CATO

May 6, 1997

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Dear Stephan:

This follows my brief e-mail of today. Thank you for yours of yesterday.

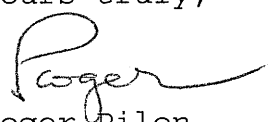
As I noted there, Ted Carpenter and I are intrigued about the possibility of commissioning a study in the general area we've discussed. We're not yet sure, however, just what the issues are or just what kind of policy we'd like to see advanced. Nonetheless, we suspect that you might be just the person to help us think through the issues, not least because you're already trained in basic libertarian theory and you're the coauthor of a related book.

To explore this possibility further, then, let me enclose a copy of the memo I sent around here, along with a few of my own writings in the area of property rights. As you'll see, America itself has a way to go in developing a principled approach to the protection of property rights. Given that, it's not entirely clear what we should be doing in the international arena toward better protecting property rights around the world.

Nevertheless, for better or for worse, the administration seems to have stumbled onto the issue via the Libertad Act and the European reaction. Given that, given the potential for good or evil in that, and given that the issue will likely be with us in any event, it does seem useful, insofar as we can, to try to shape the emerging debate. In what direction, however, we're not yet sure. The ideal, of course, is to have property rights protected around the world, along lines sketched in the enclosed articles pertaining to the domestic scene. In the international arena, however, there are tricky sovereignty and foreign policy issues to be factored in. Not every means can be justified. In fact, a bad international property rights protection regime would likely be worse than none at all.

Why don't you give it some thought, then, and get back with me after you've done so, perhaps with an outline or a summary of the kind of position you think we ought to take from a concern for first principles, as we like to say.

Yours truly,



Roger Pilon

MEMORANDUM

TO: TGC, IV, JT, EHC, DB, WN

FROM: RP

DATE: April 29, 1997

SUBJECT: **Property Rights in the International Arena**

I've just seen this piece from last week's WSJ and am struck by the ramifications--both for good and evil. (My days at State tell me it's probably the latter.)

It would be wonderful, of course, if all the world, not least the U.S., were to take seriously the idea that governments must compensate those from whom they expropriate property. In so far as this effort works to that end, I think we should support it.

That would mean, for example, that the U.S. could be held up for international criticism for not compensating owners who suffer from environmental takings. It might also mean that the international agenda of the environmentalists--through which they are trying, in part, to impose their vision on the U.S.--would be subject to limitations when property rights are implicated.

At the same time, this initiative might internationalize the errant property rights regime the Supreme Court has given the U.S. this century, making it that much more difficult to make advances here at home--whatever the rest of the world is doing. And the greens could turn this to their advantage as well, not least because they're so well represented as NGOs in these international bodies and confabs.

At the least, given the potential for good and evil in this issue, I think we should try to stay on top of it--perhaps even think of holding a forum on the subject to try to start affecting the agenda.

A Multilateral Approach to Property Rights

By STUART E. EIZENSTAT

With the approval of the European Union's 15 member states on Friday, the EU and the U.S. have taken the first step toward a potentially historic agreement to protect property rights world-wide by inhibiting and deterring investments in property expropriated without compensation contrary to international norms, while at the same time defusing a serious trans-Atlantic trade dispute over the Libertad Act, better known as Helms-Burton.

In February 1996, after Cuban MiGs shot down unarmed civilian planes in international airspace and murdered U.S. citizens and permanent residents, Congress passed and the president signed the Libertad Act. It is a reasonable statute that seeks to promote democracy in Cuba and to protect the property rights of the thousands of American citizens whose property was confiscated without compensation by the Castro regime. Toward these ends, the law imposes sanctions on foreign companies that profit from the use of that confiscated property; it does not restrict general trade or investment in Cuba. The EU challenged this law along with key provisions of overall U.S. policy toward Cuba by pressing a formal complaint to the World Trade Organization. The U.S.-EU agreement, which suspends this WTO challenge, may turn a potential dispute into a catalyst for cooperation.

Foreign-Policy Dispute

This agreement serves a number of important U.S. interests. It strengthens the international commitment to promote peaceful democratic change in Cuba. It keeps U.S. foreign-policy interests out of the WTO, an organization designed to facilitate trade, not arbitrate what is essentially a foreign-policy dispute. We had made clear that the U.S. would not participate in the case. The agreement avoids putting the WTO, still a fledgling organization, in a precarious position threatening its support both domestically and internationally. The U.S. led the world in the creation of the WTO to establish a binding system for resolving trade disputes. As the country that brings—and wins—the most cases, the U.S. has benefited from the WTO. But by bringing noncommercial matters into the WTO, the EU could have jeopardized what we and others have worked so hard to achieve.

This agreement creates the first real opportunity to develop multilateral disciplines deterring and inhibiting investment in confiscated property. This is the first time our European allies in the EU have agreed to develop such international norms. It would protect property claims world-wide by U.S. citizens. The disciplines will apply to most of the U.S.-certified claims in Cuba; they can be designed so as not to impede investment in Central Europe and the newly independent states of the former Soviet Union.

The U.S.-EU agreement on property claims in Cuba by U.S. citizens is the first time our European allies have agreed to develop such international norms.

Our goal is to establish strong global standards for the enhanced protection of property rights. The U.S. and the EU will work hard to develop these binding disciplines by Oct. 15. As this process unfolds, the administration will open a dialogue with the Congress with a view toward obtaining an amendment to the Libertad Act providing the president the authority to waive the provision denying visas to individuals profiting from expropriated property, if acceptable disciplines are developed and adhered to. If we can agree upon the disciplines bilaterally, we would work with the EU to introduce the disciplines into the negotiations of the Multilateral Agreement on Investment now under way at the Organization of Economic Cooperation and Development in Paris.

