the owner from building a store, but it also ensures the owner the security of knowing a store will not be built next door. If we want to own a house in a residential neighborhood, then property law (whether through zoning law or through court enforcement of reciprocal servitudes) must limit what individuals can do with their property. The limits exist *so that we can enjoy a certain kind of property*, i.e., a house in a neighborhood of other houses. Regulation is just another word for law, and property gets its shape and meaning from law. Democracy is not always a threat to property; it is the way we collectively act politically to define what property is and what rights we want it to contain. The law-making function of legislatures and common law courts is a major engine for creation, definition, and protection of property rights. A doctrine that rigidly protects “established property rights” would undermine democracy by reinstating *Lochner* and transferring

lawmaking power from Congress and the state legislatures to nine philosopher-kings on the Supreme Court.

*B. Property Rights and Public Reason*

I have, so far, been pretty critical of the idea that the Constitution should protect all “established rights of private property.” I want to now do a one hundred and eighty degree turn and recall (especially for liberals) what is attractive and correct about this idea. If we pay close attention to the norm that the Supreme Court has told us underlies the Takings Clause, we will see that it embodies a principle that is at the heart of liberal political thought. The Takings Clause serves “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>264</sup> At the heart of the Takings Clause is a *principle of public reason*.<sup>265</sup> Owners should be obligated to comply with the laws enacted by democratic means, through legislation, administrative regulation, and common law, but they should not be asked to endure burdens that go beyond their reasonable obligations.<sup>266</sup> How do we define what obligations are reasonable?

*We start with a presumption that lawful obligations are both legitimate and reasonable as well as fair and just.*<sup>267</sup> We do so because we live in a democracy and because we have the rule of law. We have chosen not to live in an anarchic polity or one controlled by warlords, feudal lords, or an inherited aristocracy. We the people enact laws through a republican form of government and we are not free to choose which laws to obey. Nor are we entitled to be compensated just for obeying the law. We are free to lobby to change the laws and to litigate for our rights. There is nothing unfair or unjust about requiring owners to obey the law.

At the same time, the Supreme Court has acknowledged that laws cannot withstand scrutiny unless they bear some relationship to a legitimate government objective.<sup>268</sup> This is a low test, but it is one that has, from time to time, been violated; one need only remember the decision in *United States v. Windsor*<sup>269</sup> to see why this is so. When a law *cannot be justified to those harmed by it*, we have reached the limits of democratic decision-making.

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264. *Armstrong*, 364 U.S. at 49.

265. ERIC MACGILVRAY, RECONSTRUCTING PUBLIC REASON 155 (2004); JOHN RAWLS, POLITICAL LIBERALISM 212-54 (1996); Cf. Eduardo M. Peñalver, *Is Public Reason Counterproductive?*, 110 W. VA. L. REV. 515 (2007).

266. See *Armstrong*, 364 U.S. at 49.

267. Singer, *Rule of Reason*, *supra* note 14, at 1405.

268. *Vill. of Euclid*, 272 U.S. at 392.

269. 133 S. Ct. 2675 (U.S. 2013).

The regulatory takings question is similar, but not identical. The question is not whether the law is rationally related to a conceivable legitimate governmental interest, but whether we can, in all fairness and justice, expect an owner to be burdened by the law in the absence of compensation.<sup>270</sup> Whether an owner justifiably expects not to face such a burden without compensation depends on determining whether sufficient reasons exist to justify imposing the law rather than sharing the economic burden of the law among the taxpayers.<sup>271</sup> Uncompensated burdens are generally legitimate because they are the byproduct of democratic lawmaking. They are unfair and unjust only when the government cannot give an owner a sufficient justification for bearing the burden in the absence of compensation.<sup>272</sup>

The principle of democracy—government of the people, by the people, and for the people—is usually a sufficient justification for subjecting property owners to regulatory laws without compensation. That principle reaches its limit if the regulation denies individual owners equal concern and respect. Would we consider a regulation to be just and fair if we did not know whether we were burdened by a regulation or benefited by it? If we can provide the owner an adequate justification for the regulation, then compensation is not due, but if we cannot give the owner a reason that the owner could or should accept, then justice and fairness may well require us to compensate the owner for the losses that we cannot justify.<sup>273</sup> This does not turn the Takings Clause into a shadow of the Equal Protection Clause; it imposes a compensation requirement when we could not accept the burden as a valid one in the absence of compensation.<sup>274</sup>

