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 Nov. 1, the EU and the U.S. have taken the first step toward a potentially historic agreement to protect property rights worldwide by inhibiting and deterring investments in property expropriated without compensation contrary to international norms. 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 with the EU representing 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, which is now being held in Cuba. 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 in favor of companies. 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 Inter-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 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 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 concrete steps 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 underscoresecretary for economics, business and agricultural affairs.

When 'Competitive Advantage' Is Neither

By Stuart E. Eizenstat

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, we asked what managers typically assess what competitors do, and strive to do it better. Their strategic thinking thus regresses toward matters into the WTO, the EU could have jeopardized what we and others have worked 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 to not impede investment in Central Europe and the newly independent states of the former Soviet Union.

Our goal is to establish strong global standards for the protection of intellectual property rights, and 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.

U.S. investors--who already provide 30% of U.S. investments by observing the 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, which is now being held in Cuba. 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 in favor of companies. 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 Inter-American Summit last November took a strong stand in favor of democracy throughout the Western Hemisphere, including Cuba.

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In studying some 30 high-growth companies and their less successful competitors, we asked what 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 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. Companies frame their strategic questions in this way, the futility of benchmarking the competition becomes clear.

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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 is a constitutional challenge to the state's coastal zoning laws. The case has implications for environmental protection, urban planning, rent control, landmark preservation and much more. After more than 70 years of rural and suburban growth in the area, the court may be willing, at last, to come grips with the notorious "takeings" question: whether "regulatory takings" are compensable under the Fifth Amendment's Takings Clause.

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The Modern Day

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The Lucas case involves a real estate developer who purchased a parcel of land in the coastal area of South Carolina. The developer planned to build a house on the property, but the South Carolina Coastal Council denied the developer's permit for construction. The developer challenged the coastal zone regulations, which were designed to protect the coastline and prevent development that would damage the environment.

The Supreme Court will hear arguments in the case on Monday, and the outcome could have far-reaching implications for coastal development and environmental protection across the country.

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

...
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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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 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 across the nation to protect property rights.

As 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.

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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, the breadth of the movement that joins us all it is we, not the environmental zealots, who occupy the moral high ground.

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

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.

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 delegable 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?

The Property Rights Foundation of America, Inc.
The Demise of Limited, Constitutional Government

ROGER Pilon, Ph.D., J.D.

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, re-writing 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 reinterpretated 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...
ROGER PILON, Ph.D., J.D.

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 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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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 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 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.