Fidel Castro

U.S. investors—who already provide more overseas investment capital than those of any other country in the world—are expanding their commitments and their presence overseas. The agreement with the EU represents a potentially significant advance in the administration's efforts to protect the interests of U.S. investors around the world. It complements the expansion of our bilateral investment treaty effort, which has bound our treaty partners in emerging economies to protect U.S. investments by observing the international standard to provide "prompt, adequate and effective" compensation when property is expropriated. When governments fail to meet that standard, bilateral investment treaties provide our investors the opportunity to subject them to binding international arbitration.

The OECD agreement we seek will expand market access, creating new opportunities. It will ensure that U.S. investors abroad are treated no less favorably than other countries' domestic investors and other foreign investors. Like our bilateral investment treaties it also will require that expropriations or nationalizations only take place in accordance with international-law principles requiring prompt, adequate and effective compensation. It is precisely these principles that are at issue with respect to the property of U.S. citizens expropriated by the Cuban government. This agreement provides an ideal vehicle to achieve wider acceptance of expanded protection of property rights through inhibiting or deterring investments in properties taken without respecting basic international-law standards.

At the same time, the president has wisely used the leverage of the authority to waive the right of action under Title III of the Libertad Act, which allow U.S. claimants to sue companies that traffic in their expropriated property, in order to mobilize international support and action to promote democracy in Cuba. The administration has made significant progress working with our allies to promote democracy in Cuba. In December, the European Union adopted a legally binding common position that makes improved relations with Cuba conditional on fundamental changes on human rights and political freedom. The Ibero-American Summit last November took a strong stand in favor of democracy throughout the Western Hemisphere, including Cuba.

A number of leading European business organizations have endorsed the use of business practices in Cuba that would benefit Cuban workers, and not the government. And several positive steps have been taken to promote independent civil society in Cuba. Europe's largest labor federation, the International Confederation of Free Trade Unions, has issued a sharply critical report on labor practices in Cuba and has agreed to monitor labor rights there. Nongovernmental organizations, led by the Dutch-based Pax Christi, have increased their efforts to strengthen the independent sector in Cuba. It is now Fidel Castro, not the U.S., who is increasingly isolated, even in the Western Hemisphere.

Stepped-Up Efforts

Because of these new initiatives, the president announced on Jan. 3 his expectation to continue to suspend Title III of the act so long as our friends and allies continue their stepped-up efforts to promote democracy in Cuba. The new U.S.-EU agreement reiterates that commitment.

The U.S.-EU understanding represents a beginning, not an end. An agreement on concrete, detailed disciplines and principles will require enormous efforts by U.S. and European negotiators as well as continual consultations with Congress to shape and define U.S. negotiating objectives. We will do everything in our power to reach a multilateral agreement on these disciplines, but a final agreement is not assured. It is now time to start the hard negotiating that can convert an opportunity into a reality.

Ambassador Eizenstat is undersecretary of commerce for international trade and special representative of the president and the secretary of state for the promotion of democracy in Cuba. He is also undersecretary of state-designate for economics, business and agricultural affairs.

When 'Competitive Advantage' Is Neither

One can hardly speak of business strategy without invoking the idea of competitive advantage. But our research suggests that a focus on beating the competition is counterproductive.

In studying some 30 high-growth companies and their less successful competitors around the world during the past five years, we found that pursuing competitive advantage has a paradoxical effect. When asked to build competitive advantage, managers typically assess what competitors do, and strive to do it better. Their strategic thinking thus regresses toward leap in customer value by offering inexpensive microwaves and VCRs that were truly easy to use.

To achieve high growth in the future, companies need to break the vicious circle of competitive benchmarking and imitation. Rather than competitive advantage, companies should strive for what we term "value innovation." Emphasis on value places the buyer, not the competition, at the center of strategic thinking; emphasis on innovation pushes managers to consider totally new ways of doing things.

High-growth companies question every-

panies frame their strategic questions in this way, the futility of benchmarking the competition becomes clear.

• *Pursue radically superior value for the mass of buyers.* It's crucial not only that a product or service be radically superior, but also that it be priced at a level accessible to most customers. Offering a radically superior product or service at a price most people can't afford is like laying an egg that some other company will hatch.

In the early 1990s, Apple Computer was betting on the Newton, its pioneering personal digital assistant. Compaq managers

teristic should be *created* that the industry has never offered?

The first question forces managers to question whether the factors over which companies compete actually deliver value to consumers. They often don't, either because they are embedded in industry traditions that have never been questioned, or because buyers' values have fundamentally changed but companies—so focused on one another—haven't noticed. Accor's Formule 1, the dominant low-budget hotel chain in France, was able to cut costs significantly by eliminating standard hotel

THE WALL STREET JOURNAL. FRIDAY, FEBRUARY 28, 1992

Property and Constitutional Principles

By Roger Pilon

On Monday, the Supreme Court will hear what may be one of the most important cases to come before it this century, *Lucas v. South Carolina Coastal Council*. Pitting clearly the regulatory powers of the state against the rights of private property owners, the case has implications for environmental protection, urban planning, rent control, landmark preservation and much else. After more than 70 years of rudderless jurisprudence in this area, the court may be willing at last to come to grips with the notorious "takings" question: whether "regulatory takings" are compensable under the Fifth Amendment's Takings Clause.

America has reached a crisis in the law of property as planners at all levels of government pile restriction upon restriction, leaving owners all but unable to move without official permission. The costs hit the poor especially—54% of their income now goes to shelter—but they hit others too. In 1986, David Lucas, a real estate broker living near Charleston, South Carolina, purchased two undeveloped ocean-front lots for $955,000, intending to build a home for his family on one and a house to sell on the other. At the time the lots were zoned for single-family houses, and houses already existed on similar lots along the beach, including on the lot that stood between Mr. Lucas's two lots.