What the conservatives on the Supreme Court mean by protecting “established rights of private property” is precisely what liberals mean by *constitutional democracy*. A property right is not “established” if it is legitimately subject to regulation to promote the public welfare. A property right *is* “established,” and thus deserving of protection from uncompensated deprivation, precisely when interference with the entitlement cannot be justified from a democratic point of view.<sup>275</sup> What is a democratic point of view? It is one that respects the dignity of each person, that considers each to be worthy of equal concern and respect, and that empowers us collectively to use democratic means to pass laws that shape the contexts within which we enjoy our freedoms. It is also one that recognizes an

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270. See Singer, *Rule of Reason*, *supra* note 14, at 1404-05.

271. See *Armstrong*, 364 U.S. 49.

272. See Singer, *Rule of Reason*, *supra* note 14, at 1404-05.

273. *Id.*

274. *Id.*

275. See *id.*

obligation to compensate owners for sacrifices that are legitimately shared among all because no sufficient justification exists to impose the obligation on those owners unless compensation is provided.

Liberals and conservatives may find some common ground if we recognize that what it means to protect established rights of private property is to require compensation for regulations that *cannot be justified by adequate public reasons unless compensation is paid*. 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. The *Penn Central* factors may not be the most elegantly phrased or the most normatively evocative we can imagine. Yet consideration of the character of the government action and the protection of justified expectations in light of the impact on the owner is not a bad starting point. At the same time, these factors are normatively relevant only because we understand that owners are both subject to duly-enacted laws and that the government cannot simply take their property for public use without compensation. The former turn into the latter only when the burden on the owner cannot be justified as one that the owner should bear as a member of a free and democratic society in the absence of compensation for the undue sacrifice.

Physical invasion, occupation, and destruction of property cannot be imposed on owners without sufficient reason; those reasons usually involve preventing the owner from harming the public.<sup>276</sup> We do not take homes to build highways without compensation, but we do require public accommodations to allow people in without regard to race. We do not allow the government to flood your property or invade your home without compensation, but we do prohibit restaurants from discriminating on the basis of race, religion, or disability. We do not allow government to destroy your house without compensation, but we do allow firefighters to bash down the door to save the lives of those within and to inundate the house with water to stop the fire and protect neighboring homes.

Retroactive regulations are ordinarily justified because they reflect contemporary judgments about behavior and set the minimum standards for economic transactions and relationship. But such regulations may cause unfair surprise if regulatory laws induced individuals to invest in creating structures or other objects of value, and newly enacted laws deprive owners of those rights without preventing them from harming others or posing systemic risk. We do not force you to tear down your store when the property is rezoned for residential uses, but we do prevent you from

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276. *See id.*

intensifying the use to protect neighboring owners and we do demolish property that is dangerous and dilapidated.

Laws that deprive property of all value or utility are the functional equivalent of ouster and are unjustified unless they prevent the owner from doing something she had no right to do in the first place.<sup>277</sup> We can prevent you from owning, transferring, or using property that is itself dangerous, such as heroin or land that is unstable because it is on a muddy slope. And even severe decreases in the value of property are justified if the reasons for the regulations are ones that owners should accept. But regulatory laws that have the effect of wiping out all economically viable use of property interfere not only with monetary interests, but impinge on liberty concerns by denying owners any benefit from their own property.<sup>278</sup> Such regulations are legitimate if sufficient reasons can be given to those owners, such as preventing them from engaging in construction that will harm the community.

Regulatory takings law is premised on a *principle of adequate justification*. The most fundamental justification for a law is the fact that it was enacted through democratic procedures through legislation, administrative rulemaking, or common law adjudication. A law that imposes an uncompensated burden on an owner cannot be adequately justified when the burden imposed on the owner is one that, in all fairness and justice, she should not have to bear for the good of society in the absence of compensation.<sup>279</sup> This happens *not* because a law “goes too far;” *it happens when we cannot give the owner a reason she could or should accept that she should bear the loss.*<sup>280</sup> And that happens when the owner is *asked to bear a burden that should be shared with others.*<sup>281</sup> In such a case, we have no reason we can give the owner that she alone should bear the burden of the regulation rather than achieving the public goal by compensating her for her disproportionate sacrifice.

