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

JOSEPH WILLIAM SINGER[*]

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

Audra McDonald

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

Justice Arthur Goldberg

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. 42 U.S.C. § 1982.

9. 42 U.S.C. § 2000a.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21. *Id.*

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

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

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

25. *Id.* at 715.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36. 42 U.S.C. § 2000a.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41. 42 U.S.C. §§ 1981, 1982, 2000a.

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

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

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

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

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

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

46. *Id.* at 261.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

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

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

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

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

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

58. *Tee-Hit-Ton Indians*, 348 U.S. 272 (1955).

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

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

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

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

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

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

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

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

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

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

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