Regulatory Wipeout

Eighteen months later, Mr. Lucas's plans were shelved when South Carolina passed its Beachfront Management Act. Aimed at preserving the beach and dune system, providing a wildlife habitat, and promoting tourism, the act prohibited all new construction along the beach beyond certain setback lines. In a story with countless repetitions across the country, Mr. Lucas testified that the act rendered his property all but useless. He could pitch a tent and picnic on it. But apart from that, he now held a $900,000 mortgage on property that, due to taxes and insurance, had a negative value.

The trial court found that the legislature had taken Mr. Lucas's property. Under the Fifth Amendment's requirement that private property not be taken for public use without just compensation, it awarded him $1.2 million. On appeal, a sharply divided South Carolina Supreme Court reversed. The majority found that because Mr. Lucas had not contested the validity of the act at trial but had merely prayed for damages, he was not entitled to relief. Mr. Lucas then appealed to the Supreme Court of the United States, which agreed to hear his case this term, along with two others that raise a question posed in 1922 by Justice Oliver Wendell Holmes: When does the regulation of property go "too far," requiring government to compensate the owner for the loss imposed?

Unfortunately, that was the wrong question, but it has driven the court ever since to a series of decisions that Justice John Paul Stevens recently called "open-ended and standardless." One need only sample the briefs in *Lucas*, including a host of *amicus* briefs, to discover how tortured the reasoning becomes when it tries to argue from this body of law. Indeed, Monday's court would be better advised to start with a clean sheet than to build upon this law. One is reminded of the dilemma Copernicus faced when confronting the Ptolemaic universe. Rather than add yet another epicycle to the geocentric model, he had the good sense to grasp the nettle: He moved the sun to the center.

That is what the Supreme Court must do by returning to first principles, or natural law. And in no area are those principles more illuminating than here. For the takings question involves more than the Takings Clause. More deeply, it involves relating the eminent domain power, which is what the clause is about, with the police power, which is at the core of sovereignty yet is nowhere in the Constitution. To do that, however, one must begin at the beginning, with our political origins.

Unfortunately, that is not what modern lawyers do well, as witness the consternation that arose last fall when it became known that the Supreme Court's newest member believed in natural law. Yet the amicus briefs of the U.S. and the Institute for Justice, the latter prepared by the University of Chicago's Richard Epstein, make just such a plea.

Public goods from green spaces to subsidized rents are "free" only because we leave the costs on the backs of the individuals from whom we take them.

How then does a consideration of first principles help resolve the takings question? It does so by noting first that the police power is nothing more than what John Locke called the "executive power" in the state of nature—the power of every individual to secure his rights while respecting the rights of others. Thus the source of the power is in the right of self-preservation. And its bounds are set by the rights of others. On both counts, no better model can be found than the classic common law.

The police power is constrained, then, by the power each of us has in the beginning, for we could hardly have yielded up to the state more power than we had to yield. But when we created the state—as is evidenced by the Takings Clause—we also created the "despotic power" of eminent domain, as it was called, a power that none of us had in the state of nature. In recognition of its despotic nature, however, we made sure that if the state took what rightly belonged to another it would have to pay. Thus the individual would not be made worse off. Nor would he be made to shoulder the costs of our public appetite.

Starting from first principles, then, we see that the relation between the police power and the power of eminent domain is clear and simple. When the police power is confined to securing rights, no compensation is required. The law of nuisance affords the classic example. The individual whose nuisance is enjoined gets no compensation, however large his loss, because he had no right to that activity to begin with. It is not a question, then, of whether the regulation goes "too far," as Holmes suggested. Rather, it is whether the activity prohibited is itself legitimate.

But when the public wants to secure some good by condemning an otherwise innocent activity, there is only one power legitimately available to it—the power of eminent domain. And for that, the public must pay. Public goods of the kind that today are routinely secured through an overbroad conception of the police power—from green spaces to subsidized rents—are "free" only because we leave the costs on the backs of the individuals from whom we take them.

Returning then to Mr. Lucas, we ask first whether the act was passed pursuant to a legitimate police power—to secure rights. Plainly, the promotion of tourism and the preservation of wildlife may be worthy goals, but there are no rights in those things that Mr. Lucas's houses would in any way implicate. Nor is it plausible that his houses would pose any real danger to landward neighbors—as the amicus brief of a number of environmental groups contends. If they did, then adjacent houses should probably come down too. No, in the end, the state has exercised here the most despotic power of all—condemnation of a legitimate activity, but without compensation. As the Epstein brief concludes, the reason Mr. Lucas is entitled to compensation is because "the state did not remotely offer any anti-nuisance justification." It simply took what it wanted.

If the court so rules, either by itself or by sending the case back so that Mr. Lucas can lay out a proper argument, South Carolina will then be put to a choice. Either it abandons its plan, or it proceeds—but under the power of eminent domain, not the police power. And it pays for what it wants. Only then will it know how much tourism it wants to promote or how many species it wants to preserve. But when the costs for such goods go "off budget," to be borne by lone individuals, demand grows and the appetites of planners become all but insatiable.

Planning Without Prices

Some 70 years ago, when planning was in its infancy in revolutionary Russia, economists like Ludwig von Mises and Friedrich Hayek showed how planning, absent real prices, was doomed to fail. Some 70 years later, after immeasurable costs, they have been proven right. Today, America too is awash with planners, armed with the good, yet without any sense of the price of that good. How could it be otherwise, when our jurisprudence has sheltered us from those prices? As long as that continues, our own planning also is doomed to fail—taking countless individuals along with it.