There are few cases holding that laws effect regulatory takings because our ordinary processes of government generally regulate conduct in a way that protects property rights from illegitimate interference.<sup>282</sup> Thus, it is zoning law, and not regulatory takings law, that protects prior nonconforming uses and vested rights and allows for variances in cases of undue hardship. And it is highway law that provides for compensation when land is taken for road purposes. The fact that we see few takings

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277. *Lucas*, 505 U.S. at 1015-16.

278. *Id.*

279. *Armstrong*, 364 U.S. at 49.

280. *See id.*

281. *Id.*

282. *See Singer, Rule of Reason, supra* note 14, at 1404-05.

cases won by owners does not mean that U.S. law does not provide capacious protection for property rights. *Our non-constitutional law does a pretty good job of this.* Only when that law fails to provide such protection do we see potential takings claims.

In general, regulatory laws are not illegitimate on the ground that they take property without just compensation.<sup>283</sup> Regulations normally serve legitimate public purposes despite their impacts on property rights or values. Antidiscrimination laws are justified because democracies do not recognize racial castes. Environmental laws are justified because we all (including all of us owners) want property located in an environment that is sustainable and safe. Zoning laws are justified because we want property located within appropriate contexts. Building regulations are warranted because we want to be safe in our homes. Landlord/tenant and other consumer protection laws are warranted because we want to get what we pay for, rather than be deceived or put in danger because the property we buy is unsafe or unsuitable. On the other hand, laws *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.*<sup>284</sup>

### *C. Hard Cases in Light of Democratic Norms*

We can better understand what it means to test laws by reference to the principle of adequate justification if we think about the regulatory laws that have posed the harder cases in recent years for the regulatory takings doctrine. What matters is not what the right answer is, but that we understand *why the cases are hard.* If we focus on that question, we not only can better understand the legitimate concerns of conservatives and liberals alike, but we will have a clearer window into the takings problem. Consider environmental laws and coastal regulations, anti-eviction laws, historic preservation laws, and permitting conditions. Regulatory takings cases are hard when they touch on core (“established”) property rights and we cannot defend those regulations as prohibiting the owner from doing something she should not be doing in the first place. They are also hard when they cannot be understood as based on regulations that legitimately set the rules of the game for property use and transfer.

***Environmental regulations and coastal regulations.*** Many owners have sued to seek exemptions from laws that prevent them from building on their land.<sup>285</sup> Those laws include wetlands regulations, coastal regulations,

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283. *Id.*

284. *Armstrong*, 364 U.S. at 49.

285. *See, e.g., Vill. of Euclid*, 272 U.S. 365; *Lucas*, 505 U.S. 1003.

and laws protecting endangered species. Environmental laws that prevent owners from harming others, such as laws regulating toxic waste, generally do not garner controversy unless they impose obligations on owners who argue that they are not the ones who caused the harm. In such cases, the debate revolves around the question of whether it is legitimate to impose obligations on owners of polluted land, *just because they are owners*, to clean up the land. This type of case is hard because we do not consider the owner to have done anything wrong, but we can understand the social goal of cleaning up polluted property. The question is whether it is appropriate to place that burden on the owner of property that poses a risk to the public. In general, the courts have not found such laws to be regulatory takings because property law itself, through the nuisance doctrine, has traditionally placed obligations on owners whose property unreasonably interferes with the use and enjoyment of neighboring property, *irrespective of any showing of negligence*.

Coastal regulations are controversial because they sometimes are imposed in a selective manner, as in the *Lucas* decision, where most of the coast on the Isle of Palms was built up and Lucas, alone among his neighbors, was not allowed to build his two houses.<sup>286</sup> When that happens, the owner feels that the use he is prohibited from engaging in cannot possibly be that dangerous if so many others are allowed to continue to engage in exactly the same activity. Owners like Lucas derive their expectations not so much from the law as from observing what others around them are doing. When an entire area is downzoned, as in *Euclid*, the sting is not as bad as when it happens selectively.<sup>287</sup>

A similar problem arises for people just over the border who can see development happening next door and neighbors whose property values are many times higher than their own, all because of a regulatory law. The problem here, as Nestor Davidson has eloquently explained, is that the Equal Protection Clause normally does not allow relief in such cases.<sup>288</sup> Every law makes distinctions and every law “draws lines;” using the Takings Clause to create a heightened standard of review for equal protection law affecting property seems unwarranted.<sup>289</sup> If every law regulating property use had to treat similarly situated owners precisely the same, then we would have to reverse *Euclid*. Zoning law could not survive if we could not make distinctions among owners—zones need borders.

In cases that do not involve owners who feel singled out, they may want to engage in actions to protect their property, and coastal regulations may

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286. *Lucas*, 505 U.S. 1003.

287. *Vill. of Euclid*, 272 U.S. 365.

288. Davidson, *supra* note 121, at 5.

289. *Id.*

prevent them from repairing their homes or shoring up their lands. Once regulatory laws allow construction on the coast, many find vested rights to have matured and are wary of regulatory laws that do not allow owners to maintain, safeguard, or repair their existing homes and businesses. At the same time, the public goal of limiting construction on the coast is a strong one and after more than fifty years of regulation of coastal construction, one cannot credibly claim ignorance of the fact that coastal property or other riparian property is subject to regulatory restrictions far beyond those which apply to property that does not border the ocean or rivers or lakes. Permitting authorities usually allow property on the coast to be repaired, but regulatory laws may increase standards, for example, to ensure safety in cases of flood or hurricane.

As for those who seek to buy vacant coastal land and assume that they can do with it what they wish, it seems unreasonable for them to assume that regulatory laws that have been in place for more than half a century do not apply to them, when those laws are designed to preserve the coast, protect human lives, and prevent new construction in areas where it is harmful or dangerous. Such owners are similarly situated to the buyer in *Euclid* who was held not to have a vested right to build merely because he had bought the land.<sup>290</sup>

Wetlands regulations remain as controversial as coastal regulations because some owners stubbornly refuse to accept their legitimacy.<sup>291</sup> If you know that you are buying a wetland, then it is unreasonable to expect to be able to develop your land without complying with existing environmental laws, and those laws may go so far as to outlaw your project.<sup>292</sup> Although some courts have held that substantial deprivation of market value combined with a total prohibition on development constitutes a taking of property,<sup>293</sup> others hold the opposite.<sup>294</sup> These laws prevent harm, but it is a harm that seems indirect and distant rather than direct, present, and visible.<sup>295</sup> The harm depends on believing what scientists tell us about the cumulative effect of construction on wetlands. The passage of time should,

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290. See *Vill. of Euclid*, 272 U.S. 365.

291. Toni Kong, *The Art of Stripping: How the Government Applies the Takings Clause to Strip You of Your Property*, 30 *TOURO L. REV.* 479 (2014) (describing persistent takings challenges to wetlands regulations and the inconsistent results in such cases).

292. *Gazza v. N.Y. State Dep't of Env'tl. Conservation*, 679 N.E.2d 1035, 1037, 1042 (N.Y. 1997).

293. See *In re N.Y.C.*, 35 Misc. 3d 1224(A), 2012 WL 1676889 (N.Y. Sup. Ct. 2012); *Friedenburg v. N.Y. State Dep't of Env'tl. Conservation*, 767 N.Y.S.2d 451 (App. Div. 2003); *Chase Manhattan Bank, N.A. v. State*, 479 N.Y.S.2d 983 (App. Div. 1984); see also *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484 (S.C. 1992) (taking to prohibit all construction on the coast with a finding of a 100% deprivation of economic value).

294. *Gazza*, 679 N.E.2d 1035.

295. See *In re N.Y.C.*, 35 Misc. 3d 1224(A), 2012 WL 1676889, at \*4 (wetlands regulations provide a generalize public benefit rather than preventing harm).

by now, have changed our “reasonable expectations” about our freedom to build on wetlands and on the coast.

This does not mean that there may not be some cases in which owners feel wrongfully singled out (as Lucas felt) or that some property may have been purchased in the past with the expectation of development before wetlands regulations were in effect. The key question here is not whether the law’s goal of protecting the environment and the coast is legitimate (because it is), but whether the impact of those laws on particular owners is unfair or unjust. As time goes on, the claim of injustice should become harder and harder to make. I would argue that time has already come and gone. These laws have been in effect long enough now that viable takings claims should be few and far between. And that seems to be where we are in the current case law.

**Anti-eviction laws.** Anti-eviction laws garner opposition because we conceptualize landlords as the “owners” of property with the right to recover their land at the end of the lease. But compare this to mortgage laws that prevent banks from foreclosing if the owner can make up late mortgage payments. In those cases, we think of the borrower as the “owner,” even in states like Massachusetts where banks retain title to the property until the mortgage is paid off. The Supreme Court has justified anti-eviction and mortgage moratorium laws as regulation of an ongoing relationship.<sup>296</sup> That makes a lot of sense; it is the province of law to set minimum standards for market relationships and such protective laws are generally imposed retroactively.