The goals of the South Carolina act may indeed be worthy. But let the citizens of South Carolina make that decision with a true sense of their cost, not impose those costs on individuals like Mr. Lucas. The court should not address the policy question. But it can and should articulate and enforce the law—both higher and written—that will enable citizens to know the true costs of their undertaking and, if they decide it is worth it, to proceed by respecting the rights of their fellow citizens.

Will the court return to those first principles? Your honors, move the sun to the center. That's where it belongs.

Mr. Pilon, an official in the departments of State and Justice during the Reagan administration, directs the Cato Institute's Center for Constitutional Studies.

THE MORAL HIGH GROUND

AN ANTHOLOGY OF SPEECHES

FROM THE

FIRST ANNUAL
NEW YORK STATE CONFERENCE

ON

PRIVATE PROPERTY RIGHTS

OCTOBER 14, 1995

THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC.

EDITED BY CAROL W. LAGRASSE

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Are property Rights Opposed to Environmental Protection?

Roger Pilon, Ph.D., J.D.
Director, CATO Institute Center for Constitutional Studies

Senator Owen Johnson opened our conference this morning by surveying the condition of property rights over the breadth of the Empire State. Before doing that, however, he gave a warm thank you to our conference director, Carol LaGrasse, for the outstanding job she's been doing shedding light on the political and legal problems New York's property owners are facing.

As we move into the second half of these proceedings and take up the condition of property rights across the nation, it seems only fitting to pay our respects once again to Carol for the tremendous work she's done in putting this conference together. Events like this don't just happen. This event reflects nothing as much as the prodigious work that has gone into organizing it. Thank you, Carol.

I want to begin this afternoon on a personal note, by saying what a pleasure it is to be out of Washington and back here in upstate New York. You see, I grew up not far from here, in a little town called Galway, population 150, some 50 miles to the northwest in Saratoga County. Actually, we lived five miles outside of town, so I know something firsthand about the issue of property rights, even if that learning took place longer ago than I care now to admit. It's good to be back home -- and especially good to see so many of you joining the growing movement across the nation to protect property rights.

I expect that many of you have seen the press release the Audubon Society issued about this conference, warning its members, in essence, that if they thought the dreaded property rights movement was making inroads only in the West, wake up, because it's moving East -- even to New York State. As I said to Carol at lunch, your organization can't buy publicity like that!

As the organization grows, however, it's important to stay focused on why you organized in the first place, which is why Carol has asked me to talk to you about some of the larger issues that surround the movement, a few of which came up this morning. In fact, I was flattered earlier when Bob Wieboldt of the New York State Builders Association mentioned the debate I had yesterday with a man I understand has been quite a thorn in your side, Assemblyman Richard Brodsky. In that debate before the lawyers division of the Federalist Society in Albany, I opened much as I will in a moment, whereupon Mr. Brodsky made the mistake of likening himself to the poor country mouse -- from the upscale suburb of Scarsdale, let me note -- up against the city mouse -- not knowing, of course, that I hailed originally not from Washington but from that great megalopolis to the north, Galway, New York!

Well, it was all downhill for Mr. Brodsky from there. But the point I want to note is that in response to Bob Wieboldt's question to him yesterday about whether property owners ought to be compensated under the Fifth Amendment's compensation requirement when they suffer losses in order to save some endangered species the public wants saved, Mr. Brodsky said, "Well, that's a tough one. I think we're going to have to give compensation in that kind of case." So, if he backs away from that conclusion in the future, remember, you heard it here. Let's hold his feet to the fire on that one -- and on much else as well.

This morning, Senator Johnson spoke about the moral high ground. It is often thought that environmentalists occupy that ground while we who defend property rights occupy the "low" ground of "grubby economic gain," "profit," and all the rest that goes with "mere commercial life." Let me say here and now that in the struggle that joins us all it is we, not the environmental zealots, who occupy the moral high ground.

It is absolutely essential, therefore, not to give the other side an inch on that point. But to do that we have to be clear about some of the particulars, some of the finer points, which I want to outline this afternoon.

Property Rights and Environmental Protection

The question before us, then, is this: Are property rights opposed to environmental protection? And the answer is a flat-out no. The protection of property rights, properly understood, is not only not opposed to environmental protection but is the best guarantee of environmental protection. After all, who can be expected to be a better steward of the environment than he who owns it? To paraphrase the great economist and Nobel laureate, Milton Friedman, whom I had the privilege of studying under at the University of Chicago, just as no one spends someone else's money as carefully as he spends his own, so too no one tends to someone else's property as carefully as he tends to his own.

Put that property in public hands, however, and watch the degradation begin. Indeed, we have simply to look around the world to those nations that have given virtually no protection to private property -- the nations of the former Soviet Empire, for example -- to see environmental degradation going hand-in-hand with the loss of property rights. Quite apart from moral or constitutional reasons, then, there are powerful environmental reasons, too, for protecting property rights.

In America, of course, we have not seen the outright denial of property rights, the wholesale confiscation of property, for the Fifth Amendment to the Constitution requires that when property is taken for public use, the owner must be given just compensation. What we have seen, however, is something that is much more subtle and, because of that, more sinister, more difficult to fight. It is the rise of regulatory takings, so-called, the takings that result not from outright condemnation and transfer of title to the state but from regulation -- the title remaining with the original owner.

With the rise of the regulatory state over the course of the 20th century, we have witnessed a steady erosion

of property rights through such regulatory takings. Governments at every level -- federal, state, and local -- have sought to bring about an increasing array of public goods, from lovely views to historic sites to wildlife habitat, by imposing an increasing array of regulations on property owners, regulations that often deny those owners otherwise rightful uses of their property.

But under the Supreme Court precedents that have evolved, those owners are entitled to compensation for the economic losses that result only if the losses equal the entire value of the property -- which rarely happens. Owners who suffer losses of 50, 75, even 90 percent of previous value get nothing. They are made to pay -- literally and directly -- for the goods the public enjoys as a result of the regulations.

Needless to say, I don't have to tell this audience that there's something fundamentally wrong about that situation, for you're already part of a growing movement that's speaking out to correct it. What I want to do, therefore, is step back a bit and place the problem of regulatory takings against a basic background of first principles, the better to show how property rights and environmental protection do indeed go hand and hand.

First Principles

We are fortunate in America to have a set of documents, our founding documents, from which to derive those principles: the Declaration of Independence, the Constitution, the Bill of Rights, and the Civil War Amendments. Taken together, those documents speak at bottom to a single idea -- freedom, the right of each of us to plan and live his life as he pleases, provided only that we respect the equal rights of others to do the same.

We see that idea right in the Declaration of Independence, with the famous passage that begins, "We hold these truths to be self-evident." With that simple phrase alone, Thomas Jefferson was making a fundamental point. He was placing us in the natural law tradition, the tradition that holds that there is a higher law of right and wrong, from which to derive the positive law, and against which to judge the positive law at any point in time. Thus, the propositions that followed were asserted not as mere opinions but as "truths" -- "self-evident" truths, or truths of reason.

And what are those truths? They begin with a premise of moral equality --"All men are created equal" -- then define that equality with reference to our rights to "life, liberty, and the pursuit of happiness." Notice that Jefferson did not mean that we are all equal in fact -- something he could hardly have believed. Each of us, rather, is unique. Indeed, no one is equal to anyone else *except* with respect to his equal moral rights, which means simply that no one has rights superior to those of anyone else. That was Jefferson's basic point.

Notice, too, that our rights to life, liberty, and the pursuit of happiness are essentially rights to be free -- the right to plan and live our own lives, free from the interference of others, provided only that we respect the equal rights of others to do the same. Among other things, that means that each of us has a right to exercise his liberty -- which is his property -- by acquiring property in the world, either originally or through contract with another who acquired it originally or through contract. In fact, it is by going out into the world and acquiring and improving property, either alone or in association with others, that we create over time that complex institution we call civilization or civil society.

Notice finally that to this point Jefferson has said nothing at all about government, for the idea is that we have our rights not by government grant but "by nature." Government's purpose, then, is not to give us our rights but simply to secure the rights we already have, as Jefferson goes on immediately to say: "That to secure these rights, governments are instituted among men." Civil society comes first, government second. Indeed, whatever rights or powers government legitimately has arise only because we give it those powers. Government gets its legitimacy, thus, from the people, as Jefferson makes clear when he concludes his magnificent statement by saying that governments derive their "*just* powers from the *consent* of the governed."

Constitutional Incorporation

I will apply those principles to the issue of regulatory takings in a moment, but first we need to see how they were given concrete legal effect in the Constitution that was ratified some 13 years after the Declaration was signed by the Founders. As they sat down to draft a Constitution, the Framers had before them a basic problem: how to design a government strong enough to secure our rights yet not so strong as to violate those rights in the process. To accomplish that end the Framers employed the devices we are all familiar with: the division of powers between the federal and state governments; the separation of powers among the three branches of the federal government; the provision for periodic elections and for judicial review; the addition, two years later, of a bill of rights, and so forth.

But the most important device was the simple limitation of power granted, known as the doctrine of enumerated powers. As the Tenth Amendment makes explicit, the federal government has only those powers that have been delegated to it by the people, as enumerated in the Constitution. If a power isn't found in the document, the federal government doesn't have it. Any such power belongs then to the states or to the people. The basic issue of political legitimacy is really no more complicated than that. And at the state level, involving the power of state government over the individual, the issue is exactly the same, however varied state constitutions may be.

Today, of course, that basic doctrine of enumerated powers, the centerpiece of the Constitution, has been all but forgotten as governments at all levels exercise powers nowhere found in their authorizing charters. Those powers are illegitimate, plain and simple. Yet today they are everywhere, running roughshod over our rights, including our property rights. How did we get to this state of affairs?

ROGER PILON, Ph.D., J.D.

The Demise of Limited, Constitutional Government

The answer is not all that complicated. In a nutshell, around the turn of the century we began asking government to solve all manner of social and economic problems, whether or not we had authorized it to do so through the Constitution. The political branches responded. And the Court, in time, stepped aside, rewriting the Constitution in the process -- not literally but through reinterpretation alone.

All of that took place over a relatively short period, during the 1930s, although the intellectual groundwork had been prepared well before. Still, the original design did hold, more or less, for our first 150 years, during which government was largely restrained. Following a long period of industrialization and urbanization after the Civil War, however, we started changing our view of government. No longer did we think of it as a "necessary evil," requiring restraint, as the Founders had done. Instead, the Progressive Era saw government as an engine of good, an instrument for solving the problems of modern life. Thus, we began asking and expecting government to do things for us, to solve our problems, which too many politicians of the era were only too willing to do.

Standing in the way of their exercising that power, however, was a Constitution for limited government, which the Supreme Court continued to enforce -- albeit, with increasing uncertainty. By the mid-1930s things were coming to a head as one New Deal program after another went down in constitutional flames. Faced with a body of recalcitrant jurists, Roosevelt threatened to pack the Court with six additional members -- his infamous Court-packing scheme. Not even Congress would go along with that. Nevertheless, the Court, now on notice, got the message and started stepping aside, finding powers never before found in the Constitution, ignoring rights plainly there. Under the reinterpreted Constitution, its doctrine of enumerated powers effectively eviscerated, the modern welfare state poured through, giving us the massive redistributive and regulatory programs we know and love so well today.