At the same time, one can easily understand the conservative discomfort with anti-eviction laws in cases when the landlord wants to move into the property herself or to allow a family member to move in. One can also understand the discomfort if a law prevents an owner from evicting tenants to turn the property to some other use. In such cases, the owner may have intended to rent the property only temporarily while planning to move there in retirement or some other such change in life.

On the other hand, a condo conversion law that gives tenants a right of first refusal when the property is converted from residential rental to condominium protects the market value of the landlord’s property while giving tenants the rights to tenure enjoyed by mortgagors. When such laws prevent the landlord from moving in to the property herself, we have a harder case. Such a regulation protects the tenant’s right to stay in her current home, and privileges that right over the landlord’s right to create a new one. A law protecting the tenant’s right to stay in her home as long as she pays the agreed-upon rent seems awfully close to the mortgage

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296. *Yee*, 503 U.S. 519; *Block*, 256 U.S. 135.

foreclosure laws that protect the bank's financial interest in the property along with the borrower's personal interest in staying in her home. In such cases, it is not unreasonable for the legislature to prefer to protect the right to remain in an established home over the right to create a new one.<sup>297</sup> The remedy for a taking is compensation, and that is not a substitute for moving in to a particular piece of property. And if money is all the Constitution allows as a remedy, it would seem that the ability to charge market rents would be sufficient to provide the landlord with the market value the property offers. That would seem to be the reasoning behind the cases that authorize restrictions on eviction and foreclosure.<sup>298</sup>

**Historic preservation.** Although upheld by the Supreme Court in the *Penn Central* case in 1978 on the ground that historic preservation laws allow current uses to continue and simply impose opportunity costs,<sup>299</sup> such laws remain controversial because they sometimes impose onerous obligations on a small subset of owners. Consider a law school that might want to demolish an historic structure in order to build better facilities for students. It can continue the current use, to be sure, but it may be disabled from modernizing its facilities in a way that enables it to provide the best services possible. And this obligation is not one shared by other owners in the vicinity. Of course, the owner could sell its campus and move elsewhere, but that possibility simply heightens the sense that this obligation is not a small one.

It is the effect of the law on inhibiting changes in the property that are desired to continue or improve existing uses that gives us the most pause, especially because the burdens of such laws are unevenly distributed. Imagine a law that allowed everyone to update their kitchen and bathroom facilities and to install Internet access while requiring one owner to maintain nineteenth century services in the building. If a property is being used as a residence or a business, and not a museum, it would seem to infringe on the rights of the owner to make changes needed to continue to use the property and keep up with the times. However, most historic preservation laws are interpreted to require the outside of the building to remain the same while allowing significant change on the inside. At the same time, the fact that some owners feel singled out for special obligations is the main reason such laws continue to stir passion among property rights advocates.

The issue in such cases is whether the interest in preserving historic properties is a sufficient justification for preventing private owners from

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297. Indeed, the Supreme Court found this distinction to be meaningful in the context of equal protection law. See *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (state may assess higher property taxes for new residents than old residents).

298. *Yee*, 503 U.S. 519; *Blaisdell*, 290 U.S. 398.

299. See *Penn Central*, 438 U.S. at 137-38.

changing their structures in the absence of compensation. Such laws seem like reverse spot zoning; they single out owners not for specially favorable treatment, but specially unfavorable treatment. And unlike the zoning laws upheld in *Euclid*, they arguably single out owners for burdens not shared among similarly situated neighbors. That is why historic districts get less opposition than individual historic properties; districts are much closer to zoning laws that regulate an entire area and lead to an “average reciprocity of advantage.”