Many of the programs that run roughshod over the rights of property owners today are thus illegitimate simply because done without any constitutional authority -- neither federal nor state authority. What is more, not only do those programs proceed without constitutional authority but they violate explicit constitutional guarantees -- in particular, the Fifth Amendment's guarantee that private property not be taken for public use without just compensation for the owner.

Regulatory Takings

With this as background, then, let us return to the problem of regulatory takings and notice at the outset its two sides. First, government is doing countless things today that it has no authority to do, especially in the area of regulation. And second, government is ignoring our rights as it goes about doing what it has no business doing. And on both counts, the Court is failing to exercise its authority to restrain the government. It is failing to limit government's regulatory powers to those found in the Constitution. And it is failing to secure the rights that are plainly in the document.

In truth, this second aspect of the problem had arisen even before the New Deal Court opened the floodgates afforded by the doctrine of enumerated powers. It arose, interestingly, with a pair of rent-control cases that reached the Supreme Court in 1921 from the cities of New York and Washington. Faced with a claim by landlords in those cities that, without compensation, war-time rent controls had taken their property -- the difference between market rents and controlled rents -- Justice Oliver Wendell Holmes found that "exigent circumstances" had justified the controls and so the landlords were made to bear the costs of the "public good" allegedly brought about by the controls. Rent controls are a blatant form of regulatory taking, of course. Nevertheless, in an era when legislation and law were increasingly justified not on principled but on policy grounds -- as the Progressive Era was -- the policy of "exigent circumstances" trumped principle.

A year later, however, Holmes went the other way in the famous *Pennsylvania Coal* case. The facts in that case are worth sketching because they've been repeated with a thousand variations ever since and help to explain why, as a policy matter, we have today so much regulation. It seems that coal companies in Pennsylvania had entered into contracts with landowners to mine under the owners' land, dividing the estates in three: the surface estates, which the owners would continue to own and use; the underlying mineral estates, which the coal companies would exploit over time; and the intermediate support estates. As was well understood by all the parties, if these support estates were mined they might and often did give way, causing the surface estates they supported to collapse with them. Thus, the question at contract was who would bear the risk and costs of collapse if the coal companies eventually mined the support estates, as they would want in time to do. By contract, the parties agreed that the surface owners would bear that risk, for which they were paid a significant premium.

Well, not surprisingly, when that risk began eventually to materialize, the surface owners, having more votes than the coal companies, went to the Pennsylvania legislature to get a bill to prohibit the companies from mining the support estates. The bill was passed -- effectively abrogating the contracts -- and the companies sued, eventually reaching the Supreme Court and Justice Holmes. Rather than focus on the contractual issues, however, and reaching a result rooted in principle, Holmes issued his famous statement that if a regulation goes "too far" -- and this one did, he said -- it constitutes a taking requiring compensation under the Fifth Amendment's Takings Clause. The coal companies won, rightly, but the law ever after has been a giant muddle.

In fact, armed with that "bright line" test -- "too far" -- the Court has given us what Justice Antonin Scalia recently called 70-odd years of ad hoc regulatory takings jurisprudence, with no one ever sure really where he stands. As in Pennsylvania, legislatures around the country respond to popular pressures -- often ephemeral, even

more often from special interests -- and those who must forbear using their property in order to satisfy such demands are made to pay for the goods the legislatures deliver -- unless, of course, the regulations go "too far."

Perhaps the recent case of David Lucas, which the Supreme Court decided in 1992, will help to put the issue in its current perspective. In 1986 Mr. Lucas paid nearly a million dollars for two lots on the outer banks near Charleston, South Carolina, with the idea of building a home for himself on one and a home to sell on the other. His plans were hardly extraordinary: in fact, there were already homes on both sides of each lot. Before building began, however, the South Carolina legislature passed a Beachfront Management Act -- not to protect any private or public rights but to promote tourism, preserve habitat, and provide for several other public goods.

The effect of the Act on Mr. Lucas was to render his lots all but useless. He could picnic on them, pitch a tent, pay the taxes and insurance, but that was about it. Faced with that, and holding a mortgage of nearly a million dollars on lots that were now almost worthless, Lucas did what every red-blooded American would do -- he sued. He won at trial, but on appeal was reversed, 3 to 2, by the South Carolina Supreme Court. Fortunately, the U.S. Supreme Court agreed to hear his case and, by a vote of 5 to 4, it reversed the South Carolina Supreme Court, finding that the South Carolina Act had indeed effected a taking of the property.

Two things bear mentioning here, however. First, but for a single vote on the U.S. Supreme Court, Mr. Lucas would have been forced, in effect, to dedicate a million dollars of his own money to promoting tourism, preserving habitat, and providing the various other goods the South Carolina legislature thought the citizens of the state should enjoy -- but not at their own expense. And second, Mr. Lucas prevailed only because the Act effectively wiped him out. Had his loss been less than 100 percent, as the Court all but said, he would have had to bear that loss himself. "You can take a man's property," the Court effectively tells legislatures across the country, "just so long as you don't go 'too far,' just so long as you leave him a little." Thus stands the Fifth Amendments Takings Clause today!

If a thief says, "Your money or your life," and you bargain him down to half your money, none of us would have any difficulty saying that he'd taken your money. But let that thief be called the U.S. Government or the New York State legislature and we say, "Sorry, no taking here, you've still got half your property." That's the bizarre state of affairs today. Indeed, the gap between the Constitution and modern constitutional law -- on this as on so many other constitutional questions -- is so yawning that only those paid to see a connection can do so.

Returning to Principle

What, then, are we to do? How are we to straighten this situation out and draw a sharper picture, the better to bring some reason to the question of when owners should be compensated for losses they suffer as a result of regulations that restrict the uses they can make of their property?

The answer, as always, is to return to first principles. Only so will we sort the issues out and shed light on the problem. What that means, in particular, is that we have to get clear about the relationship between two fundamental powers of government, the police power, which is the basic power of government, and the power of eminent domain, which is implicit in the Fifth Amendment's Takings Clause. We have to relate those two powers -- not by "balancing" them, as is too often thought, but by explicating their justifications and then relating them in a principled way. That isn't a matter of balancing values, so called, but of discovering and applying principles.

The police power, government's basic power, is the power to secure our rights. John Locke, the philosophical father of the American Revolution and the Declaration of Independence, put it well: the police power is the "executive power" that each of us has to secure his rights in the state of nature, prior to the creation of government. When we come together to create government -- the ratification of a constitution being the closest thing to that -- we yield that power up to government to exercise on our behalf.

The source and ultimate justification of government's police power, then, is found in the individual's right to protect himself, to secure his own rights. But that foundation also marks the *limits* of the police power. None of us, that is, has a right to secure rights he doesn't have, to take the liberties of others, for example, if those others are violating no rights of ours. We may not like what our neighbor is doing, but if he is violating no rights of ours, if he is taking nothing that belongs free and clear to us, then we must tolerate his doing it. Our executive power is bounded, in short, by our rights and his. It is not a power to do anything we want, however noble our motives might be in a given case.

But there are times, presumably, when we want government to do more than it can do legitimately under the police power alone -- limited as that power properly is by the rights of the individual. For that reason, the Framers recognized the power of eminent domain -- "the despotic power," as it was called, the power to condemn and thus take private property for public use. Because it was a despotic power, however, because eminent domain enabled government to take what didn't belong to it, the only way to mitigate that wrong -- to preserve some measure of legitimacy -- was to make the owner-victim whole, to compensate him for his loss. Thus the just compensation requirement as found in the Fifth Amendment.

Under the power of eminent domain, then, government may pursue various public ends, provided only that it compensate those whose property it needs to take in the process. On one hand, public projects can go forward. On the other hand, the just compensation requirement protects both property owners, who are left whole, and the public, which will not have to pay extortionate compensation to gain title to any property that might be needed. Armed thus with both the police power and the power of eminent domain, government may secure not

only our rights but various public goods as well -- again, provided only that owners are compensated in the course of pursuing those goods.

Resolving the Takings Issue

As we see, then, once the police power and the power of eminent domain are properly related -- through the theory of rights -- the problem of regulatory takings is largely solved. Since no one has a right to use his property in ways that harm or violate the rights of his neighbors or the public, government may exercise its police power to prohibit such uses through regulation and owners are entitled to no compensation because those uses were wrong to begin with. By contrast, if government wants not simply to prohibit harms but to provide the public with public goods, and those goods can be provided only by prohibiting property owners from doing what they would otherwise have a perfect right to do, then regulations prohibiting such activities must be enacted not under the police power but under the power of eminent domain, for they take the legitimate property of the owners -- the uses those owners would otherwise have every right to make of their property.

Protecting property rights, then, is not only perfectly consistent with protecting the environment but is absolutely required if we are going to protect the environment. After all, the prohibition of harmful uses -- uses that violate the property rights of others -- is the very essence of environmental protection. Thus, nuisance law, as derived from the theory of rights, and that part of environmental law that is nuisance law writ large are rightly enforced under the police power. And when property owners have their activities restricted in a genuine effort to protect the environment, they have no ground for complaining and no ground for asking to be compensated for not doing what they have no right to do to begin with.

There are close questions, to be sure, about whether many such efforts at environmental protection are indeed genuine. Too often, in fact, the environmental zealots who frequently occupy our regulatory agencies are utterly oblivious to costs and benefits when they draw the line where one man's right to the active use of his property ends and another man's right to the quiet enjoyment of his begins. Still, the principle of the matter is perfectly clear: property owners have no right to use their property in ways that violate the rights of other property owners.

Making the Public Pay

When we go beyond protecting the environment, however, that's when we leave the domain of the police power and enter the domain of eminent domain. And here we have to be very careful to preserve the principle. Environmental protection, strictly speaking, has to do with protecting both private and public *rights*, not private or public *goods*. There are many things in the world that many of us think good, and many disagreements about what is and is not good. But only some of those things are held, free and clear, by right. I may enjoy and think good the view that runs over your property, but if I want to make that view mine, by right, I'd better buy an easement from you that stops you from building or otherwise blocking that view -- if you are willing to sell me one.

When the public wants that view, however, all too often it simply takes it -- by passing a law prohibiting you from doing anything on your property that would block "its" view. Never mind that the view does not belong to the public. Never mind that the property and the right to use it belong to you. All that matters to the legislator is that he can provide the voting public with a free good -- at your expense. That, in a nutshell, is how the modern regulatory taking arises.

Once it is allowed to arise, however, there is no end to the matter. For when government pursues public ends on the cheap, when it drives the costs of those goods "off budget," making them fall on individual property owners, fiscal discipline goes out the window. As economics 101 teaches, when the cost of something is zero, the demand is infinite. It's no accident, therefore, that regulations to provide the public with such "free goods" have grown and grown: they're costing the public nothing. Indeed, because the costs are off budget, we have no idea whatever, as a public matter, whether a given view or historic site or subspecies is worth saving. If it's "free," save it!

None of this is to argue, of course, against saving views or historic sites or subspecies or whatever. Rather, it is to say simply that if the public wants those things, it should *pay* for them, like any ordinary person would have to do. In fact, the entire property rights movement today can be reduced to a simple phrase: "Stop stealing our property. Pay for it."