On the other hand, the owner who is allowed to continue a current, viable use has merely lost an opportunity and is in no worse position than the owner in *Euclid*. Is the fact that an historic owner is “singled out” for an obligation a reason to say that her property rights have been taken when the owner in *Euclid* has not suffered a taking? Whether we are focused on the impact on the owner or the reason for the regulation, it seems that these parties are similarly situated. And if we are bothered by the “singling out” issue, is that a reason for interpreting the Takings Clause as amending the standards under the Equal Protection Clause? Recall that nothing has actually been “taken” from the owner of an historic property; its use and development have simply been regulated, and that is the province of every zoning law. Is enjoying a single-family home in a neighborhood of single family homes a more important public purpose than preventing the destruction of Paul Revere’s house?<sup>300</sup>

**Unconstitutional conditions.** The *Koontz* decision made liberals very nervous because it appeared to place all negotiated zoning in doubt, which is to say, most zoning in the United States that applies to large projects. But conservatives are absolutely right to worry that permitting conditions may be imposed on owners in a manner that bears no relationship to their own project and that singles out owners to bear burdens they should not have to bear for the good of society. Liberal beliefs in equality before the law should prompt them to understand the legitimate impetus behind such an application of the Takings Clause. At the same time, if the *Koontz* decision takes us back to rigid Euclidean zoning, we will have disabled municipalities from creating the mixed uses that are most desired in many urban areas today. We also will have increased the costs of every development project by making regulatory approvals uncertain and costly, and will have potentially created a wave of litigation instead of construction. In reality, the *Koontz* decision may have less impact than liberals fear because real estate developers are in the business of developing

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300. *The Paul Revere House*, PAUL REVERE MEM’L ASS’N, <https://www.paulreverehouse.org/about/paulreverehouse.html> (last visited July 16, 2015).

property, and negotiating a zoning compact with the city is usually more profitable than suing the city to complain about those conditions.

What makes all these cases hard is that the law that limits what owners can do imposes burdens that are arguably *not shared by everyone equitably* and that we are uncertain *whether those burdens can be adequately justified to those affected by them*. It is Golden Rule or “veil of ignorance” thinking that gives us pause. *Would such a law appear legitimate to us if we did not know whether we would or would not own property burdened by such a regulation?* Regulatory takings law, as developed over time by the Supreme Court, takes shape and substance from this question.

#### V. JUSTIFYING PROPERTY LAW

Regulatory takings law is complex, but the case law built on it is not (entirely) incoherent.<sup>301</sup> And for those who despair of its complexities, I dare you to come up with something better and simpler. I don’t mean to argue that this is not possible; after all, the Supreme Court just tried to simplify things by giving protection for “established property rights.” I just mean that whatever formula you come up with is going to have similar nuances, complexities, and anomalies as the current doctrine. Regulatory takings law embodies norms that can be embraced by liberals and conservatives alike. At the same time, it is inevitable that the normative disagreements between conservatives and liberals will be reflected in takings law, no matter what form the doctrine takes. That is because we value both property and democracy, and because property is a more complex institution than many imagine it to be.

The law protects “established rights of private property” from regulation without compensation when a law “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>302</sup> As Nestor Davidson explains, the “fairness and justice” principle is not really an equality norm.<sup>303</sup> Rather, it is a special application of the Due Process Clause. The Due Process Clause prohibits a law that is unrelated to a legitimate public interest.<sup>304</sup> The Takings Clause requires compensation to be paid when regulations impose uncompensated burdens on owners that cannot be justified by adequate public reasons.<sup>305</sup>

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301. On the other hand, it is completely true that the *Koontz* decision threatens to introduce a world of uncertainty to negotiated zoning decisions unless the courts cabin it in.

302. *Armstrong*, 364 U.S. at 49.

303. Davidson, *supra* note 121.

304. U.S. CONST. amend. XIV.

305. U.S. CONST. amend. V.

Since the *West Coast Hotel v. Parrish*<sup>306</sup> decision in 1937, we have presumed that regulatory laws are valid and enforceable.<sup>307</sup> We have done so because we live in a democracy and that means government by the people. Legislatures are empowered to pass laws to promote the public welfare. Laws that impinge on property rights are presumptively valid. That is why the regulatory takings doctrine applies only in extreme cases akin to physical ouster or *ex post facto* laws.

Property owners are normally subject to regulation without compensation. This does not mean that the Constitution does not protect property rights or that property owners are second-class citizens. It means that property owners, like everyone else, have a duty to obey duly-enacted laws promulgated by the people and for the people. It means that owners are obligated to respect the rights of others. The rule of law is a good thing and so is democracy. The Constitution does require just compensation when the burdens that laws impose on owners cannot be adequately justified by the norms and values embraced by a free and democratic society that treats each person with equal concern and respect. Regulations like that are unusual, but when they deprive owners of established property rights, they indeed have gone too far. Short of that, we have no obligation to compensate owners just to get them to obey the law.

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306. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

307. See Singer, *Rule of Reason*, *supra* note 14, at 1404-05.