Right and Wrong

In all of this, then, what we need to do is restore these basic principles of right and wrong. Ideally, this should be done by the courts, but the courts, as indicated earlier, have failed to do the job. That's why property owners are turning increasingly to their legislators, to try to persuade them to bring some measure of reason and principle to this matter. In this effort, however, we should not delude ourselves: the opposition is organized, rich, and powerful; they reach legislatures, the media, and corporate America with ease; and they have shown themselves again and again to be willing to play fast and loose with the truth.

Environmentalists repeatedly claim, for example, that the property rights bills that are currently before the 104th Congress will result in the public's having to pay polluters not to pollute. Nothing could be further from the truth. Rather, what those bills provide, stated most generally, is that if we want to prohibit environmental harms, we have to pay property owners nothing, whereas if we want to provide environmental goods, we have to pay for them.

The *real* concern of environmentalists, of course, is that if those goods are placed on budget, if their costs are brought to light and the public is made to pay for them,

demand will go down. What a surprise! People demand less of something if they have to pay for it. In fact, that issue came up earlier this year in the House of Representatives, during testimony I was giving in support of property rights legislation. "Mr. Pilon," intoned Barney Frank, a staunch opponent of such legislation, "how much is this bill going to cost the taxpayer?" Touched by his late devotion for the taxpayer, I answered: "Mr. Frank, that's entirely up to you. If you go on regulating the way you've been regulating over the course of this century, it's going to cost the taxpayer a lot. But if you can discipline your appetite for public goods, it's going to cost only as much as the public is willing to pay."

That wasn't quite the answer Mr. Frank was looking for, of course, but it's the right answer. We will see that kind of discipline, however, only if we secure in law the principles that require it. Once we put public goods on budget, we will know what they cost. Once we know that, we can decide whether they're worth it.

Reclaiming the Moral High Ground

Let me conclude, then, by drawing together and summarizing these several points, adding a few refinements in the process.

First, the demise of property rights has gone hand in hand with the rise of the modern redistributive, regulatory state, a state that has grown well beyond its constitutional limits. The courts should have been the ultimate institutional bulwark against that growth in government, but they can withstand only so much political pressure. In the end, therefore, it is we who must right the wrongs that have been brought about through our endless demands for public goods and services. As others have said, a government big enough to give us everything we want is a government strong enough to take away everything we have.

Second, to restore the protection for property rights that the Fifth Amendment affords, we need to be clear about the principles of the matter -- and we need to be clear, in particular, about how the protection of property and the protection of the environment go hand in hand. Indeed, as a practical matter, it is particularly important that defenders of property rights be seen as protectors of the environment as well. That's what we are. Let's say it.

Third, it is crucial to distinguish between environmental harms -- defined as violations of property rights -- and environmental goods. Government does not have to compensate property owners when it prohibits them from using their property in ways that violate the rights of others. But when regulations are aimed at providing public goods, and they do so by prohibiting property owners from doing what they would otherwise have a right to do with their property, thereby reducing the value of that property, government does have to compensate those owners.

Fourth, and finally, not every regulation affecting property should lead to compensation for the owner. The owner should not be compensated (a) when he has no independent right to do what the regulation prohibits him from doing, as just noted; (b) when the regulation has the effect of reducing property values without denying any uses -- say, if a government agency downsizes, leading to a reduction in property values in a community; and (c) if the owner can show no loss -- say, if a particular zoning restriction actually raises property values.

With those principles in view, we need to go forward from here and press our cause in every arena we can, for the principles at issue are nothing less than the principles on which this nation was founded: individual liberty, individual responsibility, private property, and public accountability. As I said at the outset, those who defend property rights, properly understood, are those who defend the environment as well. It is we who occupy the moral high ground. Let us say so, and hold it. Thank you.❖

Editors Note: Please see Appendix A for the Model State Statute or State Constitutional Amendment Concerning Compensation for Takings of Private Property, prepared by Roger Pilon.

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- Roger Pilon, Ph.D., J.D., CATO Institute

APPENDICES A THROUGH C

PRIVATE PROPERTY RIGHTS LEGISLATION AND PROPOSALS OF CONFERENCE SPEAKERS

APPENDIX A

Model State Statute or State Constitutional Amendment Concerning Compensation for Takings of Private Property

prepared by
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If any non-tax or non-penalty action by the State or any of its agencies or political subdivisions reduces the fair market value of real or personal private property in the State, the owner of said property shall have a claim against the State or relevant agency or subdivision for compensation for such loss, except that no compensation shall be required:

1. if the action results merely in a diminution of the value of the property but does not otherwise destroy, damage, trespass upon, or take the property or prohibit any rightful use of the property;
2. if the action prohibits uses of the property that are injurious or potentially injurious to others or to the public, as defined by common law, statute, regulation, or rule, provided that such injurious or potentially injurious uses shall not be construed to include uses the prohibition of which would confer a benefit on others or on the public, for which compensation is required under this amendment; or
3. if the action produces benefits to the owner equivalent to or greater than any loss to the owner as determined by the fair market value of the property before and after the action.

This amendment applies to all non-tax and all non-penalty statutes, regulations, rules, administrative decisions, and judicial rulings that take effect after the effective date of the amendment.

This amendment shall be enforced through administrative procedure, suit at law, or both, at the option of the owner. All enforcement costs, including attorney's fees, shall be borne by the State or the relevant agency or subdivision, except that an owner who does not prevail in a final action for compensation shall bear his own enforcement costs and a pro-rata share of any administrative or court costs, and an owner who does not prevail in an action for an increase in a previously adjudicated compensation award shall bear the like costs in the same proportion for any such subsequent